Case In Point

Fixed-Term Contract Termination Provision Violates ESA, Says Appeal Court

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The Ontario Court of Appeal has again weighed in on the issue of termination provisions in employment contracts.

By way of background, we recently reported on the February 2017 decision of the Court of Appeal in Wood v Fred Deeley Imports Ltd. In that case, the Court reversed a motion judge's conclusion that a termination clause in an employment agreement, which provided greater notice than required under the *Employment Standards Act, 2000* (ESA), was enforceable (see our *Case in Point*, Appellate Court Finds Termination Clause Unenforceable for Breach of ESA). 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."

In Covenoho v Pendylum Ltd., released on April 5, 2017, the Court of Appeal again reversed a motion's judge's decision that a termination provision in an employment agreement was enforceable.

In *Covenoho*, the plaintiff was hired by the defendant, Pendylum Inc., under a one year fixed-term agreement. Among other things, the agreement stated:

2.1 The term of this Agreement will commence on the date of this Agreement and will continue in full force and effect unless the Agreement is terminated as follows:

(a) immediately by PENDYLUM providing written notice to you if you violate or fail to honor any of these provisions of this Agreement or fail to perform your duties as set out in Appendix A in a satisfactory manner as determined by PENDYLUM (known as Cause); or if the PENDYLUM Client to which you have been contracted terminate[s] its contract with PENDYLUM for your services; OR

(b) by either party providing written notice of at least two (2) weeks to the other.

2.2 In the event of termination, we will have no liability to you, save and except to pay any accrued and earned compensation up to and including the date of termination.

2.3 Upon termination or expiration of the agreement, you agree to return and/or destroy all

confidential information and copies and sign an undertaking that all Confidential Information has been returned and/or destroyed.

The defendant terminated the employment agreement after the plaintiff had worked just less than three months. The plaintiff (who was self-represented throughout) subsequently brought an action for wrongful dismissal. On a motion for summary judgment, the motion judge relied on Howard v. Benson Group Inc. and found that the early termination provisions in the employment contract were clear and unequivocal. Accordingly, the plaintiff was not entitled to any damages under the agreement.

The plaintiff appealed. She argued that the motion judge erred in finding that the defendant was entitled to terminate her employment under Article 2 of her employment contract. Rather, she asserted that Article 2 was void because it was contrary to the provisions of the ESA by purporting to allow the defendant to terminate her employment without cause and without notice or payment in lieu of notice, regardless of the length of her employment.

The Court of Appeal agreed.

Specifically, the Court found that the termination provisions were contrary to the ESA as they allowed the defendant to terminate the employment of the plaintiff without cause, in the event that she had been continuously employed for more than three months, by providing less than the statutory minimum notice period. The Court stated:

[7] … In determining whether the contract is in compliance with the ESA, the terms must be construed as if the appellant had continued to be employed beyond three months; if a provision's application potentially violates the ESA at any date after hiring, it is void. …

In reaching this finding the Court of Appeal relied on Wright v. Young & Rubicam Group of Companies (Wunderman) and its decision in *Wood v. Fred Deeley Imports*.

Having concluded that the termination provisions were void and of no force or effect, the Court of Appeal referred to *Howard v. Benson* and found that the plaintiff was entitled to receive the salary that she would have earned for the remaining weeks of her fixed-term contract, which in the case at hand amounted to $56,000.

This decision of the Court of Appeal continues to highlight the importance of a well-drafted termination provision in an employment contract. Where the intention is 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. This is especially true when employees are hired pursuant to fixed-term contracts: without a valid, enforceable termination provision, an employee may become entitled to damages to the end of the fixed-term contract, regardless of the length of its term.