

An appeal

- by -

Frank Dickinson
("Dickinson")

- 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: David B. Stevenson

FILE No.: 2002/123

DATE OF DECISION: June 4, 2002

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) brought by Frank Dickinson (“Dickinson”) of a Determination that was issued on February 26, 2002 by a Delegate of the Director of Employment Standards (the “Director”).

Dickinson had filed a complaint with the Director under the *Act* alleging he was owed wages, including vacation pay and daily overtime, earned during his employment with Brookfield Properties Ltd. and/or Brookfield Management Services Western Ltd. (“Brookfield”). The Determination concluded that the *Act* had not been contravened, ceased the investigation of the complaint and closed the file.

In this appeal, Dickinson takes issue with the decision to stop investigating his complaint. He says the Director, in light of statements made to him by an Employment Standards Officer about the effect under the *Act* of a release signed by him and his reliance on those statements, should have continued to investigate or, alternatively, should be held responsible by the Tribunal for the wages he alleges are owed to him by Brookfield.

ISSUE

The issue in this appeal is whether Dickinson has shown an error in the Determination sufficient to persuade the Tribunal to exercise its authority under Section 115 of the *Act* and vary it as requested.

FACTS

Brookfield operates a property management business in Abbotsford, BC. Dickinson was employed as a maintenance worker at the Seven Oaks Shopping Centre on South Fraser Way, a property managed by Brookfield, from May 20, 1998 to December 31, 2000 at a rate of \$10.00 an hour. On September 26, 2000, Brookfield gave Dickinson written notice that his position was being eliminated and he would be terminated on or about January 1, 2001. On December 22, 2000, Brookfield informed Dickinson that he would be terminated at the end of his shift on December 31, 2000. He was also told that he would be paid an amount of \$1656.92 (gross) conditional upon his signing a “Final Release and Indemnity” (the “release”) in favour of Brookfield. Dickinson signed the release, delivered it to Brookfield and received the amount promised. The release was dated as being signed on December 28, 2000. After he delivered the release to Brookfield, Dickinson communicated with Brookfield, claiming he was owed further amounts for unpaid meal breaks and for overtime. Brookfield rejected his claim and Dickinson filed a complaint with the Director on February 2, 2001, alleging wages were owed for annual vacation and overtime worked.

In his appeal, Dickinson says the release was signed and delivered to Brookfield following a discussion with an Employment Standards Officer in the Abbotsford Branch office, during which he was told that, because of Section 4 of the *Act*, the release would not be given effect against a claim under the *Act*. Dickinson places that discussion on or about January 3, 2001. He says he relied on that statement when he signed the release and delivered it to Brookfield. The Director, in reply to the appeal, says there was another discussion, which took place on January 5, 2001 in which the Officer changed his opinion about

the effect of the release and Dickinson was told that signing the release would likely bar any further remedy under the *Act*. Dickinson does not deny such a discussion, but says the release was signed and delivered before this discussion took place.

In reaching the Determination, the Director considered the terms of the release, found no evidence that Dickinson had been coerced into signing the release and that the scope of the release was inclusive of all entitlements Dickinson may have had under the *Act*. The Director decided the matters raised by the complaint had been resolved, exercised discretion under Section 76 of the *Act* and ceased investigating the complaint.

ARGUMENT AND ANALYSIS

Dickinson says he was given advice by the Officer and he relied on that advice when he signed the release and delivered it to Brookfield. He says the advice did not change until after he had signed and delivered the release. He says that the Director should have continued to investigate and issue a Determination consistent with the opinion given to him on January 3, 2001. He also argues that if Brookfield has covered themselves and cannot be held responsible for the wages owed to him, the Director should be held responsible for them.

The Director submits this appeals turns on a detailed analysis of the facts. I disagree. In my view it turns on nothing more than a conclusion about whether the Director was acting reasonably in exercising discretion under Section 76 of the *Act*. The Tribunal has stated that the scope of review of an exercise of discretion by the Director is limited to consideration of whether it can be shown 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 being, in this sense, “. . . 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.”

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 discretion for *bona fide* reasons, must not be arbitrary and must not base the decision on irrelevant considerations.

On a review of the Determination, I cannot say that the Director has acted in a manner that would justify the intervention of the Tribunal into the decision to cease investigating the complaint. The Director considered the circumstances and applied those circumstances to the probable effect of the release on Dickinson’s entitlement under the *Act*. The Decision of the Tribunal in *Heather Workman*, BC EST #D642/01, was referred to. That Decision adopted and applied the following statement from *Alnor Services Ltd.*, BC EST # D199/99 in a similar context:

The settlement of unpaid wages is an integral aspect of the Act. . . . In my view, the entire scheme of the Act is undermined if bona fide settlements can be overridden simply because one party - with the benefit of hindsight - subsequently concludes that they made a bad (or at least not an optimal) bargain.

The facts relied on by the Director were relevant considerations: that Dickinson was not coerced; that he was afforded the opportunity of seeking legal advice; and that he was aware that, on its face, the release operated to extinguish any and all claims under the *Act*. There is no dispute about any of those facts.

On the issue of the opinion expressed to Dickinson, the Officer was not retained by him to provide legal advice on the release. Neither the Director nor its Officers are in the business of providing legal advice on such matters. The Director, in good faith, expressed an opinion of the legal effect of the release relative to Dickinson's entitlement under the *Act* that was not correct. Even if Dickinson acted on the statement given January 3, opinion, there is no indication that he made any effort to withdraw the release when the Director corrected the initial opinion. He appears to have been content to let it ride. I note from the material that on January 11, 2001, he communicated with Brookfield. Part of that communication states:

. . . The Ministry has also assured me that the Release and Indemnity form that I signed, has no validity. It is a violation of my human rights, as well you cannot sign away a law that is in place by the Constitution. . . .

On any view of the evidence, the first sentence of the above excerpt is clearly a false statement. I accept that at least by the date of this communication Dickinson had been told by the Director that signing the release could bar any remedy under the *Act*. I believe the submission of the Director is close to the mark when it states that Dickinson decided to adopt a strategy which he believed would maximize the amount of money he could receive, but which ultimately was unsuccessful. In any event, the opinion stated by the Officer was a statement of opinion only. It could not prevent Brookfield from arguing the release should be given effect, notwithstanding Section 4 of the *Act*, and it could not bind the Tribunal in the event of an appeal by Brookfield of any Determination issued in Dickinson's favour.

In that respect, I am not unmindful that even if the Director issued a Determination in favour of Dickinson, the Tribunal's conclusion on any appeal of that Determination would, in all probability, have been consistent with the *Heather Workman* and *Alnor Services Ltd.* decisions.

Finally, the suggestion by Dickinson that the Tribunal hold the Director responsible for his unpaid wages is rejected on two grounds: first, there is no provision in the *Act* for imposing any liability on the Director for unpaid wages; and, second, as a matter of law, the Tribunal's jurisdiction does not include the authority to award damages (even if the Tribunal believed it was appropriate to do so) against the Director.

The appeal is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated February 26, 2002 be confirmed.

David B. Stevenson
Adjudicator
Employment Standards Tribunal