*LW1210 - Labour and Employment Law*

With Paul Tilley

*LW1210 UNIT 1 - Part 3 of 3 - CHAPTER 3 Common Law Issues Surrounding Hiring*

*Misrepresentation*

Both a potential employee and a potential employer may misrepresent (lie/stretch the truth/omit key information) during a job interview. This can have serious implications for the employment contract in the event it is formed:

***For employees:*** first and foremost is pays to conduct one’s own due diligence on a position. While legal remedies are one thing, not getting into such a situation is probably better. Second, if an employee has been induced into accepting an offer that may have been too good to be true, the employee may have recourse to remedies outside the traditional employment law realm.

Human resources professionals say up to 30% of claims on resumes of job applicants have been exaggerated. Theoretically, resume padding could be prosecuted as criminal fraud, but such charges are virtually never laid in Canada. In addition to being cause for firing, an employee may also be successfully sued in civil court by an employer for damages resulting from the misrepresentation. Employees who are fundamentally deceptive about their qualifications can be considered in a breach of the duty of trust implied in every employment contract. The false or non-disclosure could be an intentionally fraudulent misrepresentation of important fact that induced the employer to hire the worker.

Employer compensation might include the costs of finding a replacement employee, recruitment agency fees and any training costs incurred, but no cases of this kind have been found in Canada. Most employers will not sue the dishonest former employee, often seeing this as a private embarrassment and ‘throwing further good money after bad.’

***For employers:*** It pays to be cautious about what is represented to potential employees. If the employer is found to have misrepresented the position, then the employer may be found liable for far more than was initially contemplated.

***Example:*** After 14 years of service with his employer, Norman was having coffee with Albert, a co-worker, and was surprised when Albert told him that the co-worker had been allowed to purchase back some of his years of service in England before commencing employment in Canada. Norman had worked in his native Australia for twenty years before commencing employment in Canada. When he attended the sign-on interview on his first day with his Canadian employer, Norman entered believing he could not buy back his Australian service and left the meeting with the same understanding. However, this was not correct as his employer had recognized the Australian pension plan for a number of years prior to hiring Norman. Over the next three years, Norman pressed his employer for relief, but his employer took the position that failing to provide advice was not a negligent misrepresentation. Norman went to court and the court found that a negligent misrepresentation had occurred.

***Five general requirements*** mustbe met before liability will be imposed for negligent misrepresentation. These are the following:

* there must be a duty of care based on a special relationship between the parties;
* the representation must be untrue, inaccurate, or misleading;
* the defendant must have acted negligently in making the representation;
* the plaintiff must have reasonably relied on the misrepresentation; and
* the plaintiff must have suffered some loss or damage.

# Inducement

Employers are always interested in attracting the best employees to work for them. In an effort to do so, they sometimes induce employees from other organizations to join their workplace with promises of greater compensation, promotions and job security. However, the extent to which an employee has been induced to leave a secure position is a factor which may be considered when the court is awarding a reasonable notice period.

# Restrictive Covenants

Employers often seek to minimize the harm that employees can inflict upon the business once the employment relationship ends. One common method is the use of post-employment covenants that attempt to restrict an individual’s ability to compete against the employer or solicit the employer’s employees, customers or potential customers.

Canadian courts have held that although restrictive covenants are considered a restraint of trade and are contrary to public policy, some restrictive covenants will be enforceable in certain circumstances. However, since the threshold for enforceable restrictive covenants is high, those circumstances are often few and far between.

# Anticipatory Breach

An “anticipatory breach” of contract will be found where a party’s conduct amounts to a total rejection of the obligations under the contract and there is a lack of justification for such conduct. This intention will be demonstrated where a reasonable person would conclude that the breaching party no longer intends to be bound by it.

The test for anticipatory breach (also known as “repudiation”) is whether the threatened breach deprives the injured party of a substantial part of the benefit to which he is entitled under the contract. Five factors are used to determine whether conduct has deprived an innocent party from substantially benefiting from a contract. They are:

* the ratio of the party’s obligations not performed to that party’s obligations as a whole;
* the seriousness of the breach to the innocent party;
* the likelihood of repetition of such breach;
* the seriousness of the consequences of the breach; and
* the relationship of the part of the obligation performed to the whole obligation.

# Reference Checks

After you interview the highest-qualified applicants, you'll have a lot to think about as you decide who to hire. One important thing that will help you make your decision is the process of checking references.

***Problems Related to Reference Checking***

***Bias produces slanted references*** — a supervisor or co-worker with a vendetta may slant the reference so that it comes out overly negative. Supervisors may provide a negative reference on a current employee in order to improve their chances of keeping them.

***A positive slant*** — the majority of references are positive because people try not to say bad things. But when the reference is or was a close friend or colleague who wants to help you, the odds of finding negatives drops dramatically. Personal references are even more likely to be 100% positive because the individual selects only those individuals who they know will provide a positive reference. Managers may give a glowing reference in order to get rid of a problem employee.

***Self-provided references may mislead or be fraudulent*** — many firms allow the applicant to provide the names, e-mail addresses, and phone numbers of their references, and it should be obvious that self-selected references are more likely to give positive answers. In addition, unfortunately the names that applicants provide may not have been the person’s actual supervisor. In some cases, the number or e-mail address provided might not even belong to a real firm.

***Leniency effect*** — when corporate employees do reference checking, there is a measurable tendency to be “lenient” and to downplay negative information. This leniency is caused in part because finding too much negative information will mean that the reference checker will be asked to delve deeper (more work) or that they must reopen the position search. People providing references can also be overly positive because they know that a bad reference may cost the applicant (who may also be a friend) their next job.

***Competitor firms will not cooperate*** — in a highly competitive business world, it can be increasingly difficult to get any form of information from a major product or talent competitor.

***No company data to prove they work*** — because many firms execute their own reference-checking process, it would be a mistake to rely on external research to prove the accuracy of the process. Unfortunately, I have never come across an organization that routinely gathers and analyzes data on the predictive accuracy of their reference process.

***Low Reliability*** — most corporate reference-checking processes (unlike vendor processes) are loosely designed and poorly controlled. Moreover, when reference checking is decentralized and many untrained individuals are conducting them, the execution (consistency and reliability of the process) slips even further.

***Reference checking is slow*** — in order to get documentation, it is important to use written references. However, written references take much longer, and a higher percentage of individuals are reluctant to participate in references when they must provide their signature. Reference checking is often not a high priority among recruiters or support staff even though slow reference checking may cause you to lose top candidates.

***The use of leading questions*** — a significant percentage of the reference questions that I encounter are binary questions pertaining to positive traits that almost always elicit positive answers. Requiring the individual to force rank or pick from a list of both positive and negative answers is a superior approach. Open-ended questions result in different information, making comparisons between candidates difficult.

***Poor documentation*** — telephone references often suffer from poor documentation and capture no signatures, which can be a problem should legal issues arise.

***Inconsistency: A checklist is not used*** — rather than using a checklist of standard questions, many supervisors who check references “wing it” or make up their reference questions as they go, resulting in no consistency. If standard questions are used, they are often not weighted based on their relative importance in predicting future job performance.

***No permission signature is obtained*** — if you are using resumes instead of application forms, you may be checking references without written authorization. If you inadvertently call their current employer, you may get them fired, which could lead to them taking action against you.

# Defining the Employer Relationship

Determining employer-employee relations is an important part of business, not only because it determines the obligations and duties of both the employer and the employee but also because the existence of such relationship vests an employee with certain rights.

An employee is any person in service of another under any contract of hire, express or implied, oral or written, where the employer has the power or right to control and direct the employee in the material details of how the work is to be performed.

Under common law rules, employer-employee relations exist when an employer can control the services performed by an employee – what will be done and how it will be done. Further, in a case decided by the Supreme Court, even if there is no direct control over the employee, employer-employee relationship will be found under the following circumstances:

* The employer retains pervasive control over the business operation as a whole (Dependent vs. Independent Contractor)
* The employee’s duties are an integral part of the operation (Independence)
* Detailed control is unnecessary because of the nature of the work