

Cour fédérale



Federal Court

Date: 20091120

Docket: T-1627-08

Citation: 2009 FC 1181

Ottawa, Ontario, November 20, 2009

PRESENT: The Honourable Mr. Justice Boivin

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

- and -

ANDREW DONNIE AMOS

Respondent

- and -

THE PUBLIC SERVICE ALLIANCE OF CANADA

- and -

THE PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA

Interveners

AMENDED REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision dated September 25, 2008, by Adjudicator Dan Butler (the Adjudicator), under the *Public Service Labour Relations Act*, S.C. 2003, c. 22, s. 2 (*PSLRA*), regarding a grievance which had been referred to adjudication pursuant to

section 209 of the *PSLRA* but was settled before a decision was rendered on its merits. In his decision, the Adjudicator found he had jurisdiction to consider a dispute over the Memorandum of Agreement (MOA) agreed to by the parties.

Factual Background

[2] The grievor and Respondent, Andrew Donnie Amos, is employed with the Department of Public Works and Government Services (the Department) as a Senior Project Manager at the ENG 5 subgroup and level. The Deputy Minister of the Department (the Deputy Head) imposed a 20 day disciplinary suspension without pay on the Respondent by letter dated March 29, 2005. On May 2, 2005, the Respondent filed a grievance challenging the 20 day suspension and the grievance was referred to adjudication on August 10, 2005.

[3] Adjudicator Dan Butler was appointed to hear and determine the matter. A hearing was first convened in Halifax, Nova Scotia, for three days starting on November 28, 2006 and resumed in Halifax on May 1, 2007. With the assistance of the Adjudicator, the parties reached a settlement on May 2, 2007, set out in a MOA, which dealt with a number of issues. The MOA set out a plan for the parties to meet, discuss and resolve issues relating to the Respondent's working relationship with the Department.

[4] Following the MOA, the Respondent did not withdraw his grievance.

[5] On December 14, 2007, the Respondent requested that the Board reopen the adjudication hearing on the merits of his grievance on the ground that the Deputy Head failed to comply with the terms of the MOA, namely, that the Department had not honoured the promise to meet to resolve their issues and establish a positive working relationship.

[6] On January 7, 2008, the Deputy Head objected to the Respondent's request on two grounds: first, that the existence of a final and binding settlement agreement constituted a complete bar to an adjudicator's jurisdiction; and second, that it was a well-established principle that adjudicators under the *Public Service Staff Relations Act*, R.S.C. 1985, c. P-35, s. 1 (*PSSRA*), the Act which preceded the *PSLRA*, had no jurisdiction over the implementation of an MOA.

[7] The Adjudicator did not agree to re-open the hearing on the merits as requested by the Respondent. Rather, the Adjudicator ordered that the adjudication hearing resume for the purpose of determining whether the Deputy Head complied or not with the terms of the MOA, and, if necessary, for the purpose of determining an appropriate remedy.

[8] The Adjudicator decided that in light of the fact the question at hand had not been considered in the context of the *PSLRA* since it had replaced the *PSSRA*, and since the relevant law has been developing in recent years, he would accept submissions from the parties and from interveners. The Adjudicator thought it was appropriate under the circumstances to carefully review his jurisdiction under the *PSLRA*.

Decision under Review

[9] The Board wrote to the parties and interveners on February 15, 2008 as the Adjudicator sought representations from the parties and the interveners on the following three questions:

1. Where, in the case of an individual grievance referred to adjudication in relation to a disciplinary action resulting in suspension, the parties have entered into a settlement agreement, does an adjudicator have jurisdiction under the new Act to determine whether the parties' settlement agreement is final and binding?
2. In the event that an adjudicator has the jurisdiction under the new Act to determine whether the parties' settlement agreement is final and binding, does the adjudicator have the jurisdiction to hear an allegation that a party is in non-compliance with a final and binding settlement agreement?
3. In the event that an adjudicator has the jurisdiction to hear an allegation that a party is in non-compliance with a final and binding settlement agreement, does the adjudicator have the jurisdiction to make the order that the adjudicator considers appropriate in the circumstances?

[10] The Adjudicator considered the law under the *PSSRA* and found that the principal basis for finding that a settlement agreement represented a complete bar to adjudication was subsection 92(1) of the *PSSRA*, which established limitations on the subject-matter which could be referred to adjudication. Adjudicators interpreting subsection 92(1) of the *PSSRA* found that a dispute over a settlement agreement did not involve either the interpretation or application of a provision of a collective agreement or an arbitral award under paragraph 92(1)(a), nor a disciplinary action or termination within the meaning of paragraphs 92(1)(b) or (c). They were thus precluded from enforcing a MOA.

[11] The Adjudicator then considered whether anything had changed under the *PSLRA*. The Adjudicator drew the following conclusions, which guided his final decision on the three questions which were put to the parties and interveners:

- I must give the provisions of the new *Act* "... fair, large and liberal construction and interpretation..." consistent with the objects of the *Act* to promote "...collaborative efforts between the parties..." to support the "... fair, credible and efficient resolution of matters..." and to encourage "... mutual respect and harmonious labour management relations..."

- A cornerstone of the new *Act* is its emphasis on the voluntary resolution of disputes through mediation. Essential to the effectiveness of mediation processes is the expectation that the terms of a settlement agreement will be respected.

- Given subsection 236(1) of the new *Act*, and with the direction given by the *Weber* line of decisions, including *Vaughan*, Part 2 of the new *Act* must be viewed as the exclusive and comprehensive regime for the resolution of disputes that proceed "... by way of grievance...". The jurisdiction of an adjudicator must be understood within that framework.

[12] The Adjudicator found that determining whether a final and binding settlement agreement exists required an examination of the facts of the case. The parties signed a MOA which they considered at that time to be a final and binding settlement of the issue in dispute. The Adjudicator concluded he had the authority to determine whether parties had entered into a final and binding settlement agreement.

[13] The Adjudicator then determined that there were two possible scenarios for processing a dispute over a MOA:

Option 1: The dispute is properly the subject of a new grievance filed under section 208 of the new *Act*. Given that the subject matter of such a grievance does not fall within the list of subjects that may be referred to adjudication under subsection 209(1), the decision at the final level of the internal grievance procedure is final and binding.

Option 2: The dispute over the settlement agreement arises from the original grievance. Provided that the subject matter of the original grievance falls within the ambit of an adjudicator's authority under subsection 209(1) of the new *Act*, an adjudicator has the jurisdiction to consider the dispute.

[14] The Adjudicator reviewed the test set out in *Regina Police Association Inc. v. Regina (City) Board of Police Commissioners*, 2000 SCC 14, [2000] 1 S.C.R. 360, 251 N.R. 16 (*Regina Police Association Inc.*) and determined the same test should apply where the choice is between two statutory dispute resolution options under the same statute.

[15] While the Adjudicator recognized there is no explicit provision in the *PSLRA* which demonstrates the legislator's intent to provide adjudicators with jurisdiction to consider a dispute over a MOA, he nonetheless took jurisdiction because he believed that providing adjudicators with the jurisdiction to determine and resolve disputes where the subject-matter of the original grievance falls under subsection 209(1) of the *PSLRA* is consistent with attaining the objects of that Act. The Adjudicator found this decision reflects a "... fair, large and liberal..." interpretation of subsection 209(1) of the *PSLRA* and that taking jurisdiction in this manner flows logically from the application of the "essential character" test set out in *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929, 183 N.R. 241 (*Weber*) and refined by *Regina Police Association Inc.*

[16] The Adjudicator thus concluded that “an adjudicator has jurisdiction to consider an allegation that a party is in non-compliance with a final and binding settlement where the settlement agreement dispute is linked to an original grievance, the subject matter of which falls under subsection 209(1) of the new Act.”

[17] The Adjudicator finally found that he also had jurisdiction to make an order that he deemed to be appropriate in the circumstances.

Issues

[18] This application for judicial review application raises the following issues:

1. What is the appropriate standard of review of the Adjudicator’s decision in this case?
2. Did the Adjudicator err and exceed his jurisdiction when he ordered that the adjudication hearing resume for the purpose of determining whether the Deputy Head complied or not with the terms of the memorandum of agreement and, if necessary, for the purpose of determining an appropriate remedy?

Relevant Legislation

[19] The relevant statutory provisions are the following:

Public Service Labour Relations Act, S.C. 2003, c. 22, s. 2:

Orders not to be reviewed by court

51. (1) Subject to this Part, every order or decision of the Board is final and may not be

Impossibilité de révision par un tribunal

51. (1) Sous réserve des autres dispositions de la présente partie, les ordonnances et les

questioned or reviewed in any court, except in accordance with the Federal Courts Act on the grounds referred to in paragraph 18.1(4)(a), (b) or (e) of that Act.

décisions de la Commission sont définitives et ne sont susceptibles de contestation ou de révision par voie judiciaire qu'en conformité avec la Loi sur les Cours fédérales et pour les motifs visés aux alinéas 18.1(4) a), b) ou e) de cette loi.

Right of employee

208. (1) Subject to subsections (2) to (7), an employee is entitled to present an individual grievance if he or she feels aggrieved

Droit du fonctionnaire

208. (1) Sous réserve des paragraphes (2) à (7), le fonctionnaire a le droit de présenter un grief individuel lorsqu'il s'estime lésé :

(a) by the interpretation or application, in respect of the employee, of

a) par l'interprétation ou l'application à son égard :

(i) a provision of a statute or regulation, or of a direction or other instrument made or issued by the employer, that deals with terms and conditions of employment, or

(i) soit de toute disposition d'une loi ou d'un règlement, ou de toute directive ou de tout autre document de l'employeur concernant les conditions d'emploi,

(ii) a provision of a collective agreement or an arbitral award; or

(ii) soit de toute disposition d'une convention collective ou d'une décision arbitrale;

(b) as a result of any occurrence or matter affecting his or her terms and conditions of employment.

b) par suite de tout fait portant atteinte à ses conditions d'emploi.

Limitation

(2) An employee may not present an individual grievance in respect of which an administrative procedure for redress is provided under any Act of Parliament, other than

Réserve

(2) Le fonctionnaire ne peut présenter de grief individuel si un recours administratif de réparation lui est ouvert sous le régime d'une autre loi fédérale, à l'exception de la Loi

the Canadian Human Rights Act.

canadienne sur les droits de la personne.

Limitation

(3) Despite subsection (2), an employee may not present an individual grievance in respect of the right to equal pay for work of equal value.

Réserve

(3) Par dérogation au paragraphe (2), le fonctionnaire ne peut présenter de grief individuel relativement au droit à la parité salariale pour l'exécution de fonctions équivalentes.

Limitation

(4) An employee may not present an individual grievance relating to the interpretation or application, in respect of the employee, of a provision of a collective agreement or an arbitral award unless the employee has the approval of and is represented by the bargaining agent for the bargaining unit to which the collective agreement or arbitral award applies.

Réserve

(4) Le fonctionnaire ne peut présenter de grief individuel portant sur l'interprétation ou l'application à son égard de toute disposition d'une convention collective ou d'une décision arbitrale qu'à condition d'avoir obtenu l'approbation de l'agent négociateur de l'unité de négociation à laquelle s'applique la convention collective ou la décision arbitrale et d'être représenté par cet agent.

Limitation

(5) An employee who, in respect of any matter, avails himself or herself of a complaint procedure established by a policy of the employer may not present an individual grievance in respect of that matter if the policy expressly provides that an employee who avails himself or herself of the complaint procedure is precluded from presenting an individual

Réserve

(5) Le fonctionnaire qui choisit, pour une question donnée, de se prévaloir de la procédure de plainte instituée par une ligne directrice de l'employeur ne peut présenter de grief individuel à l'égard de cette question sous le régime de la présente loi si la ligne directrice prévoit expressément cette impossibilité.

grievance under this Act.

Limitation

(6) An employee may not present an individual grievance relating to any action taken under any instruction, direction or regulation given or made by or on behalf of the Government of Canada in the interest of the safety or security of Canada or any state allied or associated with Canada.

Order to be conclusive proof

(7) For the purposes of subsection (6), an order made by the Governor in Council is conclusive proof of the matters stated in the order in relation to the giving or making of an instruction, a direction or a regulation by or on behalf of the Government of Canada in the interest of the safety or security of Canada or any state allied or associated with Canada.

Reference to adjudication

209. (1) An employee may refer to adjudication an individual grievance that has been presented up to and including the final level in the grievance process and that has not been dealt with to the employee's satisfaction if the grievance is related to

(a) the interpretation or application in respect of the employee of a provision of a

Réserve

(6) Le fonctionnaire ne peut présenter de grief individuel portant sur une mesure prise en vertu d'une instruction, d'une directive ou d'un règlement établis par le gouvernement du Canada, ou au nom de celui-ci, dans l'intérêt de la sécurité du pays ou de tout État allié ou associé au Canada.

Force probante absolue du décret

(7) Pour l'application du paragraphe (6), tout décret du gouverneur en conseil constitue une preuve concluante de ce qui y est énoncé au sujet des instructions, directives ou règlements établis par le gouvernement du Canada, ou au nom de celui-ci, dans l'intérêt de la sécurité du pays ou de tout État allié ou associé au Canada.

Renvoi d'un grief à l'arbitrage

209. (1) Après l'avoir porté jusqu'au dernier palier de la procédure applicable sans avoir obtenu satisfaction, le fonctionnaire peut renvoyer à l'arbitrage tout grief individuel portant sur :

a) soit l'interprétation ou l'application, à son égard, de toute disposition d'une

collective agreement or an arbitral award;

convention collective ou d'une décision arbitrale;

(b) a disciplinary action resulting in termination, demotion, suspension or financial penalty;

b) soit une mesure disciplinaire entraînant le licenciement, la rétrogradation, la suspension ou une sanction pécuniaire;

(c) in the case of an employee in the core public administration,

c) soit, s'il est un fonctionnaire de l'administration publique centrale :

(i) demotion or termination under paragraph 12(1)(d) of the Financial Administration Act for unsatisfactory performance or under paragraph 12(1)(e) of that Act for any other reason that does not relate to a breach of discipline or misconduct, or

(i) la rétrogradation ou le licenciement imposé sous le régime soit de l'alinéa 12(1)d) de la Loi sur la gestion des finances publiques pour rendement insuffisant, soit de l'alinéa 12(1)e) de cette loi pour toute raison autre que l'insuffisance du rendement, un manquement à la discipline ou une inconduite,

(ii) deployment under the Public Service Employment Act without the employee's consent where consent is required; or

(ii) la mutation sous le régime de la Loi sur l'emploi dans la fonction publique sans son consentement alors que celui-ci était nécessaire;

(d) in the case of an employee of a separate agency designated under subsection (3), demotion or termination for any reason that does not relate to a breach of discipline or misconduct.

d) soit la rétrogradation ou le licenciement imposé pour toute raison autre qu'un manquement à la discipline ou une inconduite, s'il est un fonctionnaire d'un organisme distinct désigné au titre du paragraphe (3).

Application of paragraph (1)(a)
(2) Before referring an individual grievance related to matters referred to in paragraph (1)(a), the employee must

Application de l'alinéa (1)a)
(2) Pour que le fonctionnaire puisse renvoyer à l'arbitrage un grief individuel du type visé à l'alinéa (1)a), il faut que son

obtain the approval of his or her bargaining agent to represent him or her in the adjudication proceedings.

Designation

(3) The Governor in Council may, by order, designate any separate agency for the purposes of paragraph (1)(d).

Binding effect

214. If an individual grievance has been presented up to and including the final level in the grievance process and it is not one that under section 209 may be referred to adjudication, the decision on the grievance taken at the final level in the grievance process is final and binding for all purposes of this Act and no further action under this Act may be taken on it.

Power to mediate

226. (2) At any stage of a proceeding before an adjudicator, the adjudicator may, if the parties agree, assist the parties in resolving the difference at issue without prejudice to the power of the adjudicator to continue the adjudication with respect to the issues that have not been resolved.

Decision on grievance

228. (2) After considering the grievance, the adjudicator must

agent négociateur accepte de le représenter dans la procédure d'arbitrage.

Désignation

(3) Le gouverneur en conseil peut par décret désigner, pour l'application de l'alinéa (1)d), tout organisme distinct.

Décision définitive et obligatoire

214. Sauf dans le cas du grief individuel qui peut être renvoyé à l'arbitrage au titre de l'article 209, la décision rendue au dernier palier de la procédure applicable en la matière est définitive et obligatoire et aucune autre mesure ne peut être prise sous le régime de la présente loi à l'égard du grief en cause.

Médiation

226. (2) En tout état de cause, l'arbitre de grief peut, avec le consentement des parties, les aider à régler tout désaccord entre elles, sans qu'il soit porté atteinte à sa compétence à titre d'arbitre chargé de trancher les questions qui n'auront pas été réglées.

Décision au sujet du grief

228. (2) Après étude du grief, il tranche celui-ci par

render a decision and make the order that he or she considers appropriate in the circumstances. The adjudicator must then

(a) send a copy of the order and, if there are written reasons for the decision, a copy of the reasons, to each party, to the representative of each party and to the bargaining agent, if any, for the bargaining unit to which the employee whose grievance it is belongs; and

(b) deposit a copy of the order and, if there are written reasons for the decision, a copy of the reasons, with the Executive Director of the Board.

Decisions not to be reviewed by court

233. (1) Every decision of an adjudicator is final and may not be questioned or reviewed in any court.

No review by certiorari, etc.

(2) No order may be made, process entered or proceeding taken in any court, whether by way of injunction, certiorari, prohibition, quo warranto or otherwise, to question, review, prohibit or restrain an adjudicator in any of the adjudicator's proceedings under this Part.

l'ordonnance qu'il juge indiquée. Il transmet copie de l'ordonnance et, le cas échéant, des motifs de sa décision :

a) à chaque partie et à son représentant ainsi que, s'il y a lieu, à l'agent négociateur de l'unité de négociation à laquelle appartient le fonctionnaire qui a présenté le grief;

b) au directeur général de la Commission.

Caractère définitif des décisions

233. (1) La décision de l'arbitre de grief est définitive et ne peut être ni contestée ni révisée par voie judiciaire.

Interdiction de recours extraordinaires

(2) Il n'est admis aucun recours ni aucune décision judiciaire — notamment par voie d'injonction, de certiorari, de prohibition ou de quo warranto — visant à contester, réviser, empêcher ou limiter l'action de l'arbitre de grief exercée dans le cadre de la présente partie.

Disputes relating to employment

236. (1) The right of an employee to seek redress by way of grievance for any dispute relating to his or her terms or conditions of employment is in lieu of any right of action that the employee may have in relation to any act or omission giving rise to the dispute.

Application

(2) Subsection (1) applies whether or not the employee avails himself or herself of the right to present a grievance in any particular case and whether or not the grievance could be referred to adjudication.

Exception

(3) Subsection (1) does not apply in respect of an employee of a separate agency that has not been designated under subsection 209(3) if the dispute relates to his or her termination of employment for any reason that does not relate to a breach of discipline or misconduct.

Différend lié à l'emploi

236. (1) Le droit de recours du fonctionnaire par voie de grief relativement à tout différend lié à ses conditions d'emploi remplace ses droits d'action en justice relativement aux faits — actions ou omissions — à l'origine du différend.

Application

(2) Le paragraphe (1) s'applique que le fonctionnaire se prévale ou non de son droit de présenter un grief et qu'il soit possible ou non de soumettre le grief à l'arbitrage.

Exception

(3) Le paragraphe (1) ne s'applique pas au fonctionnaire d'un organisme distinct qui n'a pas été désigné au titre du paragraphe 209(3) si le différend porte sur le licenciement du fonctionnaire pour toute raison autre qu'un manquement à la discipline ou une inconduite.

Public Service Staff Relations Act, R.S.C. 1985, c. P-35, s. 1:

Adjudication of Grievances

Reference to Adjudication

92. (1) Where an employee has presented a grievance, up to and including the final level in the grievance process, with respect

Arbitrage des griefs

Renvoi à l'arbitrage

92. (1) Après l'avoir porté jusqu'au dernier palier de la procédure applicable sans avoir obtenu satisfaction, un

to	fonctionnaire peut renvoyer à l'arbitrage tout grief portant sur:
(a) the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award,	a) l'interprétation ou l'application, à son endroit, d'une disposition d'une convention collective ou d'une décision arbitrale;
(b) in the case of an employee in a department or other portion of the public service of Canada specified in Part I of Schedule I or designated pursuant to subsection (4),	b) dans le cas d'un fonctionnaire d'un ministère ou secteur de l'administration publique fédérale spécifié à la partie I de l'annexe I ou désigné par décret pris au titre du paragraphe (4), soit une mesure disciplinaire entraînant la suspension ou une sanction pécuniaire, soit un licenciement ou une rétrogradation visé aux alinéas 11(2)f) ou g) de la Loi sur la gestion des finances publiques;
(i) disciplinary action resulting in suspension or a financial penalty, or	
(ii) termination of employment or demotion pursuant to paragraph 11(2)(f) or (g) of the Financial Administration Act, or	
(c) in the case of an employee not described in paragraph (b), disciplinary action resulting in termination of employment, suspension or a financial penalty,	c) dans les autres cas, une mesure disciplinaire entraînant le licenciement, la suspension ou une sanction pécuniaire.
and the grievance has not been dealt with to the satisfaction of the employee, the employee may, subject to subsection (2), refer the grievance to adjudication.	

1. *What is the appropriate standard of review of the Adjudicator's decision in this case?*

[20] The Applicant submits the issue of the Adjudicator's jurisdiction in the case at bar is a pure question of law which revolves around the interpretation of the *PSLRA*, with no substantial application of facts and the Adjudicator possesses no expertise relative to the Federal Court. The Applicant claims that a contextual analysis is not necessary since this Court has already determined that the degree of deference to be accorded when the nature of an adjudicator's decision revolves around defining his or her jurisdiction should be correctness (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at par. 57).

[21] According to the Respondent, the issue at hand, whether, in the Respondent's circumstances, there were any unresolved issues subsequent to the parties' mediation which justified the continuation of the adjudication under subsection 226(2) of the *PSLRA*, is a question of mixed law and fact. The Respondent submits the appropriate standard of review is reasonableness because all the relevant factors such as the existence of a privative clause, the purpose of the tribunal, the nature of the question and the expertise of the tribunal support showing deference to the decision of the Adjudicator (*Dunsmuir* at par. 34).

[22] The Respondent claims a contextual analysis should be undertaken, as this case deals with the application of facts, the Adjudicator's discretion, policy considerations and the interpretation of the *PSLRA*. Where the question is one of fact, discretion or policy, deference will usually apply automatically (*Dunsmuir* at par. 53). Although there are questions of law involved, the issue at hand is unique to the facts of the Respondent's case and the interpretation of the new legislation in the

PSLRA. The decision deals with important policy concerns, including how the mediation process operates under the *PSLRA* and privative clauses exist under both subsections 51(1) and 233(1), restricting the ability of a grievor to access the Federal Court. Furthermore, adjudicators are known to have relative expertise in the area of labour relations (*Dunsmuir*).

[23] The Intervener Professional Institute of the Public Service of Canada (PIPSC) adds that while jurisdictional questions continue to be reviewed on the standard of correctness, the concept of jurisdiction in this case is intended in the narrow sense of “whether or not the tribunal had the authority to make the inquiry” (*Dunsmuir* at par. 59) and adds that a question of statutory interpretation does not equate with a jurisdictional issue (*Council of Canadians with Disabilities v. Via Rail Canada Inc.*, 2007 SCC 15, 360 N.R. 1 at par. 91; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at par. 25; *Canadian National Railway v. Canada (Canadian Transportation Agency)*, 2008 FCA 363, 383 N.R. 349 at par. 56-57).

[24] PIPSC agrees with the Respondent that the appropriate standard of review is reasonableness, as the Adjudicator applied his expertise in labour relations law and policy and his decision was protected by a privative clause (*Canada (Attorney General) v. Assh*, 2005 FC 734, 272 F.T.R. 314 at par. 9; *Chow v. Canada (Attorney General)*, 2008 FC 942, 331 F.T.R. 54 at par. 46-47).

[25] The Court finds that the issue in the case at bar constitutes the determination of the Adjudicator’s jurisdiction and thus, the applicable standard of review is correctness. As explained by the Supreme Court in *Dunsmuir* at par. 59:

... true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter. The tribunal must interpret the grant of authority correctly or its action will be found to be ultra vires or to constitute a wrongful decline of jurisdiction: D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf ed.), at pp. 14-3 to 14-6.

[26] The Court recognizes there are other pertinent factors to be considered, such as the presence of strong privative clauses at sections 51 and 233 of the *PSLRA*, important policy considerations such as the emphasis on efficient mediation and settlement echoed in the *PSLRA* and the general practice of the labour relations regime, which all point to according deference to the Adjudicator. However, “when a reviewing court considers the scope of a decision-making power or the jurisdiction conferred by a statute, the standard of review analysis strives to determine what authority was intended to be given to the body in relation to the subject matter.” (*Dunsmuir* at par. 29; see also *Canada (Attorney General) v. Basra*, 2008 FC 606, 327 F.T.R. 305). Although the decision at hand applies to the Respondent’s particular factual circumstances, the issue remains a jurisdictional question requiring the interpretation of specific provisions of the *PSLRA* reviewable under the correctness standard.

2. *Did the Adjudicator err and exceed his jurisdiction when he ordered that the adjudication hearing resume for the purpose of determining whether the Deputy Head complied or not with the terms of the memorandum of agreement and, if necessary, for the purpose of determining an appropriate remedy?*

Sections 208 and 209 of the *PSLRA*

[27] The Applicant submits the comprehensive regime within the *PSLRA* allows the presentation of grievances under section 208 of the *PSLRA* and includes a narrow referral of certain grievances

to adjudication under section 209 of the *PSLRA*. The Applicant therefore argues that adjudicators do not have jurisdiction to consider disputes over MOAs but notes that grievors are not without recourse. A grievor may file a grievance under section 208 of the *PSLRA* with respect to matters related to MOAs and, if he or she is not satisfied with the outcome of the grievance at the final level, an application may be made to this Court for judicial review of that decision.

[28] According to the Applicant, neither the jurisprudence nor any provisions under the *PSLRA* have changed such that an adjudicator can now take jurisdiction over the implementation of an MOA. The law under the *PSSRA* had established that the existence of a final and binding settlement agreement is a complete bar to an adjudicator's jurisdiction (*MacDonald v. Canada*, (1998), 158 F.T.R. 1, 83 A.C.W.S. (3d) 1033; *Bhatia v. Treasury Board (Public Works Canada)*, [1989] C.P.S.S.R.B. No. 141 (QL); *Fox v. Treasury Board (Immigration and Refugee Board)*, 2001 PSSRB 130 (QL); *Bedok v. Treasury Board (Department of Human Resources Development)*, 2004 PSSRB 163 (QL)). The *PSSRA* also established that an adjudicator had no jurisdiction regarding the implementation of an MOA (*Bhatia; Treasury Board v. Deom*, [1985] C.P.S.S.R.B. No. 150 (QL); *Van de Mosselaer v. Treasury Board (Department of Transport)*, 2006 PSLRB 59 (QL)). The Applicant submits that subsection 92(1) of the *PSSRA* is substantially the same as subsection 209(1) under the *PSLRA*.

[29] The Applicant submits that the Adjudicator's analysis of the "essential character" test developed by the Supreme Court of Canada of the dispute does not assist in determining the scope of his jurisdiction under section 209 of the *PSLRA*. The Adjudicator applied the tests from *Weber*,

Regina Police Association Inc., Canadian National Railway Company, 2006 CIRB no. 362

(*Canadian National Railway*) and others (the “Weber line of decisions”) to determine whether the dispute in the case at bar fell under section 208 of the *PSLRA*, where the grievor can file a grievance, or section 209, which deals with the matters which can be referred to adjudication.

[30] The Applicant submits the Adjudicator used the limitations imposed by section 236 of the *PSLRA* and the case law developed by the Supreme Court to improperly expand his jurisdiction under section 209 and he erred in confusing the comprehensiveness of the statutory scheme with his own jurisdiction. The *Canadian National Railway* decision offers validation with respect to its jurisdiction under the *Canada Labour Code*, R.S. 1985, c. L-2, but this analysis does not extend to an adjudicator’s jurisdiction under the *PSLRA*. Similarly, the adjudicator’s analysis in *Rexway Sheet Metal Limited*, [1989] OLRB Rep. November 1154 concerns the *Labour Relations Act*, R.S.O. 1980, c. 228, which is not instructive or determinative of an adjudicator’s jurisdiction under section 209 of the *PSLRA*.

[31] The Respondent submits the Adjudicator correctly determined that the differences in the *PSLRA* should be interpreted as broadening the jurisdiction of an adjudicator beyond that which was given under the *PSSRA* to include jurisdiction over settlement agreement disputes. The Adjudicator considered the preamble to the *PSLRA*, noting that it should be read in a liberal and purposive manner and that it was the intention of the legislator that mediation play an essential role in the statutory scheme.

[32] The Respondent argues the Adjudicator reasonably concluded it was appropriate to use the “essential character” test as stated in *Weber, Regina Police Association Inc.* and *New Brunswick v. O’Leary*, [1995] 2 S.C.R. 967, 183 N.R. 229 to determine whether or not a dispute falls under the comprehensive regime of the *PSLRA* and he concluded he had jurisdiction to consider the issue of non-compliance with a MOA in the circumstances of this case.

[33] As noted by the Adjudicator, the jurisdiction of an adjudicator is defined under the *PSLRA* and not in a collective agreement, as is often the case in other statutes outside the public service. Following *Canada National Railway Company* and *Rexway*, the Respondent suggests there is a link between the subject matter of a MOA and that of the original grievance in the present case.

[34] According to the Respondent, the Adjudicator’s decision was reasonable, considering the new provisions of the *PSLRA*, the specific circumstances of this case and, in particular, when the original grievance has not been withdrawn and there is a question of non-compliance with a MOA mediated through the grievance process.

[35] The Public Service Alliance of Canada (PSAC) argues the Adjudicator’s jurisdiction is essential to provide consistent recourse and that any determination of the jurisdiction conferred on adjudicators by the *PSLRA* must be coherently applicable to all types of adjudicable grievances. Where the original dispute is adjudicable, PSAC agrees with the Respondent that an adjudicator retains jurisdiction to determine a settlement dispute because of the “inextricable link” between

disputes which may subsequently arise over non-compliance with a MOA and the essential character of the originally adjudicable grievance.

[36] According to PSAC, the Applicant's proposal that recourse is available by filing a new, non-adjudicable grievance under section 208 of the PSLRA is contrary to the purpose and intent of the Act and, in the case of group and policy grievances, is simply unavailable.

[37] PIPSC submits it was not necessary for the Adjudicator to have undertaken a *Weber*-type analysis in choosing which enforcement mechanism, between adjudication and the filing of a new grievance, the Respondent was required to invoke in pursuing his allegation that the employer breached the MOA. The primary issue was not which of two competing regimes should have jurisdiction with respect to the enforcement of the MOA, but rather whether the Adjudicator lost jurisdiction after the MOA was signed (*Regina Police Association Inc.* at par. 26). Once it is determined that the Adjudicator lost jurisdiction subsequent to the signing of the MOA, then it would be necessary to consider the Respondent's options with respect to enforcing the MOA.

[38] The *PSLRA* came into effect on April 1, 2005 and replaced the *PSSRA*. Among other objectives, the *PSLRA* seeks to provide for the establishment of conflict management capacity within departments and more comprehensive grievance provisions. Contrary to other Acts within the labour relations scheme such as the *Canada Labour Code* and the *Ontario Labour Relations Act*, the Court notes the decision-maker's jurisdiction in the present case is clearly defined at sections

208 and 209 of the *PSLRA*. Under the *PSLRA*, the decision-maker is also provided with the flexibility to work informally with parties to mediate and help them reach agreements sooner.

[39] The Court is of the view that there is no substantial change between section 92 of the *PSSRA* and section 209 of the *PSLRA*. Therefore, there is no need, as suggested, to exclude case law interpreting section 92 of the *PSSRA*. That being said, the Court also recognizes that there have been some changes with the *PSLRA*, notably with the inclusion of subsection 226(2) and section 236, as discussed below.

[40] As noted by the parties at the hearing, other labour relations regimes allow the Adjudicator to retain jurisdiction over the grievance once a settlement is reached. However, this has never been the case so far within the public service as procedures for the enforcement of employment rights and obligations differ in some respect from those of the private sector (*Vaughan v. Canada*, 2005 SCC 11, [2005] 1 S.C.R. 146). There is no clear indication that Parliament, in adopting the *PSLRA*, sought to change this.

Subsection 226(2) of the *PSLRA*

[41] Pursuant to subsection 226(2) of the *PSLRA*, the Adjudicator has the power to take the parties into mediation, and this is done without prejudice to the Adjudicator's power to continue the adjudication with respect to issues which have not been resolved and which are not part of a MOA. The Respondent submits that if an adjudicator determines that some issues remain unresolved, notwithstanding a MOA, the power to make an appropriate order is not only implied by the case law

and the preamble of the *PSLRA*, but it is also clear pursuant to subsections 226(2) and 228(2) of the *PSLRA*, especially when the original grievance has not been withdrawn, as in the case at bar.

[42] The Respondent argues that if the Adjudicator did not have the jurisdiction to determine if a party has actually resolved the issue by meeting the terms of a settlement under the *PSLRA*, the employee would have no recourse to the courts to pursue the breach and no other fair recourse, as the essential character of the dispute clearly arises from the *PSLRA*.

[43] PSAC submits the comprehensive nature of the *PSLRA*, section 226(2) of the *PSLRA* and the new Act's general emphasis on voluntary dispute resolution, all support a finding that adjudicators have authority to hear grievances over unresolved disputes as a result of non-compliance with a MOA.

[44] According to PIPSC, although a MOA was entered into, the adjudicator correctly concluded that, as a result of the Respondent's allegation that the employer breached the MOA, there were issues which had not been resolved following mediation, thereby permitting a continuation of the adjudication. Hence, the issue of whether the Adjudicator had jurisdiction to continue the adjudication hearing can be determined by way of a straightforward application of subsection 226(2) of the *PSLRA*.

[45] If an employee submits a grievance under section 209 of the *PSLRA*, it is reviewed by the decision-maker and the parties can seek mediation to resolve the conflict. The Court finds that

pursuant to subsection 226(2) of the *PSLRA*, when the agreement is signed, the Adjudicator can only proceed with the grievance of the issues which have not been resolved and are not included in the MOA.

[46] At the hearing, the Respondent and Interveners argued that subsection 226(2) coupled with the preamble of the *PSLRA*, the general labour relations policy, the liberal interpretation of the statute and the fact that the *PSLRA* constitutes a comprehensive scheme, all illustrate that the legislator's intention was to increase the Adjudicator's jurisdiction. However, the Court's understanding of section 226(2) of the *PSLRA*, of the Adjudicator's powers, and especially of the decision-maker's jurisdiction within the *PSLRA*, does not correspond to the Respondent's and interveners' position.

[47] Subsection 226(2) of the *PSLRA* gives the decision-maker mediation powers and, when a MOA is reached, the decision-maker retains jurisdiction, but only over the issues which are not resolved. For example, if there are five issues to be addressed in a grievance and three issues are resolved in a MOA, according to subsection 226(2), the Adjudicator would retain jurisdiction and could continue adjudication, but solely to resolve the two remaining issues which do not form part of the MOA.

[48] The Adjudicator noted in his decision that it is common practice that a grievance be withdrawn following a MOA. For an unknown reason, such a withdrawal did not occur in this case. However, within the *PSLRA*, there is no duty imposed on the grievor to withdraw a grievance

following a MOA. Such a duty, if any, will ordinarily be included in the MOA as current practice and for more certainty.

[49] In the present circumstances, the MOA signed between the Applicant and the Respondent was not part of the record. In light of subsection 226(2) of the *PSLRA*, where there is a MOA, the Court is of the view that the Adjudicator's jurisdiction is not a function of whether the grievor withdrew or not his grievance. Rather, the signing of a MOA evidences the intention of the parties to the effect that they have agreed to abandon the procedure under section 209 of the *PSLRA* and thus depart from adjudication by taking the path of resolving their dispute through the MOA. The Applicant and the Respondent are presumed to have signed the MOA in good faith. The parties' dispute was brought to an end by the MOA and hence, the Adjudicator's jurisdiction ceased to exist.

Section 236 of the *PSLRA*

[50] The Applicant submits that section 236 of the *PSLRA* codifies the principles enunciated in *Vaughan* and effectively bars employees from suing in court in relation to employment disputes, thereby requiring employees to pursue relief under the regime established by Parliament. According to the Applicant, section 236 of the *PSLRA* does not operate to expand an adjudicator's jurisdiction, which is clearly set out under section 209 of the *PSLRA*, as section 236 of the *PSLRA* deals only with ousting the Court's jurisdiction. The Adjudicator cannot unduly expand his jurisdiction under section 209 of the *PSLRA* simply by finding that a grievor who has an issue with the enforcement of a MOA cannot proceed to court. Under these circumstances, the grievor has an avenue of redress, which is to file a grievance under section 208 of the *PSLRA*.

[51] The Respondent argues that because of the inclusion of section 236 in the *PSLRA*, the statutory scheme provided must be comprehensive. The Adjudicator considered the existence of a privative clause in section 233 and a clause which limits the jurisdiction of the Federal Court in section 236 as evidence that the *PSLRA* is an exclusive and comprehensive regime (*Weber*; *C.U.P.E. Local 963 v. N.B. Liquor Corporation*, [1979] 2 S.C.R. 227, 26 N.R. 341, *St. Anne Nackawic Pulp & Paper v. Canadian Paper Workers Union, Local 219*, [1986] 1 S.C.R. 704, 68 N.R. 112 and *Vaughan*). If a matter arises out of a grievance, in its essential character, the Respondent submits the matter must be resolved through the legislative scheme.

[52] PSAC submits that the enforceability of MOAs is vital to achieving the *PSLRA*'s objectives, as stated in the preamble of the Act. PSAC maintains that prior jurisprudence concerning an adjudicator's jurisdiction in respect of settlements of grievances under the *PSSRA* is not properly applicable to interpreting the scope of an adjudicator's jurisdiction under the *PSLRA* (*Weber* at par. 67; *O'Leary* at par. 3; *Vaughan* at par. 13-15, 33-42) because section 236 of the *PSLRA* denies the grievor access to other methods of recourse.

[53] Under the *PSSRA*, a party who disagreed with the grievance process could come before the Courts. The Court finds that by including section 236 to the *PSLRA*, Parliament seeks to avoid this situation and aims to limit the recourse of the grievor to the internal process as contemplated by the *PSLRA*.

[54] Indeed, the *PSLRA* is meant to be a comprehensive regime with restricted options for individual cases. The Court is of the view that section 236 of the *PSLRA* was adopted to remove the Court's jurisdiction to deal with the grievance as part of the internal process, but the Courts retain judicial review jurisdiction. The Court disagrees with the suggestion that section 236 of the *PSLRA* has opened the door to extending the Adjudicator's jurisdiction to disputes arising out of a MOA. The Court finds that the legislative scheme of the *PSLRA* and the relevant provisions read in conjunction with section 236 of the *PSLRA* do not support this suggestion. If Parliament's intention had been to extend the jurisdiction of the Adjudicator as suggested by the Respondent and the Interveners, it would have included language to that effect such as the language, for instance, in the *Canada Labour Code*. Absent such language, the Court cannot infer a wider scope of jurisdiction held by the Adjudicator.

[55] The Adjudicator thus erred when he concluded he had jurisdiction to consider the dispute over the MOA in the case at bar. However, the grievor is not without recourse, as he may file a grievance related to the MOA under section 208 of the *PSLRA* and, if he is not satisfied with the outcome of the grievance at the final level, he can make application to this Court for judicial review of that decision.

[56] For these reasons, the application for judicial review is allowed.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review is allowed.

“Richard Boivin”

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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