Date: 20131007

Files: 560-02-50 and
561-02-187, 204 and 351

Citation: 2013 PSLRB 124

Canada Labour Code and
Public Service Labour Relations Act

Before a panel of the
Public Service Labour Relations Board

BETWEEN

DAVID TENCH

Complainant

and

TREASURY BOARD
(Department of National Defence)
and DEPARTMENT OF NATIONAL DEFENCE

Respondents

Indexed as
Tench v. Treasury Board (Department of National Defence) and Department of National Defence

In the matter of a complaint made under section 133 of the *Canada Labour Code* and complaints under section 190 of the *Public Service Labour Relations Act*

REASONS FOR DECISION

Before: George Filliter, a panel of the Public Service Labour Relations Board

For the Complainant: Himself

For the Respondents: Adrian Bieniasiewicz, counsel

Heard at Halifax, Nova Scotia,
August 28 and 29, 2012, and July 22 and 23, 2013.

I. Introduction

[1] On December 10, 2009, David Tench ("the complainant") and the Department of National Defence ("the respondent") entered into a settlement after mediation of a complaint filed under the *Canada Labour Code* and complaints filed under the *Public Service Labour Relations Act* ("the *Act*"). This settlement was reduced to writing in a "Memorandum of Agreement" (MOA) (Exhibit 1).

[2] The complainant has not withdrawn his complaints, but alleged the respondent had not complied with the terms of the MOA.

[3] The Federal Court of Appeal offered helpful guidance on the issue of how to deal with such allegations; see *Amos v. Canada (Attorney General)*, 2011 FCA 38, at para 66 to 72.

[4] As a result of this decision, I have determined there are three questions that need to be addressed in such a case:

- Is there a final and binding agreement between the parties?
- Has one or both of the parties failed to fulfill their obligations?
- If so, what is the appropriate remedy that should be considered?

[5] In a pre-hearing teleconference and during the hearing itself, both parties agreed the settlement entered into on December 10, 2009 was final and binding. As there was no evidence adduced to the contrary, I find the settlement was indeed final and binding.

[6] As a result of this conclusion, the issue before me is to determine if one or both of the parties have failed to comply with the terms of the MOA.

II. Hearing

[7] The complainant first presented evidence respecting his allegations the respondent had violated the following terms of the settlement:

. . .

> *4. By signing this Agreement,* [Her Majesty The Queen in Right of Canada as represented by the Department of

> National Defence] *releases and forever discharges the employee, from all damages, liability, costs, expenses, claims, causes of actions, and any other matters or proceedings of any kind or nature whatsoever in law, in equity or otherwise existing up to the present time or which are known, anticipated, or unknown but which may arise in the future arising out of or connected to the subject matters cited above or in any way related to his employment in the Public Service of Canada.*
>
> . . .

[8] After the complainant had presented his case, the respondent presented evidence both in response to the complainant's allegations and in support of its contention the terms of the MOA had been fulfilled.

[9] The respondent called Christine Dumoulin, who at all material times was responsible for the oversight of matters involving the complainant. She testified quite convincingly with respect to the respondent's actions both during the mediated discussions and after the MOA was executed.

[10] Documentary evidence was introduced of internal communications on December 10, 2009, when the discussions were taking place resulting in an MOA being signed.

[11] Additionally, counsel for the respondent stipulated the following facts:

- December 22, 2009: the respondent issued a cheque to the complainant for back pay (gross amount of $49 255.00 - net $32 154.01);
- March 16, 2010: the respondent issued a cheque to the complainant for severance pay (gross amount $9958.21 - net $3117.58); and
- March 18, 2010: the respondent issued a cheque to the complainant for leave (gross amount $1249.66 - net $1166.18).

III. Issues

[12] Simply stated, were the terms of the MOA executed on December 10, 2009 fulfilled by the respondent?

[13] The complainant argued the respondent had not complied with the terms of the MOA with respect to four issues. More will be said of these later in the decision, but it is useful to list the allegations identified by the complainant:

a) Actions of the respondent resulted in third parties taking collection actions against the complainant.

b) Requirement for the complainant to pay back Employment Insurance.

c) Access to the complainant's pension funds.

d) Requirement for the complainant to pay back taxes as a result of a reassessment from the Canada Revenue Agency.

IV. Analysis

A. Preliminary Matter

[14] Prior to the hearing the complainant made a request to add D.G. Industries Inc. as an Intervenor. This request was rejected by me on June 22, 2012.

[15] The basis for my rejection was the complainant did not provide proof of either a "justiciable issue" or a "veritable public interest". As such, my view was and still is the complainant did not meet the test adopted by the Federal Court of Appeal (*Canadian Airlines International Ltd. v. Canada (Human Rights Commission)* (2000), [2010] 1 F.C.R. 226 (C.A.)).

[16] Additionally, on June 29, 2012 the complainant sent a letter. Although this post dates my ruling with respect to D.G. Industries Inc, it explains the purpose of the complainant's request. This is a quote of a portion of the letter.

. . .

> *I am receipt of the Board's written submissions denying D.G. Industries Inc., intervener status, in the referenced proceedings.*
>
> *In that letter the Board states:*
>
> > *The Board Member does not see the necessity or the legal basis for the addition of D.G. Industries Inc. Accordingly, the request is denied. Reasons for this determination will be included in the final decision.*

> *The necessity and legal basis for the addition of D.G. Industries Inc., arises under s. 212 of the* Public Service Labour Relations Act, *which is cited herein as:*
>
> ***Representation***
>
> ***Right to be represented by employee organization***
>
> ***212.*** *An employee who is not included in a bargaining unit for which an employee organization has been certified as bargaining agent may seek the assistance of, and, if the employee chooses, may be represented by, any employee organization in the presentation or reference to adjudication of an individual grievance.*
>
> *Further, evidence adduced by me in Board file 561-02-378: Tench v. CAPE, heard before the Board in 11 April 2012, supported the complaint of a failure to represent, by my union, CAPE. As a party with a claim before the Board - and clearly without a bargaining unit - under 212, I have a right to be represented "by any employee organization". I select DG Industries Inc. as that employee organization. As such, it is respectfully requested that the Board direct all future correspondence to the attention of myself as the complainant, and DG Industries Inc as my bargaining agent / legal representative and whom is appointed to receive such correspondence.*
>
> *To prove any complaint before the Board on a balance of the probabilities, I must be allowed to present evidence to support my complaint. The fact that some of the evidence that I am going to need, to help me to prove my case, is in the control of DG Industries Inc, further necessitates that the Board allow DGI to participate in the hearings.*
>
> . . .

[17] Section 212 of the *Act* is not applicable in this case. Whatever D.G. Industries Inc. may or may not be, there is no basis, either in evidence or law to establish it is an employee organization (section 2(1) of the *Act*).

B. Law

[18] After reviewing, in detail, the facts, and analyzing several provisions of the *Act,* the Federal Court of Appeal, in *Amos*, gave the following very helpful guidance on the issue of how to deal with such matters. The Court stated the following at paragraphs 66 to 72:

[66] I am unable to accept the respondent's contention that filing a new grievance under section 208 of the Act constitutes an effective redress for the appellant. The respondent's position is inconsistent with the legislator's choice to emphasize mediation as an important tool to resolve labour disputes. Procedures promoting the voluntary resolution of disputes, including mediation, are integral to achieving the labour relations and public interest objectives set out in the Preamble of the Act. Enforceability of settlement agreements is vital to the objectives of the Act. Without clear, efficient and economical means to enforce settlement agreements, mediation runs the risk of becoming meaningless and falling into abeyance. Parliament's intention must be interpreted as giving consideration to parties' legitimate expectations that a settlement agreement will be enforced, or will at least be enforceable within a reasonable delay.

[67] Giving way to the respondent's solution would add years to the resolution of the appellant's grievance. This, again, cannot be in the best interests of labour relations within the appellant's workplace or any grievor's workplace. I am reminded that Mr. Amos was disciplined in March 2005 and that he referred his grievance to adjudication in August 2005. Twenty-one months later, in May 2007, the parties reached their settlement. As of December 2007, the MOA was still not implemented. These events already cover a period of almost three years. Now, according to the respondent, the appellant would have to initiate a new grievance and, if need be, direct his further grounds of complaint to the Federal Court through an application for judicial review with its ensuing undue cost and delay.

[68] As well, the respondent's solution would impose on the appellant the difficult task of remedying the alleged violation of the MOA through a new grievance to deal separately with an issue of non-compliance that would ultimately be decided by the party effectively in breach of contract, all this while the (original) grievance is still alive. Moreover, given that the allegation of non-compliance with the settlement agreement points to the employer, the procedure would be dictated by the employer's misbehaviour. This is clearly unfair, especially because an important purpose of labour relations statutes is to level the playing field between employees and employers. Grievors like the appellant would have little incentive to settle disputes prior to or during adjudication, as doing so would constitute a waiver of access to independent third-party adjudication in exchange for what could become an unenforceable promise, or, at least, unenforceable efficiently and economically.

[69] Surely, this is not what Parliament could have intended when it legislated to ensure "fair, credible and efficient resolution" of labour disputes.

[70] A further concern of the respondent is that Adjudicator Butler, when looking at the breach, may lack jurisdiction regarding some of the issues addressed in the settlement agreement. As the settlement agreement may contain clauses in regard of matters not adjudicable under section 209, the respondent contends that the Adjudicator would be prevented from making findings on the appellant's allegation. This argument is unconvincing. If the appellant's allegation was about a settlement agreement plagued with contractual problems, such as fraud, misrepresentation, duress, undue influence or unconscionability, the respondent accepts that the Adjudicator would have jurisdiction to determine whether the parties' settlement agreement is vitiated. In that case, the respondent takes no issue with former jurisprudence stating that in order to do so, the Adjudicator may examine the text of the settlement agreement for content that explicitly conveys the final and binding nature of the deal struck by the parties or analyze other evidence from which the intent of the parties to make such a deal final and binding may be reasonably inferred (Adjudicator's reasons at paragraph 89; respondent's memorandum of facts and law at paragraph 29). If the substance of the MOA, be it restricted to the specific adjudicable issue or not, does not impede an adjudicator's jurisdiction under these circumstances, I fail to see why it does in our case.

[71] Here, the Adjudicator clearly dismissed the request to reopen the adjudication hearing on the merits. I interpret his decision as recognition of the validity of the settlement agreement signed by the parties. He expressed his intention to limit his intervention to the allegation of breach, well aware of the fact that the (original) grievance had not been withdrawn and that the question of its enforcement was still unresolved between the parties. He held that the allegation "of non-compliance must first be proven by the grievor unless the deputy head explicitly concedes that fact. The evidence required to establish the fact of non-compliance will be specific to that issue" (Adjudicator's reasons at paragraph 95).

[72] In brief, the Adjudicator concluded that he had jurisdiction to consider an allegation that a party is in non-compliance with a final and binding settlement where the dispute underlying the settlement agreement is linked to the original grievance, and where the latter falls under subsection 209(1) of the new Act (reasons at paragraph 117). Considering that the appellant had not withdrawn his grievance, I agree with the Adjudicator.

[19] This decision has been considered and followed by adjudicators (see *Exeter v. Deputy Head (Statistics Canada),* 2012 PSLRB 25, *Thom v. Treasury Board (Department of Fisheries and Oceans),* 2012 PSLRB 34, and *Public Service Alliance of Canada and Barnes et al. v. Parks Canada Agency*, 2012 PSLRB 98). Although *Amos* dealt with allegations of non-compliance with the terms of a settlement agreement in the context of adjudication, I see no reasons not to apply its guidance in the context of the complaints before me, as another panel of the Public Service Labour Relations Board has done; see *Fillet v. Public Service Alliance of Canada*, 2013 PSLRB 43. Therefore, I have jurisdiction to decide if a party has failed to comply with the terms of the MOA, as far as it relates to the disciplinary action complaint filed under Part II of the *Code* and the unfair labour practice complaints filed under the *Act*. In doing so, I should keep in mind that my jurisdiction over those complaints derives from Part II of the *Code* and from the *Act*.

[20] Given my determination, the parties entered into a final and binding agreement, and the first question that I must decide is whether the terms of the MOA have been fulfilled.

C. Allegations of non-compliance

[21] As noted earlier, the complainant argued the respondent had not complied with the MOA in four ways. I will deal with each issue separately.

1. Respondent actions resulted in third parties taking collection actions against the complainant

[22] The complainant argued that the failure of the respondent, the Department of National Defence, to respect the terms of the MOA resulted in third parties taking collection actions against him.

[23] The complainant was employed at the Correctional Service of Canada (CSC) for a period starting in 1993. He filed a complaint with the Canadian Human Rights Commission (CHRC) alleging discrimination during his employment at CSC. On March 27, 1997, as a result of interventions by the CHRC, he signed a settlement with the CSC. The settlement contemplated the complainant would move from Ontario to Nova Scotia in order to transfer to the Springhill Institution.

[24] The undisputed evidence was the complainant owned real property (a house) in Ontario.

[25] According to the complainant, the relevant term of this settlement stated as follows:

. . .

> *4. Whereas the* [CSC] *has agreed that it will pay all costs associated with the transfer of the Complainant, in accordance with the Treasury Board Relocation Directive and the Federal Government Guaranteed Home Sales Plan including moving expenses and a house hunting trip. The* [CSC] *also agreed to grant the Complainant paid leave in accordance with the Relocation Directive of up to and not exceeding thirty (30) working days to facilitate his transfer to the Springhill Institution. Such leave shall begin on March 12th, 1997 and end on April 24th, 1997.*

. . .

[26] The complainant failed to provide details surrounding the events that occurred insofar as his property was concerned. That said, on December 11, 1998, the Toronto-Dominion Bank entered judgment against the complainant in the amount of $21 566.18 plus costs fixed at the amount of $415.45 bearing interest at the rate of 7.5% per annum. This judgment was assigned to the Canada Mortgage and Housing Corporation (CMHC) on January 7, 1999 (Exhibit 10).

[27] The complainant testified he did not defend the action commenced by the Toronto-Dominion Bank. He further testified this judgment and the subsequent assignment were related to the CSC's alleged failure to honour its commitment to buy the property located in Ontario.

[28] The respondent argued the complainant did not advise the respondent of the terms of this agreement.

[29] Additionally, the respondent argued that I could not deal with this as it was not part of the Memorandum of Agreement before me. In this regard counsel for the respondent submitted the complainant was responsible for his own situation as it was his responsibility to ensure CSC fulfilled its obligation.

[30] As stated earlier, in the words of the Federal Court of Appeal, my jurisdiction to consider an allegation a party is in non-compliance with a final and binding

settlement agreement is limited, in this case, to the dispute underlying the settlement agreement that is linked to the disciplinary action complaint filed under Part II of the *Code* and the unfair labour practice complaints filed under the *Act*. I have no jurisdiction over a settlement reached by the complainant and the CSC with regard to the complainant's human rights complaint. Similarly, I have no jurisdiction over the judgment assigned to the CMHC.

[31] The complainant took the position the denial of his application for a mortgage was as a result of the failure of the respondent, the Department of National Defence, to fulfill its obligations under the MOA signed on December 10, 2009 (Exhibit 1).

[32] My jurisdiction to consider an allegation that a party is in non-compliance with a final and binding settlement agreement is limited, in this case, to the dispute underlying the settlement agreement that is linked to the disciplinary action complaint filed under Part II of the *Code* and the unfair labour practice complaints filed under the *Act*. I have no jurisdiction over the denial of the complainant's mortgage application.

[33] The complainant claimed that the MOA signed with the respondent required it to satisfy the assignment of judgment to the CMHC because the CMHC is an agency of the government.

[34] If there is any validity to the complainant's claim, I am not entitled to pronounce on it, since it was not a dispute underlying the settlement agreement that is linked to the disciplinary action complaint filed under Part II of the *Code* and the unfair labour practice complaints filed under the *Act*.

2. <u>Requirement for the complainant to pay back Employment Insurance</u>

[35] The second position adopted by the complainant was as a result the MOA the respondent reinstated his pay ". . . from February, 10, 2009 to December 10, 2009. . ." a period of 10 months. He received correspondence from Human Resources and Skills Development Canada, Employment Insurance Branch, dated March 17, 2011 (Exhibit 2).

[36] The respondent argued any claim the complainant made during argument had not crystallized as of the date of the Memorandum of Agreement.

[37] This correspondence advised the complainant that since he had not responded to earlier communication, the Employment Insurance Branch had concluded he ". . . knowingly made 7 false representation(s) noted above for which you submitted 7 report(s) to claim benefits." The complainant was advised he would have to pay back benefits and pay a fine in the amount of $3045.00.

[38] The complainant did appeal this decision on or about March 20, 2011 (Exhibit 3). The outcome from the appeal was not entered as an exhibit, but the complainant did testify his appeal was unsuccessful.

[39] Although the complainant acknowledged he was not entitled to receive Employment Insurance benefits while being paid, he took the position the respondent was responsible for this debt because he had not worked during the period referred to in the MOA.

[40] He further acknowledged to not responding to the initial communication from Employment Insurance as he felt this was the respondent's responsibility.

[41] If there is any validity to the complainant's claim, I am not entitled to pronounce on it, since a dispute about the interpretation and application of the *Employment Insurance Act*, S.C. 1996, c. 23, is not a dispute underlying the settlement agreement that is linked to the disciplinary action complaint filed under Part II of the *Code* and the unfair labour practice complaints filed under the *Act*.

3. <u>Access to the complainant's pension funds</u>

[42] The complainant submitted he is unable to access his pension monies, which he argued was due to the respondent's violation of the MOA.

[43] In response the respondent argued it had acted properly and forwarded the necessary documentation to the complainant in a timely fashion. If the complainant has prejudiced his position, the respondent argued it was his fault.

[44] On September 23, 2010, Elaine Descoteaux, Human Resources Compensation Leader for the respondent, sent the complainant correspondence outlining his options for pension benefits (Exhibit 16). It was sent to the last known address for the complainant. During his testimony, he acknowledged this was his address at the time.

[45] The aforementioned letter was sent by Express Post, a method of delivery offered by Canada Post, and was returned to the sender on October 15, 2010, after it remained unclaimed. The complainant offered no explanation for this.

[46] It is important to note the letter of September 23, 2010 referred to the complainant having received a "Notice of Termination and Option for Benefit Employees with Two or More Years of Pensionable Service Form." Therefore, I conclude the complainant was in fact aware of his options in any event.

[47] Regardless, Ms. Descoteaux then emailed the complainant on October 19, 2010 (Exhibit 17), using the email address last known by the respondent. The complainant testified this email address was disconnected by the internet provider on December 28, 2009. The complainant did not advise the respondent of the change of email address.

[48] As a result, the complainant saw Exhibits 16 and 17 only on August 29, 2012, during the hearing before me.

[49] In any event, the original letter (Exhibit 16) stated as follows: "Please advise this office as soon as possible your benefit option decision. Should your option not be received by **9 December 2010** your benefit will be a Deferred Annuity [emphasis in the original]."

[50] I am at a loss as to how the complainant categorized this as a violation of the MOA signed in December 2009 and I cannot agree with his submission.

[51] The best argument the complainant can make is, by not receiving Exhibit 16, his options respecting his pension benefits were removed at the expiry of the deadline mentioned in that letter. Even if this were a violation of the MOA, which I do not accept, at the very least, he would have had to establish the respondent was responsible for not ensuring the delivery of Exhibit 16. The evidence convinces me, on a balance of probabilities, the complainant was responsible for not receiving this letter, not the respondent.

[52] The complainant did not deny knowing the letter was available; he simply stated he did not sign for it. As a result, he is directly responsible for any negative outcome, not the respondent, who I find did everything it could to attempt to have the complainant choose an option.

4. Requirement for the complainant to pay back taxes as a result of a reassessment from the Canada Revenue Agency

[53] The complainant testified that he was assessed approximately $650.00 by the Canada Revenue Agency and the respondent's refusal to reimburse him for this was a violation of the MOA.

[54] The complainant's evidence surrounding this issue was at best vague and certainly not convincing. Despite being advised of his responsibility to provide proof of his claim, he did not provide a copy of his "Notice of Assessment" until August 14, 2013.

[55] On this day, the complainant sent by email a copy of a Notice of Assessment and asked that it be admitted as evidence. Counsel for the respondent opposed this because: "It appears that the exhibit the complainant seeks to introduce is a Canada Revenue Agency Notice of Assessment for the Tax year 2005 (hereafter 'Notice')." I decline to admit the document because, if there is any validity to the complainant's claim, I am not entitled to pronounce on it, since a dispute about the interpretation and application of the *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.), regarding tax year 2005 is not a dispute underlying the settlement agreement that is linked to the disciplinary action complaint filed under Part II of the *Code* and the unfair labour practice complaints filed under the *Act*.

[56] Therefore, I reject his position that the respondent violated the MOA.

V. Conclusion

[57] I am of the opinion the respondent has complied with the terms of the MOA as far as it relates to the dispute underlying the settlement agreement that is linked to the disciplinary action complaint filed under Part II of the *Code* and the unfair labour practice complaints filed under the *Act*. Further, I am of the opinion that, by not withdrawing his complaints, the complainant has failed to abide by his end of the bargain.

[58] For all of the above reasons, the Board makes the following order:

(The Order appears on the next page)

VI. Order

[59] I find the settlement entered into on December 10, 2009 was final and binding.

[60] I find the respondent has complied with the terms of the settlement and it is the complainant who has failed to comply with them.

[61] The following matters are dismissed and the files are ordered closed: 560-02-50 and 561-02-187, 204 and 351.

October 07, 2013

George Filliter,
a panel of the Public Service
Labour Relations Board