MANAGEMENT
COUNSEL
Employment and Labour Law Update

SHERRARD KUZZ LLP
Employment & Labour Lawyers

An employment contract may be frustrated as soon as it becomes illegal for the employee to continue in his or employment.

That's Frustrating!

Divisional Court clarifies employer's right to terminate for cause when continued employment is illegal

The Ontario Divisional Court recently considered the issue whether an employer is entitled to terminate employment on grounds of 'frustration of contract' when continued employment is made illegal by legislative change. 'Frustration of contract' allows an employer to end an employment relationship without notice and/or payment of severance. The difficulty for employers is knowing *when* 'frustration' exists in law. The Divisional Court has now clarified one circumstance in which 'frustration' will exist is when continued employment would be illegal.

What happened?

For several years George Cowie worked as a security guard at the Blue Heron Charity Casino, and was licenced by the *Gaming Control Act, 1992*. In 2007, the Government of Ontario enacted the *Private Security and Investigative Services Act, 2005 (PSISA)* which required all security guards to be licenced under the *PSISA*. The new law presented a challenge for Mr. Cowie in that licencing under the *PSISA* required a clean criminal record, something Mr. Cowie did not have.

The *PSISA* provided a one year grace period to allow any security guard, already employed at the time the law came into effect, to obtain a license. In Mr. Cowie's case this first required him to obtain a pardon of his criminal conviction. Unfortunately, at the time, it was understood by Mr. Cowie and Blue Heron the process of obtaining a pardon could take up to two years. Blue Heron therefore terminated Mr. Cowie's employment on the basis of 'frustration of contract' without notice or pay in *lieu*.

Ultimately, Mr. Cowie was able to secure a pardon within four months of his termination. However, he chose not to apply for a *PSISA* licence. Instead, he sued Blue Heron for wrongful dismissal.

The trial decision

The trial judge found Mr. Cowie to have been wrongfully dismissed and awarded him eight months' pay in *lieu* of notice. According to the judge, the failure to obtain a *PSISA* licence had not 'frustrated' the employment contract; it was merely a temporary set-back. Furthermore, given it had taken Mr. Cowie only four months to secure a pardon, Blue Heron should have *suspended* Mr. Cowie for a reasonable period to allow him to obtain the pardon and *PSISA* licence.

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The employer successfully appealed

The decision was reversed by the Ontario Divisional Court which made two key rulings.

First, the Court held frustration of contract can occur when an unexpected disruption, not provided for or contemplated in the employment contract, fundamentally changes the parties' obligations. The disruption does not have to be permanent, but it must make the contract of employment "radically different".

Second, the Divisional Court found the trial judge erred when she considered events which had taken place *after* Mr. Cowie's termination. The only relevant facts, said the Divisional Court, were ones known to the parties at the time of termination. At that time, the parties knew it was illegal for Mr. Cowie to continue to be employed as a security guard and it could take two years to obtain a pardon. There was no evidence to suggest a 'temporary inconvenience'. Blue Heron was therefore within its rights to have terminated Mr. Cowie's employment when it did. In the words of the Divisional Court, the focus is whether the contract of employment has been made 'radically different', such as where an employee's provision of services becomes illegal, *"not … when, if ever, the provision of those services will once again be legal"*.

Query whether the Divisional Court may have reached the opposite conclusion had the parties' understood a pardon could be secured within a shorter period of time. In that case, the trial judge's theory of a 'temporary suspension' may have found favour with the Divisional Court. For now, however, frustration due to illegality does not have a timing component.

Is disability treated differently?

Blue Heron was a case in which illegality frustrated the employment agreement. The more common workplace scenario is when disability or illness makes it impossible for the employee to fulfill his or her job duties. The Court commented on this latter scenario, noting where disability or illness may be temporary, 'frustration' will be found where the disability prevents the performance of the employee's essential job functions *for a significant length of time*. This is an important distinction from *illegality* cases where a contract may be frustrated as soon as it becomes illegal for the employee to perform his or her job.

Lessons for employers

Blue Heron is good news for employers because of the clarity it provides. The decision establishes an employment contract may be frustrated as soon as it becomes illegal for the employee to continue in his or employment. It also confirms the analysis of whether a contract of employment is frustrated requires an assessment of the circumstances at the time of termination, not with 20-20 hindsight. Finally, the decision draws an important distinction between frustration due to illegality and frustration due to disability or illness; the former may arise as soon as continued employment is rendered illegal; the other after a significant period of time.

The lawyers at Sherrard Kuzz LLP can assist in determining whether and when 'frustration of contract' has occurred, and the steps to take to protect the workplace. For more information, please contact a member of our team.

Quitting Time

Ontario Court of Appeal affirms reasonable notice is a two-way street awarding $20 million in damages against four departing fiduciaries

Ontario's highest court recently upheld an award for nearly $20 million in damages against four key employees who quit their employment with only two weeks' notice. The decision is an important reminder to employers and employees the obligation to provide reasonable notice is a two-way street. The key is to protect your organization at the outset of the employment relationship with a well drafted employment agreement.

What happened?

In *GasTOPS v. Forsyth*, four senior employees gave two weeks' notice of resignation before starting a competing firm and soliciting several of their former co-workers. Prior to their departure the employees were the principal designers of GasTOPS' core programs, and had intimate knowledge of the company's business plan including opportunities being pursued and proposals made to customers. Upon their giving of notice, two of the employees were directed to leave the workplace immediately.

GasTOPS sued the employees claiming they were in breach of their fiduciary duties for misappropriation of confidential information, trade secrets and corporate opportunity. GasTOPS also claimed the employees failed to give reasonable notice of their intention to resign.

In their defence, the employees argued, among other things, GasTOPS had waived its entitlement to a longer notice period when it demanded they immediately vacate the workplace.

The trial

The trial judge agreed with GasTOPS, finding the employees had breached their fiduciary duties and failed to give reasonable notice of their intention to resign. The judge also found the employees knew they had given inadequate notice and did so with the intent of destroying GasTOPS by rendering it unable to fulfill existing contracts or pursue new opportunities. Based on these facts, the judge held the employees ought to have provided the company 10 to 12 months' notice, and awarded GasTOPS almost $20 million in damages including prejudgement interest and costs.

The appeal

The Ontario Court of Appeal upheld the trial decision. However, it is important to note the parties did not appeal the length of notice awarded by the trial judge, and the Court of Appeal was careful to state its decision did not address the appropriateness of the 10 to 12 months awarded. Still this decision is an important reminder to employers and employees that the obligation to give reasonable notice is a two-way street.

How much notice can an organization expect?

Every employee owes to his or her employer common law reasonable notice of resignation unless an employment contract provides otherwise. Failure to provide sufficient notice of resignation is a breach of contract. In reality, such lawsuits are

rare and typically only commenced against individuals alleged to be fiduciary employees and when substantial damages are at issue (as in *GasTOPS*).

The amount of reasonable notice owed to an organization is difficult to predict. The purpose of notice of resignation is to provide the organization reasonable time to replace the departing employee. The length of notice required will therefore depend on factors such as the employee's duties, expected length of time to recruit and train a replacement employee, timing of the resignation in relation to the employer's peak period(s), and custom in the workplace and industry. Depending on the facts, reasonable notice of resignation can range from two weeks to 10 to 12 months.

An organization's conduct can affect the notice to which it is entitled

An organization's response to learning of an employee's impending departure can affect the amount of reasonable notice to which it is entitled.

In *Aquafor v. Whyte, Dainty and Calder*, two fiduciary employees quit their employment on four and five weeks' notice. Their former employer sued claiming it should have been entitled to 12 to 18 months' notice. The court agreed the employees were fiduciaries but disagree they should have provided the lengthy notice sought by the employer. The court reached this decision despite the fact the employees had quit their employment to start a competing firm, their business while at Aquafor accounted for 25% of the company's revenues, they were the face of Aquafor to the majority of the company's mining and land development clients, and they were intimately involved with firm management including determining employee salaries, marketing, and liaising with Aquafor's lawyer.

The amount of reasonable notice owed to an organization is difficult to predict. The purpose of notice of resignation is to provide the organization reasonable time to replace the departing employee.

The court's decision was influenced by the employer's reaction to learning of the employees' pending departure. Specifically:

1. When the employees tendered their resignation with three and four weeks' notice, the President of the company accepted four weeks from one of them, and asked the other to extend his notice to five weeks. The President neither asked for a greater period of notice nor indicated he did not accept the short departure dates.
2. The employer was unable to offer any evidence to support its claim 12 to 18 months' notice was either reasonable or would have made a difference to the company. To the contrary, in the short notice periods offered by the employees the President hired someone else to take over certain projects and transferred other work to other managers. The departing employees also cooperated with the employer before leaving by advising of their active projects and even assisting with the transition of work after their departure.

How an organization can protect itself

A common lament we hear from clients is that the end of an employment relationship often feels like a one-way street. The *employer* is required to provide notice of termination to the employee but rarely, if ever, is that courtesy returned. What these recent decisions remind us is the obligation to provide reasonable notice is a two-way street. The key is to protect your organization at the outset of the employment relationship with a well drafted employment agreement. For example:

- **Stipulate in the employment agreement the employee's obligation to provide notice of the intention to resign.** Most employers appreciate termination provisions in an employment agreement are an effective way to limit the organization's liability to provide notice in the event of termination without cause. However, a well-drafted termination provision can also protect the organization by requiring a departing employee to provide reasonable notice of the intention to resign. Including such a provision in the employment agreement also allows the *employer* to proactively decide the *reasonable* period of notice, rather than leaving this determination to the courts after the fact.
- **Inform the employee if the notice he or she is proposing is not sufficient.** An organization need not accept the length of notice offered by a departing employee. This is important to remember. As we saw in *Aquafor*, an employer's failure to object to an employee's proposed notice period can undercut the employer's later claim the notice given was insufficient. In the absence of an employment agreement stipulating otherwise, an organization should clearly communicate if the period of notice proposed by the employee is insufficient, preferably in writing.
- **Mitigate**. Just as the duty to provide reasonable notice is a two-way street, so too is the duty to mitigate. If an employee quits, the organization must make an honest and reasonable effort to replace the employee in a timely fashion. This may include recruiting a temporary employee, reorganizing duties among remaining employees, and asking the departing employee to assist with the transition even after the conclusion of his or her notice period.

To learn more, and/or for assistance preparing employment agreements to protect your organization, please contact a member of Sherrard Kuzz LLP.

DID YOU KNOW?

Providing your employees free parking may be a taxable benefit, even if parking is free for everyone. Free parking for employees in a lot where charges are normally issued has always been a taxable benefit. A recent decision of the Federal Court of Appeal has now expanded the benefit in circumstances where it can be valued by comparison to parking charges in the vicinity.

MANAGEMENT COUNSEL

HReview Seminar Series

Please join us at our next HReview Breakfast Seminar:

Drugs and Alcohol in the Workplace

Drug and Alcohol Issues in the Workplace
- It's not just about the user…

Preventative Management Strategies
- Developing and implementing a drug and alcohol policy .
- Can an employer require employees to undergo pre-employment screening?
- Is there an obligation to conduct testing for employees in safety sensitive positions?
- Can an employer conduct random testing?
- Can testing be required to monitor an employee participating in a rehabilitative return-to-work program?

Responding to Workplace Incidents Involving Drugs and Alcohol
- When and what can an employer search?
- Is post-incident impairment testing permitted?

Understanding Drug and Alcohol Testing
- What tests are available?
- What is being tested?
- Is employee consent required?
- Is privacy an issue?

Discipline for Drug and Alcohol-Related Misconduct
- What if an employee refuses to provide a sample?
- What steps can an employer take if an employee fails a drug or alcohol test?
- What can an employer do if an employee breaches a last chance agreement?
- When is dismissal appropriate?
- Is there an overriding duty to accommodate an employee with an addiction?

DATE: **Tuesday September 18, 2012; 7:30 – 9:30 a.m.** (breakfast at 7:30 a.m.; program at 8:00 a.m.)

VENUE: **Mississauga Convention Centre,** 75 Derry Road, Mississauga L5W 1G3

COST: Please be our guest

RSVP: **By Friday September 7, 2012 at www.sherrardkuzz.com/seminars** or to 416.603.0700
(for emergencies our 24 Hour Line is 416.420.0738)

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