



General Employment Issues Common to Transportation Companies

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Employment Contracts

What is it?

- “ Terms which govern the relationship between an employer and an employee
- “ Still exist if not written
 - . Common law imposes implied terms
 - . Statutory minimums are guaranteed
- “ Written agreements (hopefully) eliminate uncertainty

Typical Types

- ” Fixed-term: provides a specific date on which employment will end.
 - . Usually used where there are specific tasks to be performed for a set time frame.
 - . Contract will terminate when the specific date arrives.
 - . If no termination provision, assume that employee is entitled to compensation for the balance of the term.

Typical Types (cont'd)

- “ Indefinite Term: will continue in perpetuity until terminated by either the employer or the employee
 - . Most common form of employment contract
 - . Most contain key provisions
 - “ Remuneration
 - “ Terms of employment (policies)
 - “ Restrictive Covenants: Non-competition/Non-solicitation
 - “ Termination
 - . Can be letter agreement or more formal

Remuneration

- ” Includes salary and all benefits
- ” Salary
- ” Commissions
 - . How and when earned
 - ” Sale contract or completion and payment for sale
 - ” Periodic (i.e. monthly sales targets)
 - . When paid
 - ” When earned, monthly, quarterly, etc.

Remuneration (cont'd)

” Bonuses, shares and options

- . Discretionary or formula
- . When is it earned? When is it paid?
- . Vesting?
- . Effect of termination on entitlement
- . Ensure consistent with the wording of the bonus, share or option plan

Policies

- ” Can codify in agreement
- ” Can incorporate by reference
 - . Need to ensure employee has chance to review
 - . Need to ensure available for review
 - . Need to ensure employee notified of changes
- ” Always reserve the right to modify policies to avoid constructive dismissal argument

Restrictive Covenants

- “ Non-solicitation obligation
 - . Prevents employee from soliciting clients and employees
- “ Non-competition obligation
 - . Prevents employees from competing in same industry
- “ Confidentiality

Termination and severance

- “ Can be very employer-friendly
 - . Can provide for statutory minimums only
 - “ Duration
 - “ Amount
 - . Must have been reasonably reached and properly drafted to be enforceable
 - “ Duress, ambiguous or vague
 - “ Introduced after relationship already commenced?
- “ Require return of property and intellectual property in order to receive

Termination and severance

- “ Compensation for notice that the employee should have been given
- “ Where the intention is to maintain statutory minimums, the provision must specifically exclude more severance
- “ Remember . statutory minimums are both duration of notice period and amount of wages earned during that period

Termination and severance

- “ Calculation of Notice entitlement
 - “ Set sum vs. notice period calculation
 - “ Remuneration used to determine entitlement
 - “ Bonuses
 - . Earned and unpaid prior to termination
 - . Amount would have earned during notice period
 - “ Stock options
 - . Unvested options
 - “ Shareholdings
 - . Can the employee still own shares after termination?

Termination and severance

- “ Other issues
 - . Benefits
 - “ Do they continue?
 - “ Does employee receive an amount to secure replacement benefits in marketplace - rough cost is approximately 10% to 15% of base salary
 - . Matching pension contributions
 - “ Lost or paid out?

Termination and severance

- “ If not dealt with by way of employment contract, default is to common law notice
- “ Will generally result in a much larger severance obligation on the part of the employer
- “ Often requires getting the lawyers involved . and no one wants thatõ .



Wrongful Dismissals & Termination Packages Absent an Employment Contract

Overview

It may now be fairly and generally asserted that today, in the absence of a voluntary resignation, or serious misconduct on the part of the employee, Canadian employers must dismiss their employees with proper notice or pay in lieu thereof.

If the latter, they must “make the employee whole” for the common law period of reasonable notice.

Employment Agreement in place

- “ Parties have already contemplated what it will require to make the employee whole . bargain has already been made and will already have contemplated:
- . Notice amount
 - . Restrictive covenants
 - . Return of proprietary information
 - . Transition of Benefits

No Appropriate Employment Agreement

- “ What if there is no appropriate employment agreement?
 - . How much notice does the employee deserve?
 - . What is included in calculating the employee's compensation?
 - . What about the employee's benefits?
 - . Is there any effect on the employee's post-termination obligations?

Necessary Termination Documents

- “ Termination letter
- “ Release
- “ One or both of these documents should contemplate:
 - . Protection of confidential information
 - . Restrictive covenants (new or existing)

What Should be Said at the Meeting?

- “ For cause
 - . Particulars of conduct giving rise to for cause termination
- “ Without cause
 - . No details required or should be given
 - . %Company has decided to go in a different direction+

Post Termination Concerns

- “ Two recent decisions have brought two issues to the forefront
 - . Enforceability of restrictive covenants in a wrongful dismissal claim; and
 - . How do we manage the employee's lost benefits entitlement?

Restrictive Covenants

- ” What legal effect is the act of termination?
- . Every employee can be dismissed at once with no notice and without any grounds. That will not be a breach of the employment contract, provided that the employer gives pay in lieu of notice. . Soost, 2010 ABCA 251
 - . To summarize, when an employer terminates an employee without cause and without providing proper notice, this constitutes a wrongful dismissal, in breach of the employee's contract, and any payment by the employer in lieu of notice is an attempt at compensation for the breach . Globex, 2011 ABCA 240

Restrictive Covenants (cont'd)

- “ Why does it matter?
 - . *Globex* (majority)
 - “ When an employee is dismissed without cause or notice, the employer cannot enforce a restrictive covenant otherwise binding the employee
 - “ An employer that wrongfully terminates a contract of employment should not be able to capitalize on its failure to give notice or damages in lieu of notice by enforcing prospective obligations against an innocent employee.

Restrictive Covenants (cont'd)

” What is the impact?

. *Globex* (minority)

” Non-solicitation covenants are clearly intended to operate primarily, if not exclusively, after termination. There is no basis for saying that if the employer gives inadequate notice, the employee is entitled to take whatever proprietary information he chooses, or appropriate the employer's business by soliciting its clients. Any such self-help remedy could be entirely disproportionate to the breach. For example, assume the employer merely miscalculated the appropriate length of reasonable notice by one month. It would be completely disproportionate to that breach to thereafter excuse the employee from respecting any of the other covenants in the agreement.

Restrictive Covenants (cont'd)

- ” What do we do about this?
 - . Pretend *Globex* does not exist
 - . Ensure that any employment agreement that contains a restrictive covenant also sets out exactly what the employee's entitlement is upon termination
 - . If not, overpay the severance amount to avoid any possible wrongful dismissal claim

Valuing Lost Benefits

- “ Employees entitled to the cost of replacing the benefits in the marketplace:
- “ Ex.: *Hansen v. Altus Energy Services*, 2010 ABQB 820
 - . Fringe benefits that are part of the employee's wage package must be compensated
 - . Plaintiff obtained replacement benefits at cost of \$248.19 plus \$50.00 deductible
 - . Court awarded this amount for notice period plus expenses not covered under new plan that would have been covered under Altus plan
 - . \$5,500+ (22 month notice period)

Valuing Lost Benefits

” *Brito v. Canac Kitchens*, 2011 ONSC 1011; aff’d 2012 ONCA 61

. **FACTS**

- ” Canac notorious for using the courts to deal with dismissal claims
- ” Plaintiff was 55 at date of termination and had worked for Canac since arriving in Canada in 1979
- ” Annual salary of approximately \$70,000
- ” Plaintiff was dismissed without cause on July 15
- ” Plaintiff found a new job on August 1 with a salary of approximately \$42,500 but no disability coverage

Valuing Lost Benefits

- “ *Brito v. Canac Kitchens*, (cond)
- . What was his notice period?
 - ” Court found it to be 22 months
- . What were his damages, less mitigation?
 - ” \$40,934.65
- . What about the illness?

Valuing Lost Benefits

- ” *Brito v. Canac Kitchens*, (cond)
- . If placed in the position he would have been in had he been provided working notice, the Plaintiff would have had disability coverage for the entire notice period
 - . Employer could have made alternate arrangements, but %gambled that [the Plaintiff] would get another job and stay well. ã [I]t lost that gambleã +

Valuing Lost Benefits

- “ *Brito v. Canac Kitchens*, (cond)
- “ Lost short-term disability benefits: \$9,078.94
- “ Lost long-term disability benefits(to trial): \$146,723
- “ Lost future LTD benefits to age 65: \$47,941
- “ Damages for playing hardball: \$15,000
- . TOTAL DAMAGES: \$218,742, plus costs
 - “ (costs award against Canac was \$125,000 as well)
- . SUMMARY
 - “ Wrongful dismissal damages: \$40,935
 - “ Rest of the damages, plus costs: \$342,742 (plus interest and legal fees)



Restrictive Covenants

Purpose

- “ Post-employment conduct is restricted by duties of confidentiality, fidelity and good faith
- “ In an employment contract, a restrictive covenant is a clause that seeks to restrict an employee’s post-employment conduct
- “ Key employees also affected by on-going fiduciary duties even where there is no written agreement setting this out

Types

” Non-competition clause

- . Seeks to prevent the former employee from competing with the employer either by joining a competitor or creating a competitive business

” Non-solicitation clause

- . Seeks to prevent the former employee from soliciting the employer's clients and employees

” Confidentiality clause

- . Seeks to prevent the former employee from divulging confidential information (i.e. trade secrets, proprietary information, etc.)

Non-Competition and Non-Solicitation Clauses

- “ Acknowledgment of employer’s exposure
- “ Defined scope of prohibited activity
- “ Defined geographic scope
- “ Defined duration
- “ Remedies . injunctive relief and damages

Example: Non-competition Clause

- “ The Executive agrees that in the event the Corporation terminates this Agreement for Cause, or in the event that the Executive terminates this Agreement, neither he nor any employee or agent of the Executive shall, for a period of 12 months from the Termination Date, be engaged, either directly or indirectly in any manner including, without limitation, as an officer, director, shareholder, owner, partner, member, joint venturer, employee, independent contractor, consultant, advisor or sales representative, in any business or enterprise which competes with the business of the Corporation or any Related Corporation, as such business was conducted as of the Termination Date, with the exception that the Executive may be involved as an investor or shareholder in securities issued by corporations that do not compete directly or indirectly with the business of the Corporation, or where such investment constitutes not more than 5% of the outstanding securities of a business or corporation whose shares are traded on a national securities exchange;

Example: Non-solicitation Clause (Clients)

- “ During the Employee’s employment with the Employer and for a period of 6 months after the termination of this Agreement, the Employee shall not, directly or indirectly, through one or more Persons in any manner whatsoever including, without limitation, either individually or in partnership, jointly or in conjunction with any other Person, or as employee, principal, agent, director or shareholder make any use of any customer list of the Employer to solicit, endeavour to solicit, canvass or interfere with the relationship of the Employer with any Person that is a customer or has been a customer of the Employer within the previous two-year period.

Example: Non-solicitation Clause (Employees)

“ During the Employee’s employment with the Employer and for a period of 6 months after the termination of this Agreement, the Employee shall not, directly or indirectly, through one or more Persons in any manner whatsoever including, without limitation, either individually or in partnership, jointly or in conjunction with any other Person, or as employee, principal, agent, director or shareholder, induce any employee of the Employer to leave his or her employment with the Employer.

Example: Confidential Information Clause

- “ The Employee confirms that during the Employee’s employment with the Employer, the Employee may acquire knowledge of the secrets of the Employer and information of a confidential nature which relates to the Employer or its related entities, including but not limited to trade secrets, technical information, marketing strategies, sales and pricing policies, financial information, business plans, lists of present and prospective members of the Employer, as well as the members’ contacts and related information ("Confidential Information") concerning the affairs of the Employer and the Business. During the term of the Employee’s employment with the Employer, or for any time thereafter, the Employee shall not use any of the Confidential Information to the detriment of the Employer.

Enforcement

- “ Restrictive covenants are difficult to enforce . contrary to public policy as a restraint on trade
 - . Tension in the common law between the concept of freedom to contract and public policy considerations against restraint of trade
- “ Employers want to protect market position, goodwill, client relationships and confidential business information
- “ Employees want to be free to earn a living in their chosen field, public interest in promoting this

Enforcement (cont'd)

- “ Courts look at four factors to determine whether a restrictive covenant is reasonable
 - . Is there a legitimate proprietary interest to protect?
 - . Geographic area of restraint
 - . Duration of restraint
 - . Type/scope of activity being restrained
- “ The employer has the responsibility to show that the restrictive covenant is reasonable
- “ After establishing reasonableness, employee has the onus of proving restrictive covenant is contrary to the public interest

Enforcement (cont'd)

- “ Whether a restrictive covenants is reasonable will depend on the facts and circumstances of the case
- “ The court will consider factors such as
 - . Nature and extent of employer's business
 - . Nature of employment
 - . Range of activities covered by the restrictive covenant

Enforcement (cont'd)

- “ A non-competition clause will likely not be enforced if a non-solicitation clause can adequately protect the employers interests
 - . Difficult to prove that non-competition is necessary to protect the employer's legitimate business interests
 - . More commonly enforced when part of a sale of a business

Enforcement (cont'd)

” Restrictive Covenants . Ambiguity

- . Reasonableness cannot be determined if a covenant is ambiguous . i.e. what is prohibited is not clear as to activity, time, or geography.
- . An ambiguous restrictive covenant is by definition, *prima facie* unreasonable and unenforceable.
- . The Court will not try to fix the ambiguity: if the covenant is ambiguous it is struck entirely.

Enforcement (cont'd)

“ *Shafron v. KRG Insurance Brokers (Western) Inc.*, 2009 SCC 6 (SCC)

- . Courts are to only enforce restrictive covenants that are reasonable and not beyond
- . A vague or ambiguous restrictive covenant is unenforceable
- . Inappropriate to apply the doctrine of notional severance to restrictive covenants in employment contracts because:
 - “ There is no bright-line rule to determine whether a restrictive covenant is reasonable
 - “ Allowing notional severance would encourage employers to draft overly broad restrictive covenants and leave it to the courts to decide what to save

Enforcement (cont'd)

“ *H.L. Staebler Company Limited v. Allan*, 2008 ONCA 576

- . A non-competition covenant will not be enforced if it is too restrictive
- . Cannot restrict all business dealings with clients of former employer
- . Must limit restriction to prevent soliciting business in a defined geographic area (except in situations involving a sale of a business and goodwill, where the employee is in the business)
- . Cannot prevent employee from working in his/her profession or chosen field

Need Consideration to be Valid?

- “ If agreement containing restrictive covenant is signed at commencement of employment, employment itself is valid consideration
- “ If agreement is signed during course of employment, continued employment is not valid consideration ?

Best Practices

- “ Ensure that any employment agreement that contains a restrictive covenant also sets out exactly what the employee’s entitlement is upon termination
- “ If not, overpay the severance amount to avoid any possible wrongful dismissal claim
- “ Ensure reasonable and least restrictive as possible
- “ Ensure employee specific
- “ Ensure valid consideration given

**THANK
YOU!**



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