CV 06803

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF the jurisdiction of the Fair Practices Officer pursuant to the provisions of the *Fair Practices Act*, R.S.N.W.T. 1988, c.F-2 as amended.

BETWEEN:

THE KEEWATIN REGIONAL HEALTH BOARD and the GOVERNMENT OF THE NORTHWEST TERRITORIES as represented by the Chairman of the Financial Management Board

Applicants

- and -

BRUCE PETERKIN

Respondent

Application for order prohibiting the Fair Practices Officer from proceeding with an investigation into a complaint pursuant to the *Fair Practices Act*, R.S.N.W.T. 1988, c.F-2. Application dismissed.

Heard at Yellowknife on January 28, 1997

Reasons Filed: January 31, 1997

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE J.Z. VERTES

Counsel for the Applicants: Karan M. Shaner
Counsel for the Respondent: Steven L. Cooper

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REASONS FOR JUDGMENT

1 The applicants seek an order prohibiting the Fair Practices Officer from proceeding with an investigation into a complaint brought by the respondent pursuant to the *Fair Practices Act*, R.S.N.W.T. 1988, c.F-2 (the "Act"). In essence the applicants are asking this court to reverse a preliminary ruling by the Officer that he has jurisdiction to proceed with the investigation notwithstanding the execution of a settlement agreement by the parties. For the reasons that follow, this application is dismissed.

Background Summary:

2 The respondent was employed by the Keewatin Regional Health Board and as such was deemed to be employed in the public service of the territorial government. In May 1994, the respondent filed a written complaint pursuant to the Act alleging racial discrimination by other employees and by senior government officials. The letter was addressed to Beth Stewart in her capacity as "director" of the "Fair Practices Office". It is an acknowledged fact that at the time Ms. Stewart was an employee of the government, specifically a lawyer employed in the territorial Department of Justice. Two days later, a letter was written to the respondent, on Department of Justice letterhead, by Janis Cooper who signed it as "Deputy Fair Practices Officer". It is also acknowledged that Ms. Cooper was employed as a staff lawyer in the Department of Justice. This letter sought further information from the respondent.

3 In February 1995, the government and the respondent executed an agreement setting out terms for the termination of the respondent's employment. By those terms the respondent ceased his employment forthwith and the government agreed to make various payments relating to severance allowance and the like. The agreement also contained the following clause:

> Peterkin hereby releases and forever discharges the Keewatin Regional Health Board, its directors, officers, servants, agents and their successors and assigns and the GNWT, its Ministers, officers, servants and agents and their successors and assigns, of and from all manner of actions, causes of action, suits, debts, covenants, claims and demands, which Peterkin ever had, now has or which he or his heirs, executors, administrators or assigns may have in the future, for or by

> reason of any cause, matter or thing whatsoever arising out of or in any way related to or connected with Peterkin's employment with the GNWT or the termination of it...

4 The parties acknowledge that the agreement was executed with the benefit of independent legal advice. It is also undisputed that there were no discussions concerning the *Fair Practices Act* complaint during the negotiations leading up to execution of this agreement.

5 In March 1995, the respondent received a letter from James Posynick, a lawyer in private practice, informing him that Mr. Posynick had been appointed as an Officer under the Act to investigate his complaint. Mr. Posynick wanted the respondent to confirm that he wished to pursue the matter. There was no evidence as to what, if anything, was done about the complaint between May 1994 and March 1995.

6 Presumably Mr. Posynick's investigation continued because in October 1995, he wrote to the Health Board to inform them about the complaint and to request a response. The Chairperson of the Board responded to Mr. Posynick in November saying that they passed the matter along to the Deputy Minister of Health to address. In January 1996, Mr. Posynick received a letter from Cayley Jane Thomas, also a lawyer with the territorial Department of Justice, informing him of the settlement agreement and drawing his attention to the release contained within it. After further communications the Officer received submissions as to the effect of the release on the respondent's claim.

7 In a written decision, received by the government on June 17, 1996, Mr. Posynick concluded that (a) the release is not a bar to his exercise of jurisdiction under the Act to investigate the complaint; and, (b) the settlement agreement is a relevant fact which may be taken into account in relation to the merits of the complaint and what remedies, if any, may be appropriate under the Act. Mr. Posynick made reference to the case of *Ontario Human Rights Commission v Etobicoke*, [1982] 1 S.C.R. 202, in which it was held that one cannot contract out of human rights legislation enacted for the public good. Mr. Posynick wrote:

> In Etobicoke a contract or agreement was in issue which purported to contract-out of the Ontario Human Rights Code. Albeit not a contract for "release or settlement" as the Respondent properly points-out, the distinction between the "waiver" signed by Mr. Peterkin and the agreement in Etobicoke is more apparent than real. The reason for that is, in my view, it is not the kind of contract itself which might be proscribed by public policy considerations, it is the effect of the contract, agreement or waiver, express or implied, on the public policy espoused in the legislation which might be proscribed. In short: if by giving effect to the waiver the Officer jeopardizes the rights of other citizens, that would be contrary to public policy. In this case, the complaint suggests that the problems may be systemic and therefore the failure to remedy the situation poses a substantial risk to other persons besides Mr. Peterkin.

8 I agree in substance with Mr. Posynick's conclusions. Before discussing this issue, however, there are some procedural matters that must be addressed.

Procedural Issues:

9 On December 6, 1996, the applicants filed an Originating Notice to bring this matter before this court. It reads (in part):

> **TAKE NOTICE** that a motion will be made on behalf of the Applicants for an order prohibiting the Fair Practices Officer from proceeding to conduct an investigation into a complaint filed by Bruce Peterkin against the Government of the Northwest Territories and the Keewatin Regional Health Board on the following grounds:
>
> 1. That there is a valid and binding agreement between the parties which releases the Applicants from actions, claims and demands based on or in any way connected to the Respondent's employment.
>
> 2. That the 17 month delay in advising the Applicants of the complaint filed by the respondent prejudiced their ability to respond to the allegations.
>
> 3. Such further and other grounds as Counsel may advise and this Honourable Court may permit.

10 The applicants proceeded only on the basis of ground one, as noted above, in the hearing before me.

11 This application is brought pursuant to Part 44 ("Judicial Review in Civil Matters") of the Rules of Court. Rule 596 provides that an application must be brought within 30 days of the decision to be reviewed although that time limit may be extended by order of the court. In this case the applicants could provide no cogent reason as to why they took so long to file the application. Nevertheless, the respondent consented to an extension of the time. Without such consent, I am not at all certain that the time would have been extended.

12 Another initial concern had to do with the form of the proceedings. This is an application for prerogative relief. The Act contains a right of appeal from any order or decision of a Fair Practices Officer. It is an unlimited right of appeal by way of a trial *de novo* (see s.8 of the Act). Courts will generally refuse to grant prerogative relief when there is the effective alternative remedy of an appeal provided by the operative statute: *Harelkin v University of Regina*, [1979] 2 S.C.R. 561.

13 Counsel for the applicants submitted that prohibition is the appropriate remedy because the Fair Practices Officer is planning to carry on with his investigation. Counsel argued that "prohibition is never too late so long as there is something for it to act upon", quoting from *Hannon v Eisler (No.2)* (1954), 13 W.W.R.(NS) 565 (Man.C.A.), at page 581.

14 Again, on this issue, the respondent did not oppose the manner in which the applicants wanted to proceed. He was quite content to have this matter decided as an appeal or as an application for judicial review. I am not convinced that the respondent should be so nonchalant about his position. There are different consequences depending on the procedure. The statute provides on an appeal that the decision in this court is "conclusive and not subject to further appeal". On an application for prohibition there is still a right of further appeal to the Court of Appeal.

15 There is an additional problem. The applicants seek only an order of prohibition. I would have thought they would want to couple it with a request for *certiorari* to quash the Officer's decision. The way in which this application is framed, if successful, the applicants would have succeeded in preventing the Officer from continuing his investigation but would still have the Officer's decision remain in place until and unless some further proceeding were taken to either quash it or overturn it on appeal. Fortunately the rules in Part 44 give the court wide latitude to grant the relief required in such form as may be appropriate without letting defects in form or procedure determine the cause. In this particular case, having regard to my decision, I need not make special directions with respect to the form of these proceedings. That is not to say that the form is unimportant; it may very well be the source of a great deal of controversy in another case.

Jurisdictional Issue:

16 There is no issue that the release, as part of the settlement agreement, is not binding on the respondent within the terms of the agreement. The issue is whether such a release can encompass a complaint under the *Fair Practices Act*.

17 The Act is akin to human rights legislation found in other Canadian jurisdictions: *Re Simonson and Hodgson* (1975), 63 D.L.R.(3d) 560 (N.W.T.S.C.). It has as its purpose, as evidenced by its preamble and substantive sections, the prevention and

elimination of discrimination in employment, accommodation and services.

18 The Supreme Court of Canada, in *Robichaud v Canada*, [1987] 2 S.C.R. 84, described human rights legislation as "not quite constitutional". By that the Court meant that a human rights statute is of a special nature distinct from other statutes because it incorporates certain basic goals of our society. Such statutes, the Court said, are remedial. They are aimed primarily at the elimination of discrimination as opposed to the punishment of offenders. And, because such legislation is enacted for the benefit of the community at large and of its individual members, as a matter of public policy the provisions of such legislation may not be waived or varied by private contract: *Ontario Human Rights Commission v Etobicoke* (*supra*).

19 The *Fair Practices Act* sets up a procedure whereby someone who is alleging a contravention of the Act may make a complaint to an Officer. Officers are appointed by the Commissioner in Executive Council. The Act contemplates that the Officer investigate the matters alleged and attempt to mediate a settlement by the parties. The Officer may reject a complaint that is trivial, frivolous, vexatious or not brought in good faith. Conversely, the Officer may proceed to hold a hearing. The Officer may make any order or decision that he or she considers just and may include such terms and conditions as he or she considers proper. An order of the Officer may be filed and enforced as a judgment of the Territorial Court.

20 The Act provides, in subsection 7.2(3), that a complainant may withdraw a complaint. Subsection 7.2(4), however, empowers the Officer to continue the proceeding, even after a withdrawal of the complaint, if, in the Officer's opinion, "to proceed would not have an adverse impact on the complainant and would be in the best interests of the public".

21 In this case the applicants submitted initially that they had no knowledge of the respondent's complaint at the time the settlement agreement was executed. It may be that the specific individuals negotiating on behalf of the government had no knowledge. But I think a strong argument can be made imputing knowledge to the government as an entity.

22 As outlined above, the complaint was initially received by one lawyer within the Department of Justice and then replied to by another lawyer in the same department. These individuals presumably were appointed to act as Officers under the Act in addition to their other duties. If the government chooses to appoint civil servants to carry out these functions, then (in the absence of evidence as to strict protective measures to assure confidentiality) the government can hardly claim to have no knowledge of the state of affairs when other civil servants from the same department are engaged in negotiations with the same person. This leads to the proposition that if the government did know about the complaint, or is deemed to have known, and it now wants to say that the settlement release encompasses the complaint, then it was open to the government to

make explicit reference to it in the agreement. The implied contention that somehow the respondent was disingenuous in negotiating the settlement so as to preserve his ability to pursue the complaint can also be reversed. It could be contended that the government wanted to obtain a general release so as to use it to cut off the complaint without having to directly address it in the settlement negotiations. Both hypotheses are equally plausible in the absence of evidence.

23 In my opinion nothing turns on the government's state of knowledge at the time. The issue before me is a question of law, not of fact, due to the nature of the legislation in question, not the nature of the release. Even if the settlement agreement had expressly stipulated that the complaint is to be withdrawn, the Act gives the Officer, as noted above, the power to carry on with it.

24 The applicants submitted, however, that a release executed upon termination of the employment relationship is not the same as an attempt to contract out of the provisions of the Act on a prospective basis. Counsel pointed to s.3(1) of the Act which states that "no employer shall refuse to employ or refuse to continue to employ a person or adversely discriminate in any term or condition of employment" because of any of the prohibited grounds of discrimination. In her submission counsel argued that this contemplates an ongoing relationship whereas the settlement agreement in this case was meant to bring finality to the relationship.

25 There are many good reasons to support the freedom to contract. But, as the case law makes clear, the type of legislation involved in this case has a broad public scope that goes beyond the interests of the individual parties. As Mr. Posynick noted in his decision, there may be systemic problems that need to be remedied irrespective of the resolution of the respondent's personal situation. The Act contemplates settlement of disputes but only within the framework of the Act, i.e., with the involvement of the Officer. Otherwise, any settlement or even withdrawal of the complaint may be ineffective in halting the proceeding initiated by the Officer. That is the point of the decision in *Re Kuun and University of New Brunswick* (1984), 13 D.L.R. (4th) 745 (N.B.C.A.), a case referred to by applicants' counsel.

26 There is a telling comment in the *Robichaud* case referred to earlier. At the end of his judgment (the Court being unanimous in the result), LaForest J. stated: "Finally, we were advised that a settlement has been reached with Mrs. Robichaud, but this may not provide a full corrective to the problem identified." This comment recognizes that there may be appropriate remedies for the benefit of all employees even if the specific employee has reached a settlement.

27 For these reasons, I conclude that it is immaterial whether an agreement is made prospectively or it is made with a view to terminating a relationship. The release in this case does not bar the Fair Practices Officer from continuing with his investigation. The argument was put on the basis of jurisdiction. I find that Mr. Posynick has

jurisdiction to carry on. The release may have some impact on the respondent in the sense of what remedies he may be personally entitled to and it may have some bearing on Mr. Posynick's consideration of the merits of the complaint. But all that is for the Officer to decide within the mandate given to him by the statute.

Conclusions:

28 The application is dismissed. The respondent will have his costs of the proceedings in this court on the basis of Column 4 of the tariff. If the parties are unable to agree, they may seek further directions from me.

29 As a protective measure I direct that the Record, prepared and filed by the Fair Practices Officer, be sealed by the Clerk with the proviso that it be accessible only to counsel for the parties, or Mr. Posynick, in the absence of an order providing otherwise.

John Z. Vertes,
J.S.C.

Dated at Yellowknife this
31st day of January 1997

Counsel for the Applicants: Karan M. Shaner
Counsel for the Respondent: Steven L. Cooper