Case In Point

Confidentiality Provisions: Important, Effective and Enforceable

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In most unionized workplaces, many grievances are settled before the parties present their evidence and before an arbitrator issues a public decision. In most instances, when a grievance is settled, the terms of that settlement are recorded in written form. The parties often agree that the settlement must be kept confidential and include a confidentiality clause in their settlement. Confidentiality clauses can take many forms, but their common purpose is to ensure that the settlement's terms are not disclosed to any third party.

The grievance settlement process is well known. The inclusion of a confidentiality clause in settlement documents occurs regularly. In contrast, the issue of how employers can respond when an individual grievor violates this clause does not arise as often. Some employers assume that if a grievor breaches this confidentiality obligation, an employer cannot take meaningful action. Sometimes, settlement documents are prepared without the grievor's agreement. In other cases, a confidentiality provision may not reference a specific penalty that will apply if it is breached. These circumstances may lead an employer to conclude that an individual grievor can breach a confidentiality clause with impunity.

In an encouraging legal development for employers, Arbitrator William Marcotte has concluded that employers can secure meaningful remedies against individual employees when they violate a confidentiality clause in a grievance settlement. In Barrie Police Services Board, Arbitrator Marcotte ordered an individual grievor to return the compensation paid to him under a grievance settlement after he was found to have flagrantly violated the agreed-upon confidentiality clause.

The fact that the individual grievor had not signed the grievance settlement did not prevent his employer from obtaining an order against him. Arbitrator Marcotte affirmed that a union's decision to settle a grievance is legally binding on an individual grievor, even if he or she does not agree with the settlement. In a unionized workplace, the union is the exclusive bargaining agent for all the employees it represents. As such, an individual grievor is automatically bound to the grievance settlements that the union accepts, even if he or she refuses to settle.

Arbitrator Marcotte also emphasized that an employee's breach of a confidentiality clause can be a serious matter that will attract serious consequences. He found that the grievor's decision to disclose important details about the settlement of the grievance as part of his campaign for political office was an intentional and highly inappropriate act. In these circumstances, Arbitrator Marcotte ordered the grievor to repay all of the funds that he had received as part of the settlement. In doing so, Arbitrator Marcotte sent a clear message that the deliberate violation of a confidentiality clause will not be treated lightly.

Hicks Morley has been instrumental in helping employers ensure that the terms of their grievance settlements are enforced. Glenn Christie represented the Barrie Police Services Board in the above-referenced case before Arbitrator Marcotte. In another recent case, relied on by Arbitrator Marcotte, Stephen Shamie successfully represented the Globe and Mail in an arbitration where an individual grievor was ordered to repay the settlement funds that she had received after she violated the terms of a confidentiality clause.

If you have any questions regarding these recent legal developments, feel free to contact Glenn Christie at glenn-christie@hicksmorley.com, Stephen Shamie at stephen-shamie@hicksmorley.com, or your regular Hicks Morley lawyer.