

# Workwise

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## A Catch to a Release

By [Laura Buckingham](#)

A signed release provides peace of mind that all disputes are resolved and there will be no further claims, complaints, or legal action. Or does it? Two recent Ontario cases remind us that a signature alone is not a guarantee of an enforceable release. Employers must be careful about the circumstances surrounding negotiation and execution of releases to ensure they can rely on them.

In *Rubin v Home Depot Canada Inc.*, a terminated employee sued his former employer for wrongful dismissal. The employer sought summary dismissal of the action, relying on a release signed by the employee. The employee argued that the release should be set aside.

The plaintiff, Eric Rubin, was 63 years old and had nearly 20 years of service when his position was eliminated. He was called into a meeting, informed of the decision, and presented with a letter outlining the company's severance offer. He had no warning before the meeting that he would lose his job. Although he was taken by surprise, he reviewed the letter, asked a question about directing severance pay to his RRSP, and read and signed a release before leaving the meeting. Shortly after leaving the meeting, he had second thoughts. He sought legal advice and attempted to rescind the agreement.

The Ontario Superior Court of Justice denied the employer's motion for summary dismissal, finding the release was not enforceable. The court based its decision on some significant facts:

- The employer's severance offer barely exceeded the statutory minimum and the letter outlining the offer was less than candid. Under Ontario legislation, the employee was entitled to 27  $\frac{3}{4}$  weeks of pay. The employer offered a total of 28 weeks of pay, approximately 2 days more than the minimum. The letter referred to the offer as exceeding the minimum requirements, without stating the statutory minimum or mentioning common law notice.
- The letter was misleading about the requirement to sign a release. It stated that the severance amounts would be paid after the employee signed a release. Reading the letter, the employee would not have known that he was entitled to receive the bulk of the payment—27  $\frac{3}{4}$  weeks of pay—regardless of whether or not he signed a release. Further, the letter included check boxes for only two options: to accept the offer and receive the payment in cash or to accept the offer and direct the payment to an RRSP. There was no option not to accept the offer. The court found the check boxes created the impression that refusing the offer was not an option.
- The employee signed the release in the same meeting he was presented with the offer, which meant he had no opportunity to seek legal advice. Although he read the letter and release in the meeting, the court found he did not have a sufficient opportunity to consider it.

At the request of the parties, the court assessed the reasonable notice period and awarded the employee twelve months of salary and benefits, as well as interest.

The second case, *Miyafuji v Greyhound Transportation*, involved personal injury. The plaintiff, Mitshuro Miyafuji, was a Japanese exchange student studying at a Canadian university. He went on a trip with a group of students. On the way back, he was travelling on a Greyhound bus when he was assaulted by another passenger. Later, after the plaintiff was released from hospital and had returned to his university, a representative of Greyhound met with him and interviewed him about the assault. A Japanese speaking volunteer, who was not a professional translator, attended the meeting. The plaintiff asked the Greyhound representative for compensation. He was told Greyhound would reimburse him for out-of-pocket expenses, but would not provide additional compensation. He was presented with a release. The volunteer attempted to translate the words of the release, but the plaintiff did not receive any advice about the

consequences of signing it. The plaintiff signed the release during the meeting. The plaintiff later contacted legal counsel, attempted to rescind the release, and eventually filed a lawsuit against Greyhound and several other parties.

All the defendants sought summary dismissal of the plaintiff's claim, relying on the release, among other grounds. The court refused to summarily dismiss the action, finding that the release was unconscionable and the defendants could not rely on it. The court found that the meeting would have left the plaintiff with the mistaken impression that he had no remedies for losses other than out-of-pocket expenses. He signed the release without adequate information about his rights or the effect of the release. The language barrier was also a factor.

If a signature does not guarantee a release will be enforceable, how can employers be sure they can rely on a release? Here are a few tips:

- Ensure there is consideration for the release. An enforceable agreement requires an exchange, usually payment of money for a release of claims. When an employee is terminated, payment of the minimum statutory termination notice or termination pay is not consideration for the release, as the employee is entitled to receive those amounts in any case. The employer must provide something in addition to the statutory minimum as consideration for the release.
- Provide full and fair information about the offer. An employer should not mislead an employee about her statutory entitlements or the availability of other remedies. Consider stating the amount of statutory termination notice or termination pay and that those amounts will be paid in any case, and identifying the additional compensation offered in exchange for a release.
- Recognize that an employee has options. Avoid implying in termination letters or releases that there is no option but to sign the release.
- Allow the employee a reasonable opportunity to seek advice. Do not pressure an employee to sign a release right away. Make sure the employee is aware he may seek legal advice. Allow some time for the employee to seek advice and consider the offer.
- Be alert for special circumstances that may prevent an employee from understanding an offer or release. If there is a language barrier, a mental disability affecting decision making, or other issues, consider whether the employee has access to resources required to make an informed decision.
- Ensure the release resolves all potential disputes. A release should identify the potential claims or complaints to be released. A comprehensive release will protect an employer not only from wrongful dismissal suits, but also from employment standards claims, human rights complaints, privacy complaints, benefit claims, and tax liability. A release can also provide for confidentiality and protect against damaging statements.

Field Law can provide advice about all aspects of terminations, including drafting or reviewing releases, advising on severance offers, and providing guidance to ensure an enforceable settlement.

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