



Marvin Huberman

# Honesty is the only policy

“Whoever is careless with the truth in small matters cannot be trusted with important matters.” -- Albert Einstein

In its landmark decision in *Bhasin v. Hrynew*, released November 2014, the Supreme Court of Canada established a general doctrine of good faith, which requires the parties to a contract to “perform their contractual duties honestly and reasonably and not capriciously or arbitrarily”.

Justice Cromwell, writing for a unanimous court, explained honesty requires that parties to an agreement “not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract.” Parties to a contract are now required to have “appropriate regard” for the other party’s interests.

Although the contracting parties need not subordinate their own interests to the other party’s interest, they must not seek to undermine those interests in bad faith. The Supreme Court was not attempting to impose a duty of loyalty in contractual relationships, but rather decided that there must be a minimum standard of honesty between contracting parties.

It is of great importance to note the doctrine of good faith has existed for a long time in respect of certain types of contracts, the two most important of which are insurance and employment contracts. This article will focus on the duty of good faith and fidelity in respect of employment contracts.

## Good faith and fidelity

There is implied, as a matter of law, in every contract of employment a duty of good faith and fidelity. This requires that an employee act honestly and faithfully during their employment. An employee must:

- Put the employer’s best interests first and avoid any conflicting personal interests;
- Avoid competing with the employer during the term of employment;
- Avoid any personal interest sufficiently connected with the employee’s professional duties that there is a reasonable apprehension that the personal interest may influence the actual exercise of the professional responsibilities;
- Avoid the unauthorized disclosure or appropriation of the employer’s trade secrets and confidential information;
- Not conceal from the employer “facts which ought to be revealed”; and
- Provide full-time service to the employer.

If the employee’s breach of the duty of good faith and

fidelity is sufficiently damaging to the employment relationship, the breach is grounds for summary dismissal of the employee by the employer. As stated by the House of Lords in *Malik* and endorsed by the Ontario Court of Appeal in *Spendlove v. Thorne, Ernst & Whinney*:

“...the trust and confidence required in the employment relationship can be undermined by an employer, or indeed an employee in many different ways...the conduct must, of course, impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer.”

## Potential harm is sufficient

For an employer to establish just cause for dismissal on the basis of breach of the duty of good faith and fidelity by an employee, an employer need not prove actual prejudice; potential harm is sufficient.

As long as the employee continues in the employment relationship with the employer, including any period of working notice, the duty of good faith and fidelity continues in full force and effect. If the duty of fidelity is breached by an employee during the notice period, the employer may well have the right to dismiss him or her for just cause, even if the employer previously agreed to pay severance.

Once the employment relationship ends, employees are generally not bound by the duty of fidelity unless there are specific contractual provisions or other legal duties making the employee bound to continue that requirement, or unless there are trade secrets or confidential information which are the subject of a continuing duty of fidelity on the part of the employee.

## Last thoughts

The duty of good faith and fidelity in the employment relationship is not one-sided; there are reciprocal duties on both the employer and the employee.

It is clear then that for employees, and employers, honesty isn’t everything, but it’s the core duty which is relied upon by the courts to compel “faithful service” in an employment relationship so as to protect the legitimate interests of both contracting parties. MM&D

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