

November 7, 2019

SENT VIA E-MAIL (HRTO.Registrar@ontario.ca)

Mr. Georgios Fthenos
Registrar
Human Rights Tribunal of Ontario
655 Bay Street, 14th Floor
Toronto, Ontario M7A 2A3

Dear Mr. Fthenos:

**Re: The Regional Municipality of Waterloo Police Services Board v. Kelly Donovan
(HRTO File No. 2018-33237-S)**

1. In accordance with the September 30, 2019 decision of Vice-Chair Laurie Letheren, this letter constitutes the Reply of the Regional Municipality of Waterloo Police Services Board (the “WRPSB”) to the Applicant’s Response dated July 10, 2018 and Ms. Donovan’s submissions dated May 1, 2019 (the “Submissions”) in the above-noted matter. As our May 16, 2019 correspondence to the Tribunal set out the WRPSB’s Reply on the preliminary issues raised in the Submissions, this Reply will deal with the Submissions only to the extent that the Submissions respond to the merits of the WRPSB’s Application for Contravention of Settlement (HRTO File No. 2018-33237-S) (the “Application”).
2. The WRPSB repeats and relies on the allegations contained in the Application. Except as hereinafter expressly admitted, the WRPSB denies each and every allegation contained in the Submissions.

I. MS. DONOVAN’S BREACHES OF THE RESIGNATION AGREEMENT

(a) The presence or absence of a general non-disclosure clause is not determinative of whether Ms. Donovan breached the Resignation Agreement

3. Ms. Donovan alleges that “there is nothing preventing her from speaking publicly about her experiences working for the [WRPSB]” because the Resignation Agreement does not contain a “general non-disclosure clause preventing [Ms. Donovan] from speaking about the [WRPSB]” (at

para. 85). This allegation is reiterated by Ms. Donovan throughout her Submissions (see, e.g., paras. 102, 112, 127, and 131).

4. The WRPSB is not alleging that Ms. Donovan breached a general non-disclosure clause. Rather, as set out at paragraphs 30 and 55 to 58 of the Application, the WRPSB alleges that Ms. Donovan has continually engaged in conduct contrary to the Resignation Agreement including, in particular, the voluntary resignation, confidentiality, and release provisions of the Resignation Agreement. Further, Ms. Donovan's public complaints as set out in Part IV of Schedule "A" to the Application undermine the clear and fundamental purpose of the Resignation Agreement—namely, to fully and finally resolve all outstanding matters between Ms. Donovan and the WRPSB to the parties' mutual satisfaction. Notwithstanding the specific wording of the confidentiality or non-disclosure provisions agreed to by the parties, the inherent purpose of the Resignation Agreement itself precludes Ms. Donovan from reviving the allegations of her initial human rights application (HRTO File No. 2016-24566-I). In short, the absence of a general non-disclosure clause in the Resignation Agreement is not determinative of or fatal to the Application.

(b) Ms. Donovan's allegations regarding choice of forum or claim are immaterial to whether she breached the Resignation Agreement

5. At paragraph 102 of the Submissions, Ms. Donovan alleges that she did not breach the Resignation Agreement because she believes her statements to be truthful and about matters of public interest. In support of this allegation, Ms. Donovan points to the fact that the WRPSB did not commence an action in defamation, slander, or libel against her (see, e.g., paras. 103, 106, 111, 119, and 131).
6. Subject to the WRPSB selecting an appropriate legal forum at law, it is for the WRPSB to choose how it wishes to enforce the Resignation Agreement against Ms. Donovan. The fact that the WRPSB has opted, in the interests of efficiency and subject matter expertise, to use the Tribunal's processes as opposed to pursuing a defamation claim against Ms. Donovan does not render the Application a "gag proceeding" and is immaterial to whether or not Ms. Donovan breached the Resignation Agreement.
7. In any event, the WRPSB continues to maintain that the forums having jurisdiction over disputes arising from the Resignation Agreement are either the Human Rights Tribunal of Ontario and/or a labour arbitrator: *Human Rights Code*, RSO 1990, c H.19, ss. 39, 45.9, 46.1; *Seneca College v. Bhadauria*, [1981] 2 S.C.R. 181 at pp. 194-195; *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929 at

paras. 43 and 67; *Rivers v. Waterloo (Regional Municipality) Police Services Board*, 2018 ONSC 4307 at paras. 25-26; *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners*, 2000 SCC 14 at p. 376.

(c) Ms. Donovan raised “complaints” within the Meaning of the Resignation Agreement

8. At paragraph 91 of her Submissions, Ms. Donovan quotes instructions for the complaint processes of various regulatory and government agencies (*viz.* the Law Society of Ontario, the Federal Department of Justice, the Office of Consumer Affairs, the Canadian Human Rights Commission, and the Canadian Judicial Council). Ms. Donovan then suggests that, for the purposes of the Resignation Agreement, the making of a “complaint” must entail the submission of a written complaint form. With respect, the administrative complaint procedures of wholly unrelated offices and agencies are not determinative of how “complaint” should be interpreted under the Resignation Agreement.
9. Similarly, the online definition of “complainant” quoted by Ms. Donovan at paragraph 90 of her Submissions does not derive from any authority that would be legally binding on the Tribunal. As such, it is not determinative of how “complaint” ought to be interpreted for the purposes of the Resignation Agreement.
10. In paragraph 117 of the Submissions, Ms. Donovan purports to waive solicitor-client privilege in order to rely on extrinsic evidence of her subjective contracting intentions. Regardless of the waiver of solicitor-client privilege, such extrinsic evidence is inadmissible as an aid to contractual interpretation pursuant to the parol evidence rule.
11. For the foregoing reasons, the WRPSB maintains that Ms. Donovan made public complaints contrary to the Resignation Agreement, as pleaded in the Application.

(d) Ms. Donovan cannot cleave her allegations of constructive dismissal from the matters covered by the Resignation Agreement

12. At paragraph 101 of the Submissions, Ms. Donovan alleges that she was constructively dismissed between May 2016 and June 2017. She further asserts that this alleged constructive dismissal pre-dates her resignation and, as such, renders permissible her allegations of constructive dismissal despite the voluntary resignation provision of the Resignation Agreement. This distinction between periods of alleged constructive dismissal and resignation is wholly artificial and has no basis in law.

13. In any event, by her own admission at paragraphs 102 and 103 of the Submissions, Ms. Donovan has publicly accused the WRPSB of constructive dismissal. It does not lie in Ms. Donovan's mouth to now allege, as in paragraphs 110 and 115 of her Submissions, that "[a]t all times, when asked, [she] states she voluntarily resigned, and if asked she states the terms of her resignation are strictly confidential." Ms. Donovan's public accusation of constructive dismissal is fundamentally at odds with alleged compliance with her contractual duty to state that she voluntarily resigned from employment.
14. The WRPSB's pleadings do not amount to an admission of liability or harm to Ms. Donovan as alleged in paragraph 100 of the Submissions. Even assuming (but not admitting) that a bargaining unit employee such as Ms. Donovan can be constructively dismissed, Ms. Donovan's allegation of constructive dismissal is based on mere conjecture and her subjective belief.

II. THE APPLICATION WAS FILED IN GOOD FAITH

15. The WRPSB specifically and categorically denies that the Application was filed in bad faith, as alleged. Rather, the WRPSB filed the Application in order to enforce the Resignation Agreement and to uphold the terms contained therein.
16. The Tribunal has repeatedly held that applications will only be dismissed for abuse of process in exceptional circumstances and where such dismissal would be necessary to protect the integrity of the administrative justice system (see, for example, *Goetze v Ontario (Community and Social Services)*, 2015 HRTO 796). Respectfully, Ms. Donovan fails to demonstrate, or even allege, that processing the Application would impair the integrity of the Tribunal's justice system. Ms. Donovan's mere allegation and subjective belief that the WRPSB has "intentionally created a duplicate proceeding to deal with the same matter of breaches of the Resignation Agreement" (at para. 218 of the Submissions), without any actual supporting objective evidence, is insufficient to trigger the Tribunal's powers to remedy an abuse of process.
17. Despite Ms. Donovan's allegations to the contrary in paragraphs 138 and 139 of the Submissions, the WRPSB's Application was filed in a timely manner. Although the supporting documentation appended to the Application is time-stamped with various dates in June 2018, these June 2018 dates merely indicate when the documentation was printed for filing with the Tribunal.

18. In any event, these time-stamps are immaterial to whether Ms. Donovan breached the Resignation Agreement and do not negate the fact that the Application was filed within six months of Ms. Donovan's most recent and ongoing contraventions of the Resignation Agreement. Not only is it incorrect, but for Ms. Donovan to claim, merely based on the time-stamps of the supporting documentation, that the Application was commenced in retaliation for Ms. Donovan's civil action is wholly conjectural.

III. MS. DONOVAN'S REQUEST FOR PRODUCTION

19. At paragraph 144 of the Submissions, Ms. Donovan has requested "disclosure of documents by the [WRPSB] to prove or disprove wrongdoing on the part of the [WRSPB], and as such will ask the Tribunal to ignore litigation privilege, as this would be an exceptional case." Leaving aside the fact that Ms. Donovan cannot waive litigation privilege on behalf of the WRPSB, Ms. Donovan's request for production is too vague and/or overbroad to be arguably relevant to the Application. Accordingly, Ms. Donovan's request for production ought to be dismissed by the Tribunal forthwith and in summary fashion.

20. For all of the foregoing reasons, the Tribunal ought to grant the WRPSB's requested relief as set out in paragraph 77 of the Application.

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Please do not hesitate to contact the undersigned if you have any questions.

Yours truly,



Donald B. Jarvis
CM/

cc Ms. Virginia Torrance, Regional Municipality of Waterloo Police Services Board
Ms. Kelly Donovan, Respondent