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## On Record Contents:

Can an Employer  
 unilaterally change  
 terms of an  
 employment contract?  
 The Wronko case  
**Page 1**

Best employment  
 practices:  
 An employer's  
 obligation to view  
 a social insurance  
 number card  
**Page 3**

Raises/Promotions:  
 Effect on Written  
 Employment Contracts  
**Page 4**

The Duty to  
 Accommodate  
**Page 6**

Employer Withholding  
 on Option Exercise:  
 Blood from a Stone?  
**Page 8**

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# Can an Employer unilaterally change terms of an employment contract?

## The Wronko case

by Gina Ross

### Introduction

The recent 2008 Ontario Court of Appeal (“the Court of Appeal”) decision of *Wronko v. Western Inventory Service Ltd.* (“*Wronko*”) reviewed the principles in relation to an employer’s attempt to unilaterally change the terms of an employment contract. The *Wronko* decision has had very little judicial consideration, but has received a considerable amount of commentary by authors in the employment area. Two years later it is useful to review the decision and the principles concerning unilaterally amending the terms of employment.

### Facts of the Wronko Case

Mr. Wronko (“Wronko”) was an employee of Western Inventory Service Ltd. (“Western”) and in December 2000 entered into a “comprehensive and sophisticated employment agreement” which included a provision that he would receive two years salary if his employment was terminated. In September 2002 Western sent Wronko a new employment contract reducing the severance to thirty weeks. Wronko refused to sign the new contract and in response Western informed Wronko that the reduced severance provision would come into effect in two years time. Wronko

consistently objected to the proposed new termination provision over the next two years. In September 2004 Western indicated to Wronko that if he did not accept the new provision, Western did not have a job for him. Wronko sued for wrongful dismissal. The Court of Appeal considered whether the relevant termination pay was thirty weeks or two years.

### The Decision

The Court of Appeal concluded that the governing contractual term was the two year provision in the 2000 contract. The following

**Wronko is an important decision as it emphasizes that where an employee objects to a future unilateral and fundamental change in the employment relationship, that the employer may not be able to eliminate the risk of constructive dismissal or wrongful dismissal simply by providing reasonable working notice of the change.**

general principles as set out in the much earlier decision of *Hill v. Peter Gorman Ltd.*<sup>2</sup> were emphasized by the Court of Appeal:

- Where an employee is faced with a unilateral and fundamental change in the terms of employment the employee can accept the change expressly, or implicitly through acquiescence (staying employed without protest), and in such circumstances employment continues under the altered terms.
- The employee may reject the unilateral change and sue for damages if the employer insists in treating the relationship as being subject to the varied term.
- The employee may make it clear to the employer that he or she rejects the new employment term. If the employee does make the rejection clear and the employer does nothing in response then the original contract terms will apply. The employer always has the option in those circumstances of providing the employee with notice of termination of employment and thereafter offering re-employment on new terms.

## Discussion

Note that there are some questions as to how broadly *Wronko* can be interpreted. In *Wronko* the Court of Appeal was dealing with a comprehensive written employment agreement. The written employment agreement did not appear to give Western the ability to provide any notice of termination and rather simply stated that payment was due upon termination of employment. The Court of Appeal did not touch upon an issue that was addressed at trial which was whether there was valid consideration to amend a comprehensive written employment contract.

However, *Wronko* is an important decision as it emphasizes that where an employee objects to a future unilateral and fundamental change in the employment relationship, that the employer may not be able to eliminate the risk of constructive dismissal or wrongful

dismissal simply by providing reasonable working notice of the change. Note that there are some earlier Alberta decisions supporting the conclusion that an employer can unilaterally amend a contract through providing notice of the change. For example, in *Rosscup v. Westfair Foods Ltd.*,<sup>3</sup> Justice Clark found that where Ms. Rosscup received advance reasonable notice of a change in a written severance policy, that the “contract” was effectively, albeit unilaterally, changed by Westfair Foods Ltd. prior to her dismissal. *Wronko* has not yet been considered in a reported Alberta decision.

## Considerations for Employers

The *Wronko* decision is a reminder to employers to keep the following cautions in mind when employers are considering amending the terms of the employment relationship:

- Where there is a comprehensive employment agreement, that agreement must be read carefully to determine if it can be amended unilaterally. For example, the agreement may have a clause stating that that the employment agreement can only be amended in writing and by the agreement of both parties. In such circumstances, it is very unlikely that the contract could be amended unilaterally.
- If the written employment agreement provides for a severance payment upon termination of the contract and a clause that the amount is not reduced by income earned after the termination, or the severance amount is a lump sum payment, we caution it is unlikely that providing notice of the employment change can be effective. The employer could still be held obligated to pay out the stated severance amount.
- If the wording of a written employment contract allows for unilateral amendment or where there is no written employment contract, reasonable working notice should be given of any unilateral change.

- Employees will have anywhere from a few weeks to a few months to note their objection to a unilateral change. Any employee who does not make an objection clear could be found to have acquiesced and agreed to the changes. In that case employment will continue at the conclusion of the notice period on the changed terms. If an employee objects to the changed terms, the employer cannot unilaterally amend the contract. If the employer in those circumstances attempts to force the changes upon the employee, the employee will either have a right to assert constructive dismissal and/or an action for damages for breach of the contract.
- Where an employee objects to the changed term or terms, the employer has the option of terminating employment and the existing employment contract, and offering the employee employment on the changed terms. The employee’s obligation to mitigate his or her damages may obligate the employee to accept employment on the changed terms and essentially continue on with his/her employment as changed.

## Conclusion

Employment contracts are of value as they add certainty to the employment relationship, outline the employee’s and the employer’s obligations, and state the terms upon which the employment relationship can end. However, the *Wronko* decision is a reminder that any negative changes to a written employment agreement should be handled by consent. Where there is not a written employment agreement, care must still be taken if an employer wants to unilaterally and negatively alter the employment relationship. Advance notice should be given, and where an employee objects to the change within a reasonable timeframe, it is unlikely that the terms can be unilaterally amended.

## Footnotes

<sup>1</sup> (2008), 90 O.R. (3d) 547 (C.A.)

<sup>2</sup> [1957] 9 D.L.R. (2d) 124 (C.A.)

<sup>3</sup> [1999] A.J. No. 944



# Best employment practices: An employer's obligation to view a social insurance number card

by Gina Ross

It is generally understood that an employer must obtain an employee's SIN number in order to be able to place the employee on payroll and pay the employee. However, the *Employment Insurance Act*<sup>1</sup> ("EI Act") actually goes further than the obligation to obtain the SIN number, in that an employer must request an employee produce his/her SIN card and the employer must view the card. The Regulations to the *EI Act* state that:

*An employer who hires a person in insurable employment shall request the employee to produce to the employer a social insurance number card within three days after the employee commences employment.*

The employee has the corresponding obligation to produce his/her SIN card to the employer within three days of commencing employment. If an employer is unable to view the employee's SIN card, the employer has a mandatory obligation under the Regulations to the *EI Act* to report the matter to the local office of the Employment Insurance Commission. This reporting obligation occurs within six days of the person commencing employment.

An employer who breaches these obligations under the *EI Act* could be subject to administrative penalties. While we are not aware of any instance where administrative penalties have actually been imposed on an employer for such a breach, any employer wanting to institute best employment practices, should follow the provisions of the *EI Act* in this regard.

We are aware of instances where an employer has been provided with the SIN number of a relative or third party of an employee. The employee may have "permission" to provide the relative's SIN number or the SIN number may have been stolen by the employee from a relative or third party. Usually some number of months go by before the problem comes to light. What has happened in the interim is that the employer has been withholding and remitting tax, CPP and EI to the account of the wrong individual (someone who is not an employee), and the individual who is not an employee is being taxed with respect to income he/she has never received. Furthermore, the actual employee may not even be legally entitled to work and be paid in Canada. This can be complicated to rectify.

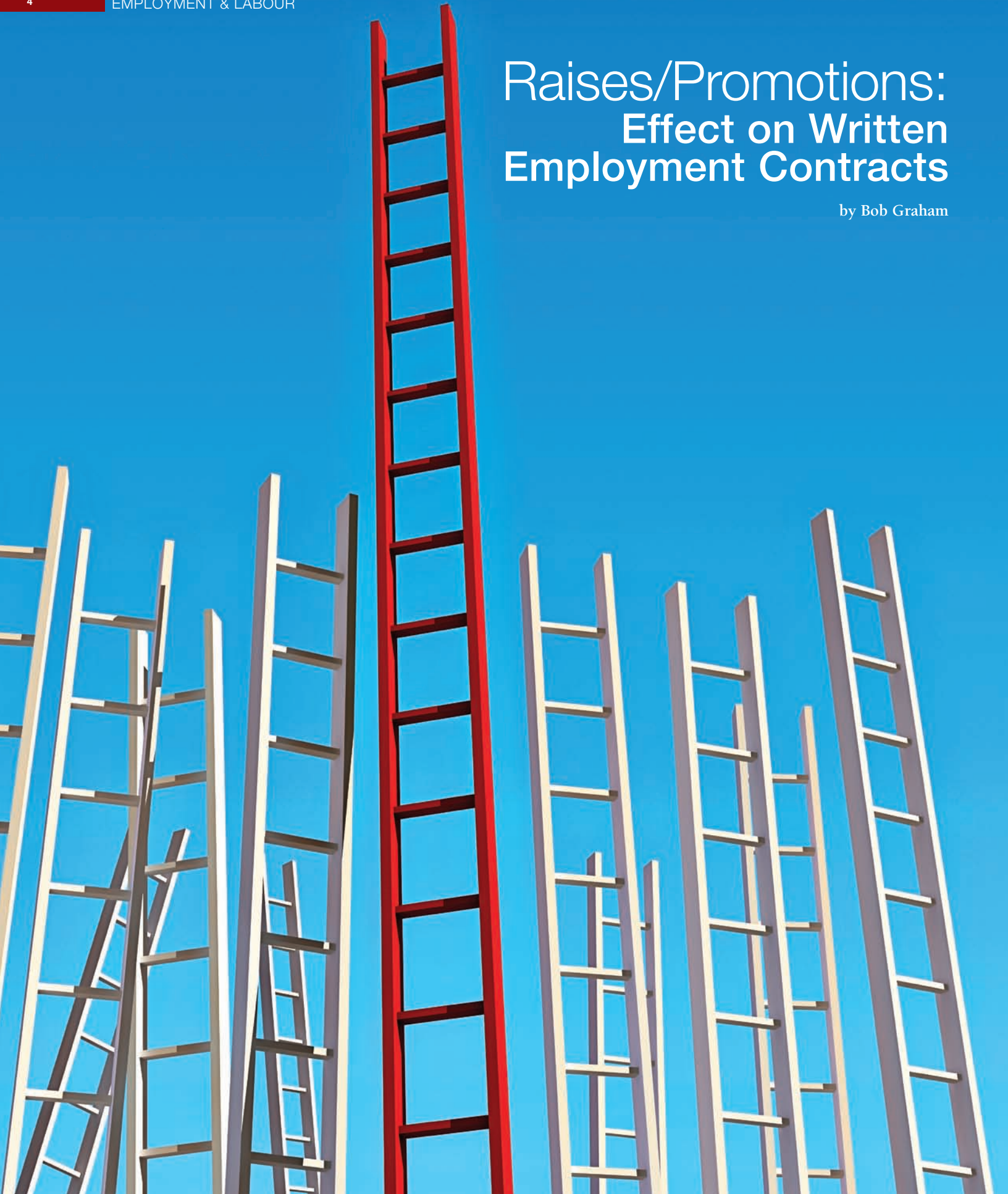
Accordingly, we recommend that all employers ask that employees produce their SIN card for viewing within three days of an employee joining the business.

## Footnotes

<sup>1</sup>S.C. 1996, c.23

# Raises/Promotions: Effect on Written Employment Contracts

by Bob Graham



## Employers need to be aware that a written employment contract that was enforceable at the time it was entered into may not continue to be enforceable if there are subsequent significant changes to the terms and conditions of the employee's position.

### Introduction

It is common for employers to require employees to execute written employment contracts at the time of hire. The contracts typically set out the fundamental terms and conditions of employment, such as the employee's title, duties, base salary, incentive compensation, vacation entitlement and the employee's entitlement in the event of a termination without just cause.

Generally speaking, employers are well advised to have employees execute a written employment contract with a properly drafted termination clause at the time of hire. This practice can go a long way to avoid uncertainty as to the terms upon which the employment relationship may end in the future. However, employers need to be aware that a written employment contract that was enforceable at the time it was entered into may not continue to be enforceable if there are subsequent significant changes to the terms and conditions of the employee's position.

### The Issue

A common scenario is one where an employer hires an employee at an entry-level position and has the employee execute a written employment contract at that time. Given the nature of the entry-level position, the termination clause in such written contracts typically (and understandably) provides for a relatively small severance payment that meets or only slightly exceeds the minimum requirements under applicable employment standards legislation (the applicable legislation in Alberta is the *Alberta Employments Standards Code*). Thereafter, the employee may advance from the entry-level position to a position with significantly different duties and responsibilities and a corresponding increase in remuneration.

Is the termination clause in the original employment contract still valid?

### Discussion

Numerous judicial decisions have established the principle that contractual terms that are fair in the early stages of an employment relationship may not be fair in the future if the employee has acquired a new position with additional duties, responsibilities and increased remuneration. When such circumstances exist, courts frequently refuse to enforce termination clauses in the original written employment contract, on the grounds that the *substratum* of that written employment contract has either disappeared or eroded to such an extent that it would no longer be fair to enforce those termination clauses. The result is that an employer who terminates an employee without just cause, believing that it would only have to provide a relatively small severance payment as set out in the original written employment contract, is instead required to make a severance payment based on common law principles. This severance payment is often many times greater than what the employer expected to pay.

The writer experienced this scenario firsthand in a recent trial. The facts were that the Plaintiff employee was hired at an entry-level position with no managerial or supervisory responsibilities and an annual base salary of approximately \$42,000. The employee executed a written employment contract at the time of hire. Approximately 5 ½ years later, the employee was terminated without just cause. By the time of his termination, the Plaintiff had

received numerous promotions, was in a position with significant supervisory responsibilities and was earning in excess of \$150,000 per year. The employer sought to rely on the termination clause in the written employment contract. The employee challenged the enforceability of the termination clause and the written employment agreement on a number of grounds, including the ground that due to the significant changes in his duties and responsibilities and the significantly higher pay since the time he executed the written employment contract, the *substratum* of the employment contract had disappeared. The Court agreed with the Plaintiff, noting that in light of all the changes over time, the employee "was no longer employed doing the same job". The employee's common law severance entitlement was ultimately determined by the Court to be ten months, as opposed to the four weeks stipulated in the original written employment contract.

### Advice for Employers

So what can employers do to protect themselves? It is incumbent on employers who wish to rely on the original termination clauses to advise an employee of the intention to continue to rely on the termination clauses in the original written employment contract when material changes are made to the terms and conditions of employment. An employee who has been so advised then has the opportunity to accept that the original termination clause still applies, or alternatively to reject that and negotiate a new and more favourable termination clause with the employer. The preferable course of action for employers is to have an employee who is being promoted and/or given a significant raise enter into a new written employment contract at the time of that promotion and/or raise. The new written employment contract should contain a clause that clearly and specifically states that the new agreement supersedes and replaces the old agreement, and any other written or oral agreements that may have been in place between the parties.

This is not to suggest that every employer needs to incur the time and expense of drafting and executing a new written employment contract every time there are relatively minor changes made to an employee's duties, responsibilities or remuneration. It is only where changes to an employee's duties, responsibilities and/or remuneration are significant enough that it can no longer be said that the employee is doing the same job that a new employment contract becomes appropriate. It is also emphasized that in order to ensure that the employees are receiving valid consideration for entering into the new written employment contract, the employer should advise the employee that receiving the promotion and/or increase in remuneration is contingent on the employee executing the new written employment contract.

### Conclusion

In conclusion, employers need to remain cognizant of the fact that significant changes to the duties, responsibilities and/or remuneration of an employee over time may have the effect of rendering unenforceable the termination clause in the original written employment contract. Therefore, whenever such significant changes are made, it would be prudent for the employer to seek legal advice regarding the appropriateness of entering into a new written employment contract.

# The Duty to Accommodate

by Rachel West and Ben Aberant



## Introduction

“Accommodation means making changes to certain rules, standards, policies, workplace cultures and physical environments to ensure that they don’t have a negative effect on a person because of the person’s mental or physical disability, religion, gender or any other protected ground.”<sup>1</sup>

All Alberta employers owe a duty to accommodate their employees’ needs based on the protected grounds in the *Alberta Human Rights Act*<sup>2</sup>: race, religious beliefs, color, gender, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income, family status or sexual orientation.

In this article we will briefly discuss two workplace circumstances in which the duty to accommodate arises and which can create potential challenges for an employer.

- an employer’s obligation to accommodate employees who experience an environmental sensitivity, such as an extreme and unusual reaction to scents, and

- the obligation to accommodate a transgendered employee or an employee going through the sex reassignment process. The duty to accommodate is a shared responsibility of the employer and the employee. Both should cooperate in the process, share information, and jointly explore accommodation solutions.

### Environmental Sensitivities

The Alberta Court of Appeal recently addressed the topic of environmental sensitivity in *Brewer v. Fraser Milner Casgrain LLP*.<sup>3</sup> Brewer, a legal assistant, had a rare condition, resulting in various symptoms such as difficulty breathing, headaches, rashes and dizziness. Chemical sensitivity was identified as the cause. Specific triggers included scents, perfumes and other chemical smells. The employer did take steps to accommodate the employee including asking staff to refrain from using perfumes and fragrances, permitting the employee to use a separate washroom, installing air cleaners in her work areas, allowing her to use charcoal filtered disposable masks, and modifying her work hours to avoid contact with crowds. Discussions were also pursued with Brewer's supervisor, and an occupational and environmental medicine specialist was retained to examine the workplace and make recommendations on possible modifications that could reduce the triggering of the sensitivities.

Ultimately, the employee left on short-term disability and did not return to the workplace. The employee filed a complaint with the Alberta Human Rights Commission, and the Investigator found that the employer made reasonable efforts to accommodate the employee to the point of undue hardship and that the employee failed to fulfill her duty to cooperate with the accommodation process. The Director and the Chief Commissioner of the Human Rights Commission and the Alberta Court of Appeal ultimately agreed with this decision.

This case provides some guidance on the amount and type of accommodation that may be necessary when an employee has a serious environmental sensitivity. While the level of necessary accommodation is determined on a case-by-case basis, in many instances physical modification of the workplace and flexible work schedules may be required. Specialists

may need to be retained to offer suggestions on further necessary modifications. Depending on the level of sensitivity and the size of the workplace, the accommodation process could result in an employer investing a significant amount of time and money. Brewer also is useful insofar as it emphasizes that the duty to accommodate is a shared responsibility.

In short, where an employer has initiated a proposal that is reasonable and which if implemented will fulfill the duty to accommodate, the employee has a duty to facilitate the implementation of that proposal. Brewer failed to fulfill her responsibility in that she failed to test the new work environment that she was reassigned.

### Transsexual/ Sex Reassignment Process

At the present time there are no Alberta Human Rights decisions on this topic, nor does Alberta's Human Rights Commission have any relevant information bulletins or publications on their website. However, both courts and human rights tribunals in some of the other Canadian provinces, the United States and Europe, have stated that discrimination with respect to someone who is transsexual or who is going through the sex reassignment process is discrimination based upon either sex or gender.

We will outline (based upon a review of human rights publications and court decisions from other jurisdictions), situations which could arise with respect to a transgendered employee and how the duty to accommodate can be met:

#### **A transsexual woman is denied access to woman's washroom at her place of employment.**

An employer defends this action by explaining that other employees have expressed discomfort. This is discrimination. This particular employer requires a policy that ensures the transsexual employee's right to access the woman's washroom, while providing education to resolve staff concerns and to prevent future harassment and discrimination. In short, an employer should give access to the washroom and related change facilities that match the lived gender of the transsexual employee, unless that employee requests other accommodation (such as for safety or privacy reasons).

#### **Threats that are made to a transgendered employee.**

If threats have been made to a transgendered employee in or in association with the workplace, the duty to accommodate may require an employer to put in place sensible safety protections such as walking the employee to his or her vehicle in the evening, providing security for the employee's office or allowing the employee to use non shared facilities within the employer's workplace.

#### **A requirement to dress or look feminine or masculine.**

An employer may have a policy or a practice that encourages employees to be particularly feminine or masculine as the case may be. In such circumstance, and where there are transgendered employees, an employer would need to modify such policies or practices to eliminate the emphasis on looking a certain way. The same issues may arise with respect to employers who have restrictive dress code policies. United States human rights cases on this topic have concluded that an employer's duty to accommodate is met by allowing a transgendered employee to dress in unisex clothing.

### Conclusion

What is required to meet an employer's duty to accommodate with respect to a protected ground is always a challenging question. Where those questions arise in circumstances are new to an employer, and where there are few human rights decisions to guide the employer, particular care should be taken. As a starting point, the human rights commissions at the various Canadian provinces have many useful publications on the duty to accommodate. It must also be remembered that the duty to accommodate is a shared responsibility, and that the employee must be cooperative in response to the employer's efforts. This will usually require open communication, trust and the willingness by both parties to seek solutions that maintain the working relationship.

#### Footnotes

<sup>1</sup> Duty to Accommodate Interpretive Bulletin – Alberta Human Rights Commission, February, 2010

<sup>2</sup> RSA 2000, c. A -25.5

<sup>3</sup> [2008] A.J. No. 1433 (C.A).

# Employer Withholding on Option Exercise: Blood from a Stone?

by Richard Smith and Denise Dunn McMullen



The 2010 Federal Budget delivered by Canadian Finance Minister Jim Flaherty on March 4, 2010 contains a number of tax measures that may have some serious implications for employers, particularly as they relate to withholding obligations on the value of stock option benefits to employees.

Several of the proposed changes are significant, as they relate to the tax treatment of stock options, and it will be important for employers to consult both securities and tax counsel in order to understand the implications related to the proposed changes. For example, employee stock option holders may no longer be afforded the capital gains treatment on options that are cashed out instead of being exercised, and there is a proposal to eliminate the election to defer taxation of the stock option benefit on publicly-traded shares. The changes, if implemented as proposed, may require organizations to rethink and restructure many of their incentive compensation arrangements, particularly as they relate to the grant of options.

In the short term and of potentially greater consequence, however, Budget 2010 proposed a “clarification” to the rules (actually an enforcement of the letter of the law regardless of adverse implications) related to the obligation of an employer to withhold and remit tax on any stock option benefit that arises when a stock option is exercised. This clarification, if it is implemented in the manner suggested, will have serious consequences to an employer that may find itself in a position of having an obligation to remit tax in circumstances where little or no funds are owing to the employee and, as a result, the employer has no ability to withhold in order to make the remittance.

As all employers know, there is a mandatory obligation on an employer to collect, withhold and remit tax (along with CPP and EI) on any income earned and paid to an employee. The current rules require such

withholding and remittance in every circumstance in which an employee obtains earnings—or a taxable benefit—from an employer. Previously, CRA’s general assessing position was that the CRA would not enforce that particular obligation of the employer to collect and remit in certain circumstances, including those related to the value generated by options on exercise. In many circumstances, such as an exercise of options on or following the termination of employment, the benefit generated from the options flows directly to the employee and the employer has no funds (and no opportunity to withhold from funds), apart from a potential cash payment related to severance.

What if there is no severance payment due (as in the circumstance of a resignation or a termination for cause) or the net severance payment is not sufficient to cover the employers obligation to withhold and remit on the value of the options to be exercised by the employee (usually within 90 days of termination)? Obviously, the employer will be put in the very uncomfortable position of having a statutory obligation to withhold and remit to the CRA, without having funds on which to draw. It is also important to remember that a number of statutory obligations can create personal liability for officers and directors, in limited circumstances.

As the bureaucrats sort through the manner by which they will regulate and enforce this clarification, employers will need to be forward-thinking with respect to the restructuring and drafting of both current and proposed option or incentive plans. Budget 2010 proposes that these changes to remittance requirements will apply to stock option benefits arising on the exercise of options and issuance of option securities after 2010. Employers will need to be alert so as to avoid potential breaches of the “clarified” statutory obligation.

## Recent Legislative Changes and Announcements

### Human Rights

On October 1, 2009 the *Human Rights Citizenship & Multiculturalism Act* was renamed the *Alberta Human Rights Act*, and the Alberta Human Rights and Citizenship Commission was renamed the Alberta Human Rights Commission.

Since April 2, 1998 “sexual orientation” has been read into the *Alberta Human Rights Act* as a protected ground. On October 1, 2009 the *Alberta Human Rights Act* was amended to expressly include “sexual orientation” as a protected ground. In addition, the definition of “marital status” was expanded to include same sex relationships.

### Employment Standards

In February 2010 the Alberta government announced that the Alberta minimum wage of \$8.80 will remain unchanged through 2010.

## Recent Decisions on Notice Periods in Western Canada

- An employee who worked for twenty-one months as coordinator of the family and community support service was found to be entitled to five months reasonable notice: *Prabhakaran v. Fort MacLeod*, [2010] A.J. No. 121 (Prov. Ct.).
- A sixty-five year old software technician was terminated after forty years of employment with the Defendant. He was in a non-managerial position, and was found to be entitled to eighteen months notice in addition to the two months notice he received: *Waterman v. IBM Canada Ltd.*, [2010] B.C.J. No. 510 (S.C.).
- A hair stylist with twenty-two years of service was found to be entitled to nine months notice: *Bohay v. 567876 Saskatchewan Ltd.*, [2009] S.J. No. 676 (Prov. Ct.).
- A thirty-four year old manager (area operations manager) with 5.7 years of employment service was found to be entitled to ten months reasonable notice: *Clint Doyle v. MI-Drilling Fluids Canada Inc.* (March 4, 2010) Action No. 0901-10015



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