YOUNG ANDERSON
BARRISTERS & SOLICITORS

MANAGING THE EMPLOYMENT RELATIONSHIP

NOVEMBER 24, 2023

Carolyn MacEachern and Michelle Blendell

MANAGING THE EMPLOYMENT RELATIONSHIP

I. INTRODUCTION

This paper addresses risks that can arise during various stages of an employment relationship from hiring through to the ending of employment and best practices to manage those risks. We start with a focus on the risks in the hiring stage of an employment relationship. We then address the importance of a written employment agreement in managing risk throughout the employment relationship, as well as other issues that may arise during later organizational restructuring which impacts an employee's position.

II. RISK MANAGEMENT ISSUES IN HIRING

Many risks can arise when a local government decides it needs to hire a new employee, including the advertising for the position and to representations made to applicants about the position for which they are applying. We also address the prohibition on discrimination in the hiring process and anti-nepotism policies.

A. Employment Advertising

A local government's need to manage risk in its employment relationships starts even before it receives the first application for a vacant position. The *British Columbia Human Rights Code*, RSBC 1996, c. 210 (the "Code"), the *Employment Standards Act*, RSBC 1996, c. 113 (the "ESA"), and the recently enacted *Pay Transparency Act*, SBC 2023, c. 18 place restrictions on an employer's ability to advertise its employment opportunities.

Section 11 of the Code prohibits an employer from publishing an advertisement that contains discriminatory limitations, specifications or preferences. It states:

> 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 Indigenous identity, race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation, gender identity or expression, or age unless the limitation, specification or preference is based on a bona fide occupational requirement

Section 8 of the ESA also contains limitations that may impact the content of an employer's job advertising. It states:

> An employer must not induce, influence or persuade a person to become an employee, or to work or to be available for work, by misrepresenting any of the following:
>
> (a) the availability of a position;
>
> (b) the type of work;
>
> (c) the wages;
>
> (d) the conditions of employment.

Further requirements for the content of an employer's job advertising are contained in the *Pay Transparency Act*. According to Section 2 of that Act, as of November 1, 2023, all employers advertising a job opportunity must specify either the expected salary or wage for the job, or the expected salary or wage range for the job. Additional regulations may also be made in the future under the Act limiting an employer's ability to use a wage range in its job advertising, and prescribing additional information that must be included in an advertisement.

B. Common Law Restrictions on Representations in the Hiring Process

The common law, i.e., legal principles created by judges, also places restrictions on an employer's representations about a particular job opportunity. Employers are prohibited from making misrepresentations to applicants in the hiring process. They must be careful when recruiting employees not to misrepresent the core components of the job.

The test negligent misrepresentation in the employment context is as follows:

- A duty of care must exist based on a special relationship between the employer and the applicant;
- The employer made untrue, inaccurate, or misleading statements;
- The employer acted negligently in making the statements;
- The applicant/employee reasonably relied on the employer's statement(s); and
- The applicant/employee suffered damages as a result of their reliance on the employer's statements.

In *Queen v. Cognos*, [1993] 1 SCR 87, a chartered accountant applied to work on a particular project. During the interview, he was not told that the funding for the project had not yet been approved. The employee gave up his existing secure management position and moved his family from Calgary to Ottawa to accept employment with the employer. The funding for the project was denied within weeks of the employee starting work. Five months after he started employment, the employer reassigned the employee to another job. The employer then terminated his employment after 1.5 years of employment.

The employee successfully sued the employer for negligent misrepresentation. The trial court held that a duty of care existed as the interviewer realized that the employee was relying on the information that he supplied to decide whether to take the job and that if the employee accepted the position he would be giving up a secure, well paying job and would have to move with his family to Ottawa. In the case before the Supreme Court of Canada, the employer conceded that a "special relationship" existed with the employee such that a duty of care arose with respect to the representations made in the interview. The Supreme Court of Canada also agreed with the trial judge that the interviewer should have informed the employee of the precarious nature of the employer's financial commitment to the project.

Employers should be particularly careful when making claims about the security of the job for which an applicant is applying. If an employer misrepresents the level of job security, and the applicant was induced to leave secure employment as a result of the misrepresentation, a court may award them extra damages in any subsequent wrongful dismissal litigation, or damages in a negligent misrepresentation action.

C. Discrimination in the Hiring Process Prohibited

Section 13 of the Code prohibits employers from discriminating against job applicants on a number of listed grounds. It states:

> 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 the Indigenous identity, race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation, gender identity or expression, 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.

It is clear from Section 13(a) that an employer must not refuse to hire an applicant because of a prohibited ground.

When making hiring decisions, a local government should keep in mind that an employer's decision not to hire an applicant will be found to be discriminatory by the Human Rights Tribunal (the "Tribunal") even if the decision was only partly related to a protected ground. It is also particularly important that hiring decision-makers be aware that they may harbour unconscious biases that may impact their hiring decisions.

The Tribunal and the Courts have recognized that Canadian society in general subconsciously holds biased and stereotyped views, particularly in regards to the notion of race, that may impact decision making. In *R v. Parks*, 1993 CanLII 3383, the Ontario Court of Appeal stated the following:

> Racism, and in particular anti-Black racism, is a part of our community's psyche. A significant segment of our community holds overtly racist views. A much larger segment subconsciously operates on the basis of negative racial stereotypes. Furthermore, our institutions, including the criminal justice system, reflect and perpetuate those negative stereotypes. These elements combine to infect our society as a whole with the evil of racism. Blacks are among the primary victims of that evil.

That statement has been cited by the Supreme Court of Canada in *R v. Spence*, 2005 SCC 71 at para. 31, and in the recent decision of the Tribunal in *Mema v. Nanaimo (City)*, 2023 BCHRT 91 at para. 7.

A further consideration during the hiring process is whether any applicants will require accommodation to fairly take part in the recruitment process. In another recent decision of the Tribunal, a human rights complaint alleging the employer failed to accommodate the complainant in the job selection process is proceeding to a hearing: *Dorman v. Kamloops (City)*, 2023 BCHRT 62. In that case, the Tribunal rejected the employer's application to dismiss the complaint before the hearing on the ground that it had no prospect of success. The issue to be decided is whether the employer was obligated to accommodate the applicant who had anxiety in relation to the requirement that he take a test of his computer skills as part of the job selection process. The complainant wanted to avoid taking the test altogether or to delay taking the test until he could take a computer skills course.

Employers should also be careful to design any physical tests that applicants must take in a non-discriminatory way. In *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (Meiorin Grievance)*, 1999 CanLII 652 (SCC), [1999] 3 SCR 3, the Supreme Court of Canada held that a physical fitness standard that the employer's forest firefighters had to meet was discriminatory. In that case, a female employee who had already worked safely as a forest firefighter for three years was dismissed after she took 49.4 seconds longer than the 11-minute standard to run 2.5 kilometers set by the employer for both men and women.

The Supreme Court of Canada reinstated the employee to her position as the employer had not proven that its standard was reasonably necessary to accomplish its purpose of identifying those forest firefighters and applicants who were able to work safely and efficiently. The employer did not establish that it would experience undue hardship if a different standard was used. There was no evidence that the standard was minimally necessary for the safe and efficient performance of the job. It was also not clear that men and women would have to meet the same minimum standard in order to safely and efficiently work as a forest firefighter. There was also no evidence that undue hardship would arise if the employee was accommodated in the job, as there was no evidence that she posed a serious safety risk to herself, her coworkers or the general public.

It is also important for employers to document the reasons for their decisions at the various steps of the hiring process. Keeping an accurate record of what occurred throughout the hiring process will assist an employer to defend against a later complaint that the employer discriminated against an applicant contrary to Section 13 of the Code in the hiring process. That is what occurred in *Ekeli v. Quesnel (City)*, 2005 BCHRT 554. In that case, a complainant alleged that she was not hired as a lifeguard because she was female, and that the City only wanted to hire male lifeguards. In defense, the City filed extensive documentation of the candidate selection process showing the objective criteria upon which its hiring decisions were based. The evidence showed that all applicants received equal treatment and the Tribunal dismissed the complaint.

D. Anti-Nepotism Policies

Many employers have anti-nepotism policies. Such policies may be adopted with the best of intentions, but if local government employers are not careful, the policies can be drafted too broadly and can run afoul of the prohibition on discrimination in Section 13 of the Code. Anti-nepotism policies have been successfully challenged on the basis that they are discriminatory against employees based on the prohibited grounds of family status or marital status. The prohibition against discrimination based on "family status" and "marital status" includes discrimination based on the identity of the person to whom a person is related, rather than just whether or not the person has a family or a spouse.

It is permissible for an employer to have an anti-nepotism policy which prohibits family members from supervising each other. In *Greater Victoria Public Library v. Canadian Union of Public Employees, Local 410 (Migliorini Grievance)*, [2004] BCCAAA No. 275, the public library had an anti-nepotism policy which prohibited employees from working together if there was a supervisor/subordinate relationship. The policy was upheld as it did not prohibit related employees from working for the employer or from working together at the same location unless they were in a supervisor/subordinate relationship. The policy was reasonably necessary to prevent real and potential conflicts of interest or abuse of power. It was a bona fide occupational requirement.

If a local government decides to implement an anti-nepotism policy, it should ensure that it is adopted honestly and in good faith, and that the policy is reasonably necessary to assure the efficient and economic performance of work and is rationally connected to those goals. The policy must also be reasonable, and not impose an undue burden on employees or potential employees. The local government should also ensure that it applies the policy consistently, fairly and in good faith.

E. Best Practices for the Hiring Process

Local government employers should consider the following best practices when preparing to fill their next vacant position:

- Ensure job postings and advertisements accurately include the expected salary range, accurately describe the job and do not contain any misrepresentations;
- Carefully prepare a standard set of interview questions to be asked of each candidate;
- Make sure that the interview questions comply with the Code;
    - For example, employers can ask a candidate whether they are legally entitled to work in Canada, but do not ask where candidates are from, or where their family is from;
- Try to avoid broad questions that might unintentionally have the effect of an applicant disclosing information about a protected ground that they would not otherwise have disclosed;
    - For example, do not ask whether the applicant has young children (instead, ask questions about whether the applicant can meet the hours and travel requirements);
- Focus questions on topics that relate to the job requirements;
- During the hiring process provide applicants with detailed information about the job requirements, such as the expected hours or days of work, the physical requirements of the position, and whether travel or evening meetings are required;
- Only consider a medical examination of the candidates if a particular physical ability is a bona fide occupational requirement. Firefighting positions are examples of positions in which a medical examination is appropriately part of the hiring process;

- If requiring a medical examination for a particular position:
  - Make passing the examination a condition of the offer of employment;
  - Require all candidates to undergo the examination if they will receive an offer of employment in the position;
  - Only use the information from the medical examination to determine if the candidate meets the job requirements;
- Require a criminal record check only when it is reasonable to do so. A criminal record check will be mandatory if the position works with vulnerable people;
- When assessing suitability for employment, only consider criminal convictions that are related to the position;
- If requiring a criminal record check make it a condition of the offer of employment;
- Do not ask the employee's age, except to determine that they are the minimum legal age for employment;
- Make sure that any application form contains a declaration requiring the applicant to certify that the statements contained in the application form are true and that dismissal may result if the employee has not been honest;
- Only collect, use and disclose personal information as necessary to make a hiring decision;
- Make sure to obtain an applicant's consent to contact references and former employers, and only contact those provided by the applicant;
- Do not encourage or "induce" a candidate to leave secure employment;
- Make sure that any anti-nepotism policy only prohibits family members from supervising each other and does not simply prohibit family members from working for the employer regardless of context.

III. EMPLOYMENT AGREEMENTS

Another way that a local government employer can reduce risk in an employment relationship is by ensuring that a written employment agreement is executed. To be valid, an employment agreement must provide each party to the agreement with what is known as "consideration", being something of value. Generally, an employee's promise to perform work for an employer and an employer's promise to pay a salary and benefits to the employee in exchange for that

work are sufficient consideration for the agreement to be valid. However, the Courts have held that changes to an employee's employment agreement after they start employment requires "fresh consideration", particularly where there is a change in the agreement to the employee's detriment. That fresh consideration may exist in the new employment agreement for the employee if the employer is providing them with something of value such as a salary increase, additional benefits, or increased vacation.

It is very important that the employment agreement include all of the important terms and conditions of employment, particularly with regard to the termination provisions, and that it be executed by the employer and the employee before the start date of the employment. Uncertainty and risk arise if an employee accepts a job offer and then later signs an employment agreement containing different terms, particularly with respect to restrictive termination of employment clauses. In those circumstances, there is a risk that a court could find on termination of the employee that the termination provisions of the employment agreement do not apply as the employee did not receive fresh consideration for signing the employment agreement with the termination provisions and that the employee is therefore entitled to reasonable notice of termination at common law. That can result in the employer paying considerably more to terminate the employee's employment on a without cause basis than if the termination provisions of the employment agreement had applied.

In *Duprey v. Seanix Technology (Canada) Inc.*, 2002 BCSC 1335, the employee was given an oral offer of employment, which he accepted. After he started employment, he was given an employment agreement, which he signed with one minor change. The employment agreement provided for statutory minimum notice of termination of employment. Upon termination, the employee claimed in a wrongful dismissal action that he had not received fresh consideration for signing the employment agreement after the start of his employment and that he was therefore entitled to reasonable notice at common law instead of the statutory minimum notice. The Court disagreed and held that the offer of medical benefits in the employment agreement was sufficient "fresh consideration" as the medical benefits were of value to the employee.

The opposite result occurred in *Rejdak v. The Fight Network Inc.*, 2008 CanLII 37909 (On. SC). In that case, the employee had been given an oral offer of employment which he accepted. He then started work a few days later, and the next day signed an employment agreement, which included a three-month probation period. The employee was subsequently terminated during the probation period, and sued for wrongful dismissal. The Court found that the provision of health benefits and paid vacation in the employment agreement were not "fresh consideration". The vacation benefit was merely the two-week statutory minimum and the medical benefits were a standard benefit offered to all employees, which the employee would have received anyway.

It is also important for an employment agreement to specifically reference an employer's employment policies. This alerts the employee to the fact that their employment will also be governed by the employer's employment policies. Key policies such as Respectful Workplace,

Code of Conduct, Technology Use, and Conflict of Interest policies can either be specifically referenced in the employment agreement, or provided to the employee prior to their start date with a requirement that they sign that they have read the policies and agreed to be bound by them.

In *Rahemtulla v. Vanfed Credit Union*, 1984 CanLII 689 (BCSC), the employee commenced employment, and soon after was provided with a policy manual and asked to read it. The employee did not provide assent in writing to be bound by the manual. The Court held that the policy manual was not a binding contract. The employer could not rely on the termination provisions set out in the policy manual, and the employee was entitled to reasonable notice at common law on termination.

In addition, to the applicable policies, the employment agreement should also expressly include a probation period if the employee will be required to serve one, as well as the notice of termination during the probation period. Employees should know about and expressly agree to those terms as part of the employment agreement.

Some best practices in relation to employment agreements include the following:

- Make sure to present an employment agreement at the same time as any offer of employment is made;
    - And get your employment agreement reviewed by legal counsel in advance of presenting it;
- Ensure that the employment agreement contains key terms, including clearly worded probation and termination clauses;
- Explicitly reference important employer policies and require a written acknowledgement that the employee has reviewed and agrees to be bound by the policies;
- If making changes to an employee's employment agreement that are to the detriment of the employee after the start of employment, such as adding a restrictive termination clause, ensure that the employee receives "fresh consideration" (i.e., something of value).

IV. RISK MANAGEMENT IN RESTRUCTURING

Another time of risk for an employer in an employment relationship is when the employer decides to restructure its organization and jobs are changed as a result. This raises the potential for a constructive dismissal claim by an employee.

The courts recognize that jobs change over time and have held that employers have some latitude to make changes to an employee's terms and conditions of employment. However, changes to fundamental employment terms may constitute constructive dismissal. Where an employer unilaterally changes a fundamental term of an employment agreement, the employee can choose not to accept the change and resign and claim constructive dismissal. If the employee is successful in a claim for constructive dismissal, the employee will be entitled to notice of termination as if their employment had been terminated without cause. However, even if a court finds a constructive dismissal has occurred, it may also find that the employee had a duty to mitigate their damages by remaining employed by the employer during the applicable notice period.

Constructive dismissal will be found where the court concludes that the employer evinced an intention to no longer be bound by the terms of the employment agreement. The analysis does not require a conclusion that the employer actually intended to no longer be bound by the employment agreement. Instead, the analysis focuses on the employee's perception and whether they would reasonably have perceived based on the totality of the circumstances that the employer no longer wanted to be bound by the agreement. There is a two part test to determine if constructive dismissal has occurred:

- The employer must have acted unilaterally and breached a term of the employment agreement; and
- The breach must substantially alter an essential term of the employment agreement.

An employer's actions will not be unilateral if the employment agreement expressly or impliedly gives the employer the right to make the change, or if the employee consents to the change. To be a breach, a change must be detrimental to the employee.

The second stage of the test is based on the reasonable person standard. The court asks whether at the time the breach occurred, a reasonable person in the same situation as the employee would have felt that the essential terms of the employment agreement were being substantially changed. The analysis of whether a breach is substantial considers issues such as the employer's good faith and honesty in discussing the change and the reasons for it with the employee, whether the employee would reasonably perceive a valid business reason for the employer's unilateral act, and the nature of the impact on the employee.

Generally, the more that the changes to an employee's terms and conditions of employment look like a demotion, the greater the likelihood that constructive dismissal will be found. An employee is also less likely to be found to have a duty to mitigate by continuing to work for the employer when they have been demoted.

In *Robbins v. Vancouver (City)*, 2014 BCSC 872, the employee worked in a managerial role as the Manager, Property Use Inspection, which involved coordinating bylaw enforcement activities. The City undertook a reorganization. The employee was removed from a newly formed

Strategic Enforcement Committee. There was also a reduction of her role in coordinated enforcement activities. The Court determined that there was no fundamental change in the employee's managerial position or a demotion.

Her title remained unchanged. There was no change to her remuneration or benefits, and no significant change to her reporting obligations. The same employees reported to her. She would not be reporting to someone who had previously been her peer or to someone who had previously reported to her. She would be reporting to someone with even more authority and responsibility than her previous supervisor. Further, coordinated enforcement was not a primary function of her position.

A similar result occurred in *Trueman v. Abbotsford (City)*, 2006 BCSC 1820. The employee was the Manager, Budget and Financial Information Systems. The employer implemented a streamlined budgetary process, eliminated his division through a merger, changed his reporting requirements and took away his ability to hire and fire personnel. Instead of reporting to the Director of Finance as he had previously done, he was required to report to the lower position of Manager of Financial Services. There was no change to the employee's title or to his salary or benefits. The employee viewed the changes as a demotion and resigned.

The Court held that the changes to the employee's position were not changes to fundamental terms of his employment and as a result he was not constructively dismissed. The employee remained in charge of the preparation of the budget. The Court viewed the new budgetary process as a change in the manner that duties were carried out rather than as a fundamental change in those employment duties themselves. The Court also concluded that the change to the reporting requirements and the loss of his division were not fundamental changes when the other employment terms remained the same. The employee was still the budget manager, and was managing employees who reported to him on budget matters. He also still had the opportunity to meet with other managers and the Director on budget planning issues. The employee also retained the same title and salary and benefits. The Court concluded that the employee had resigned from his position rather than being constructively dismissed.

The following are best practices for an employer to minimize the risk of a constructive dismissal claim when restructuring:

- Include a term in employment agreements allowing for unilateral changes to essential terms and conditions;
- Clearly communicate the changes to the employee and the business reasons for the changes in advance of the changes;
- Do not change terms of employment for purposes other than legitimate business reasons;
- Obtain written consent, if possible, that the employee accepts an alteration to the terms of employment;

- Consider providing advance notice of the change.

There is case law suggesting that an employer can make changes to an employee's terms and conditions of employment that are fundamental if the employer provides the employee with sufficient advance notice of the changes, namely the same amount of notice that would be required if the employee was dismissed without cause. However, the employer must be careful to ensure that the employee is provided with sufficient notice, otherwise the employee may have a successful claim of constructive dismissal.

Some of the case law had suggested that an employer actually had to dismiss the employee with working notice and then offer them re-employment on the new terms. However, from a practical perspective, this would be very stressful for employees, and is not ideal from a human resources perspective.

V. CONCLUSION

While there are risks for employers at all stages of the employment relationship, this paper has identified some of the ways in which those risks can be managed and reduced. As always, we recommend that local government employers seek legal advice as a further way to reduce the risks associated with their employment relationships.

NOTES

NOTES