

An appeal

- by -

John Clancy
(the "employee")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: Paul E. Love

FILE No.: 2000/794

DATE OF DECISION: February 7, 2001

DECISION

OVERVIEW

This is an appeal by the employee of a Determination dated November 2, 2000. The Delegate refused to investigate further a complaint made by the employee for wages, overtime, vacation pay, and length of service in the amount of \$2,900. This case turns on the interpretation of a settlement agreement and release signed by the employee. The Delegate has a discretion to refuse to investigate a case where the dispute that caused the complaint was resolved. The Delegate's discretion was not unreasonably exercised, and in any event the Delegate did not err in the interpretation of the release and settlement agreement.

ISSUE:

Did the Delegate err in exercising his discretion to cease the investigation of Mr. Clancy's complaint?

FACTS:

I decided this matter upon written submissions, without an oral hearing. Mr. Clancy was employed by Wilson Employment Consultant Inc. as a relief residential support worker at night and at weekends. Mr. Clancy also worked for Carlene Wilson, the principal of Wilson Employment Consultant Inc. as a community inclusion worker. Mr. Clancy was dismissed from his employment, and his union, the British Columbia Government and Service Employee's Union ("BCGEU"), negotiated a resolution of his complaint, at a mediation meeting, which involved a cash payment of \$2,500.00, and where Mr. Clancy resigned from his position. There is a written settlement agreement, between the employer, BCGEU and Mr. Clancy dated February 4, 2000. The settlement agreement attaches a release for signature by Mr. Clancy. The settlement agreement was executed by all parties, consideration paid, and Mr. Clancy signed the release.

The employer takes the view that the release was intended by the parties to resolve all employment related claims of Mr. Clancy. Mr. Clancy says that he intended the release only to resolve the issue of compensation for wrongful termination and the verbal and mental abuse he received at the time of the termination. The Delegate says that the employers representative, Community and Social Services Employers Association supports the employer's interpretation, and the BCGEU supports Mr. Clancy's view.

At the time of the signing of the release, the BCGEU was the bargaining agent accredited to represent Mr. Clancy. Mr. Clancy was terminated at a time when the union had an organizing drive. As a result of Mr. Clancy's termination the union filed an unfair labour practices complaint with the Labour Relations Board. A special investigations officer of the

Labour Relations Board, mediated the complaint, which resulted in the settlement agreement and a release signed by Mr. Clancy.

After reviewing the release and submissions of the parties, the Delegate discontinued his investigation and gave reasons. The Delegate considered that the dispute giving rise to the complaint was resolved pursuant to s. 76(2)(g) of the *Act*. The Delegate reviewed the settlement, and determined that Mr. Clancy received \$2,500 of a \$2,900 claim, which was 86.2 % of his entire claim. The Delegate determined that the amount received was not unconscionable. He found that the settlement document and the release constituted a settlement of all claims of the employee against the employer.

The release signed by John Clancy for \$2,500 and “other good and valuable consideration” discharged Wilson Employment Consultant Inc., and any related employer

... from any and all manner of actions, causes of action, suits, contracts, claims, damages, costs and expenses of any nature or kind whatsoever, whether in law or inequity, which as against the Employer or such person aforesaid or any of them I have ever had, now have, or at anytime hereafter I or my personal representatives can, shall or may have by reason of or arising out any cause, matter or thing whatsoever occurring or existing up to and inclusive of the date of these presents and, without limiting the generality of the foregoing, by reason of or arising out of the termination of my employment with the Employer or in any other way connected with my employment with the Employer ...

Employee’s Argument:

The employee argues that the Delegate erred in finding that the sum of \$2,500 was paid as compensation of all claims arising from the termination. The employee argues that any agreement to waive the minimum requirements of the *Act* is void pursuant to s. 4 of the *Act*. The employee argues that at all material times, he intended to proceed with the employment standards complaint, and that he crossed off clause 9 of the agreement to facilitate this.

Director’s Argument:

The Director determined that the payment made to the employee was made in respect of a termination of employment, and the amount clearly exceeds the employee’s entitlement under the *Act*. The Director submits that the employer’s liability was discharged by the payment made by the employer.

Employer's Argument:

The employer submits that the intent of the release was to release all claims. The employer argues that the employee was represented by a union representative at the time.

In its written submission to the Tribunal, the employer disclosed information related to a mediation or negotiation of Mr. Clancy's complaint which resulted in the signing of the settlement agreement and the release. I have not considered this submission, in so far as it discloses discussions and positions taken in mediation. Mediation is generally conducted on a without prejudice basis, and my consideration of comments and positions alleged to be made or taken at mediation would have a "chilling effect" on the use of that process to resolve labour relations and employment complaints. I do take from the employer's submission that at the time of the mediation the employee had filed the employment standards complaint, and that a special investigations officer of the Labour Relations Board, mediated the complaint, which resulted in the settlement agreement.

ANALYSIS:

In an appeal under the *Act*, the appellant, in this case the employee, must show that there is an error in the Determination such that I should vary or cancel the Determination. Mr. Clancy seeks to review a decision which involves the Delegate's exercise of discretion under s. 76(2) of the *Act* to cease an investigation of a complaint.

The Director has a discretion under s. 76(2) of the *Act* to refuse to investigate a complaint or may cease investigating a complaint if ...

(g) the dispute which caused the complaint is resolved.

The Delegate determined that the settlement agreement resolved the complaint. The essence of the complaint was that Mr. Clancy was dismissed unjustly. The complaint was resolved with a money payment, and a resignation of Mr. Clancy.

The test for the review of an exercise of discretion is set out in *Jody L. Goudreau and another, BC EST # D066/98*:

The Tribunal will not interfere with the exercise of discretion unless it can be shown that the exercise was an abuse of power, the Director made a mistake in construing the limits of her authority, there was a procedural irregularity or the decision was unreasonable. Unreasonable, in this context, has been described as being:

... a general description of the things that must not be done. For instance, a person entrusted with discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he

is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting “unreasonably”. *Associated Picture Houses v. Wednesbury Corp.* [1948] 1 K.B. 223 at 229. Absent any of these considerations, the director even has the right to be wrong.

Section 81 of the *Act* requires the Director to include, in a determination, the reasons for it. When assessing an argument that the Director has considered immaterial factors or failed to consider material factors, the Tribunal will confine itself to an examination of the relevant determination.

In *Takarabe and others*, *BCEST # D160/98*, the Tribunal added the following comment:

In *Boulis v. Minister of Manpower and Immigration* (1972), 26 D.L.R. (3d) 216 (S.C.C.) the Supreme Court of Canada decided that statutory discretion must be exercised within “well established legal principles”. In other words, the Director must exercise her discretion for bona fide reasons, must not be arbitrary and must not base her decision on irrelevant considerations.

This complaint falls squarely within the jurisdiction of the Delegate to investigate. The Delegate did not err in misconstruing jurisdiction. There was no procedural irregularity alleged by the employee. This case does not involve an allegation of an abuse of power by the Delegate. In order to succeed in this case, considering the issue is a review of a discretion, the employee must show that the exercise of discretion was “unreasonable”. In reviewing the exercise of a discretion, the proper test is a test of “unreasonableness”, not “correctness”. If the Delegate had a reasonable basis to come to a conclusion that the complaints were settled then I should not interfere with that discretion.

In reviewing the discretion exercised by the Delegate, I should consider the Determination, and the release and settlement agreement. Written submissions of the parties are helpful in setting out background facts, and argument, but unhelpful when it comes to setting out the parties intentions. This should be gleaned only from the settlement documentation, unless there is an unclarity. Here the settlement documents express clearly the intentions of the parties, and the written submissions of the parties are unhelpful.

In reviewing the Determination, I see no indication that the Delegate’s discretion to cease investigation was exercised unreasonably. The Delegate considered the wording of the settlement agreement, and considered the evidence of the parties. He was apparently persuaded that the effect of “crossing out” paragraph 9 was to remove it from the agreement. The Delegate considered the balance of the release and found that it was a complete settlement, of a dispute. He found that the settlement was not unconscionable.

In my view, while the “standard of review” is not “correctness”, the Delegate’s interpretation of the settlement agreement and release was correct in law. The recital of the settlement agreement clearly provides that the parties agreed to “settle all disputes emanating from the Clancy termination.” The release signed clearly releases “all claims against the employer arising out of the employment relationship.” Mr. Clancy had representation at the time by the BCGEU. The Delegate considered the adequacy of the consideration. This settlement cannot be characterized as an unconscionable settlement. The submission of the employee does not demonstrate that the settlement breached a minimum standard set out in the *Act*, and therefore there has been no breach of s. 4 of the *Act*. The Delegate did not consider any improper or relevant considerations in exercising his discretion pursuant to s. 76(2) of the *Act*.

I note that if Mr. Clancy intended to retain his rights under the *Act*, he could have done so by reserving expressly those rights, in clear language, from a settlement of the dispute. It appears that s. 76(2) is in the *Act* so that the Delegate can consider whether or not to proceed with an investigation where a dispute has been settled. One of the purposes of the *Act* is to encourage open communications between employees and employers, and also to provide for fair and efficient procedures to resolve disputes over the application and interpretation of the *Act* (s. 2(c)(d)). Where the parties have participated in a mediation process, with representation, facilitated by a special investigations officer of the Labour Relations Board (and also a Delegate) which has resulted in a settlement, apparently of all disputes, there are sound policy reasons supporting the discretion of the Delegate to cease an investigation of a complaint merged in the release.

ORDER

Pursuant to Section 115 of the *Act*, the Determination of November 2, 2000 is confirmed.

PAUL E. LOVE

Paul E. Love
Adjudicator
Employment Standards Tribunal