

RICKETTS, HARRIS LLP

Barristers & Solicitors

M. J. White
J. G. Miller
J. D. Gibson
I.V. Olabode
R.W. Davies, Q.C. (Ret.)

T.C. Warne, Q.C.
R. D. Preston
A. Di Nardo
J. Binavince

Counsel: M. G. Cochrane
Jay Josefo

Suite 816, 181 University Ave.,
Toronto, Ontario
M5H 2X7

Tel: (416) 364-6211

Fax: (416) 364-1697

www.rickettsharris.com

E-Mail: jzj@rickettsharris.com

Summer-Fall 2003

EMPLOYMENT NOTES AND NEWS

Dear Friends;

For your "summer reading", I hope these articles assist and amuse as you meet the ongoing challenges of people and issues management. Feedback or suggestions are always welcome. Selected past issues of this newsletter are available on our web site, under "Articles" and then, "Employment". Alternatively, hard copies can be provided upon request. All best regards.

Sincerely;

Jay Josefo

—

I

REFERENCES - AVOID THE MINEFIELDS

A recent Ontario Court decision should teach employees, their managers and corporations how to avoid disputes, and expensive litigation, over references. References are an important tool for employees and for employers, each of whom often rely upon this fair assessment of ability.

Thus, the lesson from this case is not to forgo seeking and providing references. The key messages for all involved parties are as follows:

- Employees—direct a reference request to the most appropriate person, and ensure that the reference requested is indeed justified by work performance;
- Managers—provide fair references, absent any hint of malice, and ensure that the person requesting the reference from you has a legitimate right to do so;
- Corporations—consider centralizing all reference requests to be addressed by one individual, or through the Human Resources department, for a consistent policy-driven approach.

Using common sense and tact, the problems in the case discussed likely could have been avoided.

THE FACTS IN *MILLER V. BANK OF NOVA SCOTIA, AND YAMMINE*:

Miller, a personal banking officer with Scotia Bank (“Scotia”), worked evening hours several days a week as well as on Saturdays. Miller was not satisfied with these hours and sought new arrangements with her manager, Yammine. She was told that for several months, until the conclusion of the RRSP season, new arrangements would not be possible.

Subsequently, the Canadian Imperial Bank of Commerce (“CIBC”) offered Miller employment at hours that were more suitable to her. The offer from CIBC was contingent on satisfactory references, including from her last employer. Miller, whose employment agreement was terminable upon two weeks written notice, resigned by registered letter to her manager at Scotia.

Yammine, when contacted for a reference check, stated that Miller’s performance was above average, though added that her method and manner of resignation left something to be desired. The manager felt that the approach taken by Miller was cold, and expected a personal meeting rather than a registered letter of resignation.

This reference was, in CIBC's view, unsatisfactory. On the basis of the reference Miller’s employment was terminated. Once Miller learned of her manager’s statement in response to the reference request, Miller sued both Yammine personally as well as Scotia for slander. While recognizing that references were subject to the qualified privilege that attaches to such matters, Miller claimed that the manager acted with malice, so that the qualified privilege was lost.

THE DECISION:

The Court dismissed Miller’s claim. The Court noted that it was understandable that Yammine was displeased with the manner of Miller’s resignation. Accordingly, the comments made by the manager were justifiable and thus not defamatory.

The Court also concluded that the manger's remarks were not motivated by malice. A reference check is a legitimate inquiry. The manager thus had a legitimate reason to express frankly and honestly comments about Miller, both good and bad.

The Court did note, however, that the manager’s language may have been somewhat stronger than necessary, though the Court also stated that the manager believed that what she said was true as well as was necessary for the purposes of an accurate reference check.

LESSONS TO BE LEARNED:

- In this matter the employee clearly should not have resigned by sending a registered letter to her manager. This was, in my view, a cowardly way to deal with the issue. All of us should know that one “never slams a door”. When leaving for employment that is more suitable for whatever reason, one should strive for a classy exit. After all, one never knows where one may end up, career-wise—perhaps even working for the same manager at some point in the future!
- Yammine also could have tempered her remarks when providing the reference. While she was understandably miffed with the manner of Miller’s departure, this was, perhaps, peripheral to the real issue: whether Miller’s work performance was or was not satisfactory. The manager could have made some passing reference to the method of leaving, but should have focussed more on work performance and Miller’s suitability for the job in question.
- There was certainly a high cost paid by both the manager and Scotia for Yammine’s frankness. Even though they prevailed at the end of the day, it took a long time, and no doubt a lot of money, to reach the end of that particular day. The manager had to live with the stress of ongoing litigation for quite some time, which was likely a distraction both from work as well as from personal and family pursuits. Moreover, not every employer can afford the costs of a trial, as could Scotia in this matter.
- Remember, “least said, soonest mended”. That does not mean avoid references. But, I suggest that circumspection be the rule.
- Before references are provided, if there is no central “clearing house”, such as the HR department, in the organization, the person providing a reference should never do so when angry or upset because of the departing employee, or when upset for *any* reason. References should be provided only after fair reflection.
- Rather than spontaneously responding to a telephone inquiry, it is safer to take the name and telephone number of the caller seeking a reference, to verify their identity and also the legitimacy of their request. Then, return the call at either a scheduled later time, or whenever one is emotionally prepared to provide a fair reference.
- Providing a fair reference often requires a review of the employee’s human resources file, so a complete assessment can be made rather than an “off the cuff” opinion tossed out.
- Employers should also consider a reference policy. The policy would identify who can provide a reference and what steps must be taken before a reference, whether oral or written, is provided.

II

FIRED FOR THEFT—WITHOUT PROOF ***EMPLOYER FACES HUGE LIABILITY***

THE FACTS IN SCHIMP V. RCR CATERING LIMITED:

A Nova Scotia decision demonstrates the **dangers of precipitous action by an employer** who wrongly accused an employee of theft. The case involved Schimp, who began his employment as a banquet server. Subsequently, he became a bartender earning \$9.50 hourly plus tips.

Schimp's performance evaluations were generally quite good over the four years of his employment. But, he had problems with occasional tardiness, and had been suspended for this on one occasion.

Scheduled to tend bar at an event, Schimp arrived twenty minutes late to set up the bar. The Vice President of the employer expressed concern to Schimp about his tardiness. The Vice President testified at trial that he would have fired Schimp immediately, but needed him to tend bar that night.

At the end of the evening a supervisor spotted an open water bottle, which allegedly contained vodka. Schimp was accused of stealing liquor. He denied it, but was nevertheless fired and escorted from the premises. The dismissal process was highly public.

THE DECISION:

The Court concluded that the defendant jumped to the conclusion that Schimp was guilty of theft, or seized upon the issue in an attempt to justify firing Schimp for his tardiness that particular evening.

It was specifically noted in the decision that the employer neither retained nor had analysed the bottle with, allegedly, vodka. The dismissal was found to be without cause.

The Court particularly noted the "humiliating and degrading" nature of the dismissal, and its aftermath. Schimp could not obtain employment in the hospitality industry and returned to work in the family ventilation business. The physical work performed in that business exacerbated an old injury, with the result that Schimp had to have knee surgery.

Schimp, after 4 years service in a non-managerial bartending role, was awarded:

- four and a half months salary in lieu of notice (more than one month per year of service),
- vacation pay,
- an additional five hundred dollars monthly for the notice period, for the loss of earned gratuities,
- a favourable reference letter, which the Court ordered the employer to provide, to assist Schimp secure employment elsewhere,
- \$10,000.00 for loss of reputation as well as for the physical distress suffered when he exacerbated his knee injury,
- punitive damages equivalent to six months income (salary and tips),
- costs that would come close to completely indemnifying Schimp for legal fees.

LESSONS TO BE LEARNED:

- Habitual lateness that has not been condoned and that has been clearly documented, with the employee warned and subjected to progressive discipline, may well be “just cause”. Yet, other than the one instance of suspension in this matter, the employer in this case did not follow progressive discipline;
- Thus, in this case the finding that there was no just cause to dismiss Schimp was based on a solid evidentiary foundation, including the positive performance evaluations over the years;
- Employee theft should never be condoned. But, if theft is suspected, it must be thoroughly and carefully investigated to verify any suspicions. Suspicions, after all, may not be borne out following an investigation. Allegations of theft should never be made carelessly or recklessly;
- If an investigation reveals clear and convincing evidence of employee theft or malfeasance, then provide the employee an opportunity to explain. If the explanation is unsatisfactory, a dismissal for just cause may be appropriate. But, there can be no short cuts in this process. Legal counsel should review and discuss the various available options with you;
- Publicly humiliating an employee, even if there is some evidence to justify suspicions, must be avoided. The employer in this case paid dearly for what was either a fit of temper or a rush to judgement.
- Failing to preserve the evidence of the alleged theft, with the first allegation of such theft in the four years of Schimp’s employment made coincidentally at the event where the Vice President was angry at Schimp for arriving late, did not convince the Court that there was just cause;
- The heavy cost to the employer, in addition to the significant monetary components of the judgement, also included their own legal costs, management time invested on this matter, and the negative publicity that might have resulted once the judgement was publicized.

III

THE “DUTY TO ACCOMMODATE” – AS A POLICY

Most employers have specific human resources policies that pro-actively address human rights, sexual and other harassment, and other issues that often involve interpersonal relations between employees as well as between employees and their supervisors.

Recently, in fact, some employers have prohibited any personal (“dating”) contact between a superior and subordinate employee. These types of policies – including resulting “overkill” – are aimed at the prevention of problems that could arise, particularly when such a relationship ends.

Few employers have, however, **a policy that addresses the issue of workplace accommodation**. Typically, the need to accommodate an employee disabled because of a workplace or non-workplace injury or illness is addressed on an *ad hoc* basis. While the degree of particular accommodation necessary in each individual case will, of course, require a consideration of the factors unique to each case, it would be prudent and pro-active for employers to develop a general Accommodation Policy.

THE LEGAL REGIME:

Ontario employers are governed by the Human Rights Code (“Code”). Section 5 of the Code states as follows:

“Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, same-sex partnership status, family status or handicap.

5(2) Every person who is an employee has a right to freedom from harassment in the workplace by the employer or agent of the employer or by another employee because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, age, record of offences, marital status, same-sex partnership status, family status or handicap.”

The Code also defines the extent of the employer’s duty to accommodate. An employer must demonstrably accommodate an employee to the point of “undue hardship”. Section 17 of the Code states:

“17(2) The Commission, the Board of Inquiry or a Court shall not find a person incapable [of accommodation] unless it is satisfied that the needs of the person cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.”

THE BENEFITS OF AN ACCOMMODATION POLICY:

The employers' overall commitment to the principal of accommodation in the work place, as well as the description of the general approach, can be communicated in a short policy statement. Any particular case where such accommodation is required can then be administered according to the general principals expressed in the policy.

There is no "downside" to establishing such a policy. By contrast, there are many benefits to doing so. These include the following:

- Ensuring that all employees, and any representatives of your employees, are aware of the employer's ongoing acceptance of and commitment to the principal of workplace accommodation;
- Should the employer ever be the subject of a human rights complaint, grievance under the terms of a collective agreement or wrongful dismissal action alleging failure to accommodate, the existence of a policy may well be very helpful as convincing evidence of the employer's commitment to this process;
- When interacting with the treating physicians of an employee seeking accommodation, the existence of an accommodation policy may demonstrate to those physicians the employer's genuine commitment to this process;
- A well-drafted policy will establish the duties and expectations of all parties. Employees will know, for example, that they must provide objective medical reports which address the specific reason for the accommodation, and which reasonably estimate how long such any accommodation would be required. They would also know, through a well-drafted policy, of their obligation to co-operate with co-workers. Co-workers would understand their reciprocal obligation to support an employee in need of accommodation on a temporary, or even permanent, basis;
- A workplace accommodation policy that is properly communicated to all employees will also permit the employer to address any breaches of the policy, committed either by workers or by supervisors who may be recalcitrant to adhere to these obligations.

Ongoing breaches of the policy by a supervisor might eventually lead to a dismissal for just cause. If a manager, by continually failing to adhere, causes the employer serious legal jeopardy either through violations of human rights, or weakens the employer's position in any wrongful dismissal or other matter, this ongoing conduct might, in the proper case, be just cause for discipline or dismissal.

PROMOTING "BUY-IN":

For employers who have a bargaining relationship, in order to promote acceptance of the policy, union representatives must be consulted and involved at the earliest opportunity.

Indeed, the union representatives can become a valuable ally of management when the policy is jointly created, possibly through a special committee composed of both management and bargaining unit employees, and ultimately when the newly created policy is jointly presented to the workforce.

Early consultation with the union on this issue can also enhance mutual respect between the workplace parties generally, which respect may well help to resolve other pending issues or problems in the workplace.

If the employer does not have a bargaining relationship, then members of the health and safety committee, or other employee committees upon which rank and file employees participate, can become involved in the process at the outset. The reason for such involvement is to facilitate later “buy-in” when the policy is ready for implementation.

ACCOMMODATION & WHAT CONSTITUTES “UNDUE HARDSHIP”:
A Diminishing Requirement?

The recent Ontario Divisional Court decision of Roosma and Weller vs. Ford Motor Company of Canada and CAW, Local 707 involved two employees, members of the Worldwide Church of God, who sought religious accommodation. They informed their supervisor that they could not work Friday evening shifts because this was their Sabbath. Ordinarily, these employees worked two weeks on day shifts, then two weeks of night shifts. Accommodation because of their religious beliefs would require finding two other employees to perform their Friday night shifts for twenty shifts over the course of a year.

Both Ford and the CAW rejected suggestions for accommodation. The employer and its union jointly asserted that any such accommodation could not override the right of seniority, which permitted employees with more seniority a choice of preferential shifts.

THE DECISIONS:

A Human Rights Board of Inquiry concluded that the employer and union did not violate the human rights of these employees. The Divisional Court of Ontario, which judicially reviewed the decision of the Board, agreed that to accommodate these employees would have been an “undue hardship” for Ford and the Union.

While there was discrimination in employment because of religion, the Court considered:

- the impact on other employees in the plant;
- their hard-bargained seniority rights;
- issues of work safety and product quality, which would allegedly have suffered if there had been changes in the production schedule;
- costs of accommodation.

Considering these factors, two out of three Judges of the Divisional Court concluded that accommodating these two employees would result in an undue hardship. Their complaints were dismissed. One Judge, however, issued a strong dissent.

The dissenting Judge concluded that the employer, Ford, did not sufficiently prove that it had attempted to accommodate the employees to the point of undue hardship. The minority reasons concluded as follows:

“Ford adopted no strategy to plan for the complainants’ absences. None of the options presented by [the two employees] were tried, either alone or in combination. Ford never proposed other options that would have been acceptable to it.”

COMMENT:

The decision of the Majority was somewhat surprising, given that Boards of Inquiry and the Courts have often held large and sophisticated employers to a very high standard of accommodation. “Undue hardship” in these circumstances is generally tough to prove.

Larger employers are usually considered able to handle the cost burden necessary in order to implement appropriate accommodation options. Moreover, in this particular case, given the existing shift schedule the issue involved twenty Friday nights over a one-year period. It seems to me that seniority rights in these limited circumstances likely could have been protected sufficiently, while still accommodating the religious needs of the two individuals.

This case is heading to the Court of Appeal. Stay tuned for further developments.

For more information about workplace accommodation specific to your business, the creation of a policy, and how it may assist in your workplace, consult your employment relations lawyer or advisor.

IV

EMPLOYMENT PROTECTION IN THE FACE OF SARS

At the time of writing, the SARS health crisis has been effectively managed, with no community spread of the illness. Notwithstanding this good news, the illness had considerable cost, in human terms as well as in business losses.

Employers learned much about the need to respond quickly to enforce quarantine if a staff member was infected. The need for quick response was to prevent spread amongst other employees, for which the employer could be considered liable, as well as to prevent the illness from necessitating the subsequent quarantine of all staff, leaving an employer with “no hands on deck”.

PROVINCIAL LEGISLATION RETROACTIVELY PROVIDES LEAVE OF ABSENCE RIGHTS:

On April 30, 2003, the province introduced and passed the *SARS Assistance and Recovery Strategy Act*. The effective date of the Act was March 26, 2003. Similar to provisions in the *Employment Standards Act* that provides for emergency leave of absence rights, this new Act provides employees in quarantine or isolation, or subjected to public health orders, with certain job-protection rights. Emergency leaves of absences are, however, unpaid.

Following an emergency leave under this Act, an employee also has rights of reinstatement, which are similar to those contained in the *Employment Standards Act*. An employee must be returned to their position held prior to the leave of absence or, if that position does not exist, to a comparable position. No employee can be penalised, or dismissed, for taking such an emergency leave. An emergency leave is also available to employees required to provide assistance to a family member impacted directly by SARS.

The emergency leave days taken under this Act do not count towards the unpaid leave of absence days for employees provided by the *Employment Standards Act*. The emergency leave days under this SARS-specific legislation are separate and apart from those pre-existing leave days.

Realistically, the SARS crisis, seemingly now contained, will likely not be the last such health crisis that could impact any jurisdiction in the world. Employers thus are wise to review their systems and processes, and critically consider whether things done during this last crisis could have been better done. In that way, we can effectively respond when confronted with future challenges that necessitate crisis management and prompt response.

To recipients of this newsletter outside of Toronto, please be assured that **Toronto is a safe city to visit**, either as tourists or for business purposes.