MANAGEMENT COUNSEL
Employment and Labour Law Update

SHERRARD KUZZ LLP
Employment & Labour Lawyers

A reference that overstates or, worse, misstates the poor performance of a former employee can expose the reference giver to damages under the tort of intentional interference with economic relations.

Don't Put Yourself Behind The 'Reference 8-Ball'

In a recent decision of the Ontario Superior Court, a plaintiff was awarded $200,000 in damages in part because a former employer was found to have "blackballed" the plaintiff preventing him from finding employment in his field of expertise. The Court found this to constitute the tort of intentional interference with economic relations.

FACTS

Mr. Kevin Drouillard was twice employed by Mastec Canada ("Mastec"), first in February 2001 and then again in May 2001. On the first occasion, Mr. Drouillard was terminated before he reported for his first shift. On the second occasion, he was terminated after having worked less than half a day.

Both times Mr. Drouillard was terminated because a supervisor employed by Mr. Drouillard's former employer, Cogeco Cable Inc. ("Cogeco"), had contacted Mastec and either insisted or strongly recommended that Mr. Drouillard not be allowed to work on any project related to Cogeco.

For its part, Mastec wanted to keep Mr. Drouillard as an employee. However, Mastec's largest client was Cogeco which held a virtual monopoly on the cable industry in the area where Mr. Drouillard lived and worked. As such, the economic reality was that Mastec had little option but to accede to Cogeco's request to terminate Mr. Drouillard.

For three years Mr. Drouillard made efforts to find employment in his field of expertise. However, Cogeco's influence intervened. Finally, Mr. Drouillard found employment in another field.

Ultimately, Mr. Drouillard commenced an action against Mastec and Cogeco for damages for the tort of intentional interference with contractual and economic relations.

THE TRIAL

Considerable evidence was lead regarding Mr. Drouillard's performance while at Cogeco. In the end, the evidence suggested that the root of the problem was not Mr. Drouillard's performance or attitude, but rather a personal vendetta held by a supervisor resulting from a workplace altercation some years prior.

THE AWARD

The Court's decision is interesting for a number of reasons.

1. No Liability Against Mastec

While one might have expected the Court to have imposed some liability on Mastec for hiring Mr. Drouillard and then almost immediately terminating his employment, the Court was satisfied that Mastec had acted not out of malice but rather a legitimate business concern to keep its primary customer happy. As such, the Court declined to find any liability as against

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Mastec. Instead, it was against Cogeco that the Court directed its harshest criticism.

2. The Tort of Economic Interference

The Court identified three elements which must be proved in order to establish the tort of intentional interference with economic relations:

1. An intention to injure the plaintiff.
2. Interference with business or economic relations by illegal or unlawful means.
3. Resulting economic loss.

Regarding the first element - an intention to injure - the Court held that it was not necessary to prove that Cogeco's predominant purpose was to injure Mr. Drouillard, so long as the unlawful act was in some measure directed against Mr. Drouillard. In this case the Court had no trouble finding that Cogeco had intended to injure Mr. Drouillard directly and that its actions had been taken in an effort to "engineer [Mr. Drouillard's] termination".

Regarding the second element - interference by illegal or unlawful means - the Court accepted a broad interpretation of the terms "illegal" and "unlawful" to include "without legal justification", "improper" and "unwarranted". In other words, it is not necessary that the offending action breach a law or agreement - it is sufficient that the action be taken "improperly" or without reasonable basis. In this case, the Court found that while Cogeco had a policy that allowed it to reject employees of its sub-contractors for "reasonable cause", Cogeco was unable to demonstrate that it had "reasonable cause" to reject Mr. Drouillard.

Regarding the third element - economic loss - the Court found overwhelming evidence that Mr. Drouillard had suffered economic loss. Cogeco had put Mr. Drouillard out of work for more than three years.

3. Damages

The Court ordered Cogeco to pay Mr. Drouillard $200,000 in damages - $137,000 on account of lost earnings and an additional $63,000 on account what is referred to as non-pecuniary losses (humiliation, loss of reputation and loss of career, etc.).

The non-pecuniary loss distinguishes this type of lawsuit from a traditional wrongful dismissal. Damages for the tort of intentional interference with economic relations are "at large". That is, their assessment is a "matter of impression and not addition", and may include indirect losses such as loss of reputation, injured feelings, or punitive conduct suffered.

LESSONS LEARNED

There are two important lessons to be learned from this case.

First, while the decision does not eliminate a contractor's right to determine which of a sub-contractor's employees may be given access to a worksite or project, it is fair to say that any decision to restrict access must be made on a legitimate and non-discriminatory ground.

Second, while this case is not about "reference giving" *per se*, the decision reinforces the fact that employers must be vigilant when giving references regarding former employees. A reference that overstates or, worse, misstates the poor performance of a former employee can expose the reference giver to damages under the tort of intentional interference with economic relations. As such, best practice suggests the following reference giving protocol. Whenever possible:

1. All references should be in writing
2. All references should be signed by a member of senior management (which may include a senior human resources manager).
3. Any reference that contains subjective commentary about an employee's poor "performance" should be vetted by counsel.
4. The content of a reference letter should be accurate, and neither under- nor over-state an employee's performance.
5. The departing employee should "sign off" on the reference, preferably within the context of an overall settlement and release.
6. A reference giving protocol should be published within the workplace together with a warning that the failure to following the protocol may result in discipline up to and including termination.

If you would like to learn more about these issues, including the do's and don'ts of reference giving, please contact any member of our legal team. We will be pleased to assist you.

Employees' Personal Information Must Be Safeguarded In Business Transactions

The Alberta Privacy Commission has issued a Report sharply criticizing two law firms for the improper disclosure of personal employee information during the course of a commercial transaction. The Report underscores that the personal information of employees who are impacted by a business transaction must be safeguarded, and that an employer's obligations under privacy laws may not be trumped as a matter of commerce.

FACTS

During the course of a commercial transaction, the vendor provided to its lawyers certain documents containing personal information about employees affected by the transaction. Unfortunately, the vendor provided more personal information than was necessary to appropriately complete the transaction - information that included employees' home addresses and Social Insurance Numbers. The vendor's lawyers failed to review the documents and to remove the personal information. Instead they provided the documents to the purchaser's lawyers. In accordance with securities regulations, that personal information was then posted on the internet through "SEDAR" - an electronic filing system for the disclosure of documents of public companies and investment funds in Canada. Following posting on SEDAR, all of the information was publicly accessible.

The web posting of employees' home addresses and Social Insurance Numbers violated privacy laws.

FINDINGS OF THE PRIVACY COMMISSIONER

Following a complaint by an individual employee and an investigation by the Office of the Information and Privacy Commissioner, a Report was issued on July 12, 2005. In the Report, the Alberta Privacy Commissioner's office found that the vendor and the two law firms had failed to comply with the province's privacy legislation - the Personal Information Protection Act ("PIPA"). Specifically, the parties ran afoul of subsection 22(3)(a) of PIPA by disclosing personal information pertaining to employees in the context of a business transaction.

Under PIPA, there is a general prohibition against the collection, use and disclosure of personal information without the consent of the person to whom the information relates. Subsection 22(3)(a) of PIPA creates an exception for information collected, used or disclosed in the course of "business transactions." The exception will apply if "the parties have entered into an agreement under which the collection, use and disclosure is restricted to those purposes that relate to the business transaction, and if the information is, necessary (a) for the parties to determine whether to proceed with the business transaction, and (b) if the determination is to proceed with the business transaction, for the parties to carry out and complete the business transaction."

In this case, although the parties had entered into an agreement that restricted collection, use and disclosure of personal information to business transaction purposes, the vendor had disclosed personal information that was not "necessary". The breach was compounded when the personal information was posted on the internet.

The Alberta Privacy Commission concluded that the personal information disclosed was not "reasonably required … for the sole purposes of establishing, managing or terminating the employment relationship", and thus constituted improper disclosure under PIPA. The Privacy Commissioner also found that the dissemination of the personal information through SEDAR constituted a second breach of PIPA because, although securities laws require the posting of material contracts (such as a purchase and sale agreement), the Alberta Securities Commission permits removal of personal or sensitive information before a material contract is posted on SEDAR.

The Privacy Commissioner issued declarations that the three parties (the vendor and two law firms) had failed to comply with PIPA. The Commissioner also issued recommendations to the two law firms, including in-house training for all lawyers and staff, a review of processes and controls regarding material contracts and postings on SEDAR and the establishment of a 'privacy contact' in the specific office involved.

LESSONS LEARNED

While the Commission's Report was a rude awakening for some in the corporate/commercial world, its conclusions apply equally to human resources professionals - and their lawyers - who consistently handle sensitive employee data. Many of us have long understood and appreciated the importance of safeguarding the sanctity of employee personal information. The enactment of private sector privacy legislation federally, and in the provinces of British Columbia, Alberta and Quebec, further underscores these issues.

Within in the context of a business sale, acquisition or merger, best business practices for organizations should entail a careful consideration of the following questions:

1. Do any of the jurisdictions in which impacted individuals are employed have data privacy laws that may prohibit or otherwise restrict collection, use and/or disclosure of personal information?
2. Which employee data elements must necessarily be collected, used or disclosed to enable the transaction to proceed or to facilitate a transfer of employees to employment with another entity?
3. Is there employee data that a party to the transaction should seek to collect directly from its new employees *after* the business transaction closes, rather than indirectly (and perhaps unlawfully) in the course of completing a business transaction?

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4. Is there appropriate language that could be placed in the transaction documents to describe how the parties will safeguard employee information through the completion of their business transaction (or arranging for its return or destruction if the transaction is not completed)?
5. Is any party to the transaction a public company, and will the business transaction constitute a "material" transaction for such company? If definitive agreements must be filed and posted, will applicable securities laws permit removal of certain employee information before filing and posting?

The lawyers at Sherrard Kuzz LLP have considerable experience assisting employers to understand and navigate the many employee-related privacy issues that can arise within the context of a merger or acquisition transaction. If you would like to discuss these issues, please give us a call.

DID YOU KNOW?

On Sept. 21, 2005 the owner of an Ontario automotive repair business was sentenced to 7 days in jail and 6 months' probation for preventing Ministry of Labour inspectors from conducting a routine, unannounced inspection under the *Occupational Health and Safety* Act?
For information about your organization's rights and obligations under the OHSA, speak with any member of the Sherrard Kuzz team.

SHERRARD KUZZ LLP
Employment & Labour Lawyers

155 University Avenue, Suite 1500
Toronto, Ontario, Canada M5H 3B7
Phone 416.603.0700
Fax 416.603.6035
24 Hour 416.420.0738
www.sherrardkuzz.com

BREAKFAST SEMINAR

Next in our series of employment and labour law updates:

HReview Seminar Series

TOPIC: **Don't Throw in the Towel - Recent Cases that Assist Employers!**

- Just cause still exists
- Accommodation has its limits
- Employment contracts are enforceable
- Employees can be penalized for unmeritorious claims

DATE: Thursday, November 17, 2005, 7:30 a.m. — 9:00 a.m. (program to start at 8:00 a.m.; breakfast provided)
VENUE: Toronto Board of Trade Country Club, Fireside Lounge - 20 Lloyd Street, Woodbridge, ON 416.746.6811
Please RSVP by Oct. 15, 2005 to T. 416.603.0700, F. 416.603.6035 or E. emarcelino@sherrardkuzz.com

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