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E-mail:
compnews@humanresourcesinfo.com

Publisher/Editor-in-Chief:
Yvonne Blaszczyk, FCHRP

Copy Editor:
H. Hoffmann

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Executive Compensation and Compensation Committees

WILLIAM A. DIMMA

Neither the CEO nor any other member of management should be a member but attends, when appropriate, at the request of the committee chair.

Let me begin with a few philosophic comments to set the stage for a number of suggestions for improving the relationship between executive compensation and corporate outcomes, measured by such standard measures as NET PROFIT, ROE, ROI, and SHARE PRICE PERFORMANCE, and by newer measures like EVA.

I should like to make it clear at the outset that there's nothing wrong with substantial levels of executive compensation if – and it's a critical if – shareholders are well-served. Few begrudge Jack Welch what he earned on his watch, because he created many billions of dollars of shareholder value.

Perhaps he would have been wise to turn down some of the post-retirement perks that were disclosed only because of his marital split-up. But that's as much a problem of perception as of anything else.

No, the biggest problem with executive compensation is unwarranted and excessive payouts, most commonly via options, for mediocre and even unsatisfactory results. A related problem is executives taking short-term actions, motivated by huge option grants and greed, that pump the share price in the near-term, based all too often on unrealistic expectations. Such actions are frequently not in the corporation's longer-term interests.

And, of course, eventually it's payback time and the company falters badly or even flames out. But by a majestic display of exquisite timing, the CEO and some of his key subordinates have often, by then, cashed in and moved on.

So what's the answer? As a start, we know that arbitrary measures, like wage and price controls, as experimented with in both the U.S. and Canada in the mid-'70s, are entirely dysfunctional.

In the very short-run, they can provide a salutary form of shock therapy to help dig an economy out from under unacceptably high and rising levels of inflation, hardly an issue in recent times. But their market-distorting effect, if leFt in place For long, is seriously negative. And as a remedy for executive compensation, we need a scalpel, not a sledgehammer.

It's clear, even obvious, that, if we believe in free – genuinely free – markets (and that's what a free-enterprise system is or should be all about), we must do everything within our power as a society and as informed members of that society to ensure that all markets are fair and open, not rigged or otherwise compromised.

This certainly includes the market for compensating senior executives, a market where failure both to act fairly and to be perceived among various publics as fair can have serious consequences for the economy and indeed for our economic system.

If a real and fair market concludes that the CEO of a large profitable corporation is worth many million dollars a year, so be it. But much of the explanation for unprecedently large paycheques (granted, more common in the larger, wilder U.S. economy than here) is that the market is seriously flawed.

the assumption by a few high–flying CEOs, especially in the glory days of the nineties, that they deserve to be compensated at the same level as movie and

rock stars oR world-class professional athletes, rests on some highly dubious assumptions.

The first such assumption – that compensation should be based on the relative importance of the task – is entirely rational but ignores some present-day home truths.
Prime ministers and country presidents are paid much less than warranted by the size and importance of the job, in relation to celebrities in mass entertainment, including, of course, professional sport. And running a company is much closer to running a country than it is to running a touchdown, mumbling undecipherable but obscene lyrics to teenagers, or destroying everything and everybody in sight for the benefit of millions glued to screens, large or small.

In an increasingly pleasure-seeking, hedonistic, even decadent world, entertainment is where it's at. And, for better or worse, it is and will continue to be a much higher-paying field than government, business, and the professions.

A few CEOs, principally in the U.S., have concluded, not entirely without reason, that the key to higher compensation is celebrity status. This reached its zenith in the heady '90s when the bull ran wild and the bear hibernated.

This raises an interesting question. If celebrity commands big bucks - and it does -, is celebrity an essential part of a CEO's job description? Maybe I'm old-fashioned but, to me, the answer is an unequivocal no. We had more than our share of celebrity CEOs in the '90s and you all know where that took us and what it got us.

Put that aside for the moment and focus on comparative performance. Michael Jordan or Barry Bonds or name your own athletic icon earns enormous sums because he does extraordinary things as an individual star. And this makes him a celebrity in a celebrity- obsessed world. And that has a huge cash-in value.

To extend this reasoning to CEOs is specious and misleading. An important part of why a large, well-established company is successful is its legacy. This is reflected in trademarks, patents, brand recognition, and specialized know-how in, say, manufacturing or marketing, accumulated over many decades and often building on the vision, drive and sagacity of some long-dead founder.

Why should a CEO who may have been brought in from the outside only three Years ago and supported by an enormous legacy (think of the value of Coca-cola as a brand) get a free ride? Any comparison with Russell Crowe or Madonna or Sting is out to lunch. These icons earn what they earn, based on who they are which is based in turn on what they do as consummate individual performers appealing to an enormous paying audience.

But back to the crucial question of whether the market for senior executive compensation is fair and open or rigged. I start from what clearly should be but not always is the assumption that the shareholder comes first. With celebrity CEOs, this self-evident truth is often lost in a miasma of quasi-delusional self-importance, board cronyism, and sycophantic compensation consultants who know what pleases those who pay their bills.

And then there are compensation surveys that reflect all of the above and are used with breath-taking audacity to accomplish the mind-boggling feat of bootstrapping 75% of any large sample into the top 25% of compensation levels. Of course, the impossible is made temporarily possible only by rapidly expanding compensation for all and sundry. And performance is too often lost in the shuffle.

As a final comment before turning to specific measures to address this issue of compensation inflation above and beyond that merited by performance, let me cite one recent example of executive compensation run amok. As has been reported widely, Richard Grasso, the recently deposed Chief Executive of the New York Stock Exchange, in addition to having received a handsome salary and annual bonus, will receive 139.5 million dollars in deferred retirement benefits, having decided

earlier and, I think , judiciously to return a further $48 million to his employer. His net take works out to more than three years of the NYSE'S net profit.

It's this sort of thing that gives capitalism a bad name and increases the pressure to take draconian measures that are much better avoided. But if boards don't step up to the plate and say no vigorously and more often, the pressure to adopt such measures will only increase.

So much for philosophy. Turn with me now to the more serious and sober task of what boards ought to do about absurd levels of executive compensation unsupported by corporate performance. Institutional and other shareholders also have a key role to play but Claude Lamoureux is the best person to discuss that.

With respect to corporate governance process, I have six suggestions for strengthening that crucial link between corporate performance and executive compensation. No one of them is original but, collectively, they go a long way towards creating conditions under which responsible compensation policies are likely to be established and maintained.

I should note here that what follows is most applicable to widely-held companies, less applicable on some, though not all, points to companies with a control block, and more or less irrelevant to private companies.

First, the members of the compensation committee should each be fully independent. Neither the CEO nor any other member of management should be a member but attends, when appropriate, at the request of the committee chair.

Second, the definition of independence extends to the exclusion of directors who are former company officers as well as officers of other companies where the CEO or other senior officers of this company is a director. That is, at least for compensation committees, the principle of interlocking directorships is renounced.

Incidentally, it's instructive to note that Mr. Grasso sits on the board of home depot whose co-founder and lead director, Kenneth Langone, chairs the compensation committee of the NYSE.

Third, the committee chair should have a deep, extensive knowledge of compensation issues. Compensation has become a complex and, at times, Byzantine discipline. At least one member of the committee, normally the chair, should be proficient in this discipline.

Just as audit committees should be comprised of directors who are all financially literate and where at least one possesses financial expertise, so too should compensation committees be comprised of directors who are all on easy terms and familiar with compensation principles and practices. And at least one possesses compensation expertise.

In Sarbanes-Oxley, the required level of accounting and financial expertise is not defined narrowly or specifically but the bar is set fairly high for all members and quite high for at least one. I suggest that some roughly similar guidelines should be developed for compensation committees.

Fourth, the compensation Committee should meet frequently: at least four times a year and sometimes more often. Its role is far more proactive than the perfunctory one of approving annual changes to the CEO's compensation package, after a discreet one-pager, often prepared by the head of HR, is distributed quietly at the beginning of a once-a-year meeting.

Or perhaps the CEO recommends changes to the compensation of his direct reports with supporting commentary that provides broad hints to the committee about their doing the right thing about his own package, before he slips out into an anteroom.

Fifth, and this follows from the previous point, the committee is definitely not a rubber stamp for management. It initiates as well as reacts. It insists on discussing, refining, and using principles of compensation that help to ensure that pay and performance are as closely linked as is humanly possible in an often unpredictable and volatile world.

Sixth and finally, the compensation committee hires and fires, if and when necessary, any compensation consultant, whether used for executive-level work or any other compensation-related assignments. The analogy to the evolving new relationship between audit committees and external auditors is obvious.

An alternative that has been broached is for management to hire one consultant and for the board, via its compensation committee, to hire a different and unrelated one. This is inefficient and can lead, as some U.S. experience has demonstrated, to divisive and unprofitable turf wars.

So much for the process. On substance, the only area that I'd like to address briefly is stock options. This topic has been worked over rather thoroughly in the recent past so allow me merely to state a few principles that will help to ensure that options are used responsibly.

As a parenthetical aside, I have come around to the view that stock options for directors are, on the whole, a bad idea. I have been persuaded that this aligns the board and management too closely and increases the pressure to make short-run, opportunistic decisions that are not in the best longer-run interests of the enterprise.

With respect to options for management, I remain of the view that, while most of the well-publicized examples of extraordinary levels of executive compensation involved options, most through certainly not all in the US, the problem resides much more in the practice than in the principle. Or to resort to that tired analogy, the baby need not be thrown out with the bath water.

Here, without any embroidery or discussion, are seven elements of option policy that comprise, I think, best practice. They eliminate most of the well-justified criticism that has dogged - some would say plagued - option use in recent years.

Options should vest more slowly. A reasonable schedule is 20% at the end of year one after grant and 20% at the end of each of the next four years. Term should continue to be long at seven to ten years. Shorter terms add to the pressure to take shorter-term actions that make no sense over the longer-run.

There should be a much greater use of performance options that do not vest unless tough stretch targets are met. There are a thousand variations on this theme but they have in common a determination to avoid payouts, often obscenely large, for accomplishing too little.

This was demonstrated vividly in the nineties when price-earnings ratios rose dramatically, principally because baby-boomers had entered the major savings phase of their lives.

Avoid re-pricing options everywhere and always. Despite outraged screams from high-tech startups, the powerful public perception of unfairness in relation to regular shareholders provokes outrage and so it should.

The value of option grants, regardless of their frequency, should bear some reasonable relationship to salary level. A useful benchmark is that, for any one executive, the net present value of all grants outstanding, when divided by the average term of such grants, should not exceed a year's salary.

Shares acquired through option exercise should be required to be held for some period of time. Two years might be about right. Some observers think such shares should be held until termination of employment, including retirement. Although I consider myself a hawk on most compensation issues, this seems overly harsh and restrictive.

Then there's the expensing of options. Despite the protests, this is coming, though debate continues over how best to do it. My only comment on this point is to observe that an obvious and, on the whole, salubrious result of expensing options will be a strong moderating influence on the value of new grants.

William A. Dimma, Chairman of the Board
Home Capital Group Inc.
c/o Brascan Financial Corporation

The New Jersey Worker's Compensation Act Bar Against Employer Liability Lawsuits

DOROTHY A. HARBECK, ESQ. KAREN MAINIERI

In New Jersey, the Workers Compensation Act is an injured employee=s sole remedy for damages against his or her employer. Title 34 of the New Jersey statutes is the New Jersey Workers Compensation Act. There are two major exclusions: (1) if the employer did not carry workers compensation insurance or (2) if the employer committed an "intentional wrong."

"if the risk is great, the conduct may be characterized as reckless or wanton, but it is not an intentional wrong.

The New Jersey Supreme explained the nature of "intentional wrong" in this context in Millison v. Dupont, 101 N.J. 161 (1985). The important point is that an intentional wrong generally requires a deliberate intent to injure. Specifically,

> [e]ven if the alleged conduct goes beyond aggravated negligence, and includes such elements as knowingly permitting a hazardous work condition to exist, knowingly ordering claimant to perform an extremely dangerous job, willfully failing to furnish a safe place to work, or even wilfully or unlawfully violating a safety statute, this still falls short of the kind of actual intention to injure that robs the injury of accidental character.

Millison at 171, quoting A. Larsen, The Law of Workman=s Compensation.

The mere "knowledge and appreciation of a risk" does not constitute intent. In New Jersey Appellate Division analyzed that "if the risk is great, the conduct may be characterized as reckless or wanton, but it is not an intentional wrong." Crippen v. Central Jersey Concrete Pipe, 176 N.J.S.

The immunity provided in N.J.S.A. 34:15-8 states that an employee=s exclusive remedy for an accident:

> that arises out of and during the course of employment is workers compensation and the employer Ashall not be liable to anyone at common law or otherwise on account of such injury or death for any act or omission occurring [to such an employee], except for intentional wrong.

Tomeo v. Thomas Whitesell Constr. Co., 176 N.J. Super 366, 371 (2003).

The meaning of "intentional wrong" in this context is detailed further in Millison, supra. The Millison court concluded that "intentional wrong is not strictly a deliberate assault and battery." Id. at 177. Instead, it set forth the "substantial certainty" standard, relying upon The Law of Torts:

> [the mere knowledge and appreciation of a risk - - something short of substantial certainty - - is not intent. The defendant who acts in the belief or consciousness that the act is causing an appreciable risk of harm to another may be negligent, and if the risk is great, the conduct may be characterized as reckless or wanton, but it is not an intentional wrong.

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Millison art 177, quoting W. Prosser and W. Keeton, The Law of Torts '8 at 36 (5th Ed. 1984).

I- The Workers' Compensation bar

N.J.S.A. 34:15-1 provides: "When personal injury is caused to an employee arising in and out of the course of his employment, or which the actual or lawfully imputed negligence of the employer is the natural and proximate cause, he shall receive compensation therefor from his employer ...." N.J.S.A. 34:15-8 further provides that where the Workers' Compensation Act does apply, the parties' use of the Act "shall be a surrender by the [employer and employee] of their rights to any other method, form or amount of compensation or determination thereof than as provided in this article and an acceptance of all of the provisions of [the Workers' Compensation Act] and shall bind the employee and ... as well as the employer."

New Jersey case law is well-settled that the above statutory provisions create an exclusive remedy for employees who sustain injuries arising in and out of the course of their employment. "It is the plain, unambiguous language of the statute itself ... which clearly demonstrates that Workers' Compensation is the exclusive remedy afforded to the employee who is injured during the course of his employment." DeFigueiredo v. U.S. Metals Refining Co., 235 N.J. Super. 458, 459 (Law Div. 1988), aff'd, 235 N.J. Super. 407 (App. Div. 1989). The Act embodies "an historic >trade-off= whereby employees relinquish their right to pursue common-law remedies in exchange for prompt and automatic entitlement to benefits for work-related injuries." Laidlow v. Hariton Mach. Co., Inc., 170 N.J. 602, 605 (2002); Millison v. E.I. Du Pont de Nemours & Co., 101 N.J. 161, 174 (1985); see also Seltzer v. Isaacson, 147 N.J. Super. 308, 313 (App. Div. 1977).

However, N.J.S.A. 34:15-8 contains an exception to the exclusivity rule, to wit: "[I]f an injury ... is compensable under [the Workers= Compensation Act], a person shall not be liable to anyone at common law or otherwise on account of such injury ... except for intentional wrong." A plaintiff claiming such an "intentional wrong" bears a high burden of proof. "In order to satisfy the statutory definition of 'intentional wrong,' the employee is required to show deliberate intention to injure." Millison, 101 N.J. at 170; see also Bryan v. Jeffers, 103 N.J. Super. 522, 526 (App. Div. 1968), certif. denied, 53 N.J. (1969) ("[t]he Legislature intended the words 'intentional wrong' to have their commonly understood signification of deliberate intention").

Noting that the workers' compensation system "confronts head-on the unpleasant, even harsh, reality — but a reality nonetheless — that industry knowingly exposes workers to the risks of injury," the Supreme Court has posited that "the essential question that must be answered is what level of risk-exposure is so egregious as to constitute an 'intentional wrong.'" Millison, 101 N.J. at 177. The Millison court determined that the quid pro quo of Workers' Compensation can best be preserved by applying the "intent" analysis of Prosser to determine what is an "intentional wrong" within the meaning of N.J.S.A. 34:15-9. Id. at 177. According to Prosser, the meaning of intent is that an actor desires to cause the consequences of his act or is substantially certain that such consequences will result from his actions. Restatement 2nd of Torts, '8A. Recognizing that the distinction between negligence, recklessness and intent is a matter of degree, Millison went on to state that "the dividing line between negligent or reckless conduct on the one hand and intentional conduct on the other must be drawn with caution, so that the statutory framework of the Act is not circumvented simply because a known risk later blossoms into reality. We must demand a virtual certainty." Id. at 178.

In addition to adopting Prosser=s "substantial certainty" test, the Millison court adopted a second prong, recognizing "context" as a

significant component of an "intentional wrong." "Courts must examine not only the conduct of the employer, but also the context in which that conduct takes place: may the resulting injury or disease, and the circumstances in which it is inflicted on the worker, fairly be viewed as a fact of life or industrial employment, or is it rather plainly beyond anything the Legislature could have contemplated as entitling the employee to recover *only* under the Compensation Act?" Id. at 178-79 (emphasis in original); see also Laidlow, 170 N.J. at 617.

Applying the tests it adopted, the court in Millison, which involved plaintiffs' claims against their former employer for occupational exposure to asbestos, concluded:

> Although defendants= conduct in knowingly exposing plaintiffs to asbestos clearly amounts to deliberately taking risks with employees= health, as we have observed heretofore the mere knowledge and appreciation of a risk B even the strong possibility of risk B will come up short of the Asubstantial certainty@ needed to find an intentional wrong resulting in avoidance of the exclusive-remedy bar of the compensation statute. . . . [Plaintiffs=]initial resulting occupational diseases must be considered the type of hazard of employment that the legislature anticipated would be compensable under the terms of the Compensation Act and not actionable in an additional civil suit. 101 N.J. at 179.

Accordingly, the Court affirmed the grant of summary judgment to the defendant-employer with regard to plaintiffs' claims involving occupational disease related to the hazards of their employment.

However, the Court determined that the Workers' Compensation Act does not bar causes of action for the aggravation of occupational illnesses resulting from the fraudulent concealment of already discovered disabilities. See id. at 166, 186; see also Barbaccia v. Owens-Corning Fiberglass Corp., 1989 WL 22387, at *4 (D.N.J. 1989) (holding that Millison mandated dismissal of all causes of action against defendant-employer except those encompassing an aggravation of occupational disease resulting from fraudulent concealment). Such actions amount to "intentional wrongs" that are not to be afforded the protection of the Act's exclusivity rule. Millison, 101 N.J. at 185-86 (involving alleged "cover-up" of plaintiff's illnesses by employer's staff physicians, whereby plaintiffs were misled to believe that they were fine and could continue to work despite medical evidence to the contrary).

New Jersey courts in the post-Millison era have often construed the exclusivity provision of the Workers' Compensation Act narrowly, rarely permitting employer liability in instances of work-related injuries. Recently, however, the Supreme Court revisited and clarified Millison in Laidlow v. Hariton Machinery Company, Inc., 170 N.J. 602. The Laidlow court, again citing Prosser, emphasized that "an intentional wrong is not limited to actions taken with a subjective desire to harm, but also includes instances where an employer knows that the consequences of those acts are substantially certain to result in such harm." 170 N.J. at 613 (citing W. Prosser and W. Keeton, The Law of Torts, ' 80 at 569 (5th ed. 1984)). The Court reaffirmed that "in order for an employer's act to lose the cloak of immunity of N.J.S.A. 34:15-8, two conditions must be satisfied: (1) the employer must know that his actions are substantially certain to result in injury or death to the employee; and (2) the resulting injury and the circumstances of its infliction on the worker must be (a) more than a fact of life of industrial employment and (b) plainly beyond anything the Legislature intended the Workers' Compensation Act to immunize." Id. at 617. While ordinarily the same set of facts and circumstances will be germane to both prongs, the conduct prong is a question of fact to be determined by a jury, while the context prong is question of law for the court. Id. at 623.

Laidlow involved a serious hand injury arising from the plaintiff's use of an industrial rolling mill at his place of employment. 170 N.J. at 606-07. Thirteen years prior to the plaintiff=s accident, his employer had disabled a safety guard on the mill, replacing it in its proper position only when OSHA representatives visited the plant. Id. at 608. Despite its knowledge of the dangerous condition, the plaintiff's prior requests for reinstallation of the safety guard, and various "close calls" resulting from the removal of the guard, the defendant-employer refused to reinstall the guard, electing to forego the safety of its employees in favor of increased "speed and convenience." Id. at 621. The Laidlow court determined that a reasonable jury could find that, in light of such circumstances, the defendant-employer "knew that it was substantially certain that the removal of the safety guard would result eventually in injury to one of its employees." Id. at 622. The Court made it clear that the absence of a prior accident did not preclude a finding of an intentional wrong. Id. at 621-22 (quoting Cook v. Cleveland Elec. Illuminating Co., 657 N.E.2d 356, 364 (Ohio App. 1995)). Thus, the Court held that a jury question was presented as to the conduct prong of the Millison test.

With regard to the context prong, the Laidlow court found that, "if an employee is injured when an employer deliberately removes a safety device from a dangerous machine to enhance profit or production, with substantial certainty that it will result in death or injury to a worker," and also deliberately deceives OSHA to this effect, "we are convinced that the Legislature would never consider such actions or injury to constitute simple facts of industrial life." Rather, "such conduct violates the social contract" and falls outside the scope of the Workers' Compensation bar. Id. at 622. The Court was careful to circumscribe its ruling, however, noting that it should not be understood to establish a per se rule that an "intentional wrong" is committed whenever a safety device is removed from machinery or some other OSHA violation is found. Id. at 622-23. Rather, what is necessary is the consideration of the "totality of the facts contained in the record and the satisfaction of the standards established in Millison and explicated here." Id. at 623; see also Tomeo v. Thomas Whitesell Constr. Co., Inc., 176 N.J. 366 (2003); Mull v. Zeta Computer Prods., 176 N.J. 385 (2003); and Crippen v. Central Jersey Concrete Pipe Co., 176 N.J. 397 (2003).

II. Statute of Limitations

The applicable statute of limitations governing a tort action arising out of occupational exposure to asbestos states: "Every action at law for an injury to the person caused by the wrongful act, neglect or default of any person within this state shall be commenced within 2 years next after the cause of any such action shall have accrued." N.J.S.A. 2A:14-2. Since the "discovery rule" applies to such actions, wherein the statute of limitations does not begin to toll until the plaintiff's discovery of the injury or illness, the critical inquiry becomes: "Did plaintiffs file suit within two years from the date they discovered, or by the exercise of reasonable diligence and intelligence should have discovered, the basis for an actionable claim?" Lapka v. Porter Hayden Co., 162 N.J. 545, 553 (2000). Discovery is imputed if the plaintiff is aware of facts that would alert a reasonable person to the possibility of an actionable claim; medical or legal certainty is not required. See id. at 555-56; Savage v. Old Bridge-Sayreville Med. Group, 134 N.J. 241, 248 (1993); Burd v. New Jersey Tel. Co., 76 N.J. 284, 291 (1978).

By Dorothy A. Harbeck, Esq. and Karen Mainieri. Ms. Harbeck is a partner at the New Jersey law firm of Bell, Gage & Harbeck.
She has represented petitioners in workers compensation matters and manufacturers in products liability cases. Ms. Mainieri is a human resources consultant for Extelcon Consulting. She is a graduate student at Manhattanville College in the HR Management Program.

Labour Law

Employer's policy manual no bar to reasonable notice for employee, Court of Appeal rules

Regular *FOCUS* readers are well aware that, in the absence of clear contractual terms to the contrary, employment contracts are terminable only on reasonable notice, and wrongfully dismissed employees can sue for damages in lieu of reasonable notice. As the Supreme Court of Canada decision in *Machtinger v. HOJ Industries Ltd.*, put it:

> "In Canada it has been established since at least 1936 that employment contracts for an indefinite period require the employer, absent express contractual language to the contrary, to give reasonable notice of an intention to terminate the contract if the dismissal is without cause. ... I would characterize the common law principle of termination only on reasonable notice as a presumption, rebuttable if the contract of employment clearly specifies some other period of notice, whether expressly or impliedly."

This principle has been reasserted by the Ontario Court of Appeal with respect to employment terms contained in company policy manuals in *Christensen v. Family Counselling Centre of Sault Ste. Marie* (November 16, 2001). The case arose when Ruth Christensen's employer experienced funding cuts imposed by the provincial government in 1997. Christensen was terminated as a result and was given only ten weeks' notice, even though she had been hired in 1990. Christensen took her employer to Court.

At issue in the trial was the effect of the employer's staff manual which provided that, on termination, professional staff were to receive one month's notice "and/or as established in legislation". The letter in which the offer of employment was made contained no specific reference to termination, but included a reference to the manual "which contains the conditions of employment and agency policies". The manual was not included with the offer letter. When Christensen did receive a copy of the manual, she paid no particular attention to it, nor were its provisions explained to her.

Four Possible Meanings

Assuming the reference in the manual to "legislation" meant the *Employment Standards Act* (*ESA*), the trial judge held that the notice clause was capable of being interpreted in four distinct ways:

- It set a ceiling for termination pay, in violation of the minimums established by the *ESA* and thus entitled Christensen to sue for reasonable notice damages.
- It provided for the greater of one month's pay or notice required under the *ESA*.
- It provided for one month's pay plus the notice required under the *ESA*.
- It permitted the employee to sue for wrongful dismissal, but set a minimum of one month's pay in lieu of notice in any event.

Because of this ambiguity in the manual's terms, the trial judge held that, even if it did form part of the contract, it was not sufficiently clear to bar Christensen from receiving damages in lieu of reasonable notice. In fact, two of the possible interpretations actually permitted suing for wrongful dismissal. In the result, the trial judge awarded Christensen eight months' notice.

This result was reversed by the Divisional Court, which held that the trial judge had implicitly found that the policy manual formed part of the employment contract, and that its provisions were not unfair, onerous or the result of undue influence being exerted on Christensen. It concluded that the trial judge had erred in ruling that Christensen could sue for wrongful dismissal damages.

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Internationally Speaking...

MICHELLE MINER

Has Canada missed the boat in the Human resources field? Are we following the trends of our colleagues in other countries? One has to wonder, American authors are stating that we are at the end of the HR empire but, that the need for HR activities still exists. Does this mean that we must go back to administering basic programs? If so, we may never articulate the formula to get HR invited to the Board room or prepare our resources for globalization.

We are in the 21st century focussing on people, HR practices and leading change. The HR gurus are teaching us to lead towards globalization which requires a lot of innovation and flexibility.

In Canada we are dealing with the aftermath of the SARS outbreak and wondering if we will ever be prepared to effectively deal with infectious diseases. The 1986 Chernobyl nuclear power plant disaster made us think that it would never happen to us. Althought the warning signs were there, no one was prepared, consequently we have not learned much from it. The 1998 Eastern-Canadian ice storm signaled the necessity for more emergency plans dealing with both human and capital resources. During the summer of 2003 Ontario faced a power plant shutdown resulting in a power black out. Emergency plans are now being drafted to deal with future incidents. Innovation and flexibility have become primary abilities in the quest to write the much needed plans, policies and procedures, however, they do not teach such competencies in our academic courses.

How did our ancestors deal with the black plague which decimated London in 1665?. Its bacterium « Pasteurella prestis » is still re-occurring in various forms and locations around the world. The worst epidemic in human history (judging by the number of deaths) was the Spanish influenza in 1918. As a result, HR designed paternalistic benefits and, factories were redesigned for the use of electric motors. Ecoli still emerges all over the globe. In 1979 the AIDS virus appeared in the US and reached epidemic portions, those of us working in HR in the early 80's remember writing policies on how to deal with employees affected by the AIDS virus and introducing cross cultural awareness training. In Thailand after the AIDS epidemic arrived in the late 1980's and accelerated in the early 90's the Ministry of Health launched a campaign to encourage young people to reduce risky sexual practices and use comdoms. Some of these recommendations were published in HR policies. Dengue, the disease spread by mosquitoes in the caribbean islands has travelled to Canada under the name of West Nile. In 2003 as a result of the SARS outbreak employersa need new policies to deal with quarantine and compensation for those affected.

The globalization of disease and viruses impacted our health care system and more importantly our health care workers. They worked long hours using yet unknown methodologies and modified approaches to deal with crisis. HR was asked to find the necessary resources to deal with developping issues.

There is evidence that HR evolutionized through time, this change was dictated by business trends, corporate needs and human behaviour. Factors which are found in various areas of the globe. Did HR programs effectively meet its client's needs? Or did we spread ourselves too thin by working on too many new programs? Employees are being relocated at a fast pace. Are we able to work with different governing laws and international issues? Are we effectively taking care of our most cherished resources?

We are currently trying to find the « real definition of diversity » and we posture on the question of mandatory retirement. Our American colleagues are pursuing a better quality of life through their investments in enhanced benefit coverage. One of their challenges, aside from fighting terrorism, is privacy compliance. The dichotomy unfolds when an employer requests a background check, which includes criminal records, medical and educational history and then states that he acknowledges the candidate's right to privacy.

In Europe, employees are seeking four (4) day workweeks, more holidays and time off to deal with family issues. Asian employers are demanding higher education and longer

hours from their new employees. In return, guarantying long term employment is given serious consideration.

In third-world countries, HR departments are seeking ways to achieve pay equity and job evaluation. They welcome assistance but do not have the capabilities to use computerized systems. Their current challenges include Human Rights issues and terms and conditions of employment. There is a shortage of medical specialists to treat the poor and aging population. Recruiting medical specialists is of prime importance.

Whilst some countries are focussing on basic issues such as pay equity, job evaluation and recruitment, other countries, such as Zimbabwe, where the prevalence of HIV among adults is 34%, is focussing on basic health care and the recruitment of medical specialists. Actuaries calculate pension projections on a regular basis.
The western civilization is preparing for future disasters and the evolution of cellular infectious desease and intracellular parasites. We concentrate on a better quality of life which includes a shorter workweek, more time off and increased medical benefits.

The focus of HR issues varies from country to country yet some similarities are prevalent. Effective board governance which was once a common trend has been quietly shelfved as a result of the current exposure of overspending and mis-handling of corporate funds.

People evolve as do their needs. Corporations globalize, consequently, HR must keep providing services and programs that add value to employees and to the employer's bottom line. Programs that were « flavours of the month » have come and gone. We have learned from them and in order to provide effective human resources services we must evolve and meet the needs of our employers. Issues from the past and from different hemispheres have re-occurred in North America. As we continue to globalize and provide HR services we must learn from these past experiences and prepare our employers and employees for future challenges.

Michelle Miner is a Partner of HM Résolutions, a human resources consulting firm based in Ottawa. She can be reached at :
HM Résolutions (613) 443-7265 or
by email at mminer@sympatico.ca

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Remember Machtinger

The Court of Appeal restored the trial judge's award, faulting the Divisional Court for having found that the trial judge had determined that the policy manual formed part of the contract. In fact, the Court of Appeal noted, the judge had declined to make such a determination, because she had been of the view that, regardless of the answer, the termination provisions were too ambiguous to rebut the presumption of Christensen's entitlement to common law notice damages.

More importantly, the Court held, the Divisional Court had ignored the key principle in *Machtinger*:

> "[T]he Divisional Court erred in failing to give effect to the principle in *Machtinger v. HOJ* … . The determinative question here was not whether the termination provisions in the manual were unfair, onerous or the result of undue influence or any power imbalance. Rather, as found by the trial judge, the case turned on whether the termination provisions, if they formed part of the contract, were sufficiently clear to rebut the common-law presumption. The trial judge's conclusion that they were not was entirely reasonable and ought not to have been interfered with."

In Our View

Implicit in this decision is that the provisions of a policy manual *could* be used to limit an employee's entitlement to reasonable notice damages, but the manual must form part of the employment contract, and its termination provisions must be sufficiently clear and brought to the employee's attention. Even then, however, issues specific to employment contracts will also have to be addressed, such as whether the restrictive terms are the result of the unequal bargaining power that often characterizes these sorts of contracts. (For more information on this subject, see "The effective employment contract" on our Publications page and "Clause limiting wrongful dismissal damages to *Employment Standards Act* minimum upheld by Court" on our What's New page.)

For further information, please contact Jacques A. Emond at (613) 563-7660, Extension 224.