

G T A A

## ARE YOUR SUPERINTENDENT AGREEMENTS "OFF-SIDE" WITH HUMAN RIGHTS?

*The information contained in this article is intended to provide information and comment, in a general fashion, about recent legal issues affecting the Property Management Industry. The information and views are not intended to provide legal advice. For specific legal advice, please contact the author at bprentice@blaney.com or 416 593 3953.*

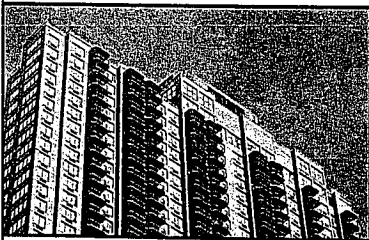
Most Owners and Property Managers of reasonably sized buildings seek to employ a couple as Superintendents. The reasons for this appear to be:

1. The need for the Superintendents to be resident in the building;

2. The logical split of the duties between the physical (usually performed by the male) and the less physical or clerical (usually performed by the female);
3. Since Superintendents are required to be resident in the building, it makes economic sense to provide accommodation as part of the remuneration, with the further benefit that if they are a "couple", only one apartment need be provided.

THE TYPICAL SUPERINTENDENT COUPLE CONTRACT  
Most of the Superintendent Couple Contracts I have reviewed contain provisions which give the employer the

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right to take disciplinary action against both individuals where the incident only involves one of them. For example:

*"Should either of you be unable to work for medical or other reasons, we will not be able to hold your position(s) for you and, as you were hired as a team it is agreed that this situation shall be grounds to terminate both parties."*

*"Should the employment of either of you be terminated, or either party provides notice of termination, it is agreed that both parties employment is terminated."*

Although there may be valid business and economic reasons for including such employer rights in the employment agreement, there is also risk that these provisions offend the Ontario Human Rights Code, which, among other proscriptions, prohibits discrimination in employment on the basis of marital status, family status, disability or relationship.

#### A RECENT EXAMPLE

Consider a case where one member of the Superintendent couple leaves work for several months because of a debilitating illness. The employer, in good faith and in fairness to each member of the couple, agrees to permit the remaining individual to attempt to perform the duties of both. After several months it becomes apparent that the job isn't being adequately performed, and it is unlikely that the ill member will return. As a result, the employer exercises its rights under the above contractual language to terminate both members of the team. What are the implications?

As most employers should be aware, terminating someone's employment because of a disability without making appropriate efforts to accommodate the individual's disability is a contravention of the Code. In addition to this perhaps obvious breach, a recent Human Rights complaint considered the above fact situation and the Commission took the position that terminating the non-ill individual not only offended the prohibition dealing with disability, it also constituted discrimination on the basis of marital status, family status and relationship. As a result, it sought an Order that the employer cease and desist from the practice of:

1. *"preferring to hire couples as resident superintendents."* and
2. *"requiring its employees to acknowledge in advance that their employment may be terminated if they become unable to work for any particular period of time for medical reasons."*

These orders, if applied, would obviously render invalid many superintendent couple contracts presently being used in the Province of Ontario with a resulting significant

negative financial impact if Owners and Managers were no longer permitted to utilize superintendent couples.

#### CAN THE "COUPLE CONTRACT" BE PRESERVED?

If your contracts contain similar provisions, would it be sufficient to leave such agreements in place but refrain from exercising the offending provisions? This cannot be advised. As indicated in the second requested Order, above, a mere requirement to sign such an agreement is seen by the Commission to be offensive in itself.

#### A SOLUTION

There is a way out of this predicament by making your contracts non-offending. Firstly, any automatic right to terminate because of illness or inability must be deleted. Secondly, because the Code prohibits discrimination on the basis marital status, family status and relationship and because the benefits to an employer of having a superintendent couple is not dependent on any such status, if we replace references to "couples" or "spouses" with terms which do not require any form of relationship between the individual members, we can make the contracts nonoffending but still preserve the benefits of having two people for the job. As an example, we have taken steps to amend our clients' superintendent contracts by referring to the members as a Team and individually as Team Members. This eliminates a possible complaint on the basis of marital status, family status or relationship, while at the same time preserving the obvious utility of having a two member resident superintendent team. Obviously, in many, if not most, cases, the team members will still be a "couple". As long as this is not a requirement, the form of agreement will not be subject to complaint on the basis of discrimination on the basis of marital status, family status or relationship. If the new contract language is chosen carefully, you will preserve the right to joint discipline and the economic benefits related to having one function split between two individuals.

We recommend that you consider an audit of your existing agreements to determine what steps can be taken to insulate you from a possible Human Rights Complaint and/or lawsuit based on discrimination. ♦

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