

Failure to Disclose New Employment Does Not Repudiate Settlement Agreement

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When does an employee's breach of a settlement agreement rise to the level of repudiation? In *Cross v. Cooling Tower Maintenance Inc.* (2025 ONSC 7203), Justice Wilkinson held that an employee's intentional failure to disclose new employment for four months did not constitute repudiation of the entire settlement agreement.

Background

Mitchell Cross was employed by Cooling Tower Maintenance Inc. (the Company) for just over twenty-six years before being terminated without cause on August 22, 2023. Following his termination, the parties executed a settlement agreement which provided for salary continuation for a period of 24 months or until Mr. Cross obtained new employment (the Settlement Agreement).

The Settlement Agreement provided that Mr. Cross was required to immediately advise the Company if he obtained new employment over the 24-month salary continuation period. Upon such disclosure, the Company would pay Mr. Cross a lump sum equal to fifty percent of the remaining settlement payments. The Settlement Agreement also included a provision stating that if Mr. Cross failed to notify the Company regarding new employment, he would have to reimburse the Company for any money paid to Mr. Cross after he commenced such employment.

Mr. Cross began working for a new employer on February 19, 2024, but did not inform the Company. Upon discovering Mr. Cross' new employment in June 2024, the Company stopped all payments to Mr. Cross and advised Mr. Cross that he had breached the terms of the Settlement Agreement. The Company took the position that Mr. Cross' failure to inform the Company of the new position resulted in a repudiation of the Settlement Agreement, such that the fifty percent lump sum owing to Mr. Cross as of February 19, 2024 was no longer owed, and moreover, that Mr. Cross should repay the amount paid to him for the four additional months, which totaled \$45,825.27.

Mr. Cross acknowledged his failure to disclose his new employment and characterized it as an unintentional oversight. He brought a motion for summary judgment seeking payment of the fifty percent lump sum owing under the Settlement Agreement (totaling \$161,212.87), less the amounts already received from the Company.

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The Company filed a counterclaim seeking repayment of the amounts paid to Mr. Cross in excess of his statutory termination entitlements under the Ontario *Employment Standards Act, 2000*, or alternatively, repayment of the full amount paid to Mr. Cross since he began new employment on the basis of unjust enrichment, as well as punitive damages.

The Decision

Justice Wilkinson rejected Mr. Cross' claim that his failure to disclose was an unintentional oversight. The Court found it implausible that a senior employee receiving both salary from a new employer and ongoing payments from his former employer would genuinely forget about his disclosure obligation for four months. However, Justice Wilkinson emphasized that intentional breach alone does not constitute repudiation. The Court noted that it is rare for conduct subsequent to a settlement agreement to amount to repudiation, and that repudiation is an exceptional remedy available only where the entire foundation of the contract has been undermined.

Specifically, Justice Wilkinson applied the five-factor test from *Stayside Corporation Inc. v. Cyndric Group Inc.*, 2024 ONCA 708, to determine whether Mr. Cross' actions constituted a fundamental breach:

- a) The ratio of the party's obligations not performed to their obligations as a whole;
- b) The seriousness of the breach to the innocent party;
- c) The likelihood of the repetition of such a breach;
- d) The seriousness of the consequences of the breach; and
- e) The relationship of the part of the obligation performed to the whole obligation.

In this case, Mr. Cross' failure to disclose was the only term of the Settlement Agreement that was breached. He complied with all other material terms, including releasing the Company from further claims, maintaining confidentiality, and not denigrating the Company. The Company did not lose a significant benefit it expected to receive from the Settlement Agreement. The breach was not one that would be repeated, as the Company was now aware of Mr. Cross' new employment. Furthermore, had Mr. Cross properly disclosed his new employment, the Company would have owed him \$161,212.87 under the Settlement Agreement. This amount far exceeded the \$45,825.27 advanced to Mr. Cross before disclosure. Moreover, Mr. Cross did ultimately disclose his new employment to the Company (although not until four months after he had begun such employment, and only after the Company discovered his breach), and confirmed his desire to continue with the Settlement Agreement. Importantly, Justice Wilkinson noted that the Settlement Agreement did not expressly state that a failure to disclose new employment would result in repudiation, and that the reimbursement provision suggested the primary purpose was to prevent double payment rather than to create grounds for repudiation.

In the result, Justice Wilkinson concluded that while Mr. Cross' failure to disclose his new employment

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materially breached the Settlement Agreement, a reasonable person would not find that his actions undermined the entire foundation of the Settlement Agreement. Accordingly, Mr. Cross had not repudiated the Settlement Agreement. The Company was ordered to pay Mr. Cross the fifty percent lump sum payment owing under the Settlement Agreement (\$161,212.87), less amounts already paid (\$45,825.27).

Key Takeaways

This decision provides important guidance on the interpretation and enforcement of settlement agreements in employment disputes:

- **Repudiation Is an Exceptional Remedy:** Courts will rarely find that conduct subsequent to a settlement agreement amounts to repudiation. Even intentional and material breaches may not rise to the level of repudiation if the entire foundation of the contract has not been undermined. Employers should be cautious before claiming repudiation and ceasing all payments under a settlement agreement.
- **Express Language Matters:** Settlement agreements should clearly specify the consequences of breaching specific terms. If parties intend that failure to comply with a particular obligation will result in repudiation or forfeiture of benefits, this should be expressly stated in the agreement. The absence of such language may weigh against a finding of repudiation.
- **Employers Should Verify Mitigation:** This case highlights the importance of employers actively monitoring compliance with settlement agreement terms, particularly disclosure obligations regarding re-employment. Employers should consider implementing regular check-ins or requiring periodic confirmations of employment status rather than relying solely on the employee's obligation to disclose.

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