

You Raise the Issue

STEVE HILLIER

LTD: New Position at Lower Pay or Termination

Question: I am a trained corporate secretary and have been on Long Term Disability for nearly two years as a result of a serious accident. Although I would like to work again, it would be very painful to sit for any time at my computer. My employer has offered me a position as a stand up clerk at a lower salary. They say if I refuse then I will be fired. Can I sue?

Answer: Generally, when an employer reassigns an employee to a new job, at a lower salary, it usually amounts to constructive dismissal and the employee may sue for salary and benefits in lieu of reasonable notice. Although the duty to mitigate requires that the employee accept any reasonable job offer, the Courts have decided that positions at lower pay and lesser duties with the same employer can be rejected in certain circumstances.

Your situation, however, may be different because your employer is looking for a position to accommodate your injury. It is not required to create a whole new position but it must look at changes in duties or worksite to allow you to return to work up to the point of "undue hardship". If a stand up clerk position is the only job available to meet your restrictions, then you are obliged to try it out. Since you share in the problem, it is important that you get involved with your employer in finding a solution.

Bad Faith Bargaining

Question: Our company is bargaining a first agreement with the union. We have met 14 times since last May but do not have much signed off. The union just complained to the Labour Board that we are bargaining in bad faith. What does that mean?

Answer: It can mean a number of things depending on what has happened at the table. Both parties have a duty to make every reasonable effort to reach an agreement. That includes sharing information that will enable a party to understand your bargaining proposals. Once a proposal is tabled, if one of the parties changes its position relying upon an important representation, then it may be bad faith to "bait and switch" by failing to live up to that representation. Both parties are certainly entitled to bargain hard but they cannot use tactics which are calculated to polarize the respective position of the parties with no real attempt to reach settlement. If there is no specific complaint about failure to disclose information or a significant change in a bargaining proposal, then the union may allege surface bargaining which is going through the motions with very superficial justification for the positions which are being taken.

2000, 10235 - 101 STREET
EDMONTON, AB T5J 3G1
PH: 780.423.3003

400 THE LOUGHEED BUILDING
604 1 STREET SW
CALGARY, AB T2P 1M7
PH: 403.260.8500

201, 5120 - 49TH STREET
YELLOWKNIFE, NT X1A 1P8
PH: 867.920.4542

www.fieldlaw.com

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Suing for an Untruthful Letter of Reference

Question: A number of months ago we hired an engineer from British Columbia whose resume attached a great letter of reference from his last place of employment. He has been a disaster so we are going to fire him. I recently found out that he was also fired from the British Columbia company where he had previously worked. Can we sue them?

Answer: Although the law in this area is not yet settled, the short answer is that an employer does owe a duty of care if it willfully or negligently misrepresents facts in a letter of reference. In one recent English case, the Court allowed a former employee to sue his former employer for inaccurately alleging that he was dishonest in response to an inquiry from a prospective employee. It is no longer sufficient that the employer genuinely believed that what was written was true when the employer has reasonable access to contrary information.

The practical problem in your case is that the loss or damage which you have suffered may be hard to prove and the cost of a lawsuit in British Columbia may not be worth it.

DISCLAIMER this article should not be interpreted as providing legal advice. Consult your legal adviser before acting on any of the information contained in it. Questions, comments, suggestions and address updates are most appreciated and should be directed to:

The Labour and Employment Group
Edmonton 780-423-3003
Calgary 403-260-8500

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