

# Employment Law

This is a summary of employment law matters of interest, from a litigator's point of view.

## Actions Speak Louder than Words: Dependant Contractor Owed Notice of Termination

Calling someone an independent contractor does not necessarily make them one, especially where a worker's role has shifted over time. An employer learned this lesson the hard way when the British Columbia Supreme Court ordered it to pay the plaintiff, who the Court classified as a dependant contractor, damages in the amount of 12 months' pay in lieu of notice. Dependant contractor is an intermediate category between employee and independent contractor. A dependant contractor is not on payroll, but in most other ways operates and is treated as an employee and, as such, is owed reasonable notice upon termination.

The worker provided accounting and computer consulting services to the defendant company since 1989. He worked the number of hours needed to complete the tasks assigned to him for a flat monthly fee. He worked out of the company's offices using their equipment. At the same time, the worker earned additional income by providing consulting services to other companies.

Over time, the worker began to take on some tasks formerly done by his sister, an employee of the company. By 2000, he had taken on most of her role. Over the next 12 years, the worker performed services for the company part-time and continued to operate and earn income from his consulting business. The worker's tasks were an integral part of the company's business. On a regular basis, the worker accepted stocks in the defendant in lieu of his \$5,000 per month remuneration, which entailed a chance of profit or risk of loss as the stock rose or fell.

The worker became an employee in 2010 when he was appointed CFO. In September 2012, the company's relationship with the worker soured and the worker was terminated without cause.

Although the parties agreed that the worker had been an employee for two years, they disagreed over whether he was a dependant or independent contractor during his previous period of service. If he was a

dependant contractor for some period of time, the company had to consider that time in determining a reasonable notice period. The Court considered the factors below in determining whether and for what period of time the worker was a dependant contractor:

- Whether the agent was largely limited exclusively to the service of the principal;
- Whether the agent was subject to the control of the principal, not only as to the product sold but also as to when, where and how it was sold;
- Whether the agent had an investment in or interest in the tools necessary to perform his service for the principal;
- Whether by performing his duties the agent undertook risk of loss or possibility of profit apart from his fixed rate remuneration;
- Whether the agent's activity was part of the principal's business organization — in other words 'whose business was it?';
- Whether the relationship was long standing — the more permanent the term of service the more dependent the contractor; and
- Whether the parties relied on one another and closely coordinated their conduct.

The Court determined that by 2000, the worker was an integral part of the company's operation. Although the worker was free to pursue other business interests and he did in fact pursue those interests, his relationship with the company was, by 2000, well ingrained and established. The Court awarded the worker damages in lieu of notice for 12 months for his 10 years of service as a dependant contractor plus 2 years' service as an employee.

Employers should be aware that though someone may start out as an independent contractor, the nature of the working relationship can shift over time to turn them into a dependant contractor. By the same token, workers who have been providing services as contractors should think twice about whether notice is owed to them upon termination, especially in the context of a long-standing, integrated working relationship. Both workers and companies should regularly review contracts for service to ensure the terms are in line with the true nature of their relationship and include appropriate provisions for notice of termination.

*Glimhagen v. GWR Resources Inc.*, 2017 BCSC 76

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## New guidance on mitigation of wrongful dismissal damages from the Court of Appeal

When an employee is wrongfully dismissed from her employment, she is required to seek alternative employment to mitigate, or reduce, the damages she incurs. The income earned from alternative employment is normally deducted from the damages the former employer owes to the employee. In a

recent decision, *Brake v. PJ-M2R Restaurant Inc.*, the Ontario Court of Appeal provided new guidance on when an employee's mitigation income should be deducted from a wrongful dismissal award.

The employee in this case worked for various McDonald's restaurants for 25 years and for the employer's franchises for the equivalent of 20 years, with the last eight years as a Restaurant Manager. The employee was 62 years old at the time of her termination. Throughout most of her employment, the employee received excellent performance reviews. In 2011, she began to receive negative performance reviews and was placed on McDonald's equivalent of a progressive discipline plan. Despite substantial success on the plan, the employer told the employee that she had failed the plan and that she had a choice between a demotion to First Assistant and termination. As she found the proposed demotion position humiliating, she declined the offer and did not return to work.

The employee brought a successful action for constructive dismissal. The trial judge awarded 20 months' notice, inclusive of statutory entitlements. He found that the employee was not required to accept the demotion position to mitigate her damages as a reasonable employee would not have done so. Moreover, he found the employee had made reasonable efforts to mitigate her damages, although she did not apply for any restaurant management positions. He declined to subtract any income earned during the notice period from the employee's damages.

The Court of Appeal upheld the trial judge's findings and provided clarification on a number of mitigation-related issues. They confirmed that EI benefits are not to be subtracted from damage awards for wrongful dismissal as the employer ought not to profit from benefits payable to the employee. The Court also clarified that income earned by an employee during the statutory notice period is not to be deducted as mitigation income, as statutory entitlements are not damages.

Once an employee has proven wrongful dismissal, the onus shifts to the employer to demonstrate that some or all of the losses incurred by the employee were avoidable or avoided. That is, the employer must prove the extent to which the employee mitigated her damages. Here, during the common law notice period, the employee earned income from a part time job at Sobey's that she also held during her full-time employment with the employer. Although she increased her hours at Sobey's after her termination, the Court declined to deduct the income earned as her full-time job and the Sobey's job were not mutually exclusive. Moreover, the income earned from Sobey's did not rise to a level where it should be considered a substitute for the amounts she would have earned at the employer. The Court left for another day when supplementary income could reach a threshold where it should be treated as mitigation income.

Notably, the concurring minority decision would have held that where an employee is effectively forced to accept a much inferior position because no comparable position is available, the amount she earns in that position is not mitigation of damages.

This decision serves as a warning to employers that the onus of proving mitigation is a heavy one. Not all income earned during the notice period is mitigation income, depending on the timing and circumstances

in which the income was earned. For employees, this decision clarifies which entitlements are free from the duty to mitigate, and indicates that some income earned during the difficult period after termination may not be deducted from damages. The type of job in which income is earned is an important factor courts will consider.

*Brake v. PJ-M2R Restaurant Inc*, 2017 ONCA 402

## Is Termination for Cause the Capital Punishment for Dishonesty?

The recent decision of the Ontario Court of Appeal found that a single act of dishonesty by an employee at the time of completing an employment application could give rise to cause for the termination of his employment.

The employee working in the area of atomic energy sought to become employed as an industrial safety specialist. He was required to complete a security assessment prior to commencing employment. In filling out his security questionnaire on a Site Access clearance form, the employee deliberately concealed that he was at that moment in time, actively employed. He omitted information about his current employer.

Shortly after commencing employment and in the context of an investigation, unrelated to the cause for his termination, it was discovered that this gap on the security clearance form had been left. This was, notwithstanding the fact that the instructions on the form required that employees should leave “no gaps” with respect to employment information. The form warned there would be implications for failing to be forthright.

The Ontario Court of Appeal upheld the trial court’s decision that the employee’s act of dishonesty in his completion of the form went to the heart of the employment relationship, and on that basis alone constituted grounds for the dismissal of his employment with cause. The security clearances were found to protect national security. The court went on to say that in this case it was clear that honesty went to the core of the employment relationship and deliberate concealment was an act of dishonesty going to the heart of that relationship.

The Supreme Court of Canada in *McKinley v. B.C. Tel.* has clearly established however there is no strict or absolute right to terminate for cause in cases of dishonesty. The contextual approach therefore continues to apply. In the case here before the Court of Appeal however, given the security context and the importance of atomic energy to national security, as well as it being in the context of a violation in the principle of honesty from the outset of the relationship, no doubt all contributed to the court’s acceptance

that this single act could constitute grounds for termination for cause.

Honesty remains the best policy, but caution should continue to be exercised by employers in terminating for cause should they discover an employee has acted otherwise.

*Aboagye v. Atomic Energy of Canada*, 2017 ONCA 598

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