

starts work, the employee receives the promise of a job and remuneration while the employer receives the benefit of work as valid consideration. The situation is different when the employer seeks to introduce or amend the contract after the employee has begun work. Continuation of employment will not be sufficient consideration. The employer must offer new consideration, such as increased salary or benefits, for the changes to the contract to be valid.

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First Nations employers can increase predictability in their human resources management by using appropriately drafted employment contracts. Lawyers at Harris & Company frequently draft employment contracts and would be pleased to assist you in preparing appropriate contracts for your workplace.

Band Councillor can Sue Band as Employee

The Ontario Superior Court has recently granted a band council member the right to sue the council. The plaintiff commenced employment as an administrator of the Wahta Mohawk Band in 1998 and was terminated in 2004. She brought an action for wrongful dismissal and subsequently was elected a member of the Wahta Band Council.

The band sought to dismiss the action on several grounds, including that the plaintiff, now a council member, was effectively suing herself. The band argued that a band is not a corporate body and does not have a separate legal personality from its members. The argument was based on the ambiguous legal status of bands and band councils.

The court rejected this argument, relying on several cases which have held that band councils have both the power to sue and be sued independent from their members. The court also held that the plaintiff was not required to step down as an elected councillor in order to continue with the action.

The court found municipal law to be instructive. Ontario municipal law does not bar members of municipal councils who have claims against councils from remaining as councillors. Instead, in the same way that a conflict of interest must be disclosed, the interest in the litigation must be disclosed and the councillor cannot participate in the deliberations or voting in respect of the claim.

Applying these principles, the court held that the plaintiff could remain a member of the band council but must refrain from discussions on her wrongful dismissal action or from influencing other members on the issue.

Commandant v. Wahta Mohawks, [2006] O.J. No. 22 (Q.L.) (Sup. Ct.)

First Nations Employment Law

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July 2006

Issue 4

Employment Law Primer: The Value of Employment Contracts

Employers are often surprised to learn they have several obligations to their employees that are implied by the common law. One of the most important of these implied obligations is to provide reasonable notice of termination (see *First Nations Employment Law* Issue 1, September 2005). Band Councils and other First Nations employers can save themselves time, money and aggravation by clarifying employment obligations in a written contract.

Elements of a Contract

A contract of employment need not be in writing. Contracts can be oral, in writing or a combination of the two. Further, a written contract need not be formal. A simple letter confirming terms of employment is enforceable in court, provided the terms are clear.

There are several elements which must be satisfied before a contract is legally enforceable. First, there must be an offer to a potential employee setting out the terms and conditions of employment. Second, those terms must be accepted by the employee. Third, all terms must be known to both parties and be clear. Ambiguities will be interpreted against the employer. Finally, there must be consideration. Consideration means that both parties derive something of value from the contract.

Why are Written Contracts Important?

Written employment contracts provide several important benefits to employers.

First Nations Employment Law Conference

Friday, October 13, 2006
Vancouver, BC

Further Conference details will
be mailed shortly.

Certainty: a carefully drafted written contract will provide both parties with clarity regarding their rights and obligations and remove the uncertainty of implied common law terms.

Reduced and Predictable Costs: an employment contract can reduce an employer's liability and ensure that costs are clear and predictable.

Fewer Disputes: where the terms are clearly spelled out in writing, the likelihood of disputes is greatly reduced.

Added Protection: inserting provisions to deal with such things as probationary periods and confidentiality can offer protection to the employer.

What Should be Included?

Subject to certain legislative restrictions, the law permits employers to design and implement employment contracts which alter obligations that would otherwise be implied by common law. The contract should specify whether the contract is for a fixed or indefinite term and the date employment is to begin. The employee's position and duties and the employer's right to make changes to those duties should be included.

The contract should also contain provisions dealing with the termination of the employment relationship. At common law, there is an obligation on the

employer to provide reasonable notice when an employee is dismissed without cause. Reasonable notice is determined with reference to the particular circumstances of the case, such as length of service. This makes it difficult to predict obligations on termination with certainty. Only an express term in a written contract can fix the period of reasonable notice.

Ensuring Enforceability

A written contract will be of no use to an employer if it is found to be unenforceable. There are several grounds upon which a contract can be deemed invalid, including ambiguity, misrepresentation by the employer, undue influence, failure to comply with employment legislation and lack of consideration.

It is important for First Nations employers to know if their employees are regulated federally or provincially. The *Canada Labour Code* applies to federally-regulated employers, while the British Columbia *Employment Standards Act* regulates provincial employers. The *Code* and the *Act* contain different minimum standards relating to vacation, overtime and severance. A term of a contract that does not meet the minimum standards provided for in the legislation will not be enforceable. This includes a termination clause, which must provide at least the minimum statutory notice.

Consideration is also a key element of enforceability – both parties must receive something of value. When the contract is signed before the employee

Harris & Company – Labour and Employment Lawyers

Harris & Company is the largest firm in Western Canada practicing exclusively in labour and employment law. Our First Nations employment law practice group is made up of lawyers with considerable experience representing band councils, First Nations schools, health centres, housing departments, social service agencies and First Nations-owned businesses.

Our lawyers offer the following services to our First Nations clients:

Litigation – defending claims for wrongful dismissal and human rights complaints

Employment Policies – preparing and advising on policies in such areas as conflict of interest, privacy, confidentiality, email communication and harassment

Pre-termination Issues – advice to employers on each step in the process of preparing for and conducting an employee dismissal

Severance Packages – advice on the amount of severance or reasonable notice and assistance in preparing letters of termination and designing severance packages

Employment Contracts – advising, designing, writing, negotiating and implementing employment contracts and assistance with interpretation and monitoring of employment contracts

Investigation of Employee Conduct – policy enforcement involving and investigating employee misconduct, substance abuse, fraudulent activities, workplace violence and misuse of property and equipment

Seminars – delivery of specialized seminars for managers of First Nations employers, covering a wide spectrum of employment issues managers face on a regular basis

Should you require advice or assistance regarding any of these matters or wish to learn more about Harris & Company, please contact us at 604 684 6633, email us at info@harrisco.com or visit our website at www.harrisco.com