FEBRUARY 2009

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Employment Notes

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"Downsizing... is never easy but there are ways to reduce the pain for all concerned."

TOUGH ISSUES IN TOUGH ECONOMIC TIMES

Elizabeth J. Forster

Many clients have contacted us recently about the issues they are facing as a result of the recent economic slowdown. Companies have been forced to lay-off employees, or alter their terms of employment.

We have prepared this special edition of our newsletter to deal solely with issues arising out of downsizing. We have addressed issues such as the mass termination provisions of the *Employment Standards Act, 2000* ("ESA"), "constructive dismissal" issues arising upon restructuring, and the renegotiation of collective agreements.

We have also prepared a Severance Package Checklist which lists many of the issues that must be addressed upon the termination of an employee. We invite you to visit our website at **www.blaney.com/article/labourandemployment** for a copy of this Checklist. You may find this of assistance if you are an employer terminating employees, or if you are an employee who has recently been severed.

There are, of course, many other issues that arise upon termination of employees. The members of our employment group are available to assist you in handling any of these issues. ■

SO YOU HAVE TO DOWNSIZE: AN EMPLOYERS MANUAL

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

Mark E. Geiger

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

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"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."

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Her work also includes wrongful dismissal actions, actions for breach of fiduciary duties and other employment and employee issues as well as labour-related actions. She advises clients on employment contracts, employment policies, non-competition and confidentiality agreements and employee pension and benefit-related issues.

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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.

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"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."

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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.

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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 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 a risk of unionization, there is also a risk of decreased productivity as a result of anxiety. Your best

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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. ■

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"...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."

Christopher McClelland has joined the firm following his call to the Bar of Ontario in 2008, and is the newest member of our Labour and Employment Group.

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RESTRUCTURING AND CONSTRUCTIVE DISMISSAL

Christopher McClelland

Faced with a shrinking economy and an uncertain economic future, one way a company may attempt to cut costs is by engaging in some form of restructuring. Often, this will involve a major reorganization of the company's workforce. In an effort to improve efficiency, an employer may terminate certain employees and then renegotiate the employment contracts of those that remain. In doing so, an employer must take care to ensure that these attempts to renegotiate do not inadvertently result in the constructive dismissal of the very employees the employer considers most valuable. This article will deal with strategies the employer can use to minimize the possibility of constructive dismissal claims when attempting to restructure its business.

Constructive Dismissal Generally

An employer cannot make a significant change to an employee's contract of employment without the employee's consent. If the employee refuses to accept the change and the employer tries to impose it anyway, the employee may treat the employer's actions as a constructive dismissal and sue for damages as if he or she had been terminated without cause or notice. This is especially relevant for a company trying to cut costs, as litigation of constructive dismissal claims is typically more expensive compared to ordinary cases of wrongful dismissal.

During a recession, employees are generally more concerned about job security, and an employer facing significant financial difficulties may be tempted to take advantage of this situation by pressuring employees to agree to a new employment contract. However, this is a risky strategy, as one of the unusual features of a constructive dismissal claim is that it is up to the employee to decide whether the changes amount to a termination. In addition, the employee has an opportunity to try out the new terms for a reasonable time before deciding whether or not to treat the change as a constructive dismissal and bring a claim for damages. A better approach is to reduce the risk of such claims by taking steps to ensure that any restructuring changes do not result in the repudiation of any employment contracts, either at law or in the minds of the employees.

Restructuring Changes That May be Considered Constructive Dismissal

Only changes to the essential terms of the employment contract will allow the employee to reject the change and conclude that he or she has been dismissed. For example, a minor change to the way an employee's vacation pay is calculated will likely not be considered fundamental. However, most restructuring efforts involve changes that are much more significant. The following are specific types of changes which the courts have found to be constructive dismissal:

- Demotion, loss of seniority, or loss of status, profile and presitge
- Reduced renumeration or termination of a bonus
- A change in hours or the number of shifts worked
- A change in job responsibilities
- A decrease in the supervisory powers of the employee
- An increase in the amount of supervision above the employee

Because these are exactly the sort of changes a company attempting to restructure would be hoping to make, it will be very difficult to completely eliminate the possibility of constructive

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dismissal claims. The following sections will cover strategies for minimizing any such claims.

Avoiding Constructive Dismissal Claims During a Restructuring

One advantage of attempting to renegotiate employment contracts during a period of economic decline is that both the employer and the employee are motivated by the knowledge that an unsuccessful restructuring may hasten the employee's eventual termination or, at worst, result in the bankruptcy of the employer's business. As such, employees may be more receptive to changes to their employment contracts if they are aware that the purpose of the changes is to keep the business viable and allow for their continued employment. If the employer is able to secure the employee's consent to the changes in advance, the new agreement will bind both parties.

The Extent to Which Courts Will Consider The Employer's Economic Circumstances

In the event that an employee does bring a claim for constructive dismissal, Canadian courts are aware that the decision to restructure is often motivated by events over which the company does not have complete control. In the 1980s, courts began to focus on the legitimate business interests of companies attempting to renegotiate employment contracts. As long as the changes were made in good faith and did not constitute a disguised attempt to force the employee to resign, courts were willing to pay less attention to the subjective concerns of employees than they had previously.

The Supreme Court of Canada took a step away from this approach in the mid-1990s. The current objective approach asks whether a reasonable person in the same position as the employee would have considered the essential terms of the employment contract to have been substantially changed. If so, the employee has been constructively dismissed. The question of whether the changes were made as part of a reorganization motivated by bona fide business purposes is only one factor, and must be considered in light of the employee's position and the broader employment relationship.

In previous cases employers have also attempted to argue that they are entitled to restructure their organization in order to avoid a potential bankruptcy, and that the notice periods for employees the employer is required to terminate should be reduced to reflect this entitlement. Courts have generally rejected this argument, on the basis that the economic factors affecting the employer will likely affect their employees to the same degree, making it more difficult for these employees to gain another job within the industry. In addition, it is often difficult for an employer to adduce evidence about the overall economy that would allow the court to give the employer special treatment.

The Employee's Requirement to Mitigate

One way in which an employer's need to restructure may be relevant to a claim for constructive dismissal relates to mitigation. In certain circumstances, an employee who claims to have been constructively dismissed may be required to mitigate his or her damages by accepting the changes offered by the employer.

An employee who concludes that he or she has been constructively dismissed is required to take the steps in mitigation that a reasonable person would take. If the employee's working atmosphere has become one of hostility, embarrassment or humiliation, or if relations between the employee and the employer are acrimonious, the employee would not be expected to continue working for the employer. However, if the changes proposed by the employer are motivated by legitimate business needs and not by concerns

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"...collective agreements negotiated over the past three years may challenge some companies wishing to remain economically viable in the current business climate. Is now time to reconsider your collective agreement?"

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John's background is in operations and human resources management. This experience provides him with the unique opportunity to assist clients in the formulation of practical legal solutions, specifically tailored to their needs.

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about the employee's performance, it may be reasonable for the employee to remain with the employer during the notice period.

As such, the employer should always make it clear to the employee that his or her employment contract is being renegotiated as a result of the economic climate and the business interests of the employer, and not the employee's individual performance. If the employee responds by claiming that they are being constructively dismissed, the employer should immediately re-offer the employee a position based on the new terms, and emphasize that the employer values the employee and does not want to end the employment relationship.

Alternatively, if the plans to restructure do not require immediate changes, the employer may consider providing the employee with reasonable notice of a change to their employment contract. For example, if an employee would normally be entitled to 12 months notice of termination, the employer may provide the employee with 12 months working notice of the employer's intention to unilaterally alter the employment contract. At the end of the working notice period the employee's previous employment contract would be terminated, and the employee would be free to accept the new terms or end the employment relationship. ■

RECESSION: IS IT TIME TO RECONSIDER YOUR COLLECTIVE AGREEMENT?

John-Edward Hyde

Scarcely a week into the new year, Canadians learned that the economy was conclusively in recession. Against this backdrop, the majority of unionized Canadian companies are bound with collective agreements providing wage rates and benefits reflective of much healthier economic times. Simply stated, collective agreements negotiated over the past three years may challenge some companies wishing to remain economically viable in the current business climate. Is now time to reconsider your collective agreement?

Many people believe that wages and benefits provided in a collective agreement must remain fixed to the terms previously negotiated. However, there is a silver lining in every economic cloud, and this may in fact be the time for companies to consider re-opening their collective agreements to negotiate for wages and benefits which reflect market reality.

If management wishes to re-open a collective agreement to reduce wages and benefits, and support such request by layoffs and/or closures, the law requires the company to establish its decisions are *bona fide* business decisions, without any taint of anti-union animus. Even if a collective agreement grants the company an absolute right to layoff employees, to determine its workforce needs, and/or close facilities, such decisions are always subject to arbitral scrutiny based upon the *"bona fide* business decision" analysis.

Naturally, unions will expect management to provide back-up for its decision. The onus is generally upon the union to establish the company has exercised its management rights in a manner which is arbitrary, discriminatory, or in bad faith. Practically speaking however, the onus is easily shifted, and companies often find themselves defending their decisions to layoff employees and/or close facilities before arbitrators and labour relations boards.

As it stands, it is contrary to the law for an employer to layoff and/or close down its operations if its decision is not completely free of a

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desire to avoid a union certification or its obligations under a collective agreement. Needless to say, in the current business climate, layoffs and/or the closure of unprofitable facilities (whether temporary or permanent) are far easier to justify and less likely to be interfered with by unions or decision makers second-guessing managerial decisions.

Although some collective agreements include wording which provides that either party may seek an amendment or variation of the collective agreement during its term, such wording is not necessary for the company to go to the union and formally request the re-opening of a collective bargaining agreement. This is usually undertaken by virtue of a letter addressed to the union outlining the request and the necessity of same in order to avoid layoffs. Provided that this can be supported as a *bona fide* business decision in the face of economic performance or market pressure, it is unlikely to be attacked. Moreover, it has been held that the legislated "duty to bargain in good faith", does not apply to the varying or amendment of a collective agreement during its term. Hence, companies generally enjoy far greater latitude in negotiating a change to the terms of a collective agreement during its operation outside of the normal collective bargaining.

Indeed, unions are not obliged to agree to a request to re-open a collective agreement, and seldom will they easily give in to any proposal which includes a reduction of wages or benefits. Faced however with significant layoffs of its members, many unions may recognize the necessity of cooperating with the employer to meet economic challenges. Although many employees will undoubtedly take issue with any agreement to reduce wages or benefits, a collective agreement is a contract made between the employer and the union, rather than individual employees, and a decision by union to re-open a collective agreement in the face of employer request is not easily subject to challenge.

Clearly, if you have a collective agreement which is not soon to be re-negotiated, it is definitely worthwhile to consider re-opening the agreement mid-term to seek amendments which reflect today's economic realities. For those companies which have collective agreement expiring this year, it is indeed a time for change. Undoubtedly, bargaining for such companies will be difficult, however the pressure placed upon the union to accept bargaining proposals providing for a reduction of wages and benefits, will also be significant. Indeed, the pressure to avoid layoff will be first and most in the mind of union negotiators.

In the present economy, unless the collective agreement provides for a specific entitlement to termination pay or severance pay, there may be motivation for both parties to support changes to a collective agreement which will keep its members employed, and particularly to avoid a strike or lock-out situation. ■

EXPECT THE BEST

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