CANADIAN
Employment Law Today

Published by Canadian HR Reporter, a Thomson Reuters business ■ www.employmentlawtoday.com

CURRENT NEWS AND PRACTICAL ADVICE FOR EMPLOYERS JANUARY 26, 2011

Sweet deal for candy factory employee

Worker didn't have to leave job to support constructive dismissal claim: Court

| BY THOMAS GORSKY |

CAN AN employee stay on the job while claiming he was constructively dismissed? Yes, according to the Ontario Superior Court of Justice. In a recent decision, the court ruled an employee can pursue a constructive dismissal claim against his employer and at the same time remain in his position of employment. Although this ground breaking decision favoured an employee, it has the potential to help employers, depending on how the decision is applied by courts going forward.

Kerr Bros., a candy manufacturer in business for more than a century, had been suffering financial losses for nine years. Claiming tough measures were necessary to ensure its financial survival, Kerr Bros. implemented an across-the-board reduction in the remuneration of its workforce. One of the employees most significantly affected was Lorenzo Russo, a managerial employee with 37 years' service. Through a combination of reduction in his regular wages, pension and bonus, Russo's annual salary was to be reduced by about 50 per cent.

Historically, courts have stated that if a unilaterally imposed, negative change to a term or condition of employment strikes at the root of the employment relationship, an employee can make a claim for constructive dismissal. In such a case, it had been widely understood the employee had a choice to either resign from employment and pursue a constructive dismissal claim or remain in employment and accept the change.

Russo was not satisfied with being confined to these two options and instead retained legal counsel. His counsel wrote a letter declaring Russo to have been constructively dismissed. What made this situation unusual was that Russo continued to report to work and perform his usual duties of employment while suing his employer for constructive dismissal.

CONSTRUCTIVE DISMISSAL

The court's decision

In the course of his lawsuit, Russo brought a motion for summary judgment. Kerr Bros. conceded the reduction in Russo's remuneration was sufficient to constitute a constructive dismissal, but argued that by his continuing in employment, Russo had accepted the reduction and therefore lost his right to pursue a claim for constructive dismissal.

The court accepted Russo's position, finding an employee could remain on the job and bring a constructive dismissal claim against his employer. In order to pursue such a claim, the employee was obliged to make it clear

Continued on page 6

In This Issue

Employer's handling of stressed, disabled worker validated

A BRITISH COLUMBIA government employer did not discriminate against a disabled employee when it changed her job duties and wasn't able to resolve a harassment complaint, the B.C. Human Rights Tribunal has ruled.

Jana Pirsel was a regional program co-ordinator for the mental health and addictions department of the Northern Health Authority (NHA), a public health provider in B.C. Pirsel supervised a program case manager, with whom she developed a friendship.

In February 2008, the case manager became a full-time employee after two years working part-time. Pirsel felt at that point, the case manager's behaviour became more negative and expressed her concern about it to her supervisor. Two months later, the case manager complained she was being harassed by Pirsel. Despite attempts to resolve the situation, things got worse

Continued on page 7

Stewart McKelvey, Halifax

Have a question for our experts?
Email **carswell.celt@thomsonreuters.com.**

CONSTRUCTIVE DISMISSAL: Transferring employees between stores in same mall

Question: Our company has two retail locations in the same mall. Can we unilaterally transfer employees between the locations without any consideration, since the locations are so close together?

Answer: Not necessarily. This question requires consideration of the law of constructive dismissal. A constructive dismissal occurs when an employer makes a unilateral and fundamental change to terms or conditions of employment without providing reasonable notice of that change to the employee. A constructive dismissal amounts to a repudiation of the employment by the employer, whether or not intentional.

The test for determining whether an employee has been constructively dismissed is an objective one (a reasonable employee in like circumstances) and essentially a question of fact. The employee's perception of the employer's conduct is not determinative. Rather, the court must ask whether a reasonable person, in a similar position as the employee, would have concluded the employer had substantially changed an essential term of the employment contract.

In this instance, a court would likely find this unilateral change was minimal and not fundamental. The change of location within the same mall will not, on its own, result in any breach of an essential term of the contract. A change of location to another mall could be a fundamental change. An employment standards decision that illustrates this point is *Vincent v. Group 4 Falck Canada Ltd.*, where the employer changed the employment location from Niagara Falls to Mississauga, Ont., or Hamilton. The new location would require a commute from Niagara Falls to either of these locations and meant additional expenses that would be borne by the employee. This, the Ontario Labour Relations Board said, amounted to a constructive dismissal.

But a different product and different opportunity for commission income, even if the commission structure was the same, could lead to finding that fundamental change has occurred.

The employee's perception of the employer's conduct is not determinative. Rather, the court must ask whether a reasonable person, in a similar position, would have concluded the employer changed an essential term of the employment contract.

Even if there are factors that would tend to support a substantial change, employees are under an obligation to mitigate their losses by staying on the job (*Evans v. Teamsters*) or accepting an offer of alternative employment. Although determinations as to whether an employee has mitigated her losses is done on a case-by-case basis, where there is no animosity between the parties, even when the change results in a demotion, an employee has a positive obligation to accept continued employment. A decision that illustrates this point is *Loehle v. Purolator Courier Ltd.*, where an employee was found constructively dismissed but no damages were awarded. The Ontario Superior Court of Justice found the employee failed to mitigate his damages, because a reasonable person would have accepted the position offered, notwithstanding the demotion, until alternative employment elsewhere was obtained. The court noted that searching for a comparable position with another company while working should be less difficult than searching during a period of unemployment.

EMPLOYMENT STANDARDS: Medical benefits during notice period

Question: Is there anything an employer can do if an employee in a key position quits her job and leaves immediately without notice?

Answer: Sue for failure to provide reasonable notice and withhold pay. In terms of withholding or deduction of pay, unless this issue is addressed in an employment contract or the employer has written permission from the former employee, the answer depends on what employment standards legislation in the jurisdiction says. For example, in some jurisdictions, such as Nova Scotia, when an employer is able to show it suffered a financial loss or hardship as a result of the former employee's failure to provide notice, the Labour Standards Tribunal has said holding back outstanding pay is permitted. However, in most jurisdictions, holding back pay is prohibited unless authorized by the employee in writing.

The fact that the "key" employee failed to provide reasonable notice would give rise to a legitimate claim by itself. As the Supreme Court of Canada said in *RBC Dominion Securities Inc. v. Merrill Lynch Canada Inc.* in 2008:

"The majority of the Court of Appeal, by contrast, held that once the investment advisors left RBC, they were no longer under a duty not to compete with it. The view of the Court of Appeal on the law for the purposes of this issue may be summed up as follows. Generally, an employee who has terminated employment is not prevented from competing with his or her employer during the notice period, and **the employer is**

Continued on page 6

City calls worker's bluff

Employee's refusal to come back to work motivated by issues from earlier grievance, not medical problems: Arbitrator

| BY JEFFREY R. SMITH |

A VANCOUVER city worker who refused to come back to work after a medical leave wasn't unfit for work but rather had an axe to grind, the British Columbia Arbitration Board has ruled. As a result, his defiant behaviour led to a more permanent leave when he was dismissed from his employment.

Kerry Grant began working for the City of Vancouver as a seasonal labourer in the paint shop in July 1999. In June 2002, Grant had a heart attack and had to take time off until December 2003, when his doctor submitted an occupational fitness assessment declaring his fitness to work again.

JUST CAUSE

Grant continued to work until April 15, 2004, when he had to take a leave because of the aggravation of "daily stressors." He returned to work on a graduated program a few months later but was in a car accident that kept him absent until December 2004.

When he returned after the accident, Grant worked regular hours until the end of May 2005, when he had to take time off again due to chest pains and anxiety caused by workplace stress.

In January 2007, Grant was still on sick leave so the city had him assessed by a doctor from its health provider. The company doctor was told by Grant's family physician that Grant needed counselling before coming back to work, so in March 2007 the city sent information on free counselling services offered by its employee assistance program (EAP).

Letter from physician indicated fitness for work

In August 2007, Grant's physician wrote to the city's health provider and said Grant was physically fit to return to work but needed counselling. However, other than his anxiety, the physician said there was "no other barrier to his fitness to work" and "I must declare him fit to return to work." Since Grant had information on the counselling needed, the health provider informed the city he was ready to return, though a work stoppage commenced two weeks later.

The work stoppage ended on Oct. 15, 2007, and Grant's supervisor wrote to Grant informing him he expected Grant back at work on Oct. 18, or else he needed medical information to support his absence. Failure to do so would result in discipline up to and including termination.

Grant said he was unaware he had been medically cleared and there was also a "legal issue" related to previous grievance that he had to discuss with his lawyer before coming back. The supervisor reiterated the demand to return to work and said Grant's employment would be in danger if he failed to show up.

Grant responded by saying his doctor had not cleared him for work. He refused to provide additional medical information because he had not completed the counselling he needed due to the cost of the private sessions he desired. He also raised his earlier grievance again, which involved a complaint that he had been denied full-time status and benefits because of his illness in 2003.

On Nov. 22, 2007, the city informed Grant that based on the medical information it had, he was fit to return to work and it had given him ample opportunity to do so. It declared him absent without leave and subordinate, terminating his employment unless he provided additional medical information within five days.

Grant said he would not return to work without proper medical clearance and regular full-time status and benefits. The union filed a grievance for unjust dismissal, claiming Grant was discriminated against because of his disability and he had not been cleared to return to work because his physician wasn't asked to fill out a fitness assessment, as with his previous medical leaves.

The arbitrator found the statement by Grant's physician in August 2007 that Grant was fit to return to work without any other barriers other than anxiety was sufficient information to request his return. Though the physician's letter was somewhat ambiguous on the anxiety issues, it clearly stated Grant was fit to return to work. The only information the city had was what it received from the health provider, which was that Grant was able to come back to work, said the arbitrator.

The arbitrator found in these circumstances, Grant had the responsibility to either come to work or meet with the city and provide information supporting his absence. However, he was unco-operative and tried to use his absence as leverage for the demands from his previous grievance. The arbitrator also noted if Grant couldn't pay for the cost of two private counselling sessions, he could have used the free counselling offered by the city's EAP, which the city had recommended.

"(Grant) exhibited no real appetite to return to work until his seniority and benefits grievance was resolved to his satisfaction," said the arbitrator. "(Grant's) absence was a function of his stubbornness and defiance, as opposed to any medical issue."

The arbitrator found Grant was absent without leave and had no justification for not at least meeting with the city. As a result, dismissal was an appropriate response to Grant's "defiant behaviour and actions" that caused irreparable damage to the employment relationship. See *Vancouver (City) v. C.U.P.E., Local 1004*, 2010 CarswellBC 3465 (B.C. Arb. Bd.).

CASE IN POINT: IMMIGRATION

Hiring foreign workers: A brave new world

Incoming changes to Foreign Worker Program increase protection for workers, penalties for violators

BACKGROUND

Protecting the domestic labour force

NEW REGULATIONS under the Immigration and Refugee Protection Act applicable to temporary foreign workers in Canada will come into effect on April 1, 2011. These regulations impose new restrictions and rules for the employment of temporary foreign workers, so it's important for employers who have or are looking to hire temporary foreign workers to be aware of what obligations they will have under the new regime.

Immigration lawyer Sergio Karas has been following the development and implementation of the regulations and provides his assessment of the changes and what employers must do to ensure compliance.

| BY SERGIO KARAS |

EMPLOYERS who hire foreign workers to work for them in Canada should take heed: Things are about to change.

On Aug. 18, 2010, Canada's Minister of Citizenship and Immigration announced significant changes that affect employers hiring foreign workers. These changes will take effect as of April 1, 2011.

The Temporary Foreign Worker Program is jointly administered by Human Resources and Skills Development Canada (HRSDC) and Citizenship and Immigration Canada (CIC). However, HRSDC is responsible for issuing Labour Market Opinions (LMOs), authorizing employers to hire temporary foreign workers in the appropriate circumstances.

LMOs attempt to ensure that hiring temporary foreign workers does not negatively affect the Canadian labour market. Before issuing an LMO, a HRSDC officer must be satisfied that the presence of the foreign worker will have only a neutral or positive impact on the Canadian labour force. Many other factors influence the issuance of LMOs, including whether the employer has made reasonable efforts to hire a Canadian, advertised the position in accordance with the minimum advertising guidelines issued by HRSDC, whether there is a labour dispute in the business, and whether the employer is offering the appropriate wages and working conditions when seeking to employ a foreign worker.

Over the last few years, given the increasing demand for foreign workers in Canada, especially in selected technical occupations, the federal government has sought to ensure that Canadians are not displaced in favour of foreign workers and, at the same time, foreign workers are treated fairly and equitably. To that end, many initiatives were pursued by the federal government, some in partnership with the provinces.

Preventing abuse of the program

The changes that will take effect on April 1, 2011, are generally meant to prevent the perceived abuse of the Temporary Foreign Worker Program by any unscrupulous employers. The changes will include:

- A more rigorous assessment of the genuineness of the job offer.
- A two-year prohibition from hiring temporary foreign workers for employers who fail to meet their commitments to workers with respect to wages, working conditions, and occupation.
- A limit on the length of time a temporary foreign worker may work in Canada before returning home.

Employers seeking to hire foreign workers, including live-in caregivers, will now have to demonstrate that the job offer is genuine. This may prompt HRSDC officers to engage in further investigations, sometimes contacting the employer directly and other times relying on information gathered from prior applications made by the same employer. In addition, employers will be assessed against past compliance with Temporary Foreign Worker Program requirements before an LMO will be granted, and those employers who are found to have violated worker rights may be refused authorization to hire a foreign worker.

This raises interesting questions as it is unclear how far HRSDC officers will go in their investigations or what type of violations could be considered sufficiently serious to deny an

Continued on page 5

CASE IN POINT: IMMIGRATION

Employer could be successful in recouping training costs

...continued from page 4

employer the right to hire a foreign worker. Possible red flags could include complaints filed against the employer by previous foreign workers, violations of health and safety standards, early terminations of other foreign workers on a routine basis and, potentially, other patterns of behavior shown by employers. The question of whether or not a job offer is genuine will be much harder to determine, as many employers who use the Temporary Foreign Worker Program, particularly in the construction industry, are sometimes related to the foreign worker and they use that program as a stepping stone to gain permanent residency. Other relevant factors to monitor for possible violations could include variations in wages due to performance, temporary lay-offs or periods without earnings. No doubt, such details may raise concerns with HRSDC officers.

Employers can get suspended from the program

The regulatory changes will add a new administrative penalty against employers: where an employer is found not to have complied with previous commitments to other foreign workers, it may be denied access to the Temporary Foreign Worker Program for the period of two years. In addition, offending employers' names will also be published on the Citizenship and Immigration Canada website, purportedly to inform other temporary foreign workers of the "danger" associated with a particular employer. Employers will be given the opportunity to explain any mitigating circumstances before such action is taken, but this could probably open an avenue for litigation by employers who feel aggrieved at being "blacklisted."

The proposed changes do not only affect employers; a new four-year cumulative limit is also being imposed on most temporary foreign workers employed in Canada. After a four-year term, they will have to wait a further period of four years outside of Canada before becoming eligible to again work temporarily in Canada. The limit does not affect eligibility for permanent residence, so it would be prudent to file applications for that purpose as soon as legally allowed. Foreign workers may qualify under the Canadian Experience Class or as Federal Skilled Workers with Arranged Employment. Prudent employers who value the services of their foreign workers should consult with legal counsel to determine the potential eligibility of their foreign workers to apply for permanent residency. In addition, it must be noted that the four-year limit does not affect foreign workers who enter Canada under the terms of an international agreement such as NAFTA. Those workers will continue to be governed by the terms of the appropriate treaty.

The potential consequences of employer misconduct under the new regulatory changes are very serious; also the consequences for foreign workers who will be close to reaching the four-year limitation can also create considerable disruption in their lives. It is essential both employers and employees are ready for the new regime and obtain the right information and legal advice when hiring foreign workers.

Work permit exemptions

NOT ALL temporary foreign workers require a permit to work in Canada. The following categories may not need a permit:

- Athletes and coaches
- Aviation accident or incident investigators
- Business visitors
- Civil aviation inspectors
- Clergy
- Convention organizers
- Crew members
- Emergency service providers
- Examiners and evaluators
- Expert witnesses or investigators
- Family members of foreign representatives
- Foreign government officers
- Foreign representatives
- Health-care students
- Judges, referees and similar officials
- Military personnel
- News reporters, film and media crews
- Performing artists
- Public speakers
- Students working on campus

Source: Citizenship and Immigration Canada

ABOUT THE AUTHOR

Sergio R. Karas

Sergio R. Karas is a certified specialist in Canadian citizenship and immigration law by the Law Society of Upper Canada. He is past chair of the Ontario Bar Association Citizenship and Immigration Section, past chair of the International Bar Association Immigration and Nationality Committee and editor of the Global Business Immigration Handbook. He can be reached at (416) 506-1800 or karas@karas.ca.

MORE CASES IN POINT

To view more cases and articles from past issues, go to www.employmentlawtoday.com and click on "Advanced Search."

Employee working during lawsuit could have benefits for employer

...continued from page 1

the workplace changes were not being accepted. If the employer did nothing in response, it would then be exposed to a claim for damages reduced by the amount of earnings received by the employee during the period of reasonable notice.

Lessons learned

The decision in *Russo* has the potential to be a double-edged sword for employers.

On the one hand, the prevailing view in the past was that an employee was required to leave his job if he wished to pursue a constructive dismissal claim. This requirement almost certainly operated as a deterrent to the pursuit of such a claim. If the *Russo* decision is followed by other courts, this deterrent will no longer be a factor because an employee will have the option of staying in his job while at the same time suing his employer.

On the other hand, *Russo* may offer a silver lining to employers because it validates the suing employee remaining in his position of employment, a scenario that could benefit some employers. In particular, where the workplace environment has not been poisoned to the point where continued employment is neither reasonable nor feasible, an employee who remains in his job enables the employer to obtain the benefit of the employee's ongoing service, while reducing the amount of the employee's claim (through mitigation earnings), should a claim be pursued. Should the employment relationship ultimately deteriorate, the employer retains the option to terminate employment with or without cause.

In addition, *Russo* does not affect the following legal and practical principles all of which continue to apply to the benefit of employers:

- The general rule that a reduction of remuneration of less than 10 per cent is not likely to trigger a constructive dismissal.
- A well-drafted employment agreement that contemplates a range of possible changes to an employee's terms and conditions of employment will reduce an employer's exposure to a constructive dismissal claim.
- Advance notice of a wage reduction, or a reduction introduced incrementally over a longer time period (as opposed to a 50 per cent reduction at once), will help an employer avoid or reduce its potential liability for a constructive dismissal claim.
- Employers with strong two-way communication with their employees, and who share some of the benefits when times are good, are more likely to enlist the support of their employees when times are bad. Fostering this type of employment environment engenders employees who are likely to be more flexible in their acceptance of pay reductions, rather than resorting to litigation.
- There are often strategies available to proactively address a claim of constructive dismissal, but they must be pursued in a timely manner to avoid liability. An employer that receives a letter from an employee or her legal counsel, or a verbal complaint, claiming constructive dismissal, should contact legal counsel as soon as possible. CELT

For more information see:

- *Russo v. Kerr Bros. Ltd.*, 2010 CarswellOnt 8373 (Ont. S.C.J.).

ASK AN EXPERT

...continued from page 2

confined to damages for failure to give reasonable notice (Southin J.A. for the majority). To this general proposition Rowles J.A. may be read as adding the qualification that a departing employee might be liable for specific wrongs such as improper use of confidential information during the notice period. This appears to be consistent with the current law, which restricts post-employment duties to the duty not to misuse confidential information, as well as duties arising out of a fiduciary duty or restrictive covenant: see G. England, Employment Law in Canada (4th ed. (loose-leaf)), vol. 2, § 11.141. Neither of the latter duties is at issue here." (Emphasis added)

Reasonable notice is determined on the facts of each case and is difficult to predict without further information about the "key" employee and his role with the company. From a business viewpoint, this alone may not warrant making such a claim. However, when a key employee quits unexpectedly, the employer should thoroughly investigate whether the lack of notice or the former employee's post-employment conduct has put it at risk. Again, counsel should be consulted to assist in determining risk and identify possible courses of action. CELT

For more information see:

- *Vincent v. Group 4 Falck Canada Ltd.* (Aug. 11, 2006), Doc. 3801-05-ES (Ont. L.R.B.).
- *Loehle v. Purolator Courier Ltd.*, 2008 CarswellOnt 3636 (Ont. S.C.J.).
- *Evans v. Teamsters, Local 31*, 2008 CarswellYukon 22 (S.C.C.).
- *RBC Dominion Securities Inc. v. Merrill Lynch Canada Inc.*, 2008 CarswellBC 2099 (S.C.C.).

Brian Johnston is a partner with Stewart McKelvey in Halifax. He can be reached at (902) 420-3374 or bjohnston@smss.com.

Employment law blog

Canadian Employment Law Today invites you to check out its employment law blog. You can get to it by visiting www.employmentlawtoday.com and clicking on the employment law blog banner on the right side of the website's front page.

MORE CASES

COMPILED BY JEFFREY R. SMITH

...continued from page 1

and Pirsel went on medical leave on July 2, 2008, feeling that she herself was being harassed.

The NHA recommended the employees see a staff development consultant for an investigation. The consultant determined a toxic relationship had developed between the employees due to a breaking down of their friendship. However, the consultant found the case manager had not harassed Pirsel.

The NHA also discovered it was paying Pirsel, despite the fact she was on medical leave and had applied for long-term disability, due to a payroll error. The NHA asked her to repay the amount it had overpaid her, but Pirsel refused because it was the employer's error.

A reorganization of the department led to the discovery that Pirsel should not have been supervising anyone according to her job description. The NHA revised her job description, which was accepted by the union.

On Jan. 13, 2009, the NHA presented Pirsel with a return-to-work proposal which stated she wouldn't have any supervisory duties, her office would move, her pay grade would be reduced, she would be required to pay the overpayment and her new duties would include driving long distances in winter. Pirsel rejected the proposal, saying it was inappropriate accommodation.

The next month, Pirsel received another proposal, which kept her at the same pay grade but earmarked one-half of her outstanding vacation pay for her overpayment and required her to agree to not file a legal action.

Pirsel rejected the second proposal and filed a human rights complaint, claiming the NHA discriminated against her by allowing the harassment, not accommodating her disabilities (in addition to suffering from stress, Pirsel was medically classified as a dwarf) and implementing the changes to her duties.

The tribunal found the NHA took steps to resolve the issues between Pirsel and the case manager, but had to deal with harassment complaints from both. The investigation and return-to-work plan were appropriate attempts at accommodation and though Pirsel felt the case manager's attitude was related to her height, the tribunal found nothing to show a link.

The tribunal also found Pirsel didn't advise the NHA of any accommodations she required, so the employer didn't have any reason to think she couldn't perform the new duties. The reorganization had involved several months of planning and other employees had their duties changed as well, said the tribunal.

The tribunal found no connection between the NHA's reorganization, payroll error, return-to-work proposals or harassment investigation, and Pirsel's disabilities. See *Pirsel v. Northern Health Authority*, 2010 CarswellBC 3405 (B.C. Human Rights Trib.).

PRIVACY: Former employer said too much to prospective employer: Adjudicator

AN ALBERTA employer was within its rights to tell workers a particular employee wasn't working there anymore but shouldn't have told a prospective employer about a non-work-related request for his personnel file, a privacy adjudicator has ruled.

Clean Harbors Lodging Services, a provider of lodging services to the refining and petrochemical industries based in Edmonton, was accused by a former employee of violating the employee's privacy rights under Alberta's Personal Information Protection Act (PIPA) by revealing information about his termination to other staff members and the fact he requested his personnel file to a prospective employer.

After the former employee left the company, he became concerned that Clean Harbor told inaccurate information about his departure to new employees. The former employee also thought the company's vice-president told a co-ordinator the former employee was fired. The former employee emailed the co-ordinator, who confirmed the vice-president revealed the information to him.

When the former employee applied for a job elsewhere, the prospective employer came to Clean Harbors for information and Clean Harbours disclosed that the former employee had requested his personnel file.

The vice-president claimed he only told the co-ordinator that it was company policy to advertise for new positions rather than automatically rehire former staff and the former employee couldn't be rehired for that reason. He denied revealing anything about the circumstances of the former employee's termination and the co-ordinator may have assumed certain facts about the dismissal.

An adjudicator for the Alberta Office of the Information and Privacy Commissioner found there was no evidence to back up the former employee's claim Clean Harbors revealed inaccurate information to other staff members. There was only evidence the vice-president said he was a former employee, not how his employment ended.

Clean Harbor admitted it told the prospective employer about the request for his personnel file. The adjudicator found the request was of an HR nature and occurred after the end of his employment, so it was not work-related. This qualified as personal information and Clean Harbour should not have disclosed it without consent, said the adjudicator.

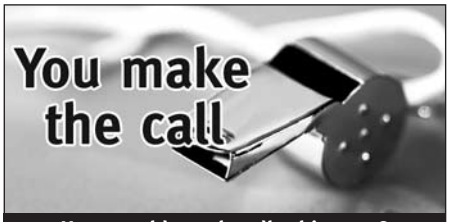
Clean Harbor argued PIPA allowed organizations to disclose personal employee information without consent if it was disclosed to another organization looking to recruit the employee, but the adjudicator found the request for a personnel file had nothing to do with recruitment.

The adjudicator found Clean Harbor violated the former employee's privacy rights under PIPA and ordered it to ensure its employees were aware of its privacy obligations. See *Alberta Office of the Information and Privacy Commissioner Order P2010-011* (Nov. 24, 2010), W.R. Raaflaub — Adj. (Alta. O.P.C.).

Fired employee fights onerous restrictive covenant

THIS INSTALMENT of You Make the Call features a dispute over the validity of a restrictive covenant in an employment contract.

Tom Mason worked for Chem-Trend, a manufacturer of chemical agents based in Michigan that operates worldwide, as a technical sales representative. Mason was hired to work for the company in Ontario in 1992. As part of his hiring, he was required to read and sign Chem-Trend's confidential information guide and agreement. The agreement included a clause that stipulated he could not work in competition with Chem-Trend, solicit business from anyone who was a Chem-Trend customer during his period of employment with the company or hire any Chem-Trend employee, for one year following the termination of his employment, regardless of whether he or the company terminated his employment. Mason reviewed and signed the agreement.



How would you handle this case? Read the facts and see if the judge agrees

Mason worked for 17 years with Chem-Trend, including eight years in the United States. He became familiar with the businesses of Chem-Trend's customers and the company's products. However, in summer 2009, Chem-Trend terminated Mason's employment. Mason sued for wrongful dismissal and challenged the restrictive covenant, arguing Chem-Trend was involved in every type of manufacturing industry and operated in every country in the world and the broadness of its scope and business, along with the length of time restricting him, made the covenant unfair and unreasonable.

Chem-Trend countered that the restrictive covenant was clear in its scope and necessary to protect valuable information about its customers, operations and products. It said Mason had plenty of time to look it over and raise any concerns about it, as he did with his vacation allotment, which he negotiated.

You make the call

- ☑ Was Chem-Trend's restrictive covenant reasonable?
  OR
- ☑ Was the covenant too broad to be enforceable?

IF YOU SAID the restrictive covenant was reasonable and enforceable, you're right. The court found the provision in the employment agreement was not ambiguous, as the wording was clear and defined the limits of the restrictions. It also found Mason read and understood the agreement since he negotiated other parts of it that weren't initially to his liking, such as his vacation entitlement.

The court agreed with Chem-Trend that although the geographic scope of the covenant was broad, it was necessary because Chem-Trend's business was global and operated in a wide variety of countries and industries. In fact, Mason was able to transfer to various regions during his time with Chem-Trend, including several states in the U.S. as well as working in Canada. It was also possible for Chem-Trend customers to have operations in several different regions.

The court also found the one-year period of restriction was reasonable. It found Mason had access to "significant information about Chem-Trend's unique products, operations, customers and pricing that could be used against Chem-Trend and be harmful to its business" and his years of experience and contacts in different regions made him a threat to the company if he started competing against it. Also, given his length of service, one year was not a long period of time, said the court.

"I find the geographic scope and activity restricted are necessary in the circumstances of Chem-Trend's business and bearing in mind Mr. Mason's employment and his knowledge of Chem-Trend's business, products and customers," said the court. "To the extent such restrictions are more onerous than the norm, they are balanced by the fact that the covenant is only in place for one year."

For more information see:

■*Mason v. Chem-Trend Ltd. Partnership*, 2010 CarswellOnt 6363 (Ont. S.C.J.).

CANADIAN Employment Law Today
www.employmentlawtoday.com
Published biweekly 23 times a year
Subscription rate: $325 per year

Customer Service
Tel: (416) 609-3800 (Toronto)
(800) 387-5164 (outside Toronto)
Fax: (416) 298-5082 (Toronto)
(877) 750-9041 (outside Toronto)
E-mail:
carswell.customerrelations@thomson.com
Website: www.employmentlawtoday.com

Thomson Reuters Canada Ltd.
One Corporate Plaza
2075 Kennedy Road, Toronto,
Ontario, Canada M1T 3V4

Publisher: John Hobel
Managing Editor: Todd Humber
Editor: Jeffrey R. Smith
E-mail: jeffrey.r.smith@thomsonreuters.com

We acknowledge the financial support of the Government of Canada, through the Publications Assistance Program (PAP), toward our mailing costs.

Canada

GST #897176350
Publications Mail Registration No. 7651