

# **Weather the Storm**

## **An Employment Perspective**

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## **Weather the Storm – An Employment Perspective**

by Karen M. Sargeant

### **INTRODUCTION**

Employment lawyers and human resources professionals are busy these days. The human rights regime in Ontario has changed, with the result that more employees are filing human rights complaints and the complaints are being dealt with faster. This is all happening at a time when employers are forced to make tough decisions as a result of the economy. Employers are laying off employees, changing their terms and conditions of employment or terminating their employment. This paper provides some practical advice in respect of handling human rights complaints under the new system and terminating employees' employment in these turbulent times.

### **NEW HUMAN RIGHTS REGIME IN ONTARIO**

On June 30, 2008, new human rights legislation in Ontario came into force. The new regime radically changes the way in which human rights complaints are dealt with in Ontario. Employers, employees and unions are watching closely to see how well the new system works.

#### **1. Complainants Given Direct Access to Tribunal**

Prior to June 30, 2008, complaints in Ontario were made to its Human Rights Commission. From there, the Commission mediated and investigated complaints. At the end of that process, which took four to five years in many cases, the Commission could dismiss a complaint or it to the Human Rights Tribunal of Ontario for a full hearing.

Now, complainants file their complaints directly with the Tribunal, cutting out the often lengthy Commission processes. Although the Tribunal will have some powers to mediate disputes, the plan is for Vice-Chairs to adjudicate complaints much earlier in the process. However, the Tribunal is not permitted to dismiss a complaint without giving all parties the opportunity to make oral submissions. This may be a real barrier to an effective mediation process. It therefore remains to be seen whether the length of time it takes to resolve complaints will be shortened.

## **2. Commission's Role Changed Drastically**

As it will no longer be processing complaints, the role of the Commission will change radically. Indeed, we know that many of the Commission's staff have already been or will soon be terminated.

Those staff left at the Commission will focus their efforts on the prevention of discrimination, through public education, promotion and public advocacy, research and analysis.

While the Commission will have the ability to bring a complaint to the Tribunal on its own behalf or to intervene in significant individual complaints, its involvement in complaints being heard by the Tribunal will be drastically reduced.

## **3. Limits on Damages Removed**

Not only will complainants have more direct access to the Tribunal in the new regime, they will also have the potential ability to recover more money.

Prior to June, complainants were limited to \$10,000 for damages for mental anguish. That cap is no longer in place, meaning the Tribunal will have the power to award more money on account of mental anguish. Similarly, the Tribunal's power to award damages for compensation and restitution are unlimited.

Together, these expanded powers to give monetary awards likely means that damage awards in human rights cases will increase. So, with more to gain by going to a Tribunal hearing, complainants may be less likely to settle complaints early.

## **4. Complainants Given Longer to Launch Complaints**

If the potential for more hearings and larger damages awards isn't bad enough for employers, complainants also now have a longer time in which to file complaints. Bill 107 has changed the limitation period for filing complaints from six months to one year.

As mentioned earlier, the Tribunal may not dismiss a complaint without giving the parties the opportunity to make oral submissions. Respondents will now be forced to pay for at least some degree of litigation cost before a complaint, even a frivolous one, is dismissed.

## **5. Human Rights Legal Support Centre Given Funding**

Under the old regime, once complaints were referred to the Tribunal, a lawyer from the Commission was appointed to “prosecute” the complaint. Although the Commission lawyers weren’t technically the complainants’ lawyers, practically that was the result.

Under the new regime, Commission lawyers will not be responsible for prosecuting complaints. Some saw this as an access to justice problem. In response, the government created and funded a Human Rights Legal Support Centre which will provide a range of legal support services to complainants.

The Human Rights Legal Support Centre opened its doors on June 30, 2008. We understand that it employs a staff of between 40 and 50 lawyers and law clerks. It is unclear how much legal support these lawyers and law clerks will be able to provide to the 2,500 or more applicants that make human rights complaints each year. However, it is clear that many complaints against employers will still be publicly funded. And more of these than ever will end up in hearings.

## **6. Human Rights Issues in Civil Litigation**

Until now, individuals were expected to restrict their human rights complaints to making a complaint at the Commission, rather than suing in court for breach of their human rights. There was little scope to add a human rights issue to another lawsuit. Now, however, someone starting a lawsuit in Ontario can claim, in addition to other claims, a breach of their human rights. For example, an employee fired from work can now bring a lawsuit claiming damages for being wrongfully dismissed and additional damages for an alleged breach by his employer of his human rights.

Why is this significant? Because now judges have the ability to award all of the human rights damages and remedies, including damages for mental anguish (which, as discussed earlier, has no cap) and reinstatement. Although the courts have historically stayed away from reinstating terminated employees, it is now a possibility. We will have to wait and see how judges deal with these increased powers. At a minimum, you can expect to see more human rights allegations in employment-related lawsuits.

### **What Employers Should Do**

Given these changes, you may wish to take the opportunity to review and update existing human rights practices and policies, and to implement preventative measures. Obviously, the best way to avoid the negative consequences of these changes to the human rights regime will be to keep any workplace issues from becoming human rights

complaints. Employers may also want to ensure that you have a “quick response plan” in place with your legal advisors, to deal with complaints when they are received.

## TERMINATIONS IN ONTARIO

Determining whether an employee is entitled to notice or pay in lieu of notice upon termination can be a tricky issue. It can be an even trickier issue to determine to how much notice or pay in lieu of notice a terminated employee is entitled.

### Cause for Termination?

The first issue to be decided is whether there is cause to terminate an employee's employment. Employees terminated for cause are entitled to no notice, pay in lieu of notice or severance pay.

The term “just cause” has been defined in a number of court decisions. The British Columbia Supreme Court in *Leung v. Doppler Industries Inc.*, [1995] 10 C.C.E.L. (2d) 147, for example, defined “just cause” as:

“[C]onduct on the part of the employee incompatible with his or her duties; conduct which goes to the root of the contract with the result that the employment relationship is too fractured to expect the employer to provide a second chance.”

Quoting from an earlier case (*Chalk v. Women's Emergency Centre (Woodstock) Inc.*, [1989] O.J. No.21), the Ontario Superior Court of Justice in *O'Dwyer v. Dominion Soil Investigation Inc.*, offered the following test:

“absent a flagrant dereliction of duty, it must be shown that something was done clearly inconsistent with the proper discharge of the employee's duties that reasonably indicates a risk of injury to the employer's interest through continued employment.”

Clear examples of just cause include dishonesty, most notably theft, serious misconduct, incompetence or conduct incompatible with the employee's duties or prejudicial to the employer's business. The concept of just cause is, however, very much fact driven. As was stated by the Saskatchewan Court of Queen's Bench in *Smith v. General Recorders Ltd.*, [1994] 121 Sask. R. 296:

“There is no compendium of employment misdemeanours which alone or in combination will justify the summary dismissal of an employee. Each case stands to be decided according to its own facts. Clearly though, it is not enough that an employer is displeased by the employee's

performance. There must be some serious misconduct or substantial incompetence.”

Thus, “cause” will be assessed in the context of the particular workplace and, in some circumstances, the courts have held that a warning is a precondition to summary dismissal. Further, past conduct and conduct discovered subsequent to the dismissal may be considered. In all instances, employer condonation of the alleged “cause” - e.g., by failing to act in a timely fashion - may deprive the employer of its entitlement to dismiss for cause.

From a practical standpoint, an employer asserting just cause bears a heavy onus. As it represents an all-or-nothing proposition, i.e., the employee may be summarily dismissed without notice or payment in lieu if cause is established, courts are generally reluctant to find that just cause exists except in the clearest cases. Employers must recognize that cause is extremely difficult to establish unless there is a fundamental element of dishonesty or serious misconduct.

Having said that, incompetence represents a special case of cause and is dealt with somewhat differently by the courts. In that respect, Canadian courts have said on numerous occasions that to establish just cause on the basis of incompetence, the employer must first establish that:

1. an objective standard of work that the employer desires or requires was set;
2. this standard was communicated to the employee;
3. the employer provided suitable instruction to the employee if the employee did not initially hold himself or herself out to be able to perform the job to the standard set by the employer;
4. the employee was incapable of meeting the standard; and
5. there had been a warning to the employee that failure to meet the standard would result in dismissal (incidental to such a warning, some cases have held that the employer must provide practical guidance on improvement of work methods or results).

**Notice, Pay in Lieu of Notice and Severance Pay – *Employment Standards Act***

An employer is obligated under the *Employment Standards Act* to provide an employee whose employment is being terminated without cause with notice or pay in lieu of notice as follows:

Notice/Pay in Lieu of Notice	3 months to less than 1 year – 1 week 1 year to less than 3 years – 2 weeks 3 years to less than 4 years – 3 weeks 4 years to less than 5 years – 4 weeks 5 years to less than 6 years – 5 weeks 6 years to less than 7 years – 6 weeks 7 years to less than 8 years – 7 weeks 8 or more years – 8 weeks
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Where the employment of 50 or more employees is being terminated in any period of four weeks or less, employers must provide additional notice or pay in lieu of notice.

In addition, employers with an annual Ontario payroll of \$2.5 million or more are obligated to give employees with five or more years of service, severance pay. Employees are entitled to one week per completed year of service to a maximum of 26 weeks, calculated to the nearest month (e.g. 6 years and 7 months service = 6 7/12 weeks severance pay).

**Reasonable Notice or Pay in Lieu of Reasonable Notice – the Common Law**

In addition to notice, pay in lieu of notice and severance pay under the *Employment Standards Act*, employees terminated without cause are entitled to reasonable notice or pay in lieu of reasonable notice under the common law. Unless the parties have expressly contemplated a termination date for the contract of employment, i.e., set a fixed term of employment, the employer must provide the employee with notice of termination or payment in lieu of such notice, absent just cause for the termination.

The length of the period notice period may be set by mutual agreement as a term of the contract of employment, although it must accord, at least, with employment standards legislation in the jurisdiction. If there is no agreed period of notice, a period of “reasonable notice” will be inferred by the courts. In fact, in Canada the term “wrongful dismissal” often refers not to the termination of the employment itself, which is permissible unless it contravenes human rights, employment standards or other specific legislation, but to the failure to provide adequate notice or payment in lieu of notice to the dismissed employee.

The period of reasonable notice is designed to provide the employee with the opportunity to find reasonable alternate employment. In the absence of an express agreement as to notice between an employer and employee, the reasonable notice to which an employee is entitled is determined by a number of factors, including:

- character of the employment;
- length of service;
- age of the employee;
- the employee's compensation;
- the employee's prospects of obtaining similar employment.

While all employment standards statutes in Canada provide for minimum notice periods in the absence of just cause, these are minimum requirements only. Reasonable notice periods at common law are often significantly greater than these minimum statutory requirements.

The determination of what constitutes reasonable notice is made on a case by case basis. There are no "rules of thumb" or formulae. Decisions in similar cases by common law courts are most frequently used as precedents in arriving at a determination. The generally accepted "rough upper limit" on notice periods in Ontario is 30 months, while in British Columbia and Quebec, it is 24 months. In these provinces this is usually reserved for senior executives, in their late 50s or early 60s, with very lengthy service. This upper limit varies somewhat in other provinces.

### **Mitigation**

There is a duty on all dismissed employees to take reasonable steps to seek alternative employment, unless an employment contract contains an express provision to the contrary. Failure to do so will result in a reduction of damages awarded. The duty to mitigate may include an obligation to move or change the character of employment. It is important to realise, however, that the dismissed employee is not under an obligation to accept a substantially different job or a job that pays significantly less. While the dismissed employee has a duty to mitigate, the employer has the onus in a wrongful dismissal court action to show that the employee has failed to take reasonable steps to mitigate.

### **Constructive Dismissal**

Employees are entitled to treat themselves as having been "constructively dismissed" when their responsibilities and duties have been altered so significantly that the employer can be said to have repudiated the employment contract. When an employee

is constructively dismissed, the law considers the situation to be like any other dismissal requiring reasonable notice.

Situations where a constructive dismissal has been found include:

- reduction in responsibilities and duties;
- unilateral decrease in salary;
- changes in hours or shifts;
- placing an employee on probation;
- unreasonably postponing an employee's start date; and
- unilateral requirement regarding mandatory retirement.

As a result, transfers of employees, changes to compensation plans and modifications to employee duties must all be considered very carefully before implementation. Providing reasonable notice to employees of anticipated changes to the terms and conditions of their employment will alleviate many concerns in this area.

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