Date: 20090519

File: 566-02-10

Citation: 2009 PSLRB 61

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

ANDREW DONNIE AMOS

Grievor

and

DEPUTY HEAD
(Department of Public Works and Government Services)

Respondent

Indexed as
Amos v. Deputy Head (Department of Public Works and Government Services)

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before:	Dan Butler, adjudicator
For the Grievor:	Kenneth A. MacLean, counsel
For the Respondent:	Jennifer Lewis, counsel

Decided on the basis of written submissions
filed March 2 and 24 and April 1, 2009.

I. Issue before the adjudicator

[1] The deputy head of the Department of Public Works and Government Services has conceded that it did not comply with a provision of a settlement agreement relating to an individual grievance referred to adjudication by Andrew Donnie Amos ("the grievor"). The issue in this decision is the remedy for that breach.

[2] In a grievance filed on May 2, 2005, the grievor challenged a 20-day disciplinary suspension imposed by the deputy head. He stated the details of his grievance as follows:

. . .

> *. . . this grievance is related to the disc. action as set out in the disciplinary notice of March 29, 2005 signed by ADM Shearer as well as other disc. actions taken to date. These actions were, and are, completely unjustified and unwarranted. There were failures in following established procedures, natural law, burden of proof, standard of proof & admin. fairness.*
>
> *Pls. note that I am still awaiting receipt of balance of long overdue and outstanding information requested 6 months ago through ATIP.*
>
> [corrective action]
>
> *That the disciplinary measures be set aside and that I be reimbursed for all losses and damages.*
>
> [*Sic* throughout]

[3] The grievor referred his grievance to adjudication on August 10, 2005.

[4] I was appointed as an adjudicator to hear and determine the matter. During the hearing, the parties agreed to try to resolve their dispute through mediation. They signed a "Consent to Mediate" form and then met privately (for the most part). I provided occasional assistance as a mediator pursuant to subsection 226(2) of the *Public Service Labour Relations Act* ("the *Act*"), enacted by section 2 of the *Public Service Modernization Act*, S.C. 2003, c. 22.

[5] On May 2, 2007, the parties announced that they had concluded a settlement. I then closed the hearing.

[6] On December 14, 2007, the Registry of the Public Service Labour Relations Board ("the Registry") received the following request from the grievor:

. . .

> *In May 2007 the parties agreed to a Memorandum of Agreement settling the above noted file. In reliance on that agreement, the grievor agreed to withdraw his grievances. A specific term of that agreement upon which the grievor relied reads as follows:*
>
> > *The parties hereby agree:*
> >
> > 1. *To participate in a meeting, or meetings as reasonably required, with a view to discussing and resolving issues of mutual interest relating to the grievors working relationship with PWGSC. This process shall take place as soon as practicable. It is the intent of both parties to establish a positive working relationship for their mutual benefit for the future.*
>
> *Unfortunately, although the grievor has* [*sic*] *attempted to schedule this meeting immediately after the Agreement was signed and repeatedly over the next seven months, the Department was unwilling to meet. This seven-month delay has moved us well beyond "as soon as practicable". This coupled with the fact that there has been no establishment of a "positive working relationship" and, in fact, a serious deterioration of the relationship.*
>
> *As a result of the above, Mr. Amos hereby requests that his original grievance proceed due to the employer's breach of the Memorandum of Agreement between the parties.*

. . .

[7] The deputy head objected to my jurisdiction to consider the alleged breach of the settlement agreement, arguing as follows:

. . .

> *It is the employer's position that the adjudicator no longer has jurisdiction over this matter as a complete and final settlement agreement (MOA) was reached between the parties on May 2, 2007.*
>
> *The existence of a final and binding settlement is a complete bar to an adjudicator's jurisdiction. The case law is abundantly clear on this issue . . . .*

> *It is also a well established principle that an adjudicator has no jurisdiction concerning the implementation of an MOA . . .*
>
> *Notwithstanding the above, if the grievor does have concerns in regard to the implementation of the MOA, his local management is more than willing to discuss matters with him.*
>
> . . .

[8] Under my direction, the Registry requested, and received, written submissions from the parties on the following three questions arising from the jurisdictional objection:

> *1) Where, in the case of an individual grievance referred to adjudication in relation to a disciplinary action resulting in suspension, the parties have entered into a settlement agreement, does an adjudicator have jurisdiction under the new* Act *to determine whether the parties' settlement agreement is final and binding?*
>
> *2) In the event that an adjudicator has the jurisdiction under the new* Act *to determine whether the parties' settlement agreement is final and binding, does the adjudicator have the jurisdiction to hear an allegation that a party is in non-compliance with a final and binding settlement agreement?*
>
> *3) In the event that an adjudicator has the jurisdiction to hear an allegation that a party is in non-compliance with a final and binding settlement agreement, does the adjudicator have the jurisdiction to make the order that the adjudicator considers appropriate in the circumstances?*

[9] I also received submissions from three interveners: the International Brotherhood of Electrical Workers, Local 2228; the Professional Institute of the Public Service of Canada and the Public Service Alliance of Canada.

[10] For the reasons outlined in *Amos v. Deputy Head (Department of Public Works and Government Services)*, 2008 PSLRB 74, I issued the following order:

> . . .
>
> *[129] I declare that an adjudicator has jurisdiction to determine whether the parties have entered into a final and binding settlement agreement.*
>
> *[130] I further declare that an adjudicator has jurisdiction to consider the grievor's allegation that the deputy head is in*

> *non-compliance with the parties' final and binding settlement agreement.*
>
> *[131] I also declare that an adjudicator has jurisdiction to make the order that he or she considers appropriate in the circumstances.*
>
> *[132] The adjudication hearing shall resume for the purpose of determining whether the deputy head has not complied with the terms of the settlement agreement signed by the parties on May 2, 2007, and, if appropriate, for the purpose of determining an appropriate remedy.*

The deputy head applied for judicial review of that decision. The judicial review application remains pending.

[11] As ordered, the Registry scheduled a new hearing to address the alleged breach of the settlement agreement. Before that hearing, the deputy head wrote to the Registry to concede that it had not complied with the following provision of the settlement agreement:

> . . .
>
> *The parties hereby agree:*
>
> 1. *To participate in a meeting, or meetings as reasonably required, with a view to discussing and resolving issues of mutual interest relating to the grievors working relationship with PWGSC. This process shall take place as soon as practicable. It is the intent of both parties to establish a positive working relationship for their mutual benefit for the future.*
>
> . . .

[12] The deputy head requested that I determine a remedy for the conceded breach of the settlement agreement based on written submissions. The grievor agreed, and I issued instructions to proceed accordingly.

II. Summary of the arguments

A. For the grievor

[13] On March 2, 2009, the grievor filed his written submissions.

[14] The grievor referred to the adjudicator's finding in 2008 PSLRB 74 that the remedial powers of an adjudicator under the *Act* are broad, as stated in subsection 228(2) of the *Act*. When dealing with an issue of non-compliance with a settlement agreement, an adjudicator has the jurisdiction to make an order that ". . . he or she considers appropriate in the circumstances."

[15] Normally, a grievor who alleges a breach of a settlement agreement seeks the enforcement of a remedy that the grievor alleges has already been agreed to by the parties. Events have seriously complicated the grievor's ability to secure such a remedy. The grievor described what occurred after filing his application on December 14, 2007, as follows:

. . .

> *Amazingly, over the next nine months between the time that we wrote to the Registry and the time that [*Amos*] was issued in September 2008, PWGSC still did not arrange for a meeting with Mr. Amos. After the parties signed the Settlement Agreement, there is simply no evidence that PWGSC ever intended to honour its commitment to meet with Mr. Amos "to establish a positive working relationship for their mutual benefit for the future", as was their stated intention in the Settlement Agreement. In fact, when Mr. Amos asked senior management in brief face-to-face conversations when they would meet as per the Settlement Agreement, Mr. Amos states that the answer he received was "I did not sign that agreement."*
>
> *Eventually, Mr. Amos resigned himself to the fact that PWGSC was not going to do their part to establish a positive working relationship for his future. He worked on the one file assigned to him, an RCMP building.*
>
> *However, since that time a new and shocking development has arisen in Mr. Amos' case. On February 2, 2009, Mr. Amos received notice from representatives of PWGSC that his employment was being terminated with just cause. Mr. Amos was shocked and extremely upset by this development. Mr. Amos states that his termination was directly related to the employer's breach of the Settlement Agreement. In fact, the termination relied on alleged wrongful acts that took place and were investigated prior to the parties signing the Settlement Agreement.*
>
> *Mr. Amos is shocked and extremely upset that PWGSC could sign the Settlement Agreement committing to work with him in one or more meetings for the purpose of "discussing and resolving" issues related to Mr. Amos' working relationship*

> *with PWGSC with the stated intent to establish "a positive working relationship for their mutual benefit for the future" while they had already acknowledged and investigated the acts which they now say (2 full years later) are just cause for his termination. PWGSC proceeded in this manner without having made any effort to meet to resolve those and any other issues. Mr. Amos states that if PWGSC had only agreed to meet with him as set out in the Settlement Agreement, his termination could have been avoided. Mr. Amos was never allowed to speak to senior management on any matter, neither the Settlement Agreement nor the alleged misconduct that the Department says led to his termination. Mr. Amos respectfully submits that it is the negative attitude toward him that those meetings were meant to resolve and that led to his termination.*
>
> *In fact, Mr. Amos submits that the investigation into his alleged wrongdoing that led to his termination was not pushed forward until he began to ask for the meetings contemplated in the Settlement Agreement (in May and June 2007) and re-filed this matter before the Adjudicator (December 14, 2007). It is, clear on the face of how the investigation into the alleged wrongdoing progressed that, rather than meeting with Mr. Amos as agreed, PWGSC re-ignited a stagnant investigation and terminated his employment. Although the investigation into the alleged wrongdoing was completed in February/March 2007, Mr. Amos received "follow-up" questions to the investigation in July 2007 and was told that the RDG would not meet with him in late December 2007. In September 2008, over a year and one-half after the investigation, Mr. Amos was provided another "investigation report" into the alleged wrongdoing. There was clearly no intention on the part of PWGSC locally in Halifax to meet with Mr. Amos and work to resolve their issues to create a positive working environment in the future, notwithstanding the Settlement Agreement.*
>
> . . .

[16] In view of the deputy head's recent move to terminate his employment based on facts that were known by the deputy head before it signed the settlement agreement, the grievor argues that he is entitled to significant damages. Those damages relate both to the breach of the settlement agreement as well as to the deputy head's subsequent actions, which reveal bad faith.

[17] To enforce the terms of the original settlement agreement, the adjudicator must find a remedy that puts the grievor in the place where he would have been had the parties met to discuss and resolve the issues related to their working relationship. The remedy must include damages that flow from the breach of the agreement. *Hadley v.*

Baxendale (1854), [1843-60] All E.R. Rep. 461, states that damages are recoverable for a contractual breach if the damages are ". . . such as may fairly and reasonably be considered either arising naturally . . . from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties . . ." when the contract was signed.

[18] In the grievor's submission, all his present damages stem from the breach of the settlement agreement. The alleged wrongful act and results of the investigation into that act that have since led to his termination were known by the deputy head before the parties concluded the settlement agreement. The remedy ordered by the adjudicator must deal with all the damages that the grievor has sustained.

[19] The grievor submits that the adjudicator should issue an order for the following remedies:

> *1. Reinstatement of Mr. Amos with all lost wages, benefits and seniority:*
>
> *2. Compensation for lost overtime that Mr. Amos reasonably expected to result from the parties meeting and resolving their outstanding issues. (The employer had agreed in the first paragraph #2 of the Settlement Agreement that Mr. Amos' lost monthly overtime had a value of $2000.00 per month.) As the Settlement Agreement stated that the parties were to meet "as soon as practicable", we submit that these overtime hours reasonably should have returned to Mr. Amos by the time we brought the breach to the attention of the Registry in December 2007 decision if a positive working relationship had been re-established, which would amount to approximately 14 months of lost overtime at $2000.00 per month, equalling 28,000.*
>
> *3. Since the Settlement Agreement was not complied with Mr. Amos had to write the Registry and subsequently provide submissions through counsel. He requests compensation for the legal fees that he incurred due to the breach of the Settlement Agreement, including all of the fees related to preparing submissions that led to the Decision, and all related matters.*
>
> *4. Mr. Amos submits that within the Settlement Agreement, he accepted approximately 45% compensation for his legal fees incurred up to the time of the Settlement Agreement in May 2, 2007. As he did not receive the remedy bargained for in the Settlement Agreement, he requests the remaining 55% of those legal fees.*

> *5. In recent case, the Supreme Court of Canada has refined the area of bad faith damages in the employment context. In* Honda v. Keays *[2008] S.C.J. No. 40, the Supreme Court of Canada has established that there remains to be an implied obligation of good faith and fair dealing in employment contracts and that damages shall flow in the same way as other cases dealing with "moral damages". At least two cases have dealt with this concept of "moral damages" due to bad faith in employment contracts since* Honda, Simmons v. Webb *[2008] O.J. No. 5249 and* Piresferreira v. Ayotte *[2008] O.J. No. 5187, which identified a moral damages amount of $20,000 and $45,000 in general damages for bad faith by the employer. We submit that to meet the objectives set out in the preamble of the PSLRA, Mr. Amos should be awarded in the higher range of these two amounts.*
>
> *6. We submit that Mr. Amos should receive aggravated and/or punative* [*sic*] *damages in this unusual case of high-handed and outrageous conduct by the employer.*
>
> *7. We submit that Mr. Amos should receive interest on all amounts from the date of the settlement Agreement, May 2, 2007.*

[20] The grievor noted that he was not aware of the deputy head's intention to terminate his employment in relation to an issue predating the settlement agreement when he consented to proceed by these written submissions. At that time, the adjudicator issued his order regarding written submissions subject to the caveat that, if evidentiary issues are in dispute, further proceedings may be required. The grievor now acknowledges that further proceedings may be necessary. The adjudicator may find that, due to the new circumstances of the case, a hearing is required to determine how he can enforce the remedy that was previously agreed to by the parties. Alternatively, the grievor notes that the evidentiary matters related to the new developments in the case will likely require a hearing, although he continues to prefer alternative dispute resolution measures.

B. <u>For the deputy head</u>

[21] The deputy head filed written arguments in reply on March 24, 2009.

[22] The deputy head submits that the effect of a settlement agreement is to bar a grievor from later resurrecting the same grievance and, in many cases, matters that are in any way related to the original grievance. The deputy head took the position on January 7, 2008 that the existence of a final and binding settlement agreement in this

case was a complete bar to an adjudicator's jurisdiction. In 2008 PSLRB 74, the adjudicator found that the traditional bar to adjudication was no longer valid and that he could consider the grievor's allegations of non-compliance. Given that the deputy head has conceded that it breached the settlement agreement, the question that must be answered now is: "What is the appropriate remedy under the circumstances?"

[23] The adjudicator derived his jurisdiction in this case from the original 20-day suspension that was grieved and then ultimately referred to adjudication in accordance with section 209 of the *Act*. The adjudicator found that there is an inextricable link between the settlement agreement and the original grievance. The deputy head submits that that link provided the adjudicator with the ability to make the orders that he did in that case. However, it is important to note that the adjudicator never had any original jurisdiction over the settlement agreement. The adjudicator's jurisdiction over the settlement agreement derived collaterally from his original jurisdiction over the 20-day suspension.

[24] The grievor argues that the adjudicator's remedial authority includes ordering a remedy that relates to the breach of the settlement agreement and not to the 20-day suspension. The adjudication of the breach of the settlement agreement, a common-law contract, is clearly not within the jurisdiction of an adjudicator appointed pursuant to the *Act*.

[25] The deputy head's position is that an adjudicator may consider evidence and argument over his jurisdiction to hear a grievance that otherwise may not be referable to adjudication. The difference is that now, in accordance with the adjudicator's ruling, adjudicators may consider not only whether a valid and binding settlement agreement has been entered into by the parties but also whether that settlement agreement has been implemented according to the terms of the agreement. If there is non-compliance, the most that an adjudicator can order is that he or she retains jurisdiction over the original grievance and that the hearing must resume. In other words, the adjudicator has jurisdiction to determine whether he or she has jurisdiction over the original grievance; he or she does not, however, have jurisdiction over the settlement agreement as he or she would over a grievance referred to adjudication in accordance with section 209 of the *Act*. Therefore, any further remedial action would depend on the merits of the grievance that has been referred to adjudication and not, as the grievor is requesting, to the breach of the settlement agreement.

[26] In that light, the deputy head submits that the grievor may wish to proceed with the hearing on the merits of the 20-day suspension if the adjudicator finds that the breach of the settlement agreement is such that the deputy head can no longer rely on it as a defence to adjudication. In the event that the hearing resumes on that basis, the deputy head requests the return of any monies paid out under the settlement agreement before proceeding with the grievance on the merits.

[27] The deputy head submits that, in the alternative, a hearing must be convened on this matter if the adjudicator disagrees with the deputy head's position on remedial authority outlined above. It has become clear that the grievor's termination, and the damages flowing from the termination, is driving the request for remedial action in this case. While the deputy head is of the opinion that the adjudicator is not seized with the grievor's termination, it is clear that the evidence put forward in the grievor's submissions can only be dealt with in the context of a full hearing.

C. Grievor's rebuttal

[28] The grievor filed written rebuttal arguments on April 1, 2009.

[29] The grievor submits that much of the deputy head's submissions deal with the adjudicator's jurisdiction to determine damages flowing from the breach of a settlement agreement. The grievor argues that the deputy head had an opportunity to make submissions on that issue in 2008 PSLRB 74 but chose not to. The issue was decided. At 2008 PSLRB 74, ¶122, the adjudicator wrote as follows:

> *[122] I regret that I thus have no guidance from the deputy head as to the nature of an adjudicator's jurisdiction where an adjudicator does have the jurisdiction to hear an allegation that a party is in non-compliance with a final and binding settlement agreement. In that sense, the deputy head's response to Question 3 does not answer Question 3.*
>
> [Emphasis in the original]

The adjudicator went on to answer the question at ¶123*:*

> *[123] . . .The remedial powers of an adjudicator under the new* Act *are broad. An adjudicator is not bound to a specific list of enumerated remedies — the new* Act *contains no such list. Instead, the new* Act *states the following in subsection 228(2):*

> **228.** (2) After considering the grievance, the adjudicator must render a decision and make the order that he or she considers appropriate in the circumstances. . .
>
> . . .

He continued at ¶124 as follows:

> *[124] I therefore find that an adjudicator has the jurisdiction to make the order that he or she considers appropriate in the circumstances. . . .*

[30] The grievor maintains that there are now no grounds to return to a hearing on the original grievance. The grievance was settled, and the deputy head has admitted to breaching the settlement agreement. There are no grounds for a return of any monies paid out in the settlement — that submission reveals a continued and potentially renewed effort by the deputy head to turn its back on the original settlement agreement and cause the grievor further difficulty.

[31] The deputy head has not provided submissions on the actual issue of damages. As a result, the grievor contends that the adjudicator should provide an order for damages based on his submissions and any further factual information that the adjudicator might request. That outcome is the result that is most consistent with the preamble of the *Act*, which notes the Government of Canada's commitment to ". . . fair, credible and efficient resolution of matters arising in respect of terms and conditions of employment."

III. Reasons

[32] 2008 PSLRB 74, at ¶132, clearly stated the purpose of these proceedings as follows:

> *[132] The adjudication hearing shall resume for the purpose of determining whether the deputy head has not complied with the terms of the settlement agreement signed by the parties on May 2, 2007, and, if appropriate, for the purpose of determining an appropriate remedy.*

[33] The deputy head has conceded non-compliance with the following term of the settlement agreement:

> *The parties hereby agree:*

> 1. *To participate in a meeting, or meetings as reasonably required, with a view to discussing and resolving issues of mutual interest relating to the grievors working relationship with PWGSC. This process shall take place as soon as practicable. It is the intent of both parties to establish a positive working relationship for their mutual benefit for the future.*

The grievor has not alleged any other breach of a specific provision of the settlement agreement. Consequently, the only issue before me is the appropriate remedy for the breach of the settlement agreement conceded by the deputy head.

[34] This is not the appropriate proceeding for the deputy head to reargue an issue determined in 2008 PSLRB 74. As noted by the grievor in rebuttal, the deputy head had full opportunity to make submissions about the extent of the adjudicator's remedial authority to address an alleged breach of a settlement agreement in 2008 PSRLR 74, but chose not to. Now, the deputy head seeks to argue that an adjudicator's remedial authority is jurisdictionally limited to considering the merits of the original grievance and not a breach of a settlement agreement. Moreover, the deputy head now also appears to reargue whether an adjudicator has jurisdiction over a settlement agreement at all as he or she would have over an original grievance.

[35] In 2008 PSLRB 74, I made the following orders, among others:

> . . .
>
> *[130] I further declare that an adjudicator has jurisdiction to consider the grievor's allegation that the deputy head is in non-compliance with the parties' final and binding settlement agreement.*
>
> *[131] I also declare that an adjudicator has jurisdiction to make the order that he or she considers appropriate in the circumstances.*
>
> . . .

Until such time as the appropriate court finds that, as a result of a judicial review application or further appeal, those orders were in error, it is not my role here to reopen consideration of the jurisdictional questions posed and answered in that decision. According to those orders, my task now is to consider whether it is appropriate to order the corrective action sought by the grievor, in whole or in part, or any other corrective action that I might consider appropriate in the circumstances.

[36] The only evidence before me pertinent to the question of an appropriate remedy for the conceded breach of the settlement agreement is the account of events offered by the grievor. The deputy head does not directly contest that account. The deputy head does, however, state that an evidentiary hearing may be required if I accept jurisdiction to consider the breach of the settlement agreement itself and the appropriate remedy for that breach.

[37] If I were of the view that the facts as alleged by the grievor were sufficient to allow me to proceed to make an award of remedy based on the written submissions received to date, I would do so — but I cannot. In my view, there is a need for evidence to clarify what consequences resulted from the breach of the settlement agreement.

[38] The grievor justifiably argues that the question of remedy has become more complex because the deputy head recently terminated his employment. However, he also argues that I am in a position to fashion an award for damages that deals comprehensively with all the deputy head's actions, including the termination of employment. I disagree. I am not seized with the merits of the termination decision. In reaching that conclusion, I am mindful of the fact that the grievor has available to him an appropriate grievance mechanism to challenge his termination of employment and, subject to meeting the requirements of the *Act*, the opportunity to seek an appropriate remedy in that regard through adjudication on that matter. The settlement agreement whose breach comprises the issue before me was a final and binding settlement of a grievance concerning a four-week suspension without pay. In the circumstances faced by the grievor, the line distinguishing an issue involving the enforcement of the settlement agreement from one relating to a distinct decision made by the deputy head to terminate the grievor's employment may be somewhat difficult to draw but it does exist and is necessary for the purpose of respecting my jurisdiction.

[39] That said, the fact that the deputy head terminated the grievor's employment is not irrelevant to my determination of the remedy that is appropriate "in the circumstances." That the grievor is no longer employed in the deputy head's workplace is an important "circumstance" that I must consider in fashioning corrective action, as appropriate.

[40] I now need to hear further from the parties so that I may identify the specific consequences sustained by the grievor that resulted from the breach of the settlement agreement conceded by the deputy head and so that I may also determine the

appropriate remedy available to me to correct that breach. I invite the parties to adduce any further evidence that they feel will assist me to make a ruling as well as their further arguments on how to interpret that evidence and apply, as the case may be, the case law on damages.

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

(The Order appears on the next page)

IV. Order

[42] I direct the Registry to consult with the parties with a view to setting hearing dates to receive further evidence and arguments on the specific consequences sustained by the grievor that resulted from the breach of the settlement agreement conceded by the deputy head, on the appropriate remedy available to an adjudicator to correct that breach and, as the case may be, on the case law on damages.

May 19, 2009.

Dan Butler,
adjudicator