Ethical Issues in EMPLOYMENT LAW

CHAIRS

Janice Rubin
Rubin Thomlinson LLP

Christine Thomlinson
Rubin Thomlinson LLP

April 5, 2017
ETHICAL ISSUES IN EMPLOYMENT LAW

Chairs: Janice Rubin, *Rubin Thomlinson LLP*
Christine Thomlinson, *Rubin Thomlinson LLP*

Speakers: Rich Appiah, *Israel Foulon LLP*
Lorna Cuthbert, *Stikeman Elliott LLP*
Andrea Wobick, *Ursel Phillips Fellows Hopkinson LLP*

April 5, 2017
12:00 p.m. to 2:00 p.m.
Total CPD Hours = 2 h Professionalism

The Law Society of Upper Canada
130 Queen Street West
Toronto, ON

SKU# CLE17-0040200-DWEB

Agenda

12:00 p.m. – 12:05 p.m. Welcome and Opening Remarks

12:05 p.m. – 12:25 p.m. Client’s Capacity to Instruct and to Participate

12:25 p.m. – 12:30 p.m. Questions and Answers

12:30 p.m. – 12:45 p.m. Dealing with Unrepresented Plaintiffs
<table>
<thead>
<tr>
<th>Time</th>
<th>Session Topic</th>
</tr>
</thead>
<tbody>
<tr>
<td>12:45 p.m.</td>
<td>Questions and Answers</td>
</tr>
<tr>
<td>12:50 p.m.</td>
<td>What to Do When You Don’t Believe Your Client Is Being Completely Honest?</td>
</tr>
<tr>
<td>1:05 p.m.</td>
<td>Questions and Answers</td>
</tr>
<tr>
<td>1:10 p.m.</td>
<td>Withdrawing Representation After a Breakdown in the Client Relationship</td>
</tr>
<tr>
<td>1:25 p.m.</td>
<td>Questions and Answers</td>
</tr>
<tr>
<td>1:30 p.m.</td>
<td>Dealing with the Professional Incompetence of Opposing Counsel</td>
</tr>
<tr>
<td>1:40 p.m.</td>
<td>Questions and Answers</td>
</tr>
<tr>
<td>1:45 p.m.</td>
<td>Who is Your Client? Acting for the Both the Employee and Employer</td>
</tr>
<tr>
<td>1:55 p.m.</td>
<td>Question and Answer Session</td>
</tr>
<tr>
<td>2:00 p.m.</td>
<td>Program Ends</td>
</tr>
</tbody>
</table>
1. Capacity to Instruct

You are retained by Mariam with respect to her employment with XYZ Holdings. Mariam tells you that she is being harassed in the workplace by several colleagues and that she has been on sick leave for three weeks as a result. She says that she is left out of social activities, colleagues stare at her without speaking, they follow her around the office wherever she goes, and they give negative feedback about her work to her manager. When you ask for examples of the negative feedback, she is unable to provide anything specific.

A letter from the employer states Mariam is on an unauthorized leave of absence as she has not provided any explanation for her absence from work. The letter indicates that if she doesn’t return to work within three days, she will be terminated for cause.

XYZ’s sick leave policy states that a medical note is required after an absence of three consecutive days or more, and that an individual must apply for short-term disability to a third party insurer after an absence of more than four weeks.

Mariam has a medical note states she is unable to work at this time due to depression and “ongoing workplace issues”. She shows you a prescription which you recognize as being one used to treat anxiety and depression.

In a second meeting, Mariam instructs you to file statements of claim against the employer and her colleagues. She tells you that she believes the employer has hired someone to surveil her. Mariam mentions that her family doctor has referred her to a psychiatrist, which she believes is because her colleagues have made her ill.

Questions

1. What, if any steps, should you take to ensure that Mariam a) doesn’t lose her job; and b) can access her sick leave benefits?

2. What should you do about Mariam’s instructions to file the statements of claim?

3. Does Mariam have capacity to instruct legal counsel? What should you do to determine whether she has capacity?
2. Unrepresented Plaintiff

Your client, Best Employer Inc. has recently fired a ten-year employee on a without cause basis. The employee, Ms. Unrepresented, has written to Best Employer claiming that during her employment she was harassed, discriminated against on the basis of sex, and was terminated because she complained about this treatment. She has demanded payment of $10,000 and advised that she is going to act on her own behalf.

Best Employer denies the conduct and say they have paid her the statutory minimums owed to her under her written contract. Through your conversations with Best Employer it becomes clear that Ms. Unrepresented may be able to prove her claim of harassment, discrimination and reprisal. As well, the employment contract is likely unenforceable because she signed it after she started her job.

Your advice to Best Employer is that they should accept her offer. However, you are instructed to call Ms. Unrepresented, be aggressive, convince her she has no valid claim and offer her $2,500.

You have a call with Ms. Unrepresented and you are concerned, based on your conversation, of her competence. She says that she knows the $10,000 is the maximum she can get under the Employment Standards Act and that's what she wants. Her conversation is erratic and she says she cannot afford her own counsel. She rejects the offer.

After the initial call, she begins to call you daily and leave multiple voicemails requesting that you immediately call her. You do not return her calls. The matter drags on.

Questions:

1. What is your obligation to your client? RPC – Section 5.1-1.

2. What is the best way to deal with Ms. Unrepresented? Do you have to correct her in her misunderstanding of the ESA? Section 7.2-1; Section 7.2-2; Section 7.2-9.

3. Do you have respond to all of Ms. Unrepresented’s phone calls? Section 5.1.5
3. Client Conflict – Untenable Allegations

George seeks your assistance to sue Acme International which, he says, dismissed him on the basis of sexual orientation. George tells you that a few months before his dismissal, he was targeted for performance monitoring. George suggested that no performance concerns had ever been raised until he disclosed to a work colleague that he is gay.

Negotiations with the company’s lawyer quickly break down. On George’s instructions, you prepare and serve a Statement of Claim. In unusual detail, Acme’s Statement of Defence reiterates what the company’s lawyer told you during the course of negotiation: that George’s performance had been severely lacking. Following your receipt of the company’s Affidavit of Documents, it becomes apparent to you that George’s case is weak and, in fact, he had not been honest when he said that the company’s performance concerns were recent revelations. Documents indicate that over a two-year period prior to George’s dismissal, George had signed off on numerous written warnings confirming that his performance was deficient and his employment in jeopardy.

You delicately raise this issue with George, but George becomes enraged. He instructs you to amend his Statement of Claim with new allegations that his supervisor had made racist remarks about him, and that his dismissal was race-based. George had never discussed such allegations with you in the past, and he gives you no evidence to support them. In light of George’s past inability to respond to Acme’s allegations, and his prior misleading advice to you, you do not believe George’s new claims.

Questions

1. What steps should you take (if any) to confront George?

2. Do you follow his instructions to amend his Statement of Claim?

Rules of Professional Conduct

Section 2.1 Integrity

Section 3.7 Withdrawal from Representation

Section 5.1 Relationship to the Administration of Justice
4. Client Conflict – Client Loss of Confidence

Nancy instructs you to prepare a Statement of Claim against Acme International after the company declined to offer a reasonable settlement of her claims. Prior to preparing the Claim, you tell Nancy what the action will cost (in both a worst case and best case scenario), the likelihood of settlement at mediation, and some other information.

After the parties exchange Affidavits of Documents, Nancy calls you and says that she needs to give some thought as to whether she was in a position, health-wise, to continue to pursue her claim. She said that she’d get back to you. Weeks go by. You attempt to contact her but she does not return your calls.

When you finally catch Nancy on the phone, she says that she felt misled – that you told her you thought she had a good case, but that your tune changed completely when you received the Defence from Acme International and you advised her that she’d have to incur up to $40,000 in legal fees for a fight. You do think that Nancy has a good case, although you did tell her the jurisprudence related to the particular facts of her case were not clear. After you received Acme International’s Defence, you simply reiterated the pros and cons of her case. You did not suggest that you had lost confidence in her case. When you tried to explain this to Nancy, she repeatedly suggested that you were lying to her.

Two days later, Nancy calls to apologise to you and ask you to push forward with her case.

**Question:**

1. How do you respond to Nancy?

**Rules of Professional Misconduct**

Section 3.7 Withdrawal from Representation
5. Professional Incompetence

You are counsel to ABC Inc., a defendant in a wrongful dismissal action brought by Jane S. After two years’ on the job, Jane was terminated without cause, and given three weeks’ pay in lieu of notice in accordance with the employment contract she signed prior to her first day of work.

Jane’s counsel, Sheila C., sent a demand letter on Jane’s behalf, demanding 3 years’ pay in lieu of notice. This offer was rejected by ABC. Sheila refused to negotiate further, even though the severance provision is clearly enforceable, and beyond that, even on a common law analysis, Jane would not be entitled to three years’ notice. Sheila ignored your position and has issued a claim.

Later, in joint discussions with the mediator, Sheila displays a shocking lack of knowledge of employment law. She flat out rejects an offer of three additional months’ notice without speaking with her client, and when asked about her client’s documentation of her mitigation efforts, she says that it wasn’t necessary since everyone knows that the job market is bad.

During a break, you overhear Jane telling your articling student that she wonders whether her lawyer is doing a good job for her, and whether she should take the deal. She mentions that she was only out of work for a few weeks after being terminated and wonders whether Sheila is making too much of her case. Jane ends the conversation before your student responds.

Questions

What are the ethical issues in this situation? If you have any ethical obligations, to whom do you owe them?

Can you use the information provided by Jane to your student?

How do you deal with the quality (or lack thereof) of Sheila’s representation?

Should you say anything to your articling student and if so what?

Rules of Professional Conduct

Section 3.1 Competence
Section 3.2-4 Encouraging Compromise or Settlement
Section 7.2-6 Communications with a Represented Person
6. Conflict of Interest

You act for an employer which is thinking about dismissing a few executives and hiring new ones. The CEO has brought in the Head of Human Resources to help determine the appropriate severance packages. You have worked with the CEO for a long time.

The company is a small but growing private company that wants to do an IPO in about twelve months. The CEO has identified the new CFO as a “friend” to the company and will be hired for a limited period of two years. The CEO presents you with a term sheet, copying the new CFO and instructs you to prepare the contract, share the draft with the new executive and negotiate its terms. You question whether or not the executive will have his own legal advice and the CEO tells you that it is all friendly and as the company grows it will be terrific for your law firm to have a good relationship with the CFO. You are concerned because the template agreement that the CEO insists on using contains a non-compete that may be unenforceable.

At the same time, the Head of Human Resources introduces another termination scenario and asks you to provide advice over the phone as to the individual’s common law entitlements. You are concerned because you believe that the facts being put to you are very similar to the Head of HR’s own circumstances.

Questions:

1. Who is the client? RPC – Section 1.1.
2. Can you act for the CFO and the Company? RPC – Section 3.2-3; Section 3.4-1, 3.4-5.
3. Can you/should you provide the advice to the Head of HR?