Employment Standards TRIBUNAL

An appeal

- by -

Tim Popoff
("Popoff")

- 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.: 2001/313

DATE OF DECISION: July 19, 2001

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) brought by Tim Popoff ("Popoff") of a Determination that was issued on March 29, 2001 by a delegate of the Director of Employment Standards (the "Director").

Popoff had filed a complaint with the Director alleging his employer, Domtar Inc. ("Domtar"), had contravened the *Act*. In his complaint, Popoff claimed payment for 462 hours of banked overtime and for accrued vacation pay on termination. The Determination did not address the merits of the complaint, but concluded the dispute that gave rise to the complaint had been resolved and that the Director would exercise the discretion allowed in Section 76(2)(g) of the *Act*, would stop investigating the complaint and would take no further action on it. The reasons provided by the Director are found in the following paragraph of the Determination:

> In reviewing the situation of Domtar Inc. and Mr. Popoff, in relation to the Act, the delegate must review the purposes of the Act. In this case, it would not promote fair treatment of the employer if the branch did not recognize that the parties had already resolved the dispute. Mr. Popoff received more than the basic standards of compensation as outlined in the Act. Further, he signed the release, with informed consent and the employer, in good faith, paid the amount set out in the release to Mr. Popoff.

Popoff says that the Director gave too broad an effect to a Release signed by Popoff on April 18, 2000, under which Domtar paid Popoff an amount of $92,325.00 following his dsimissal from employment on April 3, 2000.

ISSUE

The sole issue in this case is whether, in the circumstances, the Director improperly exercised her discretion under Section 76 of the *Act* by failing to give correct effect to the Release signed by Popoff.

FACTS

Popoff was employed by Domtar from May 6, 1974 to April 3, 2000. At the time of termination, Popoff was employed as a Financial Accountant at the rate of $6,155 a month.

In a letter dated April 4, 2000, Domtar offered to pay Popoff a termination allowance which included pay in lieu of notice and severance pay required by law. Attached to the letter were two other documents, a "Personal Termination Statement" outlining Popoff's termination allowance,

certain additional benefits and the outplace assistance that was being offered to him and a Release and two other forms that had to be signed with respect to his termination allowance.

The Personal Termination Statement included the following:

> **Your Termination Allowance**
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> The amount of your termination allowance is $92,325.00, which represents a continuation of your salary for 15 months. Under current legislation, you will not be eligible to Employment Insurance benefits until the end of this period.
>
> This allowance includes the amount required by law in lieu of notice.
>
> . . .
>
> **Group Insurance Plans**
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> Your coverage under the Domtar Insurance Benefits Program will be maintained, at no cost to you, until September 30, 2000. However, disability coverage will be maintained only for the number of weeks covered by your pay in lieu of the notice required under the British Columbia Employment Standards Act.
>
> . . .
>
> **Vacations**
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> Unused accrued vacations will be paid separately in a lump sum.

The Release stated as follows:

> I, the undersigned, in consideration of the sum of NINETY-TWO THOUSAND, THREE HUNDRED AND TWENTY-FIVE DOLLARS ($92,325.00) and other good and valuable consideration, paid to me by Domtar Inc. (the "Company") do hereby release and forever discharge the Company and each of its subsidiaries and their respective directors, officers, employees, successors, heirs and assigns, from any and all actions causes of action, suits, claims and demands whatsoever for damages, indemnity, loss or injury of every nature and kind whatsoever, as I ever had , now have or which I, my heirs, executors, administrators and assigns, or any of us, hereafter can, shall or may hereafter have against the said Company, its subsidiaries, their respective directors, officers, employees, or successors, heirs and assigns, in connection with my employment or the termination thereof with the Company or any of its subsidiaries.

> I hereby declare that I fully understand the terms of this settlement and that I voluntarily accept this amount for the purpose of making a full and final compromise, adjustment and settlement of all claims as aforesaid.

The Determination found the Release to be binding on Popoff and that it had the effect of releasing Domtar for the claims made by Popoff for overtime and annual vacation pay. The Determination also noted that Popoff had independent legal advice before signing the Release.

The complaint filed by Popoff with the Director alleged he was owed for 462 hours of banked overtime that had accrued between January, 1996 and the date of termination. He also alleged he was owed vacation pay on unused annual vacation, supplementary vacation, floater holidays, banked overtime hours and bonuses. Domtar had paid vacation pay on wages earned in the year 2000, to the date of his termination.

ARGUMENT AND ANALYSIS

In the appeal, Popoff has provided twelve reasons for appealing the Determination. In summary, Popoff claims Domtar represented in the April 4, 2000 letter and in the meeting at which the letter was presented, that the Release related only to the Termination Allowance of $92,325.00, being offered to him in that letter. He says his understanding of the intent of the release was supported by other parts of the letter, which contemplated benefits being continued and additional payments being made to him even after the Release was to be signed. He also claims he took the position, in a meeting with Mr. Crescenzo on April 4, that he was owed unused banked overtime and that his vacation pay had not been calculated correctly on termination. He and Mr. Crecsenzo agreed to disagree on those two points. Popoff also says that between April 4 and April 18, and before he signed the Release, he and Mr. Alfonso Crescenzo, acting Human Resources Manager for Domtar, tried unsuccessfully to resolve the claims that were eventually filed with the Director and, following that effort, he advised Mr. Crescenzo he would be pursuing the matter with Employment Standards. He says that at no time did Mr. Crescenzo give any indication that if Popoff signed the Release he would take the position Popoff was barred from making a claim under the *Act* for payment of the claimed banked overtime and unpaid vacation entitlement.

In reply to the appeal, the Director relies on the Determination and Domtar relies on the terms of the Release and the fact that Mr. Popoff had independent legal advice before signing the Release.

In reply to the submissions filed by the Director and Domtar, Popoff says:

> I have reviewed the response from Mr. Morin of Domtar Inc. In his response he states “Finally, by accepting the release, Mr. Popoff recognized that any amount due to him by the Company was included in the payment of the termination allowance”. This statement is not a true statement and contradicts company policy and documentation provided to me on termination of my employment. . . .

> The payment of wages and severance package were clearly presented, negotiated and paid as two separately [sic] transactions by Domtar Inc. There were additional employment issues that were settled after I signed the Release. The employer, Domtar Inc., did not finalize my pension issues until later in the year 2000 and made final payouts in early 2001. . . . I had reviewed the Release document with my Lawyer, received two separate verbal options for [sic] representatives of Labour Standards Branch and also contacted a number of Human Resource representatives in the forest industry. All parties agreed there was no specific reference made by employer in the "Release" to unpaid wages. Every one agreed that employer should have included paid [sic] all wages 48 hours after termination of my employment.

Section 76(2)(c) of the *Act* reads:

> 76 (2) The director may refuse to investigate a complaint or may stop or postpone investigation if:
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> . . .
>
> (g) the dispute that caused the complaint is resolved.

There is no disagreement in this appeal that the Director has a discretion under Section 76(2) of the *Act*. There is an onus on Popoff to show that the Tribunal would be justified in interfering with the manner in which the Director has exercised discretion in this case.

The following statement, from *Joda M. Takarbe and others*, BC EST #D160/98 outlines the approach taken by the Tribunal when asked to interfere with an exercise of discretion by the Director:

> In *Jody L. Goudreau et al* (BC EST # D066/98), the Tribunal recognized that the Director is "an administrative body charged with enforcing minimum standards of employment . . ." and ". . . is deemed to have a specialized knowledge of what is appropriate in the context of carrying out that mandate." The Tribunal also set out, at page 4, its views about the circumstances under which it would interfere with the Director's exercise of her discretion in administering the Act:
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> > The Tribunal will not interfere with the exercise of discretion unless 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, 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 Provincial 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.
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> > 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.
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> 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.

In this appeal, Popoff has, in effect, said the Director acted unreasonably, failing to consider relevant matters and failing to exercise discretion within established legal principles. More specifically, Popoff says the Director was not legally correct in her conclusion that the Release was binding on Popoff.

In *Karroll v. Silver Star Mountain Resorts Ltd.* (1988), 33 B.C.L.R. (2d) 160 (S.C.), McLachlin (then C.J.S.C.) reviewed at length the law and the principles applicable in considering the binding effect of a signed release of liability. She identified two distinct lines of authority, describing the predominant line of authority as follows:

> > The first, relied on by Silver Star, supports the principle of general contract law that where a party signs a document which he knows affects his legal rights, the party is bound by the document in the absence of fraud or misrepresentation, even though the party may not have read or understood the document: *L'Estrange v. Graucob Limited,* [1934] 2 K.B. 394 (C.A.) 403, applied to a release in *Delaney v. Cascade River Holidays Ltd. et al.* (1983), 44 B.C.L.R. 24 (C.A.) affirming (1981), 34 B.C.L.R. 62 (S.C.).

After considering the other line of authority and analysing the relationship between the two lines, she summarized her conclusions at p. 164:

> > One must begin from the proposition set out in *L'Estrange v. F. Graucob Ltd.*, *supra*, at pp. 406-407, that "where a party has signed a written agreement it is

> immaterial to the question of his liability under it that he has not read it and does not know its contents". Maugham L.J. went on to state two exceptions to this rule. The first is where the document is signed by the plaintiff "in circumstances which made it not her act" (non est factum). The second is where the agreement has been induced by fraud or misrepresentation.
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> To these exceptions a third has been added. Where the party seeking to enforce the document knew or had reason to know of the other's mistake as to its terms, those terms should not be enforced: Waddams, *The Law of Contract*, quoted with approval in *Tilden Rent-A-Car v. Clendenning*, *supra*, per Dubin J.A. at p. 605. This new exception is entirely in the spirit of the two recognized in 1934 in *L'Estrange v. F. Graucob Ltd.* Where a party has reason to believe that the signing party is mistaken as to a term, then the signing party cannot reasonably have been taken to have consented to that term, with the result that the signature which purportedly binds him to it is not his consensual act. Similarly, to allow someone to sign a document where one has reason to believe he is mistaken as to its contents is not far distant from active misrepresentation.
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> It emerges from these authorities that there is no general requirement that a party tendering a document for signature to take reasonable steps to apprise the party signing of onerous terms or to ensure that he reads and understands them. It is only where the circumstances are such that a reasonable person should have known that the party signing was not consenting to the terms in question, that such an obligation arises. For to stay silent in the face of such knowledge is, in effect, to misrepresent by omission.
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> Many factors may be relevant to whether the duty to take reasonable steps to advise of an exclusion clause or waiver arises. The effect of the exclusion clause in relation to the nature of the contract is important because if it runs contrary to the party's normal expectations it is fair to assume that he does not intend to be bound by the term. The length and format of the contract and the time available for reading and understanding it also bear on whether a reasonable person should know that the other party did not in fact intend to sign what he was signing. This list is not exhaustive. Other considerations may be important, depending on the facts of the particular case.

It is apparent that the fact of Popoff signing the Release, even if he was represented by a lawyer at the time, is not determinative of its binding effect. The fact that Popoff was represented by legal counsel would be a factor supporting the general principle of law expressed in *L'Estrange v. F. Graucob Ltd.*, *supra*., but it is apparent from the material that there were other factors that might have excluded application of that principle. In this case, the Director failed to consider any of those factors, has misdirected herself in law and, as a result, has provided a basis upon which the Tribunal may interfere with the exercise of discretion.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated March 29, 2001 be cancelled and the matter referred back to the Director for further investigation and consideration.

David B. Stevenson
Adjudicator
Employment Standards Tribunal