Date: 20001214

File: 166-2-24127

Citation: 2000 PSSRB 114

Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

CHRISTINE SRI SKANDHARAJAH

Grievor

and

TREASURY BOARD
(Employment and Immigration Canada)

Employer

Before: Guy Giguère, Board Member

For the Grievor: Sean T. McGee, Counsel

For the Employer: Robert H. Jaworski, Counsel

Heard at Toronto, Ontario,
August 16, 2000.

DECISION

[1] By letter dated February 23, 1993, Nick Mulder, then Deputy Minister of Employment and Immigration, terminated the employment of Christine Sri Skandharajah, an employment counsellor (PM-02), effective at the close of business on March 3, 1993.

[2] In his letter, Mr. Mulder explained that Mrs. Sri Skandharajah was dismissed because she had processed numerous Confirmation of Offer of Employment forms without the prior knowledge or authorization of her supervisor and, in two instances, she had approved documents which she knew to be forged in violation of the employer's policy and procedures with respect to the Foreign Worker Recruitment Program and the Canadian Job Strategy Initiative.

[3] On March 1, 1993, Mrs. Sri Skandharajah filed a grievance and it was rejected at the final level of the grievance procedure by the employer on March 31, 1993.

[4] This grievance was first scheduled to be heard in September 1993 before an adjudicator appointed under the *Public Service Staff Relations Act* (*PSSRA*) but the hearing was postponed several times, either at the request of the grievor or the employer, until January 24, 2000. This exceptionally long delay was mostly due to the hearing being held in abeyance pending the conclusion of criminal proceedings.

[5] On January 24, 2000, before the hearing began, the parties informed the Public Service Staff Relations Board (the Board) that, at this point, they wanted mediation to take place instead of an adjudication hearing. Joseph W. Potter, Deputy Chairperson, was therefore appointed by the Board as mediator in this file and mediation took place on January 26 and 27, 2000. After the mediation concluded, Mr. Potter completed a "Mediation Status Report" indicating only that the grievance had been settled without any other details, as required by the Board's policy on confidentiality of mediation.

[6] By letter dated February 16, 2000, Mrs. Sri Skandharajah advised the Board that she did not want to withdraw her grievance from adjudication since she wished to rescind the agreement reached at mediation. On March 22, Mrs. Sri Skandharajah informed the Board that she wanted her grievance to be heard at a formal adjudication.

[7] On June 30, 2000, the employer filed a Notice of Motion with the Board invoking section 21 of the *PSSRA* and seeking an order dismissing the grievance. In support of its motion, the employer presented an affidavit signed by Donna Verity. The employer

asked the Board to dismiss the grievance on the ground that the grievor had requested mediation of this grievance, which was successful, and that a settlement agreement had been executed on January 27, 2000.

[8] On August 8, 2000, Sean T. McGee, counsel, advised the Board that he had been retained by the Canada Employment and Immigration Union, a component of the Public Service Alliance of Canada, to represent Mrs. Sri Skandharajah with respect to the preliminary motion brought by the employer in this matter.

[9] Mr. McGee informed the Board on August 11, 2000 that he had discussed the matter with Mr. Jaworski and both agreed that the preliminary issue should proceed first and be decided prior to scheduling a hearing on the merits. Both counsel concurred that this preliminary matter could be heard in one day and that it would be scheduled for August 16, 2000.

Evidence

[10] During the hearing of this grievance, the following facts were established.

[11] In the affidavit filed by the employer in support of its motion, Ms. Verity, a human resources consultant with Human Resources Development Canada, explained that she participated for the employer at the mediation of Mrs. Sri Skandharajh's grievance. She indicated that Mrs. Sri Skandharajah was accompanied by her husband and was represented at the mediation session by Barry Done of the Public Service Alliance of Canada.

[12] Ms. Verity stated that a settlement, the terms of which are confidential, was reached on January 27, 2000. Mrs. Sri Skandharajah, Mr. Done and the employer's counsel, Mr. Jaworski, executed it that day and it was also initialled in four places. Ms. Verity did not hear any complaints about Mr. Done during the session and was not aware of any problems between Mrs. Sri Skandharajah and her representative.

[13] Ms. Verity declared as well that the employer considers the matter concluded and is prepared to abide by the settlement.

[14] On the morning of August 16, 2000, I was informed by counsel for the employer that criminal charges against Mrs. Sri Skandharajah arising out of the same facts which led to the termination of her employment had either been dropped or had been stayed.

Both counsel agreed that they could produce an Agreed Statement of Facts, which would facilitate the hearing on this preliminary matter while preserving the confidentiality of the mediation session that took place in January 2000.

[15] At the beginning of the hearing, the Agreed Statement of Facts was provided to me. Mr. Jaworski explained that it was worded so as not to breach the confidential nature of the agreement that was entered into at the mediation session of January 27, 2000.

[16] In summary, the Agreed Statement of Facts explains that, in addition to the facts as stated in the affidavit of Ms. Verity, the parties further agree that:

- immediately following execution of the agreement, Mrs. Sri Skandharajah fulfilled the second term of the agreement;

- the employer's party did not see what transpired when Mrs. Sri Skandharajah, Mr. Done and/or Mr. Potter were behind closed doors;

- the employer's party did not witness whether Mrs. Sri Skandharajah was distressed at the end of the day on January 27, 2000;

- Mrs. Sri Skandharajah does not have medical evidence to corroborate her distress during the course of the mediation session on January 26 and 27, 2000;

- in her former capacity as an employment counsellor, Mrs. Sri Skandharajah handled contribution agreements and therefore had experience in dealing with contracts; and

- on its face, the agreement signed by Mrs. Sri Skandharajah, in the presence of her husband, on January 27, 2000 does not contain any caveat, condition or proviso; more particularly, it does not contain a condition that it be shown to her counsel, Michael Wright, before it took effect.

[17] Submitted on consent with the Agreed Statement of Facts were two agreements concerning the mediation session, one of which was signed on January 24, 2000 by Messrs. Done and Jaworski. The other agreement, dated January 26, 2000, is basically

identical but identifies Mrs. Sri Skandharajah as plaintiff and the Attorney General of Canada as defendant in a civil suit that she brought against the employer in the Ontario Superior Court of Justice. Accordingly, added as signatories to this agreement are Jim Leising, counsel for the Attorney General, and Michael D. Wright, counsel for Mrs. Sri Skandharajah. In both agreements, it is stated that the statements made and the documents produced during the mediation session are not subject to disclosure and are not admissible into evidence for any purpose. It is also specified that the notes and recollections of the mediator conducting the session are confidential and protected from disclosure.

[18] Mr. Jaworski did not call any witnesses but relied on the Agreed Statement of Facts and Ms. Verity's affidavit. Mr. McGee brought forward two witnesses: the grievor as well as her husband, Vincent Sri Skandharajah.

[19] The grievor worked for over 19 years in the federal Public Service before she was dismissed. Before immigrating to Canada, she had been a teacher for 16 years in Sri Lanka and was a school principal for four years. Her husband is an engineer, a member of the British Institute of Engineering and holds the equivalent of a Masters in Business Administration.

[20] Mrs. Sri Skandharajah testified that she was represented by Mr. Done during the mediation session held on January 26 and 27, 2000, and that her husband was present at all times. Mr. Wright, her lawyer for the civil suit filed against the Attorney General of Canada, was also present but only for the morning session on January 26. Before leaving the mediation session, Mr. Wright told Mrs. Sri Skandharajah not to sign anything before he looked it over. Mrs. Sri Skandharajah indicated to Mr. Done that any agreement or document would have to be faxed to Mr. Wright and approved by him before she would sign it. Mr. Done assured her that he would not ask her to sign anything before Mr. Wright had approved it.

[21] During the mediation session, the grievor indicated that the employer's representatives were in a different room and she never spoke to them. On the second day of the mediation session, Mr. Done presented her with an offer from the employer. This offer was much lower than the bottom line she had set for herself. She informed Mr. Done that she did not want to accept the employer's offer and that she would rather proceed to adjudication.

[22] Mrs. Sri Skandharajah explained that she got very upset with Mr. Done when he told her that this was the best offer she would get from the employer and it was better to accept it so that they could "all go home". The grievor's husband, Vincent Sri Skandharajah, testified that when Mr. Done presented the employer's offer to his wife, she reacted in a very emotional way; she had a tantrum, was very upset and was crying. Mr. Sri Skandharajah heard Mr. Done say to his wife: "Let us sign and go home." He was hurrying her up so she would sign it. He also heard Mr. Done say that a copy of the agreement could be sent to Mr. Wright after it was signed. Mr. Sri Skandharajah told his wife that it was stupid to send the agreement to Mr. Wright after it was signed, and he told Mr. Done that there was no point in doing so. During all this time, Mrs. Sri Skandharajah was crying. He asked his wife the reason for the hurry, as the agreement was sloppy. He told her: "We have a number of days and there is another way of doing this." Mr. Sri Skandharajah explained that he did not intervene beyond those comments; he left the whole thing in Mr. Done's hands as his wife's representative.

[23] Mrs. Sri Skandharajah testified that she wanted to fax the proposed agreement to Mr. Wright but Mr. Done told her to sign it now and fax it later. After over an hour of discussions with Mr. Done, she signed the proposed agreement. Mr. McGee asked Mrs. Sri Skandharajah what she understood by Mr. Done's explanation that she should sign the document. She explained: "I believed that, if Mr. Wright was against it, I could appeal against it. There would be some legal way to rescind or appeal it. But I don't know the legal terminology." At no point before or after signing the document did she see the employer's representatives.

[24] That night, after signing the document, Mrs. Sri Skandharajah telephoned Mr. Wright and told him that she had been pressured into signing it. She therefore wrote the following day, on January 28, 2000, to Mrs. Anne Clark-McMunagle, Co-ordinator, Representation Section, Membership Services Branch, Public Service Alliance of Canada, explaining that she wanted "to rescind the mediation agreement". In her letter, she indicated (Exhibit G-1):

> *I am not satisfied with the terms and conditions of this Agreement. I want further Mediation or Adjudication instead. I feel I was pressured into signing in the interests of "saving time and money,"….*

> *Also, I had indicated right at the beginning of the negotiation, that I would not agree to or sign anything till my lawyer Mr. Michael Wright was given the opportunity to scrutinize it. In the end I was rushed through signing and this request was not afforded me, even with my repeated requests.*
>
> *In the light of all of the above, I want this Agreement rescinded with immediate effect, and further Mediation or Adjudication initiated. And, as I indicated before, I want to be able to consult my lawyer, Mr. Michael Wright, before I sign any document.*

Arguments on Objection to Admissibility of Evidence

[25] When Mr. McGee started his examination of the grievor, he asked her what was Mr. Potter's reaction when she told Mr. Done that any agreement reached would have to be faxed to Mr. Wright before she signed it.

[26] Mr. Jaworski objected to this question. He stated that he did not object to questions on what was said by Messrs. Done or Wright, but generally he did object to questions relating to what had been said by Mr. Potter or that involved Mr. Potter. His arguments in support of his objection are as follows:

- in both agreements concerning the mediation, as signed by the grievor, it is noted that the notes, record and recollection of the Board member or the Dispute Resolution Officer conducting the mediation are confidential and protected from disclosure for all purposes;

- by operation of said agreements, Mr. Potter is not compellable; also Section 108 of the *PSSRA* prohibits compelling the testimony of Board members; therefore there is no way to test his remarks;

- discussions were held behind closed doors and the employer was not privy to the remarks; what happened behind closed doors with the grievor and her representative cannot be held against the employer;

- the parol evidence rule: evidence from a witness will not be considered to contradict a written contract except when it is ambiguous;

- this would constitute hearsay.

[27] Mr. McGee's reply to Mr. Jaworski's objection is as follows:

- there are exceptions to the parol evidence rule that apply here in explaining an incomplete document and to assist in ascertaining the intentions of the parties;
- in a technical sense, the settlement of the grievance cannot be pleaded here; either you put it in or you do not;
- the mediator is not compellable, but that's an evidentiary issue that both parties accept;
- the grievor's witness can be examined and cross-examined.

[28] In support of his argument, Mr. McGee relied on the following: *The Law of Contract in Canada* by G.H.L. Fridman, Q.C., Third Edition, Carswell p. 454 to 459; *The Law of Contracts* by S.M. Waddams, Fourth Edition, Canada Law Book Inc. p. 320 to 325, *Hawrish v. Bank of Montreal* [1969] S.C.R. 515 (Q.L.); *St. Lawrence Petroleum Ltd. v. Bailey Selburn Oil & Gas Ltd.,* [1963] S.C.R. 482 (Q.L.); and *Gagnon* (Board files 166-18-17832 to 17834).

[29] In rebuttal, Mr. Jaworski added that the integrity of the mediation process is central to the employer's motion. Also, Mr. Potter is not a party; therefore the parol evidence rule exception would not apply to his evidence.

[30] At the hearing, I informed the parties that I would take note of Mr. Jaworski's objection and deal with it in my reasons for decision.

Arguments on Motion

For the Employer

[31] Mr. Jaworski submitted that the grievance should be dismissed by an order of the Board under subsection 21(1) of the *PSSRA.* He explained that, fundamentally, the *PSSRA* aims at attaining an objective, which is the resolution of labour disputes between employers and employees. Subsection 21(1) permits the Board to control its own process and administer the *PSSRA* in the best interest of continued good labour relations between management and employees. This can be done by an order dismissing the grievance on the basis that a settlement has been executed.

[32] Mr. Jaworski submitted that it is important to review the Agreed Statement of Facts. The parties reached an agreement and the evidence given at this hearing should not shake that conclusion. Mediation was entered into by mutual consent and Mrs. Sri Skandharajah had the support of her husband and Mr. Done, an experienced representative, throughout that process. Mr. Wright was never listed as solicitor of record for the grievance and was never a principal contact in the matter.

[33] It is conceded by the grievor that the settlement on its face does not contain any conditions. The employer was not aware of problems between Mrs. Sri Skandharajah and Mr. Done. The grievor explained that Mr. Wright told her not to sign anything before he gave her advice but there is no clause to that effect in the settlement agreement as conceded in the Agreed Statement of Facts.

[34] Mrs. Sri Skandharajah said that the offer that she received from the employer was below her bottom line. She explained that she had worked as a teacher and principal, had 39 years of work experience overall, yet she signed the settlement agreement. She did not testify that she did not understand its terms; there was no ambiguity. The matter is therefore settled.

[35] As noted in the Agreed Statement of Facts, immediately after signing the settlement agreement, Mrs. Sri Skandharajah fulfilled the second term, which shows a serious intent to go through the process and to follow through on the settlement agreement.

[36] The argument put forward by the grievor that she was distressed or was under extreme stress when she signed the settlement agreement is similar to the defence of duress. An argument that Mrs. Sri Skandharajah was under duress would not be acceptable here to invalidate the settlement agreement since what has been held as duress in the relevant jurisprudence occurs when a party suffered, at the hands of the other party, violence, imprisonment or seizure, none of which is present in this case.

[37] Mrs. Sri Skandharajah testified that she was very emotional; yet she still had the presence of mind to seek the advice of Mr. Wright. This contradicts her argument that she was so distressed she did not know what she was signing.

[38] Mr. Sri Skandharajah explained that he was at the mediation session to provide support and advice to his wife. He holds a degree equivalent to a top business degree; he is experienced and sophisticated enough to enter into a complex contract. He told her that the agreement was sloppy and it would be stupid for her to sign it and then send it to Mr. Wright to seek his advice. She ignored his suggestion because her intent was to sign the settlement agreement.

[39] The motion is in no way challenging the authority of the Board and is based on subsection 21(1) of the *PSSRA*. The objective of the *PSSRA* is the resolution of labour disputes and the employer submits that it is in the interest of good labour relations that parties honour settlements. If Mrs. Sri Skandharajah has a problem with the advice she received from her union representative, her recourse lies elsewhere; namely, section 23 of the *PSSRA*.

[40] The employer values finality and it is in the best interest of good labour relations that the settlement agreement be honoured.

[41] In support of his argument, Mr. Jaworski relied on the following decisions: *Cellular Rental Systems Inc. Bell Mobility Cellular Inc.,* [1995] O.J. No. 721 (Q.L.); *Cellular Rental Systems Inc. Bell Mobility Cellular Inc.,* [1995] O.J. No. 3773 (Q.L.); *Tomkins (Next friend of) v. Union Gas Ltd.,* [1994] O.J. No. 1288 (Q.L.); *Shorey v. Jones* (1888), 15 S.C.R. 398; *Fairweather v. McCullough* (1918), 43 O.L.R. 299; *Farmer v. Farmer and Bakker* (1979), 10 R.F.L. (2d) 243 (Q.L.); *Royal Bank of Canada v. Mahoney,* [1982] N.J. No. 20 (Q.L.); *Canadian Imperial Bank of Commerce v. Boudreau and Boudreau* (1982), 41 N.B.R. (2d) 365 (Q.L.).

For the Grievor

[42] Mr. McGee submitted that the grievor was relying on the basic principle found in subsection 92(1) of the *PSSRA* that, when a grievance has not been dealt with to the satisfaction of the employee, the employee may refer the grievance to adjudication. Mrs. Sri Skandharajah has a right to have this matter adjudicated under the *PSSRA* and it would be inconsistent with the *PSSRA* if she was held to this settlement.

[43] On the day after signing the settlement agreement, she corresponded with the mediator and her representative to the effect that she wanted the agreement rescinded. There is no prejudice to the employer as a result of Mrs. Sri Skandharajah's request to rescind the settlement and go to adjudication.

[44] Mr. McGee also stated that a document was signed which, if it were a binding document entered into freely and voluntarily and without collateral representation, the grievor agrees would prevent the matter from proceeding to adjudication. The difficulty in the matter is whether or not two particular elements leading to the signing of the document are of such a nature that the document cannot be held as a barrier to the grievor having her grievance adjudicated.

[45] It took a full day for the parties to reach agreement on the terms of the mediation process and Mrs. Sri Skandharajah was told then that she would have the opportunity to show the settlement agreement to Mr. Wright before signing it. Her consent was tied to the advice she would receive from Mr. Wright. Those comments were repeated and reconfirmed until she signed the settlement agreement. Therefore, to her knowledge, she was signing a document that was a conditional or tentative agreement.

[46] The grievor accepts that the employer did not have knowledge of these facts but the question remains, did she sign the settlement agreement unconditionally? The answer is no since getting Mr. Wright's advice was a condition of her acceptance of the terms of a settlement agreement. The uncontradicted evidence is that Mrs. Sri Skandharajah believed she could appeal or rescind the agreement and she signed it on that basis.

[47] It is also submitted that Mrs. Sri Skandharajah signed this document in such distress that her agreement to it was not voluntary. Everyone in the room knew that the bottom line she had set had not been met by the settlement agreement. She had a tantrum and in that context an agreement was signed. As she testified, she was supposed to have Mr. Wright look at it but she was told to sign it and fax it to him later. On this point, labour jurisprudence dealing with consent when resigning from employment is enlightening. If you are giving up employment, the evidence required to show consent will have to be substantive and, in addition, contemporary physical evidence of intent will be necessary. Here, there is an absence of contemporary

physical evidence. In fact that very night, after signing the agreement, she spoke with Mr. Wright and on his advice rescinded the agreement.

[48] As for Mr. Jaworski's argument that it is in the interest of good labour relations that a settlement agreement be honoured, Mr. McGee argued that Mrs. Sri Skandharajah did not believe that it was a final agreement. She believed that she could get Mr. Wright's advice and be able to rescind or appeal it.

[49] In support of his argument, Mr. McGee relied on the following decisions: *Re Vernon Jubilee Hospital and British Columbia Nurses' Union* (1992), 32 L.A.C. (4th) 1 (Q.L.); *Lebreux* (Board file 125-2-61); *Re Conestoga College and Ontario Public Service Employees Union* (1988), 3 L.A.C. (4th) 26 (Q.L.); *Re Metropolitan Toronto Board of Commissioners of Police and Metropolitan Toronto Police Association* (1978), 18 L.A.C. (2d) 7 (Q.L.); *Re Thompson General Hospital and Thompson Nurses M.O.N.A., Local 6* (1990), 15 L.A.C. (4th) 257 (Q.L.); *Re Foster Wheeler Ltd. and United Steelworkers, Local 6595* (1990), 14 L.A.C. (4th) 136; and *Re Nova Scotia Civil Service Commission and Nova Scotia Government Employees Union* (1986), 27 L.A.C. (3d) 120 (Q.L.).

Rebuttal

[50] In rebuttal, Mr. Jaworski submitted that the grievor put too much weight on evidence that was self-serving. The employer is not in a position to contradict this evidence. A settlement agreement was signed and the second term of that agreement was executed; that is indicative of consent and is sufficient.

[51] As to the argument of emotional distress, this grievance was filed seven and one-half years ago. The grievor had ample time to reflect on it as the mediation occurred during a two-day period. She had advice from Mr. Done and her husband. There was nothing coercive in this situation; there were no alcohol-related problems or problems with her spouse. The evidence that Mrs. Sri Skandharajah insisted on obtaining Mr. Wright's advice is contradictory since her husband testified that he told her the agreement was sloppy and it was stupid to sign it and then seek Mr. Wright's advice afterwards. There was therefore no latent ambiguity in her accepting the terms.

[52] Mr. McGee's argument that there would be no prejudice to the employer also has to be rejected. The employer has submitted that it values finality. The objective of a mediation session is to resolve the matter and finality is extremely important in

labour relations as it is somewhat like closing the book on a dispute. As for prejudice, there is no cost recovery under the *PSSRA.* The employer had prepared its case for adjudication and spent a considerable amount of time and resources. It then turned into a mediation session, which also involves costs and resources.

Reasons for Decision on Objection to Admissibility of Evidence

[53] The question to be answered with respect to this objection is whether evidence of what was said by or involving Mr. Potter, the mediator in the mediation session, should be admitted into evidence.

[54] Mr. Jaworski's main argument is that there are two agreements concerning the mediation session and in each there are clauses establishing the confidentiality of the mediation session. These agreements were signed by the representatives of the grievor and the employer. In these agreements, it is specifically noted that the notes, record or recollection of the Board member or Dispute Resolution Officer conducting the mediation are confidential and protected from disclosure for all purposes.

[55] Mr. McGee's principal argument is that those two agreements should be put aside in respect of evidence relating to what the mediator said or did or what was said to him, as it could be useful in ascertaining the intention of the grievor when she signed the settlement agreement. Mr. McGee's argument is based on exceptions to the parol evidence rule. He explained that the parol evidence rule was put in place for the purpose of avoiding an injustice; to ensure there is not an unjust result. As he mentioned, the exceptions were to explain an incomplete document or to ascertain the intentions of the parties. Also, he submitted that even if Mr. Potter is not compellable, Mr. and Mrs. Sri Skanharajah can testify as to what was said to and by the mediator.

[56] It is a recognized rule before labour arbitration boards that any communication, whether verbal or written, between a mediator and one party or between a mediator and both parties is confidential and not admissible as evidence.[1] If the parties were not assured of the confidentiality of their discussions with the mediator, it would then

[1]I found the following cases particularly interesting: *Canadian Broadcasting Corporation v. Leila Paul* [1992] 2 F.C. 3 T.O. (Q.L.); *Pacific Press, a Division of Southam Inc. and Communications Energy & Paperworkers Union, Local 115-M* [1998] B.C.C.A.A.A. No. 1000 (Q.L.); *Alice Charbonneau c. Multi restaurants inc.* [1999] J.Q. no. 2223 (Q.L.); *The Service, Office and Retail Workers Union of Canada and Eileen S. McArthur and Bank of Montreal* (1980) CLRB No. 247 (Q.L.).

become an ineffective and pointless exercise as no party would be willing to speak confidentially to the mediator.

[57] In fact, communication with a mediator is viewed as privileged. In this regard in *R. vs. Mirkhandan*, [1999] O.J. No. 3215 (Q.L.), Justice Lampkin of the Ontario Court of Justice found that, following the decision by the Supreme Court of Canada in *Slavutych v. Baker et al*, [1976] 1 S.C.R. 254 (Q.L.), a qualified privilege can cover a mediation session.

[58] Furthermore, I agree with Justice Granger of the Ontario Court of Justice (General Division) who stated in *Marchand (Litigation guardian of) v. Public General Hospital of Chatham,* [1997] O.J. No. 1805 (Q.L.), at paragraphs 5 and 6, that communication with a mediator can be privileged as an extension to the privilege that arises where parties engage "without prejudice" in negotiations for a settlement arising out of litigation.[2]

[59] As explained in *R. vs. Mirkhandan* (*supra*), at paragraph 23, the privileged nature of communications made to a mediator is not absolute and is subject to limited exceptions such as "public safety" exceptions and communications in furtherance of a crime or fraud. For example, if a threat is made towards a party, if physical violence or the safety of children is at stake, then the privilege would be waived. In the instant case, the grievor could not claim such exceptions as no violence or threats occurred during the mediation session conducted on January 26 and 27, 2000.

[60] Mr. McGee explained that the parol evidence rule was put in place for the purpose of avoiding an injustice, to ensure there is no unjust result. As he mentioned, the purpose of the exceptions was to explain an incomplete document or to ascertain the intentions of the parties. Raising these exceptions to the parol evidence rule does not address the fact that the parties had specifically agreed that communications with the mediator were to be kept confidential. It was clearly and without any ambiguity agreed to by the parties that the discussions at mediation would be confidential.

[61] I find that it is far more important for the parties to be able to engage in frank and open discussions with the aid of the mediator, which in this case led to an agreement, than the information that might be lost to subsequent proceedings. The

[2]See also *The Law of Evidence in Canada*, by Sopinka, Lederman, Bryant, Second Edition, Butterworths, para. 14.230, p. 818 and 819.

mediation discussions were meant to be held in confidence and this confidentiality element is essential for mediation to be effective. It is quite evident that mediation would not occur if this element of confidentiality was not present and it is in the best interest of both the employers and the employees that, whenever possible, disputes be resolved by mediation without having to resort to formal adjudication. It is clear that the injury that would follow the disclosure of this communication would be greater than the benefit gained by its admission. That being said, having heard the evidence about what was said while Mr. Potter was present, I find that, even if it had been admitted, it would not have changed the outcome of this proceeding.

Reasons for Decision on Motion

[62] The question that I have to determine on this motion is whether or not the settlement agreement signed by the parties is binding and operates as a bar to having the termination grievance adjudicated.

[63] Mr. Jaworski submitted that there was a settlement agreement, as it appears in the affidavit and the Agreed Statement of Facts, and that on its face there was no condition attached to it.

[64] On the other hand, Mr. McGee submitted that, when the grievor signed the mediation agreement, she was told she would be able to send a copy of any settlement agreement to Mr. Wright before she committed to it. Mr. McGee argued therefore that Mrs. Sri Skandharajah signed a conditional agreement, also known as a tentative agreement.

[65] As it appears in the Agreed Statement of Facts, there was no condition, caveat or proviso in the settlement agreement signed by Mrs. Sri Skandharajah and the settlement did not specifically contain a condition that it would be shown to Mr. Wright before it took effect.

[66] The grievor also testified that, when presented with the employer's proposal, she wanted to fax it to Mr. Wright but Mr. Done told her to sign it now and send it later. Her husband also testified that he told her it was stupid to send the agreement to Mr. Wright after she had signed it and he told Mr. Done there was no point in doing so. I therefore find that, in no way, when she signed the document, did she make it conditional upon Mr. Wright's approval. It was quite clear, when Mr. Done urged

Mrs. Sri Skandharajah to sign the document, when he said "let us sign and go home", that negotiations in view of a settlement would be over after she signed the document. Her husband was also quite clear that there was no point in obtaining Mr. Wright's advice after she signed the document, but Mrs. Sri Skandharajah signed it anyway.

[67] I therefore come to the conclusion that there was no condition attached to Mrs. Sri Skandharajah's signature to the agreement; this was in no way a conditional or tentative agreement.

[68] Another argument submitted by Mr. McGee was that, when Mrs. Sri Skandharajah signed the agreement, she signed under emotional distress. He submitted that she should benefit from a "cooling off" period similar to what is found in labour law jurisprudence in situations of resignations.

[69] Mr. Jaworski responded that Mr. McGee's argument that she was so distressed as to be unable to give full consent is blatantly unacceptable as she was not that impaired not to realize what she was signing and she wanted to seek the advice of counsel. He submitted that she had recourse to the advice of Mr. Done and her husband. There was no coercion; there were no alcohol problems or problems with her spouse. Mr. Jaworski pointed out that the grievance had been filed seven years ago and that the grievor had ample time to make up her mind during the mediation session that lasted over two days. Finally, after signing, Mrs. Sri Skandharajah fulfilled the second term of the settlement agreement, thereby showing objective proof of her intent, according to Mr. Jaworski.

[70] After reviewing the jurisprudence submitted by Mr. McGee on the test to determine whether an employee has resigned, I find that this jurisprudence is limited to situations where an employee has resigned and the arbitrator must establish if it was really the employee's intention to resign or if it was just an act of frustration. This test cannot be imported into the present case. I agree with Mr. Jaworski that Mrs. Sri Skandharajah had the advice of both Mr. Done and her husband, that the mediation was conducted over a two-day period and that her grievance had been filed seven and one-half years ago. There was no coercion; her husband told her not to sign it and that it was stupid to send the document to Mr. Wright after she signed it but Mrs. Sri Skandharajah decided to sign it anyway.

[71] As explained by Fridman in chapter 9, page 313, in *The Law of Contract* (*supra*), repudiation of consent once given could be justified to rescind an otherwise valid agreement if consent was not obtained or given when the "victim" was physically, emotionally or intellectually competent to give it but was the result of improper persuasive conduct of the "guilty party". In other words, to plead duress or distress, as was pleaded here, there must be evidence that the employer's conduct was responsible for Mrs. Sri Skandharajah's inability to give a valid consent to the agreement.

[72] As submitted in the Agreed Statement of Facts, there is no medical evidence of her emotional distress; there is therefore no medical evidence that her capacity to enter into an agreement was affected by this emotional distress. Here, at no time was the employer in the presence of Mrs. Sri Skandharajah, as they were sitting in separate rooms. I received no evidence that the employer was aware of Mrs. Sri Skandharajah's distress and therefore no evidence that the employer took advantage of this by presenting to her an offer that would be detrimental to her. At no point during the mediation session did the employer have any knowledge that Mr. Wright had told the grievor not to sign anything before he looked it over or about the conversation she had with Mr. Done that any agreement or document would have to be faxed to Mr. Wright before she signed it. Mrs. Sri Skandharajah testified that during the mediation session, the employer's representatives were in a different room and she never spoke to them. Her distress cannot be raised against the employer since there is no evidence that her distress was the product of improper or persuasive conduct by the employer. The evidence that I have is that she had experience with contracts as an employment counsellor and she had the advice of her husband, who also has experience with contracts, and Mr. Done, an experienced bargaining agent representative.

[73] I have no grounds, either at common law or in equity, to justify the repudiation of this consent. Therefore, I find that Mrs. Sri Skandharajah entered into a binding agreement and that she had the emotional, physical and intellectual capacity to give her consent.

[74] Finally, Mr. Jaworski asked that the Board dismiss this grievance by an order under subsection 21(1) of the *PSSRA* as a settlement had been executed in this matter and it would be in the best interest of good labour relations between management and employees that mediation agreements between parties be honoured.

[75] Mr. McGee, on the other hand, argued that Mrs. Sri Skandharajah has the right to have the matter adjudicated under subsection 92(1) of the *PSSRA*, as her grievance has not been dealt with to her satisfaction. This would be in the interest of good labour relations, as the grievor did not believe it was a final agreement.

[76] Mr. McGee pleaded no prejudice was sustained by the employer as a result of Mrs. Sri Skandharajah's request to rescind the settlement agreement.

[77] Mr. Jaworski responded that the employer would suffer prejudice if the agreement was rescinded, as the employer incurred costs to prepare for adjudication as well as during the mediation session.

[78] As I have found that there is a valid and binding settlement agreement, I also find that this agreement constitutes a complete bar to the grievor's proceeding to adjudication with the grievance against her termination of employment. As Justice Gibson, of the Federal Court, Trial Division, found in *MacDonald v. Canada*, [1998] F.C.J. No. 1562 (Q.L.), where a public servant is discharged, he is entitled to present a grievance but he loses this right to pursue the matter under the *PSSRA* if he enters into a binding settlement agreement with the employer.

[79] Indeed, it was the position of then Vice-Chairman J. Maurice Cantin in *Bhatia* (Board file 166-2-17829) that, when a settlement agreement has been reached between the parties, the Board no longer has jurisdiction to entertain the grievance. As he explained, the grievance procedure is designed to provide employers and employees with a method for the orderly processing of grievances. The parties may attempt to settle their disputes at various stages and at various levels. It follows therefore that if, through mediation or through discussions between themselves, the parties conclude a binding settlement agreement, they should not be allowed to have second thoughts about the matter. If this were allowed, the employer or the employee would never know whether, in fact, an agreement had been reached. This would permanently damage good labour relations and jeopardize any attempts at settlement. I agree with Mr. Jaworski that the employer in this case would suffer prejudice for incurred costs if the agreement were rescinded. However, the greatest prejudice would be to labour relations.

[80] Having found that the parties have settled this grievance, I conclude that there is no longer a dispute between them and therefore no matter to be determined by an adjudicator appointed under the *PSSRA*. Furthermore, it is in the best interest of good labour relations that binding mediation agreements be honoured. Accordingly, these proceedings are terminated.

Guy Giguère,
Board Member

OTTAWA, December 14, 2000.