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EMPLOYMENT NOTES AND NEWS

Dear Friends;

Though the days currently are short, I hope that you still manage to enjoy each one! These articles may assist as you continue to meet the daily challenges of people and issues management. Your feedback or suggestions are always welcome. All best regards.

Sincerely;

Jay Josefo

I

WORKPLACE HARASSMENT ISSUES

…Handle Pro-Actively with Care and Avoid Expensive Liability!

The decision of the Saskatchewan Human Rights Board of Inquiry in Lam v. Westfair Foods Ltd. demonstrates how a pro-active employer response to a complaint of racism can avoid liability.

THE FACTS:

Lam, of Chinese ethnicity, was the loss prevention officer for a Westfair store in rural Saskatchewan. Another employee used the descriptive term, "chinamen" on several occasions when describing two potential shoplifters. Lam told the other employee that this term was inappropriate.

The other employee, even faced with this clear message that his comments were unwelcome, persisted by asserting that, “so what, that’s what they are, chinamen”.

In the absence of the store manager Lam spoke to the assistant store manager. The assistant manager told Lam that he would “speak to” the offending employee. Unsatisfied with this vague and wishy-washy response, Lam emailed three senior members of the corporate management team. One recipient immediately called Lam to confirm receipt of his email. She also told Lam that Westfair had a zero-tolerance policy for discriminatory conduct and behaviour, and that the matter would be investigated promptly. Another also followed up and sought more information from Lam. Finally, the Industrial Relations Director travelled to the rural store to investigate the matter.

The investigation concluded within two weeks of Lam sending the emails. At a meeting involving Lam, the offending employee, and senior management including store management, the offending employee apologized to Lam. Another finding from the investigation was that the assistant manager, to whom Lam initially complained, did not address the matter with sufficient alacrity. The offending employee and the assistant manager received formal reprimands and other discipline from Westfair, including sensitivity training. Lam also received assurances, again, of the company’s zero tolerance policy. He was told that no form of racism would be tolerated.

For some reason, Lam remained unsatisfied. He subsequently quit his employment and filed a Human Rights Complaint. The Complaint, however, was ultimately dismissed.

DECISION OF THE BOARD OF INQUIRY:

The Board of Inquiry concluded that, while the other employee had indeed directly discriminated against Lam, Westfair had not done so. In fact, the Board found that Westfair handled the situation in a very positive, timely, and reasonable fashion.

It assisted Westfair that it had a strong Workplace Harassment Policy, and that the company was prepared to, and indeed, did, enforce this policy. The Board also found that, after a complete investigation, the offending employee apologized, was disciplined for his conduct and sent to a seminar on workplace harassment for sensitivity training. It was also concluded that Lam received assurances that the company would not tolerate this type of conduct, which assurances the Board concluded were realistic, given the isolated nature of the events in question and the prompt response.

It was further concluded that Lam’s subsequent action of quitting was not reasonable, given the circumstances.

LESSONS TO BE LEARNED:

- Westfair avoided liability in this matter because they had a strong policy in place and, as demonstrated by this case, were prepared to promptly investigate allegations of harassment and racism. Thus, promptly responding to such complaints and facing the issue straight on, instead of hoping the matter will go away, is a wise approach.

- That the company disciplined both the offending employee and the assistant manager also likely helped avoid liability. The nature of the suitable punishment imposed by the employer, including reprimands, a public apology and mandatory training, also likely influenced the decision of the Board.

- Where Westfair almost fell down was at the beginning. In the absence of the store manager, the assistant manager was initially prepared to minimize, or to "fob off", the complainant. Understandably, Lam was not satisfied with this response, and pursued the matter further.

- If his email to senior management had been similarly ignored with the issue again not taken seriously, then I believe the result would have been vastly different. In that case, I suspect the company would have incurred significant liability.

This case demonstrates the ongoing need for an appropriate and applicable workplace harassment policy, which includes statements borrowed from applicable Human Rights legislation, and that condemns any form of discriminatory conduct or action. Such policies should be regularly reviewed and updated when required. They can't remain "on the shelf" gathering dust.

The decision also demonstrates that such policies can't be understood and known by only a few people in the Human Resources department. Rather, all supervisory and management staff must be sufficiently trained so they know how to respond appropriately to complaints. At the least, first level supervisors must know to whom they should call if they have questions or need help when facing such issues. In fact, they should be encouraged to call and consult with HR or IR staff in such potentially explosive cases, particularly when their direct manager is absent.

Employees also should be made aware of their rights and options available from the employer, and of the internal complaints investigation process available at the employer. It is far better for employers—and employees too—if such complaints are satisfactorily resolved on an "in-house" basis, without employees feeling the need to involve outside parties, such as Human Rights Commissions. Once the Commission (in any province, except British Columbia where the Commission no longer exists) becomes involved, the matter becomes much more complicated, harder to settle, and ultimately more expensive. A public complaint can also damage a corporate reputation as well as impact upon employee morale.

Mandatory training of all supervisory levels as to what constitutes workplace harassment and what is and is not acceptable conduct should be implemented. Occasional refresher training, in addition to training for new hires, is also a good idea.

The "corporate culture" must reflect the values and words enunciated in the various policies. Essentially, the applicable company policies must be seen by employees as *real,* and not just an example of "lip-service" if these policies are to both set the right tone and also help insulate the corporation from expensive liability.

II

HUMAN RIGHTS ABUSE LEADS TO PERSONAL LIABILITY

***Company manager ordered to pay almost $100,000 for sexual harassment;
Company found not liable (but…).***

THE FACTS:

In an interesting twist, SkyCable Inc. of Manitoba ostensibly escaped liability when one of its former senior managers was found to have sexually harassed four female subordinate employees. The Canadian Human Rights Tribunal, before whom the matter proceeded, concluded that Dan Lynn must pay sums ranging from $17,000.00 to over $32,000.00 to each of the four employees. The Tribunal concluded that Mr. Lynn's sexual harassment consisted of acts that were:

"…clearly persistent, repetitious and serious enough so as to create a hostile work environment for all of the claimants".

The four employees had filed separate human rights complaints in December 1998 alleging essentially a "poisoned work environment". The poisoned work atmosphere took its toll on the complainants' health leading to documented physical ailments and stress, culminating in each of the four employees leaving work.

Lynn's management approach was also called into question. Witnesses testified that he was a "…foul mouthed individual with an extremely volatile temper".

The Tribunal concluded that, notwithstanding that SkyCable was the employer of the four women, Lynn was personally ordered to make payment to the victims. But, it appears that the corporate entity did not escape unscathed in this matter. The decision notes that the complaints made against SkyCable were withdrawn, following negotiated settlements in 1999.

The negotiated settlements were, based on my experience, likely substantial. Thus, whether the employees can collect from Lynn may not be ultimately so important.

LESSONS TO BE LEARNED:

- Corporate liability could have been minimized, if not entirely avoided, if the company had handled the matter pro-actively. Employers of individuals like Mr. Lynn, and employers often tolerate hard-nosed bosses, need to ensure that supervisors do not cross the line from being a demanding boss to someone creating a hostile or poisoned work environment.

- It is the duty of management to ensure, pro-actively, that such issues are avoided, instead of having to later resolve them at great expense of time, money and legal resources.

III

“UNCONSCIONABLE” TREATMENT BY EMPLOYER LEADS TO RELEASE SET ASIDE

…Hardball tactics by employer undermine settlement attempt.

THE FACTS:

After 19 years of employment, Reitmans Canada dismissed a 59-year-old employee with a grade 10 education and limited other employment experience. The Chief Justice of the Supreme Court of Newfoundland and Labrador ruled that, when Reitmans required Eileen Howell to sign a release in order to receive severance pay of $6,000, it acted in an unconscionable manner.

On the day Howell was dismissed, she was summoned to the back of the store and provided with a letter confirming her dismissal from employment. The letter stated that Howell would receive working notice of six weeks plus vacation pay owing at the time. In order to receive the additional $6,000.00 in severance pay, however, Howell was required to sign Reitman’s form of release.

Before consulting a lawyer, Howell, whose husband was also unemployed, signed and returned the release. She subsequently obtained legal counsel, who moved to set aside the release.

THE DECISION:

Chief Justice Derek Green concluded that there was clearly an:

“…inequality of bargaining power arising out of ignorance, need or distress of the weaker party”.

The Chief Justice also noted that there is an “obligation of fair dealing”, which an employer must meet when dismissing an employee. The Court also found that Reitman’s, the stronger party, unconsciously used its position of power to obtain an advantage when it required Howell to sign a release before she would receive her severance pay. The Court noted that Ms. Howell would have been entitled to much more notice than six weeks, whether or not she signed a release.

By attempting to so dramatically limit Howell’s rights, including her rights to claim through human rights and labour standards laws, the court found that the company had vastly overreached itself.

The Court concluded that the dismissed employee would be entitled to notice (or pay instead) well in excess of twelve months and maybe as high as eighteen months. Thus, the working notice and lump sum that, combined, totalled approximately five and a half months notice was far short of this range. The Court also concluded that, even though it set aside the release, Howell could keep the $6,000.00 she had received pending the outcome of trial.

LESSONS TO BE LEARNED:

…"terminations without tears", or, how to minimize liability in a "no-cause" dismissal—A Primer for individual, "without cause" employee terminations:

- Employers who play "hard-ball" do so at their peril. The Supreme Court of Canada has indeed confirmed that employers have a duty to treat their employees fairly throughout the employment relationship, and, in particular, when that relationship is coming to a close.

- When a decision has been made to dismiss an individual on a "without cause" basis, the actual process should be as stress-free as possible for all parties involved. Usually, it is best to have the dismissed employee meet with his or her manager as well as with a representative from the Human Resources department. The meeting should take place in a "neutral" and private room, at a time of day when few other employees are around. First thing in the morning, lunchtime, or the end of the day are often most appropriate. Dismissals should take place early in the week and, in my view, never on a Friday afternoon.

- Friday afternoons are best avoided, because the dismissed employee is essentially cut-off from his or her business network over the next 48 hours. Instead of taking immediate, constructive steps to obtain new employment, he or she only "stews" all weekend long, and manages also to upset their spouse and family members. After stewing all weekend long, the odds of the dismissed employee bursting into a lawyers office first thing Monday morning and demanding redress, is much higher, even if the package presented was a reasonable one.

- Watch out also for terminations close to the holiday season (best avoided) or at any time when it would be inappropriate (just after a spouse undergoes serious surgery, for example, or on the birthday of the departing employee). For middle or upper management employees, "outplacement" support should be considered. While expensive, this can help the dismissed employee focus energies on a job-search, instead of on litigation against the employer.

- If an employee is being dismissed immediately with no working notice, it is important to sever computer access just before or while the dismissal interview takes place. The employer should also have boxes available, to enable the dismissed employee to remove personal, and only their personal, belongings. If the dismissed employee does not have a car, it is appropriate to provide a taxi chit, or to make some arrangements to assist the dismissed employee with the removal of their personal effects. Prior to the dismissed employee leaving the company premises, all company property should be returned, or arrangements should be made for the prompt return of such documents. This includes client lists and sensitive corporate information.

- The termination meeting itself should be short and to the point, to ensure that the dismissed employee realizes that there is no benefit to rehashing past issues, and that the decision is a final one. The dismissed employee should also be told that he or she is not being cast adrift with nothing, and that a package is offered in exchange for an executed release. The dismissed employee should be encouraged to take the details of the offer home for consideration over the

next few days, along with any advice that is believed necessary. If the terms are acceptable, then the employee should return the release completed in exchange for the proposed "package".

Allowing some time for consideration of the offer will go a long way to avoid allegations that an employer acted in an unconscionable manner. It should be clear that the package offered for which a release is sought is more than the minimum legislated amounts to which the employee would, in any event, be entitled. It should also be clear that, if the dismissed employee rejects the offer, then he or she is still entitled to the minimum amounts without any pressure or fear of retribution. In such circumstances where no release is signed, the employer may even want to provide what it believes, reasonably, is the legitimate common-law notice amount. In such circumstances, there can then be no question of "hard-ball". Moreover, if the strategy is properly executed, the employer may even have entitlement for legal costs if the employee persists in pursuing a baseless claim.

Generally, <u>a reasonable settlement offer, keeping in mind the key factors of age, length of service, position held and ability to relocate, will likely be accepted</u>. Making such an offer in the first place would likely avoid the type of situation in which Reitman's found itself – spending far too much time in Court and far too much money on lawyers then necessary. Litigation, after all, is "life looking in the rear-view mirror", and forces constant re-examination of past choices. It is much more rewarding, I suggest, to move forward on more productive pursuits than law-suits.

Moreover, a creative method of capping your dismissal costs could include structuring the package to provide ongoing weekly payments up to a fixed time, or until the employee finds new employment, whichever occurs first. Fifty per cent of the remaining amount, should the employee find employment before the end date, would be paid in a lump sum (net of necessary withholdings) to the dismissed employee. Such a package generally motivates a dismissed employee to seek work promptly, given that he or she will reap a "windfall" of a lump sum amount when new employment is found. This also caps and may well reduce the employer's severance costs.

Keeping in mind statements of the Supreme Court of Canada, <u>it is important that employers treat employees with dignity and respect at a difficult time for both the dismissed employee as well as for the manager and Human Resources representative implementing the dismissal</u>. Fair treatment will go along way to avoid later recriminations, legal action, and the associated expense both in terms of dollars and time wasted with your lawyer.

IV

<u>"DIRECTORS, DO YOUR DUTY!"</u>

UPM-Kymmene Corp. vs. UPM-Kymmene Miramichi Inc. (Ontario Superior Court of Justice, June 20, 2002)

…Court refuses to enforce extravagant employment agreement.

THE FACTS:

REPAP, a Canadian public company had engaged a non-executive chairman named Berg. Berg prepared his own extremely lucrative employment agreement for approval by the Board of Directors.

After two Directors resigned in protest, Berg replaced them with new Directors more compliant with the Chairman's wishes. Berg did not disclose to the Board of Directors that a consultant who prepared a "fairness opinion" on the employment agreement had complained of a lack of sufficient time in order to prepare a complete assessment. Berg did also not disclose the existence of negative opinions expressed on the terms of his employment agreement by Management as well as by the former board members.

The compensation committee of the newly constituted Board, without having reviewed or discussed Berg's Employment Agreement, recommended that it be approved. The Board did approve the agreement.

Sometime later, after further corporate machinations, Berg was not nominated for re-election as a director. Based upon this, he terminated his employment and started a lawsuit, seeking **U.S. $ 27 million** in benefits and payments allegedly owing under the employment agreement. The plaintiff, UPM, a shareholder, brought an oppression action to set aside the agreement. The new owner of REPAP also sought aside to set aside the agreement, because it was fraudulent.

THE DECISION:

Madam Justice Lax of the Ontario Superior Court of Justice concluded that Berg had breached his fiduciary duties to REPAP when he negotiated and presented the employment agreement for the approval of the Board of Directors. The Court also concluded that the compensation committee and the Board of Directors failed in their obligations to obtain necessary information upon which to form a reasonable judgment about whether or not to approve the employment agreement.

The Board of Directors should have questioned the agreement terms, according to the Court, and the approval process should have been delayed to allow such discussion and debate.

The Court referred to the "Business Judgment" rule, and concluded that this rule could not be applied to protect the Director's decision from judicial review. The rule could not be applied in this case because the employment agreement was so egregious and unreasonable.

The "Business Judgment" rule operates to shield from Court intervention business decisions that have been made honestly, prudently and in good faith as well as on reasonable grounds. Once those preconditions are met, decisions of a Board will not be subject to microscopic examination. The Court will generally be reluctant, in such cases, to interfere, second-guess and essentially to usurp the Board of Directors' functions in managing the corporation.

In this case, because the agreement was so one-sided and unfair, it was obvious that the process followed had not led to an honest, prudent, reasonable and good faith decision. Thus, the terms of the agreement were set aside. Berg was not entitled to the multi-million dollars of damages sought.

LESSONS TO BE LEARNED:

- The Ontario Court in this decision sent a clear message to Boards of Directors as to their obligations. While it is easy to succumb to what is commonly called "group-think" in such situations, members of corporate boards must clearly resist this temptation.

- Being the "devil's advocate", and asking probing, necessary questions, are part of what corporate directors are expected to do. While executives expect and are entitled to fair compensation, a determination of what is appropriate in the circumstances must be made in proper context and on the basis of reliable and informed advice. Clearly, a U.S. $ 27 million package for a non-executive chairman should, in and of itself, ring alarm bells amongst any reasonable Director. Indeed, two such Directors of Repap dissented and quit rather than be associated with such a package.

- What constitutes "due diligence" is beyond the scope of this article, but being duly diligent is not only a director's responsibility. In many cases when Courts scrutinize past acts, it is wise that a party to an action can establish their due diligence through business records and other evidence. The establishment of due diligence, coupled with the "Business Judgment" rule, will often protect corporate and other decisions from being second guessed and endlessly revisited.

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