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Can a Severability Clause Save You? Ontario's Top Court Weighs in on Termination Provisions, Again

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The ongoing judicial saga of termination clause enforceability continues to unfold. The latest chapter is the decision of *North v. Metaswitch Networks Corporation*, 2017 ONCA 790, which sees the Ontario Court of Appeal doubling down on its more technical, employee-friendly approach to interpreting termination provisions.

Background

Employers know that in order to limit an employee's entitlements upon termination to the minimums under the *Employment Standards Act, 2000* ("ESA"), the employment contract must contain clear language that reflects that intention, and it must confirm the parties' intention to abide by the ESA's statutory minimums (including providing notice or pay in lieu, severance, benefits continuation, and the like). Section 5(1) of the ESA prohibits contracting out of its employment standards, and voids any such purported contract.

The termination clause in *North* checked most of the boxes for an enforceable termination provision. However, it also contained the following sentence:

In the event of the termination of your employment, any payments owing to you shall be based on your Base Salary, as defined in the Agreement.

By excluding the employee's commissions, which constitute "wages" under the ESA, the clause attempted to contract out of a minimum ESA standard.

The employer, however, argued that the agreement's severability clause could save the termination provision. The argument was that the severability clause — which contained standard language permitting the removal of an "illegal or otherwise unenforceable" part while leaving the rest intact — could excise the offending sentence and leave the remainder of the termination clause enforceable.

Court of Appeal's Decision

While the applications judge had accepted the employer's argument, the Ontario Court of Appeal did not agree. It concluded that section 5(1) of the ESA makes the severability clause inapplicable to the ESA-noncompliant termination clause.

Based on its recent decision of *Wood v. Fred Deeley Imports Ltd.* (released after the applications judge in *North* issued her decision), and the seminal Supreme Court of Canada decision of *Machtinger v. HOJ Industries Ltd*., the Court of Appeal concluded that where a termination clause contracts out of an employment standard, a court must find the entire termination clause to be void. Removing only the offending portion to make it ESA-compliant is an error of law. Because the non-compliant portion voids the *entire* termination clause, there *is* no remaining portion that could be saved through a severability clause.

The employee in *North* had argued that the effect of section 5(1) of the ESA was to render the severability clause itself void. Both the applications judge and the Court of Appeal rejected that argument. Instead, the Court of Appeal found that the severability clause simply

could not have any application to a termination clause that was already made void by statute due to non-compliance with the ESA.

Implications

The Court of Appeal relied heavily on *Wood* and *Machtinger*. These cases affirm the principle that for a number of policy reasons, courts interpret employment agreements differently from other commercial agreements.

Although the Court's prior decision in *Oudin v. Centre Francophone de Toronto* (on which the applications judge in *North* relied) focused on the parties' agreement and their evident intentions, *North* and *Wood* now confirm that the more traditional approach from *Machtinger* will likely prevail going forward. This approach focuses on employee protection: it acknowledges the inequality of bargaining power, encourages employers to comply with the ESA, and creates an incentive for employers to draft ESA-compliant agreements.

Employers should take care to ensure that all employment agreements comply with the ESA's minimum standards, bearing in mind that violations may not be redeemed by a severability clause.

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