

Overholt Law Firm Seminar



Best Practices in Hiring Employees: Minimizing the Risk of Claims & Liability

Overholt Law Firm Seminar

Terminal City Club, Vancouver, BC

May 31, 2017

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Due Diligence in Recruiting:



Pre-Employment Tests & Checks

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Due diligence – reference checks, social media, credit checks, and criminal record checks



Background Checks

- Employers are restricted by the *Personal Information Protection Act*, SBC 2003, c 63, regarding the collection, use, and disclosure of an individual's personal information only with that individual's consent
- Collection of personal information must be limited to that which is necessary for reasonable purposes

Questions

- You are hiring for a mid-level communications position. You receive multiple similar applications and decide that you need to conduct thorough reference checks with past employers. Most of the candidates provided a list of references that can be contacted, but some have not. Those that have not provided CVs showing their former employer.
 1. Can you cold-call the latter groups' former employers?
 2. If you are the former employer receiving the cold call, how do you respond?

Reference Checks

- If you don't have anything nice to say...
 - Can you give a poor reference check?
- *Papp v. Stokes et al.*, 2017 ONSC 2357
 - Papp's employment terminated without cause
 - He requested his former employer be a reference and that was agreed
 - He found out he was 1st ranked for a new position and informed his former employer this and to expect a call for the reference check

Reference Checks

- The former employer provided its opinion (see judgment para 21)
- Papp was informed he would not receive an offer
- Papp sued for a) wrongful dismissal; b) \$500,000 in damages for defamation; c) \$200,000 for punitive, exemplary and aggravated damages; and d) \$30,000 for intentional infliction of mental suffering
- Court found the elements of defamation, but accepted the defence of justification. All but wrongful dismissal claim dismissed.

Questions

- Can you search for and view a candidate's social media accounts pre-hire?
- Is it appropriate for you to request access to a candidate's social media accounts before hire?



Social Media Background Checks

- Social media checks include the collection of personal information. Collecting it for the purposes of assessing hire is the “use” of that information which must be reasonable
- Collection does not occur merely when asking to turn over social media passwords. Viewing publicly available social media is still a “collection”.

Social Media Background Checks

- Under BC privacy legislation, valid consent is required from the prospective employee before an employer can conduct a check and use those results in determining whether to hire the employee
- Employer must attempt to ascertain accuracy

Questions

- How many of you have at least one social media account?
- Which ones?
- What could someone who knows nothing about you learn from your social media pages? (ie. Facebook)
- When was the last time you updated the information in your social media account?

Requesting Social Media Passwords

- In 2011 the BC NDP asked leadership candidates to provide their social media passwords to the party to confirm their qualifications
- The BC Office of the Information and Privacy Commissioner [OIPC] investigated

Requesting Social Media Passwords

- OIPC found that the collection of a password, and collection of social media content was not authorized under BC's *Personal Information Protection Act [PIPA]*
- Further, there were reasonable alternatives the party had to vet candidates for leadership
- The NDP agreed to discontinue this practice

Pre-Employment Criminal Record and Credit Checks

- A criminal record check and a personal credit check on a prospective employee constitutes collection of “personal information”.
- Thus, under BC privacy legislation, valid consent is required from the prospective employee before an employer can conduct a check and use those results in determining whether to hire the employee

Pre-Employment Criminal Record and Credit Checks

- Even where consent is granted, the circumstances necessitating the check must be reasonable and appropriate
- An employer may still be liable for a human rights violation, depending on how the information gleaned from those checks is used

Pre-Employment Criminal Record and Credit Checks

- Credit checks may be harder to justify than criminal record checks
- The purpose for requesting the credit check must be reasonable and appropriate, and relevant to the purposes of the organization

Pre-Employment Criminal Record and Credit Checks

- A 2010 OIPC decision in Alberta found that pre-employment credit checks for a retail employer were not reasonable
- The employer argued they were necessary to determine how the applicants would handle financial responsibilities, and whether they were at risk for in-store theft or fraud

Pre-Employment Criminal Record and Credit Checks

- The Investigator found that credit checks for potential sales associates were unlikely to fulfill either of these two purposes
- Furthermore, there were already security policies in place at the store, and a credit score could be poor or inaccurate for a number of causes outside that individual's control

Employee Background Checks

- Human Rights Complaints
 - Social media contains highly personal and sensitive data about individuals
 - Often reveals political and religious affiliations, sexual orientation, etc.
 - Potential for larger damage awards
- Privacy Complaints
 - Nominal damages potentially, but certainly a nuisance to deal with

Employee Background Checks

- **Tips:**
 - Clearly explain the purpose of the search to prospective employees and
 - Get their consent
 - Obtaining consent is key
 - Under *PIPEDA* now, emphasis on valid consent
 - More consent is better than less

Medical examinations



Pre-Employment Medicals

- Proceed with caution: generally not permissible
- Certain industries may justify specific medical fitness standards that must be objectively demonstrated or verified before employment:
 - Lifeguards
 - Pilots
 - Firefighters
 - Police
 - Military

Pre-Employment Medicals

- Standards may be legislated and/or controlled by regulatory bodies
 - Where applicable, candidates would need to demonstrate proof of medical qualification anyways (ie. Transport Canada medical certificates)
- To maintain the standard, must prove *BFOR*

British Columbia (Public Service Employee Relations Commission) v. BCGSEU, [1999] 3 SCR 3 (SCC) – The “Meorin” Decision

- The BC government established minimum physical fitness standards for forest firefighters
- A female firefighter who was unable to meet one of the standards, but who otherwise performed her work “satisfactorily”, was dismissed
- She brought forth a grievance through her union

British Columbia (Public Service Employee Relations Commission) v. BCGSEU, [1999] 3 SCR 3 (SCC) – The “*Meorin*” Decision

- The physical fitness standard was an aerobic standard
- The arbitrator found that most women have a lower aerobic capacity than most men and, unlike most men, most women cannot increase that capacity even with sufficient aerobic training and exercise

British Columbia (Public Service Employee Relations Commission) v. BCGSEU, [1999] 3 SCR 3 (SCC) – The “*Meorin*” Decision

- This SCC established a three step test for determining whether an employer has established, on a balance of probabilities, that a *prima facie* discriminatory standard is a *bona fide* occupational requirement (commonly known as a “*BFOR*”).

British Columbia (Public Service Employee Relations Commission) v. BCGSEU, [1999] 3 SCR 3 (SCC) – The “Meorin” Decision

- 1 – What is the general purpose of the discriminatory standard?
- 2 – Was the standard adopted in an honest and good faith belief that it was necessary to the fulfilment of that purpose?
- 3 – Is the standard reasonably necessary to the accomplishment of that purpose?

British Columbia (Public Service Employee Relations Commission) v. BCGSEU, [1999] 3 SCR 3 (SCC) – The “*Meorin*” Decision

- The SCC found the Government failed to demonstrate that the aerobic standard was reasonably necessary to identify those persons who are able to perform the tasks of a forest firefighter safely and efficiently.
- The Court restored the order of the arbitrator that the employee be reinstated

Testing – drugs, alcohol and other forms of testing



Testing

- Can an alcohol test show present impairment?
- Can a drug test?

Pre-Employment Testing

- “Pre-employment” drug and alcohol testing takes place before an individual is hired into a position
- “Pre-access” testing takes place before an individual, such as a contractor, is allowed to start work on a particular job site

Pre-Employment Testing

- Generally, pre-employment drug and alcohol testing is not allowed and can lead to human rights claims if an applicant is denied employment because of their results
- However, in certain circumstances, it may be permitted to test an applicant after they've received a conditional offer of employment for a *safety-sensitive position*

Best Practices

- Avoid drug and alcohol testing at the pre-employment stage
- Consider whether testing is necessary for the position
- Don't immediately revoke the offer of employment if the test comes back positive



Best Practices in Hiring Employees



Social Media and Off Duty Conduct

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Overview

1. Enforceable workplace policies
2. Social media use policy
3. Off duty conduct; discipline and dismissal





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WORKPLACE POLICIES

Workplace Policies

- Policies must be tailored to your workplace
 - Must be clearly communicated to employees and brought to their attention and enforced
 - Cannot breach *Human Rights Code* or right to privacy
 - Employee must be made aware of possible consequences
 - Implement regular workplace training

Codes of Conduct

- *Respectful Workplace Policy / Code of Conduct*
 - Be sure to include provisions dealing with Anti-bullying and harassment (of others)
 - Clear process for making complaints
 - Clear process for investigation of complaints
- Be clear about consequences for breaches, including termination

Social Media Policies



Social Media Policies

- Address interactions and comments by employees on social media sites
- Define what is and is not considered "acceptable use" both on the company's network and outside of it.
- Be clear as to what disciplinary action will be taken, up to and including termination, if policies are not followed.

Kim v International Triathlon Union, 2014 BCSC 2151

- Case indicating social media abuse from an employee who should know better
- Could pre-employment social media screening for similar positions prevent situations like this?

Kim v International Triathlon Union, 2014 BCSC 2151

- A former employee brought an action for wrongful dismissal against her former employer
- She was dismissed without notice and given 2 weeks of salary pursuant to the BC *Employment Standards Act*
- ITU argued that they had cause to dismiss the employee for her unprofessional social media conduct

Kim v International Triathlon Union, 2014 BCSC 2151

“ITU submits that the plaintiff irreparably harmed the trust inherent in the employment relationship through her unprofessional and insubordinate communications that were far-reaching and accessible to those throughout the triathlon sport community.”

- At paragraph 10

Kim v International Triathlon Union, 2014 BCSC 2151

- The employee described ITU as a “casual” working atmosphere with no social media policy
- The employee was never reprimanded for her tweets or Facebook messages, and in fact received a raise in salary in 2012
- The employee held the position of Senior Manager of Communications

Kim v International Triathlon Union, 2014 BCSC 2151

- *“2012 ITU season...DONE. now leave me alone until 2013!!”*
- *“surprisingly fun congress after-party last night. probly [sic] only time I’ll see so many Eboard members hungover & lamenting those tequila shots”;*

Kim v International Triathlon Union, 2014 BCSC 2151

- *“I wonder if other IF congresses have as much propaganda as ours...”*
- *“hey ITU, remember this next time I fly off the deep end... ‘@Relationship 102: If I didn’t care, I wouldn’t get mad.’”*
- Additionally: blog post entitled “taking s***”

Kim v International Triathlon Union, 2014 BCSC 2151

- The Court did not find that ITU had cause to dismiss the employee
- ITU should have issued warnings that the posts were inappropriate and unacceptable, which they did not.
- Even if the posts did amount to misconduct supporting cause, ITU could not rely upon cumulative cause because they never gave the Plaintiff “express and clear” warning

“Morality” Clauses

- *Off Duty Conduct Policy*
- Employment provision that specifies what is unacceptable employee behaviour off duty
 - For example, certain criminal acts that could damage the employer’s reputation or brand by association (sex assault, indecent exposure)
- Breach of the clause can result in summary dismissal for cause

Discipline for Off-Duty Conduct

- An employee can be terminated for cause as a result of off-duty behaviour
- “Test”:
 - The conduct of the employee harms the employer’s reputation or product
 - Behaviour renders the employee unable to perform their duties satisfactorily
 - Employee’s behaviour lead to refusal, reluctance or inability of other employees to work with them

Discipline for Off-Duty Conduct



- Test, continued:
 - The employee has been guilty of a serious breach of the Criminal Code rendering his conduct injurious to the general reputation of the employer and its employees*
 - The employee's conduct places difficulty in the way of the company properly carrying out its function of efficiently managing its work and directing its workforce.

Re Millhaven Fibres Ltd. v. Oil, Chemical and Atomic Workers I.U. Loc 9-670

Whitehouse v RBC Dominion Securities Inc., 2006 ABQB 372

- The employee was a 51 year old Vice-President and investment advisor with a 16 year employment history
- One night he brought a sex worker back to his offices where a dispute arose over her fee
- The next day she returned to his office during business hours demanding her payment

Whitehouse v RBC Dominion Securities Inc., 2006 ABQB 372

- The employee was called into his supervisor's office the next day after an investigation
- He denied the events until he was told there was videotape evidence, at which point he acknowledged the incident
- He was then immediately terminated for cause

Whitehouse v RBC Dominion Securities Inc., 2006 ABQB 372

From the RBC Code of Conduct:

Employee Character:

The cornerstone of financial services is trust. RBC companies require employees whose integrity is beyond reproach.

As an employee:

** You are to avoid any conduct or association - **either inside or outside of work** - which could bring your honesty, integrity or trustworthiness into question, or which could be detrimental to RBC's security or to its reputation within the community.

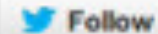
Toronto Professional Fire Fighters' Association Cases

- In 2013, two Toronto firefighters were accused in a National Post article of posting inappropriate comments about women on Twitter
- Following an investigation by the Toronto Fire Services (“TFS”), both of the employees were dismissed

Toronto Professional Fire Fighters' Association Cases



Matt Bowman
@Hero_Matt

 Follow

I'd never let a woman kick my ass. If she tried something, I'd be like HEY! You get your b[REDACTED] ass back in the kitchen and make me some pie!

 Reply  Retweet  Favorite  More

4:51 PM - 4 Mar 13

Toronto Professional Fire Fighters' Association Cases

- Mr. Edwards
 - Connection between the tweets (which were not private) and the workplace
 - Employer had social media policy (which did not explicitly refer to Twitter)
 - Tweets were both offensive and damaging
 - Mr. Edwards was apologetic and “confused” as to why the tweets were offensive
 - Verdict: Reinstatement

Toronto Professional Fire Fighters' Association Cases

- Mr. Bowman
 - Tweets harmed the reputation of his employer and impaired his ability to fulfil his responsibilities at work
 - Violated workplace policies
 - Issued an apology and underwent sensitivity training but failed to appreciate how offensive his tweets were
 - Verdict: Dismissal upheld

Toronto Professional Fire Fighters' Association Cases



“A reasonable and fair minded member of the public, if apprised of the facts, would, in my view, consider that the [Mr. Bowman’s] continued employment would so damage the reputation of the Employer as to render employment untenable.”

Toronto (City) v Toronto Professional Fire Fighters' Association, Local 3888,
2014 CanLII 76886 (ON LA)

Best Practices

- Set out expectations through company policies
- Understand that not all behaviour will be able to be captured by a social media policy
- Introduce policies at the time of hire
- Enforce regularly



Best Practices in Hiring Employees



Written Employment Offers and Contracts

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The Job Offer

***“If you’re offered a seat
on a rocket ship,
don’t ask what seat!
Just get on.”***

- Sheryl Sandberg

The Job Offer

- The steps along the way can be few or many:
 1. Interview(s) and testing
 2. Negotiating terms of employment
 3. Achieving an enforceable agreement

The Enforceable Agreement

- When did the employment contract come into existence?
 - Was there an offer made?
 - Was it accepted?
 - When?
 - The issue of consideration

Written Agreement is Best

- **CLARITY IS KEY TO AN ENFORCEABLE CONTRACT**
- Best practice – do not provide a preliminary offer with the intention of providing a more detailed one later.
- Provide the candidate with the complete job offer prior to the commencement date, including all contractual terms and relevant policies to review
- Include an Entire Agreement Clause

Buaron v Acuity Ads Inc., 2015

ONSC 5774

- Employee terminated without cause after 9 months of service
- His employment agreement “severely limited” the amount of payment in lieu of notice he would be entitled to upon dismissal
- The employee initiated a wrongful dismissal proceeding and sought to set aside the agreement on the grounds that it was unenforceable

Buaron v Acuity Ads Inc., 2015

ONSC 5774

- The employee was emailed an “offer letter” that detailed his position, start date, and salary, among other things
- The employee argued this was the point in time in which he had a contract with Acuity
- The employer argued the offer letter was not a contract, and there was “more” that the employee had to sign

Buaron v Acuity Ads Inc., 2015

ONSC 5774

- The Court found that this “offer letter” marked the beginning of an employment contract with Acuity Ads
- The letter was confirmation of the “verbal agreement” the employee had made prior to receiving the email

Buaron v Acuity Ads Inc., 2015 **ONSC 5774**

[18] “The reference to ‘contracts’ in the e-mail could mean anything. These could be the health benefit contracts or insurance contracts for the plaintiff to sign. It does not lie in the mouth of the defendant to say there was more to sign to create an agreement.”

Buaron v Acuity Ads Inc., 2015 **ONSC 5774**

[21] “I find that the Comprehensive Agreement is not enforceable. The parties already had a contract when the offer letter of March 23, 2014, was received. No new or additional consideration was provided to the plaintiff along with the comprehensive agreement in order to vary the existing agreement”

The Plaintiff was entitled to reasonable notice or payment in lieu thereof.

Defective Contracts

- Duress
- Undue Influence
- Unconscionability

Employment Contract Clauses



Contract Clauses

- Probation Period?
- Termination Clause
- Entire Agreement Clause
- Severability Clause

Probation

- Probation period:
 - Gives you breathing room
 - Can buffer arguments of inducement
- Reducing liability on termination:
 - Enforceable restrictions on:
 - Notice of termination and/or pay in lieu of notice; and
 - What is included within that notice period.

Probationary Employees

- “An express probationary clause in an employment contract may rebut the presumption of reasonable notice, provided no statutory entitlement is contravened.”

Ly v British Columbia (Interior Health Authority),
2017 BCSC 42 at paragraph 21

Probationary Employees

- Probationary period:
 - Probationary periods must be clearly stated in writing and expressly agreed to
- No notice payable during first 3 months according to the BC *ESA* – not a true “probationary period” – does not supplant common law presumption of higher amount

Probationary Employees

- Termination during probationary period:

The standard for dismissal of a regular employee is just cause; for a probationary employee the standard is suitability.....

....an employer, during a probationary period "has the implied contractual right to dismiss a probationary employee without notice and without giving reasons provided the employer acts in good faith in the assessment of a probationary employee's suitability for the permanent position."

- *Jadot v. Concert Industries Ltd.*, 1997 CanLII 4137 (BCCA),
para 28 & 29

Probationary Employees

- Termination during probationary period:
 - That “good faith assessment” involves giving a probationary employee the opportunity to demonstrate the ability to meet the *standard the employer set out when the employee was hired.*
[emphasis added]
 - *Geller v. Sable Resources Ltd.*, 2012 BCSC 1861

Termination Restrictions

- What legislation applies to the worker regarding notice entitlements upon termination?
- If none, what is a reasonable restriction?



Severability Clauses

- If any term of the contract is found to be void, unenforceable, or illegal, that term can be severed from the agreement without affecting the enforceability of the other terms.
- Best practice would be to include a severability clause in your written employment agreements



Best Practices in Hiring Employees



Litigation Claims Involving Short-Term Employees

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Short-term Employment

- Employment of less than 2 years = short term employment
- Short term employment may lead to negative presumptions about the employee's abilities

“Disproportionate” notice periods

- Courts will recognize this by awarding notice periods (at common law, where applicable) that are disproportionately long compared to the length of service
- *“An employee of less than one year of service is generally entitled to 2-3 months of notice unless there is evidence of inducement, a specialized/difficult job market, or bad faith conduct”*
 - *Saalfeld v Absolute Software Corp.*,
2009 BCCA 18

Saalfeld v Absolute Software Corporation, 2009 BCCA 18

- Ms. Saalfeld was 35 years old when she was offered the position of Federal Territorial Manager with Absolute Software Corporation.
- After 8 months her employment was terminated and she was offered one week's salary in lieu of notice.

Saalfeld v Absolute Software Corporation, 2009 BCCA 18

- There was no clear evidence that any particular promises were made during the interview process about the longevity of this employment.
- Ms. Saalfeld was able to find alternative employment, but deposed that it was “extremely difficult” because it was hard to respond to inquiries about the very short period of her employment with ASC.

Saalfeld v Absolute Software Corporation, 2009 BCCA 18

[30] ...It took the plaintiff some nine months to find another job, despite conducting a reasonably diligent search. The defendant did not allege failure to mitigate. The length of the plaintiff's subsequent job search does not determine the reasonable notice period, but it provides some evidence putting into question the “transferability of sales skills” generalization and supporting that the brevity of employment may affect a subsequent job search.

Trial judgment – 2008 BCSC 760

Saalfeld v Absolute Software Corporation, 2009 BCCA 18

- The employee was found entitled to a notice period of 5 months.
- The employer appealed to the BC Court of Appeal on the basis that the award was “outside the range of reasonableness”.

Saalfeld v Absolute Software Corporation, 2009 BCCA 18

- The Court of Appeal found that a 2-3 month range for an employee in Ms. Saalfeld's position would be an acceptable norm.
- However, the Court was unwilling to interfere with the Trial Judge's 5 month award, which was largely based on the length of time it took Ms. Saalfeld to find alternative employment.
- The appeal was dismissed.

Kastens v The Bank of Nova Scotia, 2012 BCSC 1893

- A 50 year old Private Banker was terminated from his employment after 7 months of service
- The employee was terminated for “poor performance”, not amounting to cause
- The employee was given two weeks salary on the date of termination and was later paid three months’ salary in lieu of notice

Kastens v The Bank of Nova Scotia, 2012 BCSC 1893

- The employee argued he was entitled to severance pay equalling 6-7 months' salary, benefits, and incentive bonus
- The employer submitted that he was only entitled to three months' salary, that he had provided no receipts for lost benefits, and that he would not have been entitled to a bonus in any event

Kastens v The Bank of Nova Scotia, 2012 BCSC 1893

[8] I am satisfied on the evidence that the plaintiff was entitled to five months' notice of termination of employment. Less than this would not adequately reflect the plaintiff's age and character of employment; more than this would ignore the short length of service **and ready availability of other viable employment, as illustrated by the plaintiff's subsequent employment with Manulife that commenced two months after his dismissal from the defendants.**

(Emphasis added)

Sciancamerli v Comtech (Communication Technologies) Ltd., 2014 BCSC 2140

- A senior account executive worked for Comtech for 10 months before he was dismissed
- He was given one week's severance pay
- He commenced proceedings against his former employer for wrongful dismissal

Sciancamerli v Comtech (Communication Technologies) Ltd., 2014 BCSC 2140

[47] Nevertheless, I agree with the defendant that *Saalfeld* is most helpful because of its general comments on establishing an appropriate range to which I add appropriate extensions, if necessary, to account for the *Bardal* factors. I therefore start from the proposition that a short-term employee in a similar position to the plaintiff is most likely entitled to between two and three months' notice.

Sciancamerli v Comtech (Communication Technologies) Ltd., 2014 BCSC 2140

- The Court awarded damages after the following assessment:
 - The starting range for short term employees in a non managerial, sales position is 2-3 months;
 - An extension of that range is necessary given the employee's specialization and lack of similar employment;
 - The employee was diligent in his job search, but remained unemployed at the time of trial.
- The employee was awarded 5 months' notice

Other Examples

- 36 year old VP of Marketing with 6 months of service = **10 months of notice**

Taner v Great Canadian Gaming Corp., (2005) 63 CCEL (3d) 36 (BCSC)

- Junior sales rep with 2.5 months of service = **11 months of notice**

Cassady v Wyeth-Ayerst Canada Inc. (1998), 163 DLR (4th) 1 (BCCA)

- 44 year old Regional Sales Manager with 5.5 months of service = **12 months of notice**

Robertson v Weavexx Corp. (1997), 25 CCEL (2d) 264

Best Practices

- Identify the needs of your organization and the candidates who can best meet those needs
- Take the time to conduct thorough and detailed interviews
- Mitigate the risk of common law notice periods through well-drafted employment agreements with enforceable termination provisions

