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HIRING PRACTICES: AVOIDING LEGAL PITFALLS

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I. Introduction

In the search to find the best candidate for a position, employers must be alive to the potential claims and complaints that could be brought against them for their conduct during the hiring process. To avoid costly litigation, it is essential for employers to develop best practices that are consistent with the various legal obligations imposed on them during the selection and hiring of employees.

In order to develop these best practices, it is important to understand the legal obligations governing the employment relationship. During the hiring process, employers must pay specific attention to the prohibitions set out in the *Human Rights Code.*

II. The *Human Rights Code*

The *Human Rights Code* applies to all businesses, agencies, and services in British Columbia except for those regulated by the federal government. The *Code* protects individuals from discrimination.

Section 13 of the *Code* applies to hiring and employment, and states as follows:

> 13(1) A person must not
>
> (a) refuse to employ or refuse to continue to employ a person, or
>
> (b) discriminate against a person regarding employment or any term or condition of employment
>
> because of the race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation or age of that person or because that person has been convicted of a criminal or a summary conviction offense that is unrelated to the employment or to the intended employment of that person.
>
> ...
>
> 13(4) Subsections (1) and (2) do not apply with respect to a refusal, limitation, specification or preference based on a **bona fide occupational requirement**. [emphasis added]

Discrimination under the *Code* is any conduct, intentional or unintentional, that has a negative impact on an individual, and is based on the individual's race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation or age or a prior criminal convicted (these are referred to as the "Prohibited Grounds").

In the employment context, section 13 of the *Code* prohibits employers from discriminating against both employees and job applicants on the basis of the Prohibited Grounds. Discrimination may arise where derogatory comments or unwelcomed jokes are directed at an individual based on one of the Prohibited Grounds set out in the *Code*[1].

In addition, discrimination may arise when a decision is made by an employer based, in whole or in part, on a Prohibited Ground unless the decision can be justified as a bona fide occupational requirement ("BFOR") and the duty to accommodate has been met.

To succeed on a discrimination complaint arising from the hiring process, the complaining applicant must establish that discrimination has taken place. An employer's refusal to hire an applicant based partly on legitimate grounds and partly on one of the Prohibited Grounds will be found to be discriminatory as an employer's decision is discriminatory if any part of the reason for not hiring an applicant relates to one of the Prohibited Grounds.

An employer can successfully defend a discrimination complaint arising from a refusal to hire an applicant if they can show that their decision was based on the fact that the successful applicant was better qualified for the position and not based on any of the Prohibited Grounds[2].

A. Duty to Accommodate

If discrimination is made out at the first instance, the Human Rights Tribunal will then consider whether the discrimination is justified as a BFOR (genuine requirement of the job) and whether the employer fulfilled its duty of accommodation.

The *Code* requires employers to accommodate individuals in respect to the Prohibited Grounds. This means that if an applicant is the best candidate for the job and, for example, has a physical disability, an employer cannot deny employment to that applicant because of their physical disability. The employer should instead hire the applicant and "accommodate" them as is necessary. The employer's obligation to accommodate is to the point of undue hardship.

Some examples of measures an employer could take to reasonably accommodation an employee may include the following:

(1) altering the premises to ensure they are accessible;

(2) adjusting workstations and/or equipment;

[1] *North Vancouver School District No. 44 v. Jubran* 2005 BCCA 201.
[2] *Oxley v. BCIT,* 2002 BCHRT 33

(3) modifying job duties for employees who cannot perform those duties;

(4) altering hours or days of work and providing flexible hours of work; and

(5) excusing the employee from non-essential work requirements or conditions.

The duty to accommodate is to the point of undue hardship before an employer's discrimination will be justifiable. What amounts to undue hardship is fact specific. Some of the relevant considerations include the financial costs of the accommodation, the relative interchangeability of the workplace and facilities, and the prospect of substantial interference with the rights of other employees[3].

B. What is a BFOR?

An employer can refuse to hire an individual on the basis of one of the Prohibited Grounds if the employer can establish that the decision is based on a BFOR of that position. Even if the test for a BFOR can be met, employers must nonetheless first take reasonable steps to accommodate an employee.

Determining what amounts to a BFOR requires an analysis of the position and its duties and the employer's performance standards. In order to determine if a standard set by an employer is a BFOR, the employer must be able to show that[4]:

(1) the employer has adopted the standard for a purpose rationally connected to the job;

(2) the particular standard was adopted in an honest and good-faith belief that it was necessary for the fulfilment of that legitimate work-related purpose; and

(3) the standard is reasonably necessary to accomplish the work-related purpose because it is impossible to accommodate individual employees without imposing undue hardship upon the employer.

An example of a BFOR includes limiting a security position that involves searching female passengers to only female applicants. For this type position, discrimination on the basis of gender is justified as a BFOR.

[3] *Central Alberta Dairy Pool v. Alberta (Human Rights Commission),* [1990] 2 S.C.R. 489 at 520–21.
[4] The Meiorin case: *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (B.C.G.S.E.U.)* [1999] 3 S.C.R. 3.

III. Suggested Hiring Practices

A. Written Job Description

At the outset, it may be beneficial for employers to prepare a written job description for the position they are seeking to fill. The job description should be based on the genuine requirements of the job. This may include particular physical requirements such as heavy lifting, educational qualifications and certificates, necessary skills, the requirement to work shift work and the requirement to travel. Careful attention must be taken if a foreign worker is being hired and reference to the National Occupation Classification as set by H.R.S.D.C. might be required.

A clearly articulated job description based on genuine requirements of the position will then assist in preparing an advertisement for the position and interview questions.

B. Advertising

Section 11 of the *Code* applies to pre-employment situations and prohibits publication of discriminatory job advertisements. Section 11 states as follows:

> 11. A person must not publish or cause to be published an advertisement in connection with employment or prospective employment that expresses a limitation, specification or preference as to race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation or age unless the limitation, specification or preference is based on a bona fide occupational requirement.

Advertisements for employment opportunities ideally should set out the job description, requirements and expectations. The advertisement should be limited to the actual scope of work required for the position and the required or desirable skills to do that work. Reference to preferred personal characteristics and particularly those related to any of the Prohibited Grounds should be avoided. Gender neutral language should be used in the advertisement. False statements and exaggerations about the position should strictly be avoided as such conduct may give rise to a lawsuit being commenced on the basis of misrepresentation.

C. Screening Applicants

It is good practice to develop screening criteria to assist in evaluating the suitability of applicants. The screening criteria should be focussed on the skills, experience and abilities necessary to perform the job and the criteria should be applied consistently to all applicants.

A policy of excluding overqualified applicants for a position may give rise to an allegation of discrimination. This was the case in *Sangha v. Mackenzie Valley Land and Water Board*, 2006 CHRT 9, wherein the applicant, Dr. Sangha, was denied the position despite his credentials far exceeded the job

requirements. Dr. Sangha had applied for the position as he was a recent immigrant to Canada and had difficulty obtaining employment. Dr. Sangha had been interviewed and had been ranked with the highest scores. The Tribunal held that the employer's refusal to hire Dr. Sangha because he was overqualified discriminated against him on the basis of national or ethnic origin as immigrants disproportionately experience having to apply for positions they are overqualified for.

Once the screening criteria are set, it is suggested that notes be taken as each application is reviewed against the criteria. The notes should indicate the basis of the decision to grant or deny an interview to the applicants and should be retained.

If a generic application form is being used as a part of the hiring process, the form should not contain questions related to any of the Prohibited Grounds or questions that may elicit information relating to the Prohibited Grounds. If you ask the question, you could then be "stuck" with the answer, with the employer now having to prove that the information was not even the slightest part of the consideration. This can be a very difficult hurdle to overcome.

Of note is that provincial privacy legislation requires employers to retain an applicant's personal information which includes resumes, applications and reference inquiries for a period of at least one year after the decision in respect to that applicant is made[5].

D. Conducting Interviews

There is an advantage to having each interview conducted by at least two individuals as there is then a third person to act as a witness if a dispute arises as to what was said or done during the interview. It is also good practice to keep notes of the interviews as the notes will assist should an issue later arise.

The interview questions should be prepared in advance of the interviews and the questions should be directly related to the applicant's capability to perform the essential requirements of the position as set out in the job description. A consistent approach to all interviews is desirable as all applicants should be treated in the same or a similar manner.

Employers must exercise reasonable care when making any representations during the hiring process particularly representations that may be viewed as inducing an applicant to accept the position. Where an inaccurate or misleading representation has been made by an employer and the employee has reasonably relied on the representation to their detriment, the employee may bring a lawsuit against the employer based on negligent misrepresentation.

[5] Section 35(1) of the *Protection of Information and Privacy Act*

This was the case in *Queen v. Cognos,* where prior to accepting the position, Mr. Cognos was informed that the project he was being hired for was important and that staff requirements for the project would be increased. Relies on these representations, Mr. Cognos moved to Ottawa and accepted the position. He was not told that the project had not received guaranteed funding and that it was subject to budgetary approval. Mr. Cognos was terminated after 18 months and he then commenced a lawsuit alleging negligent misrepresentation.

The Supreme Court of Canada agreed that the employer's representations were negligent and stated that the employer owed a duty to exercise reasonable care during the hiring process to ensure that any representations made were not misleading.

Of note is that the Supreme Court of Canada held that a written employment contract would not negate pre-employment representations unless expressly stated in the contract. Accordingly, it is important that the employment contract clearly and explicitly negate any liability for representations made during the hiring process.

Further, employers must take care in making any representations about the potential longevity of the employment offered particularly in the case of prospective employees who would be leaving securing long term positions elsewhere. These types of representations may increase the amount of severance an employee is entitled to in the event of termination without cause.

E. Appropriateness of Specific Interview Questions

In preparing the interview questions, employers should be particularly mindful of the Prohibited Grounds set out in the *Code*. Each of those grounds is discussed below.

i. Mental or Physical Disability

For the purposes of the *Code,* a mental disability has been defined to include alcoholism, drug addiction and psychological disorders. An applicant's disability is only relevant to the job requirements if it threatens the safety of others or prevents the applicant from carrying out the essential components of the job.

A physically disabled person cannot be found incapable of performing the essential duties of the position unless an effort has been made to accommodate the applicant's needs arising from the disability.[6]

[6] *The Justice Institute of British Columbia* v. *The Attorney General of British Columbia*, [1999] BCJ No. 1571 (BCSC)..

Questions related to general health issues or absences due to stress or mental illness should be avoided. For example, it may not be appropriate to ask an applicant whether they have any physical disabilities or whether they are healthy and strong. A better approach would be to ask if the applicant is capable of fulfilling the essential requirements of the position with reference to the specific requirements set out in the job description.

An employer considering requiring drug and alcohol testing should first seek appropriate legal advice particularly in respect to requiring testing for job applicants.

ii. Candidate's Sexual Orientation, Marital or Family Status

It is acceptable to ask an applicant if they are able to work the required hours of the position and if they are able to travel, assuming travel is a genuine requirement of the position.

Questions concerning the applicant's marital status, children, or plans to have children, and child care arrangements should be avoided as these questions may raise a concern that the employer is worried about the applicant's ability to meet the attendance demands of the position on the basis of perceived limitations arising from the applicant's family situation.

iii. Religion and Political Beliefs

Questions about a candidate's religious and political beliefs should be avoided as for most positions these questions do not relate to the essential duties of the position or the legitimate suitability of the applicant for the position.

iv. Age

An employer may ask whether an applicant has reached legal working age in B.C. There is no longer mandatory retirement in B.C. Any further questions regarding the applicant's age are likely not appropriate and should be avoided.

v. Race, Colour, Ancestry, Place of Origin

It is acceptable to ask whether an applicant is legally entitled to work in Canada. Questions about the applicant's nationality or birthplace should be avoided. This includes, for example, asking whether English is the applicant's first language and whether the applicant's parents were born in Canada.

vi. Criminal or Summary Conviction

Discrimination of an applicant on the basis of a prior criminal conviction is prohibited unless the fact of the conviction constitutes a BFOR. Accordingly, questions about an applicant's criminal history should not be

asked where the applicant's criminal history is unrelated to the position. Criminal convictions may be relevant, for example, if the job requires the employees to be bonded.

Criminal record checks are required under the *Criminal Record Review Act* for employees who will be working with children or vulnerable adults and who will have unsupervised access to children or vulnerable adults.

In other circumstances, a criminal record check should not be conducted if a criminal conviction is unrelated to the position. In *Dunphy v. B.C. (Min. of Public Safety and Sol. Gen.) and Saville (No. 2),*2005 BCHRT 3, the Human Rights Tribunal discussed the test for determining whether a criminal record is unrelated to employment. The relevant considerations include the following:

> (1) Does the behaviour for which the charge was laid, if repeated, pose any threat to the employer's ability to carry on its business safely and efficiently?
>
> (2) What were the circumstances of the charge and the particulars of the offence involved, e.g. how old was the individual when the events in question occurred, were there any extenuating circumstances?
>
> (3) How much time has elapsed between the charge and the employment decision? What has the individual done during that period of time? Has he shown any tendencies to repeat the kind of behaviour for which he was charged? Has he shown a firm intention to rehabilitate himself?

F. Conducting Reference Checks

In light of the provision of the *Protection of Information and Privacy Act,* an applicant's references should only be contacted with the express consent of the applicant. The questions asked of the reference should be related to the position and not to personal circumstances of the applicant. It may be beneficial to prepare a standard list of questions to be used for all applicants. Notes of all discussions with the references should be made.

IV. Employment Contracts

Once an applicant has been selected for the position, consideration should be given as to whether a written employment contract is needed. There are various advantages to reducing an employment contract to writing although there is no requirement for there to be a written employment contract. The benefits of a written contract include that it creates certainty as to the terms of employment and can limit the employer's liability and impose obligations on the employee on termination.

An employment contract provides an opportunity for an employer to set out what will constitute reasonable notice in the event of termination. This then provides certainty to the employer as to what its

obligations to the employee will be on termination and the contractual notice provisions can be significantly more favourable to an employer than the employee's common law entitlement to severance.

Notice provisions in the employment contract must, however, at a minimum, comply with the applicable notice periods set out in the *Employment Standards Act.* If the severance provisions in the employment contract do not meet the notice requirements set out in the *Act* then the Court will not enforce those contractual provisions.

The scope and complexity of an employment contract may depend on the nature of the position being filled. In addition to severance provisions, an employer may want to consider including the following in the employment contract:

- Job title and scope of duties;
- Remuneration, benefits and future increases;
- Vacation Pay;
- Travel and geographical assignment;
- Probationary period;
- Ownership of intellectual property; and
- Confidentiality and non-solicitation clauses.

The timing of signing the employment contract is important. The employment contract should be signed by the new employee prior to the employee commencing their employment.

In *Krieser v. Active Chemicals Ltd.,* 2005 BCSC 1370, the Court did not enforce an employment contract executed only two weeks after the commencement of employment including on the basis that the employment contract included new terms that had not previously been agreed on and that were detrimental to the employee with no consideration or benefit flowing to the employee from entering into the employment contact other than his continued employment.

Accordingly, if an employment contract is being entered into after the employee has already commenced employment even after a number of years, employers should ensure that consideration or a benefit has been provided to the employee in exchange for their entering into the contract.

In addition to the employment contract, employers should also consider establishing a policies and procedures manual and expressly incorporating the terms into the employment contract.

V. Independent Contractor, Employee, or Something in Between

It is important to determine whether the worker being hired is an employee or an independent contractor. This determination impacts how the worker will be treated under various legislation including the *Workers' Compensation Act,* the *Canada Pension Plan,* the *Employment Insurance Act,* and the *Income Tax Act.*

A. CRA Considerations

If the worker is an employee, the employer must remit both the employee's and the employer's share of CPP contributions, EI premiums and income tax. In the event that an employer fails to make the required remittances and the worker is determined by CRA to be an employee, the employer will be liable to pay both their share and the employee's share of the required CPP contributions and EI premiums that should have been remitted, along with penalties and interest.

If an employer is uncertain as to whether CRA will consider a worker to be an employee as opposed to an independent contractor, the employer may request a ruling from CRA to have the worker's status determined[7] .

In assessing a worker's status, the key question from CRA's perspective is whether the worker is engaged to perform services as a person in business on their own account or as an employee. While the intent of the worker and the employer are considered, the intention of the parties is not determinative of the issue. The total relationship is examined including the following factors:

(1) the level of control the payer has over the worker including control over the manner in which the work is done and in what work is done;

(2) whether or not the worker provides the tools and equipment;

(3) whether the worker can subcontract the work or hire assistants;

(4) the degree of financial risk taken by the worker;

(5) the degree of responsibility for investment and management held by the worker;

(6) the worker's opportunity for profit; and

(7) any other relevant factors, such as written contracts.

[7] For further information see CRA Guide, Employee or Self-Employed? RC4110

B. Severance Obligations

The status of a worker also has implications in respect to whether the worker will be entitled to severance if the relationship is terminated by the employer.

In *Marbry v. Avrecan International Inc.*[8], the British Columbia Court of Appeal observed that workplace relationships exist on a continuum, with the employer/employee relationship lying at one end, requiring reasonable notice, and the independent contractor relationship at the other, where no notice to terminate is required. The Court recognized that some relationships fall somewhere in the middle of the continuum and these employment-like relationships are often referred to as a "hybrid", "intermediary" or "dependent contractor" relationships, where the workers are not employees, but are still entitled to some rights, including reasonable notice.

In *Marbry,* the Court of Appeal set out the following factors to be considered in analyzing the relationship:

> (i) Duration/Permanency of the Relationship. The longer the duration of the relationship or the more permanent it is militates in favour of a reasonable notice requirement. Amongst other evidence, the purchase and maintenance of inventory, which contains a permanency aspect, should be considered;
>
> (ii) Degree of Reliance/Closeness of the Relationship. As these two interrelated sub-factors are increased the more likely it is that the relationship falls on the employer/employee side of the continuum. Included in this factor is whether the sale of the defendant's products amounted to a significant percentage of the plaintiff's revenues; and
>
> (iii) Degree of Exclusivity. An exclusive relationship favours the master/servant classification.

In *Marbry,* the Plaintiff Marbry Ltd. had been granted exclusive distribution of products by the Defendant Avrecan which relationship continued for 10 years. Marbry was paid a commission of 6% on the sales. The Court of Appeal determined that the relationship between Marbry and Avrecan was that of a dependent contractor and that this relationship entitled Marbry to severance.

The case law suggests that the degree of exclusivity is an important factor in assessing the nature of the relationship. If the worker is economically dependent on the employer and has been for some time, a Court may well conclude that a dependent contractor relationship exists, entitling the worker to severance. [9]:

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[8] 1999 BCCA 172, 171 D.L.R. (4th) 436.

[9] See also the Ontario Court of Appeal's decision in *McKee v. Reid's Homes Ltd.,* 2009 ONCA 916, [2009] O.J. No., wherein the Court confirmed that there are certain contractual relationships outside of ordinary employment

Employers can address the risk of potentially being liable to pay severance to an individual they consider to an independent contractor by having a written contract executed with the individual. The contract should clearly set out the parties' intention in respect to the nature of the relationship and the notice that will be provided in the event that the relationship is terminated. It is important that the contract be reviewed regularly and revised as needed.

C. Protection Under Section 13 of the Code

The nature of the relationship with the contractor is also important in determining whether an individual will be afforded the protection set out in section 13 of the *Code.* The Human Rights Tribunal has interpreted the scope of section 13 broadly to capture relationships beyond the traditional employment relationships and the fact that an individual has been characterized as an independent contractor for the purposes of other legislation (eg. *Income Tax Act)* is not determinative of the issue [10].

As noted by the Court in *British Columbia (Ministry of Health Services) v. British Columbia (Emergency Health Services Commission),* the *Code* is to be interpreted liberally and broadly[11] :

> There can be no doubt that human rights legislation must be interpreted liberally and in a manner consistent with its underlying purposes and its quasi-constitutional status. The *Code* definition of "employment" can and should be interpreted generously and flexibly to further *Code* purposes and protect against or remedy acts of prohibited discrimination. Where there is a relationship between a respondent and complainant that contains some elements of the traditional common law employment relationship or a contract of services, and even where the relationship is unusual or more akin to a contract for services (independent contractor relationship) or to a volunteer-like relationship, courts and tribunals have stretched the meaning of "employment" to ensure that the purposes of human rights legislation are not thwarted in the sense that the targets of discrimination are not left without any remedy. The intent behind such an expansive interpretation is to ensure that the person/entity committing the discrimination does not escape accountability for the discriminatory act by reason of some legalistic technicality based more on form than on substance.

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relationships in which a contractor, referred to as a "dependent contractor", defined by "economic dependency in the work relationship", must be accorded reasonable notice of termination. Of note is that the Plaintiff McKee was running her own business and had her own workers but nonetheless was entitled to severance.

[10] *Gordy v. Painter's Lodge (Oak Bay Marina Ltd.)*, 2000 BCHRT 16 (rev'd on non-jurisdictional issues at 2000 BCSC 1728, 2002 BCCA 495)

[11] 2007 BCSC 460 at para. 152.

VI. Summary

While employers have the right to hire the most qualified or suitable candidate for the position, they must ensure that their decisions are not influenced by any of the grounds prohibited under the *Human Rights Code*. By implementing hiring practices that are consistent with their legal obligations, employers can not only reduce the likelihood of being the subject of complaints and litigation but can put themselves in a better position to defend any lawsuits that may arise as a result of the hiring process.