Four key pre-employment steps and precautions

Canadian courts offer guidance to employers

Attracting and hiring the right candidate is important. However, employers often ignore or give insufficient attention to key pre-employment steps and precautions. Several recent decisions from Canadian courts have provided employers with important guidance regarding: 1. reference checks 2. representing the position 3. the timing of when the employment contract is signed and 4. the inclusion of a probationary period.

Shana French and Brian Wasyliw
LEGAL VIEW

References: "Tell me what you really think"

Many employers have moved away from reference checking because too often little meaningful information is provided by the reference giver out of a fear of being sued for a negative reference. However, as recent cases have shown, a former employer will not be liable for a negative reference provided it was made without malice.

In the 2016 Ontario case *Kanak v. Riggin*, an employee sued her former manager whose reference included the fact the employee worked well in an autonomous position but not in a collaborate environment or under stress. As a result, a conditional offer was rescinded and the employee sued the former manager for defamation. At trial, the court was satisfied the comments were defamatory on their face, but because they were given without malice, were covered by qualified privilege, and the claim was dismissed: "... an employer must be able to give a job reference with candour as to the strengths and weaknesses of an employee, without fear of being sued in defamation for doing so. Without this protection, references would either not be given, or would be given with such edited content as to render them at best unhelpful or at worst misleading to a prospective employer."

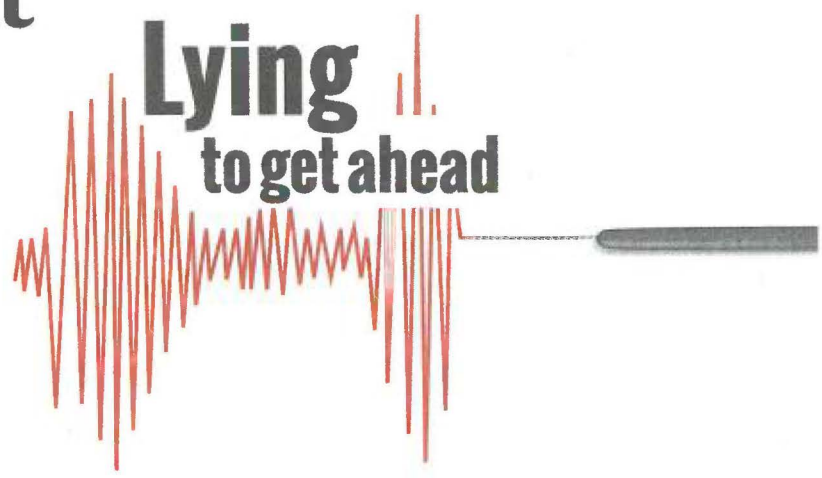
Accurately represent the role

Where a prospective employer makes a negligent misrepresentation about the position and the employee relies on the representation to his detriment, the employer may be liable for any damage suffered.

Consider the 2017 British Columbia case *Feldstein v. 364 Northern Development Corp.* Cary Feldstein had cystic fibrosis. During his pre-employment interview, he inquired about LTD coverage and was advised the company offered benefits after a three-month probationary period. He also received a benefits summary which contained a "Proof of Good Health" heading and a statement that "Approval would be required for coverage in excess of $1,000 and any increase in that coverage of 25% or more of $5,000, whichever is greater." When Feldstein inquired with the employer about the meaning of "Proof of Good Health," he was led to believe if he worked for three consecutive months, he would be approved for benefits in excess of $1,000 per month, despite his pre-existing condition.

Not surprisingly, this is not what the provision meant and when Feldstein applied for LTD coverage, he was approved, but only for $1,000 per month, as compared to the $4,700 he expected to receive, on the basis he failed to complete a medical questionnaire when

PRECAUTIONS › pg. 14



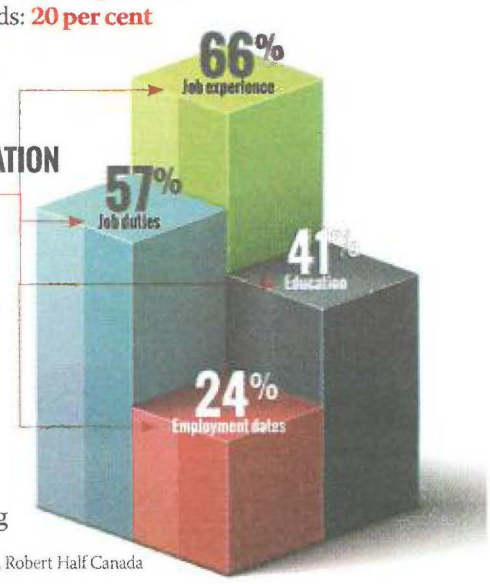
One-half (49 per cent) of Canadian employers have caught a lie on a job applicant's CV.

THE MOST COMMON LIES?

- Embellished skill set: **58 per cent**
- Embellished responsibilities: **53 per cent**
- Job title: **32 per cent**
- Academic degree: **31 per cent**
- Companies worked for: **31 per cent**
- Dates of employment: **27 per cent**
- Accolades/awards: **20 per cent**

Source: CareerBuilder

MISREPRESENTED OR EXAGGERATED INFORMATION ON RESUMES



More than **one-third** of Canadian workers **(37 per cent)** said they know someone who included false information on a resumé.

Thirty-five per cent of senior managers said their company has removed an applicant from consideration for a position after discovering he lied.

Source: OfficeTeam, Robert Half Canada

Notable cases

***Papp v. Stokes*, 2017 ONSC 2357 (Ont. S.C.J.):** After interviewing Adam Papp, the Yukon government called Ernest Stokes, Papp's former employer, for a reference. Stokes said Papp was let go because "he was not needed anymore and had a performance and attitude issue." He also said Papp didn't work well in a team setting. Papp wasn't hired and he sued his former employer for wrongful dismissal and defamation. The court agreed Stokes' comments were defamatory on their face, but said there was evidence to support what Stokes said was true, so it was not defamation.

***Nagribianko v. Select Wine Merchants Ltd.*, 2016 CarswellOnt 891 (Ont. Div. Ct.):** Alexander Nagribianko's employment contract with Select Wine Merchants included a six-month probation. With six days left in the probation, Select dismissed him without notice because he was "unsuitable for regular employment." Nagribianko claimed wrongful dismissal, saying Select hadn't given him an employee handbook. After a court found Nagribianko was induced into taking the job and awarded him four months' pay, an appeal court said an employer can dismiss a probationary employee without notice in good faith. The handbook didn't matter as the contract clearly stipulated the six-month probation. And there was no inducement as the probationary period made it clear permanent employment wasn't guaranteed.

***Gibbons v. BB Blanc Inc.*, 2016 CarswellOnt 11390 (Ont. S.C.J.):** Michael Gibbons was promoted to assistant manager at BB Blanc in Toronto and his new employment contract stated if he was terminated without cause, he would receive working notice or pay in accordance with employment standards legislation. Nine months later, BB Blanc terminated Gibbons' employment with two weeks' pay in a restructuring. He argued the contract wasn't enforceable because it was signed after he accepted the promotion. The court found the conversation about the promotion wasn't an actual job offer and everything indicated the new job duties and salary started on the start date shown in the contract after he signed it.

Consider benefits of probationary periods

PRE-EMPLOYMENT < pg. 5

he commenced employment. Feldstein argued he had not been provided a medical questionnaire and, in any event, had been led to believe there would be no requirement he demonstrate good health other than being employed for the probationary period.

The trial judge found the employer was negligent in advising Feldstein about his entitlement to LTD benefits and awarded damages equivalent to 40 months of lost LTD benefits ($83,336.80) and $10,000 for aggravated damages. The British Columbia Court of Appeal upheld the decision but eliminated the aggravated damages on the basis the employer's representatives had not acted act in a high-handed, dishonest or morally reprehensible way.

Be wary of the "offer letter" – it may mean more than you think

While many employers appreciate the benefits of an employment contract, some may not understand how the timing of when a contract is introduced can be as important as the terms. Too often, an employer, eager to solidify the relationship, will provide an "offer letter" or "term sheet" with a "formal" employment contract to follow. This can present problems for the employer if the "offer" and "contract" are materially different.

In the 2015 Ontario case of *Holland v. Hostopia.com Inc.,* Sean Holland accepted employment based on a two-page offer letter which expressly stated he would be required to sign an employment contract. Nine months after he started work, Holland was provided, and signed, the contract which contained a termination provision limiting entitlement to statutory minimum. These terms had not been included in the offer letter.

Seven years later, Holland's employment was terminated without cause and his employer relied on the termination clause in the contract, on the basis the offer letter and contract were to be read together.

The Court of Appeal disagreed, finding the contract unenforceable and awarding Holland damages in lieu of reasonable notice. Central to this ruling was the court's view the two documents were materially inconsistent on the issue of termination: The offer letter contained an implied entitlement to reasonable notice of termination, whereas the contract limited entitlement to the statutory minimum. Because Holland had not received fresh consideration for the new, more limiting terms, the contract was not enforceable.

Does this mean an employment contract signed after employment has commenced will always be unenforceable? No. In the 2017 Ontario case of *Wood v. Fred Deeley Imports Ltd.*, Julia Wood was offered and accepted a job over the phone, following which she received an email outlining the terms of employment and thereafter an employment contract.

One day after she started work, Wood was provided a hard copy of the employment contract, which she signed. The contract limited her entitlement upon termination to the employment standards minimum, and Wood argued the contract was unenforceable as it was signed after she started work without fresh consideration for its terms.

Although the termination clause was struck down on other grounds, the Court of Appeal rejected Wood's argument the contract was signed without consideration, on the basis she had received all salient terms of employment via email prior to starting the job. The timing of the signing was therefore merely "administrative convenience" and the signed contract changed nothing of significance:

"Wood's submission has no merit. A written employment agreement is not unenforceable merely because the employee signs it after starting to work. A written employment agreement might well be unenforceable if an employer includes in it a material term that was not part of the original employment relationship... But Deeley did not do so."

If an "offer letter" is to be used, clearly and precisely outline all important terms and ensure they are consistent with whatever formal contract is signed later.

The benefit of a probationary period

Generally speaking, an employer is well-advised to implement a probationary period to assess an employee's suitability for the role, limit the employee's entitlement upon termination to the statutory minimum, and potentially rebut a claim of inducement.

In the 2017 Ontario case *Nagribianko v. Select Wine Merchants Ltd.,* Alexander Nagribianko was employed for close to six months when his employment was terminated due to unsuitability. The employer relied on a clause in the employment contract which stated merely "Probation... Six months," and gave Nagribianko his statutory entitlement of one week of notice under the Employment Standards Act. Nagribianko filed a claim seeking wrongful dismissal damages.

The trial judge ruled the probationary provision was unclear and awarded four months of pay in lieu of notice. The Divisional Court overturned this ruling and the matter was appealed to the Court of Appeal which agreed with the Divisional Court on the basis the term "probation" is not ambiguous:

"The trial judge's decision to treat the term 'Probation... Six months' as having no meaning was wrong. The parties agreed to a probationary contract of employment, and the term "probation" was not ambiguous. The status of a probationary employee has acquired a clear meaning at common law. Unless the employment contract specifies otherwise, probationary status enables an employee to be terminated without notice during the probationary period if the employer makes a good faith determination that the employee is unsuitable for permanent employment, and provided the probationary employee was given a fair and reasonable opportunity to demonstrate their suitability."

A probationary clause is also a useful tool to mitigate risk of a claim of "inducement from secure employment" which can inflate liability by including prior service when calculating notice. In the 2015 Ontario case *Fraser v. Canerector Inc.,* the court found the use of a probationary clause inconsistent with the notion the employee was "induced" to leave his former employer:

"It is noteworthy that (Stuart) Fraser was hired subject to an initial probation period of three months. This factor is inconsistent with any allegation that he was 'induced' to leave his former secure employment. One is not induced to leave secure employment with an offer of precarious employment... unless the employee is already more than willing to consider the proposition without inducement."

What does this all mean for employers?

When contemplating a new hire, an employer should consider the following best practices:

1. Make any employment offer conditional on a satisfactory, meaningful reference check.
2. When discussing the nature of the position, including benefits associated with the role, be clear and accurate. If uncertain, direct questions to the insurer.
3. If an "offer letter" is to be used, clearly and precisely outline all important terms and ensure they are consistent with whatever formal contract may be signed later.
4. Although it is preferable to have a candidate sign and return the employment contract before starting work, failure to do so is not necessarily fatal to the contract's enforceability if all material terms have been outlined and agreed upon prior to the candidate accepting the job.
5. Consider the benefits of including a probationary period.

Shana French and Brian Wasyliw are lawyers with Sherrard Kuzz LLP, one of Canada's leading employment and labour law firms, representing management. Shana and Brian can be reached at (416) 603-0700 (main), (416) 420-0738 (24-hour) or by visiting www.sherrardkuzz.com.