Case In Point

Drafting Termination Provisions in Employment Contracts

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Two cases of the Ontario Superior Court serve as reminders that termination provisions in employment contracts must be compliant with the *Employment Standards Act, 2000* ("ESA") for all purposes; otherwise they may be found void and unenforceable by a court.

In the first decision, Wright v. Young and Rubicam, the Court found that while a termination provision was compliant with ESA notice entitlements at the time of termination, it would not have complied with the ESA had the employee been terminated at a later date. Moreover, the termination provision was not compliant with the ESA as it excluded payment of statutory benefits.

That decision was recently followed in Stevens v. Sifton Properties Ltd., where the Court held that an employment contract was void because, while it referenced payment of notice or payment in lieu of notice in accordance with the ESA, it did not reference statutory benefits.

At issue in this case was the following section of the employment contract:

13. With respect to termination of employment, the following terms and conditions will apply:

(a) The Corporation may terminate your employment for what it considers to be just cause without notice or payment in lieu of notice;

(b) The Corporation may terminate your employment without cause at any time by providing you with notice or payment in lieu of notice, and/or

(c) You agree to accept the notice or payment in lieu of notice and/or severance pay referenced in paragraph 13(b) herein, in satisfaction of all claims and demands against the Corporation which may arise out of statute or common law with respect to the termination of your employment with the Corporation.

In accordance with this provision, when the plaintiff's employment was terminated, she was paid her statutory notice of three weeks. The employer also provided statutory benefits. On this summary judgment motion, the Court was asked to determine whether the notice provision was enforceable.

The key issue in the case was whether the exclusion of any reference to payment of statutory benefits in paragraph 13 rendered the termination notice provision void under the ESA. The plaintiff argued, further to the *Machtinger* principles, that if the contract provision was null and void, then it was null and void for all purposes, and therefore she would be entitled to common law reasonable notice.

The Court held that section 13 "resulted in the effective and impermissible exclusion and denial of the benefit continuation rights mandated by the legislation", thereby putting it offside the ESA. The voluntary payment of the statutory benefits by the employer did not "alter the reality that the employment contract drafted by the employer is contrary to law."

This case is a reminder to all employers that when drafting an employment contract, or using a template, the contract should be reviewed and drafted to ensure compliance with the ESA, in addition to ensuring compliance with ongoing developments in the law. As the employers in the foregoing cases discovered, non-compliance with one aspect of the ESA may mean that the entire termination provision is void