



Settling on fairness

Courts intervene when parties abuse power

"It is for the public interest and policy to make an end to litigation...[so] that suits may not be immortal, while men are mortal."

—Joseph Story, *Ocean Ins Co v Fields*, 18 F Cas 532, at 539 (CCD Mass 1841) (No 10, 406)

It's true. Ending litigation is praiseworthy. But what if a settlement and release, voluntarily entered into between the parties, are unfair? Can they be set aside by a court and, if so, when? What must be demonstrated to establish that a release is unconscionable?

These questions were recently addressed by the Ontario Superior Court of Justice in the case of *Rubin v Home Depot Canada Inc.* In that case, the plaintiff, Eric Rubin, signed a release on the day he was fired from his job. He was employed as a competitive shopper by the defendant, Home Depot, for over 19 years. He was 63 years old when his position was eliminated.

At the termination meeting, Home Depot offered the plaintiff 28 weeks' pay in lieu of notice in the amount of \$30,977.81, which it stated was "to exceed our obligations under the Employment Standards Act", and a continuation of certain insurance and disability benefits, in exchange for a release in favour of Home Depot.

Rubin signed the release during the termination meeting, believing that what was offered by Home Depot was all that he was entitled to, but being unaware of his common law or statutory rights under the Employment Standards Act, 2000.

Soon after signing the release, Rubin realized that he had made a mistake by signing it and then contacted his accountant and lawyer who challenged the enforceability of the release and expressed a desire to negotiate a proper termination package. Home Depot refused to reopen the matter, relying on the release and the settlement voluntarily entered into by Rubin.

The plaintiff retained litigation counsel and brought a motion for summary judgment to set aside the release and determine the appropriate notice period and the amount of damages to be awarded. Home Depot opposed the plaintiff's motion, and asked the court for an order that the release be left to stand, and that the lawsuit be dismissed.

The court found the release to be unconscionable and set it aside. In doing so, it identified the four elements which are necessary to demonstrate that a release is unconscionable:

- A grossly unfair and improvident transaction;
- Victim's lack of independent legal advice or other suitable advice;
- Overwhelming imbalance in bargaining power caused by victim's ignorance of business, illiteracy, ignorance of the language of the bargain, blindness, deafness, illness, senility, or other disability; and
- Other parties knowingly taking advantage of this vulnerability.

The court then concluded that Rubin was able to bring himself, based on the evidence presented before the Court,

within each of the requisite four elements. Having measured the situation as a whole, the court determined that Home Depot's offer to Rubin was "so unreasonable as to be grossly unfair".

Furthermore, the court found that the notice period was "grossly inadequate" and "sufficiently divergent from community standards that it ought to be set aside", holding that "the idea that, in the modern day, a 20-year employee, moving to the end of his expected working life, who was fired without cause, for reasons reflected in an internal reorganization of the company, would receive only six months' notice is far removed from what the community would expect."

The court was also critical of Home Depot for misleading Rubin into thinking that he would not be paid at all if he didn't sign the release—the only option offered to him—thereby taking advantage of his vulnerability and the power imbalance in Home Depot's favour.

It is important to note that the court, in deciding this case in favour of the plaintiff, explicitly stated that it was not detracting from the right of parties to enter into binding and enforceable contracts.

It was, however, confirming "that employers cannot use their superior positions to mislead an employee into an agreement that is unconscionable, nor can they dismiss their employees without giving proper notice or pay in lieu thereof."

This is an extremely important lesson to be learned by both employers and employees. MM&D

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