

**Human Rights Tribunal
of Ontario**

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**Tribunal des droits de la personne
de l'Ontario**

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November 3, 2009

Via Courier

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Re: Terry Karamesinis v. National Steel Cars Ltd. and Tony Gauthier
HRTO File No.: T-0422-08

Please find enclosed a Decision of the Tribunal, dated November 3, 2009 in the above-mentioned matter.

Please address any inquiries or communication concerning the enclosed to the Registrar-Transition, Ms. Patricia M. Grenier at the above address.

Sincerely,
Marlene Mock
Adjudicative Support Assistant
/enclosure

Written materials over 25 pages, bound material, or material separated with tabs must be sent in duplicate.



HUMAN RIGHTS TRIBUNAL OF ONTARIO

BETWEEN:

Terry Karamesinis

Applicant

-and-

National Steel Cars Ltd. and Tony Gauthier

Respondents

DECISION

Adjudicator: Caroline Rowan
Date: November 3, 2009
File Number: T-0422-08
Citation: 2009 HRTO 1812
Indexed as: **Karamesinis v. National Steel Cars**

APPEARANCES BY

Terry Karamesinis, Applicant

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Grantley Howell,
Representative

National Steel Cars Ltd. and
Tony Gauthier, Respondents

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Larry Culver,
Counsel

[1] This is an Application filed pursuant to section 53(3) of Part IV of the *Human Rights Code*, R.S.O. 1990, c. H.19 as amended (the "Code") on November 28, 2008. The respondents, National Steel Car Ltd. ("NSC") and Tony Gauthier, have brought a Request for Order During Proceedings that the Application be dismissed on the basis that the matter has been settled ("Request for Dismissal"). A Case Resolution Conference ("CRC") was held on October 9, 2009 to address the Request for Dismissal.

ADJOURNMENT REQUEST

[2] At the outset of the CRC, the applicant's representative sought an adjournment on the basis that he had not had a sufficient opportunity to prepare for the CRC. In this respect, he referred to the fact that he had other matters to deal with in his position as Recording Secretary for the United Steelworkers of America, Local 7135 (the "Union"), the applicant's former bargaining agent. In particular, the applicant's representative referred to the fact that there had been a three month strike at NSC commencing in April 2009 and to the fact that the applicant's representative had had to leave Canada for a period of two weeks in August, 2009 because of a death in his immediate family. In support of the adjournment request, the applicant's representative also referred to the fact that the respondents had not filed their Response to the Application until March 25, 2009, which was past the deadline for filing a Response. The respondents opposed the adjournment request.

[3] After considering the parties' submissions, I denied the request on the basis that the applicant and his representative had had ample time in the period after March 25, 2009, when the respondents filed both their Response to the Application and their Request for Dismissal, to prepare for the CRC scheduled for October 9, 2009. The CRC therefore proceeded as previously scheduled to address the respondents' Request for Dismissal.

THE REQUEST FOR DISMISSAL

[4] The respondents take the position that the subject matter of the present Application has been appropriately dealt with within the meaning of section 45.1 of the *Code* having regard to a settlement reached between NSC, the Union and the applicant

on or about July 25, 2006 resolving all of the applicant's outstanding grievances as of that date. The respondents also rely on a settlement dated October 20, 2006 between NSC, the applicant, and the Union of the applicant's discharge grievance and rely on a full and final release signed by the applicant on October 27, 2006 in connection with his employment and the termination of his employment with NSC.

Factual Background

[5] The applicant did not dispute any the facts upon which the respondents sought to rely in support their Request for Dismissal. The parties therefore agreed to stipulate as agreed the facts set out in Mr. Bruckner's affidavit dated September 17, 2009 (the "Affidavit"). It was not therefore necessary for Mr. Bruckner to testify in person or by telephone as previously contemplated might occur.

[6] In addition to the facts set out in the Affidavit, the parties stipulated their agreement that none of the applicant's grievances referred to in the Affidavit were adjudicated to conclusion on their merits. The applicant's representative also called evidence in connection with the Request for Dismissal from the applicant.

[7] The applicant acknowledged in his testimony that the grievances which he settled on July 25, 2006 (the "July 2006 Settlement") deal with the same incidents referred to in the present human rights Application and that the Application does not raise any additional issues beyond those addressed by his grievances. Generally speaking, both involve the applicant's allegations of harassment by NSC due to a workplace injury he suffered in 2005 and the applicant's allegations that NSC failed to accommodate that workplace injury. The July 2006 Settlement was reached on the day of the arbitration hearing scheduled before Arbitrator Kaplan, who had been appointed by the Union and NSC to hear the applicant's outstanding grievances.

[8] Shortly after the July 2006 Settlement, the applicant's employment with NSC was terminated. NSC took the position that his employment was terminated as a result of a culminating incident which occurred on August 25, 2006 when the applicant failed to call in or report to work. The applicant's employment had initially been suspended as a

result of this failure. NSC then later terminated his employment for failing to call in and also for failing to provide NSC with documentation to support his explanation for failing to report for work that day. In this regard, the applicant had told NSC that he had not reported for work that day because one or more of his children had been involved in a motor vehicle accident on the morning of August 25, 2006.

[9] The applicant grieved his discharge from employment with NSC. As previously noted, the applicant's discharge grievance was ultimately settled on or about October 20, 2006 (the "October 2006 Settlement"), which was after the arbitration hearing before Arbitrator Burkett had commenced but before his discharge grievance had been fully adjudicated.

[10] Under the terms of the October 2006 Settlement entered into by the applicant, his Union representatives and NSC, the applicant accepted monetary compensation in exchange for the withdrawal of his discharge grievance. More specifically, NSC agreed to pay the applicant a sum of money and also agreed that "for Record of Employment purposes", the applicant will be "laid off due to work shortage for a period of 30 days and then altered to discharge" in consideration of the withdrawal of the discharge grievance. On or about October 27, 2006, the applicant also signed an acknowledgement of receipt of the amounts payable under the October 2006 Settlement and signed a full and final release under which he released NSC:

(...) their present and former directors, officers, representatives, shareholders, owners, employees [etc.] (collectively referred to as the "Releasee")... jointly and severally from any and all actions, causes of action, ... complaints, grievances, damages, costs or loss of any nature or kind whatsoever ... including but not limited to, those Claims which are by reason of, concerning or arising from : (a) [his] employment or the termination of [his] employment with the said Releasee.

[11] The applicant testified that he entered into the July 2006 Settlement and the October 2006 Settlement under emotional duress due to the harassment he was experiencing at work in the period after his compensable injury. He also referred to the financial difficulties he experienced following his discharge from employment and to the fact that he had a drug problem at the time he entered into these settlements and that

he consequently was not thinking properly when he entered into either of them. He referred in particular to the fact that in 2006 he was "eating many pills", which had been prescribed to him for pain.

[12] The applicant also suggested in his evidence that his drug dependency was the real reason he failed to call in or report to work on August 25, 2006. In this respect, he acknowledged having fabricated the story about his children being involved in a car accident on August 25, 2006 when, in fact, the real reason he failed to call in or report to work that day was because he had overslept. He explained that he had lied to representatives of the NSC, because he panicked and did not know what to do about having slept in that morning. He also acknowledged having lied to representatives of the Union about the reason for his absence on August 25, 2006 and agreed that that was why the Union's representative had presented a false account to Arbitrator Burkett at the outset of the arbitration hearing into his discharge grievance.

[13] The applicant also noted his belief that he could still pursue his human rights complaint against NSC despite the July 2006 Settlement and the October 2006 Settlement. According to the applicant, he filed his human rights complaint with the Ontario Human Rights Commission in or about June 2006 and he advised Mr. Gauthier in or around that same time of his intention to do so. The applicant notes that Mr. Gauthier responded simply: "do what you have to do". The respondents did not receive a copy of the complaint until in or about late October, 2006 when his complaint was forwarded to the respondents by the Human Rights Commission by cover letter dated October 30, 2006.

DECISION

[14] The issue before me is whether the Tribunal should exercise its discretion under section 45.1 of the *Code* to dismiss the present Application, in whole or in part, on the ground that the substance of the Application has been appropriately dealt with in the grievance proceedings which were settled in June and in October 2006.

[15] Section 45.1 of the *Code* reads as follows:

The Tribunal may dismiss an application, in whole or in part, in accordance with its rules if the Tribunal is of the opinion that another proceeding has appropriately dealt with the substance of the application.

[16] In *Dunn v. Sault Ste. Marie (City)*, 2008 HRTO 149 (CanLII), the Tribunal reviewed the principles applicable to the interpretation of section 45.1, at para 24:

In *Campbell v. Toronto District School Board*, 2008 HRTO 62, the Tribunal discussed some of the principles that apply to the interpretation of s. 45.1. They include:

- Section 45.1 gives expression to a legislative intent to avoid the duplication of proceedings and the re-litigation of issues that have been dealt with elsewhere;
- The discretion given to the Tribunal in s.45.1 is at least as broad as the doctrines of issue estoppel and abuse of process;
- In determining whether another proceeding has appropriately dealt with the substance of the application, the Tribunal should not be overly technical;
- The Tribunal does not act as an appellate court from the decisions of other tribunals, and the Tribunal need not be satisfied that it would have reached the same conclusion as that reached in the other forum.

Some of the factors the Tribunal found relevant to the exercise of its discretion to apply s. 45.1 in that case, which dealt with a decision by another tribunal as opposed to a settlement of its proceedings, were the purpose of the statutory scheme governing the other proceeding, whether the same question was decided, whether human rights principles were applied, and the safeguards available to the parties in the other administrative procedure.

[17] The Tribunal in *Dunn* further determined that section 45.1 may apply to settlements of proceedings under other statutory schemes having regard to the wording of that provision and its purpose of avoiding the duplication of proceedings. The Tribunal explained its reasoning, as follows, at para 37:

(...) I find that s. 45.1 may apply to settlements of proceedings under other statutory schemes. This conclusion is supported by both the wording and the purposes of s. 45.1. The provision refers to a "proceeding" having "dealt with" the matter, rather than using narrower words that would only encompass adjudication like "decision" or "reasons".

More important, the purpose of avoiding the duplication of proceedings and ensuring finality in litigation would be severely undercut if the section applied only to decisions. Most litigation ends in settlement. To be effective, settlements must be final, since otherwise the parties would have no incentive to make an agreement to end litigation. An interpretation of s. 45.1 that did not cover settlements would discourage parties from working to resolve human rights proceedings without recourse to litigation.

[18] In determining that s. 45.1 should apply equally to settlements of proceedings under other statutory schemes, the Tribunal had regard to the purpose of the discretion granted under that section, which is aimed at avoiding the duplication of proceedings, and also to the goal of ensuring finality in litigation. The Tribunal in that case further found that the appropriate factors for determining whether or not a settlement of another proceeding appropriately dealt with the substance of a human rights complaint are the facts and issues in the proceeding, which was settled, and the language used by the parties in their agreement to express the nature of the issues that were resolved.

[19] In the present case, the applicant acknowledges that his Application raises all of the same issues which were the subject of his numerous grievances and which were settled by the June 2006 Settlement. In the circumstances, in the absence of the applicant's claim to have been under duress and to have been suffering from a medical condition which affected his judgement at the relevant time, there can be no doubt that the present Application should be dismissed under section 45.1 of the *Code* in order to avoid a duplication of litigation and to ensure finality. The fact that the applicant entered into the October 2006 Settlement of his subsequent termination from employment and signed a full and final release of all claims, complaints, grievances, including those related to his employment and its termination by NSC, also underscores the need to ensure finality of settlements entered into voluntarily.

[20] The issue of whether the settlements reached in 2006 were entered into voluntarily however remains to be considered. As noted, the applicant takes the position that the Tribunal should permit this Application to be heard on its merits because he entered into the settlements under emotional and financial duress at a time when his judgement was clouded by his dependence on painkillers. The applicant

therefore suggests that he was suffering from a disability (i.e. drug dependence) at the time the settlements were reached, which disability vitiated voluntary consent.

[21] The applicant however presented no medical evidence to support his claim that he was suffering from a drug dependency. The only evidence before the Tribunal to the effect that he was addicted to pain killers at the relevant time and that his addiction was such as to affect his ability to enter into a voluntary settlement in either June 2006 or in October 2006 comes from the applicant's own testimony. The applicant's unsubstantiated assessment of his own medical condition is not however a sufficient basis on which to find that he was suffering from a disability requiring accommodation, particularly in the circumstances of this case where the applicant has already admitted that he lied to representatives of NSC and to representatives of the Union in connection with the circumstances leading to his discharge from employment.

[22] The applicant also referred to an arbitration decision between the *United Steelworkers of America, Local 7135 v. National Steel Car Limited*, unreported decision dated April 11, 2001 (Hunter), in support of his claim that he has a drug problem. A review of that decision reveals that the earlier arbitration proceeding concerned the applicant's disciplinary suspension from employment at NSC in or about 2001 as a result of an incident in which the applicant was caught smoking marihuana in the workplace. The decision makes no reference to the applicant suffering from a drug dependency of any kind and certainly makes no reference to him suffering from a dependency to pain killers. That decision could not, in any event, speak to the applicant's medical condition in 2006, some five years after the date of the arbitration decision.

[23] In all the circumstances, and notwithstanding the observations made by the Supreme Court of Appeal in *Blackburn v. Victory Credit Union Ltd.*, (1998) 1 C.C.L.I. (3d) 226 concerning the nature of mental disabilities generally (to which the applicant's representative referred in argument), I am not satisfied that the applicant has established that he was suffering from an addiction to painkillers at the time he entered into either the June 2006 Settlement or the October 2006 Settlement. In the absence of

medical evidence to corroborate the applicant's claim that he was suffering from a drug dependency which affected his judgement at the relevant time, there is not, in my view, a sufficient basis to make that finding, particularly where, as here, the applicant's credibility is suspect having regard to his own admission to lying about the circumstances leading to his discharge from employment.

[24] I am also not satisfied that the applicant has established through his testimony that he entered into the 2006 settlements under duress. The applicant did not, for example, adequately explain why his emotional distress was so great in June 2006 that he decided to resolve all of his outstanding grievances at that time rather than continue with the arbitration hearing which had been convened before Arbitrator Kaplan. In this regard, I note that he was represented throughout both arbitration proceedings by representatives of the Union and there is no suggestion in his evidence that he was under any pressure from the Union's representatives or from anyone else to settle his grievances.

[25] There is also no suggestion in the evidence that he had any significant financial difficulties in June 2006 when he remained gainfully employed. Even though I accept that the applicant likely experienced some financial distress at or around the time his employment was terminated in the Fall of 2006, he had already at that point settled all of the same issues raised in his human rights Application in the June 2006 Settlement. In any event, some emotional and/or financial distress does not in and of itself represent a sufficient reason to look behind the terms of a settlement. (See *Virgin v. Dollar*, 2009 HRTO 899 (CanLII) and *Barneveld v. I.O.O.F. Seniors Homes*, 2009 HRTO 448 (CanLII)).

[26] In the present case, the grievances before Arbitrator Kaplan raised all of the same issues which the applicant complains about in the present Application. Pursuant to section 48(12)(j) of the *Labour Relations Act, 1995*, S.O. 1995, c.1, Sched. A, as amended, Arbitrator Kaplan had the power to determine the alleged breaches of the *Code*, which the applicant is now seeking to litigate. The applicant however chose to settle all of those grievances under the terms set out in the June 2006 Settlement and

then later also released the respondents from any and all claims, grievances and complaints in October 2006 when he accepted compensation in exchange for the withdrawal of his dismissal grievance. In the circumstances, it is reasonable for the respondents to have believed that the two settlements reached in 2006 and the release signed by the applicant would bring finality to any employment related dispute they may have had with him.

[27] The situation in the present case is therefore significantly different from that before the Court of Appeal in *Thomas v. Ontario Human Rights Commission*, 2001 CanLII 5844 (ON C.A.) and from that before the Tribunal in *Baylet v. Universal Workers Union*, 2009 HRT0 700 (CanLII). In *Baylet*, the Tribunal found that the settlement in issue did not appropriately deal with the applicant's human rights complaint, since the settlement related only to unfair labour practice complaints dealing with vacation pay and insubordination and did not address the applicant's human rights complaint regarding disability-based harassment and the termination of his employment. Similarly, in *Thomas*, the Court of Appeal found that the earlier arbitration proceeding did not address the issues of sexual harassment under the *Code* raised in the human rights complaint in issue. By contrast, the applicant in the present case acknowledges that his grievances scheduled to be heard before Arbitrator Kaplan, raised all of the same issues he now seeks to litigate in the present Application.

[28] In all the circumstances, I find it appropriate to dismiss the present Application in its entirety pursuant to section 45.1 on the basis that the Application has been appropriately dealt with in the earlier arbitration proceedings in 2006 and the settlements of those proceedings back in 2006. For all these reasons, this Application is dismissed.

Dated at Toronto, this 3rd day of November, 2009.



Caroline Rowan
Member