

A Deal's a Deal?

Getting what you bargained for in wrongful dismissal settlements

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96%

Why Do Parties Settle?

- Risk Management
 - Litigation Risk
 - Reputational Risk
- Cost/Benefit Analysis
- Organizational Resources
- Certainty
- Precedent



Judith sensed that the mediation would take more time than the half-day that it had been scheduled for.

Elements of a Settlement Agreement

- Terms of Settlement
 - Compensation/Benefits
 - Reference Letters
 - Allocation of Settlement Monies
 - Timing of Payments
 - Employment Insurance Overpayment
 - Reimbursement of expenses
- Without Prejudice / No Admission of Liability
- Confidentiality
- Non-Disparagement
- Restrictive Covenants
- Indemnities
- Full and Final Release
- Prohibition on re-applying to company
- Independent Legal Advice
- Return of Company property

The devil's in the details...

Fehrman v Goodlife Fitness Centres, Inc., 2017 ONSC 4348 .

- Settlement included payment of \$25,000 “payable as wages and subject to all necessary statutory deductions”
- Employer deducted from the settlement payment for taxes, CPP and EI
- Employee claimed that the settlement should have been treated as a retiring allowance – no CPP or EI deductions and only a 30% tax rate would apply
- There was no evidence of direct discussions about treating the \$25,000 as a retiring allowance
- Judge ruled that parties agreed that employer would make the “necessary deductions” to the payments – would have been preferable for parties to have common understanding of what “necessary deductions” meant – it was up to employer to make deductions it viewed as necessary

Takeaways for Employers

Fehrman v Goodlife Fitness Centres, Inc., 2017 ONSC 4348 .

- Can't rely on what is "customary" in determining how to treat certain payments
- Parties can agree up front on how they intend to the payment to be characterized, but such an agreement is not determinative as it is ultimately up to the CRA to decide whether the characterization is appropriate in the circumstances

Loose Lips Sink Settlements...

Acadia University v. Acadia University Faculty Association, 2019 CanLII 47957 (Kaplan).

- Acadia University terminated the employment of a tenured professor for cause
- Parties attended mediation and reached a settlement
- Minutes of Settlement included a “no admission of liability” clause and confidentiality covenant
- Minutes of Settlement also included the following covenant:

“If asked, the parties will indicate that the matters in dispute proceeded to mediation and were resolved, and they will confine their remarks to this statement. Stated somewhat differently, it is an absolute condition of these Minutes that no term of these Minutes will be publicly disclosed.”

Loose Lips Sink Settlements...

Acadia University v. Acadia University Faculty Association, 2019 CanLII 47957 (Kaplan).

- Following the settlement, professor tweeted: *“Vindicated former professor! Advocate for free speech and institutional transparency in universities.”*
- One of the professor’s followers tweeted *“congrats Rick! Hope you got a nice sum monz.”*
- Professor responded as follows: *“All I will say is that I left with a big grin on my face.”*
- Professor subsequently tweeted: *“Because I got the vindication that I was seeking. In other words, I have left the university on my term, as opposed to the administration’s or union’s terms. The NDA that I was required to sign by law is not for my protection.”*

Loose Lips Sink Settlements...

Acadia University v. Acadia University Faculty Association, 2019 CanLII 47957 (Kaplan).

- Arbitrator ordered professor to delete his tweets
- In response, the professor made further tweets disparaging the University and making numerous references to his “severance pay”
- Subsequently wrote to the University’s President and threatened to release the Minutes to the media unless certain conditions were met
- Arbitrator ruled that there was no ambiguity in the Minutes about the confidentiality obligations
- As a result of the professor’s repeated breach of the Minutes, the University was relieved of its payment obligations

Takeaways for Employers

*Acadia University v. Acadia University Faculty Association, 2019
CanLII 47957 (Kaplan).*

- Confidentiality provisions should be clearly drafted
- Breach of confidentiality provisions will attract significant consequences

Fool me once...

Kearns v. Canadian Tire Corporation, Limited, 2019 ONSC 4946

- At termination employer provided employee with 8 weeks' ESA Termination Pay and 12 weeks' ESA Severance Pay; in exchange for a release employer also offered enhanced separation package amounting to approximately \$115,000.00
- Employee rejected offer and commenced wrongful dismissal claim
- Matter settled at mediation – Minutes provide that in addition to amounts already paid, the employer will pay the employee \$150,000.00
- Prior to paying out settlement, employer discovered that it had mistakenly paid out the full amount of the enhanced separation package offered at termination
- Employer's lawyer advised that it would only be paying the outstanding difference between the negotiated settlement and the overpayment (i.e. \$45,174.36)

Fool me once...

Kearns v. Canadian Tire Corporation, Limited, 2019 ONSC 4946

- Employee brought motion to enforce Minutes of Settlement; Employer brought cross-motion seeking to set-off the mistaken payments from settlement
- On cross-examination, the employee testified that when he received the payment of \$115,465.20 he did not expect this payment and did not know why it was in his account.
- Court upheld the settlement – the words “in addition to amounts already paid” are not ambiguous
- If the unmistaken party is ignorant of the other’s mistake the contract will be valid and neither rescission nor rectification will be possible – Court declined to make a ruling of fraud

Takeaways for Employers

Kearns v. Canadian Tire Corporation, Limited, 2019 ONSC 4946

- Always double check how much has been paid to dismissed employees before entering into settlement discussions
- In Minutes of Settlement/Separation Agreements, consider expressly setting out the amounts that have already been paid and including a representation that the employee has not received any other amounts from the Company

Questions

Thank you

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