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Settlement Agreements Can Pose Challenges for Human Rights Commissions

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Cases Commented On: *Buterman v Greater St. Albert Regional School Division No. 29*, 2014 AHRC 8; *Buterman v Greater St. Albert Regional School Division No. 29*, 2015 AHRC 2

It is a well-known principle that one cannot contract out of one's human rights. For example, one cannot contract or agree to be subjected to sexual harassment in the workplace *in the future*. This does not, however, prevent parties from entering into settlement agreements *after* a human rights situation has occurred. Respondents and complainants settling claims under the *Alberta Human Rights Act*, RSA 2000 c A-25.5 (*AHRA*) agree that no further human rights complaints will be made about the current circumstances, in exchange for receiving money or other remedy. There is a long line of case law in which these settlement agreements have been upheld by the Alberta Human Rights Tribunal or the courts. The leading case that sets out the requirements for upholding a settlement agreement is *Chow v Mobil Oil*, 1989 ABQB 1026. The *Buterman* decisions demonstrate some of the access to justice challenges faced by the Alberta Human Rights Commission (AHRC) and the parties when the settlement agreement is at issue.

Jan Buterman is the president of the Trans Equality Society of Alberta (TESA). He wants to encourage all Canadians, including those who are transgender, to understand that transgender Canadians have rights. Buterman is currently working on a campaign to encourage the Senate to withdraw an amendment to a trans*-rights bill that would clarify that "everyone" and "every individual" referenced in the *Canadian Charter of Rights and Freedoms* include transgender people.

The facts giving rise to the *Buterman* decisions occurred when Jan Buterman was a substitute teacher with the Greater St. Alberta Catholic Regional Division No. 29 ("School Division") from March to October 2008. On October 1, 2009, he complained to the AHRC that he was discriminated against in the area of employment on the grounds of gender, mental and physical disability. Buterman claimed that when he advised the School Division that he was diagnosed with gender identity disorder, and that he intended to undergo hormone therapy and sexual reassignment surgery, the School Division terminated him by removing his name from the substitute teacher roster. The School Division denied that it had discriminated against Buterman, arguing that it would be undue hardship to maintain Buterman's employment because gender reassignment is inconsistent with the teachings of the Catholic Church.

In 2013, the School Division applied to the Court of Queen's Bench for judicial review of the Chief Commissioner's decision to refer the matter to a Tribunal. On a preliminary application,

Madam Justice Sheila Greckol refused the Director of the Commission's application to strike out the School Division's application for judicial review because it was brought too late (see: *Greater St. Albert Regional School Division, District No. 734 v Buterman*, 2013 ABQB 485). Next, the School Division applied for judicial review of the decision of the Chief Commissioner to refer the matter to a Tribunal hearing and his decision not to refer the matter back to the Director of the Human Rights Commission for settlement purposes (see: *Greater St. Albert Regional School Division District No. 734 v Buterman*, 2014 ABQB 14). Madam Justice Greckol held that the Director reasonably concluded that he did not have the statutory authority to decide settlement issues at the point in the process he was requested to do so, and that the Chief Commissioner reasonably decided he did not have the authority to order the Director to decide the settlement issues. In dismissing the application for judicial review of these decisions and the decision of the Chief Commissioner to order a Tribunal hearing, Justice Greckol noted that the School Division's activities had served only to delay a hearing on the merits (at para 183). She went on to state (at para 184):

> Human rights process is not only for the lion-hearted and well-heeled conversant with litigation, but also for the timorous and impecunious - for all Albertans. The expeditious resolution of complaints becomes an issue of access to justice; justice delayed is justice denied since true, restorative remedies become increasingly elusive by effluxion of time.

The first sign that the *Buterman* decisions referred to in this post would be challenging was the appointment of a three-member Tribunal. In most cases, only one member sits on the Tribunal. In the past three years, I could find only one other reported case where the Tribunal consisted of more than one person. The second sign that these cases were challenging is that the three-member panel released majority (William J. Johnson, Q.C., Tribunal Chair and Joanne Archibald, B.A., LL.B., Tribunal Member) and dissenting (Sharon Lindgren-Hewlett, B.Comm., LL.B.) reasons for decision.

Buterman, 2014 Human Rights Tribunal Decision

The 2014 *Buterman* decision addressed whether the AHRC had lost jurisdiction over the case because of a settlement agreement between the parties. After the complaint was filed in 2009, the parties entered into a period of negotiations. On October 2, 2009, Mr. Feehan, counsel for the School Division, sent an offer of settlement to Mr. Michaud, who was then counsel for Buterman. The settlement proposed that in exchange for payment of $78,000, Buterman would withdraw his complaint and promise not to commence any further human rights complaint or legal processes arising out of the circumstances from which Buterman was removed from the substitute-teaching list, and would sign standard Release and Confidentiality clauses *(Buterman*, 2014, at para 13).

On November 12, 2009, Michaud replied, indicating that Buterman would not accept the offer. For the next several months, there was communication between the parties in effort to settle the matter. On September 8, 2010, Michaud wrote to Feehan expressing a desire to know whether the original offer of settlement was still open, and that if it was, Buterman was prepared to accept the offer and they would discuss the details of the settlement (at paras 14-16).

The Tribunal provides an excerpt of the letter (at para 16):

> *... Mr. Buterman has instructed us to notify you that he is willing to accept the proposal put forward by GSACRD on October 2, 2009 according to which*

> *GSACRD would make a conciliation payment to Mr. Buterman in the amount of $78,000. In view of GSACRD's commitment to finding a fair and reasonable resolution, we expect that this offer is still open for acceptance notwithstanding Mr. Buterman's earlier rejection of the offer.* (emphasis added)

Feehan responded that the offer had always been open and concluded the letter with practical details such as the provision of a cheque for $78,000 in trust and the withdrawal of the human rights complaint (at para 18). There were a number of letters exchanged between Feehan and Michaud over the next several months addressing the form and requirement of three documents: withdrawal of complaint; a covenant (usually to maintain confidentiality); and a release. On January 4, 2011, Feehan wrote to Michaud and enclosed a trust cheque for $78,000, together with a request to receive the amended three documents (at para 21). On January 7, 2011, Michaud wrote to Feehan, returning the cheque and indicating there was an issue with respect to the settlement documentation that they wanted to discuss with Feehan. Until that agreement had been reached, Buterman was not prepared to accept the settlement funds (at para 22).

On March 18, 2011, Michaud wrote to Feehan to advise that he no longer represented Buterman. On April 7, 2011, Feehan wrote Buterman, indicating that the complaint had been conclusively settled with the previous counsel in 2010. Feehan explained that his firm held the cheque in trust, and attached the settlement documents to be signed and returned (at para 14). The School Division first became aware that Buterman did not want to proceed with the settlement when the media reported that he wanted to proceed to a hearing on the merits of the case (at para 25).

The three-member Tribunal was asked to determine whether a settlement had been reached between the parties on September 8, 2010. The issue then became one of contract law; whether there was offer and acceptance and what might be the impact of the parties' failure to conclude and execute the settlement documentation. The letter of October 2, 2009 was considered to be an offer to pay a sum of money in exchange for Buterman's withdrawal of the complaint, a promise not to pursue legal process related to his removal from the substitute teaching list, and an agreement to keep the matter confidential (at paras 28, 29).

The issue was whether the offer remained open for acceptance, even after Buterman rejected it in October, 2009. Buterman argued that the letter of September 8, 2010 was merely an inquiry about whether the money was still available and that he intended to work on other elements that might be part of an eventual settlement. The School Division argued that the exchange of correspondence between the lawyers on September 8, 2010 indicated that the offer had been accepted.

A majority of the Tribunal concluded that the offer of October 2, 2009, remained open and available for acceptance when Michaud sent the letter of September 8, 2010. The majority also concluded that the language of the letters exchanged between the lawyers indicated that the offer indeed remained available for acceptance (e.g., "willing to accept"; and "we expect that this offer is still open for acceptance notwithstanding Mr. Buterman's earlier rejection of the offer") (at paras 43-44). Thus, the letters exchanged satisfied the requirements of offer and acceptance such that the parties had entered into a settlement agreement on September 8, 2010 (at para 44).

While parties may reach a settlement before they complete the settlement documentation, if the terms of the documentation are significantly altered or added to, this may negate the agreement (*Gilles Caron v City of Edmonton*, 2014 AHRC 2 (*Caron*)). In *Buterman*, the majority was

convinced that there was no evidence of addition of terms to which the parties had not previously agreed, and thus *Caron* was distinguished (at paras 50-1).

Based on the evidence that was before the Tribunal, it seemed clear that the parties were at the stage of completing the settlement agreement and they would then mutually pursue acceptable wording to properly record the settlement (at para 57). Further, the majority was not persuaded that the draft documents prepared by the School Division were evidence of repudiation of the agreement. Repudiation occurs when one party of the contract is relieved from the contract's future performance by the conduct of the other party. The documents had been identified as draft in the text of the letter, and there was no insistence that the documents be returned in the form in which they had been presented (at paras 61-63).

The majority also held that the letter of April 7, 2011 was a continuation or renewal of earlier discussions and not an act of repudiation. The evidence did not support a finding that the School Division's presentation of a draft covenant and a draft release amounted to frustration, renunciation of the settlement agreement, or a refusal to perform the obligations of the settlement agreement of September 8, 2010 (at para 66).

The majority found that the parties reached a settlement of Buterman's complaint on September 8, 2010, and it remained for the parties to determine the outcome of their executory (not yet fully completed) settlement agreement (at para 70). Further, the Tribunal determined that it would retain jurisdiction over the matter in order to address any further issues that arose with respect to the execution (completion) of the settlement agreement (at para 71).

The dissenting Tribunal member found that there was no meeting of the minds with respect to the essential terms of the settlement. Since human rights issues are constitutional or quasi-constitutional in nature, they are very important to each party, and the nature of the human rights alleged to have been violated and the nature of any defences affect the essential terms (at paras 73-74). Further, there was insufficient evidence to establish that the three settlement documents contained terms that could be reasonably implied (at para 75). The respondent School Division was bringing the preliminary application for an order that the Tribunal had lost jurisdiction, so it had the onus of establishing that a meeting of the minds had occurred with respect to the essential terms so as to enable to find there was a final settlement agreement. This had not been established, so the application should be dismissed (at para 76).

In the alternative, the dissenting member found that the School Division had tendered potentially excessive documents to complete a settlement that did not match the terms of the final agreement previously reached, and thus had repudiated the agreement or made a counter offer. Thus, there would be no final and binding settlement agreement that would be the basis of a loss of the Commission's jurisdiction (at para 77).

Buterman, 2015 Human Rights Tribunal Decision

The 2015 decision addressed whether the Tribunal had any remaining jurisdiction over the matter, given the course of dealings between the parties since the October 30, 2014 matter was decided.

The same three Tribunal members made a decision in February 2015 regarding the Tribunal's jurisdiction. Once again the same Tribunal members were split two to one.

After the majority decision of October 30, 2014, the parties took the following steps with respect to the settlement (*Buterman*, 2015, at paras 9, 11):

- November 3, 2014 – Tribunal was advised that the School Division would be providing the agreed sum plus interest, and a draft withdrawal, covenant and release to the complainant.

- November 5, 2014 – School Division's counsel provided a trust cheque and the documents to the counsel for Buterman.

- November 6, 2014 – Buterman's counsel returned the documents.

- November 14, 2014 - Buterman's counsel filed an Originating Notice in the Court of Queen's Bench with respect to the October 30, 2014 decision. This is scheduled to be heard October 15, 2015.

- November 17, 2014 – Buterman's counsel requested that the Tribunal grant an adjournment and a stay of further steps, including a hearing that was scheduled for December 3 to 5, 2014 and March 25-27, 2015, to allow the appeal to be heard. School Division's counsel consented.

- November 21, 2014 – The Tribunal wrote to the parties asking them to address a decision regarding the finality of interim rulings: *Syncrude Canada Ltd v Alberta (Human Rights and Citizenship Commission),* 2008 ABCA 217.

[*Syncrude Canada Ltd v Alberta (Human Rights and Citizenship Commission),* 2008 ABCA 217 dealt with the principle that an interlocutory motion may or may not result in a final decision that may be appealed. Statutory appeals of interlocutory decisions are not contemplated under the *AHRA*. In this case, the decision that Syncrude could not be released as a party was not a final decision and the appeal was premature. When the *Buterman* 2014 decision is addressed on appeal, the School Division will likely argue that the appeal was premature, while Buterman's counsel will argue that the effect of the decision was final and thus the order was subject to an appeal.]

- November 24, 2014 – Counsel for the School Division again provided a trust cheque for the settlement amount plus interest to Buterman's counsel, together with a waiver of all other documents that had originally been requested to be signed (i.e., the withdrawal, covenant and release). In a separate letter, School Division's counsel indicated that it did not take these actions in order to prejudice the scheduled appeal.

- November 28, 2014 – The Tribunal wrote to the parties indicating that the recent correspondence raised questions about the execution of the settlement agreement, whether it had been finalized and whether the complaint was settled. The Tribunal needed to consider whether it had any remaining authority to consider the merits of the case, or whether the case had been extinguished through settlement. The Tribunal indicated it would convene on December 3, 2014 in order to consider the arguments of counsel regarding whether the settlement had been finalized and whether the Tribunal had any further authority over the complaint.

The majority concluded that on October 30, 2014, the evidence showed that the parties had exchanged promises that had not been fulfilled. On November 24, 2014, when the settlement funds were sent to Buterman and the School Division waived the requirement of the withdrawal, covenant and release, the agreement was fully executed (i.e. fully completed) (at para 14).

The majority also concluded that it had no further jurisdiction over the matter. The majority noted that its decision was consistent with *Chow v Mobil Oil Canada*, in which the Alberta Court of Queen's Bench held that a concluded settlement that is not in dispute is not only binding on the complainant but must also be accepted by the AHRC (at para 20).

The issue of whether Buterman had entered a settlement agreement was decided by the majority in October 30, 2014. Now that the executory settlement agreement had been executed, the tribunal was without jurisdiction to proceed with Buterman's human rights complaint.

The dissenting Tribunal member disagreed. The School Division had forwarded a revised release, covenant and withdrawal letter and ultimately had retracted some of the terms that it had previously argued were essential terms of the final settlement agreement. Therefore, the School Division should not be allowed to come back again before the Tribunal requesting that the new agreement with different terms should be enforced as a final settlement agreement (at para 23). One party should not be allowed to unilaterally waive or change the essential terms of a final settlement agreement and then return to the Tribunal to seek another determination as to its loss of jurisdiction (at para 25).

Commentary

It appears that the School Division was very anxious to settle this case before the merits were considered. It was so anxious that it waived Buterman's execution of all of the documents it had required (release, covenant and withdrawal). The majority held that the waiver rendered the settlement agreement, which had been held to be executory, to be executed, and caused the majority to conclude that it had lost jurisdiction. This occurred in the context of Buterman desiring the case to be considered on its merits, and his desire to educate all Canadians about transgender rights.

We should be clear about the impact of the School Division's waiver on the case. The withdrawal of the complaint would no longer be necessary if the Tribunal held that it had lost jurisdiction, so the School Division was not really giving up anything when it waived the withdrawal requirement.

If we believe the description of the contents of the covenant provided in *Buterman,* 2014, it would likely have been found to be unenforceable, and thus would not have been of much use to the School Division. Confusingly, the decision seems to conflate the terms of the release with the terms of the covenant, which is likely because they are often part of one document. One term of the draft covenant, according to the superintendent of the School Division, referred to all possible forms of a Catholic school in Alberta and extended to 23 school divisions (*Buterman*, 2014, at para 36). It is not clear whether this refers to the covenant for confidentiality or the

release of liability. Buterman believed that he was being asked to covenant not to bring any human rights complaint related to his gender identity against any school in Alberta from now until forever. This would have been of great concern to Buterman, and could have been considered illegal and unenforceable. He was also concerned about the broad confidentiality provisions in the release (*Buterman*, 2014, at para 52).

Buterman argued that the terms of the release were so materially altered that the School Division must have repudiated the settlement agreement. For example, additional parties were added and it appeared that it would release the School Division from liability for future violations of the *AHRA*. The decisions indicate that Buterman wanted to gain teaching experience, and this term implied that he would not be able to make a case against any school that refused to hire him or place him on the substitute roster because of his gender identity.

The majority held that concerns about the release and covenant were alleviated because the documents were presented in "draft" form. But, as pointed out by the dissenting member, in the human rights context, a final settlement must enable both parties to clearly understand their rights and obligations and if it does not create certainty, there can be no final settlement (*Buterman*, 2014, at para 76). The dissent also noted that the documents were provided to Buterman with the request to sign and return them and no mention of future possible amendments, following several months of unsuccessful negotiations between (at that time) legal counsel, and, at the time he was asked to sign he was unrepresented by counsel. In Buterman's mind, these terms were essential and significant. It is also clear that Buterman did not think he had reached a final settlement.

Now, Buterman is not really clear on his rights and obligations going forward - for example, can he bring another human rights complaint for discrimination by a school in Alberta or is he barred? All he really knows is that his complaint against the School Division is considered settled and he did not get to have a hearing on the merits. In many human rights cases, the remedy desired is not really about money; it is about educating parties about their rights and responsibilities and having respondents acknowledge they have discriminated against someone and are obligated not to continue doing so. There is nothing in this case that indicates the School Division learned anything except how to waive settlement agreement requirements at the last minute in order to make an uncomfortable case "go away". Hopefully, the Court of Queen's Bench will overturn *Buterman*, 2014 later this year so that Buterman gets a full hearing and a remedy that is fair in light of the merits of the claim.