Why Employers Should Utilize Employment Contracts

Why should employers bother with employment contracts for their non-unionized employees? To answer that question let's examine two recent cases from two different provinces both involving customer service managers – a tale of two cities to demonstrate the best of times and the worst of times.

Context and Background

This discussion is not about unionized employees. Both cases involve employees who were terminated without cause and had to resort to the civil courts to address the issue of their entitlement to termination notice.

There are notice provisions in *The Employment Standards Code* ("Code"), but those are the statutory minimums. Most employees are entitled to more notice at common law than what is in the Code – and in many cases significantly more.

The common law states that employees who are terminated without cause are entitled to reasonable notice. Reasonable implies that the notice is going to be different depending on individual circumstances. Determining reasonable notice at common law is more art than science, the general factors that courts and employment lawyers look at include: length of service, age and the status or hierarchy of the employee's position with the employer.

Although the law provides that employees are entitled to reasonable notice, the law also allows an employer and employee to contractually agree to their own amount of notice (which can be less than what a court might determine is reasonable) however it cannot be less than the notice provided for in the Code.

Ottawa Ontario – *Arnone v. Best Theratronics Ltd.* 2015 ONCA 63 ("Arnone")

Matthew Arnone was a Client Services Manager for Best Theratronics Ltd. ("Best"). He worked for Best for 31 years until his employment was terminated in November 2012. Mr. Arnone was 53 years old at the date of termination. There was no written contract between Best and Mr. Arnone that defined the notice period.

The reason provided for Mr. Arnone's termination was "restructuring". Best paid Mr. Arnone 14.4 weeks' salary, which was the statutory minimum he was entitled to under

the Canada Labour Code.

Mr. Arnone sued his employer and then brought a motion for summary judgment, which is an expedited procedure where the evidence is by affidavit and cross-examination on an affidavit versus a full-fledged trial with live witnesses. A trial is a more expensive process for the parties and takes longer to schedule and complete.

Best, in addition to insisting that an employee of 31 years should settle for 14.4 weeks, contested the summary judgment process. Best wanted a full-fledged trial. At the first court level Mr. Arnone won, he was awarded compensation for a notice period of 16.8 months and for a variety of benefits that he would have been entitled to during the notice period; a total of $253,000, plus an award for Mr. Arnone's legal costs in the amount of $54,280.

The employer appealed, the focus of the appeal was on whether summary judgment was the appropriate process versus a trial. Best, also continued to argue that 14.4 weeks was reasonable notice for an employee of 31 years of service.

Mr. Arnone also appealed, he was arguing for an increase to the notice period and for greater compensation of his legal costs.

The court once again sided with Mr. Arnone and the notice period increased from 16.8 months to 22 months. The court also reopened the issue of legal costs, but sent the final decision back to the trial judge with some direction. (Read that to mean the Mr. Arnone was going to get greater compensation from the employer for his legal costs).

Kamloops British Columbia ("BC") – Miller v. Convergys CMG Canada Limited Partnership 2014 BCCA 311 ("Miller")

Gerry Miller was a Senior Client Service Manager for Convergys CMG Canada Limited Partnership ("Convergys") in Kamloops BC. By all accounts Mr. Miller was a good employee and performed his job well.

As Mr. Miller was promoted and his client base changed, it became more focused in Colorado and Utah. Convergys wanted Mr. Miller to move to the United States to be closer to the clients. Mr. Miller did not want to move to the US.

Convergys tried to find an alternative position that matched Mr. Miller's skill set but in the end they could not and Mr. Miller was terminated. Mr. Miller sued Convergys claiming that amongst other reasons his 7 years of service entitled him to 12 months' notice. Convergys, however, had an employment contract with Mr. Miller.

That contract provided that if Mr. Miller was terminated, without cause, he would only receive the statutory minimum in BC's employment standards legislation – in Mr. Miller's case that was 7 weeks.

For Mr. Miller to succeed, he had to convince the court that the termination clause should not be enforced, therefore, he alleged it was ambiguous on two fronts:

- the contract included a probationary period during which the employment could be terminated without notice. In BC a probation period allowing termination without notice is only legal during the first 90 days of employment – not 7 years later
- the placement of the second comma in the termination clause: **"Convergys may terminate your employment for cause, or by providing you with notice, or pay in lieu of notice in accordance with the *Employment Standards Act* of British Columbia"**

The court examined the probationary period wording in the context that previous contracts recognized Mr. Miller was a long term employee and preserved his vacation and benefits. They concluded that a reasonable person would not see the probationary period as being applied to Mr. Miller and that the severability clause in the contract operated to “sever” the probationary clause out of the contract.

Mr. Miller’s argument on the comma was that its placement gave rise to two possible outcomes: Mr. Miller may be provided with notice or he may be provided with pay in lieu of notice and, therefore, the termination clause failed to identify which notice Mr. Miller would receive. The court did not agree stating that the phrase “notice or pay in lieu of notice” is well known in the field of employment law. The court went on to say that it was satisfied that a “reasonable person” would not let the position of the comma interfere with an interpretation of the termination clause. The termination clause was clearly intended to provide “the traditional choice of notice or pay in lieu of notice” for the period stipulated.

Mr. Miller took his case as far down the legal road as he could. He started in BC Superior Court where he lost. Then he went to the Court of Appeal (the case cited above) he lost again. Finally Mr. Miller went through process of asking the Supreme Court of Canada to consider reviewing his case; the court refused to hear his case on February 5, 2015 and that was the end of the legal road for Mr. Miller.

Discussion

From an employer’s point of view the Miller case is the best of times. It’s a reminder that employment contracts can pay dividends. The Miller contract was not a long and convoluted document. The court upheld a simply drafted termination provision which provided the employee with only the minimum notice required by employment standards legislation.

The Miller case is also confirmation that boilerplate legalese at end of a contract is important and can be your friend. In Miller the court utilized a clearly drafted severance clause to do away with Mr. Miller’s argument that a misplaced probationary period was an ambiguity that should have tanked the whole contract.

Arnone of course exemplifies the worst of times. No court is going to restrict a long service employee of 31 years to the minimum statutory notice – at least where there no valid employment contract like existed in Miller.

Aside from minimizing the notice payable on termination, an employment contract provides employers with one additional benefit – certainty. You know what you owe when the time comes to end the employment.

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