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Indexed as: Walters v. Fraserway RV, 2019 BCHRT 142
IN THE MATTER OF THE *HUMAN RIGHTS CODE,*
RSBC 1996, c. 210 (as amended)

AND IN THE MATTER of a complaint before
the British Columbia Human Rights Tribunal

BETWEEN:

Karen Walters

COMPLAINANT

AND:

Fraserway RV

RESPONDENT[S]

REASONS FOR DECISION
APPLICATION TO DISMISS A COMPLAINT
Sections 27(1)(c), (d)(ii) and (e)

Tribunal Member:	Devyn Cousineau
Counsel for the Complainant:	Lawrence Smith
Counsel for the Respondent:	Trevor Thomas

I INTRODUCTION

[1] Karen Walters was employed as a Human Resources Coordinator for Fraserway RV. She was injured on the job and returned to work on a graduated basis. On the day before her gradual return to work was completed, Fraserway terminated her employment. Ms. Walters says that, in doing so, Fraserway discriminated against her based on a disability, violating s. 13 of the *Human Rights Code* [***Code***].

[2] Fraserway denies that Ms. Walters had a disability, or that her injury played any role in her termination. Rather, it says that Ms. Walters was terminated for poor performance. In any event, it says that Ms. Walters is bound by the release which she signed during her termination meeting. That release precludes her from bringing this human rights complaint.

[3] Fraserway asks the Human Rights Tribunal [**Tribunal**] to dismiss Ms. Walters' complaint on the bases that it would not further the purposes of the *Code* to proceed in the face of a binding settlement agreement, it has no reasonable prospect of success, and it was filed for improper motives or in bad faith: *Code,* s. 27(1)(c), (d)(ii) and (e).

[4] I find that I can most efficiently address this application under s. 27(1)(d)(ii) of the *Code.* For the reasons that follow, I find that it does not further the purposes of the *Code* to allow this complaint to proceed in light of the release which Ms. Walters signed. The complaint is dismissed.

II DECISION

[5] There is no dispute that, during her termination meeting, Fraserway offered Ms. Walters an additional two weeks' severance in exchange for the execution of a release. That release includes the following:

> 3. In consideration of the promises contained in this Agreement, you agree:
>
> a. On behalf of yourself and anyone claiming through you, irrevocably and unconditionally to release, acquit and forever discharge the Company

> and/or its parent company, subsidiaries, divisions, predecessors, successors and assigns, as well as past and present managers, employees, partners, and anyone claiming through them (hereinafter "Releasees" collectively), in each individual and/or corporate capacities, from any and all claims, liabilities, promises, actions, damages and the like, known or unknown, which you ever had against any of the Releasees **arising out of or relating to your employment with the Company and/or the elimination of your employment with the Company**. Said claims include, but are not limited to: **(1) employment discrimination (including claims of sex discrimination and/or sexual harassment);** (2) disputed wages; (3) wrongful discharge and/or breach of any alleged employment contract; and (4) claims based on any tort, such as invasion of privacy, defamation fraud and infliction of emotional distress.
>
> b. That you shall not bring any legal action against any of the Releasees for any claim waived and released under this Agreement and that you represent and warrant that no such claim has been filed to date. [emphasis added]
>
> [**Release**]

[6] Ms. Walters executed the Release during the termination meeting on June 7, 2018. On July 24, 2018, she filed this human rights complaint.

[7] The parties do not dispute that the scope of the Release captures Ms. Walters' human rights complaint. The issue in this application is whether it furthers the purposes of the *Code* to allow the complaint to proceed notwithstanding the Release.

[8] People cannot contract out of their rights under the *Code*: *Insurance Corporation of British Columbia v. Heerspink*, [1982] 2 SCR 145 at 158. For that reason, the fact that parties have entered into a settlement agreement respecting a human rights dispute does not deprive the Tribunal of jurisdiction to hear the dispute: *Thompson v. Providence Health Care*, 2003 BCHRT 58 at para. 38.

[9] Nevertheless, there are strong policy reasons that favour holding people to agreements they have voluntarily entered into:

> When parties are able to resolve human rights disputes by way of a settlement agreement, considerable public and private resources may be

> saved. They may be able to resolve the complaint more expeditiously than would a formal hearing process. The parties may also be able to craft a resolution which more closely matches their needs and interests than would a decision of the Tribunal. Finally, the mediation process itself may be better for the parties' relationship than a formal hearing. For all of these reasons, the Tribunal encourages and assists parties in attempting to resolve complaints.
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> *Nguyen v. Prince Rupert School District No. 52*, 2004 BCHRT 20 at para. 15

[10] These advantages are undermined if parties who resolve their complaints are subsequently permitted to come forward and pursue the same complaint at the Tribunal: *Thompson* at para. 28. The Tribunal has frequently dismissed complaints in the face of a settlement agreement on the basis that proceeding with the complaint would not further the purposes of the *Code*: *Code*, section 27(1)(d)(ii).

[11] The burden is on the person seeking to pursue their complaint in the face of an agreement to persuade the Tribunal that the purposes of the *Code* are best served by allowing the complaint to proceed: *Thompson* at para. 46. In this case, that means that Ms. Walters bears the burden of persuading me that her complaint should be allowed to proceed in the face of an agreement that expressly purported to preclude it.

[12] In considering this issue, the Tribunal has recognized a number of relevant factors, including: the language of the release; unconscionability; undue influence; whether the party received independent legal advice; conditions of duress, which may be related to the timing of the agreement, financial need, or other circumstances; and whether the party received little or no consideration for the release: *Thompson* at paras. 42-44, citing *Chow (Re)* (1999), 37 CHRR D/442 (Alta. Q.B.), and *Pritchard v. Ontario (Human Rights Commission) (No. 1)* (1999), 35 CHRR D/39 (Ont. Ct. (Gen. Div.)) at para. 17. The Tribunal may also consider "the seriousness of the allegations in a complaint and what is at stake for the complainant": *Gerard v. Olive's Market Whistler and others*, 2015 BCHRT 102 at para. 17.

[13] In this case, Ms. Walters argues that her complaint should proceed because: her allegations of discrimination are serious, she did not have time to properly review the Release

or obtain independent legal advice, the language in the Release was not clear and she did not understand it, she has a history of anxiety, and at the time of signing Ms. Walters was not aware of her rights under the *Code.* I consider these arguments under the headings of: nature of the allegations, unconscionability, undue influence and duress, and independent legal advice.

A. Nature of the allegations

[14] By way of background, Ms. Walters began work for Fraserway as a Human Resources Coordinator [**HR Coordinator**] in April 2017. On March 27, 2018, she fell down the stairs at work and suffered an injury to her neck and hip. She filed a claim with WorkSafeBC and took a medical leave from work.

[15] Beginning on May 7, 2018, Ms. Walters began a gradual return to work under the supervision of WorkSafeBC. She worked reduced, but gradually increasing, hours over the next four weeks. She was assigned limited duties, and much of her work was reassigned to other members of the human resources team.

[16] In her human rights complaint, Ms. Walters alleges that, during this period of gradual return to work, Fraserway began to track her diet and personal activities for the purpose of compiling evidence that she was impeding her own recovery.

[17] One day before the end of Ms. Walters' gradual return to work plan, her employment was terminated. Ms. Walters alleges in her complaint that her disabilities – which she describes as shoulder problems, anxiety and chronic fatigue – were a factor in the employer's decision to terminate her employment. Specifically, she alleges that her colleagues were frustrated with her because they had to take on extra duties as a result of the terms of her gradual return to work. She alleges further that her disabilities were not accommodated during her gradual return to work plan but does not provide any detail explaining this.

[18] Fraserway offers a very different version of events. It has submitted affidavits from the rest of the human resources team, who say that Ms. Walters was spending significant work time on personal matters, was disruptive to her colleagues despite repeated requests to stop

the offending behaviour, and was "instigating tension" in the workplace by complaining about her manager to other coworkers. On May 17, 2018 – three weeks before the termination – the employer issued Ms. Walters with an "Employee Progressive Discipline" notice. The basis for the notice was Ms. Walters' inappropriate use of work time for personal matters, which she acknowledged, as well as other disruptive behaviour in the workplace, which she did not. Fraserway says that it made the decision to terminate Ms. Walters' employment two weeks later, after Ms. Walters continued to do personal work during business hours. They say that the decision to terminate her employment was based on her behaviour and had nothing to do with any disabilities.

[19] Ms. Walters argues that her allegations warrant a hearing to ensure that employers comply with their obligations under the *Code*. She says allowing her complaint to proceed would not only afford her a means of redress – one of the express purposes of the *Code* – but also benefit other employees with disabilities who are "seen by their employers as 'burdens' to accommodate": *Code,* s. 3.

[20] In my view, the nature of Ms. Walters' allegations does not support allowing the complaint to proceed. While I agree that the purposes of the *Code* are furthered where employers and co-workers support accommodation of persons with disabilities, the information before me does not support Ms. Walters' claim that she was treated as a burden because of her graduated return to work. If I did not dismiss the complaint because of the Release, I would have dismissed it as having no reasonable prospect of success.

[21] First, I acknowledge Fraserway's argument that Ms. Walters has not provided evidence to show that her physical injuries amount to a disability within the meaning of the *Code.* In that regard, "disability", within the meaning of human rights legislation, does not capture every injury or medical problem: *Morris v. BC Rail,* 2003 BCHRT 14 at para. 214; *McGuire v. Level4 Technologies*, 2019 BCHRT 50 at paras. 14-16. The Tribunal will consider factors such as "whether the condition entails a certain measure of severity, permanence and persistence": *Viswanathapuram v. Canadian Alliance of Physiotherapy Regulators,* 2017 BCHRT 29 at para. 40. In this case, the evidence that Ms. Walters submitted is that, after she completed her

graduated return to work, she was "fit to return to work without limitations". Whether or not, in those circumstances, Ms. Walters' physical injuries are a disability is something she would have to prove at a hearing. For present purposes, however, I will assume that she had a physical disability that required accommodation in her return to work.

[22] Second, in her complaint, Ms. Walters says that she has anxiety and chronic fatigue. I accept for the purpose of this application that these could amount to disabilities within the meaning of the *Code.* However, there is no information or evidence to support a finding that Ms. Walters was adversely impacted in her employment because of these disabilities. Based on the material before me, anxiety and chronic fatigue were completely unrelated to Ms. Walters' medical leave from work and her subsequent gradual return to work plan. There is no information to support that they posed barriers in her employment and thus required accommodation by the employer. Nor is there any information to support that they factored into the employer's decision to terminate her employment.

[23] Rather, in her affidavit, Ms. Walters says that the conditions in her workplace during her gradual return to work caused her to feel increased anxiety, stress, and headaches. However, the fact that her employer may have caused her to develop these conditions does not amount to discrimination. This point was made by the Tribunal in *Vandale v. Golden (Town),* 2009 BCHRT 219 at para. 43:

> In essence, Ms. Vandale alleges that Ms. Danler and Mr. Wilsgard harassed her, and that that harassment led to stress and anxiety. Assuming that to be true, the fact that particular conduct results in an individual experiencing stress and anxiety, or even a mental disability, does not mean that that conduct constitutes discrimination on the grounds of mental disability. Ms. Vandale's allegation is that the respondents caused her to suffer stress and anxiety, not that they discriminated against her because of or in relation to the stress and anxiety she alleges she experienced. An allegation of intentional infliction of mental distress of the kind Ms. Vandale makes might be a tort or some other kind of legal wrong; it is not a human rights complaint.

I find the same analysis applicable to Ms. Walters' complaint here.

[24] Third, while Ms. Walters alleges that the employer "failed to accommodate" her in the workplace, she does not explain how. Her hours and her tasks were reduced, and the parties appear to agree that Fraserway complied with the directions of WorkSafeBC in respect of her work. In her argument, Ms. Walters refers to an employer's obligation to accommodate employees in "positions that are allegedly available" but does not explain how that concept operates in her case. There is no substance to this allegation that would lead me to conclude it warrants a hearing in the face of the Release.

[25] Finally, with respect to her termination, there is very little evidence to support Ms. Walters' allegation that her injuries or disabilities were a factor. This allegation rests simply on Ms. Walters' assertion that her co-workers expressed frustration about the extra burden being placed on them because of her gradual return to work. However, the termination occurred at the end of this gradual return to work period, after which time Ms. Walters was cleared to return to full duties, without limitation. In these circumstances, it is difficult to infer that the employer terminated her to avoid a "burden" or the perceived burden, which had come to an end, particularly in the face of Fraserway's substantial evidence supporting a non-discriminatory reason for the termination.

[26] In sum, while I accept that any case which alleges disability-related discrimination in employment is serious, I find Ms. Walters' particular case to be weak. This factor weighs against proceeding with the complaint in the face of the Release.

B. Unconscionability

[27] Unconscionability "exists where there is an inequality of bargaining power and a substantially unfair settlement": *Re Chow,* cited in *Thompson* at para. 44. In this case, Ms. Walters argues that there was an inequality of bargaining power between the parties. She says that, when she signed the Release, she was "weak, disadvantaged, and … vulnerable". This argument requires me to describe the circumstances of the termination meeting.

[28] On June 7, 2018, Ms. Walters was asked to attend a meeting with the Director of Human Resources [**Director**] and the company's Training and Development Specialist [**Specialist**]. The parties have slightly different versions of what occurred during this meeting.

[29] According to Ms. Walters, the Director told her "today is going to be your last day. Even though I have enough here [tapping on a pile of papers] to terminate you with cause, if you sign this package, we are willing to process your termination without cause. I will also give you a positive reference". Ms. Walters said that she understood from the conversation that if she did not sign the Release, her employment would be terminated for cause.

[30] According to the Director and the Specialist, the Director explained to Ms. Walters that, even though the employer had reason to dismiss her for cause, this was a dismissal without cause. They say that, during this meeting, Ms. Walters acknowledged that she had not been giving 100% of her efforts and had been considering resigning. Ms. Walters denies saying this but agrees that she had been unhappy in her workplace during her gradual return to work.

[31] During the meeting, Ms. Walters was handed a termination letter. The termination letter is one page and signed by the Director. It confirms that Ms. Walters' employment was terminated effective June 7. Under the heading "Statutory and Other Entitlements", it says that Fraserway was going to provide Ms. Walters with two weeks' compensation in lieu of notice, pursuant to its obligations under the *Employment Standards Act* and her employment contract. The final section of the letter is labelled "Release". It provides:

> To assist you with this transition, we are prepared to offer you payment of **2 weeks** (less required deductions), which will be payable upon the release of the signed Settlement Agreement enclosed with this letter. To be eligible to receive this final payment, you must return the Settlement Agreement to us, signed and witnessed no later than Tuesday, June 12th, 2018. [emphasis in original]

[32] The "Settlement Agreement" which this passage refers to is a one-page document titled "Release Form". It set out that Fraserway would pay Ms. Walters severance in the amount of two weeks' pay, on an "exgratia basis in exchange for you executing the enclosed Release". It then included the Release, which I have set out above.

[33] According to the Director and Specialist, the Director told Ms. Walters that she could take time to review the Release and sign it later. However, Ms. Walters said that she did not need extra time. She took a few minutes to read the Release, and then signed it during the meeting. In the letter, Fraserway says that the offer was open for five days. However, the Director says that if Ms. Walters had required more time to read the Release, consider the offer, or obtain legal advice, she would have allowed it.

[34] Ms. Walters says that, at this point, she felt "panicked" at the prospect that if she did not sign the Release, she would be fired for cause. She was preoccupied, worrying about how she would explain to future employers that she had been fired for cause. She was on anti-anxiety medication and felt "numb, in shock and embarrassed". She says that she did not read the Release before or after she signed it and she did not understand its meaning. She emailed the Director the next day, asking for a signed copy of the Release and explaining "I honestly did not recall what the document asked of me, just worried about benefits and finances at the time of signing".

[35] I accept, and Fraserway does not dispute, that there is an inherent power imbalance between an employer and employee, particularly at the time of a termination. However, this is not sufficient to establish that the Release as a whole is unconscionable. Indeed, the same could be said of almost any employer-employee relationship: *Woollacott v. Canadian Forest Products and Another,* 2014 BCHRT 61 at para. 39. The issue, rather, is whether Ms. Walters was compelled by that dynamic to accept a fundamentally unfair deal and did not have the power to negotiate a more favourable outcome. I am not satisfied that was the case.

[36] First, Ms. Walters does not dispute that she was told in the meeting that she could take time to review the Release before signing it. Indeed, that offer is express on the face of the termination letter, which grants a five-day period for signing and returning the Release. She chose not to exercise this option.

[37] Second, I agree with Fraserway that Ms. Walters' unique experience and qualifications as an HR Coordinator mitigated the power imbalance between the parties. Part of her role was

to oversee terminations at the company's 13 dealerships across the country. In that capacity, she prepared, discussed, and reviewed termination documents with the Director and supported managers performing terminations. Ms. Walters did not dispute Fraserway's evidence that she was involved in approximately 31 terminations during her time with the company. In fact, Ms. Walters was the last employee to modify the language of the Release for a termination. She used the same Release in terminations with five different employees. Notwithstanding this was an express part of her job, and squarely within the purview of any human resources professional, Ms. Walters says she did not understand the meaning or legal consequences of a release. While I cannot find as a fact that this claim is untrue, I do find it surprising. If Ms. Walters did not understand what a release was, she certainly should have. In my view, Ms. Walters' experience in human resources and her exposure to the termination process, at the very least, meant that she had some understanding of what she was presented with and her options at that point. Those options included rejecting the settlement agreement or taking more time to review it before signing.

[38] Third, and related, the nature of the employer's offer was that it was open to Ms. Walters to reject it or renegotiate it. She was not at the employer's mercy. She says that she understood that, if she did not sign the Release, she would be terminated for cause. However, it is clear on the face of the termination letter that this was not the case. Fraserway was paying her statutory notice, which it would not have been required to do if the employment was terminated for cause. Again, this is something Ms. Walters would have, or at least should have, understood as a human resources professional.

[39] Finally, I do not find that the payment of two weeks' severance is fundamentally unfair. At the time of her employment, Ms. Walters had worked for Fraserway for about 14 months. When added to the severance she was paid under the *Employment Standards Act* and her employment contract, Ms. Walters received a total of one month's compensation. I fully accept that, if Ms. Walters were successful in her human rights complaint, she would most likely receive significantly more compensation. However, I have already concluded that her prospect

of success is very unlikely. In such circumstances, I am not prepared to second guess the parties' agreement: *Gerrard v. Olive's Market Whistler and others,* 2015 BCHRT 102 at para. 27.

[40] In all the circumstances, I am not persuaded that it would be unconscionable to hold the parties to the Release.

C. Undue influence and duress

[41] Undue influence arises where a party was under some "coercion, oppression, abuse of power or authority, or compulsion" which undermined their ability to freely consent to the agreement: *Re Chow,* cited in *Thompson* at para. 44. There is no evidence before me that could support a finding that Ms. Walters was unduly influenced to sign the Release.

[42] Ms. Walters argues simply that she has "a history of anxiety". This alone, however, could not support a finding that she was unable to consent freely to the Release. Indeed, such a finding would have to rest on stereotype and stigma about mental illness to conclude that a person with anxiety could not be capable of making sound decisions. This is not an assumption I am prepared to make, and nothing in Ms. Walters' materials persuades me that her particular anxiety had such an effect.

[43] This Tribunal has previously acknowledged that "[a]ll employees facing termination face some stress and pressure to act": *Ghane v. Lush Fresh Handmade Cosmetics Ltd.,* 2009 BCHRT 13 at para. 18. However, such ordinary stress and pressure do not, themselves, amount to duress or create circumstances of undue influence: *Craig v. Sony Entertainment Canada Inc. and Abson,* 2005 BCHRT 54 at para. 35.

[44] Ms. Walters does not point to any conduct on the part of the Director or Specialist during the termination meeting that could be characterised as coercive or otherwise an abuse of their power over her. I find that this factor does not weigh against respecting the Release.

D. Independent legal advice

[45] Finally, Ms. Walters argues that the Tribunal should not enforce the Release because she signed it without the benefit of independent legal advice. She says that the Release was not drafted in "clear and simple language" and she was not aware that she might have recourse under the *Code.* I do not find this argument persuasive.

[46] First, as I have said, Fraserway gave Ms. Walters five business days to review the Release before signing it and she chose not to exercise this option.

[47] Second, I agree with Fraserway that a person is not required to have independent legal advice in order to enter into a binding and enforceable agreement: *Sapieha v. Intercontinental Packers Ltd* (1985), 42 Sask R 96 (SKQB).

[48] Third, the Release was a short, one-page document. While it did contain some legalese, it contained a simple and clear stand-alone clause which stated "That you shall not bring any legal action", as well as an express reference to claims involving "employment discrimination". I cannot accept that this was too complicated for someone with Ms. Walters' experience and professional qualifications to understand.

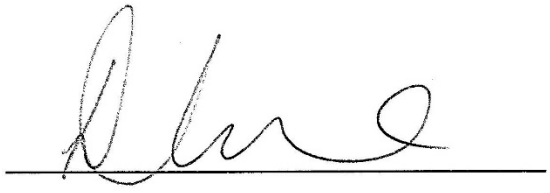
[49] Finally, as Fraserway points out, one of the tasks which Ms. Walters performed for the company was to undertake a complete review of its Company Policies manual. That manual makes repeated reference to human rights legislation, including in connection with the obligation of human resources staff to ensure terminations are done in a manner compliant with the *Code.* Ms. Walters does not dispute that she did this work. As such, she would have had more than the average exposure and understanding about the employer's obligations, and her rights as an employee, arising from human rights legislation.

[50] In sum, I do not find that this factor weighs in favour of proceeding with Ms. Walters' complaint.

III CONCLUSION

[51] In all the circumstances, I am persuaded that it would not further the purposes of the *Code* to allow the complaint to proceed. In reaching this conclusion, I have placed significant weight on my assessment of the strength of Ms. Walters' claim, as well as the facts that she was offered – and declined – the chance to take time to review the Release before signing, and that her professional qualifications in human resources would have made her familiar, at least to some extent, with the termination process and the legal concept of a release. Ms. Walters has not persuaded me that it would be unconscionable to enforce the Release, or that she was under undue influence or duress at the time of signing it. In this case, the purposes of the *Code* are best served by holding the parties to the bargain that they struck at the time of termination.

[52] Ms. Walters' complaint is dismissed under s. 27(1)(d)(ii) of the *Code*.



Devyn Cousineau, Tribunal Member