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When intention matters: assessing the enforceability of termination clauses

An invalid termination clause is a former employee's golden ticket for employment litigation, increasing a notice period from the statutory minimum to what is reasonable at common law. The monetary difference can be substantial. Given the financial implications, there is a large and growing body of case law on when a termination clause will be deemed unenforceable.

The recent Ontario Superior Court of Justice decision of *Burton v Aronovitch McCauley Rollo LLP* adds clarity to this jurisprudence and provides the additional requirement of assessing employer intention.

The case concerned Burton, a law clerk who was terminated without cause in 2015, after 12 years of employment with the defendant law firm. She commenced litigation shortly thereafter alleging that the termination clause in her employment contract was invalid as it failed to comply with the minimum requirements as set out in the *Employment Standards Act.*

The *ESA* requires an employer to continue to make benefit plan contributions on behalf of an employee during the statutory notice period. The termination clause here provided that the Plaintiff would be entitled to "notice, severance pay, and any other payment required by the relevant legislation in force as at the time of the termination". Burton argued that without specific reference to benefit plan contributions, the clause attempted to contract out of the statutory minimums, rendering it unenforceable. She argued that, without a valid termination clause, she was entitled to reasonable notice at common law.

Referring to three recent Court of Appeal decisions, the Court disagreed:

1. In *Roden v The Toronto Humane Society,* the Ontario Court of Appeal found that the fact that while silent with respect to benefit plan contributions, the termination clause did not represent an attempt to "contract out" of the employer's obligations under the *Act.*
2. In contrast, in *Wood v Fred Deeley Imports Ltd*, Justice Laskin found that the termination clause went beyond

mere silence to provide that “the Company shall not be obliged to make any payments to you other than those provided for in this paragraph” and that the “payments and notice provided for in this paragraph are inclusive of your entitlements to notice, pay in lieu of notice and severance pay pursuant to the *ESA*”. The clause was found to be an attempt to reduce the employer’s obligations to make benefit plan contributions as required by the *Act* and was deemed legally unenforceable.

3. Finally, in *Nemeth v Hatch Ltd,* the Court considered a termination clause which was silent with respect to the employee’s entitlement to severance pay. There, Justice Roberts. found that silence in the termination clause did not reflect an intention to “contract out” of the *ESA,* because there was not the fatal all-inclusive language that was present in *Wood.* Accordingly, the clause was found to be valid.

Referring to these three decisions, Justice Monahan found that, here, the termination clause’s reference to the minimum notice required under applicable law was sufficiently clear to displace the Plaintiff’s common law notice entitlement.

Further, the requirement to make “any other payment required by the relevant legislation” explicitly provided for the continuation of benefit plan contributions, which are generally paid to third-party benefit providers rather than to the employee. In contrast to *Wood*, the reference in the termination clause to “any other payment required by the relevant legislation” was not limited to payments made directly to the employee.

Finally, Justice Monahan found that the clear intention of the termination clause was to ensure that the Plaintiff received no less than the amounts entitled to under the *ESA* by virtue of the catch-all phrase that, “if the amounts which you would receive upon a Non-Cause Termination, as set out above, are less than the amounts to which you would be entitled under the *ESA…* then you shall be entitled to…any other payment required by the relevant legislation in force at the time of the termination”.

Accordingly, the clause was found to be enforceable, and the action was dismissed.

The Court did provide an alternative assessment and found the Plaintiff would have been entitled to nine months of reasonable notice, with a lump sum payment of $52,500, had the termination clause been found to be unenforceable, once again demonstrating the considerable financial implications that

would have arisen due to an improperly drafted termination clause.

Employers must ensure their termination clauses provide the statutory minimums. As employer intention will be considered when assessing the validity of a termination clause, the case suggests it would be good practice for employers to protect themselves by including a catch-all phrase making reference to the minimums required by the relevant legislation in force at the time of the termination.

In addition, in June 2018, the Court of Appeal again considered the enforceability of a termination clause in *Amberber v IBM Canada Ltd,* 2018 ONCA 571. There, the Court found a catch-all or failsafe provision, should not be treated as a severability clause. Instead, the Ontario Court of Appeal held that a failsafe provision ensures a termination clause is “read up” so that it complies with the ESA.

In summary, notwithstanding the tendency of former employees to suggest the strictest construction of termination provisions in order to side-step a contractual notice provision, recent Ontario case law demonstrates that the approach is properly more nuanced and requires consideration of the employer’s intention.