EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the

Employment Standards Act S.B.C. 1995, C. 38

\- by -

Jo Coffey and Janice Miller Operating Coffey Miller & Co.
("CMC")

\- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: John McConchie

FILE NO.: 96/413

DATE OF HEARING: December 18, 1996

DATE OF DECISION: January 24, 1997

DECISION

OVERVIEW

This is an appeal by CMC pursuant to section 112 of the Employment Standards Act (the "Act") against Determination CDET 002983 issued by the Director of the Employment Standards Branch (the "Director") and dated June 21, 1996. The complainant is Thomas Christopher Barth ("Barth"). The Determination found that CMC had contravened the following provisions of the Employment Standards Act: Section 36 (1) (hours free from work each week); Section 40 (1) (daily overtime); and Section 18 (2) (payment of wages when employee quits). The Determination required CMC to pay to the Director the sum of $6,948.40.

CMC has appealed the Determination alleging, among others, that the Director had no jurisdiction to issue the Determination because it and Barth had concluded an enforceable agreement to settle Barth's Complaint.

A hearing was held on December 18, 1996 at which I heard evidence under oath.

FACTS

At the outset of the hearing, the parties agreed that the proceeding could be divided into two parts. The first part, which is the subject of this Decision, deals solely with the issue of whether the parties had made a binding settlement of the Complaint. The parties agreed that if I were to find that there is a binding settlement between CMC and the complainant, it will not be necessary to continue the hearing. Conversely, they agreed that if I were to find that the parties have not concluded a settlement, the hearing would be reconvened to hear the remaining issues.

The material facts are not in dispute. CMC is a firm of Certified General Accountants. The complainant was employed by the firm until his resignation in or about early June, 1995. Nothing in this aspect of the hearing turns on the details of his departure. Mr. Barth filed a Complaint with the Employment Standards Branch on or about June 14, 1995 alleging, among other things, that CMC had failed to pay him certain overtime wages.

The Complaint was assigned to an experienced Industrial Relations Officer, Adele Adamic. Within a short space of time, Ms. Adamic had arranged a visit with CMC's principals in CMC's offices to discuss the matter. As an Employment Standards Officer, Adamic does not represent either party to the dispute. Instead, she attempts to use her office, experience and skills to assist the parties to reach a settlement. During July 1995 she met with CMC principals Jo Coffee and Janice Miller on two occasions in CMC's offices to discuss Barth's Complaint. Prior to her second meeting with CMC, which took place on July 20 1995, she received Barth's instructions to settle the Complaint on certain terms. She met with CMC and presented the offer of settlement in the form of a Memorandum. The Memorandum stated that the complainant had an overtime

balance owing of $1218.79. If CMC were prepared to pay this amount, the entire Complaint (which also addressed certain other claims) could be settled. Adamic left the Memorandum with CMC to give the firm's principals the opportunity to consider the proposal.

Over the course of the next month, Adamic had several discussions with CMC principals in an effort to bring the settlement to a conclusion. She asked CMC to send a cheque to her and she told the firm that she would ensure that the complainant would sign a standard form of release before providing settlement proceeds to him. As she testified, it was normal practice for the officers to ensure that they secured a release from the complainant in exchange for the settlement proceeds.

On August 30, 1995 CMC purported to accept the offer by delivering a cheque and a statement of the deductions to Adamic at the Employment Standards offices. After deductions, Barth was left with a net payment by cheque in the amount of $623.72. Adamic was taken aback; in her considerable experience with these matters, the deductions appeared to be clearly excessive. She was concerned whether, in the face of such deductions, the complainant would become angry and withdraw his consent to the settlement process. Before discussing the matter with him, however, she sought the opinion of the tax specialists in the Employment Standards Branch's Audit Department. She asked whether there was any one specific way in which the income tax deductions should be calculated. Her advisors told her that there was no single prescribed method as there were several permissible ways to calculate the deductions. The method used by CMC was not illegal or impermissible, they said. However, given the options available to CMC for a more favourable method of calculating the deductions, they characterized the CMC method as "provocative".

Adamic's concerns were exacerbated shortly after when she learned from the complainant that CMC had written to him at his new place of employment to provide him with his Record of Employment. The letter from CMC expressed the firm's disappointment about his decision to file a Complaint rather than deal with the matter directly. Since it was not marked "Private and Confidential", the letter was opened by employees of his new employer. The complainant was embarrassed and upset. On September 14, 1995, Adamic proceeded with the complainant's approval to deliver a pointed letter to CMC in which she summed up proceedings to date, including settlement efforts, and observed that "the employer's cheque for $623.72 would appear to be a rejection of the settlement offer by the complainant." She went on to advise CMC that "I will treat it as such if I am not in receipt of a cheque for $1,218.79 less standard deductions for Income Tax, U.I.C. and C.P.P. by 4:30 p.m. on 20 September, 1995." The letter also contained a demand for Employer Records, which generated a later controversy between the parties which is not material at this stage of the proceeding.

CMC replied by letter dated September 20th and expressed surprise at the "tone and content" of Adamic's correspondence. CMC's letter said (in part):

> "We went to a great deal of effort to prepare a full calculation of what was paid to you on August 30, 1995 for Mr. Barth. We have paid the $1,218.79 calculated by yourself " . . . less the standard deductions for Income Tax, U.I.C. and C.P.P. .." This is as follows:

Extra Pay		$1,218.79
Income Tax	$562.17	
CPP	32.90	
UIC	----------	
		595.07
		$ 623.72

> These deductions were remitted on September 15, 1995 to the Receiver General as the cheque had been issued August 30, 1995."

It was Ms. Coffee's testimony that the deductions were calculated in accordance with Revenue Canada requirements and that they were not intended to be unfavourable to the complainant. However, when Adamic received the letter of September 20, 1995, she concluded that CMC was not being responsive to her efforts to resolve the matter. She wrote to the complainant to determine whether he was prepared to accept the cheque in settlement of his Complaint. He was not.

On November 1, 1995, the Employment Standards Act, S.B.C. 1995, c. 38 was proclaimed. It extended the period for which a complainant could claim wages owing to 24 months from the 6 month limitation in the previous Act. On December 7, 1995 Adamic wrote to CMC to advise that the complainant "has forwarded to me a formal, written rejection of your offer of $623.72 in settlement of this matter." Adamic went on to advise that the complainant was now seeking overtime owing for the full 24 month period.

This concluded the correspondence between the parties, at least to the extent that it is material to the issues which must be resolved in this aspect of the case.

ISSUES TO BE DECIDED

The issue in this appeal is whether, on the facts of this case, the parties have a reached a binding settlement of Mr. Barth's Complaint.

ARGUMENTS

I will briefly summarize the arguments of the parties. Ms. Curran, for CMC, submitted that the case was quite simple. To find that a contract was made between the parties, there must be three essential elements: offer, acceptance and consideration. All were present here. The issue of the

deductions was a red-herring because, no matter what sum of money was deducted from the complainant's pay, it was deposited to his credit with Revenue Canada. There was no evidence that CMC made its calculations with a sinister motivation. The Branch's own specialists had confirmed that there was no single prescribed methodology for calculating income tax withholdings in this situation and that the method used by CMC was not impermissible. As a result, as of August 30, 1995, the parties had a settlement.

Ms. Hunt for the Director did not disagree with CMC's statement of the basic legal principles. However, she said, CMC's conclusions on the facts were not warranted. The settlement, she submitted, called for CMC to pay the sum of $1218.79, not the sum of $623.72. If the right to make any deductions at all was to be implied, then the deductions must be "standard deductions", which was the demand in Adamic's letter of September 14, 1995. Here the deductions were excessive and were not agreed on by the complainant. In the absence of an agreement on the deductions, there was no agreement at all. Moreover, the complainant had not signed a Release, a matter which had been specifically raised by Adamic with CMC. In the result, neither CMC's response of August 30, 1995 nor its later response of September 20, 1995 constituted an acceptance of the complainant's original offer. The parties had never reached a binding settlement.

The complainant adopted the submissions of counsel for the Director and added that he saw the CMC responses to his offer as a clear rejection of it.

Ms. Curran replied on the matter of "standard deductions" by recalling that Ms. Adamic agreed in her cross-examination that there were no "standard deductions" per se for income tax. There were several ways of deducting income tax which were permitted under the tax legislation.

DECISION

In order to decide whether the parties have a binding agreement of settlement, I must answer two questions:

1. Did the parties reach an agreement in their dealings in August or September, 1995?

2. If so, did any action by CMC constitute a rejection of the agreement so as to permit the complainant to withdraw his consent to its implementation?

The parties agree that there are three essential elements to a binding settlement agreement. To find that an agreement was reached between them, I must find:

1. that there was an offer by the complainant which was capable of acceptance by CMC;

2. that CMC did in fact accept the offer; and

3. that consideration flowed from CMC to the complainant.

As to the first element, there is no dispute that the complainant tendered an offer and that its terms were clear. It called for CMC to pay the sum of $1,218.79 in full satisfaction of the Complaint. As to the third element, it is equally clear that, whether or not it was sufficient consideration to conclude the agreement, consideration in the form of a cheque for $623.72 flowed from CMC to the complainant. That leaves this appeal to be decided on the basis of the second element in the test. The issue is whether the presentation by CMC of a cheque in the amount of $623.72 constituted an acceptance of the complainant's offer.

In my judgment, CMC's response of August 30, 1995 constituted an acceptance of the offer made by the complainant in the Memorandum of July 20, 1995. Although there was nothing said about deductions in the Memorandum, or in any of the discussions prior to August 30, 1995, it was both necessary and proper for CMC to deduct and remit income tax from the proceeds of the settlement. Where two parties reach a settlement on quantum, where the proceeds of the settlement are normally subject to income tax, and where neither party makes it a condition of the settlement that the transaction be legally structured to avoid liability for tax, then the employer's deduction and remittance of income tax is not the introduction of a new term and does not affect the validity of the underlying settlement agreement: *see Fieguth and Acklands Limited*, Vancouver Registry: CA009204 [1989] B.C.J. No. 857 (BCCA).

It is true that the complainant's concern was not as much with the *fact* of the deductions as with their allegedly excessive character. However, the complainant's disagreement with the method of making the deductions does not permit him to refuse performance of the settlement agreement. It is common for parties to have disagreements over peripheral matters which are often not discussed in detail or at all prior to the agreement being reached. The existence of a disagreement on these matters does not normally permit one of the parties to withdraw its consent to the agreement. The court in *Fieguth*, supra, dealt with a similar situation and had the following to say about the applicable legal principles:

> "In these matters it is necessary to separate the question of formation of contract from its completion. The first question is whether the parties have reached an agreement on all essential terms. There is not usually any difficulty in connection with the settlement of a claim or action for cash. That is what happened here and as a settlement implies a promise to furnish a release and, if there is an action, a consent dismissal unless there is a contractual agreement to the contrary, there was agreement on all essential terms.
>
> The next stage is the completion of the agreement. If there are no specific terms in this connection either party is entitled to submit whatever releases or other documentation he thinks appropriate. Ordinary business and professional practice cannot be equated to a game of checkers where a player is conclusively presumed to have made his move the moment he removes his hand from the piece. One can tender whatever documents he thinks appropriate without rescinding the settlement agreement. If such documents are accepted and executed and returned then the contract, which has been executory, becomes executed. If the documents are not accepted then there must be further discussion but neither party is released or discharged unless the other party has demonstrated an unwillingness to be

> bound by the agreement by insisting upon terms or conditions which have not been agreed upon or are not reasonably implied in these circumstances.
>
> Thus, it seems to me that the plaintiff in this case could have taken the position that he would not suffer a deduction for tax or that he would not execute an overreaching release, or he could have taken the same position on the tax but only executed a general release or he could have taken some other position.
>
> The defendant on the other hand could have stood firm on the tax but relented on the release and the matter might have been worked out or either party could have applied for summary relief under See. 8 of the Law & Equity Act, R.S.B.C. 1979 c. 224 or Rule 10(1)(b), or either party may have commenced an action for breach of the settlement contract and utilized R. 18A.
>
> But on the facts of this case, the settlement contract remained on foot and I see no possibility of either party contending that the settlement contract had been terminated.."
>
> *Fieguth and Acklands Limited*, supra.

Here, it cannot be said that CMC "has demonstrated an unwillingness to be bound by the agreement by insisting upon terms or conditions which have not been agreed upon or are not reasonably implied in these circumstances." In the kind of settlement proposed by the complainant, it is an implied term that income tax deductions must be made by the employer in the course of paying out the settlement proceeds. CMC's method for calculating income tax deductions was not illegal or improper. It did not amount to a refusal to perform the contract nor did it destroy the purpose of the contract. The monies which were deducted were paid to the complainant's credit with Revenue Canada and were not lost to him. If the complainant had wished to make the scale of deduction a condition of the contract (assuming lawfulness), then the onus was on him to make this a term of the agreement. Here, the parties had an agreement on quantum and subsequent difficulty in the implementation. This difficulty, however, does not permit either of the parties to avoid the contract.

Ms. Hunt also raised the issue of the need for a release. First, as I understand the evidence, the release was to be primarily for the benefit of CMC. It was not presented as a pre-condition to settlement but – perhaps among other uses -- as a means of ensuring its efficacy for the employer. It is not open to the complainant to seek to rely on his own unwillingness to provide a release as a means of avoiding the agreement. Further, and in any event, as the court in the Fieguth case said, "a settlement implies a promise to furnish a release." Had the parties said nothing at all about a release prior to August 30th, it would be implied in the usual case that a release would be furnished during implementation of the settlement.

It remains to be said that CMC's method of calculating the income tax deduction was perhaps the least favourable method to the complainant which it could have selected. Although he expressed it in somewhat different terms to Adamic, the complainant felt

that CMC had, in essence, poked its finger in his eye with its response of August 30, 1995. On the evidence, I cannot reach this conclusion. However, I think that it is fair to say that, having found its finger in the complainant's eye however innocently, CMC was slow to remove it. The recalculation of the income tax on a more favourable and equally permissible scale in response to Adamic's letter of September 14, 1995 would have avoided this litigation. Clearly, where the parties to a dispute harden their hearts in the course of the dispute there can be little that even skilled mediators like Adamic can do to bring matters to a smooth conclusion. However, once the contract is made, as it was here on August 30, 1995, the parties have an obligation to bring matters to some kind of conclusion, whether or not it is a smooth one. Despite their disappointment or anger with one another, once they have reached an agreement, they have a legal obligation to implement it.

In result, it is my conclusion that the complainant made an offer of settlement of his complaint which was accepted by CMC by its response of August 30, 1995. The parties have a binding agreement of settlement which is effective to bring these proceedings to a conclusion.

ORDER

CMC's appeal is upheld. Pursuant to Section 115, I order that Determination CDET 002983 be cancelled

---

John McConchie
Adjudicator
Employment Standards Tribunal

JLM:jel