Case In Point

Court Upholds ESA-Only Termination Clause Which Did Not Expressly Mention Benefits

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The Ontario Superior Court of Justice recently upheld a termination clause in an employment contract which limited entitlements upon termination to the minimum available under the *Employment Standards Act, 2000* (ESA) but which did not make explicit reference to the continuation of benefits during the statutory notice period.

In *Burton v. Aronovitch McCauley Rollo LLP*, the plaintiff had 13 years of service when her employment was terminated without cause. She was provided with notice, severance and payments for unused vacation in accordance with the requirements of the ESA. Additionally, her benefits were continued for the duration of her notice period.

The plaintiff sued for common law damages, arguing that the termination clause was unenforceable as it failed to expressly provide for continuation of benefits during the notice period as required by the ESA. In the alternative, she argued that termination clause was unconscionable.

The clause in question stated:

(a) AMR may, at its sole discretion, terminate your employment without cause (a “Non-Cause Termination”). In the event of a Non-Cause Termination, AMR shall provide you with severance pay in accordance with the *Employment Standards Act*, as amended, and any successor legislation, if so required as at the time of a Non-Cause Termination; and

(b) Notwithstanding the foregoing, and for greater certainty, if the amounts which you would receive upon a Non-Cause Termination, as set out above, are less than the amounts to which you would be entitled under the *Employment Standards Act*, as amended or any successor legislation, then you shall be entitled to notice, severance pay, and any other payment required by the relevant legislation in force as at the time of the termination.

The Court analyzed three relatively recent Court of Appeal cases which considered termination clauses limiting entitlement to the minimum available under the ESA: *Rodin v. The Toronto Humane Society*, *Wood v. Fred Deeley* and *Nemeth v. Hatch*. Consistent with *Roden* and *Nemeth*, Monahan J. stated that if a termination clause incorporates the applicable statutory standards by reference, “mere silence with respect to the obligation to make applicable benefit plan contributions will not impair the legal validity of the clause.”

The Court dismissed the action. It first held that the clause rebutted the common law presumption of reasonable notice as the incorporation by reference of the minimum notice required under the "relevant legislation" was "sufficiently clear to displace the Plaintiff's common law notice entitlement."

Second, the Court held that the requirement in the termination clause to provide "any other payment required by the relevant legislation in force as at the time of the termination" was broad enough to satisfy the ESA obligation to continue benefits during the notice period:

I would further hold that the Termination Clause makes explicit provision for the continuation by the employer of benefit plan contributions during the notice period. This is reflected in the requirement to make "any other payment required by the relevant legislation." These words must mean more than simply pay in lieu of notice and/or severance pay required by the *Act*, as both are already explicitly and independently referenced in the Termination Clause. In my view, the reference to "any other payment required by the relevant legislation" is sufficiently broad to include the requirement to continue to make benefit plan contributions during the notice period. [para 36]

In arriving at this conclusion, Monahan J. was clear to distinguish the clause at hand from that considered in *Wood v. Fred Deeley*, which was found unenforceable under the ESA as it contained exclusionary language which limited the employer's obligations during the notice period.

Finally, the Court concluded that the plaintiff's alternative argument failed to satisfy the "high hurdle" of establishing unconscionability. As the ESA sets out what the provincial legislature deems to be fair minimum notice periods, a minimum standards-only termination cannot be "grossly unfair or improvident."

This decision is helpful news for employers: the failure to mention benefits in a termination clause which also incorporated the minimum standards legislation by reference did not render the termination clause unenforceable. However, the case is yet another reminder of the continued importance of a well-drafted termination provision in an employment contract.