

# HR Compliance

Your Plain Language Guide to Hiring, Firing, Human Rights, Benefits & Privacy

# INSIDER

Volume 7 Issue 10

## RECRUITMENT & HIRING

### Avoid 'Inducement' Risks When Recruiting Employees from Other Firms

THIS STORY WILL HELP YOU

Avoid liability for inducement if employees you recruit from other organizations don't work out

**S**ometimes the best person for a job works at another organization. Wooing these people is part of capitalism. But it also carries legal risks, especially if things don't work out and you end up firing the employee. The "you fired me after luring me away from a secure job" argument could make you liable for big damages. The risk stems from a legal rule called inducement. Here's a look at the risk and how to manage it.

#### HOW INDUCEMENT WORKS

If you have just cause to fire the employee you recruited from another organization, you can stop reading. Inducement is only a concern when termination is *without cause* and notice is due. Such

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## THE EMPLOYMENT CONTRACT

### Avoiding Contract Pitfalls: Answers to 14 Crucial Questions

THIS STORY WILL HELP YOU

Avoid common contract pitfalls that can expose your organization to liability

**I**t seems a bit unfair to expect you to master the intricacies of employment contracting. After all, most HR directors don't go to law school. And getting a good lawyer will set you back about \$450 per hour. To level the playing field, *Insider* super-correspondent, Sheryl Smolkin, sat down with one of the country's top employment lawyers, Arleen Huggins, a partner with the Toronto firm of Koskie Minsky LLP, to discuss the practical challenges HR faces in employment contracting.

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## RECRUITMENT & HIRING: INDUCEMENT CONTINUED FROM FRONT

notice is based on how long an employee worked for you. But if the employee can show inducement, the court will extend the notice period. *Result:* Higher damages.

Making employers pay extra notice for firing employees they induced from secure jobs became official law in the famous *Wallace* case of 1997, where a Manitoba grain company fired a salesman with a stellar record right after assuring him that his position was secure. The Supreme Court of Canada found the termination not only wrongful but carried out in “bad faith.” So, it extended the salesman’s notice to 24 months.

The Court made it clear that inducing an employee to leave a secure job with false promises of security is a form of bad faith warranting *Wallace* damages. “There’s a need to safeguard the employee’s reliance and expectation interests in inducement situations,” the Court explained [*Wallace v. United Grain Growers*, [1997] 3 S.C.R. 701]. But in the very next line, the Court cautioned that “not all inducements carry equal weight.” Courts would have to decide about extra notice for inducement case by case, it instructed.

## 7 WAYS TO GET INTO TROUBLE

And so they have. Inducement gets raised just about any time an employee recruited from another organization gets fired shortly into his tenure with the new employer. If you recruit employees working at other organizations, you need to understand how these cases get decided to stay out of trouble. Although none is decisive, there are 7 basic patterns of inducement courts look for. The more you engage in, the greater your liability risks:

### 1. You Do the Chasing

Inducement is akin to seduction. The purest picture would be of an employer locating the employee working happily at the other organization, initiating the recruitment process and making a full court press to persuade her to jump ship.

**Example:** A headhunter cold calls an employee to pitch a “wonderful” opportunity at a rival software firm. The employee has a secure job and is lukewarm, but after 13 months of wining and dining and “the sky’s the limit” urgings, she takes the offer. Six months later, she’s laid off. The court finds inducement and awards \$320,000 in total damages [*Antidormi v. Blue Pumpkin Software Inc.*, [2004] O.J. No. 3888, Sept. 22, 2004].

**Example:** A production director is impressed by another company that’s also located closer to his home. He submits a resume, does 2 interviews and takes a pay cut to go there. He gets laid off 6 months later. No inducement, says the court [*Laszczewski v. Aluminart Products Ltd.*, [2007] O.J. No. 4991, Dec. 14, 2007].

### 2. You Target an Employee with a Secure Job

The more secure the employee in her current position, the greater the inducement risks you take in wooing her. Thus, for example, a casino committed inducement by firing a games manager 18 months after luring him away from a secure position of 16 years [*Dias v. Paragon Gaming EC Co.*, [2010] A.J. No. 1450]. By contrast, there was no inducement of a product packaging employee who had been looking to get out after his firm lost a big customer and eagerly responded to overtures by negotiating for a salary increase. The employee was a “willing seducee,” the court ruled [*McCulloch v. IPlatform Inc.*, [2004] O.J. No. 5237, Dec. 16, 2004].

### 3. You Offer Assurances of Long Term Employment/Security

Assurances of long-term employment are probably the most potent evidence of inducement. Witness the *Wallace* case itself where the notice bump was based on the fact that the grain salesman was fired right after being assured that his position was secure. The company’s use of

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words like “secure” and “committed” to describe the opportunity also helped the software developer prove inducement in *Blue Pumpkin* above.

#### 4. You Promise Other Benefits

Dangling other incentives, including promises of significant pay raises, can also set you up for inducement claims.

**Example:** A 21% salary increase, as compared to the cumulative 7.69% in raises received in all 6 years with his previous firm, was evidence of inducement [*Butcher v. Protagon Display Inc.*, [2011] O.J. No. 3391, June 1, 2011].

#### 5. You Misrepresent the Company or Its Finances

Putting the best face on your organization is an expected part of recruiting. But there’s a difference between puffery and misrepresentation. The latter would include portraying your company as stable and prosperous when it’s in financial distress. But while you can’t play fast and loose with the facts, employees are also expected to make inquiries about the company before accepting a job. For example, one reason the production director lost in the *Laszczewski* case above is that he jumped at the offer without doing “due diligence.” Had he bothered to look at the company’s financial statements or sought independent advice, he might have recognized that layoff was a possibility.

#### 6. You Use Misleading Recruitment Tactics

Talking up a firm or opportunity is expected when it comes from HR directors and headhunters; but using the target recruit’s friends or colleagues to do your bidding can be quite problematic, especially if you offer the supposedly objective source a referral bonus or other financial stake in the hire.

**Example:** Ex-colleagues encourage a Bell Canada employee with 20 years of service to apply for a job at Alcatel where they now work. Alcatel faces “tremendous opportunities” and offers “security” to its employees, they urge. What the employee doesn’t know is that the ex-colleagues stand to earn \$8,000 in referral fees from Alcatel. She takes the job and is fired without cause after 20 months. This kind of recruiting goes far beyond the kind of salesmanship inherent in the normal recruiting process, reasons the court in finding inducement and extending notice to 9 months [*Egan v. Alacatel Canada Inc.*, [2006] O.J. No. 34, Jan. 10, 2006].

#### 7. You Fire New Employees Early into Their Tenure

Inducement has a limited shelf life. The risks are greatest when employees are fired soon after starting the new job. Thus, for example, a highly recruited sales rep fired 3 weeks into his tenure was awarded 7.5 months notice [*McIntosh v. CTF Supply Ltd.*, [2001] O.J. No. 5062, June 25, 2001].

With each passing month, the employee accrues more notice under employment standards law and the gap in expectation between anticipated and actual tenure diminishes. Witness the salesman who lost his inducement claim when he was laid off after 13.5 years of service. “Any inducement consideration he had expired long ago,” said the court [*Smith v. Centra Windows Ltd.*, 2009 BCSC 606 (CanLII) Nov. 10, 2008].

Just how much time must pass before a fired employee can no longer claim inducement? We’d love to tell you. Unfortunately, there’s no clear line. What we *can* tell you is that in most successful inducement cases, the employee had been with the new company less than 2 years before getting fired. But as you can see from the chart below, it’s hard to find too many other patterns in the cases. Especially confounding are the 2 cases where employees got inducement bumps after 5 and 14 years (!) of service.

### INDUCEMENT CASE SCORECARD (in chronological order)

Case Name	Length of Employee’s Tenure	Months of Notice Awarded	Did Employee Get Inducement Bump?
<i>Wallace v. United Grain Growers</i> (1997) Can. S. Ct.	14 years	24	Yes
<i>McIntosh v. CTF</i> (2001) Ontario	3 weeks	7.5	Yes
<i>Gillies v. Goldman Sachs</i> (2001) BC	5 years	13	Yes
<i>Marshall v. Watson Wyatt</i> (2002) Ontario	1 year	9	Yes
<i>Buchanan v. Geotel Commun.</i> (2002) Ontario	18 months	12	Yes
<i>Antidormi v. Blue Pumpkin</i> (2004) Ontario	3 months	12	Yes
<i>McCulloch v. IPlatform</i> (2004) Ontario	4 months	6	No (3 months added but not for inducement)
<i>Egan v. Alacatel Canada</i> (2006) Ontario	20 months	9	Yes
<i>Laszczewski v. Aluminart</i> (2007) Ontario	6 months	4	No
<i>Firatli v. Kohler Ltd.</i> (2008) Ontario	30 months	5	No
<i>Smith v. Centra Windows</i> (2009) BC	13.5 years	15	No
<i>Dias v. Paragon Gaming</i> (2010) Alberta	18 months	4	Yes
<i>Butcher v. Protagon Display</i> (2011) Ontario	15 months	5.5	Yes (but only half a month)

## 6 WAYS TO PROTECT YOURSELF

There are at least 6 things you can do to minimize your liability risks:

### 1. Don't Make Promises You Can't Keep

Inducement is about fostering and taking advantage of false expectations. You probably don't need a lawyer to tell you that you should avoid making false promises and be upfront with the people you recruit—at least if your goal is to establish positive and long-lasting employment relationships.

**Practical Strategy:** Although any false promise is problematic, it's especially important to avoid false assurances of job security.

### 2. Keep Your Recruiting Agents from Making False Promises

Make sure the people you rely on to execute recruiting functions, including both internal HR staff and headhunters, are just as upfront. Most professional recruiters do their job responsibly; but a few don't, especially if they only get paid when they produce a hire. And even responsible recruiters have been known to oversell opportunities on occasion.

**Practical Strategy:** Establish a policy banning recruitment staff from offering enticements or making representations about the organization or opportunity without running it past you first. If you hire headhunters, include an equivalent provision in the recruiter's contract.

**Model Language:** Recruiter has no authority to make any representation, enticement or offer to a job candidate on the Company's behalf that's intended to induce the candidate to accept employment with the Company, unless such representation, enticement or offer has been submitted to and specifically approved in advance by the Company through its agent [*list the name of the HR director or other designated agent*].

### 3. Disclose Referral Fee Arrangements

Employee referral programs, i.e., paying bonuses to employees for recruiting friends or former colleagues, can be a good way to lure talent and build morale. But, as illustrated by the *Egan* case above, they can also get you into trouble, especially when the job candidate doesn't realize that his woosers stand to make a bonus

**Practical Strategy:** If you use these programs, be upfront with candidates and let them know about the arrangement.

### 4. Put All Promises in Writing

Putting the right provisions in the employment contract goes a long way in preventing the employee from getting an inducement bump if things don't work out. *Caveat:* You need to negotiate and get the agreement signed *before* the employee begins the job.

**Practical Strategy:** Make sure you list *all* of the terms of your agreement in the employment contract. Then, add a clause spelling out

that the contract contains the entire agreement and that no side deals or verbal promises or representations have been made.

**Model Language:** Employee acknowledges and agrees that this Contract incorporates the entire agreement between the Employee and Company, and that the Employee is relying on no other representations, promises or inducements by the Company or its representatives in entering into this Contract.

### 5. Limit Employee to Statutory Notice

Specifically address what the employee's rights will be in the event of termination without cause.

**Practical Strategy:** Limit employees to only the notice they're entitled to receive under the employment standards law of your jurisdiction. This will prevent employees from claiming more generous form of notice known as "common law notice" if they're terminated without cause.

**Model Language:** Company may terminate your employment at any time, without cause, upon giving prior notice in accordance with the [*list province Employment Standards law*] as is in force in the province when you accept Company's offer of employment, and such notice will be in lieu of common law notice and other forms of notice to which you might otherwise be entitled but for the terms of this Contract.


### 6. Make Employment Probationary

A more active expectation-busting strategy is to disclose any risk of early termination to recruits *before* they take the position.

**Practical Strategy:** Consider making the employment probationary. This could end up making it harder to lure the recruit. But if you really desire a probationary arrangement, making the recruit think the position is permanent is exactly the kind of thing that can lead to trouble.

**Final Caveat:** Employment contract language goes a long way toward dispelling the false expectations on which inducement is based. But it doesn't guarantee a favourable outcome. Rest assured that a court or arbitrator that's determined to rectify an injustice will find a way to get around a contract and rule in an employee's favour. Thus, for example, the casino manager in *Paragon Gaming* above still got an inducement bump even though his contract was probationary.

### Conclusion

If we thought that avoiding inducement liability should be your biggest priority, we'd tell you to stay away from recruiting employees who are already working at other firms. But that's not our advice. The moral of this story is that inducement, while it is a risk, is one that you can easily manage as long as you understand the rules. Best of all, the way to manage risk is also the way to ensure that the individuals you recruit turn into long-term, productive contributors: Be upfront about your organization and the opportunity and don't sell it as something that it's not. 



## HR MONTH IN REVIEW

*A roundup of important new legislation, regulations, government announcements, court cases and arbitration rulings.*

### CASE OF THE MONTH

#### New Brunswick Court OK's Random Alcohol Testing of Safety-Sensitive Employees

Courts and regulators have forged an unofficial consensus on the boundaries of drug and alcohol testing in recent years. Under this consensus, random drug testing is almost never permissible; but random *alcohol* testing may be okay for employees in so-called “safety sensitive” positions. A recent New Brunswick case sheds new light on random alcohol testing as a safety measure.

#### OVERVIEW

**What Happened:** A paper mill implemented a policy of annual random, as opposed to for cause, alcohol breathalyser testing of 10% of employees in safety-sensitive positions with a computer randomly selecting names of employees to be tested. The union grieved and the arbitration board struck down the policy. Although the work was dangerous, random testing wasn't justified given the lack of “prior incidents of alcohol-related impaired work” at the site, the board ruled. The appeals court reversed and the union appealed.

**What the Court Decided:** The New Brunswick Court of Appeals upheld the testing policy.


**How the Court Justified Its Decision:** The Court explained that random alcohol testing has generally been allowed when it's limited to employees in safety-sensitive positions and done by breathalyser, which is minimally intrusive. In particular, such policies have been upheld in workplaces that are “inherently dangerous,” such as chemical plants, railways and mines. In addition to protecting the safety of employees, co-workers and the general public, random testing can also prevent damage to the employer's property and the environment. Thus, evidence of a history of alcohol problems at

the workplace wasn't necessary for a random testing policy as long as the workplace is inherently dangerous, the Court reasoned.

The workplace in this case *was* inherently dangerous. The Court compared the mill to a chemical plant, noting that employees handle hazardous substances like sulphuric acid, chlorine dioxide and methanol. The mill also had a boiler with a “high potential” for explosion if not used properly. And it was located by a river and bay, increasing the likely environmental consequences of an explosion or other incident. [*Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp and Paper Ltd.*, [2011] NBCA 58 (CanLII), July 7, 2011].

#### ANALYSIS

Justification of testing policies is rooted in 2 factors: what's being tested for and the reason for testing. Thus, random testing is harder to justify than testing for cause; drug testing is harder to justify than alcohol testing because, among other reasons, unlike a positive alcohol test, a positive drug test is less conclusive of impairment at the time of testing.

Ensuring workplace safety is a valid justification for random alcohol testing as long as the employer can show the concern is genuine and testing is necessary. The *Irving Pulp* case offers insight into the parameters of random testing. The question: Is the dangerous nature of the work enough or must the employer also demonstrate a history of alcohol abuse at the site to justify random testing of safety-sensitive employee? The *Irving Pulp* court's decision to base the need for random alcohol testing on the inherent danger posed by the operation is good news for employers in dangerous industries because it opens the door to random alcohol testing even if there's no history of alcohol abuse by your employees. 






PRINCE EDWARD ISLAND

#### LAWS & ANNOUNCEMENTS

##### Workers' Compensation—Medical Aid

July 7: The WCB revised its policy on coverage of injured workers' medical expenses. The key change in Medical Aid (POL-92) is housekeeping, i.e., incorporating out-of-province treatment rules that were once contained in a different policy. As before, treatment will be covered if all 3 of the following conditions are met:

-  Treatment pre-authorized by WCB
-  Treatment is consistent with WCB policy and laws
-  The healthcare provider is recognized by the workers' comp board of the jurisdiction where the treatment is delivered.

##### Workers' Compensation—Benefits Review

July 7: The WCB also made some minor revisions to its policy on reviewing wage loss benefits of injured employees to clean up a few definitions and clarify how 24- and 36-hour review is undertaken before calculating the extended wage loss award of employees receiving temporary wage loss benefits.

##### Workers' Compensation—Claims

July 20: The WCB launched the first phase of WCB Online Services, which lets employers request clearance letters and access information about their WCB accounts, including Cost of Claims reports.






YT

#### LAWS & ANNOUNCEMENTS

##### Workers' Compensation

July 7: A trio of new YWCHSB policies took effect involving:

-  Daily living activities—which now focuses on helping injured employees do tasks they *could and did do* before they got hurt (HC-06)
-  Coverage of alternative treatments for injured employees (HC-07)
-  Coverage of First Nations or Inuit Traditional Healing (HC-08).






QUÉBEC

#### LAWS & ANNOUNCEMENTS

##### Pensions

July 1: Québec and Ontario became the first to officially adopt the Canadian Association of Pension Supervisory Authorities model agreement for calculating pension plans with members in more than 1 jurisdiction. Highlights:

-  Rules of jurisdiction of Major Authority (i.e., the one with most active members) regulate plan administration, investment and registration
-  Rules of Minor Authority apply to vesting, lock-in and surplus distribution
-  Rules of final location (i.e., the jurisdiction where member retires or is terminated) used to calculate member's benefits.

**LAWS & ANNOUNCEMENTS****Labour Market**

Aug. 5: July was a quiet month for jobs. A modest decline in unemployment to 7.2% was not from job growth but less participation i.e., individuals looking for jobs. A few sectors had monthly gains, including construction (31,000 new jobs), transportation and warehousing (28,000) and retail and wholesale trade (28,000). Jobs were up in Alberta and Newfoundland, down in Ontario and flat in the rest of the country.

**Employment Insurance**

July 6: As expected, the Best 14 Weeks and Working While on Claim pilot programs have been extended another 12 months. No rules changes. The extension is there to give the EI Commission more time to gather data to decide whether to make the programs permanent.

**Immigration**

July 6: Immigration law changes took effect:

- ✦ Authorized individuals must represent immigrants in legal proceedings
- ✦ Entrepreneurs OK'd by Québec as conditional permanent residents under Canada-Québec accord exempt from federal post-landing and reporting requirements
- ✦ British "subjects" from Northern Ireland, India and Pakistan no longer need to apply for temporary resident visas.

**Payroll**

July 14: The CRA issued new regulations explaining how to make CPP source deductions for employees ages 60 to 70 who decide to take advantage of the new phased retirement rules that take effect on Jan. 1, 2101. [Click here for a Free Special Report on new CPP source deductions.](#)

**Executive Compensation**

Aug. 3: The Canadian Securities Administrators are calling on publicly traded companies to disclose more information about their executive compensation arrangements, including the qualifications of their compensation committees, risks of their compensation practices and fees they pay to compensation consultants. First to be affected by the new rules are banks whose fiscal year begins on Oct. 31, 2011.

**Pensions**

Aug. 12: The government closed public comment on a proposal allowing companies that can't or won't establish a pension plan on their own to team up and share the costs of plan administration via pooled registered pension plans. PRPPs would apply to federally regulated employers but provinces could change their own pension laws to allow them.

**CASES****Explaining Job Challenges to Blind Applicant ≠ Discrimination**

A job fair attendee explained that he couldn't take a multiple choice skills test for a cruise line position because he was blind. After speaking to a company official, the attendee decided to leave the fair. The Human Rights Tribunal threw out his disability discrimination lawsuit. The official didn't discourage him from applying or make him leave the fair; he merely explained the challenges and safety issues a visually impaired person would face on the job. The court upheld the ruling as reasonable [*Canada (Canadian Human Rights Commission) v. Shmuir*, [2011] F.C.J. No. 1040, July 8, 2011].

**Demotion ≠ Constructive Dismissal**

An inexperienced accountant was hired as assistant controller on the condition that she earn CGA accreditation in 2 years. But when she struggled and it became clear that she wouldn't make the CGA, the company decided to let her stay on as a clerk and shoot for a less rigorous CMA. After dropping out of the CMA program, the accountant claimed constructive dismissal. She lost. The clerk position was a step down in pay and responsibilities, the arbitrator acknowledged. But the employer had been "supportive, patient and fair" in giving her a second chance; and the accountant didn't hold up her end of the bargain on earning the designation [*Percival v. Nisga'a Lisims Government*, [2011] C.L.A.D. No. 150, July 5, 2011].

**LAWS & ANNOUNCEMENTS****Labour Market**

Aug. 5: The province recorded job gains for the third consecutive month. 12,400 new jobs, 3,200 of them full-time, dropped unemployment 0.1% to 5.5%. More significantly, Alberta's 3.8% growth in employment over 12 months is highest in Canada and more than double the national average of 1.5%.

**Minimum Wage**

Sept. 1: Three significant minimum wage changes take effect:

- ✦ 60¢ increase in minimum wage to \$9.40
- ✦ New minimum wage for liquor servers earning tips—starts at \$9.05 and then fixed at \$1 less than regular minimum wage once latter hits \$10.05
- ✦ Future increases in minimum wage based on average of annual weekly earnings and CPI.

**CASES****Court Shouldn't Have Pulled Plug on Fiduciary Duty Case against Ex-Employees**

A securities firm sued a pair of veteran mutual funds salesmen for breach of fiduciary duty after they quit and moved to a rival firm. After the firm presented its evidence, the court did something courts in Alberta almost never do: It granted a so called non-suit dismissing the case without the defence's having to present its own case. But the appeals court said ending the trial was a no-no. The firm had made out a case and the court should have let the trial continue [*Capital Estate Planning Corp. v. Lynch*, [2011] A.J. No. 820, July 21, 2011].

**Labour Board Says No to Excluding "Managers" from Union**

The owner of a Calgary scaffolding yard claimed that 4 employees should be excluded from a newly certified carpenters' union because they performed managerial functions, citing the employees' authority to hire, fire, discipline, schedule and approve overtime. But the Board said the individuals had no real managerial discretion and that the owner was really the one in charge [*PERI Formwork Systems Inc.*, [2011] A.L.R.B.D. No. 7, July 22, 2011].

**LAWS & ANNOUNCEMENTS****Labour Market**

Aug. 5: After 2 down months, employment rose a net 3,800 jobs (1,600 full time) in July. The 0.4% decline in unemployment to 11.9% would have been even steeper but for the 0.7% increase in participation to 59.7%. Of course, participation increases are a good thing. Employment has actually grown 3.5% since last July, second highest in Canada behind only Alberta.

**Prescription Drugs**

July 25: A new regulation requires pharmacies participating in the Newfoundland and Labrador Prescription Drug Program to provide 120 days' notice before pulling out of the program. The action is in response to recent actions by independent pharmacies throughout the province in announcing their intention to quit the NLPDP.

**LAWS & ANNOUNCEMENTS****Human Rights**

June 30: In its revised Breastfeeding Policy, the Human Rights Commission restated that employers have the duty to accommodate employees who are breastfeeding. Possible accommodations include allowing a caregiver to bring the baby into the workplace for feeding and arranging a "quiet place" for the employee to breast feed.

**Health Care**

July 28: The province began building a system that will make it easier for pharmacists, doctors and other drug prescribers to share information about the medications a patient is taking. The system is due to become fully operational in 2014.

**CASES****Long Work Hours No Excuse for Filing Workers' Comp Claim Late**

Workers' comp denied a Canada Post letter carrier's claim for benefits related to what he claimed was work-related psychological stress. Rather than get a lawyer, he decided to represent himself in the appeal. Although he saved on the legal fees, he missed the 30-day filing deadline. The carrier blamed it on long work hours and plumbing problems at home but the court said none of this was an excuse and refused to give him a filing extension [*Allen v. Canada Post Corp.*, [2011] N.S.J. No. 412, July 26, 2011].

**FEDERAL****ALBERTA****NEWFOUNDLAND****NOVA SCOTIA**



## BRITISH COLUMBIA

## LAWS &amp; ANNOUNCEMENTS

**Labour Market**

July 25: Skilled workers needed will exceed the numbers of skilled workers available by 2016, according to the government's Labour Market Outlook 2010-2020 report. The northeastern part of the province will experience the highest growth in demand for skilled workers, followed by the Mainland/Southwest, North Coast and Nechako. A million jobs are expected to open up by 2020—one third generated by economic growth and the rest by retirements and aging in the workforce.

**Job Training**

July 8: The government will provide \$500,000 through the Canada/BC Labour Market Agreement to fund job-training projects in 4 regions: North Coast, Nechako, Cariboo and Kootenay. Programs must offer industry-specific training to at least 25 employees to be eligible for funding.

**Workers' Compensation**

July 15: BC became the latest province to make esophageal cancer presumably work-related and thus covered by workers' comp when suffered by firefighters. The change affects full-time, part-time, volunteer and paid on-call firefighters primarily assigned to fire suppression duties and who have at least 25 years' fire suppression experience.

**Health Care**

Aug. 2: Income assistance clients can now receive up to \$450 (rather than \$375) for orthotics, i.e., special equipment and shoes to correct foot, ankle or leg problems. Clients will also be able to get replacement orthotics every 3 years rather than every 4 years under current rules.

**Collective Bargaining**

July 7: Langara College reached a tentative labour agreement with 616 support staffers, subject to final ratification. Terms of the deal weren't announced.

## CASES

**Demotion = Constructive Dismissal**

A seafood department manager who was demoted to clerk-2 had been a solid performer but began to struggle when his marriage went bad, showing up late and sometimes drunk. The store did a good job of warning him and expressing its expectations but his performance didn't improve. At first, the manager accepted the demotion. But when negotiations broke down, he claimed constructive dismissal. The court agreed, citing cuts in wages (from \$19.95 to \$16.80), profit sharing, bonuses and responsibilities [*Haddock v. Thrifty Foods (2003) Ltd.*, [2011] B.C.J. No. 1305, July 8, 2011].

**IBM Can't Subtract Pension Benefits from 65-Year-Old's Termination Notice**

A 65-year-old IBM executive with 42 years of service began receiving his \$2,124 monthly DB pension after being fired without cause. IBM tried to exclude the benefits from his termination notice but the court said no. The contract didn't allow for the receipt of salary and pension benefits for the same period, the court acknowledged; but there was nothing in the *pension plan* saying the executive couldn't receive both at the same time [*Waterman v. IBM Canada Ltd.*, [2011] B.C.J. No. 1453, Aug. 2, 2011].

**Employee Can't Sue for Discrimination after Settling Termination Claim**

An employee signed a "full and final" release settling his wrongful termination claim. Nine days later, he filed a discrimination complaint claiming he was fired in retaliation for complaints about racist and threatening comments by co-workers. No dice, said the BC Human Rights Tribunal. The employee had a "full and fair opportunity" to raise discrimination claims in the wrongful dismissal action. Settling that case ended all claims related to his employment, the Tribunal held [*Sandhu v. Great Pacific Enterprises*, [2011] B.C.H.R.T.D. No. 156, June 20, 2011].

**Firing Over False Accusations of Gun Possession Upheld**

Two employees accused a co-worker of threatening them with a handgun in the lunchroom. The accusations proved false but only after the accused had been arrested and suspended. The company then reinstated the accused and fired the accusers. An arbitrator found that the latter's misconduct and "malice" toward the accused caused grievous harm and justified termination. The Labour Relations Board upheld the ruling as reasonable [*Aspen Planners Ltd. v. United Steelworkers of America Local 1-417*, [2011] CanLII 33748 (BC LRB), June 8, 2011].



## MANITOBA

## LAWS &amp; ANNOUNCEMENTS

**Payroll**

Aug. 1: It's still illegal to deduct amounts for interest or service fees in relation to payroll errors, cash advances or cashing a cheque. But you may deduct the greater of the following amounts to recover payroll errors in the employee's favour or cash advances:

- The amount of the payroll error or cash advance—with the employee's consent
- The amount that could be seized or garnished to cover the payroll error or cash advance under the garnishment laws.

**Workplace Violence**

Aug. 31: Employers now have to issue annual reports on violent incidents in the workplace in the past year if they've determined there's a risk of violence or are in healthcare or other designated industry. Employers must also develop policies on how employees can get immediate help if they're threatened. The OHS law changes also make it clear that companies can disclose personal information to employees to warn them about risks of violence by co-workers.

## LAWS &amp; ANNOUNCEMENTS cont'd.

**Employment Standards**

Aug. 5: The Manitoba Employment Standards Board is now posting Employment Standards Codes fines on its website. See, [http://www.gov.mb.ca/labour/standards/asset\\_library/pdf/current\\_admin\\_penalties.pdf](http://www.gov.mb.ca/labour/standards/asset_library/pdf/current_admin_penalties.pdf).

## CASES

**Employee Diagnosed with Paranoia Sues**

At Manitoba Hydro's insistence, an employee submitted to a psychological assessment. The finding: paranoid disorder. When he found out, the employee became upset not simply at the diagnosis but at the decision of the company and union not to give him the report directly. The employee sued the psychologist, the company and the union for defamation, mental distress, breach of fair representation, etc. The Court of Queen's Bench threw out all the claims. The court didn't have jurisdiction, i.e., legal authority to decide the case, it ruled; in addition, the statute of limitations had run out [*Wong v. Hawryluk*, [2011] M.J. No. 230, June 30, 2011].



## NEW BRUNSWICK

## LAWS &amp; ANNOUNCEMENTS

**Minimum Wage**

July 20: The 50 cent increase in the minimum wage to \$10 per hour has been pushed back from Sept. 1 to April 1, 2012. In addition to giving businesses more time to adjust, the Minister claims the 7-month delay is needed to enable the government to study moving to a two-tiered minimum wage.

**Accessibility**

Aug. 11: A proposed standard to make building more accessible to the disabled was posted online for public comment. Although the current proposal is limited to building construction and design, it's likely to lead to accessibility requirements for employers the way it did in Ontario.

**Drug Costs**

July 20: How can we make generic drugs more affordable? That's the question the government recently opened to public consultation. Look for New Brunswick to follow the lead of BC, Alberta, Saskatchewan, Ontario, Québec and Nova Scotia and adopt a scheme to regulate the price of generics.



## LAWS &amp; ANNOUNCEMENTS

**Mining**

July 11: Gold mining might be returning to the Northwest Territories after a 20-year absence. Vancouver-based Tyhee Gold Corp. commissioned a feasibility study of the Discovery Camp project situated 90 kilometres north of Yellowknife. Tyhee has already invested \$3 million to prepare an environmental assessment report for the project.

## LAWS &amp; ANNOUNCEMENTS

**Labour Market**

July 25: The territorial economy has created 500 more jobs in the past year. Unemployment still remains 16.6% but that's likely to change with the opening of new mining projects, including Agnico-Eagle's Meadowbrook mine near Baker Lake. Mining is expected to take off in not only the Kivalliq but Kitikmeot and Qikiani regions.



## ONTARIO

**LAWS & ANNOUNCEMENTS****Labour Market**

Aug. 5: Ontario took a step back in July, losing 22,000 net jobs. 12-month employment growth is now 1.6%, just a tick above the 1.5% national average. A decline in participation to 66.8% actually caused the unemployment rate to dip from 62.0% to 61.7%.

**Immigration**

July 27: Ontario delivered a message to the federal government: We want the same immigration deal you gave Québec, Manitoba and BC. Specifically, the province is seeking funding for programs that enable trained professionals from abroad settle in and ply their trade in Ontario as soon as possible.

**Pensions**

July 8: The government will provide \$500 million to the Pension Benefits Guaranteed Fund to finance an extra option for members of the Nortel pensions that are being wound up. Nortel members may opt out of the wind-up and transfer the commuted value of their benefits to another financial institution to be held as a LIF. Members that stay in the wind-up will get their guaranteed pension annuity and PBGF entitlement.

**Human Rights**

July 26: Looking for help with a human rights policy, investigation or dispute? The new fact sheet published by the Human Rights Commission will help you find the consultants and decide which one to hire.

**Workers' Compensation—Return-to-Work**

July 15: The WSIB's new return-to-work policies took effect. From now on, WSIB staff rather than external caseworkers will oversee injured workers' return to work, which will include a skills assessment and necessary retraining. Employers are also obligated to re-hire injured workers who can resume their old duties.

**Workers' Compensation—Rate Setting**

July 15: The WSIB's new NEER Policy (No. 13-02-02) (New Experimental Experience Rating) took effect. The big change: The window used to assess workers' comp rates expands from 3 to 4 years. WSIB compares actual claim costs over the window period to an expected rate. Employers with costs above the benchmark must pay a surcharge; employers with lower costs are eligible for refunds. Extending the window to 4 years, which is essentially a rate increase, is retroactive to claims after Jan. 1, 2008.

**Workers' Compensation—2012 Rates**

June 29: Speaking of rate increases, the WSIB confirmed that premiums for all employer rate groups will go up 2% on Jan. 1, 2012. The 2012 average premium rate will be \$2.40 per \$100 of insurable earnings, up from \$2.35 in 2011.

**Workplace Safety**

July 12: 377 workers died on the job or from occupational diseases, 53 more than in the previous year (a 15% increase). But lost time injury and illnesses fell almost 7% to 4.16 accepted claims per 100 full-time workers.

**OHS Reform**

July 6: The current status of OHS reform, according to the MOL:

- ✦ Negotiations ongoing on transfer of WSIB prevention resources to MOL
- ✦ New Chief Prevention Officer expected to be in place by the fall
- ✦ OLRB considering expedited process for safety reprisal complaints.

**LAWS & ANNOUNCEMENTS****Minimum Wage**

Sept. 1: Reminder: The minimum wage goes up 25¢ to \$9.50 per hour. Why a quarter? 25¢ represents a 2.7% increase. And 2.7% is an average of the 1.4% rise in the CPI and 4.0% increase in the Average Hourly Wage. For all its recent prosperity, Saskatchewan still has one of Canada's lowest minimum wages.

**Wage Collections**

July 26: A couple of years ago, the federal government adopted a new law to make it easier for employees to collect the wages they're owed after their company goes bankrupt. Now the government is reporting that as many as 16 employees have filed WEPP (Wage Earner Protection Program) claims against insolvent companies in Saskatchewan. So far, 13 of these claims have resulted in wage payments.

**CASES****5 Months' Notice for Wrongful Dismissal**

A maintenance assistance supervisor claimed she was fired without cause and sexually harassed by her supervisor; the employer claimed she was fired for performance problems and denied the sex harassment charges. The court said there wasn't enough evidence of sex harassment. But it found the employee's version of the termination more credible than the supervisors' "contradictory" testimony and "questionable" hand written notes of the termination meeting. So it awarded the employee 5 months' notice (\$14,166), \$1,500 in benefits and \$1,176 in vacation [*Hunt v. Buckham Transport Ltd.*, [2011] O.J. No. 3097, June 29, 2011].

**Knifing Threat Is Frustration, Not Real Risk of Violence**

An employee was suspended after telling his supervisor of his intention to bring a knife to work and cut off the hand of the next person who tried to take his tools. The employer refused to reinstate him until he had a psychiatric evaluation. But the arbitrator said the evaluation demand was unreasonable. Although ill-advised, the employee's statement was the result of anger and frustration rather than a real threat given the employee's 26-year history of not having made any violence or threats. So, a psych evaluation wasn't justified [*Canadian Pacific Railway Co. v. National Automobile, Aerospace, Transportation and General Workers Union of Canada*, [2011] CanLII 38424 (ON LA), June 29, 2011].

**Failure to Report Incident Results in 10-Week Unpaid Suspension**

A forklift operator was fired for failing to immediately report an incident in which he hit a rack of goods causing property damage in a warehouse. But an arbitrator ruled that he should get a 10-week unpaid suspension instead. Although he didn't report immediately and even lied about what had happened, the operator did eventually come forward. And he didn't have a disciplinary record or pose a threat to the safety of co-workers [*Sysco Food Services of Toronto v. Teamsters, Local Union No. 419*, [2011] CanLII 41103 (ON LA), July 5, 2011].

**OK to Fire Electrician for Neglecting Fire Watch Duty at Nukes Facility**

The OLRB upheld the firing of an electrician for not completing his fire watch duties after verifying that he had on a Hot Work Permit. The electrician had no excuses—he knew how important the fire watch was at a nuclear facility. And he made a bad situation worse by failing to take responsibility for his actions and blaming his supervisor. So, the company was justified in losing all trust in him [*E.S. Fox Ltd.*, [2011] O.L.R.D. No. 2360, June 30, 2011].

**Gun Club Discriminated Against Female Bartenders**

Two female bartenders sued the gun club where they worked for harassment, sex discrimination and reprisal. The Human Rights Tribunal ruled in their favour, finding that the club had unjustifiably reduced one of the bartenders to part-time while she was on disability leave and refused to let the other bartender work nights because she was pregnant even though her doctor said she could [*Knibbs v. Brant Artillery Gunners Club Inc.*, [2011] HRTO 1032 (CanLII), May 30, 2011].

**Arbitrator: OK to Fire Employee for 'Dry-Humping' Co-Worker**

An arbitrator upheld the firing of a lab worker for wrapping a plastic bag around a co-worker's neck and torso, bending him over a skid, slapping him on the butt several times and "dry-humping" him to simulate anal intercourse. The worker's conduct violated the company's ban on horseplay. He also had an extensive disciplinary record and failed to apologize to the co-worker. And his apology to the employer was insincere, said the arbitrator. So there was no reason to believe he would mend his ways [*Jamieson Laboratories Ltd. v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (Murphy Grievance)*, [2011] O.L.A.A. No. 273, June 10, 2011].

**CASES****Companies Fined for Not Giving Government Payroll Records**

When government officials request payroll records, you'd be well advised to comply. A pair of employers learned that lesson the hard way. Although the \$310 fine each received for not providing payroll records to the Labour Standards Officer is modest, being named in this and countless other media reports is hardly expected to do much to improve the image of either company [*It's a Blast, World of Play*, Govt. News Release, July 27, 2011].



## SK

## THE CONTRACTING PROCESS

**QUESTION 1: WHO** should be asked to sign a contract, all employees or just ones in particular positions or levels?

**Answer:** Contracts are most important for supervisory, managerial, executive and other personnel who may otherwise qualify for common law notice (which is more generous than employment standard notice) upon termination. Although generally advisable for all new employees because they provide certainty for the future, with other employees, a letter of hire may be enough.

**QUESTION 2: WHEN** should employees be asked to sign their employment contract—is having them sign on the first day when they get their benefits information advisable?

**Answer:** No. The contract should be executed by both sides *before* the employee starts the job. Offers of employment, verbal and written, should be conditional upon the employee's executing the employer's written employment contract.

## THE TERMS OF THE CONTRACT

**QUESTION 3: WHAT** should an employment contract cover?

**Answer:** It should address all the key terms of employment, including duties and responsibilities, duration of employment and, of course, compensation. It should also explain the employee's rights upon termination for and without cause, due to disability and upon the employee's resignation.

**QUESTION 4:** What should the contract say about **DURATION**?

**Answer:** Stipulate in the contract that the agreement remains binding and effective after changes in position, title, compensation, etc., regardless of how significant changes are.

**QUESTION 5:** Are **PROBATIONARY PERIODS** for new employees automatically assumed?

**Answer:** No. To make employment probationary you need to expressly state this in the contract. But you can't take away the probationary employee's right to notice provided for under employment standards law. So, for example, in Ontario, an employee who gets terminated after working 3 months gets ESA notice even if the contract makes the employment probationary.

**QUESTION 6:** What is **COMMON LAW NOTICE**?

**Answer:** Common law basically means the law that applies absent a statute like the ESA or the terms of a contract. Common-law notice is in addition to statutory ESA notice; and it's more generous. Employees are entitled to receive common-law notice unless the contract has a termination clause that specifically says otherwise.

## EMPLOYMENT POLICIES

**QUESTION 7:** Are **EMPLOYEE POLICIES** dealing with issues like sexual harassment, workplace violence, absenteeism, etc. considered part of the contract?

**Answer:** Not if you don't set things up this way. To make policies contractual, you should refer to them and include a provision in the contract requiring the employee to abide by them. In addition, ensure the employee acknowledges receiving copies of the policies.

**QUESTION:** So this means that violating an employer policy is a contract violation?

**Answer:** Yes. It's also important to include a provision that gives you the right to amend, alter, change or revoke any policies, including any group insurance policies that provide benefit coverage to the employee, on reasonable notice as you determine.

**QUESTION 8:** Wouldn't these changes make an employer susceptible to **CONSTRUCTIVE DISMISSAL**?

**Answer:** They could. So, the contract should also state that employer changes to employment policies or group insurance policies don't constitute constructive dismissal or breach of the contract.

## TERMINATION CLAUSES—FOR CAUSE

**QUESTION 9:** What are the key elements of a **FOR-CAUSE TERMINATION** clause?

**Answer:** We all know that employers have a general right to fire without notice for just cause. The issue that arises is over which kinds of infractions constitute just cause. That's why it's advisable for employers to spell out in the contracts which violations *they* deem serious enough to be just cause. A court may not necessarily agree; but it certainly helps the employer's case that it found the infraction serious enough to include in the contract and bring to the employee's attention before he started work.

**QUESTION:** I recall a case where an employer who had just cause for termination and thus wasn't responsible for *common-law notice* still had to pay \$25,000 in *ESA severance*.

**Answer:** Look, I know these terms sound confusing. The basic point your readers need to understand is that there are *2 kinds of cause*; or, to state it technically, the ESA definition of "cause" is different from "just cause" at common-law. The former requires a wilful, deliberate type of conduct. It's important to deal with both of these in the contract. The case you mention is a perfect illustration of dealing with only common law just cause. The employer might have avoided ESA severance by stating in the contract that specified infractions constituted not only just cause at common law, *but also* cause for dismissal under the ESA.

## TERMINATION CLAUSES—NOT FOR CAUSE

**QUESTION 10:** What, if anything, should the contract say about **NOT-FOR-CAUSE TERMINATION**?

**Answer:** First, employers need to understand that they can't contract out of their obligation to provide notice or wages in lieu, and other payments required by the province's (or federal) ESA in a not-for-cause termination. But what the employer can do is limit employees terminated without cause to ESA notice, i.e., take away their right to *common-law* notice.

**THE EMPLOYMENT CONTRACT CONTINUED FROM FROM PAGE 9**

**QUESTION:** Will courts enforce a clause limiting employees to ESA notice if they're terminated without cause?

**Answer:** Yes, they will—as long as the agreement is clear and is contained in the employment agreement the employee was offered and signed before being offered employment. Such clauses are even more effective when they're paired with the clause we mentioned earlier that says the contract remains effective notwithstanding the duration of the employment and whether positions change over time.

**QUESTION:** Is limiting employees to statutory notice for termination without cause always advisable?

**Answer:** No. Employment contracts are driven by business considerations and in many cases, employers will give employees more generous notice than the ESA requires. But even in such cases, you want to establish some limits by setting a maximum notice period, e.g., via an escalation clause that increases the notice amount based on the employee's service. This way, you don't have to revise your contract from time to time as the employee's employment duration increases.

**QUESTION 11:** What **OTHER TERMINATION ISSUES** should employers address?

**Answer:** One of the key ones is the elements of compensation in addition to base salary. At common law, all of these elements are payable upon termination—unless you specifically exclude them. Think about it. This means that an employee would be entitled to the bonus she'd have otherwise earned during the notice period unless the contract specifically excludes it. Another item to address is benefit duration, particularly for disability coverage to the extent a terminated employee is eligible for benefits beyond the prescribed ESA notice period.

## TEMPORARY LAYOFFS

**QUESTION 13:** With all of the recent economic concerns, how would you recommend that employers handle **TEMPORARY LAYOFFS**?

**Answer:** Legally, the ground rules of temporary layoffs are established in the ESA. If the layoffs are to union employees, you must also abide by the rules of any collective agreements that apply. With non-union employees, it depends on what, if anything, the employment contract or employee manual says. Some contracts or manuals give the employer the specific right to effect a suspension with or without pay, e.g., for progressive discipline or in response to an economic downturn. But if the employer directs an employee not to attend work and there's no such provision like this, the employee can view it as a termination at common law, and the employer must pay notice due on termination.

However, even if the contract or employee manual does provide for temporary layoffs, the ESA still applies. In Ontario, a layoff for longer than 13 weeks in any period of 20 consecutive weeks is deemed a termination and the employee is entitled to ESA notice and severance pay. This is extended up to 35 weeks in any period of 52 consecutive weeks if the employer continues the employee's compensation or benefits. No employee can be laid off, even with pay or benefits, for 35 weeks or longer without it being

deemed as a termination for ESA purposes. Of course, each jurisdiction has slightly different temporary layoff rules in its own ESA.

## DISABILITY BENEFITS

**QUESTION 14:** What is a company's exposure to liability for **DISABILITY BENEFITS IN THE NOTICE PERIOD**? Recently, there have been some big awards to employees who became disabled during the notice period. In one case, a company had to pay \$146,000 in disability benefits to a terminated employee who became disabled during the notice period after his disability coverage was cut off. How can a company protect itself?

**Answer:** The case you're referring to is *Brito v. Canac Kitchens*, [2011] O.J. No. 1117, Feb. 18, 2011, and it rang alarm bells within the employer community. Employers can protect themselves by including in the employment contract a termination provision that specifically acknowledges that the employee's disability coverage will end at the end of the ESA notice period and have the employee promise not to hold them liable for any disability or any claims for loss of benefits, etc.

**QUESTION:** Do you think a court would enforce a clause like this?

**Answer:** No case like this has ever arisen in Ontario, at least to my knowledge; but I think the clause would be upheld if it was contained in an employment contract signed by an employee before accepting employment. If a clause like this weren't enforced, it would create a huge liability for employers in the form of damage awards far in excess of payment in lieu of notice, as in the *Brito* case.

## SUMMARY

Here's a Checklist to summarize the key points to take away:

- Make verbal or written offers of employment conditional on the employee's executing the employment contract.
- Stipulate that the contract continues in effect notwithstanding changes in position, title, length of employment or compensation.
- If you want a probationary arrangement, specify that the contract is probationary.
- You can't contract out of termination notice and other payments required by the ESA.
- Take away an employee's right to common-law notice upon without cause termination—either by limiting the employee to ESA notice or providing more generous notice subject to limits you set.
- Stipulate the kinds of violations you consider to be just cause—and ensure such violations are also cause for termination under the ESA.
- Incorporate employment policies into the contract and make compliance with them a contractual obligation.
- Make sure temporary layoffs meet the requirements of the ESA and any collective agreements (or individual contract if the employee isn't in a union).
- Address all elements of compensation, including bonuses and benefits, in case of termination.



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## DUTY TO ACCOMMODATE

# TEST YOUR HR I.Q.

### Does Accommodation Mean Paying for ‘Personal Assistive Devices’?

#### SITUATION

Despite becoming partly deaf in her right ear and completely deaf in her left, grade school teacher Anna Conda is determined to keep working. The school board is willing to install a costly microphone system and make modifications to her work space. But it refuses to reimburse Anna for the \$2,800 she pays for a digital hearing aid citing a board policy saying that its duty to accommodate excludes paying for “personal bodily assistive devices.” Anna can prove that she needs the hearing aid to do her job; but she acknowledges that the device will also help her with personal life functions.

#### QUESTION

**Does the school board have to pay for Anna’s hearing aid?**

- A. Yes because Anna needs the device to do her job.**
- B. Yes, unless the board can show that paying for the device is undue hardship.**
- C. No because Anna plans to use the device for personal and professional purposes.**
- D. No because the school’s duty to accommodate applies only to the workplace and not to personal devices like hearing aids.**

#### ANSWER

**B. The board must pay for the device to accommodate Anna absent proof of undue hardship.**

#### EXPLANATION


Human rights laws require employers to accommodate disabled employees—but only to the point of undue hardship. This scenario, which is based on an actual Ontario case, illustrates whether the duty to accommodate includes paying for hearing aids, prosthetic limbs and other personal assistive devices that attach to the body and help employees with both work and personal functions.

Denying the teacher’s request would have been okay if the board had shown that paying for a hearing aid was an undue hardship. But the board relied on a policy of not paying for *any* personal assistive devices without even considering the circumstances. The duty to accommodate requires employers to respond to each request individually on the basis of the particular circumstances, the arbitrator noted. And the hearing aid in this case was necessary for the teacher to do the job, it concluded [*Thunder Bay Catholic Dist. School Bd. v. Ontario English Catholic Teachers’ Assoc.*, [2011] CanLII 38669 (ON LA), June 27, 2011].

#### WHY WRONG ANSWERS ARE WRONG

**A is wrong** because Anna’s need for the device for work is only part of the answer to the accommodation question. The school board could still avoid the accommodation by showing that paying for the device would impose undue hardship.

**C is wrong** because it’s too definitive a statement. The fact that Anna plans to use the device for personal use *could and probably would be* a factor in determining how much, if any, the board should pay towards it. But the moral of this story is that each accommodation request must be decided individually.

**D is wrong** but it sounds good. In fact, there was a 1997 Ontario case (called *Mootital Grievance*, [2007] O.L.A.A. No. 341, June 29, 2007) where an employer won on this argument. But the arbitrator in *Thunder Bay* noted that later cases have called for more open-mindedness and flexibility in determining necessary accommodations and suggested, correctly, that this kind of the-employee-takes-care-of-her-body-and-we-take-care-of-the-workplace policy would probably no longer fly. 

# EMPLOYEE BENEFITS

## WINNERS & LOSERS

### Does Paying Benefits in the Past Mean You Must Keep Paying Them in the Future?

Times are tough and many companies can't afford to keep paying the same retirement benefits they have in the past. For example, rather than defined benefit (DB) pensions, many companies now provide defined contribution (DC) plans that guarantee only the amount contributed and not how much the employee ultimately receives. But restructuring pension benefits is no simple matter. First, the changes must be allowed under your employment agreements and plan documents. And even then you may face another obstacle. Some courts have ruled that the practice of granting a benefit in the past creates a duty to keep paying that benefit in the future. When is an employer boxed in by previous practice? Here are 2 cases addressing the question.

#### PLAN LOSES


##### FACTS

In 1973, the Great-West (GW) pension plan begins granting annual benefit increases based on the plan's investment performance. Starting in 1984, the market booms and the plan has 6 years of spectacular investment returns. Consequently, adjustments to retirees soar. In 1990, GW decides that things have gotten out of hand and changes the plan. Future adjustments, including to current retirees, are to be based on the Consumer Price Index. Employees who retired before 1990 file a class action lawsuit against the plan.

##### DECISION

The Manitoba Court of Appeal rules that the plan must keep using the old formula to adjust retirees' benefits.

##### EXPLANATION

The plan was still using the old adjustment formula when the retirees retired. And upon retiring, they obtained a "vested right" to keep having their benefits adjusted that same way. The plan didn't expressly say that GW *had to use* the investment performance formula and could never change it, the court acknowledged. But GW's "subsequent conduct" in consistently indexing adjustments by investment performance created an implied promise on the part of the plan to keep doing so in the future—at least for employees who retired while the old adjustment formula was still being used. So the plan couldn't switch to the CPI index without the retirees' consent. 

*Dinney v. Great West Life Assurance Co.*, [2005] MBCA No. 36, (CanLII), March 23, 2005

#### PLAN WINS


##### FACTS

The Canadian Jewish Congress (CJC) sets up a pension plan for management employees in 1957. It's a DC plan, but the CJC often makes additional contributions to top off the benefits of long-serving employees when they retire or leave the organization. But in 2004, money is tight and when 2 senior employees are terminated as a result of reorganization, they don't get the full top off treatment they were expecting. The Superior Court rules that the CJC is bound by past practice and orders it to enhance their benefits (by \$2,030 per month and \$4,582 per month for life, respectively). The CJC appeals.

##### DECISION

The Québec Court of Appeal rules that CJC doesn't have to top off the employees' benefits.

##### EXPLANATION

Unlike the retirees in *Dinney*, the employees in this case didn't have a legal right to hold CJC to past payment practices. For one thing, plan enhancements were an act of generosity and not required under the terms of the plan. And they weren't given out as a matter of course. Top offs were provided on occasion on a case by case basis to employees the organization felt were like members of the family. "There was no uniformity or generality in the nature, amount or duration of enhancement that would enable the Court to find that a binding practice existed," the Court explained. So the employees had no right to expect that the practice had been "grandfathered" and would be applied to them. 

*Canadian Jewish Congress v. Polger*, [2011] Q.J. No. 7788, June 21, 2011

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