

Helping to create windows of opportunity

ALEXANDER
HOLBURN BEAUDIN
& LANG LLP

Barristers & Solicitors • Trade-mark Agents

BCRIMA Luncheon Seminar

Employment Practices Liability

Lawrence Robinson and Sarah
Hellmann

Alexander Holburn Beaudin & Lang LLP

Employer Liability

From hiring to firing and everything in between...

An employer's potential exposure to liability exists at all stages of the employment relationship.

Employer Liability

Examples include:

- Posting a job vacancy
- Interviewing candidates
- Monitoring employee attendance
- Changes in employee responsibility
- Investigating employee misconduct
- Terminating an employee

Sources of Employer Liability

Where should an employer look to determine its legal responsibilities in a particular situation?

Two primary sources:

- A. **Statutory Liability** = created by government legislation; and
- B. **Common Law** = created by the courts

Sources of Employer Liability continued...

Common law includes:

- **Contract – Terms of the Employment Agreement**
- **Tort – Breaches of duties owed between Individuals**
- **Vicarious Liability – Action of employee attributed to employer**

Statutory Liability

Includes Federal and Provincial Legislation

1. Canada Pension Plan Act
2. Employment Insurance Act
3. Occupational Health & Safety
4. Pay Equity
5. Employment Equity

Statutory Liability

6. Workers Compensation
7. Pension Benefits
8. Whistleblower Legislation
9. Criminal Code
10. Employment Standards
11. Human Rights

Statutory Liability: Highlights

Canada Pension Plan Act:

- **Remit premiums**
- **Financial penalties**
- **Fines/Imprisonment**
- **Officers' and Directors' liability**

Statutory Liability: Highlights Continued...

Employment Insurance Act

- **Remit premiums**
- **Financial penalties**
- **Fines/imprisonment**
- **Officers' and Directors' liability**

Statutory Liability: Highlights Continued...

Occupational Health and Safety

- Requirements to ensure employer provides healthy and safe working environment
- Criminal sanctions (fines) for violation

Statutory Liability: Highlights Continued...

Pay Equity

- **Imposes standards designed to promote employment equity**
- **Pay equity tribunals have authority to impose pay equity plans for failure to comply**

Statutory Liability: Highlights Continued...

Employment Standards Act

- Imposes minimum standards of employment: hours, reasonable notice periods for termination, vacation
- Enforcement can include payment of amounts owing, fines and other penalties

Statutory Liability: Highlights Continued...

Workers' Compensation

- No fault insurance scheme for employees injured in course of employment
- Employees liable for premiums
- Can be penalized if fail to register

Statutory Liability: Highlights Continued...

Whistleblower Legislation

- Protection for employees who report environmental damage

Statutory Liability: Highlights Continued...

Human Rights Act

- Prohibits discrimination in employment on enumerated grounds including race, gender, marital status, physical and mental disability, and religion
- Variety of remedies can be imposed: reinstatement, damages for injury to dignity

Statutory Liability: Highlights Continued...

Case Example:

➤ *Datt v. McDonalds Restaurants of Canada Ltd.*

Employee = 23 years old, developed skin condition requiring absence from work. Doctors letters stated she was prohibited from “frequent hand washing”.

Employer = policy of hand washing to comply with health and safety legislation.

Datt v. McDonalds Continued...

Human Rights Tribunal:

Ms. Datt was not entitled to a ‘perfect’ solution, but she was entitled to a fulsome consideration of her restrictions and how those intersected with hand washing policies on the jobs that were available. Without having done so, neither Ms. Datt nor McDonald’s was in a position to know what the outcome of return to work with accommodations might have been.

Datt v. McDonalds Continued...

- McDonalds ordered to pay approximately **\$25,000** to employee for lost wages, lost medical plan and medical and dental expenses and **\$25,000** for compensation for her injury to dignity and self-respect.
- Example of **policy aimed at compliance with health and safety legislation became basis for liability in discrimination** (physical condition)

Contractual Liability

1. On termination of employment
 - Contractual notice period
 - Implied term of reasonable notice
2. Benefit/pension coverage
3. Collective agreements
4. Vested Rights
5. Fiduciary Obligations

What actually happened?

Where there are two conflicting versions of a story, the court will have to make a finding of credibility:

- Not solely based on demeanor of the witness
- Test = is the story in harmony with the preponderance of probabilities which a practical and informed person would recognize as reasonable in that place and in those conditions

Chapple v. Umberto Management Ltd.

Court held:

- Ms. Chapple was expressly dismissed by Mr. Menghi. Menghi's intentions were made clear to Mr. Graham in the conversation they had in front of the coat check room... and communicated to Ms. Chapple during the telephone conversation (the next day)...
- Defendants did not claim she was terminated with cause, therefore = wrongfully dismissed

Chapple v. Umberto Management Ltd.

Damages:

- Reasonable notice

- 13 ½ years of service; base salary of \$50,112.50; 38 years old
- 15 months pay at \$62,641 (in lieu of notice)

- Gratuities

- Part of her remuneration
- \$200 a night = reasonable estimate
- \$71,375

Lessons Learned...

- Document all correspondence
- Communicate clearly – is it a suspension, termination, warning??
- Take time to cool off
- Court = public forum, decision is public, think before you air your dirty laundry

Liability in Tort

Types of Tort Liability:

- a) Misrepresentation
- b) Assault/battery
- c) Intentional Infliction of Emotional Suffering
- d) Intimidation
- e) Conspiracy

Liability in Tort

Types of Tort Liability Continued:

- f) **Defamation**
- g) **Inducing Breach of Contract**
- h) **Breach of Confidentiality**
- i) **Harassment**

Liability in Tort

Additional Damages

- a) Aggravated damages
- b) Punitive damages

Vicarious Liability

An employer is liable for the negligence or wrongful acts of its employees if the acts are committed in the course of employment.

Vicarious liability is a doctrine of *strict liability*

- liability will be imposed without a finding of fault

Vicarious Liability continued...

- Employer liable for employee's impaired driving when employer provides the alcohol or materially increases the risk
- Employer liable for employee's intentional torts

Employment Practices Liability (“EPL”)

- EPL refers to liability stemming from employment-related practices and conduct. Acts such as sexual harassment, wrongful demotion, failure to promote, wrongful dismissal, and defamation are just a few of the acts that can trigger an EPL claim

Employment Practices Liability (“EPL”)

- Stand alone EPL insurance policies have been created to supplement the Comprehensive General Liability policies, and provide coverage to the employer and employee for EPL claims.

CGL Policies vs. EPL

- Most CGL policies exclude coverage for “intentional acts”
- Most CGL policies provide coverage for “bodily injury”, “sickness”
- EPL can trigger claims involving emotional and psychological injury
- EPL insurance insures against loss arising from an employment practices claim and defence costs of the claim

EPL Policies

Typically include two classes of “insureds”:

1. Insured individuals – directors, officers and employees
2. Insured company

EPL Policies

- Broad definition of “wrongful act”
- Broad definition of “employee”
- Covers civil proceedings as well as administrative or regulatory proceedings before a human rights commission or employment standards commission
- Provides cover for retaliatory treatment
- Duty to defend wording

More Information available at:

Legislation and Cases:

www.canlii.org