COURT OF APPEAL FOR ONTARIO

CITATION: Briggs v. Durham (Police Services Board), 2022 ONCA 823
DATE: 20221128
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Simmons, Benotto and Favreau JJ.A.

BETWEEN

Joseph Briggs

Applicant
(Respondent)

and

Durham Regional Police Services Board and Christopher Delaney

Respondents
(Appellants)

and

Human Rights Tribunal of Ontario

Respondent
(Respondent)

David Cowling and Alexander Boissonneau-Lehner, for the appellants

Toby Young and Mindy Noble, for the respondent Joseph Briggs

Jason Tam and Katia Snukal, for the respondent Human Rights Tribunal of Ontario

Heard: October 26, 2022

On appeal from the order of the Divisional Court (Justices David L. Corbett, Laurence A. Pattillo, and Graeme Mew), dated January 19, 2019, with reasons reported at 2021 ONSC 414, granting an application for judicial review of the decisions of the Human Rights Tribunal of Ontario dated November 3, 2017, with reasons reported at 2017 HRTO 1457, and March 27, 2019, with reasons reported at 2019 HRTO 565.

Favreau J.A.:

A. OVERVIEW

[1] The respondent, Joseph Briggs, brought two separate applications to the Human Rights Tribunal of Ontario (the "Tribunal" or the "HRTO") against the Durham Regional Police Services Board (the "Board") and individual police officers. The parties participated in a mediation in the context of the second application and reached a settlement. A dispute then arose between Mr. Briggs and the Board over whether the release signed as part of the settlement was also meant to cover the first application, which had been heard but not decided by the Tribunal at the time of the mediation.

[2] In a decision dated November 3, 2017, the Tribunal ruled that the settlement made in the context of the second application also settled the first application. In a subsequent decision dated March 27, 2019, the Tribunal ruled that the decision which was issued in Mr. Briggs's favour on the first application following the date of the settlement was an abuse of process and was therefore cancelled.

[3] The Divisional Court found that the Tribunal's decisions were unreasonable. Rather than remitting the matter back to the Tribunal, the Divisional Court made a determination that the settlement of the second application did not settle the first application and that the decision issued in Mr. Briggs's favour on the first application was therefore not an abuse of process.

[4] The Board[1] appeals the decision of the Divisional Court on the basis that the Divisional Court did not accord sufficient deference to the Tribunal's decisions and that the Tribunal's decisions were reasonable. The Board also argues that, even if the Tribunal's decisions were unreasonable, the Divisional Court should have remitted the matter back to the Tribunal with directions rather than deciding the matter and granting a remedy.

[5] In my view, the Divisional Court did not make any errors in finding that the Tribunal's decisions were unreasonable. In addition, in the particular circumstances of this case, especially considering the lengthy delay since Mr. Briggs brought his first application, I see no error in the Divisional Court's exercise of its discretion to grant a remedy rather than remitting the matter back to the Tribunal.

B. BACKGROUND

(1) The two applications to the Tribunal

[6] In April 2012, Mr. Briggs commenced an application to the Tribunal against the Board and Constable Christopher Delaney. The application arose from an incident on May 4, 2011, when two police officers, including Constable Delaney, followed Mr. Briggs, who is a Black man, out of a restaurant parking lot. Mr. Briggs was then pulled over, questioned, handcuffed and detained. In his application, Mr.

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[1] The Board and Christopher Delaney are both appellants in this matter. For ease of reference, throughout these reasons, I have referred only to the Board when identifying the appellants.

Briggs alleged that the Board and Constable Delaney discriminated against him on the basis of race, colour and ethnic origin.

[7] The first application went to a hearing before Tribunal Vice-Chair Alison Renton on October 3, 2013. The Vice-Chair bifurcated the hearing. The first part of the hearing was to deal with liability and monetary awards. The second part of the hearing, if necessary, was to deal with non-monetary remedies. The first part of the hearing took place over four days, and was completed in June 2014. The Vice-Chair reserved her decision on the last day of the hearing.

[8] In the meantime, on October 8, 2013, Mr. Briggs filed a second application to the Tribunal against the Board and Constables Paul Grigoriou and Joseph Kehoe. This application was based on an incident that occurred on October 8, 2012, when Mr. Briggs was arrested and then detained at an Oshawa police station. The Office of the Independent Police Review Director investigated the incident and found that the police used excessive force against Mr. Briggs and denied him medical assistance. In his application to the Tribunal, Mr. Briggs alleged that his arrest and treatment at the police station were a reprisal for his first application to the Tribunal.

(2) The settlement

[9] On March 2, 2015, before the Vice-Chair released her decision on the first application, the parties participated in a mediation in the context of the second application.

[10] The mediation agreement referred to the style of cause and file number of the second application, and stated that the parties had "agreed to try to resolve some or all issues in the Application by mediation/adjudication" (emphasis added).

[11] At the conclusion of the mediation, the parties agreed to a settlement. The settlement was conditional on approval by the Board. Mr. Briggs signed the Minutes of Settlement on March 2, 2015, and a representative of the Board signed them on March 24, 2015.

[12] The style of cause of the Minutes of Settlement referred to the file number of the second application and named the parties as Mr. Briggs and the Durham Regional Police Service.

[13] The paragraphs in the recital to the Minutes of Settlement only referred to the second application and stated that the parties "wish to resolve this matter without further hearing by the Tribunal" and that "the parties agree to the full and final settlement of the Application as follows" (emphasis added).

[14] The terms of the Minutes of Settlement required the Board to pay a first amount to Mr. Briggs at the time of the settlement and to pay a second amount one year and two weeks following the settlement if Mr. Briggs met specified conditions. Paragraph 2 of the agreement set out the terms of this second payment:

> The Durham Regional Police Services Board shall pay to the Applicant an additional amount of [redacted] as

> general damages under the Human Rights Code for pain and suffering on a date that is one year and two weeks from the date of this settlement, but only if during the period of one year from the date of this settlement the applicant has not filed any complaint or commenced any litigation against the Durham Regional Police Service, its Board or its officers or employees; and if the applicant has not posted any videos or negative commentary on the Internet regarding the Durham Regional Police Service, its Board or its officers or employees; and if the applicant signs a Full and Final Release in the form set out in para. 7 below releasing the Durham Regional Police Service, its Board and its officers and employees for any and all claims up to March 1, 2016. The payment will only be made upon receipt of this Release.

[15] The Minutes of Settlement required Officer Kehoe, who was one of the officers named in the second application, to attend a de-briefing on the use of force. The agreement also specified that Mr. Briggs agreed to "withdraw the Application as against the Personal Respondents" (emphasis added).

[16] Paragraph 7 of the Minutes of Settlement set out the terms of the release between the parties:

> The Applicant hereby releases the Respondent Durham Regional Police Service, the Durham Regional Police Services Board, and its current and former officers, directors, employees and agents, including for greater certainty the Personal Respondents, from any and all applications, claims, demands, complaints, or actions of any kind up to the date of this settlement agreement or arising out of or in any way related to this Application, including but not limited to claims under the common law, the Ontario *Human Rights Code*, and the *Police Services Act*. The Applicant will not make any application, complaint or claim or bring any action against the Respondents and these Minutes of Settlement may be

> raised as a complete bar to any such application, claim, complaint or action. [Emphasis added.]

[17] Finally, paragraph 10 of the Minutes of Settlement required the parties to complete a Form 25, the Tribunal's Confirmation of Settlement form, "upon the approval of these minutes of settlement by the Durham Regional Police Services Board", and paragraph 11 provided that "[t]he parties request that the Tribunal finally dispose of this Application" (emphasis added).

[18] On March 24, 2015, the Board signed the Minutes of Settlement and a Form 25. Mr. Briggs signed the Form 25 on March 30, 2015. The style of cause on the Form 25 only referred to the file number for the second application, and only named as respondents the Durham Regional Police Service and the personal respondents to the second application. It did not name Christopher Delaney, who was the personal respondent to the first application. Form 25, which is a standard form, states that the parties "confirm that they have resolved this Application based on a written settlement that they have signed" and that the parties "understand that the HRTO will finally dispose of this Application and close its file" (emphasis added).

(3) Events following the settlement

[19] In June 2015, Mr. Briggs's counsel sent a letter to the Case Processing Officer at the Tribunal inquiring about the status of the decision on the first application. In November 2015, Mr. Briggs's counsel wrote again to the Tribunal

inquiring about the decision on the first application. In response to Mr. Briggs's counsel's email, and the Tribunal's response advising that the decision would be released in December 2015, counsel for the Board advised Mr. Briggs's counsel and the Tribunal that the Board's position was that the settlement of March 2015 settled both applications.

[20] Despite these communications, on December 18, 2015, the Vice-Chair released her decision on the first application (the "Merits Decision"). She found that the complaint was made out in part, and that the respondents to the application discriminated against Mr. Briggs by racially profiling him. She awarded $10,000 in damages to Mr. Briggs and directed that the parties contact the registrar of the Tribunal if they were not able to resolve the issue of additional remedies.

[21] Following release of the Merits Decision, the Board brought an application for judicial review of the decision to the Divisional Court. Amongst the grounds for judicial review, the Board asserted that the first application had been settled by the parties in the context of the second application.

[22] In June of 2017, before the application for judicial review proceeded before the Divisional Court, the Vice-Chair who heard the first application issued directions to the parties advising them that she had become aware that there was a dispute about whether the matter had been resolved before she released the

Merits Decision. She advised the parties that she would convene a hearing to address the issue.

[23] In advance of the hearing, the parties raised concerns regarding the evidence that would be admissible for the purpose of determining whether the settlement of the second application also settled the first application. On September 26, 2017, the Vice-Chair issued a ruling addressing this issue, in which she accepted that parol evidence may be relevant if there was an ambiguity in the Minutes of Settlement. On this basis, she directed the parties to exchange witness statements. She also directed that, if the Board intended to seek to compel the member of the Tribunal who conducted the mediation, as the Board advised it intended to do, the Board would have to be prepared to address the issue of whether the mediator was compellable as a witness.

(4) The Tribunal's Interim and Reconsideration decisions

[24] In her Interim Decision released on November 3, 2017, the Vice-Chair found that the settlement was meant to cover both applications. In reaching this conclusion, she noted that the Minutes of Settlement do not mention the first application. However, she found that the first application was covered by the broadly worded release at paragraph 7 of the Minutes of Settlement:

> I accept the respondents' submissions that the release language was "slate wiping", in that from the wording of the Minutes themselves it is clear that the parties intended to resolve everything up to the date of the Minutes, and in fact up to March 2016.

> Application #1 is covered by the "any and all applications" language found in paragraph 7.
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> The release says that the applicant releases "the Respondent Durham Regional Police Service, the Durham Regional Police Services Board, and its current and former officers, directors, employees and agents"… The personal respondent in Application #1 comes within the class of current or former officer or employee. He is not specifically excluded from the Release. The fact that he did not sign the Minutes does not deprive him of the benefit of the Release.
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> …
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> I agree with the applicant that, unlike *Biancaniello*, the first part of the release language does not identify the subject of what was being released. However, the language in the release says, "Any and all applications…. up to the date of this settlement agreement" and I find that this includes Application #1 as it was an outstanding application at the time the Minutes were entered into in March 2015. The factual matrix or surrounding circumstances at the time the Minutes were entered into, and which are part of the agreed statement of facts, included the parties being aware that the hearing in Application #1 had concluded and there was a Tribunal decision on reserve. Despite being on reserve, Application #1 was still an active application. It was also a claim under the *Code*, as is referenced later in the paragraph. [Citations omitted.]

[25] As part of her reasoning, the Vice-Chair stated that she did not have to decide the date on which the settlement was reached. However, she found that the Form 25 was not part of the factual matrix because it was post-settlement evidence. She therefore did not consider it in deciding the parties' intentions.

[26] Following the release of the Interim Decision, the Vice-Chair held a hearing to decide whether the Merits Decision could stand. On March 27, 2019, the Vice-Chair released her Reconsideration Decision, in which she found that it was an abuse of process for the Tribunal to have issued the Merits Decision and she cancelled the decision.

(5) The Divisional Court's decision

[27] Mr. Briggs sought judicial review of the Tribunal's Interim Decision and Reconsideration Decision.

[28] The Divisional Court granted the application for judicial review on the basis that the Interim Decision was unreasonable. In reaching this conclusion, the Divisional Court found that the Interim Decision failed to take account of the full factual matrix. Specifically, the Divisional Court held that it was an error for the Vice-Chair not to have considered the Form 25, given that it was signed on the same day the Board signed the Minutes of Settlement and that "the parties were clearly aware prior to the settlement that in order for a matter to be resolved at the HRTO, the parties to the application were required to sign and file a Form 25." The Divisional Court then found that the Vice-Chair's conclusion that there was no ambiguity in the settlement agreement was unreasonable, in part because she had taken an overly narrow approach to the factual matrix.

[29] Ultimately, the Divisional Court decided that the Interim Decision was "not based on a coherent and rational chain of analysis in relation to the facts and the

law" and that it was therefore unreasonable. The Divisional Court further found that the Reconsideration Decision was also unreasonable given that it was entirely based on the Interim Decision.

[30] With respect to the remedy, the Divisional Court recognized that, in the normal course, where a court finds that a decision is unreasonable, the matter should be sent back to the decision-maker for reconsideration. However, the Divisional Court exercised its discretion to decide the matter because it involved the interpretation of a release, a matter about which the Tribunal has no special expertise, and because the issue could be decided on the record before the Court. The Court also decided that it should resolve the matter because of the Tribunal's significant delay in resolving the first application. Finally, the Court justified its decision to resolve the matter on the basis that the issue was binary: the settlement either resolved the first application or it did not.

[31] On this basis, the Divisional Court went on to conduct its own analysis of the settlement agreement in the context of the full factual matrix. In doing so, the Court found that there was an ambiguity in the agreement:

> On the one hand, the Minutes as a whole together with the surrounding circumstances concerning the mediation and resulting settlement including Form 25 which the parties filed with the [Tribunal] support the finding that what is being resolved between the parties is only Application 2. On the other hand, the fact that the parties were aware that Application 1 was under reserve together with the words "any and all applications" in

> paragraph 7 of the Minutes support the finding that the parties intended to resolve Application 1 as well as Application 2.
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> In other words, having regard to the surrounding circumstances and the wording of the Minutes as a whole, together with the wording of the release in paragraph 7, it is not clear, in my view, whether it was the intention of the parties that the release in paragraph 7 include Application 1 in addition to Application 2.

[32] Given the finding of ambiguity, the Divisional Court considered post-settlement conduct, which consisted of the parties' communications with each other and the Tribunal between the time of the settlement and the release of the Merits Decision on December 18, 2015. The Divisional Court found that the parties' conduct demonstrated that they had not intended to settle the first application:

> The post-settlement evidence before the HRTO establishes that for a period of three months after the settlement was reached, neither party took any steps to advise the HRTO that Application 1 had been settled. As both sides knew at the time of the settlement that the decision in Application 1 was under reserve, at the very least, out of courtesy to the Member and the HRTO, they would have notified it that Application 1 was settled. Yet they remained silent.
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> Further, when Briggs' counsel contacted the HRTO in June 2015, it was not to advise that Application 1 had been settled but rather to inquire about the status of the decision in Application [1]. Briggs' counsel's position that Application 1 had not been resolved was consistent throughout.
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> On the other hand, counsel for DRPS took no steps to advise HRTO of the settlement of Application 1 although arguably their client had a greater interest in advising the HRTO of the settlement than Briggs did. It was not until

> Briggs' counsel raised the issue of the delay of the decision of Application 1 on November 10, 2015, approximately eight months after the settlement, that DRPS' counsel took the position that the settlement included Application 1.
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> Even after the November 10, 2015 discussion, DPRS' counsel took no steps to contact the HRTO to advise of the settlement. It was not until Briggs' counsel wrote to the HRTO about the status of the decision on November 16, 2015 (copying DRPS' counsel) and the HRTO responded to both counsel indicating that the decision was expected by December 4, 2015 that the DRPS finally wrote to the HRTO and advised that Application 1 had been settled. Even then, although the letter is dated November 20, 2015, it was not sent to the HRTO until December 14, 2015, well after the date the decision was supposed to have been released.
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> I am mindful that the above conduct consists of the parties' agents as opposed to the parties themselves. Given the conduct concerns a settlement in which the lawyers played a central part, I do not consider their actions to be any less reliable than if it was that of the parties themselves. The lawyers who were directly involved in the settlement were clearly aware of what the parties' intentions concerning settlement were at the time. In my view, the evidence is credible.

[33] Having found that the settlement did not resolve the first application, the Divisional Court allowed the application for judicial review and set aside the Interim Decision and the Reconsideration Decision.

C. DISCUSSION

[34] The appeal raises the two following issues:

a. Whether the Tribunal's Interim Decision was reasonable; and

b. Whether the Divisional Court erred in not sending the matter back to the Tribunal.

[35] I note that the standard of review on both issues is different and it is therefore addressed separately when dealing with each issue.

(1) The Tribunal's Interim Decision was unreasonable

(a) The standard of review

[36] As recently stated by this court in *Ontario (Health) v. Association of Ontario Midwives*, 2022 ONCA 458, at para. 42, on an appeal from a decision of the Divisional Court on judicial review, this court is to decide whether the Divisional Court identified the appropriate standard of review and applied it correctly. Accordingly, this amounts to a "*de novo* review of the Tribunal's decision" and the role of this court is to "step[] into the shoes" of the Divisional Court.

[37] The Divisional Court applied a reasonableness standard of review to the Tribunal's decision. Mr. Briggs and the Board agree that this was the appropriate standard of review. I agree. This is consistent with this court's decision in *Midwives*: at para. 83.

[38] On appeal to this court, in its factum, the Tribunal maintained its position that the appropriate standard of review is "patent unreasonableness" because this is the standard of review set out at s. 45.8 of the *Human Rights Code*, R.S.O. 1990, c. H.19, and because, in *Canada (Minister of Citizenship and*

Immigration) v. Vavilov, 2019 SCC 65, [2019] 4 S.C.R. 653, at para. 34, the Supreme Court instructed that courts should "to the extent possible, respect clear statutory language that prescribes the applicable standard of review." However, the Tribunal did not pursue this issue in oral argument. In effect, in *Midwives*, this court recently considered and rejected the arguments put forward by the Tribunal on this issue, holding that, consistent with the court's previous decision in *Shaw v. Phipps*, 2012 ONCA 155, 347 D.L.R. (4th) 616, the standard of review that applies to Tribunal decisions is reasonableness.

[39] In applying the reasonableness standard, as held in *Vavilov*, at para. 83, the focus is "on the decision actually made by the decision maker, including both the decision maker's reasoning and the outcome." The court is to look for reasoning that is "rational and logical", having regard to the relevant factual and legal constraints: at para. 102. In addition, the court is not to hold the reasons up to a standard of perfection or conduct a "line-by-line treasure hunt for error": at para. 102.

(b) Analysis

[40] I agree with the Divisional Court that the Interim Decision was unreasonable. The Vice-Chair articulated the correct legal framework for interpreting the Minutes of Settlement. However, her application of that legal framework was unreasonable.

[41] In accordance with *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, at para. 47, a contract must be read as a

whole, having regard to the ordinary and grammatical meaning of the words used, consistent with the surrounding circumstances or factual matrix. If based on a review of the wording of the agreement and the factual matrix, there is an ambiguity in the meaning of the agreement, the court can then have regard to external or parol evidence, which may include the subsequent conduct of the parties. However, in doing so, the court must give evidence of subsequent conduct the "appropriate weight having regard to the extent to which its inherent dangers are mitigated in the circumstances of the case at hand, to infer the parties' intentions at the time of the contract's execution": *Shewchuk v. Blackmont Capital Inc.,* 2016 ONCA 912, 404 D.L.R. (4th) 512, at para. 56.

[42] In addition, in *Biancaniello v. DMCT LLP*, 2017 ONCA 386, 411 D.L.R. (4th) 367, at para. 42, this court set out the interpretive principles that specifically apply to a release, which include that the court must "look first to the language of a release to find its meaning", that "[w]hen a release is given as part of the settlement of a claim, the parties want to wipe the slate clean between them", and that "[o]ne can look at the circumstances surrounding the giving of the release to determine what was specially in the contemplation of the parties".

[43] In this case, I agree with the Divisional Court that the Vice-Chair's decision was unreasonable because she failed to consider the full factual matrix. In other words, her chain of analysis was flawed and she failed to consider the legal and factual constraints on her decision.

[44] The Vice-Chair stated that it was unimportant to determine the date of the agreement. She nevertheless held that the Form 25 signed by the parties was post-settlement evidence and did not form part of the agreement. This was illogical and contrary to evidence in the record. In order to decide whether the Form 25 was or was not post-settlement conduct, it was necessary for the Vice-Chair to determine the date of the settlement. Moreover, given that the Minutes of Settlement contemplated that the parties would sign a Form 25 and that the Board signed the Minutes of Settlement and the Form 25 on the same date, it was clear from the record that the Form 25 was part of the settlement.

[45] Ultimately, in part given her exclusion of the Form 25, the Vice-Chair's focus was far too narrow. She only considered the wording of paragraph 7 of the Minutes of Settlement that referred to "all applications … up to the date of this settlement agreement" and the fact that the parties were aware that the Merits Decision was still pending at the time of the settlement. However, she did not have regard to multiple other factors that suggested that the settlement was not meant to include the first application, including that:

a. the mediation agreement only referred to the second application;

b. the Minutes of Settlement only referred to the second application, including in the style of cause, the recitals, and the body of the document;

c. the two applications were brought against individual officers, and the Minutes of Settlement

> did not refer to Constable Delaney, who was the subject of the first application. In fact, the Minutes of Settlement do not require any re-education or re-training for Constable Delaney whereas Officer Kehoe, who was one of the officers named in the second application, is required to participate in "de-briefing" on the use of force; and
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> d. there is no requirement that the parties sign a Form 25 for the first application and, in fact, the parties never did so.

[46] The Board argues that the Divisional Court erred in holding that "the parties were clearly aware prior to the settlement that in order for a matter to be resolved at the HRTO, the parties to the application were required to sign and file a Form 25." The Board argues that the applicable rule does not require the parties to sign a Form 25. Rule 15.6 of the Tribunal's Rules of Procedure provides as follows:

> Where the terms of any settlement are in writing and signed by the parties the parties may request that the Tribunal dispose of the matter in accordance with their agreement by filing a confirmation of settlement using Form 25 (Settlement). Parties may also ask the Tribunal to issue a consent order in accordance with s. 45.9 of the *Code.* A completed Form 25 must be filed within ten (10) days of the date of the agreement.

[47] Evidently, the rule permits parties who settle an application to file a Form 25 *or* a consent order, which may support the Board's argument that a Form 25 is not required as part of every settlement. However, at the very least, parties to a settlement are required to provide notice to the Tribunal in writing that a matter has been settled. In this case, the Minutes of Settlement only required that the parties

sign a Form 25 for the second application, which they did. The Minutes of Settlement therefore did not provide for any mechanism to notify the Tribunal that the first application was settled, despite the fact that the parties were aware that the Merits Decision was still pending. This forms part of the factual matrix and is one of the factors that suggests that, at the time of the settlement, the parties did not intend to settle the first application.

[48] The Board also argues that the Vice-Chair's decision was reasonable because the wording of paragraph 7 of the Minutes of Settlement shows a clear intent to release the Board from all known applications up to that point and to "wipe the slate clean". However, this argument simply adopts the Vice-Chair's narrow focus on the wording of the release without proper consideration of the full factual matrix.

[49] I recognize that the Divisional Court and this court owe significant deference to the Vice-Chair's decision and that, superficially, the wording of the release could support the Vice-Chair's conclusion that the parties intended to release the first application. However, as held in *Vavilov*, one of the considerations in performing a reasonableness review is whether the decision conforms to the applicable legal and factual constraints. Here, the Vice-Chair was required to apply the common law principles of contract interpretation. This required her to examine the full factual matrix at the time the parties entered into the agreement and not to only focus on isolated words in one provision of the agreement. In the circumstances of this case,

while cognizant of the deference owed to the Tribunal's decision, I agree with the Divisional Court that the Interim Decision was unreasonable. As held by the Divisional Court, it necessarily follows that the Reconsideration Decision was unreasonable too.

(2) The Divisional Court did not err in not remitting the matter back to the Tribunal

(a) The standard of review

[50] While this court does not owe deference to the Divisional Court on the issue of whether the Tribunal's decision was reasonable, the appellate standard of review applies to the issue of remedy. The court must consider whether the Divisional Court made an error of law or a palpable and overriding error of fact or mixed fact and law in deciding to substitute its own decision for the Tribunal's decision: *2274659 Ontario Inc. v. Canada Chrome Corporation*, 2016 ONCA 145, 395 D.L.R. (4th) 471, at para. 49.

[51] Here, the issue of whether this is an appropriate case for the Divisional Court to decide the issue rather than remitting the matter back to the Tribunal is a question of mixed fact and law. Similarly, the issues of whether there was an ambiguity in the Minutes of Settlement and whether that ambiguity should be resolved in Mr. Briggs's favour are also questions of mixed fact and law. Accordingly, this court can only interfere if the Divisional Court made a palpable and overriding error.

(b) The Divisional Court's decision not to remit the matter back to the Tribunal was justified

[52] In my view, the Divisional Court did not err in deciding that this was an appropriate case for substituting its decision for the Tribunal's decision.

[53] As held in *Vavilov*, in the normal course, a decision overturned on a standard of reasonableness should be returned to the original decision-maker for reconsideration. However, there are circumstances where it may be appropriate for a court to substitute its decision for the decision of the Tribunal. In *Vavilov*, at para. 144, the Supreme Court explained the circumstances where it may be appropriate to do so:

> However, while courts should, as a general rule, respect the legislature's intention to entrust the matter to the administrative decision maker, there are limited scenarios in which remitting the matter would stymie the timely and effective resolution of matters in a manner that no legislature could have intended. An intention that the administrative decision maker decide the matter at first instance cannot give rise to an endless merry-go-round of judicial reviews and subsequent reconsiderations. Declining to remit a matter to the decision maker may be appropriate where it becomes evident to the court, in the course of its review, that a particular outcome is inevitable and that remitting the case would therefore serve no useful purpose. Elements like concern for delay, fairness to the parties, urgency of providing a resolution to the dispute, the nature of the particular regulatory regime, whether the administrative decision maker had a genuine opportunity to weigh in on the issue in question, costs to the parties, and the efficient use of public resources may also influence the exercise of a court's discretion to remit a matter, just as they may influence

> the exercise of its discretion to quash a decision that is flawed. [Citations omitted.]

[54] In this case, the Divisional Court recognized that, in the normal course, the matter should be remitted back to the Tribunal. However, the Divisional Court gave several reasons for substituting its decision for the decision of the Tribunal. As reviewed above, these include the extensive delay since the first application was started, that the Tribunal does not have any special expertise in interpreting settlement documents, that the matter could be resolved on the record before the court and that the issue could only be answered in one of two ways.

[55] In accordance with *Vavilov*, these were for the most part relevant considerations. On its own, the Tribunal's lack of expertise in interpreting releases does not justify the decision not to remit the matter back to the Tribunal. Otherwise, courts could step into an administrative decision-maker's shoes in all cases where a court and a decision-maker have equal expertise. However, in combination, the other factors, especially the inordinate delay in this case, justify the Divisional Court deciding the matter rather than remitting it back to the Tribunal. Mr. Briggs's first application arises from an incident that occurred in 2012. His application raises serious issues of racial profiling. He should not have to wait any longer for a final resolution.

[56] The Board argues that the Divisional Court's decision not to remit the matter back to the Tribunal has deprived it of an opportunity to call evidence relevant to

the issue of whether the parties intended to settle the first application through the Minutes of Settlement. I reject this argument.

[57] The Board's materials on appeal do not identify the evidence it would call if the matter was remitted back to the Tribunal. When pressed during oral argument, counsel for the Board suggested that there could be evidence from the mediator that he had undertaken to let the Tribunal know that the parties had settled the first application. This does not assist the Board.

[58] If the Board had relevant evidence on the issue of the parties' intentions, it should have provided that evidence at the hearing before the Vice-Chair that led to the Interim Decision. As reviewed above, it was clear from the Vice-Chair's direction prior to the hearing that she expected the parties to provide all relevant evidence at the hearing. This included her direction that the Board address the issue of whether the mediator was a compellable witness. Evidently, this was not meant to be a bifurcated or two-step process.

[59] Even if the Board had a right to reopen its case and call fresh evidence before the Tribunal, the Board did not bring a motion to this court to demonstrate the fresh evidence it would call. Therefore, this court does not have the benefit of any evidence that supports the Board's position that, if the matter were remitted back to the Tribunal, it would have evidence available that would affect the outcome of the matter.

[60] Finally, while the Board claims, without any evidence, that the mediator indicated that he would advise the Tribunal that the first application had been settled, the record before the court does not support this position. None of the Board's communications to the Tribunal before and immediately after the release of the Merits Decision stated that the Board expected that the mediator had advised the Tribunal that the parties settled the first application. In fact, the parties' execution of a Form 25 in the second application belies the suggestion that the parties expected that it would be sufficient for the mediator to advise the Tribunal of a settlement.

[61] I agree with the Divisional Court that, in the specific circumstances of this case, it was appropriate not to remit the matter to the Tribunal. I also see no unfairness to the Board in this decision.

(3) The Divisional Court did not err in finding ambiguity and in resolving the ambiguity in Mr. Briggs's favour

[62] The Divisional Court did not make any palpable and overriding error in its ultimate finding that the settlement did not cover the first application.

[63] I see no reason to interfere with the Divisional Court's finding that there was ambiguity in the agreement. As reviewed above, the mediation agreement, Minutes of Settlement and Form 25 only refer to the second application. The individual respondent officers on both applications were different. The only possible reference to the first application in the Minutes of Settlement was the

reference in paragraph 7 to Mr. Briggs releasing “all applications … up to the date of this settlement”. However, the parties were aware of the first application and the pending decision at the time they executed the settlement. In the circumstances, I agree with the Divisional Court that it was unclear based on the wording of the settlement documents and surrounding circumstances at the time of the settlement whether the parties intended to settle both applications or only the second application.

[64] I also see no reason to interfere with the Divisional Court’s assessment of the post-settlement conduct. As found by the Divisional Court, the Board took no steps to advise the Tribunal that the first application was settled at the time of the settlement, despite the pending decision. The Board only took the position that the first application was settled many months after the settlement, and well after Mr. Briggs had first contacted the Tribunal to enquire about the status of the pending decision. This post-settlement conduct supports the Divisional Court’s finding that, looked at objectively, and not from the Board’s subjective point of view, the parties only intended to settle the second application, and not the first application.

[65] I see no reason to interfere with the Divisional Court’s decision on this issue.

DISPOSITION

[66] I would dismiss the appeal. In accordance with the agreement between the parties, Mr. Briggs is entitled to costs of $17,500 on a partial indemnity basis, inclusive of HST and disbursements.

Released: November 28, 2022 “J.S.”

“L. Favreau J.A.”
“I agree. Janet Simmons J.A.”
“I agree. M.L. Benotto J.A.”