Date: 20131213

File: 566-02-4663

Citation: 2013 PSLRB 160

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

ROHMA CHAUDHARY

Grievor

and

DEPUTY HEAD
(Department of Health)

Employer

Indexed as
Chaudhary v. Deputy Head (Department of Health)

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Augustus Richardson, adjudicator

For the Grievor: No one

For the Employer: Karen Clifford, counsel

Heard at Ottawa, Ontario,
November 14, 2013.

Introduction

[1] This motion by counsel for the Department of Health (the "employer") for an order dismissing or closing the file at issue on the grounds that the matter had been settled came before me in Ottawa on November 14, 2013. A few days earlier, the grievor, Rohma Chaudhary, had asked that the motion be adjourned so that she could obtain counsel. I dismissed the grievor's request and proceeded with the hearing of the motion on November 14. The grievor did not attend. I heard the evidence of Tracy O'Brien, a senior labour relations advisor at Health Canada. I also heard submissions on behalf of the employer. Having considered the matter carefully, I concluded that the matter had been settled on or about July 5, 2013, that, accordingly, I had no further jurisdiction to hear the matter and that the file should be closed. I also cancelled hearing dates that had been scheduled for the matter on the merits for December 2013.

[2] What follows are the facts and reasons upon which that order was made.

Background

[3] On November 1, 2010, the grievor filed a grievance with the Public Service Labour Relations Board ("the Board"). She grieved that she had been deployed in or about January 2010 without her consent. She alleged that the Board had jurisdiction to hear her grievance pursuant to subparagraph 209(1)(*c*)(ii) of the *Public Service Labour Relations Act* ("the *Act*").

[4] The employer, in response, took the position that the grievor's position had simply evolved during the time she was on leave and that there had been no deployment within the meaning of the applicable statutory and regulatory regime that governed the issue of deployment. It also took the position that the grievor had filed her grievance out of time. For those reasons, the employer maintained that an adjudicator lacked jurisdiction to hear the grievance.

[5] The grievor was initially represented by one counsel and subsequently by a second. On or about February 27, 2013, she retained new counsel, Joseph Griffiths.

[6] In due course, the grievance was scheduled to be heard in Ottawa on June 4 to 6, 2013. As of that date, the grievor had a total of four complaints: two grievances

before the Board (one of which being this case), and two complaints with the Canadian Human Rights Commission.

[7] As detailed in an *interim* order in this matter, the hearing did not proceed on June 4. The evening before the hearing, the grievor had advised Mr. Griffiths that she was not able to attend due to medical reasons; see *Chaudhary v. Deputy Head (Department of Health),* 2013 PSLRB 71. I was reluctant to accede to this request because the grievance had been filed for over two years, the matter had been scheduled for a hearing for some time, and the request, made at the very last minute, was based on a condition- anxiety- which is a common feature of most if not all grievance hearings. As I stated at that time, if adjournments were granted for that reason alone, many hearings would never be able to proceed. The adjournment was granted only due to the fulsome nature of the medical documentation provided and the fact that the employer did not object to the adjournment.

[8] In the end, I made the following order:

a. The hearing of PSLRB File No. 566-02-4663 is adjourned to a new date to be set by the Board.

b. The grievor or her representative shall produce to the employer, on or before August 31, 2013, any and all documents the grievor intends to rely upon in support of her allegation that she had been deployed without her consent.

c. The new hearing date shall be considered final.

[9] Ms. O'Brien testified (and I accept) that she and Mr. Griffiths had been in discussions following his being retained in February 2013 with a view to settling the grievor's several grievances and complaints. She forwarded a complete copy of her file to him. As the spring wore on, Ms. O'Brien worked on a settlement proposal, an initial draft of which she forwarded to Mr. Griffiths. He responded with a number of suggestions or concerns, some (but not all) of which were addressed by Ms. O'Brien by way of revisions to the draft proposal.

[10] On July 5, Ms. O'Brien met with Mr. Griffiths and Ms. Chaudhary at the offices of Mr. Griffiths. They met to discuss a written settlement proposal that had been forwarded to Mr. Griffiths by Ms. O'Brien before the meeting. Ms. O'Brien arrived at the

office at the agreed-upon time of 09:00 but had to wait for roughly an hour while Mr. Griffiths met privately with Ms. Chaudhary. The three of them then met to discuss the offer. There was a certain amount of back and forth. Ms. O'Brien recalled that Mr. Griffiths and the grievor caucused twice during the meeting to discuss things in private. In the end, the grievor agreed to accept the proposal. They shook hands. The grievor signed the offer, titled a "Memorandum of Agreement" ("MOA"). The MOA was then signed by the appropriate representative of the employer on the same day. (While the grievor was not represented by her bargaining agent, the Canadian Association of Professional Employees (CAPE), Ms. O'Brien, out of an abundance of caution, obtained the CAPE's consent to the MOA on July 31, 2013.)

[11] Two copies of the MOA were filed: one original (Exhibit E4), and one redacted on the grounds of confidentiality (Exhibit E5). The MOA was 4 pages long and was composed of 19 paragraphs. There were also several addendums attached to it. The employer's representative made a motion at the hearing for an order sealing Exhibit E 4. She pointed to clause 17 of the MOA that provided that the terms and conditions of the settlement "shall remain confidential between the parties and it shall not be disclosed to anyone except those required to implement this memorandum of settlement to the extent that disclosure is required by law." I am satisfied that it is appropriate that Exhibit E4 should be sealed. Aspects of the MOA are discussed as necessary in these reasons to determine the issue of whether or not there was a settlement. The Act mandates several processes that encourage the voluntary settlement of disputes. Terms in a settlement agreement that maintain its confidentiality advance the interests of harmonious labour relations by facilitating the resolution of matters in a fair, credible and efficient way. Therefore, the benefits of maintaining the confidentiality of the agreement to the fullest extent possible outweigh the deleterious effects of not doing so. Therefore, Exhibit E-4 is sealed. A copy of the sealing order is attached as Appendix A and reflects my reasons above.

[12] I am satisfied that pursuant to the settlement agreement, as laid out in the MOA, the grievor received certain benefits and entitlements that she would not have received had she proceeded with her grievance and lost. I am also satisfied that in consideration of those benefits and entitlements, the grievor agreed to withdraw the grievance referred to adjudication in this matter, as well as two other grievances then at the third level of the employer's grievance process (being files NCR-HECSB-2011-002

and NCR-HECSB/DGSESC-2012-001), along with two complaints with the Canadian Human Rights Commission (bearing numbers 20091537 and 20100002).

[13] On July 25, Ms. O'Brien notified the Board that the matter had been settled (Exhibit E7). On the same day, the Board requested confirmation of the settlement from Mr. Griffiths, who then advised on the next day that he was ". . . no longer authorized to act for Ms. Chaudhary" (Exhibit E7). On July 29, the Board contacted the grievor directly to request her comment with respect to the employer's advice that the matter had been settled. Ms. O'Brien testified that until that point, the grievor had not indicated that she was contesting the MOA, although she had had a number of contacts with her with respect to several matters that had to be done in furtherance of the MOA.

[14] On August 1, 2013, Ms. O'Brien provided the grievor with a copy of the MOA after it had been signed by the CAPE (Exhibit E6). By that time, some of the proceeds called for under the MOA had been provided to the grievor. (The balance of those proceeds was paid to and accepted by the grievor by the end of August.)

[15] On August 7, 2013, the grievor confirmed that Mr. Griffiths was no longer her representative. She added that she was ". . . currently in the process of retaining new counsel for advice." She went on to advise that she had not agreed to withdraw her complaints and that the Board could not close its file (Exhibit E7).

[16] On August 26, 2013, the hearing of the merits of the file at issue was scheduled for December 16 to 20, 2013. The dates had been chosen at the request of the grievor because her witnesses were not available on earlier dates that had been proposed.

[17] The respondent was still of the view that the matter had been settled and that the Board was accordingly without jurisdiction to proceed. On August 8, 2013 it made a motion to dismiss the grievances and requested scheduling of the necessary motion, based on the MOA, signed by all the parties. On August 26, 2013, the parties were advised that this motion would be heard on November 14, 2013 and were also advised that a Notice of Hearing would be sent to the parties approximately one month prior to the hearing. Not long after that, the parties were advised that a number of other procedural requests subsequently raised would also be discussed at the November 14, 2013 hearing, all of which would have related to the hearing on the merits, should it have been determined that it would proceed (for example, the

grievor's request for disclosure and any objections the employer has regarding relevance, the use of the grievor's name in the publication or decision, and any requests to rely on documents that did not form part of the disclosure process). The grievor and the employer were also provided notice of the hearing on October 16, 2013. On November 7, the grievor advised the Board by email as follows: "My lawyer Mr. Joseph Griffiths formally removed himself off the record a few days ago on Nov 5, 2013 by way of a motion from the courts" (see the email in Board file). She asked for an adjournment for two months ". . . to find a new lawyer for [her] upcoming hearing" (see the Board file). She added the following "While I can and will be present during that hearing, I will be making that same request at the hearing if this written request is denied" (see the Board file). She apologized for the request, but said that she was ". . . simply unable to represent [herself] due to [her] mental disability and will be diligently looking for a lawyer to assist [her] to represent [her] interests" (see the Board file).

[18] By email of the same date, counsel for the employer objected to the request. She pointed out that the motion was not complicated. She noted that the grievor had had three counsel already and that it would be unfair and prejudicial to the employer to delay the matter further (see the Board file). After considering those submissions, I denied the grievor's request. The parties were advised that the hearing of the motion would proceed on November 14.

[19] On November 8, the grievor renewed her request for an adjournment. She noted once again that she "can and will attend the hearing" and that she would not be in a position to make the legal arguments she considered necessary. Her request was again rejected (see the Board file).

[20] On November 13, the grievor advised the Board as follows: "As I am unable to get an adjournment for legal representation as requested, I am unable to attend this hearing prepared. Therefore, I will not be attending this hearing" (see the Board file). The Board subsequently urged the grievor to attend as she had earlier indicated she would), so that she could present her side of the evidence concerning whether or not the grievance had been settled. The grievor nevertheless chose not to attend.

Submissions on behalf of the employer

[21] Counsel for the employer submitted that the grievor had settled the matter in this file as well as others on July 5, 2013. A settlement agreement is a binding contract and ought not to be set aside in the absence of some good reason recognized at law or in equity; see *Mohammed v. York Fire and Casualty Insurance Co.* (2006), 79 O.R. (3d) 354, at para 34; and *Federation of Newfoundland Indians v. Canada,* 2011 FC 683, at para 63 to 67. The grievor was represented by competent counsel at the relevant time. Her counsel had received the proposal before it was presented and had negotiated a number of changes to it. The grievor had time to consider and discuss the proposal, in private, with her counsel. There was absolutely no evidence to suggest that the grievor did not know what she was signing, that she did not have good and independent counsel before signing it, or that there was any undue influence or oppressive conduct on the employer's part. The grievor entered into it freely; see, in general, *MacDonald v. Canada,* [1998] F.C.J. No. 1562 (T.D.) (QL); and *Nash v. Canada (Treasury Board),* 2008 FC 1389, at para 35. There are no compelling, juristic reasons to set the MOA aside; see *Samuels v. Seneca College of Applied Arts and Technology,* 2011 HRTO 1211. Moreover, once she entered into it, she acted on its terms and accepted the proceeds paid out under it.

[22] Counsel further submitted that if I accepted that the settlement was binding, then I had no further jurisdiction, and the file ought to be closed; see *Bedok v. Treasury Board (Department of Human Resources Development),* 2004 PSSRB 163, at para 52; and *Castonguay v. Treasury Board (Canada Border Services Agency),* 2005 PSLRB 73, at para 16.

Analysis and decision

[23] I will deal first with my reasons for denying the grievor's request for another adjournment. There were several reasons for my decision.

[24] First, I doubted the grievor's good faith in making the request. In her email of November 7, she stated that her counsel had just removed himself from the record, implying that she had been caught by surprise. Her second email of the same date however, acknowledges that her lawyer chose not to represent her a few months ago. In addition, she had advised the Board two months earlier, on August 7, that her counsel no longer represented her. Indeed, at that time, she said that she was looking for counsel. Yet, she offered no explanation on November 7 why, apparently, she had

done nothing between August 7 and November 7 to find new counsel. I also note that in September the grievor, while unrepresented, nevertheless proceeded in an active fashion with the scheduling of a hearing of her grievance for December 2013. She made no objection at that time that she could not attend without counsel. Nor, apparently, did she make any effort at that time to retain new counsel.

[25] Second, my original order of June 4, 2013, made it clear that the hearing of this matter when next scheduled would be final. The grievor knew that the expectation was that this matter would proceed and yet did nothing after August 7 to ensure that she was ready to proceed if in fact she was sincere in her belief that she needed counsel. I also note none of the reasons that the grievor advanced for wanting the adjournment were supported or corroborated by any other evidence.

[26] Third, there are two parties to a grievance: the grievor and the respondent employer. Both are entitled to a fair hearing of the grievance in as timely a fashion as is possible, subject to the usual exigencies and contingencies of litigation, such as conflicts in schedule, storms and so on. Neither one nor the other is entitled to obstruct or delay proceedings without good cause. The grievor did not explain why she waited until the last minute to look for counsel. She offered no independent evidence, such as correspondence, that she had in fact been looking for counsel. To grant an adjournment in such a case would be to permit a party to bootstrap itself into an adjournment simply by doing nothing.

[27] Fourth, there was the question of prejudice to the employer. The employer had already once prepared for a hearing, only to have it adjourned at the last minute by the grievor. The employer had then entered into what it thought was a settlement agreement with the grievor and, pursuant to that agreement, had provided the grievor with certain benefits and entitlements in order to avoid further litigation. To force the employer to carry on with a matter that it thought it had settled would impose a serious hardship on the employer that could not be recompensed if the matter were further adjourned. On the other hand, the grievor would in my view experience little if any prejudice if she attended the hearing without counsel. The grievor could easily provide evidence as to what she thought or understood at the time she signed the MOA. She was in the best position to explain why she signed the MOA. Such evidence would not be complicated. It involved no more than the grievor explaining her side of the story. That conclusion was supported by the grievor's own email correspondence

with the Board, which reveals her to be intelligent, coherent and logical in her thought processes. That same intelligence, cogency and logic made unsupportable her periodic comments in her correspondence with the Board that her mental state would not allow her to attend without counsel.

[28] For all those reasons, I denied her request for an adjournment to permit her to retain new counsel.

[29] I turn now to the employer's motion.

[30] Adjudicators appointed under the *Act* have the power to determine whether or not a settlement is final and binding (*Castonguay*, *Nash* and *Bedok*). Although it was not cited, the decision of the Federal Court of Appeal in *Amos v. Canada (Attorney General)*, 2011 FCA 38 confirms that an adjudicator has jurisdiction under the current *Act* to determine whether a settlement agreement is final and binding. That case also clarifies the jurisdiction of an adjudicator to determine whether a party has complied with the settlement agreement, and, if it was not complied with, the remedial order to make in the circumstances. However, the question before me relates only to whether or not there is a final and binding agreement.

[31] I was satisfied on the evidence presented that the MOA was a binding contract. The grievor was represented by counsel. She had ample opportunity to discuss the proposal with him before signing it. There was no evidence of coercion, undue influence or oppressive conduct on the part of the employer. Indeed, the grievor took the benefit of the MOA despite her argument that it was not binding on her. And, pursuant to that MOA, the grievor agreed to withdraw the grievance that forms the basis of this file as well as of one other grievance and two complaints (as detailed earlier).

[32] Accordingly, I conclude that the MOA is a full and final settlement of the grievance, part of which included the withdrawal of this grievance. As a result, I have no jurisdiction to proceed any further.

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

(The Order appears on the next page)

Order

[34] It is ordered that PSLRB File No. 566-02-4663 be closed.

December 13, 2013.

Augustus Richardson,
Adjudicator

Appendix A

Sealing order / Ordonnance de mise sous scellés

File number(s):
Numéro(s) de dossier : 566-02-4663

Parties : Chaudhary, (Rohma, Ms.)
and / et
Treasury Board

Exhibit number:
Numéro de pièce : Exhibit 4

Exhibit description:
Description de la pièce :

SUMMARY REASONS / MOTIFS SOMMAIRES

(FULL REASONS TO FOLLOW IN FINAL DECISION /
MOTIFS COMPLETS À SUIVRE DANS LA DÉCISION FINALE)

SR

Appendix A

Reasons / Motifs :

(***Dagenais*/*Mentuck* test:**
(a) Is the order necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk? **AND**
(b) Do the salutary effects of the order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings?

Critères de *Dagenais* / *Mentuck* :
(a) L'ordonnance est-elle nécessaire pour écarter un risque sérieux pour un intérêt important, y compris un intérêt commercial, dans le contexte d'un litige, en l'absence d'autres options raisonnables pour écarter ce risque? **ET**
(b) Les effets bénéfiques de l'ordonnance, y compris ses effets sur le droit des justiciables civils à un procès équitable, l'emportent-ils sur ses effets préjudiciables, y compris ses effets sur la liberté d'expression qui, dans ce contexte, comprend l'intérêt du public dans la publicité des débats judiciaires?)

Please see reasons for decision at paragraph 11, which states as follows:
Two copies of the MOA were filed: one original (Exhibit E4), and one redacted on the grounds of confidentiality (Exhibit E5). The MOA was 4 pages long and was composed of 19 paragraphs. There were also several addendums attached to it. The employer's representative made a motion at the hearing for an order sealing Exhibit E 4. She pointed to clause 17 of the MOA that provided that the terms and conditions of the settlement "shall remain confidential between the parties and it shall not be disclosed to anyone except those required to implement this memorandum of settlement to the extent that disclosure is required by law." I am satisfied that it is appropriate that Exhibit E4 should be sealed. Aspects of the MOA are discussed as necessary in these reasons to determine the issue of whether or not there was a settlement. The Act mandates several processes that encourage the voluntary settlement of disputes. Terms in a settlement agreement that maintain its confidentiality advance the interests of harmonious labour relations by facilitating the resolution of matters in a fair, credible and efficient way. Therefore, the benefits of maintaining the confidentiality of the agreement to the fullest extent possible outweigh the deleterious effects of not doing so. Therefore, Exhibit E-4 is sealed.

Date : 11 December 2013

Signature :

Augustus Richardson, QC
Adjudicator

(Forward to registry officer as soon as possible / Faire parvenir à l'agent du greffe dès que possible)