MANAGEMENT COUNSEL
Employment and Labour Law Update

SHERRARD KUZZ LLP
Barristers & Solicitors

Threat of Termination Not Sufficient "Consideration" for New or Amended Terms of Employment

The recent decision of the Ontario Court of Appeal in *Hobbs v. TDI Canada Ltd.* ("Hobbs") illustrates that courts will not enforce new or amended terms of employment unless the employer provides sufficient new consideration for the terms. The promise of continued employment does not satisfy the consideration requirement.

THE FACTS

Mr. Hobbs accepted and commenced employment with TDI on the basis of terms set out in an offer letter. The letter outlined Mr. Hobbs' annual draw against commissions, entitlement to benefits and holiday and vacation entitlements. However, the offer did not specify the commission rates which had been agreed to orally. When Mr. Hobbs questioned this omission, he was told that the commission rates would be covered in a separate document.

Six days after Mr. Hobbs commenced employment, TDI presented him with a non-negotiable document for signature (the "Agreement"). The Agreement set out the agreed commission rate, but also included what the court described as onerous terms such as: management's right to change commission rates at its sole discretion and the elimination of Mr. Hobbs' right to commissions after termination even on contracts entered into prior to termination.

After only five (5) months of employment, Mr. Hobbs began to question TDI's intention to pay commissions. He then resigned to accept new employment, and initiated a lawsuit claiming unpaid commissions. In its defence, TDI argued that Hobbs' entitlement to commissions was restricted by the terms of the Agreement.

THE COURT'S DECISION

The trial judge agreed with TDI, upheld the Agreement and dismissed Mr. Hobbs' claim. However, the Court of Appeal disagreed and overturned the trial judgment for two significant reasons.

First, the Court of Appeal rejected the arguement that the Agreement formed part of the original contract of employment because:

1. The original offer letter did not indicate that Mr. Hobbs would be required to sign the Agreement or that the

continued inside

"When presenting offers of employment, ensure that *all* important terms and conditions are included in the offer."

February 2005 Vol. IV No. 1

Sufficient Consideration Continued from p.1

Agreement would form part of his terms of employment.

2. The Agreement was inconsistent with the oral agreement regarding commission rates.

3. The Agreement was presented to Hobbs after he had already been hired and started work.

Second, the Court concluded that the Agreement was not enforceable as an independent agreement because TDI provided no "consideration" for the Agreement. In particular, the Court rejected TDI's argument that continued employment constituted sufficient consideration. Citing its earlier decision in *Francis v. Canadian Imperial Bank of Commerce* , the Court stated:

> "...the law does not permit employers to present employees with changed terms of employment, threaten to fire them if they do not agree to them, and then rely on the continued employment relationship as the consideration for the new terms."

The Court concluded that continued employment could only be considered sufficient consideration where the employer actually forebears on a clear prior intention to terminate. The Court noted that this is particularly important given the inequality of bargaining power that often characterizes the individual employment relationship:

> "The requirement of consideration to support an amended agreement is especially important in the employment context where, generally, there is inequality of bargaining power between employees and employers. Some employees may enjoy a measure of bargaining power when negotiating the terms of prospective employment, but once they have been hired and are dependent on the remuneration of the new job, they become more vulnerable."

LESSONS FOR EMPLOYERS

In light of *Hobbs*, employers need to remember:

- When presenting offers of employment, ensure that all important terms and conditions are included in the offer.
- Terms and conditions of employment found in documents other than an offer letter or employment agreement (such as a confidentiality agreement, non-competition agreement or benefit plans) should be presented with the offer or as attachments to the employment agreement. Alternatively, the offer should be made conditional upon the employee signing these separate agreements.
- All agreements must be signed BEFORE the individual commences employment.
- Changes to significant terms and conditions of employment require reasonable notice or new consideration.
- New consideration may include a reasonable monetary compensation.
- The promise of continued employment does not constitute sufficient consideration, unless the employer forebears on a clear, prior intention to terminate.

Sherrard Kuzz LLP has extensive experience assisting our clients to prepare skillful and creative workplace contracts.

BREAKFAST SEMINAR

Next in our series of employment and labour law update seminars:

HReview Seminar Series

TOPIC: **How Successful Companies Remain Union-Free**

- The Motivated Workforce - Absolutely fundamental!
- Managers Who Lead and Exceed - The key!
- Signs of Union Organizing - Know them!
- Strategies for Effectively Responding to an Organizing Campaign - Use them!

We are also extremely pleased to welcome two dynamic guest speakers from *n-gen People Performance Inc.* who will inspire you with their presentation:

Motivating and Engaging a Multigenerational Workforce: Traditionalists, Baby Boomers, Generation X, Generation Y

DATE: Thursday, March 17, 2005, 7:30 a.m. — 9:00 a.m. (program to start at 8:00 a.m.; breakfast provided)

VENUE: Wyndham Bristol Place Hotel (Toronto Airport), 950 Dixon Road, Toronto, ON

Watch for your faxed invitation or call 416.603.0700 to request an invitation.

Managers and Supervisors: Are They In Need of Protection?

As Canadians reel under increased workloads and long hours, policy-makers and adjudicators have been prompted to take a closer look at whether, and to what extent, existing labour standards adequately protect middle-level managers and supervisors.

Often expected to work longer and harder than their non-managerial counterparts, managers and supervisors are not protected by current Federal and Provincial labour standards. The presumption has always been that managers and supervisors are capable of protecting themselves and, in any event, are paid considerably more to compensate them for their efforts. The question being asked now is: does the presumption still hold true?

CURRENT CANADIAN TRENDS

Recently, the Manitoba Labour Board held that a clothing store supervisor was entitled to protection under that province's labour standards law even though she was a "manager" and had signed a contract agreeing to work "all hours required to be worked" in return for a $42,000 a year salary [*Michalowski v. Nygard International Ltd.*]. Ms. Michalowski had complained of long and unpredictable hours adversely affecting her home life and health. The Manitoba Labour Board upheld her complaint in part because it determined that she was not a "manager" in fact, only in name (i.e. she had questionable authority to hire, fire, purchase, make financial decisions, budget, etc.). Ms. Michalowski was also employed in the only Canadian jurisdiction in which managers and supervisors are not expressly excluded from employment standards provisions limiting hours of work and providing overtime pay.

The Ontario Government has also taken steps to protect employees from overwork and under pay. Protecting employees from "undue pressure to work longer hours" was an avowed purpose of the Province in tabling Bill 63, which will come into force in March, 2005. As we reported in our June, 2004 edition of Management Counsel, Bill 63 significantly changes the way excess weekly work hours and overtime averaging agreements are regulated under the *Ontario Employment Standards Act* (the "*ESA*").

Under the current provisions of the *ESA*, an employee may work more than 48 hours in a week so long as the employee agrees in writing. Approval is not required from the Director of Employment Standards (the "Director") unless the employee is to work more than 60 hours in a week. However, effective March 1, 2005, the Director's approval must be obtained if the employee is to work more than 48 hours in a week; this, in addition to a written agreement between employer and employee.

Significantly, the current provisions of the *ESA* and proposed amendments do not protect employees "whose work is supervisory or managerial in character and who may perform non-supervisory or non-managerial tasks on an irregular or exceptional basis". That is, the exemption applies even if the individual is not exclusively performing managerial or supervisory work.

Similar exemptions exist in employment standards legislation in other Canadian jurisdictions. For instance, Federal employment standards governing maximum hours of work and overtime entitlement do not apply to employees who "are managers or superintendents or who exercise management functions". However, this may soon change depending upon the recommendations of a Federal Commission recently struck to review Part III of the *Canada Labour Code* ("the *Code*") - the Federal Government's equivalent of provincial employment standards legislation.

CANADA LABOUR CODE UNDER REVIEW

Lead by Osgoode Hall Professor Harry Arthurs, the Federal Commission is expected to consider a broad range of issues, including the changing nature of work, new forms of employment relationships, measures to improve work-life balance, demographic changes in the workplace and the need for effective enforcement of the provisions of Part III of the *Code*.

The Commission is also expected to address whether and to what extent managerial and professional employees should be constrained by labour standards. Although speculative at this early stage, we anticipate that the Commission may recommend some form of protection for "independent contractors", "managers" and "supervisors". If this materializes, the consequences for federally-regulated employers will be considerable.

All of which leads us to wonder whether the Ontario Government will decide to follow suit, ostensibly to "restore" what it will describe as "the current imbalance" between employers and managerial staff. Only time will tell. It is interesting to note, perhaps only for historians, that the current Provincial Government appears to be intrigued by the issue of workplace safety, the very issue that spawned Ontario's original hours of work law, enacted in 1884.

LABOUR STANDARDS AND PRODUCTIVITY

Another interesting development is that StatsCanada recently released a report entitled *The Output Gap Between Canada and the US: The Role of Productivity, 1994-2002*. In it StatsCanada attributes two-thirds of the gap in productivity between the countries to the fact that Canadian workers, on average, work only 95 percent of the hours of their U.S. counterparts. The authors' conclusion - if we want to catch

continued on back cover

Managers and Supervisors Continued from p.3

up, we should be working harder!

The StatsCanada report creates an interested dilemma for policy-makers who have set a goal of revisiting and amending prevailing labour standards. In light of the potentially profound effect on business, we strongly encourage all employers to:

1. Remain informed and up-to-date on the work of the Federal Commission and any similar provincial initiatives.
2. Participate in the Federal Commission's hearings and/or provide written submissions to ensure your voice is heard.

Sherrard Kuzz LLP has extensive experience representing individual employers, employer associations, and industry groups before Government commissions. Please contact us if you would like our assistance.

DID YOU KNOW?

Effective March, 2005, an amendment to the *Employment Standards Act* (Ontario) will entitle employees to ten (10) Emergency Leave days for each *calendar* year - not each *employment* year. This means that an employee hired in December can claim the right to ten (10) Emergency Leave days prior to the end of that month, followed by a fresh ten (10) days as of January. This amendment clarifies previously ambiguous wording in the *Act*.

SHERRARD KUZZ LLP
Management Labour & Employment Law

155 University Ave., Suite 1500
Toronto, ON Canada M5H 3B7
Phone: 416.603.0700
Fax: 416.603.6035
www.sherrardkuzz.com
info@sherrardkuzz.com

Erin R. Kuzz
Direct: 416.603.6242
Cell: 416.459.2899
erkuzz@sherrardkuzz.com

Mark A. Mendl
Direct: 416.603.6251
Cell: 416.420.0137
mmendl@sherrardkuzz.com

Michael G. Sherrard
Direct: 416.603.6240
Cell: 416.809.9204
msherrard@sherrardkuzz.com

Madeleine L. S. Loewenberg
Direct: 416.603.6244
Cell: 416.523.6233
mloewenberg@sherrardkuzz.com

Ronald J. Ouellette
Direct: 416.603.6254
Cell: 416.788.4893
rouellette@sherrardkuzz.com

Thomas W. Teahen
Direct: 416.603.6241
Cell: 416.453.5395
tteahen@sherrardkuzz.com

Daniel J. McKeown, Counsel
Direct: 416.603.6245
Cell: 416.200.2555
dmckeown@sherrardkuzz.com

Shelly M. Patel
Direct: 416.603.6256
Cell: 416.949.6256
spatel@sherrardkuzz.com

Providing management with practical strategies that address workplace issues in proactive and innovative ways.