Minimum Standards Monitor

An Update on “Minimum Standards Only” Termination Clauses

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The Ontario Superior Court has issued several decisions over the past few years which have found “minimum standards only” termination provisions in employment contracts to be unenforceable. Thus, employers are in the unexpected position of being liable for reasonable notice at common law, which is often considerably greater than what is owed under the *Employment Standards Act, 2000*.

Earlier this year we reported on *Oudin v. Centre Francophone*, in which the Ontario Court of Appeal 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.[1] This decision was referred to in Nutting v Franklin Templeton Investments Corp., a recent case from the Alberta Queen’s Bench (ABQB).

In *Nutting*, the plaintiff was terminated on a without cause basis and brought an application for summary judgment against his former employer. Notwithstanding a termination clause limiting his entitlements, he alleged that he was entitled to reasonable notice at common law.

The employment relationship was governed by a written employment contract which contained the following termination provision:

Additionally, your employment may be terminated at any time without cause upon the provision by FTIC of the minimum notice of termination, or pay in lieu of notice, benefits and, if applicable, severance pay prescribed by applicable employment standards legislation in the province in which you are employed. The provision of such notice or pay in lieu of notice, benefits and severance pay constitutes full and final satisfaction of all rights or entitlements which you may have arising from or related to the termination of your employment (including notice, pay in lieu of notice, severance pay, etc.), whether pursuant to contract, common law, statute or otherwise.

Upon termination, the plaintiff was provided with the amount of pay in lieu of notice required by the Alberta *Employment Standards Code*.

The ABQB concluded that the contract was clear and unambiguous. It referenced the Supreme Court of Canada decision in *Machtinger v. HOJH Industries Ltd*. and stated:

The relevant general principles of the law relating to termination clauses are clear. a termination

clause may oust the presumption of reasonable notice, either expressly or impliedly, so long as the clause does not purport to violate the minimum notice periods in legislation.

The ABQB stated that the defendant had demonstrated the contract contained a valid termination clause since: 1) it provided a prescribed period of notice which did not violate the minimum entitlements of the legislation; and 2) it expressly evidenced the parties' intention that the prescribed notice would oust any other notice requirement that may have otherwise been implied.

The ABQB followed the approach taken in *Oudin* where the true intention of the parties was considered when determining the enforceability of a termination clause. These cases signal that courts may be departing from the level of scrutiny given to the language of termination clauses in cases such as Wright v. Young and Rubicam and Stevens v. Sifton Properties.

Nutting emphasizes the continued importance of a well-drafted termination provision. In particular, employers should ensure that, where applicable, their termination clauses clearly reflect their intention to provide only the applicable entitlements under the minimum standards legislation. This case also serves as a reminder of the divergent lines of reasoning in this unsettled area of employment law, which may ultimately result in the Supreme Court of Canada providing clarity to the issue.

Should you require any assistance, we are available to help with drafting and reviewing your employment contracts.

[1] Mr Oudin is seeking leave to appeal to the Supreme Court of Canada.