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Highlights

SETTLEMENT AGREEMENTS

remedies for breach of confidentiality

Workplace disputes are commonly negotiated and settled out of court. Every such settlement represents a compromise, and no party wants to have a concession that is made for settlement purposes regarded publicly as an admission of wrongdoing or other error. As a result, confidentiality is integral to the settlement of any dispute. A recent Ontario labour arbitration decision, *The Globe & Mail v. Communications, Energy and Power Union of Canada, Local 87-M*, stresses the importance of the precise terms set out in the settlement agreement as they will dictate the parties' rights. In ordering an employee to repay in full a severance previously paid to her as a result of her breach of a confidentiality clause, the case demonstrates that a properly drafted confidentiality clause and enforcement mechanism will be judicially enforced. Joe Conforti reviews the decision and its ramifications. 1062

DISCIPLINE

employee misuse of the Internet

Employee use and misuse of the Internet and company computers or systems has given rise to some of the more challenging workplace issues of our time. Employee privacy has to be appropriately balanced with an employer's legitimate concern over misconduct, liability and productivity. Brian Kenny reviews a number of recent cases considering these issues, and discusses the role and importance of an employer's Internet use policy and monitoring program. After all, a workplace Internet policy will, to a large extent, impact the atmosphere and environment of the business. The author notes that whatever an employer's policy ultimately becomes, it is clear that employee misuse of online technology is an inevitable issue and that the first step in its prevention is the development of precise guidelines. 1068

HEALTH AND SAFETY

personal liability for workplace accidents

With the recent prosecution in the Metron Construction fatality case, which resulted in a $750,000 fine against the employer and $90,000 fine against its president, under the *Occupational Health and Safety Act* (Ontario), an important wake-up call has been sent. Laurie Robson provides a summary of the cases in which employees, managers, supervisors and directors have been held personally liable for workplace accidents, along with due diligence tips for individuals. 1071

Federated Press

SETTLEMENT AGREEMENTS

Can You Keep a Secret? Enforcing the Confidentiality of Settlement Agreements

Joe Conforti
Goodmans LLP

> Whoever keeps his mouth and his tongue, keeps himself out of trouble.
>
> *Proverbs* 21:23

Workplace disputes are commonly negotiated and settled out of court. Every such settlement represents a compromise, and no party wants to have a concession that is made for settlement purposes regarded publicly as an admission of wrongdoing or other error. As a result, confidentiality is fundamental to the settlement process.

In an attempt to maintain confidentiality, settlement agreements often include a non-disclosure or confidentiality clause. The purpose of such a clause is to keep the results achieved at settlement from being disseminated to the outside world.

Inclusion of a confidentiality clause is a virtual necessity for most employers and is generally good practice for employees as well. From the employer's perspective, in addition to bad publicity, disclosure of the nature of a claim against it or of monies paid to resolve that claim could encourage "copycat" litigation or prejudice the employer's ability to deal with future issues; it gives at least the appearance of an admission of liability. From the employee's perspective, there may be privacy or reputational concerns arising from disclosure (for example, related to the fact or circumstances of dismissal), which may impact current or prospective employment.

Confidentiality clauses can take a number of different forms. At their least restrictive, they may prohibit the parties from divulging the financial terms of settlement. More restrictive clauses may prevent the parties from publicly disclosing any of the terms of settlement, any of the facts or information learned during the dispute or during the negotiations leading to settlement, or even the facts of the dispute or of the settlement. Because proving actual damages arising due to a breach of confidentiality is difficult, some confidentiality clauses include liquidated damages provisions or require a repayment of all or part of the settlement monies as a remedy for breach.

The Globe & Mail Case

Can a confidentiality clause in a settlement agreement be relied on by the parties? If so, what is the remedy for a breach of confidentiality? After all, once a secret is divulged – especially in an Internet-connected world – it can never be a secret again.

These two questions were faced squarely in a recent labour arbitration decision, *The Globe & Mail v. Communications, Energy and Power Union of Canada, Local 87-M.*[1] The arbitrator's answers were: (1) a resounding "yes," and (2) whatever remedy the parties have expressly agreed upon.

In *Globe & Mail v. CEP*, arbitrator L. Davie ruled that a confidentiality clause is a binding contractual commitment to be enforced in accordance with the terms agreed to by the parties. Breach of confidentiality will result in damages or any other appropriate remedy including, if expressly provided for in the settlement agreement, a "claw-back" or repayment by the employee of the entire severance received pursuant to the settlement.

A summary of the decision follows.

The Settlement Agreement

Jan Wong (the "Grievor") was employed for many years as a journalist at *The Globe & Mail* newspaper (the "Employer"). The Grievor's employment was terminated in June 2008 following a lengthy period when she had been absent from work because of depression.

Through her union, the Grievor filed a series of grievances relating to the Employer's failure to pay sick leave and maintaining that her dismissal was without just cause.

[1] [2013] O.L.A.A. No. 273.

The grievances proceeded to mediation and arbitration, ultimately resulting in a negotiated memorandum of agreement ("MOA"), dated September 24, 2008 – a settlement reached prior to a hearing on the merits. The parties to the MOA were the Employer and the union but it was also signed by the Grievor.

The MOA provided for severance and other payments to the Grievor by the Employer but that the terms of the settlement were to be kept confidential; all payments were to be refunded in full if the Grievor violated the confidentiality requirement.

The MOA expressly stated that there was not an admission of liability on the part of any of the parties and included the following key provisions:

> 5. The Employer acknowledges that the Grievor was ill and unable to attend at work from June 11, 2007 to November 13, 2007 for that reason.
>
> 6. With the exception of paragraph 5, the parties agree not to disclose the terms of this settlement, including Appendix A to anyone other than their legal or financial advisors, Manulife [the disability insurer] and the Grievor's immediate family.
>
> 7. Should the Grievor breach the obligation set out in paragraph 5 and 6 above, Arbitrator Davie shall remain seized to determine if there is a breach and, if she so finds, the Grievor will have an obligation to pay back to the Employer all payments paid to the Grievor under paragraph 3.

Notwithstanding the confidentiality clause, the MOA did not preclude the Grievor from telling her side of the story, including relating to her illness and inability to work; in fact, it was known to all parties at the time of settlement that the Grievor intended to write a book about her experiences. The only restriction on the Grievor, in her intended book or otherwise, was that she was not to disclose the "terms of the settlement."

Book Publication – Breach of Confidentiality

In May 2012, four years after the settlement, the Grievor published a personal memoir of her experience with workplace depression and of her dispute with the Employer. The publication attracted substantial publicity and was accompanied by various media interviews of the Grievor.

In her book, the Grievor disclosed the fact that she had commenced legal proceedings against the Employer and that she had received payments from the Employer; the book did not disclose the amount of the payment that she had received.

In a chapter dealing with the MOA, the Grievor conveyed to the reader that the Grievor had negotiated very favourable terms of settlement including a substantial payment to her, that she had successfully resisted the imposition of a "gag order" in the settlement, and that the Employer "had caved" to her demands.

Overall, the tone and tenor of the book suggested that the MOA vindicated the Grievor's positions. As described by the arbitrator, the book was written in a manner to leave the reader with the impression that the Grievor had been victorious in her dispute and that, as she wrote, had "fought back and won."

The Employer brought the matter back to the arbitrator, complaining that the book represented a breach of confidentiality and of the MOA by the Grievor in four respects:

1. By disclosing that she received a payment as part of the settlement.
2. By disclosing the fact that the MOA did not provide for a "gag order."
3. By disclosing the fact that she had been successful in settlement, thus breaching the "no admission of liability" provision of the MOA.
4. By disclosing the fact that there was a confidentiality agreement in the MOA.

The arbitrator rejected the Employer's complaints in items (2), (3) and (4). It was the arbitrator's determination that, in these instances, the Grievor did not disclose the "terms of settlement" but, instead, referred to matters that were not specifically included in the settlement (for example, the disclosure that the MOA did not have a "gag order" that prevented the Grievor from telling her story) or matters which were considered and/or discussed during the mediation or in the negotiations before the MOA was signed. Although some of these disclosures in the Grievor's book were inappropriate, in the arbitrator's

view, they could not be said to have explicitly or unambiguously disclosed the terms of settlement as set out in the MOA.

On the other hand, the arbitrator concluded that the Grievor definitively breached the non-disclosure obligations of the MOA by publishing the following:

- "I'd just been paid a pile of money to go away ..."
- "Two weeks later a big fat check landed in my account."
- "... I can't disclose the amount of money I received."
- "Even with a vastly swollen bank account ..."

The Grievor's breach was compounded by her expressions of satisfaction with the MOA, describing it as a "big win" and making her happy enough to "dance a jig," going as far as quoting a union representative as commending her: "You got everything you wanted."

The Grievor testified that she believed that she could disclose the fact that she received payment from the Employer as long as she did not disclose its amount.

However, this belief was incorrect and did not accord with the words expressly agreed to amongst the parties. As stated by the arbitrator, the confidentiality clause did not state that the parties agree not to disclose to anyone "the amount of the payment made in the settlement;" rather, the MOA stated clearly and unambiguously that the parties agreed not to disclose "the terms of this settlement" – one of which was payment by the Employer to the Grievor.

As such, the fact that the Grievor did not disclose the precise amount of the payment that she received was immaterial to a determination of whether she breached the MOA. Moreover, as was noted by the arbitrator, although the Grievor refrained from disclosing the precise amount of the payment to her, she went considerably further than merely stating that she had settled the matter and that she had received a payment. To quote the exact dollar and cents figure was redundant in view of the Grievor's communication to the readers of her book that the settlement payment was significant (in her own words, "a pile of money" and "a big fat check").

Remedy for Breach of Confidentiality

The Employer sought to hold the union and the Grievor to the express terms of the MOA, that is, repayment of all severance monies that it had paid to the Grievor.

In contrast, the union and the Grievor submitted that, notwithstanding the MOA's express provisions, compulsory repayment would constitute a "penalty" that would be "unconscionable." They argued that the Employer's remedy should be based on and actual and provable damages suffered by it and that repayment of the entire severance was excessive and beyond the reasonable expectations of the parties, especially as the confidentiality clause made no allowance for the extent and context of the breach. This argument was essentially based on past precedent, as in the few cases where there had been a breach of confidentiality, the damages awarded had been nominal and generally under $2,000.[2]

The arbitrator rejected the union's and the Grievor's position and ordered repayment of the severance.

In reviewing the context of the negotiation and execution of the MOA, the arbitrator noted various key factors:

- The MOA was freely entered into amongst experienced and sophisticated parties who understood what they were doing.
- The MOA was a comprehensive settlement, negotiated over a lengthy period of time.
- The Grievor had access to and availed herself of legal advice including an experienced and knowledgeable labour lawyer engaged to represent her and the union's interests as well as her own independent lawyer.

In this context, it could hardly be said that the consideration to the Grievor pursuant to the settlement was inadequate; to use the Grievor's own words against her (again), the book characterized the payment as "a pile of money" and a "big fat check."

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[2] *Tremblay v. 1168531 Ontario Inc.*, 2012 HRTO 1939 (CanLII); *Green Grove Foods Corp. v. United Food and Commercial Workers Canada, Local 175*, 2012 CanLII 51867 (ON LA); *Ontario (Ministry of the Attorney General) v. Ontario Public Service Employees Union*, 2004 CanLII 55317 (ON GSB).

Moreover, the arbitrator opined that there is nothing wrong or inherently unfair for one party – here the Employer – to say "I will make a payment to you but you must agree not to disclose that fact, and if you do disclose it, you must give back the payment made." In *Globe & Mail v. CEP*, that exact pre-condition to payment was an integral part of the MOA.

As is the case with most breaches of confidentiality, the arbitrator recognized that the harm to the Employer was intangible and not easily quantifiable. However, that did not detract from the fact that an integral part of the bargain was that the Grievor would not disclose the terms of the settlement. With the publication of her book, the Employer lost the benefit of the bargain struck. Once confidentiality is breached, it cannot be restored; here, the Employer would be forever deprived of the confidentiality, which was a cornerstone of its payment to the Grievor and of the settlement as a whole.

In concluding that repayment of the severance was an appropriate remedy, the arbitrator agreed with the Employer's position that, because it had been deprived of the confidentiality for which it bargained, the Grievor should be similarly deprived of the benefit she received pursuant to the MOA, namely, the severance payment. Such a repayment, according to the arbitrator. is not a "penalty" that requires proof of actual damages but, rather, is a proper "enforcement mechanism" that ought to be judicially enforced.

The Parties' Agreement Prevails

The rationale for the decision in *Globe & Mail v. CEP* is founded on freedom of contract and sound labour relations. The normal rule is that the parties will be held to their negotiated bargain voluntarily entered into, including all compromises underlying a settlement.

As stated by the arbitrator:[3]

> I accept that as a general rule, parties who have entered into signed minutes of settlement of the issues which were in dispute between them should be required to honour that settlement. Parties should not be permitted to resile from the agreements they have made or be relieved of the consequences of their settlement. This is particularly true in the labour relations context where mediation and the settlement of grievances is common and a significant manner of dealing with labour relations issues and disputes.
>
> [...]
>
> Throughout any examination of the circumstances surrounding the execution of a settlement document, it must be remembered that inevitably a settlement is a compromise. It results from an assessment by the parties of their position and their respective interests and objectives in the matter(s) being settled. Generally, settlements are seen as principled compromises achieved in an effort to avoid lengthy litigation with uncertain result. That risk and uncertainty of result can't be overemphasized. A signed settlement reflects a mutual intent of the parties that they would rather live with the certainty of the result which they themselves have crafted and evaluated, than the uncertainty of results which proceeding with the litigation brings. Recognition that signed settlements represent a compromise also means that a specific provision in the settlement can't be looked at in isolation, but that the settlement must be examined in its entirety.

Of course, the foregoing presumes that the settlement agreement was not obtained through fraud, the use of undue influence or duress, or when an overwhelming imbalance of bargaining power enabled one party to take undue advantage of the other.

Conclusion

In its upholding of the confidentiality clause at issue together with its enforcement mechanism, *Globe & Mail v. CEP* reinforces the reliability of settlement agreements. In so doing, the decision provides an incentive to negotiation and compromise and, ultimately, encourages settlement.

The decision serves as a valuable reminder that a confidentiality clause is contractual. This means, of course, that the parties to a settlement agreement should expect to be held to the strict terms of a confidentiality clause (including any enforcement mechanism) negotiated between them. It also means that, in order for confidentiality to be imposed on a party to a settlement, it must be expressly set out in the settlement agreement; put another

[3] Supra note 1 at paragraphs 43 and 45.

way, confidentiality is not a term that will be implied into a settlement.[4]

Therefore, in order to avoid future disputes, the parties will need to consider exactly how confidentiality affects them following settlement and include the necessary protections. The following are some considerations:

- Identify specifically which terms of the settlement agreement are confidential.
  - If appropriate, confirm that the existence of the settlement agreement itself is confidential.
  - If appropriate, confirm that the underlying dispute (if there is no public litigation) and negotiations about settlement are confidential.
- Identify any exclusions to confidentiality, for example:
  - To enforce the settlement agreement.
  - Disclosure required by law.
  - As required for legal or professional advice.
  - Disclosure to an individual party's immediate family.
  - Confirm that any professional advisors or other non-signatories to the settlement agreement will be subject to confidentiality.
  - The employer will need the flexibility to make such disclosure of the settlement terms internally in order to implement the settlement or as necessary for business purposes; the employer may have obligations in this regard to its insurers or shareholders.
  - To the extent that the terms of settlement becomes relevant in other litigation, provide for notice in advance of disclosure and an opportunity to quash any summons.
- Specify that any payment or other performance by the employer is conditional on and in consideration for the confidentiality clause.
- Identify the remedy for any breach of confidentiality including, if appropriate, repayment of specified damages (which may be the amount paid by the employer but subject to minimum employment/labour standards requirements).
- Ensure that, notwithstanding any breach of confidentiality and repayment or other remedy, the provisions of the release of liability survives and there will be no further litigation (that is, other than with respect to breach of the settlement agreement).
- Anticipate that some restrictions on disclosure may not be enforceable; examples include matters that are deemed to be in the "public interest" to know or otherwise covered by government access to information or "whistleblower" protection laws.[5]

[4] See, also, *J.H. v. Smith*, [2007] O.J. No. 269 (S.C.J.), at paragraph 13.

[5] See, for example, section 425.1 of the Criminal Code:

> 425.1(1) No employer or person acting on behalf of an employer or in a position of authority in respect of an employee of the employer shall take a disciplinary measure against, demote, terminate or otherwise adversely affect the employment of such an employee, or threaten to do so,
>
> (a) with the intent to compel the employee to abstain from providing information to a person whose duties include the enforcement of federal or provincial law, respecting an offence that the employee believes has been or is being committed contrary to this or any other federal or provincial Act or regulation by the employer or an officer or employee of the employer or, if the employer is a corporation, by one or more of its directors; or
>
> (b) with the intent to retaliate against the employee because the employee has provided information referred to in paragraph (a) to a person whose duties include the enforcement of federal or provincial law.
>
> (2) Any one who contravenes subsection (1) is guilty of
>
> (a) an indictable offence and liable to imprisonment for a term not exceeding five years; or
>
> (b) an offence punishable on summary conviction.

- Address the return or destruction of confidential documents.
- Identify any specific language that will be permissible for the parties to disclose publicly, for example, that the parties have settled their dispute; or a mutually agreed press release.
- Determine whether any special provisions need to be included in connection with social media postings, which some parties may mistakenly regard as "private."[6]
- An employer can minimize an employee's arguments of undue influence or duress or unconscionability by ensuring that the employee has an opportunity to obtain independent legal advice.

Globe & Mail v. CEP is an invitation for parties to a settlement to set out precisely their intentions regarding confidentiality. Consideration of all issues, together with careful negotiating and drafting, can provide comprehensive confidentiality protections, including an effective remedy for breach of confidentiality.

[6] See, for example, *Tremblay v. 1168531 Ontario Inc.* (supra note 2), where the employee-complainant's damages award was reduced by $1,000 as a result of her Facebook postings during mediation.