

EMPLOYMENT LAW

The ever-expanding duty of good faith

Recent changes to the law make a difference when terminating employment

By Ian Campbell and Steven Rosenhek

It is well-established that employers owe a duty of good faith towards employees, especially when it comes terminating an employment relationship. The scope of this duty continues to expand. In order to avoid being accused of negotiating or dealing with employees in bad faith, employers need to be aware of recent changes in the law.

Impact of *Bhasin v. Hrynew*

In December 2014, the Supreme Court of Canada released a groundbreaking decision in the case of *Bhasin v. Hrynew*. Until this decision, a party to a contract was generally able to exercise its contractual rights without having to be concerned about non-contractual promises or commitments made to the other party or demonstrating it had treated the other party fairly — provided the party complied with the strict terms of an agreement.

In *Bhasin*, the Supreme Court of Canada recognized for the first time a general obligation requiring parties to perform their contractual obligations honestly and in good faith. Put simply, parties to a contract cannot take steps intended to unfairly undermine the other party's legitimate interests.

The case involved a dispute over

a renewal clause contained in an agreement between Can-Am, a company that marketed education savings plans to investors, and one of its agents, Harish Bhasin. The contract between the parties provided Can-Am with the legal right to end the relationship after three years.

While the evidence demonstrated Can-Am had terminated the agreement in accordance with the strict terms of the contract, the issue was whether it had acted dishonestly towards Bhasin and whether, as a result, it bore responsibility for the damages suffered by the agent when he subsequently lost his business to a competitor.

By way of background, Can Am had engaged a number of agents to sell its products. Bhasin had developed a niche market that had caught the attention of other agents. One fellow agent, Larry Hrynew, had made numerous attempts to either purchase Bhasin's business or merge his business with that of Bhasin. When Bhasin refused these overtures, Hrynew encouraged Can-Am to force a merger.

Without notifying Bhasin, Can-Am developed plans to restructure its distribution network in a manner that would have resulted in Bhasin working for Hrynew. Can-Am did

not inform Bhasin of its plans, even when he specifically asked Can-Am if it intended to force a merger.

While this was going on, Can Am pressured Bhasin to allow for his business records to be reviewed by Hrynew, ostensibly as part of an ongoing compliance review. It assured Bhasin that Hrynew was subject to strict confidentiality requirements when, in fact, no such requirements existed.

After Bhasin refused to allow Hrynew access to his records and made it clear he objected to any merger, Can-Am made the decision not to renew Bhasin's agreement.

Following the termination of the agreement, Hrynew ended up taking over Bhasin's former region and hiring away most of his staff. The result was Bhasin effectively lost his business to Hrynew.

The Supreme Court found that while Can-Am had exercised its right to terminate its contract with Bhasin in accordance with the contractual terms, that was not sufficient. The court determined Can-Am had breached its duty of good faith towards Bhasin when it misled him about its intention with respect to the renewal and tried to have him agree to have his business undergo a compliance audit by Hrynew. As a result of this breach, Bhasin was

awarded damages totalling \$87,000.

In reaching this conclusion, the Supreme Court ruled contractual rights must be exercised in a manner that is "honest, candid and forthright" and with "appropriate regard to the legitimate contractual interests of the contracting partner."

The court went on to state that the scope of the duty is dependent on the type and context of the contractual relationship. For example, a higher standard would be demanded in situations involving long-term relationships requiring mutual cooperation or dependence, as compared to short-term, transactional exchanges.

The court went on to make it clear that "entire agreement" clauses (which are designed to prevent the parties from being able to rely on any representation not contained in the written agreement) will not serve as a bar to "bad faith" bargaining-related claims.

Avoiding claims of bad faith bargaining

How the new overarching principle of good faith established by the Supreme Court will be interpreted and applied in practice is still very much up for debate. What is clear, however, is it will impact the way human resource professionals should

be negotiating and administering agreements with employees and contractors.

First and foremost, this decision may open the door to new types of potential claims. Rather than being focused solely on the manner or timing of termination, bad faith claims may now be based on the manner in which an employment or contracting relationship was negotiated, managed or administered.

These new types of claims may be appealing to those who do not have grounds to challenge a decision based on the express wording of their contract but who, nonetheless, feel they have been treated unfairly.

There are a number of measures

employers should be taking to protect themselves from claims they have bargained or dealt with employees in bad faith:

- Keep notes regarding contract negotiations, especially with respect to unique or case-specific issues.
- Use standard form contracts that have clear terms setting out the parties' expectations, including potentially contentious items such as incentive compensation and termination entitlements.
- Review existing incentive compensation policies to clarify minimum required performance thresholds and other eligibility criteria; seek to limit the scope of discretionary decisions, wherever possible.
- When changes are made to terms

and conditions of employment, reduce them to writing and have the employee formally agree to, and sign off on, the changes.

- When exercising your rights under a contract, ensure you have a legitimate business justification for your decision.
- Document any important questions employees or independent contractors ask about their contracts and the responses given.
- When responding to questions by employees or contractors, do not provide information that is inaccurate or potentially misleading. For example, if an employee asks about her job security, which you know to be tenuous, avoid providing any assurances regarding her future with

the company or potential advancement opportunities.

- Where performance issues arise, document the problems and the steps taken by the organization to try and address them.

By taking these steps, an organization should be able to demonstrate it has acted fairly and honestly, and be able to defend itself against bad faith claims, if and when they arise.

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