CONSIDERATIONS FOR MUNICIPAL EMPLOYERS WHEN DRAFTING TERMINATION CLAUSES IN EMPLOYMENT CONTRACTS

Anna Karimian and Jessica Toldo, Hicks Morley Hamilton Stewart Storie LLP

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 municipal employers 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 municipal employers when drafting termination clauses in light of some important 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

Municipal employers are generally aware that they cannot contract out of the minimum standards under the ESA. However, they are often unaware that a termination provision 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 than 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

Municipal 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.

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

It's not all bad news for you! 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.

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.

Municipal employers should keep these key points in mind when drafting termination clauses in their employment contracts. A well-drafted termination clause will minimize the risk that a court may find the clause unenforceable, resulting in unintended cost consequences for a municipal employer.

Anna Karimian and Jessica Toldo specialize in labour and employment matters facing municipalities. If you have any questions about this or any other employment matter, do not hesitate to contact Anna at 416-864-7034 or Jessica at 416-864-7529. They may also be reached by email at: anna-karimian@hicksmorley.com and jessica-toldo@hicksmorley.com.

HRTO DETERMINES REQUIRING PROOF OF ELIGIBILITY TO WORK IN CANADA ON A PERMANENT BASIS IS DISCRIMINATORY

Jessica Toldo and Anna Karimian, Hicks Morley Hamilton Stewart Storie LLP

Under the Ontario *Human Rights Code*, there are many prohibited grounds of discrimination in relation to employment, including race, ancestry, place of origin, sex and family status, amongst others. Many municipal employers are aware of their obligations in relation to discrimination under the *Human Rights Code* and have policies and practices in place to prevent discrimination. However, concerns in relation to discrimination based on prohibited grounds can arise in a variety of different and unexpected situations, and municipal employers should be mindful of potential liability.

In a recent decision released by the Human Rights Tribunal of Ontario (Tribunal), the Tribunal dealt with an employment-related application in relation to citizenship. The Tribunal found that a pre-employment "permanence requirement" was discriminatory on the basis of the applicant's citizenship. The employer discriminated against a potential employee on the basis of citizenship when it required proof of eligibility to work in Canada on a permanent basis (Canadian citizenship or permanent residency) as a condition of employment.

The decision, outlined in further detail below, will be of practical interest to municipal employers when considering their hiring practices and policies.

Haseeb v Imperial Oil Limited

In *Haseeb v Imperial Oil Limited*, the Applicant, a student at McGill University, was completing his engineering degree. The Applicant applied for an entry level engineering position at Imperial Oil during his final semester. At the time, he was an international student on a student visa. Upon graduation, he would become eligible for a "postgraduate work permit" (PGWP) for three years which would allow him to work full time, anywhere, and with any employer in Canada. He anticipated that he would attain permanent residency status within three years.

The Respondent, Imperial Oil, required graduate engineers to have permanent residency or Canadian citizenship and asked a number of questions throughout the application process about whether the Applicant was eligible to work in Canada on a permanent basis. Throughout the hiring process, the Applicant repeatedly responded "Yes" to questions regarding his eligibility to work in Canada on a permanent basis.

The Applicant was successful in Imperial Oil's multi-step selection process and was offered a job, conditional upon providing documentary proof of citizenship or permanent residency. When he was unable to provide such proof, the offer was rescinded approximately one month after the deadline for its acceptance. The rescission letter, on its face, invited the applicant to reapply if he became eligible to work in Canada on a permanent basis in the future.

Imperial Oil argued that the Applicant's dishonesty during the interview process (namely, lying about his eligibility to work in Canada) was the reason the offer was rescinded. However, the Tribunal Vice-Chair found that the offer had actually expired when he failed to provide the required documents, and in any event, the evidence did not prove that this was the *sole* reason he was not hired.

Additionally, the Vice-Chair found that Imperial Oil's hiring policy was directly discriminatory on its face, and as a result, it could not rely upon an argument that *permanent* eligibility to work in Canada was

a *bona fide* occupational requirement. The Vice-Chair further found that it was not a *bona fide* occupational requirement, as it was a requirement that was occasionally waived (by providing offers conditional upon obtaining permanent residency within a few years) for candidates whose skills were in high demand.

The Tribunal is waiting to provide a decision on the appropriate remedy following submissions by the parties.

Considerations for Municipal Employers

Municipal employers should be aware of the recent HRTO decision when considering their hiring practices. In light of this decision, municipal employers should carefully review their hiring documentation and practices. While requiring proof of eligibility to work in Canada is permissible (and in fact required), employment decisions cannot be made on the basis of *permanent* eligibility to work in Canada.

Hicks Morley

Jessica Toldo and Anna Karimian specialize in labour and employment matters facing municipalities. If you have any questions about this or any other employment matter, do not hesitate to contact Jessica at 416-864-7529 or Anna at 416-864-7034. They may also be reached by email at: jessica-toldo@hicksmorley.com and anna-karimian@hicksmorley.com.