Employment Law in Canada

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Working in Canada: An Overview of Employment Law

Among the most challenging and complex issues faced by businesses, governments, organizations and individuals are those that arise in the workplace—in the relationships between management and employee, worker and employer and between employer and the myriad of regulatory bodies which supervise a wide variety of activities that occur in the workplace.

In this booklet, we have endeavoured simply to identify many of the key issues of which employers and counsel for employers need to be cognisant and which need to be prudently managed.

The Canadian framework is, in some respects, similar to that of our neighbours to the south; but it is also unique and distinct from U.S. law in some very significant ways and a failure to appreciate those distinctions can prove costly and very damaging, both to an employer's bottom line as well as to its corporate culture. In this booklet we identify the statutory and regulatory framework for Canadian employment law, and we discuss the importance of employment agreements, the critical issue of termination of the employment contract, the human rights regimes and the duty to accommodate, the distinction between unionized and non-unionized workplaces, technology use and privacy rights in the workplace, the law of fiduciaries, mitigation, progressive discipline, some selected tax aspects of the employment relationship, the distinction between employees and independent contractors, bankruptcy and insolvency issues that arise in the employment context, employment issues that arise on the purchase and sale of a business and other topics of concern in employment law.

This booklet is not intended to provide legal advice and does not purport to offer comprehensive treatment of any of the issues discussed herein. Instead, it is intended to identify for the reader the areas which require the attention of prudent management and vigilant counsel so that appropriate advice may be sought in connection with any of these issues as the need arises.

We hope that you will find this survey of the essential areas in Canadian employment law to be of interest. We invite you to get in touch with any of the talented, highly regarded and dedicated members of our employment law practice group with any questions and advice that you may have.

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Overview of Canada's Legal Framework for Employment Matters

by John B.A. Wilkinson and Nicholas Caughey

Canada has two primary sources of employment law: (1) statute and (2) the common law.

Employment statutes in Canada are enacted by both the federal parliament and the provincial legislatures because of individual and shared constitutional jurisdiction over employment matters. As a result, both levels of government have enacted an employment law statutory framework that standardizes the core aspects of the employee–employer relationship, including minimum wages, health and safety in the workplace, anti-discrimination, and pay equity. Many statutory standards reflect, or are in compliance with, International Labour Organization conventions, several of which Canada has ratified. This statutory framework establishes both minimum standards below which an employer can never fall and minimum rights for employees that cannot be contracted out of, with the result that there is no employment "at will" in Canada.

The statutory framework exists under a broader common law framework which is briefly discussed below. Generally, common law contractual principles must give way to or are adapted to the statutes, creating a hybrid legal view of employment. This article focuses on the employment law statutory framework at both the federal level and within the province of Ontario.

DIVISION OF CONSTITUTIONAL JURISDICTION OVER EMPLOYMENT MATTERS IN CANADA

Like the United States, Canada is a federation; it is comprised of ten provinces and three territories, joined by a written constitution, the *Constitution Act, 1867*.[1] The constitution sets out the specific legislative jurisdiction of both the provinces and the federal parliament.

Both the federal parliament and the provincial legislatures have the jurisdiction to enact labour and employment laws. Provincial authority over employment matters is derived from the provinces' broad constitutional jurisdiction to regulate "property and civil rights", as the right to enter into contracts is viewed as a civil right. Generally, federal authority for employment matters is limited to the federally-regulated industries expressly listed within the constitution (or modern industries that have been judicially assigned), such as banking, radio and television broadcasting, air transportation, interprovincial trucking and shipping, and railways.

Because the federal parliament has jurisdiction over a minority of Canadian employees, a solid grasp of provincial employment legislation, which governs approximately 90% of all employees in Canada, is extremely important when dealing with employment matters. In addition, while employment statutes in each province are similar, they nevertheless contain subtle distinctions and should be consulted individually if an employment matter arises in a particular province.

FEDERAL EMPLOYMENT LEGISLATION

The primary employment legislation governing federally-regulated industries is the *Canada Labour Code*[2]. This statute governs, among other things, labour or industrial relations (including collective bargaining), occupational health and safety, hours of work, minimum wages, vacation entitlements, holidays, sanctioned absence, terminations, severance, and unjust dismissal.

The *Canadian Human Rights Act*[3] protects employees and potential employees (i.e. candidates) from discrimination based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability, and convictions for which a pardon has been granted. The Act further establishes the Canadian Human Rights Tribunal which has broad remedial powers, including the power to reinstate employees who are terminated, as well as the power to award modest financial compensation for injury to feelings, dignity and self-respect.

The *Canada Pension Plan Act*[4] and the *Employment Insurance Act*[5] are federal Acts that govern all employers. The Canada Pension Plan Act provides individuals who qualify with pension benefits upon retirement or permanent disability. The *Employment Insurance Act* provides replacement income to individuals during temporary periods of unemployment.

PROVINCIAL EMPLOYMENT LEGISLATION (ONTARIO)

The following are some key employment statutes in Ontario:

[1] (U.K) 30 & 31 Victoria , c. 3
[2] R.S.C. 1985, c. L-2
[3] R.S.C. 1985, c. H-6
[4] R.S.C. 1985, c. C-8
[5] S.C. 1996, c. 23

1. The *Employment Standards Act, 2000*[6] ("ESA") provides for minimum employment standards in Ontario, including minimum wages, work hours, overtime and holiday pay, vacation entitlements, sanctioned absence, termination, and severance pay. Employment standards established by the common law will apply where the ESA minimum standards are not expressly contracted into by the parties. Typically, the common law provides greater rights and benefits to employees. However, subject to some common law restrictions and subject to the following sentence, an employer and an employee may contractually agree to specific employment terms. One cannot contract out of or below the ESA minimum standards.

2. *Ontario's Human Rights Code*[7] (the *"Code"*), like its federal counterpart the *Canadian Human Rights Act*, is aimed at ensuring that all Ontarians are provided with equal rights and opportunities without discrimination in the area of employment. The Code also establishes an adjudicative tribunal for human rights complaints.

3. The *Workplace Safety and Insurance Act, 1997*[8] provides for a no-fault compensation plan to employees in respect of work-related illnesses and injuries. Certain employers collectively pay annual premiums for such workplace safety insurance, thus limiting their financial exposure to liability and costs of a workplace accident.

4. The *Occupational Health and Safety Act*[9] imposes responsibilities and duties on employers to address health and safety hazards on the job, including the recent addition of requiring employers to address workplace violence and harassment[10] . The Act provides for penalties consisting of fines, imprisonment, or both where it is contravened.

5. The *Pay Equity Act*[11] requires employers with ten or more employees to provide equal pay for work of equal value.

6. The *Labour Relations Act, 1995*[12] deals with the rights of employees to form unions and participate in the collective bargaining process.

7. The *Accessibility for Ontarians with Disabilities Act, 2005*[13] requires certain employers to establish business practices, including training, with respect to the provision of services to individuals with disabilities.

COMMON LAW FRAMEWORK

The second overarching source of employment law is judge-made law, which establishes additional rights and remedies for employees.

The common law in Canada tends to be the sole authority for the following employment issues: (1) an employee's duty to mitigate his or her damages; (2) the enforceability of non-competition and non-solicitation agreements; and, (3) constructive dismissal. Additionally, contractual terms of employment that are not strictly regulated by statute may be significantly diminished in force, or even rendered void, by the common law.

[6] S.O. 2000, c. 41.
[7] R.S.O. 1990, c. P.7.
[8] S.O. 1997, c. 16, Sched. A.
[9] R.S.O. 1990, c. O.1.
[10] *Bill 168, An Act to Amend the Occupational Health and Safety Act with respect to violence and harassment in the workplace and other matters,* 1st Sess., 49th Leg., Ontario, 2009 (assented to 15 December 2009), S.O. 2009, c. 23.
[11] R.S.O. 1990, c.P.7.
[12] S.O. 1995, c. l, Sched. A.
[13] S.O. 2005, c. 11.

Employment Agreements

by John D. Campbell

It is prudent for employers to have written employment agreements with their employees. In the absence of a written agreement, the employment relationship will be governed by the common law. Employment agreements can limit an employer's costly common law severance exposure and can expand the employee's obligations to the employer. Also, the certainty of a written agreement benefits both parties.

ENFORCEABILITY OF EMPLOYMENT AGREEMENT

An employment agreement must comply with the Employment Standards legislation of the applicable province. The parties cannot contract out of those standards. A term which contravenes the minimum standards is void. The common law will apply in the absence of an enforceable written term.

The employment agreement must be provided to the prospective employee before the commencement of employment. That enables the employee to obtain independent legal advice and avoids the risk that the employee may later claim he or she signed the agreement under duress or under unconscionable circumstances. Further, there must be consideration flowing to both parties for the employment agreement to be enforceable. New employment is consideration for an employment agreement signed before the start of work; after the start of work, there is no additional consideration unless the employment agreement is associated with a promotion or an increase in compensation.

ELEMENTS OF THE EMPLOYMENT AGREEMENT

The agreement will set out the employee's title, responsibilities, salary, benefits and vacation. Other key terms that should be included:

Termination Without Cause

The agreement should clearly state the notice or severance the employee will receive. Sometimes the notice is limited to the Employment Standards minimum; sometimes the notice is based on a formula. At common law employees are usually entitled to substantially more notice than is set forth in the applicable Employment Standards.

Termination for Cause

The agreement should indicate that the employee is entitled to no notice or severance if he or she is terminated for cause. If "cause" includes a material breach of the employer's policies or Codes of Conduct, that should be explicitly stated.

Resignation

The employee should have to give a specified period of resignation notice.

Bonus

At common law, an employee terminated without cause is entitled to a pro-rated bonus and to compensation for loss of bonus as part of a severance claim. Those entitlements can be displaced by clear wording in the employment agreement. The agreement should also explain the basis on which the bonus is calculated.

Employer's Policies and Procedures/Policy Manuals

If the employment relationship is to be subject to the terms and conditions of the employer's policies and procedures or policy manual, those items should be incorporated by reference into the written employment agreement. Copies should be provided to the employee before signing the employment agreement.

Confidentiality

All employees have a common law duty to maintain the employer's confidential information, and fiduciary employees have certain additional obligations. However it is desirable for employers to have new employees sign formal confidentiality covenants (perhaps as separate agreements) before starting work.

Non-competition

Generally, Canadian employees are free to compete with former employers so long as they do not take customer lists or trade secrets.

Senior employees have common law fiduciary duties that may include an obligation to not compete and not solicit customers or employees. The nature and scope of those fiduciary duties depend on the circumstances.

Employers in Canada use non-competition covenants and non-

solicitation covenants as protection from competition from former employees. These covenants must be carefully drafted as Canadian courts are reluctant to enforce them. The courts are very mindful of the power imbalance associated with covenants that are in restraint of trade and inhibit workers from earning a living. Any ambiguity will be construed against the employer and will likely render the covenant unenforceable.

The onus is on the employer to demonstrate that a non-competition covenant is the minimum necessary to protect both the parties' interests and the public interest. A covenant to not solicit customers is more likely to be enforced.[1]

Canadian judges will not fix or rewrite overly broad non-competition covenants. If the covenant is ambiguous or overly broad the court will not "read down" the term so as to make it enforceable. The court will only use "blue pencil" severance sparingly, and only where the excised wording is clearly severable, trivial and not part of the main purpose of the restrictive covenant.

CONCLUSION

All employment relationships should be subject to a carefully drafted employment agreement. The absence of a written agreement results in uncertainty for both parties, and potentially costly results.

[1] *Lyons v. Multari* (2000), 50 O.R. (3d) 526 (C.A.); *H. L. Staebler Co. v. Allan* (2002), 296 D.L.R. (4th) 592 (Ont. C.A.); *Shafron v. KRG Insurance Brokers* (2009), 301 D.L.R. (4th) 522 (S.C.C.); *Mason v. Chem-Trend* 2011 ONCA 344

Termination of the Employment Relationship

by Carole McAfee Wallace

When terminating an employee in Canada, it is important to remember that the concept of "at-will" employment does not exist. Unless an employee acts in a manner that would constitute "just cause" for termination (which is a narrow category of behaviour), the employer is obligated to provide the employee with reasonable advance notice of termination. Alternatively, compensation can be paid to the employee in lieu of notice. Given that it is often practically undesirable to have an employee continue to work after receiving notice of termination, which in many cases must be given months in advance to be considered "reasonable", paying out the notice period is the more frequent choice.

NOTICE

The notice of termination provided to the employee must be specific and unequivocal. Moreover, it must be clearly communicated to the employee.

The notice of termination must be provided in reasonable advance of the actual termination. There is a statutory minimum period of notice that must be given, which varies according to length of employment. The legislation applicable to the employee must be consulted, as there is various federal and provincial legislation for unionized and non-unionized employees, each with applicable provisions. Employers cannot contract out of the statutory minimum. Legislation also may require that longer-serving employees receive severance pay, which is essentially additional payment in recognition of the employee's contribution to the employer's business.

However, the notice periods held to be reasonable in the common law have traditionally been much longer than the statutory minimum. Unless the employment contract limits the notice period to the statutory minimum, or to another amount that is greater than the statutory minimum but less than the common law standard, the employer must provide compensation for the common law notice period.

In determining "reasonable notice" under the common law, the relevant factors include the length of service, age of employee, and the character of the position, including the degree of responsibility and the employee's level of training and education. Further, the length of notice considered to be "reasonable" notice may depend on the availability of similar employment, having regard to the experience, training and qualifications of the employee.

The employer has the choice of asking the employee to work through the notice period, or to pay compensation in lieu of notice. If pay in lieu of notice is given, the employer is to pay the wages to which the employee would be entitled as though the employee had worked through the notice period. The employer may also be required to continue medical and dental benefits to the employee for the duration of the notice period, and pay for unused vacation time.

JUST CAUSE

An employer is not required to give notice of termination if there is just cause for dismissal of the employee. "Just cause" refers to a situation in which the employee acts in a manner that is effectively a repudiation of the employment contract. Whether the employee's conduct constitutes just cause depends on the particular context. Examples of behaviour that may amount to just cause include insubordination, insolence, culpable absenteeism, intoxication and sexual harassment.

There is often confusion between the concepts of "just cause" and "wilful misconduct", which may also lead to termination of employment. "Wilful misconduct" is a narrower category of behaviour than just cause. An employer must point to specific behaviour of the employee prior to dismissal, behind which must be a wilful or reckless disregard of the employer's interests on the part of the employee.

BAD FAITH

Employers should be conscious of their conduct in terminating employees, as an employee who sues for wrongful dismissal might also claim bad faith damages.

As the name indicates, bad faith damages might be claimed where the employer demonstrates bad faith in the manner in which it terminates the employee. Bad faith may be found where, for example, the employer is misleading, dishonest, or unduly insensitive in terminating the employee. The employee claiming such damages must prove that he or she suffered from mental distress as a result of the employer conduct about which the employee complains. Further, it must be shown that the mental distress was reasonably foreseeable by the parties.

The requirement that the employee must prove injury that directly resulted from the employer's conduct is a relatively recent development in the Canadian case law, established by the Supreme Court of Canada in *Honda Canada Inc. v. Keays*.[1]

[1] *Honda Canada Inc. v. Keays*, [2008] 2 S.C.R. 362

Though it makes it more difficult for employees to succeed in such claims, employers should nonetheless be cognizant of the impact their behaviour may have on an employee they are dismissing and conduct themselves accordingly.

MITIGATION OF DAMAGES

The obligations surrounding a termination are not solely the employer's. A dismissed employee has a duty to mitigate his or her damages by securing, or making reasonable efforts to secure, alternative employment. This might entail accepting a lesser position with same employer, commencing self-employment, or even relocating to obtain a suitable job in the employee's particular field.

However, the duty to mitigate is held to a standard of reasonableness. An employee is not required to take a radically different job to meet his or her duty to mitigate. The employee is entitled to have some consideration for income level and for maintaining his or her position in a particular trade, profession or industry.

EMPLOYMENT CONTRACTS

An employer can control some of the uncertainties that might arise at the time of termination of an employee by clearly setting parameters in the original employment contract. While the employer cannot contract out of statutory minimums, such as minimum notice periods that must be provided on termination, contracts can be used to limit or exclude the common law concepts that would otherwise apply.

For example, a contract can specify that certain acts will constitute just cause or wilful misconduct, effectively broadening the common law definitions of these concepts. The contract may also set out what period of notice will be given, how payment on termination will be structured, and how various types of incentive compensation will be dealt with on termination. The employee's duty to mitigate may also be outlined in the contract, or it may be expressly excluded if the parties so decide.

Carefully constructing an employment contract is therefore extremely important, yet employers often fail to give contracts due consideration. Obtaining advice before the employment relationship even begins, at the hiring stage when contracts are being drafted, can save considerable legal expenses and uncertainty down the line.

CONCLUSION

The law surrounding the termination of employees in Canada involves far greater consideration and obligation on the part of the employer than in jurisdictions that subscribe to "at-will" employment. Each situation will turn on its own set of facts. Further, there are numerous pieces of legislation in both the federal and the different provincial jurisdictions, each with its own minimum notice standards for the termination of an employment relationship.

Employers must be alert to all the variables that can impact the extent of their obligations when terminating an employee. Where the situation is at all unclear, consulting legal counsel prior to termination can save time and expense in the long run.

Thanks to *Mandy Seidenberg, Associate* for her foundational work.

Constructive Dismissal

by Sean G. Foran

It has long been the law that a unilateral substantial change to an employment contract or the introduction of a new employment contract requires consideration, an acceptable form of which is the provision of working notice of the change. A failure to give such notice of a unilateral substantial change to the essential terms of an employment contract may amount to a constructive dismissal. Examples of a substantial change include:

- demotion
- pay reduction
- forced transfer
- reduced workweek/compulsory leave of absence
- layoff

A constructive dismissal may also arise where, even in the absence of any unilateral fundamental change to the contract of employment, the employer's treatment of the employee makes continued employment intolerable. There are situations in which the entire contract of employment is said to have been repudiated by the employer, either because of the employer's own offensive conduct or because the employer has permitted or is deemed to have permitted a hostile or poisoned environment to prevail insofar as the affected employee is concerned. In circumstances in which the workplace is so poisoned or hostile or in which the relationship of trust between employer and employee is so damaged by the employer's conduct, the employee's duty to mitigate would not entail having to remain in the workplace.

In *Evans v. Teamsters Local Union* No. 3[1] the Supreme Court of Canada ruled that it was reasonable for an employee to be required to mitigate his losses by accepting re-employment, if offered by the dismissing employer, for the balance of any unexpired portion of the notice period. This decision puts an onus on employees to remain in their employment unless there are circumstances that would make it unreasonable to do so. While *Evans* involved a dismissal followed by an offer of re-employment for the remainder of the notice period, the court's decision is of equal significance for the law of constructive dismissal, as it puts a constructively dismissed employee on notice that he or she should carefully consider whether a decision to cease working might deprive that employee of the substantial benefit of a claim, as such a decision might be treated as a failure to mitigate.

THE LEADING CASE: *FARBER v. ROYAL TRUST CO.*

In the leading case on constructive dismissal, *Farber v. Royal Trust Co.*[2], the Supreme Court of Canada established that in unilaterally seeking to make substantial changes to the essential terms of the employment contract, an employer ceases to meet its obligations and is therefore terminating the contract. If the employee does not agree to the changes he or she is entitled to treat such action as a breach of contract and to leave his or her position. In cases of constructive dismissal, an employee is entitled to compensation in lieu of notice and in certain cases he or she may also be entitled to damages.

To determine whether an employee has been constructively dismissed, the court must ascertain whether the unilateral changes imposed by the employer substantially alter the essential terms of the employee's contract of employment. To make this determination, a judge will ask whether, at the time the offer was made, a reasonable person in the same situation as the employee would have felt that the essential terms of the employment contract were being substantially changed.

It is important to note that not all changes to the employment contract will constitute a substantial change. Employers can make any changes to an employee's position that are allowed by the contract, including those changes that may be categorized as part of the employer's managerial authority.

A CAUTION TO EMPLOYERS: *WRONKO v. WESTERN INVENTORY SERVICE LTD.*

The Ontario Court of Appeal in *Wronko v. Western Inventory Service Ltd.*[3] determined that an employee was constructively dismissed and entitled to damages despite the fact that he was provided with two years notice of the changes to the terms of his employment contract. This case serves as a warning to employers of the need to both provide notice of any substantial unilateral changes to the terms of employment and also to make clear to employees the consequence of a refusal of the new terms, i.e., of the employer's intention to treat the notice as notice of termination in the event that the employee fails to accept continued employment on the modified terms.

[1] *Evans v. Teamsters, [2008] 1 S.C.R. 661*
[2] *Farber v. Royal Trust Co, [1997] 1 S.C.R. 846*
[3] *Wronko*, (2008), 292 D.L.R. (4th) 58 (Ont.C.A.) An application for leave to appeal to the Supreme Court of Canada was dismissed on June 26, 2008, see *Western Inventory Service Ltd. v. Wronko* [2008] S.C.C.A. No. 294

When an employer seeks to unilaterally amend a fundamental term of a contract of employment, an employee has three options. First, he may accept the change in the terms of employment, in which case the employment will continue under the amended terms. Second, he may reject the change and sue for damages for constructive dismissal if the employer persists in treating the relationship as subject to the varied term. Third, the employee may make it clear that he is rejecting the new term. The employer may respond by terminating the employee with proper notice and offering re-employment on the new terms. If the employer does not take this course and permits the employee to continue to fulfill his job requirements, the employee is entitled to insist on adherence to the terms of the original contract. In these circumstances the employee will not have been held to condone or accept the change, however, compensation earned by the employee in continuing to fulfill his job requirements will be treated as mitigation and be deducted from any compensation awarded pursuant to the terms of the original contract.[4]

Employers need to be mindful to provide not only adequate notice of any fundamental changes to the terms of the employment contract, but also to expressly notify employees of the consequence of a rejection of the change in terms.

While employers may be hesitant to state that an employee's rejection of a change will lead to termination, *Wronko* necessitates that employers provide a clear explanation that the employee's position will be terminated should he or she refuse to accept the new conditions and that such refusal would have the automatic effect of converting the notice of coming into effect of the amended contract into a working notice of termination.[5] Requiring an employee to signify whether he or she accepts the change of terms is beneficial in that a failure to respond to the notice will not delay the running of time. Where an employee objects to the change in terms, it would be wise to provide the employee with a notice of termination effective upon the expiry of the notice period along with an offer of re-employment based on the new terms of employment.

Thanks to *Peter Biro* for his foundational work.

[4] *Russo v. Ken Bros. Limited*, 2010 ONSC 6053 (Ont.S.C.)
[5]Alternatively, employers could implement a two-step process whereby, in the event of non-acceptance by the employee of the change, the employer could give working notice of termination. Employers should, of course, use discretion as to when to contemplate termination for non-acceptance of a change in the terms of employment

The Employee's Duty to Mitigate: Working Notice and Re-Employment

by Carole McAfee Wallace

It is well established that employees who are wrongfully dismissed, either without just cause or reasonable notice are required to seek alternative work in order to mitigate their losses. The question may arise as to whether an employee must, in mitigation of his or her losses, accept an offer of re-employment with the dismissing employer. Prior to the Supreme Court of Canada decision *Evans v. Teamsters Local Union No. 3*[1] *("Evans")* several appellate court decisions suggested that returning to work for the dismissing employer post-termination would be rare.

The Court in *Evans* noted that "[a]ssuming there are no barriers to re-employment, requiring an employee to mitigate by taking temporary work with the dismissing employer is consistent with the notion that damages are meant to compensate for lack of notice, and not to penalize the employer for the dismissal itself." This reasoning tilts the balance towards a more employer-friendly approach and reverses a longstanding subtle presumption that it was not generally reasonable to expect a terminated employee to mitigate by remaining in the workplace of the former employer.

MITIGATION IN THE CONSTRUCTIVE DISMISSAL CONTEXT

The issue of mitigation in the context of constructive dismissal cases had been considered in appellate court decisions prior to the ruling in *Evans*. The Ontario Court of Appeal in *Mifsud v. MacMillan Bathurst Inc.*[2], held that an employee was obliged to accept a significant demotion as a means of mitigating damages. Prior to this decision the weight of authority was against requiring an employee to accept a lesser position with the same employer in order to mitigate damages.[3]

Evans marks the first time the Supreme Court of Canada has pronounced the law with respect to the duty to mitigate in constructive dismissal cases. There should be no distinction between constructive dismissal and wrongful dismissal as they are both characterized by employer-imposed termination of the employment contract.[4]

After *Evans,* constructively dismissed employees should continue working under the new terms imposed by the employer while they search for another job unless they would suffer undue hardship as a result. This would certainly require employees to reflect carefully on the implications of leaving their employment prior to finding new employment elsewhere in circumstances where there is an alleged constructive dismissal.

Reasonableness Is Assessed Using an Objective Criteria

An objective standard is required in determining whether a reasonable person in the employee's position would have accepted the employer's offer of employment during a notice period. This is determined on a case-by-case basis. The key factor in determining whether the employee acted reasonably is whether the employee would be working in an atmosphere of hostility, embarrassment or humiliation.[5] The onus is on the employer to establish that the employee failed to act reasonably by refusing the offer of re-employment.

No Difference Between Offers for Re-Employment and Working Notice

There is "little practical difference between informing an employee that his or her contract will be terminated in 12 months' time (i.e. giving 12 months of working notice) and terminating the contract immediately but offering the employee a new employment opportunity for a period of up to 12 months."[6] In either case, it is expected that the employee is aware that the employment relationship is finite, and that he or she will be seeking alternative work during this notice period.[7]

A Heightened Duty to Mitigate if Employee is Dismissed Due to Corporate Reorganization

Employees who are terminated based on legitimate corporate reorganizations or the business needs of the company and then offered re-employment will more likely be required to mitigate by accepting an offer of re-employment than employees who are terminated for some other reason.[8] There is

[1] [2008] 1 S.C.R. 661

[2] (1989), 70 O.R. (2d) 701 (C.A.) [*Mifsud*]

[3] See *Jobber v. Addressograph Multigraph of Canada Ltd.*, [1980] O.J. No. 3033, aff'd. on this point at [1980] O.J. No. 1598, (C.A.) (Q.L.); *O'Grady v. Insurance Corp. of B.C.* (1975), 63 D.L.R. (3d) 370 (B.C.S.C.) at 378; *Duplessis v. Irving Pulp and Paper Ltd.*, [1983] N.B.J. No. 49 (C.A.)

[4] *Evans, supra* note 1 at paras. 26-27

[5] *Ibid*. Bastarache J. at para. 30

[6] *Ibid*. at para. 29

[7] *Evans, supra* note 1 at para. 29

[8] Applied by *Humphries J. in Davies v. Fraser Collection Services Ltd.*, [2008] B.C.J. No. 1368 at para. 47 (B.C.S.C.) (Q.L.) [*Davies*]

a presumption that a dismissal due to "legitimate" business concerns may be far less personal or acrimonious than when the dismissal relates more directly to the individuals themselves.[9]

Thus, there would appear to be a more onerous burden on the employee to mitigate by accepting re-employment in situations of corporate reorganizations.

SOME PRACTICAL IMPLICATIONS OF *EVANS*

Employees

The employee has an obligation to mitigate following termination by continuing or returning to work with the employer provided there is no atmosphere of hostility, embarrassment or humiliation. This mitigation requirement applies to the extent that the employee would be entitled to reasonable notice. Further, employees are encouraged to work out the notice period with the employer.

Employers

Employers bear the onus of demonstrating both that an employee has failed to make reasonable efforts to find work and that work could have been found.[10] If the employer cannot meet its evidentiary burden, the employee is simply entitled to his or her full notice or pay in lieu. It is, therefore, important for employers to monitor the employee's mitigation efforts. Some steps that employers should take include: referring any job leads to the dismissed employee; confirming that the employee actually followed up on them and generally pursuing any leads suggesting that the employee may not be diligently searching for alternative work. As seen in *Evans*, employers can go one step further by offering re-employment. If the employee refuses (absent a hostile, poisoned or humiliating work environment), courts may consider whether the employee failed to act reasonably in refusing to accept the offer of re-employment. While there is no positive obligation on an employer to assist employees in seeking other employment, such measures would certainly enhance the employer's ability to hold an employee to his or her strict mitigation obligations.

Employers are reminded of their duty to act in good faith in the manner of dismissing the employee and in their post-termination conduct. Should an employer decide to offer re-employment after terminating an employee, this offer should be made in good faith and with the genuine purpose of assisting employees to mitigate their losses, with the effect of reducing the employer's corresponding exposure to residual claims.

While employers are not obligated to provide work during the period of reasonable notice, "it is an accepted principle of employment law that employers are entitled (indeed encouraged) to give employees working notice."[11] Offering working notice instead of payment in lieu of notice is encouraged as a practical matter as the employer receives value (that is productivity) in consideration for the termination pay.

Thanks to *Peter Biro* for his foundational work.

[9] *Evans, supra* note 1 at para. 31

[10] *Ibid.* Bastarache J. at para. 30 citing *Red Deer College v. Michaels*, [1976] 2 S.C.R. 324

[11] *Ibid. Evans, supra* note 1 at para. 29

Temporary Layoffs in a Non-Unionized Setting

by Carole McAfee Wallace and Farah Malik

In Canada, temporary layoffs are common in unionized workplaces and are explicitly dealt with in most collective agreements. Such layoffs, however, are far less common in non-unionized settings.

One reason for this is that temporary layoffs are usually not addressed in employment contracts. More importantly, however, employers have no general entitlement to temporarily lay off employees at common law, despite express provincial statutory authority to the contrary.

It is noteworthy that although provincial statutes may expressly provide for temporary layoffs without the need to specify a recall date in the non-unionized setting, such actions may be treated as constructive dismissal at common law. In light of this potential consequence, employers should consider alternative measures during an economic decline or where there is truly a shortage of work, including: (1) scaling back on hours of work; (2) job-sharing; (3) outright terminations; and (4) voluntary unpaid leaves of absence.

In the case of voluntary unpaid leaves of absence, employers can exert some control over this measure by reserving the right to deny a leave if the departure of a particular employee is not operationally feasible for the organization. An employer may also specify the minimum and maximum lengths of such a leave period and the benefits coverage that would continue during the leave period.

Should employers nevertheless believe that it would be worthwhile to temporarily lay off employees, such action should ideally be consistent with their employment contracts and written policies dealing with such layoffs, if any.

The common law will generally infer the right to temporarily lay off non-unionized employees in the absence of express terms under an employment contract in circumstances where:

(a) the employer has a history of temporary layoffs for various reasons, including a shortage of work;

(b) the employer is in an industry where temporary layoffs or breaks in service are common;

(c) the employer has a policy in place to warn employees that temporary layoffs are possible when there is a downturn in business or shortage of work; and

(d) the employer continues to provide benefits to laid off employees during the layoff term.

Canadian employers should therefore advise their employees (including those who remain) why downsizing is necessary at the earliest stage possible. Canadian employers should also be frank about their financial position with their employees.

Generally, Canadian employers should not temporarily lay off non-unionized employees in the absence of an express term to this effect in an employment contract, or in the absence of a combination of the factors noted above.

Before temporary layoffs are initiated, and before unpaid leave of absence policies are crafted, be sure to consult with legal counsel to ensure that these measures will assist in achieving cost reduction goals without exposure to employment-related liability risks.

Thanks to *Daniela Corapi, Student-At-Law* for her assistance.

Obligations of Departing Employees

by John D. Campbell

All employees have certain basic obligations to their former employer. Senior and key employees have additional fiduciary obligations to their former employer.

WHICH EMPLOYEES ARE CONSIDERED FIDUCIARIES?

Typically, fiduciary obligations are owed by top management and senior employees. Recently, these obligations have also been extended to the employer's "key personnel". The concept of "key personnel" focuses on the role the employee plays in the enterprise, not nature of the position.

Some of the factors that the courts have considered are:

(a) the employee's ability to exercise discretionary power;

(b) the authority delegated to the employee to affect the employer's legal and economic interests;

(c) the degree of trust placed in the employee; and

(d) the extent to which the employment relationship renders the employer vulnerable to the employee.

WHAT OBLIGATIONS DO EMPLOYEES OWE THEIR FORMER EMPLOYER?

Fidelity

All employees owe their employer basic duties of fidelity, loyalty and good faith. These duties are reflected in specific obligations, some of which survive the end of the employment relationship.

Competition

Non-fiduciary employees are free to compete with their former employer as long as they do not take customer lists or trade secrets.

Fiduciary employees owe an obligation to not compete unfairly against their former employers. This includes the obligation to not directly solicit their former employer's customers, clients, suppliers and employees.

It is considered unfair competition for a fiduciary to take advantage of a former employer's business opportunity, even if the former employer is not in a position to take advantage of the opportunity. In this context, the corporate opportunity must not be readily available to the employer's competitors.

A fiduciary's duty not to compete unfairly continues for a reasonable period of time after termination of the employment. The court weighs several factors to set the reasonable period of time. Usually the period does not exceed one year.

Fiduciary employees are usually permitted to advertise as long as the advertisement is not targeted at their former employer's customers, clients and suppliers. Accordingly, a generic and industry-wide solicitation is usually not considered unfair competition.

Subject to the foregoing restrictions, fiduciaries are usually free to accept the business from their former employer's customers, clients and suppliers.

Duty of Confidentiality

All employees have a duty to refrain from disclosing or improperly using confidential information that belongs to a former employer. This duty is not limited to written or electronic documents – it includes confidential information acquired and retained in the employee's memory.

The employer does not need to label the information as confidential. The information will be considered confidential if in the circumstances an obligation of confidence should be implied. An employee must maintain the confidentiality of his or her former employer's customer lists or trade secrets, and cannot use that information to compete with the former employer.

The general knowledge and skill that an employee develops from work experience is not considered confidential information.

The obligation to maintain confidentiality lasts as long as the information stays confidential.

Duty to Give Reasonable Notice of Resignation

All employees have an obligation to provide their employer with reasonable notice of resignation. The length of the notice depends on several factors including (a) the length of service; (b)

the character of the employment; (c) the employee's age; and (d) the availability of similar employment.

For most non-fiduciary employees the required notice period would be approximately two weeks. Fiduciary employees must give more notice depending on the circumstances.

THE DECISION IN *RBC v. MERRILL LYNCH*

Recently the Supreme Court of Canada ordered the former branch manager of an investment firm (RBC) to pay $1.48 million in damages for breach of his obligation of good faith owed to RBC. He joined Merrill Lynch and assisted Merrill Lynch in recruiting RBC employees. The manager was not a fiduciary at RBC. However, the court found that as a senior employee he owed a duty of good faith to his former employer, and that duty included an obligation to retain RBC employees.

The decision appears to have created a new category of quasi-fiduciary employee that owes some but not all the duties of a true fiduciary. Clearly the law is still developing in this area.

WHAT SHOULD EMPLOYERS DO?

Prudent employers insist that their employees sign agreements to deal with these issues. Wherever possible, the agreement should be signed before the employee starts work. In particular:

(a) The employment contracts of senior or key employees should set forth their fiduciary obligations.

(b) All employees should sign stand alone confidentiality and trade secrets agreements.

(c) All employment contracts should specify the amount of resignation notice.

(d) Sales and senior employees should sign stand alone non-competition or non-solicitation agreements. These agreements are inherently vulnerable to attack as being ambiguous or overbroad. Therefore it is important that these agreements be drafted with care, and they should focus on the most important concerns. Paradoxically the broadest agreements of fer the least protection, as they clearly will not be enforced.

Thanks to *Zirka Jakibchuck* for her foundational work.

Progressive Discipline

by Stephanie L. Turnham

In Ontario, the one circumstance in which an employer is justified in terminating an employee without providing reasonable notice or pay in lieu of notice is where the employer has just cause to terminate. The meaning of just cause is fluid and depends on many situational factors. Where the conduct is severe, the employer may have a case for immediate, summary dismissal. However, where the conduct is minor or moderate but capable of correction, then the employer may have a duty to engage in progressive discipline before terminating the employee. However, progressive discipline can be a double-edged sword because employers may also wish to engage in progressive discipline to correct misconduct or improve an employee's performance, but this step can sometimes have legal ramifications for the employer.

This article applies to the non-unionized workplace; employees in a unionized workplace are governed by their collective agreement and the relevant labour relations legislation.

WHAT IS PROGRESSIVE DISCIPLINE?

Progressive discipline is a process to evaluate and address employee misconduct or performance deficiencies. It involves incrementally more serious warnings and other action, such as suspensions, prior to dismissal of an employee, to make the employee aware of unacceptable conduct and thereby encourage the correction of his or her performance.

WHAT ARE THE OBJECTIVES OF PROGRESSIVE DISCIPLINE?

Not To Punish, But To Provide an Opportunity To Correct Misconduct/Improve Performance

The goal of progressive discipline is behaviour modification. Early warnings are intended to bring the issues to the attention of the employee so that they can be corrected, and gradually more serious warnings and suspensions are to drive the issues home for the employee. The idea is not to punish the employee but to correct the behaviour. There are obvious cost savings because the alternative would be to hire and train a replacement.

Can Support a Case for Just Cause Dismissal if Misconduct Continues

The use of progressive discipline can provide an employer with the necessary paper trail to support a case of just cause dismissal. It illustrates that the employer did not condone the behaviour. It may also minimize an employer's risk of facing a claim of discrimination. A termination for cause should not take an employee by surprise, and employees should not be left guessing as to the cause for termination. However, some acts of misconduct may be so serious as to justify immediate dismissal, such as theft, fraud or a risk to health and safety of individuals.

To Deter Other Employees

Other employees who witness discipline being enforced on a fellow employee may also modify their own behaviour accordingly. Progressive discipline can therefore be a form of deterrence.

Common Steps in Progressive Discipline

A progressive discipline policy typically contains the following progressive steps: (1) an informal discussion and verbal warning; (2) a written warning; and (3) suspension.

It is essential for the employer to keep a written record of all disciplinary steps, including notes of any verbal warnings and copies of any written warnings. A suspension should be accompanied by a written notification of the job expectations and future consequences if not met. At each stage, an employee should also be given an opportunity to respond, and should be given a reasonable time to improve their performance.

Proportionality and the Contextual Approach

The Supreme Court of Canada has adopted a "contextual" approach to the analysis of whether discipline or termination is justified. Where an employee is dismissed for cause, the court must determine whether the nature and degree of the dishonesty warranted dismissal in the context of the entire employment relationship. Similarly, sanctions short of discharge may be appropriate for conduct that falls short of establishing just cause, if they are proportional to the misconduct.

If the steps taken by the employer by way of progressive discipline are disproportional to the misconduct, there is a danger that a court may find the employee to have been constructively dismissed.

WHEN IS PROGRESSIVE DISCIPLINE NOT CONSIDERED CONSTRUCTIVE DISMISSAL?

When There Is an Implied Term in the Employment Contract Permitting Reasonable Discipline

The courts have found that progressive discipline may be

implied in an employment contract in certain situations, either through custom and usage, in accordance with the intentions of the parties or as a matter of law.

When There Is Express Agreement To Discipline

In addition, there may be express agreement on progressive discipline. Where an employer has created a company policy that expressly provides that failure to comply may result in disciplinary action and/or dismissal, and the employees have reviewed and signed the policy, then an employee who contravenes that policy should expect to be subject to discipline.

Note the other side to this equation: if there is a progressive discipline policy in place, then employers ought to follow it. Where a progressive discipline policy is not followed before termination of an employee, there is a risk that the court will find that the employee has been wrongfully dismissed.

When There Is Just Cause and the Employer Disciplines Instead

An employer who has just cause for termination, but instead chooses to discipline the employee, should not be found liable for constructive dismissal. However, when imposing discipline, an employer must act in a reasonable and non-discriminatory manner. There must be a reasonable amount of time for the discipline to have an effect on the employee's conduct. In addition, the application of discipline must not be inconsistent or unevenhanded.

CONCLUSION

Employers ought to be particularly wary of any circumstance in which they believe they have just cause to terminate an employee. Termination is the most severe sanction that an employee can suffer. If the termination occurs without any warning the employer may be faced with a claim of wrongful dismissal. Progressive discipline policies that provide a reasonable opportunity for the employee to correct his or her misconduct or improve performance will not only assist an employee, but will also assist the employer in providing a clear paper trail of the efforts taken prior to the severe step of dismissal and can support a claim for just cause. However, employers engaging in progressive discipline face the risk of a claim for constructive dismissal. In order to protect against this risk, employers are well advised to craft and distribute to employees a clear policy allowing for reasonable progressive discipline.

Human Rights Regimes in Canada and the Provinces

by Raj Anand and Jessica Eisen

There are currently three key means of protecting human rights in Canada: the *Canadian Charter of Rights and Freedoms*[1], the *Canadian Human Rights Act*[2], and provincial and territorial human rights legislation. These laws apply in many different contexts including the workplace and it is therefore important for all employers to be familiar with, and to protect the rights guaranteed by these laws.

CANADIAN CHARTER OF HUMAN RIGHTS AND FREEDOMS

The *Canadian Charter of Rights and Freedoms* ("*Charter*") is a bill of rights which forms the first part of the *Constitution Act, 1982*. It applies to all government laws and activities including the laws and actions of federal, provincial, and municipal governments. It does not apply to private activity.

The *Charter* guarantees certain fundamental freedoms for everyone, including freedom of conscience and religion; freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; freedom of peaceful assembly; and freedom of association. It also guarantees certain legal and equality rights for everyone including, among other things, the right to life, liberty and security of the person; the right to be secure against unreasonable search or seizure; the right not to be subjected to any cruel and unusual treatment or punishment; and the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. Unlike other rights protected by the *Charter*, mobility and democratic rights are only guaranteed for citizens.

CANADIAN HUMAN RIGHTS ACT

The *Canadian Human Rights Act* is a federal statute that applies to people who receive goods and services from or are employed by either the federal government or a private company regulated by the federal government. For example, all federal Crown corporations (i.e. Canada Post Corporation or the Bank of Canada) are required to adhere to the *Canadian Human Rights Act*, as are private companies such as railroads, airlines, banks, telephone companies, and radio or TV stations.

The *Canadian Human Rights Act* is similar to its provincial counterparts in that it lists prohibited grounds of discrimination including: race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for which a pardon has been granted. In the case of *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government Service Employees' Union*[3], the Supreme Court of Canada defined a three-part test used to determine if a violation of the *Canadian Human Rights Act* can be justified as a bona fide occupational requirement ("BFOR"). Before the Supreme Court decision in *Meiorin*, human rights violations were treated as either "direct discrimination" pursuant to the analysis in *Ontario Human Rights Commission v. Borough of Etobicoke*[4], or as 'adverse effects discrimination' pursuant to the analysis in *O'Malley v. Simpson-Sears*.[5]

The three-part *Meiorin* test, which must be established on a balance of probabilities, provides that first, the employer must show that it adopted the standard for a purpose rationally connected to the performance of the job. Second, the employer must establish that it adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose. Third, the employer must establish that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.

The process of dealing with human rights under the *Canadian Human Rights Act* or its provincial counterpart is very different from dealing with employment actions in the civil context. For example, complaints under the *Canadian Human Rights Act* are first investigated by the Canadian Human Rights Commission and, if the Commission refers the complaint on, it will be decided by the Canadian Human Rights Tribunal. At the federal level, as well as in most provinces, the Commission acts like a sort of gatekeeper, investigating complaints and determining if further inquiry is warranted. If the Commission determines that

[1] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11

[2] Canadian *Human Rights Act*, R.S.C. 1985, c. H-6

[3] *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government Service Employees' Union,* [1999] 3 S,C,R 3 *("Meiorin")*

[4] *Ontario Human Rights Commission v. Borough of Etobicoke,* [1982] 1 S.C.R. 202

[5] *O'Malley v. Simpson-Sears* [1985] 2 S.C.R. 536

further inquiry is not necessary, the complaint will not proceed to adjudication. If, however, the Commission determines that further inquiry is necessary, and if a resolution between the parties cannot be reached, the Commission will refer the case to the Tribunal for a formal hearing.

At the adjudication stage, each Tribunal has its own rules of practice and procedure, and may decide all questions of law or fact necessary to determining the matter. If a complaint is substantiated, the Tribunal has the power to order that the employer make available to the complainant all of the rights, opportunities or privileges that were denied him or her as a result of the discriminatory practice. In addition, the Tribunal can order that the employer compensate the complainant for any or all of the wages that the complainant was deprived of as well as for any expenses incurred by the complainant as a result of the discriminatory practice.

PROVINCIAL HUMAN RIGHTS

Each province and territory has its own human rights legislation, usually called a code or an act (or in Quebec, a charter). This legislation covers those kinds of organizations not covered by federal legislation such as provincial governments, as well as private entities.

Most provincial human rights legislation prohibits discrimination in the provision of goods, services, accommodation, facilities, tenancy, professional regulatory organizations and employment. Though the grounds of discrimination vary slightly by province, generally they include race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status and disability.

Most provincial human rights regimes are similar to the federal regime under the Canadian Human Rights Act in that a Commission will first investigate and mediate a complaint before determining whether a further inquiry by a Tribunal (or in the case of Saskatchewan, the Court of Queen's Bench) is necessary. In Quebec, individuals whose complaints are not referred to the Tribunal may nonetheless choose to pursue remedies before the Tribunal. While the Commission in Quebec bears the cost of presenting referred cases to the Tribunal, however, individuals proceeding without referral by the Commission must do so at their own expense.

In Ontario, British Columbia, and the territory of Nunavut, the Tribunal and not the Commission is responsible for accepting, screening, and mediating human rights complaints, in addition to adjudicating them. British Columbia and Nunavut do not even have Commissions and in Ontario, the Commission's role is focused on research, policy development and education. Another important part of the Ontario human rights system is the Human Rights Legal Support Centre which provides a range of publicly funded legal services to applicants including representation before the Tribunal.

HUMAN RIGHTS IN THE WORKPLACE

Some of the main human rights issues which arise in the workplace include discrimination on enumerated grounds in hiring and in accommodation of employees. For example, every employer has a duty to accommodate when an employee requires an adjustment to his or her work environment or terms of employment in order to accommodate a need arising from an enumerated ground such as disability, family status or religion. When the duty arises, employers must make every reasonable effort to accommodate the employee up to the point of undue hardship.

The human rights regime in Canada and the provinces is a broad system informed by legislation and common law that seeks to ensure equal treatment for all individuals both in the workplace and outside of it. It is something that all employers need to be familiar with and proactive in protecting.

Thanks to *April Brousseau* for her foundational work.

Duty to Accommodate – The Undue Hardship Threshold and the Workplace

by Mark Edelstein

The Duty to Accommodate—Striking a Balance Between Employer Needs and the Obligation to Accommodate.

An employer's duty to accommodate the legitimate needs of employees from a human rights standpoint – whether based on religious belief, illness, disability or some other factor – has long been established. What's been difficult to establish is the extent to which employers must go to accommodate these needs. Employers often are under the impression that they need to demonstrate that it is virtually impossible to accommodate the employee in order to establish that accommodation would result in undue hardship for the employer, thereby relieving the employer of the accommodation requirement.

Over the last several years the Supreme Court has shifted towards a more balanced approach. In *Hydro-Quebec v. Syndicate des Employees de Techniques Professionelles st de Bureau d'Hydro-Quebec*[1] the court infused the undue hardship test with a renewed reasonableness standard. The case (this one out of Québec) is the latest example of a string of Court of Appeal and Supreme Court of Canada decisions – *Mulvihill v. Ottawa*[2], *Honda v. Keays*[3], *and Evans v. Teamsters*[4] – that reflect an unmistakable shift in judicial attitude towards a more practical and reasonable approach to the interpretation and application of the undue hardship threshold.

DUTY TO ACCOMMODATE BASED ON ILLNESS

In the *Hydro-Québec* case, the complainant employee had an employment history marked with many physical and mental health problems. These problems resulted in extensive absences from work. In the final seven and one-half years of her employment, she had missed 960 days of work.

The employer had adjusted the employee's working conditions on several occasions in an attempt to accommodate her limitations. These included actions ranging from assigning lighter duties to providing a gradual return to work following a depressive episode. None of the actions improved the complainant's ability to report to work regularly and she was eventually dismissed.

At the time of her dismissal, the complainant had been absent from work for over five months, the employer had obtained a psychiatric assessment that confirmed that the employee would not be able to work regularly without extended absences, and the complainant's own doctor had recommended that she stop working for an indefinite period.

The employee grieved the dismissal. Her grievance was dismissed by both the arbitrator and by the Québec Superior Court on appeal. The union appealed again to the Québec Court of Appeal and won its case, with the Court of Appeal stating that the employer had to prove that it was impossible to accommodate the complainant.

MORE MODERATE STANDARD EMERGES

The Supreme Court of Canada disagreed with the Court of Appeal's approach and allowed the employer's appeal. In a unanimous decision, Justice Deschamps stated that:

> *"What is really required is not proof that it is impossible to integrate an employee who does not meet a standard, but proof of undue hardship, which can take as many forms as there are circumstances."*

Justice Deschamps went on to state that:

> *" … the goal of accommodation is to ensure that an employee who is able to work can do so. In practice, this means that the employer must accommodate the employee in a way that, while not causing the employer undue hardship, will ensure that the employee can work. The purpose of the duty to accommodate is to ensure that persons who are otherwise fit for work are not unfairly excluded where working conditions can be adjusted without undue hardship."*

> *"However, the purpose of the duty to accommodate is not to completely alter the essence of the contract of employment, that is, the employee's duty to perform work in exchange for remuneration."*

The Court found that if an employee's condition hampers business operations or prevents an employee from working in the foreseeable future – even though the employer has tried to accommodate them – the employer will have satisfied the undue hardship test and the dismissal will be non-discriminatory.

[1] *Hydro-Quebec*, [2008] 2 S.C.R. 561

[2] *Mulvihill v. Ottawa,* 90 O.R. (3d) 285 (Ont. C.A.)

[3] *Honda v Keays*, [2008] 2 S.C.R. 362

[4] *Evans v. Teamsters Local No. 31*, [2008] 1 S.C.R. 661

ASSESS THE FACTS ON A CASE-BY-CASE BASIS

The Supreme Court of Canada's acknowledgement that proof of undue hardship can take as many forms as there are circumstances reaffirms that each case must be judged on its own merits – with the standard for proving undue hardship now far short of proving that accommodation is impossible. Recent decisions have reiterated the importance of context. Where providing accommodation would, for instance, result in safety risks that a reasonable employer could not accept, a refusal to accommodate meets the undue hardship threshold.[5]

For these reasons, consultations between your organization's human resources professionals and internal or external counsel can be invaluable in helping you assess the limits of any accommodation requirements, if and when such a situation arises.

[5] See *Simcoe (County) v. Ontario Public Service Union* (2009), 98 O.R. (3d) 523.

The *Accessibility for Ontarians with Disabilities Act* Customer Service Standard

by N. Wiliam C. Ross and Faren H. Bogach

WHAT IS THE ACCESSIBILITY FOR ONTARIANS WITH DISABILITIES ACT?

The *Accessibility for Ontarians with Disabilities Act*, 2005 ("AODA") came into force in June 2005. This legislation only affects businesses operating in Ontario. There is no similar legislation in the other provinces.[1] The AODA seeks to improve access to goods, services, facilities, accommodation, employment, buildings, structures and premises in Ontario by January 1, 2025.

The three "Accessibility Standards" that have been or will be issued under the AODA are:

- Customer Service (described below)
- Integrated Accessibility - regulation came into force on July 1, 2011 (deadlines for compliance are in phases)
- Built Environment (regulation not in force)

TO WHOM DOES THE AODA APPLY?

The AODA applies to every person and organization that:

- provides goods, services or facilities;
- employs persons in Ontario;
- offers accommodation;
- owns or occupies a building, structure or premises; or
- is engaged in a prescribed business activity or undertaking or meets such other requirements as may be prescribed by the AODA.

The AODA also applies to not-for-profit organizations, associations and charities.

WHAT IS THE CUSTOMER SERVICE STANDARD?

Employers have an obligation to take reasonable steps to accommodate employees with disabilities in accordance with the *Ontario Human Rights Code*. Similarly, the Customer Service Standard addresses the business practices and training required to provide goods and services to people with disabilities.

The Customer Service Standard has applied to designated public sector organizations since January 1, 2010. It will apply to all providers of goods and services with at least one employee (except federally regulated employers) as of January 1, 2012.

Under the Customer Service Standard, organizations are required, among other things, to:

- establish policies, practices and procedures governing the provision of goods and services to persons with disabilities, including provisions for assistive devices;
- provide notice of temporary disruptions in services usually used by persons with disabilities;
- provide ongoing training in connection with any changes to the organization's policies, practices and procedures;
- establish a process for receiving and responding to feedback; and
- ensure that service animals and support persons are not denied entry into an organization's facility.

HOW TO PREPARE FOR THE CUSTOMER SERVICE STANDARD?

If the organization has 20 or more employees, it is required to maintain documents containing the general policies, feedback processes and training materials developed in accordance with the Customer Service Standard. Documents relating to the feedback process must be provided to any person whenever requested.

Accessibility compliance reports must be filed annually.

WHAT ARE THE INTEGRATED ACCESSIBILITY STANDARDS?

General

The Integrated Accessibility Standards regulation combines accessibility standards for: information, communication, employment and transportation.

These standards include requirements for organizations to:

- develop policies to achieve accessibility;

[1] Section 8(3) of the *Yukon Human Rights Act*, outlines the duty to provide for special needs.

- prepare a multi-year accessibility plan (to be updated) outlining the strategy to prevent and remove barriers;
- provide training to all who participate in the organizations' goods services or facilities. This training is for employees, volunteers, persons who participate in the developing the organizations goods and services or facilities for the organization.

The standards will be phased in over time. The timelines are based on the specific part of the standard and on the type and size of the organization.

Information and Communications Standards

- This Standard seeks to ensure that information to and communications with customers can be provided in a format to accommodate people with disabilities.

Employment Standards

- This Standard aims to establish the means by which organizations are to include accessibility measures throughout recruitment and the employment process.

Transportation Standards

- This Standard focuses on making transportation (including busses, taxis and subways) accessible to people with disabilities.

WHAT ARE THE PENALTIES FOR FAILING TO COMPLY WITH THE AODA?

The AODA grants power to the Deputy Minister to appoint one or more inspectors with the responsibility of determining whether the AODA and its regulations are being complied with.

Directors and officers have an obligation to take reasonable care to prevent their corporation from committing an offence under the AODA. Directors and officers as well as the organization can be fined for failing to comply with the AODA.

Workplace Violence and Harassment: Employer's Duty to Protect Employees

by Jessica Eisen

Employees in Canada are protected against violence and harassment by several overlapping regimes. In some cases, violence or harassment in the workplace may constitute an offence under Canada's *Criminal Code*. In other cases, harassment or violence in the workplace may so interfere with the essential employment relationship as to constitute constructive dismissal at common law (see "Constructive Dismissal"). Violence and harassment in the workplace, however, also receive specific consideration in human rights legislation and in occupational health and safety laws. These regimes are the focus of this section.

HARASSMENT AS DISCRIMINATION

While precise statutory definitions vary, harassment is generally understood to be a course of comment or conduct which is known or ought to be known to be unwelcome. When harassment is based on a prohibited ground of discrimination, it may constitute a human rights violation for which an employer bears liability. As described in the section "Human Rights Regimes in Canada and the Provinces", prohibited grounds of discrimination vary slightly by jurisdiction, but generally include race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status and disability.

Many of Canada's human rights statutes expressly prohibit harassment, and the Supreme Court of Canada has held that harassment that is based in part on a prohibited ground may constitute discrimination, whether or not 'harassment' is specifically prohibited by the particular human rights statute in question.[1]

Employers may be liable not only for the conduct of their supervisors, but also for the conduct of other employees, particularly if the employer fails to respond promptly and diligently to allegations of discriminatory harassment. Employers may also be liable for failing to respond to complaints of harassment perpetrated by customers or clients who are external to the company or organization. Where harassment has been alleged in the workplace, it is therefore crucial that employers act quickly, take complaints seriously, and conduct an adequate investigation into all allegations. For questions regarding whether a workplace complaint constitutes an allegation of discriminatory harassment, or to ensure an appropriate response in the circumstances, it is advisable to consult legal counsel.

VIOLENCE AND HARASSMENT AS AN OCCUPATIONAL HEALTH AND SAFETY ISSUE

Canada's various provincial occupational health and safety laws and the Canada *Labour Code* create general duties on employers to protect the health and safety of workers; many jurisdictions also provide specific duties in relation to either harassment or violence or both.

Defining Harassment

Unlike human rights protections against harassment, occupational health and safety laws regarding harassment do not necessarily target conduct or comments based on a prohibited ground (although in some jurisdictions, such as the federally regulated workplace and in Manitoba, grounds are specified).

Defining Violence

Related to employer duties to protect employees against harassment, are employer duties to prevent violence in the workplace. Violence in occupational health and safety statutes is generally broadly defined, and includes threats as well as physical acts.

Employer Duties

An employer's specific duties with respect to workplace violence and harassment vary in accordance with the specific statutory and regulatory requirements in each jurisdiction. In some jurisdictions such as Saskatchewan and Nova Scotia, employers of workers in high risk professions, including security services, taxi services, or liquor sales, are singled out for legislative protection in respect of workplace violence. Generally, however, employers' duties in respect of workplace violence and/or harassment apply in any type of workplace.

Occupational health and safety laws often require employers to develop policies or procedures to address any risk of violence and/or harassment in the workplace. In developing these policies, employers should be cognizant that requirements to conduct risk assessments periodically, to consult with specified workplace committees and representatives, to take particular risk factors into account, and to provide for specified mea-

[1] *Janzen v. Platy Enterprises Ltd.* (1989), 59 D.L.R. (4th) 352 (S.C.C.)

sures and procedures, vary between legislative schemes. It is therefore very important that employers consult the particular statutes in the jurisdiction(s) where they operate to ensure that their policies, and the process by which they are created, comply with the relevant legislation.

Employer duties to respond appropriately to allegations of violence and harassment also vary by jurisdiction, and should be consulted both when developing policies and when responding to complaints and incidents. In most cases, an employer will be required to investigate allegations, and may be required to respond with modifications to their workplace policies where appropriate. In some jurisdictions such as Alberta, Nova Scotia, and Saskatchewan, employers are further obliged to refer workers exposed to workplace violence to health care professionals.

In most jurisdictions, employers are subject to statutory duties to warn workers of any specific risks they may face. In some jurisdictions such as Saskatchewan, Ontario, and Newfoundland and Labrador, this includes a duty to advise workers if they may be at risk of violence due to contact with an individual with a known history of violence. In all cases, this latter duty is limited by other legal provisions which may protect the privacy of the allegedly violent individual in question. It is therefore important for employers to seek legal advice in circumstances where a worker may be exposed to a known violent individual in order to ensure that their response accords with the appropriate legal requirements in the circumstances.

This section provides an overview of requirements that are common in the various regimes, and is not meant to be a comprehensive survey of the many various obligations on employers operating throughout Canada. In all cases, employers should consult the laws in the provinces where they operate in order to ensure that they provide their workers with the required protections.

Pay Equity Primer

by Les O'Connor

In Ontario, employers are required to establish pay equity in the workplace. Pay equity can be described as "equal pay for work of equal value", not "equal pay for equal work".

SYNOPSIS

The *Pay Equity Act*[1]

Ontario's pay equity rules are set out in the *Pay Equity Act*. The stated purpose of the Act is to "redress systemic gender discrimination in compensation for work performed by employees in female job classes". "Systemic discrimination" can be defined as a pattern of discrimination that results from pervasive, interrelated actions, policies or procedures.

In the context of pay equity, systemic gender discrimination refers to the systemic undervaluation of women's work simply because historically it has been, and continues to be, performed by women. The belief is that often the wages paid to the females performing these jobs are less than they would be if the positions had been filled by males. The *Pay Equity Act* is designed to address this issue and to ensure that men and women who perform work of equal value to their employer are paid the same.[2]

To Whom Does the Act Apply?

The *Pay Equity Act* applies to all public sector employers in Ontario that are not federally regulated and all private sector employers in Ontario, with ten or more employees, that are not federally regulated (s. 3(1)).

How Does the Employer Identify Systemic Gender Discrimination?

Under the Act, systemic gender discrimination in compensation is identified by undertaking comparisons between each female job class in an establishment and the male job classes in an establishment in terms of compensation and the value of the work performed (s. 4(2)). Compensation is defined as, "all payments and benefits paid or provided to or for the benefit of a person who performs functions that entitle the person to be paid a fixed or ascertainable amount" (s. 1(1)).

The Act requires that the process of comparison be gender neutral and that the comparison be made under the four main factors of skill, effort, responsibility and working conditions involved in doing the work (s. 5(1)). Male and female jobs of equal value must receive equal pay (s. 6).

An employer could, for example, compare the value of the work of a secretary, a traditionally female job, to the value of the work of a shipper, a traditionally male job. If the value to the organization is equal or comparable, the secretary must receive at least the same job rate as the shipper.[3]

How Does the Employer Achieve Pay Equity?

Any pay inequities exposed as a result of the comparison must be remedied, starting within a specific period of time (s. 13(2)(e)).

All public sector employers and private sector employers with 100 or more employees must develop a document known as a "pay equity plan" (s. 13). Smaller private sector employers may choose to develop a plan, but are not required to do so. In unionized workplaces, employers and unions are required to negotiate the applicable pay equity plan (s. 14(2)).

The plan must identify all job classes that have been compared, describe the "gender-neutral comparison system" used, and set out the results of the comparisons. With respect to all female job classes for which pay equity does not exist, the plan must describe how the compensation in those job classes will be adjusted to achieve pay equity and set out the applicable mandatory date on which the first adjustments will be made (s. 13(2)). The compensation is increased on each anniversary date of the first adjustments until pay equity is achieved (s. 13(4) and(5)). Once the plan has been prepared, a copy must be posted in the workplace (s. 10).

An employer is not permitted to reduce the compensation payable to any employee or reduce the rate of compensation for any position in order to achieve pay equity (s. 9(1)). Where, to achieve pay equity, it is necessary to increase the rate of compensation for a job class, all positions in the job class (including those held by men) shall receive the same adjustment in dollar terms (s. 9(3)).

[1] *Pay Equity Act*, R.S.O. 1990, c.P.7

[2] C. Elliott and S. Saxe, *Pay Equity Handbook*, Canada Law Book Inc. 1992 at p. 3

[3] http://www.payequity.gove.on.ca/index _ pec.html

Are There Any Exceptions?

There are some exceptions. The *Pay Equity Act* does not apply to prevent differences in compensation between a male and female job class if the employer is able to show that the difference is the result of:

(a) a formal seniority system that does not discriminate on the basis of gender;

(b) a temporary employee training or development assignment that is equally available to male and female employees and that leads to career advancement for those involved in the program;

(c) a merit compensation plan that is based on formal performance ratings and that has been brought to the attention of the employees and that does not discriminate on the basis of gender;

(d) the personnel practice known as red-circling, where based on a gender-neutral re-evaluation process, the value of a position has been down-graded and the compensation of the incumbent employee has been frozen or his or her increases in compensation have been curtailed until the compensation for the down-graded position is equivalent to or greater than the compensation payable to the incumbent; or

(e) a skill shortage that is causing a temporary inflation in compensation because the employer is encountering difficulties in recruiting employees with the requisite skills for the positions in the job class (s. 8(1)).

RELATED LEGISLATION

There are two other Ontario statutes that address issues related to pay equity, but not pay equity per se. They are the *Employment Standards Act, 2000*[4] *("ESA")* and the *Human Rights Code*.[5]

Under the *ESA*, employers are required to pay men and women at the same rate of pay when they perform substantially the same kind of work in the same establishment, their performance requires substantially the same skill, effort and responsibility, and their work is performed under similar working conditions. An example of two employees doing substantially the same kind of work might be two machine operators on the same line (s. 42(1)).

An exception is made when the difference in the rate of pay is made on the basis of a seniority system, a merit system, a system that measures earnings by quantity or quality of production and any other factor other than sex (s. 42(2)).

Under the *Human Rights Code*, every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status or disability (s. 5(1)). This includes the right to be paid equally.

This right is not infringed where the employer's requirement, qualification or factor is a reasonable and bona fide qualification because of the nature of the employment (s. 24(1)).

Thanks to *Zirka Jakibchuck* for her foundational work.

[4] *Employment Standards Act, 2000,* S.O. 2000, c. 41

[5] Ontario *Human Rights Code*, R.S.O. 1990, c.H.19

Unionized Versus Non-Unionized Workplace

by Mark Edelstein

Unionized workplaces are governed under "labour law," which is largely governed by specialized labour legislation. In a unionized environment the employment contract is between the employer and the union who acts as the bargaining agent of a group of employees. The terms of this relationship are set out in a collective agreement between the union and the employer. The employer must respect the union as the exclusive bargaining agent for the employees it represents. The employer must deal with the union on any matters subject to the collective agreement (which effectively means the employer cannot deal directly with individual employees). Disputes in unionized environments are usually heard by specialized labour relations boards.

Non-unionized workplaces are governed by "employment law." The employment contract in the non-unionized environment is between the employer and the individual employee and non-unionized employees deal directly with their employer in accordance with the governing employment contract and the common law.

While non-unionized workplaces are also subject to a range of legislation, the common law plays a much more important role. Most disputes in the non-unionized workplace (and particularly disputes regarding employee dismissal) are adjudicated in court.

THE LEGISLATIVE FRAMEWORK

At the federal level, both unionized and certain non-unionized work environments are governed by the *Canada Labour Code*, R.S.C. 1985, c. L-2. For non-unionized work environments, the federal Code only applies to federal works and undertakings such as railways, telephone, cable, radio and television broadcasting, air transport, interprovincial trade and commerce, as well as Crown corporations.

Most workplaces are governed by provincial law. Each province has its own legislation governing unionized workplaces and a range of other minimum standards and safety legislation that regulates all workplaces. In Ontario unionized work environments are principally governed by the *Labour Relations Act, 1995, S.O. 1995*, c. 1, Schedule A. All work environments in Ontario must meet minimum standards set out in the *Employment Standards Act, 2000*, S.O. 2000, c. 41.

BECOMING UNIONIZED

Most commonly, unionization occurs when a union becomes certified by a labour relations board as the exclusive bargaining agent for a specific bargaining unit. In order to be certified the union must demonstrate, in the manner established by the governing legislation, that it has the support of the employees in the proposed bargaining unit and that it meets other organizational criteria. A workplace can also become unionized if the employer voluntarily recognizes a union as an exclusive bargaining agent for a bargaining unit.

Once certified the employer must deal with employees through the union. This means the employer must deal with individuals appointed by the employees to speak on their behalf such as a bargaining committee, union stewards, and other union representatives. A certified union owes a "duty of fair representation" to all of the employees in the bargaining unit (including employees in the bargaining unit who are not union members). Most unionized workplaces do not require all employees to be members of the union, but most provinces (including Ontario) allow unions to require that all employees in a bargaining unit pay union dues.

COLLECTIVE AGREEMENTS

A certified union has the right to bargain with the employer in order to establish a collective agreement for the bargaining unit. Once the union is certified, the employer cannot change the terms and conditions of employment for its employees until a collective agreement has been established, until there is a lockout or strike, or pursuant to the arbitration provisions in the applicable legislation. This period is generally known as a 'statutory freeze period'. A certified union generally enjoys a 'grace period' within which it cannot be decertified or replaced by a competing union.

The collective agreement is a contract setting out the terms and conditions of employees in the bargaining unit. Once ratified, it is an enforceable and binding contract until it expires or a renewal agreement is reached, unless the legislation specifies otherwise. Most collective agreements are subject to re-negotiation on a pre-determined schedule. The terms

and conditions of employment in unionized workplaces vary from collective agreement to collective agreement. No term or condition of a collective agreement can diminish or take away certain minimum standards such as minimum wage levels, holiday pay, and human rights and health and safety protection. Generally disputes regarding the operation of the agreement are dealt with by specialized arbitration procedures.

TERMS OF EMPLOYMENT

In a non-unionized setting, the terms of employment are governed by an employment agreement between the employer and the individual employee or, where there is no such agreement, by the common law. As in a unionized workplace, no term or condition of an employment agreement can diminish or take away minimum standards set out in legislation.

GRIEVANCES AND TERMINATION

In a unionized work environment, grievances and complaints are handled in accordance with the collective agreement and the relevant labour legislation. In a non-unionized work environment, grievances and complaints are dealt with according to the employer's policies and/or terms of the employment agreement. In both cases, the manner in which grievances and complaints are addressed must comply with human rights legislation and other applicable laws.

Discipline tends to be addressed differently in unionized environments than in non-unionized workplaces. In a non-unionized work environment, the employer has no right to suspend an employee for misconduct except to the extent that it has reserved the right to do so by agreement with the employee, or through an employment policy provided to the employee. In a non-unionized workplace an employee can treat suspension as constructive dismissal. In contrast, in unionized workplaces collective agreements tend to contain progressive discipline provisions that specify the nature of offences that merit discipline (these usually include terms permitting suspension) and that expressly impose limits on how and when discipline may be imposed.

Termination is also handled differently in unionized and non-unionized workplaces. In a non-unionized workplace, employers can terminate employees, with or without cause, provided that they give the employee a reasonable notice period of termination, or pay-in-lieu thereof, as defined in the applicable employment legislation and at common law.

In a unionized workplace, most collective agreements require that the employer demonstrate just cause for a dismissal. This means most unionized employers cannot dismiss someone by simply providing notice. If the employer terminates an employee without cause, and there is a dispute, the employee is usually represented by the union in a specialized arbitration process governed by the terms of the collective agreement and applicable labour law. A finding of dismissal without just cause at a labour arbitration generally leads to an order for reinstatement with compensation.

In contrast, a non-unionized employee can sue an employee in court if the employer does not provide reasonable notice, but an employee can rarely obtain reinstatement as a remedy. The usual remedy for dismissal without reasonable notice is simply the reasonable notice period owed to the employee.

In any work environment however, no employer may discipline or terminate employees on grounds defined in applicable human rights legislation, nor can an employer terminate an employee for organizing a union.

Both unionized and non-unionized work environments are prevalent throughout Canada and employers, particularly those contemplating a corporate restructuring, amalgamation or merger, should be prepared to handle the complexities of dealing with both.

Technology Use and Privacy Rights

by John B.A. Wilkinson

In Canada, an employee's right to privacy exists but is limited – and to the extent the employee uses an employer's information technology assets when dealing with private matters, those limits may be significant.

A basic principle in Canadian employment law is that an employee has a reasonable expectation of privacy with respect to matters which are personal to that employee. Importantly, however, an employer has the ability by way of contract (including using work-place policies) to limit the scope of the employee's privacy interest (as long as the limitations themselves are reasonable).

In general, a reasonable expectation of privacy arises out of two factors. The first factor is that the relevant employee must himself or herself expect privacy at some level: this may be demonstrated by actions taken by the employee to keep the relevant information private. The second factor is that the relevant employee's expectation of privacy must be reasonable.

As with other legal issues, when considering the privacy of an employee's personal information, it is important to consider the particular jurisdiction in which the relevant employees are located. In this context, under Canada's federal system, employees of certain businesses are considered to be "federally-regulated" – and certain aspects of the privacy of the personal information of such federally-regulated employees are subject to and protected by Canada's federal *Personal Information Protection and Electronic Documents Act ("PIPEDA")*. Some Canadian provinces have legislation which is substantially similar to *PIPEDA*. As well, some Canadian provincial jurisdictions have statutes which recognize invasion of privacy as an actionable wrong.

In addition, in some Canadian jurisdictions without relevant privacy legislation, courts have been willing to accept that an alleged breach of privacy regarding an employees' personal information can be the basis of a legitimate legal action or, in certain circumstances, of a shield against an employer's discipline or other action regarding that employee.

As mentioned at the outset of this article, contractual limitations on an employee's reasonable expectation of privacy may be implemented by an employer. The employer may use – depending on the context – provisions of a collective bargaining agreement, provisions of individual employment agreements, or (usually) provisions in relevant work-place policies.

The work-place policies which may affect employee privacy issues may have many different titles and varied focuses. For example, privacy rights might be addressed in any or all of a company's *"Personnel Privacy Policy", "Email Use Policy"*, or *"Internet Use Policy"*. Another route through which an employer can address the use of company assets by employees is a "Records Management Policy": such a policy would establish clear rules regarding the collection, use, accessibility and disclosure of employees' personal information located on company information technology assets.

Such policies may also address the use – and potential abuse – of portable devices owned or leased by a company (such as laptops, cell phones and PDAs). As well, technological solutions (such as the use of click-through agreements to policies during internet access or the use of passwords) can be used by an employer to protect and regulate the information created, used, viewed and transmitted using office computers and portable devices.

Such policies should be clear and unambiguous. For example, if an employer does not want an employee to have a reasonable expectation of privacy over any information found on a company computer or portable device, this should be set out clearly in such a policy. As well, as with other workplace policies, in order for the policy to be effective, each employee should be required to acknowledge that he or she has read the relevant policy, has understood the policy, and has agreed to abide by the policy.

It is always important for an employer to understand the boundaries of its access to personal information of an employee. This arises in the context of disciplinary matters, personnel files, personal emails, and even the management of benefit plans. For example, an employer investigating alleged wrongdoing in a workplace should carefully limit the scope of any investigation which may involve viewing or collecting information which may be personal information of an employee. Also for example, the details of the use by an employee of a benefit plan provided by a third party are almost always a matter between the employee and the benefit provider – the employer should not (and in most cases will not be able to) access any of those personal details.

As described above, in Canada, while employers must respect legitimate privacy rights of employees, those rights may be effectively limited – and thus an employer may actively enhance its ability to manage personal use of corporate information technology assets

Ex-Patriot Employees—Some Canadian Tax Issues

by Maralynne Monteith

Part I

With our global economy and the need to make the best use of talented employees, employers are increasingly faced with the fact that it may appear to be more efficient to transfer an employee to work in Canada than to hire locally. The "Ex-pat" employee gives rise to a myriad of tax implications, both to the employee and the employer. These papers focus on some of the critical issues that should be addressed before making the decision to transfer an employee to work in Canada.

IMPLICATIONS FOR THE EMPLOYEE

Will the Employee Be Subject to Canadian Income Tax?

As a general rule, any individual who receives income from employment that is exercised in Canada is *prima facie* subject to Canadian income tax on that employment income. This is the case regardless of whether the individual is resident in Canada for income tax purposes.

Where the individual is not a resident of Canada, relief from Canadian income tax may be provided by the terms of a relevant income tax treaty between Canada and the individual's country of residence.

The threshold question that arises with an Ex-pat employee is whether the individual's move to Canada will cause the individual to become a Canadian resident, whether the individual will remain a resident in his usual country of residence or whether the individual will become a dual resident for income tax purposes.

Becoming Resident or Remaining Non-resident

Under Canadian law, for income tax purposes an individual must be resident in at least one country and may be resident in more than one country. Not surprisingly, it is easier to become a resident than to cease to be one for income tax purposes.

There are two ways for an individual to become a resident of Canada for income tax purposes.

The first is to be physically present in Canada for more than 183 days in any calendar year. This is a criteria imposed by statute and is often referred to as the "sojourner" rule.

The second is to become "ordinarily resident", a matter determined not by statute but by the common law. It is a question of fact and applied common sense which is reflected in summary form in the tie-breaker rules contained in Canada's income tax treaties. Essentially, a person is ordinarily resident where he has a permanent home, failing that, where the centre of social and business ties resides or, failing that, where he has his habitual abode.

If an Ex-pat employee crosses the threshold and becomes a Canadian resident, then that individual will become subject to Canadian income tax on his worldwide income. If the Ex-pat does not cross the threshold for Canadian residency, then the individual will only be subject to Canadian income tax on Canadian source income, including income from employment exercised in Canada.

Applicable Tax Treaty or No Tax Treaty

If the Ex-pat employee is initially a resident of a country that has not entered into an income tax treaty with Canada, then the possibility of dual residence arises. Dual residency raises the spectre that the individual will be subject to local income tax in more than one country, with the potential for double taxation. In these circumstances, particular care must be taken to ensure that the employment in Canada is structured so that the individual has only one tax residence.

If the Ex-pat employee is initially a resident of a country that has entered into an income tax treaty with Canada, then the terms of the treaty will impact on the determination of residence of the individual. Canada's tax treaties will not permit an individual to be a dual resident. This is done by providing tie-breaker rules.

The residency tie-breaker rules for individuals look to where the individual has a permanent home. If a permanent home exists in both countries, then the test moves on to where the individual's centre of vital interests resides. If vital interests reside in both countries, then the test moves on to where the individual has a habitual abode. If a habitual abode exists in both countries, then the test moves on to the country of citizenship. If the individual is a citizen of both countries or is not a citizen of either country, then the matter must be determined by the Competent Authorities of the two contracting states to the treaty.

Competent Authority determinations are time consuming and expensive. Therefore, the individual's employment in Canada should be structured to ensure that the individual is clearly

resident in only one country so that a Competent Authority determination does not become an issue.

Staying on Foreign Payroll

It is not uncommon, particularly if Canadian operations are in a start-up phase, for the Ex-pat employee to remain on a foreign payroll. If the individual is subject to Canadian income tax on income from employment exercised in Canada, then the individual will be required to pay Canadian income tax notwithstanding that foreign income tax may have been deducted at source from the individual's remuneration. This would give rise to a hefty tax burden unless arrangements are made to address this.

Staying on Foreign Benefit Plans

The Ex-pat employee will often be reluctant to lose participation in foreign benefit plans. Consequently, these foreign benefit plans have to be reviewed to determine whether the Ex-pat's employment in Canada will cause the employee to be ineligible to participate in the plan and if so, whether the plan may be amended to permit continued participation.

If the Ex-pat employee is subject to Canadian income tax on employment income earned in Canada, then, subject to any relieving provisions of an applicable tax treaty, the individual will also be subject to the Canadian income tax system on benefits that accrue in respect of employment exercised in Canada under a benefit plan, whether the plan is based in Canada or elsewhere.

Therefore, if continued participation is permitted, each foreign benefit plan must be reviewed to determine what type of benefit plan it will be considered to be under Canadian income tax legislation. Canada has a closed system to deal with benefit plans and specific tax rules that apply to the different types of plans, as defined in the taxing legislation. For example, 401(k) plans in the United States may be any one (or more) of several types of plans under Canadian taxing legislation with entirely different Canadian income tax implications to the Ex-pat employee.

An examination of the foreign plans will reveal whether the continued participation by the Ex-pat employee will have adverse implications to the employee and whether steps may be taken to mitigate those implications.

Staying on Foreign Social Security

Canada has entered into Social Security Agreements with most of its major trading partners to facilitate the temporary transfer of employees between Canada and those countries. Generally, these agreements allow an Ex-pat employee working in Canada to remain on the social security system in the individual's home country for up to 5 years. Whether this option makes sense should be examined for each potential Ex-pat employee.

Part II

IMPLICATIONS FRO THE EMPLOYER

Carrying On Business in Canada

If a non-resident enterprise carries on business in Canada, it is *prima facie* liable to Canadian income tax on the profit attributable to that business. The threshold that must be met for a non-resident enterprise to be considered to carry on business in Canada for income tax purposes is relatively low.

When planning to have an Ex-pat employee engage in employment activities in Canada while remaining an employee of a foreign enterprise, those activities should be examined to determine whether the individual's activities would cause the non-resident employer to meet the threshold of carrying on business in Canada.

If the foreign enterprise is resident in a country that has entered into a tax treaty with Canada, then the foreign enterprise will be protected from Canadian income tax unless it carries on business in Canada through a permanent establishment located in Canada. If there is no applicable income tax treaty, then the foreign enterprise is liable to Canadian income tax even if no permanent establishment is created in the course of carrying on business in Canada.

Creating a Permanent Establishment in Canada for Income Tax Purposes

For those foreign enterprises resident in a treaty jurisdiction, care still must be taken to ensure that the activities on the Ex-pat employee do not unnecessarily cause a permanent establishment to arise. This can be one of the most common and serious exposures with senior level Ex-pat employees who retain authority to contract for the foreign enterprise.

The applicable tax treaty will set out the circumstances under which a permanent establishment will arise for income tax purposes. Those rules should be examined in the context of the functions to be performed by the Ex-pat employee to ascertain if those functions can be modified to prevent a permanent establishment from being created.

Source Deductions and Reporting

Under Canadian law, the person paying employment income that is subject to Canadian income tax is *prima facie* required to make source deductions on account of income tax, Canada pension plan contributions and employment insurance and

to report that income and source deductions on prescribed forms filed with the Canada Revenue Agency with copies to the employee.

Canadian employee source deductions and reporting requirements apply regardless of the residence of the person paying the income from employment and regardless of whether the payor is the actual employer of the individual recipient.

In addition to source deductions that relate to income from employment exercised in Canada, Canada also imposes another source deduction on account of Canadian income tax on foreign enterprises that are paid fees by a Canadian resident for services rendered in Canada.

This is a refundable source deduction of 15% of the gross fees related to the services rendered in Canada. It applies even if the foreign enterprise is ultimately not liable to Canadian income tax, for example, where the foreign enterprise is resident in a treaty jurisdiction and does not carry on business in Canada through a permanent establishment located in Canada. In that case, the amount may be claimed as a refund upon the foreign enterprise filing an income tax return in Canada in respect of the taxation year in which the fees were paid.

If the proposed activities of the Ex-pat employee relate to providing services on site in Canada, then the implications under this 15% source deduction rule need to be considered.

Payroll Taxes

Payroll taxes are imposed by many of Canada's provinces and are typically used to assist in the funding of health care. For example, the Province of Ontario imposes Employer Health Tax ("EHT") on employers with "total Ontario remuneration" over CAD$400,000. For Ontario EHT, "total Ontario remuneration" requires employees to report to or be paid from a permanent establishment located in Ontario. The relevant definition of "permanent establishment" is broader than the concept as defined in Canada's tax treaties.

Therefore, the proposed activities and structure of the Ex-pat employee's conduct in Canada needs to be examined to determine whether payroll tax issues need to be addressed.

Goods and Services Tax and Harmonized Sales Tax

Goods and Services Tax ("GST") is Canada's federal sales tax. It is similar to the VAT taxes imposed in Europe. It applies at the rate of 5% to goods and services consumed in Canada.

A non-resident enterprise will generally be brought into the GST system if it supplies goods or services in the course of carrying on business in Canada. Carrying on business in Canada for GST purposes is a different test than carrying on business in Canada for income tax purposes.

Canada's tax treaties do not protect foreign enterprises from GST. Whether a foreign enterprise is subject to the GST system does not depend upon whether the foreign enterprise has a permanent establishment in Canada.

Several provinces, including Ontario, have harmonized their provincial sales tax systems with GST.

If the Ex-pat employee is to be engaged in some element of providing goods or services that are to be consumed in whole or in part in Canada, then the GST and harmonized sales tax ("HST") implications of that individual's activities need to be reviewed to determine whether it is possible to meet the business objectives of the foreign enterprise without bringing it into the GST/HST systems.

Planning Points

Part of good planning in advance of sending an Ex-pat employee to Canada is to:

Examine what functions the foreign enterprise wants performed in Canada;

a) Examine what functions the foreign enterprise wants performed in Canada;

(b) Ascertain if those activities cause the foreign enterprise to carry on business in Canada for income tax or GST purposes;

(c) Ascertain if those functions cause there to be a permanent establishment under an applicable income tax treaty or under payroll tax legislation;

(d) If a permanent establishment is essential, consider whether the foreign enterprise and the ex-pat employees should be structured using a Canadian corporation or a branch of the foreign enterprise; and

(e) Determine if the functions can be modified to minimise the exposure of the foreign enterprise to the Canadian tax systems while maintaining the business objectives of the foreign enterprise.

SUMMARY

Engaging an Ex-pat employee does raise Canadian tax implications for both the employee and the employer but many potential exposures can be mitigated if they are addressed appropriately prior to the transfer.

Employment Law Issues Arising from Bankruptcy and Insolvency

by Albert G. Formosa, Krista R. Chaytor and Rachel Waks

In Canada, a company experiencing financial difficulties can obtain protection from its creditors under the *Bankruptcy and Insolvency Act*[1] ("BIA"). An insolvent company with claims totalling more than $5 million can obtain creditor protection from the court under the *Companies' Creditors Arrangement Act*[2] ("CCAA"). The CCAA is akin to Chapter 11 of the *U.S. Bankruptcy Code*. Both the BIA and the CCAA are federal statutes that apply across Canada.

BANKRUPTCY, THE BIA AND THE *WEPP*

The BIA offers a comprehensive code to deal with the challenges faced by companies and individuals who are insolvent. When a company files for bankruptcy under the BIA, its assets vest into a trustee and are liquidated – this is the end of the company. Employees are laid off, and although some may find employment with the purchasers of the company's assets, many do not.

While this may sound (and is) grim, employees in this situation are not without relief: unpaid compensation and severance pay benefit from special treatment in the employer's bankruptcy. Employees can receive payment for a certain amount of unpaid wages under the federal *Wage Earner Protection Program* ("WEPP"), and they can obtain security for unpaid wages (subject to a maximum) under the BIA. These protections are reviewed below.

Employee Claims: Security and Preference

The BIA contains a fixed distribution scheme. According to this distribution scheme, secured claims (that is those claims that are secured by the assets of the debtor) get paid first, followed by preferred claims (as set out in the BIA) and unsecured claims. Preferred claims do not get paid until all secured claims have been satisfied, and unsecured claims do not get paid until all preferred claims have been paid.

Secured Claim for Unpaid Wages (excluding severance or termination pay)

Employees benefit from a secured claim for unpaid wages earned during the six months prior to the date of the employer's bankruptcy, up to a maximum of $2,000 per employee. Wages include commissions and vacation pay, but exclude severance or termination pay (i.e. notice entitlement). The security applies to the current assets of the debtor (meaning cash or cash equivalents, inventory or accounts receivable, or the proceeds from any dealing with those assets) only, and not to the other assets or real property of the debtor.

Therefore, an employee with an unpaid severance entitlement in the amount of $3,000 and unpaid wages in the amount of $1,500 would have a secured claim in the amount of $1,500 (which gets paid first in the bankruptcy), and an unsecured claim in the amount of $3,000 (which gets satisfied last in the bankruptcy).

Preferred Claim for Unpaid Wages (excluding severance or termination pay)

In the event that the company has insufficient current assets to secure a claim for unpaid wages (up to a maximum of $2,000), an employee can also rely upon the preference granted to claims for unpaid wages under the BIA.

The preference applies to unpaid wages earned during the six months prior to the date of the employer's bankruptcy. Wages include commissions and vacation pay, but exclude severance or termination pay.

This preference is not in addition to the secured claim – i.e. the employee receives protection for unpaid wages in the form of either a secured claim or a preferred claim (or a combination of both) for up to $2,000 only.

Unsecured claims

Employee claims for unpaid wages in excess of $2,000, for wages earned more than six months prior to the date of the employer's bankruptcy, and for severance or termination pay are treated as unsecured claims. Employees must therefore file a proof of claim as unsecured creditors.

These unsecured claims will be paid only if there is money available for distribution after secured and preferred claims have been satisfied. Unsecured claims are usually compromised, meaning that the claimant receives less than 100% of the value of the claim.

THE *WEPP*

The WEPP is a relatively recent federal attempt to protect em-

[1] *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3

[2] *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36

ployees of bankrupt companies. Under the WEPP, employees are entitled to make a claim for: (1) unpaid wages, including commissions and vacation pay, earned during the six months prior to the date of the employer's bankruptcy or receivership; and/or (2) severance or termination pay relating to employment that ended during the six months prior to the date of the employer's bankruptcy or receivers, up to a collective maximum of $3,000 (or an amount equal to four times the maximum weekly insurable earnings under the *Employment Insurance Act*, whichever is greater). Where the WEPP and the BIA both provide coverage for the same amounts, however, the employee cannot recover under both.

Unless circumstances beyond the control of the applicant necessitate a longer period, the claim must be made within 56 days of the latter of: the termination of employment; the employer's bankruptcy; or the appointment of a receiver over the employer. Employees do not have to wait for the bankruptcy proceedings to conclude before they receive compensation.

After an employee receives his or her entitlement from the government pursuant to the WEPP, the employee can no longer claim this amount from the employer. In other words, the employee cannot recover twice. The Crown has the ability to step into the shoes of the employees to claim under the BIA to recover those amounts it paid to the employees under the WEPP.

Conclusion

An employee's position in the event of the bankruptcy of his or her employer depends on a number of factors, including: the value of the employee's claim; the cash in the employer's estate available for distribution; and the quantum of secured claims (which are paid before preferred and unsecured claims).

While employees are in a relatively favourable position in comparison to other unsecured creditors, often they will not be made whole either by operation of the BIA or of the WEPP. It is important for employees to be pro-active and to obtain as much information as possible from their union and human resources representatives, the company and the government. Employees should also consider retaining legal counsel to ensure that they maximize their recovery.

INSOLVENCY AND THE CCAA

The CCAA is not like other bankruptcy and insolvency statutes: its objective is to allow the company to restructure its affairs and emerge as a going concern. To foster this objective, the CCAA, among other things: stays all claims and actions by creditors against the debtor company for a period of time; allows the debtor company to terminate certain contracts that are not beneficial to the company; and allows the debtor company to propose a plan to its creditors to restructure its debts and obligations. The debtor company continues to operate during the reorganisation. Once a plan of compromise and arrangement has been accepted by the company's creditors and approved by the court, the debtor company emerges from CCAA protection with a (largely) blank slate.

Although the end result is attractive, navigating a company through insolvency is not an easy task. In addition to operating the company through insolvency and putting forward a plan for the reorganisation for the company's affairs—all under the watchful eye of the court, the company must look after its employees. After all, their continued support is necessary to ensure the continued operation of the company, during and after restructuring.

While the concerns of an insolvent employer are multi-faceted, we focus here on two important issues: the terms and conditions of employment during the time period in which the company is negotiating a restructuring plan with its creditors and the personal liability of directors for unpaid employee wages.

Terms and Conditions of Employment During Insolvency

Insolvent companies are given broad latitude under the CCAA to restructure the company's affairs. This includes the termination of employment contracts and the permanent or temporary lay-off of employees. Conversely, employers can usually establish a plan for the retention of key employees and pay them bonuses as part of that plan.

Under certain circumstances a court may sanction the suspension of an insolvent employer's obligation to make special payments to cover a pension plan deficit during the restructuring period.

Employers cannot, however, unilaterally amend or modify collective bargaining agreements, which continue to apply during the restructuring. To the extent that employees report for work after the company has filed for and received protection under the CCAA, the employer must pay them their wages and benefits and current service pension contributions must be made,

as provided for under the collective agreement.

Those employees not subject to a collective agreement must also be given their agreed upon compensation if they continue to work after the company receives protection from its creditors under the CCAA. Indeed, the CCAA specifically states that no creditor shall be forced to extend credit to the insolvent company after the company is granted protection under the CCAA, subject to a limited exception for "critical suppliers".

Director Liability for Unpaid Employee Wages

It seems trite to say that employees who are not being paid are unlikely to continue reporting for work. Without skilled and experienced employees, an insolvent company is unlikely to be able to meet the demands of its clients and customers. If this is not enough, however, insolvent companies should be mindful of unpaid employee wages as a way to protect and retain its directors.

As a matter of law, employees can look to the directors of the company for unpaid wages. In the case of a federally incorporated company, the *Canada Business Corporations Act* provides that employees can claim up to six months of unpaid wages from the directors of the company. In the case of an Ontario company, the *Ontario Business Corporations Act* states that employees can claim up to six months of unpaid wages and 12 months of vacation pay from the directors. The company's directors are personally liable to pay these amounts to the employees, subject to certain limitations set out in those *Acts*.

Depending on the terms of the order granted by the court to allow the company to operate under the CCAA, these employee claims against the company's directors may be stayed. However, this is not always the case and there remains a risk for directors. From the company's perspective, therefore, it is important to give special consideration to unpaid employee wages and to be open about these liabilities with the company's directors.

Conclusion

Employees with unpaid wages or pension claims become creditors of the company. As creditors, employees have a vote in the manner in which the company will restructure its affairs. Depending on the size and number of outstanding wage claims, employees may well be in a position to block a plan for restructuring that does not meet their needs.

A successful restructuring is therefore contingent upon cooperation and compromise on the part of all of the insolvent company's stakeholders, including employees. By being aware of the company's options vis-à-vis employees in the event of insolvency, the employer can choose the path that is the most beneficial for the company as a whole for the future.

Thanks to *Peter Biro and Catherine Powell* for their foundational work.

Special thanks to *Kristi J. Collins, Associate* for her contributions.

Employee or Independent Contractor—Canadian Factors and Advantages and Disadvantages

by John B.A. Wilkinson, Krista R. Chaytor and Maralynne Monteith

In Canada, what are the factors that determine whether a worker is an employee or an independent contractor? And what are the advantages and disadvantages of being an employee versus an independent contractor from the perspective of the individual and the corporation?

WHAT ARE THE FACTORS THAT DETERMINE WHETHER A WORKER IS AN EMPLOYEE OR AN INDEPENDENT CONTRACTOR?

Determining whether or not a particular working relationship constitutes an "employment" relationship or an "independent contractor" relationship is of central importance in Canadian employment law because each relationship has different rights and obligations.

In 2001, the Supreme Court of Canada considered the appropriate test for determining whether a worker is an employee or an independent contractor in *671122 Ontario v. Sagaz Industries Canada Inc.*[1], Justice Major, writing for the majority, noted, "there is no conclusive test which can be universally applied to determine whether a person is an employee or an independent contractor." The court stated that the decision maker must examine all aspects of the relationship between the parties.

Case law is consistent that no one factor is determinative of the relationship of employer/employee or hirer/independent contractor. Indeed, the test may vary from regime to regime. But generally, the four major factors (described below), taken together, suggest which arrangement is likely to be present.

The four major factors that are generally looked at to determine whether someone is an employee or an independent contractor are: (1) control; (2) ownership of tools; (3) chance of profit/risk of loss; and (4) integration. Each of these factors are discussed below:

Control

A key factor is the degree or absence of control exercised by the employer. Employment relationships imply some supervision or control over the worker. The question is not whether the alleged employer exercises control over the worker, but whether they have the right to exercise control. Generally, control is determined whether the worker has the right to decide on the time, place and manner in which the work is to be done. The "degree" of control is a factor of whether the worker, among other factors:

(a) works mostly on their own;

(b) is free to accept or refuse other work;

(c) is required to work or attend the hirer's place of business; and

(d) can control their hours of work.

Ownership of Tools

In an employer-employee relationship, the employer generally supplies the equipment and tools required by the employee. In addition, the employer covers the following costs related to their use: repairs, insurance, transport, rental, and operation.

In an independent contractor relationship, workers generally supply their own equipment and tools and cover costs related to their use. When workers purchase or rent equipment or large tools that require a major investment and costly maintenance, it usually indicates that they are self-employed individuals, because they may incur losses when replacing or repairing their equipment.

Chance of Profit/Risk of Loss

Generally, in an employer-employee relationship, the employer also generally covers operating costs, which may include office expenses, employee wages and benefits, insurance premiums, and delivery and shipping costs. The employee does not assume any financial risk, and is entitled to his full salary or wages regardless of the financial health of the business.

If the worker has a financial investment in the business over and above providing labour, this is considered a strong indicator that an independent contractor arrangement exists. There is no guarantee of a steady income because the self-employed individual's income depends on the results achieved by the end of the contract. Unlike an employee, whose weekly salary is constant, an independent contractor's income fluctuates with the amount of work they complete.

[1] *671122 Ontario v. Sagaz Industries Canada Inc.*, [2001] S.C.J. No. 61.

Integration

Another factor is the integration of the employee's work into the employer's business. The question to determine is whether the worker is an intrinsic part of the organization, or merely ancillary to it. Generally in an employee-employer relationship, a worker is employed as part of the business and his/her work is done as an integral part of the business.

In an independent contractor relationship, an individual's work although still done for the business, is ancillary to the business.

Indications of an Independent Contractor Relationship

While no one factor is determinative of the nature of a working relationship, the following factors tend to indicate an independent contractor arrangement:

(a) a contract indicating a hirer/independent contractor relationship. Please note that while a written contract between the parties attesting to the form of the relationship will assist a court, this is not a determinative factor, as the court will look past the contract to the true character of the relationship;

(b) no exclusivity of employment;

(c) remuneration is by reference to the sales or the billings of the worker;

(d) submission of an invoice by the worker to the hirer for payment for services rendered;

(e) the worker charges GST/HST;

(f) the worker is not paid if no services are rendered;

(g) the worker pays for any expenses he or she incurs during the performance of his or her work such as paying rent for the use of office space or equipment;

(h) the worker owns the tools and equipment required for the job;

(i) the absence of any restrictions on the hours of work and vacation time;

(j) no vacation pay or bonuses;

(k) the worker is not required to report to the hirer's premises;

(l) the worker is not required to perform the services personally; he/she may subcontract to a third party;

(m) the hirer does not supervise the worker's activities;

(n) the contract between the worker and the hirer is for a limited period of time; or

(o) the contract is between the hirer and the corporation and the worker is an employee or independent contractor of the corporation.

Indications of an Employer/Employee Relationship

Again, while no one factor is determinative of the nature of a working relationship, the following factors tend to indicate an employer-employee relationship:

(a) no written contract between the parties indicating a hirer/independent contractor relationship;

(b) the worker works exclusively for a particular hirer;

(c) the hirer pays any expenses incurred by the worker;

(d) the worker is paid a salary or hourly wage, rather than a percentage of sales;

(e) the worker receives payment without reference to his/her performance;

(f) the hirer controls and supervises the worker's duties;

(g) the hirer sets the working hours;

(h) the hirer provides the worker with all required tools and equipment;

(i) the provision of a pension or retirement savings plan;

(j) the provision of group benefits to the worker, including life insurance coverage, extended health and dental benefits, and long-term disability;

(k) the payment of a bonus to the worker based on the performance of the hirer's business;

(l) the payment of vacation pay;

(m) the worker must report to the hirer's premises on a regular basis;

(n) the worker does not charge GST/HST;

(o) the services of the worker are performed on an indefinite basis; or

(p) the services of the worker are being performed personally.

What are the Advantages and Disadvantages of Being an Employee Versus an Independent Contractor from the Perspective of the Individual and the Corporation?

The main advantages of the independent contractor relationships to the independent contractor are:

(a) the potential for greater flexibility in setting their working hours. An employee's hours, by contrast, are generally set for them by the employer; and

(b) with regard to income tax, an independent contractor can deduct from self-employed earnings certain business expenses. By contrast, employees have a much narrower range of deductions available to them. Furthermore, an independent contractor may be able to incorporate and take advantage of lower corporate tax rates.

The main advantages of the independent contractor relationships to employers are:

(a) costs, particularly administrative costs, are lower as: payroll taxes, Canada Pension Plan and Employment Insurance do not have to be withheld or remitted;

(b) an employer/employee relationship is subject to relevant Employment Standards legislation, which covers a myriad of topics including minimum wage, hours of work, vacation, health and safety, benefits and mandatory deductions; and

(c) the termination obligation of the hirer is limited to the contract terms. Therefore, there is no need to provide the worker with notice of termination in accordance with Employment Standards legislation or, as long as the contract terms are clear, common law principles.

These advantages to the hirer largely correspond to disadvantages endured by the contracted worker. For instance, independent contractors do not have access to employment standards and other related legislation. Employment standards legislation establishes a minimum protection of rights which cannot be undermined by an employment contract. These guaranteed rights can only be improved upon by the parties within an employment relationship.

Some of the obligations of an employer in an employer-employee relationship are:

(a) *Income Tax Deductions.* The employer must deduct from their employee's wages and remit income tax to the Canada Revenue Agency (CRA). Failure to collect and remit, even if the employer honestly believed the employee was an independent contractor, can result in a monetary penalty. Additionally, directors of an employer that is a corporation can be held to be personally responsible for the corporation's failure to make requisite source deductions.

(b) *Employment Insurance*. The same rules apply as for income tax deductions, including directors' liability. An independent contractor may receive payments without deductions that would otherwise be required if the individual were an employee.

(c) *Canada Pension Plan*. The same rules apply as for employment insurance deductions, including directors' liability, although the penalties for failure to comply differ

(d) *Workplace Safety and Insurance/Workers' Compensation.* Amounts payable for Workers' Compensation only have to be paid in the case of an employee. Failure by an employer to pay can result in the employer having to pay an additional amount in the situation of an injured worker. Note that certain Workplace Safety and Insurance / Workers' Compensation legislation uses the term "independent operator" rather than independent contractor. Usually, the test used to distinguish an independent operator from a worker is the "organization test" which casts a broader net than, say, would be the case in the context of making a determination of employee for purposes of source deductions and premium payments under the *Income Tax Act*, Employment Insurance and Canada Pension Plan.

(e) *Employment Standards Legislation* If an independent contractor, the relationship is governed by the agreement between the parties and the independent

contractor is not protected by the provisions of this Act.

As the preceding demonstrates, the determination of whether a worker is an employee or an independent contractor (or independent operator, in certain Workplace Safety and Insurance/ Workers' Compensation regimes) is an important and complex matter which often becomes an issue only after-the-fact based and is determined on very specific facts – many of which could have been established in advance with forethought and planning.

Employment Aspects of Mergers and Acquisitions

by John B.A. Wilkinson and Carole McAfee Wallace

Ignoring or minimizing the importance of employment and labour aspects of a merger or acquisition can be very costly. A number of employment and labour issues should be considered early on when contemplating a transaction of any size. If these issues are not properly canvassed, each might result in significant costs on or after the closing of the transaction.

Initial considerations are the jurisdiction(s) in which personnel are located and whether or not any of the personnel are unionized. If there are unions involved, detailed attention should be paid to the relevant collective agreements, labour legislation, arbitral or other decisions which might interpret a collective agreement, and the history of the employer-bargaining unit relationship. In particular, labour legislation in Canada includes successor employer rules.

Extensive due diligence regarding employment matters is critical in preparation for potential transactions, with a focus on outstanding employment litigation and labour relation issues (such as ongoing or pending collective bargaining or grievances), history of union certification and de-certification (and attempts at same), and ongoing and resolved human rights complaints.

Another issue that must be addressed in the context of a merger or acquisition is the quantification of a target employer's severance obligations. In particular, collective agreements, employment agreements, independent contractor agreements, and relevant employment standards legislation must be analyzed in the context of local laws in order to estimate the total severance obligations being assumed by a newcomer to the business. Employment at will is foreign to Canadian jurisdictions and Canadian employers have significant severance obligations to their personnel – pursuant to minimum standards in legislation, and possibly greater obligations pursuant to common law court decisions or in contracts. In particular, if there is to be downsizing as part of a merger or acquisition, there will be a short-term cost which might be factored into a purchase price (if relevant) and into move-forward business plans. For example, employment standards legislation in Canadian jurisdictions includes successor employer provisions which stipulate that an entity which acquires a business will assume at least all of the basic statutory obligations of the former employer in relation to the business' employees – and the employees have access to government agencies to enforce the "new" employer's assumed obligations (which range from accumulated severance obligations to accrued and unpaid vacation entitlement). In addition, some Canadian jurisdictions have super-severance obligations when an employer has a large work force or conducts a mass severance: this risk should be assessed and quantified. Finally, individual employment contracts should be reviewed to determine whether the contemplated transaction itself might trigger a special obligation to one or more employees.

In performing due diligence, there should be consideration of the status of personnel files: are the files complete?; do employment agreements exist?; do existing agreements address (and establish with certainty) severance obligations?; do employment agreements address confidentiality and non-competition/non-solicitation issues adequately?; do human resources policies exist?; are those policies compliant with relevant laws and with policies of the acquisitor?; have the policies been properly incorporated into each employee's relationship with the employer?

With respect to benefits, a participant in a transaction should consider the extent and content of existing benefit plans – as well as historical and prospective obligations in relation to those plans. Such plans may include matters such as health care coverage (which supplements Canada's governmental medi-care system), short-term or long term disability coverage, and pensions.

Some employers are subject to particular statutory regimes which should be considered, including workers' safety insurance, occupational health and safety regulation, pay equity plans, and (in some instances) personal information privacy legislation.

If a transaction involves a trustee-in-bankruptcy or a receiver, special considerations come into play including the authority of the vendor and the status of employment-related government remittances (such as income tax, employment insurance premiums and Canada Pension Plan contributions); these and other issues should be very carefully considered in such situations.

The preceding sets out a short synopsis of issues which can arise in the context of a merger or an acquisition – issues which any lawyer ignores at the peril of the client.

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