MANAGEMENT
COUNSEL
Employment and Labour Law Update

SHERRARD KUZZ LLP
Employment & Labour Lawyers

The decision serves as a good reminder that a properly drafted employment agreement or pension plan can prevent double-recovery of pension and reasonable notice benefits.

Whose Pension is it Anyway?

From time to time, an employee becomes entitled to a severance payment at the same time he is in receipt of other employment-related payments such as a pension benefit. In some cases, this *double-recovery* is not appropriate. However, in other cases, including a recent decision of the Supreme Court of Canada (*IBM v. Waterman*), double-recovery may be appropriate. The key for employers is to ensure that when double-recovery does occur, it is planned and intentional; not accidental or ordered by a court.

What happened in *IBM v. Waterman*?

Richard Waterman was 65 years old and had 42 years of service when, due to downsizing, he was terminated without cause from his position with IBM in British Columbia. He was provided eight weeks' working notice. At the time, Waterman was eligible to retire though he had chosen to continue working; his lengthy service ensuring full entitlement upon retirement under IBM's "defined benefits" pension plan funded solely by IBM. Following eight weeks' working notice and his final day at work, IBM required Waterman to immediately begin collecting his pension.

Ultimately, Waterman sued for wrongful dismissal and was awarded 18 additional months' notice (bringing his total common law entitlement to 20 months' notice). At trial, IBM argued the pension benefits Waterman received during the 18 months of non-working notice should be deducted from his notice payments, on the grounds Waterman should not be entitled to double-recovery. IBM's argument was rejected at all levels of court including the Supreme Court of Canada in a 7-2 decision.

The double-recovery divide

The primary departure point between the majority and dissenting justices was how each side viewed IBM's defined benefits pension plan. A "defined benefits" plan pays a fixed amount of benefit based on a formula which does not depend on the success of the investments in the plan. This is different from a "defined contribution" plan which pays out a variable benefit based on the amount of money available for distribution at the time.

According to the majority of the Supreme Court, IBM's defined benefits represented earnings which had been set aside by IBM for Waterman's retirement. IBM could therefore not reduce its severance

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payment obligation to Waterman by drawing on funds that already belonged to him.

The dissenting justices disagreed with this characterization of IBM's pension plan. In their view, no funds had been 'set aside' for Waterman to be drawn upon during his retirement. If this were the case, the pool of funds available to him would decrease over time as benefits were paid out. Instead, because Waterman was entitled to receive a fixed amount of benefit, the payments were more in the nature of income replacement. In that case, it is reasonable to permit IBM to reduce its obligation to provide severance compensation (also income replacement) by the amount of the pension payments made.

Working notice for the full 20 months could have been a game changer

One issue that concerned the dissenting justices was that had Waterman been given his full 20 months' notice as working notice, the issue of double-recovery would never have arisen. Under IBM's benefits plan, an employee cannot be working and in receipt of pension benefits at the same time. It was only because Waterman received his additional 18 months' notice as pay *in lieu* of working notice that he could simultaneously receive both payments - severance and pension. In short, Waterman ended up better off because he wasn't given working notice.

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The dissenting justices were of the view it should not matter *how* reasonable notice is given – working or pay *in lieu* – so long as *the proper amount* of notice is given. Why should an employee be better off, and an employer worse off, by reason of an otherwise irrelevant distinction?

The majority did not find this argument to be persuasive. Although it might be true that Waterman would receive a greater amount of compensation than if he had received working notice, the majority identified other well-established situations when a party in breach was not permitted to take advantage of an aggrieved party's receipt of collateral benefits. Again, this turned on the interpretation of the defined benefits pension plan constituting Waterman's savings, rather than something being paid at IBM's expense.

Tips for employers

The Supreme Court's decision in *Waterman* confirmed what many employers already suspected. Still, the decision serves as a good reminder that a properly drafted employment agreement or pension plan can prevent double-recovery of pension and reasonable notice benefits.

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IBM was not able to have Waterman's severance compensation reduced by the value of his pension payments because there was no clear indication this is what the parties intended. Where there is a clear indication, all members of the Supreme Court acknowledged such a reduction may be appropriate in certain cases. For example, it is still possible to deduct from severance payments employer-funded disability benefits and Workplace Safety and Insurance wage loss payments because disability pay is intended to substitute for wages when an employee is unable to work. Employers should therefore not overlook potential opportunities to make such deductions where permitted, but should consult with Sherrard Kuzz LLP before doing so.

Working notice is also an option which will prevent an employee from receiving double-recovery in circumstances such as Waterman's.

It is also open to an employer to include with working notice the option of early retirement and a lump sum payment at a discounted amount compared to what the employee might receive if required to work through a full notice period.

To learn more and/or for assistance reviewing your organization's workplace contracts, policies and plans - including pension plans, retirement plans and/or all others - contact a member of Sherrard Kuzz LLP.

DID YOU KNOW?

Employees of federally regulated employers are entitled to take up to 37 weeks of leave to care for a critically ill child, and up to 52 or 104 weeks, respectively, if a child disappears, or dies, as a result of a crime.
Most provincial and territorial jurisdictions have enacted, or will soon enact, similar legislation, with varying details.

For more information, please contact a member of Sherrard Kuzz LLP.

A "New Reality": *Higher Reasonable Notice Awards for an Aging Population*

In years past there was an expectation that when a worker reached 65 years of age, he would retire to enjoy the *golden years*. Today, retirement at 65 is no longer a reality for most working Canadians. The high cost of living, uncertain economy, and legislated end to mandatory retirement has meant more and more Canadians are working later in life.

Canadian courts are also taking note of this new reality, in some cases, awarding enhanced wrongful dismissal damages to older workers in recognition of the difficulty they can have finding new employment. The practice of providing skilled workers greater notice than less skilled workers is also under review as courts increasingly recognize that, in the present economy, lower skilled jobs are not as plentiful as they once were. Neither of these scenarios is good news for employers. Fortunately, there are steps employers can take now to protect their organization from uncertain risk in the future.

Consider two recent (2013) decisions of the Ontario Superior Court: *Kotecha v. Affinia* and *Filiatrault v. Tri-County Welding Supplies Ltd.*

Kotecha v. Affinia

Mr. Kotecha was 70 years of age and had been working for Affinia as a machine operator for 20 years when his employment was terminated without cause. He was given a severance package of approximately four and a half months' notice. In an action for wrongful dismissal Kotecha brought a motion for summary judgment in which he provided evidence of his unsuccessful efforts to find new employment, including visits to more than 225 companies to apply for work as a machine operator or for any position.

In awarding Kotecha damages equivalent to 22 months' notice, the Ontario Superior Court considered the traditional factors including: length of service, age, and the availability of similar employment taking into account the experience, training, and qualifications of the employee (*i.e.*, skill level). Significantly, however, the court rejected two traditional assumptions: (i) that an older worker would retire on or before age 65 (or in Kotecha's case very soon given his advanced age); and (ii) that there should be a reduced notice period for lower skilled workers. Instead, referring to its earlier decision in *Movileanu v. Valcom Manufacturing Group Inc.*, the court reiterated that older workers "will have more difficulty in finding similar employment with another company at the same wage rate."

A similar decision was reached in *Hussain v. Suzuki Canada Ltd*, in which a 65-year-old dismissed employee with 36 years of service was awarded 26 months' notice, two months higher than the unwritten ceiling of 24 months. The court in that case made specific reference to the employee's age and said:

> …at 65 years of age, it cannot be seriously debated that the [employee] is in the twilight if not the end of his working years and that, because of his age, his chances of employment in a similar or even related industry are remote.

The court also referred to *Di Tomaso v. Crown Metal Packaging Canada LP*, in which the Ontario Court of Appeal recognized the declining importance of job character (*i.e.*, higher vs. lower skilled work) when it held:

> ...there is recent jurisprudence suggesting that, if anything, [position/character of employment] is today a factor of declining relative importance.

Filiatrault v. Tri-County Welding Supplies Ltd.

The court considered a wrongful dismissal claim brought by two employees in their 80s, each with 42 years of service with the defendant company. One of the employees was president and CEO and the other was VP of Human Resources. They agreed to limit their respective claims to 18 months, which they were each awarded. In reaching its decision, the court made the following comments:

> The durations of employment that have attracted higher notice periods have rarely if at all been as great as 40 years. This will likely be an increasing trend with the statutory end to retirement at age 65 […]. There is no suggestion here with the current reality of employees working to more senior ages that the upper limit on notice periods should be infinite. However, the fact of the matter is courts will have to increasingly grapple with adjusting what a reasonable notice period is in this new reality.

What does this mean for employers?

The combination of an aging workforce and what seems to be a trend toward increasing notice awards for older workers may expose employers to greater risk and uncertainty.

The most effective way to minimize this risk and maximize flexibility for the employer is to ensure every employment relationship is governed by a well-drafted employment agreement (or in the case of a unionized workplace – collective agreement) which sets out plainly and clearly the parties' rights and obligations in the event of termination of employment.

If your organization does not already have employment agreements in place, you still have options. This includes offering employees incentives to enter into new employment agreements; and/or early retirement packages. Both of these options have their own benefits and risks (see for example "*Early Retirement Incentives Are Not Discriminatory*" in our February 2013 *Management Counsel* newsletter, available on our website). However, with the assistance of experienced legal counsel, the results for employers can be very positive.

For more information and/or assistance addressing these issues in your workplace, contact a member of the Sherrard Kuzz LLP team.

MANAGEMENT COUNSEL

HReview
Seminar Series

Please join us at our next HReview Breakfast Seminar:

Employment Standards - What you need to know!

In recent years Ontario employers have responded to many new regulatory requirements. Yet, the legislation that consistently exposes employers to some of the greatest liability - and headaches - is the *Employment Standards Act, 2000* - the "*ESA*". To help your organization better understand and comply with its *ESA* obligations, including how to prepare for a Ministry of Labour inspection and/or audit, this *HR*eview will address:

- ***ESA* Tips, Traps and Hurdles**
  - Hours of Work and Overtime:
    - How much time off is required?
    - Who is exempt from overtime?
    - How to minimize liability using hours of work, overtime averaging and *lieu* time agreements.
  - Public Holidays:
    - Who is entitled?
    - How to calculate public holiday pay and premium pay.
    - How to minimize liability when you need employees to work on a public holiday.
  - Vacation and Vacation Pay:
    - How are they calculated?
    - Do they accrue even when an employee isn't working?
    - How to minimize liability in the context of leaves of absence.
  - *Canada Labour Code*: A quick comparison.
- ***ESA* Inspections and Audits**
  - Who, what, where, when and why?
  - Employer obligations.
  - What can be done to prepare?

DATE: **Wednesday March 19, 2014; 7:30 – 9:30 a.m.** (breakfast at 7:30 a.m.; program at 8:00 a.m.)

VENUE: **Mississauga Convention Centre ,** 75 Derry Road West, Mississauga, L5W 1G3

COST: Complimentary

RSVP: **By Friday March 7, 2014 at www.sherrardkuzz.com/seminars.php**

Law Society of Upper Canada CPD Credits: This seminar may be applied toward general CPD credits.

HRPAO CHRP designated members should inquire at www.hrpa.ca for certification eligibility guidelines regarding this *HReview Seminar*.

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