

Growing Out Of Employment Contracts: How Employment Contracts Can Become Unenforceable Over Time If An Employee's Role Changes



In a recent decision from the Ontario Court of Appeal,¹ an employee of 12 years was terminated without cause pursuant to the terms of his employment contract. The employment contract limited the employee to, among other things, 12 months' pay upon termination, and the employer paid the employee accordingly. However, the employee took the position that he was entitled to more notice on the basis that the termination provision within his contract was unenforceable. In doing so, the employee relied upon the "changed substratum" doctrine (the "**Doctrine**"), which, in essence, means that an employee's duties have expanded to the point where the original employment contract's termination provisions are no longer binding. The employee was ultimately successful, and the employee received, among other things, 18 months' pay rather than the 12 months' pay his employment contract initially contemplated. The total award ended up exceeding \$450,000.

The purpose of this article is to provide a general outline of the Doctrine as it applies in British Columbia, as well as a few tips on how employers can avoid the implications of having their employment contracts rendered unenforceable as a result of the same.

WHAT IS THE CHANGED SUBSTRATUM DOCTRINE AND WHEN DOES IT APPLY?

As a starting point, the common law implies a term into an employment relationship of indefinite duration that the employee will receive reasonable notice before being discharged without notice. Reasonable notice is generally determined by reference to facts such as the character of the employment (i.e., administrative, technical, managerial, etc.), the length of service, the age of the employee, the availability of similar employment, and the experience, training, and qualifications of the employee. It follows that, over time, reasonable notice for a specific employee will change as the employee gains greater seniority and responsibility.

The law also recognizes that, as long as the statutory requirements (in British Columbia, the *Employment Standards Act*, R.S.B.C. c. 113) are not infringed, parties to an employment arrangement may prescribe, by express contract, the entitlements of the employee on termination. If they do so, such terms will apply to the employee,

rather than the implied term of reasonable notice. Generally speaking, a provision that limits an employee to the minimum statutory requirements will result in a smaller payment to employees upon termination than a payment made on the basis of common law entitlements.

The Doctrine operates as a limit on when an employee's common law entitlements will be restricted by the express terms of an employment contract. Given that an employer-employee relationship may evolve over time, the Doctrine recognizes the potential inappropriateness and unfairness of applying the contract's termination provisions to circumstances that were not contemplated at the time of contracting. This includes, for example, an employee being promoted or an employee acquiring expansive duties not considered at the time the employee was hired.

The Doctrine is most likely to apply where an employee is promoted and their day-to-day responsibilities dramatically change or where an employee is not expressly promoted, but their duties and responsibilities expand naturally. The Doctrine can apply even if an employee's title remains the exact same.

IMPLICATIONS OF THE CHANGED SUBSTRATUM DOCTRINE

If an employment contract's termination provisions are rendered unenforceable, the monetary implications can be significant. The difference between paying notice in accordance with the minimum statutory requirements and paying notice at common law can sometimes mean a difference of thousands of dollars.

By way of a simple and very general example, if a 10-year employee in a managerial position is terminated without cause, their entitlements under the British Columbia *Employment Standards Act* could be as little as eight weeks pay. By contrast, it is conceivable that that same employee could receive anywhere between 10 to 15 *months* pay at common law, depending upon the employee's age, responsibilities, and the circumstances of their termination.

HOW DO EMPLOYERS KEEP THEIR CONTRACTS ENFORCEABLE?

There are a few practical steps that employers can take to minimize the risk of the Doctrine applying to their contracts. These include:

1. **Draft Employment Contracts with the Doctrine in Mind:** A written employment contract may oust the application of the changed substratum doctrine, if it expressly provides that its provisions, including its termination provisions, continue to apply even if the employee's position, responsibilities, salary or benefits change. For example, in one British Columbia case,² the court decided that an employee was only entitled to the *Employment Standards Act* minimums because the employee's contract provided, among other things, "Changes in position, responsibilities, salary or benefits will not invalidate any provision in this contract unless changes to any provision in this contract are expressly agreed to by the parties."
2. **Ratify Employment Contracts when an Employee's Duties Change:** A written employment contract is more likely to have continuing force even if there have been substantial changes in the employee's duties if the parties ratify the contract's continued applicability when those changes occur.
3. **Approach Promotions or Changes to Responsibilities in a Considered and Formalized Manner:** As the above should suggest, increased responsibilities – whether they be granted through a formal promotion or not – can have significant legal and financial implications on the employee and employer alike. Thinking about each employee's circumstances thoroughly and obtaining legal advice before increasing an employee's responsibilities is always recommended.

All employee's circumstances are different, so it is prudent to obtain legal advice if employers are considering promoting an employee or if an employee's duties appear to have changed significantly since their original hiring.

Footnotes

1. *Celestini v. Shoplogix Inc.*, 2023 ONCA 131

2. *Miller v. Convergys CMG Canada Limited Partnership*, 2013 BCSC 1589, aff'd 2014 BCCA 311, leave to appeal to SCC refused, 36092 (5 February 2015).

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