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A deal is a deal

Ontario Human Rights Tribunal deems forfeiture clause in settlement agreement is enforceable



BY Arash Farzam-Kia / 04 Apr. 2024

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Often, in an employment dispute, the settlement documents will include a confidentiality and/or non-disparagement clause limiting what the parties can say about the dispute, the settlement, and each other. But what happens when a party breaches this clause? Is there a remedy for the employer? According to a recent decision of the Ontario Human Rights Tribunal - [LCC v MM., 2023 HRTO 1138](#) - if properly drafted, these important clauses will be enforced.

An employee filed an application with the tribunal against their former employer and a colleague alleging discrimination in employment on the basis of sex. The parties engaged in mediation and arrived at a settlement.

The settlement documents contained a confidentiality clause and a non-disparagement clause. The confidentiality clause permitted the employee to respond to an inquiry about the resolution of the application or conclusion of the employee's employment by simply stating, "All matters have been resolved." The non-disparagement clause required the parties to refrain from making any disparaging or derogatory comments about the other, or acting in a manner that would likely damage the other's reputation, including [on social media](#), unless required by law.

If the employee breached either clause, they would be required to [pay back any funds](#) paid under the settlement as liquidated damages (a pre-estimate of damages that provides certainty to the parties in the event of a breach).

Fast forward a few months and the employee posted the following to their LinkedIn account: “To all those inquiring, I have come to a resolution in my Human Rights Complaint against [the former employer] and [the former colleague] for sex discrimination.”

When the employer discovered this post, it brought an application before the tribunal alleging the employee had breached the settlement and seeking repayment of the settlement funds.

The tribunal found the employee had breached both the confidentiality and non-disparagement clauses and ordered repayment of the settlement funds.

The confidentiality clause was breached because it imposed specific restrictions on how the parties could respond to any inquiry about the resolution of the application - “all matters have been resolved.” The employee’s LinkedIn post did not fit within this narrow restriction because the post proactively communicated to a broad audience – not merely to those who inquired – and said more than the wording permitted, particularly including the reference to sex discrimination. Said the tribunal, “The applicant’s LinkedIn post does not fit within the spirit of the exceptions set out in the confidentiality provision and therefore the applicant’s posting breached the confidentiality clause.”

The non-disparagement clause was breached because the LinkedIn post linked the former employer and former colleague to serious and unproven allegations of discrimination on the basis of sex, creating the potential for reputational harm.

“I am of the view that, from the perspective of an objective, reasonable person, placing such information on social media serves to publicize it and create a reputationally damaging link between the names of the parties and the serious unproven allegations of human rights violation of sex discrimination - precisely what the wording of the confidentiality and non-disparagement clauses, taken together, was intended to prevent,” said the tribunal.

As for the liquidated damages, the tribunal held the amount had been agreed to by the parties and was neither punitive nor a penalty clause:

“As these damages are in a liquidated damages provision in a freely entered into contract agreed upon and executed by fully represented parties, they are damages consistent with the intentions of the parties and not punitive. The purpose of such provisions in contracts is to provide certainty and save the parties from having to prove damages, not to impose a punishment or a penalty.”

The tribunal ordered the employee to return the full amount of funds received under the

settlement.

Lessons for employers

In appropriate circumstances, use of a precisely drafted confidentiality and/or non-disparagement clause can be a useful tool to protect an employer's legitimate business interests arising out of the settlement of an employment dispute.

If an employer can prove an employee violated either or both clauses, an employer may return to the court or administrative tribunal to enforce the [settlement agreement](#) and seek repayment of any settlement funds.

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