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EMPLOYMENT LAWYERS

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Professional Development CLE

Strategies for Drafting Employment Agreements

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Ron heads Minken Employment & Labour Lawyers – a Global Award Winning Employment & Labour Law Boutique located in Markham in the GTA. With 23 years of experience as a lawyer, and mediator, he is well known by clients – employees and employers – and the business community, locally, nationally and in the United Kingdom and the United States, as heading a leading edge team, and as an energetic and passionate proponent for HR and Employment & Labour Law. For many years, Ron has also been recognized as one of Canada’s Top Employment Lawyers by *Canadian HR Reporter* in its *Canada’s Employment Lawyers Directory*. Ron regularly contributes to legal, business and HR publications such as *Canadian HR Reporter*, *Canadian Employment Law Today*, *Law Times* and *Magazine for Business* and has been quoted in publications such as *The Toronto Star* and *The Financial Post*.

ROADMAP

- *Employment Standards Act, 2000*
- Severance Pay
- Privacy
- Breach of Termination Clause
- Mitigation
- Disability Benefits
- Consideration
- Validity of Termination Clauses
- Restrictive Covenants
- Questions and Answers

EMPLOYMENT STANDARDS ACT, 2000

*Wright v. Young and Rubicam Group
of Companies (Wunderman)*

(2011) (Ontario Superior Court)

EMPLOYMENT STANDARDS ACT, 2000

– Wright v. Young and Rubicam Group of Companies

FACTS

- Employee hired in accordance with written employment agreement containing termination clause limiting notice entitlements to specific amounts depending on length of service
- After approximately 5 years of employment, Employee terminated and provided with 13 weeks notice in accordance of termination clause, being in excess of statutory minimums
- Employee initiated legal proceedings claiming termination clause was invalid and seeking common law notice

EMPLOYMENT STANDARDS ACT, 2000

– Wright v. Young and Rubicam Group of Companies

EMPLOYMENT CONTRACT

“The employment of the Employee may be terminated by the Employee at any time on 2 weeks prior written notice (one week's notice during Probationary Term), and by the Company upon payment in lieu of notice, including severance pay as follows:

- a) ...
- b) ...
- c) ...
- d) ...
- e) Five years or more and up to ten years after commencement of employment-thirteen (13) weeks' Base Salary, plus one (1) additional week of Base Salary for every year from 6-10 years of service up to a maximum of 18 weeks;
- f) ...
- g) ...

This payment will be inclusive of all notice statutory, contractual and other entitlements to compensation and statutory severance and termination pay you have in respect of the termination of your employment and no other severance, separation pay or other payments shall be made.”

EMPLOYMENT STANDARDS ACT, 2000

– Wright v. Young and Rubicam Group of Companies

LAW

- Termination clause unenforceable as it excluded benefits and had the opportunity to violate the statutory minimum requirements in certain circumstance, both in breach of the *Employment Standards Act, 2000*
- “5.(1) Subject to subsection (2), no employer or agent of an employer and no employee or agent of an employee shall contract out of or waive an employment standard and any such contracting out or waiver is void.”
- “61(1)(b) Continues to make whatever benefit plan contributions would be required to be made in order to maintain the benefits to which the employee would have been entitled had he or she continued to be employed during the period of notice that he or she would otherwise have been entitled to receive.”

EMPLOYMENT STANDARDS ACT, 2000

– Wright v. Young and Rubicam Group of Companies

APPLICATION

- Any potential breach of *Employment Standards Act, 2000* may result in invalidity of clause in Employment Agreement
- Termination Pay – Calculating Amount (ss. 57, 59 and 60); Pay In Lieu of Notice (s. 61)
- Severance Pay – Entitlement (s. 64); Calculating Amount (s. 65); Lump Sum or Installments (s. 66)
- Clauses of Concern in an Employment Agreement:
 - Termination Clauses – With and Without Cause
 - Hours of Work
 - Overtime
 - Vacation/Public Holidays

SEVERANCE PAY

Mattiassi v. Hathro Management Partnership

(2011) (Ontario Small Claims Court)

SEVERANCE PAY

– *Mattiassi v. Hathro Management Partnership*

FACTS

- After 26 years, Employee terminated and provided with 54 weeks working notice and 2 months additional payment at the end of the working notice period
- Total amount of notice provided exceeded *Employment Standards Act, 2000* statutory minimums
- Employee brought legal action seeking severance pay of 26 weeks in accordance with the *Employment Standards Act, 2000*

SEVERANCE PAY

– *Mattiassi v. Hathro Management Partnership*

LAW

- Severance pay cannot be avoided by giving working notice of termination
- *Employment Standards Act, 2000* requires severance pay to be provided in lump sum as it is provided as “compensation”
- “The working notice on the other hand does not give the employee the opportunity to get out and seek other employment, as he has to continue to work and perform his duties with his employer since he is being paid his salary. Therefore, given these qualitative and quantitative differences between working notice and payment in lieu, it becomes well nigh impossible to offset severance pay from working pay.”

SEVERANCE PAY

– *Mattiassi v. Hathro Management Partnership*

APPLICATION

- Ensure Termination Clause provides for *Employment Standards Act, 2000* requirements
- Cannot only provide working notice – severance pay must be at least in lump sum or salary continuance
- Cannot contract out of *Employment Standards Act, 2000* statutory minimums

PRIVACY



R. v. Cole

(2012) (Supreme Court of Canada)

PRIVACY

– *R. v. Cole*

FACTS

- Employee permitted to use work-issued laptop computer for incidental personal purposes
- Employer discovers folder on computer containing nude and partially nude photographs of underage girl
- Employer makes a copy of photographs and temporary internet files and contacts police
- Without a warrant, police review computer and copied items made by Employer
- Employee charged with possession of child pornography and unauthorized use of a computer
- Employee sought the exclusion of all computer materials pursuant to ss. 8 and 24(2) of the *Charter*

PRIVACY

– *R. v. Cole*

LAW

- Where personal use is permitted or reasonably expected on a work computer, an Employee has a reasonable yet diminished expectation of privacy

PRIVACY

– *R. v. Cole*

APPLICATION

- Eliminate or reduce reasonable expectation of privacy
- Clearly state limitations or removal of privacy in Employment Agreement
- Follow through with written terms to avoid claims of implied expectation of privacy

BREACH OF TERMINATION CLAUSE

Cavaliere v. Corvex Manufacturing Ltd.

(2009) (Ontario Superior Court)

BREACH OF TERMINATION CLAUSE

– *Cavaliere v. Corvex Manufacturing Ltd.*

FACTS

- Employee engaged in sexual relationship with subordinate
- Employer discovered relationship and terminated Employee for cause
- Employee initiated legal proceedings claiming wrongful dismissal and seeking common law notice

BREACH OF TERMINATION CLAUSE

– *Cavaliere v. Corvex Manufacturing Ltd.*

EMPLOYMENT AGREEMENT

- "Following the completion of your probationary period it is agreed that your employment may be terminated without just cause by providing you with the appropriate notice as outlined in the *Employment Standards Act*, plus one additional week's pay in lieu of notice."

BREACH OF TERMINATION CLAUSE

– *Cavaliere v. Corvex Manufacturing Ltd.*

LAW

- Employer unable to rely on termination clause drafted with the intention of applying to a without cause scenario after the Court has determined that cause termination was not justified

BREACH OF TERMINATION CLAUSE

– *Cavaliere v. Corvex Manufacturing Ltd.*

APPLICATION

- Do not rely on implicit interpretation of clauses in an Employment Agreement
- Clearly state the application of each clause
- When attempting to reduce notice entitlements, always include a “safety net”

MITIGATION



Bowes v. Goss Power Products Ltd.

(2012) (Ontario Court of Appeal)

MITIGATION

– *Bowes v. Goss Power Products Ltd.*

FACTS

- Employment Agreement containing termination clause which provided 6 months notice or pay in lieu of notice
- Termination clause did not state whether notice would be provided in lump sum or salary continuance and did not state Employee's mitigation obligations over the 6 month notice period
- Employee terminated and offered 6 months notice subject to his mitigation efforts
- Within two weeks Employee obtained new employment
- Only the remainder of statutory minimums provided and not the balance of the 6 months

MITIGATION

– *Bowes v. Goss Power Products Ltd.*

TERMINATION LETTER

- “Pursuant to your employment agreement dated September 26, 2007 (the "Employment Agreement"), GOSS Power Products Ltd. ("GOSS") will provide you with salary continuance and car allowance for the next six (6) months until October 13, 2011 (the "Notice Period"). Throughout that time you are required to seek out and locate alternate employment and advise GOSS immediately should you secure alternate employment prior to the end of the Notice Period.”

MITIGATION

– *Bowes v. Goss Power Products Ltd.*

LAW

- When an Employment Agreement contains a fixed period of notice, the parties have agreed to displace the common law period of reasonable notice, and as a result, there is no longer an implied duty to mitigate

MITIGATION

– *Bowes v. Goss Power Products Ltd.*

APPLICATION

- Use Employment Agreement as opportunity to address all outcomes after the Employee's departure, however caused
- Include terms that would normally appear in a termination letter
- Never exclude the Employee's duty to mitigate

DISABILITY BENEFITS

Brito v. Canac Kitchens

(2012) (Ontario Court of Appeal)

DISABILITY BENEFITS

– *Brito v. Canac Kitchens*

FACTS

- Terminated without cause and provided with statutory minimums
- Within 22 months common law notice period, Employee diagnosed with cancer, totally disabled and unable to work
- Employee initiate legal proceedings seeking, loss of disability benefits
- Employee awarded, \$200,000.00 in damages in lieu of STD and LTD benefits, including the present value of the LTD entitlements until age 65

DISABILITY BENEFITS

– *Brito v. Canac Kitchens*

LAW

- Employer must continue disability benefits throughout entire common law notice period, failing which will be responsible for damages for lost disability benefits

DISABILITY BENEFITS

– *Brito v. Canac Kitchens*

APPLICATION

- Limit the continuation of benefits after the Employee's departure, however caused
- Ensure to comply with benefit requirements under *Employment Standards Act, 2000* and Common Law
- Contact Insurer to ensure compliance

CONSIDERATION

Fasullo v. Investments Hardware Ltd.

(2012) (Ontario Superior Court)

CONSIDERATION

– *Fasullo v. Investments Hardware Ltd.*

FACTS

- Employment relationship established in accordance with verbal contract
- Written contract provided to Employee two days later containing similar terms except for the inclusion of a termination clause restricting notice entitlements to the *Employment Standards Act, 2000* statutory minimums
- Employee terminated and seeks notice in addition to statutory minimums claiming termination clause is invalid due to lack of consideration

CONSIDERATION

– *Fasullo v. Investments Hardware Ltd.*

LAW

- As the Employer failed to provide consideration to the Employee in return for signing the written contract, the written contract, and termination clause therein, is invalid entitling Employee to common law notice

CONSIDERATION

– *Fasullo v. Investments Hardware Ltd.*

APPLICATION

- Consideration must be provided to make written contract valid
- Various forms of consideration – remuneration, vacation, benefits, etc.
- Flag consideration in written contract

VALIDITY OF TERMINATION CLAUSES

Stevens v. Sifton Properties

[2012] O.J. No. 6244

VALIDITY OF TERMINATION CLAUSES

– *Stevens v. Sifton Properties*

FACTS

- The Employee's employment was governed by an employment contract
- The Employee terminated without cause and seeks additional notice on the grounds that the termination provisions contained within the employment contract are contrary to the law and therefore invalid and unenforceable

VALIDITY OF TERMINATION CLAUSES

– *Stevens v. Sifton Properties*

EMPLOYMENT CONTRACT

“With respect to termination of employment, the following terms and conditions will apply:

- The Corporation may terminate your employment for what it considers to be just cause without notice or payment in lieu of notice.
- The Corporation may terminate your employment without cause at any time by providing you with notice or payment in lieu of notice, and/or severance pay, in accordance with the Employment Standards Act of Ontario.
- You agree to accept the notice or payment in lieu of notice and/or severance pay referenced in paragraph 13(d) herein, in satisfaction of all claims and demands against the Corporation which may arise out of statute or common law with respect to the termination of your employment with the Corporation”

VALIDITY OF TERMINATION CLAUSES

– *Stevens v. Sifton Properties*

LAW

- Specific and precisely accurate legislative citation is not required to sufficiently demonstrate the parties' intention to displace the requirement of termination notice in accordance with the common law presumption
- Establishing a “floor” with statutory minimum through the wording “at least” will also establish a notice “ceiling” which is sufficient to displace the common law presumption
- Upheld ruling in *Wright v. Young and Rubicam Group of Companies* regarding the exclusion of benefits

VALIDITY OF TERMINATION CLAUSES

– *Stevens v. Sifton Properties*

APPLICATION

- Although leeway will be provided in drafting of termination clauses, clarity is always preferable
- Recommend accurately referring to the legislation being restricted to, ie. *Employment Standards Act, 2000* (currently)
- Recommend including wording that permits for amendments to the legislation, as well as any successor statutes
- Expressly limit to the statutory minimums to avoid costs of having to argue that a “floor” also establishes a “ceiling”

RESTRICTIVE COVENANTS

Martin v. Concreate USL Limited Partnership

[2013] O.J. No. 515

RESTRICTIVE COVENANTS

– *Martin v. Concreate USL Limited Partnership*

FACTS

- Martin acquired a minority interest in the Respondent companies which were sold to TriWest Construction
- In conjunction with the sale, Martin signed agreements containing restrictive covenants which included non-competition clauses, non-solicitation clause and a prohibition against using the Respondents non-public information
- The restrictive covenants would end 24 months after Martin disposed of his interest in the Respondents, however Martin could not dispose of his interest without approval of TriWest Construction, the Respondents and their subsidiaries
- Martin sought the unenforceability of the restrictive covenants on the grounds that they are ambiguous or otherwise unreasonable

RESTRICTIVE COVENANTS

– *Martin v. Concreate USL Limited Partnership*

LAW

- A covenant will only be upheld if it is reasonable in reference to the interests of the parties concerned and the interests of the public in discouraging restraints on trade
- If a covenant is ambiguous, in the sense that what is prohibited is not clear as to activity, time, or geography, it is not possible to demonstrate that it is reasonable

RESTRICTIVE COVENANTS

– *Martin v. Concreate USL Limited Partnership*

APPLICATION

- Ensure that the length of time a restrictive covenant is to be in effect, along with all other requirements including geographic scope and industry are reasonable and not vague in their restrictions.

RESTRICTIVE COVENANTS

– *Martin v. Concreate USL Limited Partnership*

APPLICATION

- Ensure that the length of time a restrictive covenant is to be in effect, along with all other requirements including geographic scope and industry are reasonable and not vague in their restrictions.



QUESTIONS AND ANSWERS

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THE END – THANK YOU!

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