



## Check that employment contract's fine print

Words Louise Lawton

Going through the interview process for a role can be quite exciting and it is so very easy to get caught up in the hype and excitement of being offered a new position. Suddenly your focus is on getting the process wrapped up quickly, getting the contract signed, handing in your notice and, of course, arranging your leaving party! Most people skim read the contents of an employment contract, and what they don't understand they figure won't happen to them anyway.

But Rebecca McBeath, a lawyer with Employment Fix, says prospective employers should always advise prospective employees that they are entitled to receive independent advice on their Individual Employment Agreement, and allow a reasonable time to consider and negotiate on any issues raised.

While an employer does not have to accept any changes that the employee proposes (they simply have to consider and respond), it does allow an employee a chance to ensure it accurately reflects what he or she has agreed to – including any non-solicitation and/or restraint of trade clauses. It's important that an employee fully understands the parameters of any clause at the time they enter into it, she says; particularly in the advertising and design industry, where restraints of trade are common.

"Restraints of Trade are complicated and dictated largely by their drafting, so each contract needs to be individually assessed," says McBeath. However, a court will allow one to be enforced against an employee if (1) the restraint is necessary to protect an employer's proprietary interest, such as the relationships that the employer has with a client; (2) if consideration has been given to the

employee for entering into the restraint – usually this is the offer of employment itself, but it may be some extra financial consideration; and (3) if the geographic and time limits are reasonable. A reasonable time will depend on the seniority of the position and the proprietary interest being protected, but six months would be on the outside of the time limit, she says.

An increasing number of advertising and design agencies now include probationary clauses giving employees a three-month trial, after which their contracts "may be extended indefinitely at the company's sole discretion". Probationary clauses are legal under the Employment Relations Act (ERA) if agreed in writing at the commencement of employment, says McBeath.

"However, even though legal, a probationary arrangement is still subject to the law relating to unjustified dismissal! This means that a "decision by the employer not to offer ongoing employment would have to be both justified and carried out in a procedurally fair manner as it is a dismissal," she says.

### Overriding laws

Whatever the employment contracts, there is no need to reissue them for the extra week of holidays due from this month under the Holidays Act, because it overrides any employment agreement: "Those minimums cannot be contracted out of."

And while we are on the subject of holidays: Can we really be made to take three of our four-week holiday entitlement over the Christmas break? "Yes," is the answer, "A company can make an employee take annual holidays in certain circumstances."


Like statutory minimum holidays,

employment agreements cannot contract out of the remedies available for unfair dismissal. Legal remedies are available to employees under the ERA and/or the Human Rights Act – where there has been an unjustified dismissal, unjustified disadvantage/s, discrimination, sexual or racial harassment or duress.

Before agreeing to fixed term employment – whether specifying a date or the conclusion of a project – an employer must have genuine business reasons, which must be advised to the employee at the commencement of employment and the term agreed in writing.

Casual workers, where an employee and an employer agree to employment on an "as required" basis, are not as protected by statutory minimums. Essentially, under a casual arrangement an employee works so intermittently that they cannot be deemed to have ordinary days or hours of work. "However, it will depend on the working patterns of the employee concerned rather than the classification the employer has attached to the arrangement (even if the employee agrees to it)," McBeath advises.

It only takes a few days to have an employment lawyer look over a contract, highlight any potential issues or give the contract a clean bill of health. The cost depends on complexity of the agreement – but it is generally \$250- \$500 plus GST.

The information contained in this article is not to be taken as legal advice. Rebecca McBeath can be contacted at Employment Fix on (09) 309 8977. 

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