Date: 20230105

File: 561-34-43069

Citation: 2023 FPSLREB 2

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

CHRISTOPHER PRIEST

Complainant

and

PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA

Respondent

Indexed as
Priest v. Professional Institute of the Public Service of Canada

In the matter of a complaint made under section 190 of the *Federal Public Sector Labour Relations Act*

Before: David Orfald, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Complainant: Himself

For the Respondent: Simon Ferrand, Professional Institute of the Public Service of Canada

Decided on the basis of written submissions, filed July 5 and August 5 and 17, 2022.

REASONS FOR DECISION

I. Matter before the Board

[1] The matter before me is whether an agreement reached between the parties to settle this complaint ("the settlement agreement") was valid, final, and binding. Secondly, if the settlement agreement was valid, final, and binding, the issue is whether one or more of its provisions have been breached and what should occur by way of remedy.

[2] On June 1, 2021, Christopher Priest ("the complainant"), an employee of the Canada Revenue Agency ("the Agency"), made a complaint to the Federal Public Sector Labour Relations and Employment Board ("the Board") under s. 190 of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*"). He alleged that his bargaining agent, the Professional Institute of the Public Service of Canada ("the respondent" or "the Institute") had violated its duty of fair representation as set out in s. 187 of the *Act*.

[3] The complainant alleged that the Institute violated its duty of fair representation in the handling of grievances he had filed with the Agency, alleging that certain of the Agency's staffing actions amounted to discrimination on the basis of age. According to the complaint, the Institute withdrew its representation on those grievances when it determined that they were staffing matters. The complainant pursued the grievances on his own, but the Agency dismissed them. In February of 2021, the complainant made an application to the Federal Court for the judicial review of the Agency's dismissal of his grievances.

[4] The complainant alleged that the Institute's decision not to represent him in the grievance process violated its duty of fair representation. He also alleged that the respondent's decision not to represent him before the Federal Court was a violation of that duty.

[5] The respondent raised two preliminary objections about the complaint. First, it submitted that the complaint was untimely, as it was not made within the mandatory 90-day period for making such complaints set out at s. 190(2) of the *Act*. Second, it submitted that even if all of Mr. Priest's allegations were accepted as true, there was no

arguable case that the respondent had violated s. 187 of the *Act* by providing representation that was arbitrary, discriminatory, or in bad faith.

[6] The Board invited the parties to file written submissions on the two preliminary objections and indicated that it expected to be able to rule on the preliminary objections on the basis of those submissions.

[7] As those submissions were being filed, the parties also agreed to use the Board Secretariat's Mediation and Dispute Resolution Services to try to resolve the complaint. Mediation took place on December 20 and 21, 2021. Following the mediation, mediation services staff confirmed that a settlement had been reached and that it was the responsibility of the complainant to inform the Board when the terms of the settlement agreement had been implemented.

[8] On January 3 and 11, 2022, the complainant wrote to the Board and said that he was 'rescinding' his acceptance of the settlement agreement and that he wished to continue with his complaint. On January 4 and 12, 2022, the respondent wrote to the Board and said that the parties had reached a final and binding settlement of the complaint, that the respondent continued to be available to meet its obligations under the agreement, and that the complainant had not lived up to his part of the agreement (the withdrawal of the complaint).

[9] The Board held a case management conference with the parties on May 31, 2022. During it, the complainant and respondent confirmed that on December 21, 2021, they had both signed a settlement agreement with respect to the complaint.

[10] Following *Amos v. Canada (Attorney General)*, 2011 FCA 38, *Fillet v. Public Service Alliance of Canada*, 2013 PSLRB 43, and *Tench v. Treasury Board (Department of National Defence) and Department of National Defence*, 2013 PSLRB 124 at para. 4, when a settlement has been reached on a grievance or complaint before the Board, its jurisdiction is limited to these three questions:

> 1) Was a valid, final, and binding settlement agreement reached?
> 2) Did a party fail to live up to the terms of the settlement agreement?
> 3) If so, what remedial action is appropriate?

[11] After the case management conference, the Board invited the parties to provide written submissions on those three questions and set out a schedule for doing so.

[12] For the reasons that follow, I conclude that a valid, final, and binding settlement agreement was reached between the parties to this complaint on December 21, 2021. I also conclude that the respondent did not breach the terms of the settlement agreement. I further conclude that the complainant did not fulfill his obligations under the agreement and therefore, he breached it. I conclude that the appropriate remedial action is the closure of this file.

II. Chronology of events relevant to the matter before the Board

[13] The following chronology of events relevant to the matter before me is drawn from the parties' submissions and the file record.

[14] In July 2021, both parties agreed to participate in the mediation of this complaint. In August 2021, while waiting for the mediation to be scheduled, they nevertheless completed the written submissions process on the respondent's objections based on the untimeliness of the complaint and the absence of an arguable case. The Board has not made a determination on those written submissions.

[15] In September 2021, a staff mediator from the Board Secretariat's Mediation and Dispute Resolution Services was appointed ("the mediator"). On October 14, 2021, the parties were informed that the mediation was scheduled for December 20 and 21, 2021. According to the complainant, on December 16, 2021, he had a one-hour preliminary phone call with the mediator.

[16] On December 20, 2021, the mediator held pre-mediation sessions with each party. The complainant represented himself. Simon Ferrand represented the Institute. On December 21, 2021, the parties signed an agreement to mediate and then participated in the mediation.

[17] Following the mediation discussions, on the afternoon of December 21, Mr. Ferrand prepared a draft settlement agreement, which was provided to Mr. Priest. Some modifications were proposed by Mr. Priest. By approximately 3:45 p.m., both parties had signed the settlement agreement.

[18] On December 23, 2021, the Federal Court set January 25, 2022, as the hearing date for Mr. Priest's judicial review application regarding the Agency's decisions on his grievances.

[19] On December 28, 2021, Mr. Priest sent Mr. Ferrand an email, which read as follows: "Simon, When can we talk?" An out-of-office reply was generated from Mr. Ferrand's email account, stating that he was away from the office from December 24, 2021, to January 4, 2022, with limited access to his emails. An email address to his assistant was also provided.

[20] On January 3, 2022, the complainant wrote to the mediator and mediation services staff to 'rescind' his acceptance of the settlement agreement. In his email, the complainant stated that in the mediation, he "… was negotiating for a retainer with [the Institute's] legal council [*sic*]" and that he was misinformed about the availability of that assistance during the negotiations. He stated that at the end of the mediation, he had asked to use the retainer that day but was refused. He stated that when he asked to use the retainer the following day (December 22), he was told that Mr. Ferrand would not be available until January 10. He stated that "[t]his lack of availability removes the value of the retainer … [and] … should have been disclosed during negotiations and alternative legal contacts supplied to provide value." He also stated as follows: "I am self represented and have been busy during these holidays preparing without the assistance expected from the retainer. It is now too late to utilize. Jan 10 is of no value."

[21] On January 4, 2022, Mr. Ferrand wrote a reply email to the complainant, which was copied to the mediator. He took the position that the parties had reached a valid and binding settlement during the mediation. Mr. Ferrand emphasized that he had informed the complainant "upfront during the mediation" that he would not be available until the new year due to his work schedule and the upcoming holiday. He also mentioned that the respondent had not breached the terms of the settlement agreement and that it remained committed to upholding its obligations under the agreement, despite the content of Mr. Priest's email of January 3. Mr. Ferrand offered to provide assistance related to Mr. Priest's judicial review application, should he require it.

[22] On January 11, 2022, the complainant wrote to the Board, stressing that he had 'rescinded' the settlement agreement, again stating that information was disclosed after the mediation was over, thereby removing any benefits from the agreement, and requesting that the Board "… continue this complaint and leave it up to the parties to discuss the validity of the agreement."

[23] On January 12, 2022, the respondent wrote to the Board, again taking the position that the settlement agreement was valid and binding. It said:

> …
>
> *The Institute categorically denies Mr. Priest's allegations. The Institute is of the view that the December 21, 2021 Settlement Agreement (SA), signed by both parties, is a valid and binding agreement that constitutes a full and final settlement of matters in Board file number 561-34-43069. Further and pursuant to the terms of the SA, the Complaint in the Board file number 561-34-43069 has been withdrawn.*
>
> …

[24] As noted, the Board convened a case management conference on May 31, 2022. The invitation to the conference indicated that the Board wished to hear from the parties as to the applicability of *Amos*, *Fillet*, and *Tench* to this matter.

[25] At the conference, both parties confirmed that the settlement agreement had been signed on December 21, 2021. They also confirmed that the complainant had not withdrawn his complaint.

[26] Following the case management conference, the Board wrote to the parties, seeking their written submissions on the following three questions:

> 1) Was a valid, final, and binding settlement agreement reached?
> 2) If so, did a party fail to live up to the terms of the settlement agreement?
> 3) If so, what remedial action is appropriate?

III. The settlement agreement

[27] Before analyzing the parties' positions on the three questions above, it is important to take note of some of the provisions in the settlement agreement. While the parties agreed not to divulge the contents of the agreement except for administrative or legal purposes, I find that it is not possible to determine this matter without quoting directly from portions of the agreement.

[28] The preamble to the agreement reads as follows:

> *The parties have made the decision to use mediation to resolve the Complaint submitted by Christopher Priest (FPSLREB file 561-02-43069). The parties acknowledge that all aspects of this matter have been resolved to their satisfaction as per the terms below.*

[29] In the settlement agreement, the Institute agreed:

> …
>
> *1. to review documents related to the Complainant's February 4, 2021, Application for Judicial Review and offer comments to the best of its ability;*
>
> *2. to answer to the best of its ability, procedural questions related to Federal Court procedures.*
>
> …

[30] In consideration for the Institute's undertakings, Mr. Priest agreed in the settlement agreement "to withdraw his complaint (file 561-02-43069)", not to expect the Institute to provide him with legal advice or representation, to release the Institute and its representatives in all regards with respect the facts that gave rise to his complaint, and not to initiate new proceedings arising out of his complaint.

[31] The settlement agreement also contains a confidentiality clause and states that the agreement constituted a full and final resolution of Mr. Priest's complaint.

IV. Analysis

A. Issue 1: Was a valid, final, and binding settlement agreement reached?

1. The complainant's arguments

[32] The complainant's arguments comprise 20 pages in total, plus attachments.

[33] The essential argument of the complainant was that the Institute unilaterally changed two major premises under which the settlement agreement was negotiated. First, he said that before he signed the agreement, the Institute failed to notify him that only Mr. Ferrand would be providing him with advice. Second, he claimed that only after the mediation was over did Mr. Ferrand disclose that he would be unavailable to provide that advice for more than two weeks. The complainant argued that time was of the essence in his judicial review application and that the Institute should have known that and written it into the agreement.

[34] The complainant argued that the Institute's failure to notify him of those points rendered the settlement agreement null and void. By imposing new conditions after the settlement agreement was signed, the Institute repudiated the agreement. His

email of January 3, 2022, 'rescinding' the agreement "was my acceptance of their repudiation", he argued.

[35] The complainant argued that he went into mediation seeking the following two undertakings in particular:

> …
>
> 2. I ask for legal advice to be provided by my Union, however if that advice is insufficient or I require further depth, I shall be funded by the Union for outside assistance on an as need [*sic*] basis.
>
> 3. My Union shall provide Commissioner of Oaths services at no charge.
>
> …

[36] The complainant argued that fundamental to his requests was that time was of the essence and that he would receive advice from someone in the Institute capable of giving it. Mr. Ferrand should have known that time was of the essence when drafting the settlement agreement, and the Institute's "… failure to include a time is of the essence clause is their failure to properly record the circumstances." He argued that time is always of the essence in labour relations matters or when the subject matter of a contract could rapidly decline in value over time (see *McDonald v. Service Employees International Union, Local 1*, 2021 CanLII 81834 (ON LRB) at para. 17, citing *Daley v. Amalgamated Transit Union, Local 1572*, [1982] OLRB Rep. March 420, 1982 CanLII 864 (ON LRB) at para. 20, and *Sail Labrador Ltd. v. Challenge One (The)*, [1999] 1 SCR 265 at paras. 54 and 62).

[37] In his arguments, the complainant explained that a requisition for hearing dates had been made to the Federal Court and that Mr. Ferrand should have known that the hearing would be scheduled soon. The complainant argued that in a search of the online database of the Canadian Legal Information Institute (CanLII), he could not find evidence that Mr. Ferrand had ever appeared in front of the Federal Court. The complainant also alleged that Mr. Ferrand had only ever provided written submissions to the Board and not appeared in person before it. The complainant said that he expected the Institute to find Federal Court expertise or legal assistance from elsewhere within its organization.

[38] The complainant also argued that the respondent should not have drafted the settlement agreement, as the Institute was biased. He said that he made a proposal for a legal retainer if the Institute's advice was insufficient and that Mr. Ferrand agreed with it, but it was not reflected in the written agreement. The complainant argued that the mediator should have drafted the agreement. The complainant said that he was "livid" when he saw the draft agreement and that he had to be pulled into a breakout room to be calmed down. He argued that he was not granted the time to fully consider the draft agreement. He said that there were two inflammatory aspects to the draft agreement and that he suggested changes to the draft. Once those changes were made, he said that he was pushed by the mediator to immediately sign the agreement, which he did.

[39] The complainant argued as follows:

> …
>
> *It is not clear that a meeting of the minds actually took place. There is significant disagreement on what was agreed to. Specifically when and whose advice I was to receive was not mutual. Further, without proper review and with refusal for time to consider the agreement, the validity of my acceptance should be in doubt.*
>
> …

[40] The complainant asserted that the Institute deliberately attempted to delay the mediation of the complaint because, although the mediator was appointed on September 1, 2021, the mediation was scheduled only for December 20 and 21, 2021, which the complainant speculated was due to the Institute's availability.

[41] The complainant said that oral statements made during the mediation were to the effect that the Institute would not be available between Christmas and New Year's Day. He argued that the Institute repudiated the settlement agreement when, after it was signed, it told him that it could not assist him from December 21, 2021, through to January 10, 2022. He said that he "… expected to be able to set a time at the end of the negotiation so that we could undertake to implement the agreement" but that Mr. Ferrand refused to do so after the agreement was signed.

[42] Relying on his "[w]hen can we talk" email to Mr. Ferrand of December 28, 2021, and the out-of-office reply he received, the complainant concluded that Mr. Ferrand

should have been available on December 22 and 23, 2021 and after January 4, 2022. The complainant claimed that Mr. Ferrand misrepresented his availability and that he failed to ensure that he had the required room in his schedule to implement the Institute's side of the settlement agreement.

[43] By mispresenting his availability and frustrating the settlement agreement, the Institute voided it, the complainant argued (see *Deschenes v. Lalonde*, 2020 ONCA 304 at para. 30, *Kiernicki v. Jaworski*, (1956) Man R 37 (CA), 1956 CanLII 676 (MB CA), and *Iermolaieva v. Mok dba Spectrum Stone*, 2021 BCCRT 1228).

[44] The complainant argued that because Mr. Ferrand drafted the settlement agreement, Mr. Ferrand should be held to a higher standard of transparency with respect to the agreement's wording and intentions, and Mr. Ferrand should have entered a time-is-of-the-essence clause, to ensure mutuality.

[45] The complainant argued that, before the mediation, both parties signed a mediation agreement stating that they would be ready and authorized to mediate but that Mr. Ferrand was unable to accept the complainant's proposal on the payment of fees to a commissioner of oaths until Mr. Ferrand spoke to management at the Institute. The complainant said that Mr. Ferrand told him that the Institute was not prepared to offer those services. He claimed "[o]n later analysis", that Mr. Ferrand had been unable to contact his management. The complainant argued that that was bargaining in bad faith and that the withdrawal of support for those services was based on misrepresentation.

[46] The complainant argued that several elements of the mediation process meant that he was operating under duress. Those included the allegations of misrepresentation about the Institute's availability already cited, the lack to time to review the draft agreement, Mr. Ferrand's alleged lack of preparation for the mediation, pressure from the mediator to reach an agreement, and the post-signing frustration of the agreement by the Institute. The complainant argued that the fact that the respondent drafted the agreement was also a form of duress and that he objected to it at the time. In his written submissions, he cited as authorities for this point descriptions of the mediation process from the websites of the Government of Quebec and the Government of Ontario.

[47] Given all the above arguments, the complainant argued that the settlement agreement should be declared null and void and that the Board should proceed to order that his duty-of-fair-representation complaint be heard on its merits.

2. The respondent's arguments

[48] The respondent said that during the mediation, and before signing the settlement agreement, Mr. Ferrand told the complainant that he was unavailable until January 10, 2022, due to his work schedule, the holiday shutdown, and his personal holidays. It said that all the discussions were predicated on Mr. Ferrand being Mr. Priest's sole contact. During the mediation, Mr. Priest did not suggest that time was of the essence; nor was there any reason to believe that it was. As of the date of the mediation, the Federal Court had not yet set a hearing date for Mr. Priest's judicial review application.

[49] The respondent said that by early afternoon on December 21, 2021, the parties reached a verbal agreement to settle the complaint, and Mr. Ferrand was tasked with preparing a draft settlement agreement, which he sent to the mediator at 2:36 p.m. In response to concerns raised by the complainant, two changes were made to the preamble of the agreement. The complainant did not propose any language as to the timing of the assistance the Institute was prepared to give him. By approximately 3:30 p.m., Mr. Ferrand provide a revised and signed settlement agreement, and by approximately 3:45 p.m., he received a copy signed by Mr. Priest.

[50] The Institute argued that the settlement agreement signed by the parties was valid, final, and binding and that the Institute lived up to its terms. The agreement should be interpreted based on the words in the agreement, "… consistent with the surrounding circumstances known to the parties at the time of formation of the contract" (see *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at para. 47). At the time the agreement was signed, the complainant knew that Mr. Ferrand was not available until January 10, the respondent alleged, and the Federal Court had not yet scheduled the hearing of Mr. Priest's judicial review.

[51] After the mediation, when Mr. Priest contacted Mr. Ferrand by email on December 28, 2021, he did not express any urgency; nor did he advise Mr. Ferrand that the Federal Court had set a hearing date for his judicial review application. He only wrote, "When can we talk?"

[52] On January 3, 2022, while the Institute was still on its holiday closure, Mr. Priest sent his email 'rescinding' his acceptance of the settlement agreement. That email also stated that he no longer needed the Institute's assistance as it was too late. In its reply of January 4, 2022, the Institute made it clear that its offer of assistance, as per the settlement agreement, still stood. As of January 4, there were still three weeks before the Federal Court hearing scheduled for January 25. There was still ample time for Mr. Ferrand to assist Mr. Priest in reviewing court documents or to answer any procedural questions about the hearing process, the respondent argued.

[53] The respondent argued that if Mr. Priest needed more time to review the settlement agreement, he should not have signed it. He cannot argue that the agreement should be interpreted as if he had negotiated a "time is of the essence" provision.

[54] The intentions of the parties when they signed the settlement agreement should be determined by making reference to the words they used in drafting the document, not the subjective intentions of the parties, the Institute argued (see *Eli Lilly & Co. v. Novopharm Ltd.*, [1998] SCR 129 at para. 54). The agreement does not specify that the complainant would be provided with assistance over the holidays. Mr. Priest claims that there was no meeting of the minds in reaching the agreement, but his signature of the agreement without any actual evidence of duress makes that argument untenable, the Institute argued.

3. Reasons

[55] I acknowledge that in their written submissions, the parties do not agree on what information was exchanged about Mr. Ferrand's availability before the settlement agreement was signed. Mr. Priest's submissions were that before signing, he was told that Mr. Ferrand would be unavailable between "Christmas and New Years" and that only after the settlement agreement was signed was he told that the period of non-availability was between "Dec 21 through Jan 10." In its submissions, the respondent claims that Mr. Ferrand's non-availability between December 21 and January 10 was disclosed before the signing.

[56] If the case turned on that, an oral hearing with witness testimony under oath might have led to a firm conclusion as to which statement was accurate. However, I do

not believe that the question before me turns on a finding of which version of those facts to believe.

[57] By his own admission, the complainant clearly knew before signing the settlement agreement that Mr. Ferrand would not be available between Christmas and New Year's Day. In other words, as of the date of signing on December 21, 2021, the complainant knew that for 11 of the next 14 days, he would not be able to reach Mr. Ferrand. If time was really of the essence, the complainant could have demanded to include specific time commitments in the settlement agreement. There is no indication in his submissions or those of the respondent that he made any requests to include specific time frames in the settlement agreement. There are no specific time frames outlined in the settlement agreement.

[58] In his arguments about the context affecting mediation, the complainant stated as follows: "My Federal Court appearance date was a month away on 2022-01-25." However, as noted earlier in this decision, that is accurate in part only. As of the date of the settlement agreement, the Federal Court had not yet set a date for hearing the complainant's judicial review application. The Federal Court did so only on December 23, 2021, which was two days after the mediation was over and the settlement agreement had been signed.

[59] The complainant's email of December 28, 2021, asking Mr. Ferrand "[w]hen can we talk" did not convey any clear sense of urgency. The complainant did not notify Mr. Ferrand that the Federal Court had set a date to hear the judicial review application or state any expectation or needs with respect to the timing of the assistance that he required from the Institute. There is also no indication that the complainant made any effort to contact Mr. Ferrand's assistant in his absence, which were the instructions outlined for addressing urgent matters in the out-of-office reply generated from Mr. Ferrand's email account.

[60] Even if I found that Mr. Ferrand explained only after the settlement agreement was signed that he would be unavailable until January 10, it is clear that by December 28, his availability had improved — his out-of-office email reply clearly stated that he would be away from the office from December 24, 2021, to January 4, 2022. He was actually back at work on January 4, 2022, as evidenced by the email he sent the complainant on that day.

[61] By his own admission, Mr. Priest had been informed that Mr. Ferrand would be out of the office between Christmas and New Year's Day. Yet, Mr. Priest wrote to Mr. Ferrand on December 28, 2021, and now has argued that Mr. Ferrand should have responded to that email by offering an appointment instead of simply providing an automated out-of-office reply.

[62] It is worth noting that December 28, 2021, was a Tuesday. January 1 landed on a Saturday, meaning that the New Year's federal statutory holiday was moved to January 3, 2022, and on that day, a federal statutory holiday, Mr. Priest sought to 'rescind' his consent to the settlement agreement by writing to the Board.

[63] In my assessment, that sequence of events demonstrates that Mr. Priest developed a post-settlement expectation that he was entitled to assistance from the Institute between December 28 and January 3. In all likelihood, his desire to receive assistance during that time frame became more pressing when, on December 23, 2021, he learned that the Federal Court had scheduled a January 25, 2022, hearing for his judicial review application.

[64] As stated by the Supreme Court of Canada in *Eli Lilly & Co.*, the subjective expectations of one party to an agreement cannot be used to override the clear language in the agreement signed by both parties. In other words, as the Trial Division of the Federal Court expressed in *Macdonald v. Canada*, [1998] F.C.J. No. 1562 (T.D.) (QL), at para. 35:

> *[35] On the test of accord and satisfaction, I am satisfied that there was an agreement among the Department, PIPS, and the plaintiff, whatever might have been in the mind of the plaintiff when he signed* […] *The outward expression of his intention was his signing of the agreement. That is what is relevant. His unexpressed intention is immaterial.…*

[65] I find no merit in Mr. Priest's allegations that he signed the settlement agreement under duress by the Institute. He argued that misrepresentation is a form of duress, but I have already found that Mr. Ferrand did not misrepresent his availability. Mr. Priest argued that "frustration" of contract is a form of duress. In my view, that argument is better dealt with by asking whether the respondent breached the agreement.

[66] As for the complainant's allegation that the Institute violated the agreement to mediate by not being prepared in advance of mediation to address his request for the funding of a Commissioner of Oaths, this is not a matter for the Board to determine. The Board is seized only with determining whether the settlement agreement was valid, final and binding. Similarly, the complainant's allegations that Mr. Ferrand was not qualified to provide him with the advice he was seeking from the Institute have no place in the matters to be determined by this Board.

[67] I do need to address the complainant's allegations that the mediator did not allow him the time to adequately review the settlement agreement. I do not find this allegation accords with the complainant's own version of events. He said he was provided with a draft of the agreement shortly before 3:00 PM on December 21, 2021. He said he was livid when he read the draft and met with the mediator. Following this, he proposed two changes to the agreement, which were then provided back to the Institute. A revised version of the agreement was prepared and then signed at approximately 3:45 PM. The complainant not only had time to read the draft settlement agreement, he clearly did, and the result of this were changes made prior to its signing. It is also worth noting that the settlement agreement is just two full pages in length, comprising less than 400 words.

[68] As for the allegation that he was under pressure by the mediator to sign the agreement, the complainant provided no specifics that would suggest that he was subject to undue pressure, in either of his initial or reply submissions. He provided no argument that he lacked the emotional, physical or emotional capacity to reach an agreement. By his own admission, Mr. Priest had plenty of time to prepare for the mediation. He was informed of the mediation dates in October 2021, had a one-hour preliminary call with the mediator on December 16, 2021, and had the pre-mediation session with the mediator on December 20. The agreement to mediate signed on December 21, 2021, includes a clear statement that the mediation process is voluntary and may be terminated by the mediator or the parties at any time. I am left to conclude on a balance of probabilities that any pressure the complaint felt to sign the settlement agreement was not undue pressure.

[69] In assessing this matter, I am first and foremost bound by the words used in the settlement agreement signed by the complainant and the Institute. The preamble clearly stated that the "… parties acknowledge that all aspects of this matter have been

resolved to their satisfaction as per the terms below." The agreement clearly stated that it constituted full and final settlement of the issues arising in the complaint. It also contained an agreement on the complainant's part not to file any further complaints or seek other recourse arising from the complaint.

[70] By his own admission, the complainant waited until after the settlement agreement was signed to try to discuss with Mr. Ferrand when they could meet to discuss his judicial review application. After the fact, he characterized that as "seeking to use the retainer that afternoon." However, there was no retainer in the agreement that he had just signed. The agreement clearly states that the Institute would review documents and provide advice on procedural issues, to the best of its abilities. As the Trial Division of the Federal Court stated in *Macdonald*, what is relevant is the complainant's "… outward expression of his intention [by] his signing of the agreement." What Mr. Priest actually wanted from the Institute going into the mediation, or what he wanted afterwards, is therefore not relevant to my determination of what the agreement actually says. He might have wanted a retainer, for the Institute to provide paid advice from outside counsel, or for the Institute to pay for a commissioner of oaths, but none of those expectations were formalized in the agreement.

[71] I place no weight on the fact that Mr. Ferrand was the one to draft the settlement agreement. It may be that in other jurisdictions (according to the Ontario and Quebec court websites cited by the complainant), a mediator drafts the agreement. That did not make it the expected process in this case. To the contrary, the long-standing practice of the Board, as was that of its predecessors, is for Board Secretariat's mediators not to be involved in drafting settlement agreements and to leave the drafting to the parties themselves. In any case, Mr. Priest was free to request changes to the wording used in the agreement drafted by Mr. Ferrand. According to Mr. Priest's own admission, he in fact did that before signing the agreement.

[72] Following *Amos*, *Fillet*, and *Tench*, the question before me is whether the parties reached a valid, final, and binding settlement agreement. On the record before me, I find that they did.

[73] Mr. Priest's allegations appear to amount to a case of settler's remorse on the basis of expectations that developed after the settlement agreement was signed. That cannot render the agreement invalid or non-binding after the fact.

B. Issue 2: Did a party fail to live up to the terms of the settlement agreement?

[74] The complainant argued that the Institute failed to live up to the terms of the settlement agreement because Mr. Ferrand did not immediately agree, at the end of the mediation on December 21, 2021, to establish dates or to work out a process for reviewing the complainant's judicial review application. Furthermore, the complainant believes that the Institute failed to live up the agreement because Mr. Ferrand ought to have replied to Mr. Priest's "[w]hen can we talk" email by offering specific dates.

[75] Those allegations are without foundation. The settlement agreement did not specify any deadlines to the communications between the parties. According to his own admission, Mr. Priest had been informed that the Institute would not be available between Christmas and New Year's Day and he therefore knew that between December 21, 2021, when the agreement was signed, and January 3, 2022, when he attempted to 'rescind' his agreement, the Institute was available for three business days only.

[76] Given that his "[w]hen can we talk" email was sent on December 28, it was completely unrealistic for the complainant to expect more than an out-of-office reply on that day. He knew that the Institute was on its holiday shutdown. The complainant's email 'rescinding' the agreement was sent on January 3, 2022. As noted, that was in fact a statutory holiday. On his first day back at work after the holiday shutdown, January 4, 2022, Mr. Ferrand wrote back to the complainant and the mediator and said that the Institute was still ready and available to fulfill its side of the settlement agreement. By then, the date set out by the Federal Court to hear Mr. Priest's judicial review application was still three weeks away. There was still sufficient time for the Institute to review documents and provide advice on procedural matters, to the best of its ability. Mr. Priest chose not to exercise his right under the agreement to request that assistance.

[77] In short, I find that the Institute did not breach the settlement agreement. The agreement contained two essential undertakings from the Institute: to review documents related to the complainant's application for judicial review and offer him feedback; and to answer his procedural questions about Federal Court procedures. On

its first day of business following receipt of Mr. Priest's request for assistance, the Institute offered to fulfill those undertakings. However, Mr. Priest did not follow up on that offer. Instead, he attempted to revive his complaint.

[78] In fact, I find that it is Mr. Priest who clearly breached the settlement agreement. By not taking Mr. Ferrand up on his January 4, 2021, renewed offer of help, the complainant prevented the Institute from discharging its undertakings under the agreement. Surely, when a party has an obligation to provide assistance, the other party has, by necessary implication, a corresponding obligation to accept that assistance. Is all fairness, the complainant ought not be allowed to rely on his own actions to support a claim that the Institute failed to abide by the agreement. That is especially true when the Institute clearly tried to fulfill its undertakings under the agreement.

[79] On January 4, 2022, the respondent told Mr. Priest that it remained available to provide him with the advice it had committed to provide through the settlement agreement. However, Mr. Priest did not seek that advice; nor did he withdraw the complaint as committed to in the settlement agreement. Instead, he again wrote to the Board on January 11, 2022, and attempted for a second time to 'rescind' his acceptance of the agreement.

C. Issue 3: Given Mr. Priest's breach of the settlement agreement, what remedial action is appropriate?

[80] I have found that the parties reached a valid, final, and binding settlement of this complaint. I find that the complainant breached the settlement agreement when he prevented the Institute from discharging its undertakings under the agreement, and did not withdraw his complaint as committed to in the settlement agreement.

[81] In another case, in which a complainant failed to live up to her commitment to withdraw her duty-of-fair representation complaint, the Board found that the appropriate remedial action was an order to close the file (see the follow-up decision to *Fillet v. Public Service Alliance of Canada*, 2013 PSLRB 43, in *Fillet v. Public Service Alliance of Canada*, 2015 PSLREB 54).

[82] In light of my findings that the Institute attempted to fulfill its undertakings under the agreement and that the complainant refused their assistance, I agree with the Board's reasoning in that case and make the same order in this case.

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

(The Order appears on the next page)

V. Order

[84] I order the complaint in Board file no. 561-34-43069 closed.

January 5, 2023.

David Orfald,
a panel of the Federal Public Sector
Labour Relations and Employment Board