AVOIDING THE LOSS OF EMPLOYEE TRAINING INVESTMENTS

L. Frank Molnar

Training an employee can entail a significant investment on the part of the employer. Often there are regulatory or even professional requirements to be met before an employee can work in a position and often, the employer will pay for the training needed to meet those requirements. If an employee quits shortly thereafter, the investment can be lost.

Employers have protected themselves against this by including reimbursement clauses in their employment contracts or by having their employees sign training agreements containing reimbursement clauses. Such clauses typically state that the employee will repay all or a portion of the training expenses if he or she leaves before a certain period of time. Often such clauses also allow for a calculation of repayment on a declining basis (ie: the longer an employee works within the time period for repayment, the less he or she will have to repay). There are very few cases where the courts have considered these clauses and those that have, have generally enforced them without much question. A recent decision indicates, however, that this may not always be the case.

In the Alberta Provincial Court decision, *99St. Dairy Queen* v. *Carter*, an employee had been offered a management position at a salary of $15,000 per year. A condition of the offer was that she complete the "Dairy Queen Management Training Program" in Minnesota. The franchise employer paid for the training expenses with the stipulation that if the employee left the company within two years, she would repay between $5,000 to $6,000 (the final amount depended on what the actual expenses – which

2000, 10235 - 101 Street
Edmonton, AB T5J 3G1
PH: 780.423.3003

1900, 350 - 7th. Avenue S.W.
Calgary, AB T2P 3N9
PH: 403.260.8500

203, 5102 - 50th Avenue
Yellowknife, NT X1A 3S8
PH: 867.920.4542

www.fieldlaw.com

included hotel and meal expenses – turned out to be). The employee successfully completed the course but quit a few months later and did not repay anything. The employer sued.

Judge Lefevre held the reimbursement clause was not enforceable because: (a) it was a "penalty" levied against the employee (and penalties are not legally enforceable); and (b) it was "unconscionable" (ie: so unfair that it was illegal). At the heart of Judge Lefevre's analysis, however, was basically one central question: who truly gains the benefit from the training? If it is the employee, he held, the reimbursement clause will be enforced. If it is the employer, it will not be.

Judge Lefevre noted that in the cases in which reimbursement clauses have been found valid, the employee typically gained some form of professional qualification or credentials from the training received. This, in turn, gave the employee opportunity for greater advancement and/or higher salary within the broader marketplace than he or she had before. By contrast, in *Carter*, the generalized nature of the training qualified the employee for little more than a low-level and low-paying management job within the Dairy Queen organization itself. Further, the expense of the training was significant relative to the employee's consequent yearly salary. Finally, the employer had had a contractual obligation with the parent company to send all its management hires to its course. Taking all these circumstances into account, Judge Lefevre found that the benefit of the training accrued primarly to the employer. The reimbursement clause was merely an attempt to offload its operating costs and, accordingly, was unfair to the employee to the point that it was unenforceable.

It is interesting to note that the defendant in *Carter* did not attend nor was she represented at the trial. Therefore, no defence to the claim was presented. Judge Lefevre, however, was apparently so prompted by the facts of this case that he took it upon himself to find a defence to the employer's action.

The Courts can be leery of contractual mechanisms that unreasonably bind employees to them and make labour immobile. Accordingly, employers using reimbursement clauses in their contracts should consider the following:

· Make the reimbursement cost somewhat less than the actual training cost. This can be done by excluding soft costs such as meals and accommodation from the equation, increasing the likelihood the clause will be seen as "reasonable".

· Decrease the reimbursement owed proportionately in accordance with how long the employee stays after training. This recognizes that the employer has received some benefit from the training it provided to its employee.

· Consider the cost of the training in proportion to the employee's subsequent salary. If the ratio is too high there is a risk the training will not be considered to be of "benefit" to the employee.

· Consider whether the qualifications/skills the employee gains from the training increases the employee's broader marketability. If they are only useful in the employer's own workplace the benefit could be seen as belonging to the employer alone (and, therefore, also the expense to obtain it).

· Finally, if the qualifications/skills the employee gains from the training *does* increase the employee's marketability, consider whether a restrictive covenant is appropriate to protect the employer's interests.