

Understanding the Human Resources Professional:

A Guide for Lawyers

Barry B. Fisher

Barrister, Arbitrator & Mediator

393 University Ave., Suite 2000

Toronto, Ontario

M5R 1E6

Tel: 416 585 2330

barryfisher@rogers.com

www.barryfisher.ca

Introduction

The purpose of this paper is to try to give some insight into the role of the lawyer in dealing with the human resources professional employed by an employer. Although many of the comments will be relevant primarily to the lawyer representing the employer, it is also vitally important for the employee's counsel to understand these issues so that they can more effectively negotiate with employer representatives.

Type of Employer

Employers are not uniform monolithic entities. Just like plaintiffs, they come in many shapes and sizes. Some are large, some are small. Some have highly sophisticated HR departments, some assign the HR work to the receptionist or the owner's secretary. Some have a deep understanding of domestic labour law, others rely solely on advice from foreign HR professionals with little or no understanding of Canadian labour and employment law.

Different industries tend to have different employment cultures. There is a vast difference between a car dealership run by the founder and his sons and a small branch of a large multinational insurance company. A company that is partly unionized and partly non-unionized will often look at employment issues differently than a non-unionized employer. The unionized employer will often have a better understanding than the non-unionized employer on issues such as progressive discipline, however they may not always appreciate the differences that flow upon termination of employment will differ greatly between the unionized and the non-unionized staff.

Level of Sophistication of the HR Professional

Although there are recognized professional designations within the HR field, there is no regulatory or statutory requirement on who can call themselves an HR practitioner. In other words, just like unregulated paralegals, anyone can call themselves an HR practitioner.

Not surprisingly then, there is a vast difference in the level of sophistication between different HR professionals. Moreover, HR people often have very specialized sub-specialties, so that a compensation expert may have a vast knowledge base when it comes to understanding bonus and commission plans, but a poor understanding of termination practices and laws.

In small organizations, the HR function is often delegated to or tacked onto the duties of the senior administrative person. This person may have little or no formal HR training and little access to proper reference material. Typically this person works in an environment where senior management has little or no appreciation of the complexities and the breadth of Canadian employment law. These employers are the ones most likely

to phone the Ministry of Labour for advise, not realizing of course that the person on the other end of the phone is at best knowledgeable in the understandings of the ESA, but bereft of knowledge of anything else.

Power of the HR Professional:

The power to make or influence decisions within the employer is the singular most important element to understanding how to deal with the HR department, whether you act for the plaintiff or the defendant. In a large number of organizations the actual ability of the HR department to make binding decisions on employment related matters is minimal. In most organizations the function of the HR department to provide advise and counsel to the other divisions of the company. The important decisions, like who is terminated, who is hired, who is promoted and most importantly how much do we pay to settle the case, lies in the hands of the part of the company either employing the individual or paying the cost of the settlement.

From a practical point what that means is that even if the HR professional thinks that the offer proposed by the plaintiff's counsel is a good one, she may not be able to agree simply because she is worried about her ability to sell the idea to the real decision maker back at the office. Therefore, continuing to argue the law or the facts to a person in that situation is of limited utility, as the HR professional's understanding of the law or the facts may not be the problem. What you need to do in that case, whether you are counsel for the company, plaintiff's counsel or the mediator, is to work with the HR professional in helping him sell the idea to the real decision maker. In order to do this you need to know who that decision maker is, what personal interest the decision maker may have in the case, the political importance of the decision maker within the organization and how this offer may affect the decision makers budget or compensation pool. It is also very important to remember that no HR professional is going to push for a settlement if the mere act of doing so may jeopardize his or her own career within the company.

The Employment or Termination Philosophy

Each organization has a employment philosophy, whether explicit or implicit. By this I mean that every employer has a certain set of outlooks or belief systems when it comes to dealing with its employees and ex-employees.

Ascertaining and understanding that philosophy is vitally important to being able to work with the HR department. The one way that you do not gain insight into the real employment beliefs of an organization is to read their "mission statements", or their "core values documents" or frankly anything else the public relations department put out based on the last management fad seminar or book that the CEO attended.

Rather than look at what the company says they believe in, look at what they actually do. If they claim to have an "open door policy" ask them how many times it has been utilized and what happens to those brave souls who attempted to use it. If they have a harassment policy, is the investigation process spelled out or is it ad hoc? How

do they usually treat dismissed employees, i.e. do they pay ESA and assume that most people will not go to lawyers, do they put together severance packages that reflect a low end common law notice period, do they prefer lump sum settlements or salary continuation? Is there a preset termination formula or is each case looked at separately? How many wrongful dismissal actions have they had in the last five years and how and when were they resolved?

If you are being asked to start acting for a new employer client, then it is important not only to understand what the existing employment philosophy is, but also whether that fits within your style of practice and whether the company is engaging you in part to help them change that philosophy. In other words, if the past history of the company has been to only pay ESA minimums upon termination and fight every case to the courtroom door in the hope of starving the plaintiff to a cheap deal, then you need to ascertain whether they simply want you to continue that approach or are they looking to you for advice and guidance on adopting a new approach. Some lawyers feel comfortable adapting to whatever employment philosophy that client wants, so for one client they can be the fearless gladiator and for the next the consummate negotiator. Other lawyers feel that they are most effective when they adopt a style or approach that most suits their own outlook and therefore are less effective when they are required to act “out of character”.

Personally I found that one of the main reasons that I was able to obtain new employer clients and one of the reasons that I lost employer clients was a desire to change their employment philosophy. In other words, I often acquired new employer clients because they were displeased with what had happened in the past, i.e. nasty and costly litigation, no protection from former employees competing with them, high employee turnover, etc. My approach would, over time, reduce the amount of litigation, increase the predictability of result and hopefully anticipate future problems and try to resolve them before they became litigious. The down side of that approach is that if there is a sudden change in the company at the senior HR level, there was always a risk that the new guy would want to radically change the employment philosophy that was associated with the now defunct predecessor. That would often mean changing the employment counsel associated with the now defunct employment philosophy.

Dealing directly with HR Professional and their Colleagues

If you are counsel for the employer, you will probably deal directly with the HR professional as the main client contact. You may or may not however deal with other important individuals within the company that have a profound effect on employment matters.

One of these people is in-house counsel. In some organizations, in-house counsel play a key role in all legal matters, including employment matters. However the level of employment expertise of in-house counsel varies greatly. Most in house counsel understand their limitations in the employment area, and have no problem and in fact prefer to work with outside employment counsel. Other times, especially where the HR

department engages outside employment counsel directly, a turf war can arise between the in-house counsel and the HR department over when outside counsel is engaged and if so, who the outside counsel reports to.

Another key individual that you may or may not ever meet is the CEO or President. If you never or rarely get to meet this individual, this may be a sign that the organization respects the HR department and therefore does not second guess their judgment. On the other hand, the HR professional may not want you to have direct access to the CEO because he or she fears that her role will be diminished if HR is not the sole conveyor of employment advise to the CEO.

If you do get to meet the “ all mighty one”, be very conscious of a number of factors. First of all, the reason that the CEO wants to meet with you may be because she feels that the HR department is not providing her with accurate information on the legal risks of the case. On the other hand, many a CEO is deep inside a frustrated lawyer (or actually has legal training) and therefore they want to discuss legal issues only with other legal professionals. However, the most common situation where I find the CEO wants to get personally involved with outside employment counsel is either where the subject matter is of utmost importance to the organization (i.e. the cost of a mass layoff) or where the matter is incredibly trivial but where the CEO has, for what ever reason , taken a intense personal interest. This usually involves the termination of someone that the CEO despises.

As counsel for the employee, you should also be aware that there could be a real advantage to dealing directly with the HR professional. When I did plaintiff’s work I would typically send my initial letter to the HR Manager. It was a very soft letter, not at all like the typical demand letter with its inherently aggressive tone. I would simply state that I am the lawyer for Mr. X, an ex-employee, that I had reviewed his proposed termination package and would like to discuss the matter with her or him. Nine times out of ten I would get a call directly from the HR manager, intrigued by this apparently reasonable plaintiff’s lawyer who wanted to talk to him. In the first phone call I rarely put any position to the HR person. Instead, I was trying to find out if this HR person knew enough about employment law so that I could engage in any real negotiations with him or her. If I felt I could reach a deal with this person, I would propose a meeting at his place to discuss and hopefully resolve the matter. More often than you would expect, they said yes and I would trot over to the company premises and meet the HR Vice President in a private meeting to try to resolve the case. I did this because I wanted to make the HR professional feel empowered and able to settle the matter without sending it off to the lawyers. Even if it didn’t settle at that stage, I had already formed a personal relationship with my opponents’ client. This often helped bring a resolution at some later stage in the litigation process. Moreover, now that we have mandatory mediation in many employment cases, it can be a real advantage to have met the HR representative before even attending the mediation session.

Simply put, involving the HR professional directly in the settlement process engages the HR person in the task of resolving the dispute, thereby enhancing the fact that there will be a resolution.

A side benefit to this direct face-to-face involvement with the HR professional is that it sometimes leads to later being retained by the company or the HR professional when he or she is let go.

Barry B. Fisher

November 8, 2001

Toronto, Ontario