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Court Finds Employment Agreement Signed After Offer Letter Presented to Employee Unenforceable

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It is common that during the hiring process an employer will have various discussions with the applicant. The general terms of the job will be explained and, if the applicant accepts the job, a general offer letter or e-mail confirmation of a welcoming nature will be sent. Sometime later, the applicant will sign additional documents, including benefits forms and, most importantly, an employment agreement.

Many employers follow this process without a second thought. However, a recent case from the Ontario Superior Court of Justice should give employers pause as the Court found that an employment agreement that was signed after an offer letter was presented to a prospective employee to be unenforceable.

The Case

In *Buaron v. AcuityAds Inc.*, during the hiring process the employee had a series of discussions with the employer's Chief Operating Officer. Eventually, those discussions culminated in an e-mail sent to the employee with an offer letter attached that set out the employee's salary, title, vacation, probationary period and participation in the benefits plan. The employee signed an employment agreement a few days later and started work shortly thereafter. All was in order until the employee was dismissed for "cost cutting" reasons. The employee demanded severance pay far and above the 1 week's pay stipulated in his employment agreement (which was the statutory minimum termination pay). No resolution was reached and litigation ensued.

On summary judgement, the Court set aside the employment agreement and awarded the employee 4 months' pay in lieu of reasonable notice. At the time of termination the employee was 34 years old, earned $110,000 annually and was employed in an IT role for only 9 months.

Understandably, the employer had tried to argue that the employment agreement was enforceable and limited the employee's entitlement to 1 week's pay as prescribed by the *Employment Standards Act, 2000*. The agreement was properly drafted and the employee had signed the agreement prior to commencing work. In the employer's email that contained the offer letter, the employer stated that a time would be scheduled to "go through the contracts". A time was scheduled and the employee did sign the contract (albeit after he resigned from his job). In short, the emplyer did not see any defect in its hiring process to somehow render the employment agreement unenforceable.

The employee argued that the parties already agreed to the terms of employment prior to him signing the employment agreement. The discussions during the hiring process about the employee's terms of employment (salary, vacation, position, probation, benefits) were agreed-upon and then confirmed in the e-mail and offer letter.

The Court agreed and held that when the e-mail with the offer letter was sent, a contract had been formed. The Court found that the e-mail and offer letter reflected terms discussed during the hiring process and confirmed an oral agreement between the parties. The Court also commented that the e-mail and offer letter referred to the employee being "on board" and "joining our team". Accordingly, the employment agreement signed a few days later was unenforceable for "lack of consideration". In other words, the employee already had the job in exchange for the terms in the offer letter. Therefore, when he signed the employment agreement he received nothing of value in exchange for its terms, which the Court noted included termination pay that "would be severely limited".

"Take-Aways" for Employers

This case is a good reminder to employers that they need to be careful during the hiring process. Specifically, they should be careful about what is communicated to applicants. In this case, the Court found that an oral agreement was reached between the parties which was confirmed by the e-mail and offer letter. That agreement did not include signing a comprehensive employment agreement, which, would have "severely limited" the employee's rights on termination.

It is apparent that the employer's downfall in this case was the fact that the employment agreement was not specifically mentioned during the hiring process. Indeed, the Court appeared to place emphasis on the fact that in the e-mail attaching the offer letter there was no employment agreement attached (just a vague mention of signing other documents later). As noted by the Court:

> "It does not lie in the mouth of the [employer] to say there was more to sign to create an agreement. It could easily have included the employment agreement with the e-mail…It chose not to do so."

Employers should be transparent with applicants during the hiring process. While terms such as salary, benefits and vacation will naturally be the main focus, employers should be very clear, including in any e-mail communications or offer letters, that employment is conditional on signing an employment agreement prior to starting work. Employers should not present applicants with an offer letter with "bare bones" terms of employment to be followed up with a more robust employment agreement. All of the hiring documents should be presented at the same time and in advance of starting the job so that there is no confusion as to the contract being entered into between the parties.

An enforceable employment agreement would have dramatically reduced the employer's liability in this case. By clearly informing the applicant that an employment agreement was a condition of employment, and by providing the offer letter and employment agreement together, it is likely the result would have been in the employer's favour.