Employment Contracts:
tips, traps and techniques

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Introduction

Every organization needs good workers to perform the necessary tasks that allow business owners to focus on making the venture a success. The key is finding the right candidate for the job. Once the incumbent is secured an employment contract will help ensure the candidate performs the duties as anticipated. If the person hired fails to do the job satisfactorily, the corporation may need to terminate the contract. Similarly, the person who is hired may have complaints with either the work they’ve been asked to do, the remuneration they receive, or the manner of their dismissal. When relations break down between these parties, this can lead to one or both of them taking legal action. A well-written employment contract will manage each parties’ expectations from the very beginning.

This paper provides an outline of best employment practices with particular emphasis on employment contracts and the appropriate regulatory framework.

A. Which Legislation Applies?

All provinces and federal jurisdiction have enacted legislation establishing a regime of employee rights and employer obligations which cannot be undercut by agreement. This paper focuses on the provincial statutory regime which will, in most cases, be applicable to organizations carrying on business in Ontario.

The Ontario Human Rights Code
All organizations must comply with the Ontario Human Rights Code (the “OHRC”).¹

It is contrary to the legislation to discriminate against an employee, or potential employee, because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, same-sex partnership status, family status or disability. Similarly, an employer or co-worker may not harass an employee on any of these grounds; this of course includes sexual harassment. The way to best comply with the law is simple: treat all employees fairly and equally.

The Employment Standards Act, 2000
The Employment Standards Act, 2000 ² establishes a minimum collection of rights which every employment contract must conform with. The legislation governs such matters as employee wages, hours of work, overtime, public holidays, vacation pay, leave of absences and termination and severance of employment. No employer or employee can contract out of or waive a statutory employment standard.

¹ R.S.O. 1990, c. H.19
² S.O. 2000 c. 41.
The Employment Standards Act, 2000 is construed purposively in order to expand rather then limit the protections available to employees. Courts have held an employer cannot justify undercutting a particular statutory benefit by arguing the overall totality of the employment package is more favourable to the employee then it would be if the employer were to observe the minimum statutory requirements.

The Workplace Safety and Insurance Act\(^3\)
This act creates a no-fault insurance system for workplace or work-related accidents. Generally organizations are required to have coverage under this act and should declare themselves to the Workplace Safety and Insurance Commission to confirm its obligations. In the event coverage is not required the organization may decide to opt in.

The employer must report their payroll to determine how much they must pay for coverage. In case of an accident, the employee is compensated by the Workplace Safety and Insurance Board and is prevented from taking any legal action against their employer. The corporation cannot pick and choose whom they wish to cover, but rather must cover all employees at the workplace if they decide to opt in.

The employer needs to determine if WSIB coverage or private insurance suits their needs. This decision would likely consider how many people they are thinking of covering. Private insurance may allow for insurance on an individual basis rather than all employees.

B. Defining the Employment Relationship

It is crucial to distinguish between an employment relationship and an independent contractor arrangement. Simply put, parties engaged in an employment relationship are said to be in a contract of service, whereas parties engaged in an independent contractor arrangement are under contract for services. This terminology provides little insight into the substantive nature of the relationships it describes. Moreover, legislation that endeavors to define what is meant by the terms “employee” and “employer”, more often than not, does so in a circular fashion. For example, an “employee” is frequently defined as a person employed by an employer, and in turn, an “employer” is commonly defined as a person who employs people.

When determining the nature of the working relationship between parties, courts have indicated four tests which must be considered. These include:

1. **Degree or absence of control exercised by the “employer”**.
   Employment relationships imply some supervision or control over the worker. The question is not whether the alleged employer exercises control over the worker, but whether they have the right to exercise control. The “degree” of control is a factor of whether the worker:

\(^3\) S.O. 1997, c.16.
a) Works mostly on their own,
b) Is free to accept or refuse other work, and
c) Is required to work or attend the hirer’s place of business.

2. Ownership of tools
A worker may be considered an independent contractor if he/she owns his/her own tools. The same is true even if the hirer provides special tools when required.

3. Chance of profit and risk of loss
If the worker has a financial investment in the business over and above providing labour, this is considered a strong indicator an independent contractor arrangement exists. Unlike an employee, an independent contractor’s income fluctuates with the amount of work completed.

4. Integration of the “employee’s” work into the “employers” business
Is the worker an intrinsic part of the organization, or merely ancillary to it? Under a contract of service the worker is employed as part of the business and his/her work is done as an integral part of the business. By contrast, under a contract for services, an individual’s work, although a servant to the business, is an ancillary to the business.

There is no one conclusive test to be universally applied to determine whether a person is an employee or an independent contractor. On the contrary, the decision-maker must examine the relationship between the parties in totality. The central question is whether the person who has been engaged to perform services is doing so on his/her own account. All four (4) indicators taken together, suggest which arrangement is more likely.

C. The Employment Contract
An employment agreement is either a definitive term or an indefinite term contract.

Definitive Term Contracts:
Definitive term contracts provide for a fixed period of employment or a specific task. If the employer terminates the employment prior to the end of this term, the employee will be in a position to sue for damages as a consequence of being prevented from working to the end of the contract. Damages most often include any loss of income and benefits that the employee would have received. Damages are generally assessed for the remaining period of the contract at the time of its breach.

Regulation 288/01, subsection 2(2)(b) of the Employment Standards Act, 2000, indicates a term or task employment agreement which exceeds twelve months is deemed to be indefinite employment. This is important because it means a contract of employment providing for a fixed or definitive term greater than twelve months can only be broken when common law notice is paid.
Indefinite Term Employment Agreements:
Where an employment contract does not provide for a fixed term or task, it is an indefinite term. At the termination of an indefinite employment agreement an employee is entitled to notice of termination of employment (inclusive of the minimum requirements set out within the Employment Standards Act, 2000) or payment in lieu of notice. An employee’s right to common law reasonable notice may be limited by mutual agreement through a written employment contract.

D. Signing the Employment Contract

Employees must read the employment agreement. Where an employee is handed a document prior to commencement of employment or asked to sign forms containing a myriad of provisions, but did not read the document before he or she signed it, the document may not be legally enforceable.

Consent to the terms of an employment contract must be given freely, voluntarily, and fully. Consent obtained though abuse of authority or coercion does not create an enforceable contract of employment.

A contract signed after the commencement of employment, without consideration, may be unenforceable. Consideration is necessary for any contract to be legally binding. It must be something of value such as money, an act, an agreement not to perform an act, or another promise.

When a new contract of employment is signed after commencement of employment, it is important to ensure additional consideration is given by the employer to the employee (e.g. a bonus, promotion or raise, etc.).

E. Contents of the Employment Agreement

A clearly worded employment contract will help both parties understand their legal rights both during employment and after it ends. Some typical clauses in employment agreements include:

1. Duties and Responsibilities of the Employee
The employment contract may specifically detail the duties and responsibilities the employee is expected to perform. An employee has a right to expect their duties and responsibilities will not be unilaterally altered during the course of employment. This expectation can be tempered through inclusion of a term allowing the employer to change the employee’s position without negotiation of the new term. Terms which allow the
employer to change an employee’s duties and responsibilities may hinder claims of constructive dismissal.

2. **Probationary Periods**

Probationary periods allow for a period of adjustment when both the employee and employer can assess the candidate’s suitability for employment. Probationary periods are not appropriate when:

   a) the employee has been induced to leave permanent, secure employment in order to commence employment with another employer; and/or

   b) the employee is a senior, executive or professional employee.

Under the *Employment Standards Act, 2000*, employees who are terminated and have been employed with an employer for less than three months are not entitled to payment on account of notice of termination (see subsection 57(1) of the *Employment Standards Act, 2000*). If the probationary period is longer than three months, the agreement should provide that the employee will receive the *Employment Standards Act, 2000* minimum notice of termination if he or she is dismissed after three months but within the probationary period.

Despite the *Employment Standards Act, 2000*, some recent court decisions in Ontario have held that it is improper for an employer to dismiss a probationary employee before the employee is given an opportunity to demonstrate his/her ability. The employer is further obligated to provide a fair evaluation and to warn an employee that his/her job is in jeopardy and provide that employee with a reasonable opportunity to correct any deficiencies, prior to a dismissal. Some cases have even indicated that an employer must provide an employee with assistance improving his/her performance. In the event of unsatisfactory performance, a clear warning is required such that the employee is made to understand the shortcomings of his/her performance, and that there is a possibility of discharge if the performance is not improved. The most recent trend with respect to probationary employees is that there be a “fair, honest and valid assessment” of an employee’s competence and that, further, an employer’s conclusion to terminate must be reasonable and properly motivated.

3. **Termination of Employment**

Where employment is terminated with cause the employee is not entitled to notice, or payment in lieu of notice. Cause for termination may include habitual neglect of duty, dishonesty, theft, fraud, conflict of interest, incompetence, disobedience or insubordination.

An organization may always dismiss an employee without cause upon providing notice of termination or payment in lieu thereof. An employer must comply with its minimum obligations as established by the *Ontario Employment Standards Act, 2000* (the “ESA”).
Generally minimum notice requirements established by the ESA are reserved for lower level employees. Professional, executive, long-term specialized, skilled, etc., employees are entitled to notice in excess of the what the ESA provides unless there is a written agreement in place limiting their rights.

Reasonable notice upon termination of employment can be addressed within a contract, as follows:

a)  *Employment Standards Act, 2000*

All employee’s are entitled to the ESA. When an employer desires to limit an employee’s rights upon termination to the *Employment Standards Act, 2000* minimums, the following principles apply:

i) If the contract provides for notice less than that required by the provisions of the applicable *Employment Standards Act, 2000*, the provision will be null and void,

ii) The contract must specifically provide the province’s *Employment Standards Act* applies. If it merely says, “provincial law”, without naming the act, it is not clear enough, and

iii) If the applicable *Employment Standards Act* specifies a minimum notice shall be “at least” a certain period of time (as British Columbia and Ontario’s *Employment Standards Act* does), then a clause that merely provides that notice will be in accordance with the *Employment Standards Act* is not clear enough.

b)  *Set Term*

The contract of employment may provide for a set notice period such as six (6) months.

c)  *Common Law Notice*

The employment contract may provide for reasonable notice upon termination of employment. Notice, pursuant to the common law, is assessed on a case-by-case basis. When assessing what constitutes reasonable notice of termination the seminal case is that of *Bardal v. Globe & Mail*, a 1960 decision wherein the Court noted, “there can be no catalogue laid down as to what is reasonable notice in particular classes of cases. The reasonableness of the notice must be decided with reference to each particular case, having regard to the character of the employment, the length of service of the servant, the age of the servant and the availability of similar employment, having regard to experience, training and qualifications of the servant.”

Other factors considered when assessing what is reasonable notice of termination include:

- whether inducement is a factor;

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- bad faith;
- break in service;
- failure to provide letter of reference and/or verbal references;
- disability;
- discrimination;
- improper cause allegations;
- manner of dismissal;
- limited formal education and skills;
- short-term employment;
- temporary employment;
- probationary period.

Where an indefinite employment agreement fails to reference notice entitlements upon termination of employment, the servant is entitled to reasonable notice of dismissal under the common law.

4. Employee Benefits
Employees should be provided with copies of all company benefit plans prior to commencement of employment and execution of an employment agreement. One unique aspect of a superintendent’s position is frequently the provision of an apartment. In the case of termination of the contract the superintendent has a right to occupancy of their apartment. Under s. 68 of the *Tenant Protection Act*,\(^5\) a superintendent’s tenancy agreement ends on the day of termination and the superintendent must vacate the premises within one week. No rent is required to be paid during the one week period. This is a statutory minimum and it is important to remember that at common law all benefits must be continued during the notice period where there is dismissal without cause. As such, the landlord will either be required to allow the dismissed superintendent to remain in the apartment for the period of reasonable notice or to compensate them for moving out.

5. Employee Handbook/Employment Policies
Employees should be provided with copies of all rules and regulations they will be subject to, prior to commencement of employment and execution of the employment agreement.

F. Constructive Dismissal
Where an employer acts in such a way as to alter the terms and conditions of an employment contract, an employee may be entitled to regard the employer’s conduct as a termination. This may occur where an employer has demoted an employee, changed the work they are required to do, taken away certain privileges, reduced their pay, or made any change that substantially alters the terms and conditions of employment. In such a situation the employer has repudiated the contract and the employee may bring the contract to an end and sue for damages.

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When changing the work to be done the question will be whether the employer has the right to assign alternative duties to the employee and whether such alternative duties are compatible with the job the employee was hired to do. To guard against a constructive dismissal claim an employer should preserve the right to make changes in the employment contract. This flexibility may be provided within a written contract or may be stipulated in personnel policies which are incorporated into the employment agreement. Wherever possible an employer should refrain from promising an employee a defined set of job duties.

Despite changes to the employment contract an employee may be required to remain in the altered position in mitigation of damages. In circumstances where the salary is the same, where working conditions are not substantially different or the work demeaning, and where personal relationships involved are not acrimonious it is reasonable to expect the employee to remain employed.

An employer may also avoid a constructive dismissal claim if it gives advance notice of the contemplated changes to the employee. The reasoning in this regard is that what an employee is entitled to is a reasonable notice of termination. Just an employee may give actual notice of termination, so too it may give notice of a fundamental change that would constitute a constructive dismissal. Provided that the amount of notice given equals or exceeds the length of the applicable common law period, an employee will not be entitled to damages.

**Conclusion**

Clarity of contract is essential to a successful working relationship. An employer must determine what kind of relationship they want to establish and what work it is they want done. Foresight will assist with managing both employment and termination procedures.

Readers should not apply information provided herein to their circumstances without seeking legal advice. This information is not intended to provide legal advice or opinion, as neither can be given without reference to the specific facts, events, and situations of individual circumstances. If you would like to consult with an employment law lawyer, contact Melynda Layton at (613) 231-8348.