Date: 20081217

Docket: T-289-08

Citation: 2008 FC 1389

Ottawa, Ontario, December 17, 2008

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

COREY NASH

Applicant

and

TREASURY BOARD SECRETARIAT
(CORRECTIONAL SERVICE OF CANADA)

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. OVERVIEW

[1] This is an application for review of the decision made by an adjudicator under the *Public Service Staff Relations Act*, R.S.C., 1985, c. P-35 (as rep. by *Public Service Modernization Act*, S.C. 2003, c. 22, s. 285). The adjudicator found that he had no jurisdiction to hear the grievance filed in 2002, because a settlement agreement had subsequently been entered into between the Applicant

and Respondent. The Adjudicator found that the agreement was valid, was not signed under duress, nor was it an unconscionable act on the part of the Respondent employer.

[2] The Applicant was self-represented, and a summary of the facts and his position as relevant to the issues before the Court have been divined from his written materials as well as from his oral argument. In proceedings in this Court, the Court accorded the Applicant considerable latitude in order that the context of this case could be better understood. That latitude, however, does not extend to altering the nature of this judicial review beyond a consideration of the adjudicator's decision with respect to the validity of the settlement agreement. It does not include a consideration of the merits of the grievance, of the past acts of the employer Correctional Service of Canada (CSC) (except as they relate to the issue of the validity of the settlement), or of the implementation of the settlement agreement.

II. BACKGROUND

A. *Facts Leading to the Filing of the Grievance*

[3] The Applicant is a parole officer who originally worked at Stony Mountain Institution (a federal medium security penitentiary) in the Winnipeg area, and is an employee of the CSC even as of this date.

[4] In January 2002, due to actions arguably imputable to the employer, the Applicant's full name, home address, and phone number were posted throughout the penitentiary where that

information was accessible to both staff and to offenders. This was a particularly troublesome event because the Applicant was the subject of a gang “hit contract” on his life. The publication of the Applicant’s personal information potentially placed himself and his family in harm’s way. While there is a dispute as to whether the threat was credible, it is not for this Court to determine that issue. However, there was evidence, as found by Labour Canada, that the threat was credible.

[5] On March 13, 2002, the Applicant filed a grievance, alleging disguised discipline against him. The grievance was referred to adjudication on April 3, 2003. By the time the matter worked its way to the adjudicator, the employer objected to the matter going to adjudication on the grounds that the grievance had been settled when the Applicant signed a memorandum of agreement (MOA) on July 26, 2004. The Applicant submitted that the MOA was obtained under duress and therefore was not a binding and valid settlement.

[6] The hearing before the adjudicator was limited to the question of whether there was a valid and binding settlement of the grievance. The existence of a binding settlement deprives the adjudicator of jurisdiction to deal with the grievance.

B. *The Negotiation Process*

[7] The Applicant was initially represented by his union in the course of the settlement negotiations, but subsequently undertook his own representation.

[8] Between February 2002 and April 2004, the Applicant was placed on “injury on duty” status. The Applicant had moved to Edmonton and was seeking a transfer to the Edmonton area along with reimbursement for the associated costs thereof. The issue of a transfer to Edmonton was convoluted, but the record indicates that as early as August 28, 2002, the employer asked the Applicant whether he wished to formally request a transfer to that area.

[9] On April 13, 2004, Health Canada concluded that the Applicant was medically fit to work as a Parole Officer in a Correctional environment. On May 12, 2004, the employer advised the Applicant that it was prepared to consider his request to return to work as a Parole Officer in Edmonton and asked that the Applicant state his preference between that and a return to his substantive position at Stony Mountain Institution.

[10] In June 2004, during the course of negotiations of the MOA, the employer sent a letter to the Applicant confirming that he would be deployed to the Edmonton District Parole Office. Counsel for the Respondent attempted to paint this as a stand-alone letter which was unrelated to the settlement agreement. However, the covering memo to the Applicant from the employer’s representative, Mr. Hyppolite, a senior manager at CSC, starts: “[i]n an attempt to bring this matter to a fair and successful conclusion, I am once again providing you with a copy of the proposed agreement and offer of deployment for your signature”. It would not be unreasonable for the Applicant to consider the two documents as interrelated and that acceptance of deployment would prejudice his negotiations of the settlement terms. Indeed, as early as March 15, 2004, the Applicant in his letter (Exhibit G-12) linked new deployment to the settlement agreement.

[11] On June 8, 2004, Mr. Hyppolite forwarded an executed settlement agreement to the Applicant for his signature. The Applicant signed the agreement on or around June 25, having made several handwritten changes to the typed copy. These changes, however, were unacceptable to the employer. Between the end of June and the end of July there were a series of exchanges between the parties, essentially tinkering with the terms and the operative date of the agreement. For all intents and purposes, there was a signed agreement in place by the end of July 2004.

[12] On August 18, 2004, the Applicant wrote to the Public Service Staff Relations Board (Board) stating that he would withdraw his grievance from adjudication on the condition that the Board remain seized of the matter to ensure that the agreement is "fairly and properly implemented by both sides". The Board advised the Applicant that it did not have jurisdiction to do so.

[13] On November 22, 2004, the Applicant wrote to the Board, alleging that the terms of the settlement had not been implemented and requesting a hearing. In addition, the Applicant requested a six-month delay to allow him to obtain legal counsel. Subsequently, on February 21, 2006, the Applicant wrote to the Board alleging that the settlement was entered into under duress.

C. *Proceedings Before the Adjudicator*

[14] The matter was heard before the adjudicator, Ian R. Mackenzie, and the hearing was limited to the question of whether there was a valid and binding settlement of the grievance.

[15] The Applicant requested, at the hearing, that a court reporter be present to record the proceedings for his own note-taking purposes. While the court reporter in attendance was unable to provide that service, the adjudicator granted a brief adjournment for the Applicant to obtain alternate services. As he was unable to do so in the time-frame granted, the hearing continued without a note-taker for the Applicant.

[16] During the course of the proceedings, the Applicant sought to introduce an audiotape of settlement discussions that had taken place over the phone and which he taped, unknown to the other party. The evidence was not permitted to be introduced.

[17] The adjudicator found that if the MOA signed by the Applicant and the employer was binding, it would constitute a complete bar to adjudication. The adjudicator also recognized that the Applicant has been through a difficult experience with his employer. Ultimately, the adjudicator found that the settlement agreement was not unconscionable and had not been signed under duress.

[18] The adjudicator stated that the issue of whether there was a valid agreement between the parties had to be considered on an objective basis which examined the manifest intentions of the parties at the formation of the agreement. The adjudicator noted that the Applicant had stated on at least two occasions during the negotiations that he was participating in the settlement discussions "without full defence of his rights". However, the adjudicator noted that the Applicant had signed the agreement, that many of the Applicant's proposed changes were accepted into the final agreement, and that the various detailed changes which he had proposed manifested his intention to

enter into the agreement. The adjudicator found that the manifest intention of both parties was to enter into a binding agreement.

[19] The adjudicator also found that the Applicant's statement that he was willing to withdraw his grievance if the Board would "remain seized of the matter to ensure the agreement is fairly and properly implemented by both sides", was a demonstration that he did not enter into the agreement under duress. The claim of duress through financial stress caused by the ending of disability benefits and the spectre of no income unless settlement was made, was not evidence of duress in law.

[20] The adjudicator then considered whether the agreement should be void for unconscionability. While the adjudicator recognized that there was inequality of bargaining power, there was no evidence that the employer had unconscionably used his position of power to secure an advantage, nor was the agreement substantially unfair to the Applicant.

[21] Having concluded that the agreement was valid and binding, the adjudicator found that he did not have jurisdiction to otherwise consider the terms of the settlement or to proceed with hearing the grievance.

III. ANALYSIS

[22] There are two issues in this judicial review. The first is whether the adjudicator accorded the proper level of procedural fairness to the Applicant. The second is whether the Board's finding that a valid settlement agreement existed is legally sustainable.

A. *Standard of Review*

[23] The standard of review with respect to procedural fairness has been consistently held to be correctness.

[24] Because the adjudicator's finding that there was a valid and binding settlement agreement determines the adjudicator's jurisdiction to hear the grievance, the adjudicator must apply the correct law in making this determination. However, for the findings of fact that ground the application of the law, the standard of review is reasonableness, with deference given to the assessment of testimony and issues of weight and credibility. (*Dunsmuir v. New Brunswick*, 2008 SCC 9)

B. *Procedural Fairness*

[25] While the Applicant does not explicitly raise procedural fairness as an issue, his written materials and - more importantly - his oral presentation disclose that he objected to the level of procedural fairness accorded him; firstly, because he was denied use of a court reporter and secondly, because the adjudicator did not consider or refer to enough of the Applicant's evidence. The gist of the Applicant's submissions is that he was deprived of an opportunity to outline all of the circumstances of his case, whether or not they related to the execution of the agreement.

[26] On the narrow issue of the use of a court reporter, the adjudicator was entitled, as master of his own proceeding, to determine that a court reporter was not necessary for his own purposes. As to the Applicant's request for a note-taker, a brief adjournment was granted to him to obtain such support. There was no requirement that the case be adjourned indefinitely because he had not anticipated his need and was unable to find anyone to perform that function at the last minute.

[27] With respect to the consideration of the Applicant's evidence, the excluded evidence was either improperly obtained (the audiotape) or dealt with the substance of the grievance and not with the settlement negotiations. The Applicant failed to understand the nature of the proceeding before the adjudicator in this regard. The adjudicator was correct in limiting the scope of the evidence to the matters directly at hand. There was no deficiency in procedural fairness in either the conduct of the hearing or in the decision itself.

C. *Validity of the Agreement*

[28] The Applicant raised a number of points in an attempt to show that the agreement was invalid either because he was under duress at the time of its formation or because the employer had proceeded in bad faith. The incidences of alleged duress include the employer refusing to authorize the transfer to Edmonton until the settlement was also finalized, the imposition of deadlines for the negotiation, and the fact that the Applicant was facing economic difficulty by virtue of the impending expiry of his disability benefits. As to bad faith, the Applicant complains that the employer used its superior bargaining position to force him into an unreasonable settlement by

driving him into a financial corner, and further never intended to implement the agreement in any event.

[29] In my view, the adjudicator applied the proper law to the issue of determining the intention of the parties at the signing of the agreement. The adjudicator referred to this Court's judgment in *MacDonald v. Canada* (1998), 158 F.T.R. 1 (F.C.T.D.), to the effect that it is the manifest words and acts, judged by a reasonable standard, which indicate a party's intention to be bound to a contract. Therefore, the adjudicator applied the correct legal test.

[30] The adjudicator also referred to the Applicant's actions in making amendments to the proposed agreement, including changing the dates of signing and of implementation, as indications of the Applicant's intention to be bound by the agreement.

[31] In regard to the issue of duress, while not expressly stating the test for duress, the adjudicator looked at the relevant factors in reaching the conclusion that the Applicant was not under "duress" as a legal concept in entering into the settlement. In particular, on the issue of his deployment to Edmonton, as a factor of duress, it was the Applicant who linked that matter to the settlement and introduced it as part of the negotiations (see paragraph 10 herein). His actions of arriving at the Edmonton office to report for work and then refusing to work because the settlement had not been effected indicates that he had implemented the linkage of deployment with settlement.

[32] The adjudicator also correctly concluded that the financial strains under which the Applicant was operating did not constitute duress. To conclude otherwise would mean that every settlement of every employment dispute, suspension, or termination where the employee is faced with a loss of wages could be considered illegal for that reason alone.

[33] With respect to the Applicant's allegations that deadlines were being imposed upon him in respect of the formation of the settlement, there is nothing untoward in a party insisting that the matter has to be settled within some reasonable date. I can find nothing unreasonable in the adjudicator's conclusions that there was no duress in these circumstances.

[34] The adjudicator noted the somewhat inconsistent position taken by the Applicant in insisting that he would drop his grievance if the Board would stay seized of the implementation of the agreement, and yet claiming that no valid agreement was in place. This was properly considered as evidence that the agreement was acceptable to the Applicant, and not unduly imposed upon him.

[35] The adjudicator also turned his mind to the issue of whether or not the agreement was unconscionable, and applied the test approved of in *MacDonald*, above, at paragraph 27, in respect of unconscionability.

> A transaction may be set aside as being unconscionable if the evidence shows the following:
>
> (1) That there is an inequality of bargaining position arising out of ignorance, need or distress of the weaker party;
> (2) The stronger party has unconscientiously used a position of power to achieve an advantage, and

> (3) the agreement reached is substantially unfair to the weaker party or, as expressed in the *Harry v. Kreutziger* case, it is sufficiently divergent from community standards of commercial morality that it should be set aside.

[36] The adjudicator recognized that the Applicant was at a disadvantage in bargaining position but found that the Respondent did not unconscionably use its position of power as an advantage.

[37] In addition, the adjudicator noted that the Applicant was originally represented by his union. While the adjudicator does not refer to the matter, before this Court the Applicant admitted, and documents substantiate, that throughout the negotiation he was in consultation with counsel both in Winnipeg and in Edmonton. While he may have been unable to afford ongoing day-to-day representation, he did have the benefit of legal counsel and the imbalance in bargaining power may be somewhat less than that which the adjudicator assumed.

[38] Regardless of any difference in bargaining power, there is no evidence to suggest that the employer engaged in bad faith negotiations with the intent of never implementing the agreement. There is no evidence to sustain a finding, as alleged by the Applicant, that the whole negotiation was a ruse designed to drive him into a settlement. To this day he remains an employee of CSC Canada and he has received, at least in large measure, the benefits of the settlement agreement.

[39] The adjudicator was correct in his legal conclusion that in the face of a valid and binding settlement agreement he ceased to have jurisdiction to consider the initial grievance or the

implementation of the agreement. His findings with respect to the facts of the case, and with the application of the correctly determined laws to those facts was more than reasonable.

IV. CONCLUSION

[40] Under these circumstances, this application for judicial review will be dismissed. Bearing in mind the difficulties the Applicant has suffered, and the emotional nature of his circumstances (manifestations of which are replete throughout the transcript of the proceeding before the Court), the Court will exercise its discretion not to award costs in favour of the Respondent.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review is dismissed. No costs are to be awarded to the Respondent.

"Michael L. Phelan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Ms. Corey Nash	FOR THE APPLICANT
Mr. Stephan Bertrand	FOR THE RESPONDENT

SOLICITORS OF RECORD:

SELF-REPRESENTED	FOR THE APPLICANT
MR. JOHN H. SIMS, Q.C. Deputy Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT