



MAKING OFFERS OF EMPLOYMENT

In recruitment situations, things often happen fast. There may be urgency to ensure that a good candidate doesn't accept an offer from someone else. Employers will sometimes complete the negotiations on a more informal basis with the intention of using a written contract once the candidate has accepted. This strategy, however, can have significant risks.

If the parties have reached agreement on fundamental terms, an enforceable contract may already be in place, and the employer may not be able to insist on a formal written agreement with new terms at a later point in time or, if the employee signs such an agreement, some key provisions may not be enforceable later on.

A contract can be formed based on conversations, e-mails, or other communications. When the employer later produces a second contract, this time in writing, with additional terms, a problem can arise if the candidate refuses to sign. Where the employer does not wish to proceed without its form of written contract, the candidate may have a good argument, depending on the facts, that she has been wrongfully dismissed. Damages can potentially be significant, particularly if the candidate has foregone other opportunities or been induced to leave an existing job.

There are several strategies to avoid this problem. The first is to use a "term sheet" for negotiation purposes. The term sheet would cover the basic principles that will later form the employment contract. For instance, the amount of salary, benefits, vacation, severance obligations, and other matters will be covered in the term sheet. The term sheet would also state that the offer is subject to the candidate signing the employer's

form of contract and a brief description of the significant terms such as, non-competition provisions and other important obligations. This would provide the candidate with the opportunity to consider the terms of the offer, and avoid the argument that the employer can't insist on a written contract because it wasn't part of the original "deal". The employer could also append a template contract to the term sheet with standard clauses that will be included.

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Even if a term sheet is not used and offers are made in the form of a letter, e-mail, or even verbally, the employer should always make sure that it covers the essential terms. If there is an intention to have the candidate enter into a written contract, that should be referenced as a term of the offer. Again, if a template or standard contract is available, it can be provided.

If there is a specific condition the candidate must satisfy before becoming employed, e.g. a reference check, a professional qualification, or immigration approval, this should also be specified. The employer should state that if the candidate fails to meet the required condition, no employment contract will come into existence and the employer will not be obliged to enter into an employment relationship with the individual.

By adopting some of these strategies, you can "close the deal" and make sure that matters of importance are addressed in an enforceable employment agreement.

The content of this Newsletter is intended to provide information on Bull, Housser & Tupper LLP, our lawyers and recent developments in the law. The information contained herein is summary in nature, and does not constitute legal advice. For additional details or advice concerning specific situations please contact any member of our Labour & Employment Group.

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