

Recent Cases of Interest to Employers

Employment Contracts Matter... a Lot!!

It is important that employers have written contracts with their employees, but in order to be enforceable, it is crucial that contracts are implemented properly, as the recent case of *Holland v Hostopia.com Inc.* highlights.

In May 2003, Mr. Holland accepted an offer of employment from Hostopia for a sales position. The "Offer Letter" set out key terms of his employment, including his salary, commissions, benefits and vacation entitlement, but did not include a termination provision. The Offer Letter, which Mr. Holland signed, included a reference to a subsequent "Employment Agreement."

Some nine months after Mr. Holland commenced employment, he was presented with this more detailed Employment Agreement, which he signed. However, while much of this Employment Agreement was boilerplate, it introduced a "Termination Provision," which limited his notice of termination entitlement to the *Employment Standards Act, 2000* (the "ESA") minimums.

Mr. Holland's employment was terminated in 2010 and Hostopia paid him his ESA minimum entitlement upon termination, which was equivalent to around three months' pay.

Mr. Holland litigated the matter all the way to the Ontario Court of Appeal, which found that the initial Offer Letter formed the contract and the Termination Provision of the Employment Agreement provided months later was not valid. Mr. Holland was awarded his common law entitlement of eight months' pay in lieu of notice, nearly tripling the employer's exposure.

Using Contractors in your Workforce?

They may be owed Notice Pay on Termination!

It is common practice for companies to retain the services of a contractor rather than hire an employee, but the lines between purely commercial versus employment relationships can be blurred. An intermediate status, known as a dependent contractor relationship may exist.

Similar to employees, dependent contractors may be entitled to pay in lieu of reasonable notice when the relationship ends.

The following are important factors considered by the courts to determine if a contractor is dependent:

- The degree of exclusivity and length of the relationship;
- The degree of integration and control over the work performed;
- Common use of equipment, business cards, advertising and office sharing; and
- The time needed to replace the contractor's revenue after the relationship ends.

Dependent Contractors (*Keenan v Canac Kitchens Ltd.*)

The Keenans, a husband and wife in their early 60s, were found to be dependent contractors. They had provided delivery and installation supervisory services to Canac for 32 and 25 years respectively. Even though in the final few years of the relationship, the Keenans only earned 66% to 80% of their revenue from Canac, for most of the time the relationship had been nearly exclusive.

Canac had to pay the Keenans 26 months' pay in lieu of notice. This case highlights the importance of defining a clear relationship between your company and those working for you.

Economic Hardship: No Defence for Employers when terminating Employment Relationships

Employees are entitled to 'reasonable notice' when their employment is terminated, not for cause, unless they have a legally enforceable employment contract with an enforceable termination provision.

The factors that judges use to determine the length of the notice period include age, length of service, the type of position and the availability of alternate comparable employment. Courts can award up to one month or more of

Is there a discount in the notice period for employers experiencing financial difficulties?

In short: NO! In a recent case the lower court reduced the length of the reasonable notice period because the employer had limited finances. The decision of *Michela v St. Thomas of Villanova Catholic School* was appealed.

The Ontario Court of Appeal ruled that an employer's limited finances or poor economic circumstances do not decrease the notice period. The employer had to pay the employee more compensation based on a longer notice period. This decision is a warning for small and medium size employers looking to end long-time employment relationships, due to financial constraints. We recommend you have contracts in place so there are no surprises when employees

What is Summary Judgment all about?

In an attempt to speed up 'access to justice', recent developments in the law have made summary judgments more readily available. Summary judgment, sometimes known as trial by paper, is used to move a case along without a full trial, largely based on written documents.

How does this put pressure on your business when firing an employee?

The courts are now using the summary judgment procedure more frequently to decide law suits for 'wrongful dismissal'. This is especially true when the scenario is straightforward and the former employee is only claiming that the employer did not give adequate notice. As a result, many wrongful dismissal cases are now being decided in a matter of months rather than years and awards can be substantial.

Timing and steps of summary judgment

When you get sued by an employee, his or her lawyer can seek a summary judgment decision. The hearing of the motion for summary judgment can take place within 14 weeks and for employers, this means incurring significant legal expense for an uncertain outcome.

Best foot forward

While employers will put their best argument forward to defend a motion for summary judgment, the legal costs

Employment Documentation Review Checklist

- Pre-employment screening policies (i.e. criminal record and reference checks)
- Hiring practices (timing of employment offers, revoking offers and executing contracts)
- New employment agreements
- Enforceable termination provisions
- Valid restrictive covenants (e.g. non-competition / non-solicitation of staff and customers)
- Confidentiality clauses
- Conflicts of interest
- Agreements with dependent/independent contractors
- Updating employment contracts
- Leave of absence policies (e.g. parental, illness and personal emergencies)
- Practices for terminating employment relationships
- Human Rights Code* implications
- Employment Standards Act* compliance (including poster, vacation pay, overtime eligibility and payment)
- Occupational Health and Safety Act* compliance and new obligations under the *Sexual Violence and Harassment Action Plan Act*
- New requirements under the *Accessibility for Ontarians with Disabilities Act*