HUMAN RIGHTS TRIBUNAL OF ONTARIO

B E T W E E N:

Anahid Kerkezian

Applicant

-and-

Donway Place Retirement Home, Anne Gro-Arboine, and Vernet Malcom

Respondents

DECISION

Adjudicator: Alan G. Smith

Date: August 16, 2012

File Number: 2010-07404-I

Citation: 2012 HRTO 1581

Indexed as: **Kerkezian v. Donway Place Retirement Home**

APPEARANCES

Anahid Kerkezian, Applicant	)	Self- represented
Donway Place Retirement Home, Anne Gro-Arboine, and Vernet Malcom, Respondents	)	Erin Porter, Counsel
Service Employees International Union	)	Jesse Kugler, Counsel

BACKGROUND

[1] The applicant filed an Application with the Tribunal on November 17, 2010, pursuant to section 34 of the *Ontario Human Rights Code*, R.S.O. 1990, c. H.19, as amended (the "*Code*"), alleging discrimination in employment.

[2] In response to a Notice of Intent to Defer issued by the Tribunal, the representative of the respondents filed submissions on March 3, 2011 in favour of deferral. The corporate respondent advised that a number of grievances had been filed by the applicant that were still outstanding, including one on April 4, 2010 and a second on December 13, 2010.

[3] On March 8, 2011, the Tribunal Released an Interim Decision, 2011 HRTO 468, deferring the Application pending the outcome of the ongoing workplace grievance-arbitration process.

[4] On October 17, 2011, the Tribunal received a Request for an Order During Proceedings from the applicant seeking reactivation of the Application. The applicant stated in the Request, "I am requesting the tribunal to re-activate my deferred application due to the fact that I believe that the mediation which occurred on June 9, 2011, was ineffective".

[5] On November 1, 2011, the respondents filed a Response to the applicant's Request for an Order. In their Response, the respondents requested that the Application be dismissed on the basis that:

> a. The request to reactivate is untimely, being outside the 60 day limitation period imposed by Tribunal Rule 14.4.;
>
> b. Since the applicant has entered into Minutes of Settlement and a full and final Release it would be an abuse of process for the Application to continue;

[6] By Case Assessment Direction of December 9, 2011, the Tribunal determined that it was appropriate to schedule a telephone conference call hearing with the parties to address the issues raised in the applicant's Request and the respondents' Response to the Request. Service Employees International Union ("SIEU") was also given notice of the hearing.

[7] Pursuant to s. 43(2) of the Code and Rule 19A of the Tribunal's Rules of Procedure, a summary hearing by teleconference was held before me on April 16, 2012. The purpose of the summary hearing was to determine whether the Application should be dismissed, in whole or in part, on the basis that the applicant had signed Minutes of Settlement and Release and/or because the applicant's Request to Reactive was untimely.

[8] The applicant and respondents made oral submissions during the summary hearing. Representatives of the SEIU observed the hearing as an interested party. The parties' written submissions were also considered by me.

CHRONOLOGY OF EVENTS

[9] Both parties agree that the following is a list of relevant events:

- March 8, 2011: The Application is deferred by Interim Decision of the Tribunal;

- May 2011: A grievance arbitration is scheduled to take place on June 9, 2011;

- June 5, 2011: The applicant emailed the SEIU's representative asking, "Could you please tell me whether the arbitration which is scheduled for this coming Thursday June 9, 2011, is binding or not?";

- June 6, 2011, (5:24 a.m.): the SEIU responded to the applicant by email, advising, "The Arbitrator's decision will be final";

- June 6, 2011, (10:54 p.m.): The applicant emailed the SEIU and asked, "Could you please be more clear when you say "final", does it mean it is binding (as in both parties must accept the decision)?";

- June 7, 2011: the SEIU responded by email to the applicant, "As I explained the Arbitration will assist both parties in reaching a settlement we all agree to. If that is not possible then the Arbitrator will issue a decision that is final and binding on all parties for all of your current grievances";

- June 9, 2011: the applicant, SEIU representatives and the corporate respondent participated in a mediation/arbitration which resulted in Minutes of Settlement being executed by the applicant, SEIU and the corporate respondent, resolving the applicant's grievances. A full and final Release was included in the Minutes of Settlement and signed by the applicant;

- October 17, 2011: the Tribunal received a Request for an Order During Proceedings from the applicant seeking reactivation of the Application.

REACTIVATION OF THE APPLICATION

[10] For the reasons that follow, I find that Application should be dismissed on the basis of the full and final Release signed by the parties. It is therefore unnecessary to deal with the untimeliness of the reactivation request.

ARGUMENT

[11] In her written submission the applicant argues that she did not understand what she was agreeing to at the conclusion of the mediation/arbitration on June 9, 2011. In particular she says she did not understand that she was releasing the employer from all employment related claims. She submits that the Tribunal decision in *Luo v. Dell Canada Inc*., 2010 HRTO 879, quoted by the respondents in support of their submissions, can be distinguished from the present situation on the basis that:

> **…**I was not able to consult independent legal advice. In fact, my son, who I had brought to assist me and to provide me with guidance and advice, to ensure I understood everything, was told to wait outside. Also, I did not

> have 7 weeks to decide on the agreement as Luo did. I had to make a decision within minutes of the offer and told by my union that circumstances would get worse for me if I did not sign.

[12] The applicant also argues that she was under coercion and duress when she signed the agreement:

> I was scared from what [the SEIU representative] had told me that if I didn't sign things would get worse. I thought if I didn't sign as well that they would tell HRTO I was being uncooperative as well.

[13] Finally, the applicant states that her "mental state during this entire process" contributed to her feeling pressured and coerced into signing an agreement she did not understand.

[14] In their written submissions the respondent notes that Paragraph 4 of the Minutes of Settlement states:

> The Griever hereby agrees to release the Employer, its Employees and Directors from any and all claims and causes of action…whether pursuant to the…*Human Rights Code*…or any other statute or the common law.

The respondent also notes that paragraph 7 of the Minutes of Settlement states:

> The Griever acknowledges that she was represented by the Union fully and fairly, in a manner that was not discriminatory, arbitrary or in bad faith. The Griever also agrees that she has had these Minutes of Settlement reviewed with her by a Union Representative, and that she has received full, fair and satisfactory representation from the Union.

[15] Finally, the respondent argues that:

> The allegation, after the fact, that the Applicant felt bullied and pressured from her Union and… [the] Arbitrator…is not only unlikely, it is also unfounded. If the Applicant was not satisfied with the settlement offer, she could have refused to sign and [the] Arbitrator would have made a ruling on the issues. This process was explained to the Applicant. The Applicant is seeking a "second kick at the can" by having the same issues addressed before the Tribunal that were already dealt with at mediation….

> In paragraph 7 of the Minutes of Settlement, the Applicant acknowledges that she was fairly and fully represented by her Union. This document was the result of a negotiated settlement between sophisticated parties and the Applicant knew or ought to have known that the Minutes of Settlement would resolve all issues pertaining to the accommodation of her disability…

ANALYSIS

[16] Section 23(1) of the *Statutory Powers Procedure Act* R.S.O. 1990, c. S.22, as amended, provides that a tribunal may make such orders or give such directions in proceedings before it as it considers proper to prevent abuse of its processes. This Tribunal has held that filing a human rights application after signing a full and final Release in respect of the subject-matter of the application may constitute an abuse of the Tribunal's process and, where that is the case, such applications should be dismissed. See, *Perricone v. Fabco Plastics Wholesale*, 2010 HRTO 1655 *Barton v. Rouge Valley Health System*, 2010 HRTO 2126 and *Sleiman v. The Participation House Project (Durham Region)*, 2012 HRTO 345.

[17] As noted in the Tribunal's decision on deferral, 2011 HRTO 468, a review of the grievances filed by the applicant reveals that they are virtually identical to the subject matter of the Application. The wording of the Minutes of Settlement and Release specifically mention "applications" and the "*Human Rights Code*". I find that the language of the release clearly obliges the Applicant to abandon her Tribunal Application.

[18] The Tribunal must next consider whether there is some reason for not requiring the applicant to be bound by what would otherwise appear to be a binding promise to not proceed with her Application before the Tribunal. Some of the reasons discussed in the Tribunal's jurisprudence include duress (both economic and psychological), fraudulent misrepresentation on the part of the respondent, and the lack of capacity by the applicant to understand the terms of the Release. See, *Monteiro v. Inspec-Sol,* 2010 HRTO 2281 and *Sleiman*, above.

[19] The applicant submitted that she did not really understand the language of the paragraph in which she agreed to discontinue her Application. The applicant did not call any evidence, however, that would demonstrate that she was *incapable* of understanding this aspect of the Release.

[20] The Tribunal case law makes clear that the issue of whether an applicant had the *capacity* to understand is distinct from the issue of whether she *actually* understood the Release. In this case, the applicant suggests that she did not appreciate what she was giving up at the time she signed the Release. In that regard, I adopt the statements made by the Tribunal in *Perricone v. Fabco Plastics Wholesale*, 2010 HRTO 1655, quoted with approval in *Monteiro v. Inspec-Sol*, 2010 HRTO 2281:

> [I]f, as the applicant contends, she chose to sign the Release without ensuring that she understood it, then she is responsible for that choice…. A party to a legal agreement cannot enter into it without taking the time and effort to understand it and then rely on her own actions as the basis upon which to resile from the agreement.

[21] The applicant has alleged that her son was not allowed to be present during the negotiations. However, the applicant provided no explanation as to why she could not have asked for and obtained an adjournment of the mediation/arbitration process to consult with her son, or other advisors, before finally agreeing to the settlement terms. Ordinarily an adult who signs a contract is held to the terms of that contract. I find that that the applicant has failed to provide any grounds to justify me deviating from that general rule.

[22] The applicant also argues that she signed the Minutes of Settlement and Release under duress. Where "duress" is put forward as the basis for vitiating a settlement agreement, the party claiming duress is really stating that he or she entered the agreement against his or her own free will. See *Monteiro*, above. As the Tribunal explained in *Barton*, above, a party alleging duress has the onus of establishing that the circumstances surrounding the conclusion of the agreement amount to duress. The

legal threshold is an exacting one, which recognizes the strong public interest in the principle of finality.

[23] The Ontario Court of Appeal described the elements of legal duress as follows in *Taber v. Paris Boutique & Bridal Inc*., 2010 ONCA 157:

> … [N]ot 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.

[24] I do not accept the applicant's bald assertions that she was under undue pressure from the union and that the union's representative did not support her in the mediation/arbitration as being sufficient to amount to duress. The applicant has not pointed to any evidence which would support this assertion. Indeed, the email exchange between the applicant and the SEIU leading up to the mediation/arbitration seems to indicate that the union's approach to the applicant was to answer her questions and concerns in a straightforward and forthright manner. Even accepting the applicant's version of what the union representative said at the conclusion of the mediation/arbitration, I cannot accept that the applicant was under any pressure from her union, or her union representative, that would amount to a "coercion of the will" so as to substantiate legal duress in the signing of the Minutes of Settlement and Release.

[25] The applicant alleges that she should not be held to the Release due to her poor mental health at the time of signing the Release. In her submissions she provided a copy of a note from Dr. A. Bogosyan, her family physician, dated December 20, 2011. It reads, "Anahid Kerkezian is under my care because of her suffering depression". I was also provided with a doctor's report dated March 30, 2012, from psychiatrist Dr. Behesnilian. The report notes that the applicant was seen in consultation in January 2012. It states, "Her mental and physical health seem to have gradually decompensated", but makes no specific reference to the state of the applicant's mental health in 2011. The medical documentation does not address or provide any opinion as

to why the applicant was unable to understand and appreciate the Minutes of Settlement she signed in June 2011.

[26] The Tribunal has stated in the past that an applicant would need to meet a high threshold to establish that he or she did not appreciate the significance of signing a Release by reason of mental illness or disability. See, *Oakley v. Lanark (County),* 2009 HRTO 1034, *Lachance v. Honda Canada*, 2010 HRTO 173, and *Anderson v. Lerners LPP*, 2011 HRTO 520. Although in the present case, the applicant presented some medical evidence that she was experiencing depression at the time she signed the Release, the medical evidence falls short of that which would be required to establish that she was prevented from understanding the significance of the Release by reason of mental illness or disability such that she could be said to have been incapable at the time it was executed.

[27] In summary, the applicant has not been able to point to evidence that would demonstrate that she was incapable of understanding the terms of the Release. She also has not established that she was not under duress, in the legal sense, at the time she executed that document.

[28] To allow this Application to proceed in light of the clear language of the Release prohibiting such a claim would amount to an abuse of the Tribunal's process.

ORDER

[29] The Application is dismissed.

Dated at Toronto, this 16th day of August, 2012.

"Signed by"

_____

Alan G. Smith
Member