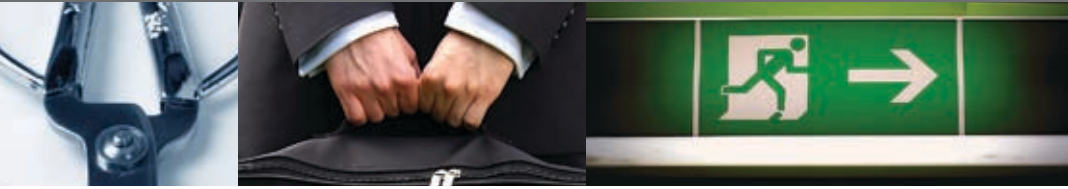


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on record

EMPLOYMENT
& LABOUR
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Economic chaos or an opportunity to regroup?

by Richard Smith

As companies throughout Alberta face an unprecedented combination of adverse economic circumstances, management and human resources personnel are confronted with many tough decisions about appropriate staffing levels, “right sizing” at a minimal cost and alternative steps that may balance short-term needs against longer term planning.

With commodity prices at low and fluctuating levels, a questionable royalty regime and slashed exploration budgets, it would seem inevitable that layoffs and cuts would be forthcoming. In many sectors, that has already happened (e.g. billions worth of oilsands projects have been suspended or cancelled), but it may get far worse before it gets better. It has been reported by Statistics Canada that Alberta’s economy has dropped 48,000 jobs since October of 2008, including 15,000 in March of 2009.

On the other side of the coin, employers are sensitive to the fact that we were in a drastic labour shortage only months ago (or so it seems). Indeed, many pundits are warning that when the economy returns, the labour shortage will return.

How then should an employer position the company to balance these competing interests? What can it do legally, and what risks are associated with each strategy? Will the employer’s cost-cutting exercises be implemented in a manner that reduces risks to the organization, while

avoiding the creation of a hostile or uncertain work environment to which employees may not return? Perhaps it is time to “cut some fat” or use the economic times as a rationale for making tough decisions relating to employees who are not a long-term fit. How important is the organization’s ongoing retention and recruitment plan, and what role will that plan play in the right-sizing exercise?

In reality, the employer has a number of tools at its disposal to deal with these difficult times. Some strategies are tried and true, but may not fit the current economic model. Other alternatives contain risks that would normally result in employee unrest or lawsuits but which (nevertheless) seem to be acceptable to employees whose top goal is to stay employed.

This edition of our *Employment & Labour On Record* Newsletter is designed to highlight and briefly describe some alternatives and some pros/cons associated with such alternatives.

Although the courts have made it clear that each individual circumstance will be assessed on its own merits, there are some general principles and comments that apply to most situations. Accordingly, these articles are intended to provide some thought-provoking alternatives, and to highlight some concerns or risks associated with those alternatives. We are hopeful that this material will provide some guideposts for discussion and a sense of direction for an organization that finds itself at a crossroad.

Tough

By Bob Graham

Introduction

Over the past year, circumstances have changed dramatically for employers in Canada. In the spring and summer of 2008, the economy was still booming and the primary concern for many employers was how to attract and retain employees. Since then, the economic downturn has altered the landscape significantly. Instead of trying to attract and retain employees, many employers are now focused on reducing employee-related costs and taking other steps to preserve their businesses.

Given that employees' salaries are typically one of the most significant costs for an employer, it is not surprising that many employers are considering reductions in salaries or hours, or outright terminations, for many of their employees. There are risks to employers in taking such steps, however. There are also a number of strategies that employers can implement in these difficult economic times to reduce employee-related costs without exposing themselves to unnecessary risks of litigation. The purpose of this article is to identify some of the risks faced by employers, and to set out strategies for employers to minimize those risks.

Terminations During an Economic Downturn

The first reaction of many employers in an economic down turn is to terminate employees as a cost reduction measure. While such terminations may be economically necessary, terminating an employee for financial reasons does not amount to just cause. Moreover, the risks of terminating an employee without just cause during an economic downturn are greater than during a period of economic growth.

For employees who executed a written employment agreement with a properly drafted termination clause at the commencement of employment, the risk of termination is no greater for an employee than during a period of economic growth. The severance entitlement of such an employee is set out in the employment agreement, and there is certainty for both sides.

decisions in tough times

Most employees, however, do not have a written employment agreement with a properly drafted termination clause. Accordingly, the severance obligations of an employer for such employees will be governed by the common law.

A terminated employee's common law severance entitlement is determined by looking at a number of factors in each individual case, including the employee's age, length of service, salary, education and position with the former employer. All of these factors (and others) are important because they all have a direct impact on the terminated employee's ability to find comparable alternative employment. In all circumstances where there is no written employment agreement with a properly drafted termination clause, the most important factor in determining an employee's common law severance entitlement is the *length of time* it is likely to take the employee to find comparable alternative employment following his or her termination.

In periods of economic growth, such as what Alberta has experienced over the past decade or so (until very recently), terminated employees frequently were able to find comparable alternative employment very quickly following a termination, often in a period of days or weeks. Employers recognized this, and frequently offered severance payments to a terminated employee that were far lower than what the employee might otherwise be entitled to at common law. Employers could do this, confident in the belief that the employee would be able to quickly find another comparable job and therefore mitigate his or her damages (and by extension, the employer's obligations towards that employee).

With the crash in the economy, things have changed significantly. The length of time that it will take most employees to find comparable alternative employment is significantly longer during an economic down turn, for the simple reason that there are not as many jobs available. Given that, the severance obligations of employers will be greater. Because employees terminated during an economic down turn are less likely to be able to mitigate their losses by quickly finding comparable

alternative employment, those employees will be far less likely to accept a lower severance payment than they would be during periods of economic growth.

Reducing Salaries or Working Hours of Employees

One strategy for employers in periods of economic uncertainty is to reduce the salaries and/or working hours of certain employees, rather than terminating them outright. This option is often the best course of action, since it reduces the employer's costs and also leaves the employer better prepared to respond when the economy picks up, since it will not find itself scrambling to find employees. However, employers who seek to reduce salaries or working hours of their employees must do so carefully. Any time an employer makes a unilateral and fundamental change to the terms and conditions of employment of an employee, such change may amount to a constructive dismissal. If the employee in question elects to treat such change as a constructive dismissal, it may trigger a severance obligation on the part of the employer.

Reducing the base salary or any other significant aspect of an employee's overall remuneration (such as an annual bonus) without the employee's consent will almost always amount to a constructive dismissal. However, an employer can eliminate the risk of an employee making a constructive dismissal claim by obtaining the agreement of the employee to the proposed changes. In a growing economy it is difficult (if not impossible) to obtain agreement from an employee to a salary cut or a cut in hours. In the current economy, however, many employees will willingly agree to reasonable reductions in remuneration or hours in order to remain employed. If an employee does voluntarily agree to a reduction in remuneration or hours, such agreement should be clearly set out in writing and should be signed by the employee indicating his or her agreement to those changes.

Another way that employers can reduce the risk of a constructive dismissal claim is to give an employee proper working notice of the change (or changes) that it seeks to unilaterally implement. The amount of working notice required to implement a change that would otherwise amount to a constructive dismissal is the same amount of working notice that the employer would have to provide to the employee if the employer wanted to simply terminate the employee's employment without just cause. The amount of working notice required can range from 1 week to 2 years under the common law.

For long-term employees, the working notice option may not be practical. However, for short-term employees, depending on a number of factors that need to be examined for each individual employee, an employer can often implement reductions to the remuneration or hours of an employee with as little as a few weeks or a few months notice. If the employer does implement such changes with proper working notice, and the employee refuses to accept the changes, then the employer has given the employee proper working notice of the termination of his or her employment. At the end of that working notice period, the employee will not be entitled to any further severance pay from the employer. If an employer elects to give working notice of such changes to an employee, such working notice must be in writing and must clearly describe the changes in remuneration or hours that are to be made and the effective date of those changes.

Conclusion

As a result of the current economic downturn, many employers are being forced to make hard choices with respect to their employees. Although the current economic landscape is creating some obvious challenges for employers, employers have some flexibility in what they can do with respect to their employees. It is possible for employers to reduce employee-related costs with a minimum of risk in the current economy, through careful planning and carefully drafted documents.



Layoff

what is it and how to do it?

by Gina Ross

Lay-off: < To cease to employ (a worker) often temporarily. > (Miriam-Webster Dictionary)

< Suspension or termination of employment (with or without notice) by the employer or management. Layoffs are not caused by any fault of the employee's but by reasons such as lack of work, cash or material. > (Business Dictionary)

< A termination of employment at the will of the employer. Such may be temporary (e.g. caused by seasonal or adverse economic conditions) or permanent. > (Black's Law Dictionary)

As is apparent from the above definitions there are a number of uses for the word layoff. Employers and employees use it to mean everything from a few days off work to a permanent exit. In Western Canada, as a result of the wording in provincial employment standards legislation, the word "layoff" should be used to refer to *an interruption of employment that is temporary*. Once the layoff ceases to be of a temporary nature, it is a *termination without just cause*. Layoffs can be a useful tool when an employer wants to retain its employees, but needs to take steps to reduce its salary costs. This article will briefly address layoff requirements under employment standards legislation and some of the common law issues that arise from layoff.

Layoff Under Employment Standards

The provisions of the employment standards legislation in the western provinces are similar. This article will refer specifically to those contained in the *Alberta Employment Standards Code* (the "Code"). Sections 62 through 64 of the Code provide that for the purposes of the Code an employer can maintain the employment relationship (and not terminate the employee) if it provides a temporary layoff. Generally

speaking, a temporary layoff cannot be more than 59 days. If the layoff continues, on the 60th day, the layoff turns into a termination with resultant severance obligations.

Note that the Code does not say anything about back-to-back layoffs (recalling the employee for a day or a few days and then laying off again). Employers need to exercise caution in that regard as there are arguments that such a use of the temporary layoff provisions is contrary to the spirit of the Code.

Alberta Courts (including our Court of Appeal) have had the opportunity to address the issue of temporary layoffs where employment standards decisions have been appealed. Those decisions recognize that a temporarily laid off employee is in a vulnerable position (the employee's life is economically and legally on hold during that time), and as such there are strict requirements that an employer must meet:

- The layoff notice must be in writing, state it is a temporary layoff, provide the effective date and provide the employee with detailed information on Sections 62 through 64 of the Code. We recommend that a copy of Sections 62 through 64 of the Code be attached as an appendix to any layoff notice.

In Western Canada, as a result of the wording in provincial employment standards legislation, the word “layoff” should be used to refer to an interruption of employment that is temporary.

- The layoff notice should state the date of the recall, or in the alternative, state that the employer will give the individual at least 7 days notice of the recall date.

An employer does not have an obligation under the Code to continue group benefits during a layoff. However, many benefit plans will allow group benefits to continue during a layoff. It is recommended that an employer talk to its benefit carrier, and if benefits can be continued, this is the preferred option. The continuation of benefits will assist in retaining employees for later recall, and will minimize the severe impact of a layoff on an employee and his or her family. If some or all of the group benefits are not going to be continued, that should be clearly stated in the letter conveying notice of the layoff. Note that employees who are on disability leave, or a maternity/parental leave, should not be the subjects of a layoff notice.

Layoff Under Common Law

It is an implied term at common law that an employee's employment cannot be negatively impacted in a significant way without the employee's consent. Such a unilateral action by an employer can be deemed constructive dismissal meaning that the employee can leave

his or her employment, and treat it as a wrongful termination without just cause. The question is whether a temporary layoff is a constructive dismissal. The debate on this issue is clouded by the fact that a temporary layoff is allowed under the Code, that the Alberta Court of Appeal has not opined on this topic and lower courts in Alberta have come to contrary conclusions. Some judicial decisions in Alberta have stated that a temporary layoff can constitute constructive dismissal; others say it cannot.

There may be specific industries or roles where it is an implied term of the employment relationship that layoffs will occur on a semi-regular basis, and there may be employment relationships where it is an express term of the relationship, be it in an offer letter or a policy manual. Generally speaking, an employer who utilizes a temporary layoff runs the risk that it is constructively dismissing employees. That risk can be minimized, although not eliminated, by the employer making sure that the temporary layoff notices are in strict compliance with the Code, by working with its group benefit carriers to continue benefits, by making the temporary layoff shorter rather than the maximum 60 days and by confining temporary layoffs to a non-supervisory or non-managerial employee.

Further Thoughts for the Employer Considering Terminations

by Richard Smith

Reorganization, Reassignments & Relocations

One strategy for an employer to implement in difficult economic times is that of an overall reorganization across a wide spectrum of employees. This may, in turn, involve reassignments or relocations which can better utilize the talents and expertise of one's workforce in a cost-effective fashion. Bona fide reorganizations (as opposed to changes imposed on one employee or a small group) will tend to receive favourable consideration by courts or regulatory bodies in circumstances in which an employer may become involved in litigation related to issues such as constructive dismissal. The issues of acrimonious working conditions and embarrassment or humiliation to an employee can be key factors in determining whether an individual reassignment is acceptable. A bona fide reorganization would certainly assist in avoiding many of those issues.

Exemptions From Statutory Obligations

Employers are often surprised to learn that they may be exempt from some statutory and common law obligations. For example, employers are exempt from statutory termination provisions in circumstances where employees are employed on a seasonal basis, where an agreement is in place by which the employee may elect to work or not to work for a temporary period when requested to do so, and where jobs have a definite term or task not exceeding 12 months. Similarly, certain industries or occupations are exempt from various provisions of the Employment Standards Code, including hours of work, overtime and other statutory requirements. These include, for example, such industries as oil well servicing, highway and railway construction, geophysical exploration, surveying and lumbering.

Insurance Coverage

Employers often overlook the huge risk associated with insurance coverage in circumstances in which an individual is either laid off or terminated. Under the common law, an employer is obliged to provide “reasonable notice” or alternatively, the employer needs to reach an agreement with the employee for compensation in lieu of notice (in exchange for a release). All too often the termination occurs or the change has been implemented (for example the announcement of a layoff), and the issue of insurance coverage has not been considered. In particular, there is a very significant landmine for employers related to the issue of *disability insurance*. There are legal precedents which suggest that an employer is responsible for insuring the employee throughout the period of notice. Most insurance policies, however, suspend or terminate disability coverage at and following the moment that the individual is no longer actively at work. If an illness or an injury were to occur during that intervening time frame, the employer could find itself becoming its own insurer for any calamity that the employee faces prior to reaching an agreement and settlement with the employee. In the worst case, the liability associated with this could be in the millions of dollars, as the employee may have the right to sue the employer for the disability insurance benefits that should have been available through to the end of the employee's working career if the employee becomes permanently disabled during the period of notice. Clearly, it is a significant risk and one that needs to be carefully considered when layoffs or terminations are set in motion.

Should I stay or should I go now:



Does a terminated employee have a duty to accept a new job offer from the terminating employer?

by Richard F. Steele and Ben Aberant, Student-at-Law

Should I stay or should I go now? ... Should I stay or should I go now?

If I go there will be trouble ... An' if I stay it will be double

So come on and let me know ... This indecision's bugging me

If you don't want me, set me free – The Clash

Introduction

Employers can terminate employees either expressly (“You’re fired!”), or constructively, where the employer changes a fundamental term of employment without providing reasonable advance notice. When an employee’s employment is terminated, either expressly or constructively, and assuming there is no just cause for the dismissal, the employee is entitled to reasonable working notice of the termination. This means the employee continues to work for the employer throughout the period of reasonable notice, or more often, the employer elects to simply offer the employee a payment (severance) in place of the period of working notice, and the employee relationship is terminated immediately.

While the employer has a duty to provide reasonable notice or pay in lieu of such notice, there is a corresponding duty on the terminated employee to take reasonable steps to find alternative employment. This is called the employee’s duty to mitigate his or her damages.

In the context of the duty to mitigate, courts in Canada have addressed whether a terminated employee has a duty to accept an offer of employment from the terminating employer during the period of notice. In other words, does the scope of a terminated employee’s duty to mitigate include having to accept an offer of employment from the terminating employer? Hence, the difficult question a terminated employee may face, “should I stay or should I go now?”

Express or Constructive Dismissal

Courts have been largely unwilling to expect an employee who has been expressly terminated to return to the service of the terminating employer during the period of reasonable notice. Often there are issues of performance and the employment relationship has broken down and become stressful and acrimonious. Courts have been loathe to put the terminated employee in such a difficult position.

While courts have been reluctant to put such a burden on a terminated employee in express dismissal situations, such as where performance issues played a role in the dismissal, the notion has been more palatable in constructive dismissal situations. Constructive dismissal may occur where an employer is simply reorganizing its workforce or making necessary changes to the duties or responsibilities of the employees. While the changes may constitute a constructive dismissal, such changes are not typically personal, acrimonious or related to the employee’s performance. In such circumstances courts have been more likely to expect the constructively dismissed employee to return to the employment of the terminating employer.

The Supreme Court of Canada Weighs In

The Supreme Court of Canada (the “SCC”) recently addressed these issues in *Evans v. Teamsters Local Union No. 31*¹ (“*Evans*”). Evans worked as a business agent for the Teamsters

as just cause and formally terminate him without any notice. Further negotiations broke down and Evans refused to return to work. The Union took the position that Evans had failed to mitigate his damages by refusing the offer to return to work. Evans sued the Union for wrongful dismissal. The matter proceeded all the way to the SCC.

The majority of the SCC clarified that there should not be any distinction between constructive and express dismissal as it relates to whether a terminated employee has a duty to accept an offer of re-employment with the terminating employer during the period of reasonable notice. Rather, the scope of the duty should be determined on a case-by-case basis, and analyzed objectively. The key question should be: would a reasonable employee in these circumstances accept the offer of re-employment? Some factors in determining reasonableness include:

- is the salary going to be the same?
- are the working conditions substantially different?
- is the new job demeaning?
- are the personal relationships acrimonious?
- what is the nature and history of the employment?
- has the employee commenced litigation?
- was the offer of new employment made while the employee was still working for the employer or only after he or she had left?
- was the employee dismissed as a result of a change in his or her position? In other words, were there legitimate business needs rather than performance issues?
- is there continued mutual understanding and respect and is this a situation where neither the employer nor the employee is likely to put the other's interests in jeopardy?

Flowing from these factors, the key point is that the employee should not be “obliged to work in an atmosphere of hostility, embarrassment or humiliation.”⁷²

While the SCC focused on what a reasonable person would do, or in other words focused on an objective test, the SCC reiterated that there are some “non-tangible” elements that have to be considered:

Although an objective standard must be used to evaluate whether a reasonable person in the employee's position would have accepted the employer's offer it is extremely important that the non-tangible elements of the situation—including work atmosphere, stigma and loss of

dignity, as well as nature and conditions of employment, the tangible elements—be included in the evaluation.³

No doubt there was a level of acrimony and tension between Evans and the new Union executive. Certainly, this was not a situation akin to a corporate restructuring where personal feelings were not involved. Nonetheless, the SCC found that, on an objective basis, a reasonable person would have received the Union's offer of employment as a legitimate employment opportunity, which could have been considered and accepted. Further, based on the evidence available, the relationship had not become so acrimonious or seriously damaged that a reasonable person could not or should not accept the employment offer. In addition, the employment offer was based on the same employment terms as previously held and, based on some conditions being satisfied, Evans was willing to return to work with the Union. In these circumstances it was unreasonable for Evans to refuse the offer of employment to return to work for at least the period of reasonable notice.

Caselaw since Evans

Not surprisingly, decisions since *Evans* have turned on the specific facts of each case. For example, in one Ontario decision, that of *Lochle v. Purolator Courier Ltd.*⁴, the Court found that a reasonable person would have accepted the employer's offer. In this case an employee had been constructively dismissed but continued to work for the employer. Between the time of the constructive dismissal and the end of the period of reasonable notice the employee was offered a demoted position that he had previously held. The employee claimed the demoted position was stressful and that he would lose credibility with his co-workers if he accepted the demotion, but the Court found that a reasonable person would have accepted the position. Considerations included the finding that the employer was treating the employee as a valued employee, the offer of employment was a valid attempt to retain the employee's service, the salary remained at the pre-demotion level and the work environment was not one of hostility, embarrassment or humiliation.

In a recent decision from British Columbia, that of *Borsato v. Atwater Insurance Agency Ltd.*⁵ the decision went the other way. An employee's salary was reduced by 20%, which was found to be a fundamental change in the employment contract and thus a constructive dismissal. The 54 year old employee had been manager of an insurance agency for 16 years. The British Columbia Court found that a 20% reduction in

Union in Whitehorse, Yukon for approximately 23 years. There was a battle to elect a new Union executive, including a new president. Evans had supported the incumbent president who was defeated. Under the direction of the newly elected president, Evans' employment was terminated, without just cause. Evans hired a lawyer who wrote to the newly elected president stating that Evans would agree to accept 24 months notice of termination. There was a further suggestion that Evans would agree to satisfy this notice period by working for 12 more months with the Union, followed by a 12-month lump sum payment in lieu of the remaining notice period.

The parties continued to negotiate for approximately 5 months. During this period, Evans received his salary and benefits. After 5 months negotiations broke down and the Union requested that Evans return to his prior position to serve out the balance of the notice period. The Union took the position that if Evans refused to return to work, the Union would treat that refusal

Arguably the judicial pendulum has swung a little in favour of employers when addressing termination situations...

pay made it unreasonable for the employee to return to work. In addition, it was considered that the employee had already left the employment and commenced litigation when the offer of employment was made which factors weighed in favour of the unreasonableness of expecting the employee to return to work.

Alberta Courts have had an opportunity to consider *Evans* as well. In *Magnan v. Brandt Tractor Ltd.*⁶ the employer told an employee that he would be forced to retire when he reached the age of 65. Apparently the employer was unaware of the potential human rights ramifications relating to terminating individuals based on age. Prior to his forced retirement date, the employee wrote a letter to the employer seeking damages for wrongful dismissal. The lower Court held that the employee had been constructively dismissed based in part on the fact that a replacement had already been hired before the retirement date and the terminated employee was asked to introduce his replacement to existing employees. The employer argued that the employee did not properly mitigate his damages because he failed to continue on with his original job once the employer eventually made it available again. The Alberta Court of Appeal cited *Evans*, but took the position that in these circumstances, and particularly because the employee was disturbed and annoyed with the employer's actions, it would be unreasonable to require the employee to accept the offer of continued employment.

Conclusion

Arguably the judicial pendulum has swung a little in favour of employers when addressing termination situations, in that employers may be able to retain the services of employees through the period of reasonable notice by offering employment that might otherwise constitute constructive dismissal. If the employee accepts the offer he or she will have to work out the period of reasonable notice... or quit. If the employee rejects the offer, the employer may have a stronger argument that the employee (like *Evans*) breached the employee's duty to mitigate, which in turn would likely reduce the exposure to the employer for wrongful dismissal. From the standpoint of terminated employees, they likely now face a broader and more demanding duty to mitigate damages, and may have a more difficult time answering the question "should I stay or should I go now?". However, employers and employees alike must remember that each situation will be very much fact specific and driven by such factors as the reasonableness of the offer, and whether the employment environment is one of hostility, embarrassment or humiliation.

Footnotes

¹[2008] 1 S.C.R. 661

²*ibid* at para.30

³*ibid* at para.30

⁴[2008] O.J. No. 2462

⁵[2008] B.C.J. No. 1039

⁶[2008] A.J. No. 1109 (C.A.)

Legislative News & Other Resources: Highlights

The following are recent or proposed legislative changes which relate to the employment relationship:

- Effective January 1, 2009 Albertans are no longer required to pay Alberta Health Care Insurance Plan premiums. As such, Alberta employers who previously had an obligation to withhold and remit those premiums if they had more than five employees, no longer have such an obligation.
- As Alberta is the only Canadian province without any legislation protecting the employment of Canadian Forces Reservists who take a leave of absence from their employment to serve in the Forces, Alberta introduced Bill 1 — The *Employment Standards (Reservist Leave) Amendment Act*, 2009 on February 10, 2009. Once the amendment becomes operative an employee who is a reservist will be entitled to take an unpaid leave to take part in Canadian Forces' operations. The employee's employment will be protected, and the employer will be obligated to return the employee to his or her job position held at the time the leave commenced.
- As part of Canada's Economic Action Plan legislative changes have been made such that as of March 1, 2009 depending upon the region (the percentage of unemployment) individuals can receive a maximum of fifty weeks of employment insurance rather than the prior maximum of forty-five weeks.
- On April 1, 2009 Alberta's minimum wage increased from \$8.40 to \$8.80. On July 1, 2009 Saskatchewan's minimum wage will increase from \$8.60 to \$9.25.

Employers may wish to look at the Ontario Human Rights Commission's recently updated "Human Rights at Work — 3rd edition" which can be accessed on-line at www.ohrc.on.ca. Although there are some variances between Ontario's human rights legislation and that of the western provinces, this resource is nonetheless a very useful guide for employers in terms of gaining an understanding of the breadth of an employer's human rights obligations and how those obligations may be met



It Isn't Over Until the Release is Signed

by Rachel West

Introduction

For an employer, firing an employee can be a risky business. Exiting employees may have a number of recourses against their former employer, including claims for severance, and employment standards or human rights complaints. Fortunately, an employer can significantly (if not entirely) minimize this risk by securing a General Release (“Release”) from its former employee.

A Release provides an employer economical insurance against future litigation or complaints, and creates certainty with respect to future liabilities. Under a Release, an employee relinquishes any rights or claims against his or her former employer. This element of finality is beneficial to both the employer, who can carry on operations without the fear of litigation or complaints, and to the employee, who may find closure in the terms of the Release. However, an employer must be cautious that the Release, and the circumstances under which the employee executes it, meet certain requirements in order for the Release to be valid and enforceable.

General Principles of Contract

A Release is a contract between the releasee (employer) and releasor (employee). Because a Release is a contract, general contractual principles apply and must be satisfied in order for the Release to be valid and enforceable.

Consideration

First and foremost, the employee must receive some sort of benefit or consideration for his or her promise not to enforce his or her rights against the employer. This consideration must be over and above any money that the employee is entitled to by law. For example, a payment of “pay in lieu of notice” pursuant to employment standards legislation (in Alberta, the *Employment Standards Code*) is insufficient consideration for a release. This is because an employee who has been fired is *already entitled* to the amounts prescribed under employment standards legislation, and such payments cannot therefore constitute valid consideration for a Release. In an employment setting, the consideration for a Release typically takes the form of a severance payment of an amount that is *greater* than the employee’s entitlement under applicable legislation.

Understanding the Release

It is essential that the language of a Release be clear and unequivocal. It must be obvious which claims the employee is agreeing not to pursue. Generally, a Release in the employment context will include a promise that the employee will not pursue legal action, nor complaints under human rights and employment standards legislation. The employer must be cautious to draft the Release broadly, so that it protects both the employer company, and related individuals and entities. Specifically, the employer should ensure that

the employer company, its employees, officers, directors, and any related companies are also released from liability.

In creating a clear and unequivocal Release, it is helpful to include headings that increase readability and understanding of what is included in the Release. Further, the usage of “legalese” or language that an average person would not understand can raise questions as to whether the employee understood the release, and should be avoided as much as possible.

Finally, the employer must ensure that the employee has both read and understood the Release that he or she is signing. A clear and unequivocal Release is useless if the employee has not read it. In fact, an employee who has signed a Release without reading it may have the Release set aside if he or she can prove that he or she did not read or understand it.

Circumstances Surrounding the Signing of the Release

It is generally accepted that, in the employment relationship (and in the termination of such a relationship), the employer holds all the cards. While this is beneficial to the employer in negotiating a settlement and Release, the employer must be cautious not to assert this power too forcefully. An employee who has been coerced or otherwise pressured to execute a Release may be successful in having that Release deemed invalid or unenforceable.

To avoid any appearance of undue influence or pressure, an employer should allow the exiting employee time to consider the Release and to seek independent legal advice. An employer need not specifically encourage the employee to contact a lawyer, but would be wise to allow the employee a few days to consider the agreement. Further, if the employee requests additional time to consult a lawyer, the employer should grant such a request.

Employers should also be alert to an employee’s state of mind when he or she signs the Release to avoid issues of capacity. A Release that is signed by an emotionally unstable or unwell employee may be found unenforceable. While courts have acknowledged that an employee who is upset following a termination still has capacity to sign a Release, the employer should be alert to more significant emotional issues that may render an employee incapable of agreeing to the terms of a Release.

Conclusion

A Release is a useful tool for employers. If drafted and undertaken properly, a Release can provide an employer with protection against future liability and nuisance from a terminated employee.



Put the Boots to Hunger

BD&P is excited about the recent launch of its joint Stampede-themed fund and food raising campaign with the Calgary Inter-Faith Food Bank — that of “PUT THE BOOTS TO HUNGER”. In light of Calgary’s not-for-profit sector finding the current economic times extremely challenging — both financially and through sustainable volunteer support — BD&P decided to commit \$150,000 to launch and promote the initiative during Stampede week, 2009.

The overall goal of the PUT THE BOOTS TO HUNGER campaign in 2009 is to raise at least \$500,000.

BD&P hopes that the PUT THE BOOTS TO HUNGER campaign will provide the opportunity to witness the true “Stampede Spirit” of community support. The proposed elements of the PUT THE BOOTS TO HUNGER initiative offers the Calgary Food Bank a unique and valuable opportunity to raise awareness in our community and to inspire individuals, community groups and corporations to support BD&P in achieving this goal — “to provide quality, emergency food to those in need”.

If the demand for the Calgary Food Bank’s services continues as it did during the fall of 2008 and in early 2009, the Food Bank will experience its largest need for emergency food hampers in nearly 10 years. The majority of people relying on the Food Bank for emergency food hampers continue to be the working poor. It is our goal to provide the Calgary Food Bank with the resources it needs to ensure that all Calgarians who need to rely on the Calgary Food Bank can do so.

For more information on how to participate in the Campaign, please visit www.putthebootstohunger.com

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