

You Make The Call: Can Waiver of OHS Rights Be Part of a Severance Package?



Workers' rights and safety protections are so important that workers can't give them up even if they want to. But based on a recent case, those dynamics may change when the worker is on the way out and no longer needs the protection.

SITUATION

A month after getting fired, a nurse at a Saskatoon convalescent home inks a severance deal waiving all legal claims against the home in exchange for a payment of one month's salary. But a month after that, she files an OHS complaint contending she was fired in reprisal for expressing concerns about the home's failure to meet its OHS obligations to prevent workplace bullying. The nurse argues that the release doesn't cover OHS claims; the home insists that it covers all claims related to the nurse's termination.

YOU MAKE THE CALL

Does the Severance Release Bar the Nurse from Asserting an OHS Reprisal Claim'

KEY EVIDENCE

Exhibit A: The Release

I hereby release the home 'from any and all actions, causes of actions, claims and demands of every nature or kind arising out of, or in any way related to, or connected with my employment or termination thereof with the [home], including, but not limited to, any claims for notice of termination, pay in lieu of such notice, bonuses, overtime pay, benefits or benefit coverage or any other compensation or benefit whatsoever.'

GENERAL RELEASE RULES

A release is enforceable under 3 conditions:

	Condition	Satisfied'	Explanation
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1	Employee must receive consideration, i.e., something of value for giving release	YES	The severance payment the nurse received was adequate consideration
2	The release must be clearly written	YES	While it didn't specify OHS claims, the release language covered 'all' claims relating to the nurse's employment and termination
3	The employee understands the release and signs it voluntarily	YES	There was no argument that the nurse didn't understand or was coerced into signing the release

The finding that the release met all 3 conditions would have ended most release cases. But this wasn't a normal release case. The twist: The claim the nurse wanted to assert was an OHS safety right.

THE OHS LAW

As in every other part of Canada, the OHS Act in Saskatchewan bans 'discrimination,' i.e., retaliation or reprisals, against workers for asserting their safety rights under the Act'in this case, asking the home to meet its OHS duty to protect against workplace bullying. The Act also gives workers the right to complain to a government safety officer if they think they've been a victim of discrimination/reprisal.

THE KEY QUESTION

Are workers allowed to waive their discrimination protections and other safety rights under the OHS'

THE ANSWER

The Sask. Court of Appeal ruled that the nurse could waive her OHS protections in this case.

EXPLANATION

Workers can't waive or contract out of OHS or other statutory rights designed to protect them if it would put them in danger or defeat the point of the law. So if on her first day on the job the nurse had signed an agreement releasing the home from its OHS obligations to protect her against bullying in exchange for a month's salary, the agreement would have been unenforceable. But that's not what happened. The nurse in this case signed the waiver after her employment ended and her safety was no longer at risk. At that point, her bargaining chip wasn't a vital workplace safety protection but the right to sue her employer for not providing it to her after the fact. And that was a personal right that an worker did have the right to waive, the Court reasoned.

[*Wieler v Saskatoon Convalescent Home*, 2017 SKCA 90 (CanLII), Oct. 20, 2017]

THE MORAL

You can't and should never attempt to ask your workers to voluntarily give up their OHS protections, even if you provide them compensation or valuable consideration in exchange. Such agreements are not only enforceable but cast suspicion on the integrity of your OHS program and your organization's commitment to OHS compliance and workplace health and safety.

However, the *Wieler* case suggests that it is permissible to include reprisal and other claims for failing to provide OHS protection *during* employment to the list of claims that a worker agrees to release as part of a severance package.

Caveat: The question of individual waiver of OHS protections is a novel one that hasn't been addressed in many jurisdictions. Thus while it may have an influence in those other jurisdictions, the *Wieler* ruling is binding law only in Saskatchewan.