

MINKEN

EMPLOYMENT LAWYERS

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Employment Law Primer

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Overview of Canada's legal framework

- Two primary sources of employment law
 1. Statute, e.g. *Employment Standards Act, 2000* or *Canada Labour Code* – minimum rights
 2. Common law, i.e. court case decisions – greater rights and benefits to employees

Applicable Legislation

- *Employment Standards Act, 2000 (“ESA”)*
- *Ontario’s Human Rights Code*
- *Workplace Safety and Insurance Act, 1997*
- *Occupational Health and Safety Act*
- *Pay Equity Act*

Employment Standards Act, 2000

- Provides for minimum employment standards in Ontario, including minimum wages, work hours, overtime, holiday time, holiday pay, vacation entitlements, sanctioned absence, termination, and severance pay
- Employment standards apply where no express contract provision
- Cannot contract out of or below ESA minimums

Ontario's Human Rights Code

- Aimed at ensuring all Ontarians are provided with equal rights and opportunities without discrimination in area of employment
- Establishes an adjudicative tribunal for human rights complaints
- Employer's have a duty to accommodate – “employer must accommodate the employee in a way that, while not causing the employer undue hardship, will ensure that the employee can work.” *Hydro-Quebec*, 2008 SCC 43.

Workplace Safety and Insurance Act, 1997

- Provides no-fault compensation plan to employees in respect to work-related illnesses and injuries.
- Certain employers collectively pay annual premiums for this insurance, thus limiting their financial exposure to liability and costs of work-place accidents

Occupational Health and Safety Act

- Imposes responsibilities and duties on employers to address health and safety hazards on the job, including workplace violence and harassment
- Harassment is a course of comment or conduct which is known or ought to be known to be unwelcome
- Where harassment alleged, employers must act quickly, take complaints seriously, and conduct an adequate investigation
- Provides penalties consisting of fines, imprisonment or both when contravened

Pay Equity Act

- Requires employers with ten or more employees to provide equal pay for work of equal value
- Applies to all public sector employers in Ontario not federally regulated, all private sector employers in Ontario, with ten or more employees

Accessibility for Ontarians with Disabilities Act, 2005

- Applies to every person/organization that:
 - Provides goods, services or facilities;
 - Employs persons in Ontario;
 - Offers accommodation;
 - Owns or occupies a building, structure or premises; or
 - Is engaged in a prescribed business activity ...
- Must establish business practices, including training, with respect to the provision of services to individuals with disabilities

Common Law in Canada

- Judge made law, known as case law
- Establishes additional rights and remedies for employees
- Sole authority for:
 1. An employee's duty to mitigate;
 2. Enforceability of non-competition and non-solicitation agreements; and
 3. Constructive dismissal.

Employment Agreements

- Employer can control some of the uncertainties with an employment agreement
- If no employment agreement, common law will govern employment relationship
- A well drafted termination clause can limit an employer's common law notice exposure
- Can expand employee's obligations to the employer, e.g. non-competition, non-solicitation

Enforceability of Employment Agreements

- Must comply with the employment standards legislation
- Must name proper employment standards legislation
- A term which contravenes the minimum ESA standards is void, for example notice on “base salary” only, or where benefits are not included
- Common law will apply in absence of enforceable written term
- Provide to prospective employee before commencing employment, and before verbally hiring employee, i.e. provide consideration for the contract
- Provide employee with sufficient time to review contract or have it reviewed by a lawyer – no pressure

Elements of the Employment Agreement

- Termination without Cause
- Termination for Cause – cause defined
- Resignation
- Bonus
- Employer's Policies and Procedures/Policy Manuals
- Confidentiality
- Non-Competition
- Non-Solicitation
- Vacation time

Termination Clause

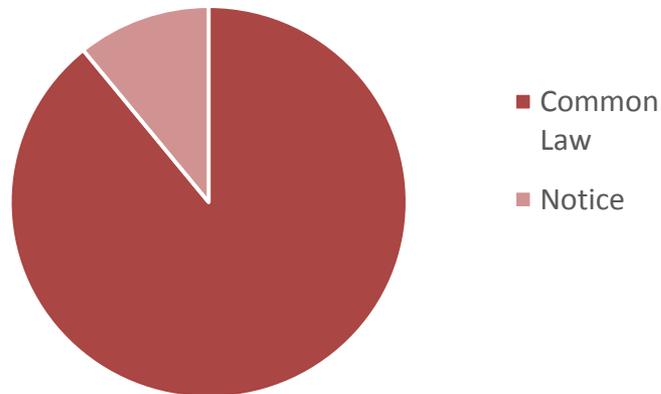
- Should clearly state notice or severance employee will receive where termination is with or without cause
- Can be based on employment standards minimum or on a formula
- Should not contravene any of the sections of the ESA, if it does, the clause will most likely not be upheld
- Should state employee is entitled to no notice or severance if terminated for cause. Explicitly state where cause includes material breach of employer's procedures/policy manual
- Difficult to draft enforceable termination clauses, but if drafted properly will minimize and Employer's risk

Issues in Termination of Employment Relationship

- Employment Agreement with Termination Clause?
- Notice
- Just Cause
- Bad Faith
- Mitigation

Notice

- Statutory Notice – ESA
 - Notice – ss. 55 – 62
 - Severance – ss. 63 – 66
- Common law Notice – Judge made law



Statutory Notice

- Must be provided in reasonable advance of the actual termination
- Statutory minimum period must be given:
 - Notice;
 - Pay in Lieu of Notice;
 - Severance (where employer has over \$2.5 million in salaries)

Common Law Notice

- Traditionally much longer than statutory minimum
- Unless there is a proper termination clause in an employment agreement employer must provide compensation for the common law notice period
- Employment lawyer will conduct a Wrongful Dismissal Database search
- Relevant factors: length of service, age, character of the position, including degree of responsibility, and employee's level of training and education
- Length of notice considered reasonable may depend on availability of similar employment, having regard to the experience, training and qualifications of the employee

Types of Notice

1) Notice, being working Notice

2) Pay in lieu of notice

- Employer to pay “wages”: to which employee would be entitled as though employee had worked through the notice period
- Required to continue benefits, medical, dental, STD, LTD for duration
- Pay for unused vacation time

Just Cause

- Not required to give notice of termination if there is just cause
- A situation in which the employee acts in a manner that is effectively a repudiation of the employment contract
- Context of situation will determine whether just cause, e.g. insubordination, insolence, culpable absenteeism, sexual harassment

Ministry of Labour – Wilful Misconduct

- If former employee brings a complaint to the Ministry of Labour, for notice pursuant to the *ESA*, test to be met is not just cause
- Test is higher: “wilful misconduct”, being: claimant’s conduct was intentional, or reckless so the applicant appreciated its consequences to the employer

Bad Faith

- Employers should be conscious of their conduct in terminating employees
- Damages for bad faith may be claimed where the employer is misleading, dishonest, or unduly insensitive in terminating employee
- Employee must prove suffered from mental distress due to employer's conduct
- Must show mental distress was reasonably foreseeable

Mitigation of Damages

- Employees have a duty to mitigate by securing, or making reasonable efforts to secure, alternative employment.
- Might entail accepting lesser position with same employer or relocating
- Duty is held to standard of reasonable
- No obligation to take a non-comparable position

Discussion Questions

- What is the direct impact of hiring my first employee?
- What is the direct impact of terminating an employee?

Concluding Thoughts

- Thank you for inviting me to speak
- Consult an employment lawyer when:
 - Hiring the first employee, to ascertain you are following all necessary legislation;
 - Drafting employment agreements;
 - Drafting independent contractor agreements;
 - Reviewing employment agreements;
 - Before terminating an employee, to provide an opinion as to termination, manner of termination, amount of notice to be provided, termination script.
- Upfront cost of employment lawyer will likely save you litigation costs later.

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