Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2017 CHRT 2
Date: January 25, 2017
File No.: T1941/2113

Between:

Cheryl Lynn Bezoine

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

City of Ottawa

Respondent

Ruling

Member: Lisa Gallivan

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I. Background

[1] This Decision determines a Motion for Dismissal filed by the City of Ottawa (the "Respondent") on the basis of abuse of process. The Respondent has requested that the Canadian Human Rights Tribunal (the "Tribunal") dismiss the complaint of Cheryl Bezoine (the "Complainant") on the basis that it is an abuse of process in light of a settlement of her labour grievance which addressed the same facts.

[2] On August 10, 2009, the Complainant was hired by the Respondent as a spare Bus Operator after successfully completing a 6 week paid training program and participating in a nine (9) month probationary period.

[3] During this probationary period the Complainant missed approximately 52 days of work. Some of these absences were deemed non culpable (9 days) and related to medical reasons, others were deemed culpable (8 days) and approximately 35 days related to a WSIB injury from a prior employer. The Complainant's probationary period was extended to accommodate her medical absences.

[4] On June 22, 2010, prior to successful completion of the probationary period, the Complainant's employment was terminated. The stated reasons for her termination were "failure to provide regular and reliable attendance". The Complainant grieved the termination of her employment.

A. The Grievance

[5] The Complainant belongs to a union. Her employment is governed by a collective agreement between the Amalgamated Transit Union Local 279 (the "Union") and the Respondent.

[6] On June 29, 2010, the Union filed a grievance on the Complainant's behalf asserting that the termination was "unjust and unwarranted".

[7] The grievance was referred to arbitration. A hearing was held April 6, May 24, and June 8, 2011 before Arbitrator Christine Schmidt. The Complainant provided sworn testimony in this hearing. There is no transcript of the evidence in this hearing.

[8] In June 2011, the Respondent and Union settled the Complainant's grievance by an agreement that the termination be replaced with a resignation for the limited purposes of employment references and that a neutral reference be given to any employer inquiries. The Complainant initially agreed to the settlement on or about June 8, 2011, the last date of the hearing, and subsequently withdrew her agreement sometime before the Minutes of Settlement were executed on June 15, 2011. This withdrawal occurred within a week, suggesting due diligence on behalf of the Complainant.

[9] Minutes of Settlement were executed on June 15, 2011 on the following terms:

> (…)
>
> AND WHEREAS this grievance asserted that the termination as both wrongful and discriminatory within the meaning of the *Canadian Human Rights Act*
>
> (…)
>
> AND WHEREAS the parties, including the grievor, following the closing of the Union's case and a discussion with Arbitrator Schmidt agreed to a settlement of her grievance and a settlement of her outstanding human rights complaint currently before the Canadian Human Rights Commission;
>
> AND WHEREAS the grievor has subsequently advised the Union that she no longer wished to settle either her grievance of her human rights complaint;
>
> AND WHEREAS the Union, in the interest of good and harmonious labour relations, is not prepared to continue to litigate a grievance that had been resolved;
>
> NOW THEREFORE the parties agree as follows:
>
> 1. The termination of the grievor, Cheryl Bezoine, for the limited purposes of her employment record and for any references to future employers is hereby withdrawn and replaced with a resignation effective the same date.
>
> 2. The grievor should be given a neutral reference by the City of Ottawa in regards to any future employers. Specifically, any employers who enquire in regards to the grievor shall be advised only of the dates of her employment, the nature of her duties and that she resigned her employment with the City as of June 24, 2010.

> 3. The parties agree that the evidence put before Arbitrator Schmidt canvassed the issue of disability and whether or not the grievor had been discriminated against by the City contrary to the provisions of the Canadian Human Rights Code.
>
> 4. The parties agree that nothing in these Minutes of Settlement precludes or restricts the City from offering any defence to the complaint filed by the grievor with the Canadian Human Rights Commission.
>
> 5. In consideration of paragraph 1 and 2 above, the Union agrees to withdraw the grievance #T-65-10 dated June 29, 2010.

The Minutes of Settlement were appended to the Commission's motion materials. No parties raised issues with regards to confidentiality.

[10] Although the Minutes of Settlement state that the grievance asserted the termination was both wrongful and discriminatory, there is no reference in the grievance form to human rights concerns.

[11] The Minutes of Settlement also note that the grievor "has subsequently advised the Union that she no longer wished to settle either her grievance or her human rights complaint".

[12] The Minutes of Settlement also state that evidence of the issue of disability and discrimination was put before the arbitrator and canvassed by the Arbitrator:

> 3. The parties agree that the evidence put before Arbitrator Schmidt canvassed the issue of disability and whether or not the grievor had been discriminated against by the City contrary to the provisions of the Canadian Human Rights Code.

[13] The Minutes of Settlement also note that nothing therein prevents the City from offering a defence to the human rights complaint:

> 4. The parties agree that nothing in these Minutes of Settlement precludes or restricts the City from offering any defence to the complaint filed by the grievor with the Canadian Human Rights Code.

[14] Because the matter was settled at arbitration, the arbitrator did not issue a final decision on the issue of whether or not the Respondent discriminated against the

Complainant on the basis of her disability or any other matter. There is no evidence that a decision was reached on this issue.

B. The Human Rights Complaint

[15] On August 20, 2010, approximately one month after filing the grievance, the Complainant filed a human rights complaint alleging that her employment was terminated because of disability related absences.

[16] The original complaint sets out the following alleged practices of discrimination:

- Adverse Differential Treatment (Failure to Accommodate)
- Termination of Employment
- Discriminatory Policy or Practice

[17] On September 8, 2011, the Respondent requested that the complaint be dismissed pursuant to section 41(1)(d) of the *Canadian Human Rights Act* (the "*Act*") on the basis that the issues raised in the complaint had been dealt with in the grievance process.

[18] On December 8, 2011, the Commission issued a section 40/41 report recommending that the Commission deal with the complaint pursuant to section 41(1) of the *Act* because it was not satisfied that the other process had addressed the allegations of discrimination.

[19] On December 22, 2011, the Respondent acknowledged in written submissions that the settlement did not prevent the Complainant from proceeding with her human rights complaint.

[20] On February 17, 2012, the Commission adopted the section 40/41 report and advised the parties that they had 30 days to judicially review the decision. Neither party filed for judicial review of this decision.

[21] On June 23, 2014, the Respondent filed a Statement of Particulars claiming that the complaint was an abuse of process as a result of the settlement of the grievance. The Respondent objected to the hearing of this matter alleging it was an abuse of process.

[22] The Tribunal determined that argument on this issue should follow the hearing of evidence and that the motion could not be dealt with on a preliminary basis.

[23] A hearing into the human rights complaint was held in November 2015. At that time the Complainant gave evidence about the nature of her grievance and the circumstances of the arbitration, including testimony that her absenteeism was related to a "feminine problem" and that other matters that she considered were disabilities were raised during the course of the arbitration hearing.

[24] The Respondent reserved its right to bring this motion to dismiss the complaint in its opening statement. No objection was raised.

[25] On November 5, 2015 after the Complainant's testimony, but before any other witnesses were called, the Respondent requested that the claim be dismissed based on settlement of the grievance.

[26] On December 4, 2015, the Respondent filed its motion to dismiss the complaint.

i.) Respondent's Motion to Dismiss the Complaint

[27] The Respondent submits that the complaint should be dismissed because it would amount to an abuse of process to proceed given the settlement of the Complainant's grievance.

ii.) Commission's Position on the Motion to Dismiss

[28] The Commission submits that the motion to dismiss is unfounded because:

a) The arbitration process did not result in a final decision determining whether or not the Respondent discriminated against Ms. Bezoine on the basis of disability;

b) The settlement between the Respondent and the Union did not resolve Ms. Bezoine's human rights allegations;

c) Ms. Bezoine is not a party to the said settlement; and

d) The Respondent already conceded before the Commission that the settlement between the Union and the Respondent did not prevent Ms. Bezoine from proceeding with her complaint.

iii.) Complainant's Position on the Motion to Dismiss

[29] The Complainant has adopted the submission of the Commission.

II. Issues

[30] Does the Tribunal have the power to decide issues that could result in a dismissal of a human rights complaint without conducting a full hearing on the merits of the complaint?

[31] If so, should the complaint of Cheryl Bezoine be dismissed as an abuse of process based on the settlement of a labour grievance between the Respondent and the Union?

III. The Law

[32] After analyzing the relevant evidence and applicable case law, I have concluded that the Tribunal has the power to decide issues that could result in a dismissal of a human rights complaint at an interlocutory stage without a full hearing and have decided not to allow the Respondent's motion to dismiss for the reasons set out below.

A. Does the Tribunal have the power to decide issues that could result in a dismissal of a human rights complaint without conducting a full hearing on the merits of the complaint?

[33] Section 50(2) of the *Act* states:

> In the course of hearing and determining any matter under inquiry, the member or panel [of the Tribunal] may decide all questions of law or fact necessary to determining the matter.

[34] I conclude that this section is broad enough that the Tribunal can decide questions of its own jurisdiction.

[35] In *Canada (Human Rights Commission) v Canada Post (re Cremasco)*, 2004 FC 81 at paras. 14-15 the Federal Court concluded that the Tribunal is a 'master of its own procedure' and may dismiss a matter without a full hearing on the basis of abuse of process:

> 15 It strikes me as evidence that one cannot maintain that the Tribunal to(sic) is the 'master of its own house' if it cannot protect its own process from abuse.
>
> ...
>
> 18 Finally, it is hard to fathom a reason why it would be in anyone's interest to have the Tribunal hold a hearing in cases where it considers that such a hearing would amount to an abuse of its process.
>
> 19 Accordingly, I find that there is no bar in either the case law or in the statute preventing the Tribunal from dismissing by way of a preliminary motion on the grounds of abuse of its process a matter referred to it by the Commission, always assuming there are valid grounds to do so.

[36] While this dealt with a preliminary motion, I have no reason to conclude that the same cannot be said of a motion brought at an interlocutory stage.

[37] In *First Nations Child and Family Caring Society of Canada*, 2012 FC 445, the Federal Court noted that while the Tribunal can dismiss a complaint without a full hearing, this authority must be exercised "cautiously" and "only in the clearest of cases":

> [140] I do, however, understand the Government to agree with the statement in Buffet that the Tribunal's power to dismiss a human rights complaint in advance of a full hearing on the merits should be exercised cautiously, and then only in the clearest of cases: above at para 39. I also agree with this statement.

[38] Thus, I conclude that the Tribunal has the power to decide issues that could result in a dismissal of a human rights complaint without conducting a full hearing on the merits of the complaint. This would include a decision at an interlocutory stage. I note however

that, as stated by the Federal Court in *First Nations Child and Family Caring Society of Canada,* this authority must be exercised cautiously and only in the clearest of cases.

[39] As discussed more fully below, I am not persuaded that this is one of the "clearest of cases".

B. Should the complaint of Cheryl Bezoine be dismissed as an abuse of process based on the settlement of a labour grievance between the Respondent and the Union?

[40] Briefly, the doctrine of abuse of process precludes relitigation in circumstances where the strict requirements of issue estoppel (typically the privity/mutuality requirements) are not met, but where allowing the litigation to proceed would nonetheless violate such principles as:

- judicial economy;
- consistency;
- finality; and
- the integrity of the administration of justice

(see para 37 of *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 ("*CUPE*"), see also *Canada (Human Rights Commission) v. Canada Post Corp.*, 2004 FC 81, aff'd in *Canadian Human Rights Commission v. Canada Post Corp.*, 2004 FCA 363 ("*Cremasco*")).

i.) Have the strict requirements of issues estoppel been met?

[41] Although not required, when considering abuse of process by relitigation, assessing the pre-conditions of issue estoppel can assist the Tribunal in completing its analysis for same. The pre-conditions of issue estoppel are as follows:

> [45] In Danyluk, the Supreme Court outlined the principles of finality underlying the doctrine of issue estoppel and reiterated the three pre-conditions for its operations:
>
> (...)

> 25. The preconditions to the operation of issue estoppel were set out by Dickson, J., in Angle, supra, at p. 254:
>
> (1) that the same question has been decided;
>
> (2) that the judicial decision which is said to create the estoppel was final; and
>
> (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.
>
> [46] The Court also stated that issue estoppel must be assessed under a two-step analysis. The first step requires the court or the tribunal to determine whether the three pre-conditions are met. If the conditions are met, the decision maker must then, as a second tier, determine as a matter of discretion whether the doctrine should be applied in the specific circumstances of the case (…).
>
> [see *Murray v. Canada*, 2014 FC 139]

(a) Has the same question been decided

[42] The grievance form states that the termination was unjust and unwarranted but makes no reference to human rights, accommodation or discrimination in either a policy or practice:

> Details of the Grievance
>
> Grieving the City of Ottawa's termination of this Employee's employment as being unjust and unwarranted.

[43] The Minutes of Settlement state that the grievance asserted that the termination was both wrongful and discriminatory within the meaning of the *Act.*

> **AND WHEREAS** this grievance asserted that the termination was both wrongful and discriminatory within the meaning of the Canadian Human Rights Act

[44] The Minutes of Settlement note that the parties agreed that there was evidence put before and canvassed by Arbitrator Schmidt on the issue of disability and discrimination under the *Act*:

> 3. The parties agree that the evidence put before Arbitrator Schmidt canvassed the issue of disability and whether or not the grievor had been discriminated against by the City contrary to the provisions of the Canadian Human Rights Code.

[45] There is no reference in the settlement to accommodation or whether the issue of whether the Respondent has a discriminatory policy or practice was decided.

[46] While the Minutes of Settlement note that the evidence put before the arbitrator canvassed the issue of disability, I have no evidence before me that there was a decision reached on this issue. There is also no reference in the Minutes of Settlement as to whether or not discrimination occurred or to the withdrawal of the human rights complaint. Furthermore there is no reference to public interest remedies or whether the issue of the Respondent's policies or practices were considered. There is also no reference to accommodation.

[47] As such I find that there is no evidence that it is the same question put before the Tribunal namely, whether or not discrimination occurred, whether the Respondent accommodated the Complainant and/or whether there was a discriminatory practice or policy in place, which was decided in the arbitration hearing. At best, I have evidence that discrimination was canvassed and that the matter of the characterization of the termination of the Complainant's employment was settled by agreement between the Respondent and the Union. This is but one of the alleged practices of discrimination set out in the complaint.

(b) Was the judicial decision that is said to create the estoppel final

[48] Finality requires consideration of whether proceeding with the complaint would bring into question the finality of another decision. This case was settled by way of an agreement between the Union and the Respondent. There was no judicial decision.

[49] Many of the authorities referred to by the Respondent, including *Dunn v. Sault Ste. Marie (City)*, 2008 HRTO 149 *("Dunn")* reference s. 45.1 of the Ontario *Human Rights Act.* This is significant as the wording of that provision refers to a matter being "appropriately dealt with" rather than using more narrow wording such as "decision" that would imply that there has been adjudication of the matter. This fact, and its significance, was noted by the HRTO at paragraph 37 of the decision:

> [37] I will deal first with whether a settlement of a matter commenced before a different tribunal may be a "proceeding" that has "dealt with the substance" of the complaints within the meaning of the section. I find that s. 45.1 may apply to settlements of proceedings under other statutory schemes. This conclusion is supported by both the wording and the purposes of s. 45.1. The provision refers to a "proceeding" having "dealt with" the matter, rather than using narrower words that would only encompass adjudication like "decision" or "reasons"....

[50] The *Dunn* case was decided specifically with reference to s. 45.1 of the Ontario *Code*. This legislation deals with language that is both specific and broad. However, s. 45.1 of Ontario's *Code* is not relevant to the present case; the *Code* does not grant any analogous authority to the Federal Tribunal. As such we rely upon common law doctrines of finality.

[51] The arbitration in this case was concluded by execution of Minutes of Settlement on June 15, 2011. This settlement was reached by the Respondent and the Union. Although there is no argument that the Union has authority to effect a settlement of a grievance, it is worthy of note that the Complainant is not a party to the Minutes of Settlement. The Minutes of Settlement are not a judicial decision on the matter and provide no indication that a decision was reached on discriminatory policies, practices or the failure to accommodate, all of which are alleged in the complaint.

[52] The Minutes of Settlement make no mention of a decision on the question of whether or not the Respondent discriminated against the Complainant on the basis of an alleged disability contrary to the *Act*, whether there was a failure to accommodate and/or whether there was a discriminatory policy or practice in place, all of which are questions before the Tribunal in this complaint.

[53] Further, the Minutes of Settlement do not contain a waiver and release of the Complainant's right to proceed with a human rights complaint. In the absence of such a clause, it appears that the Respondent is asking the Tribunal to infer a waiver of the Complainant's quasi-constitutional rights. This is not in keeping with the interpretive principles associated with human rights legislation.

[54] The issue before the Tribunal is whether there was discrimination. The arbitration deals with the termination of the complainant's employment and makes no reference to conclusions on the human rights issues raised before the Tribunal. While the characterization of the termination may be an issue that is discussed, the focus of the proceeding will be on human rights issues, injury to the complainant's dignity as a result of these issues and discriminatory policies or practices. None of these factors were addressed in the Minutes of Settlement. Human rights issues have not been addressed with finality by the Minutes of Settlement.

(c) Are the parties to the judicial decision or their privies the same persons as the parties to the proceedings in which the estoppel is raised or their privies

[55] In order for there to be a finding of estoppel, the parties to each proceeding must be the same. In this case the parties to the arbitration are the Union and the Respondent. The parties before the Tribunal are the Complainant, the Commission and the Respondent. The Complainant was not a party to the Minutes of Settlement and the Union is not a party to the human rights proceeding.

[56] Based on the above assessment, I conclude that the Respondent has failed to meet the three requirements for issue estoppel in that the there is no final decision on the matter before the Tribunal, there is no evidence that the questions before the Tribunal are the same as those before the arbitrator and the parties are not the same parties in the proceedings.

[57] Although the Respondent would fail on a motion to dismiss on the basis of issue estoppel, as previously noted, in situations where a strict application of issue estoppel does not apply, the courts may turn to the doctrine of abuse of process by relitigation.

ii.) Principles applicable to abuse of process

(a) Judicial Economy

[58] Judicial economy requires a consideration of whether it would be a waste of public resources to proceed with a complaint. This is not the case in the present matter. There is no indication in the Minutes of Settlement that the complainant's human rights issues have been addressed through the arbitration process. As such, it would not be a duplicate proceeding or be a waste of resources to consider something which it is not clear has been properly addressed.

(b) Consistency

[59] Consistency requires consideration of whether a finding before the Tribunal on human rights issues would create inconsistent results with the previous settlement/decision. In this case, the Minutes of Settlement only address the characterization of the termination and not the human rights issues. Therefore, it is unlikely that there will be an issue with respect to consistency if the matter is allowed to proceed. Should there be any issues with respect to remedies or a potential for double recovery, this may be addressed at the remedies stage of the hearing.

(c) Finality

[60] Inquiring into the complaint would not question the finality of another decision since there is no judicial decision. While the Union and the Respondent did execute Minutes of Settlement and have an expectation of finality, such expectation is limited to the proceeding that was terminated and the terms of those Minutes of Settlement. The Complainant in this case withdrew her support for the settlement prior to finalizing. While the Minutes of Settlement reflect that there was intent by the Respondent and the Union to resolve the complaint, they also note that the Complainant did not agree with the settlement and referenced that the Respondent may provide a defence to the human rights complaint. While the Union has authority to settle the grievance over the objection

of the Complainant, withdrawal of her human rights complaint cannot occur without her consent. The Minutes of Settlement clearly state that the Complainant did not agree with the settlement and furthermore contemplated a continuation of the human rights complaint when stating that nothing in the settlement "...precludes or restricts the City from offering any defence to the complaint filed by the grievor with the Canadian Human Rights Commission".

[61] I find that the human rights issues have not been addressed with finality and as such, proceeding to a hearing on the issues would not question the finality of another judicial decision.

(d) Integrity to the Administration of Justice

[62] The Tribunal is established to assist parties with their human rights issues and the *Act* is remedial in nature. The complainant in this case is seeking to have her human rights issues addressed and remedied. The Minutes of Settlement as drafted foresee or anticipate a human rights complaint. It is therefore unlikely given how this settlement document was drafted that the integrity or administration of justice would be affected if this matter proceeds.

[63] It is also important to note the comments of the Court in *Blenco*e v. *British Columbia (Human Rights Commission)* 2000 SCC 44. The Court concluded that for there to be an abuse of process the proceedings must be "unfair to the point that they are contrary to the interests of natural justice":

> [120] In order to find an abuse of process, the court must be satisfied that, "the damage to the public interest in the fairness of the administrative process should the proceeding go ahead would exceed the harm to the public interest in the enforcement of the legislative proceedings were halted (Brown and Evans, supra, at p 9-68). According to L'Heureux-Dube J. in Power, supra, at p. 616 "abuse of process has been characterized in the jurisprudence as a process tainted to such a degree that it amounts to one of the clearest cases. In my opinion, this would apply equally to abuse of process in administrative proceedings. For there to be abuse of process, the proceedings must, in the words of L'Heureux-Dube J., be "unfair to the

> point that they are contrary to the interests of justice" (p.616). "Cases of this nature will be extremely rare"...

[64] I am not convinced that in the circumstances of this case proceeding with this hearing would result in a process that is unfair to the point it is contrary to the interests of justice. While the issue of termination of employment has been considered and the issue of discrimination has been "canvassed", there is no evidence that all of the allegations in the complaint have been addressed or considered. As such, I find it would not put the integrity of the administration of justice into disrepute to move forward with the hearing and consider the human rights issues.

iii.) Fairness

[65] The Supreme Court of Canada's (the "Court:)" decision in *CUPE*, supra, remains a leading decision regarding abuse of process. In *CUPE*, the Court explains that the discretionary factors for fairness that apply to prevent the doctrine of issue estoppel from operating in an unjust or unfair way are equally available to prevent the doctrine of abuse of process from achieving a similar undesirable result (see para 53 of *CUPE*).

[66] As such, when considering the question of whether to dismiss a complaint on the basis of issue estoppel or abuse of process, it is necessary to consider the issue of fairness.

[67] The Court has recognized the importance of finality doctrines in two recent decisions: *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52 ("*Figliola")* (Can LII) and *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19 ("*Penner*") (Can LII).

[68] Briefly, *Penner* addresses the common law doctrine of issue estoppel. In particular, the Court dealt with an attempt to bar further proceedings on the basis of a previous administrative decision where the complainant was not a party and had limited participation, if any, in the administrative process. Whereas in *Figliola*, the Court dealt with provincial legislation that expressly empowered the British Columbia Human Rights Tribunal to summarily dismiss a complaint that had been appropriately dealt with in

another proceeding. The majority found that the provision in the British Columbia *Human Rights Code* was not limited to issue estoppel, but incorporated all of the principles underlying the common law doctrines of finality, including res judicata, abuse of process, collateral attack and issue estoppel. No analogous provision of the *Act* is in issue in the current matter.

[69] I find that both *Penner* and *Figliola* provide guidance in determining and assessing finality doctrines such as abuse of process, but I agree with the Commission's submission that the determination of whether a complaint is an abuse of process by relitigation in the face of a settlement or final decision is ultimately fact-driven.

[70] In *Penner,* the Court considered the issue of fairness at length. The Court concluded that the assessment of whether a second proceeding should continue must consider the procedural fairness of the first proceeding and decide if it would be fair to use the first proceeding to stop the second.

[71] In this case I am not convinced that fairness will result if the motion to dismiss is granted. There is no evidence in this case that the Complainant's human rights concerns were resolved in the previous or first hearing or that all of the alleged practices of discrimination as set out in the complaint were considered. There is reference that some of these issues were "canvassed" at the arbitration hearing however there is no evidence in the Minutes of Settlement to indicate that there was a decision reached on any of these issues. The Minutes of Settlement reference a removal of the word "termination" from the Complainant's employment record for the limited purpose of future employment inquiries and replacement with resignation as well as provision of a limited employment reference. Neither of these remedies references a finding, or lack thereof, of discrimination or the complainant's human rights complaints of failure to accommodate and discriminatory policies or practices were specifically considered. There is no evidence that all of the alleged practices of discrimination have been addressed in the settlement.

[72] While the Complainant may not be required to agree with the outcome of the settlement for it to be a bar to a second proceeding on the matter, it is relevant to note that

the settlement, which the Complainant explicitly rejected, precluded her from having a final decision by an arbitrator on the issue of discrimination in the workplace.

[73] This Decision does not diminish the importance of finality in settlements in the workplace. In the case of *Dunn* the Tribunal noted the importance of settlements in a unionized workplace:

> The importance of final and binding settlements in the unionized workplace is articulated in the purposes of the LRA, which include "to promote the expeditious resolution of workplace disputes." The importance of binding agreements was articulated by the OLRB in TRW Automotive (Kelsey-Hayes Canada Ltd) [2000] OLRB Rep. July/Aug. 731 at para 14:
>
> > Parties are entitled to rely on agreements freely entered into. Nothing would be more disruptive to orderly labour relations than to permit parties to revoke agreements among employees, their trade union, and their employer into which parties have entered to settle disputes or potential disputes.
> >
> > This is true of human rights disputes, in whatever social area they arise. There is a strong public interest in ensuring that when parties freely choose to resolve the substance of a human rights dispute, in whatever forum it is brought, the matter is at an end. This is a fundamental principle that should guide the Tribunal in the interpretation of s. 45.1, because to do otherwise could make the finality of settlements highly uncertain.

[74] While recognizing the importance of binding settlements in the workplace, after analyzing the relevant statutory provisions and applicable case law in this case, the Tribunal has decided not to allow the Respondent's motion to dismiss for abuse of process.

[75] Allowing the complaint to proceed does not amount to an abuse of process because there is no evidence that the settlement resolved the complainant's human rights allegations. The grievance process did not result in a final decision on the alleged practices of discrimination as set out in the complaint but rather resulted in a settlement on the issue of how the termination would be characterized to future employers. There is no evidence of an agreement to withdraw the human rights complaint. This may be due to

the fact that the grievor had advised the Union that she did not wish to settle her grievance or human rights complaint and was not a party to the settlement agreement. However, regardless of the reason, not only was a withdrawal of the complaint not referenced, there is specific reference to the Respondent's ability to mount a defence to this claim. This would indicate that the parties had turned their mind to this matter and were cognizant of the fact that this complaint would proceed after settlement of the grievance. I am not convinced that the parties intended the resolution of the grievance to result in the end of this complaint. On plain reading, the Minutes of Settlement contemplate that the human rights complaint will continue and make specific reference to a defence opportunity for the Respondent in the continuation of the complaint.

[76] Furthermore, while the Minutes of Settlement makes reference to the settlement of the human rights complaint, there is also reference that the Complainant did not wish to settle either the grievance or the complaint at the time of settlement. Assuming without deciding, even if the Union had the authority to decide to waive or extinguish the complainant's rights to pursue a human rights claim under the *Act*, that intention is not reflected in the Minutes of Settlement. Based on the language of the Minutes of Settlement, it does not appear that a decision was reached as to whether or not discrimination occurred but merely that a settlement was reached to end the grievance process.

[77] For these reasons I conclude that the Respondent has not established that the Tribunal should dismiss the complaint pursuant to this Motion.

C. Should the complainant have sought judicial review of the Minutes of Settlement, or gone to the labour board for Duty of Fair Representation rather than bringing this matter before the Tribunal?

[78] Finally, I note that the Respondent argues that the complainant ought to have sought judicial review of the Minutes of Settlement, or gone to the labour board for Duty of Fair Representation, rather than proceeding with this complaint before the Tribunal. I respectfully disagree.

[79] It is unclear to me how the Complainant could seek judicial review of the Minutes of Settlement since she is not a party to same, and it is not clear how this would be a reviewable final decision.

[80] The Respondent has also argued that the Complainant ought to have gone to the labour board if she was unhappy with the Union's decision to sign the Minutes of Settlement, not the Commission. Again, I respectfully disagree.

[81] In *Kelsh v. Canadian Pacific Railway*, 2014 CHRT 36, the Tribunal explains as follows:

> [26] Parliament therefore specifically vested the Commission with the authority and responsibility to exercise the discretion to decide whether to "deal with any complaint filed with it", subject to the grounds in 41(1)(a) and the subsections following it.
>
> [27] Parliament did not give that authority to the Tribunal – otherwise, that authority would be in the *Act*, as in *Harkin,* supra, at paras. 21 and 22.
>
> [28] Further, Parliament did not authorize the Tribunal to be a second screening authority – that is not the scheme envisioned in the *Act*.
>
> [29] If a party is not satisfied with the way the Commission has exercised its discretion under subsection 41(1)(a), that party has recourse by way of an application to the Federal Court for judicial review of the Commission's decision.

[82] Similarly, in the present case, the argument that the Complainant ought to have sought relief elsewhere would be more appropriately brought before the Commission.

IV. Ruling

[83] The Respondent's Motion is dismissed.

Signed by

Lisa Gallivan
Tribunal Member

Ottawa, Ontario
January 25, 2017

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1941/2113

Style of Cause: Cheryl Lynn Bezoine v. City of Ottawa

Ruling of the Tribunal Dated: January 25, 2017

Date and Place of Hearing: November 2 to 5, 2015

Ottawa, Ontario

Appearances:

Cheryl Lynn Bezoine, for herself

Ikram Warsame, for the Canadian Human Rights Commission

David Patacairk, for the Respondent