Case In Point

Appellate Court Considers Intentions of Parties, Finds an ESA-Only Termination Clause Valid

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We previously reported on a decision in which a motion judge of the Ontario Superior Court considered the intention of the parties in upholding a termination clause in an employment contract which limited payout on termination to the minimum available under the *Employment Standards Act, 2000* (ESA). He had rejected the plaintiff's argument that because the clause did not provide for **all** entitlements upon termination under the ESA, the entire clause must be considered invalid. This finding was contrary to a number of Ontario Superior Court decisions that have found various termination provisions unenforceable for non-compliance with the ESA.

In Oudin v. Centre Francophone de Toronto, the plaintiff (now appellant) argued that the motion judge had incorrectly translated the termination clause from French to English. Consequently, he misapprehended the exact translation of the clause, which was to provide for the "minimum notice" required by the ESA: the "original agreement therefore provided that the respondent could terminate the appellant's employment with ESA minimum notice and made no mention of severance." The appellant also argued that the clause was unenforceable because it ousted the operation of the ESA and the common law.

A unanimous Court of Appeal disagreed. The Court held it was clear the motion judge understood that the termination clause referred to ESA minimum notice and not all requirements of the ESA, but he had nonetheless determined that there was no attempt to contract out of the ESA. The motion judge had interpreted the contract as a whole: "he considered the circumstances of the parties, the words of the agreement as a whole and the legal obligations of the parties". Deferring to this finding, the Court quoted from the lower court decision:

Contracts are to be interpreted in their context and I can find no basis to interpret this employment agreement in a way that neither party reasonable expected it would be interpreted when they entered into it. There was no intent to contract out of the ESA in fact; to the contrary, the intent to apply the ESA is manifest. (at para 9)

The Court of Appeal found that there was "no error in his conclusion that the clause is enforceable" and dismissed the appeal.

This decision is of significance to employers. Recent court decisions have rendered ESA-only termination provisions unenforceable where they did not explicitly provide for every benefit or

entitlement that an employee may receive under the ESA. This was the case even if employers did in fact provide a terminated employee with all of the entitlements under the ESA at the time of termination. As a result, employers have been at risk of having the unintended consequence of owing reasonable notice should their ESA-only termination provisions be voided.

With this decision, the Court of Appeal has opened the door for employers to argue that the intentions of the parties – and not just the technical application of legal rules – ought to be considered when determining whether or not a termination provision is valid. As such, evidence that the employer had no intention of contracting out of the ESA – perhaps as supported by an employer's conduct post-termination – may now assist a court in finding that an otherwise "technically offside" provision ought to be enforceable. This, of course, will also depend on the particular agreement, the language used and the context in which it is used.

The Court's decision nonetheless highlights the importance of having a clear, well-drafted employment agreement. This will lend certainty to the parties' intentions and minimize the risk that the wording of the agreement may subsequently be challenged