Date: 20130422

File: 561-34-497

Citation: 2013 PSLRB 43

Public Service Labour Relations Act

Before a panel of the Public Service Labour Relations Board

BETWEEN

JOËLLE FILLET

Complainant

and

PUBLIC SERVICE ALLIANCE OF CANADA

Respondent

Indexed as
Fillet v. Public Service Alliance of Canada

In the matter of a complaint made under section 190 of the *Public Service Labour Relations Act*

REASONS FOR DECISION

Before: Steven B. Katkin, a panel of the Public Service Labour Relations Board

For the Complainant: Herself

For the Respondent: David Girard, Public Service Alliance of Canada

Decided on the basis of written submissions
filed August 27, September 24 and October 1, 2012.
(PSLRB Translation)

Matter before the Board

[1] This decision addresses the jurisdiction of a panel of the Public Service Labour Relations Board ("the Board") to determine an allegation that the terms of a settlement agreement for an unfair labour practice complaint were not respected and, if necessary, to order a remedy.

[2] On January 25, 2011, Joëlle Fillet ("the complainant"), an employee of the Canada Revenue Agency, filed a complaint with the Board under section 190 of the *Public Service Labour Relations Act* ("the *Act*"), alleging that her bargaining agent, the Public Service Alliance of Canada ("the respondent"), had violated the duty to represent her fairly that is imposed on it by section 187.

[3] After mediation, the Board was informed that the parties had entered into a settlement agreement for the complaint on August 4, 2011.

[4] In a letter dated July 23, 2012, the complainant informed the Board that she considered that the respondent had not respected the settlement agreement concluded between the parties on August 4, 2011, and therefore, she would not withdraw her complaint. The complainant pointed out how the respondent had apparently breached its duty of fair representation.

[5] In an email dated August 3, 2012, the respondent informed the Board that it considered that it had respected all the terms of the settlement agreement reached on August 4, 2011 and asked the Board to close the file.

[6] On August 10, 2012, I asked the parties to provide written submissions on the following question:

> [Translation]
>
> *Do the principles set out in* Amos v. Canada (Attorney General)*, 2011 FCA 38, apply to a complaint based on section 187 of the Public Service Labour Relations Act?*

The parties were advised that a preliminary decision would be rendered based on the written arguments that they submitted.

Summary of the arguments

[7] The complainant did not answer the question. She began her argument by citing the principles of fair representation incumbent upon bargaining agents, as set out by the Supreme Court of Canada in *Canadian Merchant Service Guild v. Gagnon et al.*, [1984] 1 S.C.R. 509. The complainant devoted the rest of her argument to the merits of her complaint.

[8] The respondent maintained that, as decided in *Amos v. Canada (Attorney General),* 2011 FCA 38, the *Act* ". . . [translation] gives jurisdiction to a Board adjudicator to determine whether a settlement agreement for a complaint based on section 187 of the *Act* was observed." The respondent argued that, although it had carried out all its obligations under the terms of the settlement agreement of August 4, 2011, the complainant did not respect hers by not withdrawing her complaint.

Reasons

[9] The parties do not dispute that the settlement agreement of August 4, 2011 is final and binding. Instead, the issue to be determined is whether a panel of the Board has jurisdiction to determine an allegation that the terms of a settlement agreement for an unfair labour practice complaint were not respected and, if necessary, to order a remedy. To that end, I asked the parties if the principles set out in *Amos* (2011 FCA 38) apply to this case.

[10] In *Amos* (2011 FCA 38), the Federal Court of Appeal described the case before it as follows:

. . .

> *[1] This case is about the scope of an adjudicator's jurisdiction under the* Public Service Labour Relations Act *. . . Does an adjudicator maintain jurisdiction over disputes relating to settlement agreements entered into by parties in respect of matters that can be referred to adjudication or, as put by the Adjudicator in this case, where does a party go for redress when he or she has settled a grievance referred to adjudication and subsequently alleges that the other party has failed to honour the settlement agreement . . . ?*

. . .

[11] *Amos* (2011 FCA 38) dealt with the powers of an adjudicator under Part 2 of the *Act*, which addresses grievances. The Federal Court of Appeal expressed as follows

its agreement with the adjudicator's findings in *Amos v. Deputy Head (Department of Public Works and Government Services)*, 2008 PSLRB 74:

. . .

b) Question 1: Final and Binding Settlement Agreements

[35] Where in the case of an individual grievance referred to adjudication in relation to a disciplinary action resulting in suspension, the parties have entered into a settlement agreement, does an adjudicator have jurisdiction under the new Act to determine whether the parties' settlement agreement is final and binding? The Adjudicator said yes, and I agree (Adjudicator's reasons at paragraph 88).

. . .

[38] This issue of where *a party alleging non-compliance with a settlement agreement can seek redress under the new Act is the core of the parties' dispute and the subject of question 2.*

c) Question 2: Enforcement of Settlement Agreements

[39] Faced with a request that the appellant's grievance be heard on the merits, the Adjudicator had to decide whether the new Act could admit of a different answer on the subject of non-compliance and, should this be the case, whether he could make a remedial order. Before turning specifically to these questions, he sought to compare the legislative framework of the Act to that of the PSSRA*, identifying, in the former, three distinguishing features: the addition of a Preamble; the adjudicator's power to assist the parties in mediation under section 226; and the inclusion of subsection 236(1).*

[40] His discussion on these elements allowed him to posit the general structure on which he would rest his final conclusions on the remaining two questions. At paragraph 86 of his reasons, he wrote:

- *I must give the provisions of the new Act ". . . fair, large and liberal construction and interpretation. . ." consistent with the objects of the Act. . .*

- *A cornerstone of the new Act is its emphasis on the voluntary resolution of disputes through mediation.*

- *Given subsection 236(1) of the new Act […] Part 2 of the new Act must be viewed as the exclusive and comprehensive regime for the resolution of disputes that proceed ". . . by way of grievance. . ."*

[41] As I explain below, in my view these three preliminary statements by the Adjudicator are unassailable.

. . .

[44] Every statute should be interpreted liberally in such a manner as to best ensure the attainment of its objects. The purpose of a preamble is to assist in explaining the Act's "purport and object." . . . Alive to this preamble, the Adjudicator concluded that his task was to interpret the Act in a manner which promotes "…collaborative efforts between the parties…" to support the "…fair, credible and efficient resolution of matters…" and to encourage "…mutual respect and harmonious labour-management relations…" I agree that this was exactly his task.

[45] In his second statement, the Adjudicator acknowledged the Act's emphasis on procedures promoting the voluntary resolution of disputes, particularly through mediation. I agree with him that an essential component of the mediation process is the implementation and enforceability of a settlement agreement.

> *In the absence of a reasonable expectation of enforceability, the various processes mandated by the new Act to facilitate voluntary settlements may have little prospect of contributing to the attainment of the objects of the new Act as identified by the Legislator. (Adjudicator's reasons at paragraph 67).*

[46] With his third statement, the Adjudicator took the position that section 236, for which there was no equivalent in the PSSRA*, confirms that Part 2 of the Act provides an exclusive and comprehensive regime for resolving grievances. The parties agree that section 236 ousts the jurisdiction of courts with respect to matters that can proceed by way of grievance under Part 2 of the Act (sections 206 through 238). However, they differ on the question of whether the present dispute over the settlement agreement made under Part 2 is caught by sections 208 or 209 of the Act.*

. . .

[53] This essential character test, applied in Weber *to the choice of forums between the courts and a statutorily created adjudicative body, was found to be equally applicable to the choice between two statutorily created bodies* (Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners, *2000 SCC 14)* [Regina].

[54] In Regina, *Justice Bastarache held that (at paragraph 39:*

> *(t)he key question in each case is whether the essential character of a dispute, in its factual context, arises either expressly or inferentially from a statutory scheme. In determining this question, a liberal interpretation of the legislation is required to ensure that a scheme is not offended by the conferral of jurisdiction on a forum not intended by the legislature. [Emphasis added.]*

[55] In his reasons, albeit in a different context, the Adjudicator asked himself that key question and found that the dispute between the parties, in its essential character, arose from the original disciplinary action. He wrote:

> *In reality, no new independent dispute had emerged — or, if it could be said that there was a new dispute, that new dispute was so expressly or inferentially linked to the disciplinary action that it could not be separated from that context (Adjudicator's reasons, at paragraph 109).*

[56] The respondent argues that the Adjudicator could not apply the essential character test *to incorrectly expand his jurisdiction. It was wrong of him to "draw inferences or imply that matters are within his jurisdiction under section 209 of the Act" (respondent's memorandum of facts and law at paragraph 49). Had Parliament intended to extend the jurisdiction of adjudicators to the enforcement of final and binding settlement agreements, it would have expressly said so.*

[57] I disagree. Weber *and* Regina *have signalled a general shift towards the greater empowerment of labour boards and adjudicators. The respondent raised no valid reason to exclude the "inextricable link" test set out in* Weber *and* Regina *because it serves here to choose between two processes available under the Act, rather than competing forums of adjudication or statutory bodies. Rather, I agree with the Adjudicator's opinion that "the Supreme Court of Canada direction in the* Weber *line of decisions favouring exclusive and comprehensive jurisdiction under the labour relations statute (as opposed to the courts) to resolve workplace disputes applies to Part 2 of the new Act, given the explicit wording of subsection 236(1)" (Adjudicator's decision at paragraph 78). [Emphasis added.]*

. . .

> *[64] As* Weber *and* Regina *teach us, the essential character of a dispute can only be determined by looking at the facts of a case. Logically, these same facts will also help in determining the jurisdiction of the Adjudicator.*
>
> *[65] In the present instance, it is clear that the parties' dispute over the settlement agreement is inextricably linked to the employer's disciplinary action and the appellant's grievance over it. In the course of the adjudication, with the help of Adjudicator Butler, the parties agreed to mediate their differences. The parties considered their agreement as a full, final and binding settlement of the dispute. It is agreed that it is in the interest of certainty in labour relations that legitimate settlement agreements be so (*Lindor v. Treasury Board *(*Solicitor General - Correctional Service Canada*), 2003 PSSRB 10). I would add that whether implicitly or expressly, a final and binding agreement incorporates the obligation of the parties to give it effect by implementing it. Without implementation, there cannot be "certainty in labour relations", the purpose itself of final and binding settlement agreements (*ibidem *at paragraph 16, see Adjudicator's reasons at paragraph 50). Without implementation, how can the issue be settled while having the effect of pre-empting the adjudicator's power to continue the adjudication with respect to the issues that have not been resolved within the meaning of subsection 226(2)?*
>
> *[66] . . . 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.*
>
> . . .
>
> *[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.*
>
> *[73] As a result of his conclusion on the second question, the Adjudicator finally turned to the last issue concerning his jurisdiction to make a remedial order assuming the appellant has met his onus of proof.*
>
> ***d) Question 3: Remedial Order***
>
> *[74] Again, the Adjudicator answered the question favourably, taking support from subsection 228(2) of the Act . . . .*
>
> *[75] He concluded that his remedial authority was broad and not restricted by a specific list of enumerated remedies. This statement is accurate.*
>
> *[76] In the end, Adjudicator Butler re-convened the parties for the purpose of determining whether the deputy head had not complied with the terms of the settlement agreement, and, if necessary, for the purpose of determining an appropriate remedy.*
>
> ***Conclusion***
>
> *[77] In my view, the respondent has not succeeded in showing that the Adjudicator's reasoning and decision are unreasonable. Within the specific context of this file, the Adjudicator's approach provides a sensible account of Parliament's intention while recognizing the applicable principles of statutory interpretation. . . . The Adjudicator's considerations are consistent with achieving the fundamental objects of the Act. The appellant's settlement agreement dispute is intrinsically related to his underlying and persisting grievance, originally referred to adjudication, and properly within the jurisdiction of the Adjudicator.*
>
> . . .

Thus, the Federal Court of Appeal confirmed that the *Act*, particularly in light of the objectives set out in its preamble, gives an adjudicator jurisdiction to determine an allegation that the terms of a settlement agreement for a grievance that could be

referred to adjudication have not been respected and, if necessary, to order a remedy that the adjudicator considers appropriate.

[12] Do the principles set out in *Amos* (2011 FCA 38) also apply to a complaint based on section 187 of the *Act*? I believe so.

[13] The Federal Court of Appeal defined as follows the role of an adjudicator in *Amos* (2011 FCA 38, at para 44):

> *[44] . . . to interpret the Act in a manner which promotes "…collaborative efforts between the parties…" to support the "…fair, credible and efficient resolution of matters…" and to encourage "…mutual respect and harmonious labour-management relations. . ." . . .*

That role applies in the same way to a panel of the Board. The objective of the fair, credible and efficient resolution of matters as set out in the preamble to the *Act* is intended equally for the resolution of an unfair labour practice complaint and for the resolution of issues arising from the enforcement of a settlement agreement for that complaint. In fact, a cornerstone of the *Act* is its emphasis on voluntarily resolving disputes through mediation. On that point, Part 1 of the *Act* provides as follows:

. . .

> ***37.*** *The Board, or any member or employee of the Board designated by the Board, may, if the parties agree, assist the parties in resolving any issue in dispute at any stage of a proceeding by any means that the Board considers appropriate, without prejudice to its power to determine issues that have not been settled.*

. . .

> ***191.*** *(1) . . . on receipt of a complaint made under subsection 190(1), the Board may assist the parties to the complaint to settle the complaint. If it decides not to do so or if the complaint is not settled within a period that the Board considers to be reasonable in the circumstances, it must determine the complaint.*

. . .

I also note that the powers conferred on a panel of the Board under section 37 of the *Act* are the same as those conferred on an adjudicator under subsection 226(2). Furthermore, it is important to stress at this point the fact that, as follows, section 36

gives a panel of the Board the powers required to achieve the objective of the fair, credible and efficient resolution of disputes set out in the preamble to the *Act*:

> ***36.*** *The Board administers this Act and it may exercise the powers and perform the functions that are conferred or imposed on it by this Act, or as are incidental to the attainment of the objects of this Act, including the making of orders requiring compliance with this Act, regulations made under it or decisions made in respect of a matter coming before the Board.*
>
> [Emphasis added]

[14] The dispute in this case is about the enforcement of a settlement agreement for an unfair labour practice complaint. This dispute is inextricably linked to the complaint because the settlement agreement is the remedy that the parties considered appropriate to address that complaint. Moreover, there is no doubt that a panel of the Board has jurisdiction to determine an unfair labour practice complaint. Therefore, I find that, just as the *Act* gives an adjudicator jurisdiction to determine an allegation that the terms of a settlement agreement for a grievance that could be referred to adjudication have not been respected and, if necessary, to order the remedy that the adjudicator considers appropriate, it gives that same jurisdiction to a panel of the Board to determine an allegation that the terms of the settlement agreement for an unfair labour practice complaint have not been respected and, if necessary, to order a remedy.

[15] Finally, in *Amos* (2011 FCA 38, at para 66), the Federal Court of Appeal felt the need to specify that "[e]nforceability of settlement agreements is vital to the objectives of the Act." However, when the parties to a complaint have entered into a final and binding agreement to resolve that complaint, it is no longer appropriate to examine the merits of the case. When a party alleges non-compliance with a settlement agreement, the question instead is whether the terms of the agreement were breached and, if so, what remedy is appropriate to address the infraction. As the adjudicator explained as follows in *Amos* (2008 PSLRB 74, at para 95):

> *[95] The alleged fact of non-compliance, according to the grievor, requires that I reopen the adjudication hearing for the purpose of considering the merits of the original grievance. I disagree. Reopening a hearing for that purpose may conceivably be an appropriate remedy in some circumstances, but other and more direct remedies will normally be available where there is a finding of non-*

> *compliance. In any event, the fact 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. The "merit evidence" stage of the proceedings has passed. . . .*
>
> [Emphasis added]

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

(The Order appears on the next page)

Order

[17] I declare that the parties do not dispute that the settlement agreement of August 4, 2011 is final and binding.

[18] I further declare that a panel of the Board has jurisdiction to determine an allegation that the terms of a settlement agreement for an unfair labour practice complaint were not respected.

[19] I also declare that a panel of the Board has jurisdiction to order the remedy it deems appropriate in the circumstances.

[20] This case will be scheduled for a hearing to determine whether the respondent failed to comply with the terms of the settlement agreement of August 4, 2011 and, if necessary, to determine the appropriate remedy in the circumstances.

April 22, 2013.

PSLRB Translation

Steven B. Katkin,
a panel of the
Public Service Labour Relations Board