BIRD RICHARD
LAWYERS FOR EMPLOYERS

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In this Issue

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Bonus Payments – When is an Employee Entitled to a Bonus Payment during a Notice Period?

In *Dawe v. Equitable Life Insurance Co. of Canada,* the Court of Appeal recently reviewed the circumstances when an employee may be entitled to a bonus payment during a notice period.

The case involved an employee ("Mr. Dawe") who had worked for Equitable Life Insurance as a Senior Vice President. Mr. Dawe's employment was terminated in October 2015 after 37 years of employment. At trial, he was awarded thirty (30) months of reasonable notice, along with all bonuses that he would have earned during this period finding that the bonuses were an integral part of the compensation package. The Court of Appeal reduced the reasonable notice period to twenty-four (24) months given the absence of any exceptional circumstances that warranted a period beyond 24 months. On appeal, the employer argued that the employee was not entitled to the bonus payments during the notice period.

The Employee's compensation package was comprised of a base salary and a cash bonus along with various other benefits. The bonus scheme changed throughout the years and Equitable Life imposed these changes unilaterally. The changes were not negotiated, nor were there any "sign off" required from those affected by the changes. In 2006, Equitable Life introduced two new bonus plans, a Long Term Incentive Plan (LTIP) and Short Term Incentive Plan (STIP) which both introduced new provisions that substantially limited employee's bonus entitlements in circumstances of resignation, termination for cause, retirement, death and termination without cause. In the case of a termination without cause, the plans provided for a "Terminal Award" which was a prorated amount to the last day of "active employment" and required the employee to sign a Full & Final Release to get the payment.

In order for a bonus to be payable to an employee after a dismissal, the Courts have outlined the following test as stated by the Court of Appeal in the *Paquette v. TeraGo Networks Inc.* case:

1. Was the bonus an integral part of the employee's compensation package?
2. If it was integral, is there any language in the bonus plan that would specifically remove the employee's common law entitlement to payment?

At trial, the Court determined that the bonus was an integral part of the individual's payment because of the fact that he was awarded the bonus with the exception of two years that he worked there, and the language within the plan describing it as "an integral component of Equitable executive cash compensation strategy".

The Court of Appeal agreed with his assessment. Turning to the language in the Plan, the Court of Appeal agreed that there was clear language in the Plan that removed the employee's entitlement to the payment during the notice period. However, while the clauses were sufficient to deny payment, the employer did not adequately implement the Plan or bring the provisions of the Plan to the attention of the employee, as it was imposed unilaterally and not brought to the attention of the employee at any time before the termination.

As a result, Mr. Dawe was entitled to a full bonus payment during the notice period. The result for employers is that where any bonus plan is provided to employees, employers need to ensure that there is very clear language addressing eligibility for the bonus payments upon termination. These provisions must be brought to the attention of employees and should not be imposed unilaterally.

Dependant Contractors – More than 50% of Income

A dependent contractor is a status that is essentially a middle ground between an employee and an independent contractor. Where a court has determined that the individual does not fall into the category of employee, the court will undertake a test to determine whether the worker is either a dependent contractor or an independent contractor. It is important to understand if an individual is a dependent contractor, he or she may be entitled to what is called "reasonable notice" on termination, unlike independent contractors.

In the recent case *Thurston v. Ontario*, the Court of Appeal dealt with a lower court's ruling whereby the court determined that a sole practitioner lawyer who provided legal services to the Office of the Children's Lawyer ("OCL") pursuant to a series of agreements over 13 years, was a dependent contractor. The lawyer had her own independent legal practice and that practice formed a majority of her billings. The work that she billed from the OCL only formed an average of 39.9% of her billings.

The agreement provided the ability for the OCL to terminate the agreement at any time, and provided no guarantee of work. At trial, the motion judge found that the lawyer's relationship with OCL was continuous over a 13-year period with no break. During that period, the lawyer performed work under the control of OCL and was perceived by the public to be an employee of OCL. In the reasons provided by the judge, he indicated that the permanence of the relationship, the fact that she performed work that was integral to OCL, and the perception that she was an OCL lawyer, all pointed to a dependent contractor relationship.

On Appeal, the Court of Appeal disagreed that she was a dependent contractor and that the judge had misapprehended the nature of the legal standard and failed to give effect to several relevant considerations. The Court indicated that a dependent contractor relationship required "a certain minimum economic dependency, which may be demonstrated by complete or near complete exclusivity". In overturning the lower court decision, the Court of Appeal noted that the individual was not working exclusively for the OCL, and that she was averaging only 39.9% of her annual billings from that organization. The Court stated that for the purposes of the dependent contractor test, "near exclusivity" requires substantially more than 50% of billings. If it were otherwise, exclusivity – the "hallmark" of the dependent contractor status – would be rendered meaningless.

For employers this decision clarifies that a dependent contractor relationship status can be found where there is total exclusivity between the worker and the organization, but where there is near exclusivity, substantially more than 50% of the contractor's income will be required to be earned from the contracting party.

The Enforceability of Termination Clauses and the Waiver of Common Law Notice

On May 5, 2019, the Ontario Court of Appeal released the *Ariss v. NORR Limited Architects & Engineers* decision. The majority decision from the Court of Appeal is an important decision for employers regarding the enforceability of termination clause in employment agreements.

In 2002, NORR acquired the company that employed Mr. Ariss and continued his employment, which had commenced in 1986. Mr. Ariss signed an employment contract. Mr. Ariss acknowledged that he had read, understood and accepted the offer of employment which included a provision that purported to limit notice and severance entitlements to the minimum statutory provisions of the Ontario *Employment Standards Act, 2000* (the "*ESA*").

In 2006, Mr. Ariss signed a new employment contract, which contained similar provisions that limited entitlements upon termination to the *ESA*. Mr. Ariss agreed that he had read and understood the provisions which, again, included a waiver of his common law entitlements to reasonable notice at common law.

In 2013, Mr. Ariss raised the possibility of reducing his hours to part-time hours. On July 31, 2013, the employer provided Mr. Ariss with an "Offer of Casual Employment", which contained the following provision: "*Either party may terminate this agreement by providing the minimum notice required under the Employment Standards Act of Ontario.*"

NORR terminated Mr. Ariss' employment on January 26, 2016. NORR did not recognize his 30 years of service, and instead gave him 3.5 weeks' notice of termination based on his part-time service from July 2013. No severance pay was paid. On a motion for summary judgement, the Court agreed with Mr. Ariss that he had been continuously employed for approximately 30 years (rejecting the employer's argument that he had resigned in 2013) and NORR was required to pay him additional statutory payments arising from his termination. Specifically, he was entitled to 8 weeks of termination pay and 26 weeks of severance pay as required under the *ESA*. At the same time, however, and most importantly for employers, the motions court held that Mr. Ariss had clearly and unequivocally waived any entitlement to reasonable notice at common law and limited any claim to his statutory entitlements.

The Court of Appeal unanimously agreed with the lower court that the employee clearly and unequivocally waived his entitlement to reasonable notice at common law. This waiver was reinforced by the various agreements that were accepted throughout the employment relationship. There was no basis to interfere with the employee's waiver of the common law entitlement to reasonable notice. For employers, the Court of Appeal has confirmed the basic and well-established principle that employment agreements may clearly limit an employee's entitlements upon termination to the minimum statutory requirements as contained in the *ESA*. If you have any questions about your employment agreements or the enforceability of termination provisions in your employment contracts, please do not hesitate to contact us.

Employer Health Tax – Who is the Employer in a Tripartite Relationship?

The Court of Appeal has rendered a decision concerning the Employer Health Tax ("EHT") and in particular, where an employee is hired through a Temporary Placement Agency, who is responsible for paying this tax.

In the case of *Azur Human Resources Ltd. v. Ontario (Minister of Revenue)* the case dealt with an appeal by a placement agency (the "Agency") regarding Employer Health Tax. The Agency supplied temporary workers to the Public Service of Canada and federal agencies under agreements between the Agency and the Government of Canada. The function of the Agency was simply to pay the worker and administer the payroll on the basis of time sheets that were signed by the Government.

The Agency appealed the decision that they should be liable for the Employer Health Tax, on account of the fact that they were only the payors, and the clients (the Government of Canada) actually managed, and directed the workers while they carried out an assignment.

The Court of Appeal determined that the original appeal judge correctly decided that the workers, the Agency and the government were in a tripartite relationship. As a result, both the government and the Agency had some aspects that made each party an employer. However, after analyzing the *Employer Health Tax Act* (*EHTA*), the appeal judge indicated that the legislation provides that "the employer is the party who pays remuneration to the employee". In this regard, the Agency would be the employer for the purposes of the *EHTA*. The Court of Appeal agreed with the decision.

The result is that in such tripartite relationships, the payor of the salaries will be required to pay the EHT.