Rae Christen Jeffries LLP
MANAGEMENT LABOUR & EMPLOYMENT LAW

Ontario Court of Appeal Provides Further Guidance Regarding Termination Clause Enforceability

November 28, 2018

Development

On June 22, 2018, the Ontario Court of Appeal issued a decision in *Amberber v IBM Canada Ltd* ("*Amberber*"), a case involving a dispute regarding the enforceability of a termination clause in an employment contract. In *Amberber*, the Court of Appeal overturned the lower court's decision that the termination clause in question was ambiguous and should therefore be construed against the employer.

The Court of Appeal reviewed the following principles that apply with respect to interpreting employment agreements:

- Where there is a genuine ambiguity, the contract is interpreted in favour of the employee.
- While the intention to exclude damages at common law must be clear, no particular wording is required to achieve that result.
- A contract must be interpreted as a whole and not on a piecemeal basis.

The Court of Appeal held that the motion judge had erred because, among other things, she did not interpret the termination clause as a whole.

The Court of Appeal also considered a "failsafe" provision in the termination clause, which stated that the employer would provide the employee with his entitlements under employment standards legislation if such entitlements were superior to those granted under the contract. The Court of Appeal found that the failsafe provision operated to ensure that, if any portion of the termination clause fell short of complying with *Employment Standards Act* ("*ESA*") minimums, the termination clause would be "read up" to comply with the *ESA*.

Based on the foregoing, the Court of Appeal allowed the appeal and concluded that the employee's entitlements were limited to those set out in the termination clause.

Context

Date	Development
Mar 31, 1936	In *Carter v Bell & Sons (Canada) Ltd*, the Ontario Court of Appeal affirms that employment contracts for an indefinite period are presumed to require employers to give "reasonable notice" of the intention to terminate the contract without cause. This represents one of the earliest recorded decisions in Canada establishing the common law presumption of "reasonable notice" of employment termination and the principle that said presumption may be rebutted where an employment contract prescribes different entitlements upon termination.
Apr 30, 1992	In *Machtinger v HOJ Industries Ltd*, the Supreme Court of Canada holds that a termination provision in an employment contract that does not comply with *ESA* minimum notice requirements or otherwise attempts to "contract out" of the *ESA* is void and unenforceable. The Supreme Court's decision clarifies that, to rebut the common law presumption of "reasonable notice", a termination clause must use clear language and be compliant with employment standards legislation.
Sep 6, 2001	In *Ceccol v Ontario Gymnastic Federation*, the Ontario Court of Appeal affirms that any ambiguities in an employment contract will be interpreted strictly against the employer's interests, and finds a termination clause to be ambiguous and unenforceable for not addressing terminations without cause.
Sep 22, 2005	In *Roden v Toronto Humane Society*, the Ontario Court of Appeal holds that a termination clause that is silent with respect to the *ESA* obligation to make benefit plan contributions during the notice period does not represent an unlawful attempt to "contract out" of the *ESA* if it incorporates that obligation referentially.

Aug 8, 2011	In *Wright v The Young and Rubicam Group of Companies*, the Ontario Superior Court of Justice holds that a termination clause is void and unenforceable for: (i) providing for payment of base salary only, thereby failing to referentially incorporate or comply with the *ESA* obligation to make benefit plan contributions during the notice period; and (ii) prescribing specific notice payment amounts that fall short of statutory minimums.
Jun 28, 2016	In *Oudin v Centre Francophone de Toronto*, the Ontario Court of Appeal upholds a motion judge's decision that a termination clause that limits notice without referring to severance is not void for attempting to "contract out" of the *ESA*.
Feb 23, 2017	In *Wood v Fred Deeley Imports Ltd*, the Ontario Court of Appeal holds that a termination clause is void and unenforceable for excluding the *ESA* obligation to contribute to the employee's benefit plans during the notice period. The termination clause in question is silent with respect to such contributions and states that the employee is not entitled to any payments other than those provided in the clause. The Court's decision emphasizes that termination clauses should generally be interpreted in a way that encourages employers to draft agreements that comply with the *ESA*.
Jan 8, 2018	In *Nemeth v Hatch Ltd*, the Ontario Court of Appeal holds that no specific phrase or particular wording is required to rebut the common law presumption of "reasonable notice".

Significance

Amberber joins a considerable body of caselaw addressing the enforceability of termination clauses in employment contracts.

Whether the language of a termination clause is sufficient to rebut the common law presumption of "reasonable notice" is a frequently litigated issue. The profusion of Ontario Court decisions addressing this subject has resulted in uncertainty regarding the proper construction of an enforceable termination clause. Nevertheless, the following general recommendations emerge from the Court of Appeal's decision in *Amberber* and other relevant cases:

1. Simplicity is a virtue. The language of a termination clause should be clear and easy to understand when read as a whole.

2. Language that expressly or impliedly excludes *ESA* obligations should be removed or revised.

3. It is generally advantageous to include a "failsafe" provision to ensure compliance with the *ESA*.

For advice specific to your situation, consider contacting your regular lawyer at Rae Christen Jeffries LLP.

Evan Daikov
evan@rcjlaw.ca

Allison Medjuck
allison@rcjlaw.ca