IN THE MATTER OF AN ARBITRATION
BETWEEN:

THE GLOBE AND MAIL
DIVISION OF CTV GLOBEMEDIA PUBLISHING INC.

(the "Employer")

-and-

COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA, LOCAL 87-M, SOUTHERN ONTARIO NEWSMEDIA GUILD

(the "Union")

AND IN THE MATTER OF AN ALLEGED BREACH OF A MEMORANDUM OF AGREEMENT

Louisa M. Davie - Sole Arbitrator

Appearances

For the Union:	**Tim Gleason, Counsel**
For the Employer:	**Stephen Shamie, Counsel**

Award

The Issue

In this case The Globe and Mail ("the Employer") alleges that Jan Wong ("the grievor") breached a Memorandum Of Agreement ("MOA") dated September 24, 2008 which was signed by the Employer, the grievor, and the Communications Energy and Paperworkers Union of Canada, Local 87-M ("the Union"). The Employer seeks enforcement of the consequences set out in the MOA if a breach is established.

The Union maintains that the grievor did not substantially breach the MOA. In addition, the Union argues that if I find that the grievor did breach the MOA, the enforcement provision of the MOA is a penalty clause which is unconscionable and unenforceable.

Factual background

The facts giving rise to the issues in dispute are relatively straightforward.

The grievor had been employed by the Employer for many years. While employed she was represented by the Union. The Union filed grievances on behalf of the grievor which dealt with the grievor's claim to sick leave and which maintained that the termination of the grievor's employment was without cause and contrary to the collective agreement. Those grievances proceeded to arbitration before me. During the course of that arbitration the parties agreed to attempt to mediate the grievances filed. That mediation resulted in the MOA dated and signed on September 24, 2008 which settled the grievances and other matters in dispute between the parties.

The MOA contains the following provisions:

5. The Employer acknowledges that the Grievor was ill and unable to attend at work from June 11, 2007 to November 13, 2007 for that reason.

6. With the exception of paragraph 5, the parties agree not to disclose the terms of this settlement, including Appendix A to anyone other than their legal or financial advisors, Manulife and the Grievor's immediate family.

7. The Grievor agrees that until August 1, 2009 she will not disparage The Globe and Mail or any of its current or former employees relating to any issues surrounding her employment and termination from The Globe and Mail. The Globe and Mail agrees that until August 1, 2009, to not disparage the Grievor.

8. Should the Grievor breach the obligations set out in paragraph 5 and 6 above, Arbitrator Davie shall remain seized to determine if there is a breach and, if she so finds, the Grievor will have an obligation to pay back to the Employer all payments paid to the Grievor under paragraph 3.

13. Arbitrator Louisa Davie shall remain seized of all matters.

In May 2012 the grievor published a book entitled "Out Of The Blue" ("OOTB").

Publication of that book caused the Employer to initiate these proceedings. The Employer maintains that passages and references in OOTB violate the nondisclosure obligation found in paragraph 6 of the MOA. The Employer also relies upon an interview which the grievor gave to the media which was broadcasted on May 6, 2012 (and re-broadcasted on September 2, 2012) and "tweets" which the grievor posted regarding the September 2, 2012 rebroadcast of the interview. As a result of the alleged violation of the nondisclosure clause the Employer seeks enforcement of paragraph 8 and repayment of money paid to the grievor.

Evidence at the hearing

Following two separate days of hearing into preliminary matters a hearing into the merits of the Employer's claim was held on May 30, 2013.

In support of its position the Employer introduced as evidence copies of the OOTB book, and portions of the media interviews about which it complains. In all the Employer relies upon twenty-three (23) references in the OOTB book to support its position that the grievor violated paragraph 6 of the MOA in the following manner:

1. By disclosing that she received payment as part of the settlement.
2. By disclosing the fact that the MOA did not provide for a "gag order".
3. By disclosing the fact she had been successful in the settlement thus breaching the "no admission of liability" provisions of the MOA.
4. By disclosing the fact that there was a confidentiality agreement in the MOA.

The Union sought to introduce viva voce evidence from the grievor. The Employer objected to the introduction of that evidence and submitted that the MOA was a complete, unambiguous agreement so that extrinsic, parol evidence was not admissible. Having been provided with particulars of the nature of the grievor's evidence through an unsworn affidavit or "will say" statement, Employer counsel also argued that much of the evidence which the grievor sought to introduce was irrelevant and amounted to legal argument which the grievor was in no position to make. Following submissions from counsel on the matter I rendered the following oral ruling at the hearing.

> The issue before me is whether there has been a breach of the Memorandum of Agreement executed by The Globe and Mail ("the Employer"), the Communications Energy and Paperworkers Union Local 87-M ("the Union") and Ms. Wong ("the grievor") on September 24, 2008.
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> During the course of the hearing into issues arising from the implementation and enforcement of the MOA the Employer objected to the admissibility of evidence which the Union sought to adduce through the

grievor. Union counsel had provided Employer counsel with a "will say" statement in the form of an unsworn affidavit from the grievor.

The Employer objects to the admissibility of this evidence stating that the MOA is a complete agreement and that its terms are not ambiguous and that therefore extrinsic and parol evidence is not required or admissible. The Employer objects also that much of the "affidavit" evidence is inadmissible either because it is irrelevant to the issues in dispute, or because it is only legal argument, properly made by counsel, and not a witness.

The Union does not dispute that where the only issue is the interpretation of an agreement extrinsic evidence is generally not permitted unless the language of the agreement is ambiguous. Here however the Union argues the issue before me is not only the appropriate interpretation of the language of the agreement. Another issue in this case is the appropriateness of the "penalty" which the Employer seeks if I find that there has been a breach of the MOA. In this instance the Union indicates that, on behalf of the grievor, it will take the position that the enforcement provision of the MOA is a penalty clause which is unenforceable and unconscionable. The Union submits that the evidence sought to be adduced is relevant to the factors which apply to that position as the evidence deals with, for example, an examination of the circumstances surrounding the negotiation of the settlement as well as the circumstances brought about by the imposition of what the Union characterizes as a penalty clause.

The Employer counters that the Union can advance any arguments it wishes to make with respect to unconscionability on the basis of the written MOA and without the need for extrinsic evidence. In this regard the Employer also argues that the facts relevant to the arguments of unconscionability which the Union may seek to adduce are referenced in Exhibit 16, the book published by the grievor. It was the publication of that book (and some interviews relating to that book) which gave rise to the Employer's position that the grievor has breached the MOA. The Employer submits that there is no need for the Union to call viva voce evidence to make the arguments it wishes to make.

I have considered the submissions of counsel and briefly reviewed the awards to which I was referred. I have determined that the Union may lead this evidence. In my view it is relevant to one of the positions which the Union wishes to advance. It may be that the Union could advance that position based on the book which is in evidence as Exhibit 16. It has chosen not to do so and wishes to adduce viva voce evidence of facts which it considers relevant to advancing its position that the enforcement

> provision is a penalty clause and that the MOA is unconscionable and therefore not enforceable.
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> I have not at this stage of these proceedings made any determinations with respect to the weight which will ultimately be attributed to this evidence. I have merely determined that the evidence is arguably relevant to a position which the Union expects to advance on behalf of the grievor. Whether or not that evidence will ultimately carry any weight has yet to be determined, and may very well be somewhat intertwined with the respective positions of the parties regarding the appropriate interpretation of the MOA. From a practical and hearing efficiency perspective it makes more sense to admit that evidence now and weigh it later in context of all of the evidence adduced.
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> In making this determination I wish to note now that I intend to ignore those portions of this affidavit form "will say" statement which purport to advance legal arguments and not merely assertions of fact. I will listen to the legal arguments of counsel, based on the evidence tendered, at the conclusion of the case.

Thereafter the grievor testified. In her testimony the grievor adopted as true the contents of her unsworn affidavit and the documents referenced in that affidavit (marked as Exhibit 18 at the hearing). She was then cross-examined by Employer counsel.

Having regard to all of the evidence adduced, including the grievor's oral testimony, the following are my findings of fact relevant to this matter.

1. The MOA was executed following a long period of negotiation between and amongst the Employer, the Union and the grievor. Much of the negotiation occurred during arbitration proceedings when the parties agreed to mediate a resolution to the grievances filed.

2. At arbitration and during these negotiations the Union and the grievor were represented by an experienced Union side labour lawyer, knowledgeable in matters relating to labour relations law. The grievor agreed that the Union represented her at the arbitration and during the mediation because it had carriage of the grievances, and that the Union "was helpful in some ways." In addition the grievor had access to, and sought advice from, her own lawyer, an independent counsel who was representing her in legal proceedings involving her claim to long-term disability entitlement.

3. The Employer's first written offer of settlement or "pass" at a written MOA was left open for the grievor's acceptance for a week. The grievor faxed this document to her own lawyer and obtained advice about the proposed settlement offer from both that lawyer and the lawyer representing the Union's and her interests at the arbitration hearing.

4. There were successive "passes" between the parties about the contents of any MOA which would settle the grievances and all matters in dispute between the parties. Throughout the mediation and the negotiation of the MOA these passes provided for a non-disparagement clause, a nondisclosure clause and a clause detailing what would happen if the nondisclosure clause was breached.

5. In correspondence between the Union and the grievor it is clear that the grievor understood that the MOA would contain two separate clauses dealing with two separate concepts. One clause related to her agreement not to disparage the Employer and its employees. The second clause related to the nondisclosure of the terms of the settlement.

6. The grievor actively participated in the lengthy negotiations which culminated in the MOA. Throughout she voiced her opinions and concerns to the Union to ensure these were addressed in the MOA which settled her grievances and all matters between the parties. Following consultation with her own lawyer she suggested changes to the MOA proposed by the Employer. Those suggested changes were accepted by the Employer and incorporated into the MOA signed September 24, 2008.

7. One of the changes proposed by the grievor following consultation with her lawyer was a change to paragraph 6 of the MOA, the nondisclosure paragraph central to the issues in dispute in this proceeding. The grievor proposed, and the Employer accepted, a "carve out" from the clause dealing with the nondisclosure of the terms of the settlement so that the grievor could disclose paragraph 5 of the MOA. It was important to the grievor that she be permitted to disclose the Employer's acknowledgment that she had been ill (a fact also referenced in OOTB at page 234).

8. Throughout the more than two and one-half months during which the parties negotiated the MOA, changes were made to the clause which dealt with the consequences which would follow if the nondisclosure clause of the settlement was breached. In all of the "passes" however the clause always provided that all or a portion of the funds received would be paid back, something which the grievor characterized as a "claw back."

9. On September 24, 2008, prior to signing the MOA, the grievor faxed to her lawyer a copy of the proposed MOA which also contained paragraph 8 of the MOA ultimately executed by the parties. Following consultation with her lawyer the grievor proposed the changes set out in paragraphs 6 & 7 above. The grievor did not propose any changes to paragraph 8. It was her evidence that she did not discuss that

paragraph with her lawyer. She agreed however that she had the opportunity to consult her own lawyer and the labour lawyer retained by the Union to act during the arbitration/mediation process if she had any questions or concerns about paragraph 8 of the MOA.

10. In the more than two years following execution of the MOA, and prior to the publication of her book, the grievor did not consult with the Union or its counsel to obtain an opinion as to whether the OOTB book was consistent with, or violated the terms of, the MOA. The grievor testified that her relationship with the Union and its counsel "made it awkward" to consult with them, but acknowledged she chose not to contact the Union for advice about the MOA and its impact on OOTB. Prior to publication the grievor did consult a lawyer experienced in libel "to vet the publication for any libelous passages."

11. During the course of the negotiations Union counsel explained to the grievor that confidentiality and a nondisclosure clause was important to the Employer, and that the Employer was unlikely to give the grievor any money unless the MOA provided for nondisclosure.

12. At the time of the negotiations/mediation of the MOA all of the parties knew that the grievor intended to write a book about her experience.

13. The grievor understood that she was not permitted to disclose "the precise terms of the settlement." The grievor believed that meant she could not disclose the amount of money received pursuant to the MOA, but that it was permissible to use phrases which left the impression that she had received a significant sum of money from the Employer. Thus she believed the MOA permitted her to write that "a big, fat check landed in my account" and "I'd just been paid a pile of money to go away." These are two of the references in the book upon which the Employer relies to establish a breach of the MOA.

14. In the grievor's mind the nondisclosure obligation was intertwined with the non-disparagement obligation found in paragraph 7 of the MOA. She understood that after August 1, 2009 she could talk and write about her experience, and the MOA did not "prevent me from telling the story of the manner in which the Globe had responded to my major episode of work place depression." This, combined with the fact that she could disclose the Employer's acknowledgment that she was sick and unable to attend at work caused the grievor to conclude that as of August 1, 2009 she could disparage the Employer in discussing issues surrounding her employment and termination from The Globe. This would include discussing the MOA as long as she did not disclose the "precise" terms of the settlement. In her mind, after August 1, 2009, the Employer could not rely on paragraph 8 to prevent such disparagement or disclosure when she told her story. Part of her story was that she had been terminated and that she had settled the grievance which claimed the termination was without cause. She assumed that a severance payment upon termination was implied and was not confidential information so that it could be disclosed, provided she didn't disclose the amount.

15. Having regard to the grievor's evidence and the book she wrote I conclude that the grievor was very satisfied with the MOA she executed on September 24, 2008. As indicated in OOTB, after executing the MOA "I wanted to dance a jig" (page 235). She considered the MOA a victory and, as described in her book, a "big win" (page 235). She received funds, obtained the Employer's acknowledgment that she had been sick and that she could publicly disclose that acknowledgment, and a time-limited "gag order" which prohibited her from disparaging the Employer until August 1, 2009, but which otherwise permitted her to tell her story. In her book the grievor quotes her sister who was with her during the mediation of the MOA, and the Union chairperson as saying, "You got everything you wanted." She quotes her lawyer as saying "It's pretty much your blueprint… Sign it." (page 235). In her oral evidence the grievor did not disavow or deny these sentiments.

16. The grievor testified that throughout the mediation and negotiations of the MOA she was suffering from depression. However, there is no evidence before me, medical or otherwise, from which I can conclude that the grievor was incapable of understanding the terms of the MOA by reason of any mental health issues she had or was experiencing.

I have not addressed the oral evidence as it relates to the grievor's "tweets" alerting her "followers" to the rebroadcast of a media interview. I do not consider that evidence to be relevant to this proceeding. In that rebroadcast the grievor is asserted to have advised the interviewer of these proceedings and that "the Globe wants her to return her settlement claiming that she violated their agreement by revealing its existence and that it included payment of money." I do not doubt that the grievor made these tweets on her Twitter account because she wanted her followers to know that she had received money as part of the settlement of her grievances, and that the Employer was now seeking to recover that money. However, in my view, commentary on this current proceeding was a statement of fact which did not breach the MOA. When it was made the fact that the Employer had initiated these proceedings claiming the MOA had been breached and seeking repayment was a matter of public record.

Breach of the MOA

The Employer relies upon twenty-three (23) specific references in the OOTB book to support its position that the grievor has breached paragraph 6 of the MOA. I have reviewed each of the references relied upon in context of the sentences and paragraphs in which they appear, and have concluded that several of the references relied upon do not technically breach the nondisclosure clause of the MOA. That is to say that from a strict and narrow reading, the references do not use words or language which explicitly or in unambiguous terms "disclose the terms of this settlement."

In coming to this conclusion I accept that many of the references to which the Employer objects are written in such a manner as to leave the reader with the impression that the grievor had been victorious and, as she wrote, had "fought back and won." (page 252) Throughout the chapter dealing with the MOA, the style, structure and language used convey to the reader that the grievor had negotiated very favourable terms which included a substantial payment, that she had successfully resisted a "gag order" in the settlement, and that the Employer "had caved." (page 235) The tone and tenor of many portions of the book about which the Employer complains suggest the terms of the MOA settlement were a vindication of the grievor's positions and infer to the reader that the Employer had admitted liability. That suggestion is not an accurate representation of the MOA. In the MOA the Employer did not admit liability. Instead the MOA contains an express provision that there was not an admission of liability on the part of any of the parties.

Despite these observations and my view that this is what the grievor sought to get across to the reader I have nonetheless determined that a number of references which the Employer asserts offend the nondisclosure clause of the MOA do not constitute a breach of the grievor's obligations as set out in paragraphs 5 and 6 because they do not disclose the terms of the settlement. Instead they refer to matters which are not in the settlement (i.e. the disclosure that the MOA does not have a gag order which prevented

the grievor from telling her story), or matters which were considered and/or discussed during the mediation and negotiations before the MOA was executed. The grievor's public disclosure of matters discussed and considered during the mediation which led to the MOA is inappropriate. (Correspondence from her own lawyer on September 30, 2008 following the execution of the MOA, as well as the grievor's notes of the mediation which form part of the affidavit adopted by the grievor in her evidence, indicate she was aware that discussions held during mediation were confidential). However, such disclosure, although inappropriate, does not disclose "the terms of the settlement" executed September 24, 2008.

I have determined however that there are at least four (4) specific references which do amount to disclosure which breaches the terms of the MOA. A breach of the nondisclosure obligations can be found in the following excerpts from OOTB.

> "… I can't disclose the amount of money I received." (Page 235)
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> "I'd just been paid a pile of money to go away..." (Page 249)
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> "Two weeks later a big fat check landed in my account." (Page 236)
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> "Even with a vastly swollen bank account…" (Page 237)

The first two references in particular constitute a significant breach of the MOA. In my view the words used in each instance are clear and unambiguous and communicate in express and unequivocal terms that the grievor received payment as part of the MOA. Disclosure that she received payment is disclosure of a term of the settlement and breaches the grievor's obligation as set out in paragraph 6 of the MOA.

The grievor testified that she mistakenly believed she could disclose the fact that she received payment from the Employer as long as she didn't disclose the amount of that payment. Her belief was incorrect. Paragraph 6 does not state that the parties agree

not to disclose to anyone "the amount of payment made in this settlement." Neither does it state that the parties are not to disclose the "precise terms" of the MOA as the grievor's evidence suggests. Paragraph 6 states that the parties agree not to disclose "the terms of this settlement." One of the terms of the settlement was payment by the Employer to the grievor.

The fact that the grievor did not disclose the exact amount of the payment received is immaterial to determining whether she breached the MOA. I point out however that although the grievor refrained from disclosing the precise amount, she went considerably further than merely stating she had settled the matter and had received payment. In statements made in OOTB she communicated to her readers that the payment was a significant amount ("a pile of money" and "a big fat check"). In view of these descriptions of the payments it is somewhat disingenuous for the grievor to maintain that she believed she did not breach the MOA because she did not quote an exact dollar and cents figure.

Similarly, the grievor testified that in her mind she was free to disparage the Employer after August 1, 2009, and that the Employer could not rely on the "penalty" clause to punish her for disparaging it. That view confuses what this case is about. The breach alleged here is not a breach of the non-disparagement clause found in paragraph 7 of the MOA. The complaint of the Employer is not that the grievor wrote a book and disparaged it. The complaint of the Employer is that the grievor wrote a book and in that book disclosed a term of the MOA, namely, that she received a payment from the Employer, when she had specifically agreed that she would not disclose the terms of the settlement.

I agree with and adopt the sentiments expressed in ***Northfield Metal Products Ltd. [1991] O.L.R.B. Rep. May 664*** which are equally true to the settlements of grievances filed under a collective agreement.

14. Settlement is perhaps the single most important method by which labour relations disputes are resolved in the Province. And this reality is particularly true with respect to proceedings before the Ontario Labour Relations Board. As the Board wrote in the *Lambton County Board of Education* [1987] OLRB Rep. Oct.1277:

> The purpose of section 89 is to secure a prompt, final, and binding resolution of unfair labour practice complaints. The Act expressly recognizes and endorses the settlement of such complaints without a formal Board hearing and decision. The provisions of section 89 are intended to facilitate settlements. Under section 89(7), where the matter complained of in the section 89 complaint has been settled, and the terms of the settlement have been put in writing and signed by the parties or their representatives, the settlement is binding upon the parties who agreed to the settlement. Indeed, section 89(7) makes non-compliance with a written settlement a breach of the Act. Each year, trade unions, employees, and employers file thousands of applications or complaints before the Board. A large majority of them are settled. Sometimes the settlement favours a trade union or an employer. Other times it favours an employee. Usually it represents a compromise under which the parties neither achieve as much nor risk as much as they would by proceeding to a hearing before the Board. The parties generally arrive at a settlement in order to avoid the cost and uncertainties of litigation. The orderly resolution of Board proceedings and the efficacy of the settlement process would be gravely prejudiced if, having signed Minutes of Settlement, the party could afterwards repudiate the settlement.

15. Settlement often involves a compromise. It is a compromise that the parties themselves have evaluated and have endorsed. Many settlements include the payment of compensation by an employer to employees or the union. Many of these would no doubt never have been finalized if the employer could not have been assured that no liability or blame could be attributed to the employer. Similarly, such "without prejudice" settlements would often be of little utility if they were not kept confidential. It is not difficult to see why, in a particular circumstance, an employer might be willing to settle a complaint with

payment of compensation to a complainant, but only if liability is not attributed and only if the community and other employees do not learn that the company has agreed to pay compensation. The employer's fear is that the disclosure of such a payment, apart from the amount of the payment, might alone undercut the efficacy of the denial of liability, and might also lead other employees or unions to file further complaints, in the belief that the employer will settle such complaints with cash. That is why some parties insist on confidentiality as a condition of any settlement. But in any event, the parties themselves determine the terms of a settlement, not the Board. It would be counterproductive to the overall efficacy of the settlement process for the Board to evaluate the parties' motivations or the means and terms of particular settlements.

16. The same concerns lead the Board to protect the settlement that the parties have reached. Where the settlement is clear, parties should not expect to be allowed to depart from the terms they have agreed to, or to be relieved from the consequences of their settlement. If it were otherwise, the settlement process, its importance in the scheme of the Board's mandate and operation, and its importance to the ongoing labour relations environment in the Province would be seriously undercut, if not destroyed.

17. Here, the parties agreed that the settlement terms remain confidential. We conclude that the statements revealing that the company had settled the occupational health and safety complaint by way of a cash payment were in breach of the confidentiality requirement contained in the Minutes of Settlement. We so find even though Parsons and Armstrong said that the money had been paid to Parsons, although the settlement required payment to the union. What is critical is that they revealed that the company had paid cash to settle the complaint between Parsons and the company. It would not have been a breach of the confidentiality requirement to have disclosed only that the matter was settled, as the employer had. But by indicating that the employer had agreed to a money payment, Parsons and Armstrong were revealing a term of the settlement, and not merely that a settlement had been reached. This breached the parties' agreement to keep the terms confidential. It was not merely a technical breach.

18. We see no reason in the circumstances to exercise our discretion to deprive the applicant company of the remedy that the parties themselves have assessed and agreed to in the settlement: that the union would have to repay the money earlier paid to it. The union signed the settlement. To decline to direct repayment of the $7500.00 would be to refuse to enforce the agreement.

(see also ***Ontario (Ministry of the Attorney General) v. Ontario Public Service Employees Union, (2004) 76 C.L.A.S. 1*** and ***Tremblay v. 1168531 Ontario Inc. 2012 HRTO 1939 (CanLii)***.

I do not accept the Union's position that these cases relied upon by the Employer are distinguishable because they do not involve severance payments following termination of employment. The Union argues that here the grievor could reasonably conclude that if she was permitted to disclose that her unjust dismissal grievance had been settled it was within permitted disclosure to say she had received a severance payment. A reasonable observer is likely to conclude that in a dismissal case the fact of severance and a settlement implies payment of some kind. The Union argues that this type of payment is materially different from payment to settle an Occupational Health & Safety complaint or a complaint under the Human Rights Code in which harassment is alleged. The Union submits that in those types of cases a payment is more likely to infer an admission of wrongdoing or liability on the part of the Employer, so that disclosure that a payment was made is more likely to cause harm to the Employer. Counsel referred to paragraph 15 of ***Northfield Metals Products Ltd*** supra in support of the argument that the fact of a payment can't be disclosed only in circumstances where such disclosure would harm the Employer because it would infer liability or blame.

In my view the principle and rationale for maintaining as confidential the fact that a payment was made as set out in ***Northfield Metal Products Ltd*** supra apply equally to this case in which grievances that the collective agreement had been violated had been filed and were settled. As in the case of complaints under the Occupational Health & Safety Act or the Human Rights Code, in the case of a termination without just cause grievance, the allegation is that the Employer has violated the collective agreement or statute, and has acted wrongfully. The circumstances of this case do <u>not</u> involve a simple severance payment upon termination of employment. The circumstances surrounding the execution of this MOA include the fact that grievances had been filed. The claim had been made that the Employer had been unjust and had acted unfairly and in violation of the collective agreement when it denied the grievor's claim to sick leave and when it terminated the grievor's employment. The Employer had denied those allegations and maintained it had acted appropriately and in accordance with the collective agreement . That is similar to the Employer who denies it has violated the law

when a complaint under the Human Rights Code or the Occupational Health & Safety Act is made.

As in the case of settlement of an Occupational Health & Safety Act or Human Rights Code complaint, in grievance settlements, where "nondisclosure" and "no admission of liability" clauses form part of the settlement, it is because the Employer does not want liability or blame attributed to its conduct. It does not want disclosure of information which might "undercut the efficacy of [its] denial of liability." The Employer who settles a wrongful dismissal grievance doesn't want any inference to be drawn that it made a payment because it agreed that it had acted improperly, or contrary to the collective agreement. It doesn't want other employees to infer that if they were terminated they would also receive a payment, even in those cases where the Employer claims it has just cause for the termination. That is why parties bound by a nondisclosure provision in a MOA can disclose that the matter has been settled, but can't disclose "terms" of the settlement, such as the fact that a payment was made. There are numerous references in OOTB to the fact that grievances about the Employer's conduct had been filed and were being mediated and arbitrated. In that context, reference to receipt of a payment as part of the settlement may lead to the inference of Employer wrongdoing and liability which "nondisclosure" and "no admission of liability" clauses are designed to avoid.

As in the case of other types of litigation "nondisclosure" and "no admission of liability clauses" are also a recognition of the fact that parties settle grievances for a variety of reasons which may be unrelated to liability or wrongdoing. Employees may settle discharge grievances not because they accept that they have engaged in culpable misconduct warranting dismissal, but because they need money as they are now unemployed and can't afford to wait the weeks, months or years for their grievance to be decided. Employers may settle discharge grievances not because they agree that they acted unjustly, but because it is less costly than proposed litigation, or simply more

expedient to deal with circumstances immediately rather than await the outcome of lengthy litigation. Parties may settle matters because each fears that potentially acrimonious litigation will negatively impact ongoing relations. There are as many reasons why parties settle grievances as there are interests and objectives at stake in the grievance. The common thread in all settlements however is certainty of result. By entering into minutes of settlement the parties achieve both finality and certainty of result on terms which they have concluded are acceptable to them. By agreeing that the terms of a settlement will not be disclosed the parties ensure that their agreement to settle matters will not be misconstrued by others.

I have therefore concluded that the grievor breached the obligation set out in paragraph 6 of the MOA when she disclosed in clear and unambiguous terms that as a result of the settlement she received a payment from the Employer. Payment to her was a term of the settlement. Whether that disclosure caused harm to the Employer is addressed below.

Submissions on Remedy

I turn therefore to the issue of remedial relief.

The Employer submits that my jurisdiction is limited by the language agreed upon by the parties in paragraph 8 of the MOA. Once a breach has been found the MOA requires that I order the grievor to pay back to the Employer all payments paid to the grievor under paragraph 3. (***Canadian Union of Postal Workers and Canada Post Corp. (Speedie Grievance, CUPW 612-92-00494 [1996] C.L.A.D. No. 726***) The Employer asserts that in the labour relations context the importance of enforcing a voluntarily negotiated settlement can't be overstated (***Lorne's Electric [1990] O.L.R.B. Rep. Sept. 935*** and ***Northfield Metal Products Ltd****.* supra)

It is the Employer's position that it would be contrary to sound labour relations to go behind the terms of a freely negotiated settlement and decide whether or not a matter agreed upon by the parties is appropriate (***Veolia ES Canada Industrial Services Inc. v. International Union of Painters and Allied Trades, Local 138 (2010) 191 L.A.C. (4th) 370***). Here the parties have agreed upon both the matter of nondisclosure and the remedy or enforcement mechanism if that nondisclosure provision is breached. It was submitted that the Employer was entitled to have the benefit of the bargain made by the parties and have paragraph 8 enforced. In this regard the Employer referred to the ***ES Veolia*** award where the arbitrator stated

> "In my view, it would be wrong in law and contrary to sound principles of labour relations to go behind the terms of a signed settlement document such as was entered into in this case. Put differently, arbitrators must hold parties accountable for the labour relations agreements they negotiate and execute in resolving their own disputes. Anything less would be irresponsible to the parties and those they represent as it would deny unions, employers and employees the opportunity to receive the benefits of the labour relations bargains they arranged and signed.

The Union submits that paragraph 8 is a penalty clause and that in the circumstances of this case it would be unfair and unconscionable to require the grievor to pay back to the Employer the payment she received. The grievor genuinely believed she could disclose the fact of the settlement and the payment, provided that she did not disclose the amount as that was a "precise" term. She actively took steps to have the OOTB book vetted by a lawyer before its publication. She took all reasonable steps to avoid what she thought would be a breach of the MOA, was careful not to disclose the amount received, and indeed advised readers she "promised to keep the terms of the settlement confidential which is why I can't disclose the amount of money I received." (Page 235 of OOTB)

The Union submits that if I found the grievor breached the MOA such breach was technical and not substantial. The Union did not agree that my jurisdiction to remedy the

breach is limited by paragraph 8. Instead it argued that I had broad jurisdiction by reason of paragraph 13 of the MOA and section 48 of the Labour Relations Act. In exercising that jurisdiction I must apply the law, including the law as it relates to the unenforceability of provisions which are unconscionable. The Union relies also upon ***Ontario (Ministry of the Attorney General) v. Ontario Public Service Employees Union,*** supra and ***Tremblay*** supra in support of its position that where a settlement contains a punitive enforcement provisions it will not be enforced.

In ***Tremblay*** supra it was noted

> [20] I find that the applicant breached the confidentiality provision of the Minutes of Settlement. The fact that she did not disclose the amount of the settlement is not relevant to the determination of whether there was a breach. By her comments she disclosed that there was a monetary settlement, which was a term of the Minutes of Settlement. **The extent and content of the breach of confidentiality is a relevant factor to consider in assessing the remedy for the breach.**
>
> [33] In determining the appropriate remedy, I have considered the fact that the respondents did not establish that the applicant disclosed the amount of the monetary settlement.

In ***Ontario (Ministry of the Attorney General) v. Ontario Public Service Employees Union,*** supra it was held

> The breach of a confidentiality provision also causes harm to the grievance settlement process, which is critical to the proper functioning of labour relations and grievance administration. For settlements to work, parties must be sure that all of the terms will be honoured *and enforced*. This is equally true for employers, unions and grievors. A remedy must ensure that confidentiality clauses will be adhered to **without being punitive**.
>
> (emphasis added)

The Union relied upon ***Ekstein v. Jones [2005] O.J. No. 3497 2005 CanLII 30309*** and ***Birch v. Union of Taxation Employees, Local 70030, 2008 ONCA (809) CanLII*** to

argue that the test for unconscionability consisted of two parts. There must be inequality of bargaining power and a finding that the terms are substantially unfair. In ***Ekstein*** supra the test was set out as follows:

> [57] In order to establish unconscionability one must show two things:
>
> (a) That the terms are very unfair or that the consideration is grossly inadequate.
>
> (b) That there was an inequality of bargaining power between the parties and that one of the parties has taken undue advantage of this.
>
> *Murray* para. 42; *Black v. Wilcox* (1977), 12 O.R.(2d) 759 (C.A.).
>
> [58] Inequality of bargaining power in this context is not established simply by showing that one party is more sophisticated or more affluent than the other. It must be shown that the weaker party's ability to bargain is impaired to the extent that he or she is "not a free agent and is not equal to protecting himself":*Mundinger v. Mundinger*, [1969] 1 O.R. 606 at p. 609. Another way of putting this is to say that the vulnerable party was not in a position to exercise a "free will and valid consent": *Ontario (Attorney General) v. Barfield Enterprises Ltd*., op. cit..
>
> [59] The following factors have been identified as showing an inequality of bargaining power:
>
> (a) distress, recklessness, want of care, intoxication: *Black v. Wilcox.*
> (b) Ignorance: *Murray*, para. 37.
> (c) Lack of independent legal advice, infirmity and where a party's bargaining power is "grievously impaired by reason of his own needs and desires": *Murray* at para. 38.
> (d) Lack of skill in the borrowing of money: *Milani*, para. 24.

The Union argued that both prongs of this two-part test have been met in this case.

The grievor was not in a position of equal bargaining power. She testified that she had been terminated and had not received any money from the Employer or the insurance company responsible for determining her entitlement to LTD benefits for many months.

She was sick and suffered from depression. The arbitration of her grievances would take years to complete. Moreover, an unequal balance of bargaining power is inherent in the Employer/terminated employee relationship. Thus, in ***Titus v. William F. Cooke Enterprises Inc. 2007 ONCA 573 284 D.L.R.. (4th) 734*** the Court stated:

> [46] There is an inherent imbalance in bargaining power between an employer and an employee when the former terminates the employment of the latter. The employer's business will continue, the employer will be there, and the employee will be gone. Thus, as Iacobucci J. said in *Wallace*, *supra*, at para. 95: "The point at which the employment relationship ruptures is the time when the employee is most vulnerable and hence, most in need of protection."

The Union submits that the clause requiring repayment was also substantially unfair. The clause itself applied only to the grievor. No penalty was stipulated if the Employer breached the nondisclosure provisions of the MOA. Moreover, the penalty was excessive and not a reasonable expectation by the parties of the harm or danger the Employer would suffer in the event there was a breach of the obligations set out in paragraph 6. The term itself made no allowance for the extent and content of the breach.

It was the Union's position that as paragraph 8 of the MOA was unconscionable and unenforceable it fell to me to determine the appropriate remedy if a breach of the MOA was found. That remedy should be based on actual damages suffered by the Employer. Here there was no evidence that the Employer had suffered any damage and in the result the Employer's claim for repayment of any portion of the payments made should be dismissed.

<u>Decision - Remedy</u>

At one level the Employer's position that sound labour relations require that a negotiated bargain voluntarily entered into by the parties should be upheld is intertwined with the Union's position that paragraph 8 of the MOA is unconscionable and unenforceable.

Both submissions require an examination of the circumstances surrounding the negotiation of the MOA and the imposition of an enforcement provision (or what the Union asserts is a "penalty" clause) in that MOA.

I accept that as a general rule parties who have entered into signed minutes of settlement of the issues which were in dispute between them should be required to honour that settlement. Parties should not be permitted to resile from the agreements they have made or be relieved of the consequences of their settlement. This is particularly true in the labour relations context were mediation and the settlement of grievances is common and a significant manner of dealing with labour relations issues and disputes.

I also accept however that sound labour relations does not support enforcement of settlements obtained through fraud, the use of undue influence or duress, or when an overwhelming imbalance of bargaining power enables one party to take undue advantage of the other. Settlements which are contrary to law cannot be saved under the guise that sound labour relations require that written agreements should be upheld.

Throughout any examination of the circumstances surrounding the execution of a settlement document it must be remembered that inevitably a settlement is a compromise. It results from an assessment by the parties of their positions and their respective interests and objectives in the matter(s) being settled. Generally settlements are seen as principled compromises achieved in an effort to avoid lengthy litigation with uncertain results. That risk and uncertainty of result can't be over emphasized. A signed settlement reflects the mutual intent of the parties that they would rather live with the certainty of the result which they themselves have crafted and evaluated, than the uncertainty of results which proceeding with the litigation brings. Recognition that signed settlements represent a compromise also means that a specific provision of the

settlement can't be looked at in isolation, but that the settlement must be examined in its entirety.

An examination of the circumstances surrounding the execution of this MOA indicate that it was freely entered into, by and amongst, experienced, sophisticated parties, who understood what they were doing. I include within that description of the parties the grievor.

The evidence before me indicates the grievor was sophisticated and well informed of the terms of the settlement. There is no evidence of incapacity to understand the terms of the MOA. Indeed the evidence is to the contrary. The grievor understood the difference between a "gag order" which would not permit her to tell her story, and the nondisclosure obligations which ultimately became paragraph 6 of the MOA. During nearly three months of mediation and negotiation, as various iterations of the settlement document which contained clauses pertaining to "gag orders" and nondisclosure clauses were passed back and forth, the grievor actively participated in those discussions, and sought advice from legal counsel, and instructed the Union in the positions she wished to take. The exhibits, correspondence, notes and chart appended to the unsworn affidavit which she adopted as her evidence at the hearing confirm she understood (and ultimately accepted) a settlement which would in due course permit her to tell her story (provided that, until August 2009 she didn't disparage the Employer) but which would not permit her to disclose the terms of the settlement, and that the consequence of such prohibited disclosure involved a repayment obligation.

At the hearing the grievor testified she misunderstood the scope of her nondisclosure obligations under the MOA. If that is the case, responsibility for that rests with her. In the circumstances of this case it would be inappropriate to set aside a comprehensive settlement, negotiated over a lengthy period of time, which in clear, unambiguous and

objective language sets out what the nondisclosure obligation entails merely because of the grievor's subjective opinion and what she "thought" her nondisclosure obligations to be.

This was not a "take it or leave it" settlement. The grievor had months to negotiate and consider its terms. She had access to, and availed herself of, legal advice throughout the process. In this regard, during the negotiations which culminated in the MOA, she had access to both an experienced, knowledgeable labour lawyer engaged to represent her and the Union's interests at the arbitration, and also her own lawyer who, according to her writings in OOTB, she hired sometime before the mediation and negotiation of the MOA to advise her "from the sidelines" and who started advising her not only on her dealings with the Employer, but "on how to deal with my Union, too." (Page 137)

In addition this isn't a case where the grievor's breach of the nondisclosure obligation can in any way be characterized as inadvertent. Disclosure of the fact that a term of the settlement included payment to her occurred in a self published book which the grievor had vetted by a libel lawyer. Just as the grievor consulted with legal counsel to ensure she complied with libel laws, the grievor could have, and should have, consulted counsel and/or the Union to ensure that what she wrote did not breach the MOA. She can't resile from the agreement she made when she did not do so because she "thought" that it was permissible to disclose she had received payment because by not disclosing the amount of the payment she did not disclose a "precise" term of the MOA.

The circumstances of this case suggest that the bargain made and agreed upon should be upheld. There is no evidence of fraud or duress. An intelligent, sophisticated grievor, with access to legal advice, voluntarily signed a MOA which she understood to provide that she could not disclose the terms of the settlement and that breach of that obligation would have consequences.

Unconscionability

The grievor and the Union argue that the terms of the MOA are unconscionable and should not be enforced. It is asserted that the terms are unfair and one-sided and that paragraph 8 in particular is punitive, an excessive penalty clause that doesn't reflect the harm which would flow from a finding of a breach of the nondisclosure obligation. It is argued that there was an imbalance of power. Although the grievor may have had legal counsel and advice, the issue is not her access to advisors, but the inequality inherent in the circumstances of the terminated employee, without funds or resources, forced to deal with a large Employer who will continue to carry on its business. Inherent in these circumstances is the vulnerability of the discharged employee. (See ***Titus*** supra)

I have carefully considered these submissions and find that I am unable to accept them in the circumstances of this case.

The test for unconscionability is high. Were it otherwise no settlement would be immune from attack and challenge. Unconscionability requires that two factors must be met. First, the terms must be very unfair or the consideration grossly inadequate. Secondly, there must be inequality of bargaining power and one of the parties must have taken undue advantage of this. Both factors must be met and will be examined.

Were the terms unfair or was the consideration grossly inadequate?

I emphasize again that a settlement is a compromise and that all terms of the settlement must be considered and examined. I do not agree that the terms of the MOA are unfair merely because one of its clauses appears one-sided or applies only to one party.

Viewed in context, and in its entirety, it can't be said that this MOA was very unfair or that the consideration was grossly inadequate. The grievor received, as she herself

characterized it, "a pile of money." She received "a big fat check" and more. Significant to any determination of whether the bargain struck was somehow improvident for, or unfair to, the grievor is her own characterization of the bargain. The OOTB book makes it clear that the grievor considered herself to be victorious. With the execution of the MOA she achieved a "big win." The MOA was "pretty much [her] blueprint" as she "...got everything [she] wanted." She was so happy following its execution that she "had to resist dancing a jig" (page 235). Her evidence at the hearing confirmed these portions of the book. In the face of these characterizations it simply does not lie in the mouth of the Union or the grievor to claim the terms set out in the MOA are unfair to the grievor or that the consideration was grossly inadequate.

Even if one ignored the totality of the MOA and focused only on paragraph 8, which is central to the dispute before me, my conclusion would not be different. I agree that it appears to be one-sided but find that there is nothing wrong or inherently unfair for one party to say "I will make a payment to you but you must agree not to disclose that fact, and if you do disclose it, you must give back the payment made." In the circumstances of this case those terms were an integral part of the agreement.

On the grievor's own evidence it was known to all parties that she intended to write a book about her experiences and intended "to tell her story." With that knowledge, and throughout the negotiations of the MOA, the Employer sought confidentiality and nondisclosure terms as a condition of payment. The Union and the grievor knew that this was important to the Employer and that there would not be any payment if the parties did not agree upon the terms which would apply to disclosure and the consequences which would flow if confidentiality of the terms was not maintained and a prohibited disclosure was made. Following months of negotiations the parties concluded a written agreement pursuant to which the quid pro quo was that payment received would have to be paid back if there was disclosure of the terms of the settlement.

It is in this context that I turn to the Union and the grievor's assertion that the "penalty" set out in paragraph 8 is excessive and not a measure of the harm or damages the Employer would suffer in the event of a breach.

Certainly the harm here is intangible and not easily or readily quantifiable. That however does not detract from the fact that the evidence indicates that for one party, the Employer, a key and integral part of the bargain struck in the MOA was that the grievor would not disclose the terms of the settlement. With the publication of the OOTB book, and the disclosures which breach the grievor's obligation, the Employer has lost the benefit of the bargain struck. Breach of confidentiality provisions are generally difficult to remedy because once there has been a breach, the confidentiality can't be restored. In this case the Employer has been deprived forever of the confidentiality and nondisclosure which was a significant factor in its willingness to enter into the MOA and make the payment it did to the grievor. There is a somewhat simplistic attraction to the Employer's position that because it has been deprived of the confidentiality for which it bargained, the grievor should similarly be deprived of the benefit she received, namely payment, when, as a result of her actions, she breached the MOA.

I prefer the Employer's submissions and approach to this issue. In my view the provisions of paragraph 8 should not be viewed as a "penalty" which requires proof of damages. Rather, it is an enforcement mechanism which seeks to ensure that the grievor lived up to a component of the deal the parties made which was key to the Employer. Just as the payment, the Employer's acknowledgment that she was sick, and the ability to disparage the Employer and tell her story after August 2009 were key to the grievor, the nondisclosure of the terms of the settlement was key to the Employer. Moreover, with the publication of OOTB the Employer has forever lost that benefit for which it bargained. The prohibited disclosure that she received a payment is in the public domain and can't be retrieved. Publication of the book means that the genie is out of the bottle and can't be put back with the result that the breach is ongoing. Every time

a reader reads the passages which I have concluded violate the nondisclosure clause, there is a further breach of the MOA.

In the result I find that the first part of the unconscionability test has not been met in this case. The terms of the MOA are not unfair and the consideration for the nondisclosure clause is not grossly inadequate

Inequality of Bargaining Power

I turn next to the issue of any inequality of bargaining power. That aspect of the test for unconscionability has also not been met in the circumstances of this case.

First, I note that any imbalance in bargaining power inherent in the employer/discharged employee relationship was counterbalanced somewhat by the fact that the grievor was represented by a large union which had filed grievances on her behalf which had been referred to arbitration. That union had retained experienced counsel to pursue the grievor's claims at arbitration. The grievor also had her own lawyer to represent her interests. There is no evidence of incapacity, and no evidence that the grievor was unable to understand the terms of the MOA or the advice she might receive from these lawyers.

More significantly the requisite is not simply inequality of bargaining power. It is inequality of bargaining power and that one of the parties has taken undue advantage of this. Mere imbalance of bargaining power doesn't permit a party to resile from, or repudiate, a settlement. It is the abuse of that bargaining power, the "taking advantage of" another party which is required. Here there is no evidence that the Employer abused its position or took unfair advantage of the grievor or her circumstances. Indeed the evidence is to the contrary. Not only is there an absence of the type of factors which

usually identify inequality of bargaining power (lack of independent legal advice, an unsophisticated party who lacks capacity to understand the MOA signed etc.) the grievor's view of the terms of the MOA itself underscore the absence of an imbalance in power. As indicated in OOTB, the grievor clearly considered herself to have "won" while the Employer "had caved" (page 235). She obtained "...everything [she] wanted." The MOA was "pretty much [her] blueprint" so that her independently retained lawyer advised her to sign it. (Page 235)

Conclusion

For all of these reasons I have concluded that the MOA executed by the parties on September 24, 2008 must be upheld. Upholding the MOA includes the enforcement mechanism found in paragraph 8 of the MOA which requires the grievor to pay back the payments received under paragraph 3 of the MOA if she breached the nondisclosure obligations set out in paragraph 6 of the MOA. The MOA was entered into voluntarily. Its terms are clear and unambiguous. The MOA is not unconscionable.

I therefore find and order as follows:

1. The grievor has breached paragraph 6 of the MOA
2. Pursuant to paragraph 8 of the MOA the grievor shall pay back to the Employer the payment received under paragraph 3.

Dated at Mississauga, this 3rd day of July, 2013.

Louisa Davie
Louisa M. Davie