

## Case In Point

# Supreme Court of Canada Denies Leave to Appeal in Case Where Termination Clause in Employment Contract Found to be Unenforceable

**Date:** March 22, 2021

On March 18, 2021, the Supreme Court of Canada [dismissed an application for leave to appeal](#) from a decision of the New Brunswick Court of Appeal, [Abrams v. RTO Asset Management](#). In that case, the New Brunswick Court of Appeal (Court) held an employer could not assert that dismissal was for cause where the employer's behaviour indicated that dismissal was effected on a without cause basis. The Court also opined on the enforceability of a termination clause in the employment contract.

In *Abrams*, the employer dismissed Mr. Abrams, after nearly 30 years of employment, from his position as Regional Manager of a furniture and appliance leasing business as a result of his entering into a romantic relationship with an employee whom he was obliged to supervise. Mr. Abrams' termination letter stated that although it was the employer's position there were facts to support a "for cause" termination, it was terminating without cause. The letter also reserved the employer's right to take the position that the termination had been for cause.

Mr. Abrams refused the employer's termination package, brought a wrongful dismissal suit, and moved to have the action decided on a summary basis. The employer argued that it did not owe Mr. Abrams common law reasonable notice of termination because it had terminated his employment for cause. The employer also argued that there was a valid and enforceable termination provision that limited Mr. Abrams' notice entitlement to four weeks' notice. This was not a situation where new facts came to light after the termination, and after-acquired cause was not argued.

The motion judge held that Mr. Abrams' relationship with a subordinate constituted cause for termination and that, consequently, Mr. Abrams was not entitled to reasonable notice of termination.

The Court disagreed. It did not dispute that the factual matrix supported a "for cause" dismissal. The Court emphasized, however, that whether facts exist to support "cause for termination" and whether termination has been effected on a "without cause" basis are two distinct lines of inquiry. Here, the evidence was clear that the employer effected termination on a without cause basis. The termination letter, the Record of Employment, verbal comments at Mr. Abrams' termination meeting, and the employer's payment of four weeks' notice all supported Mr. Abrams' position that the employer effected his termination on a without cause basis. The facts that supported a cause termination were therefore not part of the equation.

In the same decision, the Court held that Mr. Abrams' without cause contractual termination provision was unenforceable because it purported to contract out of the minimum entitlements of New Brunswick's *Employment Standards Act* (Act). The clause limited reasonable notice on termination to the statutory minimum, and stated that once notice or pay in lieu was provided, the employer "shall not be obliged to make any further payments." Because the Act requires payment of vacation pay and accrued wages after termination, the Court held that the clause illegally attempted to contract out of minimum statutory entitlements. It confirmed that if a part of a termination clause purports to contract out of a benefit under the Act, the entire clause—not just the offending part—is void.

The Court assessed the appropriate period of common law reasonable notice to be 24 months, having regard to Mr. Abrams' age and length of service, along with other factors.

The decision serves as yet another reminder of the importance of a well-drafted termination clause in an employment contract where entitlement upon termination is limited to the minimum standards only, to minimize the risk that a court might find the

clause to be off-side applicable minimum standards legislation. It also highlights that employers who change their reasons for termination, or whose reasons for termination are not clear, may expose themselves to risk during litigation.