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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

VIVIAN VALDERRAMA

Grievor

and

DEPUTY HEAD
(Department of Foreign Affairs, Trade and Development)

Respondent

Indexed as
Valderrama v. Deputy Head (Department of Foreign Affairs, Trade and Development)

In the matter of an individual grievance referred to adjudication

Before: Ian R. Mackenzie, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Falon Milligan, Professional Institute of the Public Service of Canada

For the Respondent: Stefan Kimpton, counsel

Heard by teleconference at Ottawa, Ontario,
August 18, 2020.

REASONS FOR DECISION

I. Order requested by the grievor

[1] Vivian Valderrama ("the grievor") grieved her termination of employment from the Department of Foreign Affairs, Trade and Development, commonly referred to as Global Affairs Canada (GAC), of January 16, 2018. During the hearing of this grievance before me, which started on January 27, 2020, the parties reached a settlement without my assistance. On July 20, 2020, the grievor's representative requested an order of non-compliance with the parties' "Memorandum of Agreement" (MOA).

[2] On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365; *PSLREBA*) was proclaimed into force (SI/2014-84), creating the Public Service Labour Relations and Employment Board (PSLREB) to replace the former Public Service Labour Relations Board (PSLRB) as well as the former Public Service Staffing Tribunal. On the same day, the consequential and transitional amendments contained in ss. 366 to 466 of the *Economic Action Plan 2013 Act, No. 2* (S.C. 2013, c. 40; *EAP No. 2*) also came into force (SI/2014-84). Pursuant to s. 396 of the *EAP 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; *PSLRA*) as that Act read immediately before that day.

[3] On June 19, 2017, *An Act to amend the Public Service Labour Relations Act, the Public Service Labour Relations and Employment Board Act and other Acts and to provide for certain other measures* (S.C. 2017, c. 9) received Royal Assent, changing the name of the PSLREB and the titles of the *PSLREBA* and the *PSLRA* to, respectively, the Federal Public Sector Labour Relations and Employment Board ("the Board"), the *Federal Public Sector Labour Relations and Employment Board Act*, and the *Federal Public Sector Labour Relations Act* (*FPSLRA*).

[4] The parties agreed that I had jurisdiction to determine if a party to a final and binding settlement agreement is in non-compliance with it and, if so, to make an order pursuant to the *FPSLRA* "… that he or she considers appropriate in the circumstances" to remedy any such non-compliance; see *Amos v. Deputy Head (Department of Public Works and Government Services)*, 2008 PSLRB 74 (upheld in *Amos v. Canada (Attorney General)*, 2011 FCA 38). I find that I have jurisdiction to determine if the Deputy Head has complied with the MOA.

II. Preliminary issues

A. Admissibility of negotiation emails

[5] The respondent submitted that the email correspondence between counsel that discussed the terms of settlement was relevant and therefore admissible. The grievor submitted that it was not relevant and that it should not be admitted.

[6] The respondent's counsel submitted that the emails provide evidence about the circumstances surrounding establishing the MOA. In the alternative, it argued that the emails would help resolve a latent ambiguity in the MOA. Counsel referred me to the following cases: *University Hill Holdings Inc. (589918 B.C. Ltd.) v. Canada*, 2017 FCA 232; *Filkow v. D'Arcy & Deacon LLP*, 2019 MBCA 61; and *Canada (Attorney General) v. Macadams*, 1996 CanLII 3891 (FC).

[7] The grievor's representative submitted that extrinsic evidence was not required because there is no ambiguity in the MOA; see Brown & Beatty, *Canadian Labour Arbitration*, 5th Edition, paragraph 3:4400 - "Extrinsic Evidence". The representative stated that the onus was on the respondent to satisfy the Board that an ambiguity exists, either patent or latent (see *Fisher & Ludlow Inc. v. CAW-Canada, Local 504* (2012), 220 L.A.C. (4th) 436).

[8] I have determined that the email correspondence that led to the final MOA is not relevant or necessary for determining whether the respondent is complying with the MOA. I have determined that there is no latent ambiguity in the MOA (for the reasons set out in the "Reasons" section of this decision). I also find that the emails are not necessary to determine the parties' intent and the scope of their understanding. The surrounding circumstances of the MOA can be determined without relying on the emails that led to the MOA.

[9] Accordingly, I find that the emails with respect to the MOA negotiation are not admissible. They are to be returned to the respondent and therefore are not in the record before the Board.

B. Confidentiality, and sealing order

[10] The MOA contains a confidentiality clause. The parties agreed that the MOA should be sealed, since it was negotiated with an expectation of confidentiality.

[11] In accordance with the open court principle and following the "*Dagenais/Mentuck*" test (see *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; and *R. v. Mentuck*, 2001 SCC 76), the sealing of documents will be ordered only when disclosing them would cause harm that would significantly outweigh the benefits of their full disclosure (see *Pajic v. Statistical Survey Operations*, 2012 PSLRB 70). The Supreme Court of Canada (SCC) reformulated the *Dagenais/Mentuck* test as follows in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41:

> …
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> *… A confidentiality order … should only be granted when (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.…*
>
> …

[12] I find that in the interest of labour relations, the confidentiality of settlement agreements should be preserved. The salutary effect of a confidentiality order outweighs the public interest in open proceedings. Therefore, at a pre-hearing conference call on August 17, 2020, I ruled that the MOA would be sealed.

[13] Accordingly, the MOA, including attachments, is ordered sealed. For the purposes of the hearing, it was important to know the relevant terms of the MOA, which will be discussed in broad strokes in this decision. Those terms that are not at issue will remain confidential, in accordance with the parties' will, as expressed in the MOA.

III. Summary of the facts

[14] The facts in this request for an order are not in dispute. The parties agreed on the documents filed as exhibits (other than the email correspondence related to negotiating the MOA, which I have ruled as inadmissible). The summary that follows is based on the admissible documents that the parties provided.

[15] In August 2015, the grievor was appointed as a PM-03 at GAC to what is termed a "pool position". The letter of offer contained the following term of employment:

…

> *Mobility is a condition of employment for this position. Your acceptance of this offer will constitute an appointment to a (PM 03) pool position from which you agree to accept this condition and to be assigned successively to various positions at headquarters. You confirm that you are willing and able to accept assignments which will normally be for a 3 year duration, as the Department requires.…*

…

[16] Employees in this pool are commonly referred to as "mobile" employees.

[17] As of her termination of employment on January 16, 2018, the grievor was assigned to a position on an acting basis at the CO-01 level that was scheduled to end in 2019.

[18] The following are the relevant provisions of the MOA for the purposes of this decision:

- The grievor's employment status was reactivated effective January 16, 2018, "thereby rescinding the Grievor's termination" (paragraph 3).
- The grievor was placed on "Leave Without Pay for Other Reasons" (LWOP) from January 16, 2018, to a specified future date (paragraph 4).
- The parties agreed that the grievor would provide a signed letter of resignation, effective on a specified future date (one day after the expiry of her LWOP), unless she "deploys to another public service position" before that date (paragraph 6).
- If she deployed to another public service position before the resignation date, her resignation would no longer apply, and the resignation letter would be destroyed (paragraph 6).

[19] The grievor provided a letter of resignation, with a specified effective date. It read in part as follows: "I hereby irrevocably resign my position with Global Affairs Canada …".

[20] In May 2020, the grievor received an email sent to all GAC mobile employees with respect to the assignment cycle for mobile positions. GAC officials later advised her representative that the grievor had received the email in error. The representative was advised that the grievor was not eligible to be included on the list of participants for the assignment cycle because of the terms of the MOA.

[21] GAC's guidelines for the 2020 cycle of assignments ("2020 Guidelines") provide that indeterminate Canada-based GAC staff who meet the eligibility criteria may apply for assignments. They further state the following:

…

> *Mobile employees are required to accept assignments in the National Capital Region (NCR) as per the operational requirements of the department. Their inability, reluctance or refusal to take an NCR assignment can mean that they do not meet this term and condition of employment.*

…

IV. Summary of the arguments

A. For the grievor

[22] The grievor's representative argued that the MOA does not contain a prohibition against the grievor's participation in the assignment cycle. She submitted that the grievor should be allowed to participate in it and that GAC should consider her for assignments.

[23] The 2020 Guidelines require all mobile employees to participate in the assignment cycle and make no exceptions for employees on LWOP. The grievor's representative submitted that the MOA does not explicitly deal with the assignment cycle and that it was not appropriate to imply a term that restricts the grievor's access to this process.

[24] The representative submitted that when interpreting a settlement agreement, it should be looked at fairly and objectively and without any presumptions, in the same way that collective agreements are interpreted. The representative referred me to *Ontario Power Generation Inc. v. Society of United Professionals*, 2018 CanLII 90219, in which the arbitrator said the following:

…

> *9. … The Minutes of Settlement must be given their plain and ordinary meaning, in a manner that does not unduly restrict legal rights not specifically dealt with in the document. It is not appropriate to imply a term of settlement unless it is necessary to do so in order to give effect to the terms the parties explicitly agreed to.*

…

[25] She submitted that there is no ambiguity in the MOA on its face and that silence is not an ambiguity. She also referred me to *Ontario Power Generation v. Society of United Professionals*, 2020 CanLII 44568, in which the arbitrator stated the following:

> *81. … As a practical matter, the arbitrator's task remains what it has always been; namely, to determine the objective contextual labour relations meaning of the agreement in issue, with the words used being the most important consideration. In short, when it comes to contract interpretation the words used matter most.*
>
> [Emphasis in the original]

[26] The grievor's representative submitted that were the grievor chosen for an assignment, her LWOP status would end, and her resignation letter would no longer apply. She submitted that there was no practical difference between a position at GAC and one in the public service. She submitted that the MOA does not state that the only way the grievor could obtain other employment is by being deployed to another position outside GAC; nor does it state that she cannot apply to other positions within GAC. She noted that GAC is within the public service and that the word "deploy" used in the MOA is consistent with the 2020 Guidelines.

B. For the respondent

[27] The employer's counsel submitted that the MOA precludes the grievor from applying for the 2020 assignment cycle. He submitted that she is a mobile employee and that applying for an assignment is attempting to return to her previous position. He stated that in essence, she seeks reinstatement.

[28] Counsel for the respondent submitted that in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, the SCC established that the current approach for contract interpretation is a "practical, common-sense approach". The overriding concern is to determine the parties' intent and the scope of their understanding, as follows:

> …
>
> *[47] … To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning ….*

…

[29] Counsel submitted that reading the MOA as a whole shows that the parties intended that the grievor would not be able to apply for cycle assignments.

[30] Counsel submitted that the word "deploy" in the MOA refers to a deployment, which has a specific meaning under the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13, Part 3; *PSEA*). An assignment under the 2020 Guidelines is not a deployment. Mobile employees remain in their substantive positions when they receive assignments. A deployment is a permanent transfer from one position in the public service to another. Counsel submitted that it was the parties' intention that the grievor would deploy to another public service position, not receive a temporary assignment under her current substantive position.

[31] Counsel submitted that the provision in the MOA for an extended LWOP also supports the view that the parties' intent was that the grievor would not be allowed to apply for assignments while in her substantive position.

C. The grievor's reply submissions

[32] The grievor's representative submitted that the grievor does not seek reinstatement. She submitted that the parties' intention was to allow the grievor to apply for competitions and that no limits were placed on where she could apply. The representative submitted that the MOA contemplates that opportunities could be sought in other departments or at GAC. She also noted that the definition of "public service" in the *PSEA* includes GAC.

V. Reasons

[33] For the reasons set out in this section, I decline to issue an order of non-compliance with the MOA.

[34] In *Sattva Capital Corp.*, the SCC emphasized a "practical, common-sense approach" to contract interpretation. The overriding concern in contract interpretation is to determine the parties' intent and the scope of their understanding. To do it, a decision maker must "… read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract" (at paragraph 47). The surrounding circumstances are considered because determining contractual intention

can be difficult when looking at words on their own, as "… words alone do not have an immutable or absolute meaning …".

[35] The SCC cautions that a consideration of the surrounding circumstances must never be allowed to overwhelm the words of the agreement. The purpose of examining the surrounding circumstances is to "… deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract." Any interpretation of a contractual provision must be grounded in the text and read in light of the entire contract.

[36] The grievor's position is that there is no ambiguity in the MOA. In its primary position, the respondent agreed that there is no ambiguity. It argued only in the alternative that if there is a latent ambiguity, the negotiation emails should be considered to resolve it.

[37] I find that there is no patent or latent ambiguity in the MOA. The grievor was placed on LWOP and was to follow that with a resignation from her GAC position, unless she "deploys to another public service position". The parties disagree on how this provision applies, but the provision itself is not ambiguous. The parties' intent and their understanding can be determined by examining the language of the MOA and referring to the surrounding circumstances.

[38] Before examining the surrounding circumstances, it is important to understand the parties' mutual and objective intentions as expressed in the words of the MOA. I have summarized the relevant provisions at paragraph 18 of this decision. The MOA rescinded the termination of employment, and the grievor was retroactively placed on LWOP. The MOA stated that the LWOP would continue to a specified date, followed by her resignation. The signed resignation letter, which forms part of the MOA, referred to her resignation from her GAC position. The only provision that addresses rescinding the resignation letter references the possibility of the grievor deploying to another public service position before the effective date of the resignation.

[39] From a plain reading of the MOA language, the parties' intent is clear: the grievor would remain a GAC employee on LWOP status, which provided her with an opportunity to seek employment elsewhere in the public service. If she were unable to find "another public service position", she would resign on a specified date.

[40] I now turn to the surrounding circumstances to "deepen" the understanding of the parties' intentions. The surrounding circumstances are the facts that the parties knew when the MOA was signed or the facts that they reasonably ought to have known (see *Sattva Capital Corp.*).

[41] The MOA uses the phrase "deploys to another public service position". To "deploy", or "deployment", has a specific meaning in the public service and is defined in the *PSEA*. The parties to the MOA (or at least their representatives) either knew the definition of "deploy" or ought reasonably to have known it. Section 2(1) of the *PSEA* defines "deployment" as "… the transfer of a person from one position to another in accordance with Part 3." Part 3 (at s. 52) states that on deployment, "… a person ceases to be the incumbent of the position to which he or she had previously been appointed or deployed."

[42] The letter of offer appointed the grievor to a pool position. A condition of her employment was being "assigned successively" to various "positions" at headquarters. The letter also required her to confirm that she was willing and able to "accept assignments", normally of a three-year duration. This demonstrates that the cycle of assignments were "assignments" and not "deployments". The MOA provides that the resignation no longer applies if the grievor "deploys" to another public service position. An assignment is not a deployment.

[43] The 2020 Guidelines were not in existence when the MOA was signed. Therefore, I find that it is not appropriate to consider them in the analysis of the surrounding circumstances of the MOA. I have included details of the 2020 Guidelines in this decision for context and because the Guidelines featured in the parties' submissions.

[44] It is clear from the language of the MOA as well as the surrounding circumstances that the parties' intention was that the only way the resignation would no longer apply would be if the grievor obtained another position in the public service — other than her position as a mobile PM-03. The MOA does not contemplate an assignment in the 2020 cycle. An assignment under that process is not a deployment and is not "another position", since she would remain the incumbent in her current PM-03 position.

[45] The MOA does not provide for any circumstances in which the LWOP would end, other than through a deployment for the grievor to another position in the public

service. The parties agreed to a specified term for the LWOP. No provision in the MOA provides for an end to that status (i.e., a return to paid employment). By necessary inference, a deployment to another position in the public service would end the LWOP with GAC. However, this is the only situation under the MOA in which the LWOP would end before its specified period.

[46] I find that the parties were clear in their intention that the grievor was not eligible to be considered for a pool assignment in the 2020 cycle.

[47] The grievor's representative suggested that the grievor's terms and conditions of employment (as set out in her letter of appointment and in the 2020 Guidelines) required her to make herself available for assignments. The MOA clearly modified the grievor's terms and conditions of employment. Accordingly, I reject that argument.

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

(The Order appears on the next page)

VI. Order

[49] The MOA is ordered sealed.

[50] The request for an order of non-compliance is denied.

September 1, 2020.

Ian R. Mackenzie,
a panel of the Federal Public Sector
Labour Relations and Employment Board