

OVERVIEW OF EMPLOYMENT ISSUES

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A. Outline of Issues

1. INTERNATIONAL TRANSFERS

Typically an employment relationship which has began in Ontario will remain subject to Ontario law even though an employee may be transferred to a foreign jurisdiction. The parties by separate agreement may state that the laws of a new jurisdiction will prevail. However, if nothing is said there typically will be an imposition of reasonable notice by Ontario law by an implied obligation. Further, it is likely that there will be an implied obligation upon the employer to pay the return cost of relocation back to Ontario.

An employee if terminated in a different country is particularly vulnerable and typically will not be able to work in the new jurisdiction. There clearly will be an obligation upon the employer to treat such an individual fairly. Should an employer refuse to pay, for example, the cost of relocation without a release being signed, such action may well backfire, should litigation erupt. It is expected that in all situations the notice to be provided and the severance claim will generally take into account such factors as the physical relocation, family factors such as schooling and education and further the loss of spousal income.

2. BASIC RULES

Ontario law requires a very simple obligation upon an employer. In the absence of just cause the employer must give reasonable notice of termination. Very rarely does a company actually provide working notice. The failure to do so gives the employee the right to claim for the value of lost "income", including all aspects of compensation, fringe benefits, car allowance, pension plans, contributions, stock options, bonuses etc. for the entirety of the notice period.

This however constitutes a maximum claim. Any income earned by the employee during this period will reduce the claim. In addition, any expenses incurred by an employee in seeking new employment will also be added to the claim. This may even include start up costs of a new business where the employee elects to do so as part of his "mitigation" obligation.

The accepted maximum to date is roughly 24 months. This is however a moving target. The Ontario Court of Appeal recently approved an award of 27 months given at trial.

The court may also consider aspects of an employer's conduct that may be unfair which may cause the notice period to increase from the normal range that a judge may normally order. The notice period in each case as a factor of a situation must be examined individually. Examples include allegations of misconduct made frivolously, or in bad faith, or conduct which is a breach of a public statute, such as the failure to pay even the minimum payments as required by the Employment Standards Act.

In addition, exceptional circumstances such as “inducement” may also increase the notice period. Inducement refers to a circumstance where the employer or the employer’s agent contacts an employee where he or she has visible secure employment and convinces the individual to give up this position and start new employment with it.

It is important to note that this is an implied term of an employment contract. It can be changed or altered by a valid employment agreement entered into between the two parties. Whether the agreement is binding is an entirely different issue, which is discussed under the heading “Private Contract”.

3. CONSTRUCTIVE DISMISSAL

There can be many circumstances where the conduct of the employer may legally terminate the employment relationship, where there are no direct words of termination conveyed to the employee. In such a situation the employee may assert that the employer’s actions may be constructed to be the same as termination. To succeed the conduct must “go to the root” of the expectations of the parties. Typical examples are a dramatic reduction in compensation, a substantial demotion in responsibilities, or conduct which is abusive. Care must be taken in making such an assertion in that the employee must usually end the relationship, accept immediate unemployment in the hope of winning or successfully negotiating a severance payment.

4. DISABILITY ISSUE

It is very important for an employee who is terminated to have consideration to examine the individual’s health. One of the common benefits provided by employers is disability insurance. If an employee is terminated with a medical history, his claim is not just for the normal notice claim.

In the event the individual suffers a major disability during the notice period that he or she would normally be entitled to, there could be a claim for loss of disability benefits to the extent of the continuation of the disability. This can be a very profound liability to an employer. Care must be taken in addressing the health of the individual at the time of termination in view of what could be a disastrous consequence by loss of disability insurance benefits. There may also be a claim in such a situation for the loss of pension credits and the collateral benefits for the entire length of the disability period.

Equally, it is important that life insurance conversion privileges be identified upon termination. An individual typically has the right to convert group life insurance to a privately paid plan of disability upon termination of employment. The individual is generally responsible for converting the life insurance to a privately paid plan. These issues must be clearly spelt out to an employee upon termination.

5. SEXUAL HARASSMENT

Typically the method of dealing with sexual harassment cases has been to file a complaint with the Ontario Human Rights Commission. This process, while free of any legal expense to the individual, is slow and cumbersome. A survey done last year showed such cases taking 8 to 9 years to get to hearing stage. There is a cap imposed by statute as to the sum recoverable for emotional distress set at \$5,000.

The alternative is to use existing “tort” law to sue civilly. The process, is faster and there is no limitation on the sum to be recovered. These cases can be heard by juries. The downside is that legal fees must be paid by the Plaintiff. There are also costs consequences to be paid in the event the claim does not succeed, unlike the Human Rights process.

The law appears to be evolving now to allow such civil claims to be advanced and not confined to the Human Rights Commission process. Historically there had been real doubt that a civil claim could proceed for such a claim.

Additional claims, such as wrongful dismissal, can be made in conjunction with the civil claim.

6. STATUTORY REQUIREMENT

In Ontario there is a minimum obligation by statute imposed for payment in lieu of notice. The statutory minimum takes two forms. The first is as follows: less than 3 months - nil; more than 3 months - 1 week; more than 1 year - 2 weeks; more than 3 years - 3 weeks; more than 4, 5, 6, 7 and 8 years - 4, 5, 6, 7 and 8 weeks respectively.

In addition where the employer’s payroll exceeds 2.5 million dollars, and has completed at least 5 years of employment (in total and not consecutively) the employee is entitled to an additional 1 week a year to a maximum of 26 weeks. This is referred to as a “severance payment”.

The statutory payments are not subject to an offset for other income earned. There are two ways of enforcing the statutory payment. Should the employee chose to file a complaint with the Ministry of Labour, which had been the typical method of collecting these payments prior to recent amendments in the act, the employee will give up any civil claim for wrongful dismissal.

In the event it is foreseeable that such a civil claim does exist, the employee appears to be better off to sue civilly for both the statutory and the common law wrongful dismissal payments.

7. PRIVATE CONTRACT

The implied term of reasonable notice can be “contracted out”, presuming the contract is entered into freely and represents the product of a fair and equal bargaining process.

Typically, it is difficult for an employee to bargain with an employer once the employment relationship has commenced. If however the agreement has been set out clearly before the employee has left other employment and provided that the contract meets the minimum statutory payments, the contract probably will be upheld. Legal advice should be received before signing such a document.

8. JUST CAUSE FOR TERMINATION

The employer may assert that the termination was for “just cause” in which case there will be no responsibility upon it to provide any common law notice, or payment in lieu. The argument of cause is generally a tough battle for the company to win.

In cases of performance issues, usually there must be evidence to show that the deficiency has been brought to the employee’s attention in a concrete manner and he has been given a real opportunity to correct the offending behaviour. This typically will require writing from the company to this effect.

In cases where honesty or integrity is at stake, the standard is considered an unyielding one and any deviation will likely result in a finding in the employer’s favour.

Occasionally isolated actions of insubordination may allow for immediate termination without compensation, although the accepted rule is to deliver a stern warning, rather than terminate.

It is my view that the standards of conduct under the statute create a more stringent test for the employer to meet. Occasionally there may be merit in proceeding under the Act for that reason and discarding the idea of civil law suit.

Although not considered strictly “cause “ for dismissal, the medical ability of the employee to work is sometimes considered under this heading, erroneously. The long held view that an employee’s ability to work will result in termination without financial compensation is a concept under judicial review presently. One recent decision in Ontario has held that such an event - a long term disability - will not terminate the employment relationship. This has enormous ramifications for claims such as pension accruals during the disability period.

9. CANADA LABOUR CODE

The Canada Labour Code is unique legislation covering employees in industries governed by federal law. The industries covered by the federal code include banking, telecommunications, radio and television stations, airlines, harbours, and interprovincial trucking. Certain conditions must be met to use the unjust dismissal provisions of the Code. These are as follows:

a. The employee must be a “non manager”. This term “manager” has been construed fairly broadly in favour of the employee seeking the remedy. Just because someone is

called a “manager” does not necessarily mean that the right to use this remedy is denied. At the hearing there will be evidence given as to the particular powers of the position, such as hiring and firing abilities, and in a broader perspective, whether the individual implements decisions made elsewhere or exercises independent autonomy.

b. The employee’s termination cannot be due to a genuine redundancy. This means in essence that the position or the substance of the position cannot be given to another employee to carry on as his effective responsibility. It is permissible for the employer to distribute the job functions across others in the work environment or to contract out the job functions to an external source.

c. The employee must have worked for more than 1 year.

d. The employee cannot be a member of a union.

The unjust dismissal remedy is very powerful. It can lead to an order of reinstatement and full back pay from the date of termination.. There is a statutory time of 90 days within which the individual has to file such a complaint.

10. RIGHT TO REINSTATEMENT

Typically an employee who is not a unionized employee and apart from the provisions of particular statutory remedies that may occasionally lead to reinstatement such as the Canada Labour Code, the common law does not allow for reinstatement. The common law claim is one of a civil claim for damages based upon reasonable notice.

11. RIGHT TO A HEARING - PUBLIC LAW

If an individual is however employed pursuant to a public statute and is entitled to a hearing by such statute, the deprivation of a hearing may give rise to an application nullifying the termination and hence ordering reinstatement. A good example of this are the court decisions dealing with firefighters who were not given the required hearing at the municipal council before termination.

There are also other provincial statutes allowing for reinstatement such as the Environmental Protection Act, where a person has been terminated due to his insistence the Act be followed or under the Employment Standards Act, where an employer refuses to reinstate after a maternity leave. These situations are quite rare.

12. NEGLIGENT MISREPRESENTATION

In the event an employer makes an improper statement and does so negligently that leads an employee to resign from employment to take up new employment duties, there could be a claim for damages for lost opportunity with the previous employer.

The decided cases to date frequently involve a circumstance where an individual has relocated based upon words spoken negligently by a new employer. There is no reason

for the law to be confined to such a fact situation. Employers must take care in describing the nature of a position available and the nature of work opportunity. In the event this is not done the individual may well have a claim not based upon wrongful dismissal but based upon the lost opportunity at the position from which he has departed.

Such a claim is not limited to “reasonable notice”, as is the case for most wrongful dismissal cases.

13. TAX CONSEQUENCES

Damages for wrongful dismissal are fully taxable, aside from an eligibility for an RRSP payment over and above the normal annual entitlement. The RRSP payment basically is \$2,000 per year of service up to and ending in 1996. For years prior to 1989, where there was no pension or deferred profit sharing plan, a further \$1,500 per year can be added.

Pre judgment interest is not taxable. Punitive damage claims likely are taxable, as are mental distress claims. Tort claims such as intentional infliction of mental distress claimable in a sexual harassment claim appear not to be. Legal costs are also deductible.

The federal government announced in its 1999 budget its intention to allow for refilings of tax returns where a retroactive payment is made in one year, covering income attributable to several past years. The legislation has yet to be amended, although the Department has indicated it will review cases, base on the law as proposed.

A recent decision of the Federal Court approved as non taxable a payment to a vendor of a business an allocation of funds to a non competition covenant. Where such a covenant is given by a terminated employee and had not be given as part of the prior employment relationship, it may be anticipated that such a fairly negotiated payment will be non taxable. The covenant will, however, be very binding on the departing employee in such circumstance.

B. The Court Process

The court process is divided into two distinct categories. There are different “simplified rules” for cases involving \$25,000 or less. For cases which exceed this amount, typically a case in Toronto courts will take roughly 12 to 18 months to get to trial. Each party has a right to appeal, which could easily take another 18 months.

1. Pre Trial Discovery

Each case requires the opposing party to produce all relevant documents, whether or not they favour the position asserted. After production of documents is made, each party has the right to question the opponent under oath to understand what the evidence will be to defend the position.

Unlike the United States, where any person in the world may be deposed before trial, in Ontario, one representative of the company is produced for pre-trial discovery. In exceptional circumstance a court order may be obtained to allow for the discovery of a non party.

After discoveries have been completed, the case is set down for trial and assigned a court date for hearing.

2. Mediation

There are presently 2 tracks of cases in Toronto courts. Case managed cases are selected by random or by court order. These cases have a timetable imposed as to when the case must be ready for trial. Also mediation is mandatory.

Mediation is also employed in non case managed actions on a voluntary basis. It has proven to be very valuable in settlement of controversial cases. Typically mediation occurs at the early stages of a law suit when costs are much lower and hence the case will have lesser obstacles to settlement.

The parties appoint an experienced lawyer or a retired judge, to hear what is in dispute. The clients are encouraged to speak about why they feel they are right and also what other motivations have brought about the conflict.

The mediator has no power to order anything. His influence is strictly persuasive. When entered into voluntarily, it has proven to be very successful. One critical aspect has been that both parties have a desire to be there and settle. In addition particularly in cases of wrongful dismissal, that the company representative be truly empowered to make decisions. Quite often the company may send someone as a figure head with no real decision making power, or only up to a specific dollar figure.

Mandatory mediation may suffer from the descriptive adjective. Both parties are dragged to the meeting, as opposed to wanting to be there to settle. It is likely that it will not be as

successful as the voluntary variety, but nonetheless will no doubt settle cases that would have required a 5 day trial otherwise.

3. Arbitration

This is an alternative to the court process. Sometimes the parties complete discoveries and instead of going to trial, agree to use an arbitrator. There is an agreement which denies the right of appeal.

The advantages that drive the arbitration decision are usually the ability to litigate in privacy, the right to know who the decision maker will be, and a certainty of the date. The disadvantages are the cost involved. One party no doubt will lament the loss of appeal rights.

4. The Shot Gun Alternative

Where mediation or arbitration may not succeed, innovative counsel may wish to consider a third alternative of resolution, one which has not seen much use in Canada since 1821 - a duel.

The last duel in Canada took place in Maryland, New Brunswick, between two lawyers in the midst of a heated debate about the respective rights of their clients. The gunfight took place in October of 1821. George Frederick Street and George Ludlow Wetmore quarreled on the court house steps after a heated argument before a judge in court that day. Two days later they met to settle the matter of honour. Each fired once and both missed their mark.

Street wished to call it a day. Wetmore insisted on a second round, much to his detriment, as he was fatally wounded. Street fled the scene to Maine. He returned to New Brunswick and was tried on a murder charge. He was acquitted due to the inability of the prosecution to identify the accused. He later became a judge of the New Brunswick Supreme Court.

Find out more: www.geocities.com/Heartland/Plains/8730/duel.html

C. Class Actions

Ontario law has recently approved class actions where there have multiple terminations at the same time. The advantage to the process on the part of the Plaintiffs is that the resolution of the complaints is streamlined and usually an arbitration process is ordered to determine each claim on a summary and inexpensive basis. Legal fees are paid, in effect, on a contingency basis. The process allows many smaller claims to be advanced when on an individual basis, such claims would not be economical to proceed.

D. Right of Redemption to Minority Shareholder

Where the employee terminated is also a shareholder in the company, absent a shareholders' agreement setting out obligations on termination relating to the equity, a

court will order the company to redeem the shareholders' equity. The historical requirement was to show oppression of the minority shareholder, which had mandated the proof of conduct which was abusive of minority rights, such as increasing salaries of the remaining shareholder employees, the denial of financial information and the like. Recent cases have set a lower threshold, being the breach of mutual expectations on the commencement of the business. For example, three people starting a business, two of whom decide to terminate the third, will likely be forced to buy out the terminated shareholder, even absent direct conduct of financial manipulation to the detriment of the ousted party.