CANADIAN
# Employment Law Today

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CURRENT NEWS AND PRACTICAL ADVICE FOR EMPLOYERS JULY 27, 2011

# EI worker fired after digging up info on neighbours

*Employee tried to claim he wasn't given proper ethics training but all employees knew of policies*

| BY JEFFREY R. SMITH |

**A FEDERAL** labour relations board has upheld the firing of a British Columbia employment insurance (EI) worker who looked up the personal information of some of his neighbours during a homeowners' dispute.

Grant Shaver was an investigation and control interviewing officer in the Vancouver EI operations of the Department of Human Resources and Development, Service Canada. Shaver was initially hired by Service Canada in 1990 and eventually became an officer. He swore an oath affirming a "Solemn Affirmation of Office and Secrecy" and signed a Memorandum of Understanding stating employees could not be directly involved in or influence an EI claim or other service provided by Service Canada. He was also subject to a code of ethics prohibiting conflicts of interest and took training on ethics.

**JUST CAUSE**

In order to access the information needed to work on EI claims, Shaver was given "reliability status," a level of classification giving him access to sensitive information relating to personal, medical and financial information of claimants.

In 2004, Shaver and his wife bought an apartment in Surrey, B.C. Soon, they began to have problems with the building's management and became involved in the building's governing council. The couple joined forces with a neighbouring couple and Shaver told them he was a field investigator for EI and was looking at the names of the other people on the council. The neighbor also claimed Shaver said he had looked up information on a former member of the council and found out the individual owed $500 to EI from an overpayment, as well as the individual's birth date and occupation.

Shave had a falling out with the neighbour and the neighbor became worried Shaver was using information from his work to gain an advantage over other members of the building council. The neighbor reported Shaver to Service Canada on March 31, 2008, which prompted an investigation by the employer.

After receiving the complaint, Service Canada interviewed the neighbor and another member of the building council who was concerned his private information had been compromised. It also interviewed Shaver and brought in an IT security investigator to determine Shaver's access to its databases.

Shaver initially admitted to looking up the names of some of the people and eventually his neighbor. The IT security investigator determined he had used his code to search for the five names and access personal information on one of them. The others weren't in the database.

In a second interview with his employer in June 2008, Shaver admitted he "checked on" two of the people indicated but denied giving the information

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## Exec without contract not limited to standard termination notice: Court

**AN ONTARIO** company that forgot to have an employee sign a standard employment contract cannot hold the employee to its standard termination notice, the Ontario Superior Court of Justice has ruled.

Daniel Harvey, 44, was president of a food services company in Quebec when he was hired by Shoeless Joe's to be its vice-president, operations. To take the job, Harvey had to relocate to Toronto, where the head office was located. Shoeless Joe's gave him an offer of employment with a salary, car allowance, health benefits and annual bonus. The offer didn't have any provisions for notice of termination, nor were any discussed.

Harvey began his new job on Feb. 2, 2009, without signing an employment contract. The company had a standard employment agreement for senior employees that contained a termina-

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MacPherson Leslie and Tyerman, Regina

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## CONSTRUCTIVE DISMISSAL: Failing to give employee proper equipment

**Question:** If an employee needs a certain piece of equipment but the employer is slow to provide it, is there a potential for constructive dismissal or any other liability if the job is more difficult or more stressful because of the equipment's absence?

**Answer:** A constructive dismissal will only be found to exist where the employer unilaterally imposes a fundamental change to the employment relationship. In order to determine whether a particular situation meets this test for constructive dismissal, one needs to ask whether a reasonable person in the same position would have considered the essential terms of the employment contract to have been substantially changed. The term or terms must have been significantly altered before the change will be considered fundamental. It is the degree of change which is important. With the respect to the unilateral imposition of the change, it is important to note that the terms will not be considered unilaterally imposed if the change is expressly accepted by the employee or where the change is condoned. If the employee does not convey her opposition to the change within a reasonable time frame, then they will be viewed as having condoned it.

Constructive dismissal can also be found to exist in cases where employer conduct renders continued employment intolerable to the employee. Courts will consider, in these cases, that there has been a breach of the fundamental implied term of any employment contract to treat employees with decency, civility and respect.

In this context, the absence of the equipment will only provide grounds for constructive dismissal if it represents a significant change in the employment relationship (what was promised to the employee). Alternatively, the absence of the equipment must render the working environment intolerable to the employee. To this end, if the employee has continued working with the available, although inferior, equipment for a considerable period of time, they may be viewed to have condoned the employer's conduct. In sum, unless the absence of the equipment significantly alters the employment contract or renders the working environment intolerable, then it is likely to be considered insufficient grounds for constructive dismissal.

If constructive dismissal is found, the employee has a duty to mitigate in these circumstances. The obligation generally requires employees to seek alternate employment. This duty does not impose upon the employee an obligation to accept any position available, but she is obliged to make reasonable efforts to find comparable employment.

There is another area of liability that may be of greater concern however. Occupational Health and Safety legislation in Canada often places a duty on the employer to ensure the health, safety and welfare of all of its workers in the workplace. Further, it often prescribes that the employer has a duty to provide and maintain certain equipment as per provincial regulations in this area.

If the employer's failure to provide certain equipment is making the work dangerous for the employee to perform or puts the employee's health, safety or welfare at risk, then the employer could be held liable pursuant to occupational health and safety legislation. Further, if the piece of equipment is one that is prescribed in the applicable provincial legislation and must be provided, then the employer will also be held liable for the failure to provide that particular piece of equipment.

The statutory regime across Canada also provides an employee with the right to refuse to perform dangerous work. If an employee is unable to perform work because it is dangerous or unsafe and refuses to do so, then it is possible that the workplace may be rendered intolerable. As such, there is a risk that the situation could provide the grounds for constructive dismissal. However, the statutory regime also sets out the procedures for reporting dangerous workplace environments and seeking the compliance of the employer. In light of these mechanisms, and an employee's duty to mitigate, it is likely the employee could not reasonably make a claim for constructive dismissal without first having gone through the appropriate occupational health and safety channels and thus giving the employer an opportunity to rectify the situation.

In any event, employers would therefore be well advised to make sure the existing working environment meets with the relevant occupational health and safety standards and take steps to rectify the situation immediately if it is not.

## LIABILITY: Employee called to jury duty refuses to go

**Question:** If an employee is called to jury duty but doesn't want to go, does the employer have to do anything to ensure there isn't any liability on its part and make it clear it's the employee's choice not to go?

**Answer:** Courts across Canada recognize jury service as a public duty owed by each citizen. Each province has its own legislation regarding jury duty and most are quite similar. Ordinarily, a person must be resident in the province or territory in which she is summoned, must be a Canadian citizen, and must have reached the age of majority in order to be qualified to serve as a juror. In each province and territory there are persons

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# 20-year oral contract unenforceable but deserves increased notice: Court

## *Doctor on long-term contract found to be 'dependent contractor'*

| BY ANDREW TREASH |

**THE ALBERTA** Court of Queen's Bench has ruled that even though a long-term oral employment contract is unenforceable, it may have an impact on the notice period required for termination. The court also recognized the existence of "dependent contractors." These workers, while not exactly employees, are economically dependent on their "employers" and, as such, are entitled to some form of reasonable notice.

**EMPLOYMENT CONTRACTS**

Melvyn Lavellee was a doctor who had been working at the Siksika Nation near Calgary. When he started working there at age 50, he and the nation agreed that he would work there until he retired at 70. In October 2005, after working there for about ten years, he was informed that his services would no longer be required after January 2006.

Lavellee sued the nation on the basis that they had a 20-year contract and that he was owed damages based on the length of time left in the contract — 10 years.

### The agreement

Courts are generally reluctant to find fixed-term employment contracts, usually requiring explicit language defining the fixed term. In Lavellee, although the arrangement was never put in writing, there was only one version of events. Lavellee had held steady work previously and only agreed to come and work at the Siksika Nation if he was guaranteed work until he retired at age 70. There was not a mere expectation that he would remain for that long — he would never have come without the agreement, said the court.

Since the evidence that there was a contract was undisputed, the court found there was a 20-year employment contract in place when Lavellee started working at the Siksika Nation.

### Statute of Frauds

Even though the court found that there was an agreement for Lavellee to work until he was 70, the contract was unenforceable because of the Statute of Frauds — an old law from the United Kingdom that has been adopted by Canadian provinces in one form or another — which makes certain contracts unenforceable unless they are made in writing. For example, contracts that are to be performed over the length of more than one year must be made in writing. Otherwise, they will be unenforceable.

In this case, the contract was for a 20-year term and not in writing, and therefore unenforceable. In spite of this, the court found that the understanding between the parties must still be considered.

"Although this contract is not in conformity with the Statute of Frauds...the reasonable notice requirement must reflect this understanding," said the court.

### Dependent contractor

Since the fixed-term contract was unenforceable, the court had to consider the precise nature of the relationship between the parties to determine how much notice was required.

Both sides agreed Lavellee was not an employee, but the court found it to be closer to an employment relationship than an independent contractor relationship. It fell into the intermediate category of "dependent contractor."

A dependent contractor is a contractor who is economically dependent on his employer. Three indicators of a dependent contractor are exclusivity, permanence and control. In such cases, reasonable notice of termination is required, even though the worker is not technically an employee.

The facts that made this a dependent contractor relationship were:

- The relationship was permanent. Lavellee had worked for the Siksika Nation for ten years and was under the impression that he would be there for another ten years.
- The Siksika had a substantial degree of control over Lavellee. He worked out of and used all the supplies at the defendant's clinic and he relied on the nurses at the defendant's clinic.
- Initially, Lavellee's relationship with the nation was exclusive.

Dependent contractors are entitled to reasonable notice of termination. The well-known factors from *Bardal v. Globe and Mail Ltd.* though not exclusive, must be considered. They are character of the employment, length of service, age and availability of similar employment, having regard to the experience, training and qualifications.

Lavellee also claimed inducement should be a factor, since he was persuaded to sell his practice in Fort McMurray to work at the Siksika Nation. The effect of inducement fades over time, however. Since ten years had passed since he started work for the nation, this factor did not affect the calculation of reasonable notice.

After considering the Bardal factors and the understanding between the parties that the contract was to last 20 years, the court awarded Lavellee 12 months' pay in lieu of notice.

This case is notable for the following principles:

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CASE IN POINT: IMMIGRATION

# Foreign worker on workers' comp denied temporary resident status

*Temporary foreign worker didn't inform immigration officer of additional outstanding workers' compensation claims*

## BACKGROUND

### Providing the right info

**WHEN TEMPORARY** foreign workers come to Canada for a job, they must have a valid work permit that allows them to work for a specific employer. If that work permit expires, the foreign worker must apply to renew it. But what happens if the foreign worker can't work due to a workplace injury and is fighting for workers' compensation benefits?

The Federal Court of Canada recently heard a case in which a temporary foreign worker in British Columbia, who was receiving workers' compensation benefits and had other claims in the works, applied to receive a temporary residency permit in order to continue his workers' compensation claim after his work permit expired. The immigration officer didn't have all the information on the status of his claims and the foreign worker didn't provide it. As a result, he faced the end of his time in Canada.

| BY SERGIO KARAS |

**CAN** an Immigration officer review a public document concerning an applicant for temporary status in Canada without providing him with the opportunity to address the information she found? In the recent Federal Court of Canada decision of *Vidakovic v. Canada (Minister of Citizenship & Immigration)* this issue arose along with the question of who has the duty of digging up all the relevant information related to an application by a foreign worker for temporary resident status.

In *Vidakovic*, a foreign worker who was a citizen of Bosnia-Herzegovina, entered Canada on a work permit. During the course of his employment, he suffered a leg injury while working as a temporary foreign worker in British Columbia. He submitted claims to workers' compensation authorities seeking monetary compensation for his injury. In the course of his claim, his passport expired and he sought to renew it from the Bosnian Embassy. However, he was informed that due to an equipment malfunction, passports could not be issued.

#### Imminent expiry of work permit led to temporary resident application

In light of the fact that his work permit was about to expire, the foreign worker applied for a temporary resident permit for an additional year, indicating in his application that he had a claim pending at the Workers Compensation Appeal Tribunal in British Columbia. The applicant was apparently under the impression that the appeal would determine all of his compensation claims arising out of his injury. However, that tribunal determined only a portion of the claims, namely the claim for a permanent partial disability award for chronic pain, but did not determine the remainder of the claims such as a loss of earnings award or compensation for psychological conditions. The tribunal's website indicated that the case had been decided.

Upon reviewing the application, the immigration officer reached a negative decision and communicated it to the foreign worker. The officer determined from the Workers' Compensation Appeal Tribunal's website that a final decision had been made on the claims and she was therefore satisfied that the applicant had had sufficient time in Canada to deal with his compensation appeal. Further, the officer indicated she was not satisfied that the issuance of a Temporary Resident Permit was warranted and found that the foreign worker had not presented evidence to suggest that he would be unable to obtain a travel certificate from the Embassy of Bosnia-Herzegovina that would allow him to return to his country. The foreign worker was left without status and was directed to leave Canada.

The Federal Court addressed the only issue arising out of the request for judicial review: Did the duty of fairness require the officer to follow up with the foreign worker regarding the Workers' Compensation Appeal Tribunal decision? The court determined that was an issue of procedural fairness to which the standard of correctness applied and no deference was due to the officer's decision. Therefore, the court engaged in an analysis of the facts.

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## CASE IN POINT: IMMIGRATION

# Workers' comp website erroneously reported claim was completed

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**Immigration officer lacked all the information on workers comp. claim**

In order to determine whether the officer made an erroneous finding of fact with respect to the issue of whether the Workers' Compensation Appeal Tribunal's decision was final, the foreign worker argued that he was not aware the immigration officer had consulted the tribunal's website and the officer did not inform him of her findings. The applicant also argued that the officer should have sought additional comments from him before coming to her decision so that he could have advised her that the Tribunal had not reached a final determination of his entire claim, and there were still outstanding claims.

The court rejected that argument. While the court noted that the tribunal's website stated the applicant's case had been decided, it held that the officer was entitled to rely upon the information on the website, which was also available to the foreign worker. The officer had no way of knowing that a case labelled "decided" was not, in fact, complete. The foreign worker was aware the determination of his case was relevant to his Temporary Resident Permit application and it was his responsibility to provide the officer with a copy of the Tribunal's decision — which was in his possession — and, had he done so, the officer would have been able to take this into account in reaching her decision, said the court. The court held that the officer did not have the onus of investigating whether the case was not complete despite the supposed finality of the tribunal's decision. The court determined that the duty of fairness is variable and contextual and it was not breached in this case.

The court also rejected the applicant's argument that the officer erred in fact because her understanding of the tribunal's decision was incorrect. The court noted that the officer did not have the full text of the decision before her and, therefore, she was entitled to rely on the tribunal's website to determine whether the case had been decided. The court dismissed the application for judicial review.

**Onus on applicant to provide relevant information**

*Vidakovic* highlights the importance of providing all relevant information to an immigration officer when filing an application for temporary resident status or for a work permit. Immigration officers are not under a duty to make further inquiries when relying on information that is publicly available or solely within the applicant's control. The applicant bears the onus of providing the authorities with all relevant information and to explain his situation clearly and thoroughly. CELT

**For more information see:**

- *Vidakovic v. Canada (Minister of Citizenship & Immigration)*, 2011 CarswellNat 2072 (F.C.).

## Why the denial of the application was reasonable

**THE FEDERAL** Court's explanation of why the denial of Vidakovic's application for a temporary residence permit was fair and reasonable, despite the fact the immigration officer didn't have all the information on his workers' compensation claim:

"I note that the Tribunal Record contains only a printout from the WCAT website stating that the applicant's case has been "Decided". The Tribunal Record does not contain the decision itself; no copy was received by the Officer. In my view, the respondent is correct in arguing that the Officer was entitled to rely upon the information on the website, which was also available to the applicant. The Officer had no way of knowing that a case labeled "Decided" was not in fact complete. The applicant was aware that the determination of his case was relevant to his temporary residence permit application. The applicant is correct in noting that without the reasons for the decision, the Officer did not know the applicant's exact situation. However, the applicant had received a copy of this decision and was aware that his case was not fully complete. Had he provided this information to the Officer, the Officer would have been able to take this into account in reaching her decision. In my view, the Officer did not have the onus to investigate whether the case was not complete despite the supposed finality of the WCAT decision; this was pertinent information that should have been provided to the Officer by the applicant when he became aware that his claim was not completely decided."

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## ASK AN EXPERT

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excluded from jury service — some common examples are lawyers, justices of the peace, and persons unable to understand the language in which the trial is to be conducted. For employers, this requires an awareness of the law surrounding employees being summoned and called to jury duty.

Juror summons are sent to randomly selected names of qualified persons, who are required to respond within a reasonable time of the summons being received. Persons who have been summoned to serve as a juror and wish to seek relief from jury service can normally apply for relief from jury service before the opening of the court for which the person is summoned they may be excused under certain circumstances. Otherwise, persons required at court for jury duty are usually required to attend until discharged by the presiding judge. Of those summoned for jury duty, only some persons are randomly selected and called to serve on the jury, and only these persons are sworn in for service.

Juror summons can be costly for both the employer and employee. Jurors are minimally compensated for being summoned to attend jury duty (as little as $15 per day) or for being sworn to serve as a juror (as little as $25 per day). Furthermore, collective agreements and employment contracts often provide that employers must maintain a continuing salary (or for providing the difference between the employee's salary and the jury duty compensation), even though employees are not working during these time periods.

**Various provincial statutes require employers to grant employees a leave of absence, with or without pay, and to reinstate the employee to her position upon her return.**

In Newfoundland and Labrador, employers are required by law to pay employees continued wages during their jury service. In certain cases, if employees' jury service would cause serious hardship, inconvenience or loss to them, others, or the general public, their application for relief may be granted.

Under provincial legislation, it is an offence for a person summoned as a juror who, without reasonable excuse, fails to obey the summons or fails to answer when called by the local registrar. Such a person is liable on summary conviction to fines, imprisonment or both.

The provisions dealing with employer duties are slightly different across the provinces. In Saskatchewan, it is an offence for an employer to dismiss a person from employment by reason only of that person being summoned for jury service or being required to serve on a jury. Such a dismissed employee can be reinstated and or compensated under The Labour Standards Act, as long as the employee brings a claim within two years of the alleged offence. Although the wording of the provision in Saskatchewan is slightly different, other provincial statutes have been interpreted as similar to the Saskatchewan Jury Act in requiring employers to grant employees a leave of absence, with or without pay, and to reinstate the employee to her position upon the employee's return. Ontario, Yukon, and Prince Edward Island also have similarly worded provisions.

Some provincial statues also include a prohibition and fines for employers or their agents who threaten to cause or cause actual loss of positions from employment because of an employee's response to the summons — but there is no such provision in some provinces, such as Saskatchewan.

Thus, other than the liabilities set out above, an employer does not have any legal obligation to compel the employee to attend jury duty. It is the employee who is individually liable. Generally, an employer's obligations with respect to jury duty are not to dismiss an employee summoned for jury duty, not to make or threaten to make changes to the employee's employment because of the summons, usually provide a leave of absence to the employee, and to provide the employee with a salary during this time period if required by provincial legislation, a collective agreement or an employment contract. An employer would also be well advised to keep records of such accommodation. CELT

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# More than a year not enforceable

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•The Statute of Frauds can operate to make an oral employment contract of more than one year unenforceable.
•Even if a contract is unenforceable because of the Statute of Frauds, it may operate to lengthen the notice period.
•Dependent contractors are recognized in Alberta and must receive reasonable notice of termination. Many employers call their workers "contractors" and assume they can terminate them with little or no notice. However, courts will look beyond the name of the relationship to its actual substance. If it bears the indicators of exclusivity, permanence and control, it may well be a dependent contractor or employee relationship. CELT

**For more information see:**

- *Lavellee v. Siksika Nation*, 2011 CarswellAlta 123 (Alta. Q.B.).
- *Bardal v. Globe and Mail Ltd.*, 1960 CarswellOnt 144 (Ont. H.C.).

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# Looking up names was a breach of trust: Employer

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to anyone other than his wife. He also admitted that he had checked information at work relating to friends with EI claims and gave them advice. He had been doing this periodically over the past 15 years, he said. He also expressed his "sincere apology."

Following the second interview and subsequent report, Service Canada suspended Shaver without pay effective Sept. 30, 2008, pending an investigation of his conduct. As part of the investigation, Shaver's manager interviewed him in October and again in November. Shaver denied receiving any ethics training and the information he accessed was "just between me and my wife." He also denied telling anyone he was a field investigator but he acknowledged he looked up the five names. He explained he checked up on his neighbor because he was afraid of the neighbour's vindictiveness.

Service Canada determined that his reasons for looking up the names did not justify violating its rules on the protection of client information. It also felt his claim of not receiving ethics training wasn't credible as its records indicated he had received it, which all employees did. It also noted that Shaver's conduct was not isolated and he had been violating the department's policies for 15 years by helping his friends with their claims. It was decided Shaver had breached his responsibilities as an interviewing and control officer and could no longer be trusted in the role. These facts outweighed his lengthy discipline-free tenure and on Nov. 26, 2008, Service Canada terminated Shaver's employment. Two weeks later, it also informed him it had revoked his reliability security status.

Shaver filed a grievance, claiming he had learned his lesson and wouldn't repeat the misconduct. He said he was good at his job and could return to work without any problems and pointed to his years of experience without discipline.

The Canadian Public Service Labour Relations Board found there was sufficient evidence from the investigations and Shaver's admissions that he looked up the names in Service Canada's database. However, it found Shaver had not been completely straightforward during the interviews. He didn't admit to all the names he looked up until presented with the IT investigation's proof. The board found he also played down the extent of how much he revealed to people and tried to shift blame from himself by claiming he didn't receive proper ethics training.

"The inconsistencies in (Shaver's) admissions go beyond a problem of memory or advertent mistakes," said the board. "Instead, (he) has taken a tactical approach to his admissions, changing them as needed, but always with a mind to minimizing them."

The board found regardless of how much training he received, he knew what Service Canada's expectations were regarding ethics and confidentiality. He knowingly breached these obligations and this, combined with his evasiveness during the investigation, constituted "serious misconduct," said the board. In addition, the board also found his assistance of his friends with their EI claims was repetitive misconduct. All of this added up to just cause for termination, said the board.

"(Shaver) was employed at a position that carried a moderate level of responsibility including access to personal and confidential information and a moderate level of trust was also required of (him)," said the board. "He breached the obligations placed on him when he exercised that responsibility and he has not demonstrated ...that he understands the nature of that responsibility or those obligations."

**For more information see:**

- *Shaver v. Canada (Deputy Head – Department of Human Resources & Skills Development)*, 2011 CarswellNat 1448 (Can. Pub. Service Lab. Rel. Bd.).

## MORE CASES

*COMPILED BY JEFFREY R. SMITH*

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tion provision allowing the statutory minimum of notice, but it neglected to give it to Harvey. However, the company's president was under the impression Harvey had signed such a contract.

During the first few months of his employment, Harvey received positive feedback from his immediate superior, the company's chief operating officer. He didn't receive any indication that Shoeless Joe's had any problems with his work. However, on July 21, 2009, he was told his employment was being terminated because his "performance was inconsistent with our expectations." The company told him his "trial period" of five-and-a-half months was over because it expected more from him.

Shoeless Joe's paid Harvey one week's pay in lieu of notice and continued his benefits for one week, as stipulated under its standard employment contract. Harvey tried to obtain a copy of the employment contract the company used, but wasn't given one.

The court partially agreed with the employer's argument that Harvey's short length of service limited his notice entitlement. However, it disagreed that it should be the statutory minimum. It noted his job was at a senior level with important responsibilities and there was a limited availability of similar work. The fact he relocated to Toronto from Quebec to take the job was also a factor.

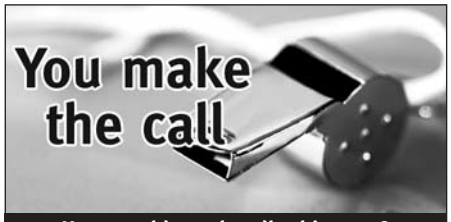
Since Harvey didn't sign an employment contract, the court found he wasn't bound to the standard termination provision. It ruled he was entitled to two-and-one-half months' pay in lieu of notice. See *Harvey v. Shoeless Joe's Ltd.*, 2011 CarswellOnt 3713 (Ont. S.C.).

# Postal worker quits twice but still wants back

**THIS INSTALMENT** of You Make the Call involves a dispute over whether a postal worker quit his job or not.

Ephrem Eshetu started out as a part-time rural mail carrier for Canada Post before becoming a full-time carrier in Edmonton in August 2009. It didn't take long for performance issues to pop up and Canada Post received several customer complaints related to mail that had been sorted poorly. Eshetu was given three warning notices.

On Dec. 21, 2009, during the holiday rush, Eshetu didn't sort all his mail.




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

When his supervisor brought this to Eshetu's attention, Eshetu replied that there was too much mail and not all of it could be delivered. When his supervisor told him that wasn't his call to make, he said he would sort the mail but management could deliver it. He was told the comment wasn't acceptable and Eshetu told the supervisor that he quit.

Eshetu handed over his keys and went home. However, two days later, Eshetu told Canada Post, through his union representative, that he wanted to come back to work and Canada Post allowed him to return to his regular job. He denied actually saying he quit.

Over the next couple of months, Eshetu received more warning notices that were frustrating him because he felt his customers were satisfied and he was doing a good job. He tried unsuccessfully to transfer to another depot. Finally, on Feb. 23, 2010, he was given another warning notice. When he met with management, he said he was quitting. They asked him to sign a paper stating that he quit, which he did. He spoke to a union advisor and handed in the note.

Management asked Eshetu if he was "100 per cent sure" and Eshetu replied in the affirmative. His identification and keys were returned and he left the depot.

When Eshetu arrived home, he had second thoughts. On his wife's advice, Eshetu called his union representative the next day and said he wanted to go back to work. He composed a written note stating his desire to return. However, Canada Post decided not to bring Eshetu back because it was the second time he had said he quit and there were still ongoing performance issues.

### You make the call

- ☑ Should Canada Post have allowed Eshetu to rescind his resignation?

OR

- ☑ Was the employer entitled to cut ties with him after two resignations?

**IF YOU SAID** Canada Post should have allowed Eshetu back to work, you're right. The arbitrator agreed with Canada post that Eshetu initially intended to quit due to frustration with his supervisors and he had already seemed to have quit once before. He was also given time to consult with his union representative and change his mind, which he didn't.

However, even though Eshetu knew what he was doing and was aware of the consequences, he indicated his desire to rescind the resignation the next day. Even after Canada Post denied his request to come back, Eshetu applied for other positions with the company, showing it was his "preferred employer," said the arbitrator. As a result, the arbitrator found Eshetu's "post-quit conduct" demonstrated he didn't have a "true continuing intent to resign."

"The timeline in the present case can be characterized as short and therefore suggestive that there was not a continuing intention to resign," said the arbitrator.

The arbitrator found there was no effective resignation because, from an objective point of view, it was clear Eshetu wanted to continue working for Canada Post and didn't make any alternate employment arrangements. The arbitrator ruled Eshetu was entitled to reinstatement. See *Canada Post Corp. v. C.U.P.W.*, 2010 CarswellNat 5518 (Can. Arb. Bd.).

### MORE CASES

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