

GET IT IN WRITING

by Michael Krawchuk

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In a chaotic world, certainty is tough to achieve. This is especially true in employment relationships. Technology, market competition and job demands have positive and negative effects on businesses and employees. Faced with an ever changing business world, setting the terms of employment in writing with employees at the time of hiring can provide employers with extra comfort.

Too much is left to uncertainty without written employment contracts,. If a matter with a former employee has to be litigated, a court's decision might be an unpleasant surprise to the employer. For example, there are provisions for pay in lieu of notice under *The Labour Standards Act* for employees terminated without cause. If a dismissal goes to trial, however, the Court will apply the common law in the absence of a written contract on point. This permits much longer notice periods (thus more pay in lieu) than is set out in *The Labour Standards Act*. An employer who thought that four weeks pay in lieu of notice was sufficient when terminating an employee may be unpleasantly surprised to learn that four *months* pay in lieu of notice is what the law requires. The surprise may be even more unpleasant if the employer did not budget for such an expense, especially if the employee's termination is due to a downturn in business.

Matters such as pay in lieu of notice for dismissals may be dealt with in a written employment contract at the beginning of the employment relationship. As mentioned above, the common law provides more generous notice periods than the statutory minimum. In most cases, however, the common law will not apply in the face of a written contract on point. In the absence of employer fraud, undue influence, misrepresentations and the like, and so long as the contractual term provides for a notice period at least equal to the statutory minimum under *The Labour Standards Act*, the contractual notice period will be enforceable against the employee.

A written employment contract may cover aspects of the employment relationship in addition to pay in lieu of notice. Start date, hours of work, details of pay, vacation entitlement, sick leave, job responsibilities, disciplinary rules and procedures and pension details (if offered) may all be dealt with in the written contract. While the common law may be displaced by a written contract on point, statutory minimums cannot be decreased. If a contractual term provides for less than the statute permits, the term will not be enforceable.

The benefit of committing terms such as these to writing is not so much to avoid unpleasant surprises, but rather, to clearly communicate to the employee the terms of the employment relationship. With a written contract, guesswork and uncertainty can be avoided at the outset of the employment relationship. This is far better than trying to deal with issues such as pay increases at a later, and usually inconvenient, date.

The written contract should not be excessively detailed. While it is important to set out the basic terms of the employment relationship, it is difficult to predict everything that can occur during an individual's employment. As time goes on and the employee's and employer's

situations change, an excessively detailed employment contract may require more revisions than are realistic. Therefore, a clearly worded written contract dealing with the basic terms of employment is preferable to a “wordy” contract that tries to cover every aspect of the employment relationship and which, in the end, may be seen to cover nothing at all.

These contracts do not have to be overly formal. They are often provided as a letter, with the employee signing the copy to indicate his or her acceptance. There should also be an effort to ensure that the employee receives independent legal advice. This helps avoid a later argument that they did not know what they were signing.

There are real benefits to an employer in ensuring that employees enter into a written employment contract at the beginning of the employment relationship. These written contracts allow the employer and employee to clearly set out and understand each side’s responsibilities and obligations at the outset. They avoid misunderstandings and litigation, which is in the best interests of both employers and employees.

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