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THE DO'S AND DON'TS OF EMPLOYEE HIRING AND FIRING

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Barbara Cornish + R. Scott Brearley

The Canadian workplace is a highly regulated, complex legal environment. Litigation involving workplace disputes, of one sort or another, has increased dramatically in the last few years.

Employers need to understand and manage the risks associated with the modern Canadian work force in order to avoid costly and time consuming claims and litigation.

I. OVERVIEW

1. PREVENTION IS BETTER THAN CURE

As in any area of potential liability, avoiding liability in the first place is always the preferable route. To that end, it is clear that most workplace disputes could be avoided, or at least lessened, if the employer had taken some basic preventative steps.

The relationship between an employer and a non-union employee is governed by the law of contract. Superimposed on that relationship, however, are two additional distinct but significant factors:

- a) a long line of common law court decisions dealing with how an employee/employer contract should be interpreted both during and at the end of the employment relationship; and
- b) a large number of governmental statutes and regulations governing virtually every aspect of the modern employment relationship.

The first step in any liability prevention strategy is to have an understanding of the basic legal framework operating in the workplace.

2. GOVERNMENTAL REGULATION OF THE EMPLOYMENT RELATIONSHIP

In addition to the decisions of the Courts, the workplace is increasingly governed by the decisions of numerous governmental tribunals regulating the workplace. Such tribunals obtain their power from the provisions of various statutes including:

- a) the *Employment Standards Act* (the Employment Standards Tribunal);
- b) the *Workers' Compensation Act* (the Workers' Compensation Board);
- c) the *Human Rights Code* (the Human Rights Tribunal);
- d) the *Protection of Information and Privacy Act* (the Privacy Commission);
- e) *Occupational Health and Safety* legislation (Workers Compensation Board);
- f) The *Income Tax Act*; and
- g) The *Employment Insurance Act*.

While a detailed consideration of these Acts is beyond the scope of this paper, employers should have a basic understanding of the provisions of these Acts, which are as follows:

a. Employment Standards Act

The *Employment Standards Act* sets out the minimum requirements regarding basic employment issues such as payment of wages, holiday pay entitlements, work-breaks and severance provisions. It also sets out the basic legal requirements governing maternity leave.

b. Workers' Compensation Act

The *Workers' Compensation Act* has two distinct areas of jurisdiction. First it provides a system of mandatory injury insurance for all workers in B.C. and provides the statutory basis to levy assessments on employers to fund the compensation system. Second, the Act regulates occupational health and safety in B.C.

c. Human Rights Code

The *Human Rights Code* prohibits discrimination in the workplace on the basis of a number of grounds including age, disability, religion, sex, sexual orientation, family status, race etc. The Act, decisions of the Tribunal and of the Courts also requires an employer to accommodate these grounds within the workplace up to the point of "undue hardship".

d. Protection of Information and Privacy Act

The *Protection of Information and Privacy Act* regulates the use of both employee and third party "personal information" within the workplace. It requires the employer to obtain consent and safeguard the gathering, use and disclosure of this information.

e. Income Tax Act

The *Income Tax Act* dictates, amongst other things, what constitutes an "employment" relationship and distinguishes that type of relationship from other relationships such as that of an "independent contractor".

3. THE EMPLOYMENT CONTRACT

In most respects, the employment contract is like any other contract. The employer offers to pay money for services and the employee accepts that offer by providing the services in exchange for the payment. The common law governing the formation of contracts is generally applicable.

Contrary to common understanding, there is no requirement that the employment contract be in writing. Having said that, most professional and/or management employees should be reduced to a written employment contract in order to best manage the risks associated with such employees. In addition, I strongly recommend implementing even a basic office "policies and procedures" manual which all employees understand will govern their day to day work activities.

II. HUMAN RIGHTS LEGISLATION

Employers must understand that they are bound by provincial Human Rights Legislation. The application of the Code to the employment relationship is meant to ensure that employment practices are based on ability, not on extraneous, unrelated considerations.

Section 13 of British Columbia's Human Rights Code ("the Code") provides:

Discrimination in employment

13. (1) A person must not:
- (a) refuse to employ or refuse to continue to employ a person, or
 - (b) discriminate against a person regarding employment or any term or condition of employment

because of race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation or age of that person or because that person has been convicted of a criminal or summary conviction offence that is unrelated to the employment or to the intended employment of that person.

- (2) An employment agency must not refuse to refer a person for employment for any reason mentioned in subsection (1).
- (3) Subsection (1) does not apply:
 - (a) As it related to age, to a bona fide scheme based on seniority, or
 - (b) As it related to marital status, physical or mental disability, sex or age, to the operation of a bona fide retirement, superannuation or pension plan or to a bona fide group or employee insurance plan.
- (4) Subsections (1) and (2) do not apply with respect to a refusal, limitation, specification or preference based on a bona fide occupational requirement.

Employers must have regard to the provisions of the Code at every stage of the employment relationship. For example, even when advertising a vacant position, the Code must be respected.

1. ADVERTISING FOR EMPLOYEES

Advertising that indicates a preference for, or exclusion of, candidates possessing a distinguishing feature is prima facie discriminatory. The Code prohibits these advertisements:

Discrimination in employment advertisements

11 A person must not publish or cause to be published an advertisement in connection with employment or prospective employment that expresses a limitation, specification or preference as to race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation or age unless the limitation, specification or preference is based on a bona fide occupational requirement.

Even the newspapers which publish an offending advertisement may be liable under the Code. Employers may be liable when agencies post offending advertisements on their behalf. Employment agencies should therefore be expressly told to advertise in a way that complies with the requirements of the Code.

The details of the advertisement are important. An intention to discriminate may be inferred where, for example, sex specific words are used (consider “waiter” or “salesman”). Gender neutral terms are to be preferred (for example, “police officer”, “waiting staff”, “sales force”).

Advertisements should be confined to legitimate qualifications for the job and employers should refrain from making stereotypical assumptions that may be discriminatory and exclude qualified candidates.

2. THE CODE, THE INTERVIEW AND REPRESENTATIONS MADE TO PROSPECTIVE EMPLOYEES

The questions asked of candidates for employment and representations made to them are fraught with potential risk. The Code impinges on a potential employment relationship even during the interview stage. An employer cannot ask questions that directly or indirectly relate to one or more of the prohibited grounds of discrimination. An application form should not contain questions related to those prohibited grounds.

It is easy to ask an inappropriate question during an interview (“are you married?” “Do you plan to have a family?”). An unsuccessful candidate may assume that the answer to an unlawful question was a factor in the decision not to offer employment. That is the seed for a complaint of discrimination.

Employers would do well to develop a detailed plan prior to the interview to ensure uniformity across interviews. All candidates should be treated in a similar fashion. Records should be kept of the interviews conducted and any information provided to candidates at the interview stage. Keep notes of why a candidate is ultimately not considered for the job. If a complaint is made, evidence of a documented and standard process will weigh in the employer’s favour.

An employer must be careful about the representations made to induce an employee into accepting a position. An employee may advance an action based on negligent misrepresentation where an employer makes an untrue, inaccurate or misleading statement negligently which the employee reasonably relies on to his or her detriment.

In the leading case of *Queen v. Cognos*, an accountant in Calgary applied for a job in Ottawa. He was told that the project for which he was to be employed was important, would be developed over time and staff requirements for that project would increase. He accepted that job and moved to Ottawa based on those representations. He did not know that the project had yet to receive guaranteed funding and was subject to budgetary approval. His employment contract provide for only one month’s notice on termination in addition to the statutory notice period.

The accountant was terminated after 18 months of employment. The resulting lawsuit alleged negligent misrepresentation. The Supreme Court of Canada upheld the decision of the trial judge and found that the employer’s representations were made negligently. The company owed a duty to exercise reasonable care during the hiring interview and ensure that any representations made were not misleading. It is important to note that the Court held that a written employment contract would not negate pre-employment representations unless done so expressly.

The result is a requirement to exercise care in how a job is “sold” to prospective employees. Employers should accurately outline a job’s duties and responsibilities and refrain from making inaccurate representations to attract candidates. When the terms of the employment are reduced to writing, the employment contract should explicitly disavow any liability for representations made during the hiring process. This provision should be brought to the attention of the employee at the time the contract is executed.

Another important issue to note is that representations as to the potential longevity of the employment offered can be a critical factor in deciding the appropriate amount of severance. This is an important consideration for employees who leave otherwise secure employment to take the new position – particularly if the employee is terminated within a short time of taking that new position.

Privacy issues are also important considerations in the hiring process and they are discussed in detail below.

III. THE CODE – ISSUES GOVERNING THE EMPLOYMENT RELATIONSHIP

The Human Rights Code continues to govern the employment relationship after the initial hiring interview by prohibiting discrimination on any of the protected grounds. Indeed, employers are required to accommodate the needs of such employees to the point of “undue hardship”. The only exception to this requirement is when the actions of the employer are based on a “bona fide occupational requirement” (“BFOR”).

THE DUTY TO ACCOMMODATE ARISES IF THE EMPLOYMENT RESTRICTION IS NOT A “BFOR”

Section 13(4) provides that the actions prohibited by section 13(1) are not discriminatory where the employer can show that its actions were based on a “bona fide occupational requirement” (“BFOR”).

In *BC v BCGEU*, [1993] 3 S.C.R. (the “Meiorin case”) the Supreme Court of Canada set out a three part test for determining whether an employer’s actions are defensible as a BFOR. As part of that test the employer must show that its actions were “reasonably necessary to accomplish a work related purpose by demonstrating that it could not accommodate the employee without incurring undue hardship”.

Discrimination can only be bona fide where there have been efforts made to accommodate members of the excluded group. An employer must demonstrate that the individual cannot be accommodated without causing undue hardship, having regard to the costs of accommodation, outside sources of funding and health and safety requirements.

In *Meiorin*, a female firefighter challenged the minimum aerobic fitness standards established by the government. She was unable to meet those standards and her employment was terminated as a result. The Supreme Court of Canada had to decide whether the aerobic standards expected of firefighters unlawfully excluded women from the job.

Meiorin established a prima facie case of discrimination because the established standard for safety could not be met equally by men and women. The burden then shifted to the employer to establish that the discriminatory aerobic standard was required as a bona fide occupational requirement. A three step test for considering discrimination and bona fide occupational requirements resulted from SCC decision:

1. the standard must be adopted for a purpose rationally connected to the performance of the job;
2. the employer must have adopted the standard in an honest and good faith belief that it was necessary to the fulfillment of that legitimate work related purpose; and
3. the standard must be reasonably necessary to accomplish that work related purpose. To demonstrate that, it must be impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship on the employer.

The employer bears the burden of establishing this defense. In this case, the Court concluded that the third step had not been established by the employer. Without cogent evidence to support the position that the employer could not accommodate Meiorin because of safety risks, the defence failed.

At a minimum, the duty to accommodate requires an employer to make changes to the usual way of doing things so that an individual can participate in the workforce. Those changes may include

modified work schedules, special aids or entrances for persons with disabilities, or altering a worker's duties and responsibilities.

As a consequence of the *Meriorin* case, employers in Canada are said to be subject to a "duty to accommodate disability in the workplace (and indeed to accommodate each of the grounds mentioned in the Code) to the point of "undue hardship". This will be unique in each circumstance and will be analyzed with reference to the specific facts of each situation.

Relevant factors in assessing whether accommodation will result in undue hardship include:

- a. the financial cost of the accommodation;
- b. the relative interchangeability of the workplace and facilities; and
- c. the prospect of substantial interference with the rights of other employees.

Some examples of accommodation include:

- purchasing or modifying tools, equipment or aids, as necessary;
- altering the premises to make them accessible;
- modifying job duties;
- offering flexible work schedules;
- offering rehabilitation programs;
- transferring job duties;
- using temporary workers;
- adjusting policies (e.g. relaxing certain uniform requirements).

1. ACCOMMODATING DISABILITY

Employers must understand how to properly treat the disabled employee. An employer has a duty to accommodate an employee's disability and this duty cannot be taken lightly. Accommodation is a "right, not an indulgence granted by one's employer or, worse yet, an act of charity"; see *Keays v. Honda Canada Inc.*, [2005] O.J. no. 1145. In *Honda*, the risks of terminating a disabled employee are apparent from the Ontario Superior Court of Justice's punitive damages award of \$500,000.00 against an employer who had wrongfully terminated a disabled employee. The Ontario Court of Appeal set aside some of the trial judge's findings of fact and reduced the award to \$100,000.00. However, it remains clear that an egregious breach of Human Rights legislation can ground a substantial award of punitive damages against an employer.

As section 13 of the Code provides, an employer may not discriminate on the basis of physical or mental disability. Such discrimination (or "adverse differential treatment) may or may not include termination of employment.

The case law provides that in order to establish a prima facie case of discrimination based on disability an employee must establish:

- a. that the employer was aware or ought reasonably to have been aware of the disability;

- b. that the employer terminated the employment (either directly or constructively) or otherwise subjected the employee to differential treatment; and
- c. that it is reasonable to infer that the disability was a factor (not necessarily the sole factor) in the adverse treatment.

Fenton v. Rona Revy Inc; 2004 BCHRT 143
Morris v. B.C. Rail, 2003 BCHRT 14
Gardiner v. A.G.B.C., 2003 BCHRT 41

2. ACCOMMODATING OTHER PROTECTED GROUPS – SOME BRIEF COMMENTS

In addition to disability, the Code prohibits discrimination on the basis of race, colour, ancestry, place of origin, political beliefs, religion, marital status, family status, sex, sexual orientation, age and criminal conviction, except to the extent that such preferences or limitations are based on a “bona fide occupational requirement”.

3. DRUG AND ALCOHOL DEPENDENCIES

Drug and/or alcohol dependencies are also considered a “disability” within the meaning of the *Human Rights Code*.

4. DRUG AND ALCOHOL TESTING

One of the problems with drug and alcohol testing is that while these tests may reveal a level of intoxication in the bloodstream those levels do not necessarily correlate to a specific level of physical or mental impairment. This is particularly so with drug testing.

The legitimacy of pre-employment or random drug/alcohol testing can be extremely problematic – even in safety sensitive positions. As such, I strongly recommend any employer who is contemplating the introduction of such testing to seek legal advice on the issue.

5. PREGNANCY

An employer may not terminate an employee because she is pregnant. Such discrimination is prohibited both under Human Rights legislation and the Employment Standards Act, which provides:

Duties of employer

54 (2) An employer must not, because of an employee's pregnancy or a leave allowed by this Part,

- (a) terminate employment, or
- (b) change a condition of employment without the employee's written consent.
- (3) As soon as the leave ends, the employer must place the employee
 - (a) in the position the employee held before taking leave under this Part, or
 - (b) in a comparable position.
- (4) If the employer's operations are suspended or discontinued when the leave ends, the employer must, subject to the seniority provisions in a collective agreement, comply with subsection (3) as soon as operations are resumed.

Evidence and burden of proof

126 (4) The burden is on the employer to prove that,

(c) in the case of an alleged contravention of Part 6, an employee's pregnancy, a leave allowed by this Act or court attendance as a juror is not the reason for terminating the employment or for changing a condition of employment without the employee's consent.

6. SEXUAL HARASSMENT

Sexual Harassment constitutes “adverse differential treatment”, i.e. discrimination within the meaning of the Code. An employer is responsible for ensuring that such discrimination is not tolerated in the workplace.

7. CRIMINAL CONVICTION

Discrimination on the basis of criminal conviction is prohibited unless such a restriction constitutes a “bona fide occupational requirement”.

8. AVENUES FOR PURSUING DISCRIMINATION COMPLAINTS

It is important to note that the duty to accommodate is owed to the employee and not to third parties. Thus, it is only the employee who can commence proceedings or otherwise seek accommodation. This raises the issue of how human rights complaints may be pursued and, for employers, the risk attendant to the remedial avenue pursued by the employee.

A non-unionized disabled employee can sue for wrongful dismissal (if terminated) or pursue a human rights complaint or both. A unionized employee can allege discrimination by way of a grievance and can also file a human rights complaint. Both union and non-union employees can also advance some forms of discrimination claims by way of a Workers Compensation complaint.

a. Complaints in front of a Human Rights Tribunal

The Human Rights Code specifically provides employees with a statutory right to commence a human rights complaint. The time limit for filing such complaints is six (6) months from the date of the alleged discriminatory conduct.

If an employee commences a claim in front of the Human Rights Tribunal alleging discriminatory treatment, including termination, he or she can seek to recoup any wages lost as a consequence of the discrimination. However, because of the compensatory nature of the Code an employee may be entitled to far greater damages for loss of income than what may be received in a civil action for wrongful dismissal.

For example, in *Morris v. BC Rail*, 2003 BCHRT 14, the complainant was awarded income loss from the end of his notice period to the date that he would have been eligible for early retirement. The complainant had worked for B.C. Rail for approximately 30 years before his termination. He received compensation for loss of income for almost four years.

The case of *Fenton v. Rona Revy Inc.*, 2004 BCHRT 143, involved the termination of employees on long term disability in the context of a corporate merger and acquisition. When Rona purchased the Revy chain, it offered jobs to virtually all of Revy's employees, exempting only certain management personnel and 24 workers on long-term disability (LTD). Rona and Revy agreed in the Asset Purchase Agreement and Revy would remain liable for all of its employees on LTD.

Shortly before the sale closed, the complainant, a 57 year old help desk analyst, informed Revy that she was ready to return to work following a one-year medical leave. Revy refused to allow the complainant back to work because of the terms of the purchase and sale agreement. The complainant received a notice of termination and 9 months severance from Revy but nevertheless filed a human rights complaint against Rona for refusing to employ her because of her disability. Rona argued that declining to hire a person who is not medically capable of performing the duties of the position at the time of hiring did not legally constitute discrimination. The Tribunal allowed the complaint and ordered Rona to pay the complainant compensation for lost wages and benefits, and damages for injury to her feelings and self-esteem.

The Tribunal found that the complainant's disability was the reason she was on LTD, and that her disability was the reason she was not offered employment. The Tribunal rejected the company's argument that it is not discriminatory to decline to hire someone who is medically incapable of doing the job at the time of hiring. The Tribunal ordered Rona to pay the complainant an estimated \$90,000 compensation for lost wages and benefits, including 21.5 months' wages, medical expenses, lost pension contributions, expenses incurred in her job search, and a tax-gross up. In addition, the Tribunal Member awarded the complainant \$10,000 in damages for injury to her dignity, feelings and self-respect, in recognition of the "profound and, I fear, permanent" effect of the termination on the complainant's self-esteem and self-confidence.

b. Discrimination claims in front of the Workers Compensation Board

The *Workers Compensation Act* and Occupational Health & Safety Regulation ("OHSR") have some provisions relevant to this discussion.

First, the OHSR specifically requires employees to notify their employer if a physical or mental impairment may create an undue risk either to the employee or others. This is an important provision because in order to trigger the duty to accommodate (under the *Human Rights Act*), the employer must first be notified of the alleged disability. The OSHR creates a positive obligation on the part of an employee to do so:

Impairment

4.19 Physical or mental impairment

(1) A worker with a physical or mental impairment which may affect the worker's ability to safely perform assigned work must inform his or her supervisor or employer of the impairment, and must not knowingly do work where the impairment may create an undue risk to the worker or anyone else.

(2) A worker must not be assigned to activities where a reported or observed impairment may create an undue risk to the worker or anyone else.

4.20 Impairment by alcohol, drug or other substance

(1) A person must not enter or remain at any workplace while the person's ability to work is affected by alcohol, a drug or other substance so as to endanger the person or anyone else.

(2) The employer must not knowingly permit a person to remain at any workplace while the person's ability to work is affected by alcohol, a drug or other substance so as to endanger the person or anyone else.

(3) A person must not remain at a workplace if the person's behaviour is affected by alcohol, a drug or other substance so as to create an undue risk to workers,

except where such a workplace has as one of its purposes the treatment or confinement of such persons.

Note: In the application of sections 4.19 and 4.20, workers and employers need to consider the effects of prescription and non-prescription drugs, and fatigue, as potential sources of impairment. There is a need for disclosure of potential impairment from any source, and for adequate supervision of work to ensure reported or observed impairment is effectively managed.

It is significant to note that the “impairment” referred to in sections 4.19 and 4.20 is not required to be one that arises “in the course of employment” (such that the Board would take jurisdiction over the injury itself).

Second, the *Workers Compensation Act* also provides that employees can file a complaint against unions or employees who discriminate against them for:

- Exercising a right to carrying out a duty under the occupational health and safety provisions of the *Workers Compensation Act* or the Occupational Health and Safety Regulations
- Testifying in any matter, inquiry, or proceeding under the *Workers Compensation Act*, the *Coroners Act*, or on an issue related to occupational health and safety
- Giving information about conditions affecting the occupational health and safety of any worker to an employer, another worker, a union representing the worker, or an officer or other person administering the *Workers Compensation Act*

Discriminatory actions include:

- Suspension, layoff or dismissal
- Demotion or loss of opportunity for promotion
- Transfer of duties
- Change of location of workplace
- Reduction in wages
- Change in working hours
- Coercion intimidation
- Imposition of any discipline, reprimand, or other penalty
- Discontinuation or elimination of the job or the worker”

The combined provisions of the Act and OHSR mean that if an employee reports their impairment (as they are obliged to do) and is required to continue activities which may put them or others at risk, or is otherwise subject to harmful or discriminatory action, the employee may have a valid complaint against the employer.

Pursuant to section 153, the Board may order the following if the contravention is proven:

- The employer/union cease the discriminatory action.
- The employer reinstate the worker to his/her former position with the same terms of employment.
- The employer pay back wages.
- The union reinstate the worker's membership.
- The employer/union remove any reprimand or references to the matter in the employer's or union's records on the worker.
- The employer/union pay the reasonable out-of-pocket expenses that the worker incurred as a result of the discriminatory action.
- The employer or union do any other thing the WCB consider necessary to secure compliance with the Workers Compensation Act and the regulations.”

c. Discrimination Claims in Civil Actions

(i) Independent Tort

Currently there is an ongoing legal debate as to whether allegations of discriminatory conduct can be made and adjudicated in a wrongful dismissal claim. Underlying this debate is the decision of the Supreme Court of Canada in *Seneca College of Applied Arts & Technology v. Bhaduria*, [1981] 2 S.C.R. 181 which holds that discrimination per se does not constitute an independent tort. The authority of Bhaduria has recently been affirmed by the Ontario Court of Appeal in *Taylor v. Bank of Nova Scotia*, [2005] O.J. No. 838 (C.A.).

In some cases, the discrimination has been held to be of such a nature that it constitutes the tort of intentional or negligent infliction of mental suffering. In these cases, the courts have allowed recovery notwithstanding Bhaduria. For example, in a recent case an RCMP officer was awarded approximately \$950,000 comprising \$225,000 for part wage loss, \$600,000 for future wage loss and \$125,000 for general damages. The Supreme Court judge found that the employer's actions caused the plaintiff to become profoundly depressed. In that case, the plaintiff was not disabled in any fashion prior to the harassment. Rather, disability occurred as a consequence of the harassment the plaintiff suffered after returning from pregnancy leave. Nevertheless, the facts of the “mountie” case were similar in some respects to the Fenton case decided by the Human Rights Tribunal. In both cases, employees returned to work after an extended leave and thereafter, were subject to harassment ultimately causing them to become depressed and leave their employment. The point is that regardless of the cause of the extended leave, employers have an obligation to treat their employees fairly on their return to the workplace and to accommodate any physical or mental disability to the point of undue hardship.

(ii) Independent actionable wrongs – punitive damages

In cases where the employer's conduct does not amount to an infliction of mental suffering some cases have avoided the decision in Bhaduria and held that discrimination may nevertheless constitute an “independent actionable wrong” allowing punitive damage awards to be imposed on employers in wrongful dismissal cases.

For example in *Greenwood v. Ballard Power Systems Inc.*, 2004, B.C.S.C. 266, Mr. Justice Melvin referred to the Supreme Court of Canada decision in *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 55 regarding the term “actionable wrong” and concluded:

[31] ... In that respect, Madam Justice Gray referred to *Collinson v. Coutts*, supra, and stated:

[141] In my view, breaching the Human Rights Code would constitute an “independently actionable wrong”, even though it is not “actionable” in the sense of giving rise to a claim in a lawsuit. It is “actionable” through a complaint pursuant to the Human Rights Code. In my view, although such complaints are resolved in a different forum, they are still “actionable” for the purposes of a punitive damages analysis.

[32] This, in my opinion, is an illustration of the broader meaning of the expression “actionable wrong” as touched on in *Whiten*, supra.

Similar sentiments have been expressed by the Ontario Courts: see *Esposito v Toronto (City)* 2005 Can II 2334.

Awards of punitive damages are aimed at punishing the wrongdoer and are distinct from aggravated damages which are aimed at compensating the plaintiff for “intangible injuries”. As such, while an award of punitive damages provides additional funds to a plaintiff, they are not funds which may be identified as connected to the plaintiff pecuniary losses.

(iii) Breach of an implied term of the employment contract

The Supreme Court of Canada has also recently suggested that employment contracts include an implied provision that the employer will not contravene human rights legislation. See: *Parry Sound (Dist) Social Services Administration Board v. O.P.S.E.U Local 324*, (2003) S.C.C. 42. Such comments suggest that, in the future, an employee could bring an action alleging discrimination as a breach of an implied term of an employment contract. To date, however, there is no case which has specifically decided this issue since *Parry Sound*. Prior to this, however, there are cases which have ruled to the contrary. See e.g. *L’Attiboudeaire v. Royal Bank of Canada* (1996) 131 D.L.R. (4th) 445 (Ont. C.A.).

IV. PRIVACY ISSUES AND EMPLOYMENT

A consideration of employment issues which may arise under the new Personal Information Protection Act, (“PIPA”), is important for a number of reasons. First, most day to day functions of an organization are carried out by employees. To the extent that the Act requires an organization to develop and follow practices and procedures to ensure compliance with the Act, the day to day implementation of those practices and procedures will likely fall to its employees. Education and training of employees in privacy matters is therefore essential in order for an organization to properly meet its responsibilities under the Act.

Second, the failure of an employee to adhere to an organization’s privacy policies and procedures can have serious consequences for the organization in the form of adverse publicity, time, expense, fines, and in serious cases, civil damages (ss. 56 and 57). As such, the implementation of privacy policies in the workplace raises issues of employee performance and competence which could potentially expose the organization to significant liability. As in all other issues of employee performance, it is essential, therefore, that an organization have internal procedures to monitor and ensure employee compliance with the standards set out in the applicable privacy policy. Indeed, organizations may choose to make adherence to privacy practices and procedures a term and condition of employment, such that repeated, deliberate, or otherwise culpable breaches of those terms and conditions may result in the imposition of disciplinary measures.

While non-compliance with an employer's policies and procedures can often be justified as conduct which may attract disciplinary measures, the law generally requires that the policies be clearly articulated, and that an employee be fully cognizant of the standard of performance expected. It is

only then that a breach of that standard can result in discipline. The “bottom line” is that it makes sense, both from a liability and a human resources perspective, to inform, educate and train all employees in their privacy obligations.

Third, unlike the Federal Act, PIPA specifically includes employee personal information under the definition of “personal information”. Thus, employee personal information is now subject to the same level of protection as any other type of personal information. As well, employees now have the right to access and, if appropriate, correct the accuracy of their personal information in the custody and control of the organization. Organizations who do not deal in personal information in the course of their day to day business will therefore nevertheless have significant responsibilities under the Act with respect to their collection, use and disclosure of employee personal information. In recognition of these responsibilities, I encourage employers with any significant number of employees to develop and implement a separate employee privacy policy.

1. EMPLOYEE PERSONAL INFORMATION

The Act provides a broad definition of “personal information” as follows:

“personal information” means information about an identifiable individual and includes employee personal information but does not include:

- (a) contact information, or
- (b) work product information.

Personal information will include information such as, but not limited to:

- (1) residential information;
- (2) age, income, marital status, dependents and ethnic origin;
- (3) social insurance number, driver's licence number, credit card number and bank account information;
- (4) employment application forms, resumés, reference letters and transcripts;
- (5) employee information such as compensation, evaluations and assessments, management opinions of employees and disciplinary actions;
- (6) office devices which record entry and exit times and video surveillance;
- (7) DNA and fingerprint samples;
- (8) Photographs;
- (9) internet activity and other computer monitoring;
- (10) leisure activities or hobbies; and
- (11) personal preferences of the individual.

“Employee personal information” is defined as:

personal information about an individual that is collected, used or disclosed solely for the purposes reasonably required to establish, manage or terminate an

employment relationship between the organization and that individual, but does not include personal information that is not about an individual's employment.

2. COLLECTION, USE AND DISCLOSURE OF EMPLOYEE PERSONAL INFORMATION

The collection, use and disclosure of employee personal information is regulated pursuant to ss. 13, 16, and 19 of PIPA respectively.

Section 13 provides:

- “13 (1) Subject to subsection (2), an organization may collect employee personal information without the consent of the individual.
- (2) An organization may not collect employee personal information without the consent of the individual unless
 - (a) section 12 allows the collection of the employee personal information without consent, or
 - (b) the collection is reasonable for the purposes of establishing, managing or terminating an employment relationship between the organization and the individual.
- (3) An organization must notify an individual that it will be collecting employee personal information about the individual and the purposes for the collection before the organization collects the employee personal information without the consent of the individual.
- (4) Subsection (3) does not apply to employee personal information if section 12 allows it to be collected without the consent of the individual.

3. THE REQUIREMENT OF NOTIFICATION

It is significant to note that while PIPA dispenses with consent in relation to the reasonable collection of employee personal information for the purpose of establishing, managing or terminating the employment relationship, s. 13(3) nevertheless requires the organization to notify the employee that it will be collecting the information for the purposes of that collection.

This requirement of notification is unique to employee personal information and applies to all information collected after January 1, 2004, when the Act came into force. (s. 3(2)(i))

Sections 16 and 19, which respectively govern the use and disclosure of employee personal information, also dispense with consent with respect to the purposes of establishing, managing, or terminating the employment relationship. A similar notification requirement to s. 13 is also provided in those sections.

4. “REASONABLE” COLLECTION, USE AND DISCLOSURE

Consistent with other provisions of the Act, PIPA does not specify what type of information may be collected, used or disclosed without the employee's consent. Rather, it imports a reasonable purpose standard.

The collection, use and disclosure of the following “typical” employee information would, in my view, likely be considered reasonable:

(a) Establishing an employment relationship

- resumés
- job application
- reference inquiries
- benefit enrollment
- payroll data
- banking information

(b) Managing an employment relationship

- benefit information
- payroll data
- banking information
- benefit applications
- RRSP/pension contribution
- emergency control information
- performance appraisals/pay increases
- discipline notes
- health/illness/absenteeism
- accommodation requests
- WCB information
- garnishment orders

(c) Terminating an employment relationship

- benefit/pension information
- severance information
- letters of resignation
- reference requests
- Standards information
- performance appraisals
- discipline notes
- health/illness/absenteeism
- WCB/UI/tax/Employment

5. THE RETENTION OF EMPLOYEE PERSONAL INFORMATION

Section 35 provides for the retention of personal information including employee personal information. It provides:

- “35(1) Despite subsection (2), if an organization uses an individual's personal information to make a decision that directly affects the individual, the organization must retain that information for at least one year after using it so that the individual has a reasonable opportunity to obtain access to it.
- (2) An organization must destroy its documents containing personal information, or remove the means by which the personal information can be associated with particular individuals, as soon as it is reasonable to assume that

- (a) the purpose for which that personal information was collected is no longer being served by retention of the personal information, and
- (b) retention is no longer necessary for legal or business purposes.”

The reference to the retention of employee information for “legal or business purposes” in s. 35(2) incorporates the requirements of retaining certain employee records pursuant to the *Employment Standards Act* for two years after the employee departs from the organization and for six years pursuant to the *Income Tax Act*. Note that it may not be considered a necessary business or legal purpose to maintain all employee information for this long.

Section 35(2) has application to individuals who apply to organizations for employment and in the course of doing so supply personal information, often in the form of a resumé. If that information is used to make a decision to hire or not hire the individual, it must be retained for a year after that decision is made.

6. PROTECTION OF EMPLOYEE PERSONAL INFORMATION

Pursuant to s. 34 of the Act, an organization is required to make reasonable security arrangements to prevent unauthorized access, collection, use, disclosure, copying, modification, or disposal of personal information, including employee personal information.

In practice, such security measures would generally include providing access to employee personal information on a strictly “need to know” basis. Health and financial information are typically amongst the most sensitive of personal information, but are routinely collected, used and disclosed in the normal course of employee relations. Security measures must, therefore, be used to protect this information. Such measures may include, at the very least, locking filing cabinets, restricting computer access, and shredding document copies.

7. DISCLOSURE OF EMPLOYEE PERSONAL INFORMATION TO THIRD PARTIES

It is important to note that s. 34 refers to the protection of personal information under an organization’s “custody” or “control”. The former generally connotes physical possession, while the latter does not.

Organizations typically have “control” but not always “custody” of a wide variety of employee personal information, which is sent to third parties. Most organizations send information to government bodies such as Employment Insurance, Income Tax, WCB, etc. Similarly, employee personal information is often sent to benefit providers. In many organizations, payroll or other activities such as benefit administration may be outsourced to third parties. Before providing this information to third parties the employer-organization must consider the use of reasonable security arrangements (often in the form of indemnities or third party contracts/undertakings) to ensure a reasonable level of protection. Many of you may have already received similar contracts from these third parties.

8. ACCESS TO AND CORRECTION OF EMPLOYEE PERSONAL INFORMATION

Parts 7 and 8 of the Act (ss. 23-32) provide employees with the right to access their personal information and to request correction of any inaccuracies. The fact that a response to such a request must (subject to requests for an extension of time) be provided within 30 days (s.29), may impose significant time pressures on organizations who are not adequately prepared and may not know where to locate all of the information requested.

9. OWNERSHIP OF PERSONNEL FILES

Prior to the enactment of PIPA, many labour and employment specialists were of the opinion that the employer owned the human resources and personnel files. With the advent of PIPA, this is likely no longer the case.

10. SHADOW FILES

Similarly, in many large organizations, ad-hoc personnel files, investigation files or other secondary human resources files - commonly known as “shadow files” were generated, often by the direct supervisor of the employee. Those days are now likely over, particularly if an employer wishes to make a decision on information maintained in the shadow file, it will likely be subject to PIPA obligations.

11. REFERENCE CHECKS

The enactment of PIPA will require employers to obtain an employee’s consent to provide references or other employee personal information to third parties after the employee has left the employ of the organization.

12. A NOTE ON PROVIDING REFERENCES TO NEW EMPLOYERS

Pursuant to PIPA, an employer requires an employee’s consent to disclose personal information to a third party, prospective new employer. When an employee leaves (whether voluntary or involuntary), you should obtain their consent prior to their departure. In addition to the issue of consent, employers should consider what type of information they will provide when asked for a reference.

V. TERMINATING THE EMPLOYMENT CONTRACT

Like any other contract, the termination of an employment contract constitutes a breach of that contract by the terminating party requiring the party in breach to pay damages. Damages for breach of an employment contract are commonly referred to as “severance”. Severance is therefore payable by an employer if it has breached the employment contract. In that regard, in Canada, an employer of a non-union employee has the right to terminate an employee at any time, (subject to the constraints of the Human Rights Code) without cause, provided they pay adequate severance. If, however, it is the employee who has fundamentally breached the terms of the employment contract, it is said that the employee is “dismissed for cause” and no severance is payable.

1. DISMISSAL FOR CAUSE

While certain types of egregious conduct, such as theft, may still constitute grounds for dismissal, in recent years it has become increasingly difficult to dismiss an employee without paying severance. In particular, the courts have increasingly required that prior to dismissal for cause the following steps should be taken:

- a) an employee must be given a proper warning that his performance is substandard and that his job is in jeopardy;
- b) he must clearly understand that if he does not improve, his employment will be terminated;
- c) the employee must be given adequate opportunity and assistance to improve after being told that his employment is in jeopardy;

- d) the requested improvements should be expressed as objective standards rather than subjective statements.

If an employer does not follow the above steps they may well be faced with having to pay an employee a substantial amount of severance notwithstanding a long period of poor performance on the part of the employee. In order to substantiate that such warnings were given it is strongly recommended that the warnings be provided in writing.

2. ENSURING THAT AN EMPLOYEE IS AWARE OF THE TERMS AND CONDITIONS OF THEIR EMPLOYMENT

In addition to warning an employee about the necessity of adhering to standards of conduct, it is important that all employees are, in the first instance, made fully aware of those standards.

Obviously, it would be cumbersome to list all of the applicable standards in the employment contract and a good alternative utilized by many companies is to have a standard employee policy manual which sets out the terms and conditions of employment for all employees and referencing this manual in the offer of employment. Typically, this policy will include such items as hours of work, absenteeism and leave provisions, vacation policy etc. In addition to these obvious provisions, it is strongly recommended that all employee policy manuals include at least a basic reference to the provisions of the *Employee Standards Act* and to other Acts now governing the workplace including: the *Human Rights Code*; the *Protection of Information and Privacy Act* and the *Workers' Compensation Act*. Those legislative regimes and their impact on the employment relationship are worthy of some further consideration.

3. SEVERANCE PAYMENTS

Severance payments in British Columbia are governed by the provisions of the *Employment Standards Act* and the common law.

For those employees governed by the *Employment Standards Act*, that Act sets out minimum provisions for the payment of severance. In addition, depending on the circumstances, the courts have held that certain employees may be eligible for additional common law severance.

Architects and engineers are not subject to the severance provisions of the *Employment Standards Act*. However, it is likely that any severance payment which doesn't comply with the minimum provisions of the Act will be deemed insufficient.

While damages in the form of severance are typically paid to employees dismissed without cause, it is important to understand the legal basis for such payments. Strictly speaking, unless an employer dismissed an employee with cause, their obligation is to provide the employee with "reasonable notice" that their employment will be terminated at a future date. By doing so, the employee is given a reasonable amount of time to seek new employment. This type of notice is referred to as "working notice" and as the name implies, it requires the employee to continue to work until the specified "reasonable notice" period has expired. Most employers, however, do not want an employee who has been advised of the termination of their employment to remain in the workplace and the law therefore allows the employer, instead, to pay the employee his wages for the notice period and not have him in the workplace. This payment is said to be "payment in lieu of reasonable notice", which, as noted, is commonly referred to as "severance".

4. CALCULATING REASONABLE NOTICE

In the absence of a written contract specifying reasonable notice/severance provisions, it is frequently said that management and professional (including architects) employees are generally entitled one month severance for each year of employment. While the Courts frequently reject this proposition it nevertheless remains that this general guide continues to be applied. This "rule of

thumb” may, however, vary depending on the particular facts and circumstances including a consideration of the following:

- a) the age of the employee and the opportunity for re-employment;
- b) the particular management and/or professional responsibilities of the employee;
- c) whether the employee was induced to accept employment with promises of longevity of tenure;
- d) the manner of the dismissal.

Of particular significance in relation to the calculation of severance is the manner of the employee dismissal. Years ago, how the employee was dismissed had no relevance to the amount of severance paid. That situation changed with the decision of the Supreme Court of Canada in *Wallace v United Grain Growers* [1997] 3 S.C.R. 701. In *Wallace*, the Supreme Court held that an employer has a duty of good faith with respect to the termination of employees and if that duty is breached the employer will be liable for increased severance. The duty of good faith was described by the Supreme Court in the following way:

“The obligation of good faith and fair dealing is incapable of precise definition. However, at a minimum I believe that in the course of dismissal employers ought to be candid, reasonable, honest and forthright with their employees and should refrain from engaging in conduct that is unfair, or is in bad faith by being for example, untruthful, misleading or unduly insensitive”.

How not to proceed with a termination was demonstrated in the facts of *Mrozowich v Grandview Hospital District No. 3B*. In that case, the trial Court found that, because of the employer’s bad faith, the employee (who had only been employed for slightly over three years) was entitled to eight months as reasonable notice. In making that finding, the Court referred to the following as evidence of “insensitive” conduct on the part of the employer:

- delivering the letter of termination to the employee’s home at 11.00 at night, without any explanation as to what was in the letter;
- changing the locks on the hospital doors at night;
- calling a meeting of the board on short notice (which the employee was not able to attend) and not giving the employee an opportunity to defend himself;
- maintaining until a few months prior to trial that the employee had been discharged for cause.

5. THE TERMINATION MEETING

In many cases, the starting point for a well conducted termination interview occurs prior to the event, with appropriate communications to the employee with respect to his or her unacceptable conduct. At the actual interview, there are two primary goals to be accomplished, as follows:

1. to clearly communicate to the employee that his or her employment with the employer is over, in a manner which is professional and accords the employee some measure of dignity; and
2. insofar as is possible, to protect (or, at the very least, not damage) the employer’s legal position.

A variety of issues should also be considered prior to conducting the actual interview, including the following:

1. An appropriate termination letter must be prepared which may include the following points:
 - a) confirmation of the termination and its effective date;
 - b) the reason for the termination. Obviously, if the termination is not for cause (such as discontinuance of a function) this should be clearly stated. If the termination is for cause, there are several alternatives:
 - i) to detail the reasons for the termination;
 - ii) to simply advise that employment is being terminated for just cause; or
 - iii) to advise that the employer has received legal advice to the effect that, in light of the employee's conduct, the employer has just cause.

As noted, in light of *Wallace*, great care must be taken with respect to the advancement of allegations of just cause.

- c) the termination letter should set out any proposal as to pay in lieu of notice and any other payments proposed by the employer;
 - d) any continuation of benefits should be addressed;
 - e) the employee should be advised as to the timing of payment of all outstanding amounts, such as salary and vacation pay;
 - f) if relevant, the return of corporate property (for example a vehicle, a corporate credit card, a computer) should be addressed; and
 - g) if it has been determined that the employer will be offering outplacement assistance, the terms of such assistance should be clearly described.
2. The employer must determine whether outplacement assistance will be offered. As a result of *Wallace* there has been a considerable increase in the use of outplacements counselors, both at the time of termination and for the purpose of providing assistance in connection with the employee's job search and the Courts have commented favorably upon such offers.
3. Consideration must be given to the timing and location of the interview.
4. Determine who will conduct the interview. Ordinarily, the individual's immediate superior should meet with the employee; however, it is recommended that two representatives of the corporation attend, for at least two reasons:
 - a) if the second person is a human resources representative, that person may address questions with respect to subjects such as the package offered and benefit conversion privileges. That person should take detailed notes of what is said and done at the meeting; and
 - b) if the matter proceeds to litigation, it is prudent to have a second witness to the discussions at the meeting.

5. Determine what will happen after the interview in connection with the employee's departure from the premises. The approach chosen will depend on the circumstances and the individual employee but it is important that this issue be addressed, since, if there is litigation, the Court may well consider in some detail the treatment of the employee during both the interview and the period between the interview and the employee's departure from the premises.
6. If necessary, consider issues of security, for example computer systems etc.
7. Plan what will be communicated to the remaining employees and those outside the organization.
8. The meeting should be conducted with the following objectives in mind:
 - a) It should be brief and direct, although not so rushed as might be considered to be "insensitive".
 - b) The message should be conveyed clearly, so that there is no possibility of confusion and so that the employee understands that the decision is final.
 - c) The meeting should not be permitted to degenerate into a debate. It is unnecessary and potentially dangerous, from a litigation perspective, to enter into an argument with the employee as to the merits of the decision to terminate.
 - d) Immediately after the meeting, both employer representatives should prepare detailed memoranda as to everything which occurred at the meeting. Assuming that the meeting was conducted properly, such memoranda are invaluable if litigation does result from the termination.

6. STRUCTURING THE SEVERANCE PAYMENT

While most employers opt to pay severance, it is clear that the obligation on an employer who wishes to terminate the employment relationship is to provide reasonable notice or payment in lieu thereof. Thus, while payment of severance is one option, the employer may nevertheless opt to simply give the employee "working notice". In other words, the employer advises the employee that his employment will be terminated at a future date but in the meantime the employee is required to continue to fulfill the terms and conditions of his employment. Any combination of working notice and severance may be structured as long as the combined amount constitutes "reasonable notice".

As discussed, most employers do not exercise the option of providing working notice simply because an employee who has been advised that his employment will be terminated is likely going to be unproductive and potentially disruptive in the workplace. In the right circumstances, however, providing working notice can be an effective way of reducing severance liability.

7. LUMP SUM OR SALARY CONTINUANCE

Generally speaking, an employee has the right to a lump sum severance payment. Certainly, *Employment Standards* severance must be paid by way of lump sum. Frequently, however, employees will request that any additional common law severance be paid by way of salary continuance. In this way the employee maintains their stream of employment income while looking for another position. This raises the issue of the employee's obligation to mitigate damages.

8. THE DUTY TO MITIGATE

The duty to mitigate, or take all reasonable steps, to reduce the amount of damages payable is common to all actions involving breach of contract. In the employment context, an employee is required to take all reasonable steps to find alternative employment once notified of the fact of termination. Cognisant of this duty, many employers will structure severance offers to take account of potential mitigation. Thus an employer may offer to pay six months' salary continuance terminating on the last day of the reasonable notice period or until the employee obtains an alternative position. If the latter is the case, the employee is offered 50% of the remaining severance amount payable by way of lump sum.

While curtailing salary continuance in the event of alternative employment may sound like an attractive alternative for employers, the fact is, it may require the employer to police the employee's efforts and employees may or may not be inclined to accept such an offer.

9. THE USE OF EMPLOYMENT CONTRACTS TO LIMIT SEVERANCE PAYMENT

Rather than face the uncertainty of attempting to calculate severance payments at the time of termination, many employers will opt to reach an agreement with the employee as to the amount of severance which may be payable in the employment contract. Provided the terms comply with the applicable *Employment Standards* minimum provisions, the employer and employee are free to agree on any amount of severance payments. The obvious advantage to including such provisions in the employment contract is that it reduces the uncertainty facing either an employer or an employee as to the quantum of severance payable at the time of termination. In order to ensure that such contract provisions will prevail, however, it is strongly recommended that the employee be encouraged to seek independent legal advice prior to signing the employment contract.

10. A WORD OF CAUTION ABOUT "INDEPENDENT CONTRACTORS"

On numerous occasions I have been advised by clients that either prior to or during an "employment" relationship, the employer and the employee have agreed that the employee will, provide services as "an independent contractor". Essentially, the parties agree that services will be provided in exchange for a monthly or bi-weekly lump sum payment and that the contractor pays all applicable statutory deductions including income tax, CPP and Employment Insurance.

All employers should be aware, however, despite the words of any agreement reached with the "independent contractor" it will not necessarily be construed in the eyes of the various government authorities as such. Whether a relationship is that of an independent contractor or an employee is a question of law to be determined by the applicable court or statutory tribunal and not a question of fact dictated by the agreement of the parties.

Under the *Income Tax Act* and related statutes, an employer has the obligation to remit income tax, CPP and other statutory deductions at source from the employee's pay check. Thus, it is the employer who remains liable for those payments if the relationship is later found to in fact constitute an "employment relationship".

Generally, courts and statutory tribunals will consider the following issues in order to determine whether the relationship is one of an independent contractor or employee:

- a) does the "employer" tell the "employee" what to do, how to do it and when to do it or are those decisions made by the "employee";
- b) is the "employee" free to work for others while providing services to the "employer";
- c) does the "employer" provide the "tools of the trade" for example, phone, fax, office supplies etc;

- d) does the “employer” provide benefits;
- e) does the “employee” receive similar amounts each pay period for similar work.

If it is the “employer” who exercises most of the control over the relationship it is likely that it will be considered a true employment relationship with the consequent obligation of the employer to remit taxes and other payments at source. If it is the “employee” who exercises the control, then it is likely that the relationship will be deemed to be that of an independent contractor and the employer will be relieved of its obligations to remit the applicable taxes.

VI. SUMMARY

The foregoing demonstrates some of the numerous and complex legal issues embedded in the modern employment relationship. As the law continues to evolve, (as it has in the areas of human rights and privacy, for example), an employer’s potential liability exposure will evolve in tandem. Understanding the evolving nature of the risk will invariably allow employers to effectively manage the workplace and hopefully avoid time consuming and expensive claims by employees.