Cassels

# Ontario Court of Appeal Provides Further Guidance on the Enforceability of Termination Provisions…Again

**February 1, 2018**

In a good-news decision for employers, the Ontario Court of Appeal upheld another less than perfect termination provision, adding to its growing collection of decisions on the issue of the enforceability of termination provisions in individual employment contracts.

In *Nemeth v Hatch Ltd.*, 2018 ONCA 7 ("*Nemeth*"), the Court considered the following termination provision:

> The Company's policy with respect to termination is that employment may be terminated by either party with notice in writing. The notice period shall amount to one week per year of service with a minimum of four weeks or the notice required by the applicable labour legislation.

The Appellant's argument that the termination provision was unenforceable focused on what the termination provision did not say.

First, the Appellant argued that he retained his right to common law notice of termination (which would have been greater than the contractual notice period) because the provision did not contain express language excluding his entitlement to common law notice.

In rejecting this argument, the Court recognized that while a high degree of clarity was required to rebut the presumption that an employee is entitled to reasonable notice at common law, an express limitation was not. The presumption is rebutted if the contract of employment "clearly specifies some other period of notice, whether expressly or impliedly, provided that it meets the minimum entitlements under the ESA." The Court found that the provision at issue clearly specified "some other period" of notice that met the requirements of the ESA, and therefore the provision denoted an intent to displace the Appellant's common law entitlement.

Second, the Appellant argued that the termination provision was void because it was silent on the Appellant's entitlement to severance pay under the ESA, evidencing an intention to contract out of the ESA. The Court also rejected this argument, noting that the provision only limited notice entitlements. Because there was no limitation on the Appellant's severance entitlement, the provision's silence on that entitlement did not render it unenforceable.

***Commentary***

This decision clarifies and affirms that express language in a termination provision is not required to displace an employee's entitlement to reasonable notice at common law, as long as there is a clearly specified other period of notice that complies with minimum standards legislation.

The Court's determination regarding silence on severance pay entitlements is consistent with its earlier jurisprudence (see our previous blog post discussing this case law here), which indicates that where a termination provision is both silent on a minimum standard **and** includes "all inclusive language" that limits entitlements on termination to only those specifically provided for in the provision, the provision will be found unenforceable for contracting out of the ESA. Where, however, the provision is silent about a minimum standard but does not include language limiting entitlement to that minimum standard, the provision's silence will not be fatal.

The law regarding enforceability of termination provisions continues to develop and, as noted by the Court in Nemeth, a "high degree of clarity" in termination provisions is still required. Accordingly, while this is a helpful decision for employers attempting to enforce less than perfect termination provisions, as always, employers are well-advised to seek experienced employment counsel when drafting a termination provision in order to increase the likelihood that the provision will withstand judicial scrutiny.