

Member's Quarterly

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Feature

Managing the Evolving Employment Relationship

Employers beware the substratum doctrine

Introduction

Employment relationships often change over time. Rarely does a long-service employee maintain the same position, compensation and responsibilities throughout their tenure. In *Celestini v Shoplogix*, 2023 ONCA 131 ("Celestini"), the Court of Appeal provides important considerations for employers about managing the progression of the employment relationship, particularly where there is a significant evolution in the employee's duties and responsibilities.

Background

Mr. Celestini commenced employment at Shoplogix in 2005 as Chief Technology Officer. The termination clause in his employment agreement limited his entitlements on termination without cause to twelve months base salary and benefits, plus bonus pro-rated to the date of his termination.

A new bonus plan – an Incentive Compensation Agreement ("ICA") – was developed in 2008 for executives such as Mr. Celestini. This ICA significantly changed his compensation from what was set out in his 2005 employment agreement. Notably, the 2005 agreement was not referenced or ratified when the ICA was agreed to. Simultaneously, Mr. Celestini's duties and responsibilities also began to expand significantly.

In 2017, Mr. Celestini's employment was terminated without cause. As per his 2005 agreement, his base salary and benefits were continued for twelve months, and he was provided a pro-rated bonus. Despite this, Mr. Celestini commenced an action for wrongful dismissal.

The Decision

Mr. Celestini's primary argument was that the termination clause in his 2005 employment agreement was no longer enforceable because of the changed substratum doctrine. In other words, the termination clause could not apply because the circumstances at the time of termination – specifically Mr. Celestini's significantly expanded role and compensation – were not contemplated at the time the 2005 employment agreement was entered into.

The motion judge agreed with Mr. Celestini, finding that his responsibilities as of 2008 far exceeded what would have been expected when he began working for the company in 2005. The motion judge also emphasized Mr. Celestini's compensation, which had increased by approximately 173% over the course of his employment. Despite the fact that his title did not change, the motion judge held that the substratum doctrine applied.

The Court of Appeal agreed with the motion judge. It held that there were two fatal flaws in Shoplogix' position that the 2005 employment agreement applied:



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1. Shoplogix did not obtain any ratification of the 2005 employment agreement in or around 2008 when substantial changes to Mr. Celestini's responsibilities and compensation were made; and
2. The 2005 employment agreement contained no anti-obsolescence clause, which may have staved off the substratum doctrine.

The Outcome

As a result of the application of the substratum doctrine, Shoplogix was ordered to pay 18 months in lieu of notice, inclusive of base salary, bonus, car allowance and lost benefits, totalling \$458,232.00 plus costs and interest.

Takeaways for Employers

The Court provided helpful guidance for employers on how to avoid the substratum doctrine.

First, *Celestini* is a reminder that employers should strategically assess whether an employment agreement should be updated, or at a minimum ratified, not only to account for changes in the state of the law, but also when there are significant changes to the terms and conditions of the employment relationship. This might include promotions, new compensation plans, etc.

Additionally, employers should ensure that their employment agreements contain an anti-obsolescence clause. Such a clause would include language setting out that the terms and conditions of the employment agreement will continue to govern the employment relationship regardless of its length and any changes to the employee's position, compensation or responsibilities, even if such changes are fundamental.

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