Handling Issues Relating to an Ageing Workforce

With the elimination of mandatory retirement in January of this year, it is expected that we will see more and more older workers remaining in the work force. Further, given there are not enough younger workers to replace them, employers will be facing some increased competition for labour and consequently face issues they may not have faced or considered before. The following is a review and brief discussion of some of those issues.

1. COMPENSATION AND SALARY BANDS

Most traditional compensation formulae and salary bands were based on a presumption that employees will normally retire by age 65, and assumed a hierarchical organizational structure where employees spent their careers with one company and were promoted within the ranks. Accordingly, compensation schemes rewarded long service, and assumed other increases due to promotions. Further, even without a conscious decision to reward longer service, regular across the board salary increases over time, results in longer service employees earning more than newly hired employees hired into the same position.

Thus, employers' most expensive employees will be their older employees. In some cases this will be an appropriate reflection of the increased skills, experience and service of that employee. In other cases however, these costs will not necessarily relate to the actual position or productivity of the employee; and hampers the ability of employers to appropriately link compensation to contributions to the organization.

Younger employees are also more mobile, and less inclined to stay with an employer for long periods of time. Because they have more choice in jobs available to them, employers are looking for ways to reward and retain those employees. The reality is a twenty-something employee will change employers several times and will not demonstrate the same type of loyalty that older employers did to one or two employers.

Employers should be considering whether or not their compensation models require adjustment, so that other more effective ways of encouraging (a) retirement (such as decreased focus on service related salary increases), (b) productivity (increased focus on performance based compensation), and (c) retention of the younger generation of workers. Given the conflicting objectives, it is likely that a more flexible type of compensation (and benefits) model be required.

2. MANAGING PERFORMANCE

2.1 Objective and Regular Performance Reviews

It is common for employers faced with under performing employees to simply put up with the performance problems or skip the usual annual performance reviews altogether if the employer knows that employee will be retiring soon. Since employees no longer can be required to retire, it is necessary for employers to manage the performance of all of their employees, including the older ones. For employers with established performance review processes, this may not be a problem, but for employers without such processes in place, they will want to consider implementing one because employers will not be able to institute performance management measures or criteria only on their older employees because that would constitute age related discrimination. Consequently, employers should ensure that it has performance review policies, including regular reviews and evaluations, that are transparent and applicable to all employees.

2.2 Objective Job Criteria Based upon Bone Fide Occupational Requirements

Employers should ensure that:

(a) their job requirements are truly related to the various jobs,

(b) such requirements are established by objective means, and

(c) there are objective ways to measure individual capabilities.

Where physical health and strength are bone fide requirements (for example, for ensuring safe work places) employers will want to consider providing assistance to employees to maintain their health and strength.

2.3 Is the Performance Problem Caused by a Disability?

Employers should always be alert to the possibility that some performance problems may be based on a disability or illness (which triggers legal obligations on the employer to accommodate the employee to the point of undue hardship). When dealing with an employee who has been off sick for a period of time, is chronically absent, or has not been performing all aspects of their job for alleged health reasons, an employer must consider whether or not that employee has a disability and therefore is entitled to the protections of the human rights legislation. Thus the first step when considering a management strategy for these employees is to understand what constitutes a disability and whether or not the employee has a disability. For example, an attendance management program for a chronically absent employee will not be effective either to improve the employee's attendance, nor uphold discharge for cause, if the program did not consider the possibility of disability and/or reasonably accommodate the employee's disability.

Being sensitive to whether or not the performance problem is caused by a disability will be even more important when dealing with older employees. Age *per se* is not a disability but age related health problems can be, and employers can expect that as their work force ages, accommodation will increase. For this reason, employers may want to take a more pro-active role in encouraging all aspects of wellness, especially fitness and healthy diet, the two leading contributors to good health and disease prevention.

Our workplaces have undergone significant technological change in the past couple of decades and there is no reason that the pace of change will slow down. Older employees often complain of the difficulty they have learning and adjusting to technology changes. In some cases, employees will not be able to cope with the changes; in other cases, the training methods will need to be modified to accommodate this group of employees. Employers will be expected to "accommodate" reasonable age based limitations on performance (e.g. adapting to new technologies), provided employers can do so without undue hardship.

2.4 Right to Discipline

Assuming an employer has had no indication that an employee's poor performance is due to an illness or disability, the employer will be entitled to take appropriate steps to manage the performance problem, up to and including discharge. It is not uncommon for an employer to have been on the verge of taking disciplinary action against an employee for performance issues, when the employee suddenly fails to report to work due to an illness. In that circumstance, an employer will want to postpone the planned disciplinary steps until it has had an opportunity to investigate the nature of the illness and to confirm the performance issues are not related to a disability. Even if the illness is unrelated to the performance problems and planned discipline, the employee will be entitled to take advantage of whatever sick leave and benefits he or she would ordinarily be entitled to.

Employees are expected to inform their employers if they have a disability, and therefore employers cannot be found to have discriminated if they did not know, or it was not reasonable for them to know, that the employee had a disability. Having said that however, employers can be deemed to have such knowledge if it can be shown that the employee did in fact communicate the disability to a management representative (who did not pass on the information to the persons responsible for invoking the disciplinary measures), or if the employer fails to make simple enquiries of the employee as to whether or not there are any non-culpable reasons for the performance problems.

2.5 Dealing with Accommodation Requests

As stated, employers have a duty to accommodate employees with disabilities pursuant to the *Human Rights Code*. Employers have a duty to take active steps to accommodate an employee's disability to the point of undue hardship, and therefore employers are entitled to sufficient information about that disability and the limitations

the disability imposes on the employee in order to make that assessment. Employees seeking to be accommodated have a duty to also actively participate in the process. At a minimum, this requires disclosure of the fact that accommodation is required, as well as notification to the employer of the nature of the disability.

Although an employer will generally be able to justify a request for more detailed medical information in order to deal with accommodation requests (versus verification of an absence for example) an employee is not necessarily required to disclose the diagnosis of the exact medical condition or disability. Instead, an employer may only request information sufficient to justify the request for accommodation. Usually, the employee will be required to provide a medical certificate or other information from his or her physician or other health professional.

It is critical that an employer actually go through the exercise of investigating the accommodation required by an employee, and whether or not the accommodation can be done without undue hardship. Without that exercise, even if the employer was ultimately correct in its assessment, a tribunal will find that the employer's decision was discriminatory. When you think about it, that is exactly what the human rights laws were designed to protect against - the subjective decisions about what an employee can and cannot do, and what accommodation was or was not practicable (i.e. did not invoke undue hardship).

Finally, ensure that accommodation is agreed to and documented by an agreement.

3. REASONABLE NOTICE AND SEVERANCE ENTITLEMENT FOR OLDER EMPLOYEES

Although the next presentation will deal generally with how to handle layoffs of employees, and the factors the courts consider when deciding what constitutes reasonable notice of termination, the topic of reasonable notice for older employees is worth a special mention. One of the primary criteria considered in assessing reasonable notice is age of the terminated employee. Despite the legislation that prohibits discrimination on hiring based upon age, the fact is older workers are deemed to have more difficulty finding new employment than younger employees. It will be interesting to see if in the decade to come, with more and more older employees in the workforce and a shortage of replacement workers, if age becomes less of a factor in determining reasonable notice. For now however, it still remains one of the most significant factors.

The increased notice entitlement related to age means that older employees with a relatively short period of service with a company (a factor which generally results in reduced reasonable notice periods), will still be entitled to significant notice awards in the absence of employment agreements limiting the notice. Without such agreements, it is not uncommon for older employees to be found to be entitled to longer reasonable notice than their original service with their employer.

Consequently, if ever there was a case to be made for employers using employment contracts, it is when an employer wishes to employ someone who is 50 or more years of age. That employment contract would then clearly set out the agreed to notice or pay in lieu of notice that an employer was required to pay should the employer decide to terminate the employee without cause. In this way an employer will have some certainty that when it makes a decision to hire an older employee, it is not also acquiring a significant severance liability.

Nicole Byres

Handling Issues Relating to an Ageing Workforce
T. 604.643.3173 / nmb@cwilson.com

47010v1