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EXPECT THE BEST

Good Faith Obligations of Employers

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In November 2014, the Supreme Court of Canada articulated the following proposition in *Bhasin v. Hrynew and Heritage Education Funds Inc.*:

> *Finding that there is a duty to perform contracts honestly will make the law more certain, more just and more in tune with reasonable commercial expectations*

The case before the Supreme Court involved a dispute between a company which markets education savings plans (Heritage) and one of its distributors (Bhasin). The contract in question had a three year term, with an automatic renewal unless either party gave six (6) months' written notice to the contrary.

In 1999, a dispute arose between Heritage and Bhasin and, ultimately, Heritage exercised its contractual right to provide notice of non-renewal. As a result, Bhasin lost the value of its business and he sued to recover this amount.

Notwithstanding the right of Heritage to exercise its right of non-renewal, the court found that Heritage had misled Bhasin as to its intentions regarding an ongoing business relationship and had acted dishonestly. Heritage was required to pay damages to Bhasin equal to the value of his lost business. In doing so, the court formulated the following principles:

1. As a general principle, contract law requires good faith in the performance of a commercial contract;
2. This good faith obligation requires the parties to act honestly and not seek to undermine the legitimate contractual interests of the other party in bad faith;
3. The parties to a commercial contract must not lie or otherwise knowingly mislead each other about matters directly related to performance of the contract.

The purpose of this article is to consider whether there is room for application of these principles to the employment relationship.

References to an employer's obligations of good faith to an employee are not novel. Indeed, it is a rare statement of claim in a wrongful dismissal action that does not reference an alleged breach of good faith by the employer. How is it, then, that the courts deal with such allegations?

In both *Wallace v United Grain Growers* and *Keays v Honda*, the Supreme Court of Canada declared that employers have an obligation of good faith and fair dealing at the time of dismissal. This

obligation requires employers to be candid, honest, reasonable, and forthright, and to refrain from bad faith actions, such as being untruthful, misleading, or unduly insensitive in the course of dismissing an employee.

It is not yet clear whether the duty of honesty and forthrightness, already applicable to the employment relationship during a termination scenario, will extend to other aspects of the employment relationship based on the principles laid down in *Bhasin*. While *Bhasin* dealt with a commercial contract, the Supreme Court did say that:

> *More specific legal doctrines would develop and be given different weight in different situations and, in the context of a long term contract of mutual cooperation, these obligations will be more significant than in that of a more transactional exchange*

In many situations an employment relationship can be appropriately described as a "*long term contract of mutual cooperation*." If so, the groundwork might exist to argue the development of a specific legal doctrine which would require the employee and employer to act honestly and without deception at certain specific stages of the relationship and not just at termination. In fact, while the court has opined on the employee's vulnerability at the time of termination and has thus exercised a supervisory role, clearly termination is not the only situation in which the employee is vulnerable. It is also obvious that the current state of the law has developed in the context of wrongful dismissal actions, i.e. where the employee has been terminated and the emphasis is on creating a remedy for that.

Some examples of situations other than dismissal where an obligation of good faith could apply are:

1. Representations as to security of tenure;
2. Providing or withholding information about a possible merger or closure of the business;
3. A description of rights and obligations under an incentive compensation plan.

If a court were prepared to apply an obligation to not mislead in any of these situations, the innocent party would have a claim for breach of contract and would be entitled to be put in the position he/it would have been in had the breaching party complied with its obligation of honesty and forthrightness. For example, in the first example above, if the employee had known that his tenure was insecure he may have moved on to a then available position. If the employer had a duty to disclose this or, at least, not mislead the individual, the employee may be able to recover damages to put him in the position he would have been in had he received the honest information and acted accordingly.

While it is arguable that the same, or similar claims, could be made on the basis of a tort claim for negligent or intentional misrepresentation, this would require proving the essentials of those or other applicable torts. Furthermore, if the court were to acknowledge this duty of honesty it would satisfy one of the essential elements of proving a misrepresentation claim.

Creative counsel will undoubtedly attempt to extend an employer's obligation to act honestly and in good faith beyond the dismissal setting by arguing that this would be "*just and in tune with reasonable expectations*." ■