A pre-employment conversation for the employer

The area of Employment Law is a much vexed one.
Once considered by many to not be a serious area of law, it has grown into a specialised field in its own right.

Irrespective of the party in power, all New Zealand governments recognise that employment is essential to a successful economy. It is the source of most of the population's income and thus their ability to spend money, buy houses and enter into credit contracts. It also is a source of our feelings of self-worth.

These matters are an important driver of our current legislation and the reason why an employee is able to claim hurt and humiliation for a breach of their rights by an employer.

In addition, the concept that the employee is in an unfair bargaining position underlies many of the rights given to the employee and the often strict interpretation of those rights by the courts and the Employment Relations Authority.

An introduction to the jargon

The employment law area is too vast to adequately summarise here, especially as the law is still evolving and open to interpretation as advocates and lawyers become involved. Any advice given on the law could be misleading and deceptive if taken as the final say on the law, so these are guides only.

The Agreement

An employer must first and foremost realise that they are treated as being the "parent" in the relationship. Most of the obligations are on them to comply with the legislation.

The starting point is the requirement that the employment agreement must be in writing. There are penalties in the Act for breach, currently at $20,000 for a company and $10,000 for an individual. In addition many of the rights available to an employer (trial periods, fixed term contracts, casual contracts and "zero" hour contracts, to name a few) require that they be in writing at the very least.

It is recommended that an employer always meet with an employment specialist before entering or negotiating employment agreements. Many standard form agreements have been found by the Authority or courts to be deficient even though the form may come from a government department. This is mainly due to the particular circumstances of the employment or that the matter is still up for interpretation by the court.

The cost of such an agreement is small compared to the potential consequences and the money riding on it.

Trial periods

The courts have adopted a strict interpretation of these clauses against the employer in all cases. The trial period takes away employee rights and is now limited to persons who have not been previously employed by the employer. The issue arises around when the person started work, as the Act includes a person intending to work as an employee. The trial period must be included in the employment agreement and the employee must sign it before starting work.

The best practice is to give the employee the contract and offer of employment several days before they start working so they can get advice on the contract. If they turn up for work without the contract signed send them home to get it, otherwise the trial period will be invalid.

The requirements of the trial period are contained in ss67 A and B of the Act and all three elements must be referred to. Make sure that the number of days is a figure not more than 90. Remember to remove the brackets if using copy & paste. Again advice on the drafting of the clause is vital.

Fixed term

These contracts must be in writing and can only be for the incidences permitted in the Act, s 68. If the trial period rolls over the Court will hold that the agreement is a permanent full time agreement and you will be in trouble if you terminate on this ground.

Casual

This is a much misused term. The case law is clear that the issue is not so much what happens during the employment relationship but what happens between the periods of employment. Is there an expectation of further work and if there is then further work, the relationship is not casual. So just because the hours are not fixed or are irregular this does not in itself make it a casual contract. Once a person is placed on a roster or there is a reasonable period of continuous employment the argument arises that the person is not truly casual and the usual termination procedures apply.

Independent contractor

This is another often misused term. Very common in the Canterbury rebuild but more often than not overturned as being an employment agreement by another name. In Bryson v Three Foot Six the court held that there are a number of factors to be taken into account. One identifies the degree of control between the parties. The fact that the person is not paying PAYE is not a determining factor at all. One recent issue is whether the “contractor” had their own public liability insurance as was required on the work site.

Restraint of Trade/Non-solicitation

The courts traditionally dislike these clauses with non-solicitation clauses being preferred. The question you need to ask is whether you have some form of trade secret you need to protect. These may be actual patents, confidential information or customer relationships. The area of restraint cannot be too wide or too long. A non-solicitation period may be more suitable to protect client relationships. However, these are not a one-clause-fits-all and specialist advice is essential.

Pre-employment negotiations

As with any contract the pre-contractual representations are important. Also the Fair Trading Act has misleading and deceptive conduct prohibitions as does the Employment Relations Act in s4. Good notes are essential.

Evolving Agreement

Remember that as the employment relationship evolves so does the agreement. It will be difficult to go back to rely on the contract if your practices and procedures have not followed the contract. You will find the Authority or the courts finding that the agreement has been amended by conduct.

The relationship

Once the relationship has started both parties are under the obligations of good faith in s4. Both parties have an obligation to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative.

Much has been written on this but it requires the parties to be active and not passive. To be responsive to communication from the other and to communicate their issues and problems they are having with each other. Sounds easy but difficult when busy.

For more information on other aspects of employment law, please see the Namecheck website or the Employment New Zealand website.