Employment settlements that stick

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A few careful steps can help ensure the employment termination settlements you provide are beyond any future legal challenge.

The structuring of a termination agreement is the central and most critical task an employer undertakes during the process of terminating an employee. It can also be the most challenging. No two termination situations are identical, and getting from termination offer to termination settlement can try even the most patient of human resources professionals.

There are many benefits to getting an employee's fast and efficient sign off on a settlement agreement. It lessens disruptions to remaining staff who may have a connection to the departed employee; it avoids the uncertainty of future legal proceedings; and minimizes your time commitment.

But in getting the deal done, it's important to ensure that any actions you take don't leave your settlement agreement exposed to a legal challenge down the road. One of the ways employees have challenged agreements is by claiming that the circumstances in which the agreement was signed and accepted were unconscionable and that any release of the employer should be set aside.

Fortunately for employers, a recent Ontario Court of Appeal decision, *Titus v. William F Cooke Enterprises Inc.*, has confirmed the test for unconscionability and given some clear direction on when an agreement will be set aside for this reason.

Four part test

In *Titus*, the employee held the position of corporate counsel for 18 months before being terminated without cause. He was offered statutory termination pay of two weeks plus a lump sum payment equal to his salary for two and a half months.

The employer prepared a termination agreement that contained the offer and a release from all claims that the employee may have against the employer. The employer suggested that the employee take the offer home consider it over the weekend. However, the employee insisted on signing the release that day in exchange for a cheque for the full amount of the termination pay.

Several months later, the employee began an action for wrongful dismissal, requesting that the release be set aside as unconscionable. Among other things, the employee claimed that the employer took advantage of his vulnerable situation due to the recent death of his father and his difficult financial situation caused by a high debt load. At trial, the employee succeeded at having the release set aside. The employer appealed.

The Ontario Court of Appeal applied the test for unconscionability set out in 2005 by the Alberta Court of Appeal in *Cain v. Clarica Life Insurance Company*. There are four elements that are necessary for an agreement to be found unconscionable:

1 A grossly unfair and improvident transaction; and

2 The victim's lack of independent legal advice or other suitable advice; and

1 An overwhelming imbalance in bargaining power caused by the victim's ignorance of business, illiteracy, ignorance of the language of the bargain, blindness, deafness, illness, senility, or similar disability; and

2 The other party's knowingly taking advantage of this vulnerability.

The Court of Appeal concluded that none of the elements of this test were present in *Titus*, due mostly to the fact that the employee was a lawyer with employment law experience and was not rushed to sign the release in difficult circumstances. He was, in fact, encouraged by the employer to take time to review and consider the release.

Based on the wording of the test adopted in *Titus,* it appears that it may be difficult for employees to have a termination agreement or release overturned on the basis of unconscionability. Nevertheless, it is important for employers to craft their termination agreements in such a way that they will not be set aside for this reason.

Steps to protect your agreement

Here are three steps you can take to help ensure any termination settlements you prepare are beyond legal rebuke:

Ensure employee gets independent legal advice

This is the most critical step to ensuring that a settlement agreement goes unchallenged. Give departing employees adequate time to get the legal advice they need. Then, be sure to include an acknowledgement that they received this advice in the release. In some cases, you may want to request that the lawyer giving independent advice sign a certificate acknowledging that this advice was given and understood.

Provide employee with adequate notice of termination

The *Employment Standards Act, 2000* mandates minimum periods of notice of termination, depending on how long the terminated employee has worked for the employer. You must provide the departing employee with the minimum statutory notice of termination. However, it is best to offer to pay some amount in addition to the statutory minimum so that it cannot be said that there was no consideration for the release.

Avoid linking letter of reference with signing of releases

The Ontario Court of Appeal in Titus found that any link between providing a letter of reference in exchange for a signed release was "potentially problematic" and could "provide valuable support for an employee's subsequent claim that a release was unconscionable ". While employers have no obligation to provide a letter of reference, your decision on whether or not to provide a letter of reference must be made independently of any settlement offer.

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