

An Application for Reconsideration

- by -

Director of Employment Standards
(the "Director")

-and by-

Domtar Inc.
("Domtar")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

pursuant to Section 116 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 2001/649

DATE OF DECISION: November 9, 2001

DECISION

OVERVIEW

I have before me two applications for reconsideration pursuant to section 116 of the *Employment Standards Act* (the “*Act*”) filed, respectively, by Domtar Inc. (“Domtar”) and the Director of Employment Standards (the “Director”). The applicants seek reconsideration of an adjudicator’s decision issued on July 19th, 2001 (B.C.E.S.T. Decision No. D393/01).

Both applications for reconsideration are timely, having been filed on September 10th and 12th, 2001, respectively. Further, the applications raise a serious legal issue relating to the Director’s discretionary authority to refuse to investigate a complaint (or to stop investigating) if the subject matter of the complaint has been resolved. This latter discretionary authority is found in section 76(2)(g) of the *Act*:

Investigation after or without a complaint

76. (1) Subject to subsection (2), the director must investigate a complaint made under section 74.
- (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 DETERMINATION

Mr. Tim Popoff (“Popoff”), formerly a financial accountant with Domtar, was terminated on April 3rd, 2000 and he subsequently negotiated a settlement of his “wrongful dismissal” claim based on a salary continuation period of 15 months. The settlement funds (representing 15 x \$6,155 monthly salary = \$92,325) were paid to Popoff who in turn, on April 18th, 2001, signed a general release in favour of Domtar after first having obtained independent legal advice.

In his complaint to the Employment Standards Branch dated May 10th, 2000, Popoff alleged, *inter alia*, that he was entitled to approximately \$35,000 on account of unused “banked overtime” and unpaid vacation pay. Popoff’s position before the Director’s delegate was that although he signed a release in favour of Domtar, it was his understanding that the payment and release were not intended to address his overtime and vacation pay claims. In a determination issued on March 29th, 2001 (the “Determination”), the Director’s delegate held that the release was “binding” and, in addition, covered Popoff’s claims for both overtime and vacation pay (Determination at page 3):

In analyzing the above release, the Delegate refers to the following parts of the release:

- *“in conjunction with my employment or the termination thereof”*
- *I voluntarily accept this amount for the purposes of making full and final compromise, adjustment and settlement of all claims as aforesaid.*

From these statements I have determined that the release relates not only to the termination but also to employment matters in general. This would include any overtime or vacation pay owed.

Accordingly, the delegate “determined that that complaint has been resolved” because (Determination at page 4):

...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 outlined in the Act. Further, he signed a release, with informed consent and the employer, in good faith, paid the amount set out in the release to Mr. Popoff.

THE APPEAL

Popoff appealed the Determination to the Tribunal on the basis that the settlement (namely, 15 months' salary) did not cover, nor was the settlement intended to cover, Popoff's claims for unpaid banked overtime and vacation pay. The adjudicator did not address the merits of Popoff's latter monetary claims; rather, the adjudicator only concerned himself with the delegate's refusal to continue investigating the complaint because the matter had been resolved. The adjudicator concluded that the delegate misdirected herself as a matter of law when she concluded that the release had the effect of releasing Domtar from Popoff's overtime and vacation pay claims.

Accordingly, the adjudicator cancelled the Determination and ordered that the matter be referred back to the Director for further investigation. It is important to note that the adjudicator did not make any findings with respect to the merits of Popoff's claim; the adjudicator only directed the delegate to consider certain factors which would have called into question Domtar's assertion that the release covered any and all claims that Popoff might have otherwise been able to advance with respect to his employment with, and termination by, Domtar.

THE APPLICATIONS FOR RECONSIDERATION

Domtar's request for reconsideration is contained in a letter to the Tribunal dated September 5th and filed September 10th, 2001. Domtar says that the “termination allowance (\$92,325), representing 15 months of salary continuation, clearly exceeds any legal requirements” and that the release covered all claims that Popoff otherwise might have had against Domtar.

The Director's application, dated and filed September 12th, 2001, is largely predicated on the assertion that the adjudicator's decision is inconsistent with an earlier Tribunal decision, *John Clancy* (B.C.E.S.T. Decision No. 059/01). The Director submits (September 12th submission at pages 2 and 4):

...that there is no factual difference of any importance between the findings of fact that resulted in the decision by [an adjudicator] in [*Clancy*] in February 2001 and those that resulted in the decision rendered [by the adjudicator] in July 2001. Both decisions deal with the Director's exercise of discretion under section 76(2)(g). Both decisions deal with an off the shelf, stock, standard all-encompassing settlement agreement that does not specifically mention the Act. Both settlement agreements were signed by the complainants with the participation of a "professional" (in the *Clancy* decision, a union representative; in the *Popoff* decision, a lawyer). The decisions were rendered within a half-year of each other. Yet there are two completely opposite decisions. Given these decisions, the Director is hard pressed to make a policy directive on the impact of a release on a complaint and the legal community likewise on how to advise a client....

The question is which decision represents the view of the Tribunal. The Tribunal needs to signal which approach it prefers....

The Director has the following views concerning releases:

- Where the employee has signed a release in order to obtain a "final" paycheque, the release is not an impediment to investigation. The Director takes the view that the parties have waived a requirement of the Act, and therefore, given the prohibition set out in s. 4, the release is without legal force or effect.
- Where the employee has signed a release that says the settlement attends to any claims arising from the Act, and if one or more of these events have occurred, the Director takes the position that the dispute has been resolved:
 - The complainant was represented by legal counsel, obtained legal advice or was assisted by a person with human resources or employment law expertise prior to signing the release
 - The complainant was given reasonable opportunity to reflect upon the settlement
 - The parties turned their minds to the matter that is the subject of the complaint
 - The parties engaged in meaningful negotiations

The Director's first consideration adopts the initial two exceptions; where the release was signed under duress or the agreement achieved by misrepresentation. The Director is of the opinion that legal representation is a cure to any misunderstanding as to the terms of an agreement, unless that misunderstanding was caused by misrepresentation of the terms that even a person with legal training would not reasonably be expected to know. For instance, a misrepresentation as to the availability of funds to pay the settlement, so instead of receiving a cheque, the complainant receives a promissory note.

ANALYSIS

Both applications for reconsideration are, in my view, without merit.

While the release is drafted in broad terms, it must be remembered that the settlement funds represented a payment of 15 months' wages (15 x \$6,155 monthly salary = \$92,325) in lieu of reasonable notice *and nothing more*. The release, on its face, does not purport to expressly release any other claims that Popoff may have under the *Act*. Although Domtar correctly asserts that the 15 months' severance pay that was paid to Popoff exceeds (and by some considerable measure) the minimum statutory requirements of section 63 of the *Act*, it should also be remembered that the settlement was intended to meet not just Domtar's obligation to pay compensation for length of service (section 63) but also its obligation to pay severance pay in lieu of reasonable notice (*i.e.*, its obligation under an implied term of Popoff's employment contract). If Popoff asserted that the release did not cover his statutory entitlement to compensation for length of service, I would have unhesitatingly found that his position was legally untenable.

However, Popoff says something quite different. He says that the payment (and by extension the release) was never intended to cover his claims for overtime pay and vacation pay and thus those claims remain outstanding. Certainly, on its face, and as previously noted, the settlement represents 15 months' severance pay but does not reflect a payment on any other account. Further, the documents Domtar provided to Popoff prior to the execution of the release certainly suggest that the settlement related only to Popoff's severance pay claim. For example, Domtar's April 4th, 2000 termination letter states: "Upon signing a Release, you will receive a termination allowance which includes pay in lieu of notice and severance pay required by law". It is to be noted that Domtar did not represent that the settlement funds were intended to cover vacation pay or overtime pay.

Domtar enclosed a form of release with its April 4th letter and indicated the purpose for which the release was sought: "A Release and two forms that you must complete *with respect to your termination allowance*" (*italics added*). Arguably, this latter reference to the release suggests that the proposed settlement was only in regard to a termination or severance payment and not with respect to *accrued* claims such as overtime and vacation pay. Perhaps even more compellingly, Domtar also enclosed a "Personal Termination Statement" in its

April 4th letter to Popoff. This latter statement clearly indicates that the settlement funds represent a 15 month severance allowance inclusive of statutory compensation for length of service. However, the statement also expressly indicates that certain group insurance benefits would continue (at Domtar's expense) until September 30th, 2000, that Popoff had certain options in regard to the payment of monies held in a share purchase account, that Domtar would provide outplacement assistance at its expense and, perhaps most importantly the following statement:

Vacations

Unused accrued vacations will be paid separately in a lump sum.

Thus, in light of the above, one can certainly make the case that the release, although drafted in wide and all-encompassing language, was not intended to effect a final release of *all* claims.

In my view, a reasonable (and perhaps the *only* reasonable) interpretation of the "Personal Termination Statement" is that the payment of the settlement funds (and by extension the scope of the release) reflected Domtar's liability for severance pay and compensation for length of service but that other monetary claims or benefits--group insurance, the share purchase account, payment for outplacement counselling and *accrued vacation pay*--would be addressed subsequently. It is my understanding that another issue, namely, Popoff's pension entitlement, was also left unresolved between the parties and remained unresolved for several months after the release was executed (according to the material before me, Popoff's pension entitlement was resolved in the latter part of 2000 and final payment was made in 2001).

If Domtar immediately refused to continue paying for group insurance benefits for Popoff, would Popoff be legally barred from advancing a claim in that regard by virtue of the release? Could the same be said if Domtar refused to cash out Popoff's share purchase account or pay for outplacement counselling? I do not think so. Similarly, and this was Popoff's position before the delegate, Popoff's entitlement, if any, with respect to accrued vacation pay was not extinguished by the release. Reading the two documents in tandem--the release and the "termination statement"--it seems clear that Popoff's claim for vacation pay was being expressly reserved and was not extinguished by the release. In other words, and to reframe the Director's submission, the only matter "the parties turned their minds to" and "meaningfully negotiated" to the point of resolution was Popoff's entitlement to severance pay in lieu of notice.

In my view, the adjudicator's decision is not in any fashion inconsistent with the *Clancy* decision (or other Tribunal decisions such as *Bowie*, B.C.E.S.T. Decision No. D286/99 and *Golden Day Cake House Ltd.*, B.C.E.S.T. Decision No. D282/01) where the evidence disclosed that the settlement was intended to be a complete and final resolution of *all* claims that the complainant might otherwise have had with respect to the termination of his employment.

In my view, the *Clancy* decision and the instant case do not represent, as is asserted by the Director, different *approaches* to settlement agreements and releases. There is but one approach, namely, to inquire into all the relevant surrounding circumstances to determine if the settlement was a *bona fide* settlement that was intended to cover all, or just some aspects, of a multifaceted claim. Although Popoff had the benefit of independent legal advice, that circumstance does not change the fact that such advice was sought and given with respect to a proposed agreement to resolve a claim for severance pay and compensation for length of service and not with respect to an agreement to release Domtar from any and all claims that Popoff asserted against his former employer. In my view, the release must be read in light of the parties' mutual intentions as reflected in the "Personal Termination Statement" which was drafted by Domtar and provided to Popoff at the same time as the release--and that is all that the adjudicator directed the delegate to review and consider. The release, standing alone, was not apparently intended to reflect the parties' entire agreement with respect to Popoff's various claims against Domtar.

Finally, I wish to note that the Director's discretion to stop investigating a complaint is predicated on a finding of law (or, at the very least, a finding of mixed fact and law), namely, that the underlying complaint has been "resolved". In my view, the Director is not entitled to any deference in the exercise of her discretion if that discretion was predicated on a faulty legal premise. The Director cannot defend an error of law (for example, an incorrect determination that a release extinguishes certain claims) on the basis that this error was something she had the discretionary authority to make. The Director's decisions are not protected by a privative clause and thus she does not have, as is sometimes said about other administrative tribunals in the context of judicial review, "the right to be wrong".

ORDER

The application to vary or cancel the decision of the adjudicator in this matter is **refused**.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal