Date: 20180226

File: 566-02-12684

Citation: 2018 FPSLREB 15

Federal Public Sector Labour Relations and Employment Board Act and *Federal Public Sector Labour Relations Act*

Before a panel of the Federal Public Sector Labour Relations and Employment Board

BETWEEN

GHANI OSMAN

Grievor

and

DEPUTY HEAD
(Department of Employment and Social Development)

Respondent

Indexed as
Osman v. Deputy Head (Department of Employment and Social Development)

In the matter of an individual grievance referred to adjudication

Before: Marie-Claire Perrault, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Samantha Kompa, counsel

For the Respondent: Stuart Wright, Treasury Board Secretariat, and Richard Fader, counsel

Decided on the basis of written submissions, filed December 8 and 15, 2017, and a conference call held February 12, 2018.

I. Application following the settlement and withdrawal of a grievance

[1] On June 16, 2016, Ghani Osman ("the grievor") referred a grievance to adjudication alleging disguised discipline and discrimination based on race and religion. At first, the deputy head of Employment and Social Development Canada ("the respondent") disputed the Board's jurisdiction to hear the matter and declined mediation. However, in October 2016, both parties agreed to settle the matter by mediation, which was held from November 22 to 24, 2016. It resulted in an agreement entitled "Minutes of settlement" ("MoS"), the final version of which was signed by the parties on December 14, 2016. The grievor withdrew his grievance on December 23, 2016. The withdrawal was one of the terms of the MoS, according to the grievor.

[2] On September 29, 2017, the grievor wrote to the Federal Public Sector Labour Relations and Employment Board ("the Board"), asking it to determine if a valid and binding settlement had been reached by the parties. He alleged that he had been led to sign the MoS based on misrepresentation on the part of the respondent. The Board asked the grievor to provide more detailed submissions and provided the respondent with the opportunity to reply. Once submissions from both parties had been received, I held a conference call to settle a question of fact, since it was unclear from the grievor's submissions. I believe that I have sufficient information to render a decision based on the written material before me and the information provided during the conference call, during which both parties were represented by counsel.

II. Summary of the arguments

A. For the grievor

[3] The grievor submits that he "… only signed the Minutes on the understanding that his Employer would provide him with a 'positive letter of reference'" [emphasis in the original]. The grievor alleges that during mediation, he was told that the letter of reference would state his years of service since March 2009, his excellent performance, and his experience and interest in labour relations. He further alleges that he signed the MoS based on these oral representations.

[4] In March 2017, the grievor approached the respondent to request changes to his letter of reference. It covered too brief a period, did not expound on his labour relations work, and gave his position the wrong title. The respondent agreed to change

the title of his position but did not change the letter further, as the signatory manager could speak only to the period in which she had managed the grievor.

[5] The grievor argues that the Board may determine if there is a valid and binding agreement between the parties, despite the fact that the grievance has been withdrawn. Based on *Palmer v. Canadian Security Intelligence Service*, 2010 PSLRB 11, if the withdrawal was a condition of settlement, which the grievor asserts it was, then the withdrawal is not determinative of the Board's jurisdiction.

[6] If the Board decides that there is a valid and binding settlement, it would still retain enforcement jurisdiction, as established in *Amos v. Canada (Attorney General)*, 2011 FCA 38. Thus, it could order the respondent to produce a letter consistent with its representations at the mediation.

[7] If the Board decides that the MoS is not valid and binding because of misrepresentation, then it can reopen the grievance (as per *Palmer*, despite the grievance being withdrawn) and adjudicate it.

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

[8] In its reply submissions, the respondent first raised a jurisdictional issue with respect to the original grievance. In *Amos*, the adjudicator had found and the Federal Court of Appeal confirmed that an adjudicator retains jurisdiction over a grievance over which he or she would have had jurisdiction were it not for the settlement. In the present case, the respondent submits that it is not certain that an adjudicator would have had jurisdiction as the original grievance concerned harassment and discrimination. It is not a disciplinary matter, which is the only ground under which the grievor could refer the grievance to adjudication without bargaining agent representation, as is the case.

[9] As to the settlement itself, the respondent argues that it is valid and binding, as the claim of misrepresentation is unfounded. The respondent denies that any representations were made to the grievor concerning the letter of reference and points to the absence of any specific information concerning an explicit representation.

[10] Moreover, according to the respondent, as of December 1, 2016, which was before the grievor signed the MoS on December 6, 2016, and then its subsequent amendment (for changes he had requested) on December 14, 2016, he was provided

with a draft letter of reference, to which no changes were requested.

[11] The grievor was assisted by an experienced representative at mediation. Ample time was spent discussing and reviewing the MoS, which indeed was modified at the grievor's request between December 6 and 14, 2016. He did not share any concerns with the respondent about the draft letter of reference provided on December 1, 2016. The respondent contends that the letter sent in March 2017, which the grievor found unsatisfactory, was essentially the same as the draft letter.

III. Reasons

[12] A valid and binding settlement is normally a bar to the Board's jurisdiction to hear the underlying grievance. The Board will reopen settlements in exceptional circumstances, such as in *Amos* and *Palmer*. It will not as a matter of course examine and reopen settlements, as doing so would run counter to the economy, good sense, and finality that settlements are meant to impose.

[13] I have not been convinced that there is any necessity to examine further the settlement finalized by the MoS. The grievor has not disputed that the terms of the MoS were largely carried out.

[14] The only point of contention that has been raised concerns the letter of reference. The MoS stated only that the respondent would provide a positive letter of reference. The respondent submitted that it had provided a draft of the letter to the grievor on December 1, 2016, before the MoS was signed.

[15] Based on the grievor's admission in the conference call, I am satisfied that he did indeed receive a draft of the reference letter on December 1, 2016. He stated that he had not looked closely at it at the time and that he realized only in February or March 2017 that it was unsatisfactory.

[16] The grievor bases his argument to reopen the settlement on an alleged misrepresentation by the respondent as to the content of the letter. I cannot find any misrepresentation, since he was provided with a draft of the reference letter before the MoS was signed. At the moment it was signed, the grievor was fully informed as to the terms of settlement, including the letter of reference. The respondent cannot be held responsible for the fact that the grievor did not then pay close attention to the letter.

[17] The settlement is final and binding, and its terms have been executed according to the MoS. The grievance has been withdrawn. There are no grounds for the Board to reopen this matter.

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

(The Order appears on the next page)

IV. Order

[19] The Board does not have jurisdiction to reopen the grievance in file number 566-02-12684.

February 26, 2018.

Marie-Claire Perrault,
a panel of the Federal Public Sector
Labour Relations and Employment Board