

Member's Quarterly

Summer 2020 Edition

Feature

Diamonds are Forever — Termination Provisions Fade

The "Changed Substratum Doctrine" still shines bright

Many employers choose to include a contractual termination provision in an employment agreement as a means of avoiding common law reasonable notice requirements and creating certainty in the amount of termination notice that may be required. However, the important question is whether or not that contractual notice provision will stand the test of time. Legislation may change, which can render a termination provision non-compliant with the law. More importantly, even if legislation does not change, the sands of time may change the employment relationship and may trigger what is often called the "changed substratum doctrine". Under this common law doctrine, if employees develop new skills, change roles or are promoted, where their status and responsibilities have significantly changed from the time of their original employment agreement, the contractual notice period in that original employment agreement may no longer be enforceable. As a result, the employer will be exposed to common law reasonable notice upon termination without cause as if the termination provision had never existed. Unlike the unenforceable termination provision, this doctrine remains ever-present and was recently reaffirmed in a Court of Queen's Bench of Saskatchewan decision.

The Facts

In *McKercher v. Stantec Architecture Ltd.*, 2019 SKQB 100, the employee was hired by the company in 2006 as a staff architect with an annual salary of slightly more than \$62,000 per year. The original employment agreement provided that if the company terminated the employee's employment other than for just cause, the employee would receive two (2) weeks' notice or pay in lieu of notice during the first two (2) years of employment increasing by one (1) week for each additional completed year of employment to a maximum of three (3) months' notice or pay in lieu of notice or the minimum notice of termination (or pay in lieu of notice) required by applicable statutes, whichever was greater.

Throughout his 11-year employment with the company, the employee was promoted multiple times and he most recently held the role of Business Centre Sector Leader earning an annual salary of \$134,004. Throughout the employee's promotions, the company and the employee never entered into a new agreement with updated terms or reaffirmed the original employment agreement.

The employee's employment was ultimately terminated without cause and the employee was provided with the contractual maximum of 3-months pay in lieu of notice. The employee brought a wrongful dismissal claim seeking compensation based on common law reasonable notice.

The Decision

The court found in favour of the employee and granted summary judgment for wrongful dismissal based on common law reasonable notice of 12 months.

There was no doubt that the employee's status and responsibilities had substantially changed throughout his employment, moving from staff architect to sector leader. Further, the court did not find any evidence that it would have been clear to the employee that the original termination provision was meant to apply to the promoted roles. As a result, the court found that the changed substratum doctrine applied,



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rendering the original termination provision unenforceable, and awarded the employee compensation based on a common law reasonable notice of 12-months, including the benefits he would have received during that time and the bonus he would have earned over the same period.

The Lesson for Employers

Simply having a termination provision that prevents common law reasonable notice from applying does not mean that it will last in perpetuity. We strongly recommend that when an employee's responsibilities and status have significantly changed (i.e. through promotions), employers should enter into a new employment agreement with the employee that contains an enforceable termination provision, or ensure the employee provides written acknowledgment that the original termination provision continues to apply.

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