Date: 20150303

Files: 566-02-6428, 6429, 6667, 8272, 8273, 8791 and 9662

Citation: 2015 PSLREB 22

Public Service Labour Relations Act Before an adjudicator

BETWEEN

HARINDER JADWANI

Grievor

and

TREASURY BOARD
(Federal Economic Development Agency for Southern Ontario)

Employer

Indexed as
Jadwani v. Treasury Board (Federal Economic Development Agency for Southern Ontario)

In the matter of individual grievances referred to adjudication

Before: Augustus Richardson, adjudicator

For the Grievor: Ben Piper and Yu-Song Soh, counsel

For the Employer: Karen Clifford, counsel

Heard at Toronto, Ontario,
November 4 to 7, 2014.

I. Grievances referred to adjudication

[1] The grievances in these seven files gave rise to the following questions with respect to the nature and status of mediated settlement agreements between parties involved in grievances referable to adjudication under the *Public Service Labour Relations Act*:

a. whether the doctrine of repudiation applies to mediated settlement agreements and, if it does, under what circumstances it might be applied; and

b. whether an adjudicator may require parties to a mediated settlement to adhere to their respective obligations when one or both later decide to resile from those obligations or, perhaps to put it another way, to ignore or undo those obligations.

[2] On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365) was proclaimed into force (SI/2014-84), creating the Public Service Labour Relations and Employment Board ("the new Board") to replace the former Public Service Labour Relations Board ("the former Board") as well as the former Public Service Staffing Tribunal. On the same day, the consequential and transitional amendments contained in sections 366 to 466 of the *Economic Action Plan 2013 Act, No. 2* (S.C. 2013, c. 40) also came into force (SI/2014-84). Pursuant to section 396 of the *Economic Action Plan 2013 Act, No. 2*, an adjudicator seized of a grievance before November 1, 2014, continues to exercise the powers set out in the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*") as that Act read immediately before that day.

[3] Based on the facts and reasons that follow, my decision is as follows:

a. the doctrine of repudiation does not apply to such agreements or, if it does, was not applicable on the facts of this case;

b. the refusal by one party to a mediated settlement agreement to comply with his, her or its obligations under the agreement does not justify the attempt by the innocent party to then resile from or undo his, her or its obligations under that agreement; and

c. the parties to such an agreement may be required to carry out the terms they agreed to — or be treated as if they had — subject to a finding that the settlement agreement was void by reason of duress, misrepresentation or fraud, according to recognized legal principles.

II. Procedural background

[4] The questions, issues and facts arrived before me by way of a somewhat indirect route.

[5] On its face, the hearing as initially constituted was to deal with a total of seven grievances. They were assigned the following numbers by the former Board: 566-02-6428, 566-02-6429, 566-02-6667, 566-02-8272, 566-02-8273, 566-02-8791 and 566-02-9662. For the purposes of what follows, I will identify each grievance and file by the last four digits in each file number, prefixed by "Board File."

[6] All the grievances were filed as individual grievances under section 208 of the *Act*. In all of them, the grievor was represented by his bargaining agent, the Professional Institute of the Public Service of Canada (PIPSC or "the bargaining agent"). The bargaining agent and the ultimate employer (the Treasury Board) were parties to the collective agreement for the Audit, Commerce and Purchasing Group with an expiry date of June 21, 2011 ("the collective agreement"; Exhibit E14).

A. Reference to adjudication

[7] The bargaining agent referred all seven grievances to adjudication. By March 25, 2014, when it referred the last — in Board File 9662 — it suggested that it would take 10 days to hear all seven grievances (which it requested be heard together).

[8] In due course, a hearing was scheduled for four days in Toronto from November 4 to 7, 2014.

B. Initial review by the adjudicator

[9] On October 7, 2014, counsel for the employer sent correspondence to the former Board seeking several orders, including the dismissal of some of the grievances without a hearing as well as particulars with respect to other grievances.

[10] On October 16, 2014, counsel for the grievor, retained by and on behalf of the bargaining agent, responded, opposing the requests of counsel for the employer.

[11] At that point, I reviewed the seven Board files. I took note of references in them that suggested the following:

a. that the grievances in Board Files 6428, 6429 and 6667 had apparently been the subject of a mediated settlement agreement between the employer, the bargaining agent and the grievor, which was executed on May 24, 2012;

b. that the employer appeared at least initially to have performed some of its obligations under the agreement;

c. that, however, the grievor apparently had refused to comply with his obligations under the agreement on the grounds in part that it resulted from coercion, misrepresentation and duress;

d. that that then led the employer to treat the agreement as void and to seek the recovery of the benefits it had paid under it; and

e. that that apparently then led the grievor to file four more grievances, Board Files 8272, 8273, 8791 and 9662.

[12] On the basis of those observations, in a letter dated October 27, 2014, I advised counsel that the seven files appeared to raise the following issues or questions:

a. Was a mediated settlement agreement reached on or about May 24, 2012?

b. If so, what were its terms?

c. If the grievor's position was that the settlement agreement was not binding according to its terms, what evidence is there to vitiate the settlement agreement?

d. If the settlement agreement was binding (that is, if it was not vitiated), did the grievor or the employer comply with its terms?

e. If not, why not?

f. Do the grievances referenced in Board Files 8791 and 9662 relate to or flow from the failure of one of the parties to abide by the terms of the mediated settlement agreement (assuming it is upheld as binding)?

[13] Given that view, I did not propose to hear evidence relating to the substance of the grievances in Board Files 6428, 6429 and 6667 at this stage in the proceedings. I advised counsel that instead, at the hearing scheduled for November 4 to 7, 2014, I wanted to hear evidence about the following:

a. Was a mediated settlement agreement reached, and, if so, what were its terms?

b. If a settlement agreement was reached, should it be set aside for any reason?

c. If the settlement should not be set aside, did the grievances in Board Files 8791 and 9662 flow from the failure of either the grievor or the employer or both to uphold or abide by the settlement agreement terms?

[14] I further advised counsel that if the settlement agreement was set aside for some reason, then the grievances in Board Files 6428, 6429 and 6667 could be heard at a later time.

III. The hearing and the evidence

[15] On behalf of the employer, I heard the evidence of the following persons:

a. Clair Gartley, now retired, but at all material times Vice-President, Federal Economic Development Agency for Southern Ontario ("FedDev"), and

b. Jodi Wilks, who at all material times was Manager, Human Resources, FedDev.

[16] On behalf of the grievor, I heard his evidence alone.

[17] Most of the testimony simply mirrored the large volume of correspondence — predominately email — between the parties, including, but not limited to, the three witnesses.

[18] The other important person involved in many of these Board files was Maeve Sullivan, a labour relations officer with the bargaining agent. She did not testify at the hearing. However, she represented the grievor's interests throughout the relevant period. She attended the May 2012 mediation meetings with him. A fair amount of the email correspondence that came into evidence included correspondence from or to her. There was no contest as to its admissibility or to my ability to accept it. Given that, I decided to rely primarily on the written correspondence between and among the parties, supplemented where material by the three witnesses' testimonies.

A. <u>The parties' opening positions</u>

[19] In her opening submissions, counsel for the employer submitted the following:

a. that the grievances in Board Files 6428, 6429 and 6667 had been settled by the mediated settlement agreement; and

b. that had the grievor complied with his side of the bargain, the events recounted in Board Files 8272, 8273, 8791 and 9662 would not have happened and hence would not have resulted in those later grievances being filed.

[20] On that basis, counsel for the employer submitted that all seven grievances ought to be dismissed.

[21] In his opening submissions, counsel for the grievor submitted that his position was that the settlement agreement was either void by reason of duress or misrepresentation, or had been repudiated by the grievor and that the employer had accepted and acted on that repudiation.

[22] In either event, counsel for the grievor submitted that the settlement agreement was no longer in effect, meaning that all seven grievances were live and could be heard.

[23] I should note that despite his opening submissions, counsel for the grievor prefaced his cross-examination of Mr. Gartley with the statement that he was abandoning the argument that the settlement agreement was void by reason of duress or misrepresentation. (Counsel for the grievor later confirmed his position in his final

submissions). However, he was maintaining his position that the employer had accepted the grievor's subsequent repudiation of the agreement.

B. The facts

[24] Before getting into the evidence before me, it is necessary to provide some context, based in essence on the history recounted in decisions by the former Board's predecessor and in Ontario courts concerning earlier disputes between the grievor and his employer (*Jadwani v. Treasury Board (Industry, Science and Technology Canada)*, PSSRB File Nos. 166-02-23622, 23623 and 24104 (19940923), and *Jadwani v. Canada (Attorney General)*, 2000 CanLII 22333 (ON SC) [upheld in 2001 CanLII 24157 (ON CA)]), on the contents of the former Board's files in respect of the seven grievances and on the testimonies of the witnesses before me at the hearing.

[25] In the late 2000s, the grievor was working out of the FedDev's Toronto office. Some years before, as a result of tensions between him and his co-workers in the Toronto office, and his stress associated with those tensions, the grievor had been accommodated by being allowed to work from home. (The FedDev's main office was in Kitchener, Ontario.) At that time, he was a CO-02 group and level development officer. He has a B.A. and an MBA. His job included assessing contracts — sometimes complex — for infrastructure development projects. That was his work arrangement in early 2011.

1. Board File 6428

[26] In or about March 2011, the employer notified the grievor that it was proposing to alter that work arrangement. That intention was apparently set out in a letter dated March 23, 2011, which the grievor received on May 17. On May 19, he grieved the employer's letter, as follows:

> *… in particular, and without limiting the generality of the foregoing, I grieve the Employer's stated intention to consider altering my disability accommodation plan–a plan that has been in place for many years–when there has been no improvement in my medical condition, and when the medical documentation continues to support the existing arrangement.*

[27] The grievor sought the rescission of the letter and ". . . any other remedy necessary to make [him] whole."

2. Board File 6429

[28] A day or two after receiving that letter, the grievor received two other letters from the employer, dated March 28 and March 29, 2011. On May 19, he grieved these two letters as well, characterizing them as a reprimand by the employer, as follows:

> *I grieve the written reprimand imposed upon me by letters dated March 28 & March 29, 2011. The reprimand is an element of management's attempt to disrupt and undermine my ability to work with a sense of security regarding my medical accommodation.*

[29] The grievor sought the rescission of the letters and any other remedy necessary to make him whole.

[30] The next year, on January 11, 2012 (that is, after the grievance had proceeded through the grievance stages), the grievor gave notice to the Canadian Human Rights Commission (CHRC) that the letters constituted ". . . a veiled means by which the employer harassed and discriminated against the grievor violating his human rights." By way of remedy, he sought the rescission of the letters, an order that the employer cease and desist from any further violations of the *Canadian Human Rights Act* (R.S.C, 1985, c. H-6; *CHRA*), and an order that the employer ". . . pay to the grievor compensation, including pain and suffering compensation, as provided for in section 53 of the *Canadian Human Rights Act*."

3. Board File 6667

[31] It appears that on or about November 10, 2011, the employer notified the grievor that (at least from his point of view) it was going to alter the accommodation under which he was working. On November 28, 2011, the grievor filed the following grievance:

> *I grieve that the Employer has discriminated against me on the basis of my disability and has breached its duty of accommodation to me. I rely on section 43.01 of the Collective Agreement as well as the relevant provisions of the* Canadian Human Rights Act *including sections 7, 10, 14 and*

> *any other relevant or related provisions. In particular and without limiting the generality of the foregoing I grieve the Employer's letter to me dated November 10, 2011. This is a continuing grievance.*
>
> [Emphasis in the original]

[32] By way of remedy, the grievor sought rescission of the letter and the following:

> *… compensation for absences from work due to illness resulting from the Employer's letter dated November 10, 2011 including absences caused by shock, mental distress, anxiety, physical inability to attend at the Employer's premises and/or any other illness or injury or inability to work resulting from the Employer's action and/or inaction.*

[33] The grievor also sought ". . . any other remedy necessary to make [him] whole including remedies available under the collective agreement, *CHRA*, and any available tort remedies."

[34] The employer's letter was apparently later revoked, but in his Form 24 notice to the CHRC, filed February 27, 2012, the grievor took the position that ". . . the actions taken by the employer nevertheless amount to harassment & discrimination . . . on the basis of disability."

[35] By January 2012, the three grievances described so far had reached the former Board for adjudication. I should also note that the grievor was not working or that at least the employer had considered him on sick leave. He had used up most if not all his sick leave and vacation credits. He had also used up the sick leave credits that had been advanced to him under the terms of clause 16.05 of the collective agreement, which gave the employer the discretion to advance unearned sick leave (up to a total of 187.5 hours) to an employee on the condition that it be earned back when the employee returned to work (or deducted from any monies owed to the employee on termination or retirement). With his sick leave, sick leave advances and vacation credits running out, the employer decided to place the grievor on sick leave without pay as of March 22, 2012 (Exhibit E59).

[36] On January 17, 2012, the former Board advised the bargaining agent and the employer that it intended to hear Board Files 6428 and 6429 together. It also advised that it would proceed to set up a mediation unless one of the parties refused to agree.

There was no objection, and on March 12, 2012, the former Board advised the parties that Tom Clairmont had been appointed as mediator for Board Files 6428 and 6429 (Exhibit E18).

[37] The next day, March 13, 2012, Ms. Sullivan emailed Ms. Wilks, copying Mr. Clairmont. She pointed out that at that point, in fact, three grievances were before the former Board, Board Files 6428, 6429 and 6667, and that it was ". . . our preference to mediate the three grievances at once so as to bring a full and final resolution to the disputes between the employer and the grievor" (Exhibit E19). The email was not copied to Mr. Jadwani, and in his testimony, he professed to be unaware of it. That might have been true, but I am satisfied that — and Mr. Jadwani agreed — when the parties met with the mediator in May 2012, all three grievances were addressed as part of the discussions.

a. <u>The mediation</u>

[38] The mediation took place in a hotel in Brampton, Ontario. Several small boardrooms were at the parties' disposal so that they could consult privately among themselves as well as with the mediator.

[39] The first day of the mediation with Mr. Clairmont took place on May 22, 2012. On that day, Mr. Clairmont met with the grievor's team in the morning and with the employer's team in the afternoon to explain the mediation process and to obtain some idea of their respective positions (pre-mediation). The mediation proper then took place on May 23 and 24.

[40] On May 23, the grievor, Ms. Sullivan (on behalf of the bargaining agent), and Mr. Gartley and Ms. Wilks (on behalf of the FedDev) signed an agreement to mediate (Exhibit E2). It included the following relevant terms:

> *The parties agree that the mediator is a neutral facilitator who will assist the parties to reach their own settlement. Further, the mediator has no duty to assert or protect the legal rights of any party, to raise any issue not raised by the parties themselves or to determine who should participate in the mediation.*
>
> *The parties and/or their representatives attending the mediation will have the authority to reach a settlement in the*

> *matter, or will have the means to readily and rapidly obtain that authority.*
>
> *It is recognized that the mediation process is voluntary, and may be terminated by the mediator or the parties at any time.*
>
> *It is agreed that when a settlement is reached there will be a written memorandum of settlement, which will be signed by the parties forthwith.*

[41] It is important to also emphasize at the outset that mediation is a confidential process. The Agreement to Mediate contains a number of clauses that protect the confidentiality of the mediation process, and any terms of settlement that may arise from the mediation. As will be seen in this case, the parties consented to the disclosure of the terms of settlement for the purposes of this hearing.

[42] Each side presented its respective position concerning the matters raised in the three grievances. Mr. Jadwani testified that he gave a detailed statement, which lasted roughly two hours, setting out the history of his relationship with the employer going back to the 1990s. He wanted Mr. Gartley, who was new to the FedDev, to have a complete understanding of that history since it underpinned his demands for compensation for damages for pain and suffering, lost future wages (by reason of his alleged total disability), harassment, and discrimination. He explained that management had inflicted them on him over the years leading up to the three most recent grievances. (Some of this history is detailed in *Jadwani v. Treasury Board (Industry, Science and Technology Canada)*). Ms. Sullivan also made a presentation. According to Mr. Jadwani, the employer's response was relatively brief and amounted to not much more than a denial that it had done anything wrong.

[43] At some point in the two days that followed, Ms. Wilks and Mr. Gartley presented proposed terms of settlement. Mr. Jadwani and his representative met and discussed the terms in caucus (that is, privately). Ms. Sullivan proposed some changes to the wording (Exhibit E21), which Ms. Wilks and Mr. Gartley incorporated into the draft terms, producing what in the end was the final agreement that the parties signed on May 24, 2012 (Exhibit E3).

b. The settlement agreement

[44] The settlement agreement was typed. It was expressed as being between the grievor, the bargaining agent and the FedDev. The grievor signed on his own behalf, Ms. Sullivan signed on behalf of the bargaining agent, and Mr. Gartley and Ms. Wilks signed on behalf of the FedDev (described as "the employer"; Exhibit E3).

[45] The preamble to the settlement agreement stated as follows (Exhibit E3):

> … [the parties] *have made the decision to use mediation to resolve the grievances submitted by Harinder Jadwani (PSLRB files 566-02-6428, 566-02-6429 and 566-02-6667). The parties acknowledge that all aspects of this matter have been resolved to their satisfaction as per the terms below.*

[46] Each party committed to do certain things.

[47] The employer committed to the following:

a. to put the grievor on-strength with pay, retroactive to March 22, 2012, to such date that an "alternation" (explained in the next section of these reasons) was offered;

b. the alternation would be in accordance with clause 6.2 of Appendix C to the collective agreement, "Workforce Adjustment" (WFA), and was to result in the following:

   i. a "Transition Support Measure" ("TSM") payment to the grievor equivalent to 52 weeks' pay; and

   ii. a severance entitlement as per clause 19.01 of the collective agreement, estimated at 29.5 weeks, and entitlement under the layoff provisions, as per clause 6.3.1(b) of the WFA;

c. to credit the grievor all annual leave he took from January 25 to March 14, 2012, in the amount of 270 hours, the one-time vacation leave entitlement from March 15 to 21, 2012, in the amount of 37.5 hours, and the advanced sick leave taken from December 16, 2011, to January 24, 2012

(the last of which would absolve his existing debt to the Crown of 187.5 hours);

d. to pay the grievor salary retroactively from March 22, 2012, to such time as the alternation became effective; and

e. to pay the grievor on his separation from the public service under the alternation an amount equal to the annual leave and vacation leave credits mentioned in the preceding points (Exhibit E3, clauses 1 to 6).

[48] The grievor committed to the following:

a. to withdraw the three grievances;

b. to release the employer ". . . from all complaints, grievances, requests or other recourse arising from this dispute"; and

c. to accept the alternation offer the employer had committed to effect, ". . . including providing his irrevocable resignation from the federal public service" (Exhibit E3, clauses 7 to 9).

[49] Finally, the bargaining agent agreed to formally withdraw the three grievances before the former Board (Exhibit E3, clause 10).

[50] All three parties then agreed to the following:

a. that the settlement agreement ". . . constitutes a full and final settlement of the specific issues and conditions associated with the above grievances of Mr. Jadwani and does not constitute a precedent";

b. that they had had ". . . an opportunity to review this settlement without duress and understand the terms contained therein and are freely entering into these terms of settlement"; and

c. that an attached addendum represented an estimate of the values of the monies referred to in the settlement agreement (Exhibit E3, clauses 12 to 14).

[51] To help in understanding the settlement agreement, it is necessary to provide information about the budget cuts of 2012 and to have a general understanding of the alternation system under the Work Force Adjustment (WFA) of the collective agreement.

4. Workforce reductions and alternation

[52] Ms. Wilks testified that as a result of the deficit reduction action plan announced for the 2012 budget year, significant workforce adjustment (that is, downsizing) had to be planned and put into effect. Individual departments had to determine which staff to retain and which to lay off. One particular option provided for under the terms of the WFA was known as alternation. In essence, the process involved two employees switching positions, each in different departments of the employer, one subject to layoff and one not. It worked as follows.

[53] To retire with full pension benefits, an employee needed to be aged 55 to 59 and needed to have 30 years of service. Employees who retired before the age of 55 without 30 years of service were penalized by way of a reduction of 5% for each year under the age of 55 or for each year less than 30 years of service. (The grievor would have been subject to the penalty had he retired at that time).

[54] However, employees subject to a WFA situation could receive a waiver of that penalty. An employee in Department "B" (whom I shall call "B") had reached the point at which he or she could take early retirement, albeit with a penalty. An employee in Department "C" (whom I shall call "C") with roughly the same vintage and skill set was selected for layoff under the WFA. As part of the layoff process, C was entitled to certain income and severance benefits (including, if he or she met the required conditions, the pension penalty waiver) that employees who left their employment voluntarily (rather than as a result of the workforce reduction) would not otherwise obtain. Under an alternation (and assuming both B and C agreed), Department C could make an offer (called a "Letter of Offer" or "LOO") to B to assume C's position. C would then transfer to and assume B's position in Department B. B, on the other hand, would transfer under the LOO to Department C, step into C's shoes and thus be able to retire with the enhanced benefits available to an employee laid off under the program.

[55] The alternation process could be initiated only by an employee who had been told that he or she was subject to layoff under WFA. Once informed of the layoff, he or she had 120 days either to take advantage of the alternation process or to accept the benefits available to him or her under the layoff. These benefits included a TSM and, under one option, educational support to assist them in obtaining new employment elsewhere. The 120-day period applied regardless of which option he or she chose.

[56] The advantages of the alternation process to all parties — the departments and the employees — were these. Making the LOO to B cost Department C no more than what it would otherwise have to pay to the employee (C) who had been selected for layoff. Department B retained its own workforce level (albeit with a different employee). And B was able to retire (from Department C after the transfer took effect) with full pension and other benefits sooner than would otherwise have been the case.

[57] Ms. Wilks testified that the alternation option had generated quite a bit of interest on the part of employees, both those who had been identified for reduction and those in a position to consider early retirement. A website had been set up to enable identifying employees in either category who were interested in participating in the alternation process.

[58] I note that the alternation process, and the consequent benefit to an employee in the grievor's position of being able to obtain better benefits on early retirement than would otherwise be available to him or her, was provided for under the WFA of the collective agreement. To that extent, the provisions in the settlement agreement of May 24, 2012, did not create any new obligations on the employer. However, it remained that the employee had to trigger the alternation process by agreeing to participate in it. Had the grievor not consented in the settlement agreement to participate, it would not have happened. As well, and in any event, nothing in the collective agreement obligated the employer to pay retroactive salary to — and then to continue to pay it until alternation — an employee who was not working and who had exhausted all sick and vacation leave, or who had used up all advanced sick leave. Only the settlement agreement gave the grievor that benefit.

5. Events subsequent to the May 24, 2012, settlement agreement

[59] On May 25, 2012, the former Board emailed Ms. Sullivan, stating that it had been informed that a settlement agreement had been reached with respect to Board Files 6428, 6429 and 6667. It noted its understanding that it was ". . . the responsibility of the bargaining agent to inform the [former] Board when the terms of the settlement have been finalized and to withdraw the grievances at that time in order that [it] may close the files" (Exhibit E34).

[60] On May 28, 2012, Ms. Wilks forwarded to the FedDev compensation branch the terms of the settlement agreement relating to putting the grievor back on salary as well as to the retroactive pay owed him from March 22, 2012 (Exhibit E22, page 3). She was advised that Mr. Jadwani was to receive his first payment on June 13 (Exhibit E22).

[61] On June 1, 2012, the compensation branch advised Ms. Wilks that on June 13 the grievor should expect the first direct deposit of his salary under the settlement agreement (Exhibit E22).

[62] On June 7, 2012, Ms. Wilks advised Ms. Sullivan of the status of the employer's obligations under the settlement agreement. She noted that Mr. Jadwani had been taken back on strength and that he should expect the payment of his arrears from March 22 around June 20. She also noted that interviews to find an alternate for the alternation were taking place (Exhibit E23).

[63] The grievor's first direct deposit did in fact take place on June 13. I make that finding because on June 15, 2012, Mr. Jadwani emailed Ms. Sullivan, stating that he had received a payment earlier that week and his pay stub on that day. He noted that the stub erroneously recorded his annual pay rate at a lower rate. He asked Ms. Sullivan to ask Ms. Wilks why that discrepancy occurred (Exhibit E25). He raised no complaint or concern about the settlement agreement at that time.

[64] Ms. Sullivan forwarded the query to Ms. Wilks, who advised the compensation branch of the error on June 18 (Exhibit E25). The compensation branch advised her on June 25 that the correction had been made. Ms. Wilks forwarded that message to Ms. Sullivan, who in turn advised on June 25 that she would forward the message to Mr. Jadwani (Exhibit E25).

[65] On July 23, 2012, Mr. Jadwani emailed Mr. Gartley, copying Ms. Wilks and Ms. Sullivan. He stated that the weeks since the execution of the mediated settlement agreement had been stressful for him. He went on as follows (Exhibit E4):

> *I have reviewed the matter carefully over and over again, and cannot resist the conclusion that the agreement was unfair to me and induced under duress. The employer was aware I was sick and had been without pay for 2 months, and the 3-day mediation format did not allow much time for a satisfactory discussion of the issues. At not [sic] time was I offered an adjournment to reflect on the offer, and the mediator's objective was to essentially force an agreement in the time allotted, knowing that without one I was in severe financial and medical distress.*

[66] Mr. Jadwani went on to complain that much of the severance and pension entitlements referenced in the mediated settlement agreement were in any event already statutory entitlements. In his testimony, he explained that without the agreement, he would have been entitled to roughly 50% of his pension, so that the 56% offered under the agreement was not much of a change. Similarly, by statute, he would have received 28 weeks rather than the 29 weeks provided for in the agreement. The fact then that they were offered ". . . as part of the employer's 'final offer,' instead of the statutory entitlements they are . . . [while perhaps it might] not have intended it, but this was a misrepresentation" (Exhibit E4). He went on to ask whether Mr. Gartley would consider agreeing to one of the following (Exhibit E4):

> *1. Alteration of the agreement to include compensation for the damage inflicted on me along the lines discussed at the mediation. Agency officials set out to destroy the accommodation and end up destroying the employment relationship and converting a partial disability into a total one. I have a medical report from a specialist, which confirms this and recommends I stay away from what he calls a 'toxic work environment,' even under accommodation.*
>
> *2. Agreement to have the mediated deal struck and have the matters proceed to adjudication. If you truly believe your officials 'did nothing wrong' you should not object to this option. Obviously under this route you might be entitled to a reimbursement of the paid leave you have given me since March 23, especially if the PSLRB agrees with your position.*

[67] Mr. Gartley responded on July 26. He noted that the employer had been working under the terms of the mediated settlement agreement to give effect to the alternation provisions and that it had identified a suitable candidate. He added that the employer had been proceeding in good faith to comply with its obligations under the agreement (Exhibit E4).

[68] Mr. Jadwani replied to Mr. Gartley on July 27, copying Ms. Sullivan, J. Harvey, another bargaining agent representative, and Ms. Wilks. I have set out the email in its entirety as follows (Exhibit E4):

> *It is not difficult for the employer to act in good faith to implement an agreement that was obtained by unfair advantage and one that overwhelmingly favours the employer's interests while doing little to make the employee 'whole.'*
>
> *A truer test of 'good faith' is the employer's actions leading into the mediation, which were characterized more by illegality, deceit and coercion.*
>
> *As I informed you in my earlier message, the mediated deal was invalidated by duress, and the procedure itself was severely flawed. You yourself were not much interested in discussing the issues, and the time available did not allow it either.*
>
> *You will note that I have offered two ways to correct this situation. The signed agreement can be salvaged by alteration. Alternatively it can be set aside in a way that restores to the employer any benefits given me under it– basically the paid leave since March 23.*
>
> *I am hoping we can agree to proceed along one of these lines. Failing that I would have no choice but to seek legal avenues to have this agreement struck.*

[69] Ms. Wilks testified at length as to the steps she took to find and interview suitable prospects for alternation with the grievor from June 2012 forward. It proved difficult to find someone who fit the CO-02 job description. One suitable candidate at Aboriginal Affairs and Northern Development Canada ("AANDC") was identified in the summer of 2012.

[70] On August 1, 2012, Ms. Wilks emailed Ms. Sullivan, copying Mr. Gartley. She advised of the progress that had been made to date with respect to the alternation and

that pursuant to the settlement agreement, Mr. Jadwani had been put back on-strength (that is, back on pay). She added that while the employer was aware that Mr. Jadwani ". . . has indicated he will not proceed with the alternation, the arrangements shad [*sic*] already been started with AANDC to declare the alternating employee surplus, and the Agency [FedDev] intends to proceed in good faith with both parties" (Exhibit E5).

[71] On September 4, 2012, Ms. Wilks emailed Ms. Sullivan. Ms. Wilks testified that Ms. Sullivan had been out of the country on vacation for a few weeks and that she wanted to update Ms. Sullivan on the status of her search for an alternation. In her email, she noted that they were still working with the AANDC with respect to the candidate identified at that point. She hoped to have more concrete information as the week progressed. She also noted as follows (Exhibit E29):

> *I have not been in direct contact with Mr Jadwani regarding the progress on this file, and wanted to confirm my understanding that you are keeping him abreast of the employer's intentions to proceed with offering him the alternation as agreed in the mediation settlement.*

[72] On September 5, 2012, Ms. Sullivan responded to Ms. Wilks as follows (Exhibit E29):

> *I haven't communicated with Harinder* [Jadwani] *on this particular matter since he and I received Clair* [Gartley's] *email. I believe Clair was very clear in his email that the employer intends on proceeding with the offer of the alternation regardless of Harinder's current view of the settlement.*
>
> *Subsequent to Clair's email, I have not had any instructions from Harinder to request that you stop pursuing the alternation. I've forwarded to Harinder the email below* [being Ms. Wilks' email to her of September 4] *so that he can be apprised of the continued work you are doing in this regard.*

[73] Mr. Jadwani did receive the September 4 email that Ms. Sullivan forwarded to him. On September 5, he responded, copying Ms. Wilks, Mr. Gartley and another bargaining agent representative (Exhibit E30). I have set out the entirety of that response as follows (Exhibit E30):

> *The employer is pretending not to have received my communications in which I informed them I would be*

> *challenging the mediated agreement as invalid, having been induced under duress by an employer who illegally undermined and destroyed accommodation required by law.*
>
> *I am of course committed to defying illegality in all forms.*
>
> *I intend to resist this alternation process and in any event am committed to have this matter referred to adjudication or other legal recourse.*

[74] The former Board's files reveal that on September 24, 2012, it wrote to Ms. Sullivan. It noted that more than four months had passed since it had been advised of a settlement agreement for Board Files 6428, 6429 and 6667. It asked for an update by October 8, 2012.

[75] On October 1, 2012, Ms. Sullivan emailed the former Board with respect to its earlier email of May 25 and follow-up note of September 24. Her response, which was copied to Mr. Jadwani and Mr. Clairmont, was as follows (Exhibit E34):

> *Pursuant to the settlement between the parties, the grievances will be withdrawn once the employer has carried out its obligations as set out in the settlement document. The obligations have not yet been fulfilled. It is my understanding that the employer is diligently and vigorously endeavouring to accomplish its obligations in as expedited a manner as possible.*

[76] Mr. Jadwani did not put anything in the record as to a response, if any, he made to that email. He did testify that at some point in the fall of 2012 he emailed the former Board, stating that he was not happy with the settlement agreement and that he wanted to challenge it. According to him, the former Board responded that it could act only on correspondence from a grievor's bargaining agent. Mr. Jadwani did not testify as to what if anything he instructed or asked Ms. Sullivan, or his bargaining agent in general, to do.

[77] The alternation process continued apace. Ms. Wilks testified that the candidate they had identified in the summer subsequently changed his or her mind. Ms. Wilks then identified another AANDC employee who was suitable and who was interested in alternation. By mid-October, it appeared to Ms. Wilks that this person was eager to follow through and that the AANDC was prepared to issue a LOO to the grievor so that the alternation could be completed (Exhibit E36). She continued to press the AANDC

administration to move as quickly as it could to obtain authorization for and to issue the LOO by early November (Exhibits E36, E37 and E38).

[78] On November 6, 2012, Ms. Wilks emailed Ms. Sullivan to advise of the status of the alternation arrangements. She advised that they had located a person at the AANDC who wanted to participate in the alternation program and that the AANDC was preparing to issue a LOO to the grievor, to give effect to the alternation (Exhibit E40). Her expectation was that the LOO would be signed by November 19, that she and the grievor would meet on November 21 to obtain his signature on the LOO, that he would be officially deployed to the AANDC on November 26 (although he would not be required to actually report there), and that his ". . . irrevocable resignation/retirement date [was] Friday, November 30, 2012" (Exhibit E40). She also noted that she had asked the compensation branch whether it was possible to hold off on the TSM and severance payments until the new year because the grievor had earlier expressed ". . . some concerns with the increased tax burden if the payments were to be made in this tax year" (Exhibit E40). Ms. Sullivan thanked her for the information (Exhibit E40).

[79] On November 7, Ms. Wilks emailed Mr. Jadwani to provide him with an update on the alternation. She advised him that she expected to receive the LOO from the AANDC on or about November 19 and that she hoped to meet with him on or about November 21 to have him sign the LOO (Exhibit E6).

[80] Mr. Jadwani responded on the same day, copying Mr. Gartley and the bargaining agent. He noted that he had already informed Mr. Gartley that ". . . the mediated settlement is invalid, as it is based on patent fraud and misrepresentation" (Exhibit E6). He added the following (Exhibit E6):

> *I am currently examining all legal options including human rights complaints as well as public disclosure.*
>
> *I am not sure if I will comply with the alternation, or if I do, it will be without prejudice to any further actions I bring.*

[81] Both Ms. Wilks and Mr. Gartley testified (and I accept) that at that stage, they felt that they had no option but to continue with the process they had committed to under the settlement agreement. The grievor had not emphatically stated he would not proceed, and they hoped that he would eventually proceed as he had agreed.

[82] On November 19, Ms. Wilks emailed the grievor a copy of the AANDC's LOO. She stated as follows (Exhibit E44):

> *Delivery of these items concludes FedDev Ontario's obligations as outlined in the Terms of Settlement from our mediated agreement signed in Mississauga on May 24, 2012.*
>
> *In order to activate the alternation, you must sign the letter of offer on the last page and select 'I accept this offer and related terms and conditions of employment'.*

[83] Ms. Wilks also advised the grievor that to facilitate the process, a meeting room had been booked at a hotel in Brampton and that she would be there from 11:00 to noon so that he could sign the required documents (Exhibit E44). On November 20, Ms. Wilks emailed a copy of that email to Ms. Sullivan, further to a voice mail that she had left for her (Exhibit E44).

6. <u>The events of November 21 and 22, 2012</u>

[84] On November 21, 2012, at 10:59, Ms. Wilks emailed the grievor to confirm that she was at the hotel in Brampton, awaiting his arrival and his signature on the necessary documents (Exhibit E45).

[85] On November 21, 2012, at 13:19, Mr. Gartley emailed the grievor. He noted the meeting that was planned and hoped that the grievor would attend. He added as follows: ". . . [it is] critical to move forward. Otherwise we will be forced to take you off strength" (Exhibit E7). On the same day, Mr. Gartley received a voice mail from Ms. Wilks, in which she stated that she was at the meeting place but that the grievor had not shown up. He urged her to stay there in the hope that the grievor would still show up, adding that "[i]f not, he missed a great opportunity" (Exhibit E7).

[86] Later that same day, the grievor responded to Mr. Gartley, copying the bargaining agent. He stated in part as follows (Exhibit E8):

> *I have sent you several messages informing you the mediated settlement is a fraud, and one in which you participated. Your officials including your counterpart Jeffrey Moore* [that is, Mr Gartley's predecessor] *inflicted severe and disabling injury on me with their actions and you took advantage at mediation, by misinforming me that the pension and severance payment were part of the employer's*

> *final offer, when in fact they belonged to me by statute. As well as by taking advantage of my financial and medical duress, as you had no interest in discussing any of the issues.*
>
> *Unless you are willing to negotiate, I am not likely to comply with the alternation.*
>
> ***I do ask, in view of your threat to strike me off-strength, that I be sent papers allowing me to retire and receive the pension and severance payments that is** [sic] **mine by statute. I ask that this be done as soon as possible.***
>
> *As for the dispute between us unless we can resolve it by re-negotiation, will be addressed one way or another–via human rights complaints, public disclosures, or the grievance process.*
>
> *I am not well. I have been particularly distressed since the mediation and the fraudulent misrepresentation that was perpetrated on me.*
>
> [Emphasis in the original]

[87] Mr. Gartley responded at 14:58 the same day, copying the bargaining agent. He urged the grievor to speak to him, since "the options we are providing you are much more generous" (Exhibit E8). He testified at the hearing that he meant that the alternation under the settlement agreement provided better retirement benefits than those available to the grievor if he simply retired.

[88] The grievor responded a few minutes later (copying the bargaining agent), at 15:03. He complained that Mr. Gartley had not made any attempt to discuss his earlier requests to reopen negotiations and concluded as follows (Exhibit E9):

> *… This is my last message to you today. If you seriously wish to discuss, instead of simply ignoring my pleas and continuing to attempt to force the fraudulent agreement down my throat–we can arrange a meeting in the next few days, when I am feeling better.*

[89] Shortly before that email was sent, Ms. Sullivan emailed Ms. Wilks at 15:00, copying Mr. Gartley, stating that she had received an email from the grievor ". . . in which he requested [her] to request the employer to extend the deadline for alternation so that he can obtain further information before alternating" (Exhibit E10).

[90] At 15:05, Mr. Gartley asked Ms. Wilks to ask Ms. Sullivan how much of an extension the grievor was seeking (Exhibit E11). Ms. Sullivan was told that the best the employer could do was extend it to midnight, November 22, because of the following: ". . . due to the fact that we have another PIPSC employee who will soon be surplus and that we cannot keep this individual hanging" (Exhibit E11).

[91] At 15:12, Mr. Gartley emailed the grievor, copying the bargaining agent, in response to his email of 15:03. He stated as follows (Exhibit E9):

> *We have already mediated and made an agreement that I expect us both to live up to.*
>
> *We are making you a significant offer of retirement plus one years [sic] salary as per our mediated agreement.*
>
> *We have been working hard to put this in place.*
>
> *Either you accept now or unfortunately this will be withdrawn and you will be off strength. You have until midnite [sic] tomorrow, Thurs Nov 22 to accept.*
>
> *I am extremely disappointed that our three days working this out for you is not being accepted. We shook hands as gentlemen on this and it hurts me to think it is not acceptable to you now.*
>
> *I worry about you as there is definitely no better deal to be had.*

[92] The grievor's response at 15:15 was curt, as follows (Exhibit E9):

> *Then I reject it.*
>
> *It hurts you? Really? Clearly my disability and distress are of no consequence to you.*

[93] Despite that response, Mr. Gartley responded at 15:21, stating that he had asked Ms. Wilks to send the grievor ". . . some calculations that should help [him] understand the benefits of our mediated settlement" (Exhibit E9).

[94] At 15:52 on November 21, 2012, Ms. Wilks emailed the grievor, copying Ms. Sullivan, some rough calculations as to the relative merits of retirement under the settlement agreement as opposed to retirement outside of it (Exhibit E12). They were as follows:

UNDER THE SETTLEMENT	***OUTSIDE OF THE SETTLEMENT***
Pension Rate: 57%	*Pension Rate: 50%*
Annual Leave to be Cashed Out: 270 hrs = $12,846.60	*Annual Leave to be Cashed out: 0 hrs (already used) = $0.00*
Vacation Credit: 37.5 hrs = $1,784.25	*Vacation Credit: 0 hrs (already used) = $0.00*
Severance: 29 weeks = $51,743.25	*Severance: 29 weeks = $51,743.25*
Debt to the Crown: $0.00	*Debt to the Crown: for retroactive and ongoing pay, March 22, 2012 to November 21st ($62,448.75) plus advanced sick leave of 187.5 hrs ($8,972.25) = $71,421.00*
	Balance Due to Crown on retirement (after severance offset of $51,743.25) = $19,677.75

[95] On November 22, 2012 at 10:18, Ms. Wilks emailed the grievor to correct a few errors that she had noticed in her email of the day before, in which she had compared the differences between retiring within and outside the settlement agreement. However, the overall picture did not change.

[96] The grievor responded to that email at 13:31 as follows (Exhibit G15):

> *I acknowledge this and other emails from you and the VP of yesterday for the record. They are merely the latest of a series of illegal abuses of authority by an arrogant employer that engaged in acts of harassment and discrimination in violation of my disability; an employer that disabled me through these acts including illegal termination of accommodation with malice, then proceeded to extract an*

> *unfair agreement with me using misrepresentation and taking advantage of my duress.*
>
> *My union is presently considering my request that the illegally mediated agreement be struck and the grievances proceed to adjudication. They have informed me that it will take them some weeks to render a decision. I have also informed you I am unwell, being totally disabled.*
>
> *Your latest emails (including those of Mr Gartely) seek to unlawfully intimidate and coerce me into accepting an alternation and forced retirement without any discussion of the issues (and before me union can act on my request) by threatening to garnish the reduced pension that I would be forced to apply for as a direct consequence of your abuses. They show a reckless disregard for my rights, and my disability and distress which the employer is directly responsible for.*
>
> *I will hold the employer and responsible officials for these illegal actions in any way I can.*
>
> *You need not wait till midnight tonight. You have been informed I will not comply with the alternation.*
>
> [*Sic* throughout]

7. <u>The employer's response to these events</u>

[97] In a letter dated November 23, 2012, copied to Ms. Sullivan, Mr. Gartley advised the grievor that given his refusal to comply with his obligation under the settlement agreement, ". . . [he] consider[ed] the settlement to be no longer valid." As a result, he ordered the grievor struck off-strength (that is, returned to sick leave without pay status) as of November 22. He also advised that he had ordered actions taken ". . . to restore [the grievor's] employment and leave status to that which was in effect prior to the signing of the mediated settlement dated May 24, 2012" (Exhibit E13). These steps included recouping the following benefits that had been credited to the grievor under the settlement agreement:

a. 270 annual leave credits for January 25 to March 14, 2012;

b. 37.5 hours of vacation credits for leave taken from March 15, 2012, to March 21, 2012;

c. 187.5 hours of sick leave that had been advanced to the grievor for December 12 to 30, 2011, and January 3 to 24, 2012; and

d. the retroactive salary paid to him from March 22, 2012, to November 22, 2012.

[98] These amounts were recorded as a debt to the Crown (Exhibit E13).

[99] In their testimonies before me, both Mr. Gartley and Ms. Wilks explained the reasoning behind the employer's letter.

[100] Mr. Gartley testified that when the grievor refused to proceed with the alternation, he did not know what to do. He had no idea how the employer could force the grievor to sign the LOO. He testified in cross-examination that in his opinion, there was no way to fulfill the settlement agreement without the grievor's "full participation." He explained that when he used the words "no longer valid" in his letter of November 23, he meant that "there was still a settlement agreement but the grievor was not living up to his part . . . and why should we do our part if he would not," adding that "it was a very unusual situation." He testified that when the grievor refused to sign the LOO and accept the alternation there "weren't any options for us, other than no longer providing the benefits we had been providing because he was not living up to the agreement . . . our only option was to pull back those benefits that we had been providing."

[101] Ms. Wilks believed the settlement agreement was no longer valid because the grievor had elected to retire outside of it. Based on what had happened, she concluded that the grievor had accepted the option (set out in her email of November 21) of simply retiring and ". . . forgetting about the benefits available under the settlement agreement."

[102] Both Mr. Gartley and Ms. Wilks believed the grievor's acceptance of the LOO to be a necessary step in the alternation provided for under the settlement agreement. Neither thought or believed that the employer could force the grievor to sign the LOO. Nor did they consider applying to the former Board for an order to compel the grievor to honour the settlement agreement. Such an application would have taken too much time, and under the alternation process, time was of the essence. Nor did they consider

asking the bargaining agent to fulfill its obligation under the settlement agreement to withdraw the grievances in Board Files 6428, 6429 and 6667 or to ask the former Board to do so.

[103] For his part, the grievor was in some sense pleased with the employer's response. As he testified before me, Mr. Gartley "was declaring the settlement invalid which is what I had wanted for the past several months." However, he did consider the recoupment of benefits paid to him under the settlement agreement to be as follows:

> *. . . an abuse because they knew that the annulment* [of the settlement agreement] *meant that the grievances were still alive . . . so it would be more reasonable for them to say 'OK, so the payments have been made, but let a third party make the decision' . . . perhaps the money won't need to be repaid . . . so they punished me by taking back everything . . . so a grievance had to be filed.*

[104] And indeed, the letter was the genesis of two more grievances, both signed on December 21, 2012.

8. <u>Board File 8272</u>

[105] In Board File 8272, the grievor took the position that the employer's actions did the following:

> *… effectively amounted to a disguised termination of employment, rendering me totally and indefinitely disabled.*
>
> *The employer's letter of November 23, 2012 seeks to punish me further by effectively forcing me not only to apply for a reduced pension incurring significant permanent penalty in order to make ends meet, but threatening to garnish even that reduced pension.*
>
> *It is not only retaliatory in nature, but predatory.*
>
> *All of the employer's actions have resulted in significant hardship both financially and emotionally.*

[106] By way of remedy, the grievor sought ". . . [the] rescission of the said letter and negotiate [*sic*] a fair and equitable settlement," and to be made whole.

9. Board File 8273

[107] The grievor filed a second grievance on the same day (December 21, 2012). In it, he enlarged upon the grievance in Board File 8272 by referring to two earlier emails as well as to the employer's correspondence of November 23 and by elaborating on his complaints. He stated that the employer's email and letter were the following (Exhibit E50):

> *… the latest in a series of illegal abuses of authority by the employer seeking to undermine and destroy disability accommodation required by law.*
>
> *The unlawful actions included attempts to coerce me to work from a poisoned workplace in defiance of medical assessments, and acts of harassment (unfair performance appraisals, delayed expense claim approvals, unjustified reprimands) to punish me for refusing to comply; and culminated in the illegal termination of accommodation in a manner calculated to inflict shock.*
>
> *The employer also violated my rights to a harassment-free workplace by refusing to discipline any Agency official for these acts on the pretext they were acting in good faith.*
>
> *The employer extracted an unfair agreement from me using misrepresentation and taking advantage of my duress, then sought through the emails alluded to above, to unlawfully intimidate me into accepting an alternation and forced retirement without any discussion of the issues by threatening to garnish the reduced pension I would be forced to apply for as a consequence of its abuses.*
>
> *The amounts the employer has recorded as a debt to the Crown and threatened to recover from my pension, remain in dispute.*
>
> *The employer through its actions converted my partial disability supported by accommodation into a total and likely permanent one. It also effectively destroyed the working relationship which now exists more on paper than in reality.*

[108] By way of remedy, the grievor sought a reversal of the employer's decision in its November 23 letter to place him on leave without pay, the reimbursement of all leave credits and that the employer ". . . cease and desist its threat to recover these amounts until the matter has been fully resolved by way of agreement or before a third party including adjudication before the PSLRB" (Exhibit E50).

10. Events after December 2012

[109] The grievor did not in fact retire, as he had suggested he would, in December 2012. Instead, he remained on sick leave without pay. More grievances followed.

11. Board File 8791

[110] The employer sent a series of letters in February, March and April 2013. The grievor signed the grievance in Board File 8791 on April 23, 2013, in response. The grievance referred expressly to the grievances in Board Files 6428, 6429 and 6667. It grieved letters and an email from the employer dated, respectively, February 15, March 4, April 10 and April 17, 2013. In the grievance, the grievor stated that the purpose of this correspondence was the following:

> *. . . to pressure and coerce me to resign, retire, return to work or be 'released for reasons other than discipline or misconduct,' and . . . to deny my request that the matters in dispute have been ruled on by the PSLRB. All these matters constitute a furtherance of the employer's campaign of harassment, intimidation and abuse of authority designed to inflict further shock and render me completely and permanently disabled. This is linked to the employer's overall strategy seeking to undermine and destroy disability accommodation required by law.*

[111] In his grievance, the grievor went on at some length, detailing his history with the employer both before and during the mediation of May 2012. He repeated the allegation that at the mediation, Mr. Gartley and Ms. Wilks had ". . . showed no interest in discussing issues." He stated that "[u]nder duress and not being informed that most [of] the pension under the final offer was already [his] by statute, [he] accepted." He added the following: "Shortly thereafter I realized I had been at least partially duped," and that he wrote ". . . asking to have the mediated settlement agreement rescinded." He went on as follows:

> *When the* [alternation] *papers came in November 2012 I refused to sign and then was issued threats that my pension would be garnished to recover amounts I had been paid since mediation. The employer struck me off pay and I have been on that status since then. . . .*

> *There is simply no willingness* [on the employer's part] *to accept responsibility for inflicting injury on me or disabling me. These officials want to force me into retirement without even giving me the assurance that they will not garnish my pension until the PSLRB adjudication is completed. . . These officials believe that my refusal to comply with an unfair agreement exculpates them from every wrong they have committed, and that not only do they not owe me any severance or compensation for the damage they have caused me, but that they are entitled to garnish any pension their actions force me to apply for.*

[112] By way of remedy, the grievor sought an order requiring the employer to cease and desist ". . . from its threats to recover these amounts [being benefits paid under the May 2012 mediated settlement agreement] until this matter has been fully resolved by way of agreement or before a third party including adjudication before the PSLRB." He also claimed damages for pain and suffering pursuant to both the *CHRA* and tort law. He also claimed, among other things, an order, as follows: ". . . to investigate through professional medical sources, the feasibility of my being able to return to work in a different work environment outside the Agency which is now poisoned as a result of the complicity of top Agency management in the abuses described."

[113] In April 2013, it appears that the grievor's physician informed the employer that the grievor could not return to work at the FedDev offices in Toronto (there were two at that point), even under accommodation.

[114] In mid-August 2013, the bargaining agent informed the employer that the grievor was considering medical retirement.

[115] In a letter dated August 19, 2013, the employer reminded the grievor that he could not remain indefinitely on sick leave without pay. It asked for an updated leave application as well as advice by October 1, 2013, as to whether he was pursing medical retirement or whether he intended to resign (Exhibit G16).

[116] In a letter dated November 27, 2013, the employer outlined for the grievor the effect that the termination of his employment, effective December 3, 2013, would have on his benefits (Exhibit G17). It outlined the pension he would be entitled to as of that date. It also detailed the debt to the Crown that had stemmed from its decision to

recoup the benefits it had paid under the mediated settlement agreement, which were as follows:

a. salary for March 22, 2012, to November 21, 2012, together with the unearned sick leave advanced to the grievor, totalling $45 710.83, net; and

b. 164.976 hours of sick leave credits, in the amount of $8269.29, gross.

[117] The grievor then filed the last of the seven grievances with which I am concerned.

12. Board File 9662

[118] On November 20, 2013, the grievor emailed Mr. Gartley, copying his counsel as well as his bargaining agent. He stated as follows (Exhibit E49):

> *Following prior communications which need not be repeated here except briefly, this will advise you that I will retire from the public service as of December 03, 2013. Your refusal to negotiate a just settlement, to initiate a new medical assessment to determine the feasibility of my working in a position outside FedDev Ontario, and your threats to release me for incapacity, leave me with little choice. . . My retirement is without prejudice to the grievances already before the PSLRB, and to other related actions I may take. In other words I will continue to seek redress and remedy for the wrongs alleged. . . .*

[119] Mr. Gartley acknowledged the email and the grievor's decision to retire, effective December 3, 2013 (Exhibit E49).

[120] On November 27, 2013, the employer's compensation and benefits advisor wrote to the grievor in response to the notice of intention to retire. She described the pension and other benefits that he would receive. She also noted that these payments would be subject to the existing debt to the Crown created by the decision on November 22, 2012, to recoup the benefits that had been paid under the settlement agreement. The debt exceeded $50 000.00 (Exhibit G17).

[121] On December 19, 2013, the grievor filed a grievance in response to the November 27, 2013, letter. He characterized the letter as being the realization of the following:

> *… its* [the employer's] *earlier threats to recover debts it claims I owe the Crown, by seizing my severance entitlement following my forced retirement and asking the Pension Centre to garnish my pension. This followed earlier threats to release me for incapacity unless I resigned or retired. The employer's position presumes it owes me no damages or severance whatsoever. This action is consistent with earlier illegal, abusive, arrogant and injurious if not malicious actions which have left me disabled, and which are already proceeding to adjudication before the PSLRB.*

[122] The grievor sought damages against seven individuals working for the employer for several actions of alleged misconduct.

[123] The grievor eventually retired from the public service, effective December 3, 2013.

13. Issues posed by the evidence

[124] At the end of the second day of evidence, I posed the following questions to counsel:

a. What relationship does a mediated settlement agreement bear to a collective agreement? Is it a stand-alone and separate agreement, or is it, in effect, part of or an amendment to the collective agreement between the employer and the bargaining agent with respect to an identified employee?

b. Can a mediated settlement agreement be repudiated? If so, what is necessary to give effect to a repudiation?

c. Did Mr. Jadwani or his bargaining agent or both of them repudiate the mediated settlement agreement?

d. Is the repudiation of a mediated settlement agreement by one party sufficient to void it? If not (if the repudiation has to be accepted by the other party), what is necessary to accept that repudiation?

e. Was the employer able to accept Mr. Jadwani's repudiation of the mediated settlement agreement? If so, what did it have to do to accept that repudiation?

f. If the settlement agreement was repudiated, what is the status of

   i. the grievances already filed before then, and

   ii. the grievances filed after the purported repudiation?

g. If the settlement agreement was not repudiated (or if the repudiation was not effective), what is the status of

   i. the grievances already filed before then,

   ii. the grievances filed after the repudiation, and

   iii. the employer's decision to reclaim the benefits it had paid under the mediated settlement agreement and then sought to recover?

h. Does an adjudicator have the jurisdiction or power to enforce a mediated settlement agreement — that is, to order that it is effective and that it was not repudiated? If so, is there any limit to his or her remedial powers?

i. What remedies do the parties seek in the event that I rule that the mediation settlement agreement

   i. was <u>not</u> repudiated in November 2012, or

   ii. <u>was</u> repudiated in November 2012?

[125] I also advised counsel that the questions I posed were without prejudice to any other issues the parties may wish to make or any other remedies they may wish to seek with respect to the matter before me.

IV. <u>Summary of the submissions</u>

A. <u>For the employer</u>

[126] Counsel for the employer commenced her submissions by emphasizing the important role accorded to collaborative efforts to mediate and resolve differences in the workplace. She referred to those values in the preamble to the *Act*. Mediators and mediation services are expressly provided for in sections 15 and 108. Indeed, under subsection 94(1) of the *Public Service Labour Relations Board Regulations* ("the

Regulations"), the parties were required to participate in mediation unless one of them notified the former Board in writing that it did not intend to participate. The importance of mediated settlement agreements, and the former Board's jurisdiction over them, was recognized in *Canada (Attorney General) v. Amos*, 2011 FCA 38.

[127] Counsel for the employer submitted that there were three possible answers to the following questions, which I had posed to the parties before the hearing began:

a. the settlement agreement of May 2012 was not valid;

b. an adjudicator has no jurisdiction to determine whether the parties had complied with a mediated settlement agreement; or

c. an adjudicator has jurisdiction to determine whether a settlement agreement had been complied with and, if it was not, to fashion an appropriate remedy.

[128] Counsel for the employer submitted that the first option was not the correct one and that either the second (her preference) or the third were the only possible answers.

1. <u>The settlement agreement was binding, according to its terms</u>

[129] Counsel for the employer then focused on what she submitted were the key facts surrounding the mediated settlement agreement. All three parties had signed both an agreement to mediate and a final settlement agreement (Exhibits E2 and E3). The grievor had been represented by his bargaining agent. The parties went into the mediation with the clear understanding that all three grievances were to be dealt with. The grievor had plenty of time to present his case in full, both in his own words and in those of his representative, Ms. Sullivan.

[130] Counsel for the employer noted that the one unusual feature of the mediated settlement agreement was its tripartite nature. She submitted that most such settlements were only between a grievor and an employer. However, in this case, the agreement incorporated references to specific provisions in the collective agreement and was signed by the bargaining agent as well as the grievor. It was not the settlement of a disciplinary grievance. Rather, it was a settlement of issues and disputes with respect to rights under the collective agreement, pursuant to section 209 of the *Act*.

Since it related to grievances arising out of the collective agreement, those grievances required the support of the bargaining agent, which, however did not make the settlement agreement part of or an amendment to the collective agreement. By entering into the settlement agreement, the employer was simply exercising its general power to manage the workplace pursuant to the *Financial Administration Act* (R.S.C., 1985, c. F-11).

[131] Counsel for the employer submitted that from May 24, 2012, the employer conducted itself as being bound by the settlement agreement. It placed the grievor back on salary even though he was not working. It returned to him the sick leave and vacation credits he had used up before the settlement agreement. Finally, it worked diligently to find someone with whom the grievor could alternate. Throughout all that time, the grievor, despite his complaints about the settlement agreement, continued to receive his salary. He never refused those payments or offered to give them back. Nor did he ever expressly and unequivocally state that he would not go ahead with the alternation before November 22, 2012. The best that could be said is that before that date, he had suggested that he did not know what he would do or that he might not sign. However, he did not clearly and expressly state before that date that he would not proceed.

[132] Counsel for the employer also emphasized that at no point did the bargaining agent ever say or suggest that there was anything wrong with the settlement agreement. It did not respond to or join in the grievor's complaints about the settlement agreement or the manner in which it had been reached. Indeed, as late as October 1, 2012, Ms. Sullivan told the former Board that ". . . the employer is diligently and vigorously endeavouring to accomplish its obligations in as expedited a manner as possible."

[133] Counsel for the employer submitted that the mediated settlement agreement was valid and binding. Absent evidence of duress, coercion, undue influence or misrepresentation, a settlement agreement could not be set aside just because a party later had buyer's remorse, and bald assertions did not amount to evidence. (See, e.g., *Topping v. Deputy Head (Department of Public Works and Government Services)*, 2014 PSLRB 74, at paras. 134 to 141.)

[134] The employer fulfilled its obligations to the extent that it could. The collapse of the settlement agreement was solely the result of the grievor's refusal to fulfill his obligation to participate in the alternation that the employer had arranged.

[135] With respect to the grievor's submission that the employer had accepted his repudiation of the settlement agreement on or about November 23, 2012, counsel for the employer submitted that the doctrine of repudiation has no place in labour relations. Counsel relies on the following cases in support of her position: *Ontario (Racing Commission) v. Association of Management, Administrative and Professional Crown Employees of Ontario (Reasonable Efforts "Settlement" Grievance)*, [2001] O.L.A.A. No. 921 (QL), at paras. 32 to 38; *Corporation of the City of Kenora v. Canadian Union of Public Employees, Local 191*, 2009 CanLII 88057 (ON LA), at 18 and 19; and *Ontario Public Service Employees Union v. Crown in Right of Ontario*, 2013 CanLII 74176 (ON GSB), at paras. 29 to 33. Alternatively, if that doctrine has such a place, it should be applied only in the rarest of cases.

[136] If the doctrine of repudiation does apply in the realm of labour relations, its requirements were not met in the circumstances of this case. Counsel for the employer pointed to the difference between rescission and repudiation. The former arises when a party to a contract ". . . expresses by word or act in an unequivocal manner that by reason of fraud or essential error of a material kind inducing him to enter into the contract he has resolved to rescind it, and refuses to be bound by it . . . ," as stated in *Abram Steamship Co. v. Westville Shipping Co.* [1923] A.C. 773 (H.L.), at 781, and as cited in *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423, at para. 39 ("*Guarantee Co.*"). That position, if justified on the facts, terminates the contract and puts the parties in the positions they stood in before entering into the contract, as per *Guarantee Co.* In this case, rescission was not applicable because there was no evidence of fraud or material misrepresentation.

[137] Repudiation, on the other hand, occurs when one party evinces a clear intention not to be bound by a contract. The effect of repudiation is not to return the parties to the positions they were in before entering into the contract. Rather, it is to give the innocent party an option. It may elect to treat the contract as continuing in full effect, in which case the contract remains in force for both parties, thus entitling each party to sue the other for damages for any past or future breaches. Or it may elect to accept

the repudiation, in which case ". . . the contract is terminated, and the parties are discharged from future obligations. Rights and obligations that have already matured are not extinguished": (see *Guarantee Co.*, at para. 40).

2. The adjudicator had no jurisdiction

[138] Counsel for the employer submitted that I had no jurisdiction because

a. the grievances in Board Files 6428, 6429 and 6667 had already in effect been withdrawn, and accordingly,

b. there was nothing upon which to ground my jurisdiction.

[139] Counsel for the employer submitted that the grievances in Board Files 6428, 6429 and 6667 arose out of the collective agreement. Thus, they were controlled by the bargaining agent. Pursuant to the settlement agreement, the bargaining agent had agreed to withdraw the grievances when the employer had fulfilled its obligations. The bargaining agent's obligation was not tied to or premised upon the grievor's fulfillment of his obligation. Since the employer had done everything it was required to do under the settlement agreement, the bargaining agent must in effect be considered to have withdrawn the grievances. An adjudicator has no jurisdiction in a case in which a full and final settlement agreement resulted in the withdrawal of a grievance. (See *Castonguay v. Treasury Board (Canada Border Services Agency)*, 2005 PSLRB 73; *Nash v. Canada (Treasury Board)*, 2008 FC 1389; and *MacDonald v. Canada*, [1998] F.C.J. No. 1562 (T.D.) (QL).)

[140] Counsel for the employer distinguished the Federal Court of Appeal's decision in *Amos* on the grounds that its facts were different. The Court of Appeal had in fact emphasized the importance of the facts in each case: (see para. 64). In the original *Amos* case, the adjudicator had participated in a mediation that had preceded what would otherwise have been a hearing of the grievance before him. The matter involved an unrepresented grievor, and the negotiations (and resulting settlement) had been between the grievor and the employer. On the other hand, the case before me involved grievances arising out of the interpretation or application of a provision in a collective agreement and not, as in *Amos*, a disciplinary matter. Once such a grievance is settled (and in effect withdrawn), an adjudicator cannot continue to have jurisdiction. Rather,

as explained in *Wray et al. v. Treasury Board (Department of Transport)*, 2012 PSLRB 64, at para. 28, ". . . an adjudicator was not *functus officio* once a settlement was reached but retained jurisdiction over the original grievance to determine whether the settlement had been complied with and to make whatever order would be appropriate in the circumstances."

3. Remedy if the adjudicator had jurisdiction

[141] Counsel for the employer submitted that if I determined that the settlement agreement was valid and binding and that I did have jurisdiction over its enforcement, then the question of remedy would arise. She made three basic submissions on that point.

[142] First, counsel for the employer noted that the employer had fully complied with its obligations under the settlement agreement. Because of the grievor's failure to proceed with the alternation process — one that was time limited in nature — it was no longer possible for the employer to provide another alternation. The grievor was the author of his own misfortune and could not then seek to obtain what he had refused to accept in November 2012.

[143] Second, counsel for the employer submitted that the most that could be ordered by way of a remedy would be to return to the grievor the sick and vacation leave credits and salary that had been provided to him under the settlement agreement.

[144] Third, and with respect to the four grievances that the grievor filed after November 23, 2012, counsel for the employer submitted that they should be treated as if they had never been filed. Had the grievor complied with his obligations under the settlement agreement, he would have retired under its terms by the end of November 2012. There would have been nothing to grieve. She submitted as well that to permit the grievor to file grievances in such a case would amount to an abuse of process that an adjudicator ought not to countenance.

B. For the grievor

[145] Counsel for the grievor commenced his submissions by stating that a mediated settlement is a type of agreement between the parties to interpret the provisions of a collective agreement in a certain way with respect to a particular individual within the

bargaining unit. It is in a way analogous to a memorandum of understanding, which traditionally has always been treated in labour relations as being part and parcel of the collective agreement to which it is attached, and so within the jurisdiction of an arbitrator or adjudicator.

[146] Counsel for the grievor acknowledged that the jurisdiction of adjudicators over settlement agreements, until the decision in *Amos*, had been limited, if not non-existent. However, *Amos* enlarged that jurisdiction to include the ability to determine whether the parties had entered into an agreement and, if so, to enforce that agreement.

[147] In the case before me, either the parties had agreed on November 22, 2012, to terminate the settlement agreement of May 24, 2012, or, to put it a slightly different way, the grievor had repudiated the settlement agreement and the employer had elected to accept that repudiation. In either event, there was an agreement that an adjudicator had jurisdiction over.

[148] Counsel for the grievor pointed to the decisions in *Exeter v. Deputy Head (Statistics Canada)*, 2012 PSLRB 25; *Tench v. Treasury Board (Department of National Defence)* and *Department of National Defence*, 2013 PSLRB 124; and *Thom v. Treasury Board (Department of Fisheries and Oceans)*, 2012 PSLRB 34, as examples where adjudicators had made findings with respect to the existence and binding effect of settlement agreements, and as to whether either party had complied with the terms and conditions of the agreements.

[149] As already noted, counsel for the grievor acknowledged that the parties had entered into a binding settlement agreement on May 24, 2012, and that it could not be set aside on any of the traditional grounds, such as duress, fraud or undue influence. However, the issue was whether the parties could later repudiate that agreement. While to his knowledge a Board adjudicator had never considered the doctrine of repudiation, the Federal Court had recognized that, albeit not in a labour relations context, an executed release could be repudiated. (See *Federation of Newfoundland Indians v. Canada*, 2011 FC 683, at para. 67.)

[150] Counsel for the grievor submitted that the law was clear that repudiation did not release an innocent party from its prior obligations, only from its future

obligations; see *Guarantee Co.*, at paras. 39 to 42. However, in the case before me, the parties had accepted not only the grievor's refusal to comply with his obligations, but also the employer's decision to unwind the settlement agreement and return to the position it occupied before the May 2012 settlement agreement. The employer accepted the grievor's repudiation and agreed that the agreement was no longer valid. The employer did not ask the bargaining agent to comply with its obligation to withdraw the grievances. Nor did it ask the former Board to enforce the settlement agreement, as it could have; see *Exeter*, at paras. 49 and 51. Indeed, it was only when the former Board raised the settlement agreement issue before the hearing that the employer chose to argue that the agreement was binding and that it should be enforced.

[151] With respect to the bargaining agent, which is the third party to the May 2012 settlement agreement, counsel for the grievor submitted that repudiation could be inferred from conduct as well as from express statements (see *Brown v. Belleville (City)*, 2013 ONCA 148, at paras. 43 to 45). Equally, he argued that an acceptance of that repudiation could be inferred from the surrounding circumstances (see *American National Red Cross v. Geddes Brothers*, (1920) 61 S.C.R. 143, at 145). In this case, the bargaining agent's acceptance of the repudiation could be found in its failure to withdraw the grievances and in its decision to continue with them to adjudication.

[152] Counsel for the grievor acknowledged that the employer had been placed in an unfair situation by reason of the grievor's refusal to comply with the settlement agreement. However, it had the right at that point to apply to the former Board for an order to enforce the settlement agreement. But it elected not to. The employer had two options: apply to the former Board, or put the situation back to where it was before the May 2012 settlement agreement. It chose the second option. He submitted that by doing so, it acted within its rights, but having done so, it could not then maintain before me that the settlement agreement was valid and binding.

[153] Counsel for the grievor also acknowledged that concerns had been raised in several arbitral decisions with respect to whether the doctrine of repudiation had a place in labour relations. He agreed that the doctrine of repudiation had to be applied carefully but did not accept that it had no role to play in labour relations. He submitted that one concern with relying on the doctrine was based on the impact on

ongoing relations between a union and an employer. As well, he recognized the concern that the doctrine could be used tactically by relying on small breaches to justify repudiating an entire agreement. However, in this case, there was no ongoing relationship between the employer and the grievor. Nor was there any issue of a tactical use of a small breach. The employer did not breach its obligations until November 22, 2012, and after that, it simply returned to the situation as it existed before the settlement agreement was signed.

[154] In response to my question as to whether an adjudicator could or should let the parties walk away from a settlement agreement, counsel for the grievor submitted that parties are always free to agree — intentionally — to withdraw from one. In this case, by their conduct, the grievor and the employer had agreed to withdraw from their settlement agreement, and by its conduct, the bargaining agent had demonstrated its intention to be bound by that agreement to withdraw. It would be unfair and inappropriate for an adjudicator to hold these parties to a bargain once they evinced an intention not to be so bound. From and after Mr. Gartley's letter of November 23, 2012 (Exhibit E13), all parties conducted themselves as if the May 2012 settlement agreement was no longer in effect and no longer applied. As such, it no longer bound them.

[155] Turning to the remedy, counsel for the grievor submitted that it depended upon the result of his submissions with respect to repudiation.

[156] If it was accepted that repudiation applied and that the May 2012 settlement agreement had been repudiated on November 23, 2012, then everything was unwound to the situation as it existed before May 24, 2012. In that case, the grievances in Board Files 6428, 6429 and 6667 remained live and could be dealt with. The two grievances that arose directly out of the November 23, 2012, letter (Board Files 8272 and 8273) were largely irrelevant and the employer was free to apply to have them dismissed. The grievances in Board Files 9662 and 8791 also remained in play since they raised issues of accommodation (or lack of it) during the period in which the grievor remained on sick leave without pay after November 23, 2012.

[157] If, on the other hand, the settlement agreement was binding and in effect, then I would be left with the question of what to do about the benefits that the employer had recouped after November 23, 2012, and about the grievances filed after that date.

[158] If that were the case, counsel for the grievor submitted that the grievor ought to be put in the position he would have been in under the terms of the settlement agreement. Such an order would comprise two elements.

[159] First, all the benefits available to him up to November 23, 2012, ought to be returned to him. Second, the employer ought to be required to pay him the benefits he would have received had the alternation taken place. In other words, the TSM, the 52 weeks of pay, the one extra week of severance pay and the pension waiver — all of which would have been his — should be provided to him. The fact that the cost or value of those benefits would in the ordinary course have been paid by the AANDC (that is, by the department into which the grievor would have transferred under the alternation) rather than the FedDev, is not a valid reason to deny the grievor those benefits. They would have been his under the settlement agreement. The money all came from the same ultimate employer (that is, the Treasury Board). It should not matter that the employer chose to place its money into different departmental "pots."

[160] Counsel for the grievor submitted that an adjudicator has the power to order a fair result. What the employer should have done as of November 23, 2012, was simply leave the grievor with the benefits he had already received under the settlement agreement. It should then have gone to the former Board to request an adjudication on that point or it could simply have waited for a hearing. What it did instead — recoup those benefits — was wrong. The employer ought not then to benefit from that wrongdoing by avoiding what it would otherwise have had to pay had the settlement agreement proceeded.

[161] With respect to the grievances filed after November 23, 2012, counsel for the grievor submitted that there is no easy answer. Some if not all were tied to the employer's conduct both before November 2012 and after that month. It was also clear that the employer had breached the settlement agreement, which was part of the grievor's grievances after November 2012. That being the case, they ought to be heard.

C. Reply on behalf of the employer

[162] Counsel for the employer submitted that the employer could not force the grievor to resign. Accordingly, it could not force him to sign the LOO. That being the case, the employer did not in fact have a choice in this case. Moreover, the correspondence of November 21 and 22, 2012, between the grievor and the employer did not amount to an agreement. The grievor refused to fulfill his obligation under the settlement agreement by proceeding with the alternation. The employer did not concede that the grievor had the right to refuse to fulfil this obligation, but did not know what else it could do.

[163] With respect to remedy, counsel for the employer submitted that the question of where the money for the settlement agreement came from was part of the mix of factors that the parties took into account when negotiating the settlement agreement. With respect to the grievances filed after November 23, 2012, these were all in effect breaches by the bargaining agent of its obligations under the settlement agreement. It had signed an agreement that would have resulted in the grievor retiring under an alternation by the end of November 2012. After that date, the grievor would not have been an employee, and the factual matrix underlying the later grievances would not have existed. Hence, no grievances would have been filed. The grievances in question all had to be approved and carried forward by the bargaining agent and, in so doing, the bargaining agent breached its obligation under the settlement agreement. Hence, these later grievances ought to be dismissed.

V. Analysis and decision

A. Adjudicator's jurisdiction with respect to settlement agreements

[164] The decision in *Amos v. Deputy Head (Department of Public Works and Government Services)*, 2008 PSLRB 74 ("*Amos*"), aff'd *Canada (Attorney General) v. Amos*, 2011 FCA 38, recognized that when dealing with settlement agreements an adjudicator has the jurisdiction to:

a. determine whether the parties have entered into a final and binding settlement agreement with respect to a grievance;

b. determine whether "a settlement agreement is unconscionable or that there are other compelling reasons why the agreement should not stand ... [in which case] he or she is similarly seized to hear or to continue to hear the grievance [that was the subject of the settlement agreement] on the merits, having set aside the settlement agreement:" *Amos*, para.92; and

c. determine an allegation that a party to the agreement is in non-compliance with a final and binding settlement agreement and, if so, make such order pursuant to s.228(2) of the *Act* "that he or she considers appropriate in the circumstances" to remedy any such non-compliance: *Amos*, paras.118-24.

[165] I will deal with the first two points together.

B. Was there a binding settlement agreement on May 24, 2012 and, if so, should it be set aside for some compelling reason?

[166] There is absolutely no doubt that the parties reached a valid final and binding settlement agreement on May 24, 2012. Counsel for the grievor was entirely right to withdraw his opening submission that the mediated settlement agreement was void *ab initio* (from the start) because of any alleged fraud, duress or misrepresentation.

[167] I should state that despite Mr. Jadwani's frequent suggestions to the contrary during his testimony, it was clear to me on the facts that the mediated settlement agreement was not void for any reason, including those that he suggested.

[168] The grievor is well educated and was used to reviewing complex documents as part of his job. He had a history of asserting his rights against his employer. He was familiar with the grievance and adjudication processes and was represented by Ms. Sullivan (his bargaining agent representative), who had been involved since at least late 2011, and so would have been undoubtedly very familiar with the grievor's situation.

[169] The mediation covered three days, which in my opinion (and contrary to Mr. Jadwani's view) was more than enough time to review and consider the options and proposals put to him. Benefits were available to him under the settlement agreement that, while perhaps not as large as he wanted, were nevertheless significant. The duress he claimed he suffered - lack of income - was no more than what underpins the

decision that many people make that it may be better to negotiate a settlement immediately rather than await the vagaries of litigation years in the future. The fact that a person may consider accepting a compromise to settle one or more grievances is not in and of itself a reason to vitiate a settlement agreement: see, for e.g., *Chaudhary v. Deputy Head (Department of Health)*, 2013 PSLRB 160, at para. 31; and *Hassard v. Treasury Board (Correctional Service of Canada)*, 2014 PSLRB 32, at paras. 159 to 165).

[170] Added to that is the fact that the bargaining agent - whose representative, Ms. Sullivan, was present at the mediation and who continued to represent the grievor's interests - never once raised the issue after the May 2012 mediation. Indeed, the grievor raised the issue only after he had first made sure (by way of correcting an error in the employer's salary calculations) that he was going to obtain the benefits to which he was entitled under the settlement agreement.

[171] The evidence is also clear that until November 23, 2012, the employer fulfilled all its obligations under the settlement agreement. It returned to the grievor his sick leave and vacation credits. It reversed the sick leave advances. It paid him salary even though he was not working. It worked diligently to identify and secure an employee who was ready, willing and able to alternate with the grievor. And it secured a LOO. All it had agreed to do, it did. All that remained was for the grievor to sign the LOO and proceed with the alternation. But he refused to do so.

[172] Given the grievor's frequent allegations of bad faith on the part of the employer in his correspondence and in his testimony before me, I should also state that if anyone was acting in bad faith, it was the grievor. He signed the settlement agreement with open eyes. His first and only complaint immediately after May 24, 2012, was that the employer had made an error in calculating and paying the salary due to him under that agreement. Only after that error was corrected, securing to him the benefit he felt entitled to under the agreement, did he begin to suggest that the settlement agreement was the result of coercion or misrepresentation.

[173] Yet, despite such a serious allegation (which, I might add, he flung at the employer repeatedly in the months that followed), he did not file a grievance. There was no evidence that he asked or instructed the bargaining agent to grieve or to raise any concern about the settlement agreement. He made no effort to have it set aside.

Nor did he offer to stop receiving the benefits being paid under the agreement that he had continued to criticize. He did not offer to return the benefits he had already received under it. Nor, finally, did he ever expressly and clearly state before November 22, 2012, that he would not proceed with the alternation. All he did was suggest that his compliance was up for consideration, that he might not proceed or that he required legal advice before deciding what to do. Only after he had capitalized on all but one of the settlement terms, and only after he had manoeuvred the employer into declaring ". . . the settlement invalid which is what [he] had wanted for the past several months [emphasis added]," did he confirm his intention not to abide by his commitment.

[174] It is clear then that on the facts there was nothing unconscionable about the settlement agreement. Nor was there any duress, misrepresentation or other such factor that might vitiate consent. Counsel for the bargaining agent quite rightly conceded such in his submissions. But, he argued, there was another compelling reason that warranted setting the settlement agreement aside. The grievor had repudiated the agreement, and the employer had accepted that repudiation. The parties had thereby returned to the position they were in prior to the settlement having been entered into. The three grievances (not yet withdrawn) should accordingly be heard.

[175] The doctrine of repudiation is recognized (if not always well understood) in the world of contracts outside the realm of labour relations. It applies when one party to a contract clearly and unequivocally - either in words or conduct - expresses its refusal to perform its obligations under the contract. The innocent party then has a choice. It may treat the contract as being in full force and effect. In that case, either party may sue the other for damages for any past or future breach of that contract. Or the innocent party may accept the repudiation, in which case ". . . the contract is terminated, and the parties are discharged from future obligations. Rights and obligations that have already matured are not extinguished [emphasis added]:" see *Guarantee Co.*, at para. 40.

[176] Repudiation is not the same as an agreement between the parties to amend or dissolve an earlier agreement. I make this observation because at times the submissions of counsel for the grievor appeared to me to verge on such a suggestion.

The parties to any agreement - including a settlement agreement - are free to amend that agreement on consent. However, that is not what happens when an agreement is repudiated. In that case one party forces the other party to choose one of two options, neither of which was negotiated or agreed to in any conventional sense. The innocent party's choice is not the result of a freely negotiated and agreed upon choice, but is forced on it by the defaulting party's decision to breach its own obligations.

[177] The other point of note is that the doctrine of repudiation does not give the innocent party the right to ignore rights and obligations that had matured before the repudiation. It provides the innocent party with the right to consider itself discharged from future - not past - obligations under the contract. And it entitles the innocent party to a remedy for past breaches.

[178] With these observations, I turn to the question of whether the doctrine of repudiation should be recognized as being applicable in the case of mediated settlements of grievances under the *Act*. In my opinion, it should not be.

[179] First, there is the harmful impact the recognition of such a doctrine could have on labour relations. Settlement agreements with respect to grievances - and the ability of the parties to rely on them - play a vital role in labour relations in general and under the *Act* in particular. Allowing parties to repudiate commitments they have freely and voluntarily agreed to would encourage bad faith and would sour the ability of the employer, bargaining agents and employees to negotiate resolutions short of adjudication: (see, e.g., the arbitrator's observations in *Ontario (Racing Commission)*, at para. 37; *Ontario Public Service Employees Union*, at para. 31; and *Corporation of the City of Kenora*, at 19).

[180] I note that the arbitrators in those cases all stopped short of saying that the doctrine of repudiation would never apply. They contented themselves with concluding that if it were applicable, it should be so on narrow terms. They ruled in those cases that the doctrine, even if it existed, had not been made out on the facts.

[181] However, I would go further. Justice between employers and unions and the employees they represent does not require a resort to the doctrine of repudiation with respect to grievance settlement agreements. The jurisprudence already recognizes that factors vitiating consent - such as duress, misrepresentation, fraud, mutual mistake,

undue influence and the like - may require setting aside such agreements. That happens because the fundamental foundation to any settlement agreement - mutual consent that is freely given - is missing and because applying such doctrines does not frustrate good faith negotiations - it enhances them. To go further than that - to permit parties, for whatever reason, to get out of their obligations by simply refusing to perform them - satisfies no equitable or just interest. It encourages bad faith negotiations and fails to advance in any way the greater good and greater interest of harmonious labour relations.

[182] Second, and flowing from the first, it is difficult to see why the new Board - and its adjudicators - should agree to recognize the doctrine of repudiation. The new Board has control of its processes and procedures. It provides mediation services to the parties to grievances and expends time, energy and resources to assist those parties to resolve their differences short of adjudication. It also has a responsibility to all parties to ensure that grievances referred to it are resolved as expeditiously as possible.

[183] For the new Board to allow parties to later repudiate agreements they had freely negotiated with its assistance would not foster respect for the new Board or its processes. It would also lead to a waste of the resources that had been expended on achieving the settlement agreement in the first place. And it would clog and therefore slow the adjudicative process by adding to, rather than subtracting from, the number of grievances to be dealt with by way of adjudication.

[184] Why then would the new Board agree to hear matters that the parties had represented to it that they wanted to settle and had settled when they later decide they could get a better deal by continuing on to adjudication?

[185] So one returns to the May 2012 settlement agreement to settle three grievances on certain terms. There was no coercion, fraud or misrepresentation that would have vitiated the grievor's consent to the settlement agreement. Nor was there any agreement - any meeting of the minds - after that point to amend the May 2012 settlement agreement. To allow the grievor in the absence of either to repudiate an agreement under such circumstances would be to allow him to do indirectly what he could not do directly. And if the grievor cannot repudiate his obligations, it stands to

reason that the innocent party - the employer in this case - cannot accept a repudiation.

[186] This conclusion does not mean that the parties may not agree to amend their settlement agreement or indeed that they may not later agree to rescind it and return to the situation as it existed before the settlement agreement. But an agreement to amend or rescind must be freely made and not coerced or forced upon the innocent party by willful and inexcusable default of the other party.

[187] For these reasons, I am satisfied that there was a final and binding settlement on May 24, 2012, and that there is on the evidence before me no compelling reason, and nothing in the adjudicative jurisprudence, that would justify setting it aside.

C. Did the parties comply with the settlement agreement, and if not, what order is appropriate?

[188] It is unnecessary for me to repeat the facts that I have already set out in these reasons. Suffice to say that I find that the employer was in full compliance with its obligations under the May 2012 settlement agreement up until November 22, 2102. The same cannot be said of the grievor or the bargaining agent, both of whom failed to comply with their respective obligations under the settlement agreement.

[189] The grievor failed entirely to comply with his obligations. The grievor failed "to accept the alternation offer the employer had committed to effect, 'including providing his irrevocable resignation from the federal public service'." Moreover, he failed to withdraw the three grievances (Board Files 6428, 6429 and 6667). For its part, the bargaining agent failed to comply with its obligation under the settlement agreement to formally withdraw the three grievances before the former Board.

[190] The fact that the grievor and the bargaining agent failed to live up to their obligations under the agreement did not, for reasons already set out, permit the employer to take the action that it did to recoup the retroactive salary and leave credits that it had provided to the grievor.

[191] What then is the appropriate order in such circumstances?

[192] As the Federal Court of Appeal in *Amos* has confirmed (at para. 75), my remedial authority is broad and not restricted by a specific list of enumerated remedies.

[193] Counsel for the grievor asserts that the grievor is entitled to the benefits that he would have received had he signed the LOO and proceeded with the alternation. In other words, he should be entitled to those benefits that would have flowed from his being - via alternation - an employee of the AANDC subject to the provisions of the collective agreement. I disagree. Those benefits depended upon his actions and depended upon him placing himself into a different department. His refusal to sign the LOO and hence to become an AANDC employee meant that those benefits were denied to him solely as a result of his attempt to get out of the settlement agreement. The employer's conduct did not cause or contribute to that denial in any way. It was solely the result and function of the grievor's own non-compliance with the settlement agreement.

[194] What about the salary and leave credits that the employer recouped after November 22, 2012? In her submissions, counsel for the employer argued that the most that could be ordered by me by way of remedy would be to return to the grievor the sick and vacation leave credits and salary that had been provided to him under the settlement agreement. I agree.

[195] As already noted, Mr. Gartley and Ms. Wilks believed that the grievor's refusal to sign the LOO or to proceed with the alternation meant that the employer had no choice but to return to the *status quo ante* (the state that existed before the settlement agreement was signed). They were incorrect.

[196] The proper course - the one in accord with sound labour relations - would have been to strike the grievor off strength (that is, return him to sick leave without pay), which the employer did, but <u>not</u> to recoup the benefits paid him under the settlement agreement. That result - that is, the removal of the grievor from the FedDev's payroll - is what the settlement agreement contemplated. That is the result that the employer, as well as the bargaining agent and the grievor, agreed in May 2012 would happen.

[197] Once the employer returns any and all benefits paid or provided to the grievor under the terms of the May 24, 2012, settlement agreement, up to and including

November 22, 2012, the proper remedy is to have Board Files 6428, 6429, and 6667 closed.

[198] In terms of the grievances that were filed after November 23, 2012, in Board Files 8272, 8273, 8791, and 9662, the appropriate order in my view is that all should be dismissed. As counsel for the employer submitted, had the grievor complied with his obligations under the settlement agreement he would have retired. There would have been nothing further to grieve. I agree with counsel for the employer that to allow these grievances to continue would constitute an abuse of process.

[199] These grievances would not exist had the grievor complied with the settlement agreement that he and his bargaining agent freely and willingly entered into on May 24, 2012. They would not have existed because the grievor would have retired under the alternation process by the end of November 2012. On their face, they are expressions of the grievor's ongoing efforts to get the employer to renegotiate a settlement agreement better than the one he and his bargaining agent had originally accepted in May 2012.

[200] For an adjudicator to hear these grievances in these circumstances would be to accede to an abuse of the new Board's processes and procedures. The grievor and the bargaining agent executed a settlement agreement that bound them both to a future event involving the grievor's retirement by the end of November 2012. The bargaining agent made no apparent effort to dissuade the grievor from backing out of the agreement, even though, to its knowledge, he had accepted all the benefits it had afforded him (other than the alternation).

[201] Accordingly, I order these four files closed. I emphasize that this is not a ruling on their substance or merits. The ruling flows from my decision that the settlement agreement was valid final and binding, that it should be honoured, and that a party should not be permitted to repudiate it. The ruling recognizes that had the grievor and the bargaining agent honoured their respective obligations under the settlement agreement, these particular grievances would not exist because the facts on which they rest and the dispute out of which they arose would not exist.

[202] To hear these four grievances would simply be to give the grievor indirectly what he had not been able to achieve directly - a new and better (for him) settlement

agreement. For me to hear the grievances would be to permit the grievor to abuse the new Board's processes by filing grievances when he had in effect agreed not to.

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

VI. Order

[204] It is ordered that

a. the grievances in Board File Nos. 566-02-8272, 8273, 8791 and 9662 are dismissed, and the files are closed;

b. the grievances in Board File Nos. 566-02-6428, 6429 and 6667 are to remain open for 30 days to allow the employer time to return to the grievor any and all benefits paid or provided to him under the terms of the settlement agreement of May 24, 2012, up to and including November 22, 2012. Once completed, all three files will be closed.

[205] I will remain seized of any issues arising in respect of the order with respect to Board File Nos. 566-02-6428, 6429 and 6667 for 30 days from the release of this decision.

March 3, 2015.

Augustus Richardson,
adjudicator