MANAGEMENT
COUNSEL
Employment and Labour Law Update

SHERRARD KUZZ LLP
Employment & Labour Lawyers

Can't put the genie back into the bottle: Protect your settlement with a confidentiality agreement

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, including the following:

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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]

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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.

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.

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.

Settlements are final - or are they?

From time to time an employer will discover misconduct after the employment relationship has ended. If a wrongful dismissal lawsuit is underway, the "after-acquired" facts can sometimes allow the employer to argue dismissal for cause.

But what if the misconduct is discovered after the employer and employee have agreed to the terms of a settlement? Can the employer rely on the misconduct to *undo* the settlement agreement? In the recent decision of *Ruder v 1049077 Ontario Limited o/a Crowntech Aluminum & Glass*, the Ontario Superior Court did just that. While this is a good news story for employers, there are lessons to be learned.

What happened?

Mr. Ruder worked as an estimator for Crowntech Aluminum and Glass. He was dismissed for poor work performance and filed a claim for wrongful dismissal. The parties settled the claim, signed settlement documents, and Crowntech forwarded a portion of the settlement funds to Mr. Ruder's lawyer.

Shortly thereafter, Crowntech was advised by a 'whistleblower' that during Mr. Ruder's employment he had been performing work on the side for some of Crowntech's clients, and even for a Crowntech competitor. To make matters worse, Mr. Ruder had been 'moonlighting' using Crowntech's time and resources. Upon learning of this misconduct, Crowntech hired a forensic computer analyst who confirmed that not only had Mr. Ruder competed against his employer, but he'd attempted to delete the evidence from his work computer using bootlegged software.

In light of this new information, Crowntech repudiated the settlement and refused to advance any further funds. Mr. Ruder brought a motion asking the court to enforce the settlement agreement.

Enforcement of the settlement would create an injustice

Generally speaking, as a matter of public policy, a court will enforce a settlement "unless enforcement would create a real risk of clear injustice". Courts therefore ask themselves two questions: (1) Was there a settlement? (2) If there was a settlement, should the court exercise its discretion to enforce it?

In the case of Crowntech and Mr. Ruder, both sides agreed there was a settlement. They disagreed on whether the court should exercise its discretion to enforce it. To answer this question, the court considered the following five factors:

1. Evidence of *mistake*.
2. *Reasonableness* of the agreement.
3. *Prejudice* to the *party seeking to uphold the settlement* if it is not enforced.
4. *Prejudice* to the *party seeking to set aside the settlement* if it is enforced.
5. The *effect on third parties* if the agreement is not enforced.

Interestingly, the court's analysis of these five factors did not tip the balance one way or the other. According to the court, there was no evidence of mistake, the settlement was reasonable and the question of prejudice "cut equally both ways". In order to resolve the matter, the court asked itself one final question: whether enforcement of the settlement would create a **real risk of clear injustice**. On this point, the court sided with the employer for the following reasons:

1. Crowntech would have never entered into the agreement had it known of Mr. Ruder's misconduct.
2. The misconduct was discovered "almost immediately" after signing the agreement.
3. Evidence of the misconduct was not easily discoverable by Crowntech prior to entering into the settlement. It was a whistleblower who provided the information.
4. Because the computer files created by Mr. Ruder had been mostly deleted, a routine inspection of the computer would not have revealed any basis for concern. It was only after Crowntech conducted a forensic examination of the computer that evidence of misconduct was revealed.

Good news for employers

This decision is good news for employers because it appropriately balances employee misconduct with the legal principle that a settlement should be enforced unless enforcement would create a real risk of clear injustice.

Practically speaking, the decision also reminds us that where an employer wishes to rely on "after-acquired cause", it will want to be in a position to demonstrate it would not have taken the course of action it did had it known of the relevant facts; evidence of cause was not reasonably discoverable at the relevant time; and upon learning of the facts supporting dismissal for cause, the employer's actions were swift and equivocal.

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

DID YOU KNOW?

As of **April 1, 2015**, new Ontario health and safety regulatory requirements will require employers to ensure construction workers working at heights receive specialized training through a certified **working at heights training program**. Workers trained before April 1, 2015, have an additional two years to complete the new certified training.

To learn more contact a member of Sherrard Kuzz LLP.

MANAGEMENT COUNSEL

HReview Seminar Series

Please join us at our next HReview Breakfast Seminar:

Here For a Good Time - Not a Long Time

Navigating the Risks of Interns, Volunteers, Temps and Student Employees

As we approach the summer of 2015, many organizations will look to beef up staff on short-term or experience-based engagements. However, as a result of increased scrutiny and legislative change, some traditional staffing solutions may attract new and potentially harmful risks.

Join us as we discuss how your organization can strategically prepare for the upcoming summer:

1) **The "Unpaid Intern" Story**
   - When is it lawful to hire an unpaid intern?
   - Co-op students *vs* volunteers *vs* interns: What's the difference and why does it matter?
   - What are the risks?
   - How to use a contract or engagement letter to minimize risk.

2) **Temporary Employees and Summer Students**
   - ESA? WSIB? OHSA? What applies and what doesn't?
   - Legislative changes to "minimum wage" (ESA) and the definition of "worker" (OHSA).
   - Setting expectations at the time of the engagement.
   - How to transition to full-time employment – or end the relationship early.

DATE: **Thursday May 28, 2015; 7:30 – 9:30 a.m.** (breakfast at 7:30 a.m.; program at 8:00 a.m.)

VENUE: **Mississauga Convention Centre**, 75 Derry Road West, Mississauga, L5W 1G3

COST: Complimentary

RSVP: **By Friday May 15, 2015 at www.sherrardkuzz.com/seminars.php**

Law Society of Upper Canada CPD Credits: This seminar may be applied toward 1.5 substantive CPD credits.

HRPA CHRP designated members should inquire at www.hrpa.ca for eligibility guidelines regarding this *HReview Seminar*.

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Jean Cumming Lexpert® Editor-in-Chief

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