

GUIDE TO RELEASES WITH RESPECT TO HUMAN RIGHTS COMPLAINTS

**ONTARIO
HUMAN RIGHTS
COMMISSION**

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I. Introduction

The issue of how to deal with releases has been a matter of concern to the Commission.

Under section 34(1)(b) of the *Human Rights Code* [the "Code"] the Ontario Human Rights Commission [the "Commission"] can exercise its discretion to not deal with a complaint where the complaint has been brought in bad faith. The Commission often receives requests from employers to exercise this power in cases where an employee has either been terminated, dismissed, or resigned from his or her position and has then signed a "release."

Many standard form releases will often contain a broadly worded clause simply indicating that the person agrees that he or she "will not bring any proceedings or claims" or "waives all rights" under, amongst other things, the *Code*.

Employers take the position that in the face of such a release to permit the complaint to proceed would constitute bad faith. When confronted with such a claim, complainants usually take the position that they were not aware of what they were signing, or that they did not know about the discrimination at the time the release was signed, or that they did not have enough time to think about what to do, or that they felt pressured into signing the release because they believed that if they did not they would not receive any severance pay at all, or simply that they needed the money right away.

Ontario courts and the Supreme Court of Canada have set out important principles that have assisted the Commission in dealing with these often-difficult "release" cases. Accordingly, the Commission has formed the view that the time is ripe for the development of a guide to releases with respect to Human Rights Complaints. It is hoped that this Guide will serve to assist both employers and employees, and will help them to structure termination agreements and releases that reflect appropriate human rights principles.

In addition, the Commission offers a sample proposed text for a release of a human rights claim. The text is intended to address a number of these important principles. Mere use of the words in this text alone, however, is not enough. Parties to a release should also deal with each other in a manner consistent with the principles and procedures set out in this Guide. It is important, therefore, to review the content of this Guide, including the tips for Employers and Employees in the Appendix in negotiating and concluding a release of a human rights complaint.

The Commission has identified that the standard form release that is often used is problematic for a number of reasons. Accordingly, the Commission proposes the following text as being preferable:

1. The parties agree that they have discussed or otherwise canvassed any and all human rights complaints, concerns, or issues, arising out of or in respect to the employee's employment at Company "A".
2. The parties agree that this agreement constitutes a full and final settlement of any existing, planned, or possible complaint or complaints against the employer under the *Human Rights Code* up to the date of this agreement, arising out of or in respect to the employee's employment at Company "A".
3. The parties agree that the employee has received a separate sum in the amount of \$X as compensation for settling and resolving the outstanding human rights complaint, concern, or issue.
- 3a. [Where the employee agrees that there are no human rights issues or concerns, the following can be included instead of paragraphs 2 and 3]: The employee agrees that he or she is aware of his or her rights under the *Human Rights Code*, and confirms that he or she is not asserting such rights or advancing a human rights claim or complaint.
4. The parties further agree that signing this agreement is not a condition for the employee to first receiving money to which he would otherwise be entitled to by operation of law. Such moneys include the separate sum of \$X for wages, \$Y for statutory severance pay, and \$Z for statutory termination pay.
5. The employee agrees that he [or she] has been given sufficient time and opportunity to obtain independent legal advice before signing this settlement agreement and
 - (a) He [or she] has done so, or
 - (b) He [or she] has freely chosen not to do so.

II. Section 34(1)(b)

A precondition for the operation of s. 34(1)(b) of the *Code* is a finding by the Commission that a complainant has acted in 'bad faith'. The mere existence of the signed release is not, without more information, sufficient to conclude that the human rights complaint was brought in bad faith. Rather, the Commission is required to look into the circumstances surrounding the signing of the release.

In legal terms, the Commission must satisfy itself that the complainant should be estopped (i.e., prohibited) from proceeding with the complaint. To meet the test of 'bad faith' the Commission must find that the evidence reveals, not an honest or negligent mistake on the complainant's part, but an intention to mislead – the conscious doing of

a wrong because of ‘dishonest purpose’ or ‘ill will.’¹

Where a complainant has fully agreed to settle a human rights complaint, has received or was provided with adequate time to receive legal advice; has signed the release form; and has received sufficient consideration; the filing of a human rights complaint may well constitute such a dishonest purpose or ill will. This would prohibit him or her from proceeding with the human rights complaint because to proceed with a complaint that has already been settled would be bad faith.

III. Common Law Principles

A release is a contract. Under that contract, one party agrees not to take any proceedings, or further proceedings, against the other. The purpose of a release is to prohibit person A from proceeding with a subsequent claim against person B.

As a first step, for a contract to exist a court must be satisfied that there was an “accord”, which consists of “agreement” and “consideration” and “satisfaction.”

1. Agreement

Agreement is “a mutual assent to do a thing” - a common understanding.

A court must be satisfied either that the parties had a meeting of the minds, or that the party accepting the funds acted in such a way as to cause the other party to believe and act upon the belief that the settlement was deemed satisfactory, and that no further claim would be advanced.

2. Consideration

Consideration is the *quid pro quo* of a contract – the giving of one valuable thing for another, without which a contract is not valid and binding. An individual who signs a release gives up something valuable - a right - in exchange for something else of value – usually (but not always) financial compensation. For example, in some cases adequate compensation may be an apology, or the removal of a negative reference in an employee’s file.

3. Satisfaction

Satisfaction is the “carrying into effect of an accord”, that is, the carrying out of the

¹ Black's Law Dictionary, 5th Edition (West Publishing Company, St. Paul Minnesota, 1979) p. 127, definition of "bad faith".

agreed upon obligation, such as the payment of the money, or the giving of the apology.

IV. The Special Status of Human Rights Legislation: "Settlement vs. Contracting Out"

A person cannot be required to "contract out" of the protection of the *Human Rights Code*². This means that a person cannot agree to relinquish his or her right to file a human rights complaint, since such a right is guaranteed by section 32 of the *Code* to any person that believes that their rights have been infringed.

However, one can agree to settle a human rights complaint. A settlement is not a promise to relinquish a right, but a promise not to proceed with a claim because it has been resolved. The *quid pro quo* need not be a substantial sum of money, indeed, it may be a letter of reference, or an apology. But there must be evidence that the complainant received some consideration as vindication or recognition of a right.

This distinction between "contracting out," which is prohibited, and settling a complaint, which is permitted, may appear complex at first. However, the difference can usually be determined by the answer to one straightforward question. Did both the employer and employee know of the existence of a human rights complaint, or if not a formal complaint at least of the existence of a human rights concern or issue, prior to the release being signed? If there was no knowledge at all of the presence of a human rights issue between the parties it cannot be said that a human rights complaint was settled. One cannot settle an issue of which one is not even aware. There is not "a meeting of minds." The very first of the common law requirements for a contract, an agreement or accord, is not present. (This can be contrasted with the situation where the complainant positively asserts that he has no human rights issues or concerns and the employer relies on this assertion, which is further discussed below).

When a standard release containing a clause purporting to prohibit the bringing of a human rights complaint is presented to the Commission by an employer in support of a

² Human rights legislation sets out a floor beneath which the parties cannot contract out. Given its public and fundamental nature, "no one, unless clearly authorized by law to do so, may contractually agree to suspend its operation and thereby put oneself beyond the reach of its protection", *Insurance Corporation of British Columbia v. Heerspink*, [1982] 2 S.C.R. 145 at 158. Any contract having that effect is void, as contrary to public policy: *Ontario Human Rights Commission v. Etobicoke (City)*, [1982] 1 S.C.R. 202 at 213-14. Human rights legislation frequently deals with situations where the parties may not possess equal bargaining power. By prohibiting the ability to contract out of the statute, the courts have prevented the exploitation of inequality of bargaining power. If contracting out were allowed, those without bargaining power might be coerced or forced to give up their rights under human rights legislation: *Newfoundland Association of Public Employees v. Newfoundland (Green Bay Health Care Centre)*, [1996] 2 S.C.R. 3 at para. 21. See also: *Leisure World Nursing Homes Ltd. and Director of Employment Standards* (1980), 29 O.R. (2d) 144 (Div. Ct.).

s. 34(1)(b) application, the Commission must be satisfied that the agreement in question is not a case of contracting-out in advance, but is a settlement after the fact. Proof that the parties raised a human rights concern or issue will be required.

Accordingly, as a very first step, the Commission requires some evidence that the parties to a release were aware of the human rights issue. Otherwise, a statement in the release that the complainant agrees not to file a complaint or commence a proceeding under the *Code* will constitute contracting out, and the release will not be evidence of "bad faith" under s. 34. It will not be a bar to proceeding.

Where the human rights issue was discussed or raised in writing between the parties, then the first of the common law requirements will be present. So long as the requirements for consideration and satisfaction are met, the release will likely constitute a valid settlement of the complaint.

This approach is supported by cases that have recognized the unequal bargaining power between employers and employees³. When one side has a strong bargaining advantage it is not unfair to ask it to provide proof that a release, in fact, constitutes a settlement.

Determining whether or not a human rights issue was discussed or raised during the negotiations leading up to the signing of the release may be contentious. The parties may disagree, after the fact, as to whether or not this occurred. In this regard, the conduct of the parties and the terms of the release itself will be important. Where, for example, the respondent can show that it sought details of the human rights issue from the complainant prior to drawing up the release, this will be strong evidence that the

³ In *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 at 1051-1052, the Court quoted with approval the following description of the employment relationship:

The relation between an employer and an isolated employee or worker is typically a relation between a bearer of power and one who is not a bearer of power. In its inception it is an act of submission, in its operation it is a condition of subordination . The main object of labour law has always been, and we venture to say will always be, to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship.

Similarly, in *Milne v. Ocean Express Ltd.* (1989), 26 C.C.E.L. 187 at 189-190 (B.C.C.A.), in which the Court adopted a 'fairness and reasonableness' approach:

Courts have generally implied concepts of reasonableness, or found some way of protecting employees even in the face of written contracts of employment, as the employer or master is usually in a dominant position at the time that the master and servant relationship is created.

issue was raised. Similarly, where the resolution involves an apology from the respondent for the alleged misconduct this is an indicator that the human rights issue was resolved. Finally, in those cases in which the terms of the resolution separately demarcate a sum of money to compensate for “any alleged violations of the human rights of the complainant” this will be a very strong indication that the case involved a settlement of an outstanding human rights issue.

The settlement of a human rights complaint should be explicit. In *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551 at para. 100, the Supreme Court of Canada has stated, in the context of foregoing a right under the *Charter of Rights and Freedoms*:

[A]t a minimum, waiver of a fundamental right such as freedom of religion, if possible at all, presumably need not only be voluntary; it must also be explicit, stated in express, specific and clear terms. Not only would a general prohibition on constructions, such as the one in the declaration of co-ownership, be insufficient to ground a finding of waiver, but arguably so would any document lacking an explicit reference to the affected *Charter* right. (emphasis added)

There is, however, at least one instance where the failure on the part of the parties to raise a human rights concern at the time of the release could still lead to a finding of bad faith. In order to calculate a fair settlement an employer may canvass with the employee all outstanding claims, such as any wrongful dismissal claims, benefit claims, and any outstanding human rights complaints or issues. If the employee, having been given a fair opportunity to consult with a legal or other advisor, expressly says that there are “no” human rights concerns, but later turns around and files a human rights complaint, this may constitute bad faith. This is not because the complaint has been settled. Indeed, if the parties proceeded on the basis that there was no human rights issue it cannot be said that a human rights complaint was settled. Rather, this will be because the employer has relied in good faith on the representations of the employee in an attempt to obtain finality and closure on the issue. The employee's deliberate dishonesty in the face of an explicit request may well disentitle him or her to proceed with a complaint. Such dishonesty would normally amount to the “intention to mislead” or “ill will” that constitutes bad faith. In such a case, the complainant should be required to provide a good explanation as to why he or she expressly stated that there were no human rights issues against the employer. If, for example, the human rights issue did not become known until after the release was signed, or if the employee can demonstrate that he or she truly did not understand or appreciate the content of his or her representation, then there could be a conclusion that no bad faith was present.

Where the evidence is clear that human rights issues did not form a part of the discussions of the parties prior to the signing of the release that will be sufficient to end the inquiry. The release will be an impermissible contracting out of the protections of the *Code*. It will not be necessary to go further and consider the four implied factors set

out in the *Pritchard* case, below.

On this issue of contracting out versus settlement, the Commission provides the following tips for parties involved in preparing and signing a release of a human rights complaint.

- ⇒ An employer should, at the time of termination, ask the employee orally or in writing whether there are any outstanding human rights issues or concerns.
- ⇒ It is important to give the employee a reasonable opportunity to consult with independent counsel or an advisor before being required to answer this question.
- ⇒ Where the answer is "yes," the employer should ask for details, in order to be able to fairly assess what would be a reasonable offer for settling the human rights issues.
- ⇒ Where the answer is "yes," it is optimum to also prepare Minutes of Settlement, in addition to the release, which will expressly deal with the human rights issue.
- ⇒ In addition, where the answer is "yes," the text of the standard form of release should be altered to include a clause that separately recognizes that there is a human rights issue or complaint that has been fully and finally resolved between the parties.
- ⇒ An employee should seek outside independent advice prior to signing a release, or answering a question concerning the existence of a human rights issue.
- ⇒ Where the answer is "no", and the employee has obtained, or had the opportunity to obtain, independent advice, it is appropriate for the release to state that the employee has obtained independent legal advice, is aware of his or her rights under the *Human Rights Code*, and warrants that he or she is not asserting such rights or advancing any human rights claim or complaint.

V. The Four *Pritchard* Factors

There will be cases where the parties tell diametrically opposing stories on the issue of whether or not a human rights issue was discussed prior to the signing of the release. In addition, even where the parties may have discussed human rights issues there may still be disagreement as to whether or not the release constituted a binding, legal

settlement of the human rights complaint. In a leading case, the Divisional Court in *Pritchard v. OHRC*⁴ set out four implied factors that must be examined to determine whether or not the release actually reflects a settlement of a human rights complaint. If it does, then permitting the complainant to proceed with the complaint would be bad faith. These factors are designed to help infer or imply whether a settlement actually occurred. They are:

- 1) Did the complainant understand the significance of the release? This will usually turn on whether or not they were given sufficient time, and a sufficient opportunity to obtain advice.
- 2) Did the complainant receive compensation for the alleged breach of the human rights issue? If, for example, the complainant only received an amount akin to what they would have been entitled to under statute (ex., severance and termination pay under the *Employment Standards Act*) then it may be implied that they did not also receive compensation for the human rights violation.
- 3) Was the complainant subject to such significant economic pressure that his or her consent was negated due to duress?
- 4) Was the complainant subject to such significant psychological or emotional pressure that his or her consent was negated due to duress?⁵

1. Did the complainant misunderstand the significance of the release?

⁴ *Pritchard v Ontario Human Rights Commission* (1999), 45 O.R. (3d) 97 (Div. Ct.). It is important to emphasize that a number of cases prior to *Pritchard* have also recognized these factors as being sufficient to negate the employee's consent to a release. *Lloyd's Bank v. Bundy* [1975] Q.B. 326 per Lord Denning (U.K.C.A.); *McKenzie v. Bank of Montreal* (1977), 70 D.L.R. (3d) 113 (Ont. C.A.); *Blackmore v. Cablenet Ltd.* [1994] A.J. No. 938 (Alta. Q.B.).

⁵ In *Pritchard, supra* at para. 17, the Divisional Court stated as follows:

[T]he facts may show that the employee misunderstood the significance of the release, or received little or no consideration for it beyond statutory entitlements under employment standards legislation, or was in such serious financial need that she or he felt there was not choice but to accept the package offered. To take the approach that there is bad faith whenever a human rights complaint is brought after signing a release risks ignoring the context within which a particular complainant has signed the release and denying access to the investigative procedure under the *Human Rights Code* without assessing the complainant's individual moral blameworthiness in pursuing the complaint.

This will require a consideration of the extent to which the complainant is sophisticated. For example, a human resources manager with years of experience dealing with terminations will rarely be able to claim that he or she was unaware of the significance of the release and settlement documents. An unsophisticated complainant may be in a stronger position to do so. Special consideration should be given to complainants who are experiencing a mental disability such as depression or bi-polar disorder that may impair their ability to understand the significance of the document.

In addition, whether or not the employer explicitly provided the complainant with an opportunity to obtain legal or other advice prior to signing a release will also be significant. Normally, an employer should permit a person a reasonable amount of time to obtain advice. What is reasonable will vary depending on the sophistication of the complainant and the circumstances of each case. Special consideration should be given to complainants with a disability, who may, for example, require additional time to physically meet with and retain counsel.

Further, where the complainant has difficulty finding counsel within a short period of time and requests an extension, an unreasonable refusal by the employer will be taken into account. (See *Pritchard, supra*).

A requirement to sign the release on the same day as the termination strongly suggests that the complainant did not have sufficient time to consult. His or her claim to not understand the significance of the release will have greater weight.

Often a complainant will state that the employer gave them some time to retain counsel for the purpose of reviewing the settlement package but he or she declined to do so. This does not mean that the complainant necessarily understood the significance of the release. The reasons why the complainant rejected the offer of time to review the documents must be considered. For example, if the complainants reasonably believe that they will not get any money at all until the release is signed, and decline the offer of time to consult because of a fear of not being able to make imminent rent payments, this may constitute sufficient duress to support a claim that they did not understand the consequences of what they were signing. As the Court noted in *Clarke v. Optyl (Can)*⁶:

[W]hen they signed the dismissal letters each one of them had been accustomed to fulltime employment; when they were abruptly dismissed they could not help but be concerned as to how they were going to meet their commitments to their families and to their creditors. Each was facing an uncertain future. Each knew, as did their employer, that they had been dismissed in difficult economic times.

⁶ *Clarke v. Optyl (Can)* (1985), 7 C.C.E.L. 1 (N.B.C.A.). See also: *Blackmore v. Cablenet Ltd.* [1994] A.J. No. 938 at paras. 36 to 38 (Alta. Q.B.).

In *Deacon v. Macmillan Bloedel*⁷ an employee was asked to sign a release on the same day as his termination. He asked for more money than was initially offered. This was agreed to by the employer. The employer argued that this negotiation was proof that Deacon understood the significance of what he was signing. The Court disagreed. The Court held:

Having regard to the circumstances that I have described as to the loss of the job, I do not think that an employee who suddenly, unexpectedly, without notice, without expectation, loses his job can be said to be acting as a reasonable and rational individual. I do not imply that the amount suggested by Mr. Deacon constitutes a legal bar to this action he had instituted.

In order for such estoppel or defence to be valid, it would be necessary that Mr. Deacon have independent advice and that he clearly indicate that knowing his rights, he was nevertheless satisfied with the amount and then agreed. He was under economic duress, he was under emotional duress and strain. (emphasis added)

On the other hand, a complainant who formed the opinion that they did not need legal advice or did not want to pay for a lawyer, may be stuck with that decision. This is not because he or she necessarily understood the consequences of what was being signed. They may well have not. Rather, where he or she has been specifically advised that they have sufficient time to respond and there is no pressure or duress, it can separately amount to bad faith for a person to freely elect not to retain counsel and to then use the fact that they consciously chose not to do so in an attempt to get out of a signed agreement.

On this issue of understanding the significance of the release, the Commission provides the following tips for parties involved in preparing and signing a release of a human rights complaint:

- ⇒ An employer should always give an employee a reasonable period of time to retain and instruct counsel or a legal advisor.
- ⇒ Reasonable requests for an extension of time should be granted.
- ⇒ To avoid claims of unwarranted pressure or duress, it is optimum that an employer *not* accept a signed release on the same day as termination (even

⁷ *Deacon v. MacMillan Bloedel Ltd.* (1982) 3 C.C.E.L. 166 at para. 25 (Ont. Dist. Ct.); See also: *Gordon v. Aklavik (Hamlet)*, (1995), 10 C.C.E.L. (2d) 249 (NWT S.C.)

where the employee offers to sign it on that day).

- ⇒ An employee should always seek separate and independent legal or expert advice before signing a release.
- ⇒ The employee should also canvass with their advisor the full range of remedies that may be available at common law, under the *Employment Standards Act*, the *Human Rights Code*, or other statutes.

2) Did the complainant receive compensation for the alleged breach of the human rights issue?

As noted, one of the common law principles is that a person receive consideration in exchange for settling their issue or complaint. Accordingly, if the complainant received a sum of money that appears to compensate him or her for the alleged breach of human rights, then it can be implied that the human rights complaint was settled. If he or she did not, then it is more likely that the human rights issue was not resolved through the signing of the release.

In this regard, attention should be paid to whether or not the complainant received anything other than the statutory entitlement in exchange for a promise not to proceed. Where the amount is around, or just slightly more, than what could have been received, for example, as severance or termination pay under the *Employment Standards Act*, then it is reasonable to infer that the human rights issue was not resolved. The Divisional Court noted in *Pritchard*, for example, that the additional amount received was only two weeks' salary. In addition, the Court commented on the lack of demarcation in the release noting, "the quantum beyond the statutory minimum was not clearly spelled out in the documentation provided to her."

There will be rare cases where it can be demonstrated that the parties never considered the human rights issue at all. The signed release would constitute "contracting out" and not a settlement. In these instances, the case cannot be disposed of under section 34 since it is not "bad faith" to continue with a claim that has not been settled. However, if an examination of the amount of money received demonstrates that the complainant received a sum that would have compensated him or her for the loss of human rights, and the respondent has offered to provide suitable public interest remedies, then this may be a case in which Commission staff may recommend that the procedure of referral is not appropriate pursuant to section 36 of the *Code*, in a manner similar to cases involving a reasonable settlement offer⁸.

⁸ See *Losenno v. Ontario Human Rights Commission* (2005), 78 O.R. (3d) 161 (C.A.) leave to appeal denied [2005] S.C.C.A. No. 531.

On this issue of adequate compensation, the Commission provides the following tips for parties involved in preparing and signing a release of a human rights complaint:

- ⇒ Employers wishing to guard against a claim that they have not compensated a complainant for the human rights issue should consider demarcating in the settlement specific sums for each “head” of damages, such as severance, termination, vacation pay and wages, as well as a set amount in compensation for any alleged human rights concern.
- ⇒ The demarcation can be in separate Minutes of Settlement.
- ⇒ An employee, after consulting with independent counsel or an advisor, should separately negotiate each head of damages or remedy when negotiating the terms of the settlement.

3) Was the complainant subject to undue economic duress in the signing of the release?

If one party is pressured by another party or by circumstance into signing a release, a court may find it “unconscionable” to uphold the agreement. The underlying theory is that the state of duress deprives the contracting individual of the exercise of her or his free will.

For example, in *Adamson v. Watts & Henderson (Atlantic) Ltd.*, [1987] 16 C.C.E.L. 74 (H.C.J.), the Court found that the defendant knew that the plaintiff was under undue financial pressure because his house in Halifax had not been sold, he had rented a home in the Ottawa area and he was out of work with no immediate prospect of employment. The Court found that there was an:

inequality of bargaining position between the plaintiff and the defendant because of the plaintiff's distress, lack of sophistication in business matters and the genuinely felt need of the plaintiff to have his pay continued that put him in a position that he was not thinking as clearly as he should have been at the time when he was discussing his termination with the defendant.

In this context the question of statutory entitlements also arises. Case law has indicated that where an employer states, or strongly suggests, that the complainant will not receive the amount that they are legally entitled to by statute (such as severance and termination payments under the *Employment Standards Act*) unless he or she first signs

a release barring all other claims (including proceedings under the *Human Rights Code*), then this will be found to constitute economic duress.

Case law strongly supports the requirement that the employer cannot withhold, or even imply to the employee that there will be a withholding of, statutory entitlements until the release is first signed.

Lord Denning in the leading case of *Lloyd's Bank Ltd. v. Bundy* [1975], 1 Q.B. 326 at 339 (U.K.C.A.) made it clear that the employer need not have committed any wrongdoing and may indeed be "unconscious of the distress he is bringing to the other." In addition, the stress need not rise to the level of being "undue" to the point that the employee's reason is "overcome." Indeed, the Court recognized that "[o]ne who is in extreme need may knowingly consent to a most improvident bargain, solely to relieve the straits in which he finds himself."

In *Adamson v. Watts & Henderson (Atlantic) Ltd.*, *supra* the Ontario High Court of Justice, following the principles enunciated in *Lloyd's Bank*, held that the plaintiff should be granted relief from the wording of a release. The Court noted that the release had been presented to the employee prior to the employee receiving the cheque in circumstances in which it would have been reasonable for the employee to infer that, if he failed to sign the release, the corporation would not release the cheque.

Similarly, in *Augustine v. Nadrofsky Corporation* (1986), 17 O.A.C. 297 (Div. Ct.), the Divisional Court found that the refusal of an employer to forward the funds unless the fired employee signed the release, negated the consent:

The plaintiff was told that he must sign the document if he was to receive his pay cheque, to which he was entitled. The employer here had absolutely no right to insist that the plaintiff employee sign the agreement or go without the pay he had earned and for which he had a real need. In our view, this unreasonable demand of the employer, having regard to age, and education of the plaintiff and the imbalance of bargaining power between the parties, constituted sufficient coercion to vitiate the legal effect of the document signed.⁹

Accordingly, where a former employer stipulates that severance payments or other monies owed will not be provided if the employee does not sign a release, a state of duress for the employee is created such that the release is of no effect.

On this issue of economic duress, the Commission provides the following tips for parties

⁹ See also *Blackmore v. Cablenet Ltd.*, *supra* at para. 45; *Deacon v. MacMillan Bloedel Ltd.*, *supra*.

involved in preparing and signing a release of a human rights complaint:

- ⇒ The employer should state that the employee will receive his or her statutory entitlements (wages owed, vacation pay, statutory termination or severance payments) regardless of whether he or she signs the release.
- ⇒ The release itself should contain a clause which makes it clear that the signing of the release was not a precondition for the payment of these statutory entitlements.
- ⇒ An employee should first request a calculation or breakdown of his or her statutory entitlements and other entitlements prior to negotiating the terms and conditions of any settlement of an outstanding human rights issue or complaint.
- ⇒ Notwithstanding that he or she may feel that they "need the money right away", an employee should request their statutory entitlements first, and always take time to consult with his or her legal counsel or advisor second, in order to negotiate an appropriate settlement. If the employer refuses to provide the statutory entitlements as required by law, the employee should address this issue with the Ministry of Labour.

4) Was the complainant experiencing undue psychological or emotional duress when signing of the release?

Canadian courts have recognized that duress can also be psychological. Where there has been an "improper use by one party to a contract of any kind of coercion, oppression, abuse of power or authority, or compulsion in order to make the other party consent."¹⁰ Relevant questions to consider are whether the complainant was pressured, humiliated, demeaned, or brow-beaten before signing the release.

In addition, the inquiry can examine whether the employer improperly threatened the complainant with sanctions should he or she not sign the release, for example, suggesting that a criminal investigation into alleged impropriety would otherwise be called unless the release was signed. However, discussions concerning whether or not a positive letter of reference would be provided or withheld would not normally constitute untoward pressure as such letters are often a term and condition of a settlement.

Even where the employer did not behave inappropriately at all, the mere act of

¹⁰ Re Chow (1999), 37 C.H.R.R. D/442 at para. 104(Alta. Q.B.); Thompson v. Providence Health Care (2003), 47 C.H.R.R. D/368 at para. 44 (B.C.H.R.T.).

termination can also create psychological stress amounting to duress. In *Pilon v. Peugeot*, (1980), 114 D.L.R. (3d) 378 (Ont. H.C.J.), Galligan, J. applied this reasoning to the wrongful dismissal context and on the facts of that case, concluded at p.383:

In my opinion, it cannot fail to have been in the contemplation of the defendant that if he suddenly, without warning, unlawfully discharged a man whom it had led to believe was secure in his job for his working life, there would be the gravest likelihood that such a man would suffer vexation, frustration, distress and anxiety.

The shock of being terminated is likely in most cases to create emotional stress. For this reason as well the Commission recommends that an employee not be asked to sign his or her release on the same day as the termination and, indeed, not be permitted to do so even where he or she offers. Requiring a minimum period of time to study and examine the offer will help to provide the employee with a reasonable chance to get over the shock of termination, to retain outside assistance, and to fairly assess his or her financial situation.

Finally, there may be instances where separate and apart from the employer's conduct or the shock of termination, an employee is experiencing psychological problems which may impair his or her capacity to freely enter into a release. If the employee at the time of his or her termination was experiencing psychological problems, such as depression or mental illness, this can impact on his or her ability to consent.

On this issue of and emotional duress, the Commission provides the following tips for parties involved in preparing and signing a release of a human rights complaint:

- ⇒ Termination meetings should be conducted with dignity, ensuring privacy, and with the employer exhibiting professionalism.
- ⇒ Employers should never require an employee to sign a release on the same day as termination.
- ⇒ If an employee has allegedly engaged in criminal wrongdoing, such as theft or fraud, the employer should not promise to refrain from contacting the police in exchange for a release.
- ⇒ Employees should always take sufficient time to study the terms and conditions of a proposed release and obtain independent legal advice before signing.
- ⇒ Where the employer has a reasonable basis to believe that an employee is

experiencing a mental disability that could impair his or her judgment, he or she should request the employee obtain medical clearance before signing the release.

VI. Binding Releases

There will certainly be cases where the employee has bargaining power. He or she may also have a potentially significant claim for wrongful dismissal, or access to a grievance procedure under a strong collective agreement. Such an employee will have retained a lawyer, and engaged in extended negotiations. The human rights issues will have been discussed and negotiated. In such cases, the employer is willing to pay an amount that more than moderately exceeds the statutory requirements, and where the parties have discussed the fact that all claims will be extinguished through an agreement, it may be argued that the parties have considered the cost and likely merit of a future claim, attached a price tag to it, and reached a final settlement. The more the evidence suggests negotiations and settlement, the less likely will it be unconscionable to enforce the release.

On the other hand, if the release is an all-purpose, broadly-worded release, then, in the absence of evidence that the issues of human rights were specifically addressed, the release will not bar a human rights proceeding. Furthermore, if there is no consideration provided other than the statutory entitlement, one can infer that the matter of human rights could not have been specifically addressed. It is unlikely that an employee, given proper legal advice, or understanding the nature of the claims being settled, would give them away for nothing in return.

To avoid uncertainty, and to assist all parties, the Commission has put forward this Guide with proposed wording for appropriate releases, as well as tips regarding the appropriate conduct of the parties, that indicate that human rights complaints have been fully and finally settled by the parties.

Appendix: Tips for Parties to a Release

For Employers

- ⇒ An employer should, at the time of termination, ask the employee orally or in writing whether there are any outstanding human rights issues or concerns.
- ⇒ It is important to give the employee a reasonable opportunity to consult with independent counsel or an advisor before being required to answer the above question or to sign a legal release.
- ⇒ Reasonable requests for an extension of time should be granted.
- ⇒ Where the answer is "yes," the employer should ask for details, in order to be able to fairly assess what would be a reasonable offer for settling the human rights issues.
- ⇒ Where the answer is "yes," it is optimum to also prepare Minutes of Settlement, in addition to the release, which will expressly deal with the human rights issue.
- ⇒ In addition, where the answer is "yes," the text of the standard form of release should be altered to include a clause that separately recognizes that there is a human rights issue or complaint that has been fully and finally resolved between the parties.
- ⇒ Where the answer is "no," and the employee has obtained, or had the opportunity to obtain, independent advice, it is appropriate for the release to state that the employee has obtained independent legal advice, is cognizant of his or her rights under the *Human Rights Code*, and warrants that he or she is not asserting such rights or advancing any human rights claim or complaint.
- ⇒ To avoid claims of unwarranted pressure or duress, it is optimum that an employer *not* accept a signed release on the same day as termination (even where the employee offers to sign it on that day).
- ⇒ Employers wishing to guard against a claim that they have not compensated a complainant for the human rights issue should consider demarcating in the settlement specific sums for each "head" of damages, such as severance, termination, vacation pay and wages, as well as a set amount in compensation for any alleged human rights concern.
- ⇒ The employer should state that the employee will receive his or her statutory

entitlements (wages owed, vacation pay, statutory termination or severance payments) regardless of whether he or she signs the release.

- ⇒ The release itself should contain a clause which makes it clear that the signing of the release was not a precondition for the payment of these statutory entitlements.
- ⇒ Termination meetings should be conducted with dignity, ensuring privacy, and with the employer exhibiting professionalism.
- ⇒ If an employee has allegedly engaged in criminal wrongdoing, such as theft or fraud, the employer should not promise to refrain from contacting the police in exchange for a release.
- ⇒ Where the employer has a reasonable basis to believe that an employee is experiencing a mental disability that could impair his or her judgment, he or she should request the employee to obtain medical clearance before signing the release.

For Employees

- ⇒ An employee should seek outside independent advice prior to signing a release, or answering a question concerning the existence of a human rights issue.
- ⇒ The employee should also canvass with their advisor the full range of remedies that may be available at common law, under the *Employment Standards Act*, the *Human Rights Code*, or other statutes.
- ⇒ To avoid unwarranted pressure or duress, it is optimum that an employee *never* accept or sign a release on the same day as termination.
- ⇒ An employee, after consulting with independent counsel or an advisor, should separately negotiate each head of damages or remedy when negotiating the terms of the settlement.
- ⇒ An employee should first request a calculation or breakdown of his or her statutory entitlements and other entitlements prior to negotiating the terms and conditions of any settlement of an outstanding human rights issue or complaint.
- ⇒ Employees should ask that the settlement set out specific sums for each “head” of damages, such as severance, termination, vacation pay and wages, as well as a set amount in compensation for any alleged human rights concern.
- ⇒ The employee should ask that he or she receive his or her statutory entitlements

(wages owed, vacation pay, statutory termination or severance payments) regardless of whether he or she signs the release.

- ⇒ The release itself should contain a clause which makes it clear that the signing of the release was not a precondition for the payment of these statutory entitlements.
- ⇒ Notwithstanding that he or she may feel that they "need the money right away" an employee should request their statutory entitlements first, and always take time to consult with his or her legal counsel or advisor second, in order to negotiate an appropriate settlement. If the employer refuses to provide the statutory entitlements as required by law, the employee should address this issue with the Ministry of Labour.