Labour and Employment Law Conference 2009 — Alberta

Tuesday, May 12, 2009

Table of Contents

Agenda – HR in Hard Times

8:00 a.m.	**Continental Breakfast and Registration**
8:40 a.m.	**Welcome and Introduction by Chair** *Paul Boniferro*
8:45 a.m.	**Employment Law Issues in Challenging Times** *Speakers: Michael Ford, Tina Giesbrecht, Earl Phillips and Richard Shaw, Q.C.* What in-house legal counsel and human resource practitioners really need to know in 2009. Trends in labour and employment, dealing with layoffs and dismissals, executive compensation and cross-border issues in challenging economic times. Practical human resource strategies to help manage the risks and traps to avoid liability in hard times.
9:45 a.m.	**Break**
10:00 a.m.	**The Year in Review and Legislative Update** *Speakers: Paul Boniferro, Lana Jackson and Erika Ringseis* Strategic overview of the hot topics including recent human rights, wrongful dismissal, privacy, Supreme Court of Canada and arbitration decisions and key legislative changes.
10:45 a.m.	**Saying Goodbye…or Not** *Speakers: Tina Giesbrecht and Brian Wasyliw* How to avoid constructive dismissal issues when changing employment terms caused by new economic realities in today's workplaces.
11:15 a.m.	**Accommodating Employees in a Challenging Economy** *Speakers: Paul Boniferro and Erika Ringseis* Navigating human rights obligations in a challenging economy, with special consideration of age and health accommodation.
11:45 a.m.	**Looking Ahead — Panel Discussion of Future Trends and Q & A** *Speakers: Panel*
12:15 – 2:00 p.m.	**Lunch and Networking Opportunity**

Employment Law Issues in Challenging Times

Michael Ford
Tina Giesbrecht
Earl Phillips
Richard Shaw, Q.C.

May 12, 2009

McCarthy Tétrault LLP
3300, 421 – 7th Avenue SW
Calgary, AB T2P 4K9
Canada

www.mccarthy.ca

Introduction

The year 2009 marks an interesting and dynamic year in labour and employment law. In the current economic downturn, issues facing in-house legal counsel and human resource practitioners are numerous and varied. The purpose of this paper is to summarize these changes and concerns. Trends in labour and employment, dealing with layoffs and dismissals, unexpected tax liabilities, executive compensation and cross-border issues in a declining economy are all addressed below.

We start by looking at possible options for reducing overhead and managing the workplace during an economic downturn. Practical suggestions are highlighted after a brief summary of the legal requirements and hurdles that need to be met and overcome. The legal framework is important, but the practical realities may provide many of the answers to the legal questions. Put simply, employees may see their legal rights as less important than the practical need to stay employed and maintain a stream of income.

Following the issue of managing your workforce during an economic downturn, this paper highlights emerging issues in 2009 from tax, executive compensation and cross-border perspectives.

Managing Your Work force During the Downturn

There are many cost reduction strategies that employers can consider during the current economic downturn. Five potential options are discussed below.

Option 1 – Reductions in Head Count

One common cost reduction option in the event of economic pressure on a workplace is a reduction in head count. Reductions may occur by terminating employment, temporary lay-offs or voluntary retirement.

A. Terminations

Terminations of employment that are tied to economic reasons and the restructuring of a workplace are considered to be without cause terminations and result in a permanent reduction in head count. This is the most drastic option as a result of its permanence and may be an expensive option given the upfront cost of severance packages. However, it does present an opportunity to critically assess your workforce and eliminate employees who have performed poorly. The key point is to keep your strong employees and part with the weak. As a result, the cost of a fair severance package may in fact be a worthwhile investment in building a high performance workforce.

Individual Terminations

In the absence of an enforceable written contractual termination provision in an employment agreement that dictates what an employee is entitled to in the event of a without cause termination, the common law implies an obligation to provide the employee with reasonable notice which is calculated based on criteria including the employee's age, length of service, the character of the position and the availability of suitable alternative employment. This is over and above but inclusive of the statutory notice of termination or pay in lieu thereof to which employees are entitled under the Alberta *Employment Standards Code* (the *"ESC"*).

Under the *ESC*, when terminating the employment of someone who has been continuously employed for three (3) months or more, the employer must provide either:

(a) written notice of termination; or

(b) termination pay in lieu of notice; or

(c) a combination of the two.

If written notice is given, the employee must be paid his or her regular wages throughout the notice period. The benefit of giving working notice rather than pay in lieu thereof is that you derive the benefit of the employee's continued work efforts during the course of the notice period. The risk, however, includes the potential impact on employee morale, quality of work, loss of confidential information, disruption of customer relationships and the overall impact on the workplace.

The amount of written notice that is required is entirely dependent on how long the employee has been employed by the employer. The *ESC* specifies the following mandatory minimum notice periods:

LENGTH OF EMPLOYMENT	AMOUNT OF NOTICE REQUIRED
Less than 3 months	No Notice Required
3 months or more but less than 2 years	1 week
2 years or more but less than 4 years	2 weeks
4 years or more but less than 6 years	4 weeks
6 years or more but less than 8 years	5 weeks
8 years or more but less than 10 years	6 weeks
10 years or more	8 weeks

In the event that the employer opts to provide the employee with termination pay in lieu of notice, the

employer must pay the employee a lump sum payment equal to the regular wages for a regular work week that an employee would have earned during the notice period had notice been given.

It is important to note that the term "wages" under the *ESC* includes salary, pay, money paid for time off instead of overtime pay, and commission or remuneration for work, however earned. Not included in the calculation is overtime pay, vacation pay, general holiday pay, termination pay, gifts or bonus dependent on the discretion of the employer and not related to hours of work, production or efficiency, expenses, or an allowance provided instead of expenses or tips or other gratuities.

Federally-regulated employers also have notice under Part III of the *Canada Labour Code* (the "CLC"). At least two weeks' notice or pay in lieu of notice is required, for those employees who have worked in excess of three months. For all employees with at least twelve consecutive months of continuous employment, additional severance pay is required (the greater of two days pay per year of employment or five days' pay).

Mass Terminations

Under the *ESC*, a mass termination occurs when fifty (50) or more employees in the same establishment have their employment terminated within a period of any four (4) consecutive weeks.

In the event of a mass termination, notice must be given to the Director of Employment Standards (Ministry of Labour) before the notice of termination to employees (or pay in lieu of notice) can commence.

For federally regulated employers, notice of group terminations must be given to the Minister at least 16 weeks before termination commences. The prescribed notice must also be posted.

Benefits During Notice Periods

Unlike other provisions, the *ESC* is silent with respect to the provision of, or compensation for, benefits during the notice period.

During the common law (or contractual) notice period, an employer is liable for all remuneration (including benefits) that an employee would have received had he or she been working during that notice period, subject to and in accordance with the terms and conditions of the applicable plans. Accordingly, in order to minimize exposure to possible liability from a benefits perspective, it is advisable for employers to maintain benefit coverage, to the greatest extent possible, for such employees during the notice period pending the signing of a binding release.

B. Lay-offs

If you are looking for a temporary reduction in labour costs, but not a permanent downsizing, lay-offs may be the appropriate solution.

Lay-offs in a Unionized Workplace

As most collective agreements spell out the specific requirements for lay-offs in a unionized workplace, employers must consult the collective agreement. Note that federally regulated employers have to be concerned about possible deemed terminations, even under a collective agreement. Finally, it should be noted that union employees working under a collective agreement have no right to common law notice. These employees must look to the collective agreement for their rights.

Lay-offs in a Non-Unionized Workplace

Lay-offs in a non-unionized environment are not as simple because there is no common law right to lay-off an employee. The Courts have held that a temporary lay-off will constitute a constructive dismissal unless there is an express or implied term in the contract of employment permitting lay-offs. An express provision for the possibility of a temporary lay-off must clearly provide the employer with the legal means by which to impose such a lay-off. An implied provision, however, is much more difficult to establish as the employer must be able to demonstrate that the employee was in fact aware of the possibility of a lay-off, generally either by way of notice from the employer or as a result of industry/company custom.

In the event that an employer can demonstrate that it is permitted to temporarily lay-off an employee, then that lay-off must be carried out in accordance with the *ESC*. The *ESC* provides for a lay off of up to 60 consecutive days.

Under the CLC, federally-regulated employers may temporarily lay off employees where:

(a) the lay-off is a result of a strike or lockout;

(b) the term of the lay-off is 12 months or less and the lay-off is mandatory pursuant to a minimum work guarantee in a collective agreement;

(c) the term of the lay-off is three months or less;

(d) the term of the lay-off is more than three months and the employer:

  (i) notifies the employee in writing at or before the time of the lay-off that he will be recalled to work on a fixed date or within a fixed period neither of which shall be more than six months from the date of the lay-off; and

  (ii) recalls the employee to his employment in accordance with subparagraph (i);

(e) the term of the lay-off is more than three months; and

(i) the employee continues during the term of the lay-off to receive payments from his employer in an amount agreed on by the employee and his employer,

(ii) the employer continues to make payments for the benefit of the employee to a pension plan that is registered pursuant to the Pension Benefits Standards Act or under a group or employee insurance plan,

(iii) the employee receives supplementary unemployment benefits, or

(iv) the employee would be entitled to supplementary unemployment benefits but is disqualified from receiving them pursuant to the Employment Insurance Act; or

(f) the term of the lay-off is more than three months but not more than 12 months and the employee, throughout the term of the lay-off, maintains recall rights pursuant to a collective agreement.

C. Voluntary Retirement

For some employees, there may be interest in retirement, whether at a normal age of retirement or earlier. A review of your pension and benefits plans may reveal options to encourage retirement with little up front cost and some longer term savings.

When dealing with the prospect of a voluntary retirement, it is important to take care to avoid any suggestion that might be used to make a claim of age discrimination. Mandatory retirement is no longer allowed in Alberta and inappropriate pressure for retirement at any age, or for "early" retirement, may be considered age discrimination. Employers who make retirement packages available to their employees should try to avoid:

- conduct which suggests age discrimination, such as suggesting to an older employee that their position "takes a lot of energy", or that it is time for the employee to "take things easy";
- pressuring employees to accept retirement packages;
- associating retirement offers with job loss; and
- placing conditions on packages (that are not part of bona fide benefits or pension plans) that exclude certain employees.

Option 2 – Reductions in Working Hours

If an employer anticipates that the economic scenario facing its business will be short-lived or if a reduction in headcount is not a viable option, an alternate solution is to reduce costs through a

reduction in the working hours of its employees. There are a variety of ways to accomplish this, including the following. Care should be taken, however, to make all changes with an eye to potential liability arising under constructive dismissal claims.

A. Unpaid Leaves of Absence

Introducing unpaid leaves of absences may be an attractive option for employees wishing to pursue personal objectives such as family time, travel, education or charitable activities. In order to avoid characterization as a lay-off, such leaves will require the agreement of the employee and should be done on a job-protected basis.

B. Reduction of Vacation Related Expenses

In the event that an employer provides paid vacation time above and beyond the *ESC* and CLC entitlements to two (2) or three (3) weeks per vacation entitlement year, depending on tenure, the employer may consider converting the excess paid time to an unpaid, job-protected leave of absence upon notice to the employee or agreement from the employee.

Also, in the event that an employer provides vacation pay at a rate above the *ESC* minimum of four percent (4%) or six percent (6%), they may want to consider reducing that to the *ESC* rate.

Keep in mind, however, that absent the employee's agreement, this arguably constitutes a reduction in the employee's compensation package and therefore may provide a basis for a claim of constructive dismissal. As such, notice of such a change should be provided whenever possible and the change should be implemented consistently.

C. Reduced Work Days or Work Weeks

Many employers are implementing shorter work days or work weeks in order to save costs and address a decrease in available work. Job-sharing is also a viable option in this regard. This may be particularly attractive to employees in the summer months when there is a desire to increase personal time or by employees with child-care obligations. Similarly, employers may consider implementing nine-day fortnights whereby the employees, on a rotating basis, will take every second Friday off without pay.

Employers considering this option may want to consider whether they are eligible for Work-Sharing Agreements available through HRSDC which provide for supplemental payments through Employment Insurance in the event of a temporary reduction in work week. Details on this program can be found at: http://www.servicecanada.gc.ca/eng/work_sharing/index.shtml.

As with the other options discussed in this paper, absent the employee's agreement, this arguably constitutes a reduction in the employee's compensation package and therefore may provide a basis for

a claim of constructive dismissal. As such, notice of such a change should be provided whenever possible and the change should ideally be implemented consistently.

Option 3 – Changes to Compensation Practices

Another option for the reduction of workforce costs is to change compensation practices to decrease a company's payroll. Again, care should be taken to avoid constructive dismissal claims by employees, an issue developed in another paper in this year's conference. There are a variety of ways to accomplish this, including the following.

A. Limiting or Banning Overtime

One of the most expensive compensation practices in many workplaces is the payment of overtime hours at premium rates of pay; often time and a half or double time an employee's regular wages. While often there is no way to avoid the need for overtime due to operational requirements, it is important to note that barring any contractual provision to the contrary, an employee has no right to work overtime. As such, reducing overtime costs can be fairly simple. In some cases an employer can actually save money by hiring more employees to perform this overtime work at straight time rates.

When considering a limit or outright ban on overtime, employers must take into consideration the reality of the business and whether its operational needs can be met by employees during regular working hours. Once the determination is made that this is a viable option, the key is enforcement. Employees must be made aware that overtime is not permitted without the express authority of the appropriate manager or supervisor and absent that permission, will not be paid or banked. The onus then falls to the management team to ensure that employees are not being asked or permitted to work above 8 hours per day or 44 hours per work week (or the Company's overtime threshold, if lower). A failure to enforce this policy may result in liability for any hours worked.

On a related note, if overtime is permitted, employees who fall into one of the statutory exemption categories should not be paid overtime unless there is an express agreement to the contrary. The typical categories for exemption include true managers and supervisors, employees licensed and employed in a professional capacity (e.g. lawyers, public accountants, doctors, etc.) and certain information technology professionals.

B. Changing the "Compensation Mix"

The "compensation mix" refers generally to the various forms of compensation or remuneration provided to employees in the course of their employment, including base salary, bonus, commissions and perquisites. When assessing whether there is an opportunity for cost-savings here, employers may want to consider options such as:

- change to the base/bonus structure to provide greater weighting on performance-based bonus compensation;

- provision of alternate forms of compensation to cash (e.g. equity-based compensation and performance awards);

- reduction or elimination of perquisites that are not tied to the performance of an employee's job duties and responsibilities (e.g. club memberships, excess travel and expense budgets, entertainment budgets and car allowances);

- deferral of bonus payments (may be paired with contractual obligation to be actively employed on the date the bonus is payable in order to be eligible for receipt);

- deferral (up to three years for tax compliance purposes) of commission payments until the money is received by the employer through its Accounts Receivable process rather than at the time the sale is closed; and

- suspension or revision of the bonus program, including the elimination or reduction of discretionary bonuses.

As with the other options discussed in this paper, absent an employee's express agreement, any material, unilateral changes in an employee's compensation package may provide a basis for a claim of constructive dismissal. As such, notice of such a change should be provided whenever possible and the change should ideally be implemented consistently.

C. Across-the-Board Reductions or Freezes in Base Salary

One of the more frequently implemented cost-savings measures is the reduction or freezing of base salaries which is typically done (and recommended to be so) on an across-the-board basis. An example would be a ten percent (10%) reduction or a 2 year freeze of the base salary of all salaried employees. Such a reduction could be done on a permanent basis or on a temporary basis, perhaps even with a prospect of future repayment.

Again, absent an employee's express agreement, any fundamental, unilateral changes in an employee's compensation package may provide a basis for a claim of constructive dismissal. When dealing with compensation reductions, a general rule of thumb is that any such reduction that amounts to a reduction of ten percent (10%) or more of the employee's compensation will be found to be a fundamental change. That said, keeping a reduction under the 10% threshold is by no means a guaranteed way of protecting against constructive dismissal claims. As such, notice of such a change should be provided whenever possible and the change should ideally be implemented across the board. Selective reductions may increase the risk of discrimination claims, particularly when an identifiable group is more significantly affected (e.g. younger/older employees). Also, employees are more likely

to feel the reduction is fair if it applies to everyone, and they may, therefore, be less inclined to allege constructive dismissal.

D. Two Tier Employment Structures

In the event that an employer is looking to reduce costs overall, but yet intends to continue hiring and recruitment in order to ensure a continuing strong talent pool, one option that may be available is a two tier employment structure. In essence, this entails the implementation of a reduction in the cost of the overall employment packages being offered to new hires, including the delay of benefits entitlements to a certain date beyond the standard probationary period.

The normal risk that would be associated with this practice is that it may inhibit the employer's ability to recruit top talent and impact on employee morale as a result of the differentiation in compensation structures for employees performing similar tasks. While the morale issue may continue to be a problem, the hiring risk is somewhat diminished in an economic downturn as there are more available candidates due to higher unemployment.

Option 4 – Changes to Pension & Benefits Programs

The final area that employers should consider when assessing opportunities for reduction of costs is the pension and benefits area. Some of the suggestions outlined in this section which may reduce costs in the short-term, while others have a longer time focus. When considering changes to pension and benefits programs a holistic approach is important as the impacts of such changes can be wide-reaching.

There is no common law right to group benefits or pensions; such programs are a matter of contract and therefore are up for negotiation. That said, once provided, benefits and pensions are a key element of the terms and conditions of employment and as such, absent an employee's express agreement, any fundamental, unilateral changes to an employee's terms and conditions of employment may provide a basis for a claim of constructive dismissal. Notice of change should be provided whenever possible and the change should ideally be implemented consistently.

A. Changes to Group Benefits Programs

When assessing the costs associated with group benefits programs, employers may want to consider the following options:

- introduce or increase the premiums or deductibles associated with the plan and consider other forms of cost-sharing (e.g. co-pay models or tying the premium level to length of service) to reduce active employee costs;

- move to an Administrative Services Only ("ASO") model, which in some circumstances may reduce costs;
- restrict drug formularies and increase the pricing of benefits in flexible plans; and
- impose annual or claim caps to avoid high claim burdens.

B. Reduction or Elimination of Post-Retirement Benefits Programs

It is important to note that there is a key difference between post-retirement benefits that have vested or crystallized (i.e. those that are in place for employees who have already retired) and post-retirement benefits that have not vested or crystallized (i.e. those that are projected to be in place for employees who have yet to retire). The Supreme Court of Canada in *Dayco Canada v. C.A.W.* held that employers are not entitled to reduce, eliminate or alter post-retirement benefits that have vested or crystallized. As such, this section applies only to non-vested or non-crystallized post-retirement benefits.

Options for consideration by employers here include:

- elimination of post-retirement benefits altogether;
- changes to the existing programs as outlined above with respect to group benefits plans;
- making a subsequent employer's post-retirement benefits plan a "first payor", subject to Canadian Life and Health Insurance Association benefits coordination rules; and
- prohibiting the recognition of a new spouse after retirement.

C. Changes to Pension Benefits Programs

Defined Contribution ("DC") Plans

When assessing your DC plan, options for cost-savings include:

- reduction of employer contributions; and
- discussing alternative investment options made available to employees by the investment advisors to determine if a revision of the menu of investment options would be helpful (e.g. to add target life cycles or date funds or investments that guarantee capital).

On a related note, employers should be careful not to provide employees with investment advice relating to DC investments. However, it may be useful to consider having investment advisors come in to talk to employees about appropriate investment strategies. Employees who are close to retirement

may need special care. Whatever can be done to provide information, and perhaps some comfort, to employees about their pension – without giving advice and making promises about the future – will be helpful.

Defined Benefits ("DB") Plans

When assessing your DB plan, options for cost-savings include:

- elimination of further *ad hoc* indexing;
- reduction or elimination of ancillary benefits (e.g. bridges, subsidized early retirement and subsidized death benefits);
- in a final average earnings plan, reduction of the accrual rate or movement to a career average formula for future service;
- addition of a new DC component either (a) for future members only or (b) for future members and existing members with or without past service conversion; and
- taking advantage of available solvency relief measures which consist mainly of extending the solvency deficit run-off period (available if the plan is registered in a jurisdiction offering such relief and subject to the applicable relief requirements, such as member consent or securing the deficit with a letter of credit.)

D. Elimination or Reduction of SERPs and RCAs

If the employer has either a Supplemental Employee Retirement Plan ("SERP") or a Retirement Compensation Arrangement ("RCA") in place, they may want to consider the following issues:

- reviewing associated documentation to ensure that the benefit promise is commensurate with position and services rendered; and
- if the SERP is funded or secured, consider whether the employer can reduce funding obligations or the letter of credit face value, or eliminate the RCA altogether.

Option 5 – Other

A. Reductions in Business and Travel Expenses

Employers who incur significant business and travel related expenses may consider implementing policies relating to what constitutes a legitimate expense, what the threshold for daily expenses during travel or business events is, who is entitled to incur such expenses and what form of authorization is required in order for the expense to be eligible for reimbursement. Keep in mind that reasonable

expenses legitimately incurred by an employee as a result of the conduct of their job duties and responsibilities should be eligible for reimbursement, however any excess expenses, including entertainment expenses and discretionary expenses, should be monitored and managed. Further, it is important to ensure that employees receive appropriate notice of any changes to such policies before they are implemented so as to avoid the employee incurring expenses for which they may not receive reimbursement.

B. Reductions in WCB Costs

Employers may be able to reap substantial savings by closely examining and managing their worker compensation board ("WCB") programs. In many cases, retention of consultants or other experts is advisable. Specific initiatives include the following:

- actively managing claims and challenging claims in appropriate circumstances;
- careful analysis that a workplace is in the appropriate rates group with its appropriate premium rates;
- careful consideration as to whether independent contractors are properly excluded from payroll to ensure premiums are not paid on behalf of individuals who are not covered under the WCB scheme;
- careful management of the reporting of insurable earnings which is a key component in the calculation of premiums; for example, severance payments need not be included; and
- consideration relating to officers and coverage for officers and directors under the WCB scheme; given the ample protection provided under directors' and officers' insurance, coverage should generally be declined.

Avoiding Unexpected (and Expensive) Tax Liability

The American Experience

Employers in Canada may be interested in the fallout in the United States relating to the issue of employee versus independent contractor status. A ten year dispute involving FedEx has resulted in a payment of $14.5 million to drivers in California who were misclassified as independent contractors. That judgment is in addition to $12.5 million in fees and court costs, and has been confirmed by the California Court of Appeals. The current U.S. nationwide class action with respect to FedEx involves the contract drivers now pursuing benefits and overtime pay that should have been awarded to them as employees.

Class action suits have been commenced in Pennsylvania, Indiana and other states. The mis-classified driver issue highlights the importance of ensuring the employees and independent contractors are properly classified by employers and paid accordingly.

The Four-Fold Test

In Canada, some basic legal principles are regularly applied by the courts in order to determine whether or not any given individual should be classified as an employee or an independent contractor. Although these principles are regularly applied by different courts and tribunals, they can often lead to different conclusions depending on the statutory regime under which the decision is being made. Nevertheless, consideration of these principles will help to decide whether independent contractor status can be sustained in various circumstances.

There are four basic tests that have been recognized:

(1) the control test;

(2) the ownership of tools;

(3) the chance of profit and risk of loss; and

(4) the integration of the person's work into the company's business.

The Control Test

The control test has been summarized as:

> ... the difference between the relations of master and servant and of principal and agent is this: a principal has the right to direct what the agent has to do; but a master has not only that right, but also the right to say how it is to be done.

This typically means minimizing the amount of reporting to be done by the contractor to the Company's management and the amount of control the Company's management has over when and how the contractor does his work. It also means maximizing the freedom of the contractor to work where, when and how he chooses.

Ownership of Tools

The more "tools" the contractor owns or provides at his expense to carry out the work increases the chance of independent contractor status being found. In many cases the basic tool is a car or a computer. The contractor should be responsible for providing that "tool" and to pay for all its acquisition and maintenance costs. Other "tools" provided by the Company that might be provided by

or paid for by the contractor are promotional materials, office space and administrative and accounting services.

Profit and Loss

The chance of profit and risk of loss refers to what is also called the "entrepreneur test". The question is to what degree the individual has a chance of profit and risk of loss, as opposed to the remuneration being dictated by the employer. This test contains elements of the previous two tests. To the extent that the contractor dictates for himself when and how he will work and provides the tools and pays the expenses of carrying out the work, he may be seen as having a chance of profit and risk of loss, and therefore carrying on business for himself.

Integration

The organization or "integration" test assesses how involved the individual is in the company's business. The test has been described as follows:

> ... under a contract of service, a man is employed as part of the business, and his work is done as an integral part of the business; whereas under a contract for services, his work, although done for the business, is not integrated into it but is only accessory to it.

Practical Considerations

Although the four separate tests exist, Canadian courts have stated that all four must be considered together and no one test will necessarily be decisive. Further, an individual may be found to be an employee in one context and an independent contractor for another purpose. From a practical perspective, care should be taken when creating the relationship.

In addition to the standard legal principles enunciated above, the Canada Revenue Agency provides specific lists of factors to consider in order to determine whether or not a worker in Canada is an independent contractor or an employee. The Canada Revenue Agency indicates that, at step one into the inquiry, it asks whether the two parties intend to enter into a contract of service (i.e. an employer's – employee relationship) or whether they intended to enter into a contract for services (i.e. business relationship). Recent case law suggests that the intent of the parties is a critical factor in determining independent contractor status, but that is not the end of the inquiry. Employers have to ensure the status of independent contractor or employee is reflected in the actual terms and conditions of employment. Thus, at the second stage of the analysis, the following indicators should be examined:

INDICATORS OF EMPLOYEE STATUS	INDICATORS OF INDEPENDENT CONTRACTOR STATUS
The relationship is one of subordination. The payer will often direct, scrutinize, and effectively control many elements of how the work is performed.	A self-employed individual usually works independently within a defined framework.
The payer controls the worker with respect to both the results of the work and the method used to do the work.	The worker does not have anyone overseeing them.
The payer determines and controls the method and amount of pay. Salary negotiations may still take place in an employer-employee relationship.	The worker is usually free to work when and for whom he or she chooses and may provide his or her services to different payers at the same time.
The worker requires permission to work for other payers while working for this payer.	The worker can accept or refuse work from the payer.
Where the schedule is irregular, priority on the worker's time is an indication of control over the worker.	The working relationship between the payer and the worker does not present a degree of continuity, loyalty, security, subordination, or integration, all of which are generally associated with an employer-employee relationship.
The payer determines what jobs the worker will do.	The worker provides the tools and equipment required for the work. In addition, the worker is responsible for the costs of repairs, insurance, and maintenance to the tools and equipment.
The worker receives training or direction from the payer on how to do the work. The overall work environment between the worker and the payer is one of subordination.	The worker has significant investment in the tools and equipment and the worker retains the right over the use of these assets.
The payer chooses to listen to the worker's suggestions but has the final word.	The worker supplies his or her own workspace, is responsible for the costs to maintain it, and performs substantial work from that site.
The payer supplies most of the tools and equipment required by the worker. In addition, the payer is responsible for repair, maintenance, and insurance costs.	The worker does not have to perform the services personally. He or she can hire another party to either complete the work or help complete the work, and pays the costs for doing so.
The worker supplies the tools and equipment and the payer reimburses the worker for their use.	The payer has no say in whom the worker hires.
The payer retains the right of use over the tools and equipment provided to the worker.	The worker hires helpers to assist in the work. The worker pays the hired helpers.
The worker cannot hire helpers or assistants.	The worker performs a substantial amount of work from their own workspace and incurs expenses relating to the operation of that workspace.

The worker does not have the ability to hire and send replacements. The worker has to perform the services personally.	The worker is hired for a specific job rather than an ongoing relationship.
The worker is not usually responsible for any operating expenses.	The worker is financially liable if he or she does not fulfill the obligations of the contract.
Generally, the working relationship between the worker and the payer is continuous.	The worker does not receive any protection or benefits from the payer.
The worker is not financially liable if he or she does not fulfil the obligations of the contract.	The worker advertises his or her services and actively markets himself or herself.
The payer determines and controls the method and amount of pay.	The worker has capital investment.
The worker has no capital investment in the business.	The worker manages his or her staff.
The worker does not have a business presence.	The worker hires and pays individuals to help perform the work.
The worker is not normally in a position to realize a business profit or loss.	The worker has established a business presence.
The worker is entitled to benefit plans which are normally only offered to employees. These include registered pension plans, and group accident, health, and dental insurance plans.	The worker can hire a substitute and the worker pays the substitute.
	The worker is compensated by a flat fee and incurs expenses in performing the services.

Executive Compensation

Many previous equity grants are underwater, performance metrics for 2008 cash incentive plans have not been met, and participants in executive compensation plans are looking more fondly at their base salaries than may have been the case in prior years.

All in all, compensation committees and boards will have reviewed the results of 2008's compensation plans and will have made their executive compensation plans for 2009 under radically different circumstances than in prior years.

Decisions on 2008 compensation and on plans for 2009 will now largely have been made, in light of the specific challenges facing each company. Reporting issuers have been considering the disclosure implications of each decision made under the new disclosure requirements applicable to reporting issuers in Canada. We have set out below certain of the issues that our clients have found to be most challenging in preparing their executive compensation disclosures this year.

Disclosure of Changes to Compensation Plans in Light of Current Conditions

Disclosure of executive compensation by a public company is, generally, disclosure of what was paid in the previous year (and why it was paid) to certain executives. Those whose compensation must be disclosed are the Named Executive Officers (NEOs). This disclosure looks backwards, not forward. As a result, shareholders learn what their companies paid their NEOs last year — and why — but not what the company proposes to pay them this year. In light of significant changes in business conditions, many companies have looked very critically at how they are compensating all of their employees, including their NEOs, and as a result have made changes to their compensation plans for 2009.

The new Compensation Discussion and Analysis (CD&A) in respect of the previous fiscal year (2008) is required to be included in executive compensation disclosure for the first time this year. Generally, an explanation is required of why each element of compensation was paid to NEOs in 2008. Any change made to compensation plans for 2009 and later is not required to be disclosed in the current CD&A unless the change could affect a reasonable person's understanding of the compensation paid in 2008. Since certain changes made to compensation plans for 2009 may well fall into this category, each such change needs to be considered from the perspective of whether a reasonable understanding of last year's compensation could be affected by knowledge of the change.

In addition to this disclosure requirement, public companies may choose to use their CD&A disclosure as an opportunity to communicate with their shareholders just how the company has responded, and is responding, to business challenges and shareholder losses. As a result, reporting companies may want to consider:

- whether disclosure is required under the relevant rules (i.e., whether the information is necessary to understand the compensation provided in the prior fiscal year); and
- if disclosure is not required, whether it would be beneficial to demonstrate to shareholders the response being taken to the current economic challenges under the company's compensation plans, or to advise shareholders of future changes.

Salary Freezes/Increases/Decreases

Many companies have frozen or at least moderated increases in base salaries for employees, including for NEOs. These changes may be in the context of more broadly based expense-reduction and cost-containment initiatives. Changes in base salaries have the following disclosure implications:

- the total salary paid for 2008 must be disclosed;
- a change to the salary of an NEO for 2009 must be disclosed if it is necessary to understand the compensation paid to the NEO for 2008; and

- although not required, an issuer may wish to disclose changes to salary compensation for 2009 in order to show shareholders what actions the issuer is taking in response to the economic downturn.

In the CD&A, an issuer must discuss whether benchmarks were used to determine compensation. Specifically, it must disclose:

- the companies that were selected for comparison (and the rationale for their selection);
- how the benchmarks were used for setting executive compensation; and
- why these benchmarks were used in setting compensation.

If benchmarks were used in setting compensation, including base salaries, for 2008, that must be disclosed. If changes have been made for 2009 in light of specific business challenges, the disclosure of the 2008 benchmarking may not reflect the basis upon which compensation for 2009 was set. If this is the case, issuers will need to consider adding an outline of changes made for 2009 to their disclosure of how they used benchmarks in 2008.

Cash Incentive Plans

We have seen a number of changes being made to cash incentive plans in the current downturn, such as:

- exercises of discretion by compensation committees in scaling back bonuses if 2008 performance metrics were met or, more rarely, awarding bonuses if performance metrics were not met;
- changes to performance metrics going forward to reflect changed business conditions (i.e., the increased use of qualitative performance metrics, as opposed to quantitative metrics, as the basis for compensation decisions); and
- executives foregoing bonuses.

Many compensation committees have taken into account current economic conditions when making bonus decisions for 2008. In the CD&A, it should be disclosed whether the compensation committee had any discretion to set the bonus, or whether the NEO's bonus was a strict entitlement. If discretion was used, issuers will also need to disclose:

- the decision-making process;
- the rationale behind the decision;

- the factors considered; and
- any differences in treatment between individual NEOs.

Underwater Equity-Based Incentives

In the past few years, equity-based incentives have become a much larger component of total compensation for many NEOs. This has been a response to numerous factors, including efforts to align NEO and shareholder interests. Just as many shareholders have seen their shares decline in value, so too many NEOs have seen the value of their equity-based compensation decline — in many instances to a level where the current market price is below the exercise price for the securities in question. Before making any changes to equity-based incentives in response, issuers need to consider the objectives of their equity-based plans in the first place; to the extent that retention of NEOs was a major objective, those concerns may, at least temporarily, have lessened.

For a variety of reasons, issuers are considering a number of alternatives in response to underwater equity-based incentives. These include:

- repricing (i.e., reducing the exercise price of the options);
- exchanging options;
- converting existing stock options into other types of incentives;
- surrendering options with the possibility of re-granting later or replacing with other types of equity-based compensation (e.g., restricted stock);
- changing the performance vesting criteria / hurdles;
- changing the grant basis (to reduce numbers, to reduce burn rate, or to impose performance criteria for vesting);
- introducing new equity-based incentive plan; and
- making no changes.

Unless necessary to understand the total compensation provided to NEOs in 2008, any changes implemented for 2009 will not require disclosure for 2008. However, issuers should consider that:

- the TSX may require shareholder approval to amend a plan or outstanding options (including a cancellation and re-grant); and
- institutional investors may have voting policies that may need to be considered.

An issuer may also wish to outline the difference between the value of the options on the grant date (as captured in the Summary Compensation Table), and the value of the options in the current economic situation. In many situations, this will show shareholders that the compensation the issuer had intended to give the NEOs (before the significant drop in share price) is not the value the NEOs have at the date of the disclosure. As shareholders have seen a significant decline in the value of their investments, this is a way for issuers to show that the incentives given to NEOs similarly reflect this loss.

Say-on-Pay

Say-on-pay proposals have been gaining traction in recent months in Canada. At the recent annual meetings of the National Bank, Royal Bank, CIBC, Bank of Montreal, and Scotiabank, shareholder proposals calling for a non-binding advisory vote by shareholders on executive compensation were advanced, and achieved a majority of votes in favour. While not an issue for disclosure in most issuers' proxy circulars this year, this is an issue boards of directors proactively need to consider for their 2010 annual meetings. For instance, both TMX Group Inc. and SunLife Financial Inc. have announced they will provide their shareholders with a non-binding advisory vote on executive compensation at their 2010 annual meetings. In reversal of its position in 2008, the Canadian Coalition for Good Governance now recommends that boards voluntarily add such a vote to their annual meetings and will publish a model form of board "Say on Pay" policy and shareholder resolution. Executive compensation disclosure this year should be prepared in the expectation that shareholders may well have a say-on-pay vote in future years.

Other Issues

Other actions being considered by issuers include:

- clawbacks of bonus payments or equity-based compensation;
- incentive payout delays;
- implementation of performance conditions on payouts;
- pension plan changes; and
- decreased perquisites.

Any of the above compensation changes for 2008 must be clearly outlined in the CD&A. In addition, any changes to compensation that are necessary to understand the total compensation for 2008 must be disclosed. As noted above, issuers may wish to disclose these changes to compensation plans going forward in order to inform their shareholders of the actions they are taking in light of the current financial challenges.

Finally, it should be noted that many of the actions discussed above have employment law consequences that must be considered before making any changes to a compensation plan. For example, if an NEO is entitled to a cash bonus without any discretion for the compensation committee to withhold it, the use of downward discretion could result in a finding of constructive dismissal.

Cross-Border Issues

An apt illustration of the rapid effect of the global recession on employment is seen in the area of foreign workers status. Last year, Alberta was suffering a labour shortage and employers were increasingly turning to the United States, Mexico and countries overseas in order to find skilled and unskilled workers to fulfill a large number of open job positions throughout the province.

Increasingly, employers are now having second thoughts about expending the time and money necessary to obtain Labour Market Opinions and complete the documentation necessary to bring foreign workers into Canada. Although hiring foreign workers remains a viable option for some employers, those positions requiring a Labour Market Opinion will first have to demonstrate that there is no Canadian available to do the job. Foreign workers in exempt categories, such as intra-company transferees or workers under the North American Free Trade Agreement ("NAFTA"), do not require a Labour Market Opinion.

Once employers have made the decision to hire foreign workers, in these uncertain economic times, employers may then be concerned about legal liabilities associated with terminating the employment of their existing foreign workers.

Alberta employers must follow the same rules and laws when terminating foreign workers that they must follow when terminating Canadian Workers. The *Employment Standards Code* sets out the minimum standards and the minimum notice period that must be provided to workers at termination. Employment contracts and the common law may also affect what notice is required.

Alberta employers cannot forget their obligations under the *Human Rights, Citizenship and Multiculturalism Act,* which prohibits discrimination on the basis of a number of enumerated grounds, including place of origin and ancestry. At the same time, Alberta employers are caught between a rock and a hard place as Labour Market Opinion confirmations often require that foreign workers be dismissed before any Canadians or permanent residents are dismissed. One of the purposes of the Labour Market Opinion process is to ensure that any eligible jobs are first offered to Canadians. Thus, it makes sense intuitively that terminations would happen in the reverse order, protecting the Canadians' jobs for as long as possible. Depending on the circumstances, however, an employer should carefully consider whether to heed the requirements of Service Canada or to terminate in some other order. Service Canada does not have the power to enforce compliance with Labour Market Opinion confirmation. From a practical perspective, though, Service Canada may put up more hurdles in the future for an employer who disobeys its instructions.

Once an employer has made the decision to terminate an employee from another country, Canadian Immigration and Citizenship should be notified of the termination in order to protect the integrity of the existing work permit. A terminated foreign worker may apply to other employers to obtain a job in Canada, although they will still have to comply with the Labour Market Opinion process.

The current program for unskilled labourers requires employers to pay the transportation costs, usually airplane fare to return the foreign worker to his or her home country. The same requirement does not exist for skilled employees, including professionals.

Personal liability

In the current economy understanding the potential for personal liability and taking appropriate measures to limit the risk is critical.

Directors and officers may be liable for up to 6 months of unpaid wages for each employee under s. 112 of the *Employment Standards Code*.

Further, directors of the Corporation may be liable:

(a) to employees of the corporation for up to 6 months of unpaid wages for each employee under s. 119 of the *Canada Business Corporations Act* or s. 119 of the Alberta *Business Corporations Act*, as applicable; and,

(b) to government authorities for:

(i) unpaid source withholdings such as employee payroll deductions;

(ii) unremitted Canada Pension Plan and EI withholdings.

Liability may also exist for directors, officers, managers or other principles with respect to unpaid *Workers' Compensation Act* assessments or employer contributions to employee pension plans.

Great care should be taken to avoid unexpected personal liability by limiting unpaid wages and other contributions. Further, we recommend that all directors and officers ensure that they have appropriate insurance coverage in place to better manage the costs associated with personal risk.

Catching the Upswing

Weeding out the Worst

Almost every employer has employees who have been allowed to coast along despite sub-par performance. A declining business may finally provide the impetus to deal with employment problems that have been festering for some time.

Take stock of your employees. Identify those who will contribute to future success and focus on keeping them. That includes showing that you value high performance by dealing with poor performers. The cost of a generous severance for under-performing employees can be a good investment in building a high performance workforce.

Retaining the Best

Until some months ago, we were constantly hearing from employers about the lack of skilled employees. It's a basic demographic problem that is not going away. As soon as the economy picks up again, employers will be scrambling to find employees. Employers that need to temporarily reduce their workforce or labour costs will have to get creative so that they hang on to as many of their top performers as possible.

Recent case law from the Supreme Court of Canada provides some guidance. If you have to reduce your workforce, you may be able to convince your best employees to stay in lesser jobs, especially since their alternative is a constructive dismissal claim that may prove to be an expensive failure.

There are also some non-traditional ways of downsizing which may help to keep your best employees. Instead of laying off or terminating a number of employees, consider:

- offering voluntary travel or education leaves or sabbaticals;
- promoting job sharing; or
- paying an employee some fraction of their regular salary to go work for a charity of their choice for awhile, or to give them a day off without pay every two weeks to work for a charity.

There may be a number of other things that employers and their employees can think of that will reduce labour costs while making some positive contributions to employee morale and retention of the best. Invite employees to make cost cutting suggestions and be flexible in considering their proposals.

Other ideas may help employees trim their costs, which in turn can alleviate some of the pain of reduced wages. For example, help employees coordinate their child care, utilizing time off from

work. Five employees could reduce to a four day week and each take turns providing child care. Or, employers could help employees come up with ideas to save on other living costs; such as car pooling.

Maintaining Morale

Once employers have planned and implemented measures to reduce the labour force or cut labour costs, they have to worry about the survivors.

The survivors are those employees who have kept their jobs, or their full compensation, or their full time hours, while many of their colleagues and friends have lost some or all of those things. There are many things that will be necessary to maintain morale (and to retain the best of the employees). These morale boosters are both tangible and intangible. Consider:

- allowing the survivors to speak openly about their anger, fears and concerns;
- controlling the rumour mill by regular, consistent, open and honest communication;
- providing whatever level of assurance you can honestly provide about job security;
- engaging the survivors in discussing and planning the employer's mission and future;
- providing the tools, resources and training to take on extra duties;
- coupling increased duties with increased responsibility and greater autonomy; and
- encouraging employee initiative and innovation.

A Final Word

Everybody is worried. Constant worry - about job security, about pension losses, about meeting the mortgage payment - does not enhance productivity.

Employees who do not know what is going on worry the most. Employers have to work harder than ever at open and effective communication with employees. They have to listen carefully to understand what the concerns are. Then they have to speak consistently, clearly and truthfully to all the employees. Employers need to understand that it's better to say 'I don't know' than to say nothing at all. Then employers have to give some realistic encouragement and cause for hope. The final task is to express gratitude for everyone working their best to help the business succeed.

A wise leader once summarized his task as this: speak truth, give hope, say thanks. That pretty much says it all for employment issues in challenging times.

Managing Your Workplace in an Economic Downturn

Available Options for Employment-Related Cost Savings

1. Working Notice of Termination
2. Terminations without Notice: Managing the Costs
3. Temporary Lay-offs
4. Voluntary Retirement
5. Unpaid Leaves of Absence
6. Converting Vacation Time to Unpaid Leave of Absence
7. Reduction in Work Days or Work Weeks
8. Elimination of Overtime
9. Restructuring the Compensation Mix including Commission Plans, Discretionary Bonuses and the Base/Bonus Mix
10. Across-the-Board Reduction or Freezes in Base Salary
11. Implementation of Two Tier Employment Structure
12. Cost Reductions for Group Benefit Plans
13. Elimination or reduction of Post-Retirement Benefits
14. Cost Reductions for Pension Plans (both Defined Contribution and Defined Benefit)
15. Elimination or reduction of SERPs and RCAs
16. Reduction of Business Expenses and Travel Costs relating to Employees
17. Reduction of WCB Premiums

VANCOUVER
P.O. Box 10424, Pacific Centre
Suite 1300, 777 Dunsmuir Street
Vancouver BC V7Y 1K2
Tel: 604-643-7100 Fax: 604-643-7900

CALGARY
Suite 3300, 421 - 7th Avenue SW
Calgary AB T2P 4K9
Tel: 403-260-3500 Fax: 403-260-3501

TORONTO
Box 48, Suite 5300
Toronto Dominion Bank Tower
Toronto ON M5K 1E6
Tel: 416-362-1812 Fax: 416-868-0673

OTTAWA
The Chambers
Suite 1400, 40 Elgin Street
Ottawa ON K1P 5K6
Tel: 613-238-2000 Fax: 613-563-9386

MONTRÉAL
Suite 2500
1000 De La Gauchetière Street West
Montréal, QC H3B 0A2
Tel: 514-397-4100 Fax: 514-875-6246

QUÉBEC
Le Complexe St-Amable
1150, rue de Claire-Fontaine, 7e étage
Québec QC G1R 5G4
Tel: 418-521-3000 Fax: 418-521-3099

UNITED KINGDOM & EUROPE
5 Old Bailey, 2nd Floor
London, England EC4M 7BA
Tel: +44(0) 20 7489 5700 Fax: +44 (0) 20 7489 5777

McCarthy Tétrault

The Year in Review & Legislative Update

Paul Boniferro
Lana Jackson
Erika Ringseis

May 12, 2009

McCarthy Tétrault LLP
3300, 421 – 7th Ave SW
Calgary, AB T2P 4K9

www.mccarthy.ca

Introduction

The past year has seen many changes in legislation and important labour and employment court decisions. The first part of the following paper will review the key decisions made by the Supreme Court of Canada. The second part of the paper will review key changes made to legislation and recent case law that may impact your business.

I – Supreme Court of Canada Year in Review

The labour and employment landscape has been dramatically reshaped by recent decisions of the Supreme Court of Canada ("SCC"). The past year the Court issued some significant decisions that will affect the legal position of employers and employees alike. What follows is an overview of these key decisions and practical advice for understanding the paths to take and pitfalls to avoid as you navigate this new employment landscape.

A. Post-Employment Competition by Non-Fiduciaries:

RBC Dominion Securities Inc. v. Merrill Lynch Canada Inc.[1]

Background

The duties and legal responsibilities of a departing employee vary depending on whether the employee is a fiduciary employee or a non-fiduciary employee. A fiduciary employee is a person who is in a legal relationship of trust or confidence with her employer because of her employment position. Fiduciary employees generally include the directors and senior management of a corporation.

In a recent case, *RBC Dominion Securities Inc. v. Merrill Lynch Canada Inc.* ("RBC") the SCC clarified what obligations a non-fiduciary employee will owe to a former employer upon leaving to work for a competitor and whether a non-fiduciary employee is entitled to compete with her former employer during the notice period.

The Facts

A branch manager of RBC coordinated the mass resignation of virtually all of the RBC investment advisors in a branch in Cranbrook, British Columbia. The departing employees terminated their employment contracts without notice to RBC and immediately began to work for a competitor, Merrill Lynch. Furthermore, in the weeks prior to leaving RBC, the employees surreptitiously copied and

[1] 2008 SCC 54

transferred RBC's client records to Merrill Lynch and convinced many of those clients to transfer their assets to the new employer. The RBC office was "effectively hollowed out and all but collapsed."

The issues before the SCC were:

- whether or not the employees "unfairly competed" against their former employer during the time of reasonable notice, and if so, whether they were liable for RBC's lost profits as a result; and
- whether or not the branch manager who orchestrated the mass resignation breached a duty of good faith owed to RBC, and if so, whether he was liable for RBC's lost profits as a result.

The SCC accepted the trial judge's finding of fact that the branch manager and other employees were non-fiduciaries. Therefore, the principles that follow relate to the broad range of non-fiduciary employees only – i.e. basically everyone who is not a director, senior manager or otherwise placed in a position of trust and confidence in their employment.

Court's Ruling: Non-Fiduciary Employees are Free to Compete with a Former Employer

In a blow to employers, the SCC held that, in the absence of a restrictive covenant, as soon as a non-fiduciary employee resigns, he or she is free to compete against a former employer. As such, the Court concluded that the employees did not "unfairly compete" against RBC during the time of reasonable notice even though they immediately assumed work with RBC's competitor, Merrill Lynch. The employees were free to compete as soon as they resigned and could not be held liable for any lost profits caused as a result of this competition.

However, on a positive note for employers, the SCC held that even non-fiduciary employees owe a duty of good faith to their employers. This duty requires an employee to faithfully perform the obligations created by his employment contract. If he breaches that contract, then he may be held liable to his employer for any damages that result. In *RBC*, the branch manager owed a duty of good faith in the discharge of his employment contract. It was an implied term of the branch manager's contract that he would retain employees of RBC who were under his supervision. By orchestrating a mass resignation of RBC employees, the Court found that the manager violated his duty of good faith to RBC.

As a result of the branch manager's breach of contract, he was found liable for 5 years' worth of RBC's lost profits. This amounted to nearly $1.5 million in damages – well beyond the lost profits caused during the reasonable notice period alone. The Court reasoned that the magnitude of damages was not too remote because it was within the reasonable contemplation of the contracting parties (i.e. the branch manager and RBC) at the time of forming the employment contract that the orchestrated departure of substantially all of the office's investment advisors would cause a loss in profits giving rise to damages.

What Does this Mean for Employers?

The SCC has clarified that there is no duty "not to compete unfairly" preventing non-fiduciary employees from competing with a former employer. Employers can manage the effects of competition from former non-fiduciary employees by:

- Including a definition of confidential information in employees' written employment contracts and an obligation on employees not to use such confidential information from and after termination of the employment relationship.
- Expressly setting out the requirements that must be met for an employee to terminate employment and give notice of termination in written employment contracts.
- Consider obtaining restrictive covenants from employees such as non-competition and non-solicitation agreements, particularly in respect of those employees to whom the employer would be vulnerable to competition following termination.

B. So Long Notional Severance:

Shafron v. KRG Insurance Brokers (Western) Inc.[2]

Background

Employers often include restrictive covenants in their employment contracts to restrict post-employment competition by departed employees. These covenants are generally seen as a restraint of trade, and for policy reasons, the courts have held that, in order for restrictive covenants to be enforceable, the restrictions on competition must be reasonable.

Problems with enforceability will arise when a restrictive covenant is ambiguous or unreasonable.

Prior to *Shafron v. KRG Insurance Brokers (Western) Inc.* ("*Shafron*"), in the case of an ambiguous restrictive covenant, courts could use the following curative mechanisms to resolve ambiguity in the employer's favour:

- notional severance;
- blue-pencil severance; and
- rectification.

---

[2] 2009 SCC 6

Notional severance means "reading down" or narrowing the scope of a contractual provision to make it legal and enforceable. For example, notional severance has been employed to read-down contracts that mistakenly charge a criminal rate of interest by replacing the illegal rate with a rate of 60% (the legal maximum).

Blue-pencil severance involves removing the ambiguous part of a contractual provision where that part is clearly severable from the rest of the contract. For example, the ambiguous term "years fourteen days" could be severed to read as "fourteen days."

Rectification, on the other hand, is sought where a party alleges that the language of a contract is mistaken and does not reflect the true intention of the parties at the time they entered into the contract. If rectification is employed, it involves the court altering or re-wording a contractual provision by restoring it to what the parties' agreement actually was. For example, where the parties buy and sell a 15 foot boat, but mistakenly describe it in the contract as a 15 inch boat, rectification would be an appropriate remedy.

This area of the law changed with the SCC's recent ruling in the *Shafron* case in which the SCC clarified how ambiguity in restrictive covenants may be resolved.

The Facts

Mr. Shafron owned and operated an insurance agency. In 1987, Mr. Shafron sold his insurance agency to KRG Insurance Brokers Inc. (KRG). Mr. Shafron was hired by KRG as an employee. His employment was subject to a restrictive covenant that prevented Mr. Shafron from competing with KRG within the "Metropolitan City of Vancouver" for a period of three years following the termination of his employment.

In 2001, Mr. Shafron left KRG to join an insurance broker practicing in the neighbouring suburb of Richmond. A significant number of KRG customers took their business to Mr. Shafron and his new employer. KRG alleged Mr. Shafron breached the restrictive covenant prohibiting competition and sued Mr. Shafron to enforce the restrictive covenant.

Mr. Shafron challenged the enforceability of the non-competition clause in his KRG employment contract on the basis that the "Metropolitan City of Vancouver" was not a legally defined term and that the restrictive covenant was ambiguous. Mr. Shafron's argument succeeded at trial, but was overturned by the BC Court of Appeal. According to the Court of Appeal, it was possible to apply the doctrine of notional severance to construe the term "Metropolitan City of Vancouver" as applying to the City of Vancouver and the municipalities contiguous to it, including Richmond.

The issues before the SCC were:

- whether or not the term "Metropolitan City of Vancouver" was ambiguous; and if so,

- whether or not the Court should apply notional severance, blue-pencil severance or rectification to resolve the ambiguity and to make an otherwise unreasonable restriction reasonable and enforceable.

What's Changed?

The SCC held that the term "Metropolitan City of Vancouver" was ambiguous because it had no legal meaning. It then turned to the question of whether or not this ambiguity could be resolved with the use of severance or rectification.

The Court clarified that notional severance is not applicable to cure an ambiguous restrictive covenant in an employment contract. Unlike other situations where notional severance may be applied, there is no bright-line test that a Court can use to determine what is a reasonable restriction and what is unreasonable. Applying any form of notional severance to a restrictive covenant would therefore require the Court to substitute its own idea of reasonableness in place of the actual agreement that was made.

Blue pencil severance was not available to cure the ambiguity on the facts of the *Shafron* case. However, the SCC did not rule out the use of this form of severance in future cases of ambiguous restrictive covenants. Blue-pencil severance may be available in rare cases if an employer can show that the contractual provision at issue is clearly severable, trivial and not necessary to give effect to the restrictive covenant. This will require proof that the employer and the employee would have unquestioningly agreed to the removal of the ambiguous term without varying other terms in the agreement.

Rectification was also not available on the facts in Shafron. However, it may be available in future cases to cure an ambiguous restrictive covenant if the employer can demonstrate that the text of the written contract does not accurately reflect the parties' true intentions.

How will this Affect Employers?

The SCC has effectively narrowed the circumstances in which severance may be available to cure an ambiguous restrictive covenant to make it enforceable. With this in mind, it is important to get it right the first time.

Employers should ensure that their restrictive covenants are not overly broad. This means restricting activities:

- to a reasonable geographic area;
- for a reasonable period of time; and

- for a reasonable scope of activities.

In this context, reasonable means that the restriction is:

- clearly stated and easily understood;
- defined as narrowly as possible; and
- does not effectively prevent the employee from earning a living.

If you are using restrictive covenants in your employment contracts or are attempting to enforce a restrictive covenant, given the recent developments in this area, we recommend that you seek legal advice as to whether the covenants are enforceable.

C. The Duty to Mitigate:

Evans v. Teamsters Local Union No. 31[3]

Background

An employer may terminate an employee's contract without cause, provided that the employer provides the employee with either reasonable working notice, or pay in lieu of that notice.

It is established law that a dismissed employee is expected to mitigate the extent of her damages by making efforts to obtain alternative sources of income, usually in the form of new employment. Although there is no requirement that a dismissed employee be successful in mitigating her damages, she must make reasonable attempts to do so. Where an employee refuses to mitigate her damages, and where an employer can prove this refusal to mitigate, the employee will lose some or all of her entitlement to compensation in lieu of notice.

Until recently, however, it was unclear whether the duty to mitigate meant that employees are required to accept work offered by a former employer. In *Evans v. Teamsters Local Union No. 31* ("*Evans*"), the Court held that, in some circumstances, the duty to mitigate will require a wrongfully dismissed employee to return to work for an ex-employer.

The Facts

In *Evans*, an employee who worked as a business agent for 23 years was dismissed without cause. The employee then hired legal counsel and demanded 12 months of continued employment and 12 months

[3] 2008 SCC 20

of pay in lieu of notice. Following receipt of the employee's demand, the parties attempted to negotiate a resolution. In the interim, the employer continued to pay the employee his salary and benefits.

Several months later, the employee received a letter from the employer asking him to return to work and serve out the remainder of his 24 months notice period. The letter stated that if the employee refused to return, the employer would treat that refusal as cause for dismissal. The employee stated that he would return to work, provided that the employer rescinds his original termination letter. The employer refused to do so and the employee commenced litigation.

At trial the judge concluded that the employee had been wrongfully dismissed and disagreed with the employer that, by failing to return to work, the employee had failed to mitigate his damages. The trial judge awarded $100,000 in damages to the employee. On appeal, the Court of Appeal overturned the decision. The Court of Appeal held that the employee acted unreasonably in refusing to return to work, which constituted a failure to mitigate damages. On that basis, the Court of Appeal concluded that the employee was not entitled to damages in lieu of notice.

The issue before the SCC was whether or not an employee's duty to mitigate damages requires him to accept a job offer from his former employer.

What *Evans* means for Employers

The Court held that, in some circumstances, an employee will be required to return to work for a former employer as part of his duty to mitigate the damages caused by a wrongful dismissal.

- An employer has the initial option of offering either working notice or pay in lieu of notice; to deny the latter selection of working notice would essentially create an artificial distinction between the two forms of compensation that is not justified in law.
- Whether or not an employee will be required to accept that offer of re-employment, however, depends on the facts.
- The overarching concern is that an employee not be obliged to mitigate his damages by working in an atmosphere of hostility, embarrassment or humiliation based on an objective standard.
- Factors that will be taken into account include whether:
    - the salary offered to the employee is the same;
    - the working conditions are not substantially different or demeaning;
    - the personal relationships involved are not acrimonious; and

- litigation has not yet been commenced.

- If an employee refuses an offer that would have been accepted by a reasonable person, doing so will amount to a failure to mitigate damages which, in turn, will cause the employee to lose any entitlement to damages in lieu of notice from the employer.

In *Evans*, the SCC held that the employee's refusal to accept his employer's offer of employment for the remainder of the notice period was unreasonable. The relationship had not been seriously damaged and there was no evidence that the employee would not be able to perform his duties upon returning to work. The employee's refusal to return to work constituted a failure to mitigate his damages such that he forfeited those damages in lieu of notice.

Evans Application in Alberta

In Alberta, an employee with 38 years of service alleged constructive dismissal following his observance of what he felt was a mandatory retirement policy.[4] The employee had informed his employer that he did not want to be retiring pursuant to his employer's retirement policy, but agreed to respect their policy. Shortly thereafter, the retiring employee assisted with training and introductions for his replacement. At a company holiday party, the employee's long service with the employer was recognized and he was given a gift.

Following a letter from the employee's counsel informing the employer that the employee did not wish to retire and had a significant wrongful dismissal claim against the employer, the employer told employee he could return to work. The employee did not return to work as directed by the employer. Unlike the decision in *Evans,* the Alberta Court of Appeal determined it was not reasonable for employee to return given the circumstances of the employee's constructive dismissal. In this case, the Court found that the employee was removed from the work force by the actions of his employer and also referred to the employer's unwithdrawn allegation of dishonesty on the part of the employee. The Court noted that in *Evans*, the employee was willing and had proposed to return to work for at least part of the notice period. Thus although *Evans* will be applied in Alberta in the right circumstances, a return to a former employer will not be enforced where inappropriate.

[4] *Magnan v. Brandt Tractor Ltd.*, 2008 ABCA 345

D. Dumping the Wallace Bump:

Honda Canada Inc. v. Keays[5]

Background

Many employers have been waiting on the edge of their seats for the SCC's take on the largest ever aggravated and punitive damages awarded for a wrongful dismissal.

When an employee is wrongfully dismissed, he or she is entitled to working notice or damages in lieu of notice. In the past, courts have extended the notice period where the manner of an employee's dismissal involved bad faith on the part of the employer, such as conduct in the manner of dismissal which damaged the employee's reputation, unfounded allegations of wrongdoing on the part of the employee, or otherwise causing mental distress to the dismissed employee. These extensions to the notice period were called "Wallace damages," after the renowned SCC case *Wallace v. United Grain Growers Ltd.*

In addition to Wallace damages, an aggrieved employee could also claim aggravated damages and punitive damages to further compensate him for an employer's bad faith manner of dismissal where the employer also committed an independent actionable wrong. Unfortunately, courts have often been inconsistent in their approach to what damages are available following a wrongful dismissal and the circumstances in which they should be awarded.

The SCC's decision in *Keays* clarifies what damages may be ordered in wrongful dismissal claims and when they should be awarded. The aspect of the decision that will be most significant for employers is that the Court eliminated the Wallace-bump altogether. Aggravated and punitive damages may still be claimed, but the Court has set restrictive guidelines on when they will be awarded.

The Facts

In *Keays*, an employee had worked for 11 years for the same employer when he was diagnosed with chronic fatigue syndrome. He ceased work and received disability benefits for one year, at which point his employer's insurer discontinued the benefits. The employee returned to work and was placed in a disability program that allowed him to take absences if he provided a doctor's note confirming that the absence was related to his disability.

The employee's absences continued and the employer began to suspect that the doctor's notes provided were not based on independent evaluations of whether or not the employee missed work due to his disability. The employer asked the employee to meet with an occupational medical specialist to

---

[5] 2008 SCC 39

determine if the disability could be accommodated. On the advice of his legal counsel, the employee refused to meet with the doctor without an explanation of the purpose, methodology and parameters of the consultation. The employer responded with a letter advising the employee that, although the employer supported his full return to work, his employment contract would be terminated if he refused to meet the doctor. The employee refused and his employment was terminated.

At trial, the court determined that the employee had been wrongfully dismissed and was entitled to a notice period of 15 months. In addition, the trial judge held that the employer had committed acts of discrimination, harassment and misconduct and increased the notice period to 24 months to compensate for this manner of dismissal (Wallace damages). The court also awarded punitive damages in the staggering amount of $500,000 and granted special costs.

On appeal, the Court of Appeal reduced the costs premium and also reduced the punitive damages award to $100,000.The Court of Appeal otherwise upheld the trial judge's decision.

The issues before the SCC were:

- what damages may be awarded in a wrongful dismissal action; and
- in what circumstances should those damages be awarded?

What's Changed?

The biggest change that comes out of the *Keays* decision is the elimination of Wallace "bump". This means that going forward courts may no longer increase wrongful dismissal damages awards with an extension of the notice period.

An employee can still be awarded damages for the bad faith manner of his dismissal, but only if he can prove that he suffered foreseeable, compensable damages and that the employer caused those damages by acting in a way that was unfair, in bad faith, attacking the employee's reputation, misleading or unduly insensitive. In other words, the bad faith damages available upon dismissal must meet the same requirements as any other moral damages; the award must be based on compensating an employee for actual, provable losses suffered.

The SCC also emphasized that punitive damages may only be awarded in cases where the employer's conduct is sufficiently egregious and outrageous to justify such an exceptional remedy. In addition, the employer must have committed an independent actionable wrong. This might include a tort (e.g. intentional infliction of mental distress, negligence) or the breach of another contractual obligation (e.g. breach of obligations under a pension agreement).

In *Keays*, the SCC found that the trial judge made over-riding errors of fact with respect to the employee's manner of dismissal. In particular, contrary to the findings of the trial judge, the SCC found

that the employer had acted fairly in the manner of dismissal. On this basis the aggravated damages award was overturned.

Similarly, the Court set aside the punitive damages award because it found that the employer had not acted in an egregious, high handed, malicious or outrageous manner required to justify such an award. In addition, the employee's reliance on an allegation of discrimination to ground his punitive damages claim did not meet the requirement for an independent actionable wrong.

What this Means for Employers

The *Keays* decision curtails an employer's liability for wrongful dismissal in the following manner:

- By eliminating the Wallace bump or extension to the notice period.
- By reinforcing that damages should serve to compensate employees for actual damage suffered. In order for an employee to obtain damages caused by an employer's bad faith manner of dismissal, the employee will have to demonstrate that he suffered actual, compensable damages.
- By imposing a prohibition on double compensation such that courts are to refrain from awarding both bad faith and punitive damages.
- By clarifying the purpose of punitive damages. In order to award punitive damages, the employee must establish that the employer committed an independent actionable wrong. Discrimination cannot constitute an independent actionable wrong if a comprehensive scheme is in place to address discrimination claims.

Keays Application in Alberta

The Alberta Court of Appeal recently applied the *Keays* decision and reduced the amount of damages awarded to an employee following her successful claim at trial for constructive dismissal as a result of sexual harassment and assault by her supervisor.[6] The trial judge had awarded two months pay in lieu of notice and added a further month as *Wallace* damages. The trial judge had also awarded $50,000 in punitive damages and $25,000 for general damages for the tort of sexual battery. In total, $88,091.55 was awarded to the plaintiff. The employer and supervisor, both of whom were found to be jointly and severally liable, appealed both liability and quantum of damages.

The Court of Appeal refused to interfere with the trial judge's finding that both the supervisor and employer were liable however, the Court of Appeal did not agree with the quantum of damages

[6] *Pawlett v. Dominion Protection Services Ltd.*, 2008 ABCA 369

awarded. Upon review of the punitive damages awarded, the Court noted that the trial judge did not have the benefit of the *Keays* decision at the time of his ruling. The Court of Appeal highlighted that in *Keays,* the SCC reminded courts that the starting point in imposing punitive damages was to determine that the award of general damages did not itself serve the purposes of denunciation, deterrence and retribution. In this case, the award of general damages in the amount of $25,000 was at least partly intended to denounce the conduct of the supervisor and did not actually reflect the actual damage suffered by the employee. As the same conduct underlay the other damage awards, the amount of punitive damages awarded was disproportionate. The Court of Appeal reduced the damages awarded at trial by $45,000.

E. Limits on the Duty to Accommodate:

Hydro Québec v. Syndicat des employé-e-s detechniques professionnelles et de bureau d'Hydro-Québec, section locale 2000[7]

There is a limit to an employer's duty to accommodate its disabled employees. In this case, the SCC overturned a decision of the Court of Appeal for Québec and clarified what this limit is. This decision clarified the following points for employers:

1. The employer is not required to prove that the employee will be totally unable to perform his or her work in the foreseeable future or that it is impossible to accommodate the employee's characteristics to establish that its duty to accommodate has been met.

2. An employer faced with a case of excessive absenteeism can take the entire situation into consideration, including the disabled employee's record and all of the efforts already made in assessing its duty to accommodate.

The Facts

The plaintiff, a unionized Hydro Québec employee, suffered from a number of physical and mental conditions that caused her miss work on a regular basis. In fact, the record showed that she had missed 960 days of work over seven and a half years. The employer made several unsuccessful attempts to adjust the employee's working conditions so that she would be able to perform her work. At the time of her dismissal on July 19, 2001, she had been off work for over five months, and her treating physician had recommended that she remain off work for an indefinite period. In addition, the company's psychiatrist was of the opinion that the employee would not be able to return to work on a regular and continuous basis without continuing to have a significant attendance problem.

[7] 2008 SCC 43

The arbitrator dismissed her grievance on the grounds that he did not believe the employee would be capable of performing regular and consistent work for the foreseeable future and that the solutions proposed by the union constituted undue hardship. The Superior Court dismissed the union's application for judicial review. However, the Court of Appeal allowed the appeal and reversed the arbitrator's decision.

The Supreme Court Decision

The SCC disagreed with the reasoning applied by the Court of Appeal on two grounds; the first relating to the standard for proving undue hardship, and the second dealing with the appropriate time for assessing whether the duty to accommodate has been met.

The Standard for Proving Undue Hardship

The SCC held that the employer is not required to prove that it is impossible to integrate an employee who does not meet its attendance standards, but only that doing so would result in undue hardship. What constitutes undue hardship can take as many forms as there are circumstances. Therefore, the SCC denounced the approach taken by the Court of Appeal, which would effectively have required the employer to prove the employee's total unfitness for work to discharge its burden, stating:

> The purpose of the duty to accommodate is to ensure that persons who are otherwise fit to work are not unfairly excluded where working conditions can be adjusted without undue hardship.[8]

According to the SCC, the test applied by the Court of Appeal was therefore misstated because the duty to accommodate could not have the effect of completely altering the essence of the employment contract. As such, the test is not whether it is impossible for the employer to accommodate the employee's characteristics. Moreover, the employer is not required to change working conditions in a fundamental way, but rather to adjust the employee's existing working conditions or duties, provided that this can be done without causing the employer undue hardship.

In all cases, if, despite the measures taken by the employer, the employee remains unable to perform his or her fundamental duties for the reasonably foreseeable future, the employer will have established undue hardship and will be justified in terminating employment.

---

[8] *Ibid.* at para. 14.

In other words:

> The employer's duty to accommodate ends where the employee is no longer able to fulfill the basic obligations associated with the employment relationship for the foreseeable future.[9]

Time of Accommodation

According to the SCC, the Court of Appeal also erred when it held that the duty to accommodate had to be assessed at the point where the decision to terminate is made. Following its decision in *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal,* the SCC opted for a global evaluation of the duty to accommodate that takes into consideration the entire duration of the employee's absence.

Furthermore, it rejected the 'compartmentalized approach' taken by the Court of Appeal, especially given that, in this case, the employer had implemented a number of measures to accommodate the employee, which ultimately proved unsuccessful. All of these measures had to be taken into consideration. The SCC therefore allowed Hydro Québec's appeal, therefore restoring the arbitrator's initial decision.

What this Means for Employers

Clarifying the Employer's Burden to Prove Undue Hardship

With respect to the employer's burden to prove undue hardship, the following principles can be drawn from the SCC's decision:

- The employer is not required to prove that it is impossible to accommodate the employee's characteristics, or that the employee will be totally unable to perform his or her work in the foreseeable future.
- A measure that would require the employer to modify working conditions in a fundamental way constitutes undue hardship.
- A measure that would completely alter the essence of the employment contract (i.e., the employee's obligation to perform work) constitutes undue hardship.

[9] *Ibid.* at para. 19.

- When, despite the measures taken by the employer, the employee remains unable to resume his or her work for the reasonably foreseeable future, the employer will be justified in terminating employment.

- An employer is allowed to assess the employee's attendance file globally; therefore accommodation efforts do not start over with each specific condition diagnosed.

Hydro Quebec's **Application in Alberta**

Following the *Hydro Quebec* decision, a case regarding an employee who had developed symptoms of dyspnoea (headache, rashes, dizziness, laboured breathing) was brought before the Alberta courts.[10] Her physician identified multiple chemical sensitivities as a likely cause of the symptoms, although there was never a clear medical diagnosis of her medical condition.

The employer took the following steps to accommodate the employee:

- Asked staff to refrain from use of perfume and fragrances.

- Allowed employee to use washroom in sickroom rather than the public washroom.

- Placed air cleaners in her work area.

- Allowed use of charcoal filtered disposable masks.

- Changed work hours to allow her to avoid contact with crowds.

These measures were not totally effective, and a specialist in occupational and environmental medicine prepared a report. Following office renovations the employee was moved to a different floor where she would no longer be able to access the private washroom and she would be exposed to some chemicals left over from the renovation. The employee never worked at the new location, but left work and went on short term disability. One month later, the employer advised the employee that as requested, her work schedule would be changed to allow her to work with reduced contact with others. She was also advised she would not be able to use the private washroom due to the location of her work station. She never returned to work.

A complaint filed with the Human Rights Commission was investigated and it was determined that the employer had taken reasonable attempts to accommodate. Moreover, the employee refused to provide both the employer and investigator with updated medical reports. The investigator viewed the employee's refusal to return to work as uncooperative:

---

[10] *Brewer v. Fraser Milner Casgrain LLP*, 2008 ABCA 435

> Human rights law indicates that the employee cannot expect a perfect solution when attempts are made to accommodate the individual needing such. If a proposal that would be reasonable in all the circumstances is turned down, the employer's duty is discharged. The employee also has a responsibility to cooperate with the accommodation process. Evidence shows that the employee did not provide such cooperation. Evidence shows that the employer had made reasonable attempts to accommodate the employee's physical disability and was prepared to continue doing so.[11]

The Human Rights officer dismissed the complaint. The employee then applied to the Chief Commissioner to review the decision and the decision was upheld. The employee then successfully appealed for judicial review. The employer appealed to the Court of Appeal.

The Court of Appeal ruled that the Commission was entitled to expect full co-operation in the investigation. The investigator's decision that given the lack of cooperation of the complainant the matter would not be referred to a hearing was reasonable. Additionally, the Court of Appeal found that an employee cannot dictate appropriate accommodation. The willingness of an employee to try the accommodation proposed by the employer can be taken into consideration of the investigator. It was reasonable to expect the employee to test the new work environment. The Court of Appeal noted the recent *Hydro Quebec* decision of the SCC and cited with approval the SCC's determination that an employer under an obligation to accommodate is not precluded from making changes to its business and its premises within the limits of that obligation.[12]

II – Alberta Legislative Updates and Recent Case Law

Legislative changes affecting labour and employment issues have occurred in both federal and provincial legislation over the last year. Alberta will also see changes to its *Occupational Health and Safety Code* and to its *Employment Standards Code* in the next few months. Federal changes to the *Employment Insurance Act* and *Bankruptcy and Insolvency Act* in regards to employment insurance and bankruptcy and insolvency have already been enacted and are now enforceable.

---

[11] *Ibid.* at para. 9.

[12] *Brewer v. Fraser Milner Casgrain LLP*, 2008 ABCA 435, at para. 25.

A. Human Rights:

Legislative Updates

The Alberta provincial government has proposed changes to the *Human Rights, Citizenship and Multiculturalism Amendment Act*. Bill 44 will be the Act's first update since its introduction over 13 years ago. Proposed changes include adding sexual orientation as a listed enumerated ground and will include confirming the right of parents on the education of their children. Parents or guardians will have the right to exempt their child from courses of study, programs or materials that include subject matter dealing explicitly with religious instruction, sexuality or sexual orientation. The child will not be penalized for this exemption and would receive alternative learning experiences. It should be noted that this process is already practiced in Alberta schools; this change merely formalizes the existing process.

Additionally, Bill 44 provides for administrative changes. Funding will be increased by $1.7 million, a 26% increase, to provide for the investigation and mediation of complaints in a timelier manner. Appeals will be addressed more quickly by being referred directly to a member of a tribunal. Under the proposed amendments, Alberta will still maintain a commission, for investigation and mediation, and a tribunal for adjudicative purposes. There will however be a more distinct separation between investigation and adjudication.

Recent Case Law

Improper Investigations

Harrison v. Nixon Safety Consulting Inc.[13]

Harrison was hired by Nixon Safety Consulting Inc. ("Nixon") to be a safety officer at a construction site in Kelowna. Nixon was contracted by Navigator Development Corporation to provide safety services. Navigator was hired by Con-Forte, who was the project manager, to do concrete work at the site. Harrison worked with Greg Ford, the project manager for Navigator and Rod Goodman, the superintendent of onsite operations for Con-Forte. Less than one month into her job, Harrison complained to Goodman that Ford was sexually harassing her. Goodman spoke to Ford, and informed Harrison that she would soon move into a different trailer and would have little or no contact with Ford. A few weeks later, Harrison spoke to her supervisor at Nixon about Ford's unwanted behaviour. Her supervisor told her to stay at home the next day. Ford's lawyer sent Harrison a letter warning her against making slanderous or defamatory comments. Her supervisor at Nixon told her to move into the other trailer, which Harrison didn't think was ready for use as it did not have a computer, phone or printer.

[13] 2008 BCHRT 462

In mid-December, Harrison was written up for being late, although she denied being late. Her supervisor at Nixon informed her to be careful as Navigator was looking for mistakes. Navigator told Nixon that Harrison was causing disruptions with Navigator and Con-Forte employees. December 20, Harrison was dismissed because she "didn't fit in". Her supervisor at Nixon told her that while he was happy with her work, Navigator wanted her gone.

The Human Rights tribunal preferred Harrison's account of what happened over Ford and Goodman. They found that Goodman's investigation was "cursory and superficial". With regards to her termination, they determined it was directly linked to the harassment and constituted discrimination. The fact that Harrison was on a probationary period during the time of her termination was irrelevant. Nixon, Navigator and Con-Forte were held jointly liable for damages of $32,000 because all three held positions of authority over her. Ford, Navigator and Con-Forte were ordered to pay an additional $3,000 for improper conduct in trying to discredit her complaints. Although was brought before the British Columbia Human Rights Tribunal, all three companies involved were incorporated in Alberta with head offices in Calgary.

Lessons for Employers

- Investigate in a timely but thorough manner.
- Two investigators are better than one at capturing information and will reduce the risk of personal bias being applied.
- If your company has a harassment policy (which is strongly recommended), make sure you follow any procedures set out in the policy for investigating complaints.
- Take the complaint seriously.
- In those jurisdictions covered by privacy legislation, ensure privacy requirements regarding the collection, use and disclosure of information are followed.

Racial Profiling

Coward v. Alberta (Human Rights and Citizenship Commission, Chief Commissioner)[14]

Racial profiling is not specifically protected under the *Human Rights, Citizenship and Multiculturalism Act* (the "Act"); however, when an individual is subjected to differential treatment because of negative stereotypes, discrimination may arise based on race or other protected grounds under the Act.

[14] 2008 ABQB 455

A recent decision of the Alberta Human Rights Tribunal highlights how racial profiling can establish the basis for a human rights complaint.

The complaint arose following an incident where the complainant, Mr. Coward, was walking on a busy street and was stopped by a police car. A police officer informed Mr. Coward that he matched the description of a person seen waving a big knife in a public place. Mr. Coward informed the officer that he did not have a knife and refused to consent to a personal search. Following Mr. Coward's refusal, the officer arrested, handcuffed and searched Mr. Coward. The officer did not find a knife in the course of his search, and Mr. Coward was released. Mr. Coward filed a complaint with the Commission and claimed that discrimination based on his race was a factor in his treatment.

The complaint was investigated by the Commission and then dismissed by the Director. Mr. Coward asked the Chief Commissioner to review the Director's decision. The Chief Commissioner agreed with the Director's dismissal as there was no evidence to show that the police treated Mr. Coward any differently than any other person in a similar situation. The Chief Commissioner noted that the only reason for the public arrest was Mr. Coward's refusal to allow for a body search.

The complainant appealed the Chief Commissioner's decision to the Alberta Court of Queen's Bench. The court found that the question to be determined was whether or not race was a factor in how Mr. Coward was treated and acknowledged that it was a low threshold to meet. The court found that the Chief Commissioner's decision was reasonable because while race was a prohibited ground of discrimination, it may also operate as a relevant descriptor. It was reasonable for the Chief Commissioner to determine that there was heightened suspicion because Mr. Coward was black; the police had received specific information that a person of a particular race was engaged in dangerous conduct and they narrowed their search accordingly. The court dismissed the application for judicial review.

Lessons for Employers

Racial profiling prejudges a person's ability, skills and personality based on unfair assumptions about racial, physical or cultural traits.

- An individual should be judged on his or her merit regardless of race, religious beliefs, colour, gender, physical and/or mental disability, marital status, family status, source of income, age, ancestry, place of origin or sexual orientation.

Discrimination Not Proven

Chartrand v. Alberta (Human Rights and Citizenship Commission, Chief Commissioner)[15]

Chartrand was hired into the service and warranty department of her employer, MacLachlan and Mitchell Homes ("MMHI") in June 2004. In November MMHI had an opening for a technician/carpenter. Chartrand offered to fill the position, and MMHI permitted her to fill the position temporarily, while they looked for someone. Chartrand told the construction manager that she was interested in filling the position and in her opinion; she was met with "chuckles". The position was eventually filled in December 2004 by a journeyman carpenter with property maintenance knowledge. In January 2005, Chartrand resigned and filed a complaint with the Alberta Human Rights Commission alleging gender discrimination. Chartrand alleged that MMHI discriminated against her by failing to seriously considering her application for the position.

The investigator dismissed the complaint, as did the Chief Commissioner. Chartrand appealed to the Alberta Queen's Bench for judicial review. Chartrand argued that the investigation was incomplete as the job advertisement was not viewed by the investigator and her fellow co-workers should have been interviewed. The court noted that there was no direct, independent or persuasive evidence corroborating Chartrand's perception and interpretation of MMHI's treatment of her.

The court noted that in order for the Commissioner to have allowed the appeal from the investigation, it would have to be determined that "Chartrand was qualified for the job, but was passed over because she was female." The job requirements and the discrepancies between Chartrand and the other potential candidates were such that the decision not to proceed was reasonable. Additionally, the majority of individuals that Chartrand claimed were not interviewed provided letters to the Commissioner. The court dismissed the application for judicial review.

Lessons for Employers

In this decision, the employer was able to prove that the applicant had not been discriminated against. When hiring, some tips to follow are provided below:

- Establish objective criteria to govern the hiring decision.
- Interview in pairs.
- Train interviewers.
- Select interviewers who are acquainted with the job requirements.

---

[15] 2008 ABQB 207

- Take detailed notes of the interview.

Employer Retaliation

Walsh v. Mobil Oil Canada[16]

In August 1991, an employee, Walsh ("Walsh"), filed a human rights complaint against her employer, Mobil Oil Canada ("Mobil"), alleging gender-based discrimination with respect to her pay and job designations (the "Complaint"). In March of 1993, Walsh was promoted. Approximately seven months later, Walsh met with Mobil regarding her human rights complaint. During this meeting Walsh was advised to withdraw her complaint. At this time, Mobil first documented significant concerns respecting Walsh's performance.

About one year later, Walsh was given a three-month plan for improving her performance and was assigned a different supervisor who was not involved in the Complaint. On February 21, 1995, Mobil terminated Walsh's employment on the same day as her Complaint was dismissed.

Walsh filed a second human rights complaint in August of 1995 alleging retaliation (the "Retaliation Complaint"). The human rights panel determined that there was no retaliation as there was no intent to retaliate and dismissed the Retaliation Complaint.

The reviewing judge reversed the panel's decision with respect to Mobil's retaliation. The judge concluded that the proper test for assessing retaliation did not require employer intent to retaliate but rather, whether a reasonable complainant would perceive that dismissal was in part motivated by retaliation. Mobil appealed the reviewing judge's decision to the Court of Appeal.

Decision

The majority found that the test for retaliation is composed of two parts to be determined on a balance of probabilities:

1. Is there a link between the alleged conduct and filing the complaint (or any other action for which retaliation is not permitted)?; and

2. Was the alleged conduct, at least in part, a deliberate response by the employer?

The majority noted that a complainant was not required to show malice, and that retaliation can also include post-complaint conduct intended to discourage future complaints. Additionally, the majority commented that intent could be inferred from all the proven facts and the timing of events.

---

[16] 2008 ABCA 268

It is interesting to note that the majority also considered the reviewing judge's finding that due to the fact that Mobil was a large corporation and either had a legal department or ready access to legal advice, Mobil would have known that there were no grounds for dismissal. The majority found that although this analysis could not stand on its own, it did support both aspects of retaliation.

As the issues of liability and damages were bifurcated before the human rights panel, damages have not yet been determined. The Court of Appeal also reversed the reviewing judge's award of solicitor-client costs based on Mobil's pre-litigation conduct, for party and party costs.

Lessons for Employers

The following are lessons that employers can take away from this decision:

- Even after a human rights complaint has been dismissed, keep in mind that retaliation provisions are still in effect.
- Care should be exercised when making human resources decisions concerning a complaint.
- The onus of proof will be on the employer to demonstrate that retaliation did not occur.
- Careful documentation is key.
- Malice is not a required element for retaliation.
- Retaliation also includes conduct intended to discourage future complaints, not just acts designed to punish the complainant.

B. Privacy:

Legislative Updates

At this time, there are no new legislative updates in regards to privacy.

Recent Case Law

Improper Disclosure

Caritas Health Group & Capital Health[17]

A nurse employed by a health care provider complained to the Office of the Information & Privacy Commissioner that her employer had improperly accessed her immunization records without her consent. The employer argued that the information was required for health purposes, as the nurse had applied for an alternate position within the employer's organization that required up to date immunizations. The investigation concluded that the information was collected primarily for employment management purposes due to the fact that the employee was not seeking health services from the employer. While the information may have protected the employee from communicable diseases associated with the position sought, the information was collected because the employee was looking for a job.

The investigation noted that although the indirect collection of the employee's information was authorized, as she was an existing employee, the same could not be said for situations in which an individual was applying for a job who was not already an employee. The investigation concluded that although the collection was authorized for the purpose of managing or administering personnel, the manner in which the information was collected was flawed. The investigator found that the employer was only entitled to access health information as a health service provider; in the context of an employment relationship, the employer should have obtained the information directly from the employee or indirectly with the employee's authorization.

Improper Collection

United Food and Commercial Workers, Local 401[18]

During a lawful strike, the Union was taking photographs and video recordings of persons entering the worksite. The Union's actions resulted in numerous complaints to the Office of the Information and Privacy Commissioner. Some of the complainants were advised by picketers that their image would be displayed on the Union website or placed on the website, www.CasinoScabs.ca. Another individual, the Vice-President of the employer, had his image placed on a poster displayed at the picketing site, and further complained that his image had been used in the Union newsletter and in pamphlets about the strike distributed at the worksite. The adjudicator ruled that the collection of personal information was necessary in the context of "evidence gathering" should the Union be required to provide evidence for the purposes of an investigation or legal proceeding. However, the adjudicator

[17] H2009 – IR – 003

[18] P2008-008

found that the gathering and collection of personal information, was in contravention of PIPA if it was used for any other purpose. The Union was ordered to cease collecting any personal information for purposes other than "evidence gathering" without first obtaining consent. The Union was also ordered to destroy any personal information of the complainants and others still in its possession, as the underlying dispute had been resolved.

Social Networking Sites

Social networking sites like Facebook have been very popular with people across the world. When researching applicants, employers may be tempted to search social networking sites for additional information. A 2008 survey conducted in the United States showed that 22 per cent of hiring managers reported using social networking sites to research job candidates. Of the hiring managers who viewed potential employee's social networking profiles, 34 per cent reported that they did not consider the applicant for the position due to the content of his or her profile. Areas of concern for hiring managers included information posted about drinking or drugs, posting of provocative or inappropriate pictures or information, poor communication skills, discriminatory remarks and sharing of confidential information from a previous employer.

Whether or not the searching of such sites infringes an individual's right to privacy is a question that employers must remember when conducting background checks of potential applicants. A recent decision of a California appeals court found that a California woman had no grounds to sue her hometown's newspaper after it published her online rant about how much she despised her hometown.[19] The California woman argued that the publication of the article was a violation of privacy. The article was posted on the woman's MySpace page and within 6 days, it was forwarded to the local newspaper and published. However the court ruled that she had no grounds even if she thought her article was for a limited audience.

As a result of the publication, the woman's family, who still resided in the small town, received death threats, were forced to close their family business and eventually relocated. While the court allowed the family to bring their emotional distress complaints before a jury, the claim for invasion of privacy was dismissed because no reasonable person would have had an expectation of privacy regarding the published material.

In Alberta, an arbitrator dismissed an employee grievance which arose from an employee's termination following her employer discovered the contents of her personal blog.[20] The employee was employed in a sensitive area of the provincial government, and that key values of the employer included confidentiality, discretion and substantial discretion. The employee had criticised numerous co-workers with whom she had contact on a daily basis, expressed contempt for management and

---

[19] *Moreno v. Hanford Sentinel Inc.*, 09 C.D.O.S. 4208

[20] *Alberta and A.U.P.E. (R) (Re)* 95 C.L.A.S. 30.

denigrated administrative processes. The employee had not taken any steps to prevent public access to the blog and the employee was adamant that she was merely exercising her right to free speech. Although the Union argued that few co-workers of the employee had viewed the blog, the arbitrators found that the most important issue was the content of the blog and public access to it. Even though the employee had a right to create a personal blog and form opinions about her co-workers, the public display of her opinions was sufficient to irreparably sever the employment relationship, and termination was justified.

If Facebook and other social networking sites are considered to be public spaces, employees may only hold a minimal expectation of privacy with respect to these sites. Therefore, should an employer have a serious reason for engaging in employee surveillance, he will likely be able to obtain specific information about that employee through a site such as Facebook without infringing the employee's right to privacy.

Lessons for Employers

- Information on social networking sites is not always reliable.
- Much information on these sites is provided without context and can be misleading.
- The type of privacy that an individual can expect will likely depend upon whether they have kept their information public or restricted access with privacy settings.
- The use of another person's password or the monitoring of someone else's Facebook account could amount to a breach of privacy, similar to the inadmissibility of private investigator evidence in a unionized setting.

C. Occupational Health & Safety:

Legislative Updates

The *Occupational Health and Safety (OHS) Code 2009* (the "OHS Code 2009") will replace the previous 2006 edition and has an effective date of July 1, 2009. The majority of the changes reflect increased worksite safety rules. The OHS Code 2009 adds new requirements and clarifies several existing requirements in the OHS Code 2006. Employers and workers may begin implementing and following the OHS Code 2009 immediately as long as they meet the minimum requirements of the OHS Code 2006. Significant changes affect the following Parts of the OHS Code:

> Part 5 - Confined Spaces establish the concept of a "restricted" space with less stringent requirements than a confined space.

Part 6 - Cranes, Hoists and Lifting Devices includes new requirements for lift calculations, tag lines and personnel baskets.

Part 14 - Lifting and Handling Loads have been expanded to include requirements specific to patient/client/resident handling.

Part 18 - Personal Protective Equipment now includes requirements applicable to respiratory protection against airborne biohazardous material.

Part 19 - Powered Mobile Equipment now includes requirements specifically aimed at concrete pump trucks.

Part 21 - Rigging references several new standards and sets new, specific safety factors for rigging components.

Part 28 – Working Alone now revises the communication requirement so that it consists of effective electronic system plus regular contact. Previously, the requirement under the OHS Code 2006, either an effective electronic system was required or regular contact.

Part 35 - Health Care and Industries with Biological Hazards includes new requirements dealing with sharp medical instruments.

Part 36 - Mining has been updated to better reflect current mining practices.

It is also worth noting that there are no planned changes to the workplace violence (Part 27) section. Thus, employers still have an obligation to develop and effectively utilize policies and procedures respecting potential and existing workplace violence.

The OHS Code 2009 and the latest edition of the OHS Code Explanation Guide can be found at: http://employment.alberta.ca/cps/rde/xchg/hre/hs.xsl/307.html.

Recent Case Law

Employer Due Diligence

R. v. Blue Ridge Lumber Inc. [21]

An Alberta employer was found guilty of failing to ensure that a worker would be protected from falling more than 3.5 metres from a temporary work area. The injured worker was a part-time employee hired to work on the cleaning crew. The cleaning crew worked once per week, every Friday night. The judge found that the employer had only provided cursory training of the cleanup crew which was ineffective. Furthermore, the person conducting the training was not a senior member of management and was not an expert in safety matters. The training focussed on issues regarding personal protection and lockouts and did not focus on fall protection. The judge found that the employer failed to assess the potential hazard of falling and was not persuaded that adequate due diligence was exercised. Although the employer tried to argue that the employee should share in responsibility for the accident, the judge quoted from Justice Laskin's decision in *Ontario (Ministry of Labour) v. Dofasco Inc.* (2005), 2005 Carswell Ont. 4346 (Ont. C.A.),

> Workplace safety regulations are not designed for the prudent worker. They are intended to prevent workplace accidents that arise when workers make mistakes, are careless, or are even reckless.[22]

The judge noted, however, that the penalty against the employer would be mitigated due to the actions of the employee.

In another decision, an employer appealed its convictions relating to an incident during which a truck unloading benzene was parked too close to the holding tank and the tank exploded, seriously injuring two workers.[23] The Provincial Court Judge found that management had failed to establish clear safety rules, had failed to properly train workers and had failed to supervise its workers. The Court of Queen's Bench dismissed the appeal, concluding that the employer had improperly put its trust in an employee to train another on safety precautions. The court noted that the employer was unable to provide any evidence that would establish their opinion that the employee was an appropriate trainer. As the employee did not set out to deliberately cause an explosion, the incident could not be blamed on the employee. The employer failed to prove that it had been duly diligent in the training of its employees and the decision was upheld.

---

[21] 2008 ABPC 268

[22] *Ibid.* at para. 30.

[23] *R. v. Rose's Well Services Ltd.*, 2009 ABQB 1

D. Labour Relations:

Legislative Updates

Several changes have occurred in the past year to Alberta's *Labour Relations Code* (the "Code"). In September of last year, Bill 26, the *Labour Relations Amendment Act 2008*, introduced revisions to the Code that introduced mandatory arbitration for ground ambulance services, essentially removing the ability of ground ambulance services to strike or lockout during labour disputes, and restricted "salting" as a union organizing tactic in the construction sector and market enhancement recovery funds, also known as "MERFS". Bill 26 also increased the maximum fine imposed on a corporation, employers' organizations or trade union for contravening or failing to comply with any provision of the Code from $10,000 to $100,000. The amendments came into force September 15, 2008.

In regards to restrictions on salting, while Bill 26 did not restrict legitimate union drives, Bill 26 did modify section 34 of the Code to restrict the employees that can participate in a union certification vote. Now, employees in the construction industry are only entitled to vote in a union certification if they have been worked for the employer for at least 30 days immediately preceding the date of application for certification. Additionally, Bill 26 amended section 52 of the Code and now allows employees in a bargaining unit, engaged in work in the construction industry, to make an application for revocation of the bargaining rights 90 days immediately following certification. It should be noted that if employees decide to make an application to revoke bargaining unit rights within 90 days of certification, an employee is only eligible to vote if they have been employed by the employer for at least 30 days preceding the application.

Section 148 of the Code has been amended by Bill 26 to restrict the union construction contractors from using funds designed to under-cut non-union contractors. Section 148.1(1) defines a "market enhancement recovery fund" as:

> A fund that is established or maintained for the purpose of assisting, by either or both of the following means, one or more construction contractors to obtain work in the construction industry;
>
> (i) Subsidizing the bids, tenders, fees or prices of a construction contractor;
>
> (ii) Subsidizing the wages paid to the employees of a construction contractor.

This section now prevents a construction contractor or a person acting on behalf of a construction contractor from contributing funds, regardless of the source, to any trade union or any person acting on behalf of a trade union for the purpose of establishing or maintaining a MERF. Construction contractors who are also employers are prohibited from making any deductions from wages other than amounts deducted for dues, assessments or other fees. Additionally, no trade union or trade union trust is allowed to subsidize bids, tenders, fees or prices of a construction contractor, or subsidize

wages paid to an employee of a construction contractor. Any amounts contributed to a MERF that are not dues, assessments or other fees, are required to be distributed either in accordance with the collective agreement, or in accordance with the regulations made under subsection 148.1(4).

In conjunction with this section of the Code, the *Market Enhancement Recovery Distribution Regulation* came into force on February 18, 2009 (the "Regulation"). The Regulation requires that every trade union and trustee that is either a signatory to a collective agreement that contemplates or references a MERF or maintains a MERF to file a disclosure report with the Labour Relations Board ("the Board"). The disclosure report must contain the following information:

(a) the name of the trade union and a contact person for the trade union;

(b) the name and position of the person who completed the disclosure report;

(c) the name of the market enhancement recovery fund;

(d) copies of any collective agreement, trust agreement, contract or other agreement that contain provisions respecting contributions to, or the winding-up of, the market enhancement recovery fund;

(e) the names of the trustees of the market enhancement recovery fund or any other persons who have control of the fund;

(f) whether any contributions to the market enhancement recovery fund were made in compliance with section 148.1 of the Act;

(g) the value of the market enhancement recovery fund as of the date on which the disclosure report was completed;

(h) any other details or documents required by the Board;

(i) a statutory declaration in the form required by the Board made by the person who completed the disclosure report stating that the disclosure report is true and complete to the best of the persons knowledge.

The declaration may include any other information the filing party considers relevant and the Board may require additional information be disclosed at a later date.

If the Board determines that the MERF must be distributed and cannot be distributed in accordance with an underlying collective agreement, the Board is authorized to order the funds transferred to another fund of the same trade union or trade union trust, in a manner that will prevent the funds from being used to subsidize bids, fees, prices or wages. Additionally, under the Regulation, the Board

is authorized to compel disclosure of relevant information and make any inquiries, investigations or inspections that the Board considers necessary. The Regulation is set to expire on January 31, 2014.

Recent Case Law

Termination Motivated by Anti-Union *Animus*

Calgary Flames Limited Partnership v. United Foods and Commercial Workers Union, Local No. 401,[24]

An employer challenged a decision of the Alberta Labour Relations Board that found the employer had been motivated in part by anti-union *animus* in terminating an employee. The employer argued that the 5-year employee, who had recently received a promotion less than two months before his termination, was terminated for job performance issues and the promotion was made not based on merit, but was made to retain an experienced employee. Further, the employee had antagonized fellow employees and the employer received e-mail complaints from clients regarding the employee's work the week of the termination. The union led evidence that the employee had hosted a meeting with a union organizer one month before his termination. In its decision, the Board noted that prior to the employee's termination, he had never received a verbal or written warning about his performance and when combined with the employee's recent promotion, the Board found that the termination was motivated in part by anti-union animus.

On appeal, the employer argued that the Board's finding was unreasonable in the absence of any cogent evidence justifying that inference. The court noted that the Board had only concluded that anti-union *animus* was only one factor in the employer's decision to terminate. The court did not agree with the employer and found that the Board's decision was reasonable and that the Board had considered all of the relevant evidence. The employer also challenged an aspect of the Board's order that required union material be distributed to all kitchen and serving staff. The employer argued that there was no rational connection between the breach of the Code in relation to the employee's termination and the distribution of union materials. The court also disagreed with this ground of appeal and found that there was a sufficient connection as the termination of the employee would have resulted in a "chilling" effect with the remaining employees and that central to the union activity the employee had been involved in would have included informing fellow employees of the purpose, benefits and services of the union.

[24] , 2009 ABQB 30.

Pre-Employment Contracts

Re Calgary (City) and A.T.U., Local 583,[25]

This dispute arose over the employer's relocation policy, which offered to offset the relocation costs of a prospective employee and allowed the employer to recover all or part of the payment if the candidate failed to stay employed for a stated period of time. This policy was developed and implemented without the agreement of the bargaining agent for the employer's employees. The employer argued that because the policy was a pre-employment contract, the union's bargaining authority was not engaged. The arbitrators determined that a pre-employment contract would cross into a union's exclusive bargaining agency in at least three circumstances:

(a) when it was not "pre-employment", i.e., when the contract [was] entered into after the employment relationship is already established;

(b) when the consideration of condition that forms part of the hiring bargain conflicts with the collective agreement; or

(c) when the consideration or condition does not conflict with the agreement, but nevertheless constitutes a term or condition of continued employment.[26]

The arbitrators determined that the policy implemented by the employer were valid with one exception. Although the policy did not conflict with any express term of the collective agreement, the policy required that the candidate agree to its terms prior to commencing employment. As noted by the arbitrators, an employee could have already signed an offer of employment prior to executing the relocation agreement, which would violate the principal that only pre-employment contracts can be upheld without bargaining agent approval. With regards to the payback provisions of the relocation agreement, the arbitrators determined that because the bargain was for pure recovery of expenses incurred on a one-time basis and can never be more than an employee actually incurs, the recovery by set-off from wages, even though enforceable after the employment relationship was established, took it outside the category of a "term or condition of continued employment".

---

[25] 179 L.A.C. (4th).

[26] *Ibid.* at para. 76.

E. Employment Standards Code

Legislative Updates

Military Reservist Leave Under the Employment Standards Code and the Canada Labour Code

Both the Federal and Alberta governments have made legislative changes in the past year to provide job-protected leaves of absences for reservists working in Alberta. Canadian Forces reservists are increasingly being called into active duty due to Canada's continuing military engagements in Afghanistan. Approximately 33% of almost every mission is made up of reservists, and overseas deployments can be tremendously disruptive for reservists and their families. Alberta has 2,500 reservists who serve in the Canadian Forces and approximately 45% of Canadian reservists maintain either full-time or part-time employment.

The Alberta government has proposed to amend the *Employment Standards Code, 2000* ("ESC") with the introduction of Bill 1, the *Employment Standards (Reservist Leave) Amendment Act, 2009* (the "Bill") to provide for reservist leave. The Bill was introduced on February 10, 2009 and has received third reading as of April 8, 2009. The federal government's amendments to the *Canada Labour Code* ("CLC") creating a leave of absence for members of the reserve force came into force on April 18, 2008. Soon all reservists working in Alberta, whether working in federally or provincially regulated workplaces, are potentially entitled to reservist leave. The federal and provincial regimes provide similar entitlements to employees, but there are some important differences which are highlighted in the following parallel discussion of the regimes.

Employee Entitlement to Reservist Leave

Like other leaves of absences mandated by the ESC and CLC, military reservist leave is an unpaid, job-protected leave of absence. Under the soon to be amended ESC, an employee who is a military reservist and who has completed at least twenty-six consecutive weeks of continuous employment with an employer is entitled to military reservist leave. Under the CLC, an employee who is a military reservist and who has completed at least six consecutive months of continuous employment with an employer will be entitled to military reservist leave. Both overseas deployment, deployment to an operation within Canada (in the event of an emergency such as a natural disaster) and training entitle a reservist to leave. Required pre-deployment or post-deployment activities are considered to be a part of the deployment for purposes of the leave entitlement.

The CLC also entitles an employee to a job-protected leave of absence for any treatment, recovery or rehabilitation for physical or mental health problem that result from their service as a reservist. The amendments to the ESC do not currently include such provisions; although future changes are possible.

Under the CLC, only reservists whose deployment or training began after the amendment came into force on April 18, 2008 are entitled to reservist leave. The amendments to the CLC do not address this question directly, but federal labour program officials appear to understand the coming into force of the amendments on this timeline. It would appear that under the ESC only reservists whose deployment or training began after the Bill receives Royal Assent are entitled to reservist leave.

Employees are entitled under the CLC to up to 15 days per year of leave for annual reservist training. Employees under the ESC are provided with up to 20 days leave each calendar year for training.

Verifying an Employee's Entitlement to Military Reservist Leave

Both the ESC and the CLC allow an employer to require an employee to provide evidence that he or she is entitled to reservist leave.

The CLC specifies that the evidence provided by the employee must either be a prescribed document, a document approved by the Chief of the Defence Staff, or a document from the employee's commanding officer. The CLC also specifies that if requested, the proof of entitlement to leave must be provided within three weeks after the day on which the leave begins, unless there is a valid reason for not meeting this deadline.

Requirement that Employee Gives Notice

Under the ESC, at least four weeks' written notice must be provided by the employee prior to the date the reservist leave is to start. The notice must include the estimated date of return (if the leave is with respect to an operation) and the actual date of return (if the leave is with respect to training). If an employee is unable to advise the employer before beginning his leave deployment, he must advise the employer as soon as possible after beginning his or her leave. If an employee does not provide written notice of his return to work, the employer may postpone the employee's return to work for up to four weeks after the day the employee has advised that they are able to return to work. During this time, the employee is deemed to be on continued reservist leave.

The CLC also requires an employee to give at least four weeks' written notice to the employer before beginning his and to inform the employer of the length of the leave. The employee must also provide the employer with at least four weeks' written notice of any change to the length of the leave. An employee may be excused from these notice requirements if he has a valid reason for failing to comply. If an employee fails, without valid reason, to notify the employer at least four weeks before the last day of the leave, the employer is entitled to postpone the employee's return to work for a period of up to four weeks after the notification of the return to work.

Length of Military Reservist Leave of Absence

If a reservist is on leave for training purposes and has provided a return to work date in his written notice, the employee is not required to give any additional written notice of his return.

Leaves of absence for deployment continue as long as the deployment lasts. Upon return from operational leave, if the employee has been gone for more than four weeks, the employee must give at least four weeks' written notice of the day he or she intends to resume work. If the employee has been gone for less than four weeks, written notice advising the employer of the return to work date must be provided as soon as possible. An employer may not deem the employee to have been terminated after a certain amount of time or impose a time limit on the leave.

If the employee does not want to return to work following reservist leave, he must provide at least four week's written notice of his intention to terminate employment.

Employee's Return to Work at the Conclusion of Military Reservist Leave

As with other leaves of absence under the ESC and CLC, the employee must be reinstated to the same position he held prior to the leave. If the employee's prior position no longer exists, the employer must provide him with a comparable position at an equal or higher rate of pay and benefits. An employer may not terminate or lay off an employee who has started reservist leave.

Under the ESC, if the employer has suspended its business while the employee is on reservist leave and resumes its business within 52 weeks following the end of the leave, the employer must reinstate the employee to the position occupied at the time the leave started or provide the employee with alternative work with no loss of seniority, benefits or pay to the employee.

Benefits During the Leave of Absence

At the time of writing this paper, details on whether employers under the ESC will be required to make benefit contributions to employees on reservist leave are not available.

Under the CLC, employers are not required to make contributions into employee pension or benefit plans while an employee is on reservist leave.

Lessons for Employers

- It is possible that reservist leaves will come up on short notice because of the sensitive nature of Canadian forces deployments.

- Employers may also be unaware that their employees are members of the military reserve. It is important for your business to be prepared for the new reality of reservist leave entitlements.

- Regardless of whether or not you are aware of having reservists currently working for your organization, you should review your human resources policies on leaves of absence and revise them to reflect the creation of military reservist leave in Alberta.

- If you do not have a leave of absence policy in place, we recommend that you create one in order to avoid confusion if and when an employee notifies you that he or she is taking a military reservist leave.

- Where applicable, collective agreements should be similarly reviewed and revised.

- It is important to note that similar legislation currently exists in P.E.I., Nova Scotia, Ontario, Manitoba and Saskatchewan. Other provinces are likely to follow the trend by adopting their own military reservist leave legislation. If you have employees in other jurisdictions, you should take care to identify your obligations across the country.

Recent Case Law

A recent case regarding the application of section 14 of the ESC (Employment Records) reinforces the employer's requirement to keep accurate records.[27] The employee appealed an Order of an Employment Standards Officer, ordering payment of wages in the amount of $1,644.00, overtime pay in the amount of $3,090.56 and vacation pay in the amount of $1,447.96 and general holiday pay in the amount of $390.92. The employer had failed to provide time records for the employee to the Officer because the employer had never recorded the employee's time. In the employer's opinion, the employee was paid on a monthly salary and therefore hourly time sheets were not applicable. The only records available to the Officer were produced by the employee. Even though the employee did not acknowledge these records in his initial complaint, he did provide them when asked by the Officer.

The court reminds employers that they are required under Alberta's Employment Standards Code to keep accurate time records for its employees. If the employer fails to keep records in accordance with the Code, any discrepancy between the employer and employee will be determined in favour of the employee. In addition, the Code also provides that an Officer may determine the amount of earnings owed to an employee in any manner they consider appropriate when the employer has failed to keep complete and accurate records. The judge concluded that the Officer had appropriately determined the amount owing to the employee using the information the employee had provided.

---

[27] *Robert Prcic Operating (Steve Auto Clinic) v. Barna,* 2008 CanLII 18253 (AB E.S.U.)

III - Federal Legislative Changes & Recent Case Law Updates

A. Canada Labour Code

Legislative Updates

On February 13, 2009, the Federal Minister of Labour announced plans to revise Part III of the *Canada Labour Code* (the "CLC"). Part III of the CLC deals with standard hours, wages, vacations and holidays. The Minister is currently consulting business, employees and unions for their views in regards to a discussion paper summarizing recommendations from the Federal Labour Standards Review Commission Report. Priorities that will be considered when reviewing the CLC include modernizing workplace practices, promoting family-friendly policies and work-life balance, and fostering long-term economic prosperity.

Recent Case Law

Courts Refuse to Enforce Collection of Union Fines

Telecommunications Workers Union Local 202 v. Macmillan,[28]

A recent Alberta Queen's Bench decision discusses whether union fines can be imposed by the courts. The union had fined three of its members for crossing picket lines during a labour dispute. The members did not pay the fines and were suspended from the union. The union sued the members in Provincial Court seeking a judgment in debt or alternatively damages, to enforce the fines imposed by the union. The Provincial Court Judge determined that the union's claims against the members were neither action in debt nor damages and that the by-laws of the union did not allow it to seek redress in the courts for an internal disciplinary matter. The union appealed the decision to the Court Queen's Bench.

The court cited with approval recent cases from Newfoundland and Ontario in which union fines penalties were not enforced by the courts. In Newfoundland, the union constitution contained a provision that determined any fine imposed by the union would constitute a debt to the union, however, the trial judge determined that the penalties imposed by the union did not constitute a debt within Newfoundland's Small Claims Act and furthermore, "merely labelling a penalty a debt" did not make it one.[29] In the Ontario decision, penalties imposed by a union against members who had crossed a picket line were found to not constitute a penalty imposed for a breach of contract because there was no evidence to suggest that the fines imposed were related to an actual loss suffered by the

[28] 2008 ABQB 657

[29] *Newfoundland Assn. of Public Employees v. Drake* [2002] N.J. No. 25 (Sup. Ct. T.D.), at para. 19.

union.[30] The Alberta Court of Queen's Bench determined that the fines imposed by the union against its members were not debts or damages and dismissed the appeal.

Employer Discipline

Teamsters Canada Rail Conference Maintenance of Way Employees Division v. Canadian Pacific Railway Company,[31]

A union employee was disciplined for the unauthorized use and disclosure of fellow employees' personal information. The employee, in his position as Secretary-Treasurer of his local union, had disclosed the personal information of members accused of working during a strike to executive union members at the trial of the member. The employee was disciplined by the employer for the disclosure of personal information, and imposed a penalty of 30 demerits. The union grieved the discipline imposed by the employer and argued that it was excessive given the employee's 22 years of service, lack of disciplinary record and the fact that the actions were a consequence of a legal strike. The Arbitrator partially agreed with the union and reduced the demerits from 30 to 10. The union appealed the decision.

On appeal, the court agreed with the arbitrator and found that even though acting in a capacity outside of work as a Union Officer, the employee could nevertheless be held accountable for conduct outside of work if the conduct in question affects a legitimate interest of the employer. The court concluded that the employer had a duty of the highest standard to protect its employees' personal information and the employee's use and disclosure of the personal documents affected the employer's legitimate interest to protect its employees' privacy. The union also argued that because PIPEDA was not breached, the arbitrator's decision was unreasonable. The court found that the employer's policy regarding privacy was a discreet, freestanding policy and the breach of the employer's privacy policy was enough to justify the discipline received by the employee. The court dismissed the appeal.

B. Additional Federal Legislative Changes

1) The Wage Earner Protection Program Act and Associated Amendments to the *Bankruptcy and Insolvency Act*

The creation of the Wage Earner Protection Program ("WEPP") is a key component of recent comprehensive reforms to Canada's insolvency system. The new *Wage Earner Protection Program Act* and associated amendments to the *Bankruptcy and Insolvency Act* came into force by order of Governor in Council on July 7, 2008. The WEPP provides statutory wage protection for workers when their employer becomes bankrupt or subject to receivership and their employment is terminated as a result.

---

[30] *Birch v. Union of Taxation Employees, Local 70030,* [2007] O.J. No. 3980 (Sup. Ct.).

[31] 2008 ABQB 769

Prior to the implementation of the WEPP and associated amendments to the Bankruptcy and Insolvency Act, employees whose employment was terminated as a result of the bankruptcy or going into receivership of their employers were considered preferred unsecured creditors and were at risk of losing wages earned in the weeks prior to the declaration of bankruptcy or receivership. Industry Canada asserts that without the protection of the WEPP, only 21% of workers affected by a corporate bankruptcy or receivership received payment for their wage claims and these employees received, on average, a recovery of only 13 cents on the dollar. The accuracy of these government statistics has been questioned; however, on the basis that secured lenders often voluntarily agree to the payment of wage claims.

The WEPP allows employees to apply to the Federal Government (rather than to the trustee in bankruptcy or receiver) for payment of their wage claims. The Government pays eligible applicants unpaid wages and unearned vacation pay up to a maximum amount of the greater of $3000 or four times the maximum weekly insurable earnings under the *Employment Insurance Act*. Following payment to a worker of an entitlement under the WEPP, the Government assumes the worker's position as a creditor in bankruptcy proceedings. The WEPP gives employees the freedom to pursue new employment without the burden of having to fight for earned, unpaid wages.

Recent amendments to the WEPP received Royal Assent on Marcy 12, 2009 to extend to severance and termination pay owed to employees by an employer who becomes bankrupt or whose property comes under the possession or control of a receiver after January 26, 2009.

Associated amendments to the Bankruptcy and Insolvency Act also serve to change the status of an employee's claim for wages against a Bankruptcy or an entity in receivership, and therefore the Federal Governments subrogated claim, by securing these claims as first ranking liens against the working capital assets of the employer up to a value of $2000 per employee.

Employee Eligibility for Payment of Unpaid Wages Under the WEPP

To be eligible to receive wages from the Federal Government under the WEPP, an employee must meet the following conditions:

(a) the employee has been rendered unemployed by their employer's bankruptcy or receivership;

(b) At the time the bankruptcy or receivership is declared, the employee is owed unpaid wages and compensation earned during the six months immediately before the date of bankruptcy or appointment of the receiver; and

(c) the employee has worked for the insolvent or bankrupt employer for more than three months prior to the date of bankruptcy or the date of appointment of a receiver.

There are several categories of individuals who are excluded from qualification for payments provided through the WEPP. The following groups are not eligible to receive payment through the WEPP:

(a) individuals who were officers or directors of the insolvent employer;

(b) individuals who had a controlling interest in the business of the insolvent employer;

(c) individuals who occupied a managerial position with the insolvent employer; and

(d) individuals who were not dealing at arms-length with the individuals listed in paragraphs a) through c) above.

How the Wage Earner Protection Program Works

Prior to the WEPP, employees who found themselves out of pocket in the wake of a corporate bankruptcy or receivership were on their own to determine how much they were owed and how they should go about recouping their losses. In many cases, employees were fortunate insofar as secured creditors would voluntarily agree to allow the debtor employer to satisfy outstanding wage claims ahead of their superior priority claims. This kind of arrangement was purely voluntary, however, and there was no positive obligation on the employer, the trustee in bankruptcy, receiver, or any other involved insolvency professional, to assist employees with the recovery of their wage claims.

Under the WEPP, the employee may apply directly to the Federal Government for arrears of wages and compensation earned within the six-month period immediately prior to the bankruptcy or receivership. The claim can be for up to the greater of $3000 or four times the maximum weekly insurable earnings under the *Employment Insurance Act*, net of taxes. The definition of "wages" for the purposes of the WEPP includes salaries, commissions, compensation for services rendered, vacation pay and any other amounts prescribed by regulation, but does not include severance or termination pay.

In order to receive their wage payment from the government, the employee assigns their claim to the Federal Government to pursue as against the insolvent employer. Amendments made to the Bankruptcy and Insolvency Act at the same time as the introduction of the WEPP give employee claims for unpaid wages the status of a first ranking lien, up to the value of $2000, secured against the working capital assets of the employer. The assignment of employee claims to the government therefore allows the government to recover, as a first ranking lien holder, up to $2000 per employee from the bankrupt or insolvent employer.

The Wage Earner Protection Plan Act also creates new responsibilities for trustees in bankruptcy and receivers. Trustees and receivers are now required to proactively assist employees by attempting to determine the value of their wage and/ or compensation entitlement, and by informing them of their rights and entitlements under the WEPP. Specifically, the legislation requires that the trustee in bankruptcy or receiver exercise due diligence to do the following:

(a) identify all employees who are owed wages and compensation within six months of the declaration of bankruptcy or receivership;

(b) determine the amount of wages and compensation owing to each individual in respect of those six months;

(c) inform each affected employee about the WEPP and the conditions under which payments may be made;

(d) provide the designated Minister with information about which employees are affected and the amount of wages and compensation they are each owed under the WEPP; and

(e) inform the designated Minister once they have been discharged from their duties as trustee or receiver.

Lessons for Employers/ Impact of the WEPP

- The fact that employees will now receive information about their entitlements and about the procedure to follow in order to obtain unpaid wages, paired with the relative speed with which employees should now be able to obtain reimbursement through the WEPP, could significantly increase the number of wage and/ or compensation based claims facing a trustee in bankruptcy or a receiver.

- It is possible, however, that the implementation of the WEPP may compel many participants in the insolvency process to avoid bankruptcy or receivership proceedings in order to avoid the new administrative obligations imposed on trustees in bankruptcy and receivers.

The federal government has instituted a dedicated WEPP information line: 1-866-683-6516.

2) Employment Insurance Changes

a) Work-Sharing Program: A Great Cost-Saving Tool for a Reduced Work Week

For employers who are experiencing a reduction in business activity during this economic downturn, there are positive steps that can be taken to reduce labour costs while still avoiding layoffs or employee terminations. Many employers are considering reducing the number of working days/week by 20 percent or more. There are government-sponsored programs to facilitate such reductions while minimizing the financial impact for your employees.

The Service Canada Work-Sharing Program (the "Program") is an adjustment program designed to help employers and employees avoid temporary layoffs when there is a reduction in the normal level of business activity that is beyond the control of the employer. The Program is intended to provide

income support to employees eligible for Employment Insurance ("EI") benefits who are willing to work a temporarily reduced work week in order to avoid temporary layoffs.

The Program requires that a tripartite agreement be reached between an employer, the affected employees and Service Canada with regard to participation. It is important to note that all employees that the employer deems to be part of the affected unit must agree to participate.

While a unit may consist of any group of EI eligible employees in a particular establishment (and generally includes everyone within a single job description), not all employees of the establishment are necessarily included. Employees who are needed to help generate work and thus assist in the recovery of the business are excluded from the unit and therefore do not need to agree to participate.

Eligibility Requirements

In order to qualify, an employer must implement a work-week reduction of 20-60% (i.e., 1-3 days) for a period of 6 — 52 weeks. Additionally, employers must: have been in year-round business in Canada for at least two years; demonstrate that the need to reduce working hours is unavoidable and that the shortage of work is significant (i.e., at least 10%), temporary and unexpected; demonstrate that it has tried to prevent layoffs through other means; demonstrate through a Recovery Plan that (i) the business can be maintained during the period of the Program's applicability; and (ii) a return to normal working hours will occur as the economy strengthens; not be undergoing a labour dispute; and have the agreement of the union (if applicable) or its employees individually.

In order to be eligible, employees must: be "core staff" (i.e., permanent full-time or part-time employees who are not seasonal); meet the eligibility requirements for regular EI benefits; and not be participating in a labour dispute. Employees who were laid off prior to the submission of the Program Application can be included in the employee unit provided that they are deemed by the employer to be essential to the maintenance of the business during the period of the Program Agreement.

Employees needed to generate business, such as managers and others who assign workloads, are generally not eligible for inclusion in an employee unit as they are deemed to be essential to the recovery of the business and therefore should not be working reduced hours.

Program Payment Information

There is no two-week waiting period for Program Benefits. The Program Benefits are payable based on the employee's normal average weekly earnings and are clawed back if the employee receives earnings above a certain threshold. If the employee is subsequently laid off, the Program Benefits do not affect the employee's regular EI Benefits.

Employers must maintain all existing employee benefits during the life of the Program Agreement, including payment of statutory holiday pay and cannot increase their workforce during the life of the

Program Agreement, but may replace essential employees who choose to leave, with the prior consent of Service Canada.

Program Application

An Application for Work-Sharing Agreement must include a Recovery Plan and a list of all Work-Sharing Unit members. Applications must be submitted at least one month prior to the anticipated start date. All Program Agreements start on a Sunday. Following commencement of the Program, Employers are expected to complete a Utilization Report every two weeks detailing the number of hours worked by each employee in the employee unit.

Lessons for Employers

During these difficult economic times, employers are finding they need to cut costs at the employee level to compensate for reductions in business activity.

- The Program is a useful tool for employers to avoid terminations and temporary layoffs by reducing the work week, while providing economic support to employees to compensate for the corresponding salary loss.
- The reduced economic loss for employees decreases the likelihood of constructive dismissal claims.
- Employers are able to retain their trained and skilled employees, without the cost and hassle of having to recruit and train new employees when business activity levels increase.

b) Increase in Coverage

The *Budget Implementation Act, 2009* ("Bill C-10") received Royal Assent on March 12, 2009. Under Bill C-10, regular Employment Insurance benefit entitlements have been increased by five weeks from 45 to 50 weeks. The increase is retroactive to March 1, 2009 and will be in force until September 12, 2010.

c) ROE Requirements

Federal Regulation SOR/2009-96 came into force on March 15, 2009 and amends the Employment Insurance Regulations with respect to the employer's filing of Records of Employment ("ROEs") and report cards for work-sharing claimants. Currently, employers are required to provide a paper copy of an ROE to an employee within five days of interruption to an employee's earnings. The new amendment change the deadline for filing an ROE to be five days after the end of the pay period during which the first day of the employee's interruption of earnings fell and allows employers to complete and submit ROEs in accordance with their pay schedules. If there are 13 or fewer pay periods per year,

the employer is required to issue the ROE 15 days after the first day of the interruption of earnings. Additionally, employers are no longer required to provide a paper copy to the employee if they electronically submit an electronic ROE to Service Canada. The electronic ROE will be provided to the employee through a request hard copy through Service Canada or electronically through the employee's online account with Service Canada.

Proposed Changes to Waiting Periods

Currently, a private member's bill, C-241, *An Act to amend the Employment Insurance Act (removal of waiting period)*, has passed second reading and has been referred to Committee. If enacted, this bill will remove the waiting period required when applying for employment insurance.

Conclusion

The past year has been an especially prolific year for significant Supreme Court of Canada employment related judgments. Further developments in the law will take place as the principles established by the highest court filter down to the many situations employers face daily, and employers and employees alike adjust to this changed legal landscape. Additionally, Alberta has seen the effects of federal legislative changes to the *Employment Insurance Act* and the *Bankruptcy and Insolvency Act* and changes to provincial legislation in the *Employment Standards Code* and *Occupational Health and Safety Act*.

VANCOUVER
P.O. Box 10424, Pacific Centre
Suite 1300, 777 Dunsmuir Street
Vancouver BC V7Y 1K2
Tel: 604-643-7100 Fax: 604-643-7900

CALGARY
Suite 3300, 421 - 7th Avenue SW
Calgary AB T2P 4K9
Tel: 403-260-3500 Fax: 403-260-3501

TORONTO
Box 48, Suite 5300
Toronto Dominion Bank Tower
Toronto ON M5K 1E6
Tel: 416-362-1812 Fax: 416-868-0673

OTTAWA
The Chambers
Suite 1400, 40 Elgin Street
Ottawa ON K1P 5K6
Tel: 613-238-2000 Fax: 613-563-9386

MONTRÉAL
Suite 2500
1000 De La Gauchetière Street West
Montréal, QC H3B 0A2
Tel: 514-397-4100 Fax: 514-875-6246

QUÉBEC
Le Complexe St-Amable
1150, rue de Claire-Fontaine, 7^{e} étage
Québec QC G1R 5G4
Tel: 418-521-3000 Fax: 418-521-3099

UNITED KINGDOM & EUROPE
5 Old Bailey, 2nd Floor
London, England EC4M 7BA
Tel: +44(0) 20 7489 5700 Fax: +44 (0) 20 7489 5777

McCarthy Tétrault

Saying Goodbye...or Not?

Tina Giesbrecht
Brian Wasyliw

May 12, 2009

McCarthy Tétrault LLP
3300, 421 – 7th Ave SW
Calgary, AB T2P 4K9

www.mccarthy.ca

Introduction

Many employers are currently faced with unprecedented negative financial and market conditions and business challenges. In an attempt to reduce costs, employers are considering various changes to their workforce. When considering options to reduce overall costs, it is important to remember that if an employer is viewed to have unilaterally changed a fundamental aspect of the employment relationship, constructive dismissal may arise, resulting in additional cost to the employer. Following a brief overview of the law on constructive dismissal, this paper will discuss how to avoid constructive dismissal issues when implementing common cost-cutting measures.

Constructive Dismissal - General Principles

The Supreme Court of Canada has stated that a constructive dismissal occurs when:

(i) the employer unilaterally makes substantial changes to the essential terms of an employee's (written or implied) contract of employment without the consent of the employee; and

(ii) a reasonable person in the same situation as the employee would have felt the essential terms of the employment contract were being substantially changed.

Where constructive dismissal is found to have occurred, an employee will, in most cases, be entitled to terminate the employment relationship, and treat himself or herself, in all respects, as having been wrongfully dismissed. The employee will thereby be entitled to bring a claim for damages against the employer.

Even if an employer acts with genuine concern for its own interests or the employee, this does not necessarily mean the employer can avoid liability for constructive dismissal. In *Cox v. Royal Trust Corp. of Canada*,[1] the Ontario Court of Appeal held that the fact that an employer acted *bona fide* and with genuine concern both for the company and the employee did not prevent the employer from being liable for constructive dismissal when it removed the employee's management functions and caused him to report to a former subordinate. McEachern C.J.B.C. has stated that the:

> Motive or subjective questions have little importance in these matters. The question is whether the proposed transfer was a fundamental breach of contract. If it was not, then subjective views on how the

[1] (1989), 26 C.C.E.L. at p. 208, 33 O.A.C. 95 (C.A.), leave to appeal to S.C.C. refused 33 C.C.E.L. 224n, 37 O.A.C. 395n.

transfer might have been effected differently are not legally significant.[2]

What is a Change to a Fundamental Term of Employment?

In determining whether the changes to the terms of employment are "substantial" or "fundamental", each case must be examined on its own facts. Accordingly, there is no "hard and fast" rule.

Courts have found the following changes[3] resulted in constructive dismissal:

- a reduction in compensation[4];
- a change in compensation structure (e.g., from salary to commission);
- a reduction in hours of work;
- a reduction/change in sales territory;
- a change in benefits;
- a geographic relocation;
- a change in job duties;
- a change in status;
- a demotion;
- a change in conditions of work.

Not every unilateral change will result in constructive dismissal. Further, a change that would be constructive dismissal for one employee might not result in constructive dismissal of another employee. The success of an employee's allegation of constructive dismissal will depend on all of the circumstances of the employment relationship and the nature of the change. For example:

---

[2] *Cayen v. Woodwards Stores Ltd.* (1993), 100 D.L.R. (4th) 294 at pp. 302-303, 45 C.C.E.L. 264 (B.C.C.A.).

[3] This list is not an exhaustive list of changes that may result in constructive dismissal.

[4] There is no set scale to determine when a reduction in compensation will result in constructive dismissal. A change of less than 5% is not likely to result in constructive dismissal. A change of more than 10% is more likely to result in constructive dismissal. A change of between 5% and 10% is a grey area.

- the geographic relocation of an employee would not be a constructive dismissal where the employment agreement gives the employer the right to transfer the employee;
- a change in bonus amount will not be a constructive dismissal if the bonus payment is discretionary;
- a minor change in compensation will not be a constructive dismissal;
- a lateral transfer may not be a constructive dismissal, particularly if compensation arrangements and status remain the same.

Cumulative Effect

A constructive dismissal will usually take place after one significant unilateral change. However, it is possible for the cumulative effect of many changes to result in a fundamental breach. For example, each of the following may not, on its own, result in constructive dismissal: a 4% reduction in salary; a change from an office with a window to one without; a change in title in the context of reorganization; a change in reporting relationships from the president to the vice president in the context of reorganization. However, if two or more of these changes occur, the chance of the employee successfully claiming constructive dismissal will increase.

In *Kussman v. AT & T Capital Canada Inc.*,[5] the British Columbia Supreme Court held that the plaintiff had been constructively dismissed through a reduction in remuneration and the removal of his assistant. In holding that the cumulative effect of many changes may result in a fundamental breach of an employment contract amounting to constructive dismissal, the court stated that some changes should not be viewed in isolation. The court then cites various cases which refer to a "cumulative effect, the "gradual undermining of authority" or the "last straw" approach to fundamental breach.[6] This decision was upheld on appeal.[7]

What Options Does an Employee have in Response to Constructive Dismissal?

An employee who believes that he or she has been constructively dismissed may:

- explicitly agree to the change in employment;

---

[5] *Kussman v. AT & T Capital Canada Inc.* (2000), 49 C.C.E.L. (2d) 124 (B.C.S.C.).

[6] Ball, supra at . 10-2 citing *Kussman*, supra at p. 139. citing *Luth v. Norwood Project Management Ltd.* (1995), 15 C.C.E.L. (2d)62 (B.C.S.C.) and *Colasurdo v. CTG Inc. et. al* (1988), 18 C.C.E.L. 264 9 (Ont. H.C.).

[7] *Kussman v. AT & T Capital Canada Inc.* (2002) B.C.J. No, 907 (B.C.C.A).

- continue to work under the new terms of employment and thereby "condone" the employer's action;

- continue to work by clearly stating he or she does not accept the changes and is therefore working without prejudice to his or her position that the employer's action is constructive dismissal[8];

- cease working and allege constructive dismissal.

Strategies that may Trigger Constructive Dismissal Claims

I – Restructuring that Results in Demotion

A downward change in reporting function, by itself, may not constitute a constructive dismissal. The issue in such cases is how fundamental the employee's reporting is to the overall employment and whether the overall change is a demotion. In *Miller v. ICO Canada Inc.,* an employee was deemed to be constructively dismissed following a series of demotions.[9] The court noted that some of the changes in the employee's position might have been attributable to the changes in the employer's organizational structure following the sale of the company. However, the end result was that the employee occupied a position quite inferior to the one previously held and the Court determined that the employee had been constructively dismissed.

The court in *Miller* found that even though the decision may have been made for corporate or financial reasons and there was no intention to harm the employee, constructive dismissal still existed. It should also be noted that in this case, the employer's actions were viewed as humiliating and embarrassing for the employee; the employee's desk was removed from his office without any prior warning; his security pass was revoked without notice and upon return from vacation, his office had been given to a new employee.

Whether a downward change in reporting function would give rise to constructive dismissal depends, to a large extent, on whether it would create a loss of prestige, thereby being seen as a demotion within the organization. A 2005 Alberta case found that the actions of an employer were "an erosion of and insult to" the employee's position and constructive dismissal was established.[10] In that case, friction developed between a new corporate executive and an existing senior employee. The new executive had removed the marketing sales staff and their reporting from the employee, had taken product

---

[8] While not common, in some circumstances an employee may continue to work and commence an action alleging constructive dismissal against the employer.

[9] [2005] 9 W.W.R. 386 (ABQB).

[10] *Larson v. Galvanic Applied Sciences Inc.*, [2005] A.W.L.D. 1349 (ABQB).

development from the employee's area of responsibility and had terminated 6 employees that had previously reported to the employee while the employee was on vacation.

The impact of change in reporting function was a central issue in *Cayen v. Woodwards Stores Ltd.*[11], although different conclusions were reached. In *Cayen*, the plaintiff was employed by the defendant as a senior buyer for ladies' dresses for British Columbia and Alberta. After seven years of employment in increasingly senior positions, she was demoted (although at her current salary) to serve as a "zone manager" in a single store. The trial Judge found that if the plaintiff had accepted the position offered, she would have been subordinate to her former colleagues and on the same level as employees she previously outranked. In such circumstances, it would have been "patently-unreasonable" to expect her to accept such a position.

On appeal, the British Columbia Court of Appeal, held that, viewed objectively, there was no reason shown in the evidence that would have prevented the plaintiff from accepting the new position. Although some of her Cayen's employees might regard her transfer as a demotion, most of those same employees would recognize the need for occasional lateral transfers that must be accepted by all parties. In the circumstances, it was unreasonable for the plaintiff not to accept the transfer while looking for alternative employment.

II - Relocation

The geographical relocation of an employee may give rise to a claim by the employee that he or she has been "constructively dismissed" as a result of the transfer. There is no "hard and fast" rule for determining whether a specific geographic relocation will give rise to a successful claim for constructive dismissal. Each case will depend on its own particular facts, as our courts have yet to establish a "threshold" increase in commuting distance which the courts will apply in determining whether or not a specific geographic relocation gives rise to a constructive dismissal.

In determining whether a transfer or relocation amounts to constructive dismissal, courts have considered the following questions:

(i) Do the terms of the employment contract – either expressly or by implication – entitle the employer to relocate an employee?

(ii) Is the proposed geographical relocation reasonable? In assessing the "reasonableness" of the geographical relocation, the court will consider:

---

[11] *Cayen v. Woodwards Stores Ltd.* (1991), 34 C.C.E.L. 95 (B.C.S.C.), reversed 45 C.E.L. 264, 75 B.C.L.R. (2d) 110, 119931 4 W.W.R. I I, 100 D.L.R. (4th) 294, 22 B.C.A.C. 32, 38 W.A.C. 32, 1993 CarswellBC 9, [1993] B.C.J. No. 83 (B.C.C.A.).

a) whether the relocation is accompanied by other alterations of the terms of the employment contract;

b) whether the relocation occurs with other substantial changes, such as a demotion, a significant change in job responsibilities, or a reduction in remuneration;

c) whether the relocation will impose substantial hardship (i.e. due to family, personal, or financial circumstances) on the employee; and

d) whether the relocation is outside of a reasonable commuting distance.[12]

(iii) Did the employer act in good faith and/or in the protection of its legitimate commercial interests? In assessing the "business motives" behind the employer's decision to relocate, the court will consider:

a) whether the relocation is accompanied by other alterations of the terms of the employment contract;

b) whether there is any evidence that the employer has acted in bad faith (i.e. whether the relocation is an attempt to force the employee to resign or accept a significant reduction in remuneration or job responsibility);

c) whether there are any indications of "good faith" conduct on the part of the employer, particularly in terms of its treatment of the employee(s) at the time of transfer (i.e. whether there has been an offer to pay the employee's expenses related to the relocation, sufficient notice of the relocation, or increased pay and/or job responsibilities, etc.);

d) whether the employer had a legitimate business rationale for relocating the employee(s).

Importantly, courts are increasingly giving priority to the employer's need to remain flexible and efficient and to maintain a mobile workforce. Consequently, the courts have become more permissive of employee relocations, particularly where there is evidence of good faith conduct and legitimate business interests driving the relocation.

[12] The relevant distance to measure is both the distance between the new and old workplace and, more importantly, the increased commuting distance that the employee must travel from his/her home to the new workplace.

Assuming that a proposed relocation creates the potential for constructive dismissal claims employers may wish to consider the following steps in order to minimize its exposure to such claims:

- provide reasonable advance notice of the affected employees;
- ensure that the compensation, working conditions and job responsibilities of affected employees are not changed as a result of the relocation;
- educate affected employees about the process and rationale for the relocation (i.e. through employee information sessions or written communications);
- reimburse affected employees for increased commuting costs; and/or
- provide a relocation bonus to affected employees.

III - Lay-offs

In Alberta, layoffs are governed by the Employment Standards Code ("*ESC*") for non-unionized workplaces and by collective agreements for unionized workplaces. In a unionized workplace, most collective agreements spell out the specific requirements for lay-offs. In those circumstances, employers must consult the collective agreement and must follow the process outlined therein in consultation with the Union, where appropriate. Note that federally regulated employers have to be concerned about possible deemed terminations, even under a collective agreement.

Lay-offs in a Non-Unionized Workplace

Lay-offs in a non-unionized environment are not as simple because there is no common law right to lay-off an employee. The Courts have held that a temporary lay-off will constitute a constructive dismissal unless there is an express or implied term in the contract of employment permitting lay-offs. Alberta's Court of Appeal in *Vrana v. Procor Ltd.*[13] recognized that section 62 of the *ESC* allowed for employers to temporarily lay-off employees. However, the court reminded employers that in order to rely on this section, fair notice should be provided to employees.

In *Vrana*, the Court of Appeal outlined what must be included in the notice to the employee if an employer wised to rely upon temporary lay-off provisions under the *ESC*:

(a) Notice of the temporary layoff must be in writing;

(b) Notice must state that it is a temporary layoff notice and provide its effective date; and

[13] [2004] A.W.L.D. 324. (ABQB).

(c) Notice must include sections 62, 63 and 64 of the *ESC*.

Failure to provide this notice increases the risk of a finding of constructive dismissal against the employer and would likely result in the "constructive dismissal date" as being held to be the starting date of the lay-off. Additionally, the *ESC* provides further guidelines for employers when they wish to use temporary lay-off provisions:

(a) Temporary layoff must not be for more than 59 days;

(b) On the 60th consecutive day of temporary layoff, the employee's employment automatically terminates and the employer must pay the employee termination pay UNLESS the wages or benefits continue to be paid on behalf of the employee or the collective agreement provides for recall rights longer than 59 days;

(c) During the 59-day period, the employer may recall the employee;

(d) Recall notice most be provided one week in advance; and

(e) If the employee does not return to work following the notice, the employee is not entitled to any termination notice or termination pay.

IV - Change in Compensation

Not surprisingly, the law recognizes that compensation is one of the most fundamental terms of the employment contract and that a reduction in compensation, or a change in the way that total compensation is calculated, will be a fundamental change to the employee's contract of employment.[14]

There is no hard and fast rule as to how great the reduction in compensation must be before it will be considered a "material change", triggering a potential constructive dismissal. Generally, there is very little tolerance for reductions in salary and the cases recognize the very serious impact on employees of even minor salary reductions. Although there are some cases that suggest that a reduction of anything less than 10% of salary would not be constructive dismissal, there are other cases where reductions of as little as 3% to 5% of total compensation have been ruled to be material changes. In some cases the courts focus on the percentage change, while other decisions point to the total dollar value – suggesting that the higher the original salary, the smaller the percentage decrease necessary to trigger a finding of constructive dismissal.

---

[14] *Kolaczynski v. Benz Sewing Machines Ltd. (c.o.b. B&W Sewing)*, [2002] O.J. No. 1117; *Wallace v. Toronto Dominion Bank* (1981), 39 O.R. (2d) 350; *Auger v. Metal-Fab Services Ltd.*, [2002] O.J. No. 3273.

As such, notice of such a change should be provided whenever possible and the change should ideally be implemented across the board. Selective reductions may increase the risk of discrimination claims, particularly when an identifiable group is more significantly affected (e.g. older employees). Also, employees are more likely to feel the reduction is fair if it applies to everyone, and they may, therefore, be less inclined to allege constructive dismissal.

Furthermore, there may be instances where the motivation of the employer in decreasing pay will be a factor.[15] This may turn on whether the pay reduction was a business necessity. For example, whether the reduction was necessary to stave off pending insolvency or whether it was the result of a business (or political) strategy could influence a determination of constructive dismissal. If an employer attempts to justify salary reductions on the grounds of economic necessity, the Court will scrutinize that defence and likely look at all the circumstances surrounding the decision, including alternate means of costs savings and whether the salary reductions were applied throughout the organization or whether a particular individual or group of individuals was selected to bear a disproportionate burden of the reductions.

The following cases summarized below highlight various circumstances where an employee's compensation has been changed by the employer and the employee has claimed constructive dismissal.

Change in Overall Compensation

In *Chapman v. Bank of Nova Scotia*[16], a 36 year employee voluntarily left and sued his former employer for damages resulting from constructive dismissal. Chapman alleged that the Bank's reduction of his compensation from 2000-2003 amounted to constructive dismissal. The Ontario Superior Court found that from 2000-2002 Chapman had condoned the changes to his compensation and therefore, could only dispute the 2003 decrease of 3.7%. It is interesting to note that at paragraph 113 of the decision, the Court still found that even if the decrease from 2000-2002 was not condoned by Chapman, that the total 13% decrease from 2000-2003 would still not amount to a fundamental breach of his employment contract.

In *Chapman*, total compensation was never fixed at a certain amount, he was never given assurance that compensation would not go up or down and he was not told that he would be compensated at a particular level in comparison to other senior vice presidents. During 2000-2003, Chapman's base salary did not decrease, nor did it increase; only his variable compensation fluctuated. Additionally, there was no commitment given with respect to the bonus, which was a significant portion of his compensation. The Court mentions at paragraph 98 of the decision that in a variable compensation system where different individuals determine compensation for different employees, it is to be expected that individuals in the same performance category have different levels of compensation.

---

[15] *Alpert v. Carreaux Ramca Ltee* (1992), 9 O.R. (3d) 207. (Ont. Gen Div.).

[16] [2007] O.J. No. 2044 (ONSC).

What is important is that the employee be compensated fairly, within the appropriate range for one's position and performance.

The court found an implied term of the contract was that Chapman would be paid within the range applicable to senior vice presidents. During 2000-2003, Chapman was compensated in line with other senior vice presidents. The only change to Chapman's employment was in his variable compensation. His responsibilities remained the same as did his title and working conditions. In 2003, his compensation was reduced by 3.7%; the Court found this amount to be not significant. While counsel for Chapman highlighted various cases where employee's had been found to have been constructively dismissed, the Court found that,

> The flavour of these cases is that changes were made either to an agreed basis for determining the plaintiff's remuneration or that changes were made to the plaintiff's status or overall employment package that amounted to a fundamental change in the employment contract.[17]

The Court found that Chapman was still being compensated within the senior vice president range, there was no change in the basis upon which he was to be compensated and that the neither the change from 2002-2003 nor the change from 2000-2003 could have been regarded as a fundamental breach. Chapman appealed the decision; however, the Ontario Court of Appeal upheld the decision of the trial judge and dismissed the appeal[18].

The Ontario Superior Court in *Doran v. Ontario Power Generation Inc.*[19] found that a combined effect of reduction in compensation by 14-17% and changes to the employee's job responsibilities, whereby 80% of the employee's work was placed on hold, resulted in the employee's constructive dismissal. The Court found that due to the continuing promises of the employer to move executive remuneration in line with market levels that overall compensation to the employee would remain the same or would rise. While the non-payment of a relatively minor portion of the compensation would not qualify as a fundamental breach, the total reduction in compensation, coupled with the change in job responsibilities was deemed to be a fundamental breach. The Court awarded damages of 24 months reasonable notice, in the amount of $698,287.

In *Hamilton & Olsen Surveys Ltd. v. Otto*[20], the Alberta Court of Appeal found that despite withholding contributions to an RRSP plan of two employees and shortening paid vacations from 6 to 4 weeks, the affected employees had not been constructively dismissed. The employer had previously compensated

---

[17] *Ibid.* at para. 122.

[18] [2008] O.J. No. 4596 (ONCA).

[19] [2007] O.J. No. 4476 (ONSC).

[20] [1993] 12 Alta. L.R. (3d) 431 (ABCA).

employees 10-30% higher than its competitors, but due to an economic downturn in the economy, in which the employer was suffering, reductions in compensation were made. The reductions resulted in loss of 6.5% for one employee and 8% for another. The Court of Appeal stated that reductions in benefit packages due to external economic pressures, where salaries remain the same, have consistently been found to be reductions that do not constitute constructive dismissal. The Court cited with approval a British Columbia decision of *Poole v. Tomenson Saunders Whitehead Ltd.* (1987), 43 D.L.R. (4th) 56 (BCCA) that the non-payment of a relatively minor portion of the consideration to be paid for services which are to be performed over a prolonged period of time would not by itself qualify as a fundamental breach. The Court found that the reduction was minor and could be compensated by damages and did not establish constructive dismissal.

Change in Commission Structure

In *Scaffold Connection Corp., Re*,[21] the employer experienced serious financial difficulties and was placed under CCAA protection. As a result of the financial difficulties, the employer changed its employee commission structure. Although the court noted that in some circumstances, a change in bonus structure could amount to a unilateral change of a fundamental term, the court found that in this case, the commission was not negotiated as a specific term of employment and a change to it did not constitute constructive dismissal.

Where the remuneration is a relatively minor portion of consideration for services, a change will not be treated as a fundamental breach. In *Scaffold,* the court quoted from a 1993 Alberta case, *Hamilton & Olsen Surveys Ltd. v. Otto* (1993), 145 A.R. 44 (Alta. C.A.) in regards to reductions in benefit packages when the employer is experiencing economic hardship and noted that;

> A reduction in the benefit package due to external economic pressures, but where salaries are maintained, has consistently escaped the characterization as fundamental breaches.[22]

In *Scaffold*, the court found that the commissions earned by the employee prior to the change in commission structure were minor and only substantially contributed to the employee's remuneration in respect of one contract. Noting that the change was due to obvious economic hardship of the employer, of which the employee was completely aware, the change in commissions payable was not found to constitute a fundamental breach. However, prior to the restructuring, the employee held the position of Regional Manager and had a salary of $75,000 per year plus commissions. Following the restructuring, the employee was offered the position of Labour Liaison with a reduced salary of $50,000 per year. Accordingly, the court found that the employee was constructively dismissed when he was demoted without notice to the position of Labour Liaison.

---

[21] [2002] A.W.L.D. 146 (ABQB).

[22] *Ibid.* at paras. 24-25.

A unilateral change in the calculation of an employee's remuneration can constitute constructive dismissal. The New Brunswick Court in *Lynch v. Mac Carter Ltd.*[23] concluded that an employer's decision to not pay an additional 10% of an employee's appraisal fees, as provided for in a written contract between the parties, constituted a substantial change in the employment contract and constituted constructive dismissal. The Court noted that there was nothing in the written contract to indicate that the additional 10% was discretionary or was linked to the employer's profitability. Lynch was an experienced real estate appraiser who had been with the employer for over 3 years. He was awarded four months reasonable notice.

In *Alpert v. Carreaux Ramca Ltee*[24], the Ontario Court found that an employer's capping of the employee's bonus, where there had not been a cap previously, constituted constructive dismissal. The employee was the branch manager who had developed the branch for four years and grew its sales from $1 million to $12 million. Under the previous two contracts, the employee was entitled to a bonus based on net profits. The employer was found to have limited the employee's participation in the growth of the employer in a particularly good year and while the difference in remuneration was determined to be minimal in the first year, the future potential losses could have been significant. The employee was awarded nine months reasonable notice.

Loss of Stock Options

In *Cruikshank v. Jordan Petroleum Ltd*.[25], an employee, with more than 10 years seniority, sued a former employer for damages from a constructive dismissal following a takeover of his employer's company and the resulting changes that occurred to his post-takeover position. Although Cruikshank retained the position of Controller, he alleged that there was a substantial change in his employment position. Cruikshank alleged various grounds that his position was altered including: various resignations that resulted in his performing duties that ordinarily were done by other employees, loss of signing authority, loss of participation in managerial process, compensation issues, loss of company assets and change in company philosophy.

In regards to reduction in his compensation, Cruikshank alleged that he incurred a loss of stock options as a result of the takeover. In dismissing this claim, the Court noted that Mr. Cruikshank's salary remained the same following the takeover. Furthermore, employees had been notified that because the new entity was a private company and there could not be a stock option savings plan, that all employees would receive a cash payment for the benefit they would have received from such a plan. Additionally, the Court found that the employer's stated intention to "keep the employees whole"

---

[23] (1995), 169 N.B.R. (2d) 202 (NBQB).

[24] (1992), 9 O.R. (3d) 207 (ONGenDiv).

[25](1999), 246 A.R. 338 (ABQB).

suggested that the employer intended to either keep benefits in place or make up the difference in some manner to the employees. It is interesting to note that the Court stated,

> If the employer had not made arrangements to replace stock option benefits that this would very likely be a change in compensation and a unilateral change which would go to finding of a constructive dismissal.[26]

The Alberta Court of Queen's Bench found that as measured against the background of a takeover, all grounds as alleged by Cruikshank, considered separately and together, did not constitute constructive dismissal, as his position was substantially similar pre and post-takeover and there had been no adverse changes in his employment duties.

In *Shinkaruk v. Miller Contracting Ltd.*[27], the British Columbia Court found that the economic situation of the employer can and should be considered in constructive dismissal cases. However, in this case the employer's attempts to nullify various covenants that had been negotiated in the employment contract were found to have constituted constructive dismissal. The employer had contracted with the employee that $40,000 worth of shares would be provided to the employee and repurchased by the employer following the employee's termination. The shares were not immediately provided to the employee due to the corporate structure of the employer. Following a reorganization of the company, the employer offered substitute shares worth 60% less than the value of the shares of the original employer company. Additionally, the employer had attempted to withdraw other benefits.

Change in Salary

In *Rasanen v. Lisle-Metrix Ltd.*[28], the Ontario Court found that a senior employee who had received a salary decrease of 10% could not claim that a fundamental term of the employment contract had been breached. All senior employees received the same 10% pay cut due to financial difficulties of the employer. The employee's contract did not guarantee any increase in salary and after the 10% reduction; the employee's salary remained more than 25% above his initial salary. Additionally, the employee's duties remained the same and he was not demoted. It should be noted, that the Court found that the employee had participated and agreed to the decrease in salary. However, the Court stated that even if he had not agreed to it, the reduction was still not serious enough to breach the employment contract. This decision was upheld by the Ontario Court of Appeal in 2004.

---

[26] *Ibid.*, at para. 30.

[27] (1997), 33 C.C.E.L. (2d) 114 (BCSC).

[28] [2002] O.J. No. 291 (ONSC) aff'd [2004] O.J. No. 2095 (ONCA).

Employer Defences to Constructive Dismissal Claims

Condonation

Even if an employer unilaterally changes a fundamental aspect of the employment relationship, constructive dismissal will not exist if the employer can successfully argue that the employee accepted the change. In a 2009 Alberta decision, an employer amended its commission agreement with its employees by capping the amount of commission that could be earned on any given sale.[29] The change had not been negotiated with the employee. The employee did not object to the cap at the meeting at which it was discussed nor did she object following the meeting. The employee continued to work under the new commission structure until her dismissal. As discussed by the court,

> If the employee elects to accept the unilateral change and remain in his or her modified job, he or she will be said to have condoned the modification. Such condonation, in turn, will stop him or her from later arguing that the changes signalled the employer's repudiation of the contract.[30]

The court found that even though the employee had not been involved in the decision to cap commissions, her actions following the change evidenced her acceptance. She was unable to claim constructive dismissal.

Reasonable Notice of the Change

Remembering that the test for constructive dismissal is a unilateral material change to a fundamental term of employment without either reasonable notice of the change or the employee's consent, one way to avoid triggering constructive dismissal is to give the employees reasonable notice of the pending change. Reasonable notice would be similar in length to the amount of notice to which an employee would be entitled upon termination of his or her employment. Reasonable notice is based on a number of factors including length of service, age, seniority, position, annual salary and availability of comparable alternate employment in the locale where the employee works. Very roughly this is generally estimated at one month per year of service. Therefore, if it is possible to give the employees advance notice of the pending salary reductions, it would significantly minimize the risk.

The Ontario Court of Appeal's decision in *Wronko (Wronko v. Western Inventory Service Ltd.,* 2008 ONCA 327 and 2008 ONCA 479*)*, however, creates new hurdles for employers who want to make significant unilateral changes to the contracts of their employees. This case suggests that reasonable

---

[29] *Anstead v. Park Royal Homes Inc.*, 2009 ABQB 179 (ABQB).

[30] *Ibid.* at para. 37.

notice of the change may not always be sufficient to create an enforceable new contract and to protect the employer's interests.

Factual Context

Darrell Wronko began working at Western Inventory Service Ltd. in 1987, and he rose through the ranks of the company over the following years. In 2000, Wronko was promoted to a new position. At the time of this promotion, Wronko signed an employment contract which included a termination provision providing for payment of "the previous two (2) years salary plus bonus to be paid as termination if notice of termination is given… at any fiscal year or at any other time." The company president who negotiated Wronko's salary left the company soon after the contract was signed.

Later in the year, the new company president approached Wronko and asked him to sign a new contract which reduced Wronko's severance entitlement to three weeks notice or pay in lieu of notice for each year of employment, to a maximum of thirty weeks. Wronko obtained independent legal advice and subsequently refused to sign the new contract.

The company president then sent Wronko a memo, which provided notice that in two years time Wronko's employment contract would be changed to provide him with the shorter notice entitlement. Wronko wrote back to the company president and once again expressed his opposition to this change to the termination provision of his contract.

Two years later, the company president sent Wronko an email to which he attached the 2002 memo and a new contract which included the termination provision as set out in the memo. The president requested that Wronko sign the agreement. He wrote in the email that "If you do not wish to accept the new terms and conditions of employment as outlined, then we do not have a job for you."

The following day, Wronko replied and informed the company that he considered his employment to be terminated. He did not report to work. The company replied and denied that it had terminated him. The president told him by email that the consequence of Wronko's refusal to sign the new contract was that his existing employment agreement remained in place, amended to include the new termination provision.

Decision of the Court

The trial judge ruled that the employer had the right to vary the termination provision since reasonable notice of this variation had been given to the employee. The trial judge accepted Wronko's claims that he had no intention of resigning and that he believed that he been dismissed. However, the trial judge found that it was nonetheless Wronko who had ended the employment relationship.

The court found that Wronko was wrongfully dismissed and that the company was obligated to pay Wronko two years of severance under his employment contract.

The Court of Appeal disagreed with the trial judge's finding that Wronko ended the employment relationship and found that the employer terminated Wronko's employment. The Court of Appeal interpreted the phrase "then we do not have a job for you" in the 2004 letter as an ultimatum advising Wronko that if he did not accept the amendments to his employment contract he would be terminated. In making this finding, the Court of Appeal relied on the trial judge's findings of fact that it was clear that Wronko did not intend to resign and that it was reasonable for him to infer that if he did not accept the new terms, the letter "was effectively notice of termination."

Wronko subsequently argued successfully that his damages should not be subject to the duty to mitigate. His contract had allowed for the payment of the severance in two lump sum installments soon after termination, and the Court of Appeal accepted that this structuring of the payment "amounted to a waiver by the [employer] of any obligation on the part of the appellant to mitigate."

Lessons for Employers

This case provides important guidance in a common scenario; employers should tread cautiously after Wronko when they seek to unilaterally change substantive provisions in an employment agreement. Employers must of course always be aware that unilateral changes may gave rise to constructive dismissal claims, but they must now also be aware that giving notice of a contractual change to an employee may not be adequate in order to make the change enforceable against the employee at the expiry of the notice period.

Your business will now need to take special care with an employee who objects to notice of a unilateral change to their contract but who continues working. Once an employee expresses his or her objection to the change, your business will either need to seek and secure the employee's acquiescence to the change or, in the alternative, give the employee working notice of dismissal along with an offer to rehire the employee subject to the new terms at the expiry of the notice period.

Duty to Mitigate

Other than in a *Wronko*-type situation, an employee has an obligation to mitigate losses arising from a constructive dismissal, which may include continuing to attend work under the new terms of employment while looking for other employment. As discussed in the Year in Review and Legislative Update, the Supreme Court of Canada's decision of *Evans* reinforces an employee's duty to mitigate losses and continue to work for their former employer during the notice period.

A court will consider all of the circumstances in determining whether an employee had an obligation to continue to work under the new employment terms in mitigation of his or her losses. A court is likely not to require the employee to continue to work for the employer where the employment relationship is acrimonious or otherwise untenable or the change is humiliating or embarrassing for the employee. For example, because a demotion is often accompanied by a loss of status, a court would be less likely to require a demoted employee to continue to work than it would be to require an employee to

continue work where the employer changed some duties and the employee's reporting relationship in the context of reorganization.

In Alberta, a 38 year employee alleged constructive dismissal following his observance of what he felt was a mandatory retirement policy.[31] The employee had informed his employer that he did not want to be retiring pursuant to his employer's retirement policy, but agreed to respect their policy. Shortly thereafter, the retiring employee assisted with training and introductions for his replacement. At a company holiday party, the employee's long service with the employer was recognized and he was given a gift.

Following a letter from the employee's counsel informing the employer that the employee did not wish to retire and had a significant wrongful dismissal claim against the employer, the employer told employee he could return to work. The employee did not return to work as directed by the employer. Unlike the decision in *Evans,* the Alberta Court of Appeal determined it was not reasonable for employee to return given the circumstances of the employee's constructive dismissal. In this case, the Court found that the employee was removed from the work force by the actions of his employer and also referred to the employer's unwithdrawn allegation of dishonesty on the part of the employee. The Court noted that in *Evans*, the employee was willing and had proposed to return to work for at least part of the notice period.

Conclusion

When assessing available cost-savings options in order to protect your workplace during an economic downturn, employers must consider possible constructive dismissal claims. When approaching a potential employment-related change, one of the best ways to ensure its success and to decrease the risk of litigation is to obtain enforceable employee buy-in or the buy-in of the union in a unionized workplace.

In a non-unionized context, obtaining agreement with large numbers of employees can be more difficult because of the need to ensure there is a properly documented agreement with each employee. Achieving such negotiated changes will be accomplished most easily after a comprehensive communications strategy that ensures employees understand the issues facing the employer, and the limited alternatives available to the employer. Such a strategy should consider the following:

- control the rumour mill with regular, consistent, and open communication;
- have a consistent, single point of contact and communication in order to control and manage the flow of information;

[31] *Magnan v. Brandt Tractor Ltd.*, 2008 ABCA 345 (ABCA).

- engage employees in discussions and strategic planning relating to the company's future;
- provide employees with the tools, resources and training to take on extra duties; and
- encourage employee initiative and innovation.

Additional Tips for Employers

- give the employee reasonable notice of the change;
- where practicable, keep the employee "whole" during the reasonable notice period, for example, where there is a compensation reduction, retain the employee's "pre-change" compensation level during the reasonable notice period;
- give the employee consideration for agreeing to accept a change to the employment terms.

VANCOUVER
P.O. Box 10424, Pacific Centre
Suite 1300, 777 Dunsmuir Street
Vancouver BC V7Y 1K2
Tel: 604-643-7100 Fax: 604-643-7900

CALGARY
Suite 3300, 421 - 7th Avenue SW
Calgary AB T2P 4K9
Tel: 403-260-3500 Fax: 403-260-3501

TORONTO
Box 48, Suite 5300
Toronto Dominion Bank Tower
Toronto ON M5K 1E6
Tel: 416-362-1812 Fax: 416-868-0673

OTTAWA
The Chambers
Suite 1400, 40 Elgin Street
Ottawa ON K1P 5K6
Tel: 613-238-2000 Fax: 613-563-9386

MONTRÉAL
Suite 2500
1000 De La Gauchetière Street West
Montréal, QC H3B 0A2
Tel: 514-397-4100 Fax: 514-875-6246

QUÉBEC
Le Complexe St-Amable
1150, rue de Claire-Fontaine, 7^{e} étage
Québec QC G1R 5G4
Tel: 418-521-3000 Fax: 418-521-3099

UNITED KINGDOM & EUROPE
5 Old Bailey, 2nd Floor
London, England EC4M 7BA
Tel: +44(0) 20 7489 5700 Fax: +44 (0) 20 7489 5777

McCarthy Tétrault

Accommodating Employees in a Challenging Economy

Paul Boniferro

Erika Ringseis

May 12, 2009

McCarthy Tétrault LLP
3300, 421 – 7th Ave SW
Calgary, AB T2P 4K9

www.mccarthy.ca

Introduction

Accommodating employees in the workplace is an increasingly complex process. Employers struggle with the duty to accommodate: When is the duty to accommodate engaged? What personal characteristics require accommodation? How should the accommodation be managed and by whom?

When we think about the duty to accommodate, we generally think of the disabled employee. There are other personal characteristics protected under human rights legislation, however, that may require accommodation. This paper focuses on accommodating disabilities, and also gives consideration to accommodating age, an issue becoming more frequent in today's workplace. Given the current fiscal restraints facing employers, increased concerns arise with respect to how much accommodation is due and required. In this paper, we examine how to accommodate employees appropriately and practically in the current economic landscape.

The Law

Section 7 of the Alberta human rights legislation, the *Human Rights, Citizenship and Multiculturalism Act* ("HRCMA") prohibits discrimination in employment on a number of grounds: race, religious beliefs, color, gender, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income and family status. In addition, although not enumerated, the legislation has been interpreted by the Courts to include sexual orientation as an enumerated ground.

Specifically, section 7 states:

> **7(1)** No employer shall
>
> a) refuse to employ or refuse to continue to employ any person, or
>
> b) discriminate against any person with regard to employment or any term or condition of employment,
>
> because of the race, religious beliefs, colour, gender, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income or family status of that person or of any other person.
>
> **(2)** Subsection (1) as it relates to age and marital status does not affect the operation of any bona fide retirement or pension plan or the terms or conditions of any bona fide group or employee insurance plan.

> **(3)** Subsection (1) does not apply with respect to a refusal, limitation, specification or preference based on a bona fide occupational requirement.

Thus, section 7 does not apply with respect to a refusal, limitation, specification or preference based on a *bona fide* occupational requirement ("BFOR").

The first step in the analysis of discrimination is for an employee to demonstrate that discrimination has occurred, or that he or she has been treated differently in a term or condition of employment on the basis of one of the enumerated grounds. "Discrimination" has been described by the Alberta courts as:

> …a distinction, whether intention or not but based on grounds relating to personal characteristics of the individual or group which has the effect of imposing burdens, obligations or disadvantages on such individual or groups not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.[1]

Once an employee or former employee can demonstrate that discrimination has likely occurred on the basis of one of the enumerated grounds, the employer has the burden of proof to establish that the jurisdiction is justifiable or that the offending term or condition of employment is a BFOR.

The duty to accommodate arises when considering whether a workplace requirement or rule is a BFOR. The workplace rule at issue might be as simple as a dress or appearance code, a safety rule, a shift schedule or even a requirement that employees attend work regularly.

In *British Columbia (Public Service Employees Relations Commission) v. British Columbia Government and Service Employees Union* ("*Meiorin*"),2 the Supreme Court of Canada defined requirements employers must meet in fulfilling their duty to accommodate.

A discriminatory standard can be justified if it is a BFOR. The test for establishing a standard as a BFOR is stringent. The employer must prove that:

---

1 *Cooperators General Insurance Company* v. *Alberta Human Rights Commission* (1993) 107 D.L.R. (4th) @ p. 8 (AB C.A.)

2 [1999] 3 S.C.R. 3.

(a) the standard is rationally connected to the function being performed;

(b) the standard was adopted in good faith, in the belief that it is necessary for the fulfillment of the purpose or goal; and

(c) the standard is reasonably necessary to accomplish its purpose or goal, in the sense that the employer cannot accommodate persons with the characteristics of the claimant without incurring undue hardship.

Usually, employers have little difficulty demonstrating that the first two requirements of the Meiorin test have been met. But the third is the focus of most judicial consideration and the most difficult for employers.

"Undue hardship" is a high standard and requires direct, objective evidence of:

- quantifiable higher costs;
- the relative non-interchangeability of the workforce and facilities;
- interference with the rights of other employees; or
- health and safety risks.

The employer must assess each employee individually to determine whether it would be an undue hardship to accommodate her particular needs.

Physical or Mental Disability

Definitions

The terms "physical disability" and "mental disability" appearing within the HRCMA have been broadly interpreted by the Human Rights Commissions and the Courts. Physical disability is seen as any degree of physical disability, deformity, malformation or disfigurement that was caused by injury, birth defect or illness. For example, physical disabilities include epilepsy, amputation, visual, hearing or speech impediments, paralysis, reduced physical coordination and reliance on an appliance or aid including a guide dog or a wheelchair.

Mental disability includes any mental, developmental or learning disorder regardless of whether caused by defect at birth or injury through life and regardless of the duration of the disorder.

In assessing whether or not any physical or mental condition is a "disability", adjudicators will take into account a number of factors, such as:

- the individual's physical or mental impairment;
- the functional limitations which result from that impairment; and
- the social, legislative or other responses to that impairment or limitations.

The third factor is particularly important and will be assessed in light of the concepts of human dignity, respect and the right to equality. The employer must assess the nature of the condition or illness giving rise to the claim in order to determine if it is a disability that must be accommodated.

If the medical information clearly shows that the employee's illness or injury has or may have an impact on their functional capacity to do their work, it is likely a disability that must be accommodated under human rights law.

Disability and Absenteeism

Employees may be absent from work because of culpable or non-culpable (innocent) reasons. Culpable absenteeism occurs when an employee is unable to fulfill attendance requirements because of factors that are within that employee's control. Examples include being absent or late without a reasonable excuse or permission from the employer, a failure to call in or report for work, leaving work without permission or abusing emergency leave. The response to culpable absenteeism does not usually engage the duty to accommodate.

Employers in a unionized environment will need to follow the disciplinary steps outlined in the collective agreement. For those employers with a non-unionized workplace, the concept of "progressive discipline" is still recommended. Thus, when dealing with an employee guilty of repeated culpable absenteeism, employers should consider oral warnings, written warnings, transfer/demotion, suspensions and, ultimately, termination for cause.

Innocent absenteeism, however, may require some accommodation by the employer. "Innocent absenteeism" is defined as the employee's inability to fulfill attendance requirements because of factors beyond the control of the employee. Examples include: medical reasons for absences, other personal excuses permitted by the employer and statutorily protected absences, such as maternity or parental leave in Alberta. As will be described in greater detail below, the duty to accommodate to the point of undue hardship will arise where an employee is unable to attend at work due to factors protected by the HRCMA, including physical or mental disability. Similarly, an employee can usually not be disciplined if any poor performance is a result of non-culpable absenteeism. Once the reason for absenteeism has been determined and classified as culpable or non-culpable, an employer needs to turn its attention to its duty to accommodate short of undue hardship.

Accommodation

Examples of actions required to meet the duty to accommodate for disability include:

- modifying a work station;
- providing special equipment;
- rescheduling shifts;
- removing more taxing parts of the job;
- bundling tasks or re-bundling tasks; and
- reduced hours or increased breaks during particular hours.

The duty to accommodate requires that all possible measures be considered and taken to the point of undue hardship. These measures must be highly individualized and tailored to meet the particular circumstances and needs of the disabled employee. However, the duty to accommodate is a "two way street" and the employee also has some responsibilities with respect to accommodation. For example, an employee must:

- make his/her needs known to the best of his/her ability;
- participate in discussions regarding possible accommodation solutions;
- answer questions or provide information regarding relevant restrictions or limitations (including information from doctors where appropriate and needed); and
- accept reasonable accommodation.

It is worth noting that "reasonable accommodation to the point of undue hardship" does not necessarily mean "providing the disabled employee with the accommodation that he or she prefers." Thus, it may be, for example, perfectly appropriate to provide a wheelchair-bound employee with ramp access to the workplace rather than a technologically advanced lift system as perhaps requested by the individual.

Questions that a court, tribunal or arbitrator will ask where an employer is being judged on whether it has met the duty to accommodate include:

1. Has the employer investigated alternative approaches that do not have a discriminatory effect, such as individual testing against a more individually sensitive standard?

2. If alternative standards were investigated and found to be capable of fulfilling the employer's purpose, why were they not implemented?

3. Is it necessary to have all employees meet the single standard for the employer to accomplish its legitimate purpose or could standards reflective of group or individual differences and capabilities be established?

4. Is there a way to do the job that is less discriminatory while still accomplishing the employer's legitimate purpose?

5. Is the standard properly designed to ensure that the desired qualification is met without placing an undue burden on those to whom the standard applies?

6. Have other parties who are obliged to assist in the search for possible accommodation fulfilled their roles?

Collection, Use and Disclosure of Medical Information

The Law: PIPA

The Alberta *Personal Information Protection Act* ("PIPA") governs the collection, use and disclosure of personal information and personal employee information for employers provincially regulated within Alberta. When assessing whether or not medical information should be collected, used or disclosed by employers, the key concepts pervasive in the legislation are reasonableness, necessity and consent. Personal information is defined in PIPA as "any information about an identifiable individual". Thus, the definition is broad and would include medical information about an individual, unless that information is being collected, used or disclosed by a health custodian under the *Health Information Act*. Less protection is accorded in PIPA for personal employee information, which is "personal information reasonably required by an organization that is collected, used or disclosed solely for the purposes of establishing, managing or terminating an employment or volunteer work relationship, but does not include information unrelated to the work relationship".

An employer may only collect information reasonably necessary to validate a sick leave claim and to manage the sick or injured employee's absence.

What Information Should be Collected, Used and Disclosed?

Information regarding an employee's diagnosis, symptoms and dates of any examinations not related to the absence are likely not reasonably collected at the initial stage of a short-term sick leave claim. More detailed information may be requested for longer-term or extended absences, but this will rarely include diagnosis and symptom information.

The medical information may be used or disclosed without consent for reasonable purposes, with notification to an employee. "Reasonable purposes" in these circumstances likely include:

- justification of absence for sick leave policy;
- application for short- or long-term disability payments;
- concern for an employee's well-being;
- adjustment of work assignments for reasonable accommodation;
- disclosure to insurance carrier for short- or long-terms disability purposes; and
- disclosure to immediate supervisor for scheduling purposes and for the adjustment of work assignments for reasonable accommodation.

The golden rule of privacy law is to collect, use and disclose only what is reasonable and necessary, obtaining consent whenever possible or else, at least, notifying employees of the collection, use or disclosure. Guidelines for what medical information may be appropriately requested by an employer are:

1. For confirmation of short absence for medical reasons:
   - whether the employee is unable to work due to illness or injury;
   - nature of the illness or injury;
   - date(s) of examination(s) related to the current absence;
   - whether a treatment plan has been established;
   - the expected return to work date; and
   - specific restrictions on an employee's ability to work.
2. For a longer medical leave, additional information may include:
   - a doctor's note indicating that the employee has a medical condition that makes it unfit to work;
   - confirmation that treatment has been received and the estimated return to work date; and
   - reasonable updates as to the employee's medical progress.

3. For a return to work, additional necessary and reasonable information may be required:

- a doctor's note specifying that the employee is fit to return to work, having regard to the physical and mental requirements of the position, and detailed information of whether the employee has any restrictions and anticipated duration of those restrictions.

- note that the employer should provide the doctor with a detailed functional job assessment.

Independent Medical Exams

It may be appropriate to ask an employee to complete an independent medical exam in certain circumstances. Circumstances should be assessed in a case-by-case basis in order to determine the appropriate approach. Circumstances in which independent medical examinations may be acceptable under existing Alberta law are:

- if the employer has concerns or doubts about the medical information provided by the employee and are seeking another opinion; and

- if less invasive measures have been insufficient to obtain the information necessary in order to accommodate reasonably the employee.

Careful attention should be paid in a unionized environment to the collective agreement.

Limits on the Employer's Duty to Accommodate

There is a limit to an employer's duty to accommodate its disabled employees, the Supreme Court confirmed this year in *Hydro Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ)*, [2008] SCC 43 (CanLII).

In this case, the Supreme Court overturned a decision of the Québec Court of Appeal, clarifying the following points for employers:

1. The employer is not required to prove that the employee will be *totally* unable to perform his or her work in the foreseeable future or that it is *impossible* to accommodate the employee's characteristics to establish that its duty to accommodate has been met.

2. An employer faced with a case of excessive absenteeism can take the entire situation into consideration, including the disabled employee's record and all of the efforts already made in assessing its duty to accommodate.

Factual Context

The plaintiff, a unionized Hydro Québec employee, suffered from a number of physical and mental conditions that caused her to miss work on a regular basis. In fact, the record showed that she had missed 960 days of work over the last seven and a half years.

The employer had made several unsuccessful attempts to adjust the employee's working conditions so that she would be able to perform her work.

At the time of her dismissal on July 19, 2001, she had been off work for over five months, and her treating physician had recommended that she remain off work for an indefinite period. In addition, the company's psychiatrist was of the opinion that the employee would not be able to return to work on a regular and continuous basis without continuing to have a significant attendance problem.

The arbitrator dismissed her grievance on the grounds that he did not believe she would be capable of performing regular and consistent work in the foreseeable future and that the solutions proposed by the union constituted undue hardship.

The Superior Court dismissed the union's application for judicial review. However, the Court of Appeal allowed the appeal and reversed the arbitrator's decision.

The Supreme Court disagreed with the reasoning applied by the Court of Appeal on two grounds; the first relating to the standard for proving undue hardship, and the second dealing with the appropriate time for assessing whether the duty to accommodate has been met.

The Standard for Proving Undue Hardship

The Supreme Court held that the employer is not required to prove that it is impossible to integrate an employee who does not meet its attendance standards, but only that doing so would result in undue hardship. What constitutes undue hardship can take as many forms as there are circumstances.

Therefore, the Supreme Court denounced the approach taken by the Court of Appeal, which would effectively have required the employer to prove the employee's total unfitness for work to discharge its burden, stating:

> [t]he purpose of the duty to accommodate is to ensure that persons who are otherwise fit to work are not unfairly excluded where working conditions can be adjusted without undue hardship.

As such, the test is not whether it is impossible for the employer to accommodate the employee's characteristics. Moreover, the employer is not required to change working conditions in a fundamental

way, but rather to adjust the employee's existing working conditions or duties, provided that this can be done without causing the employer undue hardship.

In all cases, if, despite the measures taken by the employer, the employee remains unable to perform his or her fundamental duties in the reasonably foreseeable future, the employer will have established undue hardship and will be justified in terminating employment.

In other words:

> [19] [...] The employer's duty to accommodate ends where the employee is no longer able to fulfill the basic obligations associated with the employment relationship in the foreseeable future.

The Supreme Court therefore allowed Hydro Québec's appeal, restoring the arbitrator's initial decision.

Important Effects of the Decision for Employers

With respect to the employer's burden to prove undue hardship, the following principles can be drawn from the Supreme Court's decision:

1. The employer is not required to prove that it is impossible to accommodate the employee's characteristics, or that the employee will be totally unable to perform his or her work in the foreseeable future;

2. A measure that would require the employer to modify working conditions in a fundamental way constitutes undue hardship;

3. A measure that would completely alter the essence of the employment contract (i.e., the employee's obligation to perform work) constitutes undue hardship; and

4. When, despite the measures taken by the employer, the employee remains unable to resume his or her work in the reasonably foreseeable future, the employer will be justified in terminating employment.

After Accommodation – Ready for Dismissal?

In the case of managing a sick or disabled employee, dismissal may become a possibility, either because the employee's disability cannot be accommodated short of undue hardship or the employee's absenteeism for sickness or disability amounts to frustration of contract for non-union employees or **excessive innocent absenteeism** for unionized employees.

In a **unionized workplace**, subject to the express terms of the collective agreement, an employee can be terminated for innocent absenteeism on a non-disciplinary basis where:

- the employee's past record of absenteeism is undue or excessive;
- there is no reasonable prospect for improvement in the foreseeable future; and
- if the employee's absences are related to a disability, the employer can show that the attendance expectations required are a BFOR, and that the employer has accommodated the employee's disability to the point of undue hardship.

In a **non-unionized workplace**, an employee may be terminated for frustration of contract where the employee's incapacity makes the performance of his obligations under the employment contract in the future either impossible or radically different from the agreed terms of his employment.

The factors considered to determine if there is a frustration of contract are:

- the terms of the contract, including any provisions as to sick pay;
- how long the employment was likely to last in the absence of the illness or injury;
- the nature of the employment and, in particular, whether the employee occupies a key post which must be filled on a permanent basis;
- the nature and duration of the illness and the prospects for recovery; and
- the employee's length of service.

There should be non-disciplinary warnings given prior to terminating the employee's employment for excessive absenteeism, even if it is beyond the employee's control. If no accommodation could allow an employee to return to work, the employer may be able to dismiss for innocent absenteeism.

The employer must ensure it has established the required elements for excessive innocent absenteeism and, particularly, the prognosis for future attendance and the duty to accommodate a disability. Before a decision is made to terminate an employee, the employer should review the record of absenteeism, including the reasons for the absences, and the most current medical information available to see if there has been or may be an improvement in attendance in the future, or if accommodation is possible.

The employer should not rely on periods of absence arising from a disability or a workplace injury for which WCB benefits were payable in order to justify a discharge, unless the employer can demonstrate that it has accommodated the employee to the point of undue hardship.

Recent Caselaw

The most recent Human Rights Panel decision relating to disability in the work place was released by a Human Rights panel approximately a year ago[3]. Mr. Jodoin was a City of Calgary employee for three years before he injured his back at work. He worked in the Waste & Recycling Department and his job therefore involved a lot of heavy lifting. Following his injury, Mr. Jodoin underwent extensive rehabilitation and assessment through Workers' Compensation and various programs. Ultimately, Mr. Jodoin was informed by the medical profession that he required a sedentary position. His employment with the City of Calgary was subsequently terminated.

The City of Calgary accepted that it had a duty to accommodate and, indeed, had a comprehensive policy in place with respect to accommodation. But, it noted that Mr. Jodoin had exhausted his Workers' Compensation benefits, he did not complete a long-term disability application form, he did not apply for supplementation of compensation under the existing collective agreement, and he refused to sign a request for an unpaid leave of absence.

The Panel found that Mr. Jodoin's back injury was a physical disability within the definition of the Act. The disability was known to the City of Calgary and was a factor in his dismissal. The Panel was not impressed with the steps taken by the City of Calgary with respect to accommodation. Although the policy guidelines in place would have been helpful and appropriate, there was no evidence that the guidelines were actually followed effectively. There was no record of what positions had been considered in other departments and the City also relied upon the impressions of Workers' Compensation rather than following up with the other doctors' assessments. A negative perception of Mr. Jodoin as "not co-operating" flavoured the entire scope of the half-hearted efforts to accommodate, without accounting for the fact that Mr. Jodoin was having difficulty dealing with the disability himself.

> In this case, there is no evidence that the City would have suffered undue hardship by continuing to employ Mr. Jodoin in a sedentary position. There is no evidence that the City exhausted the accommodation process in the search for a modified position for Mr. Jodoin amongst its 12,000 employees.[4]

The Panel ordered the City of Calgary to pay general damages for pain and suffering in the amount of $5,000, lost wages based on five months' salary and interest on all amounts.

The most important lesson for employers arising out of this case is that a well-drafted policy addressing issues of accommodation does not protect an employer if the policy itself is not followed, and the steps

---

3 *Jodoin v. City of Calgary*, Human Rights Panel of Alberta decision, November 24, 2008 (Bryant).

4 at paragraph 164.

taken carefully documented. Employers should take care to ensure that not only are their policies valid and reflective of the most recent case law, but also that the policies are carefully followed. The Panel stated as its closing paragraph in this case:

> The Panel acknowledges that the City of Calgary has a Duty to Accommodate Policy and Guidelines. This policy and pursuant guidelines clearly and effectively outline the process that must be followed. The Panel recommends that the City impress upon their employees the importance of following the guidelines and to outline the effect they can have on the dignity of an employee when the guidelines are not followed with sensitivity and fairness.[5]

The Aging Workforce

Changes in the workforce have led to increasing social and legal pressure for the removal of mandatory retirement policies. In Alberta, an employer cannot discriminate on the basis of age, which includes discriminating against those over the age of 65. Section 7 of the HRCMA does provide an exception, however:

> (2) Subsection (1) as it relates to age and marital status does not affect the operation of any bona fide retirement or pension plan or the terms or conditions of any bona fide group or employee insurance plan.

Thus, legitimate retirement or pension plans may impose age provisions that seemingly discriminate against older workers.

Further, discrimination on the basis of age may be justifiable in some circumstances.

Accommodation of Aging Workers

The greatest issues with respect to accommodation and an aging workforce arise when older workers start to show performance decrements directly tied to their age. Stereotyping of older workers often includes the assumptions that older workers will demonstrate:

(a) decreased work motivation, capacity and potential for development;

(b) reduced flexibility and acceptance of change; and

(c) high stability and dependability.

---

[5] At paragraph 175.

These stereotypes are based in part on the actual changes experienced as workers age:

(a) There are some established relationships between age and physical and cognitive abilities, namely a decline as one ages, but research cautions against using only chronological age as a predictor.

    (i) also many studies based on contrived laboratory tests that don't sufficiently address how the results translate into the real world,

    (ii) also the decline is most predictably seen after age 70, when many employees have already chosen to retire from the workplace,

(b) As people age, performance can decline on complex processing activities such as tasks involving divided attention or dual tasking or speeded responses.

(c) However, research also shows a general increase for job satisfaction and commitment for older workers, as well as an increase in job-relevant knowledge and citizenship behaviours at work.

The workplace can be improved to increase successful performance by older workers. A checklist of factors to consider include:

(a) Consider the work design and potential aids, such as:

    (i) charts;

    (ii) written instructions; and

    (iii) pictures.

(b) Train all employees to use the potential aids rather than just targeting older workers.

(c) Consider the training methods:

    (i) proceed-at-own pace tutorials;

    (ii) learn from errors rather than minimize errors during training; and

    (iii) active learning & discovery training.

(d) Diversity sensitivity training, including aging stereotypes.

(e) Consider alternative work arrangements rather than work or retire, such as part-time or bridge employment.

(f) Manage Performance. Employers are entitled to evaluate employees in order to ensure satisfactory performance, regardless of age. However, increased performance evaluations that target certain employees because of their age may also constitute discrimination. Performance evaluations should be carried out for all employees. It is important that complete records are retained so that any change in performance is clearly documented.

(g) Assist in appropriate retirement. Employers may wish to encourage their employees to start thinking about and planning for retirement by offering retirement planning and counselling for employees and their partners. An employer and an employee may also choose to negotiate a voluntary retirement contract with a definite departure date. Finally, employers may offer retirement packages as an incentive to promote voluntary departures.

(h) Be flexible. Employers may accommodate aging employees with more flexible working conditions, such as allowing an employee to work part-time, on flexible hours, in a job-sharing arrangement or working in a different capacity, such as a consultant.

Accommodation of an aging employee may, in some circumstances, be impossible short of undue hardship. To demonstrate undue hardship, the employer must provide objective, real evidence, which may be comprised of the following:

(a) quantifiable costs, such as increased costs of extended pension and disability plans;

(b) increased health and safety risks, including the magnitude of the risks and who bears the risk;

(c) the availability of other workers to assist when job duties are modified or reduced; and

(d) impacts on other employees, such as younger employees who must wait for advancement or experience.

As the demographics of the population change, so too will the needs of employers, employees and the dictates of the law. Employers should prepare for these changes by evaluating their workforce and the requirements of their workplace. Employers should determine what options are best for them to accommodate and manage the increasingly aging workforce.

Promoting Retirement in a Declining Economy

In the current economic climate, employers may wish to promote "early retirement" for some older workers, especially highly paid older workers. Depending on the existing pension and benefit plans, encouraging retirement may result in minimal cost up front, but long term savings.

When dealing with the prospect of a voluntary retirement, it is important to take care to avoid any suggestion that might be used to make a claim of age discrimination. Inappropriate pressure for retirement at any age, or for "early" retirement, may be considered age discrimination. Employers who make retirement packages available to their employees should try to avoid:

- conduct which suggests age discrimination, such as suggesting to an older employee that their position "takes a lot of energy", or that it is time for the employee to "take things easy";
- pressuring employees to accept retirement packages;
- associating retirement offers with job loss; and
- placing conditions on packages (that are not part of bona fide benefits or pension plans) that exclude certain employees.

Recent Caselaw

The most recent decision of a Human Rights Panel of Alberta relating to the issue of age discrimination at work is the case of *Webber v. Canadian Forest Products Ltd.*[6]

Mr. Webber's employer, Canadian Forest Products Ltd., had a mandatory retirement policy in place requiring Mr. Webber to retire at the age of 65. Mr. Webber was not ready to retire, was still capable of performing his job, and also had a family to support. His younger wife, who suffered from a medical condition, was unable to work and he had two children in school. Following his retirement, he found a job at a thrift store that was physically more demanding and stressful than he had before and he therefore had to reduce his hours of work such that he no longer received benefits.

The Panel found that the mandatory retirement scheme constituted *prima facie* discrimination. The employer did not suggest that there was any *bona fide* occupational requirement defence, such as safety issues associated with vision or processing speed decrements. Therefore the justification test outlined in *Meiorin* and described previously in this paper was not applicable. Neither did the employer suggest that Mr. Webber's performance had been compromised by his age. Therefore, the

---

6 *Webber v. Canadian Forest Products Ltd.*, Human Rights Panel of Alberta Decision, May 30, 2008 (Scragg, Q.C.)

only defence available to the employer was that the discrimination was reasonable and justifiable under Section 11 of the legislation.[7]

The employer explained the need to uphold a system that would better working conditions for all employees and protect the dignity and collective interests of workers. As it was a unionized environment, Canfor noted that the mandatory retirement was a negotiated term of the collective agreement and provided some predictability with respect to allocating resources for younger employees. Although the theories of the employer made sense, there was no empirical evidence demonstrating a connection between any threats to the economy or bargaining and elimination of a mandatory retirement policy. Mr. Webber's sense of self-worth had been diminished and the employer was not able to demonstrate that the mandatory retirement policy was reasonable and justifiable within the terms of Section 11.

The Panel Chair did not address the issue of remedy, but advised that hearing would be scheduled to address same. There is no current evidence of a remedy decision being granted, suggesting that the parties agreed to a remedy.

The lesson for employers arising out of this case is that mandatory retirement policies, even if negotiated as a term in a collective agreement, are likely *prima facie* discriminatory as against the employees. Care should be taken to consider the tests for discrimination, not just under the *bona fide* occupational requirement discussed earlier in this paper, but also under the Section 11 "reasonable and justifiable" exception. Mandatory retirement policies may be appropriate in certain circumstances and care should be taken to consider the particular circumstances of any case.

Conclusion

The accommodation process has always been time consuming and intensive for employers. In today's workplaces, where the economy is an issue and employers are facing increasing disabilities resulting from stresses imposed by the workplace, as well as an aging work force, it is even more difficult to accommodate employees. The *Hydro Québec* case provides us with some hope that the duty to accommodate is being curtailed to something less than "impossible" hardship.

The economy affects the hardship analysis, depending on the particular circumstances of the case. Each situation will need to be assessed on a case-by-case basis and employers need to consider the interplay of human rights legislation with other legislation, including PIPA, Workers' Compensation, Occupational Health and Safety and Employment Standards.

---

[7] Section 11 of the Act states that "a contravention of this Act shall be deemed not to have occurred if the person who is alleged to have contravened the Act shows that the alleged contravention was reasonable and justifiable in the circumstances".

VANCOUVER
P.O. Box 10424, Pacific Centre
Suite 1300, 777 Dunsmuir Street
Vancouver BC V7Y 1K2
Tel: 604-643-7100 Fax: 604-643-7900

CALGARY
Suite 3300, 421 - 7th Avenue SW
Calgary AB T2P 4K9
Tel: 403-260-3500 Fax: 403-260-3501

TORONTO
Box 48, Suite 5300
Toronto Dominion Bank Tower
Toronto ON M5K 1E6
Tel: 416-362-1812 Fax: 416-868-0673

OTTAWA
The Chambers
Suite 1400, 40 Elgin Street
Ottawa ON K1P 5K6
Tel: 613-238-2000 Fax: 613-563-9386

MONTRÉAL
Suite 2500
1000 De La Gauchetière Street West
Montréal, QC H3B 0A2
Tel: 514-397-4100 Fax: 514-875-6246

QUÉBEC
Le Complexe St-Amable
1150, rue de Claire-Fontaine, 7^{e} étage
Québec QC G1R 5G4
Tel: 418-521-3000 Fax: 418-521-3099

UNITED KINGDOM & EUROPE
5 Old Bailey, 2nd Floor
London, England EC4M 7BA
Tel: +44(0) 20 7489 5700 Fax: +44 (0) 20 7489 5777

McCarthy Tétrault