EDITOR’S MESSAGE

The fall issue of the Labour & Employment Law News highlights a range of topics relevant to your business. Tips for implementing effective reductions in force are set out in our regular column, Ask a Labour & Employment Lawyer. Featured articles include impairment testing as an alternative to traditional drug and alcohol testing, and the employer’s right to train.

A recent Supreme Court of Canada decision addressing discriminatory provisions of a pension plan is discussed in detail. And last but not least, tips for giving effective notice in a potential constructive dismissal situation are provided.

We trust that this edition of the Labour & Employment Law News will provide you with timely information that will assist your organization. If you have feedback or a topic you would like addressed in a future edition, please call or email me directly.

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Employers are facing an economic slowdown, and with that many are under pressure to reduce the size of their workforces. In circumstances such as these, employee actions for wrongful dismissal, as well as related claims, for example, for unpaid overtime or human rights complaints, are on the rise. Employers are well advised to plan these reductions carefully and to implement them in an informed and consistent manner.

What can be done by employers to reduce the risk of liability when making reductions in force?

Employers are urged to consider taking the following actions:

• communicate the reasons for, and scope of, the downsizing and reassure remaining employees;
• opt for voluntary attrition and early retirement first;
• have a severance policy that is fair, meets legal obligations, and is
consistently implemented. This is likely to reduce complaints by employees who may feel the severance package offered to them is inequitable in comparison to their peers;

- clearly communicate the criteria for determining the length of notice or pay in lieu of notice offered (it should accord with the criteria provided for at common law – age, position, length of service, and the prospects for finding alternate employment);
- observe termination provisions in employee contracts, if applicable;
- offer benefit continuance for the full period of reasonable notice and, if not permitted by the employer’s insurer, a lump sum in lieu of that amount to replace benefits;
- offer outplacement and reference letters. Not only will these assist employees in locating alternate employment, they are a show of good faith and appreciation for an employee’s service;
- know when mass termination provisions in the applicable employment standards legislation are triggered;
- determine the criteria for selecting employees for termination, and ensure those criteria are documented and applied consistently throughout the organization;
- refrain from selecting employees on leaves of absence (maternity, parental, disability leaves, etc.) for termination, unless they would have otherwise been selected;
- don’t make minimum employment standards payments for termination and/or severance pay, or minimum contractual payments, conditional upon the employee executing a release;
- if an employee does not accept a severance offer, pay out employment standards termination and severance pay, if applicable, and issue a record of employment within the statutory time frame.

At the end of the day, most employees care about being treated fairly at the time of their dismissal. Observing these guidelines will not only ensure that employers are meeting their legal obligations, but will likely temper feelings of ill will among dismissed employees, reducing the likelihood of litigation.
IMPAIRMENT TESTING – AN ALTERNATIVE TO TRADITIONAL DRUG & ALCOHOL TESTING

Workplace safety is an important issue for employers and employees. In British Columbia, the Workers Compensation Act requires employers to ensure the health and safety of their workers and anyone else working in the workplace. Workplace accidents also lead to productivity loss, lower employee morale and increased insurance premiums.

In an attempt to solve these problems, some employers have implemented drug and/or alcohol testing programs, which pose both practical and legal issues. The main practical issue arising from such testing is a lack of effectiveness, with some researchers finding little evidence that testing for illicit drug use has an effect on performance measures and work safety, and legal issues have arisen from human rights and privacy challenges.

In British Columbia, drug and alcohol testing programs of provincially regulated employers can be challenged on the basis of Section 13 of the BC Human Rights Code which prohibits discrimination in employment on the basis of physical or mental disability, unless the discrimination is based on a bona fide occupational requirement. In the case of federally regulated industries, the applicable legislation is sections 7 and 10 of the Canadian Human Rights Act.

While many cases have considered the human rights issues involved in alcohol and drug testing, the discussion in this article is limited to Entrop v. Imperial Oil Limited¹ and Alberta (Human Rights and Citizenship Commission) v. Kellogg Brown & Root (Canada) Co.²

In Entrop, the Ontario Court of Appeal examined the relationship between a bona fide occupational requirement and the duty to accommodate in considering Imperial Oil’s drug and alcohol testing policy and concluded that random and pre-employment drug testing were not bona fide occupational requirements, as they did not measure actual impairment of

an employee's ability to perform work safely. On the other hand, breathalyser tests for alcohol were a reasonable requirement for employees in safety sensitive jobs as they did measure current impairment. The Entrop decision has become authority for the proposition that random or blanket drug testing of employees or prospective employees is discriminatory.

In Kellogg, at issue was Kellogg's hiring policy that required all non-union applicants to pass a pre-employment drug test, which the respondent, a recreational drug user, failed. On appeal from the chambers judge's ruling that the policy discriminated against the respondent based on a perceived disability, the Alberta Court of Appeal concluded that the policy was not discriminatory because it was directed at the actual effects suffered by recreational cannabis users and not the perceived effects suffered by addicts.

The Kellogg decision muddies the already murky waters of the debate over alcohol and drug testing. As noted, in Entrop, the Ontario Court of Appeal found that blood tests for drugs did not indicate actual impairment of ability to perform work safely and were not, therefore, a bona fide occupational requirement. As well, the Entrop decision has long been considered determinative of the issue that random or blanket drug testing of employees or prospective employees is discriminatory. By finding that pre-employment testing of recreational drug users is not discriminatory and concluding that there is a nexus between recreational drug use and impairment on the job, the Alberta Court of Appeal in Kellogg has reached a conclusion that appears to conflict with Entrop. Lower courts will now have to grapple with which reasoning they wish to follow, and the law in this area is once again in a state of flux. It is also particularly unfortunate that the Supreme Court of Canada has dismissed Kellogg's leave to appeal as it could have provided employers with some much needed guidance.

A further question arising from the Kellogg decision is that, one could now presumably argue that the reasoning adopted by the Alberta Court of Appeal should also apply with regard to those who drink alcohol socially, i.e., that they are equally likely to be 'impaired' at work.
In *Kellogg*, the Alberta Court of Appeal also refused to consider whether the policy discriminated against drug-addicted employees, as that specific issue was not before the court.

Although the Alberta Court of Appeal’s decision in *Kellogg* is problematic, of particular interest is the Court of Queen’s Bench endorsement in *Kellogg*, of expert evidence that alternative methods of detecting impairment, including training supervisors to recognize the signs of impairment, would be “more reliable and individual” than urine testing.

These ‘alternative’ methods called fitness for duty or impairment testing have existed for a number of decades, and there are many technologies to measure impairment.3

Regardless of the technology used, the purpose of impairment testing is to determine impaired functioning, not the presence or past use of drugs and alcohol. It also provides instantaneous feedback to employers regarding an employee’s ability to work safely. Although breathalyzer tests also provide immediate feedback, unlike impairment testing, they are limited to detecting impairment due to alcohol and miss other sources of impairment such as drugs, fatigue, stress or illness.

While not yet judicially considered in Canada, impairment testing could be challenged on the basis that a failed test arises from grounds protected under human rights legislation, for example, family status, such as when a new parent repeatedly fails the test due to fatigue caused by sleep deprivation. Other concerns include a lack of correlation between test content and actual job tasks and the failure of pre-shift testing to catch job-induced fatigue later in a shift. In addition, impairment testing involves the collection of employee personal information (test results), therefore, employers must ensure that they comply with applicable privacy legislation in the collection, use and retention of the information.

Nevertheless, impairment testing is a viable alternative or adjunct to drug and alcohol testing, particularly with regard to employees in safety-sensitive positions, as current research indicates that it would be more effective in identifying impaired

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employees. Unlike drug and/or alcohol testing, the purpose of impairment testing is to determine impaired functioning, not the presence or past use of drugs and alcohol. It provides instantaneous feedback to employers regarding an employee's ability to work safely. It is also invaluable as it can assist employers with determining impairment due to sources other than drugs and alcohol, such as fatigue and stress. Furthermore, impairment testing is likely to be less invasive and more respectful of employee privacy than drug or alcohol testing.

While legal issues surrounding impairment testing remain, including potential human rights and privacy claims by employees and unions, empirically tested methods of impairment testing would not be subject to the main criticisms that judges and arbitrators have leveled against drug and/or alcohol testing; i.e., the inability of drug and alcohol testing to measure actual impairment and to provide immediate results. It is therefore likely that impairment testing would better withstand such legal challenges.

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“You need Training!" – An Employer’s Right to Train

Generally, employers have the right to manage and reorganize the workplace as they see fit, subject to the terms of a collective agreement, if applicable. This right includes the right to change business processes and introduce new technology or new systems of operation. Where an employer orders an employee to train on a new system, and the order is lawful and reasonable, the employer has a right to expect that the order will be obeyed. An employee’s refusal to obey a lawful and reasonable order would constitute insubordination. However, it is important to note that the directive to train must be unambiguous. Condoning the refusal to train, such as allowing an employee to work despite his or her refusal to train, may not constitute insubordination.

An unreasonable training order would include one that endangers the health and safety of an employee, or that is not within the reasonable scope of the employee’s work. Where an employee argues that he or she has sufficient work already and that training on something new is not needed, it will be important for the employer to ensure that training is, in fact, necessary. As well, an employee should be paid for training and not penalized for the inability to complete existing assignments while undergoing training. To reduce the risk of a constructive dismissal claim, an employer should also avoid saddling an employee with an unreasonable amount of extra work as a result of introducing a new system.

Employers are permitted to introduce training even where it is not part of an employee’s existing job description or part of the employment agreement. In Klassen v. C.A. Bailey Ltd. (c.o.b. Southway Charter Service), an arbitrator held that the unionized employee, a driver, had abandoned his position when he continued to refuse to take first aid and CPR training. The employee refused training on the grounds that it had not been a condition of his employment when

1 [2008] C.L.A.D. No.3
he was hired. The arbitrator found that the employer had communicated the requirement numerous times and also gave the employee many opportunities to meet the reasonable requirement.

The employee was also advised that in order to drive he had to take the training, but he refused to do so. The refusal to train constituted an abandonment of his position.

Where an employee refuses a lawful and reasonable order to train, discipline may be warranted. The discipline imposed for an act of insubordination, like all other types of misconduct, must be just and reasonable. In most circumstances, this will include some type of disciplinary measure, short of summary dismissal. Progressive discipline for an employee who continues to refuse training could include warning letters, suspensions and, ultimately, dismissal under certain circumstances.

Rarely will a single act of insubordination constitute just cause for dismissal. A single act may be sufficient, but various factors are to be considered, including the following:

- the magnitude of insubordination (the impact or potential impact upon the employer);
- whether the employee’s conduct was wilful and deliberate;
- whether the employer’s direction was clear and unequivocal;
- whether the direction was lawful and reasonable, including within a reasonable scope of the employee’s work or job description; and
- whether the employee was aware of the consequences of refusing to follow a directive; i.e., was discipline a recognized consequence of refusal;\(^2\)

The courts will also take into account the entire employment history of an individual in determining whether dismissal is appropriate. For example, in Mazur v. International Paper Canada Inc.,\(^3\) a non-unionized employee was dismissed after declining to attend a two-day, out-of-town training course on the


\(^3\) [1998] A.J. No. 1360 (Q.B.)
introduction of a new computer system, due to family commitments. Although the employee was advised that her attendance was mandatory, the court held that dismissal was not warranted given her unblemished work record, long service of 17 years, and good reputation. The court also noted that the employee could have been accommodated as training could have been made available at another time.

Conversely, in *Lucerne Foods Ltd. v. International Union of Operating Engineers, Local 955*, the refusal to train was grounds for dismissal where a unionized employee did not obey an order to attend a training meeting. In this case, the arbitrator held that dismissal was the appropriate penalty given the employee’s prior discipline record of two suspensions, even though the suspensions were unrelated to training.

In conclusion, although employers generally have a right to order training, unionized and non-unionized employers alike must ensure that any order is lawful and reasonable. Employers must act reasonably where employees resist or refuse training. If an employee has a reasonable explanation to refuse training, an employer may be required to accommodate the employee. Moreover, if an employee has a disability that would limit training or the use of a new system, an employer would be required to accommodate such an employee to the point of undue hardship.

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\[2004\] A.G.A.A. No. 24 (Alb.)
BONA FIDE PENSION PLANS

On July 18, 2008, the Supreme Court of Canada released its decision in New Brunswick v. Potash Corporation of Saskatchewan. In this case, the highest Court of the country distinguished the applicability of the bona fide occupational requirement test formulated in Meiorin and established a new test for employers seeking to justify discriminatory action in the context of pension agreements.

The Meiorin decision provided a three-step test for determining whether an employer has established that a prima facie discriminatory standard is a bona fide occupational requirement (“BFOR”). To meet the test, an employer must first show that it adopted the standard for a purpose rationally connected to the performance of the job. Second, the employer must establish that it adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose. Third, the employer must prove that the standard was reasonably necessary to the accomplishment of that legitimate work-related purpose.

Facts

In 2004, Melrose Scott, a healthy New Brunswick miner, filed a complaint with the New Brunswick Human Rights Commission when he was asked to retire at the age of 65 pursuant to the mandatory retirement policy contained in his employer’s pension plan. He alleged that this constituted age discrimination pursuant to ss. 3(1) to (4) of the New Brunswick Human Rights Code (the “Code”), which prohibits discrimination in employment on the basis of age.

It must be noted, however, that s. 3(6)(a) of the Code provides that the protections against age discrimination found in ss. 3(1) to (4) do not apply when the termination is “because of the terms or conditions of a bona fide retirement or a pension plan”.

Section 3(5) further creates an age-related limitation of these rights if it is based upon a “bona fide occupational qualification”. Applying the Meiorin test, to avail itself of s. 3(5) limitation, an employer would need to establish that the

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1 2008 SCC 45.
age-related limitation is “reasonably necessary to the achievement of a legitimate work-related objective,” and that the complainant could not be accommodated without imposing undue hardship on the employer.

The dispute in Potash Corporation was whether the Meiorin test ought to apply to assess the concept of “bona fide” in connection with a pension plan.

The employer argued that s. 3(6)(a) imposes on employers the burden of showing that the pension plan was not established to further an improper motive (assessed subjectively) and that the plan conforms to usual business practices (assessed objectively).

The New Brunswick Human Rights Commission urged the Court to apply the Meiorin bona fide occupational requirement test to determine whether, under s. 3(6)(a), the employer’s pension plan was bona fide.

Prior Decisions

In the first instance, the New Brunswick Human Rights Board found that the criteria for determining the bona fides of a pension plan were the same as would apply to the concept of “occupational requirement”. The Board concluded that once a prima facie case of age discrimination has been made out, the employer must apply the three-part “bona fide occupational requirement” test from Meiorin. On judicial review, the Court of Queen’s Bench overturned the Board’s decision, concluding that pension plans must be “reasonable” in the circumstances of the adoption as well as bona fide.

Russel J. explained that the Meiorin test relates to individuals and is not compatible with assessing the bona fides of a pension plan. The aim of a pension plan would be to provide benefits to its members on an equitable basis and the plan cannot be determined with a view to an individual’s needs or circumstances.

The majority of the Court of Appeal agreed with the Court of Queen’s Bench that the Board’s decision ought to be overturned. However, the Court of Appeal concluded that s. 3(6)(a) was a distinct provision, attracting a different test than the one applying to s. 3(5) dealing with bona fide occupational qualifications. In the Court of Appeal’s view, s. 3(6)(a) was, in fact, designed to relieve employers who had a bona fide pension plan of any obligation under s. 3(5) to justify mandatory retirement policy as a bona fide occupational qualification.
Decision of the Supreme Court of Canada

The Supreme Court of Canada agreed with the Court of Appeal in concluding that the applicable test was the one stated in the legislation: the *bona fides* of the plan. In other words, to successfully counter an allegation of *prima facie* age discrimination, employers need only to establish that retirement was imposed under a *bona fide* pension plan and a *bona fide* occupational qualification should not be read into s. 3(6)(a) of the Act.

The Supreme Court of Canada did not accept that the *bona fide* requirement in s. 3(6)(a) ought to lend itself to the same analysis as the analysis required by s. 3(5) just because these provisions are both contained in the same statute.

The Court concluded that it must consider the meaning of the entire phrase, and not only be guided by the modifier *bona fide*, the descriptive content of which emerges from, but does not define, the statutory context. In so doing, the Court reasoned that if both s. 3(6)(a) and s. 3(5) meant the same thing, both requiring a *Meiorin* analysis, s. 3(6)(a) would be redundant.

The Supreme Court of Canada concluded that the legislator was seeking to address different concerns in s. 3(5) and s. 3(6)(a). Pensions were treated differently from limitations or preferences based on an occupational qualification because they arose from different protective concerns. The Court concluded that by enacting s. 3(6)(a), the legislator was seeking to confirm the financial protection available to employees under a genuine pension plan, while at the same time ensuring that they were not arbitrarily deprived of their employment rights pursuant to a sham.

In the Court’s view, for a pension plan to be found *bona fide* within the meaning of s. 3(6)(a), the pension plan must be:

(a) a legitimate plan;
(b) adopted in good faith; and
(c) not for the purpose of defeating protected rights.

The Court recognized that the important criterion in satisfying this test is whether or not the pension plan meets the definition of a “pension plan” under applicable pension plan legislation, such as the *Pension Benefits Act* or the *Income
Tax Act, and is registered under the applicable statutory scheme. Consequently, unless there is evidence that the plan as a whole is not legitimate, it will be immune from the conclusion that a particular provision compelling retirement at a certain age constitutes age discrimination.

**Implications of this Decision**

The Supreme Court of Canada’s decision allows an employer to put in place a legitimate pension plan, adopted in good faith, that includes an age restriction. By allowing age discrimination pursuant to a legitimate pension plan (where it is permitted by the applicable human rights legislation), without the necessity to prove the criteria of a *bona fide* occupational requirement, the Supreme Court has effectively decided to evaluate the alleged discriminatory effect of a pension plan differently, making it easier for employers to assert a plan’s legitimacy.

While, in most Canadian jurisdictions, human rights statutes exempt pension plans from age discrimination claims, they do not all require that the pension plans be *bona fide*.

In Ontario, the *Human Rights Code* (section 25(2.1)) provides that the right to equal treatment with respect to employment without discrimination because of age is not infringed by a pension plan that complies with the *Employment Standards Act, 2000* and its Regulations. There is no requirement that the pension plan be *bona fide*. Consequently, the Supreme Court of Canada’s decision in *Potash Corporation* may not have direct application in Ontario.

On the other hand, the *Ontario Regulation 286/01 – Benefit Plans*, made under the *Employment Standards Act, 2000*, allows for a pension plan to discriminate based on age as long as the plan does not contravene the *Pension Benefits Act* (section 4(3)).

Under the *Pension Benefits Act*, the normal retirement date under a pension plan submitted for registration after January 1, 1988, must not be later than one year after the employee attains 65 years of age (section 35(1)). *The Pension Benefits Act* also allows members to continue membership in the pension plan...
and to continue to accrue pension benefits after attaining the "normal retirement date" under a pension plan, subject to any contributions or service caps in the plan itself. The Pension Benefits Act also allows pension plans to set a maximum number of years of employment or membership that can be taken into account for purposes of determining a pension benefit (section 35(4)).

Therefore, in Ontario, despite the enactment of new legislation in December 2006 ending mandatory retirement, the Pension Benefits Act still allows pension plans to cap the years of employment for purposes of benefit entitlement, therefore, effectively allowing what can be described as an indirect form of mandatory retirement.

While the absence in the Ontario Human Rights Code of the bona fide requirement may allow Ontario employers to escape the new test adopted by the Supreme Court of Canada in Potash Corporation, in this new era preventing mandatory retirement, employers should be careful not to put in place pension plans that seek to defeat the end of mandatory retirement. Practically speaking, therefore, legitimacy and good faith should be at the root of any employer's decision to establish a pension plan.

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Practice Tips: How to make a fundamental change to an employment contract and avoid a constructive dismissal claim

Can I make changes to an employee's compensation or benefits? How do I implement a new policy regarding progressive discipline? What do I do if an employee refuses to accept these changes? Employers often wish to make unilateral changes to employment contracts, however managing such changes without creating the basis for a constructive dismissal claim can be tricky. The Ontario Court of Appeal’s recent decision in Wronko v. Western Inventory Service Ltd., (“Wronko”),¹ has addressed the issue of what employers must do in order to give effective notice.

In Wronko, the plaintiff vice president had negotiated a two-year severance provision in the event of his dismissal without cause. When a new company president was appointed in 2002, the president reviewed all employment contracts in place and sought to reduce the severance provision in Mr. Wronko’s employment agreement to two weeks per year of service to a maximum of 30 weeks. Not surprisingly, Mr. Wronko refused to sign any amending agreement. Even though Mr. Wronko was provided with two years’ notice of this change to his severance clause, the Court of Appeal decided that he was constructively dismissed and entitled to damages. The Court further concluded that the employer terminated the plaintiff’s employment without notice or cause when it advised him that there was ‘no job’ for him unless he accepted the changed contract.

Based on the scenario presented in Wronko, the Court of Appeal ruled that when Mr. Wronko refused to accept the new severance clause, the employer had two available courses of action: (i) to advise him that failure to accept the new contract would result in his termination, and that re-employment would be offered on new terms, or (ii) to accept that there was no new contract and allow Mr. Wronko to continue to work under the existing terms.

The following tips are offered to ensure effective notice is given when making a unilateral fundamental change to an employment contract:

• Provide reasonable notice to an employee, in writing, before implementing what may amount to an amendment of a fundamental term of the employment contract. “Reasonable” notice is unique to each employee and depends on the individual’s years of service, age, position and salary. Twenty-four (24) months’ notice is considered the high-water mark for most reasonable notice awards.

• Employees should be required to sign the letter and return it to the employer, indicating their acceptance of the change. For employees who accept the change, the employer will be able to make the fundamental change at the end of the notice period.

• Where an employee objects to the change, the employer should provide the employee with written notice of termination effective at the expiry of the reasonable notice period.

• The notice of termination should be accompanied by a written offer of re-employment, effective when the notice expires. This new offer of employment should clearly state that employment will be on the same terms and conditions as the current position, with the exception of the fundamental change at issue.

• Don’t forget to ensure that all such communication is in writing!

It is now clear that merely providing an employee with reasonable notice of a fundamental change to his or her terms of employment is no longer sufficient. Following Wronko, an employee's refusal to acquiesce to such a change necessitates reasonable notice of termination and re-hire according to the new terms and conditions of employment.

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