

A Deal Is A Deal ~

Employee cannot resile from a clear and comprehensive settlement agreement

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Everyone has received the sage advice, “*Be sure to dot your i’s and cross your t’s.*” Without question, this adage applies to settlement agreements between employers and employees.

In a recent decision, [*Johnstone v Loblaw*](#), the Ontario Superior Court of Justice enforced a settlement despite the employee’s subsequent attempts to introduce new conditions, noting that “*Buyer’s remorse, a change of heart, or even growing concern about his ability to close his house purchase do not entitle [the employee] to renege on a settlement.*”

This significant decision, argued for Loblaws by Sherrard Kuzz LLP lawyer, Thomas Gorsky, reinforces the importance that a settlement proposal be comprehensive, unambiguous and properly documented.

What happened?

Scott Johnstone was a Loblaws employee with seven years’ service. He relocated from Winnipeg to Ottawa and entered into an agreement to purchase a home in Ottawa. Soon after he started in his new position, but prior to the closing on his home purchase, Loblaws terminated Johnstone’s employment. In the termination letter, Loblaws offered Johnstone a seven-month salary continuance in exchange for a release.

In response, Johnstone alleged he was wrongfully dismissed and claimed lost wages, bonus, and benefits over his notice period, which he argued to be 12 months. Johnstone also demanded Loblaws “guarantee [his] mortgage payments until he became re-employed.”

During the back-and-forth negotiations, carried out almost entirely in writing, Loblaws’ counsel maintained Loblaws “had never guaranteed an employee’s mortgage and would not do so for Mr. Johnstone.” Instead, Loblaws offered the following:

- a detailed employment letter
- a letter confirming Johnstone would receive his regular salary until November 14, 2022, and
- contact information of a member of Loblaws’ HR department who could take a call from a mortgage broker or lender to confirm the content of the letter.

Loblaws also increased its offer to eight months’ salary continuance and \$500 toward Johnstone’s legal costs.

Johnstone's counsel responded: "I can confirm receipt of instructions to **accept your most recent proposal, subject to mutual agreement on the supporting documentation** that I would suggest you prepare for our review" [emphasis added].

Loblaws' counsel submitted the requested documentation which included a release to be signed by Johnstone. However, Johnstone did not sign. Instead, Johnstone's counsel sought to include the following additional settlement terms:

1. A "fundamental term" of the settlement be the successful completion of the house purchase.
2. Loblaws fund an additional 2 weeks of short-term living needs.
3. Loblaws provide Johnstone an excellent performance rating to protect his bonus entitlement.

Johnstone's counsel ended his response, "Otherwise, I think we are in agreement."

Loblaws rejected the new terms, treated the previous agreement as a binding settlement, and proceeded to pay the eight-month salary continuance.

Ultimately, Johnstone was not able to close on the Ottawa house purchase and claimed he was sued by the sellers of the property. Johnstone then commenced a wrongful dismissal lawsuit against Loblaws in which, among other things, he sought to be indemnified from the seller's claim.

The court decides

Loblaws brought a motion to dismiss the lawsuit on the basis the parties had already negotiated a binding settlement agreement which foreclosed adding any of the new terms requested by Johnstone.

Johnstone disputed there was a binding settlement agreement, arguing that the condition stipulated by his counsel at the time of his acceptance, "subject to mutual agreement on the supporting documentation," meant that the parties had only a non-binding *agreement to agree*, rather than a legally binding settlement.

The motion judge ruled in favour of Loblaws and dismissed Johnstone's lawsuit. The judge found the issue of Loblaws compensating Johnstone regarding the house purchase was discussed and rejected in the negotiation, thus Johnstone's attempt to re-raise it was resiling from the agreement:

"[the three items were] not changes to the supporting documentation. Rather, they are attempts to change the essential terms of the agreement. Nor is this a case where Mr. Johnstone may have misunderstood the terms to which he had agreed. Housing costs and relocation were front and centre in the negotiations. **Loblaws was clear and unwavering in its position on both issues. Mr. Johnstone's re-raising of these issues can only be seen as an attempt to revisit an issue and gain a better deal than the one he had agreed to.** Buyer's remorse, a change of heart, or even growing concern about his ability to close his house purchase do not entitle him to renege on a settlement."

...

[t]he essential terms of the settlement were agreed to between the parties, who intended to enter into a binding legal agreement.”

[emphasis added]

Lessons learned

When negotiating a severance package, it is crucial for an employer’s proposals to be comprehensive – addressing all claims arising from the employment relationship – unambiguous and properly documented. Even if the parties arrive at only an informal agreement, if that agreement addresses all terms considered at law to be essential, neither party will later be entitled to add or remove terms to or from the agreement.

Because of the risks of unwittingly misstating or omitting a key term, an employer should seek expert legal advice before terminating employment and throughout any ensuing negotiation.

To learn more and for assistance, contact your Sherrard Kuzz LLP lawyer or info@sherrardkuzz.com

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