

Date: 20120124

Files: 566-02-1147, 2159 and 2765

Citation: 2012 PSLRB 8



*Public Service
Labour Relations Act*

Before an adjudicator

BETWEEN

DAVID ZESWICK

Grievor

and

**DEPUTY HEAD
(Correctional Service of Canada)**

Respondent

Indexed as
Zeswick v. Deputy Head (Correctional Service of Canada)

In the matter of individual grievances referred to adjudication

REASONS FOR DECISION

Before: [John Steeves, adjudicator](#)

For the Grievor: [Tonia Grace, counsel](#)

For the Respondent: [Christine Langille, counsel](#)

Heard at Abbotsford, British Columbia,
September 18 and 19, 2011.

I. Issue before the adjudicator

[1] This adjudication arises from three grievances that the parties agreed to refer to mediation. The mediation took place on March 30, 2009 and an agreement on the same day was signed by all parties (“the Agreement”). It included the grievor's resignation, some monetary benefits to him and a provision requiring the withdrawal of all grievances, among other things.

[2] After the Agreement was signed there were problems between the parties about its meaning. These problems could not be resolved to the grievor's satisfaction and the hearing of the original three grievances was not cancelled.

[3] The grievor now submits that the Agreement is void and unenforceable and this issue is the subject of this adjudication. The hearing of the three grievances was adjourned in order to consider this issue.

II. Summary of the arguments

[4] The grievor submits that the March 30, 2009 Agreement should be set aside as void and unenforceable for three reasons. First, it stated that payments under the Agreement were to be paid by the respondent to the grievor “within thirty (30) days.” It is agreed that one of the payments was available one-day late, on the 31st day after the date of the Agreement. The grievor submits that all obligations under the Agreement were to be completed within 30 days but they were not. A second concern of the grievor is that he was not provided with his correctional officer badge within 30 days. He submits that was a requirement of the Agreement. He is also concerned that the respondent attempted to give him a “replica” badge instead of his own service badge.

[5] The grievor's third concern is that, before and during the mediation, the respondent (and possibly the mediator) made a fraudulent misrepresentation about the amount of the transfer value available from his pension when he resigned. When he signed the Agreement, he relied on an amount that was substantially higher than what he eventually received. By way of remedy, the grievor submits that the Agreement must be set aside and his three grievances adjudicated on their merits.

[6] The respondent submits that the Agreement was valid and it is enforceable. As a preliminary matter, the respondent challenged my jurisdiction to review the grievor's

allegations about the Agreement. I denied that application. The hearing then proceeded to hear evidence about the grievor's allegations.

[7] With respect to payments under the Agreement to be made within 30 days, the respondent acknowledges that one payment was one-day late. However, according to the respondent, that is not grounds for setting aside the entire Agreement. The respondent also relies on the fact that the grievor received a cheque before the 30th day, although it was post-dated to the 31st day. Other payments were later than 30 days but the requirement of payment within 30 days under the Agreement did not apply to those payments, according to the respondent. With respect to the badge, the respondent submits that the 30-day time period also did not apply and, in any event, the respondent says it went beyond the usual policy in eventually getting the grievor the kind of badge he wanted.

[8] The respondent denies that there was any misrepresentation, fraudulent or otherwise, with regards to the transfer value of the grievor's pension. It submits the Agreement is silent about the grievor's pension and it was not an issue in the mediation. As well, according to the respondent, any differences between estimates of a payout reflected legitimate changes in the value of the pension at different times. The respondent submits that the grievor's application that the Agreement is void and unenforceable should be dismissed.

III. Background

[9] The respondent operates correctional services across Canada. The grievor was a correctional officer with the respondent until his dismissal in January 2009. He commenced employment in 1998 and at the time of his dismissal from employment he worked at Kent Institution, in British Columbia. The bargaining agent is the Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN (the "bargaining agent").

[10] The events giving rise to this application began with three grievances. In the first, filed in 2006, as explained by counsel, the grievor disputed some pay issues. Then, he grieved the respondent's decision in May 2008 to suspend his employment. The third grievance related to the respondent's decision in January 2009 to terminate his employment. These grievances proceeded through the grievance procedure without any resolution and they were referred to the Public Service Labour Relations Board

("the Board"). By agreement between the parties, the Chairperson of the Public Service Labour Relations Board appointed a mediator, and mediation took place on March 30, 2009.

[11] The mediator structured the mediation by putting the respondent's representatives in one room and the grievor and his representatives from the bargaining agent in another room. That is, the parties did not meet together and the mediator shuttled between the parties. The grievor testified that he entered the mediation expecting to discuss a return to work but things very quickly turned into a discussion about his resignation and the terms of his resignation. As will be seen, a reinstatement and then resignation were part of the eventual settlement. There is some disagreement about the information provided by the mediator to the parties, the grievor and his representatives. For example the amount of the transfer value of the grievor's pension is in dispute. The role of the mediator and whether he is compellable as a witness is discussed below.

[12] In the respondent's room during the mediation there were four people: Diane Knopf, Warden of Kent Institution; Beth Tyler, Regional Chief Labour Relations Officer; Erin Saso, Labour Relations Advisor; and Patricia Demers, another Labour Relations Advisor. In the other room were the grievor and his representatives: Brian Zimmerman, president of the Kent Institution local of the bargaining agent and Tatiana Irvine, Grievance Coordinator.

[13] It is agreed that the mediation went until early afternoon on March 30, 2009 and, at that time, the mediator advised the parties that there was a settlement. They gathered in one room to sign a document that had been prepared by Ms. Saso. By all accounts everyone was satisfied with the prepared document, with two handwritten additions described below, and everyone shook hands over it. There is now disagreement about what was said between the parties at this final meeting. The following is the background evidence to this disagreement and further detail is provided as part of the reasons for this decision.

[14] A "Terms of Settlement" document was signed by Mr. Zimmerman on behalf of the bargaining agent and it was also signed by the grievor. Ms. Knopf and Ms. Saso signed on behalf of the respondent. This is the Agreement that is in dispute in this adjudication and the parties listed were the grievor, the bargaining agent and the respondent. The body of the Agreement is as follows:

...

The parties have made a decision to resolve the following grievances: [grievance numbers removed] and all other outstanding grievances submitted by the Grievor and his Union. The parties acknowledge that all aspects of these matters have been resolved to their satisfaction as per the terms below.

The Employer hereby agrees:

- 1. To rescind the letter of suspension dated May 2, 2008 and the letter of termination dated January 5, 2009;*
- 2. To reinstate the grievor effective with pay May 2, 2008;*
- 3. To convert all outstanding leave without pay to leave with pay;*
- 4. To convert advanced sick leave to other paid leave;*
- 5. To pay all of the above within thirty (30) days.*

The Grievor and the Union hereby agree:

- 6. To withdraw the above-mentioned grievances within thirty (30) days following the implementation of these terms of settlement;*
- 7. To resign effective December 15, 2008.*

The Employer further agrees:

- 7. [sic] To accept the grievor's letter of resignation.*

The parties hereby agree:

- 8. Not to divulge the details of this agreement.*
- 9. That this agreement is made without precedent and prejudice and constitutes a full and final settlement of these matters.*

...

Mr. Zeswick's correctional officer badge will be encased + provided to him.

[Emphasis added]

I have emphasized “with pay” in item 2 and the last line in the Agreement that refers to the “correctional officer badge” to reflect that these were handwritten and the rest of the document was typed. Each handwritten addition was initialled. The evidence is that these two amendments were added to the Agreement at the very end, probably when the parties had gathered to sign the Agreement. There is no evidence that there

was any controversy about these items at the time. The addition of “with pay” is not in dispute in this adjudication.

[15] There is disagreement about the kind of badge provided by the respondent during the implementation of the Agreement and when the badge was provided. There is a suggestion in the evidence that Ms. Knopf, the Warden, suggested putting this language in at the very end to “sweeten” the settlement for the grievor. The grievor testified that the badge was an important issue for him and he testified that it was raised with the mediator by him and/or his representatives when the parties were separated.

[16] The grievor testified that the respondent provided a replica badge to him in July 2009, but this was unsatisfactory because he wanted his own badge. The bargaining agent communicated this to the respondent and there were a number of conversations within the respondent about the grievor's request. One view was that no employee is entitled to his or her own badge and the “Guidelines” of the respondent were relied on (CSC Badges, 2005-10-06). Among other things, these guidelines state that employees with a minimum of 20 years of service “...are entitled to receive a replica badge stamped ‘Retired’, upon leaving CSC, in commemoration of their service...” The grievor did not have 20 years of service. From the point of view of the bargaining agent, Mr. Zimmerman, president of the Kent Institution local, testified that an employee who retired with 35 years of service was entitled to his or her own badge along with other things such as a letter from the Prime Minister. In any event, the respondent ultimately decided to give the grievor his own badge with the condition that he return the replica badge. The respondent provided the grievor with his own badge in September 2009 but he has not returned the replica badge.

[17] According to the grievor, the Agreement required the respondent to give him his own badge “within 30 days” of the date of the Agreement. Since he received his badge well after the expiry of this time period, the Agreement is void and unenforceable, according to the grievor.

[18] By way of brief explanation of the other items in the Agreement, the grievor was reinstated effective in May 2008, but he was to resign effective December 15, 2008. This provision was for the benefit of the grievor because it gave him 10 years' seniority; the collective agreement provides for severance pay following a resignation, but only for employees with 10 or more years of service. It also gave him additional

pensionable service. Item 3 was also for the benefit of the grievor since it provided for the conversion of leave without pay, that the grievor had previously taken, to leave with pay.

[19] As a final comment on the Agreement itself, as can be seen, it included a provision that its details were not to be divulged. However, the Agreement is now very much in dispute, including its details, and logically it is not possible to adjudicate that dispute without reviewing those details. The parties proceeded on this basis in their evidence.

[20] The parties set about to implement the Agreement. This was primarily a task for the respondent since it had to calculate the various payments for the grievor. Ultimately, following the implementation of the Agreement, the grievor was required to withdraw his grievances. He has not yet done so.

[21] With regards to the requirement of payment “within 30 days” in Item 5 of the Agreement, the grievor and Mr. Zimmerman testified that it was clear in the mediation that this was a reference to 30 calendar days. According to the grievor he wanted “the whole thing to end” and everything completed within one month. The evidence of the respondent is that the issue of how to calculate the period never came up in the mediation. The witnesses for the respondent testified that, after the Agreement was signed, there were inconclusive internal discussions about how to calculate this time period. In the end the respondent decided to do its best to get everything completed by April 30, 2009, on the assumption that this was 30 days from March 30, 2009. In argument in this adjudication the parties agreed that the 30-day time period should be calculated using calendar days, but excluding March 30, 2009, the date of the mediation and the Agreement. On this basis, the 30th day was April 29, 2009.

[22] The respondent issued four cheques to the grievor pursuant to the Agreement. Beverley Norwood, a compensation advisor with the respondent, testified about the processing of these payments. She also testified that the respondent, perhaps unknown to the grievor at the time, forgave an amount of \$6078.03 owed by him for an overpayment related to previous leave.

[23] The first payment was processed by Ms. Norwood on April 3, 2009 and the cheque was dated April 16, 2009. It converted the leave without pay to leave with pay. This payment was offset by a previous overpayment owed by the grievor and it

included deductions such as tax and Canada Pension Plan. The gross amount was \$3310.66 and the net amount of the cheque was \$252.51. There is no dispute that this was paid within 30 days of the date of the Agreement.

[24] The second payment was processed on April 21, 2009 and the cheque was dated April 30, 2009. This payment included retroactive pay from May 2008 less deductions. The gross amount was \$42 532.42 and the net amount on the cheque was \$23 292.42. The evidence is that the grievor picked up the cheque on April 27 or 28, 2009. However, it was post-dated to April 30, 2009 and the grievor testified that the bank would not accept it until April 30, 2009. Since the funds were not available on April 29, 2009 (the last day of the 30-day period in the Agreement), the grievor says the entire Agreement is void and unenforceable because payment was one-day late.

[25] The third payment was for severance pay, it was processed on April 6, 2009 and the cheque was dated May 6, 2009. The gross amount was \$6621.34 and the net amount on the cheque was \$5297.07. A fourth cheque of the same date (May 6, 2009) was for unused annual leave with a gross amount of \$3824.15 and a net amount of \$2688.38. The grievor submits that these two cheques were paid well after the April 29, 2009 date and, therefore, the Agreement is void on that basis as well.

[26] With regards to the grievor's pension, there is no dispute that he was entitled to a payout when he ceased employment. He relies on a number of valuations of his pension and his concern is that the amount he ended up with was substantially less than he was expecting. More seriously, he submits that it was substantially less than the respondent and/or mediator told him it would be and he relied on that representation when he agreed to the terms of the Agreement. Hence the grievor's allegation of misrepresentation.

[27] The specific issue that is in dispute regarding the grievor's pension is the amount of the transfer value upon his resignation. On April 22, 2009 he met with Samara Gale, a compensation and benefits advisor with the respondent (Ms. Norwood was also there), to discuss his pension and other matters related to the implementation of the Agreement. At this meeting the grievor elected to take the transfer value of his pension rather than a deferred annuity or an annual allowance and he completed and signed a form to record this election. In fact, the grievor had inquired in June 2008 about the transfer value of his pension and again in September

2008. The details of the different values are complicated and controversial and they are discussed below.

[28] In any event, the form the grievor signed for the election to take the transfer value of his pension included the following description of transfer value:

...

The transfer value is the actuarial present value of the contributor's deferred annuity entitlement, and includes the value of survivor benefits and the five-year minimum benefit. This option is available to contributors over age 50 at date of termination. The value includes only the elective service that has been paid for at the date of option or the date of termination, whichever is later. The transfer value must be transferred to a locked-in retirement vehicle to the extent permitted by tax legislation.

...

Similar explanations of transfer value were given to the grievor on a number of occasions. He was also urged by Ms. Gale and others to obtain his own financial and investment advice.

[29] The transfer value of the grievor's pension was calculated and he was advised on July 5, 2009 that the amount of \$83 308.40 had been paid to his financial institution. This is the locked-in amount referred to in the above definition of transfer value and this is required as part of the election to take the transfer value of the pension. Neither the respondent nor the grievor has any control over this amount or the fact that it is locked-in. In an email dated June 9, 2008 (and on other occasions such as April 22, 2009, prior to the grievor's election) this locked-in amount was explained to the grievor by the respondent. A separate amount of \$26 759.76 was payable to him, subject to deductions. In an attachment to the June 9, 2008 email this amount was described as arising when "... an individual's transfer value exceeds the limits established by the *Income Tax Act*"; in the case of an excess, it "... will be paid in cash to the former employee and taxed at that time."

[30] The grievor testified that he ended up with an amount of about \$16 000, calculated as being the above amount of \$26 759.76 less deductions. This was and is of concern to him because his expectation was of a substantially higher amount. For example, he had been told on June 9, 2008 that the transfer value of his pension was

“approximately \$120,468.51.” He also says a similar amount was discussed in the mediation.

IV. Decision and reasons

A. Preliminary application

[31] At the beginning of the hearing into the grievor's application to set aside the Agreement, the respondent raised a preliminary issue. The thrust of it was that I do not have jurisdiction to consider the grievor's application that the Agreement is void and unenforceable. This is because the Agreement was, according to the respondent, signed by the parties, it was fully implemented and I have no authority to look behind the Agreement. The grievor opposed this application.

[32] The leading case on this issue is *Amos v. Canada (Attorney General)*, 2011 FCA 38. The facts in that case involved a settlement agreement that was challenged by Mr. Amos. He alleged that the respondent had not complied with the terms of that agreement. The matter came before an adjudicator, and the respondent objected to the adjudicator's jurisdiction. The adjudicator denied the respondent's objection. The respondent applied for judicial review and the Federal Court overturned the adjudicator's decision. The Federal Court of Appeal then allowed an appeal by Mr. Amos and concluded that the adjudicator's decision was reasonable in all respects.

[33] Prior to *Amos*, and as explained in that decision, under the previous *Public Service Staff Relations Act*, R.S.C., 1985, c. P-35 (“the former Act”), a final and binding settlement agreement was a complete bar to an adjudicator's jurisdiction (*Amos*, at para 10). If there was a dispute over an agreement, it could be the subject of a new grievance. The significance of *Amos* is that the Federal Court of Appeal agreed with the previous decision of an adjudicator that the *Public Service Labour Relations Act* (“the new Act”), enacted by section 2 of the *Public Service Modernization Act*, S.C. 2003, c. 22, as the successor legislation to the former Act, required a different result. Specifically, the court confirmed the adjudicator's conclusions on three points; an adjudicator has jurisdiction under the new Act to decide: whether a settlement agreement is final and binding; whether a party has complied with the settlement agreement; and, if there has been non-compliance, what order is appropriate in the circumstances.

[34] In the case before me I denied the respondent's preliminary application that I did not have jurisdiction to decide the grievor's allegation that the respondent had not complied with the terms of the Agreement. That is, without deciding the merits of the issue, I concluded that I had jurisdiction to decide if the Agreement was void and unenforceable because a payment or payments were late. Similarly, I found that I had jurisdiction to decide if the respondent had provided the grievor's service badge as required under the Agreement and whether this was done within the time limits in the Agreement.

[35] With respect to the issue of fraudulent misrepresentation, I also denied the respondent's submission that I was without jurisdiction. I noted that, even before *Amos*, the law has always been that an adjudicator had jurisdiction to decide if there had been misrepresentation involved in a settlement agreement (or fraud, undue influence, or unconscionability; *Amos*, at para 70). I concluded that, without making any finding on the merits of a misrepresentation, a settlement agreement could not be used by a party to avoid scrutiny by an adjudicator of an allegation of misrepresentation.

B. The mediator and proving mutual intent

[36] It is useful and relevant to consider the role of a mediator in the context of the new *Act* and in the context of proving mutual intent between the parties to a mediated settlement agreement.

[37] As described above, the mediator in this case separated the parties at the beginning of the mediation and the Agreement developed by means of discussions between the mediator and one party at a time. There were no face-to-face negotiations or even discussions between the parties. While there are different formats for mediations, it is not uncommon for mediators in labour relations to have conversations with one party without the other party. In this case the mediator chose to keep the parties apart for the entire mediation process, except for a gathering to sign the Agreement at the end. In general, these are techniques that can be part of an effective mediation process. The mediator is a messenger to communicate information between the parties, but, more significantly, the mediator's role is also to shape that information in a fashion that leads to an agreement that is appropriate to the issues in dispute.

[38] The obvious drawback to mediation in this way is that one party does not hear directly what the other party has said. Further, each party must rely on the mediator to communicate the position of the other party and the information provided by the other party. However, all parties must sign the final settlement agreement and it is at that stage that the information provided by the mediator will be tested. Put another way, if the final agreement reflects incorrect information or a position that one party has not agreed to, then the expectation is that the “agreement” will not be signed.

[39] Nonetheless, there can be disputes about the interpretation or application of a mediated agreement after it has been agreed and signed. Where the parties did not negotiate directly with each other, as in this case, difficulties can arise when one party attempts to prove what was intended by both parties. In some cases, proof of mutual intent may be impossible. For example, the grievor in this case asserts that there was a clear understanding in the mediation that the term “within 30 days” applied to all items in the Agreement. The respondent disagrees.

[40] Complicating things still further, the mediator is not compelled to provide evidence about what was said in the mediation. This is a result of section 243 of the new *Act* which is as follows:

243. *Members of the [Public Service Labour Relations Board], members of arbitration boards, members of public interest commissions, mediators, adjudicators, persons seized of referrals under section 182(1), persons employed by the Board and persons engaged under subsection 50(1) are not required to give evidence in any civil action, suit or other proceeding respecting information obtained in the discharge of functions under this Act.*

The effect of this provision is that Parliament has decided that mediators are not compellable witnesses with regards to information they receive and distribute while discharging their duties under the new *Act*. If there are disagreements after an agreement is signed, the parties are primarily limited to the language of the agreement itself.

[41] As in this case, what one party said to the mediator, or what the mediator said to one party in the absence of the other, may be relevant evidence to decide what was agreed. However, such evidence may not be sufficient to establish mutual intent. This is because a settlement agreement is a contract that represents the agreement of the parties and what was said to the mediator by one party, or what the mediator said to

one party, does not always lead to agreement. Indeed, it is the nature of mediation (and negotiation) that various approaches and results are canvassed by the mediator (or even the parties) with the objective of finding a basis of agreement. What ends up being the final agreement can be based on very different considerations than some of the discussions during the mediation process. Parliament has obviously recognized the value of this process and, as a result of section 243 of the new *Act*, the parties cannot compel a mediator to give evidence about what was said.

[42] Bearing this analysis in mind, it is not possible in the case before me to place great weight on evidence about what was said to or by the mediator to one party in the absence of the other party as a means of determining mutual intent.

C. Timeliness under the Agreement

[43] The grievor submits that the Agreement in its entirety was subject to the 30-day time period in item 5. The Agreement is dated March 30, 2009 and the 30th day was April 29, 2009. Since payments were made after April 29, 2009, the entire Agreement is void, according to the grievor.

[44] I note that the Agreement is structured in four parts. The first part includes Items 1 to 5; the second part includes Items 6 and 7; the third part includes Item 7 (there are two Item 7s); and the fourth part includes Items 8 and 9. The reference to the 30-day time period is in Item 5 in the first part of the Agreement and it states, "To pay all of the above within thirty (30) days [emphasis added]." I conclude that this means what it says and this time period applies only to Items 1 to 4. It follows that the 30-day time period does not apply to the rest of the Agreement and, to be clear, nor does it apply to the handwritten addition about the grievor's service badge. I accept Ms. Tyler's evidence that the Agreement was structured this way because the respondent had little or no control over the items not subject to the time period. For example, the respondent could not agree to the 30-day time period applying to the grievor's resignation or to the grievor's agreement to withdraw his grievances.

[45] As above, there were four different cheques paid to the grievor under the Agreement. The first was dated April 16, 2009, for \$252.21. It related to Item 3 of the Agreement, converting the grievor's leave without pay to leave with pay, net of a significant overpayment, and therefore was subject to the 30-day time period. It was paid within the 30-day time period (i.e. on or before April 29, 2009). The second

cheque was in the amount of \$23 292.42 and it was for retroactive pay as a result of the reinstatement of the grievor under Item 2 of the Agreement. Therefore, it was to be paid within 30 days. It was picked up by the grievor on April 27, 28, 2009 but it was post-dated to April 30, 2009. The April 30, 2009 date of the cheque meant that the funds were available to the grievor one-day later than the 30-day time period in the Agreement. I will return to this below.

[46] The third cheque was in the amount of \$5297.07 and it was dated May 6, 2009. It related to severance pay as a result of the grievor's resignation effective December 15, 2008 under the first Item 7 of the Agreement. A fourth cheque in the amount of \$2688.38, also dated May 6, 2009, was for payout of unused annual leave, also as a result of the grievor's resignation under the second Item 7. Neither of these payments were subject to the 30-day time period because they did not arise from "the above" items in the first part of the Agreement. For completeness, I am also unable to find that they were otherwise paid after unreasonable delay.

[47] Returning to the second cheque, again, it was available to the grievor before the end of the 30-day time period. But the grievor testified that, because it was post-dated April 30, 2009, the bank would not accept it until April 30, 2009. Therefore, the funds were available to him one-day late. Does that fact void the entire Agreement, as submitted by the grievor?

[48] The grievor testified about how angry this one-day delay made him and how it was contrary to his wish to have everything completed in one month. I acknowledge that point but it cannot be said that there was any other prejudice to the grievor caused by the one-day delay. Indeed, the delay was minimal, perhaps even negligible. In addition, there is no evidence at all that the delay was motivated by bad faith on the part of the respondent. Ms. Norwood was responsible for the processing of the cheque. I accept her evidence that there was a discussion internal to the respondent about how to calculate the 30-day time period. In the end, a decision was made to get it out as soon as they could and this was done with diligence. The evidence is also that the assumption within the respondent was that 30 days from March 30, 2009 meant April 30, 2009. This was an error but it was an inadvertent one with little if any negative impact on the grievor.

[49] Overall, the grievor's position is that a one-day delay in payment is so fundamental to the Agreement between the parties that it voids the entire Agreement.

I disagree. In the absence of bad faith, or prejudice to the grievor and in the context of diligent efforts by the respondent to meet the 30-day time period, I find that a one-day delay in payment is a minor defect in the implementation of the Agreement. To transpose this into a fundamental breach of the Agreement would place a standard of perfection on parties when they set about to implement settlement agreements. Timeliness in labour relations is important, but a standard of perfection is not necessary to give force to an the agreement itself and nor is it desirable to impose this standard on parties who are, after all, attempting to resolve problems with a minimum of time and cost.

D. The grievor's service badge

[50] The next issue is the dispute over the grievor's service badge. Again, the language in dispute was handwritten at the bottom of the Agreement and at the end of the mediation session on March 30, 2009. It says, "Mr. Zeswick's correctional officer badge will be encased and provided to him." This language was agreed and initialled but a dispute ensued after the Agreement was signed about whether the grievor was entitled to a replica badge or his own service badge. There is also a dispute about whether the 30-day time period in the Agreement applies to the badge.

[51] I have considerable difficulty accepting that this dispute was anything more than a difference over the interpretation of the handwritten language. The grievor asserts that it was always agreed that he would receive his actual badge rather than a replica. But the evidence is far from clear that this was agreed to by the parties. The Agreement related to "Mr. Zeswick's correctional officer badge . . ." and the policy of the respondent is only to give a replica badge to employees who have 20 years of service. It is reasonable for the respondent to question why the grievor should be treated any differently since he had only 10 years' service (and this by virtue of the Agreement). Finally, and in any event, the grievor did get his badge. This took place in September 2009 but, as above, the 30-day time period in the Agreement did not apply to the badge.

E. Allegation of misrepresentation

[52] Finally, there is the issue of the payout of the transfer value of the grievor's pension.

[53] I have difficulty accepting that this issue was part of the Agreement at all. It is true that the respondent brought to the mediation session information about the grievor's pension but, as Ms. Tyler testified, that is normal preparation for mediation when there has been a termination of employment. The grievor, in his evidence, was certain the pension was an issue in the mediation. However, it is not mentioned at all in the Agreement. And the respondent's evidence is that it was not discussed and certainly not agreed upon. The evidence supports the respondent's view of what occurred. Assuming without deciding that it was raised by the grievor in the mediation, the result is that there was no agreement on the issue. What one party says in mediation to the mediator does not create a legally enforceable agreement; there has to be some evidence of agreement on the issue. There is no such evidence in this case.

[54] I will nonetheless address the grievor's concerns about his pension.

[55] The evidence is that the grievor inquired about the transfer value of his pension in June 2008, a bit less than one year before the Agreement in March 2009. In an email of June 9, 2008 Ms. Gale, the respondent's compensation and benefits' advisor, advised the grievor that the transfer value was "approximately \$120,468.51." This was based on a print-out dated May 29, 2008 that included this total amount but it was broken down into \$74 341.89 as the total "in limit" and \$46 126.62 as the total "out limit." As discussed above, the "in limit" amount had to be locked into a retirement vehicle and it was not available to the grievor as cash. The "out limit" was an excess amount as determined by income tax legislation and it was available to the grievor as cash. The result was that the total amount of the transfer value of the grievor's pension - \$120 468.51 - was not available to him because of the legal structure of the pension system.

[56] Similar values were provided in other estimates of the transfer value. On March 27, 2009 the total amount was \$122 899.03, with a locked-in amount of \$86 690.88 and an excess cash amount of \$36 208.15 available to the grievor on that date. And on September 8, 2009 the numbers were \$121 702.84, \$72 913.41 and \$48 789.43, respectively. Charlene Nicholson, the compensation coordinator for the respondent, explained in her evidence that differences in these estimates reflected a number of factors prescribed by pension legislation and related regulations. These included mortality rates, interest rates, survivor rates and other factors. The respondent used "approximately" or "subject to verification" on all information

provided about the transfer value of a pension because the value could (and did) change over time as these factors change.

[57] On April 22, 2009 the grievor elected to take the transfer value of his pension instead of, for example, a deferred annuity. In a letter dated the same day and during a meeting also that day, he was told the locked-in amount of the transfer value of his pension was \$82 910.43 and the excess cash available to him would be \$27 732.66. He was also advised that there could be some change to this because of “fluctuation of interest rates.” Finally, a letter from the respondent, dated July 5, 2009, implemented his election to receive the transfer value of his pension and advised him that the amount of \$83 308.40 had been transferred to his financial institution as the locked-in portion of the transfer value. An amount of \$26 759.76, before deductions, was paid to him as the excess amount at that time. In his evidence, the grievor stated that he ended up with a net payment of about \$16 000.00.

[58] It appears that the grievor believed, at various times, that he was entitled to a transfer value from his pension of the full amount of about \$120 000.00 paid to him in cash. However, he had been told the opposite in person and in writing a number of times. Instead he could only access as cash the excess amount. So, when the transaction for the transfer value of his pension was complete in July 2009, the total value was \$110 068.16 and he was paid the amount of \$26 759.76, minus deductions. The difference, \$83 308.40, was transferred to a locked-in retirement vehicle at the grievor's bank, as required by law. This is entirely consistent with the information provided to the grievor as early as 2008. Alternatively, the grievor had the idea, as he wrote to his bargaining agent in June 2009, that the respondent was supposed to release to him the amount of \$65 000.00, instead of the \$26 759.76 (less deductions). There is similarly no evidence that the respondent gave any information to the grievor about having access to this amount as cash.

[59] There were differences in the estimates of the cash value of the transfer value. The range was a high figure of \$48 789.43 in September 2008 to a low figure of \$27 732.66 in April 2009, with the eventual figure being \$26 759.76 in September 2009. As explained to the grievor, as explained in the documents provided to him and as explained in the evidence in this adjudication, the reason for the change to the funds available to him was a complex calculation of various factors such as interest rates. I acknowledge the complexity of these matters but the grievor was advised by

the respondent's representatives on a number of occasions to obtain independent advice about his pension. He did not do so.

[60] It follows that there was no representation to the grievor that he would receive anything other than the payment he eventually received. He disagrees about the specific amount but the calculation and risks were known to him as early as June 2008 and he had ample opportunity to obtain independent advice about the calculation. Since there was no misrepresentation by the respondent to the grievor about his pension, there can be no fraudulent misrepresentation, as alleged by the grievor.

V. Summary

[61] I have jurisdiction to decide whether the Agreement is final and binding and whether the parties have complied with it. The respondent's application that I do not have this jurisdiction is denied.

[62] A mediator appointed under the new *Act* is not compellable to give evidence about what was said during a mediation under the new *Act*. As a result, when there is a mediated settlement agreement and there are disputes about mutual intent the parties are primarily limited to the agreement itself. What was said by or to the mediator to one party in the absence of the other cannot be given significant weight.

[63] Under the Agreement, the term "within 30 days" applies to specific items and not all items in the Agreement. Specifically, payment to the grievor under the Agreement for leave with pay was subject to the 30-day time period but it was not paid within that period. Instead it was available to the grievor on the 31st day. This error on the part of the respondent was not a fundamental breach of the Agreement and it does not void the entire Agreement. Other payments were not subject to the 30-day period or were paid within the 30-day period.

[64] The requirement in the Agreement for the respondent to provide to the grievor his service badge was not subject to the 30-day time period. As well, any dispute about what badge he was to receive was ultimately resolved when the respondent provided the grievor with the badge he wanted.

[65] The issue of the payment of the transfer value of the grievor's pension to him was not part of the Agreement. In any event, there was no misrepresentation, innocent or otherwise, with respect to the pay out of the transfer value of the grievor's pension

to him. The respondent provided him with accurate and timely information, both verbally and in writing.

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

(The Order appears on the following page)

VI. Order

[67] The grievor's application to set aside the Agreement is denied and the validity of the Agreement is confirmed.

[68] I order any hearing arrangements under PSLRB File Nos. 566-02-1147, 2159 and 2765 are cancelled and these files are closed.

January 24, 2012.

**John Steeves,
adjudicator**