Cassels

Nothing Ambiguous About It – Ontario Court of Appeal Brings Some Clarity to the Interpretation of Termination Clauses

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As you will recall, in April of this year, we brought you an e-LERT examining the Ontario Superior Court's decision in *Bergeron v. Movati Athletic (Group) Inc.* 2018 ONSC 885 (*Bergeron*) – a recent decision where the Court nullified a termination clause designed to limit entitlements on termination to the minimums under the Ontario *Employment Standards Act, 2000* (ESA). The reason? The clause lacked a "high degree of clarity" and, paraphrasing the Court, could have benefited from the addition of the word "only." As such, this ambiguity was resolved in favour of the employee plaintiff rather than her employer, the party who drafted the language in question.[1]

Since the decision in *Bergeron*, another case involving an arguably ambiguous termination clause has made its way to the Ontario Court of Appeal: *Amberber v. IBM Canada Ltd.*, 2018 ONCA 571 (*Amberber*) – but with a very different result.

Unlike in *Bergeron*, the disputed termination provision in *Amberber* was not designed to strictly limit the employee, Mr. Amberber, to his ESA minimums. Rather, it entitled Mr. Amberber to one week of his current annual base salary for every six months of completed employment to a maximum of twelve months of salary. The precise language of the clause was as follows (**Note:** the underlined subtitles have been added for ease of reference only and did not appear in the original clause):

> ***TERMINATION OF EMPLOYMENT***
>
> *Options Provision*
> *If you are terminated by IBM other than for cause, IBM will provide you with notice or a separation payment in lieu of notice of termination equal to the greater of (a) one (1) month of your current annual base salary or (b) one week of your current annual base salary, for each completed six months worked from your IBM service reference date to a maximum of twelve (12) months of your annual base salary.*
>
> *Inclusive Payment Provision*
> *This payment includes any and all termination notice pay, and severance payments you may be entitled to under provincial employment standards legislation and Common Law. Any separation payment will be subject to applicable statutory deductions. In addition, you will be entitled to benefit continuation for the minimum notice period under applicable provincial employment standard legislation.*
>
> *Failsafe Provision*
> *In the event that the applicable employment standard legislation provides you with superior entitlements upon termination of employment ("statutory entitlements") than provided for in this offer of employment, IBM shall provide you with your statutory entitlements in substitution for your rights under this offer of employment.*

On IBM's motion for summary judgment, the motion judge held that this termination clause was ambiguous and, more specifically, it did not clearly set out an intention to deprive Mr. Amberber of his entitlement to common law notice of termination. In coming to this conclusion, the motion judge relied heavily on the particular placement of the Inclusive Payment Provision within the termination clause. The motion judge acknowledged that the provision was clear that, in the event that the Options Provision payment met or exceeded ESA minimums, such payments would be inclusive of Mr. Amberber's common law notice entitlement. However, according to the motion judge's reasoning, because the Inclusive Payment Provision did not immediately follow the Failsafe Provision it was unclear whether, in the event that the payments identified in the Options Provision did ***not*** meet or exceed ESA minimums, such Failsafe Provision payment would likewise include his common law entitlement. This was enough for the motion judge to conclude that the clause was ambiguous and to effectively nullify the clause altogether, notwithstanding that Mr. Amberber was, in fact, paid in accordance with the Options Provision (rather than the Failsafe Provision).2 As such, the motion judge held that Mr. Amberber was entitled to damages at common law.

IBM successfully appealed the decision. According to the Court of Appeal, "the fundamental error made by the motion judge is that she subdivided the termination clause into what she regarded as its constituent parts and interpreted them individually."

Termination clauses, insisted the Court, must be interpreted as a whole and, when read as a whole, there could be "no doubt as to the clause's meaning." To hold that the Inclusive Payment provision only applied to one part of the clause but not the other, was to give the clause "a strained and unreasonable interpretation." In the view of the Court of Appeal, there was no genuine ambiguity; it was clear that the Inclusive Payment provision was meant to apply to the entirety of the clause. In the Court of Appeal's view, the motion judge "strained to create an ambiguity where none exists." As a result, the Court of Appeal reversed the motion judge's decision and held that Mr. Amberber was entitled to nothing more than the 31 weeks' salary he was provided on termination.

Commentary

The *Amberber* decision's return of some common sense to the interpretation of termination clauses is sure to be welcomed by employers. In an environment where employers have learned to expect to have their draftsmanship carefully scrutinized under a legal microscope, there is at least some comfort in seeing the Court of Appeal refuse to allow that same draftsmanship to be further dissected and examined piece-by-piece for any possible irregularities.

Notwithstanding the Court of Appeal's encouraging approach in *Amberber*, the importance of a carefully drafted termination clause cannot be overstated. The old adage still holds true; the best defence (to a wrongful dismissal claim) is a good offence (through a well-drafted employment contract at the time of hire).

For further information, please contact Adrian Jakibchuk or any other member of the Employment & Labour Group.

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[1] We are advised that Movati Athletic (Group) Inc. has appealed the decision to the Ontario Court of Appeal.

[2] Mr. Amberber was, in fact, initially erroneously paid 29.5 weeks' salary rather than the 31 weeks' salary to which he was entitled. This underpayment was corrected shortly thereafter and was found by the Court to have been unintentional.