

Can Employers Immunize Themselves Against Human Rights Complaints?

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Whether large or small, every business eventually experiences the trials and tribulations involved with dismissing an employee. The employee may be let go for misconduct or poor work performance, or may simply be let go in times of corporate downsizing. Regrettably, there are often hard feelings and either the threat or commencement of legal action.

Unfortunately, resolving a wrongful dismissal action (or threat thereof) may in some cases not be the end of an employer's legal worries. In some instances, the employee may feel that he or she has been discriminated against, and as such may choose to file a Human Rights complaint either at the same time as wrongful dismissal litigation proceeds, or some time after the fact. The possibility of two separate proceedings may mean that just when an employer believes that the controversy involving an employee has been dealt with, another new claim may arise quite unexpectedly.

In order to avoid this potential contingency, prudent employer counsel have for some time built into the release signed by the employee on settlement of wrongful dismissal proceedings, a clause expressly stating that the individual agrees not to file a Human Rights complaint in relation to his or her employment, or the termination thereof. Until recently, however, there has remained an unsettling possibility that courts might not enforce these types of clauses because their impact would be to prevent an individual from exercising statutory protections available to all. The basic presumption of our system is that an individual cannot agree to waive their basic human rights.

Fortunately this issue has been considered by the Alberta Court of Queen's Bench in the recent decision of *Chow v. Mobil Oil Canada*. The Alberta Human Rights Commission in this case requested a ruling from the Court on the validity of such releases. In this situation, there were four separate complaints before the Board involving four different employers or employees involved in this very issue. The Commission sought guidance as to whether, in the face of release documents which claimed to immunize employers from Human Rights complaints, it had any jurisdiction to process these complaints.

The Court's decision is complicated, but at its root the Court concluded that an employee could validly give up his or her right to file a Human Rights complaint against a former employer, in relation to past acts of discrimination. The Court also held that a release of this sort would not act to "suspend the application" of human rights legislation, in particular in relation to present or future rights. This type of language therefore, was permitted because it would not have the prospective effect of limiting or reducing rights of employees during the course of future employment. All that is being released is the right to file complaints in relation to past conduct, which could have been pursued at any time up until the release document was finally signed.

Although confirming the rights of employers to protect themselves from potential

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complaints of discrimination from former employees, that is not the end of the matter. The Court held that where an individual claims that a release is not valid, the Human Rights Commission will retain the power to review the circumstances behind the release to establish if the release should be enforced. Typically releases, just as any other contractual documents, will only be set aside where it can be shown that there was some sort of undue influence or fraud on the parties signing the document, or that the releasing party truly believed that the document was something other than a release of rights. Unless a complainant can establish that the release is invalid on one of these grounds, the Commission will uphold the release and refuse to proceed any further with a subsequently filed Human Rights complaint.

This issue is a complicated one, which involves not only principles of contract, but philosophical issues such as the ability to give up one's inalienable rights in our democracy. In all likelihood, the decision will be appealed to the Alberta Court of Appeal, and possibly in time even to the Supreme Court of Canada. For the time-being, however, the decision in *Chow v. Mobil Oil Canada* confirms that it is both legitimate and appropriate for employers to ask for release of Human Rights complaints when finalizing an employee's severance arrangement. Indeed, the failure to expressly include this type of language may result in a finding that the parties had no intent to prevent the employee from making these types of complaints, even after agreeing on a severance package.

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