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Ultimate HR Manual – Western Edition

WELCOME TO YOUR FIRST UHRMW E-NEWSLETTER

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Number 1

Dear HR Professional,

Welcome to the first issue of the **ULTIMATE HR MANUAL – WESTERN EDITION** e-newsletter! This e-newsletter is an integral component of your subscription to the **ULTIMATE HR MANUAL – WESTERN EDITION**. Each monthly issue will provide you with the following:

- informative lead articles written by legal experts and HR professionals on timely issues that directly affect you;
- an overview of new Western Canadian legislative developments;
- selected case digests of decisions that bear on issues of interest to the HR professional; and
- interesting tidbits drawn from some of CCH's various informative publications in the field of labour law, employment standards, human rights, occupational health and safety, and pensions management, amongst others.

In this issue, we are pleased to offer you two articles written by contributors to the **ULTIMATE HR MANUAL – WESTERN EDITION**, as follows:

- "Surviving the Economic Boom in Western Canada: Keeping Your Best Employees" by Cissy Pau, a principal consultant at Clear HR Consulting. In this article, Cissy touches upon the labour shortage facing Western Canada and offers practical tips for retaining valuable employees. For further information, be sure to visit the *Staffing* and the *Strategic Human Resources and Organizational Effectiveness* sections of the Manual.

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- “The Use of Class Actions To Enforce Employment Standards Obligations” by Carman Overholt, a partner at Fraser Milner Casgrain LLP. In this article Carman discusses the recent decision in the case *Macaraeg v. E Care Contact Centres Ltd.* and its implications for Western Canadian human resource professionals. For further information visit the *Employment Standards and Human Rights* section of the Manual.

Look out for upcoming issues of the e-newsletter, for more informative and timely articles.

Below you will find further information on the MANUAL including features, the update service, new topics that will be coming soon, and complimentary online training.

Using the Manual

The ULTIMATE HR MANUAL – WESTERN EDITION provides practical guidance on a wide range of topics. The main subject areas covered within the MANUAL include the following:

- Strategic Human Resources and Organizational Effectiveness;
- Staffing;
- Employment Contracts;
- Compensation and Benefits;
- Employment Standards and Human Rights;

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- Health and Safety;
- Performance Management;
- Labour Relations; and
- Training and Development.

These nine broad subject areas include 73 specific topics, which will be updated regularly. More topics will be introduced as the MANUAL matures.

Features

Each topic in the MANUAL, where appropriate, is divided into a common structure to allow quick access to the exact type of information you are searching for.

- *Overview*: Offers an introduction to the topic and an outline of the fundamental areas that will be covered.
- *Practical Application*: Offers more in-depth information, which is reinforced by Western Canadian examples (Alberta, British Columbia, Manitoba, and Saskatchewan), brief case studies, Western Canadian legislation, and case law, where applicable.
- *Checklists*: Where applicable, provides step-by-step “how to” guidance, to encourage best practice.
- *Sample Forms and Letters*: Includes forms and letters that can be adapted to readers’ organizations within Western Canada.
- *Model Policies and Procedures*: Contains templates that Western Canadian HR professionals can use as a starting point for developing their own policies and practices, or for auditing their existing policies and procedures.
- *Further Sources of Information*: Offers useful sources of further information such as Western Canadian Web sites and additional publications from government organizations, professional associations, and more.

Update Service

Subscribers to the loose leaf version of the MANUAL will receive updates every quarter. The online version of the Manual will be updated more frequently, as changes occur and are added to the service. Updates will include amendments to existing topics that reflect changes in legislation and best practices, and new topics as they arise.

Coming Soon

Stay tuned for important new topics that will be coming soon to the Manual, such as the following:

- Labour Relations
 - Collective Bargaining
 - Strikes and Lockouts
 - Contracting Out.

Complimentary Online Training

To sign up for complimentary training for the online version of the ULTIMATE HR MANUAL – WESTERN EDITION, please visit <http://www.training.cch.ca> or contact Training Manager Lina Stolf at 1-800-461-5308, ext. 6449. This training provides an introduction to the CCH Online platform and shows you how to easily navigate the Manual, narrow down your information searches through a variety of methods, and how to print, save, and e-mail retrieved documents.

Surviving the Economic Boom in Western Canada: Keys to Keeping Your Best Employees

By: Cissy Pau, Principal Consultant, Clear HR Consulting

Every day in the news we hear about the economic boom that Western Canada is facing. British Columbia is enjoying a vibrant economy with the construction and trade sectors leading the way. Economic growth in Alberta in 2006 was 6.8%, more than double the national average of 2.7%. And Saskatchewan is experiencing the ripple effect of a booming oil and gas industry in northern Alberta.

With this tremendous economic growth comes a significant side effect: more jobs are being created than there are people to fill them. The unemployment rates in British Columbia, Alberta, and Saskatchewan are currently below 4%. With the jobless rate at record lows, all industries are being hard hit. It's anticipated that this labour shortage will only get worse over the next few years.

Any employer, large or small, has been affected. Employers are no longer competing against employers in similar industries for skilled talent; they are competing against all the possible employers in alternative industries who just want good employees.

Compound that with the fact that employees have the luxury to move from job to job, company to company, city to city, with great ease. With this highly transient workforce, employers in all industries are suffering project and production delays, escalating labour costs, lost opportunities, and ultimately unhappy customers.

There is tremendous attention being put into increasing the talent pool available in the marketplace through options such as

- hiring foreign workers;
- encouraging greater enrolment in apprenticeship programs; and
- delaying retirements of older workers.

All of these are great options, and they will inevitably bear fruit in the intermediate to long term. In the short term, however, employers are still faced with a labour crisis.

One area that many employers often overlook is focusing their efforts on keeping the valuable employees they already have. If employers are creating the right environment and culture where employees want to work and become champions for the business, recruiting becomes easier. Great employers don't face hiring problems; it's the poor or middle-of-the-road employers that do. As the saying goes: "There isn't a shortage of employees; there's a shortage of good employers that employees want to work for."

Great employers continue to receive dozens, if not hundreds, of resumés each week, even during a tight labour market. Google, for instance, selected as the No. 1 company to work for in the United States in 2007 by *Fortune Magazine*, receives 1,300 resumés a day.

So, what are some lessons that we can learn from the great employers on how to keep the best employees? Here are the top five areas on which employers should focus:

1. Create a Compelling Vision, Mission, and Purpose

Why does your company exist? What is the message behind which your employees should rally? A compelling vision – your *raison d'être* – is what will draw employees to your company and will compel them to stay. If employees wholeheartedly support your vision and purpose, they will be inspired to work towards attaining it.

Having a purpose statement, which is sincerely supported by the leaders in the company and which is truly representative of their vision, will give employees a reason to stay.

2. Offer Meaningful Work

Employees want to feel that the work they do makes a difference. Whether it's helping to achieve the company vision, or working towards a smaller goal, people need to feel as though they are making a contribution. If employees are proud of the work they do and the company they work for, they will tell all their friends, family, and acquaintances about it and will generate a tremendous buzz about your company.

At the very least, make sure you

- develop and communicate a clear organizational structure so all employees know where they fit in the bigger picture;
- create job descriptions that indicate the purpose of the position and the impact it has on the rest of the company; and
- communicate the value that all positions have and how they help achieve the overall vision, mission, and purpose.

3. Provide Opportunities for Training, Learning and Development

Being challenged at work and having opportunities for growth and advancement are prime keys for employee retention. Stagnant employees are more likely to leave because they are bored and unchallenged. Providing company training and education to employees when they are hired, and ensuring that they have learning and development opportunities while working with the company, will create a great work environment.

Must-have training opportunities include the following

- Pre-employment education

Educating employees about your company starts before they are hired. Any contact that you have with prospective employees is an opportunity for you to educate them about your company. The purpose of this pre-employment education is to ensure that people know what your organization believes in and what you stand for – your culture – and that your environment is a right fit for them. Your company Web site, job postings, phone contacts, and job interviews are prime opportunities to offer this form of education.

- New Hire Orientation

The first in-house training that an employee should receive is an orientation to your company. The goal of orientation is to indoctrinate the employee as quickly as

possible in order to reduce their learning curve. Use this opportunity to share company information, your history, vision, and mission. Go over relevant policies and procedures. Introduce them to other employees. Make your new employees feel welcome.

- Position-Specific Orientation

Once an employee starts in a new position, and on an ongoing basis thereafter, the employee should receive on-the-job training for this specific position, to ensure that the employee is well educated on how to carry out the specific requirements of the work. As well, once the employee is comfortably performing in the role, ongoing training will encourage continuous improvement in performing the job.

Do not underestimate the value of giving employees the leeway to make improvements in their jobs. This is a fundamental way to keep employees satisfied with their position in your company.

Then, the challenge is to create ongoing learning and development opportunities for employees so that they remain motivated and inspired. As an example, Google engineers can spend 20% of their time on their own independent projects. Without this commitment, popular Internet services such as Gmail, Google News and AdSense would not exist.

Although not all companies can duplicate this 20% philosophy, developing your own opportunities for employee growth is a critical step towards retaining your best people.

4. Recognize and Reward Employee Achievements

Paying employees fair and reasonable compensation is a must. Beyond that, salaries and benefits are not a prime motivating factor for employees to stay working in your company. What is more important is that employees feel that they are being treated fairly and consistently and that they are valued and respected.

Being valued and respected includes being appreciated and recognized for the work that they do. Too often, managers focus only on what an employee does wrong. When your employees do a good job, let them know it. Recognize your employees for the good work that they do, so that they will know to repeat these actions in the future. This type of recognition can come in many ways – a simple thank you, public recognition, an award, a party, a promotion – the list is endless.

What is important is not that companies create formalized, complex recognition programs, but rather, that recog-

nition and rewards given to employees are things that they would appreciate. If you don't know what your employees want, simply ask them.

Ultimately, all employees want to take pride in their work. They want to work for a company they can be proud of. Being recognized for their achievements is one way to ensure that this pride continues.

5. Manage to Individual Strengths

Each employee has different areas of strength and weaknesses. Unfortunately, most managers try to manage away the weaknesses and pay limited attention to the strengths.

Instead, great employers manage to employees' strengths. Encouraging employees to work from their areas of strength, competence, and capability will serve to increase their confidence and happiness. Of course, weak areas, if they are causing a problem, need to be addressed. However, constant attention on the weaknesses will not generate as much success as focusing on strong points.

There are numerous other strategies that companies can undertake to retain their valuable employees. Your greatest sources of reference are your employees themselves. Don't be afraid to ask employees what they need from you. What would it take for them to recommend their friends and acquaintances to work for your company? What can be improved to make your company a better place to work?

Keeping your existing employees, if they are the right employees, is one of the most critical ways to survive the economic boom. When retention becomes less of an issue, recruitment is likely less of an issue. As a result, your company can save valuable time, money, and energy, and redirect these resources back to the core business and truly take advantage of the thriving economy.

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The Use of Class Actions To Enforce Employment Standards Obligations

*By: Carman J. Overholt, Q.C., Fraser Milner Casgrain LLP.
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The class action is frequently used in the United States to pursue employers who have policies or practices that breach legislative requirements in the area of employment, including the payment of wages. Large judgments have been obtained in the United States against employers for systemically failing to pay overtime wages owed to employees for work performed.¹ A jury in Pennsylvania awarded Wal-Mart employees \$78 million in October 2006 in connection with overtime wages.

Class proceedings legislation was introduced in British Columbia on August 1, 1995;² in Saskatchewan on January 1, 2002;³ in Manitoba on July 25, 2002;⁴ and in Alberta on April 11, 2004.⁵ To date, there have been fewer than 20 class proceedings in Western Canada in connection with the employment and pension obligations of employers.

A recent decision of the British Columbia Supreme Court in *Macaraeg v. E Care Contact Centres Ltd. (Macaraeg)*⁶ confirms that employees who are subject to the British Columbia *Employment Standards Act* ("ESA") are entitled to pursue claims in the courts for wages and benefits conferred by the ESA. Although the *Macaraeg* decision is subject to a pending appeal, the implications of this decision in the area of human resources management in British Columbia are significant. In addition, the *Macaraeg* decision adds another level of complexity to the overlapping jurisdiction of the courts and tribunals that administer the law in connection with employment. The availability of class proceedings means that claims may be efficiently pursued by employees for non-compliance with the ESA. The *Macaraeg* decision is likely to promote the use of class proceedings to pursue employment-related claims.

Macaraeg is the named plaintiff in a proceeding brought pursuant to the *Class Proceedings Act* in the Supreme Court of British Columbia. In the course of that proceeding, the plaintiff brought an application for rulings on two points of law:

1. As a matter of law, were the minimum overtime pay requirements of the *Employment Standards Act*, R.S.B.C. 1996, c. 113 implied terms of the contract of employment between E Care and its employee, Cori Macaraeg?
2. Is Ms. Macaraeg entitled to bring a civil action to enforce her statutory rights to overtime pay, or does the jurisdiction to determine such claims lie exclusively with the Director of Employment Standards under the enforcement mechanisms of the ESA?⁷

The Court held that it was indeed an implied term of the employment contract between Ms. Macaraeg and E Care that overtime would be paid in accordance with the requirements of the ESA. As well, the Court held that the ESA did not preclude a civil action being maintained.

The *Macaraeg* decision is consistent with the interpretation of similar employment standards legislation in the provinces of Ontario and Alberta, holding that employment standards requirements are implied terms of employment and employees may pursue proceedings in the courts where an employer does not comply with the legislation.

The result of the *Macaraeg* decision is to significantly increase the potential liability for employers where there is a breach of employment standards legislation. Non-compliance with employment standards legislation may occur in various ways. Frequently, employers have well established practices and policies that are in breach of the legislation. For instance, some policies may require employees to report to work earlier than the time that they are scheduled to work. Other policies may require specific work to be performed, but with a limitation on the number of paid hours that are authorized.

Prior to the *Macaraeg* decision, British Columbia employers relied upon the decision in *Sitka Forest Products Ltd. v. Andrew*,⁸ where the Court held that the plaintiff could not advance a counterclaim in a civil action on the basis of rights under the ESA. The Court held in *Sitka* that the ESA included a mechanism by which the Director of Employment Standards pursues unpaid wages and may issue a certificate of an amount owing, which constitutes a lien or secured debt in favour of the Director.

Given the nature and purpose of employment standards legislation and the decision of the Supreme Court of Canada in *Machtinger v. HOJ Industries Ltd.*,⁹ the court held in *Macaraeg* that the ESA does not grant exclusive jurisdiction to the Director of Employment Standards nor does it restrict employees from pursuing a claim in the courts to wages and benefits conferred by the ESA. On the basis of the *Machtinger* decision and the nature of the legislation, the Court in *Macaraeg* decided not to follow the *Sitka* decision.

On April 26, 2007 the British Columbia Supreme Court in *Holland v. Northwest Fuels Ltd, et al.*¹⁰ followed the *Macaraeg* decision and similarly declined to follow the *Sitka* decision.

The implications of the *Macaraeg* decision are potentially catastrophic for employers in light of the potential value of the claim that might be made by employees. An employee who files a complaint under the ESA might be limited to wages that ought to have been paid in a six-month period before the earlier of the complaint being filed or the termination of employment.¹¹ Historically, such

a claim by an individual employee might have had a nominal value, in most instances. In contrast, a civil action claiming indebtedness or damages for breach of contract based upon an implied term of compliance with the ESA, such as overtime requirements, might be very large. Such a claim might be subject only to a six-year limitation period for breach of contract. If non-compliance with the ESA involves a large workforce, the amount of the claim might reach the level commonly associated with U.S. jury awards.

The *Macaraeg* decision emphasizes the need for policies and practices that promote strict compliance with employment standards legislation. The availability of class proceedings legislation and the recognition that ESA requirements are an implied term of employment, will make the pursuit of claims economical from the perspective of employees. At the same time, technology has made the organization of large groups of individuals to pursue litigation efficient and cost effective. Although there is always the possibility of a legislative response to this development in the law in British Columbia, it is unlikely that governments will attempt to limit the potential liability of employers for non-compliance with employment standards legislation. In fact, governments may view this development in the law as an efficient means to promote compliance with the legislation, which may lessen the burden of the Director of Employment Standards.

The use of class proceedings legislation to pursue claims for non-compliance with employment standards legislation should not be viewed as an unexpected development in light of the U.S. experience and the stated goal of class action legislation, which is to promote access to the justice system. An audit of current employment policies and practices to ensure compliance with employment standards legislation may be prudent in order to reduce the risk of claims.

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Notes:

¹ *Suits on Overtime Hitting Big Firms* by Brooke A. Masters and Amy Joyce in the *Washington Post*, Tuesday, February 21, 2006.

² *Class Proceedings Act*, R.S.B.C. 1996, c. 50.

³ *Class Proceedings Act*, S.S. 2001, c. 12.01.

⁴ *Class Proceedings Act*, C.C.S.M. c. C130.

⁵ *Class Proceedings Act*, S.A. 2003, c. C-16.5.

⁶ *Macaraeg v. E Care Contact Centres Ltd.* (2006), BCSC 1851 (appeal pending).

⁷ *Macaraeg v. E Care Contact Centres Ltd.*, *supra* p. 1.

⁸ *Sitka Forest Products Ltd. v. Andrew* (1988), 32 B.C.L.R. 2d 62.

⁹ *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986.

¹⁰ *Holland v. Northwest Fuels Ltd., et al.* (2007), BCSC 569.

¹¹ *Employment Standards Act*, R.S.B.C. 1996, c. 113, s. 80.

LEGISLATIVE ROUNDUP

Alberta

Alberta Bill 45

Amendments to provincial legislation will ban smoking in all public places in Alberta, as well as prohibit tobacco product displays in retail outlets and ban tobacco sales in pharmacies and on post-secondary campuses. Minister of Health and Wellness Dave Hancock introduced Bill 45, the *Smoke-free Places (Tobacco Reduction) Amendment Act, 2007*, on June 12, 2007 in the Legislative Assembly. It received second reading on June 13, 2007.

The *Smoke-free Places (Tobacco Reduction) Amendment Act, 2007* will prohibit smoking in all public places and workplaces. Other changes proposed under the legislation will ban tobacco power walls and other promotional displays in retail outlets. Tobacco products will no longer be permitted for sale in pharmacies, public colleges, and universities.

Minimum Wage Increase

Alberta's minimum wage will increase from \$7 to \$8 per hour on September 1, 2007, to reflect the latest economic indicators.

British Columbia

British Columbia OHS Regulation Amendments Effective July 26, 2007

Effective July 26, 2007, all employers must ensure that a young or new worker is given health and safety orientation and training specific to his/her workplace before the young or new worker begins work.

A young worker is defined as "any worker who is under 25 years of age" and a new worker is defined as "any worker who is new to the workplace, returning to a workplace where the hazards in that workplace have changed during the worker's absence, affected by a change in the hazards of a workplace, or relocated to a new workplace if the hazards in that workplace are different from the hazards in the worker's previous workplace". An employer must document all orientation and training.

The new sections of the Occupational Health and Safety Regulation, sections 3.22 to 3.25, detail 13 topics that must be included in the orientation and training. Additional training must be provided if the employer observes

that a young or new worker is not able to perform work tasks or work processes safely, or if a young or new worker requests additional training.

To assist employers in achieving compliance with these new safety requirements, the Employers' Advisers Office, a branch of the Ministry of Labour and Citizens' Services, will be holding information sessions free of charge. For seminar dates and locations, and to register online, check out the Employers' Advisers' Web site at www.labour.gov.bc.ca/eao.

Elimination of Mandatory Retirement

Bill 31, the *Human Rights Code (Mandatory Retirement Elimination) Amendment Act* was introduced April 25, 2007, and received second and third reading and Royal Assent all on May 31, 2007 (S.B.C. 2006, c. 21). It comes into effect on January 1, 2008.

Manitoba

Reservist Leave in Effect

Bill 12, *The Employment Standards Code Amendment Act (Leave For Reservists)*, now S.M. 2007, c. 2, which was introduced in the previous session of the Manitoba legislature as Bill 17 is now in force. The Bill amends the *Employment Standards Code* to provide job protection for members of the reserve force of the Canadian Forces.

Pursuant to the Bill, an employee who is a member of the Reserves, who has been employed by the same employer for at least seven consecutive months, and who is required to be absent from work for the purpose of service in the Reserves, is entitled to unpaid leave for the period necessary to fulfill the service requirement.

The "Reserves" is defined in the Bill to mean the component of the Canadian Forces referred to in the *National Defence Act* as the reserve force. (Subsection 15(3) of the *National Defence Act* stipulates that the reserve force "consists of officers and non-commissioned members who are enrolled for other than continuing, full-time military service when not on active service".) "Service" is defined in the Bill to mean active duty or training in the Reserves.

The employee taking reservist leave must give the employer, in writing, as much notice as is reasonable and practicable in the circumstances. The employer may require the employee to provide reasonable verification of the necessity of the leave, including a certificate from an official with the Reserves stating that the employee is a member of the Reserves and is required for service and, if possible, providing the start and end dates for the period of service.

The employee must also give the employer written notice of the expected date of return to work. However, the employer may defer the employee's return to work by up to two weeks or one pay period, whichever is longer, after receiving the notice.

Bill 12 received first reading on April 5, 2007 and second reading on April 18. The Bill received third reading and Royal Assent on June 14 and came into force on Assent.

Saskatchewan

Reservist Leave Regulations In Force

Regulations related to legislation ensuring job security for Canadian Forces Reservists in Saskatchewan are now in place. The Labour Standards Amendment Regulations, 2007 (No. 3), S.R. 48/2007 came into force on June 13, 2007, and specify the required deadlines by which employees volunteering for duty with the Canadian Forces must notify their employers of intended leaves of absence, or returns from leaves of absence, for deployment.

The *Labour Standards Amendment Act, 2007*, S.S. 2007, c. 14 amended the *Labour Standards Code* so that an employee who has volunteered for service and, as a result, is required to be absent from his or her employment, is now entitled, upon providing notice, to an unpaid leave of absence for the relevant period of service. Upon completion of the leave and receipt of the proper notice, the employer must allow the employee to continue employment without loss of any privilege connected with seniority, seniority being determined at the date the unpaid leave began.

The new Regulations stipulate that the notice deadline for informing one's employer of the intent to take such a leave is:

- (a) a date that is not less than six weeks before the date that the intended unpaid leave of absence will begin; or
- (b) any period before the unpaid leave of absence begins that is reasonable in the circumstances if:
 - (i) an official with the reserve force informs the employee that the employee is required for service because of an emergency; and
 - (ii) the employee advises his or her employer that the employee has been informed by an official with the reserve force that the employee is required for service because of an emergency.

When the employee intends to return from such a leave, the Regulation provides that the amount of notice to be given to the employer is:

- (a) in the case of training, a date that is before the unpaid leave of absence begins;
- (b) in the case of regular deployment, a date that is not less than six weeks before the date that the employee intends to return to work; or
- (c) in the case of service that is required because of an emergency, any period before the employee returns to work that is reasonable in the circumstances.

There are approximately 900 reservists in Saskatchewan and the laws protecting their employment apply to all provincially regulated jobs.

Elimination of Mandatory Retirement

Bill 9, the *Saskatchewan Human Rights Code Amendment Act, 2006*, was introduced in the legislature on November 6, 2006, received second reading on April 3, 2007, third reading on May 9, 2007, and Royal Assent on May 17, 2007 (S.S. 2007, c. 39). It takes effect six months after the date on which it received Royal Assent.

ON THE CASE

Employee Constructively Dismissed When Full-time Work Turned to Part-time

• • • **Alberta** • • • Therrien, a chartered accountant, worked for years in a partnership with other chartered accountants. Therrien sold his stake in the accounting partnership and accepted an offer to work full-time for a group of companies owned by Gagnon, which had represented one-third of his work when he was with the partnership. During the discussions before accepting the position, Therrien and Gagnon discussed retirement plans, as Therrien planned to retire in eight to ten years, and agreed on a monthly salary for Therrien of \$12,000 per month with six weeks' vacation. Therrien worked under the direction of Gagnon, where he kept regular office hours. While two employees reported to Therrien with respect to accounting issues, they were otherwise under the direction of Gagnon. Therrien did hire one additional staff member to work with him, but otherwise he had no hiring or firing power. As a result of a continuing cash crisis, Gagnon told Therrien that his salary would be reduced, and that he might have to work on a part-time, as needed basis, instead of full-time for the company. Therrien took this to

be a constructive dismissal, left the Gagnon companies, and sued for wrongful dismissal.

The action was allowed. First, the Court addressed the claim of the Gagnon companies that Therrien was not an employee, but an independent contractor. The Court noted that Gagnon had the control and direction of Therrien in respect of what work was to be done and when it would be done, including allocation of hours and fees when invoicing companies. Therrien had no power or authority to hire or fire employees or to delegate his work, and the Gagnon companies were his sole source of income. Therefore, there was an employment relationship between the parties. Next, the Court determined that Gagnon's statements to Therrien that his work in the future would only be part-time and that he would have to look for other work constituted constructive dismissal. Given that Therrien was induced to leave a long-term successful partnership, that he was 57 years old when he was dismissed, that he believed he would be working at the company until his retirement, and that his dismissal substantially affected his health, the Court awarded 12 months' notice. The Court did not award bad faith damages.

Therrien v. True North Properties Ltd., (Alberta Court of Queen's Bench), 2007 CLC ¶210-023.

Suspension of Seniority Accrual for Employee on LTD Was Discriminatory

• • • **British Columbia** • • • Matuszewski began working for the Liquor Distribution Branch (the "LDB") in October 1996, and in June 1999, he sustained a lower back injury at work which required him to receive Workers' Compensation Benefits ("WCB"). He returned to work in August, but reinjured his back in September and was back on WCB. After returning to work again in February 2000, Matuszewski reinjured his back for a third time in May and went back on WCB. It was determined that he had a permanent aggravation of a chronic lumbar condition and a herniated disc. In January 2001, he was placed on Long Term Disability Benefits ("LTD"), at which point he ceased to accumulate seniority. He remained on LTD until July 12, 2002, more than 18 months. In December 2001, Matuszewski filed a grievance regarding his failure to accrue seniority while on LTD, which was deferred pending the outcome of another grievance filed by his union. In that grievance, an arbitrator determined that preventing employees on LTD from accruing service and classification seniority did not offend the *Human Rights Code* (the "Code"). Matuszewski then filed a human rights complaint, alleging that he was discriminated against on the basis of physical disability for not accruing seniority while on LTD, even though active employees, employees on the Short Term Illness and Injury Plan, and employees on WCB did. While Matuszewski was eventually credited with full seniority because of the grievance that he had filed, he continued to go ahead with his human rights complaint.

The complaint was allowed. After determining that the complaint should not be dismissed on the basis of issue estoppel, abuse of process or mootness, the Tribunal noted that Matuszewski was required to establish a *prima facie* case of discrimination. Then, the LDB was required to show that its policies were not discriminatory, or were justifiable as a *bona fide* occupational requirement. With respect to a *prima facie* case of discrimination, using the traditional approach to discrimination cases, Matuszewski clearly had a disability for which he was on LTD. He was subject to adverse treatment, and his disability was a factor in the adverse treatment because he did not accrue seniority while on LTD. Alternatively, using the approach set out by the Supreme Court of Canada in *Law*, the Tribunal first determined that the policy drew a formal distinction between Matuszewski and other employees based on his disability. Matuszewski was not accruing seniority while on LTD, while the comparator group of all employees at work did accrue seniority. Next, the Tribunal determined that Matuszewski was subject to differential treatment on the basis of one or more enumerated grounds, namely his disability and the fact that he was on LTD. Finally, the Tribunal found that the differential treatment of Matuszewski was discrimination in a substantive sense. Therefore, Matuszewski had established a *prima facie* case of discrimination, and since the LDB provided no defence, it was found to have contravened the Code by denying seniority to disabled employees receiving LTD.

Matuszewski v. British Columbia (Ministry of Competition, Science and Enterprise operating as Liquor Distribution Branch) (British Columbia Human Rights Tribunal), 2007 CLC ¶230-017.

No Explanation for Termination of Employee on Extended Medical Leave

• • • **Manitoba** • • • Taks was employed by Integra Castings since June 2004 as a grinder, which tended to be hard on the hands and wrists because of the vibration of the tools. In December 2005, Taks informed Integra that he had some problems with his hands and wrists, and he produced a medical note from his doctor, indicating that his condition would require an extended absence from work, or an extended period of modified duties while he recovered from his injuries. Integra claimed that they expected that Taks would return to work on January 16, 2006, and when he did not return that whole week they decided to terminate him for overstaying a leave of absence, and not showing up or calling in to work for three consecutive scheduled shifts. During this time, however, Taks was in contact with his supervisor, who informed Taks that there was no problem with him taking that week off work. In addition, Taks gave his supervisor a doctor's note on January 20, at which point he was told to come back in for a meeting on January 23. At the meeting, Taks believed he was being laid off for medical reasons, but Integra claimed he was terminated. From January until March 9, 2006, Taks received Workers' Compensation benefits, and

once these benefits were up, Taks went to Integra to inform them he was ready to return to work. At that point, Integra told Taks that they were not interested in rehiring him. Taks brought an application seeking remedy for an alleged unfair labour practice.

The application was allowed. Under the unfair labour practice provisions of *The Labour Relations Act* (the “Act”), an employee is required to establish that he was employed by the employer, discharged from his employment, and that at the time of his discharge he had exercised his rights to receive benefits under *The Workers’ Compensation Act*. All of these points were established in this case, so the onus then shifted to the employer to satisfy the Manitoba Labour Board (the “Board”) that it did not discharge the employee because he was exercising his rights under *The Workers’ Compensation Act*. In this situation, the Board determined that Integra did not satisfy this onus, as they failed to adequately explain the basis for deciding to terminate Taks’s employment. Taks had a work-related injury that caused his absence, and Integra was aware of his injury because Taks had informed them directly and had given them medical notes. As a result, there was no adequate explanation for their decision to discharge Taks, and Integra did not satisfy the Board that its reasons for terminating Taks did not include the fact that he was exercising his right to receive benefits under *The Workers’ Compensation Act*. Accordingly, Integra was found to have committed an unfair labour practice, and was ordered to reinstate Taks and compensate him for lost income, less amounts earned in mitigation since the time of his discharge.

Taks v. Integra Castings Inc. and Winkler Foundry Employees Association, (Manitoba Labour Board) 2007 CLLC ¶220-031.

Director Personally Liable for Portion of Constructive Dismissal Award

● ● ● **Saskatchewan** ● ● ● Sulkers Ltd. ran a Canadian Tire franchise in Saskatchewan, where Schwindt worked as the service manager of the automotive department. Sulker was displeased with Schwindt’s performance as service manager because he had failed to control the mechanics’ wage costs and the profit margin had been shrinking. Sulkers asked Schwindt to prepare a business plan to rectify the situation, but while Schwindt was developing that plan, Sulkers was in discussions with another employee about him replacing Schwindt. About a month after that employee was convinced to take over the position, the store manager and the personnel manager informed Schwindt that they were not happy with his performance, and they requested he retire. Schwindt was then given a piece of paper stating that he was submitting his resignation immediately, which he signed although he was visibly

upset by this request. A few weeks later, Schwindt received a cheque from Sulkers Ltd. in lieu of notice, along with a copy of his record of employment. Schwindt brought a wrongful dismissal claim.

The claim was allowed. Schwindt did not voluntarily resign from his employment, but was terminated. He was upset during the meeting with the managers, and he would not have signed the resignation letter except for the pressure to do so from his employer. When an employer forces an employee to resign, the resignation is, in essence, a termination. While the employer claimed that Schwindt was terminated because of his failure to develop a proper business plan for the automotive department, it was apparent that this was just a ruse to allow the employer to replace Schwindt. Therefore, there was no cause for Schwindt’s dismissal, and he was entitled to reasonable notice. Schwindt worked for Canadian Tire for 22 years prior to his termination, although he briefly left at an earlier point and received severance pay because he refused to accept a pay reduction. Following his return, he had worked for the store for seven years, and the Court determined that he should be awarded nine months’ pay. In addition, the Court awarded bad faith damages, as there was no reason for the employer to treat Schwindt the way that it did or to force him to sign a resignation letter. As a result, an additional two months’ salary was awarded for bad faith damages. Sulkers, as director of the corporation, was found personally liable for six months’ wages.

Schwindt v. Jann and Neil Sulkers Ltd. and Sulkers, (Saskatchewan Court of Queen’s Bench), 2007 CLLC ¶210-024.

WORTH NOTING

CCOHS: National Forum to Focus on Health and Safety Issues of Changing Workplaces

Forum ’07: September 17-18, 2007

Location: Vancouver, British Columbia

With “Emerging Health & Safety Issues in Changing Workplaces: A Canadian Discussion” as the theme, this two-day event will bring together subject experts, workers, employers, and governments to share their knowledge and experience around this pan-Canadian issue and to discuss problems and solutions.

For more details visit the Forum ’07 Web site at www.ccohs.ca/events/forum07.

CCOHS: E-Courses Offer Help in Preparing for Workplace Emergencies

CCOHS has launched two new e-courses to help workers and employers prepare for emergencies in the workplace: Emergency Preparedness for Workers; and Emergency Response Planning.

● Emergency Preparedness for Workers

Workers will learn how to prepare for and respond to workplace emergencies in this one-hour e-course. It covers the rights and responsibilities of employers and workers, and how to identify potential emergencies, activate the response, and evacuate, as well as other information on emergency preparedness, response, and training.

Emergency Preparedness for Workers is suitable for anyone working with an emergency response plan for their workplace. Health & safety committee members making informed recommendations for their organization's emergency response plans will also benefit from this e-course.

● Emergency Response Planning

The Emergency Response Planning e-course is targeted to anyone with responsibility for developing, implementing, and maintaining emergency response plans; managers and administrators; health and safety committee members; and supervisors.

This introductory course provides guidance for developing and implementing a response plan for workplace emergencies, which may also include emergencies off-site that affect the organization's staff. The course also covers how to identify and assess potential emergencies and how organizations can respond. Please note that this course does not address community-wide emergencies (pandemic planning) that are not directly related to the workplace.

Registration and pricing information is available on the CCOHS Web site at www.ccohs.ca/products/courses/course_listing.html.

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