PRACTICE MADE PERFECT CLE BC

EMPLOYMENT LAW CONFERENCE—2009
PAPER 9.1

Being Proactive: Proactively Working with Senior Management and In-House Legal Counsel on Employment and Human Resource Issues Before a Problem Arises

These materials were prepared by Sheena M. Mitchell of West Coast Timeshare Ltd., Vancouver, BC, for the Continuing Legal Education Society of British Columbia, May 2009.

BEING PROACTIVE: PROACTIVELY WORKING WITH SENIOR MANAGEMENT AND IN-HOUSE LEGAL COUNSEL ON EMPLOYMENT AND HUMAN RESOURCE ISSUES BEFORE A PROBLEM ARISES

I. Introduction

> We *learn by example* and by direct experience because there are real limits to the adequacy of verbal instruction. (Malcolm Gladwell in *Blink: The Power of Thinking Without Thinking*)

Corporate counsel and HR professionals take note of how employment law rulings can affect their company's policies and procedures. 2008 saw a number of rulings that made in-house counsel sit up and take notice. And just as Malcolm Gladwell said 'we learn by example' most of us in-house counsel hope that the learning is through reading the case law and not being in the case law. The purpose of my paper is to provide a starting point for in-house vounsel, HR professionals, and out-side counsel alike to avoid being in the case law.

The culture of an organization starts at the top. Senior management sets the example. So how can legal and HR professionals ensure that senior management is setting the right example? First, the critical issues need to be identified. Second, those issues must be presented to senior management. And finally, practical solutions with a touch of humanism ought to be implemented.

II. Proactive Planning

It is more often the case than not that it is as a result of crises that an organization reviews its potential liability. Instead of dealing with issues during a crisis it is necessary to undertake a 360° review of your organization's strengths and weaknesses on a periodic basis. Some of the case law that has been discussed, and that will be reviewed by me, point to the weaknesses that the organizations have and that could have been alleviated by a periodic review of the organization's strengths and weaknesses.

When reviewing its strengths and weaknesses every organization ought to go beyond its hiring policies and its termination policies. As we have seen in *Honda Canada Inc. v. Keays*, 2008 SCC 39, practices to deal with workplace absenteeism, letters from an employee's legal counsel to employee file management need to be reviewed and addressed. *Correia, et al. v. Canac Kitchens, et al.*, 2007 CanLII 691 (Ont. S.C.) and 2008 ONCA 506 (C.A.) demonstrates that workplace theft and drug use are serious issues and the implementation of a sting operation must be done with attention to detail.

A. What Are the Practical Steps that an Organization Can Take to be Proactive?

Every organization should have one person on its senior management team that is responsible for human resources issues. This may sound a bit obvious, however, what I am referring to is not just issuing pay stubs and Records of Employment. There ought to be, within every organization, a champion of managing the issues that arise from the organization's work force: workplace conduct, absenteeism, attitudes, sick leave, parental leave, flexible work schedules, and the dreaded personal family issues. In smaller organizations it may be the office manager or the senior accountant. Larger organizations will generally have a designated HR manager or vice-president of human resources. Occasionally, the in-house counsel will find that they are the designated HR professional within an organization. These individuals are uniquely positioned to bring these issues in front of senior management. In-house counsel and HR professionals can act as a bridge.

It is vital to an organization that there is consensus among senior management on some of the basic work place rules. Developing a few guiding principals, that senior management agrees to, will ensure that a workplace has a consistent set of rules and an understanding among the individual employees that make up an organization of what the rules are. Guiding principals also help supervisors in applying standards. This is not to say that all organizations ought to have "Mission Statements" and such, rather it is meant to let the players know the rules. The best attention grabber is events that occur that can be used as an example. When it comes to employee/employer relations most employers understand that they can be put under intense scrutiny. Guiding principals developed within an organization need to be cognizant of that scrutiny. In-house counsel should bring the latest legal decisions in front of senior management, and in particular those decisions that have a relevant application to the counsel's organization.

Outside legal counsel should be a "go-to person" when necessary. CPD requires minimum number of hours which in-house counsel can obtain at CLE courses, workshops put on by the BC Human Resources Management Association, and law firm seminars. Practical advice and avoidance of issues before they arise, open door policy among senior managers, being approachable.

Employers should be careful and not believe that they can off-load their responsibility and duty to an employee onto a third party. In the case of *Keays v. Honda*, I will discuss where the employer could have done a better job in managing the process and their third party occupational medicine specialist. In *Correia v. Canac Kitchens*, the results of a third party private investigator's report was not correctly implemented. The Supreme Court of Canada in *Keays*, and the Ontario Court of Appeal in *Correia*, both held that the employer, in each of these decisions does not owe a duty of care to an employee in connection with the conduct of the third parties hired by the employer, however, employers ought to be wary of distancing themselves from third parties.

III. Ethical and Practice Management Issues

A. Conflict of Interest and Anti-Contact Rules

A question that in-house counsel ought to frequently ask is "Who is my client?" It is important for in-house counsel to have an understanding with the employees, at all levels of the organization that they work for, to what extent personal legal advice can be provided.

In-house counsel must always ensure their compliance with Chapter 4 of the *Professional Conduct Handbook* issued by the Law Society of BC when communicating with employees of the organization that is the recipient of the in-house counsel's legal services.[1] Guidance on the Law Society of BC's anti-contact rules suggest that they should apply if an employee or other nonofficial person affiliated with an organization, no matter how powerless within the organization, is independently represented in the matter.[2] Likewise, the Law Society of Upper Canada's commentary suggests that a lawyer may communicate with a represented person but *only concerning matters outside of those the person has sought representation*.

There are two scenarios that I recommend an in-house counsel be cautious when working with a fellow employee of an organization: 1) an employee is seeking legal advice on a matter outside the scope of the employment context, for example, in a family-law related matter; and 2) in the event of an employee being represented on a specific matter, for example, related to that employee's employment or related to some other circumstance which impacts the employer/employee relationship. As a matter of practice when an employee of an organization seeks legal advice it is incumbent on in-house counsel to establish the parameters of the relationship. It is prudent to say to the employee that you are the lawyer for the company and therefore may not be able to provide legal advice to the employee.

B. Solicitor-Client Privilege

On the matter of solicitor-client privilege in-house counsel must ensure that they comply with Chapter 5 of the *Professional Conduct Handbook* issued by the Law Society of BC, specifically Rule 1, when working for an organization, which reads as follows:

> **Duty of confidentiality**
>
> 1. A lawyer shall hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship, regardless of the nature or source of the information or of the fact that others may share the knowledge, and shall not divulge any such information unless disclosure is expressly or impliedly authorized by the client, or is required by law or by a court

While stating this proposition is relatively easy in practice it can be much more challenging for in-house counsel. The issue is to what extent does an in-house legal counsel's privilege extend over business related communications? If, in conveying advice, the advice being conveyed can be characterized as privileged, the fact that he or she is 'in-house' does not remove the privilege, or change its nature. All lawyers, whether practicing in private practice or in-house, are governed by the same Professional Conduct Rules.

HH1 Law Society of BC, *Professional Conduct Handbook* - Chapter 4 – Avoiding Questionable Conduct, Including Improper Communications – 1) Dealing with unrepresented persons—A lawyer acting for a client in a matter in which there is an unrepresented person must advise that client and unrepresented person that the latter's interests are not being protected by the lawyer; and 1.1) Communication with clients of other lawyers—A lawyer who has an interest in a matter, or represents a client who has an interest in a matter, must not communicate with any person regarding the matter if, to the lawyer's knowledge, the person is represented by another lawyer, except through or with the consent of the person's lawyer.

2 The Law Society of BC—EC September 2000, item 10.

Are there limits on what communications are privileged? Communications and advice that are purely of a business nature are not covered by the privilege. Only legal advice can assume privileged standing. It is important for in-house counsel to realize that they will occasionally become involved in communications of a purely business nature and that these communications will not necessarily be covered by solicitor-client privilege. Additionally, if any of the communications among in-house counsel and its corporate client are in further of an illegal act none of the communications will be covered by solicitor-client privilege.[3]

If done properly, in-house counsel can insure that legal advice given is privileged. Reports written by non-legal staff at the behest of in-house counsel in furtherance of providing legal advice should be marked "Privileged and Confidential" and should contain a notation that the "... report is prepared for [In-House Counsel] for the purpose of providing legal advice..."[4] However, non-lawyer third party communications, even though the third party may have been hired by in-house counsel may not be privileged communications. Where a third party's advice sought is incidental to the obtaining of legal advice privilege will not attach.

IV. Lessons Learned—Recent Cases

A. Honda Canada Inc. v. Keays, 2008 SCC 39

What are the obligations of in-house counsel when an employee is represented and the employer organization has received correspondence from the employee's counsel?

Kevin Keays began working for Honda Canada Inc. (Honda) in 1986 at their manufacturing plant in Alliston, Ontario, where he worked in the Quality Engineering Department. In 1996, Mr. Keays went on disability leave returning to work in 1998. During his disability leave he was diagnosed with Chronic Fatigue Syndrome ("CFS"). Upon Mr. Keays return to work he was not able to work full time work schedule and was absent for several days in any given month. Honda directed Mr. Keays to meet with an occupational medicine specialist consultant. Mr. Keays retained counsel *who wrote to Honda* to attempt to negotiate a reasonable resolution of the differences between Honda and Mr. Keays. Mr. Keays declined to meet with Honda's occupational medicine specialist without clarification from Honda as to the purpose of the meeting, the methodology to be used, and the parameters of the doctor's assessment. Honda refused to provide him with such clarification, and terminated him in 2000 for disobeying its direction.

Honda communicated with Mr. Keays after he had retained counsel and counsel made himself known to Honda. Honda did not have any communications with Mr. Keays' lawyer and began, according to the Trial Judgment, dictating a course of action that Mr. Keays was required to follow.

> ... Keays had attempted to resolve the impasse by retaining counsel who had an expertise in these matters but Honda refused to reciprocate. His lawyer attempted to negotiate a reasonable resolution of the differences between the parties but Honda continued to threaten him with termination from the job he loved unless he agreed unconditionally to meet with Dr. Brennan ... (para. 44, Ont. Sup. Ct. Decision)

The trial judge stated that Honda's reaction to Mr. Keays' having retained a lawyer can be characterized as outrageous and high-handed conduct. Honda did not respond to a letter, characterized by the trial judge as conciliatory, rather Honda's reaction was to meet with Mr. Keays and require him to meet with their occupational medicine specialist.

---

3 For a good discussion on privilege in the context of business communications please see: *Blue Line Hockey Acquisition Co., Inc. v. Orca Bay Hockey Limited Partnership*, 2007 BCSC 143.

4 *Hydro-One Network Services Inc. v. Ontario (Ministry of Labour)*, [2002] O.J. No. 4370 (O.C.J.).

The trial judge stated that Honda's in-house counsel breached the Rules of Professional Conduct of the Law Society of Upper Canada when she participated in the "scrum" to attempt to persuade Mr. Keay's to abandon his request for clarification of Dr. Brennan's mandate (Law Society of Upper Canada Rules of Professional Conduct 6.03(7)).[5] However, the Supreme Court of Canada has held that there was no breach of the Rules of Professional Conduct. The trial judge mischaracterized the situation. Employees in Honda's HR department met with Mr. Keays to discuss the proposed meeting with Dr. Brennan. After Mr. Keays left the room, these employees were paged by Honda's in-house counsel, who wanted to meet with them about an unrelated matter. Counsel came to the room they were in, and Mr. Keays re-entered the room after counsel had arrived. Some discussion about Mr. Keays' situation ensued, although it appears to have been minimal (para. 92). The behaviour of Honda's in-house counsel was, at most, a technical breach of the Rules of Professional Conduct of the Law Society of Upper Canada.

The Supreme Court of Canada stated that "...There is no legal obligation on the part of any party to deal with an employee's counsel while he or she continues with his or her employer. Parties are always entitled to deal with each other directly. What was egregious was the fact that Honda told Keays that hiring outside counsel was a mistake and that it would make things worse. This was surely a way of undermining the advice of the lawyer. This conduct was ill-advised and unnecessarily harsh, but it does not provide justification for an award of punitive damages." (SCC para. 77)

B. Correia et al. v. Canac Kitchens et al., 2007 CanLII 691 (Ont. S.C.) and 2008 ONCA 506 (C.A.)

> All the evidence points to misidentification of the plaintiff in the place of Joao Correiro starting with Ms. Smith's misspelling of the name for the Authorized Corporate Transaction document. The sequelae of the mistake gathered momentum like a boulder rolling down a hill but there is no evidence of pressure upon Canac by any of the defendants to discharge the plaintiff.

On October 24, 2002, the plaintiff, Joao Correia, aged 62, was discharged from his employment with the defendant Canac Kitchens and on the same day was arrested for theft. Both events were the result of mistaken identity arising from the similarity of his name to that of the actual suspect, one Joao Correiro, a man in his 20s and the intended subject of the termination and arrest. Both were employees of Canac Kitchens at the time of the events.

The mistaken identification came to the attention of Canac four months later in the course of the police's subsequent investigation and, at that time, Canac offered to reinstate Mr. Correia to his employment. The offer was not taken up as Mr. Correia was of the view that as a result of the firing and the arrest, he was rendered permanently disabled from working again by reason of physical and psychological injuries.

As against Canac Kitchens, Mr. Correia seeks damages, aggravated damages and punitive damages for wrongful dismissal. He alleges five intentional torts against the moving party defendants and he also alleges negligence in the investigation leading to the discharge and arrest.

Had Ms. Smith read and digested the reports, viewed the videotape and examined the photocopy of the suspect's identification badge and compared the visual and other information to the identification details for suspect #5 supplied by her to Aston for transmission to the police, it is possible if not likely

---

5 Law Society of Upper Canada Rules of Professional Conduct – 6.03(7) Communications with a represented person - 6.03(7) Subject to subrule (8), if a person is represented by a licensee in respect of a matter, a lawyer shall not, except through or with the consent of the licensee, (a) approach or communicate or deal with the person on the matter, or (b) attempt to negotiate or compromise the matter directly with the person. *[Amended - November 2007]*

(depending on the quality of the visual evidence) that she would have noticed that the name "Joao Correia," the name of a person born in 1940 that she inserted in the Authorized Corporate Transaction and supplied for the suspect list was not likely the name of the suspect and that she had confused the suspect with another employee.

There is no evidence that Ms. Smith performed a close and comprehensive review of the investigative evidence to compare it to the identification details she supplied for the suspect list and no evidence that she was cognizant of a discrepancy. The mistake went undetected.

A tort of negligent investigation by a person other than an arm of the state has not been recognized in Ontario. Mr. Correia did not stand in a relationship with any of the defendants which could fairly be seen to fall within a category or in a position analogous to a category in which a duty of care has been recognized in law, for example, that of bank and customer in *Howbott v. TD Canada Trust*, [2006] O.J. No. 3047 or in *Haskett v. Equifax Canada Inc*. (2003), 63 O.R. (3d) 577 (C.A.) where an analogous relationship was found.

The fact that in coming to its decision to discharge the employer has acted on misinformation negligently gathered does not augment the employee's rights; nor is the employer's obligation diminished if it acts without negligence. The loss alleged to have been suffered by Mr. Correia arises from the termination of employment and the arrest immediately following. If an employee is discharged with neither reasonable notice nor just cause, it matters not whether the employer's action resulted from misinformation arising from negligent investigation, from no investigation at all or from an entirely flawless investigation. Conversely, if there had been a negligent investigation but the employer gave reasonable notice or had just cause for the termination, the discharge is lawful and the negligent investigation cannot transform the lawful discharge into a wrongful act. It is unnecessary for me to speculate here as to whether loss and harm resulting from the arrest may or may not be encompassed in the consequential loss suffered by Mr. Correia in the event that he is found to have been wrongfully dismissed—that issue is for another occasion. Such loss would, however, be the proper subject matter of an action in defamation regardless of whether it is comprehended in wrongful dismissal damages and Mr. Correia is not without legal remedies.

There was no *prima facie* duty of care owed by the employer and HR manager, personally, to Mr. Correia in the administration of the results of the Private Investigator's report.

V. Conclusion

These cases demonstrate that within the employment law context in-house counsel can face issues that arise outside of the normal scope from an organization's work force: workplace conduct, absenteeism, attitudes, sick leave, parental leave, and flexible work schedules. It is incumbent to be proactive by undertaking periodic reviews and thinking through the potentialities of liability before that liability arises. Courts have given direction to in-house counsel in the recent case law described in this paper. Hopefully our learning by example' is through reading the case law examples not being made an example of in the in the case law.