

Ethical Trends in Workplace Law

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Presentation Overview

- **Ethical pitfalls when recruiting and hiring**
 - employment contracts and the duty to bargain in good faith
 - what should you and should you not say to employees when enticing them to join your firm?
 - what should be included in employment contracts?
- **Ethics in internal investigations**
 - who should direct investigation
 - protecting privilege
- **Ethical predicaments in concluding wrongful dismissal settlements**
 - how should the settlement funds be allocated?
 - what do you write on the record of employment?
 - should you be writing letters of reference?

Ethical Pitfalls in Recruiting and Hiring

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The Sell

- You have been trying to fill an Associate GC position for months. You are overworked, you need someone now, but you need a candidate with a particular skill set
- The recruiter advises that he thinks that he has found the perfect candidate on LinkedIn. He has called her a few times. She is currently employed and was not looking. She has finally agreed to meet with you and is perfect for the job.
 - do you tell her about the long hours, constant travel, unreasonable demands of client, the fact that no bonuses have been paid for the last 2 years, etc.?

Duty to Contract Honestly

- *Bhasin v. Hrynew*, 2014 SCC 71
 - general organizing principle of good faith in contractual performance
 - duty to act honestly in the performance of contractual obligations

Inducement & Misrepresentation

- Negligent misrepresentation
- Inducement from a secure position
- Inducement of breach of contract

What About the “Entire Agreement” Provision?

- Clause does not preclude the implication of a duty of good faith
- Any modification to the duty of honest performance would need to be express

What Does this Mean for Employers?

- Evaluation by courts of fairness in contractual bargains
 - unconscionability
 - power imbalances
- Act with honesty, candour and transparency
- Do not “puff up” the job
- Not only conduct, but intentions will be examined
- Be frank about challenges, particularly if asked

Employment Contracts

- Should employers draw to the employee's attention certain provisions?
 - non-competition, non-solicitation clauses
 - termination provisions
- Give sufficient time for employee to obtain legal advice and encourage it

Ethics in Investigations

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When to Investigate

- Do you need to investigate?
 - human rights
 - occupational health and safety
 - wish to allege cause for termination
 - other suspected breaches of law, regulations, policies

Who Should Direct Investigation?

- Internal v. External third-party
 - who is being investigated
 - nature of allegations
 - internal expertise available?
 - neutrality
 - time sensitivity

The Importance of Getting it Right

- *Vernon v. British Columbia (Ministry of Housing and Social Development) (Liquor Distribution Branch) (2012)*:
 - allegation that Vernon behaved inappropriately in the workplace
 - investigation was conducted – evidence that Vernon swore in the workplace
 - defendant concluded that Vernon bullied, harassed and intimidated subordinates – fired for cause
 - the Court awarded \$35,000 in aggravated damages and \$50,000 in punitive damages largely due to the “flawed” and “biased” investigation on top of the 18 months of wages for wrongful dismissal

Protecting Privilege

- Investigation privileged if done at the direction of legal counsel
 - legal counsel must have been retained in capacity as a lawyer
 - who is the “client” in an internal investigation
 - **caution** – can’t be a witness and a lawyer
 - preservation of privilege may be more readily managed through the use of outside counsel

Protecting Privilege

- Pre-existing documents not privileged
- “Upjohn warning”
- Consider signing confidentiality agreements
- Mark documents as privileged
- Limit people with access to the information
- Separate documents where public disclosure is anticipated

A Friend in Need?

- You're in-house counsel for a company. A close colleague comes to you and asks for your advice after disclosing to you that he intentionally provided inaccurate information to the company during an audit and insists that you keep this information confidential. The information, if disclosed, would have a significant adverse effect on the company.
 - what are your obligations to the employee? to the company?
 - is it appropriate for you to conduct an investigation?
 - are there any additional ethical issues?

Ethical Predicaments in Wrongful Dismissal Settlements

Terminations of employment

- General considerations
 - can terminate for any (legal) reason
 - need to be forthright and truthful
 - when and where to advise
 - working notice option
 - announcements
 - content of termination agreement

Termination scenario

- You have just terminated the employment of Sue, your assistant for the last 25 years. You are sad to see her go, but she has not kept up with the latest changes to technology and company systems, appears to be slowing down, takes a lot of sick time and has a higher salary than others due to her long service. Sue is offered a package based on 2.5 weeks per year of service, which you believe to be fair and a possible win for her as she has hinted that she might like to retire.
- Three days later, you receive a demand letter claiming that Sue's age and disability were factors in the termination. You are shocked. They are demanding 24 months and \$50,000 in human rights damages.
 - how do you respond?

Taxation on Termination

- Statutory notice (regular payroll withholdings)
- Retiring allowance (flat tax of 10, 20, 30%)
- Non-taxable damages
 - human rights
 - torts (misrepresentation, defamation etc.)
- Special damages
- Legal fees

Allocation of Settlement Funds

- Allocation as wages v. general damages?
 - general damages must have basis in the claim – apportionment must reflect what court would reasonably award
 - tax consequences
 - interest, penalties, prosecution
 - what should/can you do to protect the company?

Other Common Requests

- Amend the Record of Employment
 - misrepresentation on ROE is an offence
- Agree to non-disparagement

Letters of Reference

- Confirmation of employment v. positive reference
 - defamation
 - negligent misrepresentation
- Tips for reference letters
 - determine form and content, be consistent
 - assign responsibility for inquiries

Questions?

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