

Employee who resigns in mid-year wins pro-rated share of annual profits

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A recent decision of the Ontario Court of Appeal has once again demonstrated the importance of clarity in employment contracts. *Moore v. Thomas Fuller Construction Co. (1958)* (November 4, 2003) involved the claim of Richard Moore, a former president of the company, to \$133,230, or 7/12 of the annual share of the profits to which he would have been entitled had he not resigned in 1999.

Under the terms of his unwritten employment contract, Moore was to be paid a salary of only \$95,000; the principal attraction of the position was his entitlement to ten per cent of annual net profits. The company's year end was December 31 and the amount that was available for profit sharing was calculated the following April. Moore and the company did not discuss whether he would be entitled to a share of the profits if he left the company before the fiscal year end.

When Moore tendered his resignation in June 1999, he made no mention of an entitlement to a share in the company's 1999 net profits; nor was there any evidence to suggest that he believed that any other executive who had left the company's employ partway through a year had ever received a share of that year's profits. However, the trial judge hearing Moore's claim for his share of the profits noted that, when Moore resigned, the company appeared to be on track for a net loss. It was only in the latter half of 1999, after Moore's departure, that it became apparent that the company was headed for a profitable year. In the end, the company earned \$2,283,943, ten per cent of which would have been Moore's share had he remained.

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In ruling in Moore's favour, the trial judge found that the profit-sharing plan was an integral part of Moore's compensation package and had been a major incentive for him to accept the position. Furthermore, it was not a discretionary component of his compensation, as it was calculated and paid whenever profits exceeded the company's losses according to a known formula.

The judge also held that there was only limited evidence of a past practice of not paying out profits to departing executives. He found that the only example Moore may have known about related to an executive who left during a year in which there had been no net profits to share. Finally, the judge found that the company did not expressly make known to Moore that his entitlement depended on his remaining employed for the entire fiscal year.

The company appealed to the Ontario Court of Appeal solely on the issue of the evidence of past practice. In dismissing the company's appeal, the Court noted that the judge had ample evidence

on which to find that the company's past practice was unclear, and that Moore was unaware of much of it. It noted the judge's ruling that the profit-sharing scheme was an integral part of the employment contract and stated the following about the company's options when it hired Moore:

"The company could have negotiated a different contract with Mr. Moore that, for example, made the payment of the bonus discretionary, or conditioned the bonus on service for a full year. As the company did not do so, we are of the view that the trial judge reached the correct result in the circumstances of this case."

For examples of cases in which the employer has limited its liability upon the termination of the employment relationship through clear contract language, see ["Ontario Court of Appeal upholds validity of termination clause for independent contractor"](#) on our What's New page and ["Clause limiting wrongful dismissal damages to *Employment Standards Act* minimum upheld by Court"](#) on our Publications page.

For further information, please contact [Jacques A. Emond](#) at (613) 940-2730.