Employers Face Possible Expansion of the Duty of Honesty and Good Faith

By Landon Young

Do employers have a general duty to act honestly and in good faith when dealing with their employees?

Some years ago the Supreme Court of Canada in the case of Wallace v. United Grain Growers held that employers have a duty to act honestly and in good faith when terminating employees. But that case only applied to the termination of an employment relationship, when an employee is most vulnerable. Most of the caselaw since then has indicated that the duty is restricted to the manner in which employers terminate employees and does not apply generally to other aspects of the employment relationship.

However, a recent decision from the Supreme Court, C.M. Callow Inc. v. Zollinger, could be applied to expand the duty of honesty and good faith on employers, with far-reaching and uncertain implications.

Facts of the Case

The contract in question was not an employment contract, but a commercial contract for the performance of winter maintenance at a condominium. The contract was for a two-year term and contained a clause where the condo corporation could terminate on 10 days' notice, which it did.

The service provider did not dispute the existence of the corporation's right to terminate the contract on 10 days' notice. The service provider's claim rested on the manner in which the condo corporation exercised that right. The service provider claimed that the condo corporation acted dishonestly in the manner it terminated the contract and it suffered losses as a result.

The trial judge found in favour of the service provider and held that the condo corporation misled the service provider into thinking that the contract was not in danger of being terminated. The service provider performed some extra services for free, and foregoed bidding on other contracts, because it believed the contract with the condo corporation would be renewed.

This belief was based on discussions the service provider had with two board members of the condo corporation. However, the condo corporation had already decided to terminate the contract due to dissatisfaction with the service provided - well before it gave

notice to terminate and knowingly permitted the service provider to perform the free extra services.

The Ontario Court of Appeal overturned the trial judge's decision on the basis that the condo corporation had the right to terminate the contract and there was no legal basis to award the service provider the damages it was seeking.

The Supreme Court's Decision

In a majority decision, the Supreme Court overturned the Ontario Court of Appeal's decision and held that the service provider was entitled to an award of damages as a result of the termination of the contract despite the fact the condo corporation acted within its contractual rights in terminating the contract. The Supreme Court upheld the findings of the trial judge that the corporation had acted dishonestly and in bad faith in the manner in which it terminated the contract.

The Court's majority relied on its earlier case, Bhasin v. Hrynew, also involving a commercial contract, which held that parties must perform their contractual duties honestly and in good faith. The Court stated that the duty to act honestly precludes parties to a contract from knowingly deceiving each other on matters that relate to performance of the contract, even if they are exercising an express contractual right.

Interestingly, the Court did not rely upon other principles established by the courts over many years to address situations where a party to a contract may suffer losses as a result of misrepresentation by the other party. One such doctrine is "equitable estoppel", where a party may receive damages as a result its detrimental reliance on a representation of the other party.

The Court stated that, unlike estoppel, the duty of honest performance does not require any intention that the dishonesty be relied upon to attract liability.

The principles for when an "estoppel" may apply have been well established, which provides some certainty as to how and when it may be applied. By taking this relatively new legal path to achieve this result, the Court has spread the legal net to capture situations where there is no intention for the dishonest statement to be relied upon. The result may be considerable uncertainty in lower courts as to how it should be applied in new factual scenarios, such as where a party makes a dishonest statement without realizing how it may be relied upon by the other party.

To learn more about this case as well as some of the other most significant employment law developments of 2020, attend our webinar this Friday, January 15 at 12 noon (EST). To register click here: https://www.stringerllp.com/seminars-events.

Potential Implications for Employers

This case may have significant implications for employers, even though it dealt with a commercial contract. Every employment relationship is considered contractual in nature under the common law, even if there is no written contract in place. As a result, contract law principles established by the courts for one type of contract can apply to other types of contracts.

If employers will be found to have a duty of honesty and good faith in how they perform employment contracts, the consequences could be far reaching and lead to an increase in litigation.

Uncertainty as to how these new legal concepts will apply can also be expected. The concept of "bad faith" has always eluded precise legal definition. While it is often clear when a party has acted dishonestly, it is not always clear when a party has acted in "bad faith." In a commercial context, it may be easier to determine when a party has engaged in "bad faith." However, in the employment context, where the parties deal with each other continuously over many years and there is an intangible human dynamic at play in that relationship with sometimes raised emotions on both sides, it may often be unclear when an employer has acted in "bad faith." In the complex day-to-day dynamics of employment relationships may not fit easily into these legal categories.

To give just a few examples, employees may claim that an employer has acted dishonestly or in bad faith when awarding discretionary bonuses, pay increases or promotions.

This duty could also apply to independent contractors relationships. One could foresee cases where a contractor alleges dishonest or bad faith conduct because the client company did not provide notice of its intention to terminate the contract before whatever notice period is required by the contract.

While employees may not necessarily bring a lawsuit at the time they believe their employers have acted dishonestly, under the Ontario Limitations Act, an employee has up to two years to bring a lawsuit from the date the cause of action arose or the employee becomes aware of it. If the matter giving rise to the cause of action is ongoing, the employee could bring a claim going back even more than two years. This means employers, when terminating employees, could be facing "add on" claims for a wide range of matters that have nothing to with the termination.

To avoid such claims or at least to minimize the risk of legal liability if they are brought, employers should be careful to be as transparent and honest as possible with employees, particularly when making decisions or taking actions that have an economic impact on

employees. This may sometimes mean having hard conversations with employees or being open on matters about which an employer would prefer to be discrete.

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