Federal Court  Cour fédérale

Date: 20130402

Docket: T-795-12

Citation: 2013 FC 326

Ottawa, Ontario, April 2, 2013

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

PAUL THOM

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] This is an application under section 18.1 of the *Federal Courts Act*, RSC 1985 c F-7 for judicial review of a decision dated 19 March 2012 (Decision) of Adjudicator George Filliter (Adjudicator) constituted pursuant to the *Public Service Labour Relations Act*, SC 2003, c 22, s 2 (PSLRA). In the Decision, the Adjudicator set aside the memorandum of settlement (Settlement) between Paul Thom and his employer, the Department of Fisheries and Oceans (DFO), because the terms of the Settlement had not been fulfilled.

BACKGROUND

[2] The Respondent is a federal public servant employed with the DFO. As a result of a Classification Renewal Initiative undertaking across the DFO, on or about 24 July 2006, the Respondent received a notification of classification with a new work description, national model decision #24186D (Applicant's Record, page 158). On 10 August 2006, the Respondent filed a grievance, stating that this new work description was not a complete and current statement of his duties and responsibilities as required by Article 20.02 of the *Agreement between the Treasury Board and the Professional Institute of the Public Service of Canada (Group: Computer Systems, Code: 303)* (Collective Agreement) (Applicant's Record, page 58). Article 20.02 of the Collective Agreement provides that:

> Upon written request, an employee shall be entitled to a complete and current statement of duties and responsibilities of his position including the position's classification level and point rating allotted by factor and an organization chart depicting the position's place in the organization (Applicant's Record, page 202).

[3] By letter dated 19 October 2006, Gary Somerton, Chief of Technology Services for the DFO responded to the Respondent's grievance. Mr. Somerton stated that the DFO had implemented the national model work descriptions, and noted that in assigning the appropriate description to the Respondent's position, consideration was given to the relativity of the position within the organization and the normal work that would be expected of a person occupying the position. Mr. Somerton stated that he was satisfied that national model decision #24186 provided a complete and current work description as required by the Collective Agreement (Applicant's Record, page 60).

[4] The Respondent filed a second grievance on 1 November 2006. On 23 November 2006, the Respondent and his representative met with Serge Theriault, Regional Director of Corporate

Services for the DFO. By way of a letter dated 1 December 2006, Mr. Theriault denied the Respondent's grievance, stating that the job description provided was current and provided an accurate description of the Respondent's duties (Applicant's Record, page 62).

[5] By letter dated 4 July 2008, Cal Hegge, Assistant Deputy Minister, wrote to the Respondent, stating that he was satisfied that the national model work description assigned to his position was a complete and accurate reflection of the Respondent's duties. Mr. Hegge noted, however, that the Applicant's grievance had been forwarded to a further level (Applicant's Record, page 64).

[6] On 5 August 2008, the grievance was referred to adjudication. The parties agreed to participate in mediation, which was provided by the Board's Dispute Resolution Services. On 26 May 2009, the Respondent and the DFO signed the Settlement. In it, the parties agreed that the DFO would undertake a desk audit of a modified work description agreed to by the parties, a variant to decision #24186. Subsections 9(c) and 9(d) of the Settlement further provided that the DFO would

> (c) provide the Respondent and his union representative with the dates of the desk audit along with a copy of the results of the desk audit,
>
> (d) review the findings and considerations of the desk audit for implementation and, if required, submit a final product for classification (Applicant's Record, page 67).

[7] The Respondent and the DFO also agreed that the grievance would be withdrawn upon completion of the terms of the Settlement (Applicant's Record, page 67).

[8] The desk audit was completed by a consultant, Dani Chambers. Ms. Chambers developed a new work description and prepared an abbreviated version of it.

[9] On 19 March 2010, Graham Scott, Director of Planning and Enterprise Architecture, Information Management and Technology Services e-mailed Ms. Chambers, inquiring what evidence the Respondent had provided to her during the desk audit. Ms. Chambers responded the same day, stating that the evidence included a narrative prepared by the Respondent, as well as copies of agendas, distribution lists and committee membership lists of his participation on national committees. Ms. Chambers stated that her approach had been to ask for evidence if she had questions, but that this had not been the case with the Respondent (Applicant's Record, page 306).

[10] By letter dated 18 May 2010, Filippo Gagliardi, Chief Information Officer and Director General of Information Management and Technology Services at the DFO wrote to the Respondent, stating that:

> [m]anagement has reviewed the findings and considerations of the desk audit, concluding that the proposed changes were reflected in the existing Variant National Model Work Description 1031 – Technology Support Specialist / Lan Manager (Telecommunications), CS02, decision number 25740.
>
> As a result, your former substantive position (13655) will be linked to the VNMWD 1031 Technology Support Specialist/LAN Manager, decision #24186, CS 02, effective April 1, 2005.
>
> Consequently, all the conditions of the Memorandum of Settlement have now been fulfilled, and we respectfully request that you withdraw your grievance with the Public Service Labour Relations Board… (Applicant's Record, page 133).

[11] The effect of this letter was thus to link the Respondent's former substantive position to national model decision #24186, rather than to rely on the work description written by Ms. Chambers.

[12] On 7 July 2010, the Respondent submitted a grievance concerning Mr. Gagliardi's 18 May 2010 letter to the Respondent (Applicant's Record, page 304). On 23 August 2010, Mr. Scott wrote to the Respondent and his union representative, Allan Phillips, stating that he was of the view that there were three main areas of contention with respect to the work description. Mr. Scott also requested that the Respondent provide any substantiating documentation over and above his narrative, as well as the information which he had provided to the consultant, Ms. Chambers, on the three subjects at issue. On 24 August 2010, the Respondent e-mailed Mr. Phillips saying that he found Mr. Scott's e-mail disingenuous and that management had not disputed the three items in the report and that he and his union had provided everything requested of them during the audit (Applicant's Record, page 135).

[13] On 5 October 2010, Mr. Scott sent a proposed work description to Allan Phillips (Applicant's Record, page 138). On 7 October 2010, Mr. Phillips responded to Mr. Scott, stating that the amended work description was "totally unacceptable" (Applicant's Record, page 156). On 18 October 2010, Mr. Gagliardi wrote to the Respondent in response to his grievance dated 7 July 2010 saying that:

> [d]ue to the fact that we were unable to reach agreement on all aspects of the desk audit, the OCCOE [Organizational and Classification Centre of Expertise] could not initiate their process. In an effort to resolve this issue, management requested that you provide documentation to support your explanation of responsibilities. Subsequent to this, and based on the discussion at the second level hearing, management proposed amended wording to the work description which you provided.
> As no additional information was provided, and the proposed wording was not accepted, we are unable to resubmit the work description to the OCCOE as there is still not full agreement on the duties.

> I believe that management has met the conditions of the settlement agreement, and therefore must deny your grievance (Applicant's Record, page 304).

[14] The Respondent asked the Board to reconvene a hearing of his grievance. This hearing took place on 17-18 January 2012. Following the Adjudicator's decision, the DFO submitted a revised work description for classification. The OCCOE evaluated the work description and completed the classification exercise on 19 April 2012 (Affidavit of Patrick Giroux, Applicant's Record, page 325).

DECISION UNDER REVIEW

[15] The Adjudicator began by reviewing the facts of the dispute and the parties' positions. He stated that, based on the evidence before him, the parties agreed to hire Ms. Chambers and to draft a new work description. The Adjudicator noted that the Respondent's grievance of 10 August 2006 read as follows:

> I grieve that my work description is not a complete and current statement of my duties and responsibilities, as required by Article 20.02 of my collective agreement.
>
> I request that I be provided with a complete and current statement of my duties and responsibilities as required by Article 20.02 of my collective agreement.

[16] The first issue for the Adjudicator to consider was whether the grievance was moot. He determined it was not, as there remained a tangible and concrete issue between the parties. Furthermore, the Applicant had entered into the Settlement and should not now contest it on the basis of mootness.

[17] As to the Settlement, the Adjudicator noted that it must be remembered that it was entered into to settle the grievance, and so must be read in the context of the grievance, evidence and the Collective Agreement. As the Adjudicator saw it, the parties entered into an agreement to draft a new job description for the Respondent, and Ms. Chambers to assist. The Adjudicator stated that he was unable to find that the parties had agreed to adopt the description exactly as proposed by Ms. Chambers, but rather that it was agreed that a degree of "tweaking" would take place. Good faith must be presumed.

[18] The Adjudicator thought that the Applicant did act in good faith by hiring Ms. Chambers and reviewing her findings with the Respondent. The agreement was for the Applicant to review the results "for implementation," and this must be given meaning. The Adjudicator found that the parties had not agreed to adopt Ms. Chamber's job description regardless of how it is drafted. The parties accepted that there may be some back and forth between them, but were confident they would be able to reach a mutually acceptable job description. However, for whatever reason, this did not happen.

[19] The Adjudicator also stated that he was unable to accept the DFO's submission that it had fulfilled its obligation under paragraph 9(d) of the Settlement to "review" the results of the desk audit "for implementation," and "if required, for classification." The Adjudicator stated that while he would not fault the DFO for attempting to engage in some wordsmithing, the DFO's actions belied an intention to agree on wording, which it was understood, would be based on the results of the desk audit.

[20] The Adjudicator could not accept the Applicant's position that the wording of the Settlement meant that it could simply put into place whatever job description it saw fit, as this

would encourage the Respondent to file another grievance. Thus, the Adjudicator decided he would put aside the Settlement and decide the grievance on its merits. The Adjudicator pointed out that the parties came to the hearing with evidence to present on this issue.

[21] The Adjudicator noted that the parties had agreed on the issue of technical guidance/direction in the work description. They also agreed on the issue of national and regional responsibilities. The only real issue between the parties was to "Tier 3" or "final in-house escalation," which refers to the final level of intervention within the employer to correct a technical issue. The Respondent contended that he performed these duties. The Applicant did not disagree, but said there were others who also performed these duties. Thus, the Adjudicator concluded that the job description must include recognition of the fact that the Respondent performed these duties.

[22] The Adjudicator concluded that the job description created by Ms. Chambers should be amended to include the three issues discussed above. He directed that the Settlement be set aside, and that this document be used as the basis for the work description.

ISSUES

[23] The Applicant submits the following issues in this application:

- Has this application for judicial review been rendered moot, and if so must this court exercise its discretion to hear it?

- Was the Adjudicator's Decision to set aside the Settlement and hear the grievance *de novo* appropriate in the circumstances and therefore reasonable?

STANDARD OF REVIEW

[24] The Supreme Court of Canada, in *Dunsmuir v New Brunswick*, 2008 SCC 9, held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[25] The Applicant submits that the standard of review applicable to the Adjudicator's Decision is reasonableness, as he was called upon to interpret and apply the provisions of his home statute to a set of factual circumstances (*Canada (Attorney General) v Amos*, 2011 FCA 38 [*Amos*] at paragraphs 27-33). The Respondent agrees that the applicable standard of review is reasonableness.

[26] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at paragraph 47, and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

STATUTORY PROVISIONS

[27] The following sections of the PSLRA are applicable to this application:

Hearing of grievance	**Audition du grief**
228. (1) If a grievance is referred to adjudication, the adjudicator must give both parties to the grievance an opportunity to be heard.	**228.** (1) L'arbitre de grief donne à chaque partie au grief l'occasion de se faire entendre.
Decision on grievance	**Décision au sujet du grief**
(2) After considering the grievance, the adjudicator must render a decision and make the order that he or she considers appropriate in the circumstances. The adjudicator must then	(2) Après étude du grief, il tranche celui-ci par l'ordonnance qu'il juge indiquée. Il transmet copie de l'ordonnance et, le cas échéant, des motifs de sa décision :
(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	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) 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.	b) au directeur général de la Commission.
[…]	[…]

ARGUMENTS

The Applicant

Mootness

[28] The Applicant submits that the issue of whether an adjudicator can award a remedy of rescission in the face of a valid and binding settlement agreement remains a live issue. In *Borowski v Canada (Attorney General),* [1989] 1 SCR 342 at 353 [*Borowski*], Justice Sopinka set out the following approach, at paragraph 16, for dealing with mootness:

> The approach in recent cases involves a two-step analysis. First it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case. The cases do not always make it clear whether the term "moot" applies to cases that do not present a concrete controversy or whether the term applies only to such of those cases as the court declines to hear. In the interest of clarity, I consider that a case is moot if it fails to meet the "live controversy" test. A court may nonetheless elect to address a moot issue if the circumstances warrant.

[29] With respect to the first part of the *Borowski* analysis, the Applicant says that the issue relating to the scope of an adjudicator's remedial powers when faced with a valid memorandum of settlement is not academic. Since the Federal Court of Appeal's decision in *Amos*, above, the Public Service Labour Relations Board had not made any decisions relating to the remedial options available to adjudicators faced with an allegation that a provision in a valid settlement agreement has not been complied with. In *Amos*, the Court confirmed that an adjudicator's remedial authority is "broad" and unrestricted. Moreover, subsection 228(2) of the PSLRA authorizes an adjudicator to make an order that is "appropriate in the circumstances."

[30] The Applicant submits that although the issue between the Respondent and the DFO appears to have been resolved, the broader issue of how adjudicators ought to proceed in this context remains. Because this is the first case to be decided after *Amos*, there is a risk that the adjudicator's approach will be followed in subsequent cases. In *Sloane v Canada (Attorney General)*, 2012 FC 567 at paragraph 27, Justice Mary Gleason stated that while *stare decisis* does not apply to administrative tribunals, it is "both commonplace and highly desirable that tribunals follow and consistently apply their previous awards." The Board's jurisprudence also suggests that adjudicators are "often reluctant to disregard prior decisions, particularly those involving the same parties or the same collective agreement, without strong reason" (*Stafford v Canadian Food Inspection Agency*, 2011 PSLRB 123 at paragraphs 54-56). Without additional guidance, the Adjudicator's approach may potentially affect parties' willingness to enter into settlement agreements.

[31] With respect to the second part of the *Borowski* analysis, a court may exercise its discretion to hear a moot issue. The court should have regard to three principles: the continued existence of an adversarial context; concern for judicial economy; and concern for the proper role of the judiciary (*Borowski*, pages 358-363).

[32] The Applicant says that, first, there continues to be an adversarial context. Second, the need for further interpretation of the *Amos* decision means that there are special circumstances to justify the expenditure of scarce judicial resources. Third, a decision on this issue will not intrude into the role of Parliament. This Court has exercised its jurisdiction to hear moot issues where doing so would serve a "useful purpose" (*Wong v Canada (Public Safety and Emergency Preparedness*, 2008 FC 783; *Burley v Canada (Attorney General)*, 2008 FC 588 at paragraphs 10-23; *Statham v Canadian Broadcasting Corporation*, [2010] 4 FCR 216 at paragraph 30).

The Reasonableness of the Adjudicator's Decision

[33] The Applicant submits that the Adjudicator's decision was unreasonable. First, mediation is an important component of the PSLRA. Adjudicators have broad remedial powers (*Lam v Canada (Attorney General)*, 2009 FC 913 at paragraph 3). Subsection 228(2) of the PSLRA provides that an adjudicator must render a decision and make the "order that he or she considers appropriate in the circumstances." In *Amos*, above at paragraph 65, the Federal Court of Appeal held that PSLRB adjudicators have the authority to enforce valid settlement agreements and that the purpose of such agreements is certainty in labour relations. Moreover, adjudicators have broad remedial authority when faced with alleged non-compliance with a settlement agreement (*Amos* at paragraphs 75-76).

[34] The Applicant points out that a settlement agreement is a valid contract which may only be set aside for a valid reason, such as fraud or other exceptional circumstances (*Mohammed v York Fire and Casualty Insurance Company* (2006), 79 OR (3d) 354 at paragraph 34; *Richmond v Matar*, 2009 NSSC 113 at paragraphs 14-15; *Federation of Newfoundland Indians v Canada* (2011), 390 FTR 294).

[35] The general law of contract is applicable to a settlement agreement unless specifically excluded by statute or a collective agreement (P. Hogg, *Liability of the Crown*, 3rd Edition, pages 238-240). The contractual remedy of rescission is normally only granted where there has been a finding that the contract has been vitiated by virtue of a mistake, misrepresentation, fraud, duress, repudiation or a fundamental breach. Rescission will not be granted unless the parties can be put back into their previous situations; *restitutio in integrum* must also be possible (G.H.L Fridman, *The Law of Contract*, Carswell: Fourth Edition, pages 852-854; S.M. Waddams, *The Law of Contracts*, Canada Law Book Inc. Fourth Edition, paragraphs 630 – 633; J. Swan, *Canadian Contract Law*,

LexisNexis, Buttersworths: First Edition, pages 410-412; *Guarantee Co. of North America v Gordon Capital Corp.*, [1999] 3 SCR 423 at paragraph 39).

[36] Settlement agreements concluded under the PSLRA are subject to common law contractual principles. In *Castonguay v Treasury Board (Canada Border Services Agency)*, 2005 PSLRB 73 at paragraphs 17-23, the adjudicator applied basic contractual principles and concluded that the parties had entered into a valid and binding agreement which operated as a bar to his hearing the grievance *de novo*. In *Van de Mosselaer v Treasury Board (Department of Transport)*, 2006 PSLRB 59 at paragraph 61, the adjudicator dismissed a grievance in which the grievor had informed the employer that she would not honour the settlement agreement, on the grounds that "it is only in extraordinary circumstances such as duress, which is completely absent here, that a party should be permitted to resile from a bargain made at mediation."

[37] The Applicant submits that PSLRB adjudicators have applied basic contractual principles in deciding issues involving settlement agreements, and that the Adjudicator in this case erred by misapplying the principles of contract law. By setting aside the Settlement, the Adjudicator effectively granted the grievor the remedy of rescission, even though none of the circumstances warranting such a remedy were present in this case. *Resitutio in integrum* was not possible in this case. The employer executed the terms of the Settlement in good faith; rescinding the Settlement was thus not an appropriate remedy.

[38] Given the above, the Applicant submits that the Adjudicator erred when, without any analysis, he determined that the appropriate remedy was to set aside the Settlement and determine the grievance *de novo*. The Applicant says that the unreasonableness of this approach is further

demonstrated by the fact that he adopted the fruit of the agreement which he had set aside as the basis for his order.

The Respondent

Mootness

[39] The Respondent agrees with the Applicant that the principles relating to moot cases are set out in *Borowski*, above. The Respondent highlights that the Supreme Court of Canada, at paragraphs 15-16 of *Borowski*, noted that a court may decline to hear a case which raises an "abstract question," that is, "a question which will not have the effect of resolving some controversy which affects or may affect the rights of the parties." A court will also decline to decide a case which will have no practical effect on parties' rights, or if events subsequent to the decision affect the relationship between the parties such that there is no live controversy (*Borowski*, at paragraphs 31 and 34).

[40] In the case at bar, the Respondent sought a complete and current statement of duties and responsibilities. The Adjudicator ordered the employer to make revisions to the consultant's revised job description to ensure that it was complete and current. The DFO accepted these changes and there is thus no longer any dispute. The Applicant acknowledged this point in stating that "the issue between Mr. Thom and his employer appears to have been resolved" (Applicant's Memorandum, paragraph 31). No "controversy which affects or may affect the rights of the parties" remains, and this Court's judgment will have "no practical effect" (*Borowski*, paragraph 15).

[41] The Respondent submits there are no relevant factors which would cause the Court to exercise its discretion to hear this application. First, there is no ongoing adversarial context. The

reasonableness of the Decision is not relevant to any collateral, adversarial dispute between the parties. Second, there are no special circumstances in this case because there is no impediment to having this issue fully considered in a future case. Adjudicators are not bound by prior adjudication decisions; the Applicant argues at most that "there is a risk" that the case may be followed by other adjudicators (see, for example, *Wry v Treasury Board*, 2006 PSLRB 127 at paragraphs 38-40).

[42] The Respondent furthers points out that the unique facts of each case will determine the nature of an appropriate remedy. That a legal issue may arise again in the future is not sufficient to warrant the hearing of a moot case (*Borowski*, paragraph 36).

[43] Furthermore, the Applicant's argument that allowing the Decision to stand may cause parties to be more unwilling to enter into settlements is without merit. Parties enter into settlements in the good faith belief that they will be honoured. That an adjudicator may have the authority to set aside a settlement agreement ought not to impede parties. Indeed, fundamental breach of a contract has always been a ground for setting aside a parties' agreement, and this has not discouraged parties from settling disputes.

[44] The importance of the issue at hand is not the test that is applied in determining whether a moot case should be heard. The appropriate consideration is the "social cost in leaving the matter undecided" (*Borowski*, paragraph 39; *Kozarov v Minister of Public Safety and Emergency Preparedness*, 2008 FCA 185 at paragraphs 4-5). The Respondent submits that here, there is no such cost associated with leaving the matter undecided.

[45] Finally, the Adjudicator did not give a specific rationale for setting aside the Settlement. The Respondent submits that this further suggests that this is not an appropriate case for the Court to

review the Decision, which is now otherwise moot. Given that this Court is expected to give deference to the expertise and rationale of adjudicators in reaching decisions, the Court should not exercise its discretion in the context of a moot case to offer an assessment of the reasonableness of the Adjudicator's decision in the absence of such an express rationale set out by the Adjudicator in support of his decision on this point.

The Reasonableness of the Decision

[46] The Respondent submits that the Adjudicator had the option of enforcing the Settlement by ordering the DFO to negotiate with the Respondent to reach an acceptable work description. As the employer acknowledged at the hearing, this was the only dispute between the parties.

[47] However, based on the evidence tendered by the parties, the Adjudicator found that the Respondent was engaged in Tier 3 duties and that the employer had for an "unexplained reason" refused to incorporate this responsibility in the work description. To send the matter back to the parties would have resulted in continued disagreement. Given that the evidence was clear that the Respondent had engaged in Tier 3 duties, the Adjudicator found that it was in the interest of good labour relations and common sense to resolve the grievance and order the employer to accept the revised description. On the facts, this was an entirely reasonable approach for the Adjudicator to resolve once and for all the underlying dispute between the parties, particularly since the parties agreed in the Settlement that the grievance would not be withdrawn until the Settlement had been fully complied with. Furthermore, this approach is consistent with the role of adjudicators to support the "fair, credible and efficient resolution of matters" as set out by the Federal Court of Appeal in *Amos*, above, at paragraph 44.

[48] The Respondent submits that the Adjudicator's decision was also consistent with the doctrine of fundamental breach. This doctrine provides that a party can treat an agreement as having ended where it has been breached in a fundamental way. Here, the essence of the Settlement was that the parties reach agreement on an accurate statement of duties and responsibilities. The DFO's failure to agree that the Respondent engaged in Tier 3 duties undermined the entire settlement (*Abenstein v Canada* (1990), 34 FTR 116 (TD); Swan, *Canadian Contract Law*, 2nd Edition, Chapter 9.2). That the parties agreed to keep the grievance alive pending fulfillment of the terms of the settlement is compelling evidence that the parties intended to have the right to proceed with the grievance if the settlement was not fully implemented.

[49] The Respondent submits that the jurisprudence demonstrates that labour adjudicators are entitled to adapt and change common law legal doctrines to better suit the unique labour relations environment, and are not required to apply the doctrine of fundamental breach in the same manner as a court of law (*Nor-Man Regional Health Authority Inc. v Manitoba Association of Health Care Professionals*, [2011] 3 SCR 616 at paragraphs 44-54). Moreover, their broad remedial authority (*Lam*, above at paragraph 3; *Amos*, above, at paragraph 75) as set out in the PSLRA reflects Parliament's intention that they be able to construct effective and case specific remedies (*Canada (A.G.) v O'Leary*, 2008 FC 212 at paragraphs 11-12). In *Alberta Union of Provincial Employees v Lethbridge Community College*, 2004 SCC 28 at paragraph 54, the Supreme Court of Canada stated that arbitrators need to be "liberally empowered to fashion appropriate remedies, taking into consideration the whole of the circumstances."

[50] Finally, at the end of the hearing before the Adjudicator, counsel for the Applicant acknowledged that it was open to the Adjudicator to "hear the grievance afresh" (Affidavit of Max

Way, paragraph 6, Application Record, pages 350, 354). Parties' submissions are a relevant factor in determining the reasonableness of an adjudicator's decision (*Newfoundland Nurses*, above, at paragraph 18). The Respondent submits that the Applicant should not now be able to argue that the Adjudicator erred in adopting one of the remedies agreed to by its counsel.

[51] In conclusion, the Respondent submits that it was open to the Adjudicator to set aside the parties' Settlement based on the fundamental breach of its purpose and terms. It was reasonable for the Adjudicator to resolve the underlying grievance by ensuring that Mr. Thom's job description accurately reflected his Tier 3 duties, as the uncontested evidence at the hearing demonstrated.

ANALYSIS

[52] There is no disagreement between the parties on the facts of this case. One of these facts is that the Applicant's employer accepted the Adjudicator's decision, revised the Respondent's work description as directed by the Adjudicator and forwarded it for classification.

[53] In essence, then, the Applicant is seeking a declaration that the Adjudicator in this case erred by setting aside the Settlement in the absence of any finding of vitiating circumstances.

Mootness

[54] The Applicant argues that the substantive issue in this application is not moot despite the employer's compliance with the Adjudicator's order, and that there remains a live issue to be decided. The Applicant states that the live issue is:

> Whether an adjudicator can award a remedy of rescission in the face of a valid and binding settlement agreement.

[55] If this is a live issue, it is not a live issue between the parties who have accepted and implemented the Adjudicator's decision. In accordance with the principles established by the Supreme Court of Canada in *Borowski*, above, this application is moot because the decision by the Court on the issue posed by this application will not have the effect of resolving some controversy which affects, or may affect, the rights of the parties, and it will have no practical effect on such rights. The tangible and concrete dispute has disappeared and the issue raised has become academic.

[56] So the issue for the Court is, notwithstanding that the question raised in this application is moot as between the parties, should the Court nonetheless elect to address the question because the circumstances warrant it (*Borowski* at 353).

[57] When considering if it should hear a moot issue, the Court is guided by the three main factors set out in *Borowski*:

a. The continued existence of an adversarial context;

b. Concern for judicial economy; and

c. Concern for the proper role of the judiciary not to intrude on the law in making function of the legislative branch.

Whether or not the Court decides to hear an issue is a contextual analysis. All three factors need not be present, but each needs to be considered (*Borowski* at paragraph 42.)

[58] In this regard, the Applicant argues that there continues to be a broader adversarial context and, given the decision in *Amos*, above, there are special circumstances to justify the expenditure of scarce judicial resources and a determination on this issue will not intrude on the role of Parliament. The special circumstances suggested by the Applicant are that the declaration sought in this case will have a practical effect on the rights of employers and grievors who enter into settlement agreements under the provisions of the PSLRA, and will resolve the broader issue of how adjudicators faced with allegations of non-compliance with settlement agreements ought to proceed. Further, the Applicant alleges that without guidance from this Court as to the proper approach, the approach of the Adjudicator in this case may affect the willingness of parties to enter into settlement agreements, and may thereby create a chill on the credible and effective resolution of grievances. The Applicant believes that the Decision in this case sends the wrong message because no rationale is offered for setting aside the Settlement and deciding the grievance *de novo*.

[59] It seems to me that the Applicant is clearly concerned with "employers and grievors [in general] who enter into settlement agreements under the provisions of the PSLRA" and is asking the Court to regard this as the "broader adversarial context" that justifies the Court deciding the non-live issue raised in this case.

[60] In my view, there are several reasons why I think it would be inappropriate for the Court to venture further in this case and attempt to provide guidance in the "broader adversarial context."

[61] The decisions of adjudicators in the context of PSLRA are fact-driven and the facts of the present case are somewhat unique. The Settlement in this case was unusual and there was only

one outstanding matter of contention between the parties, i.e. the appropriate wording as to "Tier 3" or "final in-house escalation." The evidence was clear that the employer's witnesses did not directly dispute the fact that the Respondent had performed Tier 3 duties. No reason was given by the employer for refusing to add the words to the Respondent's work description to reflect the reality of what he did.

[62] It was clear that paragraph 9(d) of the Settlement had not been fulfilled. Given this fact, continuing the dispute by way of the Settlement would have required the Respondent "to file yet another grievance… ." On the facts before the Adjudicator and the facts before me, the appropriate remedy under the Settlement would have produced the same result as the Adjudicator produced in this case by deciding the remaining issue of contention *de novo*.

[63] So I really do not see that this case has much precedential value in the broader adversarial context of the PSLRA. Nor does it appear to me that the decision will undermine the importance of mediation and settlement agreements in this context. The Adjudicator makes it clear that the parties to settlement agreements must abide by them. The Respondent was not attempting to renege on the Settlement so that he could have his cake and eat it by reverting to grievance. The Adjudicator found that the employer was in breach of the Settlement and they had to find an appropriate remedy.

[64] It is also worth bearing in mind that, in this case, the parties themselves agreed that the Respondent's grievance would not be withdrawn until "completion of the terms of settlement." In my view, then, both sides agreed that if the terms of Settlement were not completed, then the matter would be decided by way of grievance. In effect, that is what happened here. There is

nothing to suggest that continuing with the Settlement could have yielded a different result. The evidence of breach was clear and the wording required for the job description was clear.

[65] So, the precedential value of this decision is extremely dubious when it comes to the way that settlement agreements will function in future disputes. The jurisprudence makes it clear that the decisions of adjudicators are not binding (see *Wry v Treasury Board (Correctional Service of Canada)*, 2006 PSLRB 127 at paragraph 40**)**, and I do not see what real persuasive value the decision might have given its rather unusual set of facts. Not only that, the Applicant now has a Court decision pointing out the unusual circumstances of this case and its low precedent value for disputes involving mediation settlements.

[66] The Supreme Court of Canada in *Borowski* had the following to say on point at paragraph 36:

> Similarly an expenditure of judicial resources is considered warranted in cases which although moot are of a recurring nature but brief duration. In order to ensure that an important question which might independently evade review be heard by the court, the mootness doctrine is not applied strictly. This was the situation in *International Brotherhood of Electrical Workers, Local Union 2085 v. Winnipeg Builders' Exchange, supra*. The issue was the validity of an interlocutory injunction prohibiting certain strike action. By the time the case reached this Court the strike had been settled. This is the usual result of the operation of a temporary injunction in labour cases. If the point was ever to be tested, it almost had to be in a case [page361] that was moot. Accordingly, this Court exercised its discretion to hear the case. To the same effect are *Le Syndicat des Employés du Transport de Montréal v. Attorney General of Quebec*, [1970] S.C.R. 713, and *Wood, Wire and Metal Lathers' Int. Union v. United Brotherhood of Carpenters and Joiners of America*, [1973] S.C.R. 756. The mere fact, however, that a case raising the same point is likely to recur even frequently should not by itself be a reason for hearing an appeal which is moot. It is preferable to wait and determine the point in a genuine adversarial context unless the circumstances

> suggest that the dispute will have always disappeared before it is ultimately resolved.

[67] It seems to me that the Supreme Court of Canada here rejects the bad precedent argument as a justification, even when the precedent in question came from the Saskatchewan Court of Appeal. As the Supreme Court says, the existence of an adversarial context is an important part of the legal system, and if an issue is likely to arise again it is best to wait and deal with it within an adversarial dispute.

[68] This is not one of those cases like *Burley*, above, where the issue will continue to arise and become moot. Nor do I see real parallels with other cases, such as *Statham* and *Wong*, above, relied upon by the Applicant.

[69] I think it is also worth pointing out that the evidence shows that, at the hearing, the Applicant conceded that the adjudicator could "revert back to grievance" and could "hear the grievance afresh or from the get-go," even though the Applicant did not feel it was appropriate to do so. The Applicant's complaint before me comes down to saying that the Adjudicator could have done what he did, but he did not provide sufficient reasons or rationale for doing it in this case. This, of course, is an issue on the merits of the application, but it means that if the real issue of concern is the absence of a full rationale then, once again, this is not a set of facts upon which to provide general guidance for the broader adversarial context.

[70] I cannot find any special circumstances in this case that would warrant deviation from this generally accepted position. In conclusion, then, I feel that I must follow the general guidance of the Supreme Court of Canada in *Borowski* at paragraph 36 that "It is preferable to

wait and determine the point in a genuine adversarial context unless the circumstances suggest that the dispute will have always disappeared before it is ultimately resolved."

JUDGMENT

THIS COURT'S JUDGMENT is that

1. This application for judicial review is dismissed with costs to the Respondent (Mr. Thom) fixed in the amount of $2,500.00.

"James Russell"

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	T-795-12
STYLE OF CAUSE:	**ATTORNEY GENERAL OF CANADA**
	- and -
	PAUL THOM
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	February 27, 2013
REASONS FOR JUDGMENT AND JUDGMENT:	HON. MR. JUSTICE RUSSELL
DATED:	April 2, 2013

APPEARANCES:

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Steven Welchner	**RESPONDENT**

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