Simple As Pie? Not Exactly



EMPLOYMENT CONTRACTS DON’T HAVE TO BE DIFFICULT, BUT DO TAKE CARE

Making a new hire can be a happy time for a business. That said, it’s important to take the long view and make sure your employment contract covers the issues that are important to your business.

As a lawyer, employment contracts aren’t my specialty. But they are worth discussing, so I’m taking a different approach to this column. I’ve interviewed my colleague Jason Harley. He’s an expert in the area and is known for his solutions-oriented approach to resolving issues. I invite you to listen in.

Generally, what does an employment contract look like?

Most employment contracts are simple one-page documents that quickly and accurately spell out the key terms: a description of the position, core duties, compensation and the length of contract. Sometimes, the contract is not written. An oral agreement sealed by a handshake is a binding, and at times quite effective, employment contract.

Other times, the contract can be quite lengthy and complex. Depending on the nature of the workplace and type of position, non-disclosure, non-solicitation and non-compete conditions are sometimes required. These contracts can run 20-30 pages.

For an employer, are there terms that should be included, even in a simple contract, that are often missing?

When you hire the right person for the right position with the right employer, it’s highly likely the employment relationship will be mutually beneficial, long-lasting and end agreeably. Unfortunately, that’s not always the case.

While it is good to be optimistic, it’s prudent for an employer to begin the employment relationship with the end in mind. There are some provisions that an employer should include in their employment contracts to avoid or significantly minimize costly disputes when employment relationships end.

You definitely want a termination provision. The *Employment Standards Act* for the Northwest Territories sets the minimum notice periods an employer must provide when dismissing an employee without cause. An employer cannot opt out of these provisions. Any attempts to do so will be struck down by a Court as unlawful.

When an employment contract is silent on the terms of dismissal, the *Employment Standards Act* sets the minimum notice—or severance pay—an employee is to receive. The common law determines the actual amount of notice an employee is entitled to. At common law, when an employee is dismissed without cause, a court considers the employee's age, the position with the employer, length of service and availability of similar work to determine the length of severance owed. A rough guideline that usually applies is one month of severance for each year of employment. For long-term employees—10 or more years—with high wages, the severance can become significant.

While an employer cannot contract out of a statute—that is, write a contract that runs contrary to written law—an employer can contract out of the common law. So, a termination provision that limits the employee's severance to the Employment Standards Act's provisions is lawful and advisable. Under the Employment Standards Act, for example, a 10-year-plus employee dismissed without cause is entitled to eight weeks of severance. At common law, the same employee may be entitled to nine to 11 months of severance.

Are there other provisions an employer should make?

Yes. You want a reference to your company's code of conduct, and policy and procedure. Often when an employee is dismissed with cause, it is usually attributable to blatantly unacceptable behaviour. However, the definition of "blatantly unacceptable" can vary from person to person. One way for an employer to reduce ambiguity in terms of unacceptable employee conduct is to have a written Code of Conduct and clear Policies and Procedures.

The employer should make specific reference to the Code of Conduct and the Policies and Procedures in the employment contract and state that any breach of these provisions will be grounds for dismissal with cause.

On a dismissal with cause, it's the employee who breached the employment contract. Therefore, no severance is owed. The reference to the Code of Conduct and Policies and Procedures in the employment contract needs to be carefully worded so it won't be misconstrued as a blanket clause that allows the employer to fire someone whenever they make a mistake. A well-drafted reference will limit an employee's ability to later claim that "no one told me I couldn't do that" or "no one ever said this sort of thing was a big deal." That hampers their ability to argue that a warning or suspension is more appropriate discipline than a dismissal.

Should an employee consult a lawyer before signing an employment contract?

Generally, no, this isn't required. Most employment contracts are relatively straight forward, and the *Employment Standards Act* provides a level of protection. That said, all employees should take the time to read their employment contract before signing it. Many do not. If some of the terms seem off or difficult to understand, you should consult an employment lawyer before signing. Later on, if things go awry, a defence of "no one told me that was in my contract" will not work.

It is often by learning the hard way that an employer updates and improves their employment contracts. This lesson generally comes at a high cost in terms of dollars, time and stress. Like most things in life, with employment contracts, an ounce of prevention is worth a pound of cure. Legal advice early on will save litigation expenses down the road.

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