Date: 20160128

File: 566-02-4853

Citation: 2016 PSLREB 5

Public Service Labour Relations Act Before an adjudicator

BETWEEN

MICHELINE GODBOUT

Grievor

and

TREASURY BOARD
(Office of the Co-ordinator, Status of Women)

Employer

Indexed as
Godbout v. Treasury Board (Office of the Co-ordinator, Status of Women)

In the matter of an individual grievance referred to adjudication

Before: Margaret T.A. Shannon, adjudicator

For the Grievor: Chris Buchanan, counsel

For the Employer: Pierre-Marc Champagne, counsel

Heard at Vancouver, British Columbia,
December 15, 2015.

I. Individual grievance referred to adjudication

[1] The grievor, Micheline Godbout, grieved that the employer, Status of Women Canada, violated article 19, "No Discrimination", and Appendix D, "Workforce Adjustment", of the agreement between the Treasury Board and the Public Service Alliance of Canada (PSAC) for the Program and Administrative Services Group (all employees), expiry date: June 20, 2011 ("the collective agreement"), when it advised her that her AS-01 position in Vancouver, British Columbia, was eliminated and that she had been offered a position in Edmonton, Alberta, at a time when she was unfit to work for medical reasons. She also alleged that the employer should have accommodated her due to her disability and that it failed to by not offering her a position in her preferred area of residence.

[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] Following three days of hearings in May 2014, this matter was adjourned until April 8, 2015. On April 6, 2015, the parties advised the new Board that a further postponement was required pending the implementation of an agreement they had struck to settle the grievance, following which the grievance would be withdrawn. The parties were given 90 days in which to implement the settlement, following which the matter was to be rescheduled if it had not been withdrawn. The matter was then rescheduled for hearing on December 15 and 16, 2015.

[4] The employer raised an objection to the new Board's jurisdiction to decide this matter on its merits based on the fact that the parties struck a deal. A hearing was held only on the preliminary objection on December 15, 2015, following which a further hearing date to consider the matter on the merits would be scheduled

if required.

[5] The employer argued that the new Board no longer has jurisdiction to hear the matter on the merits. Rather, the new Board has jurisdiction to determine if a settlement has been reached and to enforce that settlement. According to the employer, as of April 6, 2015, the parties had a binding oral agreement on three items, which were to be reflected in the minutes of settlement (MOS) to be drafted by Joshua Alcock, who was counsel of record for the employer at all times relevant to the objection to jurisdiction. The problem arose when the bargaining agent, the PSAC, refused to sign the proposed MOS. The employer further asserts that the grievor apparently changed her mind and was no longer willing to accept the settlement negotiated by the employer and the PSAC.

[6] For the reasons that follow, I have determined that there was a binding agreement between the parties as at April 6, 2015. I have further determined that both the grievor and the bargaining agent are in non-compliance with the agreement. As such, I have made an order that I consider appropriate in the circumstances to remedy the non-compliance. Since the parties had a binding agreement, I am without jurisdiction to hear the grievance on its merits.

II. Summary of the evidence

[7] Mr. Alcock testified that his area of practice as employer legal counsel since 2010 has been in the area of labour and employment law. In 40% to 50% of his cases, the PSAC represented the grievors. Of those cases, 50% did not proceed; the majority of the cases which did not proceed were settled by the parties and withdrawn. In all cases, when the matter was settled, the parties signed an MOS. The practice in cases that were settled is that the PSAC and the employer would agree on the critical elements of the settlement. The Board would be contacted and the matter postponed pending the settlement's implementation. Then, an MOS would be drafted and would be signed by the parties. This case was no different from any of the others that he had settled with the PSAC.

[8] Mr. Alcock drafted an MOS based on a template that he had used with the PSAC on several previous occasions and that the PSAC had accepted and agreed to. He added the specifics of the deal that had been struck and included standard provisions that he always inserted with all MOSs negotiated with the PSAC, and which remained the same

as previously agreed to by the PSAC. He forwarded this draft MOS to Nicole O'Young, who was the PSAC's counsel of record. Mr. Alcock drafted the MOS on April 7, 2015, and submitted it to Ms. O'Young for her approval (Exhibit 4, tab 3). He heard nothing from her about its content other than that the grievor was seeking independent legal advice and that a few small changes to the MOS were inevitable (Exhibit 5, tab 4). Ms. O'Young did not at any time advise Mr. Alcock about the required small changes. Had the PSAC requested changes to the MOS's wording, the employer would have been willing to work at wordsmithing it. The parties had agreed to the settlement and were just trying to formalize it.

[9] On May 5, 2015, Mr. Alcock again followed up with Ms. O'Young concerning the MOS (Exhibit 4, tab 4). She advised him that she was waiting to hear from the grievor, whose response was due by May 8, 2015. Mr. Alcock again followed up concerning the status of the MOS on May 26, 2015 (Exhibit 5, tab 5). He again followed up with Ms. O'Young in June 2015.

[10] On July 9, 2015, after several attempts to follow up with Ms. O'Young on the status of the MOS, Mr. Alcock was advised that the parties did not have an agreement and that the MOS had been rejected despite the fact that Ms. O'Young had communicated to him the grievor's acceptance of the offer on April 3, 2015, and the PSAC's on April 6, 2015 (Exhibit 4, tab 1). He was surprised by the response as the MOS was not a new offer and merely set out what had been agreed to in April 2015. The employer had acted upon the confirmation that the offer had been accepted and had requested that the new Board postpone the matter pending the implementation of the settlement as is the normal practice in such matters. Neither the PSAC nor the grievor indicated that anything in the MOS was objectionable or that it inaccurately reflected the deal that was struck.

[11] On July 14, 2015, Ms. O'Young contacted the new Board; she was seeking a further postponement to allow the parties to continue their attempts to settle the matter.

[12] On July 21, 2015, the parties were notified by Registry Operations of this Board that the matter was set down for hearing in December 2015 (Exhibit 4, tab 5).

[13] On August 5, 2015, Ms. O'Young advised Mr. Alcock that she was continuing her discussions with the grievor in hopes that she would be able to address the grievor's

concerns. Mr. Alcock followed up with Ms. O'Young on October 27, 2015, and again on November 4, 2015.

[14] On November 4, 2015, Ms. O'Young advised Mr. Alcock that the grievor had sought independent legal advice and that she had declined to sign the MOS (Exhibit 4, tab 6).

[15] According to Mr. Alcock, Ms. O'Young took that position that she did not represent the grievor but rather that she was acting on the PSAC's behalf. Since the MOS had included a provision for independent legal advice, the grievor had sought out counsel of her own and then would not agree to the settlement despite having accepted it on April 3, 2015. Mr. Alcock testified that paragraph 10 of the MOS, referring to independent legal advice, was the same language used in his dealings with the PSAC no matter whether the grievor was represented by outside legal counsel or a bargaining agent shop steward. The intent of the paragraph was to confirm that neither party was acting on advice from the other. At no time prior to this had Ms. O'Young indicated to Mr. Alcock that paragraph 10 did not reflect her current relationship with the grievor. In his practice with the PSAC, paragraph 10 had been modified only once, when a PSAC grievance services officer was involved and did not want it reflected that he had provided legal advice.

[16] The MOS reflected the agreement the parties struck concerning payments for damages and in lieu of notice for a termination of employment in exchange for the grievance's withdrawal. Mr. Alcock did not recall specifically mentioning the requirement for a release or confidentiality agreement. Nor did he recall mentioning that this agreement was without prejudice to any stand the parties may take in the future. These were implied terms, according to Mr. Alcock, which were standard in agreements between the employer and the PSAC. The fact that the grievor was included in paragraph 10 of the MOS did not change the nature of the deal. It was not a three-party deal as the grievance was filed under the collective agreement, and the parties to it are the parties to that collective agreement. The PSAC could have unilaterally withdrawn its agreement to the terms but never did; only the grievor did. At no time during the negotiation of the agreement had Ms. O'Young indicated that she did not have the authority to negotiate for the grievor and that her client was not the grievor but rather the PSAC. It came up for the first time on November 4, 2015.

[17] Mr. Alcock had assumed that the delay was caused by the grievor getting cold feet. He believed his assumption was confirmed when Ms. O'Young asked for additional time to talk to her. If the MOS did not accurately reflect the deal that had been struck, he expected that Ms. O'Young would have communicated the problems long before July 2015. As time progressed past July, Mr. Alcock continued to expect Ms. O'Young to identify what changes she required to the MOS, yet none were forthcoming. The MOS he drafted reflected the practice with the PSAC and with all bargaining agents with which he had dealt. All MOSs contain some version of the standard language contained in the one provided to Ms. O'Young.

[18] Mr. Alcock had not dealt with Ms. O'Young before and was not familiar with how aware she was of the standard content of MOSs between the PSAC and the employer. Regardless, according to Mr. Alcock, based on his experience, the PSAC was fully aware of the employer's expectations and the standard content of an MOS.

[19] The PSAC led no evidence.

III. Summary of the arguments

A. For the employer

[20] A deal was stuck on April 6, 2015, to settle a collective agreement grievance the PSAC filed on behalf of the grievor, which was confirmed in writing by Ms. O'Young on the PSAC's behalf on more than one occasion to both the counsel for the employer and the new Board. In her email of April 3, 2015, Ms. O'Young stated that the grievor had accepted the deal but that Ms. O'Young still needed the PSAC to agree to the proposal (Exhibit 4, tab 1). On April 6, 2015, she confirmed that the parties had a deal (Exhibit 4, tab 1). Later that same day, she confirmed to the new Board that the parties had an agreement in principle (Exhibit 4, tab 2).

[21] On April 7, 2015, Mr. Alcock submitted a draft MOS to Ms. O'Young. The undisputed evidence is that that MOS was based on others the parties had used when settling other grievance files. The deal was simple — a cash settlement in exchange for withdrawing the grievance. The rest of the clauses are pure and simple labour law settlement text. The only evidence is Mr. Alcock's that those clauses were always included in the parties' MOSs. The bargaining agent never specifically asked to have them changed. It is the normal way the parties have done business.

[22] When Ms. O'Young did not comment on the MOS or provide alternate wording, Mr. Alcock followed up with her on numerous occasions via email (Exhibit 4, tabs 4, 5, and 6, and Exhibit 5, tab 4) and via phone. At no point did the bargaining agent identify what it disagreed with in the MOS or that it no longer considered itself bound by the deal that had been struck. On April 16, 2015, Ms. O'Young indicated that minor changes would be required but provided no details.

[23] The parties have a valid and binding agreement; therefore, the new Board has lost the jurisdiction to hear the matter on its merits. Settlement, by definition, ends the matter, even at civil law. The whole essence of a settlement is to end a dispute; therefore, it must include a release. A settlement agreement is a contract subject to the same basic contract law conditions as apply to other contracts; see *Ontario v. Ontario (Ministry of Children and Youth Services)*, [2013] O.G.S.B.A. No. 139 (QL).

[24] The parties agreed to a sum of money and how and when it was to be paid, in exchange for withdrawing the grievance. Supplementary details, such as the MOS's wording, did not preclude the settlement. The employer went beyond what is necessary. Only the bargaining agent's agreement was required to give effect to the contract. That the bargaining agent agreed that a deal had been struck is unequivocal based on Ms. O'Young's statements in her email that the grievor had accepted the deal and after consulting the PSAC, confirming that the parties had a deal.

[25] There was offer and acceptance, and there was nothing substantive left to be negotiated. The substantive matter was money to be exchanged for the withdrawal of the grievance. There were no express conditions to preclude the deal. Mr. Alcock's uncontradicted evidence established that, on the balance of probabilities, on April 6, 2015, the parties had a deal.

[26] An adjudicator can determine whether an agreement has been reached (*Amos v. Attorney General of Canada*, 2011 FCA 38, and *Chaudhary v. Deputy Head (Department of Health)*, 2013 PSLRB 160 at para. 30). Once it has been determined that the parties have reached an agreement, the parties have an implicit obligation to implement it (*Amos*, at para. 65). There is no need for a signature for an agreement to be binding; parties can be bound by an oral agreement. Signatures are merely evidence of the binding nature of the agreement (*Ontario*, at para. 33). MOSs are not necessary to settle a grievance as long as there is a meeting of the minds on the substantive issues (*Air Canada v. National Automobile, Aerospace, Transportation and General*

Workers Union of Canada (CAW-Canada), Local 2213 (2002), 107 L.A.C. (4th) 250 at paras. 20 to 25, and *Tulli v. Symcor Inc.*, 2005 FC 1440 at para. 40).

[27] Ms. O'Young never specifically identified what changes were required. It appears from the cross-examination that the release, confidentiality clause, independent legal advice clause, and without-prejudice clauses were not specifically discussed. One has to guess what the bargaining agent's issues were with the MOS as they were never specifically expressed. Mr. Alcock's undisputed evidence is that those clauses are a given and are included in all MOSs. Any reasonable person dealing with settlements would expect those basic terms to be included. It is common that those terms are not specified during settlement negotiations. They are implicit elements of a settlement contract.

[28] A contract also includes implicitly what is considered normal business practice within the area of practice. The undisputed evidence is that it is customary for the parties to include these elements. They are an implicit part of the agreement. A contractual term may be implied on the basis of the parties' presumed intention if it is necessary for business efficacy or if it meets the "officious bystander test" (*Energy Fundamentals Group Inc. v. Veresen Inc.*, 2015 ONCA 514 at paras. 30 and 31).

[29] The officious bystander test states that *prima facie* that which is in any contract is left to be implied and need not be addressed specifically. The question is whether a reasonable person, practising in the relevant area, would consider the term implicit to the agreement. This case involves sophisticated parties experienced in negotiating and in settling grievances. There is no evidence that the bargaining agent did not consider those terms implicit; however, it is clear from Mr. Alcock's evidence that the employer did consider them implicit. Given the context of the settlement discussions, the parties' sophistication, the practice in the area, and the parties' custom, it is clear that those elements were not new and were implicit in the agreement.

[30] On April 16, 2015, Ms. O'Young did not raise any issues with the MOS, other than stating that minor changes would be required. It was never indicated that Ms. O'Young or the PSAC were surprised by the MOS or that they no longer considered themselves bound by the deal. When asked to identify what was new in the MOS, Ms. O'Young never identified anything. Neither she nor the PSAC asked to have the offending elements of the MOS removed. Their conduct did not match the position the bargaining agent took at the hearing.

[31] Nothing that the bargaining agent identified at the hearing attacked the core of the agreement. Ms. O'Young said nothing on April 16, 2015, that would change her April 6, 2015, affirmative statement that the parties had a deal. The parties' conduct is important when deciding whom Ms. O'Young represented. She led the employer and the new Board to believe through her emails that she represented the grievor in respect of this grievance. She needed time to address the grievor's concerns.

[32] Paragraph 209(1)(*a*) of the *Act* requires a bargaining agent to represent a grievor in respect of grievances filed under the relevant collective agreement. Ms. O'Young provided the legal advice relative to the grievor's settlement; the grievor could have obtained independent legal advice before she accepted, but she did not. She had Ms. O'Young convey her acceptance of the settlement proposal to the employer. It was a simple agreement that was accepted by all. Whether or not the grievor had independent legal advice is not relevant to this situation as she is not a party to the agreement, and adding her as a signatory to the MOS does not make her one. The collective agreement belongs to the bargaining agent and the employer, not the employee. A bargaining agent may settle a grievance; that settlement then binds the grievor (*Air Canada*, at para. 23). The grievor's consent is not required (*Ontario*, at paras. 39 and 40).

[33] Mr. Alcock testified that he expected that the delay executing the MOS was caused by the grievor having cold feet, which does not change the fact that the bargaining agent accepted the deal on April 6, 2015, and that it is binding. Productive and effective labour relations require the bargaining agent to accept its responsibilities under the deal that has been struck (*Ontario*, at paras. 29 and 30).

[34] Therefore, a settlement deal is in place, and the new Board no longer has jurisdiction to hear the grievance on its merits.

B. <u>For the bargaining agent</u>

[35] When deciding whether a settlement has been reached, one must look at the communications to determine whether, in all the circumstances, the parties reached a settlement on the essential terms of the deal. In this case, there are compelling objective indications that the parties had not reached a final agreement. They contemplated that an MOS had to be executed to resolve the actual terms of the settlement, which the employer communicated to the new Board, which then

adjourned the matter pending the withdrawal of the grievance. The employer's document clearly contemplated that the grievor would obtain independent legal advice on the proposed settlement. Furthermore, the employer's proposed MOS included terms not included in the communications between the parties, such as the confidentiality clause and the release. All those are clear indications that the parties did not have a meeting of the minds.

[36] While the parties were near to reaching a deal, it was not sufficient to bar the continuation of the hearing. Alternatively, if there was in fact a deal, the question is what exactly it was. At best, it would have included nothing other than the three elements communicated in the emails between Mr. Alcock and Ms. O'Young before April 6, 2015. It is readily apparent that the parties negotiated on only three terms: the amount to be paid to the grievor, how the payment was to be characterized, and the withdrawal of the grievance. It is also evident that the parties contemplated that an MOS be executed, which would have involved further negotiations over the terms of that agreement. Unfortunately, that did not happen.

[37] Ensuring that the parties honour consummated deals is an important element of labour relations. Bargaining agents and employers that have long-standing relationships must be prepared to honour agreements they have reached. However, near-deals are not binding. Such an incomplete transaction cannot operate in law to deny the grievor her fundamental rights, including constitutionally protected human rights, from being determined on their merits.

[38] It may be tempting for the new Board to try to bridge the gap and impose terms that may be reasonable. Tribunals cannot impose what they believe to be just and reasonable terms to settle a dispute. Settlements have to be voluntary. If there is no deal, it is as fundamentally important that no deal be imposed as it is to honour a deal that is consummated. Occasionally, when parties have agreed to terms but there are some gaps in those agreed-upon terms but clear agreement on the terms, a tribunal can fill the gaps of these agreed upon terms. That is not so in this case. There were no proposals that contained the additional terms in the MOS.

[39] In *Allergan, Inc. v. Apotex Inc.*, 2015 FC 367 at para. 34, the Federal Court identifies the test to determine whether a contract has been entered into, which is one of the reasonableness of the parties' expectations. Has the promisor committed itself to a firm agreement, or does it retain an element of discretion as to whether to execute

the formal agreement? If discretion is retained, then there is no agreement. To create a contract, the parties must have a mutual intention to create a legally binding agreement and must have agreed to all its essential terms (*Allergan*, at para. 36). The law differentiates between a case in which a final agreement has been reached, which the parties intend to record in formal documentation, and one in which the parties have reached only a tentative agreement, which will not be binding upon either party until the documentation is complete.

[40] The parties had no meeting of the minds. Their communications had to create an offer that set out the offerer's willingness to enter into an agreement on certain terms, which was then matched with a corresponding agreement that reflected the offer. The acceptance must have precisely matched the terms of the offer (*Allergan*, at para. 36).

[41] The employer produced a proposed MOS that included multiple terms that the parties had not discussed. The bargaining agent believed that it was a straightforward deal involving the payment of a specific sum to the grievor and its withdrawal of the grievance. Comparing the two versions of the deal, it is apparent that there was no mirror agreement. It does not matter that the employer believed its understanding of the deal included non-contentious or routine items; they were not included in its initial offer. The release, confidentiality clause, and without-prejudice clause included in the employer's MOS were all to its benefit, for which there was no reciprocal monetary or other advantage to the grievor.

[42] Furthermore, there was no express term that the agreement contain the standard terms as the employer described them. It is clear from the email exchangesthat at no time was the matter of any usual terms and conditions included. One cannot even determine what those terms were, particularly since Mr. Alcock described using different forms of the usual terms for different bargaining agents. It does not matter whether the employer usually settles on terms that include such provisions. Each settlement is negotiated individually, and there is no legal basis to include the terms that the parties might have included in other agreements, particularly since those agreements were without prejudice.

[43] There is a fundamental problem with the employer's position that cannot be rectified. The proposed MOS expressly contemplated that the parties would receive independent legal advice before signing it. The inclusion of this term in the MOS

clearly demonstrates that even the employer understood that any agreement reached was subject to further approval. The parties had not yet negotiated the proposed terms of the agreement before they entered into it. Rather, the original agreement was not a contract because essential provisions intended to govern the contractual relationship had not been settled or agreed to. This was a contract to make a contract, and nothing more. The execution of the MOS was not intended only as a solemn record of an already completed and binding contract but also was essential to forming the contract itself.

[44] It defies credulity that the MOS drafted by the employer could reflect a binding settlement when it contains a clause that requires the parties to obtain independent legal advice before executing it. It was impossible for the parties to have been bound by the terms set out in the MOS on April 6, 2015, before they had even seen the terms that could have bound them had they executed the MOS.

[45] The independent legal advice is a true condition precedent. The grievor could not have been bound by the terms of the MOS until she certified that she had received independent legal advice. While the parties were hopeful that a final settlement could be achieved, they each characterized the nature of their agreement as one in principle. If a further document was contemplated at the time the parties reached the agreement in principle, the terms had not been finalized. Further comment contemplates further negotiations. The contract cannot have crystalized. The parties had not agreed to all the essential terms of the agreement.

[46] The request to the new Board to postpone the hearing pending the withdrawal of the grievance connoted uncertainty about the eventuality of executing the MOS. Provision was made for this, namely, that if the parties failed to execute the MOS and the bargaining agent did not withdraw the grievance within 90 days, the hearing would be set down once more, which is exactly what took place.

[47] On reviewing the communications between the parties up to and including April 6, 2015, it is apparent that there never was a meeting of the minds and that no enforceable agreement is in place. Alternatively, if one is in place, the bargaining agent agreed that the new Board has jurisdiction over its implementation, pursuant to *Amos*. An adjudicator's task is to determine the nature of the agreement. The bargaining agent submitted that there is evidence only that the parties had contemplated three items: the payment to the grievor, how that payment would be characterized, and the

withdrawal of the grievance bearing PSLREB File No. 566-02-4853. If the adjudicator concludes that an agreement was reached, it can be only on the basis of the offer made and accepted on April 6, 2015, and not on the subsequently rejected MOS.

IV. Reasons

[48] At the outset, I have to stress that this is a very unusual case, and I have reached my decision based on the specific facts it presents. The Federal Court of Appeal in *Amos* confirmed that an adjudicator has jurisdiction to decide whether the parties have reached a binding agreement, whether a party has complied with the agreement and, if not, what order is appropriate in the circumstances. (See also *Chaudhary* at para. 30.)

[49] The first issue I must resolve is whether the parties had a binding agreement. For a contract to exist, there must be an offer, an acceptance, and a consideration. The Federal Court in *Allergan*, relying on Waddams, *The Law of Contracts*, 6th edition, identified as follows the questions to ask when attempting to determine whether a contract had been entered into:

. . .

> *A similar analysis may be employed where an agreement is made that contemplates a further document such as a formal contract. Is execution of the formal contract a step in carrying out an already enforceable agreement, like a conveyance under an agreement to buy land, or is it a prerequisite of any enforceable agreement at all? Again, the test must be the reasonableness of the parties' expectations. Has the promisor committed himself to a firm agreement or does he retain an element of discretion whether or not to execute the formal agreement? In the former case there is an enforceable agreement. In the later there is none.* ***If the promisee's expectation of a firm commitment is a reasonable one it will be protected even though the formal document is never executed. Again the courts seem particularly ready to protect such an expectation when it is manifested in conduct in reliance on the agreement.***
>
> . . .
>
> [Emphasis added]

[50] In my analysis, the promisee is the employer, which expected that in exchange for paying a sum of money, the bargaining agent would withdraw the grievance bearing PSRLEB File No. 566-02-4853.

[51] I am convinced that the parties had a binding agreement as at April 6, 2015. The *viva voce* evidence of the employer, together with the documentary evidence tendered by the employer, leaves no question that the parties had reached a binding agreement. The two key documents are the emails from Ms. O'Young to Mr. Alcock (Exhibit 4, tab 1), both with the subject heading: "Grievor has accepted, waiting final instructions from Union." The first email was dated April 3, 2015, and it reads as follows: "I am writing to advise you that the grievor has accepted the Employer's final offer of … I still need to obtain final instructions from my client, and will let you know as soon as I do." This was followed by her email dated April 6, 2015, which reads: "We have a deal. Thank you for advising the board that we have reached a settlement." It is important to emphasize that not only did the grievor not testify on the preliminary objection, the bargaining agent led no evidence at all to refute the position of the employer that the parties had reached a settlement of the grievance.

[52] A verbal agreement had been struck. Verbal agreements are enforceable. There is no need for a signature for an agreement to be binding. Parties can be bound by an oral agreement. Signatures are merely evidence of the binding nature of the agreement (*Ontario*, at para. 33). MOSs are not necessary to settle a grievance as long as there is a meeting of the minds on the substantive issues (*Air Canada*, at paras. 20 to 25, and *Tulli*, at para. 40). The uncontradictory evidence is that the primary terms of the agreement were that that the employer would pay a cash payment, characterized in a specific fashion at the grievor's request, in exchange for the withdrawal of the grievance bearing PSLREB File No. 566-02-4853.

[53] It is clear that both legal counsel involved in the settlement negotiations were in a hurry to resolve this grievance, to prevent the imminent hearing of this matter on the merits, and that they could have been more clear and succinct in their communications. However, Ms. O'Young succinctly communicated one thing to Mr. Alcock, her statements, "We have a deal", and "I am writing to advise you that the grievor has accepted the Employer's final offer …" (Exhibit 4, tab 1). Equally clear was that Mr. Alcock would draft the MOS. Their haste should not deny the employer of the benefits of the deal it struck with the bargaining agent.

[54] Accordingly, I have determined that the parties had a binding settlement agreement as at April 6, 2015.

[55] The grievor initially accepted that arrangement and had it communicated to the employer through the bargaining agent's representative, who later informed the employer that the bargaining agent had accepted the offer and that there was a deal. Based on that, Mr. Alcock advised the new Board and sought time to implement its terms. It was imminently reasonable for the employer to expect that the bargaining agent's firm commitment would be consummated. The fact that the new Board merely postponed the matter for 90 days did not, as counsel for the bargaining agent argued, make the agreement any less solid. The timeline that the new Board imposed on the parties to complete the settlement and withdraw the grievance is immaterial to the terms of the agreement struck between the parties. It is not a further term or condition of the agreement. In fact, the provisions in the draft MOS stipulated a 90-day period for payment from the employer.

[56] Unfortunately, neither the grievor nor the bargaining agent complied with the agreement. Both refused to sign the MOS. Following a series of communications between counsel as set out in the summary of evidence, Ms. O'Young finally confirmed that neither the grievor nor the bargaining agent would be withdrawing the grievance.

[57] Pursuant to s. 228(2) of the *Act*, I must now determine what an appropriate order should be in the circumstances to enforce the agreement.

[58] It is clear from the employer's evidence and the exhibits submitted by both parties that an MOS was to be drafted to memorialize the agreement. Mr. Alcock volunteered to draft the MOS and did so based on a template agreement used on a number of occasions for finalizing agreements with this particular bargaining agent. The question is whether the MOS was anything more than a document to memorialize the agreement between the employer and the bargaining agent.

[59] While counsel acting for the bargaining agent in representing the grievor might not have been familiar with this type of agreement, I have no doubts that the bargaining agent was and that it should not have been in any way surprised by its contents. I accept that there was nothing new in it and that the parties had used this same agreement, with the exception of the particulars of the monetary compensation, on many occasions.

[60] As counsel for the employer argued, if the parties have a valid and binding agreement, then the new Board loses jurisdiction to hear the matter on its merits.

Settlement, by definition, ends the matter. The whole essence of a settlement is to end a dispute; therefore, it must include a release, without which there is nothing to preclude one party or the other from attempting to resurrect the dispute. The parties to this settlement are the same parties to the collective agreement; the grievor is not a party to either. A grievor is bound by any agreement struck between the relevant bargaining agent and employer to settle a grievance (*Air Canada*, at para. 23, and *Ontario*, at paras. 40-41). The bargaining agent has the right to settle any grievance filed under the collective agreement, and such a settlement is binding on the grievor.

[61] Counsel for the bargaining agent argued at length that the addition of the without-prejudice, release, and confidentiality clauses in the MOS were new terms. I disagree. They were terms that, based on the practice between the parties, were to be anticipated and expected by both parties. While I find, based on the evidence, that the parties had not discussed these specific clauses prior to April 6, 2015, the bargaining agent did not provide any evidence that the release, without prejudice, and confidentiality clauses were anything but standard provisions that went into every settlement agreement between the employer and this bargaining agent. Therefore, in the circumstances of this case, I am satisfied that the release, without prejudice and confidentiality clauses form part of the agreement between the parties.

[62] A document drafted to memorialize the key terms of an agreement is often ripe with such boilerplate language, which was of no surprise to the parties, both of whom were very sophisticated and experienced in the nature of this type of agreement. The presence or absence of the grievor's signature, who is not a party to the collective agreement, is not fatal to implementing the agreement between the bargaining agent and the employer.

[63] Counsel for the bargaining agent argues that the clause with respect to independent legal advice is a true condition precedent. I cannot agree. The independent legal advice clause was not a condition precedent to the coming into force of the agreement. (See *Turney v. Zhilka*, [1959] S.C.R. 578 at page 583, and *Health Employers Assn. of British Columbia v. British Columbia Nurses Union (Lebel Grievance)* (1999), 80 L.A.C. (4th) 75 at para 9.) I have already determined that there was a binding agreement between the parties as at April 6, 2015. If the grievor had concerns about the agreement, she should not have advised Ms. O'Young that she accepted the employer's final offer. The clause in the draft MOS with respect to independent legal

advice does not change that fact.

[64] A grievance filed under the collective agreement cannot proceed to adjudication before the new Board without the bargaining agent's authorization as is evidenced by the Form 20 the bargaining agent used to refer this matter to the new Board. The grievance belongs to the bargaining agent and not the grievor unless it includes a grievance for which the bargaining agent's support is not required. This grievance is about an interpretation of article 19 of the collective agreement and its workforce adjustment appendix and could not proceed without the bargaining agent's authorization as follows pursuant to section 209 of the *Act*:

> ***209.*** *(1) An employee may refer to adjudication an individual grievance that has been presented up to and including the final level in the grievance process and that has not been dealt with to the employee's satisfaction if the grievance is related to*
>
> > *(*a*) the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award . . . .*
> >
> > *(2) Before referring an individual grievance related to matters referred to in paragraph (1)(a), the employee must obtain the approval of his or her bargaining agent to represent him or her in the adjudication proceedings.*

[65] There is no independent human rights complaint or grievance not requiring the bargaining agent's support before me that could stand alone without the bargaining agent's support. Since an agreement is in place to settle the grievance before me, I am without jurisdiction to hear the matter on the merits.

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

(The Order appears on the next page)

V. Order

[67] The new Board has no jurisdiction to hear the grievance bearing PSLREB File No. 566-02-4853 on its merits.

[68] The parties are directed to complete the agreement they struck on April 6, 2015, as set out in paragraphs 1, 2, 3, 4, 6, 7, 8, and 9 of the MOS drafted to finalize that agreement (Exhibit 4, tab 3). Given the already lengthy delays in implementing the agreement, rather than the 90 days referred to in paragraphs 1 and 2, the employer shall make these payments to the grievor within 30 days of the date of this order.

[69] PLSREB File No. 566-02-4853 will remain open for 30 days to allow the parties to implement the terms of the agreement as I have directed, following which the file will be closed.

[70] I will remain seized in respect of any issues arising from the order for 30 days from the release of this decision.

January 28, 2016.

Margaret T.A. Shannon,
adjudicator