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Severing a Single Sentence: The Interplay of the Employment Standards Act and Severability Clauses

Employers sometimes rely on severability clauses—which provide that any clauses that are found to be illegal or unenforceable are severed from the agreement and that the agreement otherwise remains in effect—to hedge against the risk that clauses in employment contracts could be found to run afoul of the *Employment Standards Act* and be unenforceable as a whole. However, in its recent decision in *North v Metaswitch Networks Corporation*, the Court of Appeal for Ontario signalled that these clauses have limited effect when parties include terms in agreements that contract out of minimum employment standards.

In that case, the appellant was an employee of the respondent company. His employment agreement provided for earnings consisting of a base salary plus commission. The agreement also provided that the respondent could terminate his employment at any time by providing "notice and severance… in accordance with the Ontario *Employment Standards Act*". However, this clause also provided that any payments owing on termination would be based on his base salary alone. At first glance, this clause would not comply with the *ESA*'s provisions as to the minimum payments required in the circumstances.

In 2016, the respondent terminated the appellant without cause. The appellant employee sued the company for wrongful dismissal, seeking common law notice. The respondent employer defended, largely on the basis of the termination clause which purported to limit the employee to the minimum entitlements under the *ESA*.

The appellant argued that the clause was void under section 5(1) of the *ESA*, which provides that "no employer or agent of an employer and no employee or agent of an employee shall contract out of or waive an employment standard and any such contracting out or waiver is void". The appellant contended that the clause here excluded his commission from the calculation of his payment in lieu of notice, and therefore was an impermissible attempt to contract out of the *ESA* minimums. The respondent argued in turn that due to the presence of a

severability clause, the offending sentence (particularly the words “based on your base salary”) could be excised, leaving the clause applying the standard notice provided in the *ESA*.

The application judge agreed that the clause contravened the *ESA* and that any payments made should include commission, but also found that the severability clause expressed the parties’ intention to comply with the *ESA* and sever any offending provisions. The application judge held that the words “any part” in section 5(1) of the *ESA* could apply to any offending sentence. He ordered that that words “based on your base salary” be excised, leaving the appellant to be paid the *ESA* standard notice.

On appeal, Justice Feldman held that it was an error of law to use a severability clause to save a termination clause that contravened the *ESA*. Justice Feldman found that section 5(1) clearly provided that any clause that contracts out of or waives the application of an employment standard (other than to provide a greater benefit to the employee) is void. She held that where a clause is void under section 5(1), it is an error of law to interpret “any part” as allowing the excision of a single sentence. The *ESA* therefore automatically voids the entire offending clause. As such, Justice Feldman ordered that the appellant ought to receive common law reasonable notice.

Justice Feldman then addressed the appellant’s alternative argument that section 5(1) of the *ESA* voids the severability clause itself. Justice Feldman framed the question as follows: can a severability clause have any application to a clause that is already void as a result of section 5(1) of the *ESA*?

Justice Feldman examined two different approaches to interpreting and applying a severability clause. The first approach provides that a severability clause is modified “only to the extent necessary” to comply with the law. In that decision, the Court found that the parties had anticipated severance, and intended to comply with the *ESA* if severance occurred.

Justice Feldman disagreed with this approach, pointing out that the result would be that the only consequence of drafting a clause that does not respect the *ESA* would be the application of the *ESA*. As such, this approach incentivizes employers to contract out of the *ESA*, while including a severability clause to save the offending provision in the event an employee has the time and money to challenge the agreement in court.

Instead, Justice Feldman indicated a clear preference for the second approach: where a clause in an employment contract is void under section 5(1), a severability clause is inoperative to save that clause. In this way, the severability clause itself is not

void, as it will continue to have application to the rest of the agreement, but it does not result in an incentive for employers to contravene the *ESA.*

This decision outlines an interpretation of section 5(1) which is in line with the Supreme Court's earlier case law, as well as with the policy underpinning the *ESA*. It provides a clear message to employers and employees that, going forward, the combination of a severability clause and a termination clause which includes a catchall reference to compliance with the *ESA* will not be enough to act as a failsafe against the application of common law reasonable notice where some part of the termination clause is unlawful.

With notes from Zachary Rosen.