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COMPARATIVE LABOR LAW DOSSIER
DISMISSAL DUE TO BUSINESS REASONS IN CANADA

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Introduction

Canada is a liberal market economy and as such the law places few restrictions on the employer's freedom to dismiss an employee. In particular, the law places no restriction on the freedom of employers to dismiss employees for business reasons. However, dismissed employees are entitled to certain rights, the most important of which is notice of termination or pay in lieu of notice.

It must also be noted at the outset that the unionized and non-unionized employees operate under somewhat different legal regimes. Non-unionized employees derive their rights from their individual contracts of employment, which are governed by the common law and minimum standards laws. Unionized employees (about 31% of the labour force[1]) derive their rights from the collective agreement. They cannot make claims under the common law but they are covered by minimum standards laws.

Unionized employees are generally better protected against dismissal than non-unionized employees. This is because collective agreements typically restrict the employer's freedom to dismissal by providing that dismissals shall only be for just cause. However, just cause protection does not restrict the freedom of the employer to dismiss for business reasons. In principle, individual employees could also negotiate protection against dismissal, including dismissal for business reasons, but this is very unusual.

Canada does not publish statistics on dismissals for business reasons, but we can get a sense of the extent of the phenomenon from other data. During the last recession, beginning in October 2008 and bottoming out in July 2009, total employment declined by 431,000 or 2.5% of the workforce. While not all job loss was due to economic reasons, it is fair to assume that a significant proportion was. Since July 2009, there has been net job growth,

1 Union density in the public sector is 74.6% and 17.5% in the private sector.

although the current unemployment rate is still higher than it was in 2008.[2] Even while there is net job growth, some workers continue to lose jobs due to business reasons. Unemployment statistics report that job losers constitute about 50% of the newly unemployed, but not all job losers lose their jobs for business reasons.[3] Data on firm entry and exit rates discloses that between 2000 and 2008 12.3% of all firms exited the market annually, affecting 1.9% of the labour force, but not all firms exit for business reasons.[4]

Canada is a federal state and labour and employment is primarily of provincial jurisdiction. In this brief survey, we cannot discuss the laws of every province, so we have chosen to focus on the province of Ontario, Canada's most populous, and occasionally consider federal labour laws, which govern about ten percent of the labour force. With the exception of Quebec, the differences between provincial laws tend to be small.

1. How does the legislation or judicial bodies define the causes that allow for a dismissal due to business reasons?

As a liberal market economy that does not restrict the freedom of employers to dismiss workers due to business reasons, there has been no need to define the term.

1.1 Common Law

At common law, an employer is permitted to dismiss an employee for any reason and, indeed, is not required to provide the dismissed employee with the reasons for the dismissal.

[2] Sharanjit Uppal and Sébastian LaRochelle, "Employment Changes Across Industries During the Downturn and Recovery" Statistics Canada, Catalogue no. 75-006-X, Insights on Canadian Society, April 2013).

[3] "EI Monitoring and Assessment Report 2012/13" (Employment and Social Development Canada, March 2014). About 15% are job leavers. The remainder are workers who have not worked in the past year.

[4] Oana Ciobanu and Weimin Wang, "Firm Dynamics: Firm Entry and Exit in Canada, 2000 to 2008" (Statistics Canada, Catalogue no. 11-622-M — No. 022, Research Paper, The Canadian Economy in Transition Series, January 2012). It should be noted that on average 10.8% of firms were new entrants and employed 1.9% of employees.

1.2 Minimum Standards Legislation

In Ontario, the *Employment Standards Act* (ESA) deals with minimum standards, including several matters related to termination.[5] However, it does not require the employer to provide reasons for dismissal and it does not restrict the employer's common law freedom to dismiss for business reasons. The *Canada Labour Code* (CLC)[6], which applies to federally regulated employees, is similar, except that it provides that in certain circumstances an employee is entitled to reasons for dismissal. This is in aid of a provision that entitles individuals to challenge their dismissal as unjust. However, the CLC specifically provides that it is not an unjust dismissal to terminate an employee "because of lack of work or because of the discontinuance of a function."[7]

1.3 Collective Bargaining

Labour relations statutes do not prohibit unionized employers from shutting down for business reasons. While collective agreements typically provide that there shall be no lay-offs or dismissals without just cause, arbitrators interpreting collective agreements have consistently held that just-cause protection does not restrict the freedom of employers to dismiss for business reasons. Unions have rarely been able to negotiate more substantial restrictions on the freedom of employers to terminate employees for economic reasons.

2. Must the business reasons that justify the dismissal concur in the whole company or can they concur in the workplace where dismissal occurs?

Employers are free to dismiss employees in any part of the company they choose.

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[5] Employment Standards Act, 2000, S.O. 2000, c. 41. There is other protective legislation addressing occupational health and safety and employment discrimination. These are not considered here other than to note that they each restrict the freedom of employees to dismiss employees for specific reasons, such as on the basis of race or gender, or for exercising rights under these acts. As under the ESA, proof that the dismissal was entirely for business reasons would be a complete to defence to a claim that the employee had been unlawfully dismissed, but no case law has developed defining business reasons.

[6] *Canadian Labour Code*, RSC 1995, c L-2 s 241(1).

[7] Ibid., s. 242(3.1)(a).

3. What is the procedure that the company must follow to conduct a dismissal for business reasons? Are there any specialties in such procedure in relation to the number of workers affected?

3.1 Common Law

At common law, there is no set procedure that must be followed to conduct a dismissal for business reasons. There is, however, an implied duty to give employees reasonable notice of termination or pay in lieu of notice (discussed below). The courts have developed a doctrine that employees are entitled to good faith and fair dealing in the manner of dismissal, but this is unlikely to arise in the context of dismissals for economic reasons.[8]

3.2 Minimum Standards Legislation

Pursuant to the ESA, s. 54, absent just cause, it is unlawful for an employer to terminate an employee, continuously employed for three months, without notice or pay in lieu of notice without (discussed below). Terminations for business reasons do not excuse the employer from the duty to provide notice.

Where the employer terminates the employment of *50 or more employees* at the employer's establishment in the *same four-week period* the ESA, s. 58, requires more extended notice periods. The length of the notice period varies depending on the number of employees begin terminated, the shortest being 8 weeks (50 to 199 dismissed) and the longest being 16 weeks (more than 500). Employees may also be given pay in lieu of notice.

In addition to longer notice periods, mass termination requires the employer to provide the government with information, including the economic circumstances surrounding the termination, the number of employees being terminated and the dates of termination. That information must also be posted in the workplace.[9] There is no obligation to consult with the government or the employees or union in advance of a mass termination or after notice has been given. The information provided is not used to assess whether the terminations were lawful; rather, it is used for government informational purposes and planning.

For federally regulated employees, the CLC, s. 230, requires employers to provide written notice or pay in lieu of notice. The CLC, s. 241, also provides employees with a right to

[8] *Honda Canada Inc. v. Keays*, [2008] 2 SCR 362.
[9] ESA, s. 58; O. Reg. 288/01, s. 3.

obtain written reasons for dismissal. The CLC also makes special provision for mass terminations, defined as the dismissal of fifty or more employees in a four-week period. Notice must be given to the government 16 weeks before the first termination with a copy to the employees or union. The notice must set out the dates of the termination, the number of employees to be terminated and the reasons for the termination.[10] The employer must establish a joint planning committee, consisting of at least four members, half of whom must be employee representatives, which is to meet with the goal of developing an adjustment program that either eliminates the necessity of terminations or minimizes their impact and assists dismissed employees. An arbitrator may be appointed to assist if the parties cannot agree, but the arbitrator cannot review the employer's decision to terminate employees.[11]

3.3 Collective Bargaining Legislation

Collective bargaining legislation does not create procedural requirements for terminations due to economic reasons. The existence of special procedures governing lay-offs for business reasons will depend on the content of the collective agreement. We are not aware of studies that have examined the extent to which collective agreements create specific procedures to be followed in the case of proposed lay-offs. In the absence of collective bargaining language, unionized workers are covered by minimum standards laws and so would gain the benefit of the procedures they impose for mass terminations.

Even in the absence of collective agreement language imposing procedures regarding lay-offs for business reasons, it is not uncommon for unionized employers to meet with the union to discuss ways of minimizing the impact of dismissals on redundant workers. This could include result in agreements that increase termination pay, supplement pension entitlements, provide assistance with job retraining and relocation or address any other matter the parties agree on.

4. In the legal system of Canada, are there groups of workers who have retention priority in a dismissal for business reasons and/or exist criteria for determining the workers affected by such a redundancy?

At common law the employer retains complete discretion over who to terminate. No employee has any implied priority over any other when it comes to terminations for

[10] CLC, s. 212; Canada Labour Standards Regulations, C.R.C., c. 986, s. 26.
[11] Ibid, ss. 214-226.

business reasons. Minimum standards laws have not displaced the common law in this regard, except that human rights laws do not allow the employer to discriminate on various prohibited grounds, including sex, race, age, etc.

Under the collective bargaining regime, unions often negotiate that terminations shall be by seniority. The scope of seniority clauses vary. For example, seniority may be plant-wide or limited to a particular department. As well, unions sometime negotiate that notice of economic lay-offs must be given.[12]

5. Does the dismissal for business reasons that is correct/legal generate the worker's right to obtain economic compensation?

As we have noted, Canadian workers dismissed for business reasons are entitled to notice or pay in lieu of notice dismissal for business reasons. As well, redundant workers who qualify are entitled to employment insurance benefits.

5.1 Common Law

The common law requires that an employer provide notice or pay in lieu of notice when dismissing employees for business reasons. The amount of notice or pay in lieu of notice must be "reasonable." The calculation of reasonable notice at common law is to be determined according to four factors: character of the employment; length of service; age of the employee; and availability of similar employment.[13] Economic circumstances may play a limited role in calculating reasonable notice. During a recession, employees will find it harder to find re-employment and this weighs in favour of extending notice periods. However, during a recession employers need to be able to reduce their workforce at a reasonable cost. Courts have articulated the position that the economic outlook for both the employer and the employee must be considered in determining reasonable notice, but have not given economic factors too much weight.

5.2 Minimum Standards Legislation

The ESA provides minimum entitlements to notice or pay in lieu of notice. Non-unionized employees must opt to either pursue a common law claim or a claim under the ESA. The

[12] D. Brown and D. Beatty, *Canada Labour Arbitration*, 3 ed (Aurora: Canada Law Book, 1992, loose-leaf), c 6.

[13] *Bardal v. The Globe and Mail* (1960), 24 D.L.R. (2d) 140.

basic qualification to claim under the ESA is that an employee must have been continuously employed for more than three months. The amount of notice increases with job tenure. Basically, employees are entitled to a week of notice or pay in lieu of notice for every year of service for a maximum of eight weeks.[14] Regulations under the ESA exclude some workers from the termination provisions. The only exclusion related to business reasons is for employees terminated during a strike or lock-out.[15] Where there is a mass termination (see §3.2) employers are entitled to longer notice periods or pay in lieu of notice.

In addition to notice, long-term employees are entitled to severance pay. To qualify for severance the employee must have been employed with the employer for at least five years and the employer must have a payroll of at least $2.5 million or there must have been a permanent discontinuance of all or part of the employer's business and 50 or more employees were terminated within a six-month period. The amount severance increases with the length of service, basically calculated at one week of pay for every year of service up to a maximum of 26 weeks.[16]

5.3 Employment Insurance Act

The object of the Employment Insurance Act[17] (EIA) is to provide insurance against the risk of termination to individuals discharged without fault. Employees discharged for business reasons are eligible, provided they otherwise meet the requirements of the Act. These include having worked a minimum number of insurable hours in a defined period before being terminated, being ready, willing and able to work, and actively seeking work. Where a dismissed employee is eligible for employment insurance, the weekly benefit is 55% of the claimant's average weekly insurable earnings. The maximum benefit period ranges between 14 and 45 weeks, depending on the unemployment rate in the region and the number of insurable hours.[18]

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[14] ESA, ss. 54-57.
[15] O.Reg. 288/01, s. 2(1)8
[16] *ESA*, ss. 64-65.
[17] S.C. 1996, c. 23.
[18] Canada, Parliamentary Information and Research Services, The Employment Insurance Program in Canada: How It Works, (Ottawa: Library of Parliament 2013) at 5.

6. In addition to, when applicable, the worker's right to economic compensation, what other company obligations derive from a dismissal due to business reasons?

There are no other obligations imposed on employers by law. However, the parties are free to negotiate over the terms and conditions of employment, either individually or in a collective agreement where the workplace is unionized, and they may stipulate other obligations that arise in the context of dismissals due to business reasons. Apart from the most privileged managerial employees, individuals rarely negotiate additional protections. The most common protection for unionized workers is that dismissals for economic reasons shall be governed by seniority.

7. What are the consequences that arise from breach or non-compliance with the legal procedure regarding redundancies due to business reasons?

7.1 Common Law

Employees who are terminated without reasonable notice or pay in lieu of notice may sue for wrongful dismissal. Generally, their damages are limited to the amount of notice to which they are entitled, but additional damages may be awarded where the employer has acted in bad faith in the manner of dismissal and the employee has suffered damages as a result.

7.2 Minimum Standards Legislation

If an employee chooses to pursue an ESA claim rather than a common law claim, generally they are required to attempt to resolve the matter directly with their employer before making a complaint to the Employment Standards Branch of the Ministry of Labour. If the complaint is assigned to an Employment Standards Officer, then the officer will assess the merits of the complaint and may attempt to facilitate a voluntary settlement. If the officer concludes that an employer has notice or severance obligations, then it is within the officer's power to make an order to pay the amount owed, up to a maximum of $10,000. An employer who has violated the ESA by failing to pay termination or severance pay may also be penalized, but this rarely occurs.

7.3 Collective Bargaining Law

Since it is not a violation of labour relations statutes to dismiss employees for business reasons, no remedy is provided. However, if the collective agreement restricts the employer's freedom, and the union believes that the employer has violated the collective agreement, then the union may seek a remedy through the arbitration process. Arbitrators have broad remedial authority, but since collective agreements typically only require that economic terminations are to be by seniority or that notice is to be given, damages are the usual remedy.

8. Are there specialties in the dismissal due to business reasons for micro companies and/or small and medium enterprises?

The common law makes no express provision for small and medium sized employers (SMEs). As noted previously, the ESA does vary termination and severance entitlements for small firms. The mass termination provisions (discussed in § 3.2) are only triggered where 50 or more employees are discharged over the course of a four-week period and so would not apply to most SMEs. Similarly, SMEs are unlikely to be required to provided dismissed workers with severance pay (discussed in § 5.2) because the entitlement only arises in workplaces with a payroll above $2.5 million or when 50 or more employees are terminated in a six month period because of a permanent discontinuance.

9. What consequences exist regarding the legal regime of dismissal due to business reasons when the dismissal takes place within the framework of a company that is part of a holding company?

The primary issue that arises in this context is the question of who is the employer or can be held liable for the employer's responsibilities, the holding company or the subsidiary. This can make a difference where the subsidiary has gone bankrupt but the holding company remains solvent or, in the employment standards context, whether the employees are entitled to severance pay.

In the first instance, a determination has to be made about who is the employer. The most common test is a multi-factor test that aims to determine which entity exercises the greatest control over the performance of work.[19] Where the subsidiary operates at arm's length from

[19] *York Condominium Corporation* [1977] OLRB Rep. 645.

the holding company it will likely be found to be the employer for the purposes of the common law as well as for minimum standards and collective bargaining law.

Even after there has been a determination of who is the employer, it may also be possible to establish that the holding company is jointly responsible for the obligations of the subsidiary under related or common employer provisions. However, the mere fact that two entities have common ownership is not sufficient. In the absence of some further connection between the operations of the parent and subsidiary it is extremely unlikely that joint liability will be found.[20]

Finally, in some circumstances it is possible for employees to obtain an oppression remedy available under Canadian business corporations' statutes. As creditors of the corporation they can bring an action on the basis that a corporate restructuring was unfairly prejudicial to or unfairly disregarded their interests.[21]

10. Is it possible to conduct a dismissal due to business reasons in a public administration? In this case, what specialties exist in regard to the definition of business causes?

The freedom of the government or crown corporations to dismiss employees is similar to that of private employers. Therefore, there has not been a need to define "business causes" in this particular context any more than they have been defined for the private sector.

[20] Downtown Eatery (1993) Ltd. v. Ontario (2001), 54 O.R. (3d) 161 (Ont. C.A.).
[21] Ibid.