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Building Capabilities for Growth



## The Buck Stops Here - Liability and Damages

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# Introduction

- Liabilities which can arise from employment relationship
  - Initial, pre-employment stage
  - During the employment relationship
  - Damages in the unionized context
  - Reasonable notice following a wrongful dismissal
  - Employee's obligations to a former employer may attract liability for new employer

# When Employment Starts

- Focus is on attracting the strongest candidate
- But be cautious of the direct and indirect representations
- Negligent misrepresentation: *Khan v. Vernon Jubilee Hospital* (2008, BCSC)
  - During recruitment, parallel discussions about transfer of work to other hospital
  - Duty of care to provide accurate information about the job when employer knows employee will rely on it

# When Employment Starts (cont'd)

- Inducement: *Wallace v. United Grain Growers* (1997, SCC)
  - Reasonable notice may be increased if employee was induced to leave secure employment
  - Not all inducements will carry equal weight when determining the appropriate period of notice

# During (and After) Employment – Employment Standards

## *Employment Standards Act*

- Overtime, vacation pay, statutory holiday pay, special provisions for employees on leave
- 6 months to make claim
- 6 months limitation of liability

# During (and After) Employment – Employment Standards

- Remedies under *Employment Standards Act*
  - Lost wages and interest
  - Reinstate or hire a person
  - Expenses

# During (and After) Employment – Human Rights

## *Human Rights Code*

- Compensation for lost wages or salary
- “Make whole” - s. 37(2)(d)(ii)
  - *Bouchard v. Cambie Malone Group and another*, 2013 BCHRT 130
- Discretionary
- Exercised on a principled basis
- Loss must be caused by the discrimination

# During (and After) Employment – Human Rights

## *Human Rights Code*

- Damages for injury to dignity – s. 37(2)(d)(iii)
  - On the rise
  - \$75,000 in *Kelly v. UBC*, 2013
- Factors:
  - Nature of discrimination
  - Time period and frequency of discrimination
  - Vulnerability of the employee
  - Impact of the discrimination
  - Whole context of the relationship



# During (and After) Employment – Human Rights

- BC does not permit the Human Rights Tribunal to order costs like those in civil litigation against a party in a human rights complaint.
- “Primary purpose of awarding costs is punitive”
- Costs will be ordered by the tribunal for “improper conduct”
  - Intentional wrongdoing
  - [a]ny conduct which has a significant impact on the integrity of the Tribunal’s processes
  - Prejudicial impact on a party

# During (and After) Employment – Human Rights

- Costs in the Federal context: “any expenses” incurred by the complainant because of the discrimination
  - Expenses do not include legal costs
  - Expenses directly attributable to the discrimination, such as additional costs of obtaining goods, services or facilities
    - *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2011 SCC 53

# During (and After) Employment - Privacy

- *Personal Information Protection Act*
  - 'Cease and desist' order
  - Fines for failure to comply with an order, for deception or misconduct in proceeding
    - Up to \$10,000 for individual employer
    - Up to \$100,000 for corporate employer
  - Individuals can sue for breach of *PIPA* if they suffer actual harm

# During (and After) Employment - Privacy (cont'd)

## → *Privacy Act*

- Can sue for wilful, unlawful breach of privacy

- No need to prove damages

- Wide range of awards: \$300 - \$35,000

- *Poirier v. Wal-Mart Canada*, 2006, BCSC: \$15,000 for use of employee's images in marketing materials after termination

## → Common Law

- In Ontario, tort for invasion of privacy

- *Jones v. Tsige*, 2012, ONCA: \$10,000 for repeated, private viewing of personal financial information

# Unionized Workplace

- Reinstatement and “make whole” is usual remedy
- Damages in lieu of reinstatement
  - Where relationship no longer viable
  - More than common law notice to compensate for loss of rights under collective agreement – “fringe benefit factor”
  - No mitigation
- Mental distress – “peace of mind”

# After Employment

- Reasonable notice at common law
  - Age, character of employment, length of service and availability of alternate employment
  - “Rough upper limit” = 24 months
  
- Limit by contract
  - Must be very clear and carefully drafted to comply with minimum employment standards

## After Employment (cont'd)

- Unless explicitly changed by contract, reasonable notice includes
  - Salary, including shift premiums and commissions
  - Tips
  - Benefits (cost incurred to replace)
  - RRSP and pension plan contributions
  - Allowances (clothing, meal, vehicle)
  - Professional membership dues
  - Bonus
- May also include costs incurred for job search

## After Employment (cont'd)

- Aggravated damages: *Honda v. Keays*, 2008, SCC
  - Compensation for unfair or bad faith conduct
  - Actual proof of damages required
  - Amounts are relatively modest



# After Employment (cont'd)

- Punitive damages
  - not compensatory
  - “independent actionable wrong”
  - shocking or harsh conduct
  - must be a rational means to deter or punish
  - very rare

# Restrictive Covenants

- Injunction
- Damages for breach
  - Lost profits and mitigation expenses

# Best Practices to Limit Liability

- Develop standardized hiring and termination processes
- Develop (and use) carefully drafted contracts
- Clearly define entitlements under policies and benefits plans upon termination
- Properly train and enforce policies - with management and employees
- Carefully proceed with discipline and termination
- Audit practices to ensure compliance

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