



What's New in HR Law

Court of Appeal: Employees Can Outgrow Employment Contracts without Formal Promotion

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Bottom Line

The Court of Appeal for Ontario has found that an employee was no longer bound by the termination clause in his existing employment contract after he was given significant new job duties. Although the employee never received a formal promotion, his increased responsibilities had altered the substratum (i.e., the central substance) of his employment contract. The case highlights the dangers of giving employees significant new duties without also updating their employment contract, and provides helpful ways to prevent against this risk.

Background Facts

In the case of [Celestini v Shoplogix Inc, 2023 ONCA 131](#), the Plaintiff was hired by Shoplogix Inc. (“Shoplogix”) as Chief Technical Officer (“CTO”) in 2005, and entered into an employment contract at that time. The employment contract stated that the Plaintiff would perform the duties of a CTO, as set by Shoplogix’s by-laws and as specified by the CEO, as well as “any other duties that may reasonably be assigned to him by the CEO or the board.” The contract also included a clause that provided 12 months of pay and benefits in lieu of notice upon a “without cause” termination.

This article is for the purposes of only general information and does not constitute legal advice or opinion.

At the time of hiring, the Plaintiff's duties primarily focused on the internal transfer of product and corporate knowledge and he did not have any direct reports. Importantly, the Plaintiff did not have any responsibilities related to sales, travel, infrastructure, or financing.

In 2008, a new CEO joined Shoplogix and fundamentally changed its senior management structure, such that the Plaintiff:

- received new duties relating to sales, marketing, business development, technical solutions, and quality assurance;
- gained significant responsibilities relating to Shoplogix's infrastructure and the solicitation of investment funds;
- inherited managers and other employees who began to report directly to the Plaintiff; and
- was expected to travel to pursue international sales.

The Plaintiff's compensation structure also changed in 2008 and 2012 through the implementation of an Incentive Compensation Agreement and Management Incentive Plan, which provided for new and different compensation entitlements.

In 2017, Shoplogix terminated the Plaintiff's employment and, pursuant to the Plaintiff's 2005 employment contract, provided 12 months of pay and benefits in lieu of notice. At no point prior to the Plaintiff's dismissal had his 2005 contract (including the termination clause therein) been re-ratified or his title been changed.

The Trial Decision

The Plaintiff sued Shoplogix for wrongful dismissal. He argued that the termination provision in his 2005 employment contract was unenforceable because the fundamental changes to his employment duties changed the "substratum" of the employment relationship.

The Ontario Superior Court of Justice agreed, and held that the termination clause was unenforceable due to the "change of substratum" doctrine. Specifically, the Court found that the Plaintiff's duties and compensation had changed substantially and fundamentally over the course of his employment. Although the Plaintiff's title never changed, the changes to his duties and compensation undermined the substratum of the original employment contract. As a result, the termination clause in that contract could not have been intended to apply to his role as it was at the time of the Plaintiff's dismissal and was therefore unenforceable.

The trial judge also found that the termination clause was not saved by a clause of the employment contract, which required the Plaintiff to perform duties reasonably assigned to him. Shoplogix alleged that the clause allowed for changes to the Plaintiff's duties, but the Court disagreed. Had the clause expressly stated that the terms of the contract would apply notwithstanding *any* changes, including fundamental changes, to the Plaintiff's responsibilities, the trial judge would have found the termination clause to be enforceable.

Ultimately, the trial judge awarded the Plaintiff 18 months of notice of dismissal (i.e., six months more than he was provided by Shoplogix).

The Appeal Decision

On appeal, the Court of Appeal for Ontario upheld the trial decision. In doing so, the Court clarified that the "change of substratum" doctrine did not require an employee to be formally promoted in order to

outgrow a termination clause. Instead, an employee is essentially promoted when they are given fundamental increases in duties and responsibility, even if their assigned job title remains the same.

Check the Box

Employers should be careful when giving substantial new duties to employees. If an employee's contract does not expressly say that it continues to apply despite changes to the employee's duties, there is a risk that the contract — and any termination clause therein — could be deemed to be unenforceable. This can lead to costly consequences in situations involving long-term or high-level employees.

Employers can also mitigate risk by ensuring that employment contracts allow for the assignment of *any* duties and responsibilities to employees (as suggested by the trial Court), and/or that any changes to employment terms or compensation are supported by written documentation of the employee's agreement to those changes. If the parties are not signing a new employment agreement, the documentation should at least expressly state that the parties' existing employment contract and termination clause continue to apply.

Need More Information?

For more information or assistance with employment issues, contact [Micah Fysh](mailto:Micah.Fysh@filion.on.ca) at mfysh@filion.on.ca or your regular lawyer at the firm.



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