

An appeal

- by -

Heather Workman  
(“Workman”)

- 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:** Carol L. Roberts

**FILE No.:** 2001/607

**DATE OF HEARING:** November 22, 2001

**DATE OF DECISION:** December 4, 2001

## DECISION

### APPEARANCES:

For Heather Workman:	Dean A. Crawford, Davis & Company
For Teleskill Human Resource Solutions Inc.:	David W. Buchanan, Q.C., Clark, Wilson
For the Director:	M. Alman

### OVERVIEW

This is an appeal by Heather Workman ("Workman"), pursuant to Section 112 of the Employment Standards Act ("the Act"), against a Determination of a delegate of the Director of Employment Standards ("the Director") issued July 23, 2001. The Director's delegate determined that it was appropriate to exercise her discretion under s. 76(2)(g) to decline to investigate Workman's complaint in light of a settlement agreement between the parties.

### ISSUE TO BE DECIDED

At issue is whether the Director erred in failing to exercise her discretion to investigate Ms. Workman's complaint.

### FACTS

Ms. Workman was employed by Teleskill Human Resource Solutions Inc. ("Teleskill"), as the Director of Career Training from February 9, 1998 to January 27, 1999, when she resigned. After her employment ended, the parties wrote to each other regarding outstanding financial matters between them. On February 15, 1999, Ms. Workman's counsel, Mr. Crawford, issued a demand letter to Mr. Buchanan, counsel for Teleskill, claiming compensation for shares, and for outstanding commissions and overtime hours allegedly due to Ms. Workman. Counsel indicated that, in the event the parties were unable to resolve the claims, Ms. Workman would pursue the matter in Supreme Court and with the Employment Standards Branch.

On March 1, Teleskill responded with an offer in the amount of \$13,289.00, representing full and final settlement of all the claims.

Ms. Workman accepted Teleskill's offer on April 7. In his letter to Mr. Buchanan, Mr. Crawford wrote as follows;

Our client is prepared to accept your client's offer of \$13,289.00 on the following basis:

1. Teleskill will forward to Davis & Company a cheque for \$7,000 payable to Heather Workman by April 15, 1999. This amount shall represent your client's payment in respect of the value of the shares owed to our client and our client's outstanding overtime claim.
2. Your client will forward to Davis & Company a cheque for \$3,000.00 payable to Heather Workman by May 15, 1999. Your client will forward a further cheque for \$3,289.00 payable to Heather Workman by June 15, 1999. These sums shall represent our client's claim for outstanding commissions owed to her.
3. Upon fulfilment of the above conditions, our client will execute a Release.

On April 21, 1999, the parties entered into a comprehensive release, in which Ms. Workman acknowledged that she had received legal advice before entering into the settlement, that she fully understood the terms of the release, and that she had not been influenced by Teleskill or any of its representatives or employees in making the release.

Clause 4 of the Release reads as follows:

And the Releasor acknowledges receipt of all wages, commissions, overtime pay, vacation pay, general holiday pay, and pay in place of termination of the employment contract that she is entitled to by virtue of the Employment Standards Act, and the Releasor further confirms that there are no entitlements, overtime pay, wages, or commissions due and owing to her by the Releasees.

Ms. Workman further acknowledged that she understood that the payments made to her constituted a compromise settlement of a disputed claim and that the payment of the consideration for the release should not be deemed to be or construed as an admission of liability by Teleskill.

On June 28, 1999, Ms. Workman filed a complaint against Teleskill with the Employment Standards Branch claiming commission wages and overtime wages in the total amount of \$23,155.88 in addition to the amount already received under the settlement agreement. She argued that the amounts she was entitled to far exceeded the amount she received from Teleskill, and that section 4 of the Act were minimum standards that could not be waived. She argued that the release was invalid since it failed to meet all of the requirements of the Act.

The delegate considered Ms. Workman's position that she accepted, by way of settlement, amounts that were significantly lower than the amounts she was entitled to under the Act, and that in doing so, her release was null and void. The delegate also considered Teleskill's position that the payment constituted full and final settlement of the dispute. The delegate reviewed the correspondence between the parties and the specific terms of the release entered into by the parties. She also considered sections 4 and 76 of the Act. After noting that Ms. Workman was represented by legal counsel, that she had a reasonable opportunity to reflect on the settlement offer, and that the release specifically acknowledged receipt of any wages that might be owed under the Employment Standards Act, the delegate concluded that it was an appropriate case for the Director to decline to investigate the complaint under s. 76(2)(g).

The delegate also concluded that since she decided that it was not appropriate to proceed with the investigation of the complaint, the issue of whether overtime and commission wages were owed was not fully investigated.

## ARGUMENT

Ms. Workman argued that, where the delegate has prima facie evidence that the minimum standards under the Act have not been complied with, it is improper for the delegate to exercise her discretion not to investigate a claim, even where there appears to be a bona fide settlement agreement. She argued that s. 76(2)(g) must be read in a manner consistent with s. 4, and that the Director should only exercise her discretion not to investigate if the dispute has been resolved in a manner that complies with the minimum requirements set out in s. 4.

Ms Workman relied on Re: *August* BCEST #D225/96 and Re: *Travis* BCEST #D389/00 in support of her argument that the test to be applied for determining whether the delegate has properly exercised her discretion is whether there is prima facie evidence which demonstrates that the settlement does not comply with the minimum requirements of the Act.

The Director argued that the delegate, in declining to investigate under s. 76(2)(g), properly exercised her discretion. The Director contended that s. 78 and s. 4 must be read together with s. 2, which sets out the purposes of the Act, and includes the fair treatment of employees and employers, the encouragement of open communication between employers and employees, as well as the fair and efficient disposition of disputes. She argued that, after the delegate determined that Ms. Workman was not coerced or intimidated, that the terms of the agreement included an agreement to settle all of Ms. Workman's claims under the Act, and that the agreement had been concluded with the assistance of counsel, the delegate reasonably exercised her discretion in declining to investigate Ms. Workman's complaint.

The Director further argued that, since Ms. Workman's counsel negotiated the settlement after referring to a possible claim under the Act, s. 4 should not be interpreted to permit parties to take steps to forego or repudiate that settlement. She contended that to do so would offend the purposes of the Act.

The Director submitted that the intent of s. 2 is to encourage settlement, and that purpose must be given equal weight to the guarantee of minimum standards, even where the effect of the settlement may be less than the statutory entitlement. The Delegate relied on *Joda Takarabe*, BC EST #D160/98, *Shiming S.Yuan*, BC EST #D414/00, *Alnor Services Ltd*, BC EST #D199/99 and *Ellerton Rudy Small*, BCEST #D032/98 in support of her argument.

Teleskill argued that the Determination ought to be upheld. Mr. Buchanan argued that Ms. Workman herself pushed for an early resolution to this matter, indicating that she would commence proceedings "immediately" with the Employment Standards Branch if Teleskill did not respond to her claims within a short time frame. Teleskill responded with an offer within that time frame. Ms. Workman accepted that offer after contemplating it for five weeks. Teleskill further contended that, rather than having prima facie evidence that Ms. Workman settled for less than minimum standards, the delegate had only Ms. Workman's assertion that she was owed further wages. Teleskill denied that she was, and argued that no right had been established.

Finally, Teleskill contended that nothing on the face of the settlement offends the provisions of the Act, and that the appeal should be dismissed.

## **DECISION**

The Appellant bears the burden of establishing that a Determination is incorrect. After careful consideration of the submissions of the Appellant, I am not persuaded that the burden has been discharged, for the following reasons.

The relevant provision of the Act is as follows:

76(2) The director may refuse to investigate a complaint or may stop or postpone investigating a complaint if

...

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

The test for the review of an exercise of the delegate's discretion is one of reasonableness:

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. (*Jodie L. Goudreau* (BC EST #D066/98))

In *Takarabe and others* (BC EST #D160/98) the Tribunal added as follows:

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.

Ms. Workman did not allege that the delegate abused her powers, or that there was a procedural irregularity. There is also no evidence the delegate did not consider the matters she was bound to consider, or considered irrelevant factors.

As I understand her argument, Ms. Workman contends that the delegate made a mistake in construing the limits of her authority in refusing to investigate her complaint, and that she was unreasonable in the exercise of her discretion.

The evidence is that, prior to making her decision not to investigate, the Director's delegate considered the form and content of the settlement agreement, the correspondence exchanged by the parties leading up to the agreement, the fact that the parties had counsel, and whether Ms. Workman was coerced or intimidated in any way. She also considered the relevant sections of the legislation, and determined that the settlement was not repugnant to the Act.

The purposes of the Act include both the guarantee of minimum standards and the fair and efficient settlement of disputes:

2. The purposes of this Act are as follows:

- (a) to ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment;
- (b) to promote the fair treatment of employees and employers;
- (c) to encourage open communication between employers and employees;
- (d) to provide fair and efficient procedures for resolving disputes of the application and interpretation of this Act

...

The purposes of the Act might best be understood by an examination of Professor Thompson's report "Rights and Responsibilities in a Changing Workplace: A Review of Employment

Standards in British Columbia". In his report, Professor Thompson noted that settlement was an important value, and one which was to be fostered:

...any statute such as this one should provide for the least expensive and most rapid procedures possible for resolving differences in these times of increasing legalism and expense in dispute settlement" (at p.29)

The value of settling disputed claims is underscored by the express grant of power to the Director to assist in the settlement of complaints:

78. (1) The director may do one or more of the following:

(a) assist in settling a complaint or a matter investigated under section 76;

....

The power of the Director to assist in the resolution of disputes, and the refusal of the Tribunal to go behind the settlement agreements was at issue in *Re Clancy* ( BC EST #D059/01). In that case, the Director's delegate refused to investigate a complaint made by an employee where the employee signed a settlement agreement and release, as Ms. Workman has done. On appeal to the Tribunal, the adjudicator stated:

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 Section 76(2) is in the Act so that the delegate can consider whether or not to proceed with 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. (Section 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.

While there is a public policy interest in the enforcement of minimum employment standards, there is an equally compelling public interest in the enforcement of bona fide settlement agreements, even where the terms of that settlement may be something less than a party alleges they are entitled to under the Act. In my view, such settlements do not offend the Act. As the Tribunal stated in *Alnor Services Ltd.* (BC EST #D199/99):

The settlement of unpaid wage claims 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.

I have reviewed the cases relied upon by the Appellant in support of her contention that the delegate may set aside a settlement agreement where the evidence discloses a breach of the minimum standards. In all of those cases, neither party was represented by counsel, and may not have been aware of their rights under the Act. The same cannot be said of Ms. Workman.

In this case, Teleskill disputed Ms. Workman's claims, but agreed to settle the matter in an effort to avoid continued litigation. There was no evidence that the settlement was obviously contrary to s. 4 of the Act. The delegate conducted an independent assessment of the fairness of the settlement agreement and the interests of the parties in the circumstances, and determined that no unfairness existed. I am unable to conclude that the delegate's decision not to investigate was in error, and dismiss the appeal.

### **ORDER**

I Order, pursuant to Section 115 of the Act, that the Determination, dated July 23, 2001, be confirmed.

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**Carol L. Roberts**  
**Adjudicator**  
**Employment Standards Tribunal**