

Breakfast Seminar Series: Is Your Employment Contract Enforceable? What would a judge say?

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Overview

- The basics
- Key provisions in every contract
- Proper consideration
- Fixed term contract pitfalls
- Enforceable termination clauses
- Restrictive covenants

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The Basics

Forming the Contract

- Every employment relationship is governed by an employment contract
- How is an employment contract formed?
 - Offer
 - Acceptance
 - Consideration
 - Opportunity for independent legal advice

Timing and Clarity

- A contract must be presented before employment commences
- All terms should be clear and unequivocal
 - Ambiguities interpreted against the interest of the party who drafted the contract
 - Interpretation most favorable to the employee will be used

Key Provisions – The Obvious Stuff

- Duration and form of the employment relationship
 - Start date
 - Probationary period
 - Hours of work
- Compensation practices
 - Salary
 - Benefits
 - Vacation

Key Provisions – Employer Protect Thyslf

- Protection of interests
 - Confidentiality
 - Non-solicitation
 - Non-competition
- Termination
 - Notice of termination/severance pay and benefits liability
 - Resignation
 - Successor employer/sale of business

Consideration

What is Proper Consideration?

- Each party receives something of value, and each party gives something up in return
 - Can come in many forms – value is widely defined
- Fact-specific – no clear rule for appropriate consideration
 - Who is the employee
 - What is the position
 - What are the circumstances
 - What is a “fair exchange”

What Would a Judge Say?

- An employee signs a letter of offer which is silent on termination entitlements
 - The letter indicates that an employment agreement will be forthcoming
- 9 months later, the employee signs the employment agreement contemplated by the letter of offer
 - Termination clause = ESA only
- On termination, the employer provides only ESA notice

Case Study – *Holland v. Hostopia.com Inc.* (2015 – ONCA)

- Trial judge found the offer letter and contract were to be read together, no additional consideration needed
- Overturned by the Court of Appeal, who viewed the offer letter and contract as two separate documents
 - No consideration for contract
 - ESA termination clause a material term
 - Without fresh consideration, ESA clause cannot replace implied term of reasonable notice

Consideration – Lessons Learned

- Employees should sign contracts before they start work
- The contract should be the entire agreement; avoid separate letters of offer
- Fresh consideration must be provided to existing employees
- The same approach/consideration will not work for every employee, nor for every situation
- The consideration provided to existing employees should be set out in the contract

Fixed Term Contracts

The Basics

- An agreement for a definite period of time
- No requirement to continue beyond end of term
- Reasonable notice not required prior to end date
- Different terms can be offered if a further contract offered

The Pitfalls

- Requires active monitoring and staffing
- Employee will become indefinite if works beyond end-date
- Potential liability if terminate prior to end-date
- Successive terms may be considered indefinite employment

What Would a Judge Say?

- Employee on a 5 year term contract
- Contract terminated after 23 months
- The contract provides for termination on the following basis:
 - *Employment may be terminated at any time by the Employer and any amounts paid to the Employee shall be in accordance with the Employment Standards Act of Ontario.*

Case Study – *Howard v. Benson Group Inc.* (The Benson Group Inc.) (2016 – ONCA)

- On the employee's motion for summary judgement, clause deemed unenforceable for vagueness - common law notice awarded
- The Court of Appeal disagreed with the damage assessment and ordered the Employer to pay the balance of the contract

Fixed Term Contracts – Lessons Learned

- Always have a valid escape clause
- Have a new contract for every successive term
- Be cautious of multiple terms
- Consider whether the position should be term or indeterminate
- Avoid automatic renewal provisions
- Do not lead the employee to expect automatic renewals

Termination Clauses

Enforceable Termination Clauses

- One of the most important terms of an employment agreement
- Allows an employer to limit liability upon termination
 - Provides either statutory minimums or a greater amount based on a formula devised by the employer
 - Avoids costly common law notice
- The key is to be clear and precise about entitlements

What Would a Judge Say?

- *In the event the [sic] termination of employment, except where such termination is for just cause, the company will provide you with notice (or salary in lieu thereof), and severance pay [if applicable] pursuant to its obligations as an employer and successor employer to (company) under Employment Standards legislation, as amended.*
- *You will also be paid all salary amounts that may have accrued to you to the date of termination. This includes all your entitlements to both termination pay and severance pay under the applicable Employment legislation [sic] as well as any outstanding vacation or statutory holiday pay.*

Case Study – *Carpenter v. Brains II, Canada Inc.* (2015 – ONSC)

- Not enforceable
 - Failed to provide for continuation of benefits
- Reference to payment of “salary amounts”
- “Salary” doesn’t include benefits
 - “In other words, not only does the clause provide the employer with the right to pay salary, without mentioning or obliging it to pay benefits during the notice period, it also expressly exempts the employer from any other obligations.”

What Would a Judge Say?

- *If your employment is terminated for any reason other than “just cause” in law then you will receive one weeks’ notice of termination, or pay in lieu, for each complete 12 month period of employment as part of whatever entitlement you have under any applicable statute.*
- Employment terminated in accordance with clause

Case Study – *Mlotek v. York-Med Systems Inc.* (2016 – ONSC)

- Motions Judge found the clause to be enforceable, despite lacking specific reference to benefits or severance pay
- “Entitlement” cannot be read in isolation
- Meant to be interpreted in the plural sense
- “No hint of ambiguity”
- Divisional Court agreed

Enforcing Termination Clauses

- Can an employer make changes to the employment relationship during the notice period?
 - For example, removing an employee's entitlement to a bonus?

- Under section 60(1) of the ESA, employers cannot reduce an employee's wage rate or alter any term or condition of employment during the notice period

Termination Clauses – Lessons Learned

- Conduct a regular (bi-annual, at least) review of contract templates to ensure compliance with current law
- Address benefits and all other statutory entitlements upon termination in the termination clause
- Expressly provide for a claw back if offering more than the statutory minimums and you want the employee to mitigate
- Remember that the Courts are unpredictable
- Read our Focus Alerts

Restrictive Covenants

Restrictive Covenants

- Non-competition and non-solicitation clauses
- Viewed as a restraint on employees
 - Strictly interpreted
 - Reluctantly enforced
- Non-solicitation clauses are preferred by the courts
- Non-competition clauses will only be enforced in exceptional circumstances
- Covenants in a commercial/sale agreement are treated differently than an employment agreement

What Would a Judge Say?

- Employees of a placement agency signed agreements with a one year non-solicitation clause
- The company retained a list of 12,000 clients and 80,000 candidates, both actual and prospective
- After an employee left for a job with the competition, it was discovered that he had contacted organizations in the database
- The employer sought an injunction, preventing the former employee from contacting anyone in its database

The Clause in Question

- *For a period of one year, approach, contact, solicit, divert or accept Information Technology candidates, regardless of technical or business skill, to provide services on a temporary or permanent basis to any individual, corporation or other entity which prior to the termination of the Term of Utilization was a client or candidate of Plan IT Search Inc.*
- *For a period of one year, approach, contact or solicit any individual, corporation or other entity which prior to the termination of the Term of utilization was a client of Plan IT Search Inc.*

Case Study – *Planit Search Inc. v Mann* (2013 – ONSC)

- Injunction not granted
- Court found a number of flaws in the clause
 - No geographic limit
 - No way to determine proprietary information
 - Would prevent the employee from serving existing clients of his new employer
 - No evidence of actual loss
 - No way to determine the names of candidates or clients
- Fatal to motion – no way to identify candidates or clients

Restrictive Covenants – Lessons Learned

- Be clear about what the employer is looking to protect
 - Territories, timelines, scope of activities
 - Name specific clients or a defined list if known
- Will a non-solicitation adequately protect your interests?
- Will a strict confidentiality clause be sufficient?
- Update the restrictive covenants as the employee's role and/or the business/market evolves

Questions?

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