A ‘Watertight’ Employment Agreement – in Search of the Elusive Beast!

23 November 2020

Catherine Stewart, Barrister and Laurie Knight, Staff Barrister, share some tips to drafting a watertight employment agreement by looking at mandatory requirements, clauses that go beyond the minimum and clauses relevant to COVID-19. They will delve further into this topic at the upcoming Employment Agreements: Drafting and Enforcement Workshop on Friday 27 November 2020.

A watertight employment agreement is an elusive beast. No single template agreement will be suitable for every business and every employee. Each agreement must be carefully tailored to the specific circumstances the parties have in mind for every situation they expect to arise.

Moreover, what ‘watertight’ means is constantly changing as legislative changes occur and new situations arise, such as the COVID-19 pandemic. The pandemic threw into stark relief a number of new employment law issues which can be addressed by way of clauses in an employment agreement.

This article will address, firstly, the mandatory requirements for an employment agreement; secondly, a number of clauses that go beyond the minimum, and thirdly, clauses relevant to COVID-19.

Mandatory Clauses

As a starting point, there are some legal requirements for the contents of an employment agreement. Many employers have template agreements that include those minimum clauses as well as others that are common to their business. A comprehensive template that allows an employer to “pick and mix” terms can be helpful. A crucial step, however, is to give some thought to the terms and conditions that should apply to the specific employment relationship that will be governed by the agreement.

Every employment agreement must specify who the parties to the employment relationship are. This can be critical for the employer’s liability – is the employer an individual or a company? If a company, is the correct name given?

The agreement must also describe the employee’s work and give an indication of their place of work. These provide the benchmark against which any dispute can be judged, and any potential changes can be measured.

Setting out the employee’s hours of work can be tricky – particularly if there are shift rosters involved. Minimum working hours, availability outside ordinary hours, and a requirement to work on public holidays might all be relevant to the circumstances.

Working hours are in turn linked to the employee’s pay, which must also be specified, including how the factors above will affect it.

Finally, the law requires specific clauses on employee protections in case of sale or restructure of the business and how employment relationship problems are to be resolved.

Beyond the Minimum

The mandatory clauses outlined above are only the starting point for an employment agreement. An employer drafting the text must give careful thought to the issues that could arise in the employment and aim to record clear commitments on them.

For example, how much annual leave and sick leave are you offering the employee? You might want to offer more generous terms, beyond legal minimum, as part of the employee’s benefits.

On the other hand, you might be feeling more cautious about the employment relationship and want to require a 90 day trial period. Trial period clauses are notoriously easy to unpick, so legal assistance with the drafting is highly recommended.

If you want the employee to be available for possible work, ie to be on call, then the terms for that must be specified, and there must be compensation for it (potentially, as part of the employee's overall salary).

If the employee's work requires certain equipment – such as tools, a uniform, a computer, a phone, a vehicle – the agreement should specify who will provide it and maintain it, and any conditions of use.

Will the employee's work involve creating or working with confidential information or intellectual property? If so, the employment agreement should set out terms and conditions for that.

It is common for New Zealand employment agreements to specify closedown periods during the summer, and what conditions apply to those.

Clauses Relevant to Covid-19

The COVID-19 pandemic has shown that there may be a need for new terms covering workplace closedowns associated with Alert Level restrictions, up to and including Level 4 'lockdowns'.

The Employment Relations Authority has determined that an employer is still bound to pay an employee who is ready, willing and able to work, in accordance with their employment agreement, despite the business being unable to operate or operating at reduced hours due to official restrictions. All of the risk seems to rest with the employer where there is no contractual clause that covers the unusual situation. This legal position might change in the near future – the first cases are under challenge to the Employment Court.

In other jurisdictions, such as the United States, the law allows for a 'furlough' – a term that has recently appearing in news reports. This is essentially a suspension of the entire employment agreement for a period of time. It temporarily releases the employer from all of its obligations under the agreement, including obligations of pay and the accrual of leave entitlements. It is not clear whether a furlough clause would be upheld under New Zealand law.

Watch this space, as the experiences of 2020 might yet lead to a law change that will more evenly share the risk of serious disruption between employers and employees.

In the meantime, however, it is strongly recommended that employers review their employment agreements to ensure that they contain a suitable clause that might apply in the circumstances of a pandemic. Examples are:

- **force majeure** (a provision that recognises that there can be failure to meet contractual obligations due to an event that is beyond control of either party);
- **deductions** (a specific reference to an employee agreeing to deductions from their pay in the event that they cannot work due to a pandemic);
- **lawful suspension** (permitting the employer to lawfully suspend an employee from work if they cannot work due to a pandemic); and
- **business interruption** (permitting the employer to not pay an employee in the event of an interruption to the employer's business).

The ability for a party to trigger any one of the above clauses depends entirely on how the clause is drafted, and therefore, professional advice in drafting the clause/s is recommended.

In the absence of an applicable clause, it may be possible to argue that a contract is 'frustrated' where an extraordinary and unforeseen event occurs which makes it impossible for the parties to perform the contract. However, establishing that the contract is frustrated is likely to be more difficult than relying on an appropriately worded contractual clause.

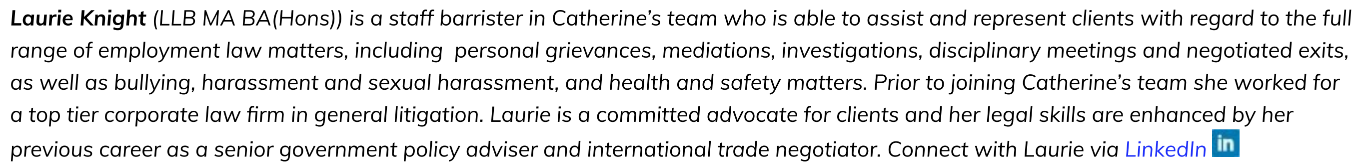
---

*Specializing in all areas of employment law, **Catherine Stewart** has around 25 years' experience as an employment and litigation lawyer. She joined the independent bar as a barrister sole in 2012, having held senior roles in employment law including at partnership level in a major city firm. She also has significant experience in civil and commercial litigation.*

Catherine also won a landmark case on stress in the workplace in the Employment Court, and argued a landmark case on freedom of association for which she was appointed "amica curiae" (adviser to the Court) by the Employment Court and the Court of Appeal.

Catherine holds a Bachelor of Laws with Honours and a Bachelor of Arts in languages. She was admitted to the bar of the High Court of New Zealand in 1990.

A regular presenter and writer on topical employment law issues, Catherine is a member of the New Zealand Bar Association, the New Zealand Law Society, the Auckland District Law Society Inc. and is a committee member of the Auckland Association of Workplace Investigators. Catherine is the Convenor of the Auckland District Law Society Inc. Employment Law Committee, a committee which represents practitioners in regular meetings with Judges, members of the Employment Relations Authority, mediators, Government departments and other employment-related institutions such as trade unions.



***Laurie Knight** (LLB MA BA(Hons)) is a staff barrister in Catherine’s team who is able to assist and represent clients with regard to the full range of employment law matters, including personal grievances, mediations, investigations, disciplinary meetings and negotiated exits, as well as bullying, harassment and sexual harassment, and health and safety matters. Prior to joining Catherine’s team she worked for a top tier corporate law firm in general litigation. Laurie is a committed advocate for clients and her legal skills are enhanced by her previous career as a senior government policy adviser and international trade negotiator. Connect with Laurie via LinkedIn*