Clear as Mud: Minimum Entitlements and Termination Clauses — Yet Another Ontario Court of Appeal Decision

March 02, 2018

Termination clauses have been the subject of several recent Ontario Court of Appeal decisions. For example, in *Wood v. Fred Deeley Imports Ltd*., 2017 ONCA 158, the Ontario Court of Appeal concluded that the termination clause at issue was unenforceable due to its failure to provide for the continuation of the benefits plan. While the body of case law in this area is expanding at the appellate level, it is not necessarily adding certainty and clarity.

The Ontario Court of Appeal recently dealt with yet another case regarding minimum entitlements and termination clauses in *Nemeth v. Hatch Ltd*., 2018 ONCA 7.

Background

In this case, the appellant ("employee") was dismissed after 19 years of employment with the employer. The employee was given 8 weeks' notice of termination, 19.42 weeks' salary as severance pay, and continued benefits over the notice period.

The termination clause stated that:

The Company's policy with respect to termination is that employment may be terminated by either party with notice in writing. The notice period shall amount to one week per year of service with a minimum of four weeks or the notice required by the applicable labour legislation.

The employee appealed an earlier decision rendering the termination clause as enforceable and submitted that: (i) his rights to common law notice were retained due to the clause's failure to include express language excluding common law entitlements, and (ii) the clause was void pursuant to the *Employment Standards Act, 2000* ("ESA") due to it purporting to contract out of the employee's statutory entitlement to severance pay by the lack of any reference to the entitlement. Moreover, the employee submitted that in the alternative, he was entitled to 19 weeks' notice – one week for every year of employment under the clause at issue.

Issues

In allowing the appeal in part, the Court of Appeal dealt with three main issues:

1. Was it necessary for the employer to include an explicit stipulation in the termination clause in order to displace the common law?
2. Was the termination clause void because it purported to contract out of the ESA?
3. Did the termination clause entitle the employee to 19 weeks' notice on termination of his employment?

Court Of Appeal 's Decision

Was it necessary for the employer to include an explicit stipulation in the termination clause in order to displace the common law?

The Court did not agree with the employee that his common law notice entitlement was retained due to the clause not explicitly stating otherwise. The Court explained that although there is a need for clarity in the context of drafting clauses that displace an employee's common law notice entitlement, parties are not required to "use a specific phrase of formula" or include language such as "the parties have agreed to limit an employee's common law rights on termination." The Court noted that "it suffices that the parties' intention to displace an employee's common law notice rights can be readily gleaned from the language agreed to by the parties." No ambiguity was found in the clause at issue regarding the intention to displace the employee's common law entitlement and the Court concluded that the employee's common law entitlements could not be retained due to "explicit language, which denotes an intent to the opposite effect."

Was the termination clause void because it purported to contract out of the ESA*?*

The Court did not agree with the employee that the clause's silence on the issue of the employee's entitlement to severance pay represented an intention to contract out of the ESA. The Court noted that the clause purported to limit notice but not severance pay, and that the clause "did not provide less than the minimum severance obligations under the ESA, and is not void pursuant to s. 5(1)."

The Court distinguished this case from the recent Court of Appeal case of *Wood*, and applied the earlier Court of Appeal case of *Roden v. Toronto Humane Society* (2005), 259 D.L.R. (4th) 89 (Ont. C.A.). In *Roden*, it was determined that the termination clause was simply silent on the issue of its obligation to continue its contributions to the employee's benefits plan during the notice period, and did not contravene the ESA because the employer remained obligated to continue its contributions during that period.

Did the termination clause entitle the employee to 19 weeks' notice on termination of his *employment?*

In finding that the clause at issue gave rise to two potential interpretations, the Court agreed that the employee was entitled to 19 weeks' notice under the clause. Quoting *Wood*, the Court noted that when faced with a termination clause that could reasonably

have multiple interpretations, the interpretation applied should be the one that provides greater benefit to the employee. In other words, “the correct interpretation of the termination clause would have been the one most favourable to the appellant that does not limit the appellant’s notice entitlement to the ESA minimum.” In the clause at issue, there was no language present that restricted the employee’s entitlements to solely the minimum notice set out under the ESA. Quoting from the Supreme Court of Canada decision of *Machtinger v. HOJ Industries LTD*., [1992] 1 S.C.R. 986, the Court stated that if the employer wanted to include a limitation of that nature, it was open to the employer to do so by drafting the clause differently and with language that “converts the statutory floor into a ceiling.”

As such, the Court concluded that the employee was entitled to receive one week’s notice for each year of service – for a total of 19 years.

Implications

This case demonstrates that explicit phrasing and language may not be necessary to limit common law rights on termination. However, the Court still noted that a high degree of clarity is required and that if the required clarity in the termination clause is absent, ambiguities would be interpreted in favour of the employee. As noted by the Court, “if employers do not make clear the parties’ intention to displace the common law notice, they cannot complain if the fruits of their drafting are found to be ambiguous and unenforceable.”

Should you have any questions about this case, please contact the author.

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