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"Employed" in Name Only – An Employer's Duty to Provide Work

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Will an employment contract be fundamentally changed if the employer stops assigning work? This was the question tackled by the Alberta Court of Appeal in its recent decision in *Bonsma v Tesco Corporation*, 2013 ABCA 367. The Plaintiff resigned and commenced an action for constructive dismissal after the passage of a four-month period in 2004 when he did not receive any work assignments from the defendant employer.

The Plaintiff, Clarence Bonsma, was employed by the Defendant, Tesco Corporation, as a top drive supervisor whose duties consisted of assisting customers with training, as well as set-up and service of drilling equipment rented or purchased from Tesco. The contract between the Plaintiff and the Defendant established rates for pay but did not specify a particular minimum amount of work in a given period of time. Finding that an employer had no duty to provide a specific minimum amount of work at common law, the Court considered whether such a duty could be implied into the terms of the employment contract on the facts of this case. Ultimately, on the facts before him, the Trial Judge was unable to conclude that the employer had fundamentally changed the employment contract so as to constitute constructive dismissal.

In considering whether an additional term could be implied into the employment contract the Court of Appeal noted that this could only be done if it was satisfied that such a term reflected the intention of the parties at the time the contract was entered. In order to make this determination, the Court of Appeal reviewed the Trial Judge's findings of fact and found no grounds on which to overturn them. At the end of the day, the Court was not prepared to imply such a term into the employment contract, and the Plaintiff's appeal was dismissed.

This decision raises a number of significant questions with respect to the relationship between an employer and an employee, and an employer's duty to provide work. Does this decision mean that an employer can simply stop assigning work to an employee? What if the length of time between assignments had been six months, or a year? How does this decision fit together with previous cases where a reduction in hours of

work has been found to amount to constructive dismissal?

The answers to some of these questions may be found in the specific facts of this case, which are somewhat unusual, and may not necessarily translate to other employment contracts. The Trial Judge found, and the Court of Appeal agreed, that the evidence supported the employer's argument that no guarantee of work was intended. Specifically, the Court found that:

- The Plaintiff was aware of periodic slowdowns in the industry;
- The nature of the work was cyclical, and the period in question was a slow period for the drilling industry in Canada;
- Other employees did not expect a minimum amount of work each year;
- Other employees regularly worked other jobs to earn money in the downtimes;
- There was a pattern of long gaps between work assignments not just for the Plaintiff, but for other employees as well.

The Court of Appeal found that a guarantee of minimum amount of work was not strictly necessary for the contract to be workable, and so was not required under the "business efficacy test". Further, the Court found that it was not obvious that the parties intended such a term, such that it could be implied under the "officious bystander test".

Finally, the Appellant raised the argument that, because the maximum length of a temporary layoff under ss. 62 and 63 of the *Employment Standards Code* is 60 days, any longer period between work assignments would constitute a termination. The Court rejected this argument finding that those provisions of the *Code* are intended to provide a measure of certainty to employees who are temporarily laid off; they do not have the effect of implying terms into an employment contract where no temporary lay-off has occurred.

The Court of Appeal ultimately found that the substance of the appeal was a challenge to the Trial Judge's findings of fact, and that it could not interfere with those findings. Such a decision leaves an open question as to how the Court would approach this issue on another set of facts.

If you find yourself in a situation where an employer's duty to provide work to employees is an issue, it is best to seek legal advice. Field Law's Labour and Employment Group would be happy to assist.

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