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Improperly issued, executive employment contracts may be unenforceable | Frank Portman

By **Frank Portman**

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Law360 Canada (March 12, 2025, 10:57 AM EDT) -- The legal community was abuzz this week with the sudden exit of Diana Miles, the Law Society of Ontario (LSO) chief executive officer, with only a terse news release being provided to the public. Miles had been with the law society for more than 23 years. She was named acting CEO of the LSO in September 2017; the position was made permanent in March 2018.

Miles' exit came on the heels of reporting that suggested that she had received a 50 per cent increase in compensation from $595,000 to $936,800 last June. As well, she was given a retroactive payment of $226,000 related to her pension, according to investigative reporter Robyn Doolittle with *The Globe and Mail*.

The increase followed a pay review which some observers criticized as lacking transparency and an appropriate internal vetting process. It is clear to this executive employment lawyer that there are significant questions about how the offer was calculated and the process by which the offer was approved.

The *Globe and Mail* alleges that the significant salary increase of Miles happened without the knowledge of the board of directors of the LSO, comprised of elected benchers who act as directors.

Now, much of the scrutiny is being directed to the now-former chief executive officer after a months-long probe focused on the significant increase in compensation and whether it is justifiable in the market.

CEOs, executives are within their rights to negotiate better executive compensation package

In my view, as an executive employment lawyer, the subject of that scrutiny is misplaced. Where the scrutiny should rightfully focus on is whether Miles was aware that the offer being made to her needed to be approved by the LSO's board, which recent reports have indicated was the case.

Absent extraordinary circumstances, the chief executive officer was fully within her rights to negotiate and accept the pay package offered to her, without regard to whether it was subjectively within market norms.

There is no general obligation for any employee, including an executive, to ensure that their compensation is "reasonable" by any particular standard. The parties to an executive employment contract are free to negotiate terms such as compensation, fettered only by the minimums in the *Employment Standards Act, 2000*, looking out for only their individual self-interest.

There is no reason that this principle should not apply in non-profit generating organizations such as the LSO. Indeed, there is no substantive difference in employment law between the for-profit sector and the not-for-profit sector, generally. And the work of a CEO is generally the same.

Employment law accounts for the tension between the right of an employer and an employee as commercial parties to negotiate their own economic affairs and acknowledgment of the unique

employment relationship as imposing obligations beyond the normal commercial relationship. However, as a general rule, employees do not owe their employers any particular obligations when they are negotiating their salaries or terms and conditions of employment.

Be on guard for 'flies in the ointment'

The exception to this is where an executive is aware of an irregularity or impropriety in the manner in which the offer was formulated that could render it non-binding.

For example, an employee who knows that an offer circumvented the normal processes for preparing or making an offer, such as requiring explicit approval of the board of directors, runs the risk that the deal is found to be unenforceable. This is not because they are an employee, but instead because they are aware that the offer being presented to them was flawed.

In this case, it appears the LSO is taking exactly that position. Doolittle's most recent article, citing an internal investigation conducted by former Justice Dennis O'Connor, asserts that Justice O'Connor found that the law society's bylaws could not support the salary increase without board approval, a fact that Miles is alleged to have been aware of.

This account is even more intriguing given that the compensation committee that approved the increase included a lawyer alleged to have been Miles' former counsel.

The Nixonian question: 'What did you know and when did you know it?'

This last piece is the key to the question: What was the knowledge of the executive employee of any irregularities in the offer, and when? Absent such actual knowledge, an employee has no obligation to look behind an offer to determine whether it was properly issued.

With the news that the LSO has decided not to release its internal investigation into the contract, citing solicitor-client privilege, it may be that the public will never learn the true circumstances leading to the more lucrative renewed executive employment contract.

However, it seems clear to this executive employment lawyer, based on the allegations and the important transparency issues they invoke, that this story is not complete. One question will be whether the LSO seeks reimbursement of the increased compensation under the contract, under the theory that the contract was never properly issued.

For executives, the odyssey of the LSO in this matter is a reminder to be live to an offer that seems too good to be true. If an employer makes such an offer and an executive has reason to believe it might not follow the usual decision-making process, that executive employee risks having that executive employment contract rescinded or resulting in a termination for cause — or worse.

Frank Portman is an employment lawyer at Massey LLP. His specialty is executive employment law where he assists presidents, vice-presidents and other C-level executives and the organization seeking to hire their talents to complete the deal through effective executive employment contracts.

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