

## Avoiding Liability for Misrepresentations during Recruitment

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The hopes and dreams of employers and job seekers are often in full display during the recruitment process. Applicants who display the enthusiasm coveted by employers will imagine themselves in the role, projecting themselves as competent, energetic, and successful. Likewise, employers will imagine the applicant excelling within the company and reaching great heights of career and financial success. These lofty aspirations will often be verbalized in some way during interviews, office tours and recruitment dinners; although they will rarely make it into the employment contract. It is not until some time after hiring, when the honeymoon is over, that the parties will start to question the success of the arrangement. They may even start to feel that they have been sold a bill of goods.



In extreme cases, a disgruntled employee may sue his/her employer based on misrepresentations alleged to have been made during recruitment. This most often arises if the employee has left secure employment to join the employer based on the premise of a long and bright future only to be terminated without cause shortly after commencing employment. Such lawsuits can be successful in some cases.

In *Queen v. Cognos Inc.*, [1993] SCJ No. 3, the plaintiff left a stable and well-paying position as a corporate controller in Calgary to join a software firm in Ottawa. He did this because he was bored in his position and wanted to transition to the burgeoning tech industry in Ontario. In making the move, the plaintiff relied on the defendant's representation that the company would be developing a new accounting software program that the plaintiff would be responsible for developing. The defendant gave the impression that the company was fully committed to the project and would require the plaintiff's services for at least two years. This was not reflected in the employment agreement which stated that the plaintiff could be terminated or reassigned on one month's notice.

The company neglected to mention that the software project was contingent on funding being approved by the board of directors. This did not occur and the project fell through a few months after the plaintiff had relocated to Ottawa. In due course, he was terminated with

one month's notice. The plaintiff sued for negligent misrepresentation.

The Supreme Court of Canada allowed the plaintiff's claim and awarded significant damages. While there was no evidence that the person hiring the plaintiff had intentionally deceived him (the evidence was that the interviewer believed that funding would be approved by the board), the interviewer should have known that funding could not be taken for granted and that this could be highly detrimental to the plaintiff. In making the representations it did, the employer had not only a duty to be honest but also to be careful, and the employer was required to take reasonable care to ensure its representations were accurate and not misleading. In the circumstances, this meant disclosing highly relevant information about the project's tenuous nature to the plaintiff before he relied on it in changing positions.

In *Antunes v. Limen Structures Ltd.*, 2015 ONSC 2163 (aff'd 2016 ONCA 509), the plaintiff accepted a job offer based on the employer's assertion that he would receive 5% of the shares of the company, which the employer stated was worth \$10M. The plaintiff did not investigate this representation since he was related to the employer by marriage and trusted him. The plaintiff soon determined that the company's financial position was not nearly as good as represented. His employment was terminated after five months. The plaintiff sued for wrongful dismissal, breach of contract and negligent misrepresentation.

The Court awarded the plaintiff eight months' notice and \$500,000.00 to compensate him for the loss of the shares. It did not matter that the shares were not likely worth \$500,000.00 as the plaintiff had reasonably relied on the employer's representation that they were. The employer had a duty to deal honestly with the plaintiff in contractual negotiations. It also had a duty to take reasonable care to ensure the representations being made about the company's financial position were true and accurate.

In *Khan v. Vernon Jubilee Hospital*, 2008 BCSC 1637, the plaintiff doctor relocated his surgery practice from Ontario to B.C. on assurances from the hospital that he would be able to practise there until he retired. Shortly after he moved, the hospital implemented a regional centralization plan that would see surgeries he performed relocated to another hospital. The evidence was that the regional centralization plan was in the works at the time that the plaintiff was hired, but that it was not brought to his attention.

The Court allowed the plaintiff's claim for negligent misrepresentation. While the plan was still contingent when the plaintiff was hired, it was sufficiently well-developed to constitute a material risk to the plaintiff's plan to relocate. The hospital had a duty to inform the doctor of this highly relevant fact under the circumstances. The fact that the persons interviewing the plaintiff may not have been aware of the plan was irrelevant since the organization was aware of it. According to the Court, the "communication gaps and a lack of informational flow" only contributed to the organization's negligence.

While potentially significant, it should be noted that the doctrine of negligent

misrepresentation is not limitless in the employment context. Courts have thus far restricted the doctrine to actions based on misstatements or omissions of material facts. Actions based on best laid plans, hopes, dreams and aspirations are not actionable even where they fail to come to fruition.

In *Bureau v. KPMG Quality Registrar Inc.*, 1999 NSCA 100, the plaintiff relocated her professional practice to KPMG after being led to believe that her practice would be successful there and that she would become a partner. However, the evidence did not indicate that KPMG promised these things notwithstanding its hope that the plaintiff would be successful. The plaintiff was terminated after 14 months when her practice with KPMG was not as successful as either party had hoped.

The Court dismissed the action for negligent misrepresentation, stating that: “[to] be actionable, a negligent misrepresentation must be more than a misunderstanding. The fact that the reality of employment with KPMG did not meet with the sanguine expectations of Bureau [the plaintiff] does not, of itself, constitute negligence”. The plaintiff should have known that her ultimate success at KPMG would depend on how things progressed. The statements made by her interviewer were merely aspirational and could not have reasonably been regarded as binding legal statements.

Employers seeking to avoid liability for negligent misrepresentation should take care to ensure the completeness and accuracy of statements made during recruitment. This is especially so where those statements relate to the existence or non-existence of conditions fundamental to the employment. Where future plans are contingent on future events, this should be disclosed to the applicant so that he or she can make an informed decision as to whether to take the position. Negligent misrepresentation claims are most likely to succeed when an employer misstates (or fails to mention) fundamental eventualities that could render the position obsolete or drastically different than that initially represented.

It is also important that companies provide human resource departments with the necessary high-level information to ensure that applicants are not unintentionally misled. No one should be hired for a position that is likely to be eliminated or significantly altered without informing that person that this eventuality is at least possible. Communication gaps or lack of information flow within organizations will not absolve them of liability for negligent misrepresentations, even those made honestly.

Finally, employers should consider reproducing all important statements in written contracts of employment. While it may not be determinative, contractual language disclaiming any prior representations on the part of the employer is likely to be highly persuasive if the matter is litigated.

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