

DECISION RESPECTING THE SETTLEMENT AGREEMENT

BETWEEN:

ROSEWOOD HOTEL GEORGIA

(the "Employer")

AND:

UNITE HERE, Local 40

(Wendy Chen Grievance)

(the "Union")

ARBITRATOR:

Corinn Bell

COUNSEL:

Kacey A. Krenn
for the Employer

Leo McGrady
for the Union

DECISION:

December 10, 2015

The parties agree that I am properly constituted as an arbitrator in this matter with jurisdiction to determine the issue in dispute.

The Facts

The Rosewood Hotel (the “Employer”) and Unite Here, Local 40 (the “Union”) met on October 20, 2015 to arbitrate a termination grievance. The Grievor, Ms. Chen, and her husband were in attendance. The parties agreed to mediate the grievance and a Settlement Agreement was reached after hours of productive mediation. As mediator, I called the parties together at the end of the mediation to jointly review and sign the Settlement Agreement. The Confidentiality Clause agreed to in this mediation was found at paragraph F of the Settlement Agreement reads as follows:

The Union, the Grievor, and the Employer agree to hold this Settlement Agreement in strict confidence and that they will not discuss the terms of this Settlement Agreement with any other person, or any other employee of the Employer, subject to the following exceptions:

- a. The Union is allowed to disclose the terms of the Settlement Agreement to:
 - i. the minimum extent necessary to process its membership records;
 - ii. its lawyers; and
 - iii. the minimum extent required by law.
- b. The Grievor is allowed to disclose the terms of this Settlement Agreement to:
 - i. the governmental authority that deals with Employment Insurance claim/benefits;
 - ii. her immediate family members;
 - iii. her financial advisor(s) and/or accountant(s);

- iv. her lawyer(s); and
- v. the minimum extent required by law.

The Settlement Agreement was a hand written document and all parties to the agreement initialed and signed the Settlement Agreement on October 20, 2015. Employer counsel then produced the Settlement Agreement electronically on October 22, 2015.

The Parties' Position Regarding the Alleged Breach of the Settlement Agreement

The Employer

It is the position of the Employer that the Union has breached a fundamental term of the Settlement Agreement. The Employer argues that significant time during the mediation was spent on the confidentiality clause of the Settlement Agreement (the "Confidentiality Clause"). During mediation, the Employer proposed a clause permitting the Employer claw back of any settlement funds paid to the Grievor in the event of a breach of the Confidentiality Clause. This claw back clause was vehemently rejected by the Union in the mediation and ultimately, the Employer agreed to the Confidentiality Clause without a claw back provision. The Employer argues that the Confidentiality Clause was of utmost importance to the settlement.

In particular, the Employer asserts that the confidentiality provision of the Settlement Agreement was breached by two Union officials, Mr. Augustino, Union Organizer and Mr. Demand, Union President. The Employer alleges that both these Union officials commented on the Settlement Agreement generally and provided information as to some of the terms of the Settlement Agreement, specifically the fact that the Union "got Wendy's job back" and that the Union "got her compensation for her hardship", or words to that effect. The Employer argues that after such disclosure, Union members started to wear Union buttons and demanding a fair contract in collective bargaining.

Further, the Employer submits that the Union breached the Confidentiality provision of the Settlement in disclosing terms of the Settlement Agreement. The Employer disputes past practice between the parties with respect to settlements, but argues that such a past

practice would not be relevant in this case given that the parties specifically negotiated the Confidentiality Clause. The Employer relies on the following case law to support its position: *Globe and Mail and C.E.P. Union of Canada, Local 87-M*, [2013] O.L.A.A. No. 273, *Wong v. The Globe and Mail Inc.*, 2014 ONSC 6372, and *Northfield Metal Products Ltd.*, [1991] OLRB Rep. May 664.

Finally, the Employer argues it suffered prejudice as a result of the Union's material breach of the Confidentiality Clause. The Employer submits this prejudice is highlighted by the fact that the parties are engaged in ongoing collective bargaining. The Employer seeks the following:

A declaration that the Union breached the Settlement Agreement;

- (a) An order that the Employer is relieved of its obligations under the Confidentiality Clause; and,
- (b) An order that the Union refrain from making any further comments with respect to the Settlement Agreement.

The Union

The Union denies breaching any terms of the Settlement Agreement. The Union agrees that the Employer sought a claw back provision in the Settlement Agreement but was not successful in obtaining such language. While the Union does not share the view that the Confidentiality Clause was of "utmost importance" in the overall context of the Settlement Agreement, it does acknowledge that it is an important feature.

With respect to the alleged breaches of the Confidentiality Clause, the Union disputes the factual allegations and argues that they are based on hearsay or double hearsay. The Union submits that Mr. Augustino and Mr. Demand spoke to a small number of hotel employees to advise them of the outcome of the dispute; communicated that the Grievor would be returning to work; and let them know that there was a confidentiality agreement. The Union argues that it was under a legal duty and obligation to report the outcome of important legal proceedings to members and that the Grievor's co-workers "...had a right to be informed of this outcome in a case they viewed as very important.". The Union relies on its obligations under section 2(b) of the Charter as well as its duties

pursuant to s.12 of the *Labour Relations Code*. In the alternative, the Union argues that the disclosure was caught by s.2(iii) of para. F of the Settlement Agreement.

The Union further argues that it has been a party to many settlement agreements with confidentiality clauses that do not prevent the Union from performing its duty to inform the members of the fact that a settlement was reached and that an employee was returning to work.

The Union submits that the *Globe and Mail* case relied upon the Employer is fundamentally different than the facts in this case. The Union points out that it was the Grievor in that case that violated the terms of the agreement and that the terms were widely broadcasted by the Grievor. In this case, the Union asserts that it communicated there was a settlement reached and that the Grievor was returning to work but that further details could not be shared as there was a confidentiality agreement.

DECISION

In the course of the mediation, the Confidentiality Clause was discussed at length. In particular, the Employer indicated that it was concerned about confidentiality in this case with respect to both the Union and the Grievor and proposed a claw back clause. This clause was rejected by the Union. The parties were brought together at the conclusion of the mediation to jointly review the language and sign the Settlement Agreement.

The parties very specifically detailed that the terms of the Settlement Agreement were to be kept “in strict confidence” and identified certain exceptions to such confidentiality. The Confidentiality Clause and the exceptions were discussed in the mediation and agreed by the parties to the Settlement Agreement. It goes without saying that those terms must be respected by the parties.

I agree with the Union that the allegations put forward by the Employer are hearsay. As such, I decline to find that there has been a breach of the Settlement Agreement and decline to issue the orders sought by the Employer in this case. I must, however, state that if the allegations put forward by the Employer were not hearsay and the Union

Representatives spoke of the terms contained in the Settlement Agreement, the Union would be in contravention of the language negotiated in this case by the parties.

While I decline to award the remedies sought by the Employer in this case, I conclude by reminding the parties of the Confidentiality Clause and retain jurisdiction over this issue should any of the parties believe there to be non-compliance with the negotiated terms. In my opinion, the Settlement Agreement negotiated in this case contemplates that the terms are held in strict confidence and the terms must be respected by the parties. The parties agreed that the terms of the Settlement Agreement would not be shared "...with any other person, or any other employee of the Employer..." and, except where the specific exceptions are engaged, the parties must hold the Settlement Agreement in "strict confidence" going forward.

Dated at the City of Kamloops in the Province of British Columbia this 10th Day of December 2015.



Corinn Bell

Arbitrator