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Citation: 2011 PSLRB 22

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

ORANE SCOTT

Grievor

and

DEPUTY HEAD
(Department of Human Resources and Skills Development)

Respondent

Indexed as
Scott v. Deputy Head (Department of Human Resources and Skills Development)

In the matter of individual grievances referred to adjudication

REASONS FOR DECISION

Before: Georges Nadeau, adjudicator

For the Grievor: Osborne G. Barnwell, counsel

For the Respondent: Neil McGraw, counsel

Heard at Toronto, Ontario,
November 8 and 9, 2010.

I. Matter before the adjudicator

[1] On March 24, 2010, I issued the following order in *Scott v. Deputy Head (Department of Human Resources and Skills Development)*, 2010 PSLRB 42:

> ***V. Order***
>
> *[121] The 15-day suspension imposed on Mr. Scott on January 27, 2006, is rescinded. I order the deputy head to reimburse Mr. Scott for all wages and reinstate all benefits associated with that suspension. I further order the deputy head to remove from Mr. Scott's employee file all references to the suspension.*
>
> *[122] Mr. Scott's termination is rescinded. I order the deputy head to reinstate Mr. Scott as of March 16, 2007, and reimburse him for all wages and reinstate all his benefits as of that date, except for a 15-day suspension commencing on that date. I further order the deputy head to remove from Mr. Scott's employee file all references to the termination.*
>
> *[123] I shall remain seized of this matter for 90 days to resolve any issues about any amount payable to Mr. Scott as a result of this decision.*

[2] On June 5, 2010, counsel for Orane Scott ("the grievor") requested by email that the deputy head ("the respondent") be ordered to pay $34 000 for his legal fees. This amount included the hourly fee for the actual time that counsel spent representing the grievor, as well as an amount, agreed to by the grievor, equal to 10% of the damages payable by the respondent if the grievor were reinstated in his employment. The request was based on the allegation that the respondent had behaved unreasonably in deducting from the monies payable to the grievor the pension benefits that the grievor had received and needed to reimburse the Public Service Pension Fund. The request prompted an exchange of emails that resulted in my asking the parties for written submissions on the issue of whether I had retained jurisdiction to deal with the request.

[3] In his submissions filed on June 24, 2010, counsel for the grievor further requested, on behalf of the grievor, damages for mental anguish in the amount of $75 000, in addition to legal costs increased to $38 000 and interest. Counsel for the respondent objected that I, the adjudicator, was *functus officio* and that, in any event, I did not have jurisdiction to award legal costs. Counsel for the grievor essentially replied that I had retained jurisdiction to resolve any issues about any amount payable

to the grievor. He added that the issues of legal costs and damages had not been dealt with and that I was empowered by the enabling statute to dispose of these issues.

[4] After considering the parties' written submissions, I called a hearing on the matter of jurisdiction. The parties were advised to be prepared to proceed on the merits of the grievances were I to accept jurisdiction to entertain the request from counsel for the grievor. The hearing was scheduled for November 8 and 9, 2010.

[5] On November 8, 2010, the parties, after their opening remarks and discussions about the admissibility of evidence, asked me to render a decision on the objection raised by the respondent, that I was *functus officio*, before proceeding any further. They asked that the hearing be adjourned until the following day, when they would make their submissions on that issue. I granted the adjournment. The hearing was reconvened on November 9, 2010.

II. The parties submissions

A. For the respondent

[6] Counsel for the respondent stated that this was a highly unusual case as the request from counsel for the grievor to reopen it is something that has never been seen in this jurisdiction. He indicated that it is a very basic rule of administrative law that when a decision has been rendered, the task of the decision maker is finished. An adjudicator only has the powers Parliament granted under the *Public Service Labour Relations Act* (*PSLRA*). Once an adjudicator has rendered a decision, he or she cannot revisit that decision. An adjudicator cannot reconsider issues that were put to him or her or consider new related issues. The basic rule is that, whether a decision is faulty or correct or whether it contains a breach of natural justice or of procedural fairness, the job is done. The recourse available to a party is not before the adjudicator but before a higher court, which ensures the finality of the proceedings.

[7] Counsel for the respondent recognized that an adjudicator may bifurcate a hearing by dealing separately with a preliminary issue or by hearing further submissions on an appropriate remedy. Counsel for the respondent submitted that there was no question that 2010 PSLRB 42 was a final and binding decision under the *PSLRA*.

[8] Counsel for the respondent acknowledged that, during the course of the hearing leading to 2010 PSLRB 42, he asked that the adjudicator reserve jurisdiction on the question of remedy should a decision be rendered in favour of the grievor. Counsel for the respondent argued that his request had not been granted.

[9] Counsel for the respondent indicated that the respondent took issue with how much of the time elapsed between the original hearing and 2010 PSLRB 42 was rendered should bear on the respondent. The respondent could have filed an application for judicial review with the Federal Court but it did not. Similarly, counsel for the respondent argued that recourse to that court was available to the grievor and that the grievor chose not to seek judicial review. He submitted that, if counsel for the grievor felt the grievor had been denied the opportunity to raise the issues of legal costs and damages, his recourse was before the Federal Court, which could have either done one of two things: grant the application and send the matter back to the adjudicator to deal with those issues or deny the application. An adjudicator under the *PSLRA* cannot reopen a closed case; only the Federal Court has that power.

[10] Counsel for the respondent added that, even had the grievor applied for judicial review, the Federal Court might not have sent the matter back to the adjudicator. The Federal Court might have ruled that the grievor had never asked for legal costs or damages at any stage of the grievance process or during the hearing leading to 2010 PSLRB 42. Counsel for the grievor assumed that the matter would be bifurcated. In any event, the decision that the Federal Court might have made will never be known, as the grievor never sought judicial review.

[11] Citing Brown and Evans, *Judicial Review of Administrative Action in Canada* (2009), counsel for the respondent indicated that, "[o]nce an adjudicator has done everything necessary to perfect the decision, they [sic] are barred from revisiting them [sic] other than to correct clerical error or other minor technical errors." He also relied on *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848, in which the Supreme Court of Canada enumerated as follows the exceptions under which the principle of *functus officio* should be applied:

. . .

> *Accordingly, the principle should not be strictly applied where there are indications in the enabling statute that a decision can be reopened in order to enable the tribunal to*

> *discharge the function committed to it by enabling legislation. . . .*
>
> *Furthermore, if the tribunal has failed to dispose of an issue which is fairly raised by the proceedings and of which the tribunal is empowered by its enabling statute to dispose, it ought to be allowed to complete its statutory task. If, however, the administrative entity is empowered to dispose of a matter by one or more specified remedies . . . the fact that one is selected does not entitle it to reopen proceedings to make another or further selection. Nor will reserving the right to do so preserve the continuing jurisdiction of the tribunal unless a power to make provisional or interim orders has been conferred on it by statute. . . .*
>
> . . .

[12] Counsel for the respondent argued that the exceptions to the *functus officio* principle did not apply in this case. Nothing in the enabling statute, the *PSLRA*, allows an adjudicator to reopen a case. Closely examining the circumstances in *Chandler* reveals they are completely different from those to be considered in this case.

[13] Counsel for the respondent submitted that the grievor is asking the adjudicator to reopen 2010 PSLRB 42. However, whether that decision was correct or faulty, it is no longer the adjudicator's concern. If the grievor found that the remedy did not go far enough, his recourse was before the Federal Court.

[14] If the grievor takes the position that the jurisdiction that the adjudicator retained at 2010 PSLRB 42 ¶123 should be read broadly enough to encompass legal costs or damages, counsel for the respondent submitted that, in all fairness, that position is false. Remedies are not open to different interpretations and are not to be read broadly. The order at 2010 PSLRB 42 ¶122 is to reinstate all wages and to reinstate all benefits up to the specified date except for a 15-day suspension. No possible interpretation of that order can suggest that the grievor should be awarded legal costs or damages, however defined.

[15] Counsel for the respondent submitted that the adjudicator remained seized to resolve any issues about any amounts to be paid to the grievor with regard to the order to reinstate pay and benefits. At times, disagreements occur over wages to be reimbursed or over whether an employee is entitled to lost overtime. However the fact that the adjudicator retained jurisdiction to deal with those issues does not create an opportunity to request new and additional remedies. The request for legal costs and

damages was in fact made well after 2010 PSLRB 42 was issued. At no time during the grievance process or at the hearing leading to 2010 PSRLB 42 did the grievor request legal costs or damages for mental suffering. The claim for legal costs was raised only after counsel for the grievor became aware that the grievor would not be able to pay his legal fees. Had the grievor received the entire amount of back pay, no claim would have been made that the respondent pay the legal costs.

[16] Counsel for the respondent drew attention to the email that counsel for the grievor sent to the Registry on June 5, 2010. In it, counsel for the grievor provided in great detail the fee arrangement that he had with the grievor. The email makes it quite clear that the respondent should pay the bill and makes no mention of a claim for damages because of mental anguish. The first time that the claim for damages for mental anguish was made was in the written submissions filed on June 24, 2010.

[17] Counsel for the respondent asked that I consider whether the grievor could realistically obtain his legal costs. He submitted that in *Canada (Attorney General) v. Mowat*, 2009 FCA 309, the Federal Court of Appeal ruled that an administrative tribunal can award legal costs only if its enabling legislation grants it that authority. He added that the claim for damages was made on June 24, 2010, after it became clear to the grievor's counsel that the monies payable under 2010 PSLRB 42 would not cover his legal fees.

[18] Counsel for the respondent submitted that the issue is that the grievor had led his counsel to believe that the grievor would pay his legal fees. What the grievor failed to disclose was that he had signed an agreement that if he were reinstated, all his back wages would be put toward his debt to the Crown that was created by his decision to cash out his pension benefits.

[19] Counsel for the respondent submitted that this case was not so important that the labour relations principle that the parties should pay their own costs should be set aside. The matter before the adjudicator is not a dispute between the grievor and the respondent; it is one between the grievor and his counsel. Recourse for counsel is before the Ontario court system, not before an adjudicator appointed under the *PSLRA*.

[20] Counsel for the respondent submitted that a plain reading of 2010 PSLRB 42 reveals no intent to grant legal costs or additional damages.

[21] In conclusion, counsel for the respondent reiterated that I was *functus officio* and that the grievor was asking for additional remedies to those awarded in 2010 PSLRB 42, which is final and binding. Counsel for the respondent submitted that I could not and should not award those remedies as it would create havoc in labour relations and would be against the principle of finality of decisions.

[22] Counsel for the respondent submitted that the damages for legal costs awarded in *Tipple v. Deputy Head (Department of Public Works and Government Services)*, 2010 PSLRB 83, were specific to the very set of circumstances in that case, that those circumstances bear no resemblance to the circumstances of this case and that *Tipple* is currently under judicial review.

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

[23] Counsel for the grievor indicated that he understood from the argument submitted by the respondent that it did not take issue with the retained jurisdiction of the adjudicator but rather with the extent to which 2010 PSLRB 42 ¶123 could be applied to the matter of legal costs and damages.

[24] Counsel for the grievor indicated that, before considering the *functus officio* argument, it was important to take a realistic view of the situation because it involves an aggrieved employee in a labour relations context. Referring to sections 209 and 228 of the *PSLRA*, counsel for the grievor indicated that an adjudicator must give both parties an opportunity to be heard. He or she must render a decision and make an order he or she considers appropriate in the circumstances. This matter must be considered in a labour context, in which the parties have a relationship of unequal power. Counsel for the grievor also noted that section 233 of the *PSLRA* provides that an adjudicator's decision cannot be questioned in any court. He underlined an adjudicator's broad remedial powers.

[25] Counsel for the grievor indicated that, given his understanding of the process, he had anticipated a second hearing at which remedies would be discussed. He mentioned that the jurisprudence indicates that errors by counsel should not be used to deny a party its day in court.

[26] Counsel for the grievor submitted that, confronted with the request for legal costs and damages for mental anguish, the adjudicator has the duty under the *PSLRA* to do what is fair and reasonable.

[27] Counsel for the grievor submitted counsel for the respondent's argument about the motive for submitting a claim for damages for mental anguish, in light of its timing, should not be relevant, as inquiring into the motives behind that claim would require examining discussions between client and counsel. Counsel for the grievor asked that that argument be rejected.

[28] Counsel for the grievor submitted that I must determine what is fair and just for an employee who was dismissed when he had medical proof to justify his absence, who claimed that he suffered mental anguish, who had to hire legal counsel and who discovered that he had no way to deal with the obligations that resulted from his dismissal.

[29] Counsel for the grievor indicated that he does not dispute the principle of *functus officio*, which lends itself to the formality of court proceedings. However, applying that principle to a quasi-judicial setting is more difficult. He relied on *Chandler* to support the view that that principle should be applied in a more flexible and less formal way with respect to decisions of administrative tribunals. Quoting *Chandler* he indicated that justice might require reopening an administrative proceeding to bring relief that would otherwise be available on appeal. Counsel for the grievor noted that what the grievor would receive on judicial review could be dealt with by reopening the matter, as this is a labour relations issue.

[30] Counsel for the grievor added that it is common sense that when there is a strong preclusive clause, as is the case in the *PSLRA*, justice may require a determination of whether the facts warrant reopening the case. Counsel for the grievor noted that, in *Chandler*, the view was expressed that, if a tribunal has failed to dispose of an issue fairly raised by the parties, it ought to be allowed to complete its statutory task.

[31] Counsel for the grievor indicated that the grievor emailed the respondent on September 28, 2007, claiming damages and setting out the grounds for his claim. The grievor always intended to raise a claim for damages.

[32] Counsel for the grievor submitted that an adjudicator has the power to award legal costs, especially in circumstances in which it is suggested that the grievor suffered mental anguish and in which the grievor faces legal costs in dealing with a situation in which he or she was unjustly dismissed. Counsel for the grievor asked if it

were fair and just for the grievor to have to bear the burden of hiring a lawyer. He submitted that the grievor had been denied his salary for more than three years and that he had been presented with an offer that he could not accept. Counsel for the grievor asked why that situation would be permitted to continue without the grievor being compensated for his legal costs.

[33] Counsel for the grievor submitted that *Mowat* involved the Canadian Human Rights Tribunal and that the Federal Court of Appeal had been concerned with access to the Tribunal proceedings should legal costs be awarded. Enforcing the payment of legal costs would have the effect of limiting access to the Tribunal. However, this case involves a labour relations matter. The *PSLRA* gives an adjudicator the power to grant any order that he or she deems appropriate. Adjudicators have found that power to mean that they should return a grievor to the position that he or she would have been in had it not been for the grievor's dismissal.

[34] Counsel for the grievor noted that, while 2010 PSLRB 42 had been in favour of the grievor, he had not been given an opportunity to make submissions on damages. Counsel for the grievor submitted that the respondent was responsible for creating those costs and that those costs were within the adjudicator's jurisdiction. The costs were not addressed. The adjudicator must give both parties the opportunity to be heard. Counsel for the grievor organized his case with the understanding that the opportunity to argue damages would come in a subsequent hearing.

[35] Counsel for the grievor submitted that 2010 PSLRB 42 ¶123 indicated that the adjudicator remained seized of any issue about any amount payable to the grievor. Consequently, the principle of *functus officio* does not apply in this case.

[36] As for the agreement signed by the grievor that he would pay back his pension benefits, counsel for the grievor submitted that the grievor signed that agreement in a situation in which he had no job, no means to support himself and no assistance from legal counsel. The respondent created those circumstances, which flowed from an unjust dismissal in which the grievor had no choice. The grievor has no other recourse to address this situation. The grievor must be able to return before the adjudicator to obtain a determination of what is just.

[37] It must be kept in mind that this is a labour relations situation in which an unequal balance of power exists between the parties.

[38] Counsel for the grievor submitted that the grievor had been impoverished by the conduct of the respondent. He is further impoverished by the fact that he must deal with the reality that he has no funds to pay his counsel, whom he had to hire because he was dismissed so early and unfairly.

[39] Counsel for the grievor submitted that the facts present lead to the conclusion that to leave this situation as it is would be unjust. The facts of this case compel a re-examination to ensure that the grievor's victory was not moot. Counsel for the grievor added that the argument about the ability to pursue recourse elsewhere is callous and insensitive considering that the respondent created the grievor's situation.

[40] Counsel for the grievor submitted that the issue of legal costs is valid because it was caused by the respondent's conduct. The issue of legal costs flows from 2010 PSLRB 42 ¶123, in which jurisdiction was retained. That paragraph should be interpreted broadly, given the factual context and the grievor's legal counsel's understanding of the proceedings.

[41] Counsel for the grievor submitted that the adjudicator has jurisdiction to order the reimbursement of legal costs and damages that he believes are appropriate. The adjudicator should be more concerned with resolving the outstanding issues. Counsel for the grievor submitted *Chiarelli v. Weins* (2000), 46 O.R. (3d) 780 (C.A.), and *Halton Community Credit Union Ltd. v. ICL Computers Canada Ltd.*, [1985] O.J. No. 953 (QL) (Ont. C.A.), in support of his argument that errors by counsel should not prevent the grievor from presenting his claim.

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

[42] Counsel for the respondent submitted that the arguments made on behalf of the grievor ignore the fact that an adjudicator is empowered by statute and is not a court of equity. He added that a complete reading of the *PSLRA* indicates that adjudication decisions are subject to judicial review by the Federal Court and, eventually, by the Federal Court of Appeal. A number of decisions by adjudicators have been the subject of successful judicial reviews. The grievor's redress with respect to 2010 PSLRB 42 is the same as that of the respondent. Counsel for the respondent noted that he had asked the adjudicator to remain seized of the question of mitigation and that he could have asked for a judicial review on the basis that the request had been ignored. If the grievor was unsatisfied with 2010 PSLRB 42, he could have filed for judicial review.

Counsel for the respondent noted that the grievor's counsel did not ask the adjudicator to remain seized; he simply assumed that the adjudicator would remain seized.

[43] Referring to *Chandler*, counsel for the respondent emphasized that a decision can be reopened when the enabling statute allows it. He submitted that nothing in the *PSLRA* suggests that an adjudicator can reopen a matter once a decision has been rendered.

[44] Counsel for the respondent also submitted that, while he agreed that an adjudicator may award damages, he expressed strong disagreement with the proposition that an adjudicator may award legal costs. Different policy considerations must be taken into account by tribunals dealing with human rights violations. The history of labour arbitration in Canada has been that the parties pay their own legal costs. The only exceptions are when the parties have otherwise agreed in a collective agreement or when cost reimbursement is specified in the legislation. The policy consideration suggested by counsel for the grievor about access to recourse has no foundation in labour relations in Canada.

[45] Counsel for the respondent indicated that, upon reinstatement, the grievor had to reimburse the pension benefits he had received when he was terminated. Because of that debt, the grievor was unable to pay his counsel. Counsel for the respondent submitted that no policy suggests that, in this type of case, the obligation to pay legal costs should then rest on the respondent. Counsel for the grievor was retained after the grievor's relationship with his bargaining agent broke down. No matter the reason why that relationship broke down, the responsibility to pay representation does not shift to the respondent. Nothing in the *PSLRA* mandates representation by legal counsel.

[46] Counsel for the respondent submitted that he gave full credit to counsel for the grievor for agreeing to represent the grievor, in midstream, and to argue the case without having completely heard the evidence. However, at that end of the day, that does not mean that the respondent should pay the bill.

[47] Counsel for the respondent submitted that there was no reasonable interpretation of 2010 PSLRB 42 ¶123 as to extend jurisdiction to issues of damages that were not awarded. 2010 PSLRB 42 awarded three years of pay minus 15 days. The

award did not include legal costs or damages for mental distress. The issue of legal costs came only after 2010 PSLRB 42 was issued and had never been raised before that.

III. Reasons

[48] 2010 PSLRB 42 quashed the grievor's disciplinary discharge and replaced it with a 15-day suspension. It specifically ordered the following:

> ***V. Order***
>
> *[121] The 15-day suspension imposed on Mr. Scott on January 27, 2006, is rescinded. I order the deputy head to reimburse Mr. Scott for all wages and reinstate all benefits associated with that suspension. I further order the deputy head to remove from Mr. Scott's employee file all references to the suspension.*
>
> *[122] Mr. Scott's termination is rescinded. I order the deputy head to reinstate Mr. Scott as of March 16, 2007, and reimburse him for all wages and reinstate all his benefits as of that date, except for a 15-day suspension commencing on that date. I further order the deputy head to remove from Mr. Scott's employee file all references to the termination.*
>
> *[123] I shall remain seized of this matter for 90 days to resolve any issues about any amount payable to Mr. Scott as a result of this decision.*

[49] No provision in the *PSLRA* allows an adjudicator to reopen a grievance once a final decision has been rendered. However unjust or incomplete, 2010 PSLRB 42 finally disposed of the issues it addressed. The appropriate recourse to challenge it was to file a judicial review application before the Federal Court, which did not occur in this case.

[50] The order in 2010 PSLRB 42 specifically dealt with the redress that I considered appropriate in the circumstances. The respondent was ordered to reinstate the grievor and to reimburse him for all wages and reinstate all his benefits as of March 16, 2007, except for a 15-day period. 2010 PSLRB 42 did not decide any claim for legal costs, nor any claim of damages for mental anguish, as no such claims had been put clearly before me at that time.

[51] Although I retained jurisdiction to deal with any issues related to any amount payable to the grievor as a result of 2010 PSLRB 42, none of the issues now raised by counsel for the grievor referred to amounts payable "as a result of" the order to reimburse the grievor his wages and reinstate his benefits. 2010 PSLRB 42 finally

disposed of any issues relating to the extent of the remedy that I considered appropriate in the circumstances.

[52] Since no provisions in the *PSLRA* allow me to reopen my adjudication decision in 2010 PSLRB 42, I must conclude that, as the respondent has objected, I am *functus officio* and that I have no jurisdiction to entertain any new claims relating to remedy.

[53] Finally, I would add that the grievor was partially the author of his own demise. While 2010 PSLRB 42 found his termination excessive in the circumstances, it found that a disciplinary action was justified and that a 15-day suspension was appropriate in the circumstances. I considerably doubt that those circumstances would have lead to an award of legal costs or damages for mental anguish had such claims been properly before the adjudicator at that time.

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

(The Order appears on the next page)

IV. Order

[55] The deputy head's objection is allowed and I declare that I do not have jurisdiction to entertain the grievor's new claim for legal costs and damages for mental anguish.

[56] I am ordering these files closed.

February 18, 2011.

Georges Nadeau,
adjudicator