Case In Point

Court Examines Parties' Intentions and Severability Clause in Upholding ESA-Only Termination Provision

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Over the past few years, the Ontario Superior Court has rendered several decisions which consider the enforceability of termination notice provisions in employment contracts that provide only for the *Employment Standards Act, 2000* ("ESA") minimum entitlements. Depending on the specific wording used, many of these provisions have been held to be unenforceable for non-compliance with the ESA and thereby have given rise to reasonable notice owing, a consequence unintended by the employers.

In Oudin v Le Centre Francophone de Toronto, Justice Dunphy provided some helpful guidance on the enforceability of such provisions. He stated that it is **not** the law that "if any potential interpretation can be posited that might in some hypothetical circumstance entail a potential violation of the ESA, however absurd or implausible the interpretation may be, then the only possible result is to strike out the entire section of the agreement."

The plaintiff in this case was the project manager for a magazine produced by the employer. After several years of declining sales, the decision was made to discontinue the publication and as a result the plaintiff's employment was terminated. Upon termination, the employer relied on the termination provision found in the plaintiff's Employment Agreement ("Agreement"), which read:

9.2 Termination and contractual rescission: This agreement may be terminated without notice or compensation by CFT [the employer] for the reasons mentioned in article 4 of this agreement. The CFT may also terminate this agreement for any other reason by giving the employee 15 days notice or the minimum prescribed by the *Employment Standards Act* or by paying an amount of salary equal to the salary the employee would have had the right to receive during the notice period (after deduction and/or withholding at source), in the entire discretion of CFT.

In this action, the plaintiff challenged the Agreement and the validity of the termination provision.

First, he argued that s. 9.2 was "infected" by referencing "article 4 of the agreement." The plaintiff argued that Article 4 "prescribes a result that would be contrary to the ESA in that it purports to authorize termination without notice by reason of permanent disability." Note that regulatory changes made under the ESA in 2005 had removed employees who are unable to perform their contracts of employment due to illness or injury from the prescribed list of employees who are not entitled to termination pay or severance upon termination. However, the employer's standard form contract was not updated to reflect those changes. The plaintiff argued that, in accordance with the Supreme Court of Canada's decision in *Machtinger*, the entire provision was therefore void.

The Court disagreed. It referred to the "severability clause" in the Agreement which stated that should any provision in the Agreement be invalid because of the operation of the law, that "modality" should be modified or nullified to the extent necessary to bring it into legal compliance. The offending language in article 4 could therefore be excised and s. 9.2 needed "no modification at all".

Second, the plaintiff argued that s. 9.2 was ambiguous and therefore void because at least one interpretation was that it only permitted 15 days' notice, an amount that was less than he was otherwise entitled to. Section 9.2 stated that the Agreement could be terminated upon the provision of 15 days' notice or the minimum prescribed by the ESA.

The Court disagreed. It found no ambiguity in the provision as the intention of the parties was clear that the plaintiff receive

the greater of the two notice periods. The Court stated:

[53] I do not accept that I should strive to find the least plausible interpretation the language will bear simply because the outcome happens to favour one party or another in hindsight. While the plaintiff argues for *contra proferentem* – a doctrine of limited utility in the circumstances of this case – the interpretation that most favours the interest of the employee is the one that provides the employee with the greater of the two levels of notice, not the least. *Contra proferentem* is not a means of finding the least favourable interpretation to the employee with a view to invalidating the contract in whole or in part.[emphasis added]

Finally, the plaintiff argued that the employer repudiated the Agreement because it failed to immediately pay out the correct ESA amounts. The employer had paid 21 weeks' severance and termination pay, rather than the correct amount of approximately 22 weeks. When the employer learned of the error, it was quickly corrected. The Court stated that such an oversight did not "come close to the standard of a deliberate and clear repudiation of an entire legal relationship."

This decision is very helpful to employers for a number of reasons:

- the Court stressed that termination provisions should be interpreted in a manner consistent with the intention of the parties. It is not the law to "to imagine how the contract can be construed at its conclusion with a pre-determined goal of finding a means to avoid it entirely because one side finds it less generous than desired," nor to arrive at a conclusion, however implausible, which **might** entail a violation of the ESA;
- it reinforces the importance of having a clear, well-drafted employment agreement. Reliance on a standard form contract may be problematic should issues later arise; and
- in particular, a well-drafted "severability clause" is a key component of any employment agreement, to mitigate against any later finding that a particular provision may be invalid.