

## Member's Quarterly

## Winter 2024 Edition

### Feature

# The Season(al) Employee Predicament

*You don't want a continuous employment relationship*

As the seasons change, so do many employers' needs for staff. The changing weather or the need for extra hands around the holidays results in employers looking to seasonal employees to round out their staff for a temporary period of time. But what happens when "the season" ends and what rights do these employees have? What many employers may not realize is that if the employment relationship has not been clearly and properly defined by an employment contract at the outset of each season, seasonal employees may be entitled to notice if they are not rehired for subsequent seasons.

### Definition of a "Season"

In the employment context, a "season" is typically defined by the temporary nature of the work being offered. The length of the season and amount of work available is often dictated by weather conditions, holidays, and/or consumer demand, all external factors over which the employer has no control over. Therefore, the needs of an employer can ebb and flow during the season or as seasons change, depending on the nature of their workplace.

Seasonal employees are often hired on a fixed term basis. In such cases where seasonal employees are provided with clear fixed term contracts that end on a pre-determined date without any intention of rehire, legal issues are less likely to materialize. However, matters become more complex when employees are hired for "the season" without setting clear expectations as to the duration of the season or what the rights and obligations are of the parties when the season comes to an end. This is especially so in cases where employees are consistently rehired season after season.

### Termination Rights and Obligations of Seasonal Employees

Most provincial employment legislation contains special rules for seasonal employees (or fixed term employees more generally). Specifically, on the completion of a fixed season, the employee's employment may come to an end without the need for the employer to provide termination notice. However, despite such legislative provisions, an employee's common law rights must also be considered.

Under the common law, there is a risk that seasonal employees are deemed to be continuous employees where representations have been made by the employer which could constitute a promise or reasonable expectation of rehire the following season. The following examples demonstrate some common representations employers make when hiring and/or terminating seasonal employees at the end of the season that could lead a court to find the relationship was continuous:

- Automatically hiring seasonal employees back every season over a number of years without requiring an application;



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- Failing to implement an employment contract;
- Where a contract is in place, failing to include language that clearly sets out the seasonal nature of employment;
- Continuing to provide benefits during the off-season; and
- Providing a return date on the employee's ROE.

If an employer decides not to rehire a seasonal employee in subsequent seasons, and if the employee can convince a Court that their employment relationship was actually continuous in nature, they would be entitled to proper severance pay. Calculation of severance pay entitlement will depend on whether the employee has an enforceable contractual termination clause defining severance pay entitlement, or alternatively, if no enforceable termination clause exists, reasonable notice will be assessed based on the employee's unique circumstances.

It is therefore important to understand that simply calling an employee "seasonal" does not necessarily make it so when it comes to their legal entitlements, even if that employee only works during certain times of the year.

### Mitigating the Seasonal Risk

Employers can take proactive steps when seasonal employees are first hired in order to mitigate the risk of creating a continuous employment relationship. We note that employers are not precluded from rehiring the same employees for subsequent seasons, but that in doing so they should clearly outline to the employee in writing that rehire is never guaranteed season-to-season.

Accordingly, we recommend incorporating the following practices into your seasonal hiring:

- Require employees to submit applications for each season, even if they have been hired before;
- Implement seasonal employee fixed-term contracts at the outset of each season that contain clear language setting out the duration of the season, expressly states no guarantee of rehire and includes an enforceable termination clause should the need arise to terminate mid-season;
- Do not include return dates on ROE; and
- Do not continue to pay compensation or provide benefits during the off-season.

Please note the foregoing mitigation strategies more generally apply to new seasonal employment relationships and we recommend seeking out legal advice for dealing with current employees who may already raise the risks noted above.

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