Date: 20071004

Docket: T-1619-06

Citation: 2007 FC 1021

Ottawa, Ontario, October 4, 2007

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

VERNON JOHNSON

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

O'KEEFE J.

[1] This is an application for judicial review of a decision by the Canadian Human Rights Commission (the Commission) dated August 11, 2006 which approved the terms of settlement negotiated by the parties pursuant to section 48 of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (CHRA).

[2] The applicant requests:

a) an order quashing the Commission's decision dated August 11, 2006;

b) an order compelling the Commission to convene a tribunal to hear the applicant's original complaint; or

c) in the alternative, an order directing the parties to return to conciliation; and

d) costs of this application in an amount fixed by the Court, plus GST.

Background

[3] The applicant has been an employee of the Government of Canada since September 1980. In November 1996, he began working for the Department of National Defence (the Department) in an AS-3 position. In 2002, he received a promotion and began working as a PE-2. His primary responsibilities in this position included staffing, employment equity, training and recognitions.

[4] On April 2, 2003, the applicant filed a complaint with the Commission against the Department. The applicant alleged that he received adverse differential treatment as per sections 7 and 14 of CHRA when he was denied promotions and other opportunities. The applicant's complaint also alleged that he had been discriminated against on numerous other occasions because of his race and colour.

[5] The Commission conducted a preliminary investigation of the complaint and recommended the appointment of a Human Rights Tribunal to inquire into the complaint. In doing so, the

Commission stated that the case required an assessment of the credibility of the parties and their evidence.

[6] On February 21, 2006, the parties attended a conciliation session wherein both parties were represented by counsel. The applicant was represented by his then legal counsel; he has since retained new legal counsel. The parties did not meet face to face; instead, the conciliator went back and forth between the parties, who were located in separate rooms. At one point in the conciliation session, counsel for the parties met in caucus without the conciliator. The conciliation lasted fourteen hours. Upon its conclusion, the conciliator drafted a letter of understanding which was signed by the parties, their legal counsel and the conciliator.

[7] The letter of understanding contained a number of agreements reached by the parties and contemplated that a further document entitled minutes of settlement would be drafted and signed by the parties. Furthermore, the letter of understanding required the parties to follow-up on certain matters before the minutes of settlement were signed. Specifically, the Department was to draft a letter of employment for the applicant and to identify key activities for an AS-4 position to which the applicant would be assigned. The applicant was to provide a letter of certification indicating his fitness to return to work.

[8] On March 1, 2006, the Department fulfilled the above-mentioned requirements and informed the conciliator. The conciliator then drafted the minutes of settlement. A copy of the

minutes of settlement was then provided to each party for signature. The appropriate representatives from the Department signed. The applicant refused to sign.

[9] The conciliator then issued its conciliation report dated June 7, 2006 which recommended the following to the Commission:

> The parties met in conciliation on 21 February, 2006, and agreed to settle the complaint as per the attached Letter of Understanding, signed by the parties as well as their respective legal counsel. It was understood by the Conciliator and by the parties that the Letter of Understanding was drafted as an interim settlement due to time constraints. This intention is clearly set out in the preamble of the Letter of Understanding. After the conciliation, the respondent provided some additional information for clarification purposes and in order to address some of the commitments in Letter of Understanding.
>
> The formalized Minutes of Settlement, attached, was subsequently provided to the parties, however, the complainant has refused to sign the Minutes of Settlement.
>
> It is recommended, pursuant to section 48 of the *Canadian Human Rights Act*, that the Commission approve the terms of the settlement agreed to by the parties.

[10] The parties then filed written submissions with the Commission regarding the conciliation report, the alleged agreement and the approval of the terms of settlement under section 48 of CHRA.

[11] Section 48 of CHRA reads:

> (1) When, at any stage after the filing of a complaint 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.

[12] By letter dated August 11, 2006, the Commission informed the parties that they had approved the terms of settlement between the parties pursuant to section 48 of CHRA. This is the judicial review of the Commission's decision.

Commission's Reasons for Decision

[13] In a letter to the parties dated August 11, 2006, the Commission approved the terms of the settlement agreed on by the parties for the following reasons:

1. The agreement was reached by the parties through conciliation and the parties were represented by legal counsel;

2. The agreement was signed by the parties after lengthy discussion and with the advice of legal counsel;

3. The agreement provides that the Commission will monitor the settlement to ensure that the terms are carried out as stated.

Issues

[14] The applicant has submitted the following issues for consideration:

1. Does the signed letter of understanding constitute a settlement between the parties that the Commission could approve as settlement of the applicant's complaint?

2. If the signed letter of understanding is a binding agreement between the parties, did it contain the necessary provisions to be approved by Commission as settlement of the applicant's complaint?

3. Did the applicant endorse the terms of the minutes of settlement when he signed the letter of understanding?

4. If the minutes of settlement is not an agreement binding on the parties, did the Commission make a reviewable error when it approved the settlement?

[15] I would rephrase the issues as follows:

1. What is the appropriate standard of review?

2. Did the Commission err in finding that a settlement had been agreed to by the parties as required by section 48 of CHRA?

Applicant's Submissions

[16] The applicant submitted that he did not sign the minutes of settlement; therefore, it did not constitute a settlement agreed on by the parties, and consequently, the Commission erred in approving it pursuant to section 48 of CHRA.

[17] The applicant submitted that under section 48 of CHRA, the Commission only has the authority to approve a settlement that has been agreed to by the parties. The applicant further submitted that CHRA does not confer power upon the Commission to impose settlement terms on the parties. The applicant noted that this Court previously held that CHRA was to be construed and applied so as to ensure the remedial goals of the legislation were best achieved (see *Loyer* v. *Air Canada*, 2006 FC 1172, 2006 Carswell Nat 3092 (Fed)). The applicant argued that these remedial goals cannot be achieved if the parties have a settlement imposed on them, without having agreed to its terms.

[18] The applicant also submitted that of the instances where the question of whether the parties had actually agreed to settlement terms was as issue, there are no reported cases where a decision by the Commission to impose a settlement on the parties has been upheld on judicial review.

[19] The applicant submitted that the letter of understanding by no means constituted a settlement between the parties that the Commission could approve under section 48 of CHRA as settlement of the applicant's complaint. The applicant argued that a letter of understanding is similar

in form and function to a letter of intent in that it is created during negotiations; it sets out some of the terms that the parties have agreed to, and provides that the parties agree to create a binding contract in the future based on the terms provided in the letter of understanding.

[20] The applicant submitted that when assessing whether a letter of intent is actually a binding contract, the courts have typically looked to the context in which the agreement was signed to determine the intentions of the parties (see *Modderman* v. *Ondaatje Corp*, [1998] O.J. No. 3018 (Ont. Gen. Div.). With regards to the context in which the letter of understanding was signed, the applicant made the following submissions:

1. The letter of understanding included the following statement: “For the purposes of an interim settlement, leading to formalized Minutes of Settlement, the parties agree to the following”. This language is not language found in a contract intended to create binding relations; it indicates that there remained details to be worked out.

2. The letter of understanding included the requirement that the respondent endeavour to identify the key activities/positions to which the complainant could return to work in an AS-4 position. This requirement was to be completed prior to the signing of the minutes of settlement. The fact that the respondent was to complete this task before the signing of the minutes of settlement demonstrates that the key activities/positions identified by the respondent had to be thereafter approved by the applicant.

3. The applicant believed that the document he was signing was only a preliminary document, similar to a letter of intent, and that the minutes of settlement was to be the parties’ formal binding agreement.

[21] Based on the above contextual factors, the applicant submitted that the letter of understanding was not a binding legal settlement.

[22] The applicant further submits that even if the Court finds that the letter of understanding was a binding agreement between the parties, it did not contain the necessary provisions to be approved by the Commission. The applicant noted that the Commission's letter dated August 11, 2006 provided the following reasons for the approval of the settlement agreement under section 48 of CHRA: (i) the parties were represented by counsel, (ii) the agreement was signed by the parties with the advice or counsel, and (iii) the agreement provided that the Commission would monitor the settlement to ensure that the terms were carried out as stated. The applicant submits that the signed letter of understanding included no provision that the Commission would monitor the settlement to ensure that the terms were carried out as stated. This provision was included in the minutes of settlement and as such, the letter of understanding alone was insufficient to act as a settlement.

[23] The applicant then went on to address whether he endorsed the terms of the minutes of settlement when he signed the letter of understanding. The applicant submitted that the minutes of settlement contain greater detail and impose new obligations on the applicant absent in the letter of understanding. Specifically, the applicant noted clauses 9, and 12 to 15. The applicant submitted that because of these additional clauses, signing the letter of understanding cannot be interpreted as assenting to all the terms in the minutes of settlement (see *Bawitko Investments Lted.* v. *Kernels Popcorn Ltd.* (1991), 79 D.L.R. (4th) 97 (Ont. C.A.) at 103 to 104).

[24] The applicant then submitted that the Commission erred in law by approving the minutes of settlement as they were not agreed on by the parties and thus, section 48 did not apply. The applicant submitted that in general, the determination of whether an agreement has been reached between two parties is a question of law. Furthermore, the applicant submitted that deciding whether or not an agreement was reached is outside the Commission's typical administrative role of assessing whether there is sufficient evidence to warrant proceeding, and accordingly, it should not be given the high degree of deference normally awarded (see *Cooper* v. *Canada (Human Rights Commission)* 1996 3 S.C.R. 854 at 889-93, [1996] S.C.J. No. 115 (QL)).

Respondent's Submissions

[25] The respondent submitted that the Commission's decision was reasonable. The respondent argued that the true reason for this application was that the applicant has now changed his mind as to the reasonableness of the settlement and is unhappy with the representation that he received from this previous counsel. The respondent submitted that this is not a sufficient basis upon which to set aside the Commission's decision and as such the application should be dismissed.

[26] With regard to the appropriate standard of review, the respondent made the following submissions regarding the pragmatic and functional approach. The respondent submitted that CHRA does not contain a privative clause, but that this silence is a neutral factor (see *Dr. Q* v. *College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226 at paragraph 27;

Loyer v. *Air Canada*, [2006] F.C.J. No. 1473 (Q.L) at paragraph 46). The respondent submitted that the question of whether the parties reached a valid and binding settlement at conciliation is a matter that falls squarely within the expertise of the Commission and thus considerable deference is warranted (see *Dr. Q*, above; *Loyer* above; *Moussa* v. *Canada*, (2006) F.C.J. No. 1169 (T.D.)(Q.L.) at paragraph 32). With regard to the purpose of the Act, the respondent submitted that CHRA is supposed to prevent discrimination and provide remedies (see *Loyer* above). The purpose of section 48 in particular has been noted by this Court as ensuring that the Commission has input into settlement, in order to ensure that the remedial goals of CHRA are adequately addressed in the settlement of a human rights complaint. The respondent submitted that the discretionary nature of section 48 indicates that a significant amount of deference is owed.

[27] Finally, regarding the nature of the problem, the respondent submitted that the Commission's decision involved a consideration of the terms of the settlement and the circumstances surrounding the conciliation. As such, this is a question of mixed law and fact, albeit one that is highly fact specific. Thus, a significant amount of deference is owed. The respondent submitted that the appropriate standard of review is reasonable *simpliciter* (see *Canada (Director of Investigation and Research)* v. *Southam*, [1997] 1 S.C.R. 748).

[28] The respondent submitted that there is a well established policy in favour of upholding and enforcing settlement agreements agreed upon by litigants. Fostering secondary litigation to overturn these settlements is contrary to both court and public policy (see *Perrin* v. *Cara Operations Ltd.*, (2004) O.J. No. 1582 (Sup. Ct) (Q.L.) at paragraph 24).

[29] The respondent submitted that the Commission correctly determined that the parties had reached a valid and binding settlement at conciliation. The respondent submitted that the following factors all indicate that the Commission's decision was reasonable:

1. The parties were in agreement regarding the terms of the settlement as recorded in the letter of understanding.

2. The applicant was represented by legal counsel during the conciliation and received legal advice prior to signing the letter of understanding.

3. Paragraph 9 of the letter of understanding specifically states that the "Complainant agrees that this settlement is in full and final compensation for all incidents alleged in the complaint and the complainant agrees to withdraw his human rights complaint."

4. There are no allegations that the applicant did not have the capacity to sign or did not understand the terms contained in the letter of understanding.

5. The settlement agreement is fair and reasonable. It provides financial compensation, renewed employment, and guaranteed training and counselling for the applicant.

6. The Commission reviewed the record in making its decision. The record included the applicant's written submissions and thus, he had the full opportunity to have his case heard by the decision maker.

[30] The respondent also submitted that the applicant was told he did not have to sign the letter of understanding immediately; however, he chose to do so.

[31] With regards to the relationship between the letter of understanding and the minutes of settlement, the respondent argued that the terms of settlement are in no way modified from the former to the latter. The respondent submitted that the applicant's submission that there were "significant additions" and clarification of issues in the minutes of settlement is simply not true. The respondent submitted that the only clauses added in the minutes of settlement were the standard clauses of the Commission such as those relating to implementation, confidentiality, and Commission approval of the settlement under section 48 of CHRA.

[32] The respondent submitted that the letter of understanding required the Department to follow-up on two matters: the letter of employment and the job description. The respondent further submitted while these tasks were to be completed before the signing of the minutes of settlement, they were not negotiable as the terms in the letter of understanding were final.

[33] Finally, the respondent submitted that the applicant's real complaint is with the representation provided to him by his previous counsel. However, this frustration is not a sufficient basis to set aside the Commission's decision. The respondent claimed that the applicant is required to live with the signed agreement that was negotiated in good faith between the parties.

Analysis and Decision

[34] **Issue 1**

What is the appropriate standard of review?

As instructed by the Federal Court of Appeal in *Sketchley* v. *Canada (Attorney General),* [2005] F.C.J. No. 2056, 2005 FCA 404, a reviewing body must refrain from adopting the standard of review used by other judges reviewing decisions of the Commission under the same legislative provision. As such, I will begin my analysis by engaging in my own assessment of the pragmatic and functional analysis in order to determine the level of deference owed to the Commission in this case.

[35] Privative Clause

There is no privative clause in the CHRA, nor is there any statutory right of appeal. The absence of a privative clause is understood to be a neutral factor (*Dr. Q* v. *College of Physicians and Surgeons of British Columbia,* [2003] 1 S.C.R. 226, 2003 SCC 19).

[36] Nature of the Question

The applicant alleges that the Commission erred in approving the minutes of settlement under section 48 of CHRA on the basis that no settlement had been agreed on by the parties. Thus, the question before this Court is whether or not the Commission erred in finding that a settlement had been agreed on by the parties. While the determination of what constitutes a settlement is a question of law, the requirement that it be agreed to by the parties is fact dependent. As a result, I find that this issue is one of mixed fact and law; a mid-level of deference is owed.

[37] Relative Expertise

In considering the relative expertise of the Commission in comparison to that of the Court, the nature of the question at issue must be kept in mind. As noted in *Loyer* v. *Air Canada*, [2006] F.C.J. No. 1473 at paragraph 47, 2006 FC 1172, the mandate of the Commission "requires that it deal, on a daily basis, with examination and resolution of human rights complaints." Thus, it appears that issues of settlement appear to fall directly within the expertise of the Commission. However, the nature of the question at issue is whether or not the parties agreed to the settlement. I am of the belief that this is more a question of contract law, which falls within the expertise of the Court. This consideration attracts a less deferential standard.

[38] Purpose of the Legislation and Section

Section 2 of CHRA articulates that the purpose of the Act is to ensure equality by preventing discriminatory practices based on a series of enumerated grounds. In *Sketchley* above, the Federal Court of Appeal found that "the protection of human and individual rights is a fundamental value in Canada and any institution, organization or person given the mandate by law to delve into human rights issues should be subjected to some control by judicial authorities."

[39] As for the purpose of section 48, in *Loyer* above at paragraph 87 Justice Mactavish made the following comments regarding the purpose of section 48:

> There has been little judicial consideration of section 48 of the *Canadian Human Rights Act*. However, when the section is read in context, consistent with the aims of the Act as a whole, and in light of the public interest mandate of the Canadian Human Rights Commission, it is clear that the section is there to ensure that the Commissioners themselves have input into settlements, so as to

> ensure that the remedial goals of the Act are adequately addressed in the resolution of individual complaints.

[40] It appears that Parliament's intent was to give the Commission a great deal of discretion under section 48 in approving or rejecting settlements. This naturally points to more deference. However, the effect of the approval appears to end the complainant's claim with the Commission with the exception of enforcement of the settlement found within the section under subsection 38(3). These factors suggest a mid-level deference.

[41] Conclusion

Having applied the four factors of the pragmatic and functional approach, I am of the opinion that the appropriate standard of review in this case is reasonableness *simipliciter*.

[42] **Issue 2**

Did the CHRC err in finding that a settlement had been agreed to by the parties as required by section 48 of CHRA?

In deciding whether or not the Commission erred in finding that there existed a settlement agreed to by the parties, the evidence before the Commission when it made its decision must be considered.

[43] The issue was put before the Commission by way of the conciliator's report dated April 3, 2003, which reads as follows:

> The parties met in conciliation on 21 February, 2006, and agreed to settle the complaint as per the attached Letter of Understanding, signed by the parties as well as their respective legal counsel. It was understood by the Conciliator and by the parties that the Letter of Understanding was drafted as an interim settlement due to time constraints. This intention is clearly set out in the preamble of the Letter of Understanding. After the conciliation, the respondent provided some additional information for clarification purposes and in order to address some of the commitments in Letter of Understanding.
>
> The formalized Minutes of Settlement, attached, was subsequently provided to the parties, however, the complainant has refused to sign the Minutes of Settlement.
>
> It is recommended, pursuant to section 48 of the *Canadian Human Rights Act*, that the Commission approve the terms of the settlement agreed to by the parties.

[44] This report shows that the Commission had both the letter of understanding and the minutes of settlement before it, when it made its decision.

[45] The letter of understanding was signed by both parties as an interim settlement and was not a final settlement as further matters had to be completed. Term 6 of the letter of understanding states that “the Respondent agrees to provide a letter of employment to be drafted and mutually agreed upon prior to the signing of the Minutes of Settlement.” Term 7 states that “the Respondent will endeavour to identify the key activities/positions prior to the signing of the Minutes of Settlement.” The inclusion of the requirement that these tasks be completed before the signing of the minutes of settlement and the inclusion of the requirement in term 6 that the letter of employment be “mutually agreed upon” support the conclusion that the letter of understanding was only a preliminary document. These requirements provided the applicant with the guarantee that if he was not satisfied

with the letter of employment or the key activities/positions identified, he had the option to show his dissatisfaction by not signing the minutes of settlement.

[46] The respondent submits that this simply was not the case and that these documents did not require the applicant's approval. I cannot agree with this statement. These requirements were included for a reason and to ignore their presence would deny the applicant his right to approve or disprove these documents by signing or refusing to sign the minutes of settlement.

[47] As for the minutes of settlement, the applicant refused to sign this document and as such, I cannot accept that it constituted "a settlement agreed to by the parties" as required by section 48 of CHRA. Furthermore, in rendering its decision, the Commission had before it a letter from the applicant's legal counsel expressing that the applicant was unsatisfied with the letter of employment and job description provided by the respondent and as such, refused to sign the minutes of settlement.

[48] In my opinion, the Commission's decision to approve the letter of understanding and minutes of settlement under section 48 of CHRA was unreasonable. The evidence before the Commission included a signed interim settlement that required certain tasks be completed by the respondent and subsequently approved by the applicant and an unsigned final settlement. In light of these circumstances, I find that the Commission's decision to approve the settlement pursuant to section 48 of CHRA does not stand up to a somewhat probing examination. Accordingly, the application for judicial review must be allowed and the decision of the Commission dated August

11, 2006 is set aside. The matter is referred back to the Commission to be dealt with in accordance with the law.

[49] The applicant shall have his costs of the application.

JUDGMENT

[50] **IT IS ORDERED that:**

1. The application for judicial review is allowed, the decision of the Commission is set aside, and the matter is referred back to the Commission to be dealt with in accordance with the law.

2. The applicant shall have his costs of the application.

"John A. O'Keefe"

Judge

ANNEX

Relevant Statutory Provisions

The relevant statutory provisions are set out in this section.

Canadian Human Rights Act, R.S.C. 1985, c. H-6:

2. The purpose of this Act is to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for an offence for which a pardon has been granted.	2. La présente loi a pour objet de compléter la législation canadienne en donnant effet, dans le champ de compétence du Parlement du Canada, au principe suivant : le droit de tous les individus, dans la mesure compatible avec leurs devoirs et obligations au sein de la société, à l'égalité des chances d'épanouissement et à la prise de mesures visant à la satisfaction de leurs besoins, indépendamment des considérations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, l'âge, le sexe, l'orientation sexuelle, l'état matrimonial, la situation de famille, la déficience ou l'état de personne graciée.
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.	48.(1) Les parties qui conviennent d'un règlement à toute étape postérieure au dépôt de la plainte, mais avant le début de l'audience d'un tribunal des droits de la personne, en présentent les conditions à l'approbation de la Commission.

(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.

(2) Dans le cas prévu au paragraphe (1), la Commission certifie sa décision et la communique aux 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.

(3) Le règlement approuvé par la Commission peut, par requête d'une partie ou de la Commission à la Cour fédérale, être assimilé à une ordonnance de cette juridiction et être exécuté comme telle.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1619-06
STYLE OF CAUSE:	VERNON JOHNSON
	- and -
	ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	September 10, 2007
REASONS FOR JUDGMENT AND JUDGMENT OF:	O'KEEFE J.
DATED:	October 4, 2007

APPEARANCES:

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Michael Roach	FOR THE RESPONDENT

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