



EMPLOYMENT LAW SERIES

Peter Israel *General Editor*

# The Written Contract of Employment

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
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### III. Can the Agreement Contract Out of General Billposting?

The rule of *General Billposting*<sup>30</sup> denies an employer the right to terminate unlawfully and then insist upon compliance with the restrictive covenant in its favour. The accuracy of the statement of law is not without debate.

The real issue that emerges from this principle is whether the drafter may fashion a covenant that contemplates dismissal, rightly or wrongly, and yet requires the terminated employee to adhere to the restrictive covenant.

The first step is to understand the development of the rule of *General Billposting*.

Stinson J of the Ontario Superior Court in *Zesta Engineering* compared the rule of *General Billposting* with the duty of a fiduciary and concluded that, just as an employee is not bound by a non-competition clause if he is dismissed without cause and without notice, so is a fiduciary relieved of his obligations if he is unfairly terminated:

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27 *Ibid* at paras 303, 305-6.

28 *Evans v Sports Corporation*, *supra* note 23.

29 *Rhebergen v Creston Veterinary Clinic Ltd*, 2014 BCCA 97.

30 *General Billposting Co v Atkinson*, [1909] AC 118 (HL).

An analogous situation was considered in *General Billposting Co. v. Atkinson*, ... where it was held that an employer was precluded from enforcing a restrictive covenant against competition, where the employer had dismissed the employee without cause and without notice. This makes sense, because to allow employer to enforce the restrictive covenant would be to allow it to benefit from its own breach of contract. This analysis applies equally to a general fiduciary obligation not to compete with one's former employer.<sup>31</sup>

The most recent appellate authority on this subject is the 2011 Alberta Court of Appeal decision in *Globex Foreign Exchange Corporation v Kelcher*.<sup>32</sup> The substantive decision was not based on this issue because the covenants were found to be unenforceable in any event.

The majority decision, written by Hunt JA, did, however, review the law on this issue and concluded that an employer that had acted in breach of its contractual obligation by dismissing an employee unfairly could not assert a claim in its favour to enforce the restrictive covenant against the employee. Apart from following *General Billposting*, the decision also spoke to the policy reasons underlying in this view. The primary argument was that to hold otherwise would allow a company to hire a competitor, extract the restrictive covenant, and then shortly thereafter dismiss, which would promote unfair competition. The secondary argument was that to allow such conduct would “negate the consideration” for the bargain:

A second justification ... may be that enforcing a restrictive covenant in the face of wrongful termination *prima facie* negates the consideration (whether continued employment or something else) given by the employer to the employee when she accepted the restrictive covenant. Said another way, because the employment was prematurely and wrongfully terminated the employee will not “have received, during the period of his or her employment, an extra amount of remuneration for having conceded to be bound by the restraint in the contract” ... .<sup>33</sup>

The majority decision referred to the 1990 decision of Cowan J of the BC Supreme Court in *Raymond Salons Ltd v Boucher*,<sup>34</sup> who found that the contract looked to the event of a wrongful dismissal and required that the covenant still apply. This was then found to be a complete answer to the issue. The issue pure and simple as determined in this decision was that the contract allowed for this very event and hence the covenant was to be enforced:

31 *Zesta Engineering Ltd v Cloutier*, 2010 ONSC 5810 at para 183.

32 *Globex Foreign Exchange Corporation v Kelcher*, 2011 ABCA 240.

33 *Ibid* at para 54, quoting Peter Barnackle, *Employment Law in Canada*, 4th ed (Markham, Ont: LexisNexis, 2005) at § 11.48.

34 *Raymond Salons Ltd v Boucher*, 1990 CanLII 1763 (BCSC).



That clause in my opinion contemplates the occurrence of such an event as wrongful dismissal, yet provides that the provisions of Schedule “A,” which contains the restrictive covenant in issue “shall survive such termination.” That is the agreement which the defendant made, and, in my opinion she is bound by it.

The decision in *Raymond Salons* was given no weight by the majority because it provided, they said, a “weak foundation” for the argument.

One of the employees in *Globex*, MacLean, was subject to a covenant that applied to him on termination for “whatever reason.” Hunt JA reviewed the English decision in *Rock Refrigeration Ltd v Jones*<sup>35</sup> and concluded that the parties could not by private contract allow for the enforceability of a restrictive covenant in such context. In this precedent case, the covenant was applicable on the face of the contract as a consequence of a termination “for whatever reason.”

The employee in *Rock Refrigeration* was not unfairly dismissed, but rather resigned his employment. Nonetheless, his sense of temerity prevailed as he argued that the wording of the contract was unenforceable because of its broadly worded intent. Hunt JA referred to *Rock Refrigeration* as follows:

Simon Brown L.J. reiterated the principle in *General Billposting*, noting that “in cases of repudiatory breach by the employer, the employee is ... released from his obligations under the contract and restrictive covenants, otherwise valid against him, accordingly cannot be enforced”: at 13. He added that it did not matter whether the covenants included phrases such as “whether lawfully or not,” because “they are merely writ in water, unenforceable under the *General Billposting* principle.”<sup>36</sup>

As noted by Hunt JA, Simon Brown LJ’s view was shared by Morritt LJ, and Phillips LJ expressed reservations in *obiter* as to the general application of *General Billposting*:

In *obiter*, he expressed doubt about the continued appropriateness of the rule in *General Billposting*, specifically, whether its principle should apply to negative obligations placed on an employee by restrictive covenants. He described as “at least arguable” that “not every restrictive covenant will be discharged upon a repudiatory termination of the employment,” adding that it was unnecessary to resolve the issue: at 32.<sup>37</sup>

For these reasons, the majority of the Alberta Court of Appeal, in effect, stated that the parties cannot by contract allow the employer to act unfairly and then proceed to enforce the covenant.

35 *Rock Refrigeration Ltd v Jones*, [1997] 1 All ER 1 (CA).

36 *Globex Foreign Exchange Corporation v Kelcher*, *supra* note 32 at para 68.

37 *Ibid* at para 70.

The dissenting opinion of Slatter JA on this issue provides an excellent review of the law on the subject. Slatter JA took issue with the proposition that a party in breach cannot, as a general rule, seek recourse to the post-termination obligations of the contract.

Slatter JA concluded that the covenant not to compete would continue post-termination. MacLean may have had a right to sue for economic loss resulting from his termination, but this would not affect his negative covenant:

If his employment contract was breached by failure to give him reasonable notice (or pay in lieu), MacLean was relieved from any future obligation to provide his services, and was entitled to damages. But he was not entitled to simply ignore all the other covenants he made with, and duties he owed to the appellant.<sup>38</sup>

Slatter JA's dissenting opinion also concluded that the wording of the covenant with respect to MacLean, which allowed for the post-termination restriction to apply "for whatever reason," should allow the employer to prevail, even if the termination was unfair.

Slatter JA also noted that many agreements contain clauses that are clearly intended to survive the termination of the employment relationship, such as terms dealing with arbitration, choice of law and forum, liquidated damages, limitation of liability, and NC and NS provisions. He also forcefully added that if the issue of contractual interpretation is one of "construction" and not a rule of law, then the covenant should remain enforceable.

These differing commentaries on *General Billposting* did not decide the issue before the court and strictly speaking are *obiter*, yet such statements from the Alberta Court of Appeal must be given attention.

The issue becomes more complex when the contract does not define a severance sum. What, then, becomes the test of an unfair termination to invoke *General Billposting*? If the employer provides nine months' notice and a court determines that the correct number is three months more, does this relieve the employee of the covenant? What if the initial notice was three months?

If the employer asserts cause in good faith, but fails to prove this, does the covenant fail? What if the contract states that the severance due is six months, the employer complies, but the agreement is found unenforceable for other reasons, such as lack of consideration or a substratum argument? Is the principle "winner takes all," or is there to be a graded skill or a good-faith test?

For the present moment, the drafter may well consider wording that will allow the effectiveness of the covenant regardless of the issues that led to termination. There is likely no potential loss. An alternative would be to tie, absent the statutory sums,

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38 *Ibid* at para 143.

compliance with the covenant to an agreed notice period and/or a predetermined reasonable estimate of damages.<sup>39</sup>

#### IV. Restrictive Covenant in Termination Agreement

Many employers request as a term of a settlement agreement that the employee “re-affirm” an existing covenant or enter into a new provision of the same genre in exchange for a separation payment as a lump sum or over time.

There is little law on this subject, but it is to be expected that the statutory payment, absent controversy, such as an allegation of just cause, should not be tied to such a covenant. The question of the enforceability of such a negative covenant is tied to the common law payment, which may be in debate.

The Ontario High Court of Justice in *Furlong v Burns & Co Ltd*<sup>40</sup> reviewed a covenant that arose from a settlement agreement that included a pension sum. The sum was stated to be an “allowance to be continued at the discretion of the Company subject to your attitude and conduct not being, in the opinion of the Executive of the Company, detrimental to the Company or its personnel.” The clause was enforced by the employer when the plaintiff took employment with a competitor. The court found this to be a restrictive covenant and unenforceable.

The decision of the Ontario Superior Court in *Dent Wizard v Catastrophe Solutions*<sup>41</sup> addresses this issue to some extent. The personal defendant entered into a settlement agreement with the plaintiff that included a pension sum. The plaintiff was paid for a period of four years, while the negative covenants endured for six years.

In determining the reasonableness of these covenants, the court applied the usual test of an employment restrictive covenant and did not distinguish the fact that these terms arose from a settlement agreement rather than an active employment agreement. The termination agreement did contemplate that the terminated employee would provide certain services for the first four of these years, but the reality was that he was not called upon to do so.

The court found that such covenants were overly broad and unenforceable. The judge did, however, allow for the argument that the consideration paid for the period of the active covenant may have been upheld. In this instance, the reasoning was that the covenants must be examined in a global context. Had the covenants been limited to the four-year period of compensatory payment, the case may have taken a different turn:

While I am sympathetic to the applicants’ submission that during the first four of those six years [the defendant] paid real money to [the plaintiff] in consideration for the restrictive covenants it received from him, the difficulty with Section 12 [of the termination

39 As in *Rhebergen v Creston Veterinary Clinic Ltd*, *supra* note 29.

40 *Furlong v Burns & Co Ltd*, 1964 CanLII 167 (Ont H Ct J).

41 *Dent Wizard v Catastrophe Solutions*, 2011 ONSC 1456.

## I. Right of Temporary Layoff

A clause dealing with the right of temporary layoff will be important to a company that experiences fluctuations in its volume of business. The clause will allow the company to adjust to changes in its business demands and retain its workforce. Without such a clause, the company may experience nothing but severance claims and headaches.

Generally, both parties would be prudent to include in the contract of employment the right to, or the absence of, a temporary layoff and to ensure that the definition of the layoff duration is in compliance with the relevant governing statute.

The clear tendency of the case law is to require apparent prior consent from the employee, by writing or practice, to allow the employer the right of temporary layoff, even when contemplated by the relevant statute.

The fundamental issue is whether a temporary layoff, in apparent compliance with the statute, can be considered a termination in law. A subordinate issue will arise if the employer offers to the employee the right to return to work under the very same working conditions. Might it then be said that the individual has failed to mitigate his or her damage claim, in line with the Supreme Court of Canada decision in *Evans v Teamsters Local Union No 31*?<sup>1</sup>

These issues become quite complex but, once again, can be readily resolved in the written contract.

The review of cases that follows shows the usual considerations as discussed in *Evans*. A further argument could be advanced that an employee's agreement to accept a recall request implicitly establishes a past practice that can be used against the employee later. Even if the employee considers such a return to work, he or she should request an acknowledgment that he or she has not accepted the layoff as a contractual term.

Although Ontario's *Employment Standards Act*,<sup>2</sup> on its face, allows for the right of layoff, such action by an employer has been interpreted to be a termination of employment. The employee must consent in writing or by visible acceptance of a past practice to allow for the employer's ability to effect a temporary layoff without effecting a dismissal in law.

The Ontario Court of Appeal addressed this issue in *Stolze v Addario*,<sup>3</sup> in which the employee had been indefinitely laid off. The court concluded, however, that the layoff would be considered termination of employment, whether it was indefinite or even for the time period set out in the statute.

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1 *Evans v Teamsters Local Union No 31*, 2008 SCC 20, [2008] 1 SCR 661, where the Supreme Court discussed the context in which a terminated employee may be required to accept employment from the same employer that terminated him as a mitigation obligation.

2 *Employment Standards Act*, 2000, SO 2000, c 41, s 56(2).

3 *Stolze v Addario*, 1997 CanLII 764 (Ont CA).

The solution to this issue is to create written terms of temporary layoff that comply with the statute. The agreement must allow the employer the right of layoff and confine its duration to that allowed by the Act. It is not a difficult assignment for the drafter.

The Act allows a temporary layoff of not more than 13 weeks in any period of consecutive 20 weeks, or more than 13 and up to 35 weeks in 52 consecutive weeks, provided, in the latter instance, that other terms are met, such as the continuation of pension and other benefits. If a layoff exceeds these limits, it is treated as termination.

Where an employment contract does allow for a temporary layoff, the term cannot permit a layoff that contravenes the statutory provision.

This was the view of the Ontario Court of Appeal in *Elsegood v Cambridge Spring Service*.<sup>4</sup> The case was not decided on this reasoning, but it is nonetheless instructive. The company had argued that the employee had accepted its right of layoff by past practice. That argument might succeed in the right context, but here it failed because the layoff had exceeded the statutory period of 35 weeks.

The case law in British Columbia has followed the same logic as that in the Ontario cases.<sup>5</sup> The employer must bargain for and receive consent to effect a temporary layoff by agreement or by apparent practice by which consent may be seen.

The law in Alberta initially took a different turn. In *Vrana v Procor Ltd*,<sup>6</sup> the Court of Queen's Bench determined that the *Stolze* line of reasoning would not apply in view of the particular wording of the Alberta statute:

I am of the view that s. 62 of the *Employment Standards Code* has created a new right for employers in Alberta. The plain and express language of s. 62 entitles an employer who wishes to maintain an employment relationship to temporarily lay off the employee. The length of the temporary layoff is subject to the terms contained in ss. 63 and 64. The effect of s. 62 is to suspend or delay the use of a common-law right until the occurrence of certain events, (i.e., for at least 60 days (s. 63(1)), or sooner, in the event of a failure to return to work after recall (s. 64(1)).<sup>7</sup>

The Court of Appeal reversed this decision, but not on the basis of the question addressed in the reasons set out above. The appellate court concluded that the notice provided by the employer was procedurally defective and, for this reason, set aside the above decision.

However, the Alberta Court of Queen's Bench in *Turner v Uniglobe Custom Travel*<sup>8</sup> reviewed the competing arguments on this issue. It sided with the view taken by the

4 *Elsegood v Cambridge Spring Service (2001) Ltd*, 2011 ONCA 831 at para 16.

5 See e.g. *Collins v Jim Pattison Industries Ltd*, 1995 CanLII 919 (BCSC); *Sinclair v Intrawest Resort Ownership Corp*, 2005 BCCA 10.

6 *Vrana v Procor Ltd*, 2003 ABQB 98, rev'd 2004 ABCA 126.

7 *Ibid* at para 23 (QB), citing *Employment Standards Code*, RSA 2000, c E-9.

8 *Turner v Uniglobe Custom Travel Ltd*, 2005 ABQB 513.

Ontario Court of Appeal and rejected the *ratio* of the *Vrana* trial decision. The court accordingly found that an employer acting in accordance with the statute to effect a temporary layoff brought about a termination of the relationship at common law.

Manitoba has also accepted the position that a temporary layoff is in law a termination,<sup>9</sup> as has New Brunswick.<sup>10</sup>

There is no interpretive case law in the remaining Canadian jurisdictions.

This review is offered to reflect the apparent controversy that may result in litigation, absent a firm agreement between the parties that may eliminate such uncertainty.

As noted above, the issue becomes more complicated in the context of the employer's recall-to-work notice, on parallel terms and conditions and presumably absent any adverse or hostile working conditions.

Such were the facts before the Supreme Court of Nova Scotia in *Damery v Matchless Inc.*<sup>11</sup> a decision from 1996, well before the Supreme Court of Canada's 2008 decision in *Evans*.<sup>12</sup> The trial judge found that the plaintiff had no intention of returning to work with the same employer and found that this conduct was a violation of his duty to mitigate. The damage claim was thus allowed, from the date of the layoff to the date of the recall notice.

An argument may be made by an employee that an unqualified return to work in response to a recall notice is, in effect, implicit agreement with the employer's right of layoff, and hence making the employee vulnerable to the very same conduct in the future.

This seemed to be the theory behind the Alberta Queen's Bench rejection of the employer's submission regarding this argument of recall in *Turner*:

When Turner received the October 30th "recall letter" on October 31st, there was no current lawsuit by Turner against the defendants. But Turner and the defendants knew that a lawsuit was imminent—from Mr. Landry's October 18th, 2001 letter.

There was nothing in Beth Gardner's October 30th, letter that guaranteed "during the next 12 months Uniglobe will *not* give you a layoff pursuant to sections 62, 63, and 64 [of] the *Employment Standards Code*. Therefore, please return to work to *mitigate* your damages." Therefore, if Turner returned to work at Uniglobe without that guarantee, Turner would be taking a gamble.<sup>13</sup>

The Ontario Superior Court considered such a plea from the company in *Chevalier v Active Tire & Auto Centre Inc.*<sup>14</sup> The plaintiff had been advised of his layoff, only to

9 *Rodger v Falcon Machinery (1965) Ltd.*, 2006 MBQB 216.

10 *Pryor v Taylor's Feed*, 2009 NBQB 346; *MacDonald-Ross v Connect North America*, 2010 NBQB 250.

11 *Damery v Matchless Inc.*, 1996 CanLII 5518 (NSSC).

12 *Evans v Teamsters Local Union No 31*, *supra* note 1.

13 *Turner v Uniglobe Custom Travel Ltd.*, *supra* note 8 at paras 72-73 (original emphasis).

14 *Chevalier v Active Tire & Auto Centre Inc.*, 2012 ONSC 4309.

be told a few days later that the company had mistakenly believed it had such a legal right. The company then offered him his employment back on similar terms.

The employee declined this offer, which was fatal to his case because the trial judge found this refusal to be a failure to mitigate.

The court cited the Supreme Court's conclusion in *Evans*<sup>15</sup> that in certain situations a terminated employee would be obliged to return back to the employ of the company, but not in an atmosphere of hostility, embarrassment, or humiliation.

The argument of accepting amended terms of employment was not advanced. The court denied the claim.

A similar conclusion was reached by the BC Supreme Court in *Besse v Dr AS Machner Inc.*<sup>16</sup> As in many other cases, the context and the *ratio* of the decision were very much fact-driven. The court agreed that the plaintiff employee failed to mitigate by not accepting an offer of re-employment, and limited the damage claim from the date of the layoff to the offer. In essence, the court stated that the employer made the layoff decision in good faith in an attempt to deal with financial issues, and that the employer made an error, acknowledged it, and conducted itself in a courteous manner.

The BC Court of Appeal considered the same issue in *Fredrickson v Newtech Dental Laboratory Inc.*<sup>17</sup> On the facts, it determined that the plaintiff employee had no obligation to return to work and, as a result, overturned the trial decision.

The plaintiff had taken a medical leave to deal with personal life issues, and the employer had disputed her entitlement to the leave. When she returned to work on July 20, 2011, after an absence of about three months, the employer advised her that she had been laid off because of insufficient work.

The plaintiff hired legal counsel, who sent the employer a letter on September 9, 2011 asserting that she had been dismissed in July. The employer, through its counsel, directed the plaintiff on September 23, 2011 to resume her employment as of September 26, 2011. If the plaintiff failed to return, the employer's counsel asserted that she would be in violation of her obligation to mitigate.

The plaintiff commenced an action on October 18, 2011. On October 19, 2011, before the employer was aware of this proceeding, it offered to re-employ the plaintiff as well as pay her wage arrears from July 20, 2011 to September 26, 2011.

Again on October 25, 2011 and November 4, 2011, the company offered to re-employ the plaintiff on the same terms, and it repeated the offer again on April 19, 2012.

In the course of the defence of the proceeding, the employer pleaded that it had not dismissed the plaintiff in July. This assertion was not changed to an admission until final argument.

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15 *Evans v Teamsters Local Union No 31*, *supra* note 1 at para 28.

16 *Besse v Dr AS Machner Inc.*, 2009 BCSC 1316.

17 *Fredrickson v Newtech Dental Laboratory Inc.*, 2015 BCCA 357, rev'g 2014 BCSC 335.

The trial judge accepted the mitigation plea and allowed for damages only from the date of the layoff to the date of the offer of re-employment, September 23, 2011.

The plaintiff put forward two reasons for rejecting the offer: the employer's conduct in surreptitiously recording two telephone conversations, and a discussion between the company representative and a fellow employee in which the representative stated that the plaintiff would be too embarrassed to return to work.

The Court of Appeal concluded that the offers of return to work were not coupled with "make whole" compensatory payments, because the offer of September 23, 2011 dealt only with the income loss to the date the offer was made. In any event, the court stated that she was entitled to full compensation for such period as she had been dismissed. A further factor in favour of the plaintiff's argument was the employer's failure to admit the dismissal. Further, the court noted, the trial judge failed to address the factor of current litigation between the parties.

The Court of Appeal also spoke to the need for the employer to respect the integrity of the employment relationship, which required an examination of the full nature of the employment relationship.

In this case, the trust factor was seen to have been eroded by the employer's recording and use of telephone conversations with the plaintiff and the above-mentioned discussion with a colleague of the plaintiff.

This decision illustrates the point that the application of the *Evans* obligation is very much factually driven.

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18 *Butschler v Waters*, 2009 NUCJ 4.