

This is a summary of employment matters of interest to the business community, from a litigator's point of view.

We welcome your questions and comments.

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SPECIAL EDITION

In this edition of Employment News we will explore four recent decisions, each of which addresses a different aspect of the contract of employment, and each is a common provision in today's marketplace. The value to be taken from these cases is the importance of being clear and concise in the language employed in drafting employment contracts, and the care to be taken in their execution.

OWNERSHIP OF INVENTIONS

The Ontario Court of Appeal recently considered the enforceability of an agreement concerning ownership of inventions by an employee/contractor, which made such inventions the property of the employer/corporation.

The individual had been an eight-year employee when he signed a consulting agreement and became an independent contractor. The individual was then requested to execute an "Employee Technology Agreement". Four years later the individual's contract was terminated. He commenced proceedings for a

declaration that he owned an invention produced during the course of the contract and that because he was not an employee the Technology Agreement was not binding.

The Court considered whether "continuing employment" could operate as valid consideration. It held that the continuation of employment could constitute sufficient consideration for an agreement by the employer imposing a reasonable restraint or forbearance from termination. It was found that the employer tacitly promised to forebear from dismissing the employee/contractor, and did forebear for a term of four years which it held was a reasonable period of time thereafter.

The Court upheld the agreement respecting ownership of inventions and overturned the finding of the trial judge that there was a lack of consideration and duress.

TERMINATION PROVISIONS IN EMPLOYEE MANUAL

In a decision by the Ontario Court of Appeal released in November, 2001, the Court was asked to determine the enforceability of provisions in an Employers Policy Manual respecting notice to be provided upon termination of employment.

At the time of hiring, the employee was advised in writing that:

"The responsibilities of this position have been outlined and I am enclosing a staff manual which contains the conditions of employment and agency policies."

The manual provided that the employer may terminate the employment of the employee upon the provision of:

"one month's notice to professional staff... and/or [as] established by legislation."

The Court of Appeal held that while termination provisions in an employment manual are capable of forming part of the employment contract, they must be sufficiently clear if they are intended to rebut the common-law presumption of reasonable notice.

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The Court upheld the decision of the trial judge finding that the provisions in the manual were not sufficiently clear to rebut the common-law presumption because there were several interpretations available as to what the provision was intended to convey. The Court held that it was possible to interpret the provision as even permitting an action for wrongful dismissal. The ambiguity of the provision must be construed in favour of the employee. The Court therefore concluded that the employee was entitled to notice in accordance with the common-law despite the provision in the manual.

EXERCISE OF STOCK OPTIONS FOLLOWING TERMINATION

The Supreme Court of Canada dismissed the application for leave to appeal from the decision of the Ontario Court of Appeal which interpreted a contractual provision for a period of "30 days following termination in which to exercise stock options", to mean 30 days following the expiration of appropriate notice of termination.

Weiler and Goudge J.J.A., writing for the majority of the Court of Appeal, held that while the wording of the contractual provision must govern, the issue was whether the provision clearly included as a triggering event a termination that is in breach of the employment contract.

The provision was:

"If an optionee ceases to be employed... by the Corporation otherwise than by reason of death or termination for cause... any option...held by such optionee at the effective date may be exercised in whole or in part for a period of thirty (30) days thereafter."

The Court held that the provision must be read such that the effective date of termination would include the notice period because the provision can be read as contemplating a lawful period of notice.

ENFORCEMENT OF CLAW-BACK PROVISION ON BONUS

The Superior Court of Justice recently considered how to treat a senior executive provided with annual stock options during the last 7 years of his employment. In exchange for the options, the employee had been required to execute a "Grant Contract" that provided for claw-back of the value of the exercise of the options. The employee resigned from his employment to work for a competitor having in recent months exercised a large number of options.

The "Grant Contract" specifically provided that if the employee left the Plaintiff's employ within 12 months of the date of exercise of options, and accepted employment with a competitor to the Plaintiff, and such action was contrary to the best interests of the Plaintiff, the employee would be required to repay an amount equal to the excess of the market value on the date of exercise of the options.

Rivard J. at trial found that the employee had joined a competitor as defined, and found that this was contrary to the best interests of the corporation. The employee was ordered to repay over \$600,000 in profits realized on the exercise of stock options in the 12 months preceding his resignation.

Arguments of lack of consideration, restraint of trade, mala fides and unconscionability were unsuccessful.

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