CITATION: Briggs v. Durham Regional Police Services, 2021 ONSC 414
DIVISIONAL COURT FILE NO.: 243/19
DATE: 20210119

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

D.L. CORBETT, PATTILLO and MEW JJ.

B E T W E E N:	
JOSEPH BRIGGS	*Toby Young*, for the Applicant
Applicant	
- and -	
DURHAM REGIONAL POLICE SERVICES BOARD, CHRISTOPHER DELANEY and HUMAN RIGHTS TRIBUNAL of ONTARIO	*David Cowling* and *Alexander J. Sinclair*, for the Respondents the Durham Regional Police and Christopher Delaney
Respondents	*Jason Tam*, for the HRTO

L.A. Pattillo J.

Introduction

[1] The Applicant, Joseph Briggs, ("Briggs") brings this application for judicial review of two separate decisions of the Human Rights Tribunal of Ontario ("HTRO"), dated November 3, 2017 (2017 HRTO 1457) and March 27, 2019 (2019 HTRO 565) respectively.

[2] The HRTO decisions deal with the interpretation and subsequent application of a release Briggs entered into as part of the settlement with the Respondent, the Durham Regional Police Service ("DRPS"), concerning an HRTO application commenced by Briggs against the DRPS in October 2013.

[3] The November 2017 decision held that the release covered an earlier HRTO application commenced by Briggs against the DRPS in April 2012 which had been heard but not decided by the HTRO at the time of the release. The March

2019 decision set aside the subsequent HTRO decision in Briggs' April 2012 application based on the November 2017 decision.

[4] For the reasons that follow, the application is allowed and both the November 2017 and the March 2019 HRTO decisions are set aside. In my view, the November 2017 decision interpreting the release to apply to Briggs' April 2012 HRTO application was unreasonable and cannot be upheld. Further, as the March 2019 decision canceling HRTO's earlier decision in Briggs' April 2012 application is based solely on the November 2017 decision, the subsequent decision cannot stand and must also be set aside.

Background

1. Briggs' April 2012 HRTO Application

[5] Briggs is a young Black man. On May 4, 2011, he was followed into the parking lot of a sandwich shop in Pickering, Ontario by two DRPS officers, who proceeded to check his licence plate and when he left the parking lot, followed him, pulled him over, questioned and then handcuffed and detained him.

[6] In April 2012, Briggs filed an application with the HRTO pursuant to s. 34 of the *Human Rights Code* R.S.O. 1990, c. H.19, as amended (the "*Code*"), against the DRPS and the Respondent, Christopher Delaney ("Delaney"), a police constable with DRPS (HTRO File No. 2012-11340-1). The application alleged discrimination by the DRPS and Delaney on the basis of race, colour, ethnic origin and reprisal arising out of the May 2011 incident ("Application 1").

[7] Application 1 came for a hearing on October 3, 2013 before HRTO Vice-Chair Alison Renton (the "Member"). The Member bifurcated the hearing to first deal with liability and monetary remedies, reserving non-monetary remedies to a further hearing if necessary. The hearing continued intermittently for four more days, concluding in June 2014 at which time, the Member reserved her decision.

2. The October 2013 HRTO Application

[8] On October 8, 2012, Briggs was arrested, detained and subjected to unlawful force and assault at an Oshawa police station by the DRPS.

[9] A subsequent investigation of the October 8, 2012 incident by the Office of the Independent Police Review Director concluded that excessive force had been

used against Briggs in the search room and that he had been denied medical assistance contrary to DRPS Policy.

[10] On October 8, 2013, Briggs filed a further application at the HRTO against DRPS, the Durham Regional Police Services Board (the "Board") and DRPS police constables Paul Grigoriou and Joseph Kehoe (HTRO file No. 2013-15697-1) alleging that his arrest on October 8, 2012 and the subsequent mistreatment he was subjected to at the police station were reprisal under the *Code* for having filed Application 1 ("Application 2").

[11] While the decision in Application 1 was still under reserve, Application 2 came on for hearing on March 2, 2015.

3. The Settlement

[12] On March 2, 2015, the parties to Application 2 agreed to mediate it. In accordance with HRTO practice, the parties to Application 2 entered into a Mediation/Adjudication Agreement providing, among other things, that they agreed to try to resolve some or all of the issues in Application 2 through a mediation/adjudication involving an HRTO Tribunal member. A settlement was subsequently reached in accordance with the terms set out in Minutes of Settlement (the "Minutes").

[13] The Minutes were signed by Briggs on March 2, 2015. As the settlement was conditional on the approval by the Board which did not take place until March 23, 2015, they were signed on behalf of the DRPS on March 25, 2015.

[14] The Minutes have the style of cause and HTRO file number of Application 2 and identify Briggs as the Applicant, the DRPS as the Respondent.

[15] The preamble notes that Briggs filed Application 2 pursuant to s. 34 of the *Code* alleging a breach of the *Code* by the DRPS and the "Personal Respondents" Grigoriou and Kehoe and that the parties wish to resolve "this matter" without further hearing by the Tribunal.

[16] The Minutes then provide, in "full and final settlement of the Application", among other things, that the DRPS will pay Briggs two sums as general damages under the *Code* for pain and suffering: the first payment within two weeks of approval of the settlement by the Board (paragraph 1); the second payment on a date one year and two weeks from the date of settlement provided Briggs has not filed any complaint or commenced any litigation

against the DRPS, the Board or its officers and employees; has not posted any videos or negative commentary on the internet regarding the DRPS, the Board or its officers and employees; and has delivered a full and final release in the form set out in paragraph 7 of the Minutes releasing the DRPS, the Board and its officers and employees from any and all claims up to March 1, 2016 (paragraph 2).

[17] Paragraph 7 of the Minutes provides as follows:

> The Applicant hereby releases the Respondent Durham Regional Police Service, the Durham Regional Police Services Board, and its current and former officers, directors, employees and agents, including for greater certainty the Personal Representatives, from any and all applications, claims, demands, complaints, or actions of any kind up to the date of the settlement agreement or arising out of or in any way related to this Application, including but not limited to claims under the common law, the Ontario Human Rights Code, and the Police Services Act. The Applicant will not make any application, complaint or claim or bring any action against the Respondents and these Minutes of Settlement may be raised as a complete bar to any such application, claim, complaint or action.

[18] The Minutes further provide that Briggs would withdraw Application 2 (paragraph 6) and that upon approval of the settlement by the Durham Regional Police Services Board, the parties would file a completed Form 25 (paragraph 10).

[19] HTRO's Form 25 is entitled "Confirmation of Settlement" and has the style and HRTO file number of the HRTO application being resolved. It confirms, among other things, that the parties have resolved the application based on a written settlement signed by them and that the HRTO will finally dispose of the application and close the file.

[20] A Form 25 in the style of Application 2, confirming the settlement of Application 2 and the withdrawing Application 2 against the Respondents, including constables Grigoriou and Kehoe, was signed on behalf of the DRPS on March 24, 2015 and by Briggs on March 30, 2015 and filed with the HRTO.

4. Subsequent Events

[21] As noted, the hearing in Application 1 concluded in June 2014 and the Tribunal reserved her decision.

[22] On June 19, 2015, counsel for Briggs contacted the Case Processing Officer at the HRTO about the status of the decision in Application 1 and was advised that the decision was still pending.

[23] On November 10, 2015, still not having heard from the HRTO, counsel for Briggs enquired of counsel for the DRPS if they had any information concerning the status of the decision in Application 1. DRPS' counsel responded that it was their position Application 1 had been resolved by the settlement of Application 2. Briggs responded disputing the DRPS' position.

[24] On November 16, 2015, Briggs, counsel contacted the Registrar of the HRTO by email, copying the DRPS, requesting an update on the status of the decision in Application 1.

[25] On November 19, 2015, the Associate Chair of the HRTO wrote to the parties and advised that she had spoken with the Member and expected that the decision in Application 1 would be released by December 4, 2015.

[26] By letter dated November 20, 2015 (but not sent to the HRTO until December 14, 2015), counsel for the DRPS advised the HRTO that Application 1 had been settled in March 2015. Briggs immediately responded to the HRTO on December 15, 2015, stating that Application 1 had not been settled.

[27] On December 18, 2015, and unaware of the above correspondence to the HRTO, the Member released her decision in Application 1. The decision found that Briggs had been racially profiled, discriminated against and reprised against under the *Code* in respect of the May 2011incident; awarded Briggs damages of $10,000; and provided if the parties were unable to agree on the outstanding issue of non-monetary remedies, a continuation hearing would be held (the "Merits Decision").

[28] On February 18, 2016, the DRPS advised the HRTO and Briggs that it intended to seek judicial review of the Merits Decision.

[29] On March 2, 2016, Briggs sent his signed release to the DRPS in accordance with the terms of the Minutes. The DRPS subsequently refused to pay him the second payment due under the Minutes on the ground that he was in breach of the settlement. As a result, on May 24, 2016, Briggs commenced a third HTRO application for Contravention of Settlement.

[30] On April 22, 2016, the DRPS filed its application for judicial review with this court in respect of the Merits Decision in Application 1. The application was perfected in March 2017 and a hearing date was set for October 25, 2017. The October 25, 2017 date was subsequently adjourned as a result of the following events.

5. The November 3, 2017 Decision

[31] On June 2, 2017, the Member, on her own initiative, issued a Case Assessment Direction ("CAD") stating she had become aware of the dispute between the parties as to whether Application 1 had been settled prior to release of the Merits Decision and offering the parties the opportunity to make submissions on the issue.

[32] Following submissions from the parties, and a hearing on October 18 and 19, 2017, the Member issued what she referred to as an "interim decision" on November 3, 2017, concluding that Application 1 was covered by the release language in the Minutes which were entered into prior to her release of the Merits Decision in Application 1 (the "Interim Decision").

[33] After setting out the agreed facts, paragraphs 1 and 7 as well as parts of paragraphs 2 and 10 of the Minutes followed by the parties' lengthy submissions, the Member set out the legal principles that apply to contractual interpretation generally and minutes of settlement and releases specifically. The Member's analysis begins at paragraph 59 of the Interim Decision. She concludes, among other things:

a) For the purpose of the decision it did not matter whether the settlement was effective on March 2, 2015 when Briggs signed the Minutes or March 24, 2015 when the DRPS signed;

b) As part of the factual matrix, the parties were aware at the time of the settlement that the hearing in Application 1 had ended and the decision remained under reserve;

c) Form 25 filed in Application 2 pursuant to the Minutes could not be considered to determine whether Minutes are ambiguous as it is "post-settlement evidence" and not part of the factual matrix;

d) While it is clear from a review of the Minutes as a whole that Application 2 was resolved, the Minutes resolve more than Application 2. They resolve "any claims" up to March 2016;

e) Application 1 is covered by the "any and all applications" language in paragraph 7 of the Minutes. It is included unless specifically excluded, relying on the Court of Appeal decision in *Biancaniello v. DMCT LLP*, 2017 ONCA 386 at para. 49;

f) The Tribunal further relied on *Arcand v. Abiwyn Co-operative Inc.*, 2010 FC 529, at para. 56, upheld 2011 FCA 170.

g) There was no objective evidence that Briggs wished to keep open the possibility of continuing Application 1.

h) The Minutes are not ambiguous, and Application 1 is covered by the release language in paragraph 7.

6. The March 27, 2019 Decision

[34] Following the Interim Decision, the Member held further hearing dates on the issues of whether it would be an abuse of process for her to hear and decide the remaining remedial issue in Application 1 and whether she had the jurisdiction to vacate its decision in Application 1. The last hearing was held on January 23, 2018.

[35] On March 27, 2019, the Member released her decision concluding that in light of the fact that the HRTO had been advised that there was an issue concerning whether Application 1 had been settled prior to the release of the Merits Decision on December 18, 2015, it was an abuse of process for her to have issued the Merits Decision. Accordingly, the Member set aside the Merits Decision (the "Reconsideration Decision").

Standard of Review

[36] Section 45.8 of the *Code* provides that a decision of the HRTO can only be altered or set aside on judicial review if it is "patently unreasonable".

[37] In *Shaw v. Phipps*, 2010 ONSC 3884 (Div. Ct.), aff'd 2012 ONCA 155, this court held, having regard to *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008]

1 S.C.R. 190, that the "patently unreasonable" standard in s. 45.8 is equivalent to "reasonableness".

[38] The HTRO submits, in light of the recent decision of the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration v. Vavilov*, 2019 SCC 65, the standard of review from its decisions is "patently unreasonable".

[39] Subsequent to *Vavilov*, the HRTO has repeatedly submitted that *Vavilov* overrules *Shaw v. Phipps*. In response, this court has rejected the HRTO's submissions and held that the principle in *Shaw v. Phipps* still applies. See: *Intercounty Tennis Association v. Human Rights Tribunal of Ontario*, 2020 ONSC 1632; *Ontario v. Association of Ontario Midwives*, 2020 ONSC 2839; and *Xia v. Board of Governors of Lakehead University*, 2020 ONSC 6150 at paras. 14-17.

[40] Briggs and the DRPS, relying on *Intercounty Tennis*, agree that the standard of review from the HRTO's decisions is reasonableness.

[41] The HTRO submission is based on what it submits is *Vavilov's* clear direction that reviewing courts are to respect legislative standards of review together with the supersedence of *Dunsmuir*'s contextual standard of review analysis. It submits therefore that the holding in *Shaw v. Phipps* is no longer relevant to the standard of review analysis. It further takes issue with the rule of law considerations cited in both *Intercounty Tennis and Midwives* as reasons supporting the application of reasonableness rather than a patently unreasonable standard of review. Finally, the HRTO relies on post - *Vavilov* judicial review decisions in the courts of British Columbia and Alberta.

[42] The HTRO's submissions concerning the standard of review are not new. They are similar to submissions it has made in the earlier cases which have been rejected by the court. I also reject those submissions. In my view, the reasoning as set out in both *Intercounty Tennis* and *Midwives* is correct.

[43] Before us, the HRTO submitted that the issue of the standard of review for HRTO decisions post *Vavilov* had been argued and was under reserve at the Court of Appeal in the case of *Longueépée v. University of Waterloo*.

[44] I note that the Court of Appeal recently released its decision in *Longueépée* (2020 ONCA 830) and declined, in the circumstances of that case, to

determine whether post *Vavilov*, decisions of the HRTO are subject to a "patent unreasonableness" standard of review.

[45] Accordingly, the standard of review from a decision of the HRTO continues to be reasonableness.

[46] As noted in *Vavilov*, at para. 85, a reasonable decision is one that is based on an internally coherent and rational chain of analysis that is justified in relation to the facts and law that constrain the decision maker.

[47] A reviewing court must ask "whether the decision bears the hallmarks of reasonableness – justification, intelligibility and transparency – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision." Vavilov, para. 99.

The Issues

[48] The issues as raised by the parties are:

1. Is the Member's Interim Decision interpreting the release in paragraph 7 of the Minutes to apply to Application 1 unreasonable? and

2. Is the Member's Reconsideration Decision in cancelling the December 2015 decision on the basis that it was an abuse of process and/or moot unreasonable?

Position of the Parties

1) Briggs

[49] Briggs submits that both the Interim Decision and the Reconsideration Decision are unreasonable and should be set aside and the matter remitted back to the HRTO to a different member with directions.

[50] Briggs submits the Interim Decision is unreasonable in that the Member failed to apply the principles of contract and release interpretation. In particular, the Member failed to have regard to both the Minutes as a whole and the factual matrix; erred in her consideration of the factual matrix; erred in her conclusion that the Minutes were not ambiguous; and erred in her reliance on both *Biancaniello v. DMCT LLP*, 2017 ONCA 386 and *Arcand v. Abiwyn Co-operative Inc.*, 2010 FC 529, aff. 2011 FCA 170.

[51] In respect of the Reconsideration Decision, Briggs submits the Tribunal erred in finding an abuse of process and exercised its discretion unreasonably in cancelling its consideration of the outstanding issues in Application 1. Given the DRPS' application for judicial review of the Merits Decision, the Member's cancellation of the decision was premature.

[52] In the alternative, Briggs submits that if he is successful in setting the Interim Decision aside, the Reconsideration Decision, which is based on the Interim Decision, cannot stand.

2) DRPS and Delaney

[53] In response, the DRPS and Delaney submit that the Tribunal's interpretation of the release in paragraph 7 of the Minutes in the Interim Decision was reasonable. The Tribunal carefully analyzed both the language of the Minutes and the relevant factual matrix. Further, there was no ambiguity in the terms of the Minutes.

[54] They further submit that the Reconsideration Decision that the Merits Decision was an abuse of process was also reasonable given the Tribunal's Interim Decision that Application 1 was covered by the release in the Minutes.

The Law

[55] As noted in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at para. 24, the goal of contract interpretation is to determine the objective intent of the parties and the scope of their understanding. The meaning of a contractual term is derived not just from the words used but from the context in which the words are used. In that regard, the contract must be read as a whole, given the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances or factual matrix.

[56] The "surrounding circumstances" or factual matrix consist of objective evidence of the background facts at the time of the execution of the contract, that is knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting: *Sattva*, para. 58.

[57] An ambiguity is where there are two or more possible interpretations to the word or words in issue. In order to determine whether an ambiguity exists, the words of a contract together with the factual matrix must be considered. See:

Arthur Andersen Inc. v. Toronto-Dominion Bank (1994), 17 O.R. (3d) 363 (C.A.) at para. 18; Geoff R. Hall, *Canadian Contractual Interpretation Law*, 3rd ed (2016) at para. 3.4.2

[58] In the event ambiguity exists, evidence of subsequent conduct of the parties is admissible to assist in the contractual interpretation: *Shewchuk* at para. 56. See too: Arthur Andersen at para. 18. As stated by Laskin J.A. in *Montreal Trust Co. of Canada v. Birmingham Lodge Ltd.* (1995), 24 O.R. (3d) 97 (C.A.) at p. 108:

> Subsequent conduct may be used to interpret a written agreement because "it may be helpful in showing what meaning the parties attached to the document after its execution, and this in turn may suggest that they took the same view at the earlier date". S.M. Waddams, The Law of Contracts, 3rd ed. (1993), at para. 323. Often, as Thomson J. wrote in Bank of Montreal v. University of Saskatchewan (1953), 1953 CanLII 166 (SK QB), 9 W.W.R. (N.S.) 193 at p. 199 (Sask. Q.B.): "there is no better way of determining what the parties intended than to look what they did under it."

[59] As discussed in *Shewchuk*, at paras. 42 - 56, there are some dangers in relying on post-contractual conduct such as changes in behaviour over time, ambiguity in the evidence itself or self-serving conduct which the court must be cognizant of before relying on it. The weight to be given to such evidence therefore depends on the circumstances.

[60] In *Biancaniello* at para. 42, the Court, after reviewing seminal cases dealing with the proper approach to the interpretation of a release, set out the following principles:

1. One looks first to the language of a release to find its meaning;

2. Parties may use language that releases every claim that arises, including unknown claims. However, courts will require clear language to infer that a party intended to release claims of which it was unaware;

3. General language in a release will be limited to the thing or things that were specifically in the contemplation of the parties when the release was given;

4. When a release is given as part of the settlement of a claim, the parties want to wipe the slate clean between them; and

5. One can look at the circumstances surrounding the giving of the release to determine what was specially in the contemplation of the parties.

[61] In interpreting the release in question here, it is important to remember that it cannot be looked at in a vacuum. What is contemplated by the parties must be considered having regard to the Minutes as a whole together with the surrounding circumstances or factual matrix: *Hill v. Nova Scotia (Attorney General)*, [1997] 1 S.C.R. 69 at para. 20.

Discussion

A. The Interim Decision

i. Factual Matrix

[62] Briggs submits that the Member ignored and excluded relevant and objective evidence in her determination of the factual matrix or surrounding circumstances. I agree.

[63] In the Interim Decision, the Member specifically noted, citing both *Sattva* at para. 58 and *Shewchuk* at para. 41, that the surrounding circumstances (or factual matrix) should consist only of objective evidence of the background facts at the time of execution of the contract, and knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of the contract.

[64] Contrary to that direction, however, the Member first stated it was not necessary to determine the date the Minutes were executed notwithstanding the authorities are clear that the factual matrix is composed of objective background facts at the time the contract is executed (my emphasis).

[65] Further, by limiting her determination of the factual matrix to the fact that the parties were aware that the hearing in Application 1 had concluded and there was a Tribunal decision on reserve, the Member ignored objective evidence before her which was known to the parties before the Minutes were entered into including that Applications 1 and 2 involved different incidents and DRPS officers; and the terms of the Mediation Agreement which gave rise to the settlement and specifically that it was only in regard to Application 2.

[66] The Member further erred in my view by excluding the Form 25 filed with the HRTO by the parties as part of the settlement of Application 2 from the factual matrix on the basis it was "post-settlement" evidence.

[67] The settlement was conditional on the approval of the Board which didn't occur until March 23, 2015. The DRPS signed the Form 25 on March 24, 2015 and the Minutes on March 25, 2015. The date the Minutes were executed was therefore March 24, 2015. Form 25 was therefore clearly part of the settlement and not "post-settlement" evidence.

[68] In any event, the parties were clearly aware prior to the settlement that in order for a matter to be resolved at the HRTO, the parties to the application were required to sign and file a Form 25.

[69] Accordingly, the objective evidence of the factual matrix prior to the execution of the Minutes included not only that Application which dealt with a separate incident involving a separate officer was under reserve, but also that the Mediation Agreement and its terms concerned only Application 2 and the Form 25 which was filed with the HRTO dealt with only the settlement of Application 2 and the parties to Application 2.

[70] As will be seen, the Member's errors in limiting the composition of the factual matrix or surrounding circumstances directly impacted on her subsequent interpretation of the Minutes and specifically the release in paragraph 7 of the Minutes.

ii. Ambiguity

[71] Briggs submits that the Member wrongly concluded there was no ambiguity in the Minutes and the release concerning whether the release encompassed Application 1.

[72] In the Interim Decision, the Member's finding that the Minutes were not ambiguous comes at the end of the Interim Decision, after she concluded that the "any and all applications" wording in paragraph 7 of the Minutes encompassed Application 1.

[73] The Member's analysis of ambiguity in the Interim Decision consists of a reference early on in the decision to paragraphs 1, 2, 7 and 10 of the Minutes being relevant to the issue of whether an ambiguity exists; and her

determination that the Form 25 filed in Application 2 was "post-settlement evidence" and therefore could not be considered to determine ambiguity.

[74] Although she referred to the fact that when the Minutes are reviewed as a whole it is clear that Application 2 was resolved, the Member gave no consideration to the wording of the Minutes or the evidence of the factual matrix as noted above when considering the question of ambiguity. Rather, she states at paragraph 65 of the Interim Decision:

> However, in reviewing the Minutes as a whole, I agree with the respondents that the Minutes resolve Application 2.

[75] While the Member then goes on to refer to paragraph 3 of the Minutes which refers to the release in paragraph 7 being signed by Briggs as one of the conditions to the payment of the second portion of the settlement in March 2016, it is the "any and all applications" words in the release that is the basis for her conclusion.

[76] As noted, the Member's finding of no ambiguity is made after she has concluded that the Minutes resolve more than Application 2. Further, in making that finding, the Member relied on the fact that there was no objective evidence Briggs wished to keep open the possibility of continuing Application 1 and that his intention was not relevant to whether or not there was ambiguity in the release.

[77] The authorities are clear that ambiguity is not determined on objective evidence of one party's intention. It arises from an analysis of the wording of the Minutes as a whole and the factual matrix to determine whether the words in issue are capable of two or more meanings.

[78] Contrary to the direction in *Arthur Andersen* at para. 18, in reaching her conclusion there was no ambiguity, the Member failed to consider whether, having regard to the wording of the Minutes as a whole, and the factual matrix, there was an ambiguity in what the release covered.

[79] Further, the Member's error in the manner in which she concluded there was no ambiguity was compounded by her error in narrowing the composition of the factual matrix as discussed above.

[80] As a result, I am satisfied the Member's finding that the release covers Application 1 in addition to Application 2 is not based on a coherent and

rational chain of analysis in relation to the facts and the law. The Member erred in her the application of the principles of interpretation of both the Minutes and the release by concluding in the manner in which she did that the Minutes were not ambiguous coupled with her failure to properly determine or consider factual matrix. As a result, the Interim Decision is not reasonable and must be set aside.

[81] In light of the above, I do not consider it necessary to address Briggs' remaining arguments in respect of the Interim Decision.

B. The Reconsideration Decision

[82] As noted, the Reconsideration Decision which sets aside the Merits Decision in Application 1 is based entirely on the Interim Decision and specifically that the release in the Minutes encompasses Application 1 as well as Application 2.

[83] Given my decision that the Interim Decision is not reasonable and cannot stand, it follows that the Reconsideration Decision also cannot stand and must be set aside too.

C. Remedy

[84] Given my conclusion, what is the remedy? As noted, Briggs submits that the matter should be remitted back to the HRTO with directions. Given the circumstances of this case, I disagree.

[85] The issue to be resolved is whether the words in the release in paragraph 7 of the Minutes are ambiguous, or expressed another way, does the release apply to both Application 1 and 2 or just Application 2?

[86] Generally, where a decision being reviewed on the reasonableness standard cannot be upheld, it should be remitted back to the decision-maker to reconsider the matter (*Vavilov*, para. 141). *Vavilov* notes, however, that there are "limited scenarios" where it would not be appropriate to do that, including where timely and effective resolution of the matter would be stymied or where it is evident that remitting the matter would serve no useful purpose (para. 142).

[87] In the circumstances of this case, I am of the view that it would not be appropriate to remit the matter back to the HRTO. The issue is one of

interpretation of the release in the Minutes which involves the application of legal principles of interpretation. As such, it does not engage the HRTO's expertise in Human Rights matters. It is an issue that can be resolved by this court on the record. Nor is it a matter that requires the HRTO to fashion a remedy under the Code as was the case in *Longueépée*. Either the release applies to Application 1 in which case the judicial review will be dismissed or it doesn't in which case Application 1 remains to be completed at the HTRO.

[88] More importantly, the resolution of Application 1 has already experienced significant delay at the HRTO. It was commenced in April 2012. The process before the HRTO has taken far too long and the parties should not be put to the expense and delay of relitigating the issue below and, potentially, again in this court. The issues in the two complaints – serious racial discrimination by a police force against a member of the public – argue strongly for closure after so many years of litigation.

[89] Accordingly, applying the above principles of contract/release interpretation, are the words of the release in paragraph 7 of the Minutes ambiguous?

[90] Having regard to the factual matrix as I have found it, it is clear that Application 1 involved different incidents and different officers of the DRPS than Application 2. Further, based on the Mediation Agreement and the Form 25 both the mediation and subsequent resolution reached related solely and exclusively to Application 2. On the other hand, as noted by the Member, at the time of the settlement, the parties were aware that the decision in Application 1 was under reserve.

[91] In respect of the wording of the Minutes themselves, as noted by the Member, the style of cause and the preamble pertain only to Application 2 and the wording is only in the singular rather than the plural tense throughout. Further, the Minutes provide for a remedial de-briefing of the officer involved in Application 2 concerning the use of force and alternative responses (para. 3); withdrawal of Application 2 versus the officers named in Application 2; agreement to complete a Form 25 (para. 10) and request that the HRTO finally dispose of Application 2 (para. 11).

[92] Turning finally to the wording of paragraph 7, while the words releasing the DRPS "from any and all applications, claims, demands, complaints, or actions of any kind up to the date of the settlement agreement" can be read to include

Application 2, when viewed in the context of the entire wording of paragraph 7, that conclusion is not so clear. The above excerpt concludes "or arising out of or in any way related to the Application, including but not limited to claims under the common law, the *Ontario Human Rights Code*, and the *Police Services Act*." Clearly, Application 1, having preceded Application 2, is not related to it.

[93] The last sentence of paragraph 7 provides "The Applicant will not make any application, complaint or claim or bring any action against the Respondents and these Minutes of Settlement may be raised as a complete bar to any such application, claim, complaint or action." That sentence speaks to future applications or action, not Application 1 which had been brought and heard.

[94] Accordingly, when the words of the release are read in their entirety, together with the wording of the Minutes as a whole and the factual matrix as identified, in my view the Minutes are ambiguous as to whether the release 7 covers just Application 2 or whether it also covers Application 1.

[95] On the one hand, the Minutes as a whole together with the surrounding circumstances concerning the mediation and resulting settlement including the Form 25 which the parties filed with the HRTO support the finding that what is being resolved between the parties is only Application 2. On the other hand, the fact that the parties were aware that Application 1 was under reserve together with the words "any and all applications" in paragraph 7 of the Minutes support the finding that the parties intended to resolve Application 1 as well as Application 2.

[96] In other words, having regard to the surrounding circumstances and the wording of the Minutes as a whole, together with the wording of the release in paragraph 7, it is not clear, in my view, whether it was the intention of the parties that the release in paragraph 7 include Application 1 in addition to Application 2.

[97] Having found the Minutes ambiguous as to whether the release applies to Application 1 as well as Application 2, as noted above, post-settlement evidence may be admitted, subject to weight, to assist in determining the parties' intention.

[98] The post-settlement evidence before the HRTO establishes that for a period of three months after the settlement was reached, neither party took any steps

to advise the HRTO that Application 1 had been settled. As both sides knew at the time of the settlement that the decision in Application 1 was under reserve, at the very least, out of courtesy to the Member and the HRTO, they would have notified it that Application 1 was settled. Yet they remained silent.

[99] Further, when Briggs' counsel contacted the HRTO in June 2015, it was not to advise that Application 1 had been settled but rather to inquire about the status of the decision in Application. Briggs' counsel's position that Application 1 had not been resolved was consistent throughout.

[100] On the other hand, counsel for DRPS took no steps to advise HRTO of the settlement of Application 1 although arguably their client had a greater interest in advising the HTRO of the settlement than Briggs did. It was not until Briggs' counsel raised the issue of the delay of the decision of Application 1 on November 10, 2015, approximately eight months after the settlement, that DRPS' counsel took the position that the settlement included Application 1.

[101] Even after the November 10, 2015 discussion, DPRS' counsel took no steps to contact the HRTO to advise of the settlement. It was not until Briggs' counsel wrote to the HRTO about the status of the decision on November 16, 2015 (copying DRPS' counsel) and the HRTO responded to both counsel indicating that the decision was expected by December 4, 2015 that the DRPS finally wrote to the HRTO and advised that Application 1 had been settled. Even then, although the letter is dated November 20, 2015, it was not sent to the HRTO until December 14, 2015, well after the date the decision was supposed to have been released.

[102] I am mindful that the above conduct consists of the parties' agents as opposed to the parties themselves. Given the conduct concerns a settlement in which the lawyers played a central part, I do not consider their actions to be any less reliable than if it was that of the parties themselves. The lawyers who were directly involved in the settlement were clearly aware of what the parties' intentions concerning settlement were at the time. In my view, the evidence is credible.

[103] Accordingly, I accept the post-settlement evidence which establishes that following the settlement of Application 2 in March 2015, the conduct of the counsel for both Briggs and the DRPS was consistent with Application 1 not being settled by the Minutes.

[104] In my view, when the surrounding circumstances are considered along with the Minutes as a whole and specifically paragraph 7 together with the post-settlement evidence of the parties conduct in respect of Application 1, I am satisfied that Application 1 was not part of the settlement reached by them and that they had no intention of releasing Application 1 when they settled Application 2.

[105] For the above reasons, therefore, I find that the release in paragraph 7 of the Minutes does not cover Application 1.

Conclusion

[106] For the above reasons, therefore, Briggs' judicial review application of both the Interim Decision and the Reconsideration Decision is allowed, and both Decisions are set aside.

[107] As Briggs was successful on both judicial review applications, he is entitled to costs which, in accordance with the parties' agreement, are fixed at $7,500 in total.

[108] The HRTO seeks no costs and the parties have agreed to not seek costs against it.

L. A. Pattillo J.

I agree

D. L. Corbett J.

I agree

G. Mew J.

Released: January 19, 2021

CITATION: Briggs v. Durham Regional Police Services, 2020 ONSC
DIVISIONAL COURT FILE NO.: 243/19
DATE: 20210119

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

D.L. CORBETT, PATTILLO and MEW JJ.

JOSEPH BRIGGS

Applicant

– and –

DURHAM REGIONAL POLICE SERVICES, CHRISTOPHER DELANEY and HUMAN RIGHTS TRIBUNAL of ONTARIO

Respondents

REASONS

L.A. Pattillo J.

Released: January 19, 2021