

# EMPLOYMENT CONTRACTS AND THE DUTY TO ACT HONESTLY

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Ever since the Supreme Court's landmark decision in *Bhasin v. Hrynew* ("Bhasin"),<sup>[1]</sup> the legal duty to act honestly in the performance of contractual obligations has been a hot button issue in Canadian contract law cases. The subsequent decision of *Antunes v Limen Structures Ltd.*<sup>[2]</sup> serves as a stark warning to employers that employment contracts are by no means exempt from this principle, and that the consequences of getting it wrong can be severe. **Background**

Mr. Antunes was hired by Limen Structures Ltd. ("Limen") in 2012. Mr. Antunes' employment contract entitled him to an annual salary of \$150,000 and 5% of the shares of Limen. During contract negotiations, Limen's President had represented to Mr. Antunes that the company was a thriving business worth \$10 million, such that his shares would be worth \$500,000. In reality, however, the company was worth much less than \$10 million – a fact that Mr. Antunes did not discover until *after* the contract with Limen had already been signed.

Limen never issued the shares promised to Mr. Antunes upon the commencement of his employment and, a mere six months later, it dismissed him without cause. Mr. Antunes then brought an action for wrongful dismissal against Limen seeking, among other things, compensation in lieu of the unissued shares.

## Honesty in Contractual Performance

The court started its analysis by acknowledging that parties to a contract, including an employment contract, must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of that contract. Citing *Bhasin*, the court opined that:

*[a] party to a contract must be able to rely on a minimum standard of honesty from the contracting partner in relation to performing the contract with the reassurance that if the contract does not work out, they will have a fair opportunity to protect their interests.*

With these principles in mind, the court found that Limen had failed to deal with Mr. Antunes honestly during negotiations. In particular, Mr. Antunes had relied on the untrue representations made by Limen's President regarding the financial circumstances of Limen before accepting his offer of employment.

Not surprisingly, the court held that Mr. Antunes was contractually entitled to 5% of Limen's shares (as this

entitlement was clearly set out in his contract). However, the court took a novel approach with respect to the valuation of those shares. In the court's view, Mr. Antunes was told that he would receive shares worth \$500,000 in exchange for commencing employment with Limen even though the contract itself was silent as to the value of the shares. In order to put Mr. Antunes in a position commensurate with his expectations, he would have to be compensated in accordance with the President's representations. On this basis, the court ordered Limen to pay damages to Mr. Antunes in the amount of \$500,000 (in addition to damages for pay in lieu of notice of his dismissal).

### **What Employers Should Know**

The court's decision in *Antunes v Limen Structures Ltd.* confirms that employers cannot always rely on the strict wording of a contract when it comes to quantifying employee entitlements. The courts have the jurisdiction to look at the totality of the circumstances, and may apply the duty of honesty in contractual performance to find that employees are entitled to more than what is written in a contract.

In order to avoid the same fate as Limen, employers should take great care when negotiating the terms and conditions of employment with potential employees. Playing it "fast and loose" when it comes to making representations is a recipe for disaster. Above all, employers should always consider whether their conduct would be perceived as honest, fair and reasonable, having regard to any oral promises which may have been made to the employee by the employer's representatives.

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1. 2014 SCC 71.[ps2id id='1' target='']
2. 2015 ONSC 2163.[ps2id id='2' target='']

### **A Cautionary Note**

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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