

# SUBSTRATUM WHAT NOW?! EMPLOYEE PROMOTIONS MAY UNDERMINE YOUR WRITTEN CONTRACTS

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In *Celestini v Shoplogix Inc.*,<sup>[1]</sup> the Ontario Court of Appeal (ONCA) held that if an employer fundamentally and substantially expands an employee's duties and responsibilities, it may no longer be able to rely on the employee's written contract – even if the employee's title remains unchanged.

## Background

In 2005, Mr. Celestini commenced employment with Shoplogix as its Chief Technology Officer (CTO). He signed an employment contract that limited his entitlements upon dismissal without cause to 12 months of base salary and benefits, plus a pro-rated bonus to the date of termination. As CTO, Mr. Celestini initially focused on transferring product and corporate knowledge within Shoplogix.

In 2008, Mr. Celestini and Shoplogix entered into an Incentive Compensation Agreement (ICA), a new bonus plan for management-level employees that significantly changed Mr. Celestini's compensation from the 2005 employment contract. Importantly, Shoplogix did not mention or ratify Mr. Celestini's 2005 employment contract when the ICA was agreed to.

Coinciding with the ICA, Shoplogix significantly increased Mr. Celestini's workload and responsibilities. These new responsibilities included managing sales and marketing, directing managers and senior staff, travelling to pursue international sales, handling all of the company's infrastructure responsibilities, and soliciting investment funds.

In 2017, Mr. Celestini was dismissed from his employment without cause. In accordance with the 2005 employment contract, Shoplogix continued Mr. Celestini's base salary and benefits for 12 months beyond the termination date, and paid him a further sum representing a pro-rated bonus to the date of termination.

However, Mr. Celestini brought an action for wrongful dismissal that was decided in his favour by way of a summary judgment motion. Shoplogix subsequently appealed to the ONCA.

## The Changed Substratum Doctrine

Mr. Celestini argued that the termination clause in his 2005 employment contract was no longer valid because

of the “changed substratum” doctrine. This doctrine applies where there have been fundamental expansions to an employee’s duties and responsibilities after the initial contract was made, such that the foundation of the contract has disappeared or substantially eroded. This doctrine is supposed to recognize the unfairness of applying termination provisions to circumstances that were not contemplated at the time of contracting.

The ONCA agreed with the motion judge that starting in 2008, Mr. Celestini received new responsibilities that were “substantial and far exceeded any predictable or incremental changes to his role that reasonably would have been expected when he started as CTO in 2005”. Underscoring these changes were significant increases to Mr. Celestini’s compensation, including as a result of the ICA, which resulted in the substratum of the 2005 employment contract disappearing (the motion judge specifically noted that Mr. Celestini’s total remuneration increased 173% over the course of his employment). The ONCA held that a change in the employee’s title was not required for the changed substratum doctrine to apply.

Fatal to Shoplogix’s case was the fact that it had failed to obtain any ratification of Mr. Celestini’s 2005 employment contract when the substantial changes to his responsibilities were made. The ONCA also noted that the 2005 employment contract did not contain an “anti-obsolescence” clause, which otherwise may have averted the application of the changed substratum doctrine in this case. The ONCA held that a general reference in the 2005 employment contract to performing other duties “reasonably assigned to him” did not anticipate the significant changes that occurred.

In the result, Shoplogix was ordered to pay 18 months of damages in lieu of reasonable notice, based on Mr. Celestini’s base salary, bonus, car allowance, and lost benefits, totaling \$458,232 (plus costs and interest).

### **Takeaways for Employers**

This decision serves as an important reminder that employment contracts entered into at the start of employment may not be worth the paper they are written on where an employee’s duties and responsibilities have fundamentally expanded over time.

In order to help avoid the application of the changed substratum doctrine, employers can protect themselves by including an “anti-obsolescence” clause in all offer letters and employment contracts. For example:

*The terms and conditions of this employment agreement shall govern your employment relationship with the Company, regardless of the length of employment or any changes to your position, compensation, duties or responsibilities, and regardless of whether such change is fundamental or otherwise.*

Second, when promoting employees and/or increasing their compensation, employers should ensure that they ratify the terms and conditions of any existing contracts. For example:

*Except as set out above, all of the terms and conditions of your employment agreement dated [DATE], remain in full force and effect.*

Alternatively, when rolling out new compensation plans, employers may wish to consider asking employees to enter into new employment contracts with updated terms and conditions (especially in cases where existing termination clauses or restrictive covenants may be unenforceable on their terms).

[1] 2023 ONCA 131.

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### **A Cautionary Note**

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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