

# Employer's policy manual no bar to reasonable notice for employee, Court of Appeal rules

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Regular *FOCUS* readers are well aware that, in the absence of clear contractual terms to the contrary, employment contracts are terminable only on reasonable notice, and wrongfully dismissed employees can sue for damages in lieu of reasonable notice. As the Supreme Court of Canada decision in *Machtinger v. HOJ Industries Ltd.*, put it:

"In Canada it has been established since at least 1936 that employment contracts for an indefinite period require the employer, absent express contractual language to the contrary, to give reasonable notice of an intention to terminate the contract if the dismissal is without cause. ... I would characterize the common law principle of termination only on reasonable notice as a presumption, rebuttable if the contract of employment clearly specifies some other period of notice, whether expressly or impliedly."

This principle has been reasserted by the Ontario Court of Appeal with respect to employment terms contained in company policy manuals in *Christensen v. Family Counselling Centre of Sault Ste. Marie* (November 16, 2001). The case arose when Ruth Christensen's employer experienced funding cuts imposed by the provincial government in 1997. Christensen was terminated as a result and was given only ten weeks' notice, even though she had been hired in 1990. Christensen took her employer to Court.

At issue in the trial was the effect of the employer's staff manual which provided that, on termination, professional staff were to receive one month's notice "and/or as established in legislation". The letter in which the offer of employment was made contained no specific reference to termination, but included a reference to the manual "which contains the conditions of employment and agency policies". The manual was not included with the offer letter. When Christensen did receive a copy of the manual, she paid no particular attention to it, nor were its provisions explained to her.

## FOUR POSSIBLE MEANINGS

Assuming the reference in the manual to "legislation" meant the *Employment Standards Act (ESA)*, the trial judge held that the notice clause was capable of being interpreted in four distinct ways:

- It set a ceiling for termination pay, in violation of the minimums established by the *ESA* and thus entitled Christensen to sue for reasonable notice damages.
- It provided for the greater of one month's pay or notice required under the *ESA*.
- It provided for one month's pay plus the notice required under the *ESA*.

- It permitted the employee to sue for wrongful dismissal, but set a minimum of one month's pay in lieu of notice in any event.

Because of this ambiguity in the manual's terms, the trial judge held that, even if it did form part of the contract, it was not sufficiently clear to bar Christensen from receiving damages in lieu of reasonable notice. In fact, two of the possible interpretations actually permitted suing for wrongful dismissal. In the result, the trial judge awarded Christensen eight months' notice.

This result was reversed by the Divisional Court, which held that the trial judge had implicitly found that the policy manual formed part of the employment contract, and that its provisions were not unfair, onerous or the result of undue influence being exerted on Christensen. It concluded that the trial judge had erred in ruling that Christensen could sue for wrongful dismissal damages.

## **REMEMBER *MACHTINGER***

The Court of Appeal restored the trial judge's award, faulting the Divisional Court for having found that the trial judge had determined that the policy manual formed part of the contract. In fact, the Court of Appeal noted, the judge had declined to make such a determination, because she had been of the view that, regardless of the answer, the termination provisions were too ambiguous to rebut the presumption of Christensen's entitlement to common law notice damages.

More importantly, the Court held, the Divisional Court had ignored the key principle in *Machtlinger*:

"[T]he Divisional Court erred in failing to give effect to the principle in *Machtlinger v. HOJ* ... . The determinative question here was not whether the termination provisions in the manual were unfair, onerous or the result of undue influence or any power imbalance. Rather, as found by the trial judge, the case turned on whether the termination provisions, if they formed part of the contract, were sufficiently clear to rebut the common-law presumption. The trial judge's conclusion that they were not was entirely reasonable and ought not to have been interfered with."

## **In Our View**

Implicit in this decision is that the provisions of a policy manual *could* be used to limit an employee's entitlement to reasonable notice damages, but the manual must form part of the employment contract, and its termination provisions must be sufficiently clear and brought to the employee's attention. Even then, however, issues specific to employment contracts will also have to be addressed, such as whether the restrictive terms are the result of the unequal bargaining power that often characterizes these sorts of contracts. (For more information on this subject, see ["The effective employment contract"](#) on our Publications page and ["Clause limiting wrongful dismissal damages to \*Employment Standards Act\* minimum upheld by Court"](#) on our What's New page.)

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