Federal Court Cour fédérale

Date: 20140321

Docket: T-1934-12

Citation: 2014 FC 281

Ottawa, Ontario, March 21, 2014

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

PETER TATICEK

Applicant

And

CANADA BORDER SERVICES AGENCY

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a final-level grievance decision made pursuant to subsection 208(1) of the *Public Service Labour Relations Act*, SC 2003, c 22, s 2 (PSLRA). The decision was made by the Vice-President of the Human Resources Branch of the Respondent, the Canada Border Service Agency (CBSA) and denied the Applicant's grievance.

Background Facts

[2] The Applicant is an employee of CBSA. On December 30, 2008, he filed a complaint with the Public Service Staffing Tribunal (PSST) regarding an internally advertised appointment process, conducted under the *Public Service Employment Act*, SC 2003, c 22, ss 12, 13 (the PSEA), for a Team Leader position at the CS-03 group and level. The Applicant alleged that the President of the CBSA abused his authority by extending an acting appointment for the CS-03 Team Leader position thereby providing the incumbent actor with an unfair advantage in gaining experience in the position.

[3] The parties participated in mediation with respect to the complaint which resulted in the execution of a document entitled "Terms of Settlement" (settlement agreement) dated April 1, 2009, which stated that it constituted a "full and final settlement of the specific issues and conditions associated with the complaint of the Complainant." Further, that the parties acknowledged that all aspects of the matter had been resolved to their satisfaction in accordance with its terms. The second item of the settlement agreement is at issue and reads as follows:

> 2. to staff any current vacant ~~acting~~ PL [*sic*] positions using the upcoming acting CS-03 selection process and then from the upcoming indeterminate CS-03 selection process based on the essential and asset qualifications for each of the positions.

[4] The crossing out by hand of the world "acting" was initialled by each party. The Applicant withdrew his complaint subsequent to the signing of the settlement agreement.

[5] Some time thereafter, CBSA deployed an employee from the Canada Revenue Agency into a vacant CS-03 position and filled two other vacant CS-03 positions by way of internal

deployments. In response, the Applicant filed two grievances, later consolidated, alleging that the deployments were in breach of the settlement agreement. The Applicant sought to have CBSA comply with the settlement agreement, correct the contraventions and take any other measures necessary to remedy the situation.

[6] On December 9, 2009, a meeting was held, the purpose of which was to clarify the parties' understanding of the terms of settlement agreement. Their interpretations as to the intent of the agreement differed. The Respondent's view was that the second item of the settlement agreement captured promotional appointments only and was intended to provide the Applicant with a fair opportunity for promotion. It did not apply to short term acting positions and deployments. The Applicant's view was that the word "any" meant all positions, including acting positions for short term periods.

[7] On March 29, 2012, a final level grievance consultation was held by Ms. Rachel Stanford, a senior labour relations advisor of CBSA, which resulted in Ms. Stanford preparing a "Final Level Grievance Précis" (Précis) containing her analysis of the grievance. Her analysis is summarized below:

- The settlement agreement dealt with a staffing issue regarding a pool of candidates that no longer existed as it expired in fall of 2010;

- There was a misunderstanding as to the interpretation of the settlement agreement. Management believed the subject term only applied to promotional appointments or acting positions of over four months. The Applicant and the union believed that "any" vacant positions were to be staffed by using the existing pools and that this included all acting, short or long term, as well as indeterminate appointments;

- The PSST would not review the situation because the complaint had been withdrawn and the file closed. Further, there was no provision under the PSEA to file a new complaint on the basis of a mediation or settlement not being respected as outlined in the Howarth decision;
- As the settlement was not clear on what type of appointments or staffing actions were to be used for these positions, "it would appear that it was an unfortunate misunderstanding" between the Applicant and management.

[8] Ms. Stanford recommended that the grievances be denied.

[9] On June 29, 2012, Ms. Therriault-Power, Vice President of the Human Resources Branch of CBSA, issued a "Reply to Grievance" which denied the grievances. It is that decision which is the subject of this judicial review (Decision).

Decision under Review

[10] In the Reply to Grievance, the decision-maker, Ms. Therriault-Power stated the following as the basis of her decision:

> It is my understanding that the memorandum of settlement was interpreted by management to apply only to indeterminate promotional appointments. As the settlement was unclear on what type of appointments or staffing actions were to be used for these positions, I am of the opinion that it was an unfortunate misunderstanding between yourself and management. As such your grievances are denied.
>
> In addition, the remedy you are seeking cannot be implemented, as such, no further corrective action will be forthcoming.

Issues

[11] In my view, the issues can be framed as follows:

1. What is the appropriate standard of review?
2. Did the decision-maker commit a reviewable error warranting the intervention of this Court in deciding not to allow the grievances?
3. Did the decision-maker commit a reviewable error in concluding that the requested corrective action could not be implemented?

Issue 1: What is the applicable standard of review?

Applicant's Position

[12] The Applicant submits that correctness is the appropriate standard of review and must be applied in cases where it would be unfair to allow the employer, who is a party to the dispute, to have its final-level grievance decision insulated through the application of deference on judicial review. In *Assh v Canada (Attorney General)*, 2006 FCA 358 at paras 44-46, 50-51 (*Assh*), the Federal Court of Appeal referred to the "informal nature of the grievance process" and "the fact that it is not independent of the employer" to suggest that a court should not afford much deference to internal grievance board's decisions on questions that are not purely factual in nature. The Federal Court of Appeal made similar comments in *Johal v Canada Revenue Agency*, 2009 FCA 276 at para 32 (*Johal*) as well as in *Appleby-Ostroff v Canada (Attorney General)*, 2011 FCA 84 at para 23 (*Appleby-Ostroff*).

[13] In *Blais v Canada (Attorney General)*, [2004] FCJ No 1996 (QL) at para 16 (TD) (*Blais*), the Court applied a correctness standard in reviewing a grievance that concerned a specific salary, reasoning that contract analysis fell within the Court's expertise. Similarly, in *Endicott v Canada (Treasury Board)*, [2005] FCJ No 308 (QL) at para 9 (TD) (*Endicott*), the Court applied

a standard of correctness to a final-level grievance involving the interpretation and application of a Treasury Board policy regarding indeterminate appointments.

[14] The Applicant submits that, in addition to the nature of the decision under review, other factors point to the correctness standard in this case including the relative lack of expertise of the employer, CBSA, in interpreting the settlement agreement (*Blais*, above, at para 16) and the weak privative clause. This Court has held that the privative clause under section 214 of the PSLRA is weak in contrast to that governing adjudicators under section 233 (*Assh*, above; *Hagel v Canada (Attorney General)*, 2009 FC 329 at para 24, aff'd 2009 FCA 364 [*Hagel*]).

[15] Also at issue is whether the decision-maker had jurisdiction to grant the Applicant's requested remedy which raises questions of law not within the decision-maker's expertise, again attracting the correctness standard.

Respondent's Position

[16] The Respondent submits that the appropriate standard of review for non-adjudicative final level grievance decisions which interpret and apply internal procedures and policies is reasonableness (*Hagel*, above, at para 27; *Spencer v Canada (Attorney General)*, 2010 FC 33 at para 32 [*Spencer*]; *Insch v Canada (Revenue Agency)*, [2009] FCJ No 1525 (QL) at para 14 (TD) [*Insch*]; *Peck v Canada (Parks Canada)*, 2009 FC 686 at para 23 [*Peck*]; *Backx v Canadian Food Inspection Agency and Nancy Griffith*, 2013 FC 139 at para 19 [*Backx*]). The Respondent submits that the present matter concerns how a decision-maker in the grievance process, whose final ruling is not subject to third party adjudication, considered the application of internal

polices and procedures to the specific circumstances of the Applicant's situation. Thus, like the above cases, it too should attract the standard of reasonableness.

[17] In the alternative, the Respondent submits that a standard of review analysis also yields a reasonableness standard (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 64 [*Dunsmuir*]). There is a privative clause in section 214 of the PSLRA which suggests that non-adjudicative final-level grievance decisions must be afforded a high degree of deference (*Peck*, above; *Spencer*, above; *Dunsmuir*, above, at paras 52, 55).

[18] The purpose of the PSLRA is to resolve labour disputes expeditiously, inexpensively and informally (*Canadian Federal Pilots Association v Canada (Attorney General)*, 2009 FCA 223). The non-adjudicative dispute resolution process is a comprehensive scheme worthy of deference even in the absence of third party adjudication (*Vaughan v Canada*, 2005 SCC 11, [2005] 1 SCR 146 at paras 31, 38-39; *Hagel*, above, at para 26).

[19] The nature of the question before the final level decision-maker was whether the deployments breached the settlement agreement and was one of mixed fact and law. Final level decision-makers are generally given deference when interpreting and applying policies and procedures which are issues of mixed fact and law (*Dunsmuir*, above, at para 53; *Peck*, above, at para 21). The expertise of the decision-maker in this case concerns labour relations which favours the standard of reasonableness (*Dunsmuir*, above, at paras 55, 68), and the application of internal policies and procedures is within the specialized expertise of a final level grievance decision-maker (*Hagel*, above, at para 25).

[20] The Applicant takes issue with how management interpreted and applied the settlement agreement, which issue involves consideration of the circumstances relating to the subject deployments being an area which the decision-maker is expected to possess expertise.

[21] Further, the application for judicial review does not raise any constitutional or jurisdictional questions or questions of general law that are of central importance to the legal system as a whole (*Canada (Canadian Human Rights Commission) v Canada (Attorney General*), 2011 SCC 53, [2011] 3 SCR 471 at para 25 [*Canadian Human Rights Commission*]).

Analysis

[22] The first step in determining the appropriate standard of review is to ascertain whether existing jurisprudence has already resolved, in a satisfactory manner, the degree of deference to be afforded to a particular category of question. If it does not, then the Court must proceed to the second step which is to determine the appropriate standard by way of a contextual analysis having regard to the nature of the question, the expertise and purpose of the tribunal, and the presence or absence of a privative clause. (*Dunsmuir*, above, at paras 57-64).

[23] In this case, the Applicant disputes the decision-maker's dismissal of the grievance based on management's interpretation of the settlement agreement. Therefore, the category of question before this Court is a final-level decision in the PSLRA grievance process, where independent adjudication was not available, involving the interpretation of a settlement agreement entered into and having effect only on the parties to the agreement.

[24] While the case law referenced by the parties is helpful in setting out several principles regarding final-level grievance decisions made under the PSLRA, none of those cases involved the interpretation of a settlement agreement entered into between the parties, which agreement formed the basis of a grievance. In most of the cases cited by the Applicant, the issue before the court primarily concerned statutory interpretation of relevant legislation (*Johal*, above) attracting the correctness standard, or the application and interpretation of a policy, directive or guideline that that did not hinge on key findings of fact (*Assh*; *Appleby-Ostroff; Endicott*, *Blais*, all above*).*

[25] The Respondent refers to jurisprudence which is also not entirely analogous as, again, the authorities cited do not involve interpreting a settlement agreement, but are concerned with the application and interpretation of internal procedures and policies (*Hagel; Spencer; Insch, Peck*, all above; *Backx v Canada (Canadian Food Inspection Agency)*, 2013 FC 139 [*Backx*]*)*

[26] Moreover, the case law regarding the appropriate standard of review for various final-level grievance decisions made under the PSLRA is not well settled as Justice O'Keefe recognized in *Backx v Canada (Canadian Food Inspection Agency)*, 2010 FC 480 at para 22, aff'd 2011 FCA 36.

[27] Accordingly, the *Dunsmuir* second step contextual analysis is required.

[28] A privative clause is typically considered a strong indication of the reasonableness standard as it suggests that that the intent of the legislators was to afford greater deference to the administrative decision-maker. Here, there is a privative clause contained in section 214 of the

PSLRA and, although some prior jurisprudence has described it as weak (*Assh*, above at para 35 (referring to section 96(3), the equivalent of the previous *Public Service Staff Relations Act*, RSC 1985, c P-35); *Hagel*, above, at para 24), it has also been described it as strong (*Peck*, above, at para 19). While the presence or absence of a privative clause is not determinative (*Canadian Human Rights Commission*, above, at para 17; *Dunsmuir*, above, at para 52), in my view, in this case, it suggests the reasonableness standard.

[29] However, the most important factor to consider may be the nature of the issue that was before the decision-maker (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at para 4; *Canadian Human Rights Commission*, above, at para 16).

[30] Here, the Applicant's initial complaint pertained to section 77 of the PSEA and concerned an internal appointment. That complaint was discontinued as a result of the settlement agreement having been achieved. The present two grievances were brought pursuant to section 208 of the PSLRA which permits an employee to present an individual grievance if he or she feels aggrieved by the interpretation or application, in respect of the employee, of a provision of any statute or regulation, or of a direction or other instrument made or issued by the employer, that deals with terms or conditions of employment (subsection 208(1)(a)), or, as a result of any occurrence or matter affecting his or her terms of employment (subsection 208(1)(b)). This suggests that the settlement agreement, which arose from the grievance process, should be viewed in the context of that process and not solely as the interpretation of a stand-alone contract.

[31] Thus, in my view, even if the decision-maker would not be owed deference in the interpretation of the settlement agreement as a question of pure contract interpretation, this is tempered by the context in which the contract arose and by the fact that its interpretation would require considering relevant staffing policies and provisions. This favours the reasonableness standard.

[32] Further, the settlement agreement in this case was entered into only between the parties, and its interpretation involves only gleaning the parties' intentions and is not of central importance to the legal system as a whole. I would also note that in *Hagel*, above, Justice Zinn quoted the following from the Supreme Court of Canada concerning deference in the labour relationships scheme:

> [26] When one examines the statutory scheme as a whole, it is clear that it constitutes a comprehensive scheme for dealing with employment related disputes, whereby Parliament has established an exclusive mechanism of non-adjudicative dispute resolution for grievances which do not involve demotion or termination, or disciplinary actions resulting in financial penalty. This has implications for the level of deference the Court should show to decision-makers acting within this scheme. In this regard, it is noted that in *Vaughan v. Canada*, [2005] 1 S.C.R. 146, Justice Binnie, writing for a majority of the Court, stated:
>
> > I do not accept […] that comprehensive legislative schemes which do not provide for third-party adjudication are not, on that account, worthy of deference. It is a consideration, but in the case of the PSSRA it is outweighed by other more persuasive indications of clues to parliamentary intent.
> >
> > …
> >
> > While the absence of independent third-party adjudication may in certain circumstances impact on the court's exercise of its residual discretion (as in the whistle-blower cases) <u>the general rule of</u>

> deference in matters arising out of labour relations should prevail" (emphasis added).
>
> (Emphasis in Original)

[33] In my view, while there are factors that would support a correctness standard such as the informal nature of the grievance process in the present case and the fact that it is not independent of the employer, weighing these factors and applying a contextual analysis points to reasonableness as the appropriate standard of review on the second issue.

[34] With respect to the third issue, the decision-maker did not dismiss the requested remedies because she found that she did not have the authority to order them, but rather because she found that they could not be implemented, albeit without offering any supporting rationale for that determination. Therefore, for the reasons above, the appropriate standard of review for the final issue is also reasonableness.

Issue 2: Did the decision-maker commit a reviewable error warranting the intervention of this Court in deciding not to allow the grievances?

Applicant's Submissions

[35] The Applicant submits, in essence, that the decision-maker erred by relying on management's subjective intention as the basis for disregarding the settlement agreement's clearly stated terms. Those terms apply to all staffing arrangements, not just those involving indeterminate appointments.

[36] The Applicant submits that the settlement agreement is a form of contract pursuant to which the Deputy Head agreed to "staff any currently vacant" team leader positions. It cannot be that this provision is limited to staffing only indeterminate promotional appointments given that staffing at the CBSA occurs by way of appointments, acting appointments and deployments. The CBSA's interpretation does not even extend to staffing long-term acting appointments which was the context of the Applicant's staffing complaint resolved by the settlement agreement.

[37] The Applicant points to the principles of contract interpretation in assessing the settlement agreement. The golden rule of contract interpretation is that the "literal meaning must be given to the language of the contract, unless this would result in absurdity." Context can be admitted to show the purpose for which the contractual provision at issue was included, not to vary the meaning of the words of a written contract (Gerald H. L. Fridman, *The Law of Contract in Canada* (Carswell) at 437- 438). Evidence of one party's subjective intention is not relevant and extrinsic evidence should not be considered when the contract is clear and unambiguous (*Eli Lilly and Co v Novopharm Ltd*, [1998] 2 SCR 129 at paras 54-59 [*Eli Lilly*]).

[38] The CBSA conceded that deployments are an available staffing option. In accordance with the broad wording of the settlement agreement which applies to the "staffing" of certain vacancies, staffing by way of deployment must be considered to have been governed by the terms of the settlement. This conclusion is consistent with the clear language of the settlement agreement.

Respondent's Submissions

[39] The Respondent submits that the decision to deny the grievances on the basis that there had been no breach of the settlement agreement was reasonable.

[40] The PSLRA equips an adjudicator with jurisdiction to decide whether a settlement is final and binding on the parties and whether each party complied with it, where the dispute underlying the settlement agreement is linked to the original grievance (*Canada (Attorney General) v Amos*, 2011 FCA 38, [2012] 4 FCR 67 (CA) at paras 71-72 [*Amos*]).

[41] The Respondent also submits that the Applicant's dispute concerned the settlement agreement which is not linked to his complaint to the PSST. His complaint to the PSST concerned the extension of an acting appointment in 2008, which was withdrawn. The alleged breach of the settlement agreement relates to deployments occurring after April 9, 2009. The PSST may have retained jurisdiction over implementation if the Applicant had stipulated that he would withdraw his complaint only once the settlement agreement had been fully implemented as in *Amos*, above, but this was not the case. Given this, it was reasonable for the decision-maker, while acknowledging the misunderstanding between the parties, to treat the settlement agreement as final and binding and therefore, to deny the grievances.

[42] The Respondent also submits that management interpreted and applied paragraph 2 of the settlement agreement in accordance with its understanding of that provision. It stated that only currently vacant CS-03 Team Leader positions were to be staffed using the acting and indeterminate CS-03 selection processes and were to be based on qualification. Ms. Diane

Binney, by email dated January 22, 2010, stated that short-term acting appointments offered when the incumbent was on holidays were not staffing appointments to vacant PL positions as contemplated in paragraph 2 of the settlement agreement.

[43] With respect to deployments, the Respondent submits that it is clear that the CS-03 positions required specific skills and experience. It would be contrary to the PSEA to staff these positions with employees who were not qualified.

Analysis

[44] As to the reasons for the Decision, the decision-maker does not explain why she came to her conclusion, but merely states that the settlement was unclear, there was a misunderstanding and adopts management's interpretation of the agreement denying the grievances. Jurisprudence establishes, however, that a précis or an internal memorandum with recommendations to the decision-maker may serve as reasons (*Wanis v Canadian Food Inspection Agency*, 2013 FC 963 at para 21; *Miller v Canada (Solicitor General)*, 2006 FC 912, [2007] 3 FCR 438 at para 62). In this case, the Précis was relied on by the decision-maker in coming to her decision and, accordingly, its contents should be considered as part of the reasons for the final Decision.

[45] The Précis refers to the decision of *Howarth v Deputy Minister of Indian Affairs and Northern Development et al*, 2009 PSST 11 [*Howarth*] in stating that "there is no provision under the PSEA to file a new complaint on the basis of a mediation or settlement not being respected [...]".

[46] In *Howarth*, above, the applicant had brought a complaint concerning an appointment process. A settlement agreement was reached and the complaint was withdrawn. Subsequently, however, a new complaint was filed claiming that the deputy head had abused his authority pursuant to s. 77 of the PSEA. In the new complaint, the applicant sought to continue her initial complaint on the basis that the respondent had failed to comply with the settlement agreement terms.

[47] When considering the legal effect of a discontinuance the PSST, in *Howarth*, above, referred to *Canada (Attorney General) v Lebreux*, [1994] FCJ No 1711 (CA)(QL) (*Lebreux*). In *Lebreux*, the grievor discontinued his grievance concerning his suspension and dismissal from employment pursuant to an agreement reached between the parties. He later asked the then Public Service Staff Relations Board (the Board) to set a new date for a hearing on the basis that there had been no satisfactory agreement between the parties. The Board quashed its earlier decision terminating the proceeding and agreed to hear the grievance on its merits. The Federal Court of Appeal found that the adjudicator erred in doing so, and that once a withdrawal is filed, the Board loses jurisdiction to hear a grievance:

> [12] From the time the respondent discontinued his grievances the Board and the designated adjudicator became functus officio since the matter was then no longer before them. The Board was not required either to inquire into the merits or feasibility of such a discontinuance or to agree to accept or reject it. The act of discontinuance without more terminated the grievance process in respect of which it was filed.

[48] The PSST also noted that *Lebreux* was analysed and applied in *Maiangowi v Treasury Board (Department of Health)*, [2008] CPSLRB No 6 (QL) [*Maiangowi*]. In *Maiangowi*, the grievor's representative had requested that the grievance be reopened, and scheduled for a hearing, on the ground that the employer had breached the settlement agreed to by the parties. She asked the PSLRB to take jurisdiction over the enforcement of the settlement agreement. The adjudicator, relying on *Lebreux*, held as follows:

> [61] In my view, *Lebreux* stands for the proposition that the withdrawal of a grievance is a bar to adjudication, not only regarding the merits of the grievance but also the enforcement of the settlement if I had that jurisdiction. Once a grievance is withdrawn, the Board loses jurisdiction over all matters related to it. There is simply no longer any grievance before the adjudicator.

[49] Based on this, in *Howarth*, the PSST concluded that once the original complaint was withdrawn, that the tribunal lost jurisdiction and the withdrawal was a complete bar to adjudication. Further, that subsections 77(1)(c) and 30(2) of the PSEA permitted a complaint based on abuse of authority and/or application of merit but that an alleged breach of a settlement agreement was not a proper ground under those sections.

[50] Recently, in *Amos*, the Federal Court of Appeal found that the adjudicator had jurisdiction under the PSLRA to determine whether the parties' settlement agreement was final and binding; to hear an allegation that a party was in non-compliance with a final and binding settlement agreement; and then to make the appropriate remedial order. The adjudicator did not reopen the case on the merits, as there was a final and binding settlement agreement in place, but did do so in order to determine if there had been compliance with the agreement. The Court

noted that the dispute underlying the settlement agreement was linked to the original grievance which had not been withdrawn and concluded:

> [77] […] The appellant's settlement agreement dispute is intrinsically related to his underlying and persisting grievance, originally referred to adjudication, and properly within the jurisdiction of the Adjudicator.

[51] In my view, the circumstances of the matter before me differ from *Howarth*, *Maiangowi* and *Amos*, all above. Here, the settlement agreement is based on the original complaint which was withdrawn. The Applicant is not, however, seeking to continue or revive the original complaint. Rather, and unlike *Amos*, the Applicant filed new grievances pursuant to subsection 208(1), which were based on alleged contraventions of the settlement agreement and which have not been withdrawn. While *Howarth* found that s. 77(1)(c) and s. 30(2) of the PSEA did not ground a new complaint based on an alleged breach of the settlement agreement, here the new complaint is grounded in subsection 208(1). While the Précis states that there is no provision under PSEA to file a new complaint on the basis of the settlement agreement, the decision-maker did not refuse to address the new grievances nor did she clearly reject them as being outside the scope of subsection 208 and the decision-maker's jurisdiction. In my view, the decision-maker alluded to it but did not squarely address this issue in the reasons.

[52] Regardless of that issue, the Applicant's concern before the decision-maker was the alleged breach of the settlement agreement which, in my view, if it were to be addressed, necessarily required the interpretation of the agreement in resolving the dispute. There is also no issue between the parties that the settlement agreement was final and binding.

[53] The question is, therefore, whether the decision-maker reasonably adopted management's interpretation of the settlement agreement.

[54] As noted above, the following paragraph of the settlement agreement is in dispute:

> …to staff any current vacant ~~acting~~ PL [sic] position using the upcoming acting CS-03 selection process and then from the upcoming indeterminate CS-03 selection process based on the essential and asset qualifications for each of the positions.

[55] In my view, "any current vacant ~~acting~~ PL [sic] position", is worded broadly and on its face, and in the absence of any applicable policy or guidelines to the contrary, could be read to include deployments.

[56] The record contains various communications from the parties generated after the dispute arose as to the interpretation of the settlement agreement which are intended to set out their respective views on their interpretation of the agreement.

[57] In that regard, I would note that the general law of contract is applicable to a settlement agreement unless specifically excluded by statute or a collective agreement (P.W. Hogg and P. J. Monahan, *Liability of the Crown* (3rd ed, 2000) at 238-240). Settlement agreements concluded under the PSLRA have previously been analyzed according to common law contractual principles (*Castonguay v Treasury Board (Canada Border Services Agency)*, 2005 PSLRB 73 at paras 17-23).

[58] Thus, while management and the Applicant were entitled to their respective subjective beliefs as to what was intended to be achieved by the settlement agreement, evidence of a party's subjective intention is not relevant. The Supreme Court of Canada stated the following in *Eli Lilly*, above:

> [54] […] The contractual intent of the parties is to be determined by reference to the words they used in drafting the document, possibly read in light of the surrounding circumstances which were prevalent at the time. Evidence of one party's subjective intention has no independent place in this determination.

[59] Labour arbitration jurisprudence also indicates that the fundamental rule of written settlement interpretation in the labour context is the same as it is for contract and statutory interpretation. That is, the words used must be given their plain and ordinary meaning unless the result would be absurd or it is apparent from the structure of a provision or the settlement read as a whole that a different or special meaning is intended (*Exepertech Network Installation Inc v Communications Energy and Paperworkers Union of Canada,* 2010 CanLII 69131 (CA LA)). Words in a contract take their meaning from the context in which they are used and the intent of the parties (*Eli Lilly*, above).

[60] Thus, in my view, the parties' after the fact submissions to the decision-maker on their subjective intentions have little relevance and should not have been the sole basis of the Decision. Rather, the decision-maker should have based her determination on an interpretation of the terms of the settlement agreement and the context in which it was made. Even if the wording was not clear, and for that reason some reliance on extrinsic evidence were permissible, in the absence of any reasons for accepting one party's interpretation over the other, there is no reasonable basis for merely adopting management's interpretation.

[61] Given the foregoing, in my view, this matter should be remitted back on the basis that the decision-maker erred in basing her its decision solely on management's interpretation of the settlement agreement which was not reasonably supported by the record. Further, as to the decision-maker's jurisdiction to consider the grievance, the reasons do not provide justification, transparency and intelligibility as to the decision making process and do not permit this Court to determine whether the Decision is within the range of acceptable outcomes defensible in respect of the facts and the law (*Dunsmuir*, above, at para 48; *Newfoundland and Labrador Nurses' Union v Newfoundland & Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708 at para 14)

Issue 3: Did the decision-maker commit a reviewable error in concluding that the requested corrective action could not be implemented?

Applicant's Submissions

[62] The Applicant submits that the decision-maker failed to provide reasons as to why she could not implement the requested remedy, and as for the position that she did not have legal authority to do so, this is wrong in law.

[63] The statutory right of employees to grieve CBSA's staffing actions, including deployments, implies that deployments can be revoked as a result of a successful grievance (*MJB Enterprises Ltd v Defence Construction (1951) Ltd*, [1999] 1 SCR 619 at para 27; subsections 208(1) and (2) of the PSLRA).

[64] Successful promotional grievances reveal that a wronged employee will be compensated and the fact that an employee did not work in the position in question will not prevent

compensation where the employer is at fault (*Abbotsford Police Department v Teamsters Local Union 31 (Allen Grievance)* (2008), 179 LAC (4th) 305 (Coleman) at para 115; *Sudbury Regional Hospital v OPSEU, Local 659 (Paquette)*, [2002] OLAA No 1035 at para 9 (QL)).

[65] The Applicant submits that the same legal principles concerning the determination of appropriate corrective measures by a neutral arbitrator or arbitration should apply to a final level decision-maker at the CBSA.

[66] The Applicant points to *Macklai v Canada Revenue Agency*, 2011 FCA 49 at para 7, where it was confirmed that the Canada Revenue Agency has the discretion to pay retroactive back pay where an employee has been wrongfully denied a promotion. Even if this Court finds that the final-level decision-maker could not rescind the deployment, CBSA was still required to compensate the Applicant for breach of the settlement agreement consistent with his request for "any other measure to remedy the situation" and "to be made whole." Damages for breach of contract are calculated in accordance with the expectation of the parties at the time the contract was made and should place the innocent party in the position he would have been had the contract been fulfilled. The only limit to the extent of damages recoverable is where damages are too remote (*Mustapha v Culligan of Canada*, 2008 SCC 27, [2008] 2 SCR 114 at para 19; *BG Checo International Ltd v BC Hydro and Power Authority*, [1993] 1 SCR 12 at para 48).

[67] While it is impossible to know if the Applicant would have been the successful candidate, the final-level decision maker has the ability to award damages for the "loss opportunity" to obtain one of the three positions sought (*Ontario (Ministry of Community, Family and Children's*

Services v OPSEU, [2004] OGSBA No 192 (Crown Employees Grievance Settlement Board) at paras 14-21; *Alberta Health Services v Alberta Union of Provincial Employees (McGinnis Arbitration)*, [2011] AGAA No 42 (Sims, QC) at paras 37-47; *OPSEU v Ontario (St Lawrence Parks Commission)*, [2010] OGSBA No 113 (Herlich) at paras 14-27; *Grand Yellowhead Regional Division No 35 v CUPE, Local 1357 (Proulx Grievance)*, [2010] AGAA No 47 (Tettensor) at paras 16-21). Arbitral jurisprudence has awarded damages for lost opportunity to obtain a promotion in accordance with the common law damages for lost opportunity (*Chaplin v Hicks*, [1911] 2 KB 786 (CA) and the law of damages for lost opportunity has been applied in Canadian courts (*Eastwalsh Homes Ltd v Anatal Developments Ltd*, [1993] OJ No 676 (QL) at para 42 (CA)).

Respondent's Submissions

[68] The Respondent submits that the requested remedy could not be implemented for three reasons.

[69] First, the pool of qualified candidates established from the CS-03 selection process expired in the fall of 2010, and as a result, no further appointments could be made from it.

[70] Secondly, the deployment itself is not the subject of the Applicant's grievance which relates to an alleged breach of the settlement agreement. Subsections 208(1) and (2) of the PSLRA may entitle an individual to grieve a deployment. However, subsections 209(1)(c) and 211(b) of the PSLRA specify the category of deployment-related grievances that can be referred to adjudication by the PSLRB. Subsection 209(1)(c)(ii) provides that only a grievance related to

a deployment without the employee's consent, where an employee's consent is required, can be referred to the PSLRB. Section 211 prohibits referring the adjudication of a grievance on "any deployment under the PSEA, other than the deployment of the employee who presented the grievance". In requesting the Court to revoke the deployment, the Applicant is seeking to achieve indirectly what the PSEA expressly prohibits him from doing directly. There is also no indication that the individuals deployed were not qualified for the positions.

[71] Third, the request for damages is too remote. The settlement agreement did not provide for the staffing of CS-03 positions by the Applicant, rather positions were to be staffed by employees found to be qualified in the CS-03 selection process. If the CS-03 position had been staffed from the pool of qualified candidates, there is no evidence that the Applicant would have been successful. A request for damages for lost opportunity is speculative in nature and the Applicant has not demonstrated that he had a reasonable chance of success (Harvin D. Pitch and Ronald M. Snyder, *Damages for Breach of* Contract (Toronto: Carswell, 1989) 3-1 to 3-18; *Graybriar Industries Ltd v Davis & Co* (1990), 46 BCLR (2d) 164 (SC)).

Analysis

[72] The decision-maker in this case did not state that she lacked the authority to implement the remedy. Rather, she states:

> In addition, the remedy you are seeking cannot be implemented, as such, no further corrective action will be forthcoming.

[73] There is no analysis or rationale offered in support of this finding in the Decision or in the Précis. The Applicant's grievances requested that: CBSA comply with the settlement

agreement, correct the contraventions and take and any other measures to remedy the situation; and, request the "PSST mediation agreement," to be adhered to "when it comes to the present temporary replacement for ACROSS Team Lead position occupied by Marion as stipulated in the Terms of Settlement," and, "To be made whole."

[74] A review for reasonableness "inquires into the qualities that make a decision reasonable, referring to both the process of articulating the reasons and to outcomes" and these qualities include "the existence of justification, transparency and intelligibility within the decision-making process" [*Dunsmuir*, above, at para 47].

[75] Given that the grievances were dismissed, it was technically unnecessary for the decision-maker to address the issue of remedy; however, she states that the remedy could not be implemented. Without any reasons as to why the remedy could not be implemented, it would be speculative to attempt to assess the basis for that decision and whether it is a reasonable finding.

[76] In any event, given that I have found that this matter should be remitted back for reconsideration, it is up to the decision-maker , if necessary, at that time, to craft an appropriate remedy (*Backx*, above, at para 25).

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. the application for judicial review is granted and the matter is remitted to a different decision-maker for re-determination; and

2. the Applicant shall have his costs of the application. In the event the parties cannot agree as to the quantum of the costs to be paid to the Applicant, they may file written submissions to the Court within 10 days of the issuance of this decision.

"Cecily Y. Strickland"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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PLACE OF HEARING:	OTTAWA, ONTARIO
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APPEARANCES:

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