

## You Raise the Issue

**GARETT EISENBRAUN**

### Dismissing a Term Employee with an Expired Contract

**Question: My company hired an employee for a one year term. His original one year contract has expired, and while he has continued to work, no new contract has been entered into. In the event I wish to dismiss this employee, how will this lack of a written contract affect me?**

Answer: Where an employment contract is for a fixed term, the employer may dismiss the employee upon the expiry of the contract, without any notice or severance. However, the law is clear that if an employee continues to work after the expiry of the employment contract, and no new contract is entered into, a 'continuous' contract of employment is deemed to exist.

The significance of a continuous contract is that an employee may only be dismissed (without just cause) upon receiving reasonable notice, or pay in lieu thereof. In other words, an employer in such circumstances is not entitled to summarily terminate an employee by claiming that no subsisting contractual arrangement exists; the law will deem a contract of indefinite duration to have been entered into by the parties.

In determining what constitutes reasonable notice, reference should be made to the article entitled "Navigating Notice Periods" on page 1 of this newsletter.

### Selling a Business with Unionized Employees

**Question: My business employs unionized employees under a collective bargaining agreement. I wish to sell my company to a third party. Will the purchaser be able to avoid the operation of the collective bargaining agreement?**

Answer: This situation is governed by the doctrine of "successor rights." In the past, employers sought to avoid unionization by transferring ownership of a company once a collective agreement had been entered into, then arguing that the new owner could not be bound by the collective agreement's terms.

Today, labour relations statutes across Canada have enshrined the principle of successor rights. This doctrine holds that while an employer may dispose of the business as he or she sees fit, employees' rights under the collective agreement will be protected in the event the business is sold.

This approach is based on the premise that collective bargaining rights flow through changes in a company's ownership, so long as there is a continuation of the same business. The employees' rights under a collective bargaining arrangement now become attached to the business itself — not the employer. Thus a change in the legal ownership of a business will not suffice to undermine the employees' bargained for rights, and the new employer will be required by law to abide by the contract already in place.

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## Liability for Volunteers

**Question: I operate an organization which depends heavily on the work of volunteers. Can my organization be liable for the acts of my volunteers?**

Answer: Whether a for profit or nonprofit organization, which relies upon volunteers, is liable for their acts depends largely on the factual context. Generally speaking, volunteers do not meet the common law definition of an employee, which focuses on two factors: a) obligation — the employee is obliged (by contract or otherwise) to perform services, and receives remuneration therefor; and b) control — the employer determines when and how these services are carried out. Clearly under this definition volunteers do not qualify as employees because the element of control is missing.

Nevertheless, liability may still attach to an organization for its employees' actions, based on the principle of vicarious liability. Vicarious liability occurs when an agent, during the course of his or her duties, acts in a fashion causing harm to another party; liability for that action ultimately attaches to the company or organization on whose behalf the agent acted. Individuals need not get paid to qualify as agents, nor do they have to operate under any express form of contract.

Two issues follow from this potential liability: first, organizations should take care when recruiting volunteers and supervise them appropriately. Second, organizations which rely heavily on the work of volunteers should determine whether their current insurance plans adequately cover them in the event of vicarious liability.

**DISCLAIMER** this article should not be interpreted as providing legal advice. Consult your legal adviser before acting on any of the information contained in it. Questions, comments, suggestions and address updates are most appreciated and should be directed to:

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