

Workwise

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The Many Benefits of a Good Termination Clause

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A recent Ontario Court of Appeal decision means that a properly drafted employment contract can protect employers *and* their employees from personal liability when carrying out a termination.

In *Richards v. Media Experts M.H.S. Inc.*, Lauren Richards, the CEO of Media Experts, was terminated for cause less than one year after she was hired. Richards sued Media Experts for wrongful dismissal and personally named its founder and executive chairman, Mark Sherman, claiming his actions during termination caused her to suffer intentional and negligent infliction of nervous shock.

The defendants sought to strike the claim against Sherman on the basis of an exclusion clause in Richards' employment contract. The exclusion clause stated that aside from 12 months' pay upon termination, Richards would have no other rights to any severance payment, damages or indemnity. Richards argued that the employment contract did not preclude her from bringing an action against Sherman personally as he was not party to the contract between herself and Media Experts.

At trial, the Superior Court found that the exclusion clause protected Sherman and struck the claims against him. The Superior Court held that to find otherwise would allow Richards to circumvent or escape the contractual exclusion clause that she had agreed to.

Richards appealed the Superior Court's decision, but the Court of Appeal upheld the decision and agreed that the exclusion clause extended to Sherman even though he was not a party to the employment contract.

The Court of Appeal found that both requirements of the test set out by the Supreme Court of Canada in *London Drugs Ltd. v. Kuehne & Nagel International Ltd.* were met. In that case, the Supreme Court held that one employee could benefit from an exclusion clause between the employer and another employee if (1) the clause expressly or impliedly extended its benefit to the employee seeking to rely on it, and (2) the employee seeking the benefit was acting in the course of their employment and performing the very services provided for in the contract. With respect to the first requirement, the Court of Appeal held that the clause impliedly extended to Sherman as he negotiated the agreement with Richards and became her boss. As such, the parties would not have contemplated that Richards could make claims against Sherman personally that she could not make against Media Experts. With respect to the second requirement, the Court of Appeal found that Sherman was acting on behalf of Media Experts when he terminated Richards.

A properly drafted termination provision provides certainty to the employer and the employee and can avoid time consuming and costly litigation. It can also be drafted to protect the employees involved in carrying out the termination from the risk of personal liability. Field Law can help employers draft such exclusion clauses to protect themselves and their employees from personal claims arising out of terminations.

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