

# Facebook Posting Breaches Settlement Confidentiality

by William R. Gale

In virtually every settlement agreement between employers and employees engaged in a dispute, one finds a confidentiality covenant. The confidentiality provisions typically deal with two aspects of confidentiality: first, a general provision which reminds the former employee that he or she had access to confidential information while employed and is obliged to maintain that confidentiality after employment; and, secondly, a covenant which specifically obliges both employer and employee to keep the terms of the settlement agreement itself confidential, with a usual exemption for disclosure to professional advisors such as lawyers and accountants, as well as immediate family.

There are not many reported decisions of cases in which one of the parties to a settlement agreement is alleged to have disclosed the terms of the settlement agreement.

A recent example of such a reported decision is found in the Ontario Human Rights Tribunal ("OHRT") decision, *Tremblay v. 1168537 Ontario Inc.*, 2012 HRTO 1939. In this decision, released in October 2012, the OHRT was faced with an application by the corporate and personal respondents that Ms. Tremblay had breached the settlement agreement reached between them by disclosing details of the settlement agreement, contrary to the confidentiality provision of the settlement agreement. Ms. Tremblay, in turn, filed an application alleging that the respondents had refused to pay the amount owing pursuant to the settlement agreement.

At the mediation of the original Human Rights application initiated by Ms. Tremblay against both her former employer and Ms. Lalonde the manager of the corporate respondent's fast food franchise, the parties were able to agree to a settlement and entered into Minutes of Settlement. One of the provisions in the Minutes of Settlement provided as follows:

*The Applicant and Respondents agree to maintain confidentiality of the terms of these Minutes of Settlement, and shall not discuss or disclose the terms of the settlement with anyone other than immediate family, or legal or financial advisors, or as required by law.*

On the next day following mediation, the personal respondent became aware that the applicant had actually posted on her Facebook account the following message which was posted during the course of the mediation itself:

*Sitting in court now and [blank in original posting] is feeding them a bunch of bull shit. I don't care but I'm not leaving here without any money... lol.*

Within minutes after signing the Minutes of Settlement, Ms. Tremblay posted the following message on her Facebook account.

*Well court is done didn't get what I wanted but I still walked away with some...*

Approximately four hours later, Ms. Tremblay posted the following message on her Facebook account:

*Well my mother always said something is better than nothing... Thank you so much Saphir for coming today ...*

Although Ms. Tremblay did not deny that she wrote the postings, she submitted that she did not refer to the respondents by name and, further, that Facebook was private. She also submitted that there was no mention of the amount, of the settlement.

The Tribunal found that the applicant did breach the confidentiality provision of the Minutes of Settlement. Although she did not disclose the amount of the settlement, by her comments she disclosed that there was a monetary settlement. The fact that she did not disclose the amount, although not relevant to a determination of whether there was a breach, was a relevant factor to consider when the Tribunal assessed the remedy for her breach.

The Tribunal quoted with approval from another OHRT decision, *Saunders v. Toronto Standard Condominium Corp. No. 1571*, 2010 HRTO 2516 [at para. 51]:

*Respect for terms of settlement is not only a legally binding, contractual obligation, it also promotes essential Code values. A contravention of settlement can undermine the administration of justice by discrediting the human rights system and generating wrong disincentives to negotiation. The uncertainty created by a contravention of settlement potentially undermines the substantive and procedural provisions of the Code. An award of monetary compensation can help reflect both the private and public importance of complying with settlement terms.*

The Tribunal was also required to deal with the allegation that the respondents had breached the agreement by refusing to pay the settlement moneys. The Tribunal dealt with both allegations of breach by reducing the monetary amount owing to the applicant by \$1,000, and ordering the respondents to pay that reduced amount together with interest at the rate of 1.3% per annum from the date Ms. Tremblay filed her application to the date of the decision.

This decision is helpful in providing some guidelines to litigants in human rights disputes. There may be further considerations in the case of civil actions, where one of the litigants may be able to present evidence of real and significant damages flowing from disclosure of a settlement amount. If the proper set of facts existed, one can contemplate a situation in which a breach of confidentiality may have vitiated the whole underlying settlement agreement, and created fresh damages for the innocent party.

One of the frequent limitations in a potential breach of confidentiality provision is the matter of presenting cogent evidence about the breach. In other words, actually proving that one of the parties did disclose a term of the settlement is often difficult, especially in situations which arise in employment disputes where the whole employment litigation process is often accompanied by a significant amount of gossip and innuendo.

Here, of course, the Facebook posting provided all of the evidence required. It is somewhat surprising that parties still continue to maintain that a particular posting on Facebook or a blog or LinkedIn or Twitter is a private communication. While parties may have been excused during the infancy of social media, owing to their ignorance of the extent and reach of social media, now that social media is well established as a form of communication, the case law has left little doubt that sending messages via social media is anything but private.