

Workwise

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Employee Relief Causes Employer Grief:

The ability to perform employment-related duties is an integral part of an employment contract

By Leah Anaka

Recently, two employers who provided notice of termination, and at the same time relieved employees of their duties, were held instead to have at that time terminated those employees, which lead to financial consequences for both employers. In Alberta, an employer's attempt to avoid "callous and insensitive treatment" by providing notice that it would not be renewing an employee's contract resulted in a finding that it had instead constructively dismissed the employee and was therefore liable to pay him a year's salary in accordance with his contract. In BC, the Court of Appeal held that an employer who gave 15 months' "working notice" had in effect terminated the employment contract when it relieved the employee of his duties, and therefore was liable to pay severance in accordance with an employment contract that did not impose a duty to mitigate.

Term employee relieved from duties was constructively dismissed

An employee not appointed to a subsequent fixed-term contract sued his employer for constructive dismissal in *Thompson v Cardel Homes Limited Partnership*. In September 2008, the plaintiff Geoffrey Thompson was hired as a full-time regional president with the defendant employer Cardel Homes Limited Partnership. Thompson's two-year, written contract stated that in the event Cardel failed to renew his contract, or terminated him without cause, Cardel would pay Thompson one year's salary. Cardel and Thompson entered into a subsequent agreement in September 2010, for a term of 13 months, reappointing Thompson to his position as a full-time regional president. Under the second agreement, Thompson's compensation included a fixed yearly salary equal to \$285,000, and participation in a profit sharing plan. This agreement did not provide for payment of one year's salary in the event of non-renewal, but did provide for severance equal to of twelve months' base salary in the event of termination without cause.

One month prior to the expiration of the second agreement, Cardel's president and CEO met with Thompson and provided him with a letter that advised that Cardel would not be entering into a third agreement, and that it did not require Thompson to attend work for the remainder of the term of the second agreement. The letter stated that Thompson would be paid regular earned salary, plus accrued vacation and any profit share earned until the date of termination of the agreement. Cardel also instructed Thompson to return his card key, building keys, and computer password. During the meeting, Thompson was advised he no longer had responsibilities at Cardel and was asked to clean out his office. Thompson left Cardel's premises as requested and performed no further services for Cardel.

Thompson took the position that Cardel, by relieving him of his duties one month prior to the expiration of the second agreement, had terminated his employment. He argued that Cardel's actions constituted a substantial change to his duties and status, repudiating Cardel's essential obligations imposed by the agreement, and resulted in his constructive dismissal.

Cardel argued that it did not sever its relationship with Thompson, and continued to provide him regular pay, profit sharing and benefits until the expiry date of the contract. According to Cardel, it was not under an obligation to provide Thompson work, and in fact did him a favour by allowing him time to prepare for new employment.

The Alberta Court of Queen's Bench agreed with Thompson, and found that Cardel had fundamentally breached the second agreement. The repudiation of the second agreement constituted constructive dismissal, or a termination of Thompson's employment without cause, and therefore Thompson was entitled to the damages as contracted for equal to 12 months' salary. The Court stated that the question to be asked is as follows: would a reasonable person in Thompson's position as regional president have felt that an essential term of his employment was being substantially changed when he was relieved of his duties one month before the end of his contract, and was asked to return his keys, passwords, and leave the building?

Employee relieved from duties was terminated, not given working notice

In *Allen v. Ainsworth Lumber Co. Ltd.*, the BC Court of Appeal held that an employer who relieved an employee from duties in a manner similar to that outlined in *Cardel* repudiated the employment contract when it ceased to make severance payments upon the employee's employment elsewhere. The BC Court rejected the employer's argument that its repudiation of the employment contract was accepted by the employee.

In October 2009, the appellant Ainsworth Lumber Co. Ltd advised its chief financial officer, the respondent Robert Allen, that in 15 months his employment would be terminated, and that Allen would no longer be required to report to work. Allen was asked to surrender his access card and his keys, and was told to arrange removal of his personal belongings from his office, and was escorted from the building. Allen did not return. The following day, Ainsworth announced Allen had "left the company", and that Allen's replacement would commence work about three weeks later.

Allen and Ainsworth had signed an agreement in May 2008 which stated that in the event Allen was terminated without cause, Allen would be provided 15 months' notice or pay in lieu. Ainsworth continued to pay salary and benefits to Allen monthly until June 2010, when Allen obtained new employment that paid more than his salary from Ainsworth. Ainsworth stopped its payments on the basis that Allen had mitigated any further damages arising from his dismissal. Allen disagreed, and sued for breach of contract, alleging Ainsworth had dismissed him in October 2009, he had no duty to mitigate, and he was entitled to the balance of 15 months' "pay in lieu" as a debt due under his employment agreement. Ainsworth took the position that in October 2009 it had placed Allen on 15 months' working notice, and the reassignment of his duties at that time constituted repudiation, rather than termination, of his employment contract. It contended that, when Allen accepted work with another employer, he accepted the repudiation, and also fulfilled his duty to mitigate, which relieved Ainsworth from any further financial obligations related to his dismissal.

At trial, the Court held that Ainsworth had dismissed Allen in October 2009 and, under his employment agreement, he was entitled to 15 months' pay and benefits in lieu of notice. The trial judge rejected Ainsworth's argument that it had simply changed Allen's duties to search for new employment, and stated that nothing in the evidence suggested that Allen had accepted the revocation of his duties and his exclusion from involvement in the company, and that the circumstances, when viewed as a whole, "amounted unmistakably to immediate termination".

The trial judge held that working notice was a "guise for actual termination", and decided it was unnecessary to resort to the doctrine of constructive dismissal. Ainsworth appealed.

The BC Court of Appeal denied the appeal, and stated that Ainsworth was unable to overcome the trial judge's finding that Ainsworth's conduct went beyond repudiation by simply changing Allen's employment duties. Ainsworth's actions instead constituted a wholesale termination of the employment relationship, which entitled Allen to 15 months' pay in lieu of notice, in accordance with his employment agreement. If the trial judge had held instead that Ainsworth had repudiated the agreement, like the plaintiff had in *Cardel*, the Court of Appeal seemed to agree with Ainsworth that Allen then would have been able to sue for wrongful dismissal, and been obligated to mitigate his damages.

Like the Alberta Court in *Cardel*, the BC Court stated that the test as to whether an employment relationship has terminated is objective: was notice of termination specifically and unequivocally communicated to the employee in such a manner that a reasonable person would clearly understand the employment contract was at an end? The Court of Appeal also disagreed with Ainsworth's suggestion that Allen's decision to commence a job search and accept continuing payments of salary and benefits demonstrated he had accepted his changed employment duties. The employment agreement did not impose a duty to mitigate, and therefore Ainsworth was required to pay Allen the entire 15 months' salary.

Don't let me down easy: a matter of substance over form

In both *Cardel* and *Ainsworth*, the employer's decision to relieve an employee from his duties was held to constitute immediate termination. In *Cardel*, the employee sued his employer alleging constructive dismissal and the Court found had been so dismissed. In *Ainsworth*, an employee sued his employer for breaching contractual notice provisions, and Court held that since the employer's actions constituted termination without cause, the notice provisions had been triggered.

What these decisions make clear is that an employee's ability to perform employment-related duties, and the exercise of employment-related powers, are integral parts of an employment contract, particularly at the executive level. To determine whether being relieved from one's duties amounts to termination of employment depends on whether such relief of duties amounts to a substantial change in the employee's exercise of power and control. The test is objective: would a reasonable person understand the employment contract was at an end? Consider:

- Has the employee been banished from the premises?
- Will the employee continue to play a role with the company?
- Has the employee's replacement been hired?
- Will the employee's reputation suffer? Will the employee be presenting him or herself to prospective employers as an unemployed candidate?
- Will the employee continue to receive benefits during the notice period?

A court will consider all circumstances surrounding the termination of an employee. An employer's intention in giving notice of termination is but one factor to consider in deciding whether the totality of the circumstances support a reasonable belief that the employment relationship had ended.

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