

CANADA / JUDGMENT

Bellman v. HMTQ et al.

2006 BCSC 426

COURT

Supreme Court of British Columbia

DECIDED

31 January 2006

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2006 BCSC 426 Bellman v. HMTQ et al

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Bellman v. HMTQ et al.,

2006 BCSC 426

Date: 20060131

Docket: 26989

Registry: Penticton

Between:

Lawrence Richard Bellman

Petitioner

And

Her Majesty The Queen In Right of The Province of British Columbia

and The Employment Standards Tribunal of British Columbia

Respondents

Before: The Honourable Mr. Justice Barrow

Oral Reasons for Judgment

In Chambers

January 31, 2006

Appearing on his own behalf:

L.R. Bellman

Counsel for the Respondent, Employment Standards Tribunal of British Columbia:

D.W. Garner

Counsel for the Director of Employment Standards:

A.J. Adamic

No other appearances

Place of Hearing:

Penticton, B.C.

- [1] THE COURT: The petitioner, Mr. Bellman, challenges the decision of the Employment Standards Tribunal made on January 14, 2004, in the matter of Lawrence R. Bellman, BC EST#RD003/04 (the "decision"). His petition is brought pursuant to the provisions of the Judicial Review Procedure Act, R.S.B.C. 1996, c. 241. He maintains that the tribunal erred in law in its interpretation of a variety of sections of the Employment Standards Act, R.S.B.C. 1996, c. 113 (the "Act"), including particularly s. 4 of that Act, and it erred in failing to consider "all the evidence that jurisprudence submitted".

BACKGROUND

- [2] Mr. Bellman was employed by the provincial government as an industrial relations officer from December 15, 1975 until March 25, 2002, when he retired. I use the word "retired" advisedly. One of Mr. Bellman's complaints is that the adjudicator referred to his departure from government service as a "retirement" when, in fact, it was something else. Whatever its proper characterization for purposes of the application of the Act, Mr. Bellman himself, in his complaint, stated that he "retired".
- [3] In 1977, Mr. Bellman commenced an action against the government alleging that the government was in breach of a contract which required it to provide him with an automobile for use, among other things, in commuting from his home in Penticton to the Employment Standards Branch office in Kelowna, where he worked. That lawsuit was still outstanding when, in the early part of this decade, his employer, the Ministry of Skills Development and Labour, offered a number of employees, including Mr. Bellman, a severance package that included a number of incentives designed to encourage early retirement. Over the spring and summer of 2001, Mr. Bellman, with the assistance of counsel, negotiated a severance package which included compensation for length of service. As part of this package, Mr. Bellman signed a release about which I will say more in a moment.

- [4] On August 16, 2002, Mr. Bellman filed a complaint under the Employment Standards Act. The Employment Standards Act sets minimum standards that employers must meet in relation to vacation pay or entitlement. It allows employees who consider that those standards have not been met to complain to the Director of Employment Standards. Mr. Bellman's complaint was that he had not been paid vacation pay for the year 2001, nor had he been paid vacation pay for the period covered by his severance package.
- [5] On receiving a complaint, the Director may investigate it and make a determination as to its validity. In response to Mr. Bellman's complaint and because Mr. Bellman was an employee of the Employment Standards Branch of the Ministry of Skills Development and Labour, the Director delegated his authority to Mr. Suhr, a labour relations consultant not employed by the government.
- [6] Mr. Suhr conducted an investigation and made a determination on November 29, 2002. He reached three conclusions: first, he found that the release that Mr. Bellman had signed did not bar his entitlement to vacation pay; second, he concluded that Mr. Bellman was not owed any vacation pay for the year 2001; and, third, he held that Mr. Bellman was entitled to some, but not all, of the vacation pay he was claiming in relation to the period covered by his severance package.
- [7] The Employment Standards Act provides for an appeal from determinations made by the Director to the Employment Standards Tribunal, a body continued under s. 102 of the Act. Both the employer, as represented by the Public Service Relations Committee ("PSRC"), and Mr. Bellman appealed the determination. Mr. Bellman appealed the conclusion that he was not entitled to vacation pay for 2001 and the determination that he was only entitled to a portion of the vacation pay he considered his due for the period covered by the severance package. The employer appealed the Director's determination that the release was not a bar to both of Mr. Bellman's claims.
- [8] A tribunal consisting of a single adjudicator, Ms. Taylor, dealt with the appeal on the basis of written submissions, and on June 25, 2003, she issued her decision. She found that the release that Mr. Bellman signed barred his claims. In spite of that, she addressed the merits of his claims under the Employment Standards Act and concluded that he was not entitled to vacation pay for the period covered by the severance package, even to the limited extent that the Director had concluded.
- [9] The Employment Standards Act provides a further level of administrative review. By s. 116, the employee is entitled to seek a reconsideration of the tribunal's decision. Mr. Bellman sought such a reconsideration, and a three-member panel heard the matter again on the basis of written submissions. On January 14, 2004, they rendered their decision, in effect, confirming Adjudicator Taylor's conclusions, albeit for somewhat different reasons. It is from this decision that the petitioner seeks judicial review.

STANDARD OF REVIEW

[10] The Employment Standards Act contains a privative clause. Specifically, s. 110 provides:

110(1) The tribunal has exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact, law and discretion arising or required to be determined in an appeal or reconsideration under Parts 12 and 13 and to make any order permitted to be made.

(2) A decision or order of the tribunal on a matter in respect of which the tribunal has exclusive jurisdiction is final and conclusive and is not open to question or review in any court.

[11] By s. 103 of the Employment Standards Act, s. 58 of the Administrative Tribunals Act, S.B.C. 2004, c. 45, applies to the decisions of the tribunal. Section 58 of the Administrative Tribunals Act provides as follows:

58(1) If the tribunal's enabling Act contains a privative clause, relative to the courts the tribunal must be considered to be an expert tribunal in relation to all matters over which it has exclusive jurisdiction.

(2) In a judicial review proceeding relating to expert tribunals under subsection (1)

(a) a finding of fact or law or an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause must not be interfered with unless it is patently unreasonable,

(b) questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly...

[12] In *Canada (Attorney General) v. Public Service Alliance of Canada* (1993), 101 D.L.R. (4th) 673 (S.C.C.) at p. 690, Cory J. on behalf of a majority of that court held as follows:

It is said that it is difficult to know what "patently unreasonable" means. What is patently unreasonable to one judge may be eminently reasonable to another. Yet any test can only be defined by words, the building blocks of all reasons. Obviously, the patently unreasonable test sets a high standard of review. In the *Shorter Oxford English Dictionary* "patently", an adverb, is defined as "openly, evidently, clearly". "Unreasonable" is defined as "not having the faculty of reason, irrational, not acting in accordance with reason or good sense". Thus, based on the dictionary definition of the words "patently unreasonable", it is apparent that if the decision of the Board reached, acting within its jurisdiction, is not clearly irrational, that is to say evidently not in accordance with reason, then it cannot be said that there was a loss of jurisdiction. This is clearly a very strict test.

...

It is not enough that the decision of the Board is wrong in the eyes of the court; it must, in order to be patently unreasonable, be found by the court to be clearly irrational.

[13] Further, in *Canadian Assn. of Industrial Mechanical and Allied Workers, Local 14 v. Paccar of Canada Ltd.*, [1989] 2 S.C.R. 983, the Supreme Court of Canada said this about the test at para. 19:

The test for review is "a severe test"...Mere disagreement with the result arrived at by the tribunal does not make that result "patently unreasonable". The courts must be careful to focus their inquiry on the existence of a rational basis for the decision of a tribunal, and not on their agreement with it. The emphasis should be not so much on what result the tribunal has arrived at, but on how the tribunal arrived at that result.

The issue, therefore, is whether the tribunal's decision is patently unreasonable as that expression has been explained in the jurisprudence just referred to.

POSITION OF THE PARTIES

[14] The petition names both the Director and the former employer, Her Majesty the Queen in Right of the Province of British Columbia, as defendants. Both defendants appeared through counsel. I am told that the Director's role on petitions of this nature, if not neutral, is at the least less adversarial than the role taken by the employer. The Director's counsel, in his submissions, explained the Employment Standards Act and its related regulations and the standard of review applicable to applications of this nature. While it supported the decision under review, the bulk of the argument on the merits was carried by the employer.

[15] Mr. Bellman advanced a variety of arguments in support of his contention that the tribunal's decision is patently unreasonable. The only issue he advanced relating to the principles of natural justice is that the tribunal was biased against him, or at least he had and has a reasonable apprehension of bias, and hence there was a breach of natural justice. While he has raised a host of other issues, because of the view I take on the issue of whether the release he signed bars his claim, I need only deal with that one.

[16] Section 4 of the Employment Standards Act provides that:

The requirements of this Act and the regulations are minimum requirements and an agreement to waive any of those requirements, not being an agreement referred to in Section 3(2) or (4), has no effect.

[17] Mr. Bellman argues that the release he signed on accepting his severance package, if it applies to vacation entitlement at all, contravenes this section and is, therefore, of no effect. The Director acceded to this argument. Mr. Bellman also argues that even if the release is not rendered ineffective by operation of s. 4, it does not specifically address vacation pay and thus, by its own terms, does not bar his entitlement. Finally, he says that the release is not binding because he signed it under duress.

- [18] The employer argues that the decision under review is not unreasonable, never mind patently so. As to the question of bias, real or reasonably apprehended, it points to the lack of any evidence to support that assertion.

DISCUSSION

- [19] I will deal first with the argument relating to bias and then address the decision as it relates to the release.
- [20] The petitioner's assertion that the tribunal is biased, or that there exists a reasonable apprehension of bias, is based on two features of the tribunal's decision. The first is that the tribunal made reference to his experience as an industrial relations officer. The tribunal's reference in that regard was made in the context of considering whether the release and settlement he entered into was binding. They observed:

Mr. Bellman has significant experience as an industrial relations officer, and had sophisticated knowledge of his rights as an employee as well as the jurisprudence of this Tribunal. He could not be said to have entered into the agreement without full knowledge and appreciation of the consequences of doing so.

- [21] There is no question but that the evidence supports that conclusion; after all, Mr. Bellman's entire career had been spent in that field. Further, it was entirely proper to consider that aspect of Mr. Bellman's history in the context of the issue the tribunal was considering. There is nothing in the tribunal's reference to the petitioner's experience to suggest that they were biased against him.
- [22] The second matter to which Mr. Bellman points is that the tribunal failed to consider the purpose of the Employment Standards Act, and they failed to consider the wording of the release. Whether the tribunal did either of these things or not, they are not matters which support the conclusion that they were biased. If established, they might support the conclusion that they fell into error but nothing more.
- [23] The Supreme Court of Canada has commented on the notion of bias or reasonable apprehension of bias on the part of decision-makers in a variety of contexts. In particular in *R. v. S.(R.D.)* (1997), 118 C.C.C. (3d) 353 at para. 31, *L'Heureux-Dubé and McLachlin JJ.* adopted the decision of *Grandpré in Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369, 68 D.L.R. (3d) 716, where Mr. Justice Grandpré said this:
- ...that test is "what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude. Would he [conclude] that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."
- [24] As to the attributes of the postulated "informed person", *L'Heureux-Dubé and McLachlin JJ.* said this at para. 36:

The presence or absence of an apprehension of bias is evaluated through the eyes of the reasonable, informed, practical and realistic person who considers the matter in some detail...The person postulated is not a "very sensitive or scrupulous" person, but rather a right-minded person familiar with the circumstances of the case.

[25] There is nothing in the matters pointed to by the petitioner to support the conclusion that the tribunal was biased or that there would be a reasonable apprehension of bias on the part of a reasonable, informed, practical and realistic person who considers the matter in some detail.

RELEASE

[26] I turn next to the question of the release. The release that Mr. Bellman signed was executed as a condition of settling his severance package. The terms of that severance package were negotiated by counsel. In the exchange of correspondence leading up to the settlement, the issue of vacation pay entitlement for 2001 was raised (for example, see Mr. Marshall's letter of August 31, 2001, at para. (c)). The negotiations culminated in a letter by an official from the Public Service Relations Commission dated November 15, 2001. That letter sets out, in detail, the terms of the package. It addressed the amount of vacation pay that the employer was prepared to pay by way of settlement of the outstanding claims. It required that a release be executed by Mr. Bellman should he accept the proposed terms of settlement. Paragraph 9 of that letter states: "the above constitutes full and complete terms of settlement."

[27] Mr. Bellman accepted the terms of settlement and signed the release on November 22, 2001. It provides that in consideration of the payment of \$112,385 by way of settlement of a severance arrangement and the sum of \$30,000 by way of settlement of his court action, he released and forever discharged the government "from all manner of actions...claims and demands whatsoever", which he ever had, then had, or might in the future have arising out of or connected with his employment or his court action. The letter of November 15, 2001, to which I have just referred is attached to the release as an appendix.

[28] As noted above, Mr. Bellman advances three arguments in relation to the release.

[29] First, he argues that s. 4 of the Employment Standards Act renders the release ineffective. The Director agreed with that position, but both the adjudicator and the tribunal, on reconsideration, rejected it. The Director concluded that "the settlement agreement and the release signed by Bellman would be considered to be agreements to waive the minimum requirements of the Act and therefore they are of 'no effect'...".

[30] Adjudicator Taylor found this conclusion to be "far too broad". She noted that while the issue had not been fully argued before her, she considered the tribunal's jurisprudence which addresses the purpose of the Act and the effect of settlements generally. The tribunal, on reconsideration, noted that:

...while there is a public policy interest in the enforcement of minimum employment standards, there is an equally compelling public interest in the enforcement of bona fide settlement agreements, even where the terms of that settlement may be something less than the party alleges they are entitled to under the Act. In our view such settlements do not offend the Act.

- [31] The issue for consideration is whether the tribunal's conclusion in this regard is "patently unreasonable". In my view, it is not. It is for the tribunal to balance the competing public policy goals embodied in the Act. In doing so, it may have regard to a host of considerations and provided those considerations have some rational connection to the issue to be resolved, it cannot be said that their conclusion was "patently unreasonable". In my view, their analysis addressed issues that were rationally connected to the issue before them, and in the result, their conclusion is not patently unreasonable.
- [32] I note further that s. 4 renders ineffective waivers of the minimum requirements of the Act. The settlement accepted by Mr. Bellman involved the payment to him of in excess of \$112,000, exclusive of the amount paid to settle his suit relating to the provision of an automobile. While the amount of the settlement was calculated on the basis of a number of considerations, including the amount of severance he was to receive, it was a negotiated settlement and it was the dollar amount that was of importance to the parties. In Mr. Bellman's circumstances the payment of \$112,000 as a full settlement of a variety of claims does not amount to a waiver of the minimum requirements of the Act. Rather, it is a global payment for all of his claims which, on any view of the method by which the sum was calculated, far exceeds the minimum requirements of the Act.
- [33] Next, Mr. Bellman argues that he was under duress when he signed the release. He argues that he signed it under threat. The threat he points to is the letter dated November 19, 2001, which was sent by counsel for the government to Mr. Bellman's lawyer. In that letter, the offer of settlement was set out. Counsel wrote that it was a comprehensive offer and "must be accepted or rejected in its entirety". It is this latter phrase that Mr. Bellman characterizes as a threat and amounts to duress in his view. Properly understood, it is merely a statement of the condition upon which the offer was being put forth. Mr. Bellman had the option to either accept it in comprehensive settlement of his claims or reject it and proceed with litigation, or whatever other course of action he chose. He chose to accept it. Adjudicator Taylor's decision that the release was not vitiated by duress is not unreasonable, never mind patently so.
- [34] Finally, Mr. Bellman argues that because the release does not specifically mention vacation pay, either in relation to his claim for such pay in 2001 or in relation to his claim for vacation pay on the severance payment aspect of the settlement, it does not bar these claims. As just noted, the release was prepared following a course of negotiations in which both the severance package and the 2001 vacation pay was discussed. The terms of the release could not be broader or clearer. The letter that accompanied the release described the settlement as the "full and complete terms of settlement". The release itself provides, as noted above, that in signing it and accepting the monies paid in consideration for it, Mr. Bellman was

releasing the government from "all claims" that he ever had "arising out of or in any way connected with" his employment. His claim for vacation pay for 2001 and for similar pay on the severance he was awarded fall within that language. The conclusion of both Adjudicator Taylor and the tribunal, upon reconsideration, that the release, by its terms, barred these claims is not unreasonable, never mind patently so. This is particularly so given that Mr. Bellman was represented by counsel during the course of negotiations and at the time he signed the release.

CONCLUSION

[35] It follows from the foregoing that the petition is dismissed. None of the parties to this application are seeking costs and therefore none are awarded.

"G.M. Barrow, J."

The Honourable Mr. Justice G.M. Barrow

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