Case In Point

Appeal Court Rules on Termination Clauses and Proper “Failsafe” Language

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The differing interpretations by the courts of employment contract provisions which limit entitlements upon termination has caused considerable confusion of late. The Ontario Court of Appeal has rendered a helpful decision which may serve to lessen some of the confusion.

The Court reversed a lower court decision and found that a clause in an employment contract which stipulated the amounts owing to an employee upon termination was enforceable. It also concluded that a “failsafe provision” in the clause (a “catch-all” provision which stated that the employee shall always receive the entitlements under the *Employment Standards Act, 2000* (ESA)) was not a severability provision but ensured that any non-compliant part of the clause could be “read up” to comply with the ESA.

In *Amberber v IBM Canada Ltd.*, the former employee (respondent) had been employed by the appellant for approximately 15.5 years, when he was advised that his employment would be terminated, without cause. The termination provision in his employment contract stated:

If you are terminated by IBM other than for cause, IBM will provide you with notice or a separation payment in lieu of notice of termination equal to the greater of (a) one (1) month of your current annual base salary or (b) one week of your current annual base salary, for each completed six months worked from your IBM service reference date to a maximum of twelve (12) months of your annual base salary. *This payment includes any and all termination notice pay, and severance payments you may be entitled to under provincial employment standards legislation and Common Law. Any separation payment will be subject to applicable statutory deductions. In addition, you will be entitled to benefit continuation for the minimum notice period under applicable provincial employment standard legislation.* In the event that the applicable provincial employment standard legislation provides you with superior entitlements upon termination of employment (“statutory entitlements”) than provided for in this offer of employment, IBM shall provide you with your statutory entitlements in substitution for your rights under this offer of employment. [emphasis added]

The motion judge divided the clause into three parts and found that the “inclusive payment provision” (*italicized above*) only applied to the preceding sentence (the “options provision”) but not the sentence that followed it (the “failsafe provision”). She concluded that the clause was therefore unenforceable as it was not clear the parties intended to rebut the common law

entitlements for all purposes of the clause.

Justice Gray, sitting *ad hoc* on the Court, provided a useful overview of the case law regarding the ESA and termination clauses, as well as contract interpretation generally.

In allowing the appeal, he concluded there was no ambiguity in the clause. Specifically, the motion judge made a fundamental error when she divided the clause into three parts as "the individual sentences of the clause cannot be interpreted on their own. Rather, the clause must be interpreted as a whole." He continued:

[62] […] To hold that the inclusive payment provision applies to only one part of the clause, but not the other, gives the clause as a whole a strained and unreasonable interpretation. In fact, if the inclusive payment provision were repeated at the end of the clause, as suggested by the motion judge, it would likely do little more than create confusion.

The Court agreed with the finding of the motion judge that the "failsafe provision" was not analogous to a severability provision, and dismissed a cross-appeal on this ground. Justice Gray concluded that the "failsafe provision" did not "purport to sever any part of the termination provision. Rather, it ensures that any portion of the termination clause that falls short of the ESA must be read up so that it complies with the ESA."

This case is significant for two key points:

1. it signals that a termination clause must be read as a whole, rather than being parsed into individual components, to assess its meaning
2. a properly written "failsafe provision" may operate to cure a clause which otherwise may be viewed as offside the ESA.

As always, a well-drafted termination clause (which includes a proper failsafe provision regarding ESA-only entitlements, where applicable) will minimize the risk that a court may find the clause unenforceable, resulting in unintended cost consequences for an employer.
