

## **EMPLOYEES, CONTRACTORS, AND IN-BETWEENS**

In the employment world there are employees, contractors, and what I call in-betweens. The category into which an individual falls will have a substantial impact on his or her entitlements upon the termination of the relationship.

### **Basic Legal Entitlements**

Reasonable working notice is the basic pre-termination entitlement of most employees. This entitlement is an implied term of the relationship unless it is altered by a binding employment contract. If reasonable working notice is not provided, the employee is entitled to pay in lieu of notice (commonly referred to as severance pay).

At the other end of the spectrum live true independent contractors. These individuals are clearly in business for themselves and are not, aside from the service relationship, a part of the principal's business organization. These individuals typically are not entitled to reasonable working notice of termination of the relationship.

In some instances, however, contractors are awarded the entitlement of reasonable working notice. These in-between situations are often referred to as intermediate relationships because they bear some of the important characteristics of employment.

### **Can Contractors Claim Severance Pay?**

It seems the most common instance in which non-employees receive the remedy of reasonable notice occurs in the sales context. Sales agents who have served as the sales arm for a manufacturer of products are frequently awarded damages in lieu of reasonable notice of termination.

Although these sales agents may seem to be in business for themselves, the courts sometimes deem the relationship sufficiently employment-like that it warrants the same termination rights. A recent B.C. Supreme Court decision is typical of this scenario.

### **A Live Example – Smith v. Centra Windows Ltd.**

Sydney Smith had the title of Vice President of Marketing and Sales with Centra Windows Ltd. He was, in effect, a commissioned sales person and had been with the company for almost 14 years when his employment was terminated.

Smith sued for damages in lieu of reasonable notice. Centra defended with the proposition that Smith was an independent contractor and, as such, was not entitled to reasonable notice of dismissal.

Of particular note, Smith had been providing services via his own incorporated company and had hired his own "lead generators" to assist with developing sales leads.

The Court stated that the fact a person provides services via a corporate vehicle is not determinative of whether reasonable notice of termination is required. Nor is a written agreement stating that the person is an independent contractor.

And, the Court emphasized, the question of whether a person is entitled to reasonable notice is not decided strictly by a finding of whether the person is an employee versus an independent contractor. An intermediate category has been recognized, falling between the two, in which there is an implied entitlement to reasonable notice.

The Court listed the primary factors to be taken into account in determining to which end of the spectrum the relationship in question is nearest: the duration or permanency of the relationship; the degree of reliance or closeness of the relationship; and the degree of exclusivity.

In Smith's case, the Court determined his relationship was nearer to the employment end of the spectrum. Among other factors of importance, Smith was contractually bound to sell only Centra's products, virtually all of his income came from his work for Centra, he was provided with workers compensation coverage and office supplies, and his expenses were reimbursed from time to time.

The Court seemingly had little difficulty determining that Smith had been entitled to reasonable notice of termination, and awarded him 15 months' pay in lieu of notice. That made for over \$100,000 in damages.

It was a costly error by Centra that had a simple solution. Businesses wanting to avoid such an expensive lesson should seek legal advice on properly structuring relationships with all their service providers – employees, contractors, and in-betweens alike.

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