Disputes Between Employers and Employees

Including Wrongful Dismissal by Termination Notice Requirement Failures, among many other things

Brief Introduction to Common Legal Issues Arising Within Employment Disputes

Disputes and lawsuits arising out of employment relationships are becoming more and more frequent as long gone are the days of substantial loyalties between employer and employee. When was the last time the boss came over for dinner? Who was the last thirty (30) year employee to earn a gold watch?

Wrongful Dismissal

Eventually every employment arrangement ends; unfortunately however, planning the 'end' is often a failing when the employment arrangement begins. While it is commonplace and quite reasonable that both employer and employee wish to discuss the employment in a positive atmosphere during interviews and the hiring process, much future grief could be avoided by carefully discussing and agreeing to the termination terms in advance.

Employee or Contractor

When hiring, or being hired, the employer and 'employee' need to carefully decide the type of relationship desired as for a variety of reasons, it may be best to enter into a true employment relationship or perhaps an independent contractor relationship. In today's economy, oftentimes the employer prefers the independent contractor relationship although 'employees' sometimes prefer certain freedoms from being a true 'employee' such as lack of payroll deductions and other freedoms, etc.

Unfortunately however, it is important that both sides to the relationship understand that it takes much more than simply labeling the relationship as an independent contractor relationship rather than employment relationship to legally establish the difference. Indeed, in ***671122 Ontario Ltd. v. Sagaz Industries Canada Inc.***, [2001] 2 S.C.R. 983 the Supreme Court has said that:

> The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks.
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> It bears repeating that the above factors constitute a non-exhaustive list, and there is no set formula as to their application. The relative weight of each will depend on the particular facts and circumstances of the case.

In the last decade or two, the trend of hiring independent contractors as opposed to employees is much on the rise. It is common that businesses prefer the independent contractor relationship as this type of an arrangement often has significant benefits such as reduced legal obligations and reduced paperwork.

Restrictive Covenants

The courts will generally be cautious when enforcing contract clauses that limit a former employees future opportunity to earn a living as well as the public interest in maintaining a competitive marketplace while also attempting to balance the freedom to contract that exists between employers and employees. On whether non-competition or non-solicitation clauses should be enforceable, in ***Shafron v. KRG Insurance Brokers (Western) Inc.***, [2009] 1 S.C.R. 157, the Supreme Court has said that:

Restrictive covenants give rise to a tension in the common law between the concept of freedom to contract and public policy considerations against restraint of trade. In the seminal decision of the House of Lords in *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co.*, [1894] A.C. 535, this tension was explained. At common law, restraints of trade are contrary to public policy because they interfere with individual liberty of action and because the exercise of trade should be encouraged and should be free. Lord Macnaghten stated, at p.565:

> The public have an interest in every person's carrying on his trade freely: so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule.

However, recognition of the freedom of the parties to contract requires that there be exceptions to the general rule against restraints of trade. The exception is where the restraint of trade is found to be reasonable. At p. 565, Lord Macnaghten continued:

> But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable – reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public. That, I think, is the fair result of all the authorities. [Emphasis added.]

Therefore, despite the presumption that restrictive covenants are prima facie unenforceable, a reasonable restrictive covenant will be upheld.

Generally, employees receive significant latitude from the courts. Except in the most extreme of circumstances, a dismissal involving allegations of 'just cause' will be difficult for the employer to prove - and the onus to prove that 'just cause' existed is upon the employer. The employer must convince the court that 'just cause' existed rather than the employee proving otherwise. Even in cases where an employee was disobedient (see: ***Chaba v. Ensign Drilling Inc.***, 2002 ABPC 131) or dishonest (see: ***McKinley v. BC Tel***, [2001] 2 S.C.R. 161) or insubordinate (see: ***Henry v. Foxco Ltd.***, 2004 NBCA 22) or intoxicated (see: ***Ditchburn v. Landis & Gyr Powers Ltd.***, 1997 CanLII 1500), among other things, a 'just cause' allegation will be difficult for the employer to sustain.

Fair Wage Laws

An employer is statutorily required to pay at least the minimum wage despite employment agreements that state pay terms are based on commissions or other potentially variable compensation. Additionally, in some circumstances, such as where a employee was hired to perform certain duties for a certain level of pay but thereafter was assigned greater duties, the common law may require an employer to pay on the basis of *Quantum Meruit* (meaning what the job was truly worth, being the quantum or amount).