Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2016 CHRT 1
Date: January 11, 2016
File Nos.: T2003/0414 and T2004/0514

Between:

Barbara Barrie

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Canada Post Corporation

- and -

Association of Postal Officials of Canada

Respondents

Ruling

Member: David L. Thomas

Table of Contents

[1] This is a ruling concerning a Motion filed by Barbara Barrie (the Complainant) seeking an order to re-open two complaints that were before the Tribunal. Ms. Barrie was an employee of Canada Post Corporation (CPC) and had filed human rights complaints against both CPC and her union, the Association of Postal Officers of Canada (APOC). In January of 2015, Ms. Barrie participated in a mediation session conducted by a member of the Tribunal. Ms. Barrie accepted an offer from the Respondents and the minutes of settlement were approved in due course by the Canadian Human Rights Commission (CHRC or Commission) under s. 48 of the *Canadian Human Rights Act* (*CHRA*). Upon receiving notice from the CHRC that it had approved the minutes of settlement, the Tribunal closed its files.

[2] Ms. Barrie is self-represented and her Motion is not as clear as it could be in terms of the relief that is being sought. In the Motion she requests that she be, "released from the "binding" Settlement Agreement…" and she requests an order for financial compensation similar to the request in her Statement of Particulars. I understand this to be a request that the Tribunal find that the settlement should be considered null and void in light of the circumstances surrounding its negotiation, which are outlined in her Motion, and that the case proceed to inquiry.

[3] In her Reply to the submissions of the other parties, Ms. Barrie appears to amend her Motion by requesting, in the alternative, that the parties be ordered to return to mediation to renegotiate:

> "Based on the Cawson v. Air Canada case law the respondents have provided if the Tribunal does not have jurisdiction to overturn the signed Minutes of Settlement it should have the jurisdiction to send the parties back to mediation to renegotiate the issues in dispute."

[4] For the reasons given below, the Tribunal dismisses the motion to re-open the case.

I. Confidentiality

[5] The Tribunal is prohibited from admitting and accepting into evidence privileged information by virtue of s. 50(4) of the *CHRA*. The Tribunal acknowledges that settlement privilege normally protects from disclosure and renders inadmissible the terms of settlement. However, in this ruling it will be necessary for the Tribunal to consider one particular term of the minutes of settlement which was raised in Ms. Barrie's Reply. Ms. Barrie disclosed what appears to be a standard term used in the template for minutes of settlement. Given that the complainant's motion impugned the validity of a final settlement, and the existence or scope thereof, the Tribunal accepted and considered the text of this standard term—as well as other information about the settlement process—pursuant to exceptions to settlement privilege (*Sable Offshore Energy Inc. v. Ameron International Corp*., 2013 SCC 37, para. 19; *Union Carbide Canada Inc. v. Bombardier Inc*., 2014 SCC 35, para. 35.) The standard term, and certain other facts pertaining to the settlement process, will also be discussed in the ruling.

[6] Apart from the forgoing, the Commission, APOC and CPC have all requested that the Tribunal issue a confidentiality order concerning any other terms of the minutes of settlement and I note that the mediation itself was governed by a confidentiality agreement to which all the parties agreed to be bound. Accordingly, with respect to all documents filed in connection with Ms. Barrie's motion, the Tribunal orders, pursuant to s. 52 of the *CHRA,* that they be treated as confidential and the parties are ordered not to disclose any documents filed or received in connection with Ms. Barrie's motion, except in any judicial review proceedings taken under the *Federal Courts Act.*

II. Background

[7] The complaints in this matter were filed with the Commission by the Complainant on April 29, 2013. On March 26, 2014, pursuant to s. 44(3)(*a*) of the *CHRA*, the Commission requested the Chairperson of the Tribunal to institute an inquiry into the complaints. The first complaint is against CPC on the ground of age and alleges discrimination under sections 7 and 10 of the *CHRA*. The second is against the APOC on

the ground of age and alleges discrimination under sections 9 and 10 of the *CHRA*. The Commission requested a single inquiry into the two complaints.

[8] The parties eventually agreed to a voluntary mediation session conducted by a member of the Tribunal. At the mediation session, Ms. Barrie accepted an offer from the Respondents. Minutes of settlement were prepared and were signed by Ms. Barrie and the Respondents. Pursuant to s. 48(1) of the *CHRA*, copies of the minutes of settlement were forwarded to the CHRC for its approval or rejection.

[9] As Ms. Barrie was not represented by counsel at the mediation session, she was afforded a 7 day "cooling off" period to reflect upon the agreement. It is a normal practice of the Tribunal to allow unrepresented parties to have this 7 day period during which to fully consider the settlement agreement and seek legal advice if they choose to do so. Unrepresented parties may withdraw their consent to the settlement agreement up until the expiration of the 7 days. In this case, Ms. Barrie used the 7 days to make further inquiries to the Respondents and CPC provided a response to her. On January 23, 2015, which was 7 days after the mediation session, Ms. Barrie advised the parties that she still agreed with the minutes of settlement.

[10] On or about February 9, 2015, Ms. Barrie advised the Commission that she had changed her mind and that she no longer approved of the agreement set out in the minutes of settlement. Counsel for the Commission advised the other parties that Ms. Barrie had changed her mind.

[11] On March 17, 2015, the Tribunal held a Case Management Conference call with all the parties. During this call, counsel for the Commission advised the other parties that the minutes of settlement had been submitted to the Acting Chief Commissioner of the CHRC for approval or rejection, but that Commission counsel had since withdrawn them from consideration after hearing that Ms. Barrie had changed her mind.

[12] By letter dated March 27, 2015, counsel for the Commission proposed to the Respondents that they should submit their respective positions as to whether or not the terms of the settlement should be referred to the Commission for approval or rejection, given Ms. Barrie's withdrawal of agreement. The Respondents rejected the invitation to

make submissions and insisted that the minutes of settlement be put before the Acting Chief Commissioner for approval or rejection forthwith.

[13] By letter dated July 7, 2015, counsel for the Commission advised the Tribunal that the Commission had approved the minutes of settlement on May 6, 2015 and that the parties had been so advised on May 20, 2015. Thereafter, as per its usual practice, the Tribunal closed its file and the parties were so advised, in writing, on July 27, 2015. On August, 10, 2015, the Complainant filed the present motion.

III. Issues

1. Does the tribunal have jurisdiction to decide a dispute relating to the validity of a settlement agreement that has been approved by the Commission under s. 48 of the *CHRA*?

2. If the tribunal does have jurisdiction, has Ms. Barrie shown that the minutes of settlement should be considered null and void on the grounds that, according to her submissions;

    a. She was under duress;

    b. The Respondents misrepresented the facts and mediated in bad faith; and

    c. She advised the other parties that she had changed her mind just 23 days after the minutes of settlement were signed.

IV. Analysis

1. Jurisdiction

[14] As the jurisdiction of the Tribunal has been brought into question by the Commission's, CPC's and APOC's submissions, I will address this issue first. The Commission and the Respondents all submit that the Tribunal lacks jurisdiction to re-open Ms. Barrie's complaints, based on the Tribunal's recent decision in *Cawson v. Air Canada*

2015 CHRT 17. In *Cawson*, the complainant sought to re-open a complaint file that had been settled some time beforehand through the Tribunal's mediation process.

[15] While the Tribunal does not have an explicit statutory mandate to conduct mediations, mediation is offered to parties on a voluntary basis with a view to assisting them in their attempts to arrive at a mutually satisfactory conclusion to the matter, and as an alternative to the generally lengthier, costlier and more formal hearing process. In order to guide the mediation process, the Tribunal requests all parties to sign a Mediation Agreement before the commencement of the mediation session, and unrepresented parties are also made aware of the 7 day cooling off rule.

[16] The *CHRA* specifically contemplates the possibility of settlements being reached prior to the commencement of a hearing before the Tribunal:

> 48. (1) When, at any stage after the filing of a complaint and before the commencement of a hearing before a Human Rights Tribunal in respect thereof, a settlement is agreed on by the parties, the terms of the settlement shall be referred to the Commission for approval or rejection.
>
> (2) If the Commission approves or rejects the terms of a settlement referred to in subsection (1), it shall so certify and notify the parties.
>
> (3) A settlement approved under this section may, for the purpose of enforcement, be made an order of the Federal Court on application to that Court by the Commission or a party to the settlement.

[17] Section 48 was considered by the Tribunal in *Powell v. United Parcel Service Canada Ltd.* 2008 CHRT 43, a case where the respondent argued the Tribunal should close its file because, in its view, a settlement had been reached. In *Powell*, the Tribunal discussed how s. 48 affects the status of the Tribunal's inquiry. At paragraph 10, it observed:

> There is no indication that the Commission has either explicitly or tacitly approved the alleged settlement between Ms. Powell and UPS. Absent such approval, it cannot be said that there exists a settlement bringing about an end to the Tribunal's inquiry into the complaint.

[18] In the *Cawson* case, the Tribunal had already been notified of the Commission's approval of the settlement reached between the parties. At paragraph 24 of the *Cawson* decision, Vice-chairperson Gupta expanded on the meaning of section 48 as follows:

> Under the scheme of section 48 of the *CHRA*, the Commission's decision to approve the terms of a settlement has the effect of bringing an end to the human rights complaint and, consequently, the jurisdiction of the Tribunal over that complaint. It is also a decision that is subject to judicial review (see for example *Johnson v. Canada (Attorney General)*, 2007 FC 1021). Subsection 48(3) also provides for the Federal Court to resolve disputes over settlement agreements that have been approved by the Commission. Therefore, in my view, once a settlement agreement has been approved by the Commission, the Tribunal no longer has jurisdiction to deal with the human rights complaint that is the subject of the settlement, nor does it have jurisdiction to deal with disputes regarding that settlement agreement.

[19] It is reasonable for parties to have an expectation of finality when a settlement agreement is reached. If there could be no assurance of finality, there would be little incentive for parties to engage in the mediation process. I am also in agreement with the Tribunal's finding in *Cawson*, that once the Commission has approved the settlement under section 48 of the *CHRA*, the Tribunal no longer has jurisdiction to hear the complaint. While I do not rely on the recent judgment of the Federal Court in *Rameau c. Canada (Procureur général)* 2015 CF 1180, I would note that the aforementioned finding is consistent with that judgment.

[20] The matter of finality, and the role of the Tribunal in connection therewith, are unfortunately raised somewhat ambiguously in the context of paragraph 9 of the minutes of settlement signed by Ms. Barrie and the Respondents. In her Reply to the Commission's and Respondents' submissions to her Motion, Ms. Barrie disclosed part of this paragraph. According to her Reply, Ms. Barrie views paragraph 9 as giving her "the right to re-open or re-mediate settlement." She argues that if the Tribunal does not have jurisdiction to overturn the minutes of settlement, it has the jurisdiction to send the parties back to mediation to negotiate the issues in dispute.

[21] For clarity, counsel for CPC disclosed the entirety of the paragraph and I have reproduced it below. As mentioned above, I admitted and accepted this information in

accordance with exceptions to settlement privilege, and this is the only provision of the minutes of settlement not governed by the s.52 order for confidentiality in respect of the terms of settlement. Paragraph 9 reads as follows:

> "9. Once the settlement has been approved by the Commission, in the event of a disagreement as to the proper implementation of one or more of the terms of the settlement, the parties agree to return to mediation to renegotiate the issues in dispute. The parties further agree that the amendment will be submitted to the Commission for approval pursuant to section 48 of the Canadian Human Rights Act and the amendment will be subject to enforcement in the Federal Court in the same manner as the original agreement."

[22] The Tribunal is never a party to minutes of settlement signed at one of its mediation sessions. Moreover, Tribunal members are not expected to participate at all in the drafting of such minutes. They do not request or retain a copy of the minutes of settlement.

[23] The availability of mediation services provided by CHRT Member-mediators is a matter falling within the CHRT Chairperson's managerial and policy-making role (See *CHRA* s. 48.4(2); CHRT, *Annual Report 2000*, pp. 2-3, 5). The Tribunal's explanatory documents detailing its mediation procedures indicate that if a settlement arrived at through mediation is approved by the Commission, "the Tribunal proceedings will be discontinued" (See CHRT, *Evaluative Mediation Procedures*, December 10, 2010, p. 9; CHRT, *A Guide to Understanding the Canadian Human Rights Tribunal*, p. 20[1]).

[24] Moreover, on two occasions (*Powell* and *Cawson*), the Tribunal has observed that approval of a settlement under s. 48 deprives the Tribunal of jurisdiction to conduct an inquiry. In view of the foregoing, the inclusion of a "return to mediation" clause, such as paragraph 9 above, is potentially problematic. To the extent it suggests to parties that subsequent mediation *by a Tribunal member* is indefinitely available to deal with any subsequent disputes in the case arising from the settlement, such clause does not fully take into account the role and responsibilities of the CHRT Chairperson, the Tribunal's mediation procedures or Tribunal jurisprudence. For all of the above reasons, I conclude

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[1] Online : http://chrt-tcdp.gc.ca/ns/pdf/annual00-e.pdf ; http://chrt-tcdp.gc.ca/NS/pdf/guide-eng.pdf

that paragraph 9 of the minutes of settlement does not grant Ms. Barry the right to re-open or re-mediate the settlement at the Tribunal.

2. Minutes of Settlement Null & Void?

[25] Having determined that it lacks jurisdiction, the Tribunal is not obliged to consider the second issue of contractual nullity due to duress, misrepresentation, bad faith and prompt withdrawal of consent. Nevertheless, the allegations will be addressed below in the event the Tribunal is found to have the jurisdiction to consider the merits of the motion.

a. Duress

[26] Ms. Barrie has alleged that misinformation gave her the impression that she had no "realistic alternative" and therefore had to give up her complaint and sign the settlement agreement. She described the misinformation as "a type of duress." The legal threshold for establishing duress has been set out by the Ontario Court of Appeal in *Taber v. Paris Boutique & Bridal Inc*., 2010 ONCA 157, at paras. 8-9:

> There is no doubt that economic duress can serve to make an agreement unenforceable against a party who was compelled by the duress to enter into it. Nor is there any doubt that the party can have the agreement declared void on this basis.
>
> However, not all pressure, economic or otherwise, can constitute duress sufficient to carry these legal consequences. It must have two elements: it must be pressure that the law regards as illegitimate; and it must be applied to such a degree as to amount to "a coercion of the will" of the party relying on the concept…

[27] Ms. Barrie has not alleged any facts in support of her general assertion that she was being compelled to act against her will at the mediation. The submissions of CPC suggest that the parties were in separate rooms throughout the mediation session. Furthermore, and perhaps most importantly, Ms. Barrie benefitted from a 7 day period during which she was able to reflect upon her decision to settle at the mediation session. Even if she felt pressure at the time of the mediation session itself, Ms. Barrie would have had adequate time in the days following to reflect on the question of whether or not she

truly wished to settle. As such, I cannot find that Ms. Barrie satisfies the test outlined in *Taber, supra*.

[28] Furthermore, Ms. Barrie asserted that she had no other "realistic alternative" but to give up her complaint and sign the minutes of settlement. Ms. Barrie appears to rely on the mediator's alleged comment that there would be no guarantee as to the outcome of the Tribunal's inquiry, should the matter proceed to a hearing. However, Ms. Barrie does not go so far as to say the mediator advised her that the outcome would be something less than what she was being offered through mediation. Members of the Tribunal are sometimes asked to give an evaluative assessment at mediation of a party's prospects, should the mediation fail and the matter go on to a hearing. It is implied, if not stated explicitly by the member each time, that their evaluation is speculative and not a guarantee of the inquiry outcome. Indeed, in the present case, Ms. Barrie is not suggesting any specific outcome was predicted, just that nothing could be guaranteed. In this context, I disagree with Ms. Barrie's assertion that she did not have a realistic alternative. She could have simply declined the offer and proceeded with her complaint in the context of a CHRT hearing.

b. Misrepresentation / Bad Faith

[29] Ms. Barrie alleges that the Respondents did not tell her "the whole truth" at the mediation session and, as such, they misrepresented the facts and mediated in bad faith. Ms. Barrie cites the Human Rights Tribunal of Ontario's decision in *Wedderburn v. Air Liquide Canada* 2010 HRTO 691 to support the premise that a contract may be set aside where one party has deliberately misled another to induce the latter into entering the agreement.

[30] *Wedderburn* is also cited by the respondents, because it relied upon the Ontario Court of Appeal's judgment in *1018429 Ontario Inc. v. Fea Investments Ltd*., 1999 CanLII 1741 (ON CA). In this judgment, the Court of Appeal considered the issue of fraudulent misrepresentation, and at paragraph 51 cited Professor Fridman's description of this

concept, taken from the *The Law of Contract in Canada*, 3rd ed. (Toronto: Carswell, 1994) at p. 294:

> A fraudulent misrepresentation is one which is made with knowledge that it is untrue and with the intent to deceive. It may even constitute a term of the contract. Whether it does or not is immaterial, since fraud gives rise to effects in the law of contract and the law of tort. A contract resulting from a fraudulent misrepresentation may be avoided by the victim of the fraud. In such instances the apparent consent by the innocent party to the contract and its terms, is not a real consent. Whether or not the effect of such fraud is to induce a mistake (which might render the contract void), the consent of the innocent party may be revoked at his option.

[31] At issue in that case was whether a misrepresentation disclaimer in a contract could immunize a party from an award of damages for fraudulent misrepresentation. That is not the issue of main concern in the present case, but on the following page of his text, at p. 295, Professor Fridman provides a definitive description of fraudulent misrepresentation, setting out its essential elements:

> A fraudulent misrepresentation consists of a representation of fact made without any belief in its truth, with the intent that the person to whom it is made shall act upon it and actually causing that person to act upon it. In *United Shoe Machinery Co. v. Brunet* (1909 A.C. 330 (P.C.)), the defendants wanted to raise the defence of fraudulent misrepresentation to an action for an injunction and damages based upon a contract under which the plaintiffs leased to the defendants machines for performing a certain process in the making of shoes. In the event, the Privy Council held that the defendants could not raise and rely on the defence because they had adopted and affirmed the contract despite the fraudulent misrepresentations. In holding that the defence had been made out, and would have operated had it not been for the subsequent conduct of the defendants, Lord Atkinson made it clear that to establish a case of false or fraudulent misrepresentation the following had to be established: (1) that the representations complained of were made by the wrongdoer to the victim; (2) that these representations were false in fact; (3) that the wrongdoer, when he made them, either knew that they were false or made them recklessly without knowing whether they were false or true; (4) that the victim was thereby induced to enter into the contract in question.

See also: Westwood Shipping Lines Inc. v. Geo International Inc., 1999 CanLII 7652 (FC), para. 10).

[32] I find Lord Atkinson's four point test to be helpful in this matter. Regarding the second requirement of the test, the respondents argue that the disputed information was a statement of their legal position and not a statement of fact. However, it is not necessary for me to explore that issue, nor the third or fourth requirement under the test.

[33] This argument fails because Ms. Barrie does not claim that the alleged misinformation was actually conveyed to her by the respondents. According to the submissions of the respondents, the parties were not in the same room at the mediation session and apparently did not speak to each other directly. Ms. Barrie alleges the Respondents told certain misinformation to the Tribunal's mediator who then relayed it to her, thus inducing her agreement. There is no dispute that there was no direct communication between Ms. Barrie and the Respondents at the mediation. The Respondents deny making the representation in question, and Ms. Barrie has no direct knowledge that they did in fact make it. Furthermore, it is certainly within the realm of possibility that there was a mistake or miscommunication in the relaying of verbal information through the mediator. Ms. Barrie's alleged facts cannot support a finding of fraudulent misrepresentation according to Lord Atkinson's test.

c. Prompt Withdrawal

[34] Upon re-reading the Statement of Particulars of APOC on or about February 9, 2015, Ms. Barrie realized that a state of facts she came to believe at the mediation session may not have been true. She immediately thereafter contacted the Commission to withdraw her consent to the terms of the settlement agreement.

[35] The deadline for withdrawing her consent had been January 23, 2015. Ms. Barrie was well aware of the deadline, and had used the 7 day cooling off period to ask further questions of the Respondents. On the 7th day after the mediation, she advised all parties of her ongoing agreement with the minutes of settlement signed at the mediation session.

[36] It is unfortunate that Ms. Barrie did not fully absorb the information in APOC's Statement of Particulars until February 9, 2015. Had she become aware of it earlier, she may very well have withdrawn her consent to the settlement terms, or not agreed to the

settlement in the first place. However, the fact that she requested a withdrawal immediately upon her revelation is not grounds to set aside the minutes of settlement.

[37] One of the imperative assurances of a mediated settlement is finality. The 7 day cooling off period was made clear to the parties and Ms. Barrie does not dispute that. If the Tribunal were to set aside the peremptory nature of the 7 day cooling off period on the grounds invoked in this one case, the integrity of its entire mediation process would be brought into question.

V. Decision

[38] For the foregoing reasons, the Tribunal dismisses the motion.

Signed by

David L. Thomas
Tribunal Chairperson

Ottawa, Ontario
January 11, 2016