

EMPLOYMENT CONTRACTS – An Ounce of Prevention...

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THE EMPLOYMENT CONTRACT

Why have one?

- Limits the employer's legal liability up front
- Provides parties with certainty regarding key aspects of the employment relationship, for example:
 - Is the contract to last for an indefinite or limited term?
 - What do the parties consider to be a reasonable notice period for termination?
 - When is special protection required against harmful or unfair competition by existing/former employees?

THE EMPLOYMENT CONTRACT

Why have one? (cont'd)

- Provides certainty when the employment relationship ends
- Ensures exclusive service and reduces conflict of interest situations

DETERMINING WHETHER TO USE AN EMPLOYMENT CONTRACT

Factors to consider:

- Degree of responsibility
- Access to proprietary information
- Complexity of compensation arrangements
- Potential liability for wrongful dismissal damages

ABSENCE OF AN EMPLOYMENT CONTRACT

Duties which exist at common law:

- Duty of confidentiality
- Fiduciary duty
 - Key individuals, power to “bind the corporation”
- Reasonable notice of termination
 - ESA vs. common law
- Reasonable notice of resignation

ALL EMPLOYMENT CONTRACTS REQUIRE 3 ELEMENTS

1. An offer
2. Acceptance of the offer
3. Consideration

THE EMPLOYMENT CONTRACT

Common contractual terms:

- Term
 - Fixed or indefinite
- ***Ceccol v. Ontario Gymnastic Federation*** (Ont.C.A. – 2001)
- Series of successive short-term contracts
- Employer may not be able to rely on an employee's contract status to avoid obligation to provide reasonable notice

FIXED-TERM CONTRACTS

Pitfalls to Avoid

- Include an “escape” clause
- Allows the parties to terminate the contract short of the fixed-term without attracting damages amounting to the unexpired portion of the term
- ***Spark v. Generex Pharmaceuticals Inc.*** (Ont. C.A. – 2003)
 - Leave to appeal to SCC filed April 29, 2003

Spark v. Generex Pharmaceuticals Inc.

(Ont. C.A. – 2003)

The “Fax”

“Further to our telephone conversation this morning the following changes have been made to your employee proposal for position of President:

1. an annual salary of one hundred thousand dollars (\$100,000)
2. one hundred thousand (\$100,000) share options. The price of the options is to be set
3. coverage under the company’s medical health plan
4. coverage of all business-related expenses administered by head office

Spark v. Generex Pharmaceuticals Inc.

(Ont. C.A. – 2003)

The “Fax” (cont’d)

5. provision of a company vehicle

6. the company would require a minimum three-year commitment

We kindly ask you to review the above term. We look forward to hearing your comments soon.”

- Spark indicated he accepted the job. Asked to start on November 1. Changed to November 4
- Spark showed up but was told to go home for one week. On November 11 he was again told to go home

Spark v. Generex Pharmaceuticals Inc. **(Ont. C.A. – 2003) (cont'd)**

- Spark had difficulty contacting anyone at Generex
- Mid-December advised his services would not be required
- Spark sued for wrongful dismissal and breach of contract
- At trial, Generex said their discussions with Spark were preliminary and exploratory only, denied fax to Spark constituted an offer of employment
- Court found that a contract existed
- Spark owed damages equal to unexpired portion of term – all three years. After deducting monies earned in mitigation Spark's damages came to \$194,000 for never starting the job!

FIXED-TERM CONTRACTS

Contract for Life?

- ***Foreman v. 818329 Ontario Ltd.*** (Ont. C.A. – 2003)
- Written employment contract provided:
 - “2. Anne Marie is an employee of 818329 and Suhan in the capacity of hall manager. Her duties include the day-to-day management of 818329’s hall in St. Thomas and the supervision of Suhan’s hall in Stratford. She is paid a total of \$640.00 per week, is entitled to the exclusive use of the apartment located at the St. Thomas Hall, and is entitled to sell lottery tickets ... for her own benefit. Her salary is revised annually on March 1st. ...
 - **5. 818329 and Suhan shall not dismiss Anne Marie.”**

Foreman v. 818329 Ontario Ltd. (Ont. C.A. – 2003) (cont'd)

- Trial judge found employment contract provided for a fixed-term – life employment – that could only be terminated by Ms. Foreman
- Trial judge awarded damages representing 33 years of lost wages plus anticipated profits from the sale of lottery tickets
- Issue before the Court of Appeal: Was the contract a contract for life and whether the amount of \$712,000 in damages awarded by the trial judge was appropriate

Foreman v. 818329 Ontario Ltd. (Ont. C.A. – 2003) (cont'd)

- Court considered *Ceccol*
- Court noted it is possible to have a fixed term contract for life of an employee – requires “clearer articulation, given the profound financial responsibility of such a guarantee”
- Court found no explicit language unequivocally stating that the fixed term is for life or retirement age
- Evidence disclosed parties intended to protect Ms. Foreman from dismissal through the change in management and not for the rest of her life

Foreman v. 818329 Ontario Ltd. (Ont. C.A. – 2003) (cont'd)

- Court found term of contract ambiguous
- Interpreted the ambiguity against Ms. Foreman's assertions but concluded that the employment contract provisions "insulates Ms. Foreman from dismissal indefinitely, but not for the rest of her life."
- Court awarded 12 months reasonable notice

THE EMPLOYMENT CONTRACT

Common contractual terms:

- Delineation of duties/responsibilities
- Exclusive service
- Relocation
- Insured benefits – premiums, entitlement to benefits
- Remuneration – salary, bonus, incentives
- Stock options – vesting during notice period

THE EMPLOYMENT CONTRACT

Common contractual terms: (cont'd)

- Pension plan
- Probationary period
- Confidentiality
- Non-competition
- Non-solicitation
 - Customers
 - Employees

THE EMPLOYMENT CONTRACT

Common contractual terms: (cont'd)

- Ownership of intellectual property
- Notice of termination/severance pay and benefits liability
 - Employer
- Arbitration provision
- Acknowledgement of independent legal advice, fairness of terms

A VALID, ENFORCEABLE CONTRACT

- Enforceability of a contract requires existence of consideration
- Something of value promised by each party to the bargain
 - i.e. employer's promise to hire and the employee's promise to perform service
- Contract to be presented as a condition precedent to the employment relationship and represents the understanding of the parties as to the terms

A VALID, ENFORCEABLE CONTRACT (cont'd)

- What is valid consideration for a change to an employment contract?
- Is continued employment enough?
- Is implicit forbearance from dismissal of the employee sufficient?
- *Techform v. Wolda* (Ont. C.A. - 2001)
 - Leave to appeal to SCC dismissed (June 11, 2002)

Techform v. Wolda (Ont. C.A. - 2001)

- Unusual facts
- Wolda, employee with Techform for 8 years, resigned and became an independent consultant governed by a consultancy agreement
- Agreement silent on the issue of ownership of inventions
- 3 years after signing the consultancy agreement and working under its terms, Wolda invented a new kind of hinge called a “Boxless Hinge” without knowledge of management
- Wolda approached President in an effort to obtain royalties for the new hinge

Techform v. Wolda (Ont. C.A. - 2001) (cont'd)

- Techform refused and told Wolda that it owned the patent rights to any inventions
- In 1992, Techform then decided to have Wolda sign a new Employee Technology Agreement (ETA) to safeguard inventions
- Under ETA, Wolda assigned all rights to any of his inventions to the Company
- Wolda unhappy about signing the ETA, believed he had little choice, as Techform was prepared to terminate his contract on 60 days' notice if he refused

Techform v. Wolda (Ont. C.A. - 2001) (cont'd)

- In 1996, Wolda developed a new hinge, again without having been assigned to do so by the Company
- Wolda sought compensation for assigning his rights to the new hinge
- Techform terminated Wolda and went to court requesting a declaration that it was the owner of the 3D Hinge
- Trial judge held the ETA was not binding on Wolda because it did not provide any consideration (i.e. something of value) and had been entered into under duress

Techform v. Wolda (Ont. C.A. - 2001) (cont'd)

- Ruling overturned by the Court of Appeal
- Court held a promise by an employer not to exercise its right to terminate an employee on notice can constitute consideration in some cases
- Evidence showed Techform did intend to terminate Wolda if he refused to sign
- Wolda remained with Techform for a further 4 years
- Court held the promise not to give Wolda 60 days' notice of termination did constitute something of value going to Wolda

Techform v. Wolda (Ont. C.A. - 2001) (cont'd)

- “Where there is no clear prior intention to terminate that the employer sets aside, and no promise to refrain from discharging for any period after signing the amendment, it is very difficult to see anything of value flowing to the employee in return for his signature. The employer cannot, out of the blue, simply present the employee with an amendment to the employment contract, say, “sign or you’ll be fired” and expect a binding contractual amendment to result without at least an implicit promise of reasonable forbearance for some period of time thereafter.”

A VALID, ENFORCEABLE CONTRACT

Some Advice after *Techform*:

- To ensure validity of a contract, employers confronting the situation faced by *Techform* are advised to offer something of value; i.e. an improvement in salary, signing bonus, in addition to the promise not to terminate
- Otherwise an employer will have to establish:
 - 1. that it had a real intention to terminate the employee if the employee did not sign the agreement; and
 - 2. that it will forbear from terminating the employee for a reasonable period of time if the employee signs

ENFORCEABILITY CONSIDERATIONS

- Ensure all terms are clear and unequivocal
- Avoid ambiguity
- Doctrine of Contra Proferentem
 - Ambiguities will be interpreted against the interest of the party who drafted the contract
 - Interpretation most favourable to the employee will be adopted

EFFECT OF AMBIGUOUS CONTRACT PROVISIONS

- ***Easton v. Wilmslow Properties*** (Ont. S.C.J. – 2001)
- Easton's offer letter provided:
 - Probationary Period: "90 days from the start date"
 - Post Probationary Period: "Upon successful review and completion of the outline duties, the salary shall be adjusted upward to \$ 45 000.00 per annum. Failure to completely and satisfactorily fulfill the prescribed duties will result in a re-negotiation of the salary structure."

Easton v. Wilmslow Properties (Ont. S.C.J. – 2001) (cont'd)

- Within 2 weeks Easton was terminated for her inability to master the company's software package
- Employer claimed that Easton was a probationary employee and therefore could not be entitled to significant damages

Easton v. Wilmslow Properties (Ont. S.C.J. – 2001) (cont'd)

- Ambiguous offer fails to create probationary period
- Court found that the offer letter did not create an actual probationary period:
 - Offer letter ambiguous
 - “It did not spell out that a probationary period was meant to be a period when the employee must demonstrate that she was suitable for regular employment as a permanent employee and that she was going through a period of assessment to determine whether she was suitable for the job.”
 - Court awarded three month’s notice for two weeks of work

THE EMPLOYMENT CONTRACT

The termination clause – when the honeymoon is over!

- Limiting notice obligations through an employment contract
- ***Mesgarlou v. 3XS Enterprises Inc.*** (Ont. S.C.J. – 2002)
- Plaintiff with one year's service terminated without cause
- Issue – whether the employer could rely on the contract to pay less than reasonable notice under the common law

Mesgarlou v. 3XS Enterprises Inc. (Ont. S.C.J. – 2002) (cont'd)

- The termination clause
- Notice provision in employment contract provided
 - “After the first three (3) months of employment, both parties shall give notice in accordance to the Ontario Employment Standards Act prior to terminating this employment agreement.”
- Plaintiff argued that the clause was too vague to displace presumption of entitlement to reasonable notice

Mesgarlou v. 3XS Enterprises Inc. (Ont. S.C.J. – 2002) (cont'd)

- Court disagreed
- Clause was sufficiently clear and unambiguous to rebut common law presumption of reasonable notice
- Employee was entitled only to statutory minimum notice period – 1 week

TERMINATION NOTICE – Effect of Ambiguous Contract Provisions

- ***Christensen v. Family Counselling Centre*** (Ont. C.A. - 2001)
- Plaintiff's employment as a therapist terminated by reason of funding cuts
- 3 substantial issues to be determined at trial:
 1. Were the provisions regarding termination of employment contained in the respondent's policy manual part of Christensen's contract of employment?
 2. Did such provisions limit Christensen's common-law entitlement to damages in lieu of notice?
 3. What was the appropriate quantum of damages, if any, to which Christensen was entitled?

Christensen v. Family Counselling Centre (Ont. C.A. - 2001)

- Contract between the parties consisted of a letter of offer
- Only reference to termination in the letter related to the six month probationary period during which time either the employer or employee could terminate the contract on giving 4 weeks' notice
- Letter also set out remuneration for the position and made the following reference to the Employer's staff manual:
 - “The responsibilities of this position have been outlined and I am enclosing a staff manual which contains the conditions of employment and agency policies.”

Christensen v. Family Counselling Centre (Ont. C.A. - 2001)

The relevant provisions

“The Personnel Code is to be considered as a policy guideline setting for [sic] the minimum expectations of employment and benefits obtaining therefrom. ...

H. Termination of Employment

Section A

- 1) By Employee ...
- b) Professional Staff: will require one month notice in writing to the Executive Director and their supervisor.
- 2) By Employer ...
- b) Professional and Clerical Staff: will be in writing from the Executive Director and the same ratios as above will apply, that is one month's notice to professional staff ... and/or as established by legislation.”

Christensen v. Family Counselling Centre (Ont. C.A. - 2001)

Trial judge - provision capable of multiple interpretations:

1. Setting a ceiling for termination pay, implicitly providing that the lesser of one month's pay or the termination pay provided for by the ESA
2. Providing the greater of one month's pay or the notice required by the ESA, that is, establishing a maximum and a minimum for the level of payments to be made on termination
3. Providing one month's notice and the notice or pay in lieu of notice required on termination by the ESA
4. Permitting an action for damages for wrongful dismissal, but setting a minimum of one month's notice to be given in any event

Christensen v. Family Counselling Centre (Ont. C.A. - 2001) (cont'd)

- Trial judge found contractual provision was unclear, 2 of 4 possible interpretations would permit Christensen to claim damages for wrongful dismissal
- In the event of any ambiguity, the provision must be construed in favour of the employee who took no part in the preparation of the document
- Trial judge awarded 8 months notice
- Divisional Court – trial judge erred in concluding Christensen was entitled to common law damages
- Court of Appeal upheld trial judge's decision

THE EMPLOYMENT CONTRACT

Restrictive covenants – “You can’t take my business!”

- Limits the right of former employees to:
 - Compete with the employer;
 - Solicit its employees or customers; or
 - Disclose confidential business information
- Provides protection from competition:
 - In a limited geographic area
 - For a limited period of time
- Cannot eliminate competition

THE EMPLOYMENT CONTRACT

Creating an enforceable restrictive covenant

- Be reasonable
- Legitimate need for scope of protection
- Demonstrable danger from unfair competition by former employee
- Provides protection from competition, but it cannot eliminate competition
- The Courts look to respect the balance between:
 - Employer's right to protect its legitimate business interests
 - Employee's right to earn a living in chosen field

***Lyons v. Multari* (Ont. C.A. - 2000)**

What is reasonable?

- Consequences of drafting an overly-broad restriction on former employee's activity
- Oral surgeon
- Employment contract, non-competition clause:
 - “Protection Covenant – 3 yrs. – 5 mi”

***Lyons v. Multari* (Ont. C.A. - 2000) (cont'd)**

- Determination of whether restrictive covenant is reasonable, 3 factors:
 1. Whether the employer has a proprietary interest worthy of protection;
 2. Whether the temporal and spatial restrictions are too broad; and
 3. Whether the covenant restricts competition generally, or merely bars solicitation of the former employer's clients

***Lyons v. Multari* (Ont. C.A. - 2000)** **(cont'd)**

- Non-solicitation clauses must be considered before non-competition clauses
- Non-competition clauses are often worded too broadly
 - What is the least necessary to protect legitimate business interests?
- Where an employee is the “personification” of the business, a non-competition clause might be acceptable

IT/NET Ottawa Inc. v. Berthiaume (Ont. S.C.J. - 2002)

- IT/NET, management consulting firm, services to the Federal Government re information management and technology
- Berthiaume one of IT/Net's subcontractors, signed a Contact for Services Master Agreement
- Master Agreement included non-solicitation, non-competition and confidentiality clauses
- Issue before court – whether the non-solitation and non-competition clauses were enforceable and whether Berthiaume breached his duty of confidentiality

IT/NET Ottawa Inc. v. Berthiaume (Ont. S.C.J. - 2002) (cont'd)

In assessing reasonableness of clauses, the court considered:

- Did IT/NET have a proprietary interest entitled to protection?
- Was the duration, geographical ambit or scope of the covenant too broad?
- Was the covenant prohibitive of competition generally or was it limited to proscribing solicitation of clients of the former employer or proscribing the appropriation of the employer's trade connection through his acquaintance with the employer's customers?

IT/NET Ottawa Inc. v. Berthiaume (Ont. S.C.J. - 2002) (cont'd)

The non-competition/non-solicitation clause

- “The subcontractor agrees that during this Agreement period and for a period of 12 months after its termination, that s/he will not, directly or indirectly, on anyone’s behalf (including company, partnership, person or self):
 - 4.1 offer or cause to be offered, or to recommend, the offering of employment or subcontract services, to any employee or Subcontractor of IT/NET
 - 4.2 s/he will not attempt to solicit business from any IT/NET clients or prospects without the written consent of IT/NET...”

IT/NET Ottawa Inc. v. Berthiaume (Ont. S.C.J. - 2002) (cont'd)

- Non-solicitation and non-competition clauses unenforceable
- Covenants were contrary to the public interest, they constituted too wide a prohibition against trade and competition

IT/NET Ottawa Inc. v. Berthiaume (Ont. S.C.J. - 2002) (cont'd)

The confidentiality clause

- “5. The Subcontractor agrees and acknowledges that s/he has a fiduciary duty to comply with the duties found in this clause. The Subcontractor will not at any time, directly or indirectly, divulge to anyone (including company, partnership, person or self) either:
 - 5.1 any name, address or requirement of any customer of IT/NET
 - 5.2 any process, method or device of IT/NET or other information, whether of the foregoing character or not, acquired as a result of his service
 - 5.3 any of the financial affairs of IT/NET”

IT/NET Ottawa Inc. v. Berthiaume (Ont. S.C.J. - 2002)

- Duty of confidentiality breached
- Court did not accept that Berthiaume had a fiduciary duty to IT/NET
- Court held under the terms of the contract and under the common law, Berthiaume was obliged not to exploit confidential information to the detriment of IT/NET

IT/NET Ottawa Inc. v. Berthiaume (Ont. S.C.J. - 2002)(cont'd)

Court commented:

- “Berthiaume became aware of SXID’s needs for someone to fill the position he was in, he learned how much IT/Net had bid for the contract he was fulfilling, he learned about the technical aspects of IT/NET’s proposal to SXID and he learned when that IT/NET contract was coming up for renewal. By sharing this confidential information with Pertinex, one of IT/NET’s competitors, Berthiaume was able to give Pertinex a competitive advantage it would not otherwise have had. In fact, Pertinex, would not have been aware of IT/NET’s contract coming up for renewal and would not have been invited to respond to the RFP ...”

IT/NET Ottawa Inc. v. Berthiaume (Ont. S.C.J. – 2002) (cont'd)

- Court awarded:
 - \$22,000 in damages for breach of contract
 - \$22,000 in court costs
 - \$2,000 in punitive damages (“devious form of behaviour”)