Case In Point

Appellate Court Finds Termination Clause Unenforceable for Breach of ESA

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The recent dismissal by the Supreme Court of Canada of an employee's leave to appeal an appellate decision which upheld the enforceability of a minimum standards-only termination clause was good news for employers. But that good news appears to have been short-lived in light of the Ontario Court of Appeal's latest word on the subject.

For the past year, we have been tracking the decision of Oudin v. Centre Francophone de Toronto, in which Justice Dunphy upheld a minimum standards-only termination clause in an employment contract. He found that it was not the law to look for any potential interpretation that might violate the *Employment Standards Act, 2000* (ESA) in an effort to strike out a termination clause. Rather, the contract should be interpreted in a manner consistent with the intention of the parties which, in this case, was to apply the ESA rather than oust it. See our Case in Point of December 2015, Court Examines Parties' Intentions and Severability Clause in Upholding ESA-Only Termination Provision for a detailed summary of this decision.

On appeal, Mr. Oudin argued that Justice Dunphy had incorrectly translated the termination clause from French to English and that a literal translation of the termination provision made no reference to severance payments as required by the ESA. The Ontario Court of Appeal disagreed and found Justice Dunphy's conclusion that there was no attempt or intention of the parties to contract out of the ESA was entitled to deference. Our Case in Point of July 2016, Appellate Court Considers Intentions of Parties, Finds an ESA-Only Termination Clause Valid provides a summary of this decision.

On February 2, 2017, the Supreme Court of Canada dismissed Mr. Oudin's application for leave to appeal the Court of Appeal decision.

On February 23, 2017, the Ontario Court of Appeal released its decision in Wood v Fred Deeley Imports Ltd. which reversed a motion judge's decision that a termination clause in an employment agreement that provided greater notice than required under the ESA was enforceable. The Court stated that the "question of the enforceability of the termination clause turns on the wording of the clause, the purpose and language of the ESA, and the jurisprudence on interpreting employment agreements."

A comparison of the "wording of the clause" used in the two cases may help shed some light on the different outcomes in these cases:

Case	*Oudin v. Centre Francophone de Toronto*	*Wood v Fred Deeley Imports Ltd.*
Outcome	Enforceable	Unenforceable
Termination Clause	Termination and contractual rescission: This agreement may be terminated without notice or compensation by CFT 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 [notice] prescribed by the *Employment Standards Act* or by paying an amount of salary equal to the salary	[The Company] is entitled to terminate employment at any time without cause providing you with 2 weeks' notice of termination or pay in lieu thereof for ea completed or partial year of employme Company. If the Company terminates y employment without cause, the Compa not be obliged to make any payments t other than those provided for in this pa

	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.	except for any amounts which may be remaining unpaid at the time of termina your employment. The payments and r provided for in this paragraph are inclu your entitlements to notice, pay in lieu and severance pay pursuant to the *Em Standards Act*, 2000.

As can be seen above, neither termination clause specifically states that the employee will receive all of their entitlements pursuant to the ESA. However, it appears that the difference in language between the two clauses relates to the "all inclusive" language used in *Wood* against the broader language – or the absence of language – used in *Oudin*. For example, in *Oudin* the motion judge concluded that the language used made it clear that there was "no intent to contract out of the ESA in fact; to the contrary, the intent to apply the ESA is manifest." That conclusion could be reached because there was no express language that ousted additional entitlements pursuant to the ESA.

In contrast, the Court of Appeal in *Wood* found that the "all inclusive" language may have resulted in termination entitlements below the minimum standards (despite providing a greater right or benefit with respect to notice). As such, the Court found that because "the clause is void, it cannot be used as evidence of the parties' intention." Further, the Court refused to give any deference to the motion judge's decision. It found that he had considered extrinsic evidence in interpreting the clause which was an "extricable error of law" because "[t]he wording of the clause alone must be looked at to decide whether it contravenes or complies with the ESA."

Notwithstanding the outcome in *Oudin*, both cases highlight the importance of a well-drafted termination provision in an employment contract. Where it is intended that an employee will be limited to only minimum standards entitlements upon termination, the clause should be carefully drafted to ensure that the language clearly reflects this intention. Otherwise, employers may find themselves unexpectedly liable for payment of reasonable notice, contrary to the bargain they thought they had entered into at the beginning of the employment relationship.