

July 9, 2012

Employers and Applicants must be cautious in making Pre-Hiring Representations

By Karin Pagé

In most cases, the hiring of an employee will involve a negotiation – salary, benefits, hours, job title, moving expenses – the list goes on. Inevitably, it also involves representations – representations by the employer about the work, the expected income, growth potential, etc. Similarly, the applicant represents to the employer his or her qualifications for the position, both in the form of a resume and during an interview and in follow-up conversations. Such seemingly innocent representations, if overstated, may have legal repercussions for either party.

In addition to breach of contract, employers and employees may face liability for misrepresentations in the law of tort. The tort of *fraudulent* misrepresentation occurs where one side makes a statement of existing fact either knowing it to be untrue or being reckless as to its truth and the other party relies on the representation to its detriment.

More common in the employment context is the tort of *negligent* misrepresentation which requires the following elements:

1. there must be a duty of care based on a "special relationship" between the representor and the representee;
2. the representation in question must be untrue, inaccurate, or misleading;
3. the representor must have acted negligently in making the misrepresentation;
4. the representee must have relied, in a reasonable manner, on the negligent misrepresentation; and
5. the reliance must have been detrimental to the representee in the sense that damages resulted.

In the well-known case of *Queen v. Cognos*, [1993] 1 S.C.R. 87, the employer was found liable for the tort of negligent misrepresentation, and thus unable to rely on the termination provision of the employment contract. In that case, the employee was misled about the security of the position, which induced the employee to leave his previous permanent position and move to Ottawa to take up the new job. Employers must also be careful not to overstate the income that might be earned by the employee.

Prospective employees too must be wary of overstating their credentials to potential employers. If they do, such may be grounds for dismissal. (See *O'Donnell v. Bourgault Industries Ltd.*, 1999 CanLII 12726 (S.K. Q.B.), affm'd 2002 SKCA 38 (CanLII)).

However, not every misrepresentation will rise to the level of "just cause" giving an employer the right to terminate the employment without notice. In *Islip v. Coldmatic Refrigeration of Canada Ltd.*, 2002 BCCA 255 (CanLII), the employee had falsely represented the amount of his previous salary in order to improve his bargaining position with the defendant. The court considered whether Islip's pre-contractual false



PERLEY-ROBERTSON,
HILL & MCDUGALL LLP/s.r.l.

representation of the amount of his previous salary should allow the employer to avoid the contract or justify the employee's termination. In considering the matter, the court applied the following test for fraudulent misrepresentation:

1. the wrongdoer must make a representation of fact to the victim;
2. the representation must be false in fact;
3. the party making the representation must have known the representation was false at the time it was made; and
4. the victim must have been induced to enter into the contract in reliance upon it.

It is on this final element of the test that the employer's argument failed. It could not establish that it would not have agreed to pay Islip \$75,000 if it had known that his previous salary was only \$61,000. The court held that this was not of critical importance to the hiring decision.

These cases reinforce the need to be honest and forthright in pre-hiring situations or risk the consequences if and when the relationship ends.

The law of tort will intervene to protect parties from their reasonable reliance on negligent and/or fraudulent representations, even in the face of a written contract limiting an employer's liability upon termination.

Karin Pagé is a lawyer in our Litigation Law Group. She can be reached at kpage@perlaw.ca or 613.566.2860..