



Risk Management Considerations for Employment Practices Liability

Although we are not as litigious as our neighbours to the south, it doesn't mean Canadian employers are immune from employee suits. We face the same risks that can lead to legal liability such as unlawful dismissal, harassment and discrimination. What we have yet to experience is a dynamic shift in the litigious environment that encourages and facilitates a high frequency of claims with large payouts.

That being said, employee related suits against employers are increasing in Canada. Employees are aware of the legislation in place to protect them and know what their rights are in the workplace. They are not afraid to legally challenge their employer when they feel they have been wrongly or unfairly treated.

What can employers do to protect their organization?

The first step in preventing employee claims is to develop clear and strong human resource policies and procedures. Corporate policies and procedures should address the following as a minimum:

1. Hiring practices
2. Probationary periods
3. Compensation
4. Guide to employee conduct and reporting inappropriate workplace behaviour
5. Absences and leaves
6. Accessibility

7. Employee job appraisals
8. Termination of employment
9. Workplace violence and harassment
10. Drugs and alcohol in the workplace
11. Training and development
12. Health and safety
13. Job evaluations
14. Group benefits
15. Vacation periods
16. Electronic communications

Train all employees on corporate policies and procedures. These documents should not be a secret. Employees need to know what behaviour is expected of them and what they can expect from their employer. Hold refresher sessions throughout the year.

Develop strong and clearly written job descriptions for all positions. Make sure employees understand their role in the workplace. These descriptions should also include the qualifications required for the position and outline employer expectations. All policies and procedures should be posted on the intranet so employees who have aspirations of getting ahead know what they need to do to move to a higher position. When interviewing new candidates, have the job description available and focus on it during the interview.

Hold training sessions for all of employees in management or supervisory roles. Make sure they understand all of

the policies and procedures and know how to conduct themselves, interact with and support their team.

Develop a good working culture by explaining the corporate vision, goals, objectives and strategies. Let employees know that they all play a vital role in achieving this vision. Encourage them to use their skills and provide suggestions for improvement.

Have managers hold job appraisal meetings with their employees on a quarterly basis. The purpose of these meetings is to let employees know how they are doing and where they can improve. These meetings are vital in today's workplace.

Know the law – not only common law but the Human Rights Legislation in your province. Make sure any termination is not linked to discrimination. Even if an employee voluntarily leaves the organization, it may still find itself before the Human Rights Commission. The employee can always state they left because of a work environment that was poisoned with discriminatory practices.

Always conduct exit interviews with employees who are leaving. Probe why they are leaving to try and determine if discrimination of any sort played a part in their decision.

When in doubt don't be afraid to call an employment practices lawyer. Their fee will be less than the cost of litigation or representation before the Human Rights Tribunal and/or the courts.

Having good policies and procedures that are well communicated and understood is the first step. The second step is choosing a method of financing the risk. Both steps are needed because you can do everything in your power to prevent a lawsuit, but at the end of the day you can't stop a disgruntled employee from launching an action in common law or before the Tribunal. Once you find yourself in either of these positions, you must defend. Corporate policies and procedures will form part of your defence and your insurance policy will fund your defence.

Protect your organization from costly litigation by purchasing a Directors & Officers policy that includes Employment Practices Liability.

Adga Group Consultants Inc. v Lane et. al

Facts of the Case

Lane had a bipolar disorder that led to manic and depressive episodes and sometimes periods of instability. During the interview process Lane did not disclose his condition.

He was hired as a software program tester. This position was described to him as being stressful and came with tight time-lines. Lane accepted the position.

Shortly after starting in the position he informed his supervisor of his bipolar condition. He also educated his supervisor on how to recognize his manic behaviour and how to intervene. Shortly thereafter he entered into a pre-manic phase. Ten days after starting his position he was terminated.

After his termination Lane's condition escalated and he was hospitalized for 12 days. He filed a complaint with the Human Rights Tribunal alleging he was discriminated against because of his medical condition.

Human Rights Tribunal Decision

The Tribunal found that Adga Group did discriminate against Lane and awarded him \$35,000 in General Damages; \$10,000 in Damages for Mental Anguish and certain public interest remedies under S 41(1) (a) of the Code.

The employer appealed and the Tribunal cross-appealed to increase the general damages. The appeal was allowed. The cross-appeal was dismissed.

Ontario Superior Court Decision

The employer had a duty to act in good faith. The employer's dismissal had consequences for Lane. The damages as assessed by the Tribunal were both reasonable and allowed to stand. Two of the public interest remedies were deemed unreasonable and struck.

Source: *Adga Group Consultants Inc. v. Lane*, 2008 CanLII 39605 (ON SCDC), <http://canlii.ca/t/205dq>