CANADIAN
Employment Law Today
A Carswellbusiness Publication ■ www.employmentlawtoday.com

CURRENT NEWS AND PRACTICAL ADVICE FOR EMPLOYERS

ISSUE NO. 517 • SEPTEMBER 10, 2008

Employee fired after refusing contract changes

Employer should have given choice of accepting new contract provisions or resigning under old ones: Court

By Ronald Minken

The Ontario Court of Appeal has provided insight into how an employer should handle an employee who refuses to accept a unilateral change to a term of her employment even with reasonable notice. The court overturned a lower court's decision that an employee was wrongfully dismissed when the change was implemented, which seems to require an employer notify an employee who clearly refuses the change that further refusal will result in termination. If the employer fails to notify the employee of this, then the termination for refusing the change will be considered a wrongful dismissal.

EMPLOYMENT CONTRACTS

Employer introduced new termination provision

Darrell Wronko, 43, had an employment contract with Western Inventory Service in Toronto, which allowed for two years' pay if terminated. Western attempted to shorten the provision to 30 weeks, but Wronko refused to agree to the change. Western notified Wronko the new termination provision would come into effect in two years. Again, Wronko indicated his disapproval.

Once the notice period elapsed, Western sent an e-mail to Wronko indicating the new termination provision was in effect and "if you do not wish to accept the new terms and conditions of employment as outlined, then we do not have a job for you." Wronko acknowledged he understood his employment to be terminated and requested his severance package of two years. Western told Wronko he had not been terminated, but rather his employment contract had been amended with the new termination provision. Wronko did not return to work and was not given his two year severance package.

The Ontario Court of Justice, believing this case to be one involving a constructive dismissal, held that Western had the right to unilaterally alter the termination provision of the contract because reasonable notice was given to the employee of this change. With this concept in mind, the court dismissed Wronko's claim and found he ended the employment relationship.

No constructive dismissal, says Court of Appeal

The Ontario Court of Appeal disagreed with the trial decision in two ways. First, it found Wronko did not end the employment relationship, but rather Western had done so by giving him an ultimatum that he accept a term it knew he did not agree with.

Continued on page 6

IN THIS ISSUE

Ask an expert

Employee privacy trumps business interests

More cases

You make the call

CASE IN POINT: Transgendered lawyer denied armed forces job

MICHELINE MONTREUIL successfully interviewed for a position as a grievance officer with the Canadian Forces Board, who placed her on an eligibility list. After two years, she still didn't have a position, though other candidates with equal qualifications were hired. Montreuil filed a discrimination complaint, claiming she wasn't hired because of her status as a transgendered person.....4-5

Stewart McKelvey Stirling Scales, Halifax

Have a question for our experts?
E-mail **carswell.celt@thomson.com.**

ACCOMMODATION: Absence due to alcoholism-related jail time

Question: An employee was absent for more than 30 days because he was in custody for an alcohol-related assault charge. This is the second time in less than six months he's been under house arrest, but he is allowed to leave home to attend work. He's worked at our company for seven months and has never informed us of an alcohol problem. What are our responsibilities regarding accommodation? Can we proceed with his termination for culpable absenteeism?

Answer: It is fundamental to the employment relationship that an employee has to attend work unless absent as a result of an approved or statutorily mandated leave. Therefore, if an employee is absent for a considerable amount of time, the employer may dismiss him. When determining if a dismissal on the grounds of culpable absenteeism is justified, courts have considered the employee's work record, the reasons for the absence, the harm the absence would have on the workplace, the employee's seniority and whether dismissal is more severe than is necessary to correct the conduct or whether a less severe punishment is appropriate.

The fact the employee has only been working for seven months, his history of missing work and the fact the employee was absent from work for a month already, are all factors a court would consider in the employer's favour for termination due to culpable absenteeism.

As well, Canadian courts have held that a lengthy term in prison is enough to frustrate an employment contract. However, in those cases, the jail term was significantly longer than a month.

However, before terminating the employee, the apparent drinking problem has to be considered. Though the employee has not informed his employer of a drinking problem, the fact he has been arrested twice in recent months, once for an alcohol-related assault, seems to indicate alcoholism could exist. If the employee wishes to use alcohol as an excuse, he should bring its existence to the employer's attention. The exception is if, given all the circumstances, the employer ought to have known he suffered from an addiction. Further, if he does claim to be an alcoholic, the employer has the right to obtain information that confirms his claim.

If the employee is an alcoholic, terminating employment becomes more difficult. Human rights legislation in most Canadian provinces, as well as federal legislation, has recognized alcohol dependency as a handicap. As such, alcoholism is classified as a disability and a protected ground from discrimination. When an employer is faced with a disabled employee, it has a duty to accommodate the employee to the point of undue hardship. Just what is meant by "undue hardship" will vary depending on the circumstances. Some examples of accommodations that employers have made with regard to alcoholics include providing access to rehabilitation and treatment and allowing the employee a "last chance agreement." A last chance agreement is an agreement whereby an employee returns to work under certain conditions, such as abstaining from alcohol, and if those conditions are breached, the employee may be terminated.

Without a last chance agreement or proof of undue hardship, courts have found if an employee's misconduct is a result of a disability, it cannot be used as grounds for a disciplinary dismissal. Thus, if the assault and subsequent time away from work was caused by the employee's alcoholism, the employer might not be able to use it as grounds to terminate his employment unless the employee has been accommodated to the point of undue hardship.

For more information see:

- *Entrop v. Imperial Oil Ltd.*, 1996 CarswellOnt 4403 (Ont. Bd. of Inquiry).
- *Syndicat des employés de l'Hôpital général de Montréal c. Sexton*, 2007 CarswellQue 110 (S.C.C.).

EMPLOYMENT STANDARDS: Banning smoking on employer's property

Question: Can an employer prohibit employees from smoking anywhere on company property, even if it's outside? How does the law on smoking in the workplace compare in different provinces?

Answer: Employers have been successful in implementing smoking policies that prohibit smoking anywhere on company property. However, they should not breathe too easy just yet, as courts have not fully determined the issue of whether such a policy violates human rights legislation.

In a recent Ontario case, an arbitration board found a smoking ban implemented by Invista Canada did not violate its collective agreement. Despite the fact another company policy prohibited many workers from leaving the premises during their shift, which essentially banned smoking for a complete 12-hour shift, the board found this total smoking ban on company property was permitted. It must be noted, however, the union did not challenge whether the provisions of the smoking ban violated human rights legislation and the union has reserved the right to raise that issue in a future grievance.

Both the *Charter of Rights and Freedoms* and human rights legislation prohibit discrimination on the basis of a disability. Whether smoking can be con-

Continued on page 6

Employee privacy trumps business interests

Arbitrator orders employer to stop asking for detailed medical information for short-term disability benefits

By Jeffrey R. Smith

In a faceoff between an employer's business interests and employee privacy, the British Columbia Arbitration Board has limited a B.C. company's requirements for medical information while a privacy complaint is decided.

Accenture Business Services, a consulting and outsourcing company, had a sick leave policy where it required a medical certificate for absences of more than five working days. More than four of these absences in one year sometimes resulted in a request for a medical exam.

Usually, Accenture would ask for a medical certificate or examination on a case-by-case basis. However, on March 20, 2006, it developed a short-term disability plan with its benefits administrator that included a form asking for information such as primary and secondary diagnoses, symptoms, all test results and consultation reports, medications taken, history of similar conditions, pregnancy, current treatment and specialist reports.

PRIVACY

The union grieved the plan and the settlement resulted in a new claim process with a form that only required general information related to the employee's ability to work and whether accommodation was needed. The new process also stipulated Accenture could request "further specific information to substantiate an employee's absence due to illness/injury" on a case-by-case basis. Accenture agreed this type of request would be used in limited circumstances.

Accenture followed the new process for about a year but eventually began asking for all information about employees' illnesses regardless of the circumstances. The company introduced a new form that was similar to the one used before the settlement. Claiming more than 60 per cent of short-term disability applicants were being asked for extra information, the union filed another grievance. It said Accenture was violating the process by demanding employees "compromise their right of privacy through unwarranted disclosure of personal medical information."

The union also requested interim orders requiring the company to stop requesting information beyond that on the general information form unless the union approved it, not require any medical information for absences of less than five business days and for no sick leave to be denied until a final ruling was made on the privacy grievance.

Accenture argued these requests were more restrictive than the previous settlement and it should be allowed to continue the regular practice at least until a final ruling was made. Because only the benefits provider received the information, it said, there was "minimal" infringement of privacy. The benefits provider maintained strict confidentiality and didn't share information with Accenture other than the basic information in a claims advice form.

Accenture also said if the union's request for the interim orders was granted and the company won the case, it wouldn't be able to recoup the loss from false claims it couldn't substantiate if the orders were made. Because the union's demands were so strict, it would in fact restrict the agreement they had reached in the previous settlement.

The board found the sensitivity of the employees' privacy interests warranted interim relief. If Accenture was allowed to continue to request all information, it said, there would be no way to undo it if in the end it was decided the employer was asking for too much.

It also found Accenture wasn't limiting its requests for additional medical information to limited circumstances, since it was doing so in 60 per cent of applications. This had the effect of "essentially requiring independent medical examinations" of that 60 per cent, which "it is well established that given the sensitive nature of medical information, additional medical examinations by an independent party may only be required in exceptional circumstances."

In addition, the board said, if Accenture was prevented from requesting additional information on the new form by an interim order, it would still be able to ask for the basic information on the previous form from the settlement.

Given it found the interim orders for Accenture to stop requesting more detailed medical information wouldn't hurt the company but without them employees' privacy could be harmed, the board granted the union's request for the interim orders.

"The interim relief sought is the protection of employee privacy, entitlement to sick leave, the prevention of unreasonable demands for medical information and unreasonable denials of sick leave during the time period in which the parties must wait for the matter to be arbitrated," the board said. "

Canadian Employment Law Today will follow this case as it moves towards a final decision.

For more information see:

■*Accenture Business Services for Utilities v. C.O.P.E., Local 378*, 2008 CarswellBC 1640 (B.C. Arb. Bd.).

CASE IN POINT: HUMAN RIGHTS

Transgendered lawyer denied armed forces job

Sex status was only difference between lawyer and other successful candidates, says human rights tribunal

BACKGROUND

Applicant successful but no job after two years

BORN A MAN, Micheline Montreuil began living as a woman in the 1980s and became known as a lawyer, teacher, writer, radio host and politician in Quebec City. She also became involved in various fights for her rights as a transgendered person.

In 2002, Montreuil applied and successfully interviewed for a position as a grievance officer with the Canadian Forces Board. The board placed her on an eligibility list for when positions became open. However, after two years, she still didn't have a position, though other candidates with equal qualifications were hired.

The board claimed it didn't have enough French files to warrant hiring Montreuil, a French-only candidate. However, Montreuil suspected there was more to it and filed a complaint with the Canadian Human Rights Commission that she was discriminated against because of her transgendered status.

By Jeffrey R. Smith

The Canadian Forces Grievance Board has been ordered to pay a Quebec lawyer more than $39,000 for discrimination based on her transgender status she faced in applying for a job with the board.

Micheline Montreuil, 56, was a lawyer in Quebec City who was trained in industrial relations, administration and ethics. She also taught courses at two colleges and two universities. Montreuil was born a male but over time began dressing in female clothes and finally decided in the 1980s to live as a woman. She legally changed her name to Micheline and underwent hormone therapy to give herself female characteristics. She described her status as transgendered, or between "a normal man or woman."

In May 2002, Montreuil applied for the position of grievance officer with the Canadian Forces Board, which had been created two months earlier to examine military grievances filed by members of the Canadian Forces. Grievance officers investigated and reviewed the board's findings and served as specialists with board members and a competition open to the public was launched in April in which 10 positions were advertised. The job posting required applicants to have a university degree in human resources, law or industrial or labour relations. It also said the majority of positions were bilingual but "some are unilingual English or French."

Montreuil, whose first language was French, took the Public Service Commission of Canada English language exam twice and her proficiency level for oral interaction was sufficient but her written comprehension and expression fell below the requirements for the bilingual positions. However, she passed her application exam and was told on Oct. 31, 2002, she would be interviewed by the board.

Montreuil had her interview on Nov. 15, 2002, and it seemed to go well. She was evaluated according to knowledge, ability, competencies and personal attributes and scored well. The board indicated she place third of four candidates interviewed.

Qualified for position

On Dec. 30, Montreuil received a letter saying she had qualified and would be placed on an eligibility list used to fill positions when they became vacant. The board told her she would remain on the list until the end of March 2003.

Montreuil contacted the board several times over the next few months and was told the board was waiting for a budget increase. However, she wasn't offered a job.

In October 2003, the board planned to clear a backlog of grievances and hired three unilingual English grievance officers. Montreuil called again and asked if it would be hiring more, but the board said no. She was told the board didn't need unilingual French officers at the time as the French grievances were easily covered by the bilingual officers. It hired unilingual English officers because they had a sufficient number of English grievances. The board said it extended the eligibility list to March 2004 and would call if there was an increase in French grievances and a unilingual French officer was needed.

Montreuil felt she wasn't being hired

Continued on page 5

CASE IN POINT: HUMAN RIGHTS

Grievance board knew it wouldn't have work for candidate

...continued from page 4

because of her transgender status, which was the only characteristic differentiating her from the unilingual English candidates. She felt language was an excuse covering up the fact she was being discriminated against. On Aug. 24, 2004, she filed a complaint with the Canadian Human Rights Tribunal for discrimination based on sex in the board's refusal to hire her.

Board knew she wouldn't be hired

The tribunal found that Montreuil's application was never outright rejected, but it didn't intend to hire her. She was told she would be hired if French grievances increased "considerably," but the board knew there were not enough French files to warrant hiring a unilingual French officer. Even if there was some increase, it could hire bilingual officers to cover it. With that qualifier, it could leave her on the eligibility list without actually hiring her. It had also advertised on the job posting that unilingual French positions were available, which wouldn't make sense if there wasn't enough of a caseload for them.

"By placing Ms. Montreuil on an eligibility list for which there was never any need, the board in effect rejected her application because it was imposing a condition that was impossible to fulfill," the tribunal said. Considering the other three candidates who interviewed at the same time as Montreuil were all hired and the only difference other than the fact they were unilingual English was her transgendered status, the tribunal found there was a prima facie case of discrimination.

The tribunal looked at the board's statistics for 2004 to 2005, which showed French grievances accounted for between 15.6 per cent and 35 per cent of the total files. Since the board didn't see the need for a unilingual French officer in the year there were 35 per cent French files, the tribunal concluded the board "will never need a unilingual French grievance officer."

Since the board hired unilingual English officers even though bilingual officers could handle the English files as well, the tribunal found the only characteristic that differentiated Montreuil, the only unilingual French candidate, from the English candidates who were hired was that she was transgendered. This led to discrimination, whether intentional or not, on the basis of Montreuil's sex.

"It is possible that the discriminatory reasons were not the only reasons for the decision not to hire Ms. Montreuil," the tribunal said. "That is not enough when discriminatory considerations are also factors in the decision not to hire."

Since the position for which Montreuil applied was for a term of at least 12 months, the tribunal awarded compensation for the loss of 12 months' salary for a grievance officer minus her actual income for one year from her estimated start date. The tribunal denied Montreuil's claim for damages for pain and suffering, finding there was no evidence to support it. It did find, however, she was entitled to $5,000 because the board acted recklessly, though not willfully.

"Given the nature of the board's mandate, we are entitled to expect that it be more sensitive to the consequences of its practices," the tribunal said.

The board was ordered to pay a total of $44,174 to Montreuil for discriminating against her on the basis of her sex when it failed to hire her.

For more information see:

■*Micheline Montreuil v. Canadian Forces Grievance Board*, 2007 CHRT 53 (Can. Human Rights Trib.).

Applicant denied job after sex change

MICHELINE MONTREUIL isn't the only transgendered person to lose a job offer after a prospective employer found out about her condition. A former U.S. army commander had a job offer rescinded after her prospective employer learned she was undergoing a sex change.

Diane Schroer, 52, applied and was interviewed for a job at the Library of Congress's Congressional Research Service in 2004. When she interviewed, she was living as a man named David. Impressed by Schroer's resumé that included seven years in the U.S. army's special forces command followed by a position as director of an organization that tracked international terrorists, the Library of Congress offered her the job.

After the offer was made, Schroer went to lunch with her would-be supervisor. At the meeting, she told the supervisor she was undergoing operations to become a woman. She showed pictures of herself dressed as a woman to ease any concerns about what she would wear to work.

At the end of the lunch, the supervisor told Schroer she had "given me a lot to think about" and the next day called her to say she wasn't "a good fit."

Schroer filed a sex discrimination case under the U.S. *Civil Rights Act* in 2005, demanding the job be offered to her again plus damages.

The Library of Congress said the job offer was rescinded because it needed to fill the position quickly and Schroer's transgender status would result in more time to make a background check for security clearance. It also said Schroer's contacts with military intelligence and her credibility with Congress might suffer because of her transition to a female.

The case is being heard in U.S. District court and it may have to determine whether the *Civil Rights Act* prohibits discrimination based on gender identity.

Employer must give choice to accept new terms or resign

...continued from page 1

Secondly, the Court of Appeal disagreed with the lower court's position that this case was one concerning a constructive dismissal.

No immediate impact on employee ruled out constructive dismissal

"In many cases, where an employer imposes a unilateral change of a fundamental term of an employment contract, the employee's response will be to sue for constructive dismissal because the change will have an immediate and undesired impact on the employee, the Court of Appeal said. "In the present case, the unilateral change did not have an immediate impact on the employee. Wronko's response to the attempted change and Western's reaction to his response bring this case outside the constructive dismissal context."

The distinction appears to be that the Court of Appeal viewed the change as not having an immediate impact on the employee and the employer effectively terminated the employee, therefore not bringing Wronko within the constructive dismissal context.

In drawing this distinction, the Court of Appeal stated that Western should have either informed Wronko that refusing the new provision would result in his termination and re-employment under the new term would be offered, or permitted him to continue working pursuant to the original provision. Since it did not choose the former, it acquiesced to allow Wronko to continue employment pursuant to his original termination provision and, since he was found to have been terminated, he was entitled to the two year severance package.

Reasonable notice of change not enough if employee objects

This decision seems to indicate reasonable notice of a unilateral change to a term of an employment contract, by itself, is not enough when the employee objects to it. In addition to the notification, the employer must inform the employee that refusal to accept the new term will result in termination. If this warning is not provided, an employer will likely be found to have wrongfully dismissed the employee.

For more information see:

- *Wronko v. Western Inventory Service Ltd.*, 2008 CarswellOnt 2350 (Ont. C.A.).

ABOUT THE AUTHOR

Ronald S. Minken

Ronald S. Minken is a senior lawyer at Minken & Associates P.C., an employment law boutique located in Markham, Ont. He can be reached at (905) 477-7011 or www.EmploymentLawIssues.ca. Minken gratefully acknowledges Kyle Burgis and Sara Kauder for their assistance.

ASK AN EXPERT

...continued from page 2

sidered a disability has not been fully determined. In *R. v. Ample Annie's Itty Bitty Roadhouse*, the Ontario Court of Justice determined smoking is not a disability under the charter but also said determining a disability under the charter is different than determining it under human rights legislation.

In C*ominco Ltd. v. The United Steelworkers of America, Local 9705*, a British Columbia arbitration board determined that smoking is a disability. Provided with ample scientific evidence, the board found nicotine was as addictive as cocaine or heroine. As a result, Cominco was not able to implement a new workplace smoking policy that would prohibit the use and possession of tobacco anywhere on company property as it would discriminate against smokers who were considered disabled under human rights legislation. The extent that an employer would be required to accommodate smokers remains to be determined.

Despite the ruling in *Cominco*, more employers are successfully prohibiting smoking on their property, forcing smokers to use public property. The success of these programs is likely related to society's changing attitude towards smoking and the increasingly stringent provincial smoking regulations.

Although there is currently no provincial legislation that requires employers to prohibit smoking on all property, Saskatchewan, Manitoba, Ontario, Quebec, New Brunswick, Nova Scotia and Newfoundland and Labrador prohibit smoking in all enclosed public places and workplaces, including restaurants and bars. A number of provinces also prohibit smoking on restaurant or bar patios as well as in vehicles operated for a work purpose. British Columbia, Alberta and Prince Edward Island prohibit smoking in most indoor workplaces, although all allow limited smoking indoors in restaurants, bars and venues such as casinos, bingo halls and bowling alleys. In these provinces many municipalities enforce stricter standards.

For more information see:

- *Cominco Ltd. v. U.S.W.A., Local 9705* (February 29, 2000), Doc. A-046/00 (B.C. Arb. Bd.).
- *Kingston Independent Nylon Workers Union v. Invista Canada*, 2007 CarswellOnt 9156 (Ont. Arb. Bd.).
- *R. v. Ample Annie's Itty Bitty Roadhouse*, 2001 CarswellOnt 6078 (Ont. C.J.).

Brian Johnston is a partner with Stewart McKelvey Stirling Scales in Halifax. He can be reached at (902) 420-3374 or bjohnston@smss.com.

MORE CASES

COMPILED BY JEFFREY R. SMITH

LABOUR RELATIONS: Harassed employee's constructive dismissal claim belongs in arbitration: Court

AN ALBERTA COURT has refused to hear a woman's complaint of constructive dismissal due to harassment, ruling it should be handled though the grievance process outlined by her collective agreement.

Tracy Granter worked for Hood Packaging Corporation in Calgary. In September 2006, while training her on new equipment, a co-worker harassed her with inappropriate behaviour and comments. Granter complained to her supervisor, who told her he would discuss it with the co-worker.

When the harassment continued and two more complaints didn't get her anywhere, Granter brought the matter to the HR department in October 2006. The harassment stopped for a while but soon resumed. In November, she requested a transfer to a different work crew but her supervisor denied the request.

The harassment continued and in January 2007 another worker saw Granter's co-worker touch her inappropriately. The co-worker was warned but the harassment didn't stop until Granter started having panic attacks. She "begged and pleaded" to be moved but she was told to ignore the co-worker and continue working as normal. The harassment continued for several months.

Granter went on short-term disability leave for seven weeks starting on June 1, 2007. She gave a written complaint to the plant manager, the HR co-ordinator and a union member. She asked what she could do to stop the harassment but the plant manager told her "the issue was dead." The HR department said it investigated her complaint and disciplined the co-worker in August 2007 for situations where there were witnesses.

The collective agreement provided for a grievance procedure for disputes between the company and any employee and the right of the company to discipline or dismiss employees for "neglect of duty, insubordination and dishonesty."

Granter felt the way her supervisors were handling the situation rendered the grievance process useless and the causes for dismissal in the collective agreement didn't include sexual and emotional harassment. As a result, she filed a claim in court for constructive dismissal based on the harassment she faced and management's lack of action.

"Ms. Granter's allegations, if proven, describe a working environment at Hood Packaging that was appalling: conduct that was abusive, sexist and intolerable and a callous disregard by management of both the situation and the inaction of her supervisors," the court said. However, it continued, her claim was for constructive dismissal against Hood, not the harassment, which was within the jurisdiction of the collective agreement. Therefore, the court denied her claim.

"The essential nature of Ms. Granter's dispute with her employer relates to the improper constructive termination of her employment and therefore alleges a violation of a term of the agreement that the employer will discharge her only for cause," the court said. "It comes within the terms and provisions of the collective agreement." See *Granter v. Hood Packaging Corp.*, 2008 CarswellAlta 364 (Alta. Master).

LABOUR RELATIONS: Memo to employees outling position didn't undermine union: Board

A REGINA HOTEL did not commit an unfair labour practice when it sent a memo to employees regarding its position in labour negotiations, the Saskatchewan Labour Relations Board has ruled.

In the fall of 2007, the West Harvest Inn began negotiating with its union for a new collective agreement. The two sides agreed on some issues but at an Oct. 15, 2007, meeting, the hotel said any agreement must be based on five of its proposed terms, including wages. The union disagreed and cut off talks.

After the meeting, the union president passed out buttons and spoke briefly to a few members on how things were proceeding but didn't elaborate.

The hotel sent a letter to the union confirming its position and sent out a memo with all employees' paycheques on Oct. 19 outlining its proposals on the issues it was insisting on. Many employees were confused because the total wage increase was different from what the union had told them. The hotel included a clothing allowance in the calculations while the union didn't consider it part of the proposed wage increase. The union also felt it wasn't the employer's place to communicate the issues to the employees and all the memo did was confuse them and undermine the union's credibility.

The hotel argued the memo didn't accuse the union of any misrepresentation and merely set out its position accurately. It had no intentions of undermining the union and sent the memo to all employees so no one was singled out.

The board found everything in the memo was outlined to the union previously so it could not be considered bargaining directly with employees. The union also had the opportunity to inform its members before the memo went out and all employees received it equally.

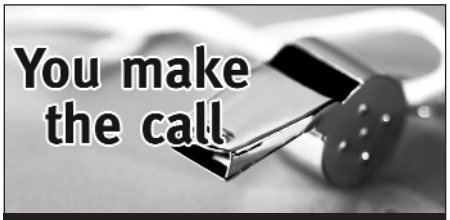
"There is little in the memo other than a straightforward recitation of the facts relating to the progress of the negotiations and a straightforward recitation of both what the employer wanted to take away from the employees in the next collective agreement and what it was prepared to give," the board said. "There is nothing in the memo that even tried to persuade the reader of the employer's position as being better than the union's, much less anything the board finds would restrain, intimidate, threaten or coerce an employee of average intelligence and fortitude to accept the employer's terms."

The board found the hotel didn't commit an unfair labour practice and dismissed the union's complaint. See *U.N.I.T.E.-H.E.R.E., Local 41 v. West Harvest Inn*, 2007 CarswellSask 792 (Sask. L.R.B.).

Contract workers claim employment status

This instalment of You Make the Call looks at a dispute in Tax Court over whether five workers were independent contractors or employees.

Promotions C.D. was a distributor of non-food products inside grocery stores and pharmacies in the province of Quebec. The company had a mix of salaried employees and workers it considered to be "self-employed representatives." Michel Blais, Antoine Corbeil, David Franks, Robert Lavoie and Denis Pilon were five of these representatives who each signed a contract to take orders from Promotions' customers, picking up merchandise at the regional warehouse and delivering and setting it up in the stores.



How would you handle this case? Read the facts and see if the judge agrees

The contracts set out the terms and conditions for the workers to sell Promotions products and described them as non-exclusive independent contractors. Promotions paid them on commission every two weeks and they had to pay their own costs. Promotions provided each with a handheld computer and equipment racks but nothing else. The workers were also free to sell products from other companies, as long as they didn't compete with those of Promotions, and hire their own sales staff to help without any input from Promotions. Each worker carried business cards provided by Promotions.

Pilon worked for Promotions for 12 years, Blais and Franks for eight years and Corbeil and Lavoie for five years. Their contracts were renewed automatically on an annual basis. They decided on their own hours of work and recruited their own customers in addition to Promotions customers.

Though the five workers reported their payment from Promotions as business income each year and registered with the government for GST and provincial tax purposes, they claimed they accepted the terms of the contracts only so they could "work and earn a living." After working for Promotions for many years, they claimed the circumstances were that of an employment relationship, despite what the contracts that were automatically renewed said. They also claimed Promotions instructed them setting up proper displays but Promotions said it didn't give any formal training to its contractors.

You make the call

- ☑ Were the five workers employees of Promotions C.D.?
  OR
- ☑ Were they independent contractors?

IF YOU SAID they were independent contractors, you're right. The relationship between Promotions and the workers was not necessarily defined by the contracts, the court said, but rather the reality of the circumstances. However, it found the relationship was that of a contract of service.

The court felt there was no element of subordination in the working relationship as the workers were free to decide their own hours and weren't providing their services on an exclusive basis. They assumed the costs of doing business and, except for the computer and product display materials, owned their own tools need to do the job.

The only control Promotions had was over the pricing of merchandise, the court found. However, this wasn't an element of subordination in this case as it was Promotions who contracted with the customers while the workers were middle men.

"It can be said the fundamental distinction between a contract for services and a contract of employment is the absence, in the former case, of a relationship between the provider of services and the client," the court said. "And, in the latter case, of the right of the employer to direct and control the employee."

Since Promotions had no control over the workers and their tools, the court found the workers were under legitimate contracts of service and weren't employees. CELT

For more information see:

■*Promotions C.D. Inc. c. Ministre du Revenu national*, 2008 CarswellNat 2499 (T.C.C. [Employment Insurance]).

CANADIAN
Employment Law Today

Published biweekly 24 times a year
Subscription rate: $299 per year

Customer Service
Tel: (416) 609-3800 (Toronto)
(800) 387-5164 (outside Toronto)
Fax: (416) 298-5082 (Toronto)
(877) 750-9041 (outside Toronto)
E-mail:
carswell.customerrelations@thomson.com
Website: www.employmentlawtoday.com

THOMSON
CARSWELL

One Corporate Plaza
2075 Kennedy Road, Toronto,
Ontario, Canada M1T 3V4

Director, Carswell Business: Ben Wentzell
Publisher: John Hobel
Managing Editor: Todd Humber
Editor: Jeffrey R. Smith
E-mail: jeffrey.r.smith@thomsonreuters.com

We acknowledge the financial support of the Government of Canada, through the Publications Assistance Program (PAP), toward our mailing costs.
Canada
GST #897176350
Publications Mail Registration No. 7651