FTR Quarterly

FTR Quarterly – Issue 10

Date: August 21, 2018

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Featured Articles

5 Key Things for Employers to Consider When Drafting Termination Clauses in Employment Contracts

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Over the past several years, there have been numerous court decisions relating to the enforceability of termination notice provisions in employment contracts. In many cases, the courts have found these provisions to be unenforceable for non-compliance with the *Employment Standards Act, 2000* (ESA), and as a consequence, employees are instead owed common law reasonable notice. Recent decisions have reinforced the importance of having a clear and well-crafted termination provision to minimize the risk that a reviewing court will find the clause to be unenforceable, should litigation arise.

Here are five key considerations for employers to consider when drafting termination clauses in light of some key developments in the case law.

1. **A termination provision that provides less than ESA notice and/or severance at any point during any contract (even into the future) will not be enforceable**

Employers are generally aware that they cannot contract out of the minimum standards under the ESA. However, employers are often unaware that a termination which complies with minimum standards at one point in time will be considered unenforceable if that provision, applied later in the employment relationship, would result in a notice/severance entitlement that is less the minimum standards. In other words, courts have found termination provisions to be unenforceable where they are not ESA-compliant for all years of service, including future years.

2. **Termination provisions must clearly provide for benefit continuation through the employee's statutory notice period**

The lack of a benefit continuation provision is one of the most commonly used arguments made by employee counsel as the basis for asserting that a termination clause is unenforceable. Where an employee has benefit coverage as part of their compensation package, the ESA requires that the benefits continue throughout the statutory notice period. If the language is silent or ambiguous as to whether benefits will continue through the statutory notice period, there is a high risk of a court concluding that the termination provision is unenforceable.

3. **A poorly drafted termination clause cannot be saved by a severability clause**

Employers often believe that including a severability clause will save any defect in an employment contract. However, the Ontario Court of Appeal in *North v Metaswitch Networks Corporation*, found that a severability clause cannot rectify a partially unenforceable termination provision. If any part of the termination provision is found to have breached the ESA, the entire provision will be declared void and the employee will be entitled to common law reasonable notice. Read more about this case in our publication, *Appellate Court Rules that Severability Clause Can't Save a Partly Flawed ESA-Only Termination Clause*.

4. **Consider including a "failsafe provision" to cure any defects in the termination clause**

It's not all bad news for employers. The Ontario Court of Appeal in *Amberber v IBM Canada Ltd.* recently considered a termination clause that included a "failsafe provision" – a provision which states that the employee's entitlements upon termination shall always comply with the entitlements under the ESA. In *Amberber,* the termination provision contained a formula for calculating notice/severance entitlements upon termination. The "failsafe" provision stated that if the employee's minimum entitlements under employment standards legislation provided for a greater benefit than the entitlements under the termination provision, the employee would receive the minimum standards. In a decision helpful to employers, the Court determined that the failsafe provision was not a severability provision, but rather ensured that any non-compliant part of the clause could be "read up" to meet the minimum standards set out by the ESA. The decision is important and gives some assurance to employers that a properly written "failsafe provision" may operate to cure a clause that otherwise may be viewed as offside the ESA. Learn more in our publication, *Appeal Court Rules on Termination Clauses and Proper "Failsafe" Language*.

5. **The termination provision must go far enough to explicitly rebut the common law presumption to reasonable notice**

It is not enough for a termination clause to merely state that the employee will receive their entitlements in accordance with the ESA without providing any further detail. The provision must go a step further by clearly indicating that the employee's entitlements upon termination are limited to minimum standards and that the employee will not be entitled to common law reasonable notice. Otherwise, courts are likely to interpret the clause as simply confirming that the employer will comply with minimum standards, rather than limiting the employee's entitlement to those standards. Always remember that clear, unambiguous language is required for the common law presumption of reasonable notice to be properly rebutted. In the absence of such clear language, there is a good chance that a court will not restrict the employee's notice/severance entitlement to the applicable minimum employment standards.

FTRQ&A with John Kloosterman: Key Differences Between Canadian and U.S. Employment Law

With: John C. Kloosterman

What are some common misconceptions about the differences between Canadian and U.S. employment law?

There are a number of misconceptions on both sides. An important one for people in both countries to understand is that there are more similarities than differences – a lot of the basic frameworks are the same.

What are some examples of similar frameworks?

One is that both countries follow the same general rules on reasonable accommodation for disabilities – Canadians tend to think that human rights laws are very different than anything Americans are used to, which is not at all the situation. Both countries follow the same general accommodation standard – that employers must accommodate to the point of undue

hardship. The difference is that most U.S. jurisdictions have effectively taken “undue” out of the standard – employers have to show some hardship. In contrast, Canadian jurisdictions have put an exclamation point on “undue” – the hardship must be huge.

Another example is the at-will employment doctrine in the U.S. It allows either party to end the employment relationship at any time for any reason without notice. In most Canadian jurisdictions, employers are also allowed to terminate employees at any time for any reason – they just have to provide notice or pay in lieu. Canadians often believe that the existence of the at-will doctrine means U.S. employers go around randomly terminating employees for no reason. In reality, U.S. employers do that about as much as Canadian employers randomly terminate employees for no reason. Most U.S. employers follow progressive discipline, only terminate if there’s a performance-related or misconduct-related reason to do so, and provide a severance payment in exchange for a release upon termination.

Are there any areas that are completely different?

Absolutely. One is health insurance. While Canada has a single-payer system with employees receiving basic coverage from their province, the U.S. system is different and employers bear much of the burden for providing healthcare coverage. Accordingly, healthcare is a huge cost for U.S. employers.

Another is maternity and parental leave. In most U.S. jurisdictions, employers are required to provide no more than three months of leave. In most Canadian jurisdictions, a birth mother can take up to 18 months and a father or adoptive parent can take up to 63 weeks of leave.

What about labour law?

The two countries also share a similar framework – the U.S. law on private sector labour relations was originally known as the *Wagner Act* when it was enacted in 1935. All of the Canadian labour relations legislation is modeled on the *Wagner Act*. Some of the key portions of the law have developed differently – like how unions become certified as a bargaining representative – but a lot of the unfair labour practice provisions are similar between the two countries.

One difference is how our two countries distinguish between private and public sector employers when it comes to labour issues. In Canada, there is no fundamental difference – for example, a private school in Ontario and a public school board are both covered by the *Labour Relations Act, 1995*. In contrast, private sector employers in the U.S. are covered by federal law (the *National Labor Relations Act*, which grew out of the *Wagner Act*) and public sector employers are covered by state law.

What challenges do local HR teams have with a U.S. headquarters, and vice versa?

Some of the challenges on both sides are cultural, while others are legal. An overall cultural challenge is that the average American knows less about Canada than the average Canadian knows about the U.S. That can frustrate both sides.

Another cultural challenge that touches on being a legal challenge is that Canadians and Americans have different views on government and its role in society. Canadians tend to trust governmental institutions; Americans do not. As an example, many local HR teams would think nothing of calling the Ministry of Labour with a question about the law. Their U.S. colleagues would never do that and cannot begin to understand why their Canadian colleagues would.

How about challenges from an employment law standpoint?

An overall challenge comes from just the nature of the legal system – in the U.S., employers have to navigate a complex web of federal, state and local employment laws. In Canada, employers follow federal law or provincial law, not both. And as noted before, Canada does not distinguish between private and public sector employers.

For a specific challenge, the nature of the U.S. legal system has led employers to have employees agree to resolve employment-related claims in private arbitration. Employers do so because the legal system is pro-arbitration and employers can avoid juries and large-scale class actions through private arbitration. Most employment-related claims in the U.S. can be heard by juries, which adds an additional dimension to cases. Also, class actions in the U.S. can be nationwide in scope and cover tens of thousands of class members. In contrast, the legal system in Canada gives employers the advantages gained through arbitration in the U.S. – cases do not go to juries, damages are more predictable, and class actions are more limited. However, the local Canadian teams do not understand why their U.S. colleagues push for arbitration agreements and the Americans do not understand why the Canadians do not appreciate the perceived advantages of arbitration.

Finally, I predict we will see more challenges down the road regarding cannabis. Cannabis will be legal throughout Canada in October. In the U.S., cannabis is illegal federally, although several states have legalized it and other states allow medical cannabis. But that has led to a dual legislative scheme where employers risk violating federal law while complying with state law. It has also led to situations where employers in the U.S. can deny employment to an applicant who has tested positive for cannabis in a state where it is legal. There is also the further cross-border challenge of a pre-employment drug screen – but that is a topic for another time!

For more insights on cross-border labour and employment law issues, check out our FTR Nexus series.

What Is – and What Isn't – Constructive Dismissal: An Update

By: David S. Alli

We typically think of change as a good thing, and in many cases it is. However, when dealing with employment terms and conditions, we need to approach change very selectively and cautiously to avoid allegations of constructive dismissal.

Here are some guiding principles for employers based on our review of recent Ontario cases which consider when change will – or will not – constitute constructive dismissal.

A Quick Refresher on the Test

The Supreme Court of Canada set out the two-pronged test for constructive dismissal in *Potter v. New Brunswick Legal Aid Service Commission*. The first branch of the test requires determining if the employer's unilateral change constitutes a breach of the agreement, and if so, considering if the breach substantially alters the essential terms of the contract. The second branch considers all circumstances and whether a reasonable person would determine that the employer no longer intended to be bound by the employment contract.

Constructive dismissal also occurs where the employer's cumulative conduct suggests an intention to repudiate the entire employment relationship, rather than change a specific term in the agreement. This type of repudiation occurs when the employer's actions create a toxic or hostile work environment, which become intolerable for the employee.

Guiding Principles Seen Through the Lens of Recent Cases

1. **Beware of changing an "unwritten" practice**

Long-standing working arrangements may form a legitimate part of the employment contract, despite not initially being written down. Consequently, unilaterally altering such a term or condition can result in a finding of constructive dismissal.

In 2017, the Ontario Superior Court in *Hagholm v. Coreio Inc*. held that the employer constructively dismissed its employee

when it revoked a long-standing agreement that she could work three days at home and two days in the office. Her commute to the defendant's office was 110 km daily one way. The employee had worked for the company's predecessor full-time since 1995 with this commuting arrangement in place. When the predecessor was sold to the defendant, it advised the employee she would have to work full-time at the office. She resigned, partly on the basis of this new arrangement.

The Court stated that an oral agreement existed between the parties and the working from home arrangement was an essential term of that agreement. Constructive dismissal was found, and this was upheld on appeal.

2. **A one-time outburst can constitute a constructive dismissal**

An employer's actions do not necessarily have to involve changing the actual terms and conditions of employment for constructive dismissal to result. An employer has a duty to treat its employees with dignity and respect: intolerable or cruel treatment – even in a single act – may result in a finding that the employment contract has been fundamentally repudiated.

This principle was illustrated in the recent case of *Sweeting v. Mok*. The Ontario Court of Appeal upheld the finding of trial judge that an employee was wrongfully dismissed when her employer became angry with her and said "Go! Get out! I am so sick of coming into this office every day and looking at your ugly face," among other offensive comments. The employee left work and did not return. The trial judge found that this "treatment made future performance of her work impossible and her continued employment intolerable." The employment relationship was effectively destroyed in that meeting and, among other things, constructive dismissal was established.

3. **Adequate notice is the key to changing the terms of employment**

Where an employer provides ample notice of a fundamental change, such a change will not amount to a constructive dismissal. But how much notice is enough notice?

In 2018, the Ontario Superior Court in *Lancia v. Park Dentistry* provided some guidance to this question. It found that an employer did not constructively dismiss an employee when it provided her with 18 months' notice of termination and a $2000 signing bonus to enter into a new written employment agreement. Among other things, the Court held that the plaintiff received consideration for the new contract, and that her old employment was terminated with sufficient notice: it "is settled law that an employer may transition an employee to a new contract without consideration by providing reasonable notice." If the plaintiff did not wish to accept the changes to her contract, she could have used the notice period to seek new employment. Accordingly, the employer was able to implement a fundamental change given the notice provided.

4. **Constructive dismissal may be difficult to establish when employee condones the changes**

When an employee condones specific changes to the working relationship, they will likely be unable to claim that such changes form a basis of their constructive dismissal. In 2017, the Ontario Court of Appeal, in *Persaud v. Telus Corporation* upheld a lower court decision which found, among other things, that the appellant was not constructively dismissed because she "acquiesced in or condoned the changes to the working conditions."

The appellant argued that she was constructively dismissed because of changes in her working conditions, in particular an increase in her working hours, and a poisoned work environment. The Court agreed with the trial judge that the appellant did not leave her employment because of changes to her working conditions; rather, evidence established she was unhappy with the direction the company was taking, the treatment of her mentor and the evaluation structure, among other things. It was essential to establish a causal link between the alleged breach of the contract and the damages suffered, and no causal link was established.

5. **Not all change constitutes an "essential term" of the employment contract**

Determining what constitutes an "essential term" of the contract can sometimes be a difficult task. Among other things,

courts will look at the degree of the change and the employer's intent to continue to be bound by the contract.

The Ontario Court of Appeal considered these issues in the 2017 case *Chapman v. GPM Investment Management*. It found that the appellant, the CEO and President of the respondent company, was not constructively dismissed when certain profits received by the respondent were not factored into the appellant's bonus. The Court upheld the finding of the trial judge stating that the dispute "amounted to a dispute over the interpretation of one transaction to [the appellant's] bonus scheme and nothing more." There was no substantial alteration of an essential term of the employment contract.

The trial judge did find that the calculation used to determine the appellant's bonus was in fact a breach of the employment contract and he ordered that the bonus be paid. However, he found that the breach was not so significant that it altered an essential term of the employment contract. Further, the evidence established that the respondent had every intention of continuing to be bound by the contract.

Takeaways for Employers

Work situations change, and changes to an employment relationship are often a necessary consequence. However, to avoid unintended consequences related to constructive dismissal, changes should be approached with forethought to determine how the employment contract or working environment could be impacted.

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