

CAN'T PUT THE GENIE BACK INTO THE BOTTLE: PROTECT YOUR SETTLEMENT WITH A CONFIDENTIALITY AGREEMENT

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Most employers want to keep their settlements confidential. Aside from limiting the potential for a copycat complaint, there is comfort in knowing the terms of a settlement will not become the subject of public scrutiny, be misconstrued, or result in an assumption the employer has admitted liability.

A well written settlement agreement will include language prohibiting the parties from disclosing the terms of the settlement (other than to legal or other advisors or immediate family), as well as the underlying facts, and that there was a settlement at all. Some settlements even include the precise answer to be given in response to a third-party inquiry.

The question we often receive from clients is '*how much teeth does a confidentiality agreement really have*'? As revealed in the recent case of *Jan Wong v. The Globe and Mail Inc.* – the answer is, *potentially a lot*. The Ontario Superior Court of Justice (Divisional Court) upheld Arbitrator Davie's ruling that Jan Wong's lack of discretion regarding the settlement of a grievance would cost her \$209,912.

What happened?

Ms. Wong had been employed for 21 years as a journalist by The Globe and Mail ("The Globe"). After publishing a controversial article, Ms. Wong was publically attacked for her views by readers, journalists, politicians and academics. She claimed this caused her to develop depression, and she took a few months off on sick leave. Ms. Wong returned to work briefly, but then requested another paid sick leave. The Globe refused and required her to return to work because, in its view, she was neither sick nor unable to work. Ms. Wong refused and consequently her employment was terminated.

Ms. Wong, a union member, grieved her termination and denial of paid sick leave. Ultimately the parties settled on the basis The Globe not admit liability, but acknowledge Ms. Wong was sick and unable to work for a stipulated period of time. She was paid two lump sums: one for the sick leave pay she would have received; and another in the amount of \$209,912 representing two years' salary. Throughout it all, both sides were represented by counsel.

As part of the settlement, the parties negotiated confidentiality and non-disparagement clauses, excerpts of which are set out below:

6. [...] the parties agree not to disclose the terms of this settlement, including Appendix A to anyone other than their legal or financial advisors, Manulife and [Ms. Wong's] immediate family.

7. [Ms. Wong] agrees that until August 1, 2009 she will not disparage [The Globe] or any of its current or former employees relating to any issues surrounding her employment and termination from [The Globe]. [The Globe] agrees that until August 1, 2009, to not disparage [Ms. Wong].

8. Should [Ms. Wong] breach the obligations set out in paragraph [6 and 7 sic] above, Arbitrator Davie shall remain seized to determine if there is a breach and, if she so finds, [Ms. Wong] will have an obligation to pay back to [The Globe] all payments paid to [Ms. Wong] under paragraph 3 [\$209,912].
[emphasis added]

At the time of the settlement, the parties knew Ms. Wong intended to write a book about her experience with depression. After it was published The Globe complained that twenty-three statements in it violated the terms of the settlement, including, for example: "... I can't disclose the amount of money I received", "I'd just been paid a pile of money to go away...", "Two weeks later a big fat check landed in my account" and "Even with a vastly swollen bank account...", etc. The Globe requested that Arbitrator Davie order Ms. Wong to repay the \$209,912.

Ms. Wong denied she had breached the settlement, relying on the following arguments made by her counsel:

- Under the settlement agreement Ms. Wong was precluded from disclosing the terms of the settlement (such as the payment amount), but not that settlement funds had been paid at all.
- The August 1, 2009 expiry date for the non-disparagement clause applied to the confidentiality clause as well; hence the prohibition on disparagement had expired by the time the book was published.
- The repayment clause was unconscionable and therefore unenforceable.
- Ms. Wong's breach was a result of a misunderstanding of the terms of the agreement.
- Ms. Wong tried to comply with the agreement, even going so far as to retain a lawyer to review the book for libel before it was published.

The arbitrator's decision

Upon hearing the arguments of both sides, Arbitrator Davie found in favour of The Globe and ordered Ms. Wong to repay \$209,912. According to the Arbitrator, the following factors were key:

- The terms of the settlement were clear and unambiguous.
- Throughout the settlement negotiations Ms. Wong had the benefit of representation by counsel.
- There was no evidence Ms. Wong did not understand the settlement terms.
- While Ms. Wong had retained a lawyer to assess libel risks, she did not consult with the union or its counsel about a potential breach of the confidentiality agreement.
- Disclosure in her book of the impugned statements was not inadvertent.
- Ms. Wong's statements clearly and unambiguously confirmed she had received a settlement payment, violating the confidentiality clause.
- The impugned statements painted the false picture The Globe had admitted liability.

In reaching her decision, Arbitrator Davie also stressed the importance of settlement in labour relations generally; that in addition to being an efficient resolution of a dispute, settlement allows parties to resolve their differences without an admission of liability, or the risk an agreement may be misconstrued by others.

Tips for employers

The *Wong v. The Globe* decision serves as an important reminder that while there may be no way to *guarantee* a party to a settlement will *never* breach a confidentiality agreement, there can be great value in having such an agreement, prepared by skilled and experienced employment counsel.

A well-drafted confidentiality (and non-disparagement) agreement should clearly and unambiguously set out the parties' obligations, as well as the penalty in the event of a breach. Although a strong penalty clause may not undo the damage caused by disclosure, in most cases it will act as an effective deterrent.

Finally, it is important to allow parties time to review and approve the terms of a settlement with the assistance of independent legal counsel. Doing so will minimize the risk of a future claim that a party did not understand the meaning or scope of an agreement, or signed it under duress.

To learn more, or for assistance, contact a member of Sherrard Kuzz LLP.

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