

## Long-serving employee on serial short-term contracts wins record notice and punitive damages

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In a decision rendered on April 12, 1999, an Ontario Court judge has reiterated the position taken in *Ceccol v. Ontario Gymnastic Federation*, reported in the July 1999 issue of *FOCUS* (see "[Term contract does not a temporary employee make](#)" on our Publications page), that employers cannot avoid their obligation to pay reasonable notice by having their employees work on a series of short-term contracts. Moreover, in this case, the Court awarded the employee 30 months' notice, currently the record for an Ontario court, as well as punitive damages of \$20,000.

In *Ben David v. Congregation B'nai Israel*, a 62 year old rabbi was given nine months' notice that his latest term contract would not be renewed, after more than 25 years of service on a series of short-term contracts. Not surprisingly, Ben David took the position that, despite the term contracts under which he had been employed, he had in fact been an indefinite term employee entitled to reasonable notice.

### **CONTRACTS NOT "SERIOUS DOCUMENTS"**

The Court agreed, holding that the term contract was not a legally enforceable document. The Court surveyed the long series of short-term contracts and found that they had never been "considered as serious documents to be relied on by the parties". In support of this finding, it noted that, at times, Ben David had worked without a contract, or under a contract that the parties had not signed.

As well, the Court pointed out, the renewal notices required by the contracts had never been given to Ben David by the employer in the past, nor had the fact that his contracts were for fixed terms ever been explained to him. As was the case in *Ceccol*, the Court expressed the view that the documents related more to the renegotiation of Ben David's salary than to the term of his employment.

### **UNACCEPTABLE BEHAVIOUR LENGTHENS NOTICE PERIOD**

The Court awarded Ben David 30 months' notice, based on the usual factors of his age and years of service, the character of his employment and his prospects for finding similar work. In awarding the lengthy notice period, however, the Court also took account of what it considered to be the employer's unacceptable conduct in misleading the employee as to his status and then terminating him without explanation: "The [employee] trusted his employer to act fairly. He felt they had

common interests. The [employer] prepared documents and the [employee] signed them without close scrutiny as to the period of employment. ... Eventually the [employer] tried to unilaterally exercise its power by relying on a term in a document which it alleged to be in its favour. This is not acceptable.

The [employer] was not acting in good faith when the [employee] was handed the notice of termination letter ... . In view of my findings of how the [employer] supported and encouraged the [employee to become a rabbi and the spiritual leader of the congregation], they owed him the decency of explaining why his contract would not be renewed. They did not."

### **"CRUEL, ABUSIVE, INSOLENT AND HURTFUL"**

As the Supreme Court of Canada stated in *Wallace v. United Grain Growers Ltd.*, which we reported in the January 1998 issue of *FOCUS* (see ["Fairly, reasonably and decently": Employers obliged to deal in good faith with dismissed employees. Supreme Court rules"](#) on our Publications page), heavy-handedness in the manner of dismissal cannot, by itself, lead to punitive or aggravated damages against the employer, but may be considered when determining the length of the notice period. To win more than notice damages, an employee must show that the employer's objectionable conduct amounts to a cause of action separate and distinct from the wrongful dismissal itself.

The Court agreed with Ben David that the employer's conduct, which it termed "cruel, abusive, insolent and hurtful" did constitute an independent cause of action. Among the actions cited by the Court was the employer's decision to plead cause against Ben David, based on allegations that the Court stated were unfounded. The allegations of cause were withdrawn shortly before the trial.

While not indicating the precise nature of the allegations, the Court described them as a "personal attack" not just on Ben David, but on his family as well. This attack was then aggravated by the employer's decision to dismiss Ben David's wife from her position. The Court also pointed to a letter written by the President of the employer's Board of Governors which criticized Ben David for having decided to sue, and it stated that the purpose of the letter was to denigrate Ben David in the eyes of the congregation.

Finally, the Court referred to the fact that, on an important Jewish holiday, a member of the employer refused to recognize Ben David and his son for the purpose of constituting a "minyan", the group of worshippers required for the service to begin. The Court found this conduct to be malicious, noting that the synagogue was the only one in town where Ben David and his family could worship.

### **In Our View**

With the overruling by the Ontario Court of Appeal of the result in *Kilpatrick v. Peterborough Civic*

*Hospital* in which an employee had been awarded 30 months' notice (see "["Kilpatrick award reversed on procedural grounds"](#)" and "["Hospital CEO with six years' service awarded 30 months' notice"](#)" on our Publications page), this case represents the high water mark for length of notice awarded by an Ontario court. It is, therefore, another indication of judges' increasing willingness to go beyond the customary 24-month boundary that had previously been in effect.

In the event of an appeal, it is likely that there will be close scrutiny of the award of punitive damages, particularly because the notice period had already been lengthened due to what the Court viewed as the callous manner in which the employee had been dismissed. Nonetheless, this case serves as another reminder of the consequences when the termination of a long-term employee is mishandled.

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