Confidentiality: It Does Mean Something After All!

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When an employer settles a severance issue with a former employee, it is common for the employer to put a clause in the settlement agreement that provides that the former employee will keep the terms of settlement confidential and not disclose them except to family members, legal and financial advisors or as otherwise required by law.

Employers may insist on confidentiality for many reasons but the most common reason is that they do not want the amount they paid to one employee to influence the expectations of other employees on termination.

Notwithstanding the importance of confidentiality, employers often express concern that these provisions are not enforceable.

A recent case involving Jan Wong, a well-known author and former reporter for the *Globe & Mail*, illustrates that these clauses can be enforced and what can happen if a former employee breaches a confidentiality clause.

Jan Wong filed a grievance through her union claiming that she had been terminated from the *Globe & Mail* without cause. After protracted negotiations, her grievance was settled on September 24, 2008.

The settlement agreement provided that neither party would disclose the terms of the settlement to anyone other than their legal and financial advisors, Manulife, and the grievor's immediate family.

The settlement agreement also contained a clause that stated that if an arbitrator found that Ms. Wong breached the confidentiality provisions, she was obliged to repay the full amount of the settlement.

In 2012, Ms. Wong published a book entitled *Out of the Blue* which described her battle with depression while employed by the *Globe & Mail*.

The *Globe & Mail* alleged that in the book Ms. Wong violated the confidentiality provisions of the settlement by disclosing that she received a payment as part of the settlement, that she had been successful in the settlement and that there was a confidentiality agreement. It therefore sought an order from the arbitrator requiring Ms. Wong to pay back the full amount of the settlement.

The arbitrator found that Ms. Wong violated the confidentiality provision by making the following comments:

"… I can't disclose the amount of money I received."

"I had just been paid a pile of money to go away…"

"Two weeks later a big fat cheque landed in my account."

"Even with a vastly swollen bank account…"

Ms. Wong's evidence was that she felt that the settlement agreement allowed her to disclose that she had received a payment from the *Globe & Mail* and that she was only prohibited from disclosing the amount of the payment.

The arbitrator disagreed. The arbitrator noted that parties settle cases for many different reasons that may have nothing to do with any admission of liability. Non-disclosure and no admission of liability clauses recognize this fact and must be respected to encourage the settlement of cases. The arbitrator therefore ordered Ms. Wong to repay the full amount of the settlement.

In most cases there remains a problem of proving that one party has breached a confidentiality clause. There are few cases where the other party takes some step as public as publishing a book. However, this case is a reminder that parties should comply with the non-disclosure provisions of their settlements and the severe consequences that may result if they do not.