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So You Have to Downsize: An Employers Manual

The "How To" Manual You Wish You Didn't Need

by Mark E. Geiger
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Mark is the head of the employment group at Blaney McMurtry and a member of the Labour Section executive of the Canadian Bar Association (Ontario).

Mark acts for a wide variety of employers and individuals in many sectors of the economy with respect to employment and labour relations. That includes giving advice and negotiating collective agreements, arbitrations and labour board hearings, occupational health and safety cases, human rights, employment standards and many civil cases.

Mark can be reached at 416.593.3926 or mgeiger@blaney.com.

In Canada, and especially in Ontario, plant closures, reductions and lay offs are becoming all too common. Downsizing, or to use the euphemism that became popular in the last recession, *rightsizing*, is never easy but there are ways to reduce the pain for all concerned.

The Basics

When demand for product and services diminishes, and it is obvious that the demand is not going to increase any time soon, employers are faced with some tough choices. Very often a reduction in the work force is seen as a necessary step to save the business and keep it profitable.

Sometimes employers go too far and terminate more employees than they should, and end up paying far more than they need to in both severance and notice to those who are terminated, and later for training and recruiting when the recession is over. The cost of terminating large numbers of employees is significantly greater than it is in the U.S. and therefore employers are wise to consider the future and determine whether large scale downsizing is really in their long term interest. In the last recession many employers paid more to terminated employees than it would have cost them to continue those same employees for the duration of the recession - and then had difficulty finding good replacements when demand returned. The first consideration we recommend involves a careful analysis of what the downsizing is going to cost, not only in dollars, but also in knowledge and ability once the recession is over.

The Hard Costs

What does downsizing cost? Firstly, there are statutory minimum provisions in each of the various provinces which are normally set out in the employment standards acts of those provinces. Ontario has the most generous provisions in that it provides, in addition to notice or pay in lieu, severance payments under certain circumstances. There are also requirements when large numbers of individuals are terminated at the same time.

In addition there are common law obligations on employers that apply to all non-unionized employees. Unionized workers lose these common law rights on unionization, but gain the right to collectively bargain collective agreements. Usually the terms of a collective agreement provide the employer with the right to lay off, but restrict that right by way of the seniority provisions in the agreement. There is also, in most cases, a right of recall for those who are laid off.

Generally speaking, in a unionized environment, the employer is required to lay off employees with less seniority. Those employees are entitled to the benefits provided in the ESA, for provincially regulated employees in Ontario, or the *Canada Labour Code* for Federally regulated employers. Sometimes collective agreements provide benefits superior to the statutory minimums.

In this Article I will deal primarily with the provisions of the ESA and the Common Law.

Rights Under The ESA

Right to Notice and Benefits: Employees with 3 months' service are entitled to 1 week's notice, in writing, or pay in lieu. Once they have a year's service that becomes 2 weeks, and after 3 years, 3 weeks, after 4 years, 4 weeks and so on to a maximum of 8 weeks. During the period of actual notice, all benefits must be continued. If pay in lieu is given, benefits must be continued during the period following the termination for a length of time equivalent to the number of weeks of notice pay. If benefits are not continued during such period, the employer must pay the value of the premiums for such benefits to the employee.

If more than 50 employees are terminated in a 4 week period, all of them are entitled to 8 weeks' notice AND information in the prescribed form must be delivered to the Director of the Employment Standards Branch of the Ministry of Labour prior to the notice being given. Failure to do so voids any actual notice given. This form must also be posted in the establishment for the period of the notice. If 200 employees are terminated in a 4 week period, all of them are entitled to 12 weeks' notice or pay in lieu, and for 500 or more, that becomes 16 weeks'. The requirements for the notice to the Director are set out in Regulation 285/01 and the forms are available from the Ministry's web site. There are some complications to this provision which I will deal with later in this article.

Right to Severance: In addition to notice, employees with 5 years' seniority or more are entitled to 1 week's pay per year of service to a maximum of 26 weeks **if** the employer has a payroll of at least $2.5 million, or that employer terminates 50 or more employees in a 6 month period.

Common Law Rights

At common law, employees are entitled to 'reasonable notice of termination or pay in lieu thereof'. The courts have made it very clear that employment standards minimums are not a measure of reasonable notice - they are the minimums that most be provided in every circumstance. Employees can contractually agree to forego anything beyond ESA minimums, but any attempt by an employer to impose that condition on an employee after they have been hired is probably unenforceable.

Notice periods depend on the individual circumstances of the employee, with their age, seniority, and level of responsibility being the most important criteria. While notice and severance under the ESA is sufficient in some limited circumstances, notice periods of a year or more are not uncommon, and notice periods of more than 2 years have been awarded by the courts to very long service, older employees.

What About a Lay Off?

There is a further complication. At common law there is no right to lay off employees even though lay off is specifically dealt with in the Act. This raises a difficult question: Can a non unionized employer avail themselves of the temporary lay off provisions of the Act?

The Act provides for temporary lay off which is not a termination and therefore no notice or severance pay is required. If an employer temporarily lays off an employee, and the lay off extends beyond 13 weeks, the lay off is deemed to be a termination under the Act, and notice and severance (if applicable) becomes due. In addition, the date of the termination is deemed to be the day the lay off commenced for purposes of the Act, including the mass termination provisions. (The 13 weeks can be increased to 35 weeks if the employer continues some of the employee benefits during the lay off). By using a temporary lay off, an employer can postpone payment of large amounts of severance and notice payments under the Act, but there are significant complications to this approach in a non-unionized environment.

The main purpose for providing notice at common law is to provide the employee with reasonable time to find alternative employment. But temporarily laying them off implies that the employer expects to recall the employee - therefore the employee has less incentive to mitigate his damages by finding a new job. If the temporary lay off eventually becomes permanent, the employee can argue that his common law notice should be increased by the length of the temporary lay off because he was expecting to return to his job shortly and therefore did not seek alternative employment during the temporary lay off period. In addition, some courts have found a lay off to be constructive dismissal because, absent a contractual 'right' to lay off, which normally only exists in unionized environments, a lay off constitutes a fundamental breach of the common law employment contract. A temporary lay off may postpone payment of severance and notice, but could end up adding additional cost if the temporary lay off becomes permanent.

Other Considerations

Cost is not the only consideration. The most important factor to an employer forced to downsize is how the terminations are perceived by those who remain. The most important people to the continuing success of the company are those who continue to be employed after res-tructuring has taken place. If the restructuring is done in such a way as to create a sense of tremendous insecurity, not only is there a risk of unionization, there is also a risk of decreased productivity as a result of anxiety. Your best employees may leave to seek more secure employment. It is therefore almost always better to restructure in 'one fell swoop' as opposed to two or three phases. People are much more likely to accept restructuring, no matter how that restructuring is done, if they can be told at the time the restructuring is announced that there is no more restructuring contemplated. While it is never possible to make promises in this regard, you are far more likely to have the workforce accept a number of changes, if they are all made at the same time. However, the cost of restructuring may be greater if more than 50 people are involved because of the mass termination provisions discussed earlier.

We've Decided to Downsize: How do we do it?

If you are unionized, the job of downsizing is more straight forward because the companies right to choose who goes is probably significantly restricted by the seniority provisions of the collective agreement. For non unionized employees, the issues are more difficult. Absent discrimination on prohibited grounds, the company gets to decide which employees are laid off, but those who are laid off have the benefit of common law notice requirements and the individual right to sue for wrongful dismissal.

Reasonable notice is decided by a court based on the individual circumstances of each individual employee. The best any lawyer can do is provide you with the 'range' a court is likely to provide.

Establishing Notice Periods

It has been our experience that use of a 'formula' is a good way of establishing the overall entitlements when a large group is being terminated at the same time. The formula is created by first establishing the 'range' for each employee, and then grouping employees with similar ranges with similar offers.

It is important that any formula take into account the provisions of the ESA to ensure that no one receives less than the minimums provided under the Act. It is also important to review any formula to ensure that each employee is fairly treated under it.

Offering some or all employees the option of salary continuance or a lump sum is a technique that can be used to reduce the overall cost. Traditionally in wrongful dismissal matters, a lump sum offer equal to approximately 2/3 of the amount a court was likely to award is considered a reasonable offer and is often accepted.

Announcing the Downsizing

How you do it is almost as important as what you do. Some tips.

- Communicate why the downsizing is necessary, especially to those who will remain;
- Give them the straight goods as to the Company's financial position;
- Meet individually with each employee terminated;
- Offer letters of reference to assist them in finding new jobs;
- Consider career counselling for more senior employees;
- Let them know that you used a formula to fairly determine their package;
- Use options in appropriate cases - especially with longer term employees. Base the options on the common law ranges provided by previous cases in the reports. You will need expert assistance on at least this phase of the process;
- Don't drag it out. Try to get it all done in one day;
- Keep the packages confidential until they are actually given to the employees;
- Make sure the option includes a proper release. ■