

Be Careful What You Say! Recent HRTO Decision Underscores The Importance Of Confidentiality And Non-disparagement Clauses



A recent decision of the Ontario Human Rights Tribunal (the “HRTO”) serves as an important reminder that breaches of confidentiality and non-disparagement clauses will not be taken lightly by the Tribunal. If properly drafted into a settlement agreement, these clauses can carry real, and expensive, legal consequences for employees that choose to breach them.

As a bit of a refresher, the purpose of a confidentiality clause is to keep the terms of a settlement, and the information exchanged during the course of litigation, confidential by restricting the information that a party can reveal. Similarly, a non-disparagement clause aims to protect the parties’ reputation and public perception by preventing parties from communicating negative statements about one another.

Background of the Case

In [*L.C.C v M.M., 2023 HRTO 1138*](#), an employee had originally brought forward an application alleging sex discrimination in the course of employment against both a corporation and an individual. All of the parties to the proceeding were represented by legal counsel and, following mediation, a settlement agreement was reached.

In exchange for a settlement payment, it was required that the employee in this case sign Minutes of Settlement, which contained both a confidentiality clause and a mutual non-disparagement clause.

The confidentiality clause required the employee to respond to any inquiries about the resolution of the application or the conclusion of their employment with simply “all matters have been resolved”. The employee was to make no mention of, or allude in any way whatsoever to, the receipt of money or the amount of money received in the settlement. The mutual non-disparagement clause required the parties to refrain from making any defamatory, disparaging, or derogatory statements that would damage the party’s reputation, including in any electronic communications made through social media. The consequence of a breach of any of these obligations was outlined in the Minutes as a requirement to repay the settlement payment as liquidated damages.

A few months after the mediation and settlement, 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 applicant corporation] and [the individual applicant] for sex discrimination.”

After discovering the social media post, the employer asked the employee to remove it but the employee did not respond to this request. The employer then brought an application before the HRTO alleging that the employee had breached the settlement and seeking repayment of the settlement funds.

HRTO’s Decision

In its decision, the Tribunal found that the employee had breached the confidentiality clause. By attaching the reference to “sex discrimination” and disclosing the names of the corporation and individual involved, the employee had shared more than the plain language of the confidentiality exception permitted.

The Tribunal also held that the employee breached the non-disparagement clause. The Tribunal was 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.”

The Tribunal then turned to the issue of ordering an appropriate remedy for the breaches. The Tribunal referred to [*Community Living Atikokan v Ontario Public Service Employees Union, 2021 CanLII 97468 \(ON LA\)*](#), to establish that proof of reputational damage is not required when assessing the appropriate remedy for a breach of a confidentiality or non-disparagement clause in a settlement agreement. It held that the harm is understood as the lack of respect shown to those intended to receive the benefit of those terms in the Minutes of Settlement. Since the agreement was clear that the consequence of such a breach would be the repayment of settlement payment as liquidated damages, that was ordered by the Tribunal.

Implications for Employers

This should be a welcome decision for employers. It is important to exercise diligence when entering into final and binding settlement agreements. The use of well drafted confidentiality and/or non-disparagement clauses can be an important tool to protect an employer’s business interests and mitigate its risk during the settlement of an employment dispute.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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