Not So Full and Final? Recent Decisions Permitting Release Leaks

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Getting a full and final release after ending an employment relationship or other dispute can often bring employers a sigh of relief: the employee has signed on the dotted line, the matter can be closed, and the parties can move on. However, a number of recent cases may show a trend in courts declining to enforce what appear to be full and final releases.

- In our December newsletter and year-end review, we reported on *Watson v. The Governing Council of the Salvation Army of Canada*, 2018 ONSC 1066. In that decision, the employee had signed a release applicable to all claims "arising out of the employment relationship." When the employee subsequently commenced a sexual harassment claim, the court declined to enforce the release on the grounds that alleged sexual harassment did not "arise out of" employment and thus was outside the scope of the release.
- Last month, we read about the rules in the Ontario Securities Commission's Whistleblower Program which prohibit restrictions on reporting potential securities law violations to the OSC. Common provisions found in many employment-related releases – such as non-disclosure and non-disparagement – may be construed as being non-compliant with those rules, and may therefore be deemed unenforceable. If the OSC follows the lead of its US counterpart, it may begin taking enforcement action even in the face of apparent releases.
- In December 2018, the Federal Court released its judicial review decision in *Bank of Montreal v. Li*, 2018 FC 1298. In this case, the employee received a severance package and signed a release, but shortly thereafter commenced a complaint for unjust dismissal under the *Canada Labour Code* (Code). The Federal Court found that section 168(1) of the Code – "This Part and all regulations made under this Part apply notwithstanding any other law or any custom, contract or arrangement…" – rendered any purported release to be unenforceable. The parties were not permitted to effectively contract out of the Code and the complaint was not barred.
- In a similar decision from December 2018, the Ontario Court of Appeal in *Kerzner v. American Iron & Metal Company Inc.*, 2018 ONCA 989 considered a release signed in the context of a 2008 sale of the business, several years prior to the employee's ultimate termination. The court found that the release could not be enforced with respect to the employee's *Employment Standards Act, 2000* entitlements (*i.e.*, the employee could not have waived any entitlements based on

pre-2008 service), but did enforce the release with respect to the employee's common law entitlements.

- The Ontario Human Rights Tribunal has a long history of refusing to dismiss applications on the grounds that the matter has been settled, unless the release expressly refers to waiver and settlement of any human rights claims. Where such language is included in a release, however, the tribunal does dismiss applications on the grounds that they are an abuse of process.
- Finally, in June 2018 in *Swampillai v. Royal & Sun Alliance Insurance Company of Canada*, 2018 ONSC 4023, the Ontario Superior Court ruled that a release signed by a 14-year employee – who suffered from several ailments and who, the employer knew, was in the process of appealing the denial of his long-term disability benefits at the time he signed the release – was unenforceable as it related to his claim for benefits against the employer.

We have long known the courts in Ontario to be employee-friendly. The above cases may signal a somewhat discouraging development in that respect, but all hope is not lost. Common-law claims can still be released, and these risks can be mitigated through properly drafting and regularly updating your standard releases to ensure they contain appropriate protections. Additionally, positive HR practices and fair treatment of employees can help build a healthy working environment where certain claims are less likely to be commenced – with or without a release.

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