## Case In Point

# "ESA-Only" Termination Clause Complied with ESA but Failed to Rebut Presumption of Common Law Notice

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The Divisional Court recently upheld a decision of the Superior Court of Justice which held that a termination clause in an employment contract which complied with the *Employment Standards Act, 2000* (ESA) failed to clearly rebut the presumption of entitlement to common law notice. The plaintiff was therefore owed reasonable notice.

In *Movati Athletic (Group) Inc. v. Bergeron*, the plaintiff's employment was terminated after 16 months and she was provided with her entitlements under the ESA, further to the following clause in her employment contract:

Movati Athletic Inc. may terminate your employment without cause at any time during the term of your employment upon providing you with notice or pay in lieu of notice, and severance, if applicable, pursuant to the *Employment Standards Act, 2000* and subject to the continuation of your group benefits coverage, if applicable, for the minimum period required by the *Employment Standards Act, 2000*, as amended from time to time.

The plaintiff then claimed wrongful dismissal and brought a successful motion for summary judgment seeking common law reasonable notice inclusive of her salary, her benefits, and her bonus.

The motion judge found that the clause complied with the ESA. However, it lacked the "high degree of clarity" required to rebut the common law presumption of reasonable notice and there was no "warning sign" that common law notice would not be paid. The motion judge suggested that had the clause provided for entitlement to "only" that available under the ESA, the presumption of common law notice would have been rebutted. Accordingly, any ambiguity had to be resolved in favour of the plaintiff in accordance with the principle of *contra proferentem*.

A unanimous Divisional Court upheld the decision. The Court reviewed the clause and stated that the "words 'pursuant to the ESA' may be interpreted to mean that the notice period in the termination clause complies with the minimum requirements in the legislation, but they do not clearly provide that reasonable notice at common law no longer applies." It continued that "contracts must be read as a whole, giving the words their ordinary and grammatical meaning." In this particular case, the contract contained a probation clause, which limited the plaintiff's "receipt of notice of termination during the probationary period to: '**only** providing you with the minimum

notice necessary to ensure compliance with the [ESA] as amended from time to time' (emphasis added)."

The Court noted a number of differences between the termination and probation clauses in the contract at issue. The notice provision in the probation clause provided that payment upon termination during the probation period would be made "only" for the "minimum notice necessary" to comply with the ESA. The group benefits provision in the termination clause provided that payments would be made only for the "minimum period required" by the ESA. However, the notice provision in the termination clause provided that notice or payment in lieu of notice would be made "pursuant to the *Employment Standards Act.*" Unlike the probation clause or the benefits section of the termination clause, that language did not create a clear limitation on payments in lieu of notice.

As a result, the Court found that there had been no palpable or overriding error:

[41] The words "only" or "minimum" are not required language. However, the fact that the words "only" and "minimum" are used in the probation clause, and the word "minimum" is used in the group benefits provision of the termination clause, but neither is used in the notice provision in the termination clause, reflects a difference in the intention of the drafter.

[42] Based on the wording of the termination clause as seen in the context of the Agreement as a whole, the motion judge made no palpable and overriding error in concluding that the termination clause was not sufficiently clear and unequivocal to rebut the presumption that the reasonable notice requirements at common law apply: *Holm v. AGAT Laboratories Ltd*., 2018 ABCA 23 (CanLII) at paras. 22 and 33-36.

The Court also concluded that there was no palpable and overriding error in noting that the termination clause did not contain "warning signs" as this was not a relevant factor in the determination of whether the clause was sufficiently clear to rebut the common law presumption.

*Movati* is significant to the growing body of case law addressing the enforceability of termination provisions. Most clearly, it highlights that failing to clarify whether the ESA minimums are a floor or a ceiling may lead a court to decide that it is a floor: the fact the ESA applies doesn't necessarily mean that the common law no longer applies.

How the Court reached its conclusion is also important. *Movati* follows the growing trend by the courts to re-emphasise the need, as in all contractual interpretation, to look at the contract as a whole when evaluating termination provisions.

As always, employers should be careful to ensure that any ESA-only termination clauses are clearly drafted to limit entitlements to those under the ESA, and to clearly rebut the presumption of any entitlement to common law notice.