Case In Point

What Happens When an Employee Breaches a Confidentiality Provision in a Human Rights Settlement?

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In Tremblay v. 1168531 Ontario Inc., the Human Rights Tribunal of Ontario issued its first decision in which it held an applicant accountable for breaching a confidentiality clause in a settlement arising from the resolution of a human rights application brought against her employer.

The employee had signed an agreement to maintain the confidentiality of a mediation process before the Tribunal, and she subsequently signed Minutes of Settlements which included a confidentiality provision. Her employer then discovered that during the mediation, the employee had posted messages on her Facebook account about the mediation and the settlement, including the statement that she "didn't get what I wanted but I still walked away with some … ."

When the employer learned of the confidentiality breach, it refused to make the payment required under the settlement. The employee then filed an Application for Contravention of Settlement with the Tribunal, seeking damages for the employer's failure to pay.

The employee argued before the Tribunal that she had not breached confidentiality as the exact amount of the settlement had not been revealed and that Facebook was private. Not surprisingly, the Tribunal found it was clear the Facebook postings in question related to the mediation and the Minutes of Settlement and that the applicant had breached the confidentiality provision in the settlement.

However, the Tribunal also found that the employer had breached the settlement by failing to pay the amounts owing to the employee.

The Tribunal weighed the fact the Facebook postings did not reveal the amount of the settlement against the fact those postings were not "private" in finding that the original amount owing to the former employee should be reduced by $1000. The Tribunal's decision did not reveal the amount owing to the employee, so it is difficult to gauge the significance of this amount. The Tribunal also commented that deterrence was a factor in determining penalty: if confidentiality provisions were routinely ignored by applicants there may be a disincentive for respondents to settle human rights applications. No damages against the employer were awarded for its failure to pay under the settlement but it did have to pay interest on the amount owing.

Employers are often very concerned about confidentiality. This case is good news, as it demonstrates that the Tribunal will provide a remedy where a party to a settlement breaches a confidentiality clause. The Tribunal's reasoning suggests that it will take deterrence and proportionality into account when deciding the appropriate remedy in cases and that as the amount of detail and information about the settlement increases, so should the penalty to the party breaching the settlement. An employer should also remember that where the obligation of confidentiality is mutual, it should take active measures to ensure that confidentiality is not breached within its organization. Finally, employers may wish to consider having specific wording in the settlement about what remedy will result from a breach of confidentiality.