These Are The 10 Biggest Mistakes Employers Make

From offering too much to offering too little, these are the traps employers fall into time and time again

What are the biggest mistakes employers make? I could write five columns on this, and come up with a different Top 10 in each. But let's pick a few:

1) Being too generous with your initial severance offer

In an era when employment lawyers advertise riches to every fired employee, few are willing to accept their employer's first severance offer. But too many employers, out of a fear of becoming embroiled in litigation, quickly give in to demands for a better package, even if their first offer was reasonable. To avoid this trap, employers should make a lower first offer so as to leave themselves room to negotiate.

2) Being too litigation averse

Employers hate litigation. But employees hate it even more. For both, it is a tremendous drain of energy and money which could have gone to the employee but ends up instead in the hands of the parties' lawyers. Understanding the general futility of litigation, many companies quickly pay what they think the case might be worth when litigation is threatened – sometimes even more. But the value of a case is never known at the outset since its value reduces if the employee mitigates (i.e., obtains another job.) Also, employees often lose interest in their case or the will to fight. Employers who quickly pay a lot to those threatening litigation soon end up paying far more than they have to to everyone else, too.

Some clients take the opposite position. They pay a reasonable amount, near the low end of the range of severance and, if an employee sues, defend their position. It may be that they end up paying more in that particular case, including in legal fees, than they would have had to. But the employee also ends up dissatisfied because, after paying their own legal fees, they end up worse off than if they had taken your first offer. And the word then quickly disseminates that it is worth taking that employer's initial offer and avoiding litigating. That will save a lot of money.

I had a client that purchased a company in one of the maritime provinces and laid off 50 or so employees. Twelve of them hired lawyers who wrote demand letters. Eleven of

them dropped their cases along the way with no additional amount being offered. Only one went to trial recovering under $20,000. But the trial judge made a mistake, so I appealed and reduced it by another $3,000. The fees to go to the court of appeal were obviously far more than the $3,000 reduction. But to the employee, it was a financial disaster.

No employee at that company sued again for many years despite a large number of other dismissals with severance offers less than a court would have provided. Everyone paid attention to how the company had handled its litigation.

3) Offering too little

If you offer an amount that is obviously improvident when an employee is entitled to much more, you are encouraging them to sue – and they will and you will lose. Furthermore, you have lost credibility with the employee so when you increase your offer, the sky, in the mind of the employee, then becomes the limit. The case then becomes very difficult to settle for that employer.

4) Relying on severance formulas

There is no formula or severance calculator which accurately represents what a court will do. No month per year of service or any algorithm will replicate A judges' decisions. Formulas and calculators invariably overpay some employees and underpay others. An employment lawyer, looking at the basic factors of age, length of service, position and remuneration, along with information as to any extraordinary factors impacting on that employee, can provide a reasonable estimate as to what a court will do and then the company can discount that as it wishes.

5) Wasting legal resources

Legal advice is only as good as the client's input. If clients have no sense of what is relevant, they will not only waste legal fees, but send their lawyers on wild goose chases while missing theories that would have been helpful.

Largely as a lesson for future work to one client who had such tendencies, I went through material sent to an associate for the purposes of crafting a statement of defence and edited out literally 90 per cent, leaving only that which was relevant and helpful. The excess information was a waste of the client's legal fees. More significantly, if the client had so little grasp of what was relevant, there was the risk that they would leave out matters that would have been very helpful to their case. It is important for the lawyer and client to meet and discern what facts might be helpful, what might be hurtful and then focus on those, largely ignoring the surplusage.

6) Condoning misconduct

If you have cause, fire. Don't delay, don't give an evaluation which is better than desultory, don't give a raise and don't give a positive reference after you fire the employee. All of those acts could vitiate any prospect you have of asserting cause down the line.

7) Hiring outside investigators

Too many companies pay $100,000 or more to investigate whether misconduct warranted dismissal when the employee could have been dismissed, without cause, for less than what you have just paid the investigator. And the court does not care what the investigator's opinion is. The judge will derive her own conclusion after hearing the

witnesses directly. The investigator's report is hearsay and inadmissible. And the law is clear that, in almost every circumstances, no investigation is legally required. If the employee committed an act of cause, the employer will succeed even if they conducted no investigation and asked no questions at all. If you are going to do an investigation of anyone beyond the CEO, have an internal employee do it quickly without additional cost.

8) Playing favourites

Too many employers have employees they treat as favourites and others that they think little of, sometimes for good reason, sometimes not. They make a mistake when they too quickly assume that those they favour are telling the truth and overlook their conduct that they would not abide in others. Such differential treatment not only leads to mistakes and morale issues, but creates precedents making it impossible to fire others for deserved cause of the same nature.

9) Inadequate research

If you are going to fire, or even discipline an employee, do your homework. Get their side of the story and ensure your case is ironclad. Don't have emails, that you were too lazy/careless to review, pop up later in the employee's hands and vitiate your theory of the case. Review everything in advance so as to attend the meeting with the employee fully armed.

10) Not reviewing your employment contracts

This area of law changes so quickly and the courts are so employee friendly that employment contracts enforceable last year likely no longer are. Employers should review their contracts regularly to ensure they anticipate such issues as constructive dismissals, layoffs and anything else that you want to be able to do but cannot without a contract.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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