LABOR & EMPLOYMENT

5 KEY DO'S AND DON'TS OF ONTARIO EMPLOYMENT

by W. Eric Kay
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Do enter into an Employment Contract which:

1. sets out and defines the title, role and responsibilities of the employee;
2. clearly sets out the terms of employment, including employee rights upon termination; and
3. if required to protect your business, contains non-solicitation clauses and/or non-competition clauses which will be enforceable;

But do not:

4. make unilateral fundamental changes to an employee's terms of employment; or
5. terminate an employee and allege just cause where there is none.

The Employment Contract

In Ontario, employment is governed by the principals of common law and statute. An employee is employed pursuant to a contract of employment, either express or implied. Where an employee and employer have not agreed to fundamental terms such as termination provisions, a court will determine what the parties would have agreed to had they put their minds to it. Absent clear wording in an employment contract which limits the employee's entitlement upon termination to notice pursuant to the *Employment Standards Act* (the "ESA"), which is the minimum standard only, an employer will likely be required to give lengthier notice or pay in lieu as provided by the common law. In addition, an employer whose contract may meet ESA minimum standards but who errs when terminating an employee, for example by cutting off employment benefits during the reasonable notice period, which is prohibited by the ESA, may find itself facing a lengthier notice period.

ESA Notice Periods

In general terms, the ESA provides for notice of termination without cause, or pay in lieu thereof, of one week per year of service to a maximum of 8 weeks. An employer may also face severance obligations when terminating an employee. Severance obligations arise where an employee with more than 5 years of service is terminated without cause and the employer has a payroll in excess of $2.5 million or is shutting down an establishment and terminating more than 50 employees in a 6 month period, or terminating more than 50 employees in a four week period. If applicable, severance obligations require an employer to pay an additional week of salary for each year of service up to a maximum of 26 weeks.

Common Law Notice Periods

The common law provides for notice of termination of employment without cause, or pay in lieu thereof, generally based on what have become known as the Bardal factors which include: the employee's age, length of service; seniority of position and; ability to obtain alternative comparable employment. Ontario Courts have typically awarded up to one month of pay for each year of service to terminated employees who have implied contracts of employment or written contracts of employment which do not contain clear and unambiguous termination clauses or which have attempted to impose contractual terms that do not meet the minimum ESA standards. The Courts have a tendency to award lengthier than usual notice to short term, senior level employees or if the employee was induced to leave secure employment for what turns out to be short term employment.

Wrongful Dismissal and/or Constructive Dismissal

Where an employee is not provided with sufficient notice of termination of employment or fundamental changes to the existing employment contract, Ontario Courts can find that the employee has been wrongfully terminated or constructively dismissed. Damages are generally assessed in an amount corresponding to the employee's remuneration (including all benefits of employment) during the reasonable notice period discussed above.

Continued employment does not generally constitute valid consideration to support changes in the terms of employment in Ontario. Accordingly, where an employer seeks to add terms (such as a post-employment non-competition or non-solicitation clause) or change an employee's role, title and/or remuneration (including bonus structure), without consideration for such changes, an employee may take the position that he/she has been constructively dismissed.

Where an employee is offered fresh consideration for changes that an employer wishes to impose, the employee is not under a duty to accept the change and may still consider him/herself as constructively dismissed if the employer does not then handle the situation properly and give reasonable notice of the change in terms. A constructive dismissal will give rise to the employer's obligation to provide notice or pay in lieu thereof as discussed previously. In such a circumstance, the employee is subject to a duty to mitigate and therefore, an offer of continued employment on the terms and conditions that the employer has attempted to institute may have the effect of reducing the actual damages that an employer may be required to pay.

Just Cause for Termination

If an employee has been guilty of serious misconduct, habitual neglect of duty, incompetence, conduct incompatible with his duties or prejudicial to the employer's business, or willful disobedience to the employer's orders on a matter of substance, the law recognizes the employer's right summarily to dismiss the delinquent employee. (*R. v Arthurs, Ex parte Port Arthur Shipbuilding Co.*, 1967 CanLii 30 ONCA) However, despite *Port Arthur* still being considered good law, Ontario Courts and the Supreme Court of Canada have imposed an obligation of good faith and fair dealing on the part of employers in dismissing employees. Accordingly, Courts began to punish employers for alleging just cause where there was none, by finding bad faith in the manner of termination and awarding additional damages through the extension of the reasonable notice period. As a result of the recent Supreme Court of Canada decision in *Honda Canada Inc. v. Keays* (2008 SCC 39) where the Court held that damages which are punitive in nature should not be added to the length of the notice period but instead should be considered and determined as a separate actionable tort, the jury is still out on the full extent to which Courts will use this punitive remedy.

Restrictive Covenants

Ontario Courts are generally loathe to enforce non-competition covenants where a non-solicitation clause would have been sufficient to protect the employer's interest (*J. G. Collins Insurance Agencies Ltd. v. Elsley Estate,* 1978 CanLII 7 (S.C.C.), [1978] 2 S.C.R. 916 (S.C.C.)). In order to successfully enforce a non-compete, the covenant will be required to be reasonable (given the business interest to be protected) in time and geographic scope and not unduly limit an employee's ability to secure employment. Ontario Courts will not "blue pencil" or modify restrictive covenants, so a covenant that is too broad will be struck out completely and will be unenforceable. Where an employer requires an enforceable non-competition covenant, the employee should be encouraged to obtain independent legal advice prior to entering into the employment contract. Where an employer can effectively protect its interest, the use of a non-solicitation covenant is preferable.

FOR MORE INFORMATION, PLEASE CONTACT:

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