Case In Point

Ontario Court of Appeal Rules (Again) on the Enforceability of an ESA-Only Termination Clause

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The Ontario Court of Appeal has once again considered a minimum entitlements clause in an employment contract and ruled it to be generally enforceable.

In Nemeth v Hatch Ltd., an employee with 19 years service was dismissed with 8 weeks' notice of termination and 19.42 weeks' salary as severance pay, as well as continued benefits through the statutory notice period. In paying the employee his minimum entitlements under the *Employment Standards Act, 2000* (ESA), the employer relied on the following clause:

The Company's policy with respect to termination is that employment may be terminated by either party with notice in writing. The notice period shall amount to one week per year of service with a minimum of four weeks or the notice required by the applicable labour legislation.

The Superior Court of Justice held that the clause was enforceable and no further damages were owing. The employee appealed.

The Court of Appeal ruled on the following issues:

- **Does a termination clause need an explicit stipulation to displace the common law?**

Quoting from *Machtinger v HOJ industries*, the Court noted the well-established principle that "on termination, an employee is entitled to common law notice; however this presumption may be rebutted if the contract of employment 'clearly specifies some other period of notice, whether expressly or impliedly', provided that it meets the minimum entitlements prescribed under the ESA."

However, it went on to state that "the need for clarity does not mean that the parties must use a specific phrase or particular formula, or state literally that 'the parties have agreed to limit an employee's common law rights on termination.' It suffices that the parties' intention to displace an employee's common law notice rights can be readily gleaned from the language agreed to by the parties."

In ruling that there was no ambiguity in the termination clause, the Court found that the employee could not retain his common law entitlements in the face of explicit language to the contrary.

- **Did the clause attempt to contract out of the ESA?**

The employee argued that the employer attempted to contract out of the ESA because "severance" was not included in the termination clause, rendering the clause void.

The Court disagreed. It stated that this case was "entirely distinguishable" from its earlier finding in Wood v. Deeley**[1]** and applied the principles set out in an earlier Court of Appeal decision, *Roden v Toronto Humane Society*. In *Roden*, a termination clause was silent with respect to the continuation of benefits. The Court held that it did not violate the ESA as the employer was still obligated to continue the employee's benefits and comply with the ESA.

Following this reasoning, the Court of Appeal in this case stated that the silence in the termination clause with respect to

severance pay entitlement did not denote an intention to contract out of the ESA.

- **Did the termination clause provide for 19 weeks' notice on termination?**

The employee argued, in the alternative, that he was entitled to 19 weeks' notice based on the following wording in the clause: "The notice period shall amount to one week per year of service with a minimum of four weeks or the notice required by the applicable labour legislation."

The Court recognized that this provision gave rise to two different interpretations: one that would limit the employee's notice entitlement, and one which would provide 19 weeks' notice. It stated that where a clause could "reasonably be interpreted in more than one way, courts will prefer the interpretation that gives the greater benefit to the employee" and ruled in favour of the employee on this issue.

The appeal was allowed in part. The employer was ordered to pay the employee an additional 11 weeks' notice as 8 weeks' statutory notice had already been paid.

Over the past few years, there has been a long line of often conflicting cases which interpret and rule on ESA-only termination clauses. The Court's decision in this case provides welcome clarity on how a court may interpret an ESA-only termination clause that is silent with respect to a particular issue (e.g. severance or benefits). That said, a prudent employer should always draft any ESA-only termination clause clearly and with precision, to minimize the risk of unanticipated cost consequences should the clause later be deemed unenforceable.

[1] In that case, the Court of Appeal found that the language in an ESA-only termination clause was "all inclusive." It violated the ESA because it failed to include benefits.