Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

**Citation:** 2015 CHRT 17
**Date:** July 21, 2015
**File No.:** T1886/11612M

**Between:**

**Douglas George Cawson**

**Complainant**

**- and -**

**Canadian Human Rights Commission**

**Commission**

**- and -**

**Air Canada**

**Respondent**

**Ruling**

**Member:** Susheel Gupta

## I. Confidentiality

[1] During a Case Management Conference Call (CMCC) held on October 6, 2014, I issued an Order of Confidentiality which read as follows:

> As this motion raises issues about the confidential settlement process, I hereby order, pursuant to s. 52 of the *Canadian Human Rights Act* that this case management call and all documents filed in this matter since the notice of settlement will be treated as confidential.
>
> I further order that parties are not to disclose any documents filed or received except in any judicial review proceedings taken under the *Federal Courts Act*. All documents filed on this motion as well as the recording of this call will be treated as confidential by the Tribunal. Of particular importance is the need to protect the confidentiality of the settlement agreement. No party shall disclose the settlement agreement, or any contents thereof, to anyone unless permission from the Tribunal has been obtained in advance.

[2] In light of this Order which was intended to maintain confidentiality of the Minutes of Settlement, this Ruling will not delve into those details except to the extent necessary to rule upon the Motion. The Minutes of Settlement remain sealed by the Tribunal.

[3] The complaint in this matter was filed by the Complainant, Douglas George Cawson, on October 19, 2011, with the Canadian Human Rights Commission (the "Commission"). On December 7, 2012, the Commission, pursuant to s. 49 of the *Canadian Human Rights Act* (the "*CHRA*"), requested the Canadian Human Rights Tribunal (the "Tribunal") to institute an inquiry into the complaint. For the purposes of this decision, the allegations in the underlying complaint are not necessary for the Tribunal to delve into at this point in time. Prior to an Inquiry being held, this matter was settled by the parties via the Tribunal's voluntary mediation process.

[4] This is a ruling concerning a Motion filed by the Complainant, seeking an order to re-open this case. The Complainant's grounds for the motion are that the Complainant alleges there was a breach of contract vis a vis the implementation of the Minutes of Settlement (the "Settlement Agreement") and that he was pressured and/or under duress during the Mediation process.

[5] For the reasons given below, I am denying the Complainant's request.

## II. Background and Summary

[6] On July 23, 2013, a Mediation was held between the Complainant, the Respondent and the Commission. This Mediation was conducted with the assistance of a Member of the Tribunal acting as Mediator.

[7] At the conclusion of the Mediation, Minutes of Settlement (the “Settlement Agreement”) were signed by all parties.

[8] The Settlement Agreement contained terms requiring the Respondent to pay specified amounts to the Complainant, upon the parties having received written confirmation from the Commission of approval of the settlement, within a defined period of time from that date.

[9] By letter dated August 30, 2013, received by the Respondent on September 5, 2013, the Commission wrote to the Respondent indicating that the Settlement Agreement had been approved. The copy of the Settlement Agreement filed as part of this motion indicates the Settlement Agreement was signed and approved by the Commission on August 14, 2013.

[10] On September 6, 2013, the Tribunal wrote to the parties noting that as the Settlement Agreement had been approved by the Commission, the Tribunal’s file would be closed.

[11] In a letter dated October 1 and 2, 2013 (Note: the Complainant wrote two letters, one dated October 1, 2013 and then a second dated October 2, 2013 which continued numbering from the first letter), the Complainant wrote to the Tribunal indicating that the Respondent has missed its deadlines for sending payment as had been specified in the Settlement Agreement. The Complainant alleged a breach of the contract, ie. the Settement Agreement, and that he felt the Mediator took sides, and further that the Complainant had had only 3 hours sleep the night before the Mediation which impacted him during the Mediation. The letter also went into depth on the substantive merits of his

human rights complaint. The Complainant indicated he would like his file re-opened. This letter was not sent by the Complainant to the Respondent or the Commission.

[12] In a letter dated November 4, 2013, the Complainant wrote to the Tribunal, alleging that he felt he was not represented by the Mediator as well as he could have been, and that he felt the Mediator was in favour of the Respondent's interests. Again, he indicated that he and his wife had had minimal sleep the night before the Mediation. The Complainant also described how the Settlement Agreement and the Mediation process made him feel. The Complainant again made assertions and argument about the merits of his human rights complaint. Finally, the Complainant indicated that he did cash the first check he received from the Respondent and that he did not cash the second check received as it was late and he was "glad when the second Air Canada check was late as it gave me the opportunity to express my view of my outcome – as to my mediation meeting. They slipped up. Good for me I (I Hope)." Finally, the Complainant indicated he would like another chance at a Mediation or a Hearing. This letter was not provided to the Respondent or the Commission.

[13] By letter dated February 12, 2014, the Complainant wrote to the Tribunal indicating he would like to file a motion to re-open his case. This was the first time the Complainant advised the Tribunal he was bringing a Motion. The Complainant again mentioned that he felt he was not "represented" fairly by the Mediator and how the process made him feel. He repeated some of the allegations contained in his previous letters and again argued the merits of his human rights complaints. He indicated that he did cash the first check received from the Respondent pursuant to the Settlement Agreement as it was for "expenses I had occurred etc. leading up to mediation hearing".

[14] The Registrar of the Tribunal subsequently provided a copy of the Complainant's February 12, 2014 Notice of Motion to the Respondent and the Commission. The Tribunal set out a schedule for response submissions with all parties.

[15] The Respondent filed their Response Submissions on March 17, 2014. Within those submissions, the Respondent opposed the Complainant's Motion on several grounds including that the Mediation process was followed, a valid settlement had been

reached, the terms of the settlement had been adhered to, the Tribunal was *functus officio*, and that finality of a settlement must take precedence, ie. that there is a strong public policy interest in upholding the terms of a mutually agreed upon settlement.

[16] The Complainant filed Reply submissions on March 27, 2014. Within those submissions, the Complainant went into details about the substance of his human rights complaint. Further, he states that he was not scared or afraid, but simply nervous and had not slept much the night before the Mediation. He goes on to assert that the Mediator was biased because the Mediator may have been involved in cases with the Respondent previously. He goes on to state that he was not happy with the outcome and analogized the Mediation process of negotiating to similar negotiations that occur when one is buying a car.

[17] The Commission notified the Tribunal and all parties that it would not be making submissions on the Motion.

[18] On October 6, 2014, a CMCC was held with all of the parties. A number of issues were addressed including the provision of the Settlement Agreement to the Tribunal, the aforementioned Confidentiality Order, and the provision to the Respondent of the pre-February 12, 2014 communications from the Complainant. Finally, the Respondent was given an opportunity to review those pre-February 2014 letters and then provide additional submissions.

[19] The Respondent provided additional submissions on October 29, 2014. Among the additional arguments set forward were the Respondent's position that the Complainant had miscalculated the time limits in the Settlement Agreement for the Respondent to complete its obligations, that the Complainant cannot accept part of the Settlement Agreement and then goes on to argue the Settlement Agreement is void, and that the Complainant has not met the legal burden to show duress.

## III. Analysis and Findings

[20] The issues that I must determine are as follows:

A) Does the Tribunal have jurisdiction over disputes relating to settlement agreements that have been approved by the Commission pursuant to section 48 of the *CHRA*?

If the Tribunal has jursidiction, then:

B) Was there duress such that the Settlement Agreement should be voided?

C) Was there a breach of the Settlement Agreement resulting in its nullity?

### A. Jurisdiction of the Tribunal over disputes relating to settlement agreements that have been approved by the Commission pursuant to section 48 of the *CHRA*

[21] In its submissions, the Respondent questioned the Tribunal's jurisdiction to decide the issues raised by the Complainant. Given the Tribunal had closed its file following the Commission's approval of the Settlement Agreement, the Respondent claims the Tribunal is *functus officio*. In general, I find the Tribunal does not have jurisdiction over disputes relating to settlement agreements that have been approved by the Commission pursuant to section 48 of the *CHRA*.

[22] The Tribunal's role under the *CHRA* is to institute inquiries into complaints referred to it by the Commission (ss. 49(2), 50) and determine whether a complaint is substantiated or not (s.53). As opposed to the Commission (see s. 47), the Tribunal does not have an explicit statutory mandate to conduct mediations. It offers mediation to parties on an informal and voluntary basis. That said, the Tribunal has seen much benefit in offering mediation to parties. With the human rights expertise and knowledge of a Tribunal Member acting as the mediator, parties can explore settlement possibilities that satisfactorily resolve a complaint for both parties, while saving the time, energy and cost of a hearing for both the parties and the Tribunal. If a case does not settle, a mediation session may nonetheless serve to narrow the issues in dispute or resolve procedural

issues. Overall, mediation is an important tool the Tribunal utilizes to manage its case load and resolve human rights complaints informally and expeditiously (see s. 48.9(1)).

[23] While the Tribunal does not have an explicit statutory mandate to conduct mediations, the *CHRA* does contemplate the possibility of settlements being reached prior to 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.

[24] 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.

[25] I also note that the willingness of parties to participate in mediation with the Tribunal may be undermined if parties who entered into a settlement of their human rights complaint were permitted to come forward, following approval of the settlement before the Commission, and attempt to pursue their settled complaint before the Tribunal. I agree with the following passage from *Nolan v Royal Ottawa Health Care Group*, 2014 HRTO 1604, at para. 43:

> … When two parties agree to settle a legal dispute, the principle of finality demands that the contract be given effect and prevents parties from litigating settled matters, unless there are compelling reasons to set the contract aside. Most litigation ends in settlements and almost all settlements include a provision by which a claimant fully releases the respondent from future claims relating to the subject matter of the settlement. To be effective, settlements must be final. Otherwise, parties would have no incentive to enter into settlements to end litigation. …

[26] While this paragraph of *Nolan* dealt with whether seeking to reopen a case that had been settled with a full and final release was an abuse of process, I find it also speaks well to the importance of Tribunals and courts upholding the finality of settlement agreements where there are no compelling reasons to set aside such settlement agreements.

[27] In this case, following mediation with the Tribunal, the Complainant did not raise any issues with regard to the validity of the settlement agreement. The Commission then examined the settlement and approved it. The Complainant did not judicially review the Commission's decision to approve the settlement. If the Complainant has issues with the settlement agreement, or alternatively, if the Respondent wishes to have the agreement enforced, they are both at liberty to pursue the matter in Federal Court, as provided in the *CHRA*.

[28] While there are cases where it has been recognized that administrative tribunals have jurisdiction over disputes relating to settlement agreements, (see for example *Amos v. Canada (Attorney General)*, 2011 FCA 38), I believe the specific statutory scheme of the *CHRA* distiniguishes the Tribunal in this regard (specifically s. 48).

[29] For the reasons above, I do not believe the Tribunal has jurisdiction to deal with the matters raised by the Complainant with regard to the settlement agreement.

[30] In any event, and as explained in the following pages, I do not accept that the Settlement Agreement was agreed to under duress or that the Respondent breached its terms.

## B. Was there duress such that the Settlement Agreement should be voided?

[31] The parties entered into a Settlement Agreement conducted by a Tribunal Member. The Commission was represented at the Mediation by an ADR Practitioner. The Mediation and the signing of the Settlement Agreement occurred on July 23, 2013.

[32] The Complainant indicates in his letters to the Tribunal and his motion application that he felt the Mediator took sides and that he was not represented fairly by the Mediator. He also indicated that he was not scared or afraid, but simply nervous and had only slept 3 hours the night before the Mediation, which impacted him during the Mediation. He goes on to state that he was not happy with the outcome.

[33] Dealing first with the role of the Mediator, the Tribunal's *Evaluative Mediation Procedures* clearly indicate that the role of a Tribunal Mediator is to assist and facilitate a Settlement Agreement amongst the parties. The Tribunal's *Evaluative Mediation Procedures* were provided to all of the parties before the Mediation was conducted. Within those procedures, it quite clearly explains that the Tribunal Mediator is not there to represent either of the parties, and furthermore indicates that unrepresented parties have seven days from the signing of the Settlement Agreement to obtain legal advice and/or withdraw from the Settlement. The Mediator's role is to facilitate discussions towards a settlement, not to provide legal advice to the parties. The Mediator and the Tribunal have no personal interest in the outcome of such Mediation nor is the Mediator a representative, lay representative or legal representative, of either of the parties. All parties are aware that the Mediator does not have the power to impose a settlement and/or any conditions within a settlement. At the end of the day, the Complainant had the option of walking away from

the Mediation and proceeding to a Hearing. Nowhere in the Complainant's materials does he assert that he was misled as to the role of the Mediator.

[34] The Complainant in this case did not have legal counsel present with him during the Mediation. He was accompanied by his wife on July 23, 2013. The Complainant did not indicate in his materials whether he did or did not seek legal advice after July 23, 2013. It is clear that October 1 and 2, 2013 was the first time he contacted the Tribunal seeking to withdraw from the Settlement Agreement. Well after the 7 day cooling-off period provided for to unrepresented parties at a Tribunal Mediation.

[35] That said, I must still consider whether the events during the Mediation amounted to duress. The legal threshold has been set out in the case of *Taber v Paris Boutique & Bridal Inc*, 2010 ONCA 157 at paragraph 9 which reads, referring to duress that can serve to make an agreement unenforceable against a party who was compelled by the duress to enter into it:

> 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 "a coercion of the will" of the party relying on the concept.

[36] There is nothing in the Complainant's materials that demonstrate he was under any illegitimate pressure to resolve, to accept the agreement being offered or negotiated with the Respondent or that he had no other alternative. He may have felt tired or not at his best because of the lack of sleep and most likely was nervous as many litigants do feel be they represented or not. This does not rise to the level of illegitimate pressure.

[37] Mediation is a process that is designed to encourage parties to think about their options and sometimes doing a cost-benefit analysis of what is in their best interests. That the Mediator may have highlighted the strengths and weaknesses of the Complainant's case to the Complainant, the length of time to get to a Hearing and the possible continued stress throughout the process until a decision is rendered are factors a Mediator may highlight in order to assist a party in considering his or her course of action. Highlighting those factors does not amount to coercion of the will such that the Complainant was left

with no choice but to settle. Such explanations or highlighting by the Mediator cannot be construed as placing someone under illegitimate duress. In fact, a benefit of a Tribunal Mediation conducted by Tribunal Members, is that a party in mediation has the benefit of hearing about the strengths, weaknesses and challenges in their case from a Member familiar with Tribunal jurisprudence. This can assist the party in making an informed decision about how to proceed with their case. A party may find it difficult to hear the opinion of their case, especially if there are more weaknesses than strengths; ultimately, the party still has the power to decide whether to proceed to a Hearing.

[38] It must be noted that under the Tribubal's *Evaluative Mediation Procedures*, in most cases, the Member who mediates a case is not the Member who will preside at the Hearing. In only those cases where all parties consent would the Tribunal Member who mediated a case then go on to be the Member who adjudicates at the Hearing. Without all parties' consent, a different Member would be assigned to adjudicate at the Hearing. Furthermore, the Tribunal's Mediation process is entirely confidential such that all information exchanged and communicated during the Mediation process (including the exchange of documents prior to and during a Mediation) do not get shared with any other Tribunal Members should the Mediation not result in a Settlement Agreement. This provides the parties with the confidence that should they choose to proceed to a Hearing, they will be protected by having an independent and impartial decision maker who comes to the Hearing without any prior knowledge of information exchanged during the Mediation process.

[39] Thus, I conclude that the examples of pressure referred to by the Complainant do not amount to or reach the threshold of duress according to the jurisprudence previously cited. While the Complainant felt pressure during the Mediation, he has not alleged that he could not have rejected the Settlement terms that were offered to him by the Respondent. Furthermore, the procedures at Tribunal Mediations are specifically structured to give an unrepresented Complainant, as in this case, 7 days to "cool down" and make a final decision outside the pressures of the Mediation room.

## C. Was there a breach of the settlement agreement resulting in a nullity?

[40] The Complainant alleges that the Respondent missed its deadlines for sending payment as had been specified in the Settlement Agreement. Specifically, the Complainant argues (in his letter to the Tribunal of October 1) that he received Check #1 on September 25, 2013 which he had calculated as being 65 days after the signing of the Settlement Agreement. He indicates that Check #2 arrived on October 2, 2013 and in his February 12, 2014 Motion alleges it was this, the second check, which was late thus causing a breach of the contract.

[41] Numbered paragraph 1 of the Settlement Agreement reads as follows:

> 1) Within fourty-five (45) days of receipt of the letter from the Canadian Human Rights Commission (CHRC) advising that it has approved this settlement, the Respondent shall:
>
> > A) Give to the Complainant $XX[1] number of dollars as payment for pain and suffering against which no taxable deductions will be applied.
> >
> > B) Give to the Complainant $XX[2] number of dollars as wages against which statutory deductions will be applied.
>
> [emphasis added]

[42] While the Settlement Agreement was approved by the Commission on August 14, 2013, neither of the parties asserted that it was aware of the approval on that date.

[43] In fact, communication of the approval did not occur until September 4, 2013 from the Commission's counsel. The Commission approved the Settlement Agreement and a cover letter dated August 30, 2013 was received by the Respondent on September 5, 2013.

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[1] Note that the actual amount stipulated in the Settlement Agreement is confidential as per the agreement between the Parties and the Confidentiality Order described earlier in this Ruling.

[2] Ibid.

[44] The obligation upon the Respondent to comply with paragraph 1 of the Settlement Agreement only started the clock ticking upon the Respondent having received a letter from the Commission advising the Respondent that the Commission had approved the Settlement. It is clear to me then that the clock in this case for the purposes of calculating the 45 days agreed to between the Complainant and the Respondent, is September 5, 2013.

[45] Check #1 according to the Complainant arrived on September 25, 2013. Twenty days after the Respondent received notification of the Commission's approval of the Settlement Agreement. Check #2 arrived on October 2, 2013, which is 27 days after the Commission notified the Respondent, in writing, of the Commission's approval of the Settlement Agreement.

[46] Clearly, the Respondent did not breach the contract as it did provide the checks within the 45 days agreed to.

[47] The Complainant was mistaken in calculating the 45 day time limit from either the date the Settlement Agreement was signed between the Complainant and the Respondent and/or calculating from the date the Commission actually approved the Settlement Agreement. The clock only began once the parties had received written notification of the approval.

[48] Even if the clock were to have begun on September 4, 2013, the date on which Commission Counsel notified the Respondent that the Commission had approved the Settlement Agreement or if August 30, 2013 were used, the date on which the Commission sent their letter, the two checks arrived within 45 calendar days to what had been agreed to.

[49] Thus, I find that there was no breach of the Settlement Agreement.

[50] I find it necessary to comment upon the fact that the Complainant chose to accept partial satisfaction of the Settlement Agreement and then subsequently seeks to void the entire Settlement Agreement. Specifically, the Complainant indicated that he received the first check from the Respondent agreed to in Paragraph 1 A) of the Settlement Agreement.

The Complainant indicated in his materials that it he had cashed it for it was for “expenses I had occurred etc. leading up to mediation hearing”. The Settlement Agreement quite clearly states that the first check was for “pain and suffering” presumably referring to the damages the Tribunal may award pursuant to s. 53(2)(e) of the *CHRA*. The Complainant cannot take active steps to accept part of the Settlement Agreement, in this case, depositing and cashing the check, and then later on attempt to claim the entire Settlement Agreement is void. His positive steps further demonstrated that he had accepted the Settlement Agreement.

[51] Accordingly, this motion to reopen the case is denied.

[52] There remains one issue that must be addressed. As recounted above, the Settlement Agreement provided for the provision of two checks to the Complainant. The Complainant acknowledges he received both checks, but only cashed the first one. It is my understanding that checks are valid in Canada for a period of 6 months from the date on such checks. As such, due to the passage of time in this case, the second check would now have expired. Thus, it will be necessary for the Respondent to provide a new check in the same amounts of the second check to the Complainant.

*Signed by*

Susheel Gupta
Tribunal Member

Ottawa, Ontario
July 21, 2015