



Is it Time to Update your Employment Contracts 2.0?

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I first wrote about this issue a couple of years ago in response to repeated inquiries from new employer clients who were frustrated with high severance costs in Ontario.

A few of them approached our firm for guidance in restructuring their businesses to reduce costs and were perplexed to learn that cutting staff did not necessarily improve cash flow or profitability once severance arrangements had been factored in.

Of course, they wanted to know whether there was anything they could have done differently to manage severance costs in the future. The answer is simple: ensure that you have valid employment contracts (or offer letters) which address your employee's entitlements upon termination.

The problem for many clients was that while they had employment contracts intended to minimize their severance liability, the termination provisions had become unenforceable due to changes in the case law, leaving them on the hook to provide "common law" reasonable notice of termination, or pay in lieu thereof. As many employers discovered, these "common law" obligations were well in excess of their minimum obligations under the *Employment Standards Act, 2000* (the "ESA").

This "problem" for employers received a lot of attention (including my original article on the topic) a few years ago following the court's decision in *Stevens v. Sifton Properties Ltd.* In that case, the employer had a fairly common termination clause in its standard employment agreement which allowed for termination of employment upon payment of only ESA minimum notice (or pay in lieu of notice) and severance pay and also included language which said that the employee accepted those amounts in satisfaction of *all* claims against the employer.

This type of clause was previously thought to be enforceable by most employers and their legal advisors, but the court in *Stevens* disagreed and found the clause unenforceable because it did not specifically mandate the continuation of benefits during the ESA notice period, and continuation of such benefits is required under the ESA.

In the *Stevens* case, the employer actually continued the employee's benefits. However, since the employment agreement did not specifically mandate the continuation of benefits, and included the clause which said that the employee accepted the payments set out in the agreement in full

satisfaction of all claims, the court held that the employment contract violated the ESA (since the employer could have theoretically relied upon it and not continued benefits) and was, therefore, unenforceable.

As such, the terms of the employment contract were deemed to be invalid and the employee was entitled to reasonable common law notice instead of the contractually agreed upon ESA minimum entitlements. The difference can be significant depending on an employee's length of service and other factors.

The absence of an express reference to the continuation of benefits was found to invalidate termination clauses in subsequent cases. In those subsequent cases, the court also found other reasons to invalidate termination clauses.

For example, in *Miller v. A.B.M. Canada Inc.*, the court found that a reference to only paying "salary" during the notice period was invalid, as the ESA requires the employer to provide *all* forms of compensation and the employment contract specifically included a pension and car allowance as part of the compensation package.

In *Howard v. Benson Group*, the court had to decide whether a reference in the termination clause to "amounts paid" in accordance with the ESA included all forms of compensation, including benefits. The court determined that it was ambiguous and held that the entire termination clause was invalid.

While more recent decisions like *Luney v. Day & Ross*, *Ford v. Keegan* and *Goldsmith v. Sears Canada Inc.* appear to signal the court's willingness to uphold termination clauses where possible, particularly when the alleged ESA violations are only theoretical, the law in this area continues to evolve.

As a result of the ongoing evolution of the law in this area, employers should have their employment agreements reviewed periodically to ensure that they remain enforceable, particularly with respect to the termination provisions. Failure to do so could result in significant unexpected costs for employers.

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