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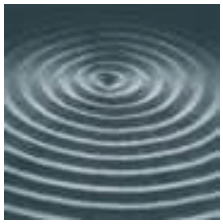

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Negotiating the terms of employment – Odeka Corp.

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NEGOTIATING THE TERMS OF EMPLOYMENT – ODEKA CORP.

Many years ago (when the writer began practising employment law), judges were commonly heard to pronounce that employment law was merely a branch of contract law and that the employment relationship should be governed and regulated largely in accordance with the principles of contract law. A combination of legislation and judicial activism has largely eroded that notion. Employment standards legislation has restricted the ability of employers and employees to contract as they see fit. Cases such as *Queen v. Cognos* and *Wallace v. United Grain Growers* have overlaid contract principles with elements of tort law and obligations of good faith not found in other contractual relationships.

The recent judgment of the Ontario Superior Court of Justice in *Kouznetchik v. Odeka Corp.* may herald a return to the ascendancy of contract law principles in employment law, but is more likely an anomaly. Mr. Kouznetchik worked for Odeka as a computer programmer from August, 1997 until March, 2001. In the summer of 2000, Mr. Kouznetchik tendered his resignation. Odeka prevailed upon him to continue working, on a reduced basis, until the end of December, 2000. Beginning in early 2001, there were negotiations between Mr. Kouznetchik and Odeka for Mr. Kouznetchik's continued employment in a management role. Mr. Kouznetchik continued working while those negotiations were ongoing. Ultimately, the negotiations broke down over Mr. Kouznetchik's insistence on 40 days of vacation per year and his refusal to sign confidentiality and non-competition covenants. On March 6, 2001, the principals of Odeka advised Mr. Kouznetchik that they had decided to terminate his employment since they could not work with him without the confidentiality and non-competition agreements. Mr. Kouznetchik sued claiming damages for wrongful dismissal.

The trial judge dismissed Mr. Kouznetchik's action on the ground that since the parties had failed to reach agreement on certain material terms (in particular, vacation), there was no contract of employment. The trial judge framed the issue not in terms of whether Mr. Kouznetchik had been terminated without cause but whether Mr. Kouznetchik and Odeka had "reached an agreement on a binding contract of employment". Having framed the issue in that fashion, the result was inevitable. Had the question been whether a failed attempt to renegotiate terms of employment can amount to cause for dismissal, the result might well have been different.

The result in *Kouznetchik v. Odeka Corp.* may be contrasted with the result in *Congregation Beth-El v. Commission des Relations du Travail and Louise Côté-Desbiolles* [2003] Q.J. No. 20718. That case involved an application for judicial review of a decision of the Commission des Relations du Travail of Quebec awarding Rabbi Irvin Brandwein damages in the amount of $259,664.00 for the termination of his employment with Congregation Beth-El.

Rabbi Brandwein was employed by Congregation Beth-El from March 1, 1998 under a fixed term contract of employment which expired June 30, 2001. In March, 2001, Rabbi Brandwein and Congregation Beth-El negotiated for and reached a tentative agreement on the terms of a new three-year contract to begin upon the expiration of his existing contract. In April, 2001, Rabbi Brandwein wrote to Congregation Beth-El advising that he was not prepared to sign the new contract and wished to make certain changes to it. Congregation Beth-El refused to agree to the changes and advised Rabbi Brandwein that it would simply permit his contract to expire at the end of its term on June 30, 2001. Congregation Beth-El took the position that Rabbi Brandwein had not been dismissed; rather, his contract of employment had simply expired without a renewal or extension having been agreed upon.

The Commissioner found that Rabbi Brandwein could reasonably have expected to continue in his position following the expiry of the term of his contract and that by allowing the contract to terminate because of a failure to agree on the terms of a long-term agreement, Congregation Beth-El effectively dismissed Rabbi Brandwein without cause. In upholding the decision of the Commissioner, the Court stated that Congregation Beth-El failed in its obligation towards Rabbi Brandwein to make it clear that since they were unable to reach an agreement on the terms of a long-term contract, Rabbi Brandwein's employment would terminate.

The decision in *Congregation Beth-El* cannot be reconciled with the decision in *Odeka Corp.* In *Congregation Beth-El*, the Commission found, and the court agreed, that there was a wrongful dismissal notwithstanding the expiry of a fixed term contract and the failure of the parties to come to terms on a new contract. In *Odeka*, there was not a wrongful dismissal notwithstanding an indefinite hiring and an actual termination of employment by the employer where the employee refused to execute non-competition and confidentiality covenants.

The law in this area is unsettled and unsatisfactory. Employers and employees should be free to order their affairs as they see fit subject to the constraints of employment standards legislation and to appropriate judicial constraints recognizing the vulnerable position in which many employees find themselves when faced with a requirement to sign an employment contract. Whether or not one agrees with the decision reached in *Congregation Beth-El*, the Commission and the Court proceeded on what is probably a correct basis given the current state of employment law in Canada. In the employment context, the failure of negotiations with an existing employee does not necessarily mean that the employment relationship has come to an end. Certainly an employee who fails to achieve his or her objectives in a negotiation with that employer is free to terminate the employment relationship, however, the same is not true of the

employer. A failed negotiation will only entitle the employer to terminate if it can fairly be said that the employee is not prepared to continue his or her employment in light of that failure. Even if an employee takes what seems to be an unreasonable position in the negotiations, the employer will only have the right to terminate if the employee's conduct is tantamount to a resignation.

In analysing situations of this sort it is probably important to separate the issue of continued employment from the issue of whether agreement has been reached on new terms of employment. The law is quite clear that an employer may not terminate for cause simply because an employee will not agree to revised terms of employment proposed by the employer. The obverse should also be true; an employee cannot be terminated for cause where the employer will not accept changes proposed by the employee, nor can the employee claim to have been constructively dismissed in such circumstances. The mere failure to reach agreement is not, in and of itself, sufficient to end the employment relationship.

In order for the employment relationship to end in these circumstances, there must be conduct on the part of the employee that he or she will not continue in the employment relationship unless the employer will agree to his or her demands; in other words, conduct tantamount to a resignation. Such conduct will have to be clear and equivocal since the result will be a loss of employment with no compensation. In *Odeka*, the court was likely influenced by the earlier resignation and by the "unreasonable" position taken by the employee in negotiations. Nevertheless, the stated reason of the employer for terminating the employee was his refusal to agree to confidentiality and non-competition covenants, matters which in isolation would certainly not amount to cause.