

Current Workplace Issues Inducing Employees

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In the current Alberta labour market, where good employees are hard to find, employers often go to great lengths to tempt skilled employees from other employers. However, there are risks involved with that strategy, and two recent cases highlight those risks.

In *Egan v. Alcatel Canada Inc.*, [2006] O.J. No. 34 (C.A.)(QL), Ms. Egan was encouraged to leave her 20-year employment with Bell by two employees of Alcatel who had worked with her at Bell. They gave her resume to an assistant Vice President who raved about the “tremendous opportunities facing the company” and about the security that it offered its employees. Ultimately, Ms. Egan was offered a position with a significant annual salary increase and a signing bonus, which she accepted. Unfortunately, after only 20 months at Alcatel, she was terminated as part of a mass termination.

Ms. Egan sued Alcatel for wrongful dismissal on the basis of insufficient notice given the fact that she had been induced away from secure employment. The Ontario Court agreed and awarded her 9 months notice.

The Court noted that inducement will not always be a factor in determining the reasonable notice upon termination, but should be considered when the inducement “reaches a level beyond that inherent in every hiring process.” In Ms. Egan’s case that occurred through the persuasion from two former colleagues of Ms. Egan who, it was discovered, received a substantial recruiting bonus for their efforts. The Court made a distinction between such circumstances and when a headhunter is recruiting a prospective employee.

Following close on the heels of *Egan* is *Alishah v. J.D. Collins Fire Protection Co.*, [2006] O.J. No. 4634 (S.C.J)(QL). At trial, the parties agreed that Mr. Alishah was induced to leave his prior employer of 8 years, (he was offered significantly more money, the financial incentive of which was important to Mr. Alishah as he had just started a family, and he had been assured that he would have a long term career with J. D. Collins and that there would be no shortage of work). As a result, Mr. Alishah signed an employment agreement with J. D. Collins in December of 2004, with a start date of January 15, 2005. The day prior to his first day of work he was presented with a Confidentiality and Non-Solicitation Agreement, and was told that if he did not sign it he would not be permitted to commence work. Although they had never discussed such an agreement prior to that day, he signed the agreement and began working. Within approximately 3 months of employment, Mr. Alishah was accused of breaching the Confidentiality and Non-Solicitation Agreement by allegedly offering employment to other J.D. Collins employees if he was successful in opening up a competing business, and was terminated for cause on April 29th, 2005. Mr. Alishah sued for wrongful dismissal.

The Ontario Court first found that Mr. Alishah had not breached the Confidentiality and Non-Solicitation Agreement because he only had a casual conversation

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with the J.D. Collins employee that the prospective employee did not even take seriously, and because the agreement was null and void in the circumstances.

Ultimately, the court awarded Mr. Alishah 5 months salary, even though he had only been working with J.D. Collins for 3 months. The increase in the notice period was as a direct result of the fact that Mr. Alishah was induced to leave a secure position of 8 years with his former employer. As a result of the inducement, Mr. Alishah was to be treated as a long-term secure employee of J.D. Collins of 8 years versus the 3 months he in fact had been working.

The lessons to be learned from these cases are:

- If an employer makes direct contact, either through management or other employees of the company, with a prospective employee with the intention to induce them away from secure employment, this can be a factor when calculating the reasonable notice period should that new employee be terminated in the future.
- This will not be a factor in the case where a headhunter contacts a prospective employee or when the employee seeks out a position without having been induced by the prospective employer.
- If inducement is a factor, the Court can attribute the employee's service time with their prior employer in calculating the reasonable notice period.

To reduce the risk of being saddled with the service time from prior employers, an employer should specify the termination notice period in a written employment contract signed at the commencement of the employment. Additionally, it is advisable to provide some form of increased compensation in the notice period to take into consideration any inducement from previous secure employment. During times of labour shortages, employers tend to do whatever it takes to hire the best and the brightest but when employers do so, precautions must be taken.

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