

MANAGEMENT COUNSEL

Employment and Labour Law Update



A dismissed employee who chooses to return to school instead of seeking comparable replacement work fails to mitigate his or her damages, giving up any entitlement to common law notice from that point forward.

Dismissed employee does not have “free pass” to forego mitigation opportunities to return to school

Little irritates an employer more than having to pay a terminated employee common law notice while the employee fails to take reasonable steps to find a new job and mitigate his or her losses. A dismissed employee has a duty to mitigate those damages by making reasonable efforts to find comparable, replacement work. The income earned from the replacement work reduces the former employer's common law termination liability.

A question we are often asked is, ‘*what if the employee chooses to forego a new job (and mitigation income) to enroll in school or start a new profession? Is the former employer still on the hook for the full amount of the unmitigated loss?*’ A recent Ontario Superior Court of Justice decision suggests the answer is, ‘no’.

What happened?

In *Benjamin and Cascades Canada ULC*¹, Cascades Canada closed one of its Greater Toronto Area (“GTA”) facilities, resulting in the termination of employment of 42 employees. One of these employees was Patrick Benjamin, a line operator and general labourer with no management or supervisory responsibilities. He had worked for Cascades Canada for 28 years, without a written employment contract setting out his entitlements upon termination.

Benjamin was offered a termination package which he rejected. He was then given his entitlements under Ontario's *Employment Standards Act* (“ESA”), amounting to eight weeks' pay in lieu of notice and 26 weeks' severance pay.

Benjamin also received outplacement job counselling, one-on-one job coaching and a weekly email newsletter that included: (i) tips and guidance on searching for new employment, (ii) job opportunities with Cascades Canada at its other GTA locations, and (iii) job postings at other companies in the area for which he appeared qualified. In one newsletter, a number of job opportunities were listed, including three positions with Cascades Canada at its other GTA locations.



Edward Snetsinger
416.603.6245
esnetsinger@sherrardkuzz.com

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Instead of applying for a new job, Benjamin decided to switch careers. He entered a six-month, full-time welding training program, believing upgrading his skills would give him greater job security.

Meanwhile, because Benjamin had not initially signed an employment contract limiting his entitlement upon termination to the *ESA* minimum, Cascades Canada remained exposed to the risk Benjamin might sue for common law reasonable notice. When he did launch that claim, seeking the equivalent of two years' salary, Cascades Canada sought to dismiss it on the basis Benjamin failed to "mitigate" his common law damages by not applying for available positions, including the three at Cascades Canada's other locations.

The trial decision

The trial judge agreed with Cascades Canada, finding Benjamin's decision to go back to school equated to a failure to take reasonable steps to mitigate his losses. Benjamin's entitlement to wrongful dismissal damages therefore ended on the date he made the decision to enroll in school. By that time, Benjamin had already received the equivalent of eight months' salary through his *ESA* entitlements; well in excess of his then common law entitlement. His claim for wrongful dismissal damages was therefore dismissed.

In reaching this conclusion, the court was clear that a dismissed employee who chooses to return to school instead of seeking comparable replacement work fails to mitigate his or her damages, giving up any entitlement to common law notice from that point forward:

If the employer can establish that the dismissed employee (i) chose to retrain instead of seeking comparable positions, and (ii) could have procured that comparable employment, a dismissed employee ought not to have a "free pass" to change careers to enhance job security or obtain better hours, and then collect damages for notice simply because of dismissal. In those circumstances, an employer should not be required to fund retraining (through payment of reasonable notice) when the employee could have obtained comparable employment. [emphasis added]

Lessons for employers

1. An enforceable employment contract is key.

An enforceable employment contract can reduce the risk an employer may be exposed to liability for a lengthy common law notice period. In many cases, a contract can limit notice to the minimum amount required by employment standards legislation. An enforceable employment contract also reduces uncertainty, by predetermining the amount of notice due upon termination.

This can result in significant savings for an employer, as well as flexibility to make personnel decisions based on business needs rather than notice and severance obligations.

Consider the case of Mr. Benjamin. Based on his years 28 years of service, his common law entitlement to reasonable notice may have been upwards of 24 months. Yet, under the *ESA*, he was entitled to eight months' pay (eight weeks' notice and 26 weeks' severance pay). An enforceable employment contract could have achieved this level of certainty right from the start.

The best time to introduce an employment contract is at the time of hire, prior to the employee commencing work so the offer of employment is the "consideration" in exchange for which the employee agrees to be bound by the terms of the contract.

However, all is not lost if an employment contract is not entered into prior to an employee starting work. There are opportunities during the employment relationship to introduce an employment contract in exchange for additional consideration (*e.g.*, salary increase, promotion, improved benefit plan, signing bonus, *etc.*). The amount of consideration and the preferred approach depends on a variety of factors, so it is best to consult with counsel to ensure this is done correctly.

2. Take reasonable steps to assist the dismissed employee to find comparable replacement work.

An employee dismissed without cause has a duty to mitigate his or her damages by making reasonable efforts to find comparable, replacement work. The income earned from the replacement work then reduces the former employer's common law termination liability (not the statutory entitlements).

As such, wherever possible and practical, it is in the interests of a former employer to help a former employee find comparable replacement work. This might include offering another position in the organization (if appropriate), a positive reference, out-placement assistance, and/or bringing to the employee's attention any comparable job posting in the area. The sooner the employee finds new work, the sooner there will be mitigation earnings.

Further, as we saw in the Benjamin decision, by assisting a former employee to identify new employment opportunities, the onus shifts to the employee to either apply for a new position or provide a compelling reason for not doing so.

¹2017 ONSC 2583.

For assistance preparing or updating enforceable employment contracts tailored to your workplace, contact the experts at Sherrard Kuzz LLP.

DID YOU KNOW?

Thinking of hiring summer students... Effective April 1, 2018, the new "equal pay" provisions of the *Employment Standards Act, 2000* require an employer to pay any university or college student (18 years of age or older) the same rate of pay as a newly hired permanent employee where the student performs substantially the same work, in the same establishment, requiring the same skills. An employer is exempt from this requirement where the pay differential can be justified on the basis of a seniority system, merit system, system that measures earnings by quantity or quality of production, or other objective grounds not otherwise prohibited by law (*e.g.*, distinguishing based on sex is prohibited by the *Human Rights Code* of Ontario).

These equal pay provisions do not apply where the student is under 18 years of age and works 28 or fewer hours a week or during the summer or an academic break (*e.g.*, March break).

To learn more and for assistance, contact Sherrard Kuzz LLP.

Bill 148 Ups the Ante on the Employee/Independent Contractor Debate



Jeffrey Stewart
416.217.2228
jstewart@sherrardkuzz.com

Misclassifying an employee as an independent contractor has always been a live issue for Canadian employers. Whether intentional or accidental, misclassification can expose an employer to a claim for unpaid entitlements under employment standards legislation, including unpaid vacation pay, public holiday pay, overtime pay and termination pay.

The enactment of Bill 148 in Ontario, and the amendments to the province's *Employment Standards Act* ("ESA"), has further raised these

stakes. Effective November 27, 2017, misclassifying an employee as an independent contractor exposes an employer to a penalty of \$350 per misclassified employee. This amount increases to \$700 per employee for a second offence and \$1,500 for a third offence within a three year period. These amounts are in addition to the requirement to pay any unpaid wage entitlement, such as vacation pay, public holiday pay or overtime pay. There is also the potential for negative publicity should the Minister of Labour make good on his recent promise to publically identify offending employers.

It is a common misconception that, if a worker operates through an incorporated entity, this is sufficient to establish the worker is an independent contractor. However, the test is broader and more nuanced and a decision-maker will look at the true nature of the relationship, examining factors such as: (1) whether the worker bears a risk of profit or loss, (2) who controls and directs the work performed and how it is performed, (3) who owns the tools and equipment used to perform the work, and (4) the ability of the worker to subcontract out work and perform services for others. Where there is a dispute whether a worker is an employee, the entity receiving the services bears the burden of proving the worker is not an employee under the *ESA*.

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Why was this amendment made to the *ESA*?

According to Ontario's Changing Workforce Review Final Report, of the province's 5.25 million workers, 12% are reported as independent contractors; however, a significant portion of these workers ought to be classified as employees because they are in a position of economic dependence on an employer, and the relationship between the parties more closely resembles an employment relationship.

The government identified a variety of reasons why an employer might want to classify an employee as an independent contractor, including that the employer would not be obliged to pay vacation pay, public holiday pay, overtime pay, termination and severance pay, and premiums toward Employment Insurance and the Canada Pension Plan. However, many independent contractors prefer to be classified this way to trigger their own preferential tax treatment. Bill 148 fails to acknowledge this.

The employee vs. independent contractor test

To the frustration of many, that a worker is found to be an independent contractor under one statute (*e.g.*, the *Income Tax Act*) is not determinative for the purposes of employment standards. The rationale for this distinction is that employment standards legislation is 'benefit conferring,' designed to ensure every employee receives certain minimum employment standards. Employment adjudicators therefore apply a broad and generous interpretation to the meaning of "employee".

When assessing whether a worker is an employee or independent contractor, Canadian employment adjudicators ask this question: 'is this worker in business for his/her own account'? If the answer is, 'yes', the worker will be considered an independent contractor.

To determine whether the worker is in business for his/her own account, five factors are considered:

1. The level of control the entity has over the worker's activities
2. Whether the worker provides his/her own equipment
3. Whether the worker hires his/her own helpers
4. The degree of financial risk taken on by the worker
5. The degree of responsibility for investment and management held by the worker

When assessing *level of control* common questions include:

- Does the entity demand the exclusive service or can the worker provide services to others?
- Was the worker hired for a limited scope project or duration?
- Can the worker refuse a project?
- Does the worker have the ability to subcontract the work?
- Does the worker set his/her own hours of work?
- Does the entity have the ability to discipline the worker?
- Does the entity have supervisory responsibilities over the worker?

When assessing *financial risk* common questions include:

- Does the worker bear financial risk associated with providing the services?
- Can the worker negotiate his/her compensation?
- Would the worker's compensation be negatively impacted if work is performed poorly?

What should an employer do?

In Ontario, the government has announced its intention to hire up to an additional 175 Employment Standards Officers to enforce the *ESA*. Any entity that engages independent contractors, or is considering doing so, should carefully review these contractual relationships to ensure legal compliance, and minimize risk. Ignorance of the law, or turning a blind eye, has always created risk for employers. With Bill 148, the Ontario government has upped the ante.

For assistance, contact the employment law experts at Sherrard Kuzz LLP.

HReview Seminar Series

Please join us at our next HReview Breakfast Seminar:

Drugs (including Cannabis) in the Workplace Employer Rights and Obligations Best Practices to Protect Your Workplace

Legalization of cannabis is around the corner and employers are looking for ways to protect the safety and productivity of their workplaces. Join our panel of experts, including a specialist in testing and treatment of substance use disorder, as we explore:

1. *Balancing Safety, Privacy and Human Rights*

- Employer rights and obligations regarding cannabis, opioids or other impairing substances.
- The significance of medical vs. recreational use.

2. *Impairment*

- The impact of cannabis on cognitive ability.
- Recognizing signs of impairment.
- Measuring impairment.

3. *Testing*

- Types of testing: pre-employment; pre-access; random; post-incident; return to work.
- New developments in testing technology.
- New developments in the law.

4. *Discipline and Policies*

- Holding employees accountable.
- Practical tips on developing and implementing effective policies.

DATE: Wednesday, June 6, 2018; 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 West, Mississauga

COST: Complimentary

REGISTER: By Monday May 14, 2018 at www.sherrardkuzz.com/seminars.php

Law Society of Upper Canada CPD Hours: This seminar may be applied toward general CPD hours.

HRPA CHRP designated members should inquire at www.hrpa.ca for eligibility guidelines regarding this *HReview Seminar*.

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250 Yonge Street, Suite 3300
Toronto, Ontario, Canada M5B 2L7
Tel 416.603.0700
Fax 416.603.6035
24 HOUR 416.420.0738
www.sherrardkuzz.com
[@SherrardKuzz](https://twitter.com/SherrardKuzz)



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Jean Cumming Lexpert® Editor-in-Chief

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