Date: 20080124

File: 166-02-35724

Citation: 2008 PSLRB 6

Public Service Staff Relations Act

Before an adjudicator

BETWEEN

GAIL MAIANGOWI

Grievor

and

TREASURY BOARD
(Department of Health)

Employer

Indexed as
Maiangowi v. Treasury Board (Department of Health)

In the matter of a grievance referred to adjudication pursuant to section 92 of the *Public Service Staff Relations Act*

REASONS FOR DECISION

Before: John A. Mooney, adjudicator

For the Grievor: Jacquie de Aguayo, Public Service Alliance of Canada

For the Employer: Catherine Chagnon, Treasury Board

Decided on the basis of written submissions
filed February 12, July 13, August 10 and 31, and September 19, 2007.

I. Grievance referred to adjudication

[1] On February 9, 2007, Gail Maiangowi ("the grievor"), through her representative, wrote to the Public Service Labour Relations Board ("the PSLRB" or "the Board") asking that her grievance relating to her dismissal be reopened and scheduled for adjudication.

[2] She explained that on or about January 30, 2006, the parties had reached a settlement of her grievance and that the settlement had been breached.

[3] In the settlement, the grievor had agreed to withdraw her grievance as well as a human rights complaint in exchange for certain assurances provided by Treasury Board.

[4] The grievor's representative added that because of that breach, the grievor has lost an appointment opportunity and her reputation was damaged within her employment community.

[5] In a letter filed July 13, 2007, the employer objected to my jurisdiction to hear this matter since the parties had reached a binding agreement. It asked that the grievance be rejected without an oral hearing since the Board had no jurisdiction.

[6] On July 19, 2007, the Board directed the parties to provide written submissions on whether it had jurisdiction regarding the grievor's request.

[7] On April 1, 2005, the *Public Service Labour Relations Act* (*PSLRA*), enacted by section 2 of the *Public Service Modernization Act*, S.C. 2003, c. 22, was proclaimed in force. Pursuant to section 61 of the *Public Service Modernization Act*, this reference to adjudication must be dealt with in accordance with the provisions of the *Public Service Staff Relations Act*, R.S.C., 1985, c. P-35 (*PSSRA*).

II. Summary of arguments regarding the Board's jurisdiction

A. For the employer

[8] In letters filed July 13 and August 10, 2007, the employer contended that an agreement had been reached between the parties and that it had been signed in good faith. The circumstances surrounding the alleged breach were outside the employer's

control, and the breach did not occur because of bad faith or in circumvention of the terms of the agreement.

[9] On January 30, 2006, the parties reached a settlement and signed a memorandum of understanding ("MOU"), which specifically settled the matter of referring the grievance to adjudication.

[10] The employer added that "a deal is a deal" and that decisions of the Public Service Staff Relations Board ("The PSSRB") had long before established that a valid settlement is a complete bar to an adjudicator's jurisdiction to hear a grievance. It is in the best interest of certainty in labour relations that legitimate settlement agreements be final and binding on all parties. Accordingly, an adjudicator has no jurisdiction to proceed with a hearing when the parties have settled a grievance.

[11] The PSSRB has clearly indicated that such a bar to an adjudicator's jurisdiction includes a bar to deciding whether a party failed to respect a term or condition of a settlement agreement. For example, in *Dillon v. Treasury Board (Correctional Service of Canada)*, 2006 PSLRB 135, Adjudicator Mackenzie confirmed the Board's long-established jurisprudence that an adjudicator has no jurisdiction to decide whether the terms and conditions of a settlement agreement have been complied with. The employer referred me specifically to paragraph 9 of that decision, which reads as follows:

> *[9] However, it is not necessary for me to determine whether the terms of the settlement have been complied with in order to dispose of this matter. The existence of a valid settlement is not challenged by the grievor. A valid settlement is a complete bar to an adjudicator's jurisdiction (Lindor v. Treasury Board (Solicitor General Canada - Correctional Service), 2003 PSSRB 10). On this basis, I can only conclude that the referral to adjudication should be dismissed.*

[12] The employer argued that in this case, the only issue is whether there is a binding agreement between the parties. The parties clearly executed a MOU that specifically settled the reference to adjudication issue. That was acknowledged by the grievor's representative in her letter dated May 24, 2006.

[13] The employer concluded that I was without jurisdiction over this matter and asked that I dismiss the grievor's request to have it scheduled for adjudication.

[14] The employer referred me to several cases that stand for the proposition that a settlement is a bar to an adjudicator's jurisdiction over a grievance: *Bedok v. Treasury Board (Department of Human Resources Development)*, 2004 PSSRB 163; *Castonguay v. Treasury Board (Canada Border Services Agency)*, 2005 PSLRB 73; and *Van de Mosselaer v. Treasury Board (Department of Transport)*, 2006 PSLRB 59.

B. <u>For the grievor</u>

[15] The grievor, through her representative, filed her submissions on August 31, 2007. The following paragraphs detail the main arguments in those submissions, which are on file with the Board.

[16] The grievor stated that a hearing was required for the Board to adjudicate the question of its jurisdiction to direct parties to a settlement to abide by its terms and to remedy any breaches of that settlement. The resolution of the jurisdiction question requires that the Board consider the related issues of forum and remedy for enforcement.

[17] The grievor also filed two related complaints with the Canadian Human Rights Commission ("the CHRC"), but the parties and the CHRC agreed to hold them in abeyance pending the outcome of the termination grievance.

[18] The parties signed a MOU on January 30, 2006. The Board was advised of the settlement by letter dated February 1, 2006. The grievance was withdrawn by letter to the Board dated May 24, 2006.

[19] The grievor asked me not to refer to the contents of the settlement in my decision to maintain its confidentiality and integrity. Consequently, I will only refer to the aspects of the settlement that are necessary to understand this decision. It is sufficient, for the purposes of this decision, to indicate that the grievor committed in the agreement to resign from her employment and that she has done so. Also, as part of the settlement, she withdrew her grievance and the complaints she had filed with the CHRC.

[20] The grievor sought to have the CHRC reopen her complaints in light of the breach of the MOU. However, the CHRC decided that since it did not approve the MOU directly, it will not reopen its files. This has prejudiced her capacity to pursue human rights remedies in that forum.

[21] The grievor's representatives did attempt to resolve the issues raised directly with the employer, but unfortunately, those attempts were unsuccessful.

[22] The PSSRB's position had been that enforcement was available in the civil courts; however, the Supreme Court of Canada's decision in *Vaughan v. Canada,* 2005 SCC 11, challenged that view. The Board ought to consider the negative labour relations and public interest impacts arising from finding that it has no jurisdiction to hold parties accountable for their conduct under a settlement that was negotiated in the context of an otherwise valid referral to adjudication under the *PSSRA* or the *PSLRA*.

[23] The grievor added that the Board's current jurisprudence holds that it is irrelevant, for the purposes of jurisdiction, whether or not a grievance was formally withdrawn from adjudication or whether the terms of a settlement were fully implemented. Withdrawing her grievance ought not to prejudice her in such a way as to preclude an adjudicator from dealing with the jurisdictional question. That is particularly so in this case where, in respecting the terms of the settlement, she resigned her position and withdrew her human rights complaints before the CHRC, which will not reopen them. The grievor referred me to the following cases: *Castonguay,* at para 30 to 34; *Lindor v. Treasury Board (Solicitor General Canada – Correctional Service)*, 2003 PSSRB 10, at para 16; and *Dillon,* at para 9.

[24] The grievor filed a labour relations grievance that was validly referred to adjudication under section 92 of the *PSSRA* on February 24, 2005. The grievance maintained that the grievor's employment as a PM-04 program liaison officer in the First Nations and Inuit Health Branch of Health Canada had been terminated without just cause.

[25] The grievor's position is that an adjudicator has a residual jurisdiction over the settlement of a grievance over which he or she originally had jurisdiction to ensure that the parties remain true to, and bound by, the bargain they struck.

[26] The grievor's position is consistent with the Board's powers under the *PSSRA* and the *PSLRA.* Both the former *PSSRA* and the current *PSLRA* provide that the Board can exercise such powers or perform such duties as are conferred on it under either *Act*, or as are incidental to the attainment of the objects of those *Acts*. Where a situation, such as the one in this case, is linked in a proximate way to the legislation's

labour relations and public interest objectives, as well as to a grievance within the Board's primary and exclusive jurisdiction, the Board retains a residual or incidental power to ensure that a settlement is implemented. The grievor referred me to subsection 21(1); section 93 and subsection 96(1) of the *PSSRA* and to section 36 of the *PSLRA*.

[27] The grievor maintained that her position is also consistent with good labour relations and public interest in the finality and the integrity of the labour relations dispute resolution process. A failure to implement or abide by a settlement constitutes the type of bad faith that the Board has taken jurisdiction in other contexts.

[28] The grievor submitted that the capacity of the Board to hold parties to settlement agreements is fundamental to its labour relations mandate and that it would be anathema to that mandate to allow parties, through non-compliance, to resile from a settlement of a grievance over which the Board originally had jurisdiction.

[29] The PSSRB provided informal dispute resolution services (mediation), encouraged parties to resolve matters without resort to formal adjudication (expedited adjudication), adjudicated allegations of bad faith related to rejections on probation and recognized that it retained a residual jurisdiction to determine if a settlement was entered into under circumstances that would be unconscionable. The latter finding was affirmed by the Federal Court. Adjudicators appointed by the Board have also, from time to time, held matters in abeyance pending implementation. Those precedents demonstrate that the Board has consistently exercised powers to resolve disputes that were not express under the PSSRA and the PSLRA *Acts* but were incidental to its powers to administer those *Acts*. On those points, the grievor referred me to *Dhaliwal v. Treasury Board (Solicitor General Canada – Correctional Service)*, 2004 PSSRB 109, at para 93 and 94; which was applied by the PSLRB in *Wright v. Treasury Board (Correctional Service of Canada)*, 2005 PSLRB 139, and in *Chaudhry v. Treasury Board (Correctional Service of Canada)*, 2005 PSLRB 72; *Van de Mosselaer,* at para 42; and *MacDonald v. Canada*, [1998] F.C.J. No. 1562 (QL); at para 26 to 38.

[30] Under the *PSLRA*, the importance of supporting mediation and dispute resolution as a means of resolving workplace issues is more express and firmly reflects the practice established by the PSSRB under the *PSSRA*. The preamble to the *PSLRA* states the following:

. . .

Recognizing that

. . .

effective labour-management relations represent a cornerstone of good human resource management and that collaborative efforts between the parties, through communication and sustained dialogue, improve the ability of the public service to serve and protect the public interest;

. . .

the Government of Canada is committed to fair, credible and efficient resolution of matters arising in respect of terms and conditions of employment;

. . .

[31] The *PSLRA* stipulates a range of areas in which the Board may step in and resolve disputes: see sections 13 to 15, 36, 37 and 207 and subsection 226(2).

[32] Despite the foregoing, adjudicators have found that they do not have jurisdiction over the implementation of a settlement agreement. That rests largely on the finding that the power to do so is not expressly provided for in section 91 or 92 of the *PSSRA* or in sections 208 and 209 of the *PSLRA*. The grievor submitted that that interpretation of the adjudicator's authority is too narrow that it ought to be revisited.

[33] The history and practice of the PSSRB and the PSLRB demonstrate that the Board has the authority to resolve labour relations disputes broadly contemplated by its constituent legislation. Accordingly, its powers necessarily extend beyond the wording of sections 91 and 92 of the *PSSRA* and sections 208 and 209 of the *PSLRA*. Those provisions must be read purposefully and in a manner consistent with the objects of the legislation.

[34] The grievor did not suggest that this opened the door wide enough to allow the referral of any matter to adjudication, thereby rendering the provisions of the *PSSRA* or the *PSLRA* meaningless. On the contrary, the Board's jurisdiction to enforce a settlement is part of its primary jurisdiction over the original grievance and its residual jurisdiction to administer those *Acts*.

[35] An overriding preoccupation of the existing jurisprudence is the importance of finality. Upholding the principle that a signed settlement agreement is final and binding prevents persons from walking away from an agreement based on second thoughts or doubts or a desire to give less or seek more. Upholding the principle of finality furthers good and the public interest in certainty and bolsters the confidence of the parties in the legitimacy of the process. Stated another way, if a party can change its mind after having signed a settlement, it has a systemic chilling effect on our collective confidence that a settlement is a meaningful and reliable resolution to a workplace dispute. On that point, the grievor referred me to the following cases: *Myles v. Treasury Board (Human Resources Development Canada)*, 2002 PSSRB 53, at para 14; *Van de Mosselaer,* at para 47 and in the paragraphs that follow and para 57 in particular; *MacDonald* at para 26 to 36; and *Castonguay,* at para 29.

[36] The grievor emphasized that this case is not inconsistent with those principles, as the grievor is not seeking to resile from a final and binding settlement. Rather, she accepted that the settlement was binding on both parties. What she seeks is the Board's assistance in addressing the fact that the employer has breached a fundamental term of a valid settlement in a manner that has resulted in significant prejudice to her.

[37] The Board's jurisprudence reflects the view that a binding settlement is a bar to adjudication on an otherwise adjudicable grievance. Moreover, a grievance concerning a failure to fulfill the terms of a settlement does not meet the criteria for referral to adjudication set out in the PSSRA and the PSLRA *Acts* and, accordingly, a settlement can never be enforced at adjudication. The grievor referred to the following cases that support that proposition: *Myles,* at para 13, 19 and 20; *Skandharajah v. Treasury Board (Employment and Immigration Canada)*, 2000 PSSRB 114, at para 78 to 80; *Lindor,* at para 16; *Dillon,* at para 9; *Bedok,* at para 53; and *Carignan v. Treasury Board (Veterans Affairs Canada),* 2003 PSSRB 58, at para 48.

[38] The grievor argued that it was in the best interests of good labour relations to hold the parties to their settlement. It is inconsistent to allow either party to effectively resile from it by failing to comply with its terms. If the broad principle of finality is true and defensible, it cannot apply only until the time that ink dries on paper.

[39] The grievor submitted that the Board must exercise its authority to ensure that the integrity of mediation and consensual settlements as a labour relations dispute

resolution mechanism is maintained. It is particularly the case since the Board itself strongly encourages parties to mediate and settle grievances that fall within its primary jurisdiction. If the bargaining agent cannot assure its members that in signing a settlement the agreement is enforceable by the third party to whom their grievance has been referred, the likely impact will be that persons would rather litigate than forego their grievance rights and gamble with a tangible risk of non-compliance. In other words, there cannot be a meaningful right under a settlement without a meaningful remedy in the event of a party's failure to implement.

[40] The Supreme Court of Canada's decision in *Vaughan* at para 33 to 41 recognized that the Courts have a residual authority to resolve disputes where there is no statutory mechanism to do so. However, the Court will defer to an existing mechanism for dispute resolution available under the *PSSRA* or the *PSLRA*, including the filing of a non-adjudicable grievance.

[41] The grievor acknowledged that adjudicators have already concluded that a grievance seeking to enforce a settlement is not adjudicable. She referred me to *Myles,* at para 20.

[42] The grievor argued that section 236 of the *PSLRA* provides that where a right to grieve is available to an employee, that person has no right of action in a court. While the scope of that section has not yet been fully interpreted and applied, it could lead to the conclusion that an employee who maintains that a settlement has been violated may not resort to the civil courts for enforcement.

[43] On December 5, 2002, the Chairperson of the PSSRB wrote to the Public Service Alliance of Canada to advise it that the means of enforcement of a settlement was through the civil courts (the grievor submitted a copy of that letter).

[44] The grievor added that if enforcement through the Board is not available, she requests clarification on which forum is available to an employee to effectively obtain a remedy in the face of a breach of a settlement. In assessing that important question, the Board must consider that if the grievor filed a non-adjudicable grievance with the department, she would be seeking relief and remedies from the very party that violated the settlement. With respect to the courts, the grievor suggests that filing a non-adjudicable grievance in this context falls within the type of inherent conflict contemplated by the Supreme Court of Canada in *Vaughan,* which would, arguably,

invite a civil claim (see paragraph 37 of that decision). However, in seeking relief in the courts, unionized workers are being pushed back into a forum that labour relations legislation was designed to help them avoid.

[45] The grievor is not advocating in favour of civil recourse. On the contrary, the issues of forum and remedy underscores how little sense it makes to have public service workers deciding between a civil action or a non-adjudicable grievance depending on the facts of any given case. The legislation encourages mediation and dispute resolution. The Board has the power to administer the PSSRA and the PSLRA *Acts* to achieve those objects. Where a settlement resolves a labour relations dispute over which the Board has primary and exclusive jurisdiction, it makes good labour relations sense to have implementation issues resolved by that same Board.

[46] The grievor concluded by stating that enforcing the settlement of an otherwise adjudicable grievance is within the Board's jurisdiction as it involves administering both the PSSRA and the PSLRA and is incidental to achieving the objects of both of those *Acts.* The resolution of an adjudicable grievance ought only to be considered complete when its terms are complied with. Anything short of that leaves the parties with a strong disincentive to settle, as the union cannot assure its members that it can enforce the bargain in a meaningful and expeditious way.

[47] Accordingly, the grievor asked the Board to have an adjudicator hear this matter and find, based on the evidence and the arguments, that he or she has jurisdiction to consider whether a settlement of an adjudicable grievance has been implemented and, in the event of a breach, to remedy that breach.

[48] The grievor added in closing that she is seeking such relief in the context of the very real and substantive prejudice of a breach of settlement in this case, where she has lost the opportunities that were the foundation of the settlement and has, by complying with the settlement, shut the door on her ability to pursue quasi-constitutional human rights through the two complaints that she withdrew from the CHRC.

C. <u>Employer's rebuttal</u>

[49] The employer, through its representative, filed its rebuttal arguments on September 19, 2007. The employer maintained its position that the Board has

established a clear and long-standing jurisprudence that a valid and binding settlement agreement is a complete bar to an adjudicator's jurisdiction.

[50] The employer submitted that the only issue to be decided is whether there is a binding agreement between the parties with respect to the grievor's termination of employment. The parties have clearly executed a valid and binding MOU that specifically settled the issue of the reference to adjudication. Therefore, an adjudicator no longer has jurisdiction to hear or reopen this matter.

[51] The employer also argued that any issue with respect to enforcing the MOU is a separate issue which should be addressed in a separate process. As such, the Board need not address the means of enforcing the MOU as it falls outside the Board's jurisdiction. In light of that, the employer asked that the reference to adjudication be dismissed.

III. Reasons

[52] The grievor, through her representative, has requested that the "matter be scheduled for adjudication" because the employer has breached the settlement that the parties had agreed on to resolve the grievance. She asked that I reopen the reference to adjudication "in order for the Board to adjudicate the question of its jurisdiction to direct parties to a settlement to abide by its terms and to remedy a breach thereof." In other words, the grievor is asking me to take jurisdiction over the enforcement of the agreement. The employer is of the view that I cannot reopen this case because the parties reached a settlement, and a settlement is a complete bar to adjudication.

[53] At this point, it is useful to review the chronology of events. The documents on file indicate that on February 24, 2005, the grievor referred a grievance to adjudication under the *PSSRA* regarding the termination of her employment.

[54] It is common ground that on January 30, 2006, the parties signed a MOU to settle the matter that was the subject of the grievance.

[55] On May 24, 2006, the grievor's bargaining agent wrote to the Board to withdraw the grievance from adjudication as a settlement had been reached and implemented.

[56] On May 26, 2006, the Board wrote to the parties informing them that the file was closed since the matter was settled and the grievance withdrawn.

[57] The grievor asked the Board to schedule the grievance for adjudication on February 12, 2007, and on July 19, 2007, the Board directed the parties to file written submissions on whether the Board had jurisdiction to hear the grievor's request.

[58] This case raises two jurisdictional issues. The first is the effect of the withdrawal of the grievance on my jurisdiction. The second is the effect of the agreement that the parties reached to settle the grievance.

[59] I have considered all the arguments, evidence and case law submitted by the parties and I have decided that I do not have jurisdiction over this matter for the reasons that follow.

[60] The grievor argued that withdrawing her grievance ought not to prejudice her in such a way as to preclude the Board from dealing with the jurisdictional question. I cannot agree with that submission. In my view, the Federal Court of Appeal has clearly established that an adjudicator appointed by the Board loses jurisdiction over a grievance when a grievor withdraws it. In *Canada (Attorney General) v. Lebreux*, [1994] F.C.J. No. 1711 (QL), the employee had reached an agreement with the employer and withdrew his grievance. The Board closed the files, but the grievor later asked that the files be reopened because there had been no satisfactory agreement between the parties. The Board agreed to review the case and hear the grievance on its merits. The Federal Court of Appeal found that the adjudicator erred in doing so because the withdrawal of the grievance rendered the Board without jurisdiction at paragraph 12:

> *[12] From the time the respondent discontinued his grievances the Board and the designated adjudicator became functus officio since the matter was then no longer before them. The Board was not required either to inquire into the merits or feasibility of such a discontinuance or to agree to accept or reject it. The act of discontinuance forthwith and without more terminated the grievance process in respect of which it was filed. Accordingly, no order or decision could be or was made within the meaning of the Act that could be the subject of cancellation or review under s. 27.*
>
> [Footnote omitted]

[61] The Court indicated that the only thing that the adjudicator could have done was to note the withdrawal. In my view, *Lebreux* stands for the proposition that the withdrawal of a grievance is a bar to adjudication, not only regarding the merits of the grievance but also the enforcement of the settlement if I had that jurisdiction. Once a grievance is withdrawn, the Board loses jurisdiction over all matters related to it. There is simply no longer any grievance before the adjudicator.

[62] Since I have no jurisdiction over this grievance, the issue of whether an adjudicator has jurisdiction over the enforcement of the settlement is moot. I can only note that adjudicators have always refused to take jurisdiction over the enforcement of a settlement (see *Myles* and *Treasury Board v. Deom*, PSSRB File No. 148-02-107 (19850522)).

[63] For all of the above reasons, I make the following order:

(The Order appears on the next page)

IV. Order

[64] I note the withdrawal of the grievance.

January 24, 2008.

John A. Mooney,
adjudicator