



ACC Seminar - Drafting Employment Contracts

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Agenda

- Introduction
- Form of the Contract/Enforceability
- Duties/Constructive Dismissal
- Termination Provisions
- Bonus and Options Provisions
- Benefit Provisions
- Restrictive Covenants
- Confidential Information/Privacy
- Choice of Law/Governing Law

Form of the Contract/Enforceability

- Form:
 - Length and complexity of contract depends upon position (executive versus lower level)
- Enforceability
 - Consideration
 - Duress
- Beware offer letter followed by formal contract
 - Contract formed when there is offer and acceptance

Form of the Contract/Enforceability - Cases

- Cassidy v.277033 Ontario Ltd., [2013] O.J. No. 4386
 - Recent Ontario case reiterating the general rule that contracts signed after employment are not enforceable
- Techform Products Ltd. V. Wolda, [2001] O.J. No.3822
 - Circumstances when forbearance is adequate consideration

Duties/Constructive Dismissal

- Executive can claim wrongful dismissal based on:
 - Unilateral changes to duties
 - Material reduction in compensation
- Employment agreement pitfalls
 - Specific title
 - Reporting relationship
 - Duties (fixed or too detailed)
 - Work location

Duties/Constructive Dismissal – Cases

- Farber v. Royal Trust Co. [1997] 1 S.C.R. 846

SCC:

1. objective test to assess constructive dismissal
 2. focus on substantial change to fundamental terms
- Shah v Xerox Canada Limited [2006] O.J. No. 849 (ON CA)
 - hostile work environment can be basis to claim constructive dismissal

Termination Provisions

- Must meet or exceed statutory requirements
- Avoid potential that provision could fall below statutory requirements in certain circumstances
- Reserve right to provide working notice or pay in lieu (subject to severance pay requirements)
- Three approaches:
 1. Statutory entitlements only
 - No ambiguity
 - Address benefits
 - Address severance pay
 - All-inclusive

Termination Provisions (cont'd)

2. Formula approach (e.g., 2 weeks per year of service)
 - Cap entitlement?
 - Require release?
 - Lump sum or periodic payments?
 - Roll back in the event of mitigation?
3. Set amount (e.g., 12 months)
 - Consider probationary period
 - Require release?
 - Lump sum or periodic payments?
 - Roll back in the event of mitigation?

Termination Provisions – Cases

- *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986
 - Contracts providing for less than statutory minimum are void
- *Wright v. Young & Rubicam Group of Cos.*, [2011] O.J. No. 4960
 - ESA only provision that does not specifically provide for benefits continuation is void

Bonus and Options Provisions

- Wrongful dismissal damages presumed to be “fully loaded”
- Challenges with no/bad clause
 - “inactive” employee
 - notional service for notice period
 - cherry pick “best examples”
 - claim a “me too”
 - employer pays for same benefit twice

Bonus and Options Provisions - Cases

- Jivraj v. Strategic Management 2014 ABQB 463
 - Well-drafted amendments to existing employee
 - Subsequent bonus forfeited when terminated “for whatever reason”
- Kielb v. National Money Mart Company, 2015 ONSC 3790
 - Limitation clause was properly relied upon to deny bonus
 - Court referred to clear example which desired bonus

Bonus and Options Provisions - Cases

- Wolfman v. Rocktenn – Container Canada, LP 2015 ONSC 1432
 - Employee awarded damages for bonus during notice period
 - Detailed provision only addressed “no bonus” in cases of resignation or termination for cause
- Kieran v. Ingram Micro Inc. [2004] O.J. 3118 (C.A.)
 - No ambiguity in particular plan
 - “The focus of the inquiry is on the wording of the particular plan”

Benefits Provisions

- Key consideration is reducing the risk of constructive dismissal claims if benefits are amended
 - Consider “entitled to” versus “eligible for”
 - Explicit right to amend plans and change benefits providers (without advance notice or compensation)
 - Explicit right to terminate plan (without advance notice or compensation)
- *Gustavson v. TimberWest Forest Corp.*, 2011 BCPC 272

Restrictive Covenants

- Employer onus to prove enforceability:
 - Proprietary interest being protected?
 - Overly broad?
 - time
 - geography
 - scope
- Non-compete vs. Non-solicit

Restrictive Covenants - Cases

- Lyons v. Multari (2000) 50 OR (3d) (Ont CA)
 - Employer required to use least intrusive restrictive covenant
- Payette v. Guay [2013] SCC 45
 - covenants agreed in transaction context presumed enforceable
 - broad geographic scope reasonable if business/clients mobile

Restrictive Covenants - Cases

- Mason v. Chem-Trend, 2011 ONCA 344
 - non-solicit unenforceable when confidentiality provision adequate
 - beware the clients “throughout employment” clause
- Shafron v. KRG Brokers [2009] SCC 6
 - no blue-penciling in Canada

Confidential Information/Privacy

- Confidential Information
 - Define confidential information (customize based upon nature of business)
 - Impose confidentiality obligations (during and after employment)
 - Return of materials upon termination of employment (deletion of electronic copies)
- Privacy – Personal Information
 - How the employee's information will be handled?
 - Employee's obligations when handling personal information of others?

Choice of Law/Governing Law

- Not just “simple boiler plate”
- Failure to review issue can impact case:
 - location of litigation
 - applicable law
 - costs and enforcement

Choice of Law/Governing Law - Cases

- Christmas v. Fort McKay, 2014 ONSC 373
 - Ontario resident employee not able to sue in Ontario against Alberta employer
- Sullivan v. Four Seasons Hotels, 2013 ONSC 4622
 - stay of Ontario proceedings relating to work performed in New York



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