

Ontario Superior Court Finds Executive Resigned From BlackBerry Ltd. In Violation Of His Employment Contract



[BlackBerry Limited v. Marineau-Mes](#) is a refreshing case for employers that wish to hold their employees to the terms in their employment agreement, particularly notice of resignation provisions.

Facts

Mr. Marineau-Mes (the “employee”) had long service at BlackBerry Ltd. (“Blackberry”). The employee rose throughout the ranks of a software company BlackBerry acquired in 2010 and held the position at BlackBerry of Senior Vice President (“SVP”) in early 2013. As SVP the employee was responsible for a group of six hundred (600) employees, including three (3) Vice Presidents.

In early fall of 2013, the employee was offered a promotion to the position of Executive Vice President (“EVP”) where he would be responsible for three thousand (3000) employees, including eleven (11) Vice Presidents and seventy (70) Directors. The employee indicated in that he would have an employment lawyer review his contract in September of 2013 and eventually signed the contract on October 16, 2013. Included in the signed employment contract was a term requiring the employee to give six (6) months’ notice in the event of a resignation.

In September 2013, the employee began discussions with Apple Inc. (“Apple”) regarding a position with their company. Meanwhile, in the fall of 2013 Blackberry underwent some difficult times and discussed with the employee that his role might be narrower in scope than originally contemplated. On December 23, 2013 the employee gave his notice of resignation where he advised BlackBerry that he would be joining Apple in approximately two (2) months’ time.

This matter was brought to Court by Blackberry where they sought an interpretation of the employment agreement and a declaration that the six (6) month notice period for resignation was valid.

The employee argued that the contract was not valid and enforceable because;

- i. the contract offended specific provisions of the Employment Standards Act (“ESA”);

- ii. there was a material failure because the employee did not assume the duties of EVP;
- iii. the six (6) month notice period was equivalent to an unenforceable non-compete policy; and
- iv. the employee had "Good Reason" to resign pursuant to article 4.5(b) of the agreement.

Findings

i. Violation of the ESA

The employee argued that he was not accruing vacation pay in accordance with ss 33(1) and 33(2) of the ESA. As such, the employee argued that the entire contract was null and void and that termination had occurred when he was no longer active in service. The Court found that termination did not occur when the employee was no longer performing active service and that he could be called upon to provide assistance to BlackBerry at any time during the notice period. Moreover, the employee was still being paid vacation pay up until the end of the six month period, the time when employment actually ceases. Further, the Court stated that if the employee were correct only the offending term would be considered null and void in the employment contract but not the entire section or the requirement to give full notice.

The employee also argued that he was terminated in accordance with s. 56 of the ESA whereby an employer dismisses an employee if they refuse or are unable to continue to employ him. The Court found that BlackBerry legitimately required the employee's services as part of a transition out of the company during the notice period and that the provisions in the employment contract constituted a reasonable notice given the industry and the employee's senior position. As such, the employee was not dismissed.

ii. Material Failure – Contract void because Employee did not assume the duties of the promotion

The Court determined that the employee participated in critical discussions regarding BlackBerry's future and received a pay increase proportionate to the EVP promotion. Further, the promotion was documented by internal emails and that the lack of a formal announcement was known to be suppressed due to business reasons. As such, the Court found that no material failure occurred and that the employee was promoted.

iii. Notice period is equivalent to a non-compete and is thus unenforceable

The Court did not agree that the six (6) month notice period was equivalent to a non-compete agreement. A non-compete is significantly different as the employee continues to receive remuneration during the notice period. Further, these provisions were made known by BlackBerry and were fair and common in the industry.

The Court also noted that even if the notice of resignation provisions constituted a non-competition clause that reasonable non-competes are enforceable. In this case, there was nothing to suggest that the terms included by BlackBerry were offensive or overreaching as a non-compete or a notice provision.

iv. The Employee had "Good Reason" as defined by the contract to terminate the agreement

The Court found that according to the contract's section 1.7 BlackBerry was allowed to modify, change, reduce or add to employment duties to meet business demands.

Moreover, under the contract, the employee would first have to provide BlackBerry with notice of any breach, which he did not do.

Further, the court stated that a change in the employee's duties after he announced his resignation is not surprising and did not amount to a material and detrimental alteration. In fact, upon resignation BlackBerry would need him to assist with his transition out of the company.

For the reasons above BlackBerry received the declaration that the Employment Agreement was binding and that the employee was obligated to provide six (6) months' prior written notice of his resignation. BlackBerry was also entitled to costs.

Lessons for Employers

Employers often think that their employees do not have to provide notice of resignation but this is not true at common law (without an employment agreement) and it is certainly not true when an employment contract appropriately sets out a required notice period.

Article by Paul Macchione

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