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### OUR EMPLOYMENT PRACTICE

Lenczner Slaght provides expert counsel in employment litigation to organizations of all sizes, acting on their behalf in disputes and helping to establish effective corporate policies and practices. Our focus is on complex employment law disputes, including terminations of executives, employee fraud, disputes involving departing employees who take confidential information to a competitor, and employment law class actions.

# Employment

*“Employers will want to periodically review their employment contracts to ensure that they will be enforceable in the event of a termination.”*

### What was the most interesting development of 2023, and why?

In [Celestini v Shoplogix Inc](#), the Court of Appeal for Ontario applied the “changed substratum” doctrine to find an otherwise valid employment contract unenforceable, and calculated the damages payable in lieu of notice at common law without reference to the written employment contract. The changed substratum doctrine renders portions of an employment contract that restrict or limit the amounts payable to a dismissed employee unenforceable where the employee’s responsibilities and status have significantly changed. The idea behind the changed substratum doctrine is that with promotions and greater responsibilities, the substratum of the original employment contract has changed, and so the notice provisions in the original employment contract should be nullified.

This case has been seen as an extension of the typical use of the changed substratum doctrine.



The employee was employed for 12 years as a senior executive, and held the same job title throughout until his termination. The Court held that there did not need to be a promotion of the employee for the doctrine to apply, but it was sufficient that the duties and responsibilities were fundamentally increased such that the meaning of the job title was redefined.

### What’s the primary takeaway for businesses from the past year?

The courts continue to be very employee friendly. The use of the changed substratum doctrine is one example.

Further, the courts continue to find termination provisions in employment contracts unenforceable for technical non-compliance with the *Employment Standards Act* (“ESA”). While it is generally clear if a termination clause is unenforceable where it provides for less notice than the minimum set out in the ESA, it may not be clear whether a termination clause properly provides for payment of non-salary items like vacation pay during the reasonable notice period.

Employers will want to periodically review their employment contracts to ensure that they will be enforceable in the event of a termination. They will want to consider whether the provisions are compliant with the ESA and whether the employee’s duties or compensation have changed over time such that an update to the contract is warranted.

Where a termination clause is unenforceable, employees will be compensated in line with the common law with respect to reasonable notice of termination, which can be vastly more than the amount as set out in a written contract. In the absence of a contract, the courts determine the reasonable notice period by considering relevant factors such as

the character of employment, the length of service, the age of the employee and the availability of similar employment having regard to the experience, training, and qualifications of the employee.

### What’s one trend you are expecting in 2024?

We expect to see more employees attempting to assert claims for longer notice periods and therefore larger reasonable notice awards. The courts have held there is an upper limit on reasonable notice awards in the range of 24 months, absent “special circumstances.” Last year, the Court of Appeal for Ontario upheld two awards of reasonable notice periods of 27 and 30 months, in the context of long-serving employees towards retirement age, where there was a finding that the employee’s technical skills were geared towards the defendant’s business. While these cases are very fact specific, and only directly applicable to long service employees near retirement age with specialized skills, it is likely that employees will attempt to rely on these cases more generally to extend the notice period outside the conventional 24-month notice period.