

e2r Alert!

MOONLIGHTING – OUTSIDE EMPLOYMENT AND CONFLICTS OF INTEREST

A 2005 survey by the U.S. Bureau of Labour Statistics estimated that approximately five percent (5%) of Americans held a second job in addition to their primary full-time employment. Similarly, a previous Canadian survey estimated that nearly six percent (6%) of Canadians also held second jobs in addition to their primary employment. “Moonlighting”, the act of holding a second job in addition to ones’ primary occupation, remains prevalent in the modern work era. According to Statistics Canada, people are drawn to moonlighting for a number of financial and non-financial reasons, including the desire to supplement regular income, the nature of the employment derived from a second job, as well as market considerations. While a second job is often a fact of life for some Canadians, a growing number of employers are adopting proactive measures in relation to conflicts of interest that arise as a result of outside employment. *Patterson v. The Bank of Nova Scotia (“Patterson”)*, a recent British Columbia case, highlights the need for employers to have policies in place which address conflicts of interest.

In this case, Marilynn Patterson, a former employee of The Bank of Nova Scotia, sued for damages for wrongful dismissal. Her lawsuit was in response to being terminated for cause on the grounds that she failed to abide by the Bank’s policies relating to outside employment and conflicts of interest. Up to the date of her termination, Ms. Patterson was not only employed with the Bank as a customer service supervisor, but also moonlighted as a real estate agent. Although the nature of her role did not require her to be directly involved with the Bank’s lending activities, it was expected that part of her employment involved making efforts to assess whether there were Bank services that she could recommend to potential customers and existing bank clientele. Having discovered that Ms. Patterson had been moonlighting as a real estate agent, the Bank advised her that there could be a potential conflict of interest. It is important to note that the court found that an express term of Ms. Patterson’s contract was a set of human resource policies entitled “Guidelines for Business Conduct”. These guidelines, of which were known to Ms. Patterson, clearly set out the Bank’s position in relation to conflicts of interest. In finding in favour of the Bank, the court relied heavily on the fact that the Bank had clear policies in place dealing with conflicts of interest. Having established the Bank’s policies to be clear and unambiguous, the court also found that these policies were consistently applied throughout the organization. In the end, the Bank’s decision to terminate Ms. Patterson was upheld on the basis that she refused to accept a reasonable order to comply with the Bank’s policies in respect of outside employment and conflicts of interest.

Be Proactive

Patterson highlights the need for employers to develop policies which address outside employment and conflicts of interest. When developing such policies, it is important for them to be clear and unambiguous. Furthermore, such policies should address the following:

- 1) Relationships or activities (i.e. outside employment, etc.), which may, or may not be perceived to be in conflict with the interest of the organization
- 2) Provide a non-exhaustive list of examples of particular activities which may be found to constitute a conflict of interest
- 3) Provide a clear protocol upon discovering a conflict of interest, or a perceived conflict of interest
- 4) Clearly set out disciplinary consequences

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