

# Ontario Court of Appeal upholds validity of termination clause for independent contractor

**Date :** January 1, 2004

The importance of written agreements in limiting an employer's liability on termination of an employment-like relationship has once again been demonstrated in *Aqwa v. Centennial Home Renovations Ltd.* (March 28, 2003), a decision of the Ontario Court of Appeal. The decision reversed a lower court ruling in which Ron Aqwa, the plaintiff contractor, was awarded five months of average commissions and one year's bonus.

The award by the trial judge of damages in lieu of notice came in the face of a clause in the contract that entitled either party to "terminate this agreement at any time without notice or penalty" and despite his having found that the plaintiff was not an employee. The judge had also rejected Aqwa's claim that he did not fully understand the contract when he signed it, noting that Aqwa had worked in a similar capacity before and understood that he was being hired, not as an employee, but as an independent sales agent.

The trial judge arrived at the conclusion that Aqwa was entitled to damages after reviewing a number of Supreme Court of Canada decisions, including *Wallace v. United Grain Growers Ltd.* and *McKinley v. BC Tel* (see ["'Fairly, reasonably and decently': Employers obliged to deal in good faith with dismissed employees, Supreme Court rules"](#) and ["'Unreasonable and unjust': SCC says not just any dishonest conduct by employee is cause for dismissal"](#) on our Publications page). These cases discuss the central role of employment in people's lives, the power imbalance inherent in the employment relationship, and the particular vulnerability of employees at the point of dismissal.

## **NOT AN EMPLOYEE; NOT AN INDEPENDENT CONTRACTOR**

Although the trial judge had determined that Aqwa was not an employee, and the Supreme Court of Canada decisions had dealt with employment relationships, the judge held that the cases were relevant to Aqwa's situation. He found that Aqwa's relationship with Centennial was "a modern-day emerging relationship which is more closely allied to the employment relationship than it is to the traditional independent contractor relationship". The judge pointed to a number of aspects of the relationship that supported his conclusion:

- Centennial had trained and equipped Aqwa;
- Aqwa's business activity was effectively limited to one geographic area;
- Aqwa's sales were subject to Centennial's approval; and
- Centennial referred to him as a "branch manager".

Yet, the judge also noted, Aqwa was, in some ways "on his own".

When the contract was abruptly terminated by Centennial, the judge stated, Aqwa was "instantly cut off from the prospect of earning income", while Centennial could always find another sales agent. The judge held that this imbalance required judicial intervention:

"The courts have occasionally had to read into a contract a provision which the parties, had they been in an equally informed bargaining position, would likely have included themselves in order to bring a degree of fairness into the relationship. ... A provision needs to be incorporated requiring the giving of reasonable notice by either party to terminate the contract and further providing for payment in lieu thereof."

However, as this was not an employment relationship, the judge held that the notice period should be shorter than for a case of wrongful dismissal. The employer appealed.

### **COURT OF APPEAL: CONTRACT NOT UNFAIR**

In a short oral judgment, the Ontario Court of Appeal reversed the trial judge's decision. Noting that the trial judge had found as a fact that Aqwa had understood the contract he was signing, the Court further expressed the view that there was no evidence of unfairness either in Centennial's conduct or in the contract itself:

"There was no evidence of pressure or duress or the other usual indicia of unconscionability. Nor was [Aqwa] in a vulnerable position when presented with the agreement. He had been employed in the field for a number of years and saw employment with [Centennial] as an opportunity to improve his financial situation. Finally, when the terms of the contract are viewed in their entirety, we see nothing unfair in those terms. Several terms operated to the benefit of [Aqwa]. For example, he could pursue other work as long as it did not conflict directly with the products sold by [Centennial], he could work at his own pace and on his own hours, and he could sever his connection with the appellant at any time he saw fit without penalty.

In summary, we see no justification for rewriting the agreement entered into by the parties."

### **In Our View**

Neither the trial judge nor the Court of Appeal explicitly referred to the case law on "dependent contractors", the intermediate category between employees and independent contractors, although the trial judge essentially found that Aqwa was a dependent contractor. Some courts have

elaborated the test for determining whether one is a dependent contractor as involving three factors:

- the duration and permanency of the relationship;
- the degree of reliance or closeness in the relationship; and
- the degree of exclusivity in the relationship.

If a court determines that a plaintiff is a dependent contractor, it is more likely to rule that the plaintiff is entitled to reasonable notice upon termination, although the notice period may be shorter than would be the case for an employee. In any event, whether an employer is dealing with an independent contractor, a dependent contractor or an employee, it is clear that they would be well advised to include a termination provision in the contract.

It is possible that a court would decline to enforce a provision such as the one at issue in this case. (Also, if a plaintiff is clearly an employee, he or she would be entitled to the statutory minimum notice under the *Employment Standards Act*.) However, if it can be demonstrated that a contract was fair and the bargaining power of the parties not too unequal, even a harsh termination provision may be enforceable. For contrasting examples of courts' attitudes towards termination clauses in an employment context see ["Clause limiting wrongful dismissal damages to \*Employment Standards Act\* minimum upheld by Court"](#) and ["Court of Appeal upholds ruling that employee isn't on 'fixed term'"](#) on our Publications page.

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