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Ontario targets workplace smoking

Why employers need to pay careful attention to the province's tough new anti-smoking laws

BY CHRIS FOULON

Ontario employers need to be aware of new legislation that came into effect on May 31. The legislation, the *Smoke Free Ontario Act* amends certain portions of the *Tobacco Control Act, 1994.*

LEGISLATION

The act provides for a strict province-wide uniform prohibition against the smoking of tobacco in any enclosed public place or any enclosed workplace. The situation in Ontario up to now regarding smoking in public places and smoking in workplaces has largely been governed by a patchwork of local municipal bylaws. The new legislation provides uniform rules for all public places, subject to some minor exceptions, and all enclosed workplaces in the province.

As of May 31, 2006, employers are required to ensure smoking does not take place in an "enclosed workplace." The act defines an "enclosed workplace" as the inside of any place, building or structure or vehicle or conveyance or a part of any of them that is covered by a roof, that employees work in or frequent during the course of their employment whether or not they are acting in the course of their employment at the time and that is not primarily a private dwelling.

The act imposes substantial obligations on the part of employers. It provides that every employer shall:

- ensure compliance with the act;
- give notice to each employee in an enclosed workplace that smoking is prohibited in the enclosed workplace in a manner that complies with the regulations;
- post any prescribed signs prohibiting smoking throughout the enclosed workplace in the prescribed manner;
- ensure that no ashtrays or similar equipment remain in the enclosed workplace other than in a vehicle in which the manufacturer has installed an ashtray;
- ensure that a person who refuses to comply with these obligations does not remain in the enclosed workplace; and
- ensure compliance with any other prescribed obligations.

Employers must police the workplace

Effectively what this means is that employers are required to police the workplace to ensure that employees or other individuals do not smoke in any enclosed area.

The act further mandates that the employer give notice to each employee in an enclosed workplace that smoking is prohibited in the enclosed workplace.

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Ask an Expert

with **Brian Johnston**

Stewart McKelvey Stirling Scales, Halifax

Have a question for our experts?
E-mail **carswell.celt@thomson.com.**

CONSTRUCTIVE DISMISSAL: Disciplining employee who isn't keeping files up to date

Question: We have an employee who has not been keeping his files updated. We have given repeated verbal warnings about this problem and have introduced a company policy that says files must be updated. Consistent with the terms of this new policy, we have removed clients from his territory for files that have not been updated. The employee is now saying that we have fundamentally changed his job responsibilities because he had never been disciplined before or forced to keep his files up to date. Is he correct?

Answer: No, the employee is probably not correct. Where there is a unilateral fundamental change in a term or condition of employment, without reasonable notice of that change, an employee may claim constructive dismissal.

In *Farber v. Royal Trust*, the Supreme Court of Canada said constructive dismissal is determined on the facts of the employment relationship:

"Each constructive dismissal case must be decided on its own facts, since the specific features of each employment contract and each situation must be taken into account to determine whether the essential terms of the contract have been substantially changed," the court said.

Cases since *Farber* have provided insight into what changes to employment will attract a finding of constructive dismissal.

In 2005, the Ontario Superior Court of Justice considered constructive dismissal in the context of discipline imposed by an employer in reaction to an employee's poor performance. In *Carscallen v. FRI Corp.*, the worker, a 43 year old marketing executive, was given responsibility to deliver a marketing booth and marketing materials from Toronto to Barcelona. The booth and materials failed to arrive in a timely fashion. E-mails were exchanged between the worker and the president of the company and a few days later she was suspended without pay.

A week later, she was demoted to manager of marketing and told she would no longer be allowed to work flexible hours, would lose her office and would be assigned to a shared cubicle. She sued alleging constructive dismissal. The court agreed, saying there was never an agreement that allowed the employer to discipline by suspension.

The court noted that a company policy laid out an investigation and multi-stepped progressive discipline scheme for disciplinary matters but was not followed in the circumstances. The court said:

"Notably, the FRI Corporate Employment Policies and Procedures Manuals makes no mention of an employer right to suspend. Rather it speaks to implementing 'fair and constructive disciplinary guidelines, which we feel will allow for rehabilitation in the workplace rather than punishment.' Indeed, this policy suggests a proper investigation and multi-stepped progressive discipline scheme. This court heard no reference to considering or following those guidelines in the handling of its complaint about the Barcelona booth and ensuing e-mail exchange in the spring of 2003. This employer did not follow the very policies it promulgated to its employees and professed to be guided by."

The court found that because there was no express term in the employment contract providing for this type of discipline for poor performance, there had been a constructive dismissal.

In the question posed above, the employee has been repeatedly warned and the removal of clients is consistent with the policy. However the employee may say that the policy itself was a fundamental change, introduced unilaterally without sufficient notice and therefore the application of the policy constitutes constructive dismissal. As the Supreme Court of Canada has said, constructive dismissal depends on the situation.

JUST CAUSE: Can we fire manager who told staff to falsify records?

Question: Our HR policy, under rules of conduct, lists falsification of records as a serious matter resulting in disciplinary action up to and including termination. If we suspect that a manager is falsifying records and has instructed her staff to do so, can we terminate for cause?

Answer: The answer is that you probably can, but caution has to be exercised. Dismissing for dishonesty is not as simple as it once was.

Whether an employer can justify dismissing an employee on the grounds of dishonesty requires an assessment of the context of the alleged misconduct. The Supreme Court of Canada, in *McKinley v. BC Tel*, said the test for dishonesty is:

"… whether the employee's dishonesty gave rise to a breakdown in the employment relationship. This test can be expressed in different ways. One could say, for example, that just cause for dismissal exists where the dishonesty violates an essential condition of the employment contract, breaches the faith inherent to the work relationship or is fundamentally or directly inconsistent with the employee's obligations to his or her employer."

Courts have rejected an argument that dishonesty standing alone and unexamined in light of circumstances is

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Union calls for criminal charges

Quebec union wants charges under corporate killing law brought in death of worker

A Quebec union is calling on the province's attorney general to file criminal charges against a company for the death of a young worker in 2005.

HEALTH AND SAFETY

The Fédération des travailleurs et travailleuses du Québec (FTQ) wants the government to lay charges under the Criminal Code. The federal government made amendments to the Criminal Code in 2004 when it passed Bill C-45, clearing the way for criminal charges to be laid against corporations and individuals when a worker is injured or killed on the job.

Steve L'Ecuyer, a 23-year-old worker at Transpavé, a concrete products manufacturer in Saint-Eustache, Que., was killed on the job last October shortly after being hired, the union said.

FTQ president Henri Massé said they have been waiting in vain for seven months for the local police report, the findings of the workers' compensation board (WCB) investigation and for the attorney general to decide whether or not to lay charges against the company.

Massé said each of the regulatory bodies is waiting on the other, afraid to make a decision for fear of setting a precedent. Serge Bérubé, the president of the Teamsters Quebec union local 1999, joined Massé in asking that the company be charged in the worker's death.

L'Ecuyer was crushed by a concrete press, which the WCB had previously instructed the company to repair, after pallets with concrete had backed-up on the conveyor belt. The company's security cameras captured the entire incident on tape, which was turned over to police.

One of the WCB investigators later discovered that the motion sensor that would stop the press if someone were to move past it was turned off at the time of the accident. The on/off switch for the safety device was kept in a locked cabinet for which the employer was responsible, the union said.

ASK AN EXPERT (CON'T)

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always just cause for dismissal. The ultimate question is whether the dishonesty constitutes a breakdown in the employment relationship by revealing the bad character of an employee. For example, in *Day v. Wal-Mart* the Nova Scotia Court of Appeal said that "reasonableness" is a governing factor in upholding a trial judge's instructions to a jury on the issue saying that a zero tolerance policy for dishonesty "is a laudable expression of principle, an ideal, but it is inconceivable that courts would uphold the dismissal, without warning or notice, of a senior employee with an unblemished record, for eating a candy from a broken bag." Thus, the context of dishonesty will be examined by courts.

Justice Finch of the British Columbia Supreme Court, in *Niwranski v. H.N. Helicopter Parts International Corp*, said that dishonest conduct is not proven on mere suspicion but requires clear intention to defraud:

"To establish dishonest conduct on the part of an employee as a ground justifying her dismissal, the employer must show that there was a clear intention on the part of the employee to defraud or otherwise cheat the employer. That is because the courts find "cause" for summary dismissal in the revelation of the employee's untrustworthy character, rather than in any specific improper act."

Cases say that a manager has a higher duty to be trustworthy and honest than subordinate employees. If, after conducting a complete investigation, it appears more likely than not that the manager actively participated in a dishonest scheme (such as instructing subordinates to falsify records), in breach of a consistently applied company policy, the company should have just cause to dismiss.

In *Alvi v. YM Inc. (Sales)*, an Ontario Superior Court of Justice ruling, a district manager, who would not receive a bonus in respect of a store's sales for the month if inventory shrinkage exceeded one per cent, instructed staff that they would have to pay for missing merchandise and adjust inventory sheets accordingly. The court found there was just cause to dismiss the district manager saying:

"A supervisory employee who instructs a subordinate to record a non-existent purchase and pay for missing inventory has breached the trust and confidence which his employer must repose in him and which is inherent in his position."

A full investigation should be done before making any decision to terminate based on falsification of company records. Although punitive damages are only awarded in rare and extreme cases, those wrongful dismissal cases where punitive damages have been awarded are usually where there has been unjustified conduct by an employer such as an unsupported accusation that an employee falsified company records or the employer has conducted a faulty or negligent investigation. Such conduct may also attract *Wallace* damages.

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CASE IN POINT: IMMIGRATION

Residency rules for immigrants

New rules provide an objective test in determining if individual has abandoned Canada as a place of residence, but caselaw shows a subjective element is still present in evaluating a permanent resident's conduct

BY SERGIO KARAS

The *Immigration and Refugee Protection Act* (IRPA) states in s. 28 that a permanent resident must, with respect to every five year period, be physically present in Canada for a total of 730 days unless she is outside Canada and fits in one of the exemptions specifically provided for in the legislation. Such exemptions from the physical residency requirement are:
•being outside of Canada accompanying a Canadian citizen spouse, common-law partner, or parent in case of a minor child;
•being employed abroad on a full-time basis by a Canadian business as defined by the regulations, or by a federal or provincial government; or
•accompanying a spouse, common-law partner or parent in the case of a minor child who is employed by a Canadian business or government.

Old versus new legislation

The physical presence requirement and the objective standard set out in the legislation represent a change from the previous provisions in the *Immigration Act*, which was in force until June 28, 2002. While the previous legislation emphasized a permanent resident's intention to abandon Canada as her place of residency, the current provisions provide an objective test.

But, as the caselaw developed in the last four years shows, a subjective element is still present in the evaluation of the resident's conduct and it comes into play before a person can be stripped of permanent resident status.

The current legislation introduces, for the first time, two new elements: the application of humanitarian and compassionate grounds relating to a permanent resident and the consideration of the best interests of the child affected by the parent's loss of status. Both elements must be taken into account prior to a final determination that a person has lost permanent residency in Canada.

Surprisingly, there have been relatively few cases dealing with these provisions, and most of the decisions rendered seem to be strongly tied to the facts of each case. There are, however, several noteworthy decisions that relate to work and employment situations, which both employers and employees must consider.

Permanent resident returned to Taiwan

In *Kuan v. Canada (Minister of Citizenship & Immigration)*, Chih Kao James Kuan became a permanent resident, returning to Taiwan with his family within five days of landing in Canada. Upon returning to Canada four years later, he was ordered removed on the basis he had failed to comply with the residency obligation. His appeal to the Immigration Appeal Division (IAD) failed. In a lengthy decision, the IAD held that under the previous *Immigration Act*, permanent residents could justify extended physical absences by establishing that they did not have the requisite intention to abandon Canada as their place of permanent residence, but that opportunity no longer exists under current legislation, which provides for a mathematical calculation of a permanent resident's obligation of physical presence in Canada.

More important, in canvassing the possible existence of humanitarian and compassionate grounds, the tribunal attempted to develop a test to examine the circumstances of each case and noted that appropriate considerations included:
•the appellant's initial and continuing degree of establishment in Canada;
•reasons for departure from Canada;
•reasons for continued or lengthy stay abroad;
•ties to Canada;
•whether reasonable attempts to return to Canada were made at the first opportunity; and
•generally, whether unique or special circumstances are present that may have prevented the appellant from returning.

Couple sent back to the United States

A similar conclusion was reached in *Kroupa v. Canada (Minister of Citizenship & Immigration)*. In that case, the Robert and Diana Kroupa were citizens of the United States. The husband and wife couple became permanent residents in 1985 when the husband was employed in Canada. They returned to the U.S. in 1987 in order to look after a mentally ill daughter and the husband remained employed by a U.S. company in Portland, Ore. He visited Canada once or twice per month to assist his employer's Canadian subsidiary. Upon returning to Canada for a visit in 2002, the couple were issued removal orders on the basis they had lost their permanent resident status. Their appeal was

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CASE IN POINT: IMMIGRATION

Employees going abroad could lose residency

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dismissed.

Robert argued that he could avail himself of the exemption provided in the legislation, because he was employed on a full-time basis by a Canadian business. However, the tribunal specifically rejected his argument, noting that he remained employed by a U.S. company and he only provided services periodically on behalf of his U.S. employer parent company for its Canadian subsidiary. This was considered insufficient to meet the Canadian business employment exemption.

Airline employee spent little time in Canada

Different arguments were advanced in *Angeles v. Canada (Minister of Citizenship & Immigration)*. In that case, Antonio Angeles was an airline employee, a citizen of the Philippines and a permanent resident of Canada for several years. However, during the relevant five-year period for the calculation of his residency obligation, he had only spent 360 days in Canada.

The tribunal dismissed his appeal and he pursued a judicial review application at the Federal Court. Angeles impugned the tribunal's decision, advancing three distinct arguments. First, he argued he was deprived of the assistance of an interpreter. Second, that the tribunal breached the principles of fundamental justice by failing to ensure that he was properly represented by competent counsel.

And, third, that the immigration officer who made an adverse determination concerning his permanent resident status was obligated to consider humanitarian and compassionate grounds prior to making such determination.

The court rejected all the arguments and noted that Angeles failed to demonstrate a clear intention to establish himself in Canada while maintaining his home on a permanent basis in the Philippines with his wife and children whom he never attempted to sponsor. The court noted that his intention "to perhaps settle in Canada at some point in the future in the hope of improving his family's standard of living" was not sufficient to warrant special relief. The court also held that the immigration officer was not obligated to consider humanitarian and compassionate grounds unless Angeles advanced those arguments at the first opportunity. The court also dismissed his contention of lack of competent counsel and held the tribunal had no obligation to intervene regarding his choice of representative.

The court noted that his intention "to perhaps settle in Canada at some point in the future in the hope of improving his family's standard of living" was not sufficient to warrant special relief.

Humanitarian, compassionate factors still relevant

Having regard to the caselaw developed in the four years since the new legislation came into force, it is apparent that, while it provides an objective test for determining whether a permanent resident has maintained her obligation to reside in Canada, the consideration of humanitarian and compassionate grounds continues to be a relevant factor that must be carefully canvassed before a permanent resident can be held to be in breach of the residency obligation.

However, the onus rests with the applicant to ensure all facts and arguments are presented at the earliest possible opportunity.

The skilful presentation of the case is crucial in the success of a challenge to a decision that a person is no longer a permanent resident of Canada. The caselaw also emphasizes the importance of advance planning by employees who must carry on assignments abroad or must take temporary leave of absence for personal reasons and return to their countries of origin, before they become Canadian citizens.

For more information see:

- *Kuan v. Canada (Minister of Citizenship & Immigration)*, [2003] I.A.D.D. No. 638, 2003 CarswellNat 4538, 34 Imm. L.R. (3d) 269 (Imm. & Ref. Bd. (App. Div.))
- *Kroupa v. Canada (Minister of Citizenship & Immigration)*, 2003 CarswellNat 4352, 34 Imm. L.R. (3d) 55 (Imm. & Ref. Bd. (App. Div.))
- *Angeles v. Canada (Minister of Citizenship & Immigration)*, 2004 CarswellNat 5860, 2004 CarswellNat 3197, 262 F.T.R. 41, 2004 CF 1257, 2004 FC 1257, 38 Imm. L.R. (3d) 308 (F.C.)

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Ontario's anti-smoking law

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The act provides that this communication to employees should be given "in a manner that complies with the regulations, if any." At this point, the regulations passed under the act have not provided a format in which this communication should be given to employees. Unfortunately, this leaves employers with uncertainty as to how to do this.

The surest way to achieve compliance with the regulation would be to provide all employees with formal written notification that, in accordance with new provincial legislation, smoking is prohibited anywhere in the employer's workplace. This could be accomplished by enclosing a short memo with a pay cheque or pay stub. In situations where this would be administratively difficult, employers may wish to post such notices in a number of conspicuous locations in the workplace. However, it is unclear at this point whether this would meet the requirement of employers to "give notice to each employee."

Posting no-smoking signs

The regulations to the act include specific requirements about no smoking signs that must be posted throughout enclosed workplaces. Specifically, the regulations provide that an employer post specific designated no smoking signs at each entrance and exit of the enclosed workplace in appropriate locations and in sufficient numbers to ensure that employees and the public are aware that no smoking is permitted in the enclosed workplace. The regulations go on to provide that these no smoking signs shall:

•be 10 centimeters in height and 10 centimeters in width;

•have a white background and display a graphic of the international no-smoking symbol;

•display the Ontario government Trillium logo and Smoke-Free Ontario logo; and

•be in the format shown on the Ministry of Health and Long-Term Care website.

Therefore, not only does the legislation require that employers post no smoking signs, but the legislation specifically requires that employers post the specific sign with the specific contents and in a specific size as set out in the ministry's website. The required sign is accessible via Internet at: www.mhp.gov.on.ca/english/health/smoke_free/sign_intl. To ensure compliance, employers should simply print off the sign from the website for posting. Finally, the regulations specifically provide that the signs must be posted in a "conspicuous manner and shall not be obstructed from view."

The legislation requires employers to take other steps to ensure that no smoking occurs in an enclosed workplace. Specifically, an employer is obligated to ensure that no ashtrays or "similar equipment" remain in the enclosed workplace. Of particular significance, the employer also has an obligation to ensure that a person who refuses to comply with the non- smoking rule does not remain in the enclosed workplace. Presumably, an employee who continually refuses to comply with this legislation would be subject to termination for cause.

Act protects employees from reprisals

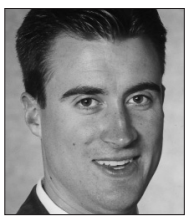
Employers also need to be aware that the legislation contains anti-reprisal provisions that prohibit an employer from taking any actions against an employee because the employee has acted in accordance with the act or has sought enforcement of the act. Specifically, the act indicates that employers may not dismiss or threaten to dismiss, discipline or suspend or threaten to do so, impose a penalty or intimidate or coerce an employee as a result of the employee's attempt to have the provisions of the act enforced.

Enforcing the rules

Consistent with all acts that provide this kind of workplace regulation, the province will be appointing inspectors to ensure the requirements of the act are being complied with. Of particular note for employers is the power of inspectors to enter and inspect the workplace without a warrant during a workplace's regular business hours. Inspectors have broad powers of inspection and investigation under the act and may require employers to produce records or other evidence demonstrating compliance with the requirements of the act. Employers should keep a file demonstrating that they have complied with their notice and posting requirements.

Inspectors also have the power to question a person in the workplace on any matters relevant to the inspection. Employers are obligated to comply with such requests. There is a specific provision in the act that prohibits any person from hindering, obstructing or interfering with an inspector conducting an inspection, refusing to answer questions on matters relevant to the inspection or providing the inspector with information on matters relevant to the inspection that the person knows to be false or misleading.

The act provides fines for non-compliance on the part of both individuals and corporations. For most offences individuals are subject to a maximum fine of $1,000 for a first offence and maximum fine of $5,000 for any subsequent offences. Interestingly, there is no prescribed maximum fine for employer corporations who breach their obligations under the act. There are specific maximum fines for both individuals and corporations who breach the anti-reprisal provisions of the act. Fines for breach of this section are a maximum of $4,000 on the part of individuals and $10,000 on the part of corporations. CELT



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MORE CASES

REASONABLE NOTICE: Former executive entitled to 24 months' notice

AN ONTARIO company is on the hook for 24 months' severance after it fired one of its executives without cause.

Andries Mellema was let go from his position at Fishercast Global Corp. without cause on Oct. 22, 2004. A termination clause in his employment contract clearly stated that if he was terminated without cause after two years, he would be entitled to 24 months' compensation. It wasn't clear from the judgment how long Mellema had been with the company, but it was in excess of two years.

The employer opted to make the termination payments on a continuing salary basis and made payments for 51 weeks from Oct. 22, 2004, to Oct. 15, 2005. But it then stopped the payments and repossessed the company car, which had been provided to Mellema under the terms of the agreement, on Nov. 4, 2005.

The employer claimed Mellema had secured alternate employment with substantially similar compensation to that he enjoyed while with Fishercast. His salary at Fishercast was $300,000 per year along with benefits for a total of about $340,000. His new salary was $204,000 plus $800 per month for a company car allowance.

The employer argued that Mellema had been compensated by both employers from April 18, 2005, (the date he found his new job) until Oct. 15, 2005. If Fishercast continued to pay his salary continuance for another 12 months, Mellema would receive more than $500,000 for that year. It argued the agreement wasn't meant to cover this kind of double-dipping.

But the court disagreed.

"No matter what canon of construction is applied to the interpretation of the employment agreement, it is clear that (Mellema) is entitled to an additional 12 months' salary together with the other fringe benefits set out in (his) claim," the court said. See *Mellema v. Fishercast Global Corp.*, 2006 CarswellOnt 2882 (Ont. S.C.J.).

BONUSES: Former Nissan service manager awarded $22,000 bonus

A FORMER service manager at a Nissan dealership was awarded a $22,000 bonus by an Ontario court.

Francois Danis was the service manager at Rendez-Vous Nissan in Hawkesbury, Ont., from 1998 until he left in February 2002. Danis said he was entitled to receive a yearly bonus on the sale of parts and services for the period he was employed by the dealership.

But the dealership said it had already paid him all the bonuses he was entitled to and that Danis had agreed to cancel the existing bonus arrangement in March of 2000 in return for being allowed to earn commissions by selling cars. Danis agreed he was allowed to sell cars and earn commissions, but denied this replaced the bonus arrangement.

The first thing for Justice Robert Smith of the Ontario Superior Court of Justice to decide was whether the bonus arrangement had indeed been cancelled. There was nothing in writing about the bonus arrangement being cancelled, something that didn't make sense given the history between the parties, the court said.

"Both when Mr. Danis was initially hired and when the terms of the bonus were amended on Feb. 28, 2001, Rendez-Vous put the terms of the bonus agreement in writing," said Justice Smith. "The (dealership's) evidence that it amended the bonus arrangement by a verbal agreement is inconsistent with its previous conduct of confirming any new bonus arrangement in writing, by way of an agreement or a memorandum."

The court also said it wouldn't make sense for Danis to agree to end the bonus in return for the ability to earn commission by selling cars.

"It would not accord with common sense for Mr. Danis to work additional hours to attempt to sell cars and earn the same bonus and to forgo his bonuses on the sale of parts and service, which was his primary responsibility as the service manager of the garage," said Justice Smith. "To do so would require him to work extra hours to sell cars and to receive the same remuneration. I find that Mr. Danis's evidence that he worked extra hours to sell cars and earn additional income, which benefited both him and Rendez-Vous Nissan, accords with common sense. The agreement to allow Mr. Danis to sell cars and earn commissions did not affect his responsibility for managing the service department and would not have removed his incentive to reach the sales targets."

Nor would it make sense for the dealership to terminate the bonus arrangement on the sales of parts and service because it was "still very interested in ensuring that it reached its sales objectives for parts and service. The sale of parts and service was a very important part of the Nissan dealership."

Justice Smith then turned his attention to calculating the amount of the bonus. When Danis was hired in 1998, he received a base salary of $42,000 plus a bonus of five per cent on parts and service sales above the set objective of $228,000 for service and $350,000 for parts, provided the profit margin on the sale of parts was equal to or above 30 per cent.

The bonus was amended in February 2001 to an amount of $10,000 if 100 per cent of the objective was achieved, namely gross profit on service sales of $349,776 to a lower amount of $7,000 if 70 per cent of the objective was achieved. The parts bonus was changed to $3,000 if $155,400 of gross profit was achieved (100 per cent of objective) and $2,7000 if 90 per cent of the objective was achieved.

The court calculated the total amount owing to Danis was $22,189.05. See *Danis v. 1292024 Ontario Inc.*, 2006 CarswellOnt 2832 (Ont. S.C.J.).

Did termination provision limit notice?

This instalment of "You Make the Call" takes a look at a termination provision in an employment contract that was intended to limit the amount of notice a worker would receive if she was dismissed without cause.

Linda Dodich was hired as the manager of recreation services at the O'Keefe, a seniors residence in Vancouver, in December 2002. On Oct. 5, 2004, Dodich was dismissed without notice and without cause with payment of three weeks' salary.

Dodich sued, claiming she was entitled to reasonable notice and payment of equivalent salary in lieu of that notice. The employer said there was a term in her employment contract that limited the reasonable notice period. The termination provision in the contract read:

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

"Should it be necessary, (the employer) may end the employment relationship by providing you with a minimum of two weeks' notice, or pay in lieu of notice, or such that is required by the *Employment Standards Act*, whichever is greater. In any event, we guarantee that you will be provided with compensation upon the severance of the employment relationship, on a without cause basis, which shall not be less than two weeks per year of service. This payment will include any statutory obligations (the employer) may have under the *Employment Standards Act*."

You make the call

☑ Did the above termination clause limit the reasonable notice period?
OR
☑ Is the employee entitled to additional notice?

IF YOU said the employee is entitled to additional notice, you're right. Justice Holmes of the British Columbia Supreme Court said the clause only guaranteed a minimum amount of notice and was silent about trumping reasonable notice, nor did it set a maximum amount.

"The termination clause therefore purports to provide minimum amounts that will accrue to (Dodich) and to guarantee payment will not be less than a specified amount," said Justice Holmes. "The wording of the guarantee does not suggest a maximum or upper limit and the presumption of reasonable notice is not clearly displaced by another notice period."

The employer argued the court should interpret the plain meaning of the termination clause.

"I accept (the employer's) premise that the guiding principles for construction require that one consider the plain meaning of the termination clause and seek to avoid absurdity in interpretation of it," said Justice Holmes. "(The employer) is driven to interpret the termination provision's plain meaning to be that the minimum period of notice (two weeks per year of service) and the maximum are the same. I do not accept that to be a plain meaning and if intended (it) could easily have been specified."

The court said the termination clause was ambiguous. The first provision for the greater of two weeks' notice or the entitlement under the act standing alone sets a maximum or limit on compensation to be paid. But the entitlement under the act is statutory and does not require the contract of the parties, the court said.

"The guarantee portion of the termination clause, in contrast, does not set a maximum and therefore leaves open the interpretation that if, for example, reasonable notice were found to be less than a period of two weeks for each year of service the (worker) would have the protection of a minimum guarantee," said Justice Holmes.

Taking into account Dodich was 47, was a low-level manager and had been unsuccessful in finding another position, the court settled on a reasonable notice period of three months. At the time of dismissal, she was earning a salary of $38,000 per year so it awarded her $6,576.93.

In his decision, Justice Holmes also pointed out that awards regarding notice periods for short-term employees has trended upwards. CELT

For more information see:

■ *Dodich v. Leisure Care Canada*, 2006 CarswellBC 78 (B.C. S.C.)

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