THE NEW ECONOMY, YOU HAVE TO DOWNSIZE:

AN EMPLOYMENT LAWYERS MANUAL THE HOW TO MANUAL YOU WISH YOU DIDN'T NEED

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These are tough economic times. The reasons for where we are now are complex and subject to speculation, controversy and ideologically based argument. Whatever the reason, employment and labour lawyers are currently inundated with work they probably would prefer to not have. Employers in the United States have been terminating and laying off employees in the millions. 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

Employment Law in Canada is very different from that of the United States. For this reason, American clients are often shocked and surprised at the obligations which they may have to departing employees who are being terminated for economic or other reasons. These differences arise both as a result of major differences in the Common Law principles in Canada and the United States and also because of significantly greater statutory protection afforded to employees in Canada, and especially in Ontario.

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. Recessions and even depression have a significant psychological component. People stop buying because they are afraid they will lose there job. Investors stop investing because they've just lost money on the stock market. The effect grows and people start to panic. This time the panic has been world wide and governments around the world have reacted with unprecedented 'stimulus' packages. The U.S. government is borrowing up to a trillion dollars in an attempt to prop up a faltering economy. That's $3000 for every man woman and child in the country. No one knows whether this massive spending will stem the tide - only time will tell.

Every labour and employment lawyer I know is involved, one way or another, with downsizing. In this paper I want to briefly discuss the basics and then speculate on what may develop as this crisis plays itself out.

The Clients

Employers are not immune from the panic and distress that has affected all of us. In my experience, in past recessions some of them have gone too far and terminated more employees than they should have. Some ended up paying far more than they needed to in both severance and notice to those who were terminated, and later for training and recruiting replacements when the recession was over. Only time will tell whether that will be repeated this time, but in my

view, lawyers have an obligation to bring this possibility to the attention of their employer clients when advising on terminations.

In Canada, and especially in Ontario, 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. In doing so, it is crucial to consider the options. By way of example, E.I. provides a work sharing program which allows employers, with the consent of their workers, or their representatives, to reduce the work week to avoid lay offs or terminations and to obtain partial E.I. benefits for a period of time to make up for some of the wages lost. Details of this program are available on the E.I. web site.

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 if the payroll of the employer is 2.5 million per year, in Ontario, or if more than 50 employees are terminated in a 6 month period as a result of a permanent discontinuance of part or all of a business. 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 *Employment Standards Act 2000* (the ESA), for provincially regulated employees in Ontario, or the *Canada Code* for Federally regulated employers. Sometimes collective agreements provide benefits superior to the statutory minimums and in such cases, the collective agreement benefits take precedence over those in the ESA.

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 I weeks 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 or more seniority 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.

It is easy to see that the cost of a mass termination in notice and severance alone can be very high, especially if more senior employees are involved.

Common Law Rights

Although there are significantly fewer restrictions on an employer who terminates non-unionized employees, the costs per employee can be much higher. 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 each 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 restructuring has taken place. If the restructuring is done in such a way as to create a sense of tremendous insecurity, not only is there an increased risk of unionization in a non-unionized facility, there is also a risk of decreased productivity as a result of anxiety. Your client's 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, especially in the current environment, 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 your client is 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. Sometimes these provisions can be complicated, and a 'bumping right' may be implied if not specifically stated. Employers with 'relative ability' clauses are often tempted to use these provisions during a lay off to selectively keep their 'best' employees. Careful reading of the actual provisions of these clauses is required before advising employers of their rights. I often advice clients that abuse or overuse of a relative ability clause is often the surest approach to have that issue become a strike issue in the next round of negotiations.

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. More senior employees will resent it if they are laid off and junior employees maintained - and remaining employees may seek unionization in order to protect themselves from similar actions in the future. I usually advise employers to lay-off less senior employees, unless the ability or 'scope' of the less senior employee is clearly recognized and required. Less senior employees require less notice at common law, and under the ESA in most cases in any event.

There is no formulae by which common law entitlements can be determined. Reasonable notice is decided by a court based on the individual circumstances of each individual employee. The best any lawyer can do currently is provide the client with the 'range' a court is likely to provide in individual cases. Older employees with long service will generally have a more difficult time obtaining new employment. For older employees with long service, notice periods greater than 2 years are not uncommon. Mitigation is always a factor to consider, and where there are plentiful employment opportunities for a particular individual or trade, lower periods than those normal can be justified. Unfortunately, that is probably not the case at this juncture.

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 are being terminated at the same time. The formulae is created by first establishing the 'range' for each employee, and then grouping employees with similar ranges with similar offers. [The range is best established by a review of the case law or the excellent charts made available for this purpose by Barry Fisher and others.] There are a number of reasons for this.

First employees will almost certainly discuss their offers with other employees. If employees who are similarly situated and have similar age and experience are offered different packages, that will often in and of itself trigger litigation. If similar employees are treated similarly, there is a perception that favouritism is not a factor.

Second a well established 'formula', even though providing less than might be expected should the matter proceed to trial, will often assist in limiting the number of cases of litigation arising from the mass termination. This is so because employees, and their legal advisors realise that once a company has established a standard approach, it is unlikely to deviate from it because of the affect that will have on all other terminations being considered at the same time. Thus when a formula is established, we often advise that the fact there has been a formula be made known to the employees, but not the formulae itself. Employees who do not accept what is offered would be forced to commence litigation and the employer vigorously defends the offers. This tends to discourage other employees from commencing actions of their own.

It is important that any formulae take into account the provisions of the Employment Standards Act to insure that no one receives less than the minimums provided under the Act. In our office we have an approach which involves more than one experienced lawyer in establishing relative ranges and formulae in cases of mass termination. I have found this approach to be very useful in establishing spread sheets which can then be used to automatically estimate overall cost. If a change is warranted because of a consideration previously overlooked, the change can be automatically made where required, and the cost consequences immediately established.

Offering some or all employees options is one technique that can be used to reduce the overall cost to the client. 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. Providing an individual with a lump sum removes their obligation to attempt to mitigate their damages and may provide them with an opportunity for a windfall. It also provides a lump sum which some employees may use to help in early retirement, or as seed money for an entirely different enterprise. Employees who believe they have marketable skills and a fair chance of obtaining alternative employment in a short period of time will often choose a lump sum payment which is less, or even considerably less, than they would be entitled to at common law in the hopes that they will obtain alternative employment quickly and thus gain money that otherwise would not be provided. The lump sum approach also allows employees to take advantage of tax breaks available to longer term employees on termination. Simply providing salary continuance for a period of time can create an "I'm on holiday" attitude for the period of notice given, notwithstanding the duty to mitigate.

The following approach has been used successfully by many of our clients:

> Offer two options. Option A consists of salary continuance for a specified period or until the individual obtains alternative employment whichever first occurs. Option B consists of a pre-determined and lower lump sum payment provided at the time of termination. Often a majority of employees choose the smaller lump sum option when these two options are provided. In providing Option A, the employer must specify that under no circumstance will the employee receive less than the minimums required by the Act.

An alternative approach often used to reduce the "I'm on holiday" attitude is to provide salary continuance, but with a bonus in the event the employee gets alternative employment before the end of the salary continuance period.

Announcing the Downsizing

How your client does this is almost as important as what they do. Some tips.

1. Communicate why the downsizing is necessary, especially to those who will remain.

2. Give them straight goods as to the Company's financial position.

3. Meet individually with each employee terminated.

4. Offer letters of reference to assist them in finding new jobs.

5. Consider career counselling for more senior employees.

6. Let them know that you used a formulae to fairly determine their package.

7. 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.

8. Don’t drag it out. Try to get it all done in one day.

9. Keep the packages confidential until they are actually given to the employees.

10. Make sure the option includes a proper release.

What about other options?

The times we currently face are unprecedented in recent memory. How courts will react as this recession unfolds may depend on its length and breadth. What might have been considered constructive dismissal in previous cases, may not be so perceived if this recession turns into the depression some predict. For this reason, I believe employers should consider reduced wages, reduced hours, perhaps in conjunction with the Work Share program of E.I., and other measures short of termination. In many industries, especially construction, a core of experienced employees is essential to the future success of the company. In the last recession, some of our clients maintained a core of workers, and obtained work at no profit, or even at a loss, so that they could keep a core of experienced workers for when the recession was over. Those who did had a huge advantage when the economy improved.

Don't be afraid to propose re-opening existing collective agreements if that is what is required for your client to survive. One year ago, CAW concessions negotiated mid-contract would have been seen as impossible. It was just announced as under consideration by their new president. In a recent case of mine, a CAW strike was settled by reference to voluntary binding arbitration with the union in full knowledge that wage cuts would be the employer's position.

In a non-unionized setting, wage cuts, accepted by the employees, were used by many companies in the recession of the late 80's and early 90's. I will not be surprised if such wage reductions gain the approval of the courts as not constituting constructive dismissal. In any event, many if not most employees in bad times will consider wage reductions as a better alternative to termination. Often giving notice that there will be changes, or that wages will be decreased can significantly reduce the risk of litigation. In these circumstances, a carefully planned communications strategy is essential to success.

Advising employees, in my view, will also be more difficult this time. Often companies will be 'on the ropes' and will offer severance packages worth much less than the common law may require. They may do so in full recognition that their survival is at stake, and paying the full common law entitlements to large numbers of terminated employees will bankrupt them because of the dried up credit market. In these cases, employees may be faced with litigation to get what they are entitled to in cases where the law is pretty clear. But employers resist because they simply have no choice. By the time the matter is decided in court, the company may be gone or in CCAA protection. That is a risk solicitors need to point out to their clients in appropriate circumstances.

Conclusions

Mass terminations create challenging problems for employers, employees, and their advisors. Unfortunately, it would seem that those of us who practice in this area will be busy for some time to come. We need to remember that these times are very difficult for our clients, whether they be employers or employees. Our job is not easy, but good advice for all concerned is an important, if not vital service that we can provide in tough economic times.

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