

## **HUMAN RIGHTS TRIBUNAL OF ONTARIO RULES SETTLEMENTS AND RELEASES ARE TO BE ENFORCED**

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*By Barry W. Kwasniewski\**

### **A. INTRODUCTION**

In four decisions released this year, the Human Rights Tribunal of Ontario (the “Tribunal”) dismissed applications alleging various types of discrimination on prohibited grounds in respect of employment on the basis that the complaints giving rise to the applications had been settled.<sup>1</sup> These Tribunal decisions upheld the principle that a settlement agreement and a release are enforceable in respect of not only the most common type of employment related claims, such as past wages, overtime, and pay in lieu of notice of dismissal, but will also apply to claims alleging breaches of human rights protected by the Ontario *Human Rights Code*<sup>2</sup> (the “Code”). This Bulletin will discuss the approach that the Tribunal has taken in determining whether or not a settlement agreement and a release will be enforced to defeat an otherwise potentially valid human rights application, and will also provide guidance as to how non-profits and charities may reduce the risk of defending a human rights claim.

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<sup>1</sup> O’Regan v Firestone Textiles Co. 2010 HRTO 502

Wedderburn v. Air Liquide Canada, 2010 HRTO 691

Luo v. Dell Canada, 2010 HRTO 879

Martel v. North Shore Community Support Services, 2010 HRTO 957

<sup>2</sup> R.S.O. 1990 Ch. H.19

## B. TRIBUNAL REGARDS SETTLEMENT AND RELEASE AS A BINDING CONTRACT

The law is clear that a person cannot contract out of *future* rights under human rights legislation, unless the result is to *improve* on the rights provided. However, a release signed as part of a settlement agreement relating to *past* acts of alleged discrimination is permissible and does not constitute unlawful “contracting out.” For example, an employer and an employee cannot agree in a contract that the employee may be dismissed at some future time on the basis of a prohibited ground under the Code. Conversely, if an employee has been dismissed or has made allegations of improper treatment pursuant to the Code, and has subsequently entered into a settlement agreement with the employer which includes a release, both the settlement agreement and the release will likely be a bar to any future human rights claim.

The Tribunal regards a settlement and release as a valid contract between the parties, notwithstanding that the contract relates to fundamental human rights recognized by the Code. The Tribunal has decided that it would be against public policy to permit an application to continue in the face of a valid settlement agreement and a release. However, the Tribunal does have the discretion to determine whether it will uphold the settlement and release, based on the factors discussed below.

## C. FACTORS TRIBUNAL WILL REVIEW TO UPHOLD OR SET ASIDE A SETTLEMENT AND RELEASE

In determining whether or not a particular settlement and release relating to a human rights complaint will be upheld, the Tribunal will examine a variety of factors, including:

- **Capacity:** If the applicant can prove that he or she lacked the mental capacity to enter into an agreement, it will likely not be upheld. An applicant bears the burden of proving that he or she did not understand the settlement agreement and release when it was entered into as a result of lack of mental capacity. In those circumstances, the Tribunal may determine that the applicant lacked the capacity to consent to the agreement, and is therefore not bound by its terms.
- **Duress:** The term “duress” means the party who signed the settlement and release did so against his or her own free will. Duress may be a threat of harm or, more commonly, the threat of financial harm, known as “economic duress”. To prove economic duress, the party must satisfy the Tribunal that the employer unlawfully coerced the employee by threatening financial injury. An example would be requiring the employee to sign a release by threatening not to pay wages that are due and owing.

- **Misrepresentation:** The Tribunal may set aside a settlement agreement and a release in circumstances where the employer negligently or intentionally deceived the employee, if such representations induced the employee to enter into the settlement agreement. For example, if the employer misled the employee as to the components of the settlement and did not permit the employee sufficient time to properly review the settlement before it was signed, this could be grounds for the Tribunal voiding the agreement.
- **Fairness of the settlement:** In light of the potential for the inequality of bargaining power between the employer and the employee, the Tribunal may also examine the fairness of the settlement. This is particularly true where the employee was not represented by a lawyer. While the Tribunal will not parse a settlement agreement to see whether all potential claims for compensation have been satisfied, the Tribunal will examine the overall settlement to determine whether the employee received sufficient benefit in exchange for signing the settlement and the release.

#### D. CONCLUSION

In light of the approach taken by the Tribunal in determining the validity and enforceability of a settlement agreement and release, employers should keep the following issues in mind:

- Make sure that any release that an employee is asked to sign includes a release of claims under the Code, whether or not the employee has raised human rights issues.
- Allow the employee sufficient time to review the settlement agreement and release prior to signing it and suggest in writing that the employee obtain legal advice prior to doing so.
- Be prepared to explain the settlement agreement and release to the employee, and do so accurately.
- Do not adopt a negotiation strategy that could be construed as coercion, compulsion or abuse of power or authority, which will leave the employer open to complaints of duress.
- Finally, be aware of your human rights obligations as an employer. The Ontario Human Rights Commission has useful information for employers on its website: [www.ohrc.on.ca](http://www.ohrc.on.ca).

Being faced with a human rights application is a costly and time consuming matter. Therefore, it is important that charities and not-for-profits take steps to reduce the risk of this type of claim.