Date: 20140811

File: 566-02-279

Citation: 2014 PSLRB 74

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

PETER TOPPING

Grievor

and

DEPUTY HEAD
(Department of Public Works and Government Services)

Respondent

Indexed as
Topping v. Deputy Head (Department of Public Works and Government Services)

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: John G. Jaworski, adjudicator

For the Grievor: Lucienne MacLauchlan, counsel

For the Respondent: Pierre-Marc Champagne, counsel

Heard at Ottawa, Ontario,
June 24 and 25, 2013, and June 9 and 10, 2014.

I. Individual grievance referred to adjudication

[1] Peter Topping ("the grievor") worked for the Department of Public Works and Government Services ("PWGSC" or "the employer") as a general labourer; he was part of the GL unit but worked as a building systems technician. On November 25, 2005, the employer terminated his employment. On November 30, 2005, he filed a grievance against the employer's decision to terminate his employment and, as relief, the grievor requested that he be reinstated without loss of pay and benefits and that he be made whole.

[2] The employer denied the grievance at the final level of the grievance procedure, and the grievance was referred to adjudication on May 2, 2006. In referring the grievance the PSAC recognized that it might be untimely and asked that the Board exercise its discretion to extend time limits.

[3] As will be described in more detail later in this decision, the matter was scheduled for adjudication in October 2008, and prior to the hearing a settlement was reached, which was reduced to writing in March 2009.

[4] The grievor has taken the position that the settlement is void, since he did not have the mental capacity to enter into the agreement, or he entered the agreement while under duress. In the alternative, the grievor has taken the position that the terms and conditions of the agreement have not been complied with by the employer.

II. Summary of the evidence

A. Procedural history

[5] On May 18, 2006, after the referral of the grievance to adjudication on May 2, 2006, the employer objected to the jurisdiction of the Public Service Labour Relations Board ("the Board") on the basis of the timeliness of the referral.

[6] In June 2007 the parties engaged in mediation with the Board's Dispute Resolution Services (DRS); however, no settlement was reached. The matter was placed on the Board's list of cases to be scheduled for a hearing, and the matter was set for hearing from February 18 to 20, 2008. Given the employer's objection to the Board's jurisdiction, the parties agreed that these days would be used to hear the grievor's request for an extension of time to refer the matter to adjudication.

[7] In January 2008 the grievor, who was being represented by his bargaining agent, the Public Service Alliance of Canada (PSAC), also started to be represented by legal counsel ("former legal counsel") retained on his behalf by the PSAC.

[8] On January 25, 2008, the respondent confirmed to the Board that it was withdrawing its objection to the Board's jurisdiction with respect to the timeliness of the reference to adjudication, and the February 2008 hearing days were postponed.

[9] The matter was rescheduled for hearing from October 20 to 24, 2008. On October 16, 2008, the parties wrote to the Board requesting that the first two days of the hearing be set aside to be used for mediation, failing which the hearing would then commence on October 23, 2008. The request was granted and mediation was held on October 20 and 21, 2008. On October 22, 2008, the parties informed the Board that a contingent settlement had been reached during mediation and requested that the hearing days scheduled for October 23 and 24, 2008, be postponed. The request was granted and the hearing was postponed.

[10] On January 22, 2009, the Board wrote to the parties to enquire about the status of the matter, because the grievance had not been withdrawn. On January 23, 2009, the Board received confirmation from the parties that they were still finalizing the settlement.

[11] On March 23, 2009, the grievor and employer entered into a written settlement ("the settlement") regarding this matter, which comprised a Memorandum of Agreement (MOA) and Direction Re: Funds (DRF).

[12] On May 22, 2009, the Board again wrote to the parties to enquire about the status of the matter. On June 2, 2009, the grievor's former legal counsel responded to the Board, advising that the parties were close to finalizing the implementation of the settlement and that the finalization was expected in four weeks.

[13] On November 6, 2009, the Board again wrote to the parties to enquire about the status of the matter. On November 19, 2009, the Board was informed that the grievor's former legal counsel was no longer representing him, and that he was now represented by legal counsel retained directly by him.

[14] On November 20, 2009, counsel for the respondent wrote to the Board, stating that it had complied with all of its obligations under the settlement and requesting that the Board close the file.

[15] On December 4, 2009, counsel for the grievor wrote to the Board, advising that she was reviewing the grievor's file, but, as a result of the grievor's health issues, was having difficulty holding "coherent, focused discussions" with the grievor. She advised that she was nonetheless working on the file with a view to having "fruitful discussions" with the grievor on outstanding issues.

[16] On March 8, 2010, the Board again wrote to the parties to enquire about the status of the matter. On March 24, 2010, counsel for the grievor wrote to the Board and to counsel for the respondent, raising some issues regarding the implementation of the settlement and requesting an in-person meeting.

[17] On April 12, 2010, counsel for the respondent wrote to the Board and to counsel for the grievor, advising that he had not been provided with any details of inaccuracies or particulars of problems with implementation and reiterating the request for the Board to close the file.

[18] On July 13, 2010, the Board wrote to the parties to enquire about the status of the matter.

[19] On November 1, 2010, counsel for the respondent wrote the following to the Board and to counsel for the grievor:

> *Despite the significant length of time that has elapsed since the parties settled this matter, there has been no indication from the grievor's counsel that he intends to withdraw his grievance. It is the position of the employer, in accordance with the arguments presented in our previous communication attached, that the PSLRB should close this file. Whether the employer has met all of its obligations under the terms of the settlement is irrelevant (though we maintain that we have). In accordance with the Federal Court's decision in AG v. Amos 2009 FC 1181, the parties' dispute is now at an end. The employer has met all of its obligations and has received no indication to the contrary. We therefore respectfully ask that the adjudicator seized of this matter, in accordance with the direction of the Federal Court, to [*sic*] close this file.*

[20] On November 10, 2010, the Board wrote to the parties, advising that it was holding the request by the respondent to close the file in abeyance, pending the Federal Court of Appeal decision in *Amos v. Canada (Attorney General)*.

[21] On February 3, 2011, the Federal Court of Appeal issued the decision in *Amos v. Canada (Attorney General)*, 2011 FCA 38. On June 17, 2011, the Board wrote to the parties to enquire about their position on the status of the matter, in light of the decision in *Amos.*

[22] On July 11, 2011, counsel for the respondent wrote to the Board and to counsel for the grievor, stating that the respondent still had not received any information as to how the respondent had failed to meet its obligations under the terms and conditions of the settlement. Counsel for the respondent reiterated the respondent's position that it had met the terms and conditions of the settlement and that the only outstanding matter was the withdrawal of the grievance by the grievor. Counsel for the respondent stated that it was impossible for him to respond until the grievor or counsel for the grievor provided more information.

[23] On July 12, 2011, counsel for the grievor wrote the following to the Board and to counsel for the respondent:

. . .

> *Mr. Topping believes that this matter has [*sic*] not resolved. He has no ability to reconcile the monies paid pursuant to the Memorandum of Understanding. Further, he is not in possession of a duly executed Direction of Funds . . . . an accountant is necessary to reconcile payments. Mr. Topping's mental health issues impair his ability to focus and comprehend financial matters of this magnitude without professional assistance. . . .*
>
> *Mr. Topping voices concerns that all issues have not been resolved, in particular, he has not been afforded the assistance anticipated by the MOU to apply for a medical retirement. . . .*
>
> *There are outstanding issues of entitlement to benefits not addressed in the Memorandum of Understanding.*

. . .

[24] On July 27, 2011, counsel for the respondent wrote to the Board and to counsel for the grievor, stating that at that juncture it had been three years since the

settlement had been entered into, and the respondent had not yet received any explanation as to how it had failed to meet its obligations. Counsel for the respondent stated that it had provided the following:

> 1. *On **September 11, 2009** I provided Ms. MacLauchlan with a detailed account of all the payments made to Mr. Topping pursuant to the settlement, with a detailed breakdown of each. I requested that Ms. MacLauchlan please make me aware of any discrepancies in the payments or calculations, or if there were none, to please inform the Board of the withdrawal of the grievance.*
>
> 2. *On **June 21, 2010** I provided Ms. MacLauchlan with a copy of the Direction of Funds signed by Mr. Topping. I asked her if there were any outstanding issues. I have heard nothing from Ms. MacLauchlan on the subject of the Direction until her email below (July 12, 2011), more than one year later.*
>
> 3. *On the subject of the medical retirement, I sent an email response to Ms. MacLauchlan on **October 23, 2009**, indicating that according to our records, Mr. Topping had not applied for any retirement option since the date of his resignation on **April 1, 2009**.*
>
> 4. *To clarify the reference below by Ms. MacLauchlan, the authorization by Mr. Topping for Ms. MacLaughlan [*sic*] to communicate on his behalf on the issue of medical retirement was provided to the employer on **July 13, 2011**, with a signature dated **July 6, 2011**.*
>
> . . .

[25] On July 28, 2011, counsel for the grievor wrote to the Board, copying counsel for the respondent and stating the following:

> . . .
>
> *I have not received from Mr. McGraw the requested signed Memorandum of Understanding nor the signed Direction of Funds.*
>
> *Mr. Topping is a difficult client from which to receive instructions as his disability continues to cause him grave difficulties with focus and comprehension. Neither he nor I are able to reconcile payments made pursuant to the Agreement. Mr. Topping requires a qualified accountant with knowledge of the Collective Agreement to ensure that Mr. Topping is/has [*sic*] received the payments to which he is entitled.*

> *Further Mr. Topping has not received any co-operation with respect to an application for medical retirement as contemplated in the Memorandum. Mr. Topping has on his own initiative contacted a department to explain the medical retirement application process and benefits that flow therefrom. He has directed the department to communicate with my office directly.*
>
> *Mr. Topping has incurred unnecessary legal fees in an attempt to finalize this matter. He has instructed me to advise that until he is provided qualified assistance to reconcile payments received and confirm that all payments and benefits to which he is entitled, he does not consider this matter resolved and wishes to proceed with the arbitration process.*
>
> . . .

[26] On August 25, 2011, the Board wrote to the parties and requested that they provide the Board with their respective positions on using mediation to resolve the outstanding issues. On September 19, 2011, the employer confirmed its willingness to use the mediation process. On October 12, 2011, the grievor confirmed his willingness to use the mediation process. The matter was referred to the Board's DRS to schedule a session.

[27] The grievor was out of the country from mid-November 2011 to mid-May 2012; therefore, the mediation could not be scheduled during that time frame. Given the time gap, DRS referred the matter back to the Board's registry to be scheduled for a hearing. The matter was scheduled for a hearing on September 4, 2012.

[28] In April 2012, the parties reiterated to the Board their willingness to try resolve the outstanding issues, and the matter was scheduled for mediation on August 21, 2012.

[29] On August 21, 2012, a mediation session took place.

[30] On August 23, 2012, counsel for the respondent wrote an extensive letter to the Board requesting that the hearing scheduled for September 4, 2012 be postponed. According to counsel for the respondent, and set out in his correspondence, the reason for the requested postponement was that, on August 22, 2012, the day after the mediation session, counsel for the grievor informed the employer, for the first time, that the grievor was taking the position that the settlement reached was not a binding contract in law or that, in the alternative, it should be set aside based on the following:

1. At the time of execution the grievor lacked the legal capacity to enter into a contract as a result of his mental state.

2. Mr. Topping was uninformed as to the facts or evidence withheld by the employer, despite Mr. Topping's efforts to inform himself.

3. Mr. Topping had signed the settlement documents under duress.

4. The employer had failed to accommodate Mr. Topping's limitations resulting from his mental illness.

[31] According to the letter dated August 23, 2012, from counsel for the respondent, counsel for the respondent understood that the grievor's position (in the event that the Board held that there was a binding contract or enforceable settlement) was that the employer had failed to comply with provisions of the agreement and had misled the grievor with respect to the tax consequences of the retroactive salary compensation. Counsel advised that in light of this change insufficient time remained for him to properly prepare for the hearing.

[32] In addition to requesting that the hearing scheduled for September 4, 2012, be postponed, the employer requested particulars of the allegations of the non-binding nature of the settlement and a detailed statement of particulars on the four provisions of the settlement with which the employer had allegedly failed to comply.

[33] On August 24, 2012, counsel for the grievor responded to the letter of August 23, 2012, confirming to the Board that the grievor did not oppose the request for postponement and agreed to provide the disclosure as requested and particularized in the correspondence from counsel for the respondent dated August 23, 2012.

[34] The hearing scheduled for September 4, 2012 was postponed. The matter was rescheduled for June 24 to 27, 2013.

B. <u>The hearing</u>

[35] The MOA and DRF executed on March 23, 2009, were marked on consent as exhibits E-1 and E-2, respectively.

[36] The grievor testified, and the employer called one witness, Maya Lahoud, who at all material times was employed by the employer in corporate compensation and was involved in finalizing the terms and conditions of the settlement with the grievor that dealt with pay and benefits.

[37] The grievor testified that he had been an employee of PWGSC for 21 years. His employment had been terminated in November 2005. The grievor confirmed that it was his signature on the MOA and DRF and that, at the time he signed those documents, he was represented by his former legal counsel, who had been retained by the PSAC.

[38] At the time the MOA and DRF were signed, the grievor was in the GL group and was at the MAM-08 level.

[39] The grievor testified that he also signed several other directions regarding funds, which were marked as exhibits; however, they all predated the DRF that formed part of the settlement.

[40] The grievor was asked during examination in chief if, at the time he signed the MOA and DRF, he had been receiving medical assistance. The grievor testified that he had started to have mental health issues as far back as 1988.

[41] The grievor was asked during examination in chief what was happening in his life when he was involved with the mediation in October 2008 and when he signed the MOA and DRF in March 2009. The grievor testified that he was separated from his wife; his house was being sold; he was living with his parents; and he was involved in a custody and access dispute regarding his child. When asked if he had any financial issues at that time, he stated that he was broke.

[42] The grievor testified that he went to the mediation in October 2008 and agreed to the terms and conditions of the settlement. He stated that an agreement in principle was reached at the mediation, but it was left to him to put the agreement in writing. He stated that he saw many different drafts and caught many mistakes. He stated that his union-appointed lawyer withdrew her services, and he was required to retain a chartered accountant.

[43] During examination in chief, the grievor was asked when he had first sought medical attention after signing the MOA and DRF. The grievor testified that he had

sought medical attention throughout that period. He stated that he had never wanted to sign the MOA. He stated that he had been suicidal at the time and that he had sought medical attention a week after signing the MOA and DRF.

[44] Exhibit G-2 was identified by the grievor as the document provided to him from his visit to the Hotel Dieu Hospital in Kingston, the week after he signed the MOA and DRF. It was a "Professional Services Consultation Request and Report Form" dated March 30, 2009, at 9:38 p.m. ("the Hotel Dieu report"). The Hotel Dieu report had handwriting that referred to the treating physician as a Dr. Crawford; however, the two-page report was handwritten by another person not identified as a doctor.

[45] The Hotel Dieu report stated that the grievor's reason for requesting help was his belief that he was not coping and required psychiatric admission. The form reported that the grievor:

1. was a difficult historian;
2. was tangential and unable to answer questions coherently;
3. reported a long history of mental illness;
4. was last hospitalized in 2007, in connection with his spouse leaving him;
5. his current medication follow up routine or compliance with medication was unclear;
6. had a consultation with registered nurses at the Providence Care Forensic Consultation Service ("Providence") twice a week;
7. was paranoid about Dr. Scott, with whom the grievor had several files, according to the report;
8. said that he had attempted suicide in the past and that it would have solved all his problems;
9. told the report writer that he had more than six degrees and more than 20 years of education; and
10. told the report writer that he was at the hospital because he was having difficulty remembering dates.

[46] The Hotel Dieu report identified the grievor's family physician as a Dr. Laura Marie Di Quinzio.

[47] The Hotel Dieu report ended with the writer stating that the matter had been reviewed with Dr. Karen Graham, that the report had been given to a Dr. Papadopoulos and that the grievor had been referred to psychiatry for further assessment.

[48] No one from the Hotel Dieu Hospital testified.

[49] Dr. Di Quinzio did not testify.

[50] The grievor identified Dr. Duncan Scott as a physician who had treated him while the settlement was being negotiated and executed. Exhibit E-5 was a letter from the grievor's former legal counsel to Dr. Scott dated April 15, 2009, with what appeared to be Dr. Scott's handwriting upon it, to which was attached a seven-page Government of Canada form entitled "Claim for Disability Insurance Employee's Medical Information and Attending Physician's Statement Policy No. 12500-G" ("the disability form"). In her letter to Dr. Scott, counsel for the grievor indicated that she was, at Dr. Scott's request, writing to confirm that disability certificates were being requested on the grievor's behalf and outlining for him which documents were required to complete his application for insurance and/or a disability pension. At the top of the disability form there appears a note, "Bring to Doctor I fill in top sheet," in the grievor's handwriting. Exhibit E-5 was put to the grievor in cross-examination, and he confirmed that Dr. Scott was still his doctor as of April 15, 2009. On page 7 of the disability form was the subheading "Physician Information." In that section Dr. Scott indicated that his specialty was psychiatry.

[51] Dr. Scott did not testify.

[52] The grievor identified two nurses from Providence whom he had been seeing twice a week and whom he had been seeing when the settlement was being negotiated and executed.

[53] No one from Providence testified.

[54] The grievor testified that, on March 30, 2009, he was sent to a ward for 72 hours, and all his medication was taken away. He stated that he was not allowed to leave during those 72 hours.

[55] The grievor testified that he was forced to leave the hospital under duress, because he had to have a tooth removed. He stated that he felt he had to leave; he stated that the hospital staff had advised him against it. Exhibit G-3 was a "Release from Responsibility for Discharge" from the Hotel Dieu Hospital dated April 2, 2009, and signed by the grievor. That document stated that the grievor acknowledged that he was being discharged against the advice of the attending physician and hospital administration.

[56] No other documents or reports from the Hotel Dieu Hospital regarding the grievor's stay from March 30, 2009, to April 2, 2009, were produced.

[57] The grievor stated that, after the stay at the Hotel Dieu Hospital from March 30 to April 2, 2009, he had had other stays at psychiatric wards; however, I was not provided with the details of those stays.

[58] Exhibit E-8 was a letter dated December 30, 2008, to the grievor from his former legal counsel. The letter confirmed a discussion that took place between the grievor's former legal counsel and the grievor regarding the grievor's concerns about his settlement. The letter set out in detail the agreed-upon terms and conditions of the settlement and the potential consequences if the grievor were to refuse to complete the settlement agreed to at the October 2008 mediation.

[59] The grievor testified that in January 2009 he was sent a package from his former legal counsel and that, at that time, he was given a short timeframe within which to execute and return the settlement documents. He stated that he had a total mental breakdown and ran around to various chartered accountants trying to get advice. In the end, the grievor stated that he spoke with PSAC officers and told them that he needed a chartered accountant, one who understood the bargaining process and pay grades and T4 slips.

[60] The grievor testified that, when he asked his former legal counsel to renegotiate on his behalf, he was told that the legal services would be withdrawn and his former legal counsel would no longer represent him.

[61] Exhibit G-5 was a letter dated March 17, 2009, from the grievor to his former legal counsel. At the top of the first page was handwritten "March 23/09 by hand." The grievor testified that he gave the letter to his former legal counsel on March 23, 2009,

which was coincidentally the same day he signed both the MOA and the DRF. The letter was three-and-a-half pages long and set out a number of various statements and allegations, many of which were against his former legal counsel.

[62] The grievor testified that he had not received the $4,000.00 lump-sum bonus that others in his bargaining unit had received. Exhibit G-7 was a PSAC-generated document entitled "Everything you need to know about the Treasury Board agreements" obtained from the internet, dated March 17, 2009, referring to a $4,000.00 lump-sum payment for members of the EB and PA Groups.

[63] The grievor testified that he had to pay extra taxes because he was given T1198E forms instead of the T4 slips he had requested. He also testified that he had been assured by everyone during the discussions that any monies paid to him would be allocated to specific tax years, to reduce the tax payable. He stated that all the monies paid to him as part of the settlement were paid in the same year, so that he had to pay tax on a lump-sum payment all in a single tax year. Exhibit G-9 is a letter dated July 31, 2012, from H&R Block that sets out what it believes is the difference in tax liability as a result of the settlement funds being paid to the grievor in one lump sum.

[64] The grievor testified that he also lost monies because he resigned instead of qualifying for a medical retirement. In addition, the grievor stated that he was not sure whether or not he in fact received the money he was supposed to get as severance when he resigned.

[65] The grievor testified that his vacation leave credits were paid out rather than being used to extend his length of service. He also stated that he was not paid interest on the payout of his vacation leave credits.

[66] The grievor testified that, throughout the process of putting the settlement into writing (from the date of the mediation to the date of the execution), no one listened to him.

[67] At one point during his examination in chief, the grievor was asked when his former legal counsel stopped representing him. During the course of his answer the grievor waived his solicitor-client privilege. As a result of the waiver of solicitor-client privilege, the respondent requested and I ordered the production of all

communications between the grievor and his former legal counsel regarding this matter from October 20, 2008, onward. In addition, I ordered the grievor to produce his Notice of Assessment for the 2009 tax year, his T1198Es that had been sent with his tax returns and any correspondence sent to Health Canada in support of his medical retirement.

[68] In cross-examination the grievor stated that it was in the settlement that the employer was supposed to help him secure disability benefits. He confirmed that he had received disability benefits. Exhibit E-3 was a letter dated September 18, 2009, from the Sun Life Assurance Company of Canada to the grievor, informing him that disability benefits had been approved for him effective April 1, 2009, based on the results of an independent medical assessment. The grievor was referred to the second page of Exhibit E-3, which outlined the amount of the monthly disability benefit that would be paid to him and the payment schedule.

[69] Exhibit E-4 was a letter from the grievor's former legal counsel to the grievor dated November 18, 2008, to which was attached a three-page document consisting of a fax cover sheet dated October 27, 2008, from Al Marlin, R.N., at Providence, and an earlier letter that the grievor's former legal counsel had sent to Dr. Scott, at Providence, on October 23, 2008, asking Dr. Scott certain questions about the grievor's health. The fax cover sheet from Mr. Marlin indicated that Dr. Scott had answered the questions directly on the letter of October 23, 2008, and Mr. Marlin was therefore sending the letter back to the grievor's former legal counsel.

[70] The questions posed by the former legal counsel in Exhibit E-4 and the answers of Dr. Scott were as follows:

> 1. *In your opinion, is Peter presently medically fit to perform all of the functions of his job with Public Works? No*
>
> 2. *If not, is it likely that his condition will change in the next 24 months' time, so that he would be medically fit to work? No*
>
>   *Is Peter presently medically fit to work full-time in another occupation? No*
>
> 3. *Based on Mr. Topping's health condition in the past 18 months that you have treated him, can you comment on his prospect for medical fitness for work in the foreseeable future? Low*

> 4. *Finally, can you confirm whether Mr. Topping is presently capable of making a decision concerning his severance package?* *Yes*
>
> . . .

[71] The grievor signed and dated the bottom of the disability form (Exhibit E-5) on March 25, 2009. On the second page of the disability form, under the subheading "About your illness or injury," in box 9, the form requested a list of the doctors the grievor had consulted during the illness for which he was being treated at that time. The grievor listed Dr. Scott and two other doctors. Under the subheading "Your general medical history," in box 1, the form requested a list of all the doctors that the grievor had consulted in the past five years. The grievor listed Dr. Scott and one other doctor. In box 2 under the same subheading, the form requested a list of the names and addresses of the hospitals in which the grievor had been treated in the past five years. The grievor listed the illness as major depression and bipolar disorder; the date was April 15, 2007; the hospital was the Ottawa General Hospital; and the treatment was medication.

[72] Pages 3 through 7 of the disability form were for the attending physician to complete, and it appeared to have been filled out and signed by Dr. Scott on April 30, 2009. The information in that part of Exhibit E-5 indicated that the first time Dr. Scott saw the grievor was on July 12, 2007, and the last time Dr. Scott saw the grievor before filling out the disability form was on March 26, 2009 (three days after the grievor signed the MOA and DRF, and four days before the grievor went to the Hotel Dieu Hospital). According to the disability form, between July 12, 2007, and March 26, 2009, Dr. Scott saw the grievor 19 times. Under "Clinical findings," Dr. Scott stated that the grievor was suffering from an adjustment disorder and depressive disorder. He stated that the grievor had been on multiple medications and had received counselling. On the last page of the disability form, under the subheading "Additional Information," was the question "In your opinion, does the patient have any physical or mental limitations that would prevent him/her from handling his or her own financial affairs?" Dr. Scott answered no to that question.

[73] During cross-examination the grievor was asked on many occasions if he had sought the assistance of consultants with respect to the settlement and draft documentation. He confirmed that he had seen Barry Graham, a chartered accountant in Napanee, Ontario, and Maureen Otten of H&R Block in Ottawa.

[74] Exhibit E-9 was a letter dated February 5, 2009, from Mr. Graham to the grievor's former legal counsel. The letter stated that Mr. Graham had reviewed a draft memorandum of agreement and a draft direction regarding funds, had received instructions from the grievor and was requesting that the grievor's former legal counsel amend the drafts to reflect the grievor's instructions. The changes requested by the grievor were reflected in Exhibit E-9, on a paragraph-by-paragraph basis.

[75] Ms. Lahoud testified that, at all material times, she worked in corporate compensation and was tasked with pay and benefit-related matters involving the grievor's settlement.

[76] Ms. Lahoud testified that she had prepared and signed the T1198E that was marked as Exhibit E-12 and that set out the settlement amounts paid in given years. Ms. Lahoud stated that if a payment covers salary retroactive for a number of years, the employer will issue a T4 form for the entire amount for the year in which the monies are paid, and the employer will also issue a T1198E which specifies the years to which the total amount in the T4 is allocated.

[77] Ms. Lahoud also testified that she had been involved in calculating the severance pay pursuant to the MOA and DRF. She stated that she had calculated the severance pay based on the MOA. She confirmed that the severance pay differed depending on whether the person resigned or took a medical retirement. She stated that she had provided the grievor's former legal counsel with the information and paperwork to facilitate a medical retirement application for the grievor. She also testified that she recalled having a conference call regarding medical retirement in which the grievor was involved. She testified that she recalled advising the grievor that it would be a good idea for him to apply for medical retirement, as it would generate a higher severance amount for him. Ms. Lahoud testified that she received calls from Health Canada advising her that it was missing documents from the grievor, and she learned that it eventually closed its file, since it had failed to receive a response from the grievor.

[78] Exhibit G-8 was a letter dated June 1, 2010, from the grievor's counsel to the respondent's counsel, to which was attached the grievor's T4 slips for the 2009 tax year. The exhibit outlined the amounts of income paid to the grievor during that tax year and requested that new T4 slips be issued for each year to which the monies paid were being attributed.

III. Summary of the arguments

A. For the grievor

[79] Parliament, when it passed the *Public Service Labour Relations Act* ("the *Act*"), intended to ensure the "fair, credible and efficient resolution" of labour disputes. The grievor refers me to *Amos*, which stands for the proposition that adjudicators under the *PSLRA* have jurisdiction to determine whether a final and binding settlement agreement exists between the parties, or whether it ought to be set aside for unconscionability, duress or undue influence.

[80] The grievor could not enter into the settlement as a result of his mental health issues, specifically in February and March 2009, when the MOA and DRF were being executed. During that period the grievor was also dealing with a dispute with his spouse over the breakdown of his marriage and the custody of his child.

[81] A number of directions regarding funds were executed by the grievor, one dated February 24, 2009, and the final one signed in conjunction with the MOA on March 23, 2009. When the February direction was executed, the grievor was seeking the assistance of professionals to understand the complex matter, as the grievor has testified.

[82] When the grievor signed the MOA on March 23, 2009, he had a pre-written letter to his counsel dated March 17, 2009 (Exhibit G-5), which he hand delivered to his counsel. At page 2 of that letter, at the second paragraph, the grievor states the following:

> *I wish to stress the point that at every turn, the accounting of monies for the final contract has not been done correctly, even to this late date. I further stress that you my Union Advocate needed to be informed by me at least twice now, that the numbers making up, in essence the contract, were incorrect.*

. . .

[83] At page 3 of Exhibit G-5, the grievor discusses an invoice he received from Mr. Graham for accounting services in the sum of $2,500, of which the PSAC was prepared to cover $500, and the grievor states the following:

. . .

> *I reiterate that I am very seriously ill and have been on starvation money for years and to stick me with a bill when I am refused Advocacy from my own lawyer is not only unfair but punitive to my health.*
>
> . . .

[84] The grievor felt that his counsel was threatening him, and that was the stress and duress he was under during that period.

[85] Regarding the grievor's mental health and his ability to enter into the settlement, the grievor states that, while the evidence in the letter from his counsel to Dr. Scott dated October 23, 2008, with attached questions and responses on the grievor's medical abilities may have been correct at that time, five months had passed by the time the grievor signed the MOA and DRF on March 23, 2009. During that period the grievor was dealing with numerous issues in addition to this settlement, specifically his ongoing mental health issues and the breakdown of his marriage. Seven days after he signed the MOA and DRF, he presented himself at the Hotel Dieu Hospital and stayed for three days before discharging himself against the advice of medical staff.

[86] The Hotel Dieu Hospital report dated March 30, 2009, is the best evidence regarding the seriousness of the grievor's mental health with respect to the execution of the MOA and DRF.

[87] The grievor did not understand the MOA and DRF, despite attempts to get help. His former legal counsel admitted in her letter to him on December 30, 2008, that he was reluctant to enter into the settlement.

[88] The grievor requests that the MOA and DRF be set aside and that the grievance dated November 30, 2005, be scheduled for a hearing.

[89] With respect to whether or not the respondent complied with MOA and DRF, the grievor states that compliance with the terms is not an indication that the agreement was a fair resolution. Payments and contact are issues that are not indicative of the grievor's ability to enter into a binding contract. This is a matter that can be dealt with later.

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

[90] *Amos* sets out the test for determining whether or not a settlement is final and binding. There are two parts that the Federal Court of Appeal has stated must be addressed, namely whether or not there is a final and binding agreement and, if so, whether or not the parties have complied with that final and binding agreement.

[91] The burden of proof is on the grievor either to establish that there is not a binding agreement or, if it is found that there is a binding agreement, to establish that the respondent has failed to comply with it.

[92] The respondent states that the grievor is assuming that he will be successful in the first part of the test or else the question of compliance will be dealt with later. The respondent agrees that, if the grievor is successful in the first part of the test, the second part is irrelevant; if there is no final and binding agreement, there can be no question of compliance as there is no agreement. However, if the grievor is unsuccessful and the settlement is found to be a binding agreement, the burden of proof is on the grievor to establish that the respondent is not in compliance, and the matter must be dealt with now.

[93] It is the respondent's position that there is both a final and binding agreement and that the grievor has failed to establish that there is non-compliance.

[94] The grievor's position is that, during the period in question, namely October 2008 to April 2009, he did not have the mental capacity to enter into the settlement agreement. The question is whether or not the grievor had the mental capability required; if he did not, the inquiry will be finished. If he did, the next question is whether or not he was coerced or forced to enter into the settlement.

[95] The evidence presented by the grievor in this regard is contradictory. When it suits the grievor, he states that he had no capacity and did not understand, yet he points to his own actions in the same period that demonstrate that he did have the mental capability required.

[96] Dr. Scott provided information on two occasions, in October 2008 and in April 2009. The information provided by Dr. Scott was that the grievor was competent.

[97] The grievor was asked in cross-examination whether or not he felt that he had been competent to enter into an agreement between October 2008 and April 2009, and his answer was no. Yet, during that same period, he was engaged in discussions with his legal counsel and he retained and instructed an accountant.

[98] There is no credible medical evidence to conclude that the grievor was not able to enter into a contract at any time. The grievor's statements that he was sick or overwhelmed do not meet the test.

[99] What has been presented as evidence by the grievor, the Hotel Dieu report dated March 30, 2009, and the Release from Responsibility for Discharge dated April 2, 2009, came after the settlement had been negotiated and executed. Neither states that the grievor was unable to manage his affairs. The fact that the grievor was going through a rough time does not mean that he could not make a decision.

[100] The respondent refers to *Karaim v. United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 1-85,* BCLRB No. B24/2008. In *Karaim* the grievor entered into a termination agreement that he sought to vitiate, claiming that he had entered into it when he was being subjected to harassment at work, which caused him stress that required him to seek medical attention and time off work. At the time of the arbitration Mr. Karaim submitted medical documentation; however, there was no indication that medical documentation was provided to the union at the time it was negotiating on his behalf, and the medical documentation submitted did not indicate that the condition Mr. Karaim had was a lack of mental capacity.

[101] In *Karaim* the arbitrator held that it was policy not to look behind settlement agreements. At paragraphs 29 and 30 of *Karaim*, the arbitrator stated the following:

> *29.* . . .
>
> . . . "[A] deal is a deal" unless there are compelling labour relations reasons to set the agreement aside.
>
> *30. Where a party enters into an agreement under duress or as a result of undue influence, the agreement was not entered into voluntarily and therefore will not be enforceable against that party. Not all forms of pressure or stress constitute duress or undue influence. In the labour relations context, the test for undue influence and duress is very high.*

> *As noted in* Jennifer MacDonald, *BCLRB No. B315/2002, at para. 55:*
>
> > In law, a party will not be held to an agreement it has entered into under duress or as a result of undue influence. For an agreement to be binding, it must be entered into freely. However, this does not mean that any form of pressure will render an agreement voidable. Agreements, particularly in labour relations matters, are not made under sterile or laboratory conditions. It is completely unrealistic to suggest that anyone is entitled to decide to enter into an agreement free of any pressure whatsoever. Like it or not, pressures are part of life. Most decisions, particularly significant ones, are made under pressure, sometimes pressure so overwhelming that it could be said that the person had no real choice but to act as s/he did. The real question is not whether there was pressure, but whether it was undue or improper in the circumstances.
> >
> > . . . [F]or an agreement to be voidable, the coercion of will must be such that it vitiates consent.
> >
> > > *In determining whether there was a coercion of will such that there was not true consent, it is material to enquire whether the person alleged to have been coerced did nor did not protest; whether, at the time he was allegedly coerced into making the contract, he did or he did not have an alternative course open to him such as an adequate legal remedy; whether he was independently advised; and whether, after entering into the contract, he took steps to avoid it.*
>
> [Emphasis added]

[102] In *Karaim* the arbitrator dismissed the complaint against the bargaining agent and stated: "Perhaps the circumstances were such that he had, or at least perceived that he had, no choice but to resign. That fact alone does not vitiate his consent."

[103] *Alibay v. Deputy Head (Department of Employment and Social Development),* 2014 PSLRB 29 is a recent decision of an adjudicator of the Board dealing with the validity of settlement agreements. Ms. Alibay, after the termination of her employment and before the hearing of her grievance against her termination, entered into a settlement agreement with her employer that settled the termination grievance and three other grievances. Ms. Alibay refused to withdraw her grievance as set out in the settlement agreement. In the course of her submissions Ms. Alibay raised the fact that

she was in poor health when she entered into the settlement. The adjudicator found that she did not provide any evidence or make any submissions on how illness had prevented her from understanding the events taking place or the agreement that was entered into.

[104] In *Exeter v. Deputy Head (Statistics Canada),* 2012 PSLRB 25, the grievor had nine grievances pending before the Board that were settled through a written agreement. Ms. Exeter had been represented by legal counsel throughout the mediation process and at the time of the settlement. Two years after the settlement had been entered into and the settlement monies had been paid, Ms. Exeter claimed that the settlement had been signed under duress and undue influence while she was suffering from medical and physical incapacities, coercion, anguish, and fear, and that the employer had failed to comply with the agreement. In support of her position, Ms. Exeter provided a medical certificate that was dated 29 months after the settlement and that referred to a medical condition that had been ongoing for many years. The adjudicator found that the medical certificate provided did not satisfy the requirement that Ms. Exeter was suffering from a medical incapacity or duress.

[105] *City of Vancouver v. Johnnie Falbo,* 2012 BCPC 106 (*"Falbo"*) involves an attempt by Mr. Falbo to set aside a mediation agreement that he claimed to have signed under duress. No medical documentation was submitted that would suggest how his alleged medical condition had affected his ability to participate in the mediation. The British Columbia Provincial Court stated the following at paragraph 23 of the decision:

> *[23] In order to succeed in his application to have the mediated agreement set aside on the basis of duress, Mr. Falbo must establish on a balance of probabilities that pressure was exerted upon him to such a degree that it amounted to coercion of the will. In determining that issue, the Court must consider the four factors described in* Midland Walwyn Capital Inc., Stott v. Merit and Gordon v. Roebuck, *supra.*

[106] The test referred to at paragraph 23 of *Falbo* is the test set out in *Midland Walwyn Capital Inc. v. Roderick C. Clark,* [1992] B.C.J. No. 2195, which was the test considered and applied in *Gordon v. Roebuck,* (1989), 64 D.L.R (4th) 568 (Ont. H.C.J.), which reads as follows:

1. Did the party seeking to set aside the agreement protest?

2. Did the party seeking to set aside the agreement have an alternative course of action open to them?

3. Was the party seeking to set aside the agreement independently advised?

4. Did the party seeking to set aside the agreement take steps to avoid the agreement after it was signed?

[107] The respondent maintains that the grievor has not satisfied the test in *Gordon v. Roebuck, Walwyn*, and *Falbo*, for the following reasons:

1. The grievor did not protest.

2. The grievor had an alternative course of action open to him, since his grievance was scheduled to be heard by the Board.

3. The grievor had independent advice, because he was represented by legal counsel retained by his bargaining agent and he had retained the services of a chartered accountant. There is also evidence that his taxes were prepared each year by a tax specialist in Ottawa. There is ample evidence that all of these independent advisors were aware of the various issues involved in the settlement discussions. The correspondence from the grievor's counsel sent days before the MOA and DRF were signed clearly discusses issues such as tax implications. In addition, the grievor was being treated during that period by medical professionals who assessed his condition.

4. The grievor did not take any steps to avoid the agreement after it had been signed.

[108] The respondent relies on *Kerkezian v. Donway Place Retirement Home, Anne Gro-Arboine, and Vernet Malcom,* 2012 HRTO 1581, in which the Ontario Human Rights Tribunal (OHRT), at paragraph 24, did not accept the "bald assertions" of the applicant that she was under undue pressure from the union and that the union's representative did not support her in the mediation or arbitration as being sufficient to amount to duress.

[109] The grievor is required to provide evidence of duress and evidence that he was incapable of understanding the agreement. He has provided neither. It is not enough to say that one is under duress or that one does not understand. One must prove it.

[110] At paragraphs 22 and 23 of *Kerkezian*, in opining on the availability of the ground of duress to vitiate a settlement agreement, the OHRT state the following:

> ***[22]*** *. . . . Where "duress" is put forward as the basis for vitiating a settlement agreement, the party claiming duress is really stating that he or she entered the agreement against his or her own free will. . . . As the Tribunal explained in* Barton*, above, a party alleging duress has the onus of establishing that the circumstances surrounding the conclusion of the agreement amount to duress. The legal threshold is an exacting one, which recognizes the strong public interest in the principle of finality.*
>
> ***[23]*** *The Ontario Court of Appeal described the elements of legal duress as follows in* Taber v. Paris Boutique & Bridal Inc.*, 2010 ONCA 157:*
>
> > **. . .** [N]ot all pressure, economic or otherwise, can constitute duress sufficient to carry these legal consequences. It must have two elements: it must be pressure that the law regards as illegitimate; and it must be applied to such a degree as to amount to a "coercion of the will" of the party relying on the concept.

[111] At paragraph 25 of *Kerkezian* the OHRT states that, although medical documentation from a psychiatrist was provided about the applicant's mental health, which indicated that she was suffering from mental illness and that her mental and physical health was deteriorating, the OHRT specifically referred to the fact that the medical documentation did not state why the applicant was unable to understand and appreciate the agreement that she had signed. The grievor in this case falls into the same situation as the applicant in *Kerkezian*. We have some material from medical professionals; however none of it meets the test.

[112] Finally, the respondent argued that it was incumbent on the grievor to prove that there was no compliance. The onus is not on the respondent to go through the terms and conditions of the settlement and show that each and every one has been fulfilled. According to the respondent, the grievor has failed in this regard. The respondent argues that, as far as it can tell, the grievor's allegations of non-compliance with the settlement are as follows:

1. The grievor suffered a loss by paying more in taxes because the amounts paid pursuant to the settlement were all paid in one tax year.

2. The grievor suffered a loss in severance pay by virtue of resigning rather than taking medical retirement.

3. The employer did not help him.

[113] The respondent states that the alleged tax loss cannot be attributed to the MOA or DRF. The respondent has complied with the MOA and DRF. If there has been a tax loss (the evidence is not clear that this is true), it is not the fault of the respondent.

[114] With respect to the alleged loss as a result of the grievor resigning rather than taking medical retirement, the grievor was the author of his own demise. The employer did everything it could to facilitate the grievor's medical retirement; however, the grievor failed to submit the documentation required so that Health Canada eventually closed its file. Had the grievor filed his documentation, his departure may have been by way of medical retirement instead of resignation and his severance would have been greater.

[115] Finally, while the grievor makes a general statement that the respondent did not help him, he has not provided any information from which the respondent can ascertain where, how, what or when the grievor required assistance.

C. Reply of the grievor

[116] The grievor never stated that he did not accept the terms and conditions of the agreement. He felt that he did not understand or accept them because of his lack of understanding or inability to understand.

[117] The grievor states that all of the cases submitted by the respondent can be distinguished on their facts.

[118] The grievor states that, for me to determine whether or not he had the capacity to enter into the settlement agreement, I must consider the stress he was under as well as his mental health.

[119] The grievor has made it clear that he tried to get answers so that he could understand the agreement, but he did not get those answers. Notwithstanding the

pressure he was under, the grievor pointed out the problems with the contract to Mr. Graham.

IV. Reasons

A. Sealing of documents

[120] In *Basic v. Canadian Association of Professional Employees,* 2012 PSLRB 120, at paragraphs 9 through 11, the Board states the following:

> *9 The sealing of documents and records filed in judicial and quasi-judicial hearings is inconsistent with the fundamental principle enshrined in our system of justice that hearings are public and accessible. The Supreme Court of Canada has ruled that public access to exhibits and other documents filed in legal proceedings is a constitutionally protected right under the "freedom of expression" provisions of the* Canadian Charter of Rights and Freedoms; *for example, see* Canadian Broadcasting Corp. v. New Brunswick (Attorney General), *[1996] 3 S.C.R. 480;* Dagenais v. Canadian Broadcasting Corp., *[1994] 3 S.C.R. 835;* R. v. Mentuck, *2001 SCC 76,* Sierra Club of Canada v. Canada (Minister of Finance), *2002 SCC 41(CanLII).*
>
> *10 However, occasions arise where freedom of expression and the principle of open and public access to judicial and quasi-judicial hearings must be balanced against other important rights, including the right to a fair hearing. While courts and administrative tribunals have the discretion to grant requests for confidentiality orders, publication bans and the sealing of exhibits, it is circumscribed by the requirement to balance these competing rights and interests. The Supreme Court of Canada articulated the sum of the considerations that should come into play when considering requests to limit accessibility to judicial proceedings or to the documents filed in such proceedings, in decisions such as* Dagenais *and* Mentuck. *These decisions give rise to what is now known as the* Dagenais/Mentuck *test.*
>
> *11 The* Dagenais/Mentuck *test was developed in the context of requests for publication bans in criminal proceedings. In* Sierra Club of Canada, *the Supreme Court of Canada refined the test in response to a request for a confidentiality order in the context of a civil proceeding. As adapted, the test is as follows:*
>
> ***. . .***

> a. Such an order is 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. The salutary effects of the confidentiality 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.
>
> ***. . .***

[121] Paragraph 1 at page 3 of the MOA is as follows:

> ***The Parties Hereby Agree:***
>
> *1. That the terms of this Memorandum of Agreement are private and confidential as between the parties and must not, except as authorized by law, be disclosed by the parties to anyone, except their legal counsel, any employee of the Employer who is required to implement the terms of settlement, and a financial advisor for the Grievor.*

[122] Mediation and the settlement of litigation are widely recognized as important interests, and the confidentiality of the details of those discussions and the terms and conditions of the settlement reached are interests that outweigh the right to public access. Consequently, in this matter, I have ordered that the following documents, which set out in detail the terms and conditions of the settlement reached between the parties and agreed to by the parties as being confidential, be sealed:

> Exhibit E-1 Memorandum of Agreement (MOA) dated March 23, 2009;
>
> Exhibit E-2 Direction regarding funds (DRF) dated March 23, 2009;
>
> Exhibit E-6 Letter dated November 6, 2008, from the grievor's former legal counsel to the grievor;
>
> Exhibit E-7 Letter dated November 24, 2008, from the grievor's former legal counsel to the grievor;
>
> Exhibit E-8 Letter dated December 30, 2008, from the grievor's former legal counsel to the grievor;

Exhibit E-12 Form T1198E dated May 13, 2009;

Exhibit E-13 Canada Revenue Agency Notice of Assessment of the grievor for the 2009 tax year;

Exhibit G-1 Direction regarding funds dated February 24, 2009;

Exhibit G-4 Direction regarding funds dated February 11, 2009;

Exhibit G-8 Letter dated June 1, 2010, from the grievor's legal counsel to counsel for the employer; and

Exhibit G-9 Letter dated July 31, 2012, from H&R Block to the grievor.

V. Decision

[123] On or around October 22, 2008, the parties reached what they describe to the Board as a "contingent settlement." Over the next five months the parties ironed out the paperwork for the contingent settlement, and the settlement documents, consisting of the MOA and DRF, were signed on March 23, 2009.

[124] The Federal Court of Appeal in *Amos* set out the test for determining whether or not a settlement is final and binding. There are two parts that the court has stated must be addressed, namely whether or not there is a final and binding agreement and, if so, whether or not he parties have complied with that final and binding agreement.

A. Was there a final and binding agreement

[125] The grievor's position is that, during the period in question, namely October 2008 to April 2009, he did not have the mental capacity to enter into the settlement agreement or was under duress to enter into the agreement, and therefore the first part of the *Amos* test has not been met.

B. Mental capacity

[126] I agree with the reasoning in *Karaim* at paragraph 29, which is that "a deal is a deal unless there are compelling labour relations reasons to set the agreement aside." Clearly, one party not having the required mental capacity when the agreement was made would be a compelling labour relations reason, and the agreement would be set aside. It is not sufficient for a party merely to state that it did not have the mental

capacity to enter into the agreement. Evidence that can be tested on an objective standard must be produced at the hearing.

[127] The only evidence regarding the grievor's mental capacity came from the grievor. The grievor stated in his testimony that he did not have the mental capacity required to enter into the settlement. In support of this, the grievor produced Exhibit G-2, the Hotel Dieu report. Although that report provides information about the grievor's health status, it falls far short of being credible evidence that the grievor lacked the mental capacity required to enter into the settlement. There is no evidence that the person who completed the Hotel Dieu report was a medical or mental health professional. The Hotel Dieu report appears to be an intake document and does not state that the grievor is incapable of managing his affairs or making financial or other decisions. The document identifies the reason for his visit and states that the grievor has a variety of mental health problems.

[128] The grievor's evidence is not sufficient to convince me that he lacked the mental capacity required to enter into the settlement agreement.

[129] Indeed, other evidence suggests that the grievor did have the mental capacity required to enter into the settlement. Correspondence obtained from the grievor's former legal counsel indicates that the question of the grievor's mental capacity was considered by his former legal counsel, both when the contingent settlement was reached and when the MOA and DRF were signed by the grievor. The question of the grievor's ability to make decisions regarding his financial well-being was put to Dr. Scott, a psychiatrist treating the grievor at the time of the contingent settlement and the signing of the MOA and DRF. Dr. Scott indicated on October 27, 2008, shortly after the mediation took place and the contingent settlement was reached, that the grievor was capable of making a decision concerning his severance package. On April 30, 2009, Dr. Scott signed the disability form (Exhibit E-5), indicating that the most recent appointment the grievor had had with him was on March 26, 2009 (some three days after the MOA and DRF had been signed by the grievor), and that it was his opinion that the grievor did not have any physical or mental limitations that would prevent him from handling his own financial affairs.

[130] The evidence adduced before me shows that the grievor was treated by Dr. Scott on an ongoing basis and that his family physician was Dr. Di Quinzio. In addition, Exhibit G-2, the Hotel Dieu report, refers to the treating physician at the hospital as

Dr. Crawford, and states that two other physicians, Dr. Graham and Dr. Papadopoulos, were made aware of the grievor's condition in late March 2009. The grievor testified that, at all material times, he was being seen at least twice a week by registered nurses at Providence. None of those people were called as witnesses. It is obvious to me that those people would have been in the best position to provide me with evidence as to the grievor's mental and medical condition and capabilities and it was therefore incumbent on the grievor to call them. He did not, and I draw an adverse inference from this fact.

[131] The grievor's own testimony in this regard is not credible. On the one hand he states that he was not competent to enter into the agreement, yet in the same breath he states that no one knew what they were doing, the paperwork was all wrong and it was left to him to sort it all out.

[132] The evidence with respect to the grievor's mental capacity is very limited and what is before me certainly does not convince me on a balance of probabilities that the grievor lacked the mental capacity required to enter into the settlement. What little evidence has been put forward indicates that the grievor did in fact have the mental capacity required to enter into the settlement.

C. Duress

[133] In the alternative to the argument that the grievor did not have the mental capacity required to enter into the settlement agreement, the grievor argues that the settlement is void because he was under duress and was forced to enter into the settlement agreement. Again, as set out in *Karaim*, being forced to enter into an agreement against its will is a compelling labour relations reason to set the agreement aside. Again, however, as with mental capacity, there must be objective evidence that demonstrates that there was duress.

[134] The test for duress is set out in *Falbo*. In *Falbo* the court held at paragraph 23 that, for a mediated settlement to be set aside on the basis of duress, the party seeking to do so must establish on a balance of probabilities that pressure was exerted to such a degree that it amounted to coercion of the will. In determining that factor, the court stated that it must consider the four factors described previously in *Midland Walwyn* and *Gordon v. Roebuck,* which are as follows:

1. Did the party seeking to set aside the agreement protest?

2. Did the party seeking to set aside the agreement have an alternative course of action open to it?

3. Was the party seeking to set aside the agreement independently advised?

4. Did the party seeking to set aside the agreement take steps to avoid the agreement after it was signed?

[135] I find that the grievor has not, on a balance of probabilities, established that pressure was exerted upon him to such a degree that it amount to a coercion of the will. There was absolutely no evidence that the employer or any of its employees, agents, servants or assigns or his bargaining agent exerted or attempted to exert any sort of undue pressure upon the grievor to settle his grievance. The evidence of the grievor about being pressured was that he was feeling pressure due to his personal circumstances, which included the breakdown of his marriage and a custody and access dispute over his child. As well, he indicated that he was "broke" and was living with his parents. He further suggested that his former legal counsel was exerting pressure upon him to accept the settlement.

[136] In reviewing the factors as set out in *Falbo, Walwyn* and *Gordon v. Roebuck*, I find that the evidence does not favour the grievor.

[137] The first factor is whether or not the party seeking to set aside the agreement protested. The settlement was reached in October 2008 and signed on March 23, 2009. The grievor did not suggest that there was no settlement or object to the settlement until August 2012, more than three years after signing the MOA and DRF and almost four years after reaching the agreement. The grievor had numerous opportunities to protest and did not; in fact, the opposite is true: the position he took, which was described on numerous occasions, was that the employer had not complied with the settlement.

[138] The second factor is whether or not the party seeking to set aside the agreement had an alternative course of action open to it. The answer is yes. The grievor had filed a grievance. He did not have to settle the grievance. In fact, the settlement of the grievance was reached through mediation held at the time of the adjudication of the grievance. The alternative open to the grievor was to proceed with the hearing. The

grievor was represented by the PSAC and by experienced counsel retained on his behalf by the PSAC.

[139] The third factor is whether or not the party seeking to set aside the agreement was independently advised. The grievor was independently advised. The adverse party in this matter is the employer, the PWGSC, or the Deputy Head of the PWGSC. The grievor was represented by a bargaining agent, the PSAC, which is a large public sector union that represents thousands of employees before the large federal government as employer. Not only did the grievor have the PSAC representing him, the PSAC retained legal counsel that specialized in federal public service labour law to act for him. In addition, the grievor had the benefit of both an accountant and an income tax specialist giving him advice.

[140] The fourth factor is whether or not the party seeking to set aside the agreement took steps to avoid the agreement after it had been signed. As with the first factor, the grievor did nothing to try and avoid the agreement until more than three years after it had been signed, when the grievor suggested that he had not had the mental capacity required to enter into such an agreement.

[141] In *Kerkezian* the OHRT held that it is insufficient to rely on bald assertions of undue pressure. The onus is upon the grievor to provide evidence of the duress. The grievor has not provided evidence, but simply bald assertions. The legal threshold is an exacting one that recognizes the strong public interest in the finality of settlements. The OHRT in *Kerkezian,* opining on duress, quoted from the Ontario Court of Appeal in *Taber v. Paris Boutique & Bridal Inc.* and held that not all pressure, economic or otherwise, could constitute duress sufficient to carry legal consequences. To be duress, it had to be pressure that the law regarded as illegitimate and it had to be applied to such a degree that it amounted to a coercion of the will. These pressures simply did not exist in this case.

[142] The grievor alleges that his former legal counsel exerted pressure on him. In evidence, the grievor submitted a letter that he wrote to his former legal counsel, Exhibit G-5, which was hand delivered the same day the MOA and DRF were entered into. Submitted into evidence before me are eight letters sent by the grievor's former legal counsel either to him or on his behalf with a copy to him; seven of these were entered by the employer when cross-examining the grievor. The only one that was entered by the grievor was a letter sent to him on June 24, 2009 (Exhibit G-6), some

two months after the MOA and DRF were signed. I have reviewed all the letters and they quite clearly demonstrate that the grievor's legal counsel was acting on his behalf, answering his questions and explaining the potential legal ramifications of actions being contemplated. There is nothing in the material that would suggest any form of undue or improper influence.

D. Non-compliance with the terms and conditions of the settlement

[143] The final ground upon which the grievor seeks to have the settlement set aside is that the respondent or employer has not complied with the terms and conditions of the settlement.

[144] During final arguments, the grievor submitted that, if I found that there was a final and binding agreement, compliance should be left to be dealt with at another time. I disagree. It is clear to me, based on the correspondence on file, that the position of the grievor is that either there was no settlement (by virtue of lack of mental competency or duress) or the employer has not complied with the terms and conditions of the settlement. The history of this file with the Board shortly after the MOA and DRF were signed is rife with requests by the employer to the grievor for particulars of the alleged non-compliance. On August 23, 2012, when counsel for the employer wrote to the Board requesting a postponement of the September 2012 hearing days, it was specifically stated to the Board that the employer still had not received particulars of the alleged non-compliance. On August 24, 2012, in the response to the correspondence of August 23, 2012, counsel for the grievor advised that particulars of the non-compliance would be provided. At the outset of this hearing, it was the grievor's position that, if there was a binding settlement, the employer was not in compliance. I have no doubt that the issue of alleged non-compliance is before me and is to be disposed of by this hearing.

[145] With respect to the ground of non-compliance with the settlement, the grievor is alleging that the employer

1. did not pay him a $4,000.00 bonus to which he was entitled under his collective agreement;

2. did not issue him T4 slips for the tax years covered by the settlement, but instead issued him T1198E forms;

3. did not pay him the correct amount of severance pay;

4. paid him out for his outstanding vacation leave credits and did not pay interest on the payout; and

5. did not assist him.

E. $4,000 bonus

[146] There is nothing in the MOA or DRF regarding the payment of a $4,000.00 bonus. In support of his position, the grievor provided to me Exhibit G-7, a PSAC-generated document from the Internet dated March 17, 2003, entitled "Everything you need to know about the Treasury Board agreements." This document refers to a lump sum payment for the EB and PA groups. The grievor was not a member of the EB or PA bargaining units. In cross-examination the grievor admitted that he did not think that he was entitled to the $4,000.00, because he was not in the EB or PA group, but rather in the GL-MAM group. In fact the MOA refers to the grievor as being in a MAM-08 position. Ms. Lahoud testified that the grievor was not entitled to the $4,000.00 bonus referred to in Exhibit G-7, since he was not in the EB or PA group, but in the GL group. As there is no evidence that the grievor is entitled to a $4,000.00 bonus and a $4,000.00 bonus is not referred to anywhere in the MOA or DRF, this allegation that the employer did not comply with the settlement fails.

F. Failure to issue T4 slips

[147] Ms. Lahoud also testified that a T4 slip is prepared for the tax year in which money is paid, even if it is retroactive salary. T1198E is the form that allocates those monies to the years to which they are retroactive. If a payment covers salary retroactive for a number of years, the employer will issue a T4 slip for the entire amount, for the year in which the monies are paid, and the employer will also issue a T1198E form, which specifies the years to which the total amount in the T4 is allocated.

[148] The MOA is silent with respect to the provision of T4 slips; however, the DRF specifically states at paragraph 4 that the employer shall provide to the grievor a T1198E form with respect to the settlement. There is no evidence that the T1198E form that the employer agreed to provide was not provided, and indeed there is evidence that it was provided. Exhibit E-12 is a copy of the T1198E form issued by

the employer and signed by Ms. Lahoud, who testified before me that she had issued Exhibit E-12 as part of her duties in corporate compensation for the employer. Exhibit G-9 is the letter provided to the grievor by H&R Block dated July 31, 2012, which refers to the T1198E form.

[149] Exhibit G-8 is a letter dated June 1, 2010, from counsel for the grievor to counsel for the respondent. Attached to that letter is a copy of the T4 slip issued to the grievor for the 2009 tax year.

[150] Since a T4 slip was issued and a T1198E form was issued for the portions of the settlement that were retroactive, and since the amounts in the T1198E form reflect the amounts at paragraph 4 of the DRF, the employer has complied with the settlement, and the allegation that the employer did not comply with the settlement on this point fails.

G. <u>Failure to pay correct severance for medical retirement</u>

[151] Paragraph 4 of the MOA provides that the grievor shall resign effective the close of business on March 31, 2009. This resignation is conditional on paragraph 5 of the MOA, which provides that, if the grievor applies for and is accepted for medical retirement, his resignation shall be declined. Paragraph 7 of the MOA provides that the employer shall pay the grievor, under the DRF, severance pay pursuant to Article 60 of the collective agreement. Neither the MOA nor the DRF specifies the amount of the severance pay.

[152] Exhibit E-6 is a letter from the grievor's former legal counsel dated November 6, 2008, which sets out the difference in amounts of severance if the grievor qualifies for medical retirement versus simple resignation. A medical retirement would effectively double the amount of severance compared to a resignation. Exhibit E-8 is another letter from the grievor's former legal counsel to the grievor dated December 30, 2008, which sets out specifically what the severance pay would be if the grievor resigns and what it would be if he qualifies for medical retirement.

[153] Many of the exhibits filed refer to the application for medical retirement. Paragraph 5 of the MOA refers to the employer "facilitating" the medical retirement. Exhibit E-6, the letter from the grievor's former legal counsel dated November 6, 2008, is chronologically the first document that refers to medical retirement versus

resignation. It is clear that this option was on the table and being contemplated some four and a half months before the MOA and DRF were signed. Exhibit E-5 is a letter dated April 15, 2009, from the grievor's former legal counsel to Dr. Scott. At the second full paragraph on the first page of that letter, point 3 states: "Initiation for medical retirement form. Again, I have highlighted the sections of the forms which require your input." The third paragraph of the first page of that letter then asks Dr. Scott to return the information to the grievor's former legal counsel. I was not provided with any evidence that this form was returned to the grievor's former legal counsel.

[154] Ms. Lahoud testified that she was the one who calculated the grievor's severance pay. She stated that it was calculated based on the article in the relevant collective agreement. She stated that if a person resigned, the person would receive an amount based on a calculation set out in the collective agreement; however, if the person took medical retirement, the amount was different. Ms. Lahoud testified that she provided the information and paperwork to facilitate a medical retirement to the grievor's former legal counsel. She also testified that she recalled having a conference call about that in which the grievor participated. She testified that she told the grievor to take a medical retirement, because it would generate a higher severance. Ms. Lahoud stated that she received calls from Health Canada advising her that it was missing documents from the grievor. She stated that in the end she understood that Health Canada closed its file, because it failed to receive a response from the grievor.

[155] From the evidence put before me it is clear that the employer did what was necessary to facilitate the medical retirement. There is no evidence that the employer has not fulfilled its obligation as set out at paragraph 5 of the MOA. The grievor has provided me with no evidence as to what he did regarding the medical retirement, let alone how the employer has failed to comply with this term of the settlement.

H. <u>Payout of vacation leave credits and failure to pay interest on vacation pay</u>

[156] The MOA is silent with respect to vacation leave credits; however, paragraph 2 of the DRF states, "On termination, all vacation credits earned but not used will be paid out at the applicable rate of pay."

[157] Neither the MOA nor the DRF refer to using vacation days to extend the grievor's length of service or paying interest on the monies paid for the vacation leave

credits. In addition, there was no evidence before me to suggest that the vacation leave credits that existed at the time of the MOA and DRF were not paid out or were paid out incorrectly.

[158] The evidence shows that the MOA and DRF have been fulfilled in this regard and therefore the allegation that the employer has failed to comply with the terms of the settlement in this regard fails.

I. Failure to assist

[159] Throughout the hearing, the grievor suggests that he was not receiving assistance. The testimony of the grievor was often contradictory and self-serving, and often merely bald assertions. He directed his comments towards the PSAC, various officers or employees of the PSAC, his former legal counsel, and the employer in general. He often stated that he did not understand the agreement. There is no evidence before me that leads me to believe that any of the parties mentioned in this paragraph failed to do what was necessary to facilitate the implementation of the MOA and DRF.

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

(The Order appears on the next page)

VI. Order

[161] For the reasons set out in this decision, the following documents placed into evidence shall be sealed:

Exhibit E-1 Memorandum of Agreement (MOA) dated March 23, 2009;

Exhibit E-2 Direction regarding funds (DRF) dated March 23, 2009;

Exhibit E-6 Letter dated November 6, 2008 from the grievor's former legal counsel to the grievor;

Exhibit E-7 Letter dated November 24, 2008 from the grievor's former legal counsel to the grievor;

Exhibit E-8 Letter dated December 30, 2008 from the grievor's former legal counsel to the grievor;

Exhibit E-12 Form T1198E dated May 13, 2009;

Exhibit E-13 Canada Revenue Agency Notice of Assessment of the grievor for the 2009 tax year;

Exhibit G-1 Direction regarding funds dated February 24, 2009;

Exhibit G-4 Direction regarding funds dated February 11, 2009;

Exhibit G-8 Letter dated June 1, 2010, from the grievor's legal counsel to counsel for the employer; and

Exhibit G-9 Letter dated July 31, 2012, from H&R Block to the grievor.

[162] The grievance is dismissed.

[163] The file shall be closed

August 11, 2014.

John G. Jaworski,
adjudicator