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HUMAN RESOURCES
LAW AND ADVOCACY

In this issue:

CLASS ACTIONS WITH AN HR TWIST

While still relatively new to the game, Canada is now embracing the US-style class action lawsuit – and HR departments face a growing litigation threat because of this.

Compared to its southern neighbour, Canada has never been seen as a particularly litigious nation, but times are changing. The number of Canadian class action proceedings has grown substantially over the past several years – and a growing number of them involve human resources issues. Our firm has been involved in a number of these cases, using our expertise both in litigation and human resources.

"Class actions were only permitted in Ontario when the *Class Proceedings Act* came into force in 1992," says John Field. Field, a Litigation Group partner in the firm's Toronto office, is one of the leading employment-related class action defence counsel in Canada and has been at the forefront of a number of high-profile cases in this area. "So while they are still relatively new here, the genie is certainly out of the bottle."

The increased litigation that class action proceedings have brought is not necessarily viewed as a bad thing from a public policy perspective.

"The main reason class actions were allowed in Ontario was to provide improved access to justice," says Ian Dick, chair of Hicks Morley's Litigation Group. "The system for individual claims is both expensive and overwhelming, and an individual with a relatively small but legitimate claim will rarely pursue it alone. Class actions have really opened up the justice system to a whole new group of people."

ENTER THE EMPLOYEE

Included in this new group of litigants are employees bringing actions against their employers.

"Class action lawsuits based on an HR issue are a trend that's here to stay," says Andrew McCreary, a Litigation Group partner in the Hicks Morley Ottawa office. "They really lend themselves very neatly to employee claims because the class of plaintiffs is so well defined. A competent plaintiff's counsel, often working for fees contingent on the successful resolution of the action, can easily make issues relating to benefits and other work conditions the focus of litigation."

Class action claims relating to human resources issues are as broadly based as the human resources practice area itself.

But the increase in class action litigation involving employees is based on much more than just the ease with which the class of plaintiffs can be identified.

"Employees have a common interest not found in all groups," says McCreary. "They often operate under the same contractual terms, policies and working conditions. While each individual employee may have only a small claim, the economies of scale make class action litigation worthwhile for plaintiffs' lawyers to pursue."

MANY POTENTIAL SOURCES OF CLAIMS

Class action claims relating to human resources issues are as broadly based as the human resources practice area itself. Employers have had to defend class actions involving

breaches of fiduciary duty, occupational health and safety and environmental damage claims, and negligent misrepresentation. And most recently, large employers in Canada have become the target of proposed class overtime claims as well.

Field believes that there are some trigger points that employers should watch for in terms of managing the risk of class actions. Field notes that, "The potential for a class proceeding increases in a number of situations – such as mass terminations and plant closures, common representations to employees not acted upon and changes to benefit programs and pension plans, including claims to pension surplus."

In terms of managing frivolous claims that have little or no merit, one of the employer-friendly trends that is emerging is the awarding of costs against plaintiffs if an action is not successful. According to Field, "There was little downside to launching a proposed class action. Now, I think the pendulum has swung back a little and courts are conscious of potential abuses of the system. Some cost awards have been made against plaintiffs in a few cases, and that's an important check in the system."

RISK MANAGEMENT IS KEY

While no employer can completely safeguard its organization from a class action lawsuit, there are steps you can take to lessen the risks of an action being launched.

"Reviewing policies and practices to ensure they comply with minimum statutory thresholds and have been properly applied is critical," says Stephen Gleave, a Litigation Group partner in the firm's Toronto office.

"Employers need to review and assess their communications and representations to their employees with an eye to potential risk as well," Gleave adds.

"A review of the employer's workplace practices is in order to consider whether there are any aspects that could put the employer at risk of a common claim for breach of contract, breach of fiduciary duty or negligent misrepresentation," says Gleave.

START WITH A RISK ASSESSMENT

If you think your organization is potentially vulnerable to a class action lawsuit, a risk assessment of key human resources areas – working conditions, health and safety, pension and benefits – is a good starting point. With new class actions making the news seemingly every week, spending a little time now could save your organization significant time and money later.

HR QUICK HITS

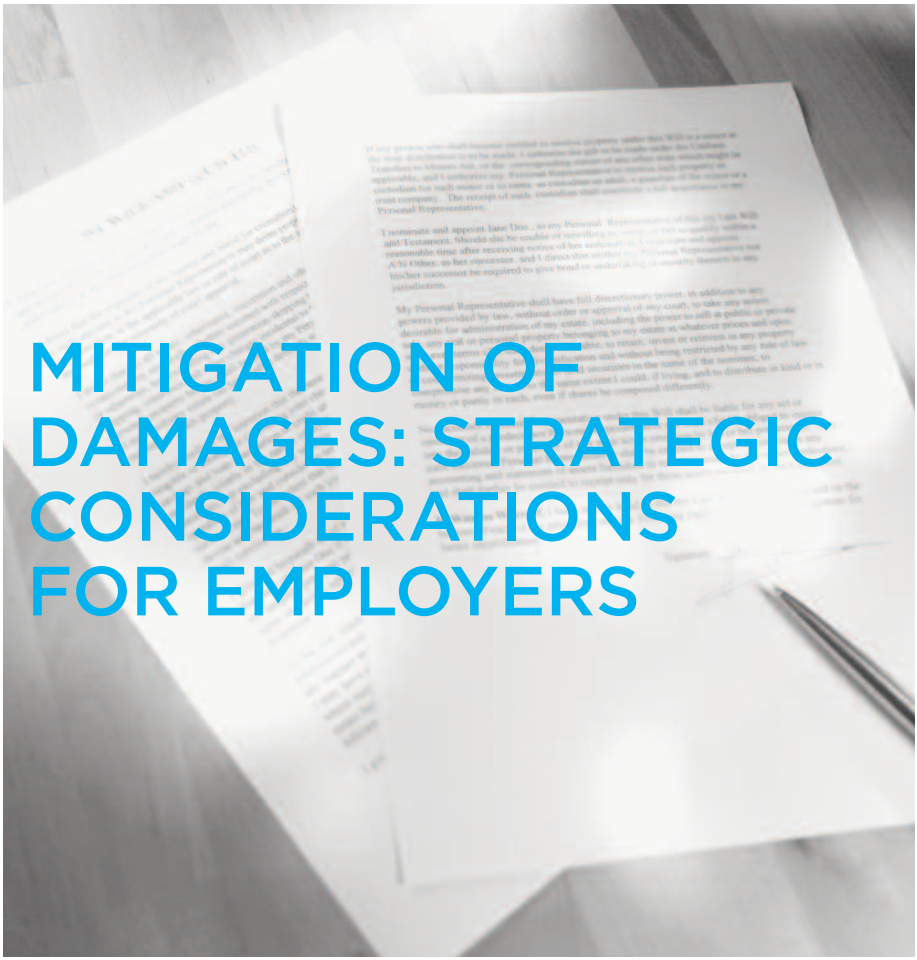
New Curricula Prepared for Security Guards and Private Investigators

Since the passage of the *Private Security and Investigative Services Act, 2005* – legislation that sets new standards for individual security licensees in order to professionalize the protective services industry – the Ontario Government has been developing a training and testing program to comply with the requirements of the statute. In a memorandum posted recently on its website, the Ministry of Community Safety and Correctional Services indicated that the training and testing curricula are now complete.

The Government had previously published a "Testing and Training" regulation, with an effective date of November 30. Because of the length of time required to develop the curricula, this timeline for compliance is no longer feasible, and the Government has revoked the original regulation.

A new regulation, reflecting the new curricula, and with a new timetable, is expected to be published shortly. In the meantime, the Ministry has posted the new curricula for private security practitioners and private investigators on its website. The Ministry has indicated that no licensee will be required to complete the specified training or take a test until the new regulation is in force.

The Ministry's memorandum – with links to the curricula – can be downloaded at:
www.mcscs.jus.gov.on.ca/English/police_serv/pisg/jh_memo.pdf



MITIGATION OF DAMAGES: STRATEGIC CONSIDERATIONS FOR EMPLOYERS

When an employee is entitled to damages for breach of an employment contract, the employee has a duty to mitigate his or her losses. Employers should consider ways to assist employees to fulfil their duty to mitigate.

BY: GLENN CHRISTIE

In contract law generally, when there is a breach of contract, the non-breaching parties cannot just sit by and watch their damages mount. The law requires them to act reasonably and try to reduce or mitigate their losses – even though this means that the party who breached the contract will benefit through a reduction in the damages owed.

In an employment law context, the obligation to mitigate damages means that the dismissed employee must try to obtain new employment during the

notice period.[1] At the trial of a wrongful dismissal action, the former employee's damages may be reduced by the amount that he or she could have earned at new employment found through a reasonable job search.

What many employers don't realize is that, in many cases, they can take steps to help the mitigation process.

ONUS ON EMPLOYER TO PROVE A FAILURE TO MITIGATE

The onus of proving that the former employee has failed to act reasonably in mitigation lies on you, the employer. In order to satisfy this onus, you need to show that there was available, suitable employment that the former employee could have taken during the notice period. At trial, courts hold employers to a fairly high standard to prove a failure to mitigate – speculation about available employment will not be enough to meet the onus.

The former employee does not have to accept any alternative employment. Since the obligation is to act reasonably, the former employee will be required to look for, and accept, similar employment that fits his or her skills and experience. In the initial stages of the job search, it would be reasonable to focus on very similar jobs with similar terms and conditions of employment. As the period of unemployment lengthens, the scope of a reasonable job search must broaden to take in a wider range of possibilities.

ACCEPTING EMPLOYMENT WITH THE OLD EMPLOYER

Although it might seem unusual at first, sometimes a dismissed employee must accept employment (or, perhaps more accurately, re-employment) with the old employer in order to mitigate his or her damages. This situation can arise in two different ways. First, the dismissed employee may be given the opportunity to take up a new position with the employer, which could arise in what would otherwise be a constructive dismissal situation. Alternatively, the dismissed employee might have been offered a period of working notice with the employer as a way to reduce the impact of the dismissal.

Absent there being a barrier to accepting the offer, the duty to mitigate may require a dismissed employee to accept temporary work with the former employer.

Recently, in *Evans v. Teamsters Local Union No. 3*, the Supreme Court of Canada considered whether a dismissed employee had to accept an offer of employment from his former employer as part of the duty to mitigate. In that case, the answer was "yes" – absent there being a barrier to accepting the offer, the duty to mitigate may require a dismissed employee to accept temporary work with the former employer.

The Court stated that the pivotal issue in this situation is whether a reasonable person would accept the opportunity of temporary employment. Some of the critical elements are whether the salary is the same, working conditions are similar, the work to be performed is not demeaning and the personal relationships are not acrimonious. Other considerations include

[1] Similar considerations apply in the labour law context. If a dismissed unionized employee is reinstated with compensation for lost wages, it may be possible to successfully argue that the grievor did not act reasonably in mitigating his or her damages.

the history and nature of the employment, the timing of the offer of temporary employment and non-tangible elements such as work atmosphere, stigma and loss of dignity.

STRATEGIES FOR EMPLOYERS

Here are a few strategies that you might consider to increase the chances of an employee successfully mitigating his or her damages upon dismissal.

- **Job search help.** You may be able to facilitate the dismissed employee's mitigation efforts by providing job search assistance that is geared to the individual's needs and circumstances.
- **References.** Where possible, provide letters of reference, letters confirming employment or other tangible forms of support that will bolster the employee's job search.
- **Administrative support.** Consider providing access to administrative supports such as computers, fax and copying, where appropriate. This may only make sense where a working notice period is being provided.
- **Continued work.** In the right circumstances, a period of working notice or offer of temporary work might help a job search. It's sometimes easier to find a new job while one is still working. A prospective employer might view the employee favourably if it is clear that he or she is leaving on good terms.
- **Industry contacts.** For specialist, professional or technical occupations, make contact with the appropriate industry or trade groups. They might have more timely information about vacancies and employment trends.

If the dismissal has occurred and litigation is underway, try to keep track of vacancies and job advertisements that might apply to the former employee. This information can be very useful later in the discovery and trial process. It is much harder to replicate this data after the fact.

By planning for mitigation before the actual dismissal of an employee, you can significantly improve the chances of successful mitigation – or have a much better chance at trial of proving that the former employee failed to mitigate.

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CHANGING A TERM OF EMPLOYMENT? NOTICE MAY NOT BE ENOUGH

According to a recent Ontario Court of Appeal decision, notice could have little meaning if an employee objects to a change to his or her employment contract

BY: AMANDA HUNTER

You need to change something in your employment arrangement with employees – reduce a benefit, add or take away duties, move work locations, or some other potential take-away. You understand the issue of constructive dismissal, where a unilateral change in a fundamental term of employment amounts to a repudiation of the employment contract. So you give employees plenty of notice of the change. After all, if a contract of employment can be terminated with notice, then it's reasonable to conclude that you should be able to change it with notice.

Or is it?

A recent Ontario Court of Appeal decision, *Wronko v. Western Inventory Service Ltd.*, has raised concerns about the extent of an employer's right to implement changes with notice.

EMPLOYEE OBJECTED TO CHANGE

Wronko had worked for Western for approximately 17 years at the time that Western hired a new president. The president wanted Wronko to sign a new employment contract that

reduced his severance entitlement from two years' pay to thirty weeks' pay.

Wronko refused to sign the new contract. At that point, the president notified Wronko in writing that the new contract – including the reduced severance pay provision – would come into effect in two years' time. Wronko continued to object to the change over the two-year period.

Two years later, the president sent Wronko a copy of the amended contract and asked him to sign it. The president told Wronko that the amended contract was "now in effect", and advised him that "if you do not wish to accept the new terms and conditions of employment as outlined, then we do not have a job for you". Wronko replied the next day that he understood that his contract had been terminated, and demanded payment of the two years of pay in lieu of notice contemplated by the original contract.

OLD CONTRACT PREVAILS

The Court of Appeal found that Western repudiated the employment contract when it presented Wronko with the amended contract that included the new severance provision. At that point, Wronko had three choices: (1) accept the change, and continue employment under the new contractual terms; (2) reject the change and sue for damages; or (3) continue working but make it clear that he rejected the new terms. In the third situation, the Court said that the employer "may respond to this rejection by terminating the employee with proper notice and offering re-employment on new terms". However, if the employer does not terminate the employee, but allows him or her to continue to work, the employee is entitled to insist that the employer comply with the terms of the original contract.

The Court of Appeal found that Wronko's case fell into the third category – he had responded to the unilateral change by making his objection known and continuing to work. Since Western allowed him to do so, Wronko was entitled to enforce the terms of the original contract, and was awarded two years of pay in lieu of notice, less what he earned from other employment during the two year notice period.

EMPLOYER SHOULD HAVE TERMINATED

According to the Court, Western should have terminated Wronko when he made his objections known, and offered him re-employment on the amended terms. The president's

letter to Mr. Wronko giving him notice that the new contract would apply in two years' time did not meet this requirement.

It is interesting to note that in the *Wronko* case, there was no discussion of the issue of mitigation. As discussed in the accompanying article, "Mitigation of damages: Strategic considerations for employers", the Supreme Court of Canada has held that an employee may have to accept re-employment with his or her employer as a means of mitigating his or her damages. In this case – where the only change to the employment contract is a reduced severance provision – it is certainly arguable that Wronko could have continued working with Western to mitigate his damages.

The *Wronko* case suggests that employers need a back-up strategy if they wish to change the terms of an employment contract by providing notice of the change. As the case illustrates, employees may choose to accept the change, reject it and sue for damages, or reject it and continue working. In this last scenario, the employer may then respond by giving proper notice of termination coupled with an offer of re-employment on the new terms.

An alternative approach for employers dealing with an individual employee is to provide working notice of termination coupled with an offer of re-employment at the outset, thereby avoiding the uncertainty created by providing a notice of change and waiting for a response. However, this would be a less effective approach in some cases – for example, if the change affects a larger group of employees.

Whatever strategy for change is ultimately adopted, employers should consider their options carefully, and ensure they have the legal advice they need up front, before taking any action.

Amanda Hunter *advises clients in both private and public sectors on all labour and employment issues. She has represented clients before the Ontario Labour Relations Board, Ontario Human Rights Commission and Tribunal and arbitrators. Amanda has a particular expertise in the application of the Employment Standards Act, 2000.*

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A PENSION BENEFIT

Elizabeth Brown joined Hicks Morley in 1995 as the first lawyer at the firm to specialize in pension and benefits law. Fast forward 13 years and she now heads a ten-lawyer group focused on client pension and benefit issues. Elizabeth took some time with FTR Quarterly in June to discuss her "path to pensions" and the explosive growth in the pension and benefits practice area at the firm.

Tell us a bit about your background. Have you always lived in Toronto?

I was born in Toronto, but when I was six we moved to Pointe-Claire outside of Montreal, so that's where I spent most of my childhood. My family moved to Milton when I was 17, so I actually finished high school here in Ontario.

And after high school?

My passion was music, especially the piano, so that was my major when I went to Queen's for undergrad. Then I spent a year in Vienna at the Hochschule für Musik before coming back to Ontario to go to law school at Osgoode.

Why the switch from music to law?

I think there were a lot of practical reasons behind it. I had some wonderful experiences in music, but I knew that I could have wonderful experiences in other areas as well.

Law was an easy choice, in a way, because I'd always had a fascination with it.

Where did you head after graduation?

I articled at Blakes and was hired back as a civil litigator. I was there for two years and liked the law practice, but I

really missed the type of specialization that I enjoyed in music. You just didn't get that as a junior lawyer in a broad area like civil litigation.

This was in the late 80s, and the whole pension field was really developing, and there were a lot of opportunities for lawyers at the HR consulting firms, so I took the plunge and made a move to the legal group at Hewitt Associates. I really saw it as a fast-track to specialization.

What prompted your move from consulting back to a law firm?

I'd reached the point after a number of years of pension work that I had something more to offer, and I always knew I'd return to private practice at some point. I loved the consulting work, but I missed the front-line lawyer part, where you are an integral part of shaping the solutions.

Hewitt had a good working relationship with Hicks Morley, and I found out that the firm was looking for a pension specialist. That was in 1995 and I haven't looked back.

What was it like for you when you first arrived?

It was very exciting because I didn't know from one week to the next what I would be doing. Remember, this was a brand new practice area for the firm, so everyone here had to get up to speed on what a pension lawyer could offer. I was putting stuff in our newsletter every week, putting on internal seminars and my attitude basically was "take everything and do it." I really treated every lawyer in the firm like a client.

How has your role at the firm changed over the years?

I think I've come full circle, but instead of explaining the value we bring to our own lawyers, I'm doing that now with our clients. So client service is a huge part of what I do. We now have a terrific team of pension lawyers, five of whom are partners who spend a good deal of their time mentoring and bringing associates along. We are fortunate that we have been able to attract the kind of people that we have.

As well, pension law has become a very complex area of the law, with links to other practice areas, like human rights, business law, insolvency law, labour and litigation. Pension and benefits law has become much more litigious than it once was. Our firm is involved representing employers in many of the leading cases in this area today.

How did the growth in your group come about?

Once you reach a critical mass, with a strong core group of clients and files, it suddenly takes off. We're definitely in the take-off stage right now with 10 lawyers in the group.

Have changes in the pension area impacted your growth?

Absolutely. Our growth says a lot about how pension plans have changed over the past decade. There are far more legal issues involved. It's not just compliance with the regulations that employers have to think about. It's compliance with governance standards, case law – a much broader spectrum. Pensions are often key in business transactions because they are worth large dollars. We'll get called before anything significant takes place, and I think our clients see the benefit of having their pension advice integrated with the other HR services we provide. That's also been a big part of our growth.

Any trends for the future? What do clients have to watch for?

I think the emphasis on plan governance and litigation avoidance will continue to grow for some time. Our practice has certainly shifted into dispute-related matters. We're already seeing lots of litigation around plan changes and related governance issues – and the fee disclosures associated with DC plans are becoming an issue. We're seeing creative and innovative approaches to DC plans and are currently involved in shaping a novel pension fund restructuring with one of our clients.

Also, the boards of directors of companies are really demanding more structure to the operation of pension plans – and there's a realization that pensions are far more central to company operations than they thought previously.

And even pension lawyers have personal lives?

Yes, believe it or not, I do have a life away from the law. Growing up in Montreal, I skied as a teenager, and I've taken that up again with my family. And our two kids keep us busy too, with all of their activities, especially my daughter who's really into hockey. Our refuge in the summer is a place on Georgian Bay, where my family's been for years. It's a great place to escape. And I still have my piano, so the artistic side of my life is still there when I need it!

HICKS MORLEY WELCOMES NEW LITIGATOR

FRANK CESARIO

Frank Cesario joined Hicks Morley's Litigation Practice Group in August 2008 after engaging in a litigation practice for several years at a large Bay Street firm. Frank graduated *magna cum laude* from Harvard Law School (J.D. 1998) after doing an undergraduate degree at the University of Toronto. He served as a law clerk with the Ontario Court of Appeal in 1999-2000 prior to his call to the Bar in 2001. He is also called to the Bar of the State of New York.

Frank brings a wide range of litigation experience to Hicks Morley, and has appeared as counsel before numerous boards and tribunals, as well as at all levels of court in Ontario, the Federal Court of Appeal and the Supreme Court of Canada. He has particular expertise in administrative law and judicial review proceedings, corporate/commercial and shareholder litigation, employment litigation, class actions and injunction proceedings.

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HR QUICK HITS

False Allegations Against Employee Lead to Large Damages Award

In a rather extreme case, Brewer's Retail was ordered to pay over $2 million dollars in damages to an employee for malicious prosecution (*McNeil v. Brewer's Retail Inc.*).

The employer had concerns about cash shortfalls and loss of inventory, and set up covert video surveillance to investigate. McNeil was an employee who was captured on tape engaging in some apparently suspicious behaviour; however, various segments of the tape indicated that he was probably not engaging in illegal behaviour.

Brewer's Retail provided the tapes to the police, but said nothing about the segments of the tape that exonerated the employee. McNeil was convicted and discharged for cause. When the exonerating material finally came to light, McNeil's convictions were overturned, and he was ultimately acquitted of the charges. He then successfully brought a claim for malicious prosecution against the employer.

While employers have a legitimate interest in detecting and responding to employee theft and other illegal activities, this case stands as a stark reminder that the employer's investigative process must be reasonable, thorough and fair to the employee.

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