

Feature

Release or No Release? Federal Court of Appeal Upholds Employee's Rights

Employee who signs a full release of claims not barred from bringing unjust dismissal claim

A release prohibiting employees from bringing claims is often seen as a safety net for employers who terminate the employment of employees. If enforceable, it also often has the desired effect. However, a recent decision of the Federal Court of Appeal confirms that this will not always be the case.

Whether or not a settlement agreement that contained a provision releasing the employer from any claims related to the termination of the employment of an employee was a bar to filing an unjust dismissal complaint was at issue in *Bank of Montreal v Li*, 2020 FCA 22 (CanLII).

The respondent, Ms. Li, worked for the appellant Bank of Montreal (the "Bank") for nearly six (6) years when her employment was terminated. On termination of her employment, Ms. Li was provided with the option of either salary continuation for eighteen (18) weeks or a lump sum payment in exchange for signing a settlement agreement. Ms. Li did not consult legal counsel but sought advice from a friend who was a labour lawyer in Ontario. Ms. Li opted to receive the lump sum payment and signed the settlement agreement. In signing the settlement agreement, Ms. Li released the Bank from all claims arising from the termination of her employment.

Not long after signing the settlement agreement, Ms. Li, a federally regulated employee, filed an unjust dismissal complaint pursuant to the *Canada Labour Code* (the "Code"), which is the employment standards legislation that governs federally regulated employers and employees.

The Bank challenged the complaint on the basis of the adjudicator's jurisdiction to hear the complaint as a result of Ms. Li releasing the Bank from any and all claims pursuant to the settlement agreement. The adjudicator determined that an agreement to release the Bank of all claims is not a bar to a complaint under the *Code*. The adjudicator's decision was in line with earlier decisions of the Federal Court and Federal Court of Appeal following this reasoning.

The Bank sought judicial review of the adjudicator's decision by the Federal Court. The Federal Court dismissed the Bank's application for judicial review, finding that the adjudicator's decision was reasonable and that decisions which differ from the earlier decisions relied on by the adjudicator were bad law. The Federal Court rejected the Bank's argument that other regulatory regimes allow individuals to release claims for breaches of statutory rights on the basis that the language in section 168(1) was different and that the law was unsettled. Section 168(1) of the *Code* is a "notwithstanding clause" giving benefits provided to employees under the *Code* priority over contractual arrangements like the release, unless the contractual arrangement is more favourable to the employee:

168 (1) This Part and all regulations made under this Part apply notwithstanding any other law or any custom, contract or arrangement, but nothing in this Part shall be construed as affecting any rights or benefits of an employee under any law, custom, contract or arrangement that are more favourable to the employee than his rights or benefits under this Part.

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These types of clauses are also found in provincial employment standards legislation. For example, section 6 of the Nova Scotia *Labour Standards Code* contains language that is nearly identical to the language in s.168(1) of the *Code*.

The Bank appealed to the Federal Court of Appeal. The only issue for the Federal Court of Appeal to decide was whether the adjudicator erred in following the earlier decision that found an agreement to release an employer of claims does not prohibit an employee from making an unjust dismissal complaint under the *Code*. The Bank argued the Federal Court of Appeal should decline to follow the reasoning in earlier decisions for three (3) reasons: 1) earlier decisions ignore the common law principle permitting retrospective waiver of rights; 2) there are compelling reasons to allow retrospective waiver of rights; and 3) overturning earlier decision will foster certainty and predictability. Applying the reasonableness standard of review, the Federal Court of Appeal found that the adjudicator's decision was reasonable and rejected the Bank's arguments. The Federal Court of Appeal rejected the Bank's first argument that prospective and retrospective waiver are distinguishable and noted that it was not clear whether Ms. Li was aware of the rights she had under the *Code* when she signed the release. The Federal Court of Appeal also rejected the Bank's argument that allowing complaints to proceed despite a release dissuades voluntary settlement between the parties, noting that this policy argument is best left for Parliament which is free to change the legislation. Lastly, the Federal Court of Appeal determined that any certainty is not a sufficient reason to overturn earlier decisions and dismissed the appeal.

All this said, what does it mean for employers? Employers should carefully consider the provisions of the applicable employment standards legislation as well as the time period for filing complaints pursuant to those statutory regimes when determining whether or not to make settlement agreements and releases for claims.

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