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A Lovely Review of Employment Contract Principles



By **Mick Wall**

In *Lovely v. Prestige Travel Ltd.*, 2013 ABQB 467, the Alberta Court of Queen's Bench ordered an employer to pay an executive level employee one year's base salary, after it terminated his employment one year into a two-year, fixed term employment contract. In doing so, the court held that an employer must abide by the express terms of the employment contracts it enters. While that ruling is obviously uncontroversial, the court's reasons, in addition to providing an excellent review of several important employment law principles, are a reminder to employers that they would be wise to have counsel review any document that purports to represent the terms and conditions of employment, especially where it relates to the employment of senior executives.

In *Lovely*, the defendant employers, Prestige Travel Ltd. and McDonald & Bychowski Ltd., hired the plaintiff, Mr. Lovely, who was an experienced and well-qualified travel industry executive, as the President and CEO of Prestige Travel. Mr. Lovely's mandate was to transform Prestige Travel into a leading provider of internet based luxury travel packages.

Prior to entering into an employment agreement, Mr. Lovely had several meetings with the four principals of McDonald & Bychowski Ltd., which owned 100% of the shares in Prestige Travel. Although the parties made significant strides toward finalizing a written employment contract, the parties disagreed over Mr. Lovely's severance should the proposed fixed-term two-year contract be terminated early. The plaintiff insisted he receive one year's base salary in the event of early termination; the defendants agreed to the one year's base salary, in general, but wanted the right to terminate without notice at one year if a review showed that the business was failing to meet expectations.

Anxious for Mr. Lovely to begin work, one of the directors of Prestige Travel subsequently directed Mr. Lovely to draw up a contract reflecting the terms discussed and have it signed by the general manager of Prestige, Mr. Sutherland. Mr. Lovely's draft contract, entitled "Prestige Travel Employment Contract", stated that he was entitled to one year's base salary if the two-year fixed-term contract was terminated early. Mr. Sutherland signed the contract (the "Signed Contract").

In late April 2008, more than a month after Mr. Lovely commenced work for Prestige Travel, he was presented with a proposed formal contract of employment, which was drafted by counsel for Prestige Travel. As the proposed contract allowed Prestige Travel to terminate the two-year fixed-term contract without notice or severance following a one-year review, Mr. Lovely refused to sign it (the "Unsigned Contract").

In late March 2009, the defendants terminated Mr. Lovely's employment. Relying upon the Unsigned Contract, the defendants did not provide Mr. Lovely reasonable notice, or payment in lieu thereof, and refused the plaintiff's demand, based upon the Signed Contract, for a severance package equal to one year's base salary.

At trial, Mr. Lovely argued that Signed Contract, including its termination clause, was a valid enforceable employment contract and that, although the Signed Contract was in the name of Prestige Travel, McDonald & Bychowski was his true employer, or a common employer. The defendants argued that the Unsigned Contract governed the terms of employment and that Mr. Lovely induced Mr. Sutherland to sign the Signed Contract by fraudulently misrepresenting its purpose, or that Mr. Sutherland was unaware that, in executing the Signed Contract, he was binding the defendants to an employment contract (i.e., the defence of *non est factum*). According to the defendants, Mr. Lovely induced Mr. Sutherland to execute the Signed Contract by telling him that he needed it to obtain a work visa in Canada. The Defendants also argued that even if the Signed Contract was enforceable, Mr. Lovely had failed to mitigate his damages.

In a thorough decision, Justice Wakeling dismissed all of the defendant's arguments. First, Justice Wakeling held that Mr. Lovely had not misrepresented the nature of the Signed Contract, which was written in plain English, entitled "Prestige Travel Employment Contract", and was presented to an experienced business person for execution. Although Prestige Travel and McDonald & Bychowski were separate legal entities, Justice Wakeling found that McDonald & Bychowski, which owned and directly financed Prestige Travel operations, paid the plaintiff's salary, provided his benefits, and issued his T4 and Record of Employment in its own name, exercised sufficient direction control to be considered a common employer. Finally, on mitigation, Justice Wakeling observed that the defendants led insufficient evidence to establish a failure to mitigate, but even if they had, he noted that an employee has no obligation to mitigate a contractual entitlement to a predetermined severance amount. Accordingly, Justice Wakeling awarded Mr. Lovely one year's base salary, plus costs.

In the event his conclusions regarding the enforceability of the Signed Contract were wrong, Justice Wakeling considered Mr. Lovely's entitlement to common law reasonable notice of termination. After reviewing the *Bardal* factors, Justice Wakeling held that when considering the appropriate notice for senior executives, length of service is a less compelling factor than the nature of the position. A senior manager of an enterprise is entitled to a "significant notice period" as soon as employment commences, and the notice period will not escalate for some time. In this instance, given his extensive experience, and his senior position within Prestige Travel, Mr. Lovely would have been entitled to a 12 months reasonable notice of his termination after only one year of employment. In short, regardless of whether Mr. Lovely's employment was governed by the Signed Contract or an indefinite term contract, Justice Wakeling held that he would have been entitled to one year's salary.

Two important practical considerations arise from this decision: (1) before signing a written document that contains terms and conditions of employment, employers should always have it reviewed by legal counsel, especially where it involves executive level staff; and (2) as executive level employees are almost immediately entitled to significant severance awards, employers should give serious thought to having all executive level employees enter written employment agreements that contain defined and, preferably, limited termination and severance clauses.

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