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ONTARIO HUMAN RIGHTS TRIBUNAL UPHOLDS 'FULL AND FINAL' RELEASE

By Barry W. Kwasniewski*

A. INTRODUCTION

AN ONTARIO HUMAN RIGHTS TRIBUNAL case highlights the significance of using plain and clear wording in employment termination agreements. In *Sterling v Dollarama LP*,[1] dated March 5, 2021, the applicant, who identifies as "Black and from Jamaica", alleged racial discrimination by the employer in contravention of the *Human Rights Code*.[2] However, the applicant signed a separation agreement that expressly released the employer from any claims under human rights legislation. The Ontario Human Rights Tribunal (the "Tribunal") did not accept the applicant's arguments that the separation agreement should be set aside. This decision stresses the importance of properly drafted full and final releases in employment termination documents, which include releases from human rights claims. This *Bulletin* summarizes the factual background and highlights some of the Tribunal's analysis.

B. BACKGROUND

MR. LOUIS STERLING, who began working as a store manager for the employer in February 2017, was transferred in September of that year to a store location in Georgetown. After his employment was terminated in November 2017, Sterling alleged unlawful discrimination in employment, and made the following allegations in his 2018 application to the HRTO:[3]

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[1] 2021 HRTO 183, online: CanLII https://www.canlii.org/en/on/onhrt/doc/2021/2021hrto183/2021hrto183.html.

[2] RSO 1990, c H.19.

[3] *Sterling*, *supra* note 1 at para 6.

> a. when the applicant approached one of his subordinates in order to provide her with instructions, the employee threw her keys at him. The applicant then sent the employee home, but she was later recalled by one of the applicant's superiors. Moreover, when the applicant told his superiors of the employee's actions, he feels that he was not believed because of his colour;
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> b. his district manager gave the applicant only six weeks to complete tasks that would reasonably have taken a year and then berated him in public;
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> c. an employee asked to be transferred to another store because she did not like working for a black store manager;
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> d. various racial slurs were made by Dollarama employees (both at the Georgetown location and at another store);
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> e. the applicant was the only black store manager in his district and received the lowest wages; and
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> f. the applicant was made to work every day for two consecutive weeks, including on his Sabbath.

The employer terminated Sterling's employment "without cause" on November 24, 2017, and he received a separation offer by e-mail on the same day. The separation offer agreed to pay Sterling severance money on two conditions: (1) he sign a "full and final release" (the "Release"); and (2) he agree to a non-disclosure clause.[4] The separation offer stated the severance package was "inclusive of, and not in addition to, any benefits, allowances or obligations prescribed by law and is to be in full payment of such obligations, including any individual notice, termination pay and severance pay options".[5] The offer exceeded Sterling's minimum entitlements under the *Employment Standards Act, 2000* (*ESA*)[6] but included a deadline for acceptance on December 1, 2017, after which he would receive only those *ESA* minimums.[7]

In the evening on the same day, November 24, 2017, Sterling informed the employer he was rejecting the separation offer and requested a reinstatement at another store location. If the employer did not reply by November 30, Sterling stated, "I will contact the ministry of labour".[8] However, on December 1, Sterling accepted the employer`s offer and signed the Release, which included a clause stating that the employer and its employees would be released from "any claims under applicable employment standards or human

[4] *Ibid* at para 7.
[5] *Ibid* at para 8.
[6] SO 2000, c 41 [*ESA*].
[7] *Sterling, supra* note 1 at 8.
[8] *Ibid* at para 9.

rights legislation (having discussed or otherwise canvassed any and all human rights complaints, concerns or issues arising out of or with respect to my relationship with the Releasee) or any employment-related legislation".[9] The employer paid Sterling the severance money on December 17, 2017 according to the separation offer.[10]

C. ANALYSIS

THE EMPLOYER took the position that the application was an abuse of the Tribunal`s process, because Sterling "entered into the clear and unambiguous Release in a manner that was free and voluntary. The Applicant also received good and [valuable] consideration in exchange for his execution of the Release."[11] Sterling did not dispute that he accepted the separation offer and signed the Release, nor that the employer paid him accordingly. Sterling argued, however, that the Release should be set aside because (1) he agreed to it under duress; and (2) he did not seek independent legal advice before signing it.[12]

The Tribunal referred to an earlier of its decisions, *Kailani v Securitas Canada*,[13] for the test of duress, which includes any "unlawful threat or coercion" to induce someone to act "in a manner he or she otherwise would not (or would)"; and subjecting a person to "improper pressure which overcomes his will and coerces him to comply with demand to which he would not yield if acting as a free agent."[14] Since Sterling claimed he was under economic duress, the Tribunal outlined the test from *Kailani* and cited the Ontario Court of Appeal precedent in *Taber v Paris Boutique & Bridal Inc. (Paris Boutique)*:[15]

> 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.[16]

[9] *Ibid* at para 10.
[10] *Ibid* at para 11.
[11] *Ibid* at para 15.
[12] *Ibid*.
[13] 2009 HRTO 1183 [*Kailani*], online: CanLII https://www.canlii.org/en/on/onhrt/doc/2009/2009hrto1183/2009hrto1183.html.
[14] *Sterling, supra* note 1 at para 16.
[15] 2010 ONCA 157 [*Taber*], online: CanLII https://www.canlii.org/en/on/onca/doc/2010/2010onca157/2010onca157.html.
[16] *Sterling, supra* note 1 at para 18.

Sterling said he was in economic duress because he and his wife support three children, have a mortgage and credit card debt, and expenses including groceries, utilities and insurance. Additionally, when he signed the Release, Sterling said his wife was about to lose her job and "December was the worst time of the year to get a new job, as all of the retailers had already done their hiring for the season."[17]

Sterling said in cross-examination that no one contacted him on behalf of the employer from November 24, 2017 to December 1, 2017.[18] The fact that no one contacted him during that time period suggested there was no illegitimate pressure by the employer on Sterling's decision to sign the Release. The Tribunal found that Sterling failed to demonstrate economic duress, as there was insufficient evidence to establish that the employer did anything that could be considered coercion of his free will.[19]

As for his not consulting independent legal advice before signing the Release, Sterling said he did not know that some lawyers provide free consultations, he did not call the Human Rights Legal Support Centre, and he "did not consult counsel until the week of the hearing."[20] The third page of the separation offer, which he signed, included the following paragraph:[21]

> I hereby declare that I have had the opportunity to seek legal advice with respect to the matters addressed in this Release and the Letter. I hereby voluntarily accept the said terms for the purpose of making full and final compromise, adjustment and settlement of all claims as aforesaid.

Citing *Demaine v Racine*,[22] which applied the test of finding whether an applicant could have obtained independent legal advice but chose not to do so on a balance of probabilities, the Tribunal decided that Sterling failed to demonstrate the Release should be set aside for that reason. As an "intelligent and articulate individual who now has degrees in both business administration and nursing", and with a "plainly worded" offer, the Tribunal found that Sterling had the capacity to understand the offer, could

[17] *Ibid* at para 19.
[18] *Ibid.*
[19] *Ibid* at para 20.
[20] *Ibid* at para 21.
[21] *Ibid* at para 22.
[22] 2013 ONSC 2940 at paras 27 and 30, [2013] OJ No 2269 (QL) [*Demaine*], online: CanLII <https://www.canlii.org/en/on/onsc/doc/2013/2013onsc2940/2013onsc2940.html>.

have obtained independent legal advice, but chose not to.[23] With both of Sterling's arguments that the Release should be set aside disproven, the Tribunal dismissed his application as an abuse of process.

D. CONCLUSION

BECAUSE HE SIGNED the Release, and could not demonstrate that he suffered economic duress, did not understand the Release, nor that he had insufficient opportunity to obtain independent legal advice, Sterling's application that the employer contravened the *Human Rights Code* was dismissed as an abuse of the Tribunal's process. The employer was found to have followed the appropriate steps in the termination process, which included providing Sterling with one week to review the termination offer and the Release. Employers, including charities and not for profits, which decide to terminate employees, need to be aware that properly drafted and enforceable termination documents, including full and final releases, are important to mitigate the risks of future claims.

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[23] *Sterling*, *supra* note 1 at paras 24–25.