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La-Z-Boy Caught Reclining While Drafting Employment Contract, Says Court of Appeal

By Thomas Gorsky

In response to increasing judicial and legislative expansion of employee rights, many employers have learned the importance of protecting themselves by means of written contracts.

In *Braiden v. La-Z-Boy*, decided this June by the Ontario Court of Appeal, employers were reminded that it is not enough merely to *attempt* such written protection; employers need to *ensure* that their written documentation fully conforms to well-established case law requirements.

The Facts

Gordon Braiden began his employment in 1981, and continued his employment as a customer service manager until 1986. That year he was assigned a combined salaried and commissioned sales role, which soon further transformed into straight commissioned sales.

In 1995, La-Z-Boy initiated a practice of requiring each salesperson to sign an annual written fixed-term employment agreement ("Agreement") which contained a provision entitling La-Z-Boy to terminate employment at any time upon provision of 60 days' notice. At trial Mr. Braiden explained that he felt he had to sign the Agreement in order to keep his job. In fact, he signed Agreements each year so that by the time of his termination of employment in 2003, he had signed nine successive agreements, each with an identical 60 day termination clause.

La-Z-Boy took further steps in 1998 to contractually protect its interests by requiring Mr. Braiden to incorporate. From that point forward, the Agreements were with between La-Z-Boy and Mr. Braiden's corporation, not with Mr. Braiden in his personal capacity.

The Agreements also defined Mr. Braiden's and later his corporation's status as an "Independent Marketing Consultant" and stated that the relationship was <u>not</u> one of employment, but rather of an independent contractor.

In 2003, La-Z-Boy terminated Mr. Braiden's corporation and provided 60 days' notice. In response to Mr. Braiden's subsequent wrongful dismissal lawsuit, La-Z-Boy pleaded that: (i) its relationship was with Mr. Braiden's corporation and a corporation has no right to reasonable notice; (ii) even if the relationship was with Mr. Braiden, he was an independent contractor who also had no right to reasonable notice; and (iii) the contractual 60 days' notice provision governed.

The Court of Appeal's Decision

The Court of Appeal sided with Mr. Braiden in respect of each of the three arguments.

First, the Court held that the corporate status of the subordinate contracting party (Mr. Braiden's corporation) did not prevent a wrongful dismissal action. The essential purpose of the relationship was for Mr. Braiden to provide his personal services.

Second, the Court held that Mr. Braiden was an employee and not an independent contractor based upon the following factors: (i) he was limited to servicing La-Z-Boy exclusively; (ii) prices, territory and promotional methods were determined solely by La-Z-Boy; (iii) he had not undertaken any business risk and had no expectation for profit (beyond a fixed commission) and (iv) he was part of a sales force which was a crucial part of La-Z-Boy's business organization, as opposed to providing services that were merely ancillary to La-Z-Boy's overall operations.

As for the contractual stipulation of 60 days' notice, the Court of Appeal observed that Mr. Braiden had the benefit of an implied right to reasonable notice of termination when the first Agreement was signed. The law presumes this right in most employment relationships. The law also permits this right to be restricted by the use of an employment contract. However, in order to do so, an employer must adhere to very rigid and technical rules set down by legislation and case law.

For example, where an employment contract is used in the course of an employment relationship, an employer must be able to demonstrate that the employee received something of value (known as 'consideration') in exchange for signing the contract. Very often, when a contract is signed before employment begins, that 'consideration' is the job itself. If the contract is signed after an employee has already started work, even if they've been there only a day, or if a change is made to an important term of the contract, new consideration or value must be provided for the contract to be enforceable.

In the case of Mr. Braiden, the Court of Appeal relied on one of its statements from an earlier decision that removal of the right to reasonable notice is "a tremendously significant modification" of an individual's rights and approvingly quoted another prior statement:

> … the terms of the employment contract rarely result from an exercise of free bargaining power in the way that the paradigm commercial exchange between two traders does. Individual employees on the whole lack both the bargaining power and the information necessary to achieve more favourable contract provisions than those offered by the employer, particularly with regard to tenure.

According to the Court, La-Z-Boy's introduction of the 60 days' notice provision through the new contract stripped Mr. Braiden of his right to reasonable notice, without providing any consideration or benefit to him. The Court rejected La-Z-Boy's argument that tax benefits, which Mr. Braiden was alleged to have gained by incorporating, would be sufficient to establish consideration. La-Z-Boy had led no evidence that tax benefits were realized. Further, any such benefits were not provided by La-Z-Boy but were an incidental consequence of the transaction.

The Court noted that consideration, if it is to be given, must be made clear in the contract. Theoretical benefits cannot be argued after the fact in an effort to ferret out "hidden" consideration.

Because there was no consideration, the 60 days' notice provision in the Agreement was held to be null and void, and Mr. Braiden was entitled to reasonable notice of termination. That Mr. Braiden re-executed the Agreement on multiple of occasions did not assist La-Z-Boy. Mr. Braiden was awarded a judgment of nearly $140,000 plus legal costs.

The Court of Appeal found it unnecessary to consider Mr. Braiden's alternative argument which had been accepted by the trial judge, that the 60 days' notice provision was null and void because it was less than the statutory minimum termination and severance pay stipulated in the Ontario *Employment Standards Act*.

Lessons Learned

In siding with the employee on each contentious issue, the Court of Appeal relied on at least three of its own well-established decisions which were sufficiently similar to Mr. Braiden's claim.

In the final analysis, La-Z-Boy failed in multiple ways to protect its own interests. Had La-Z-Boy been more alert to the detailed requirements set out in previous, well-known case precedents, it could have protected itself by using a properly drafted contract before the employment relationship even started. Alternatively, when seeking to implement a contract after the relationship had begun, it could have provided appropriate, fresh consideration to Mr. Braiden so that he would have become bound to the restricted notice provision.

There are various options available to employers to assist them to lawfully and effectively manage their business. A properly drafted employment agreement is but one important example.

To learn more about how to protect your organization through the use of properly drafted and implemented employment contracts, please contact a member of the Sherrard Kuzz LLP team.

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