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# Another Termination Clause Falls - When Even ESA "Failsafe" Language Can Malfunction

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In September, we covered the Ontario Court of Appeal's recent decision in *Andros v. Colliers Macaulay Nicolls Inc.* which struck down yet another employee termination provision and, in so doing, notably, exposed the weaknesses and limitations of what are commonly referred to as *Employment Standards Act, 2000* (ESA) "failsafe" clauses.

This article examines an even more recent decision on the subject – that of the Ontario Superior Court of Justice in the case of *Groves v. UTS Consultants Inc.* (*Groves*) – which goes even further in addressing the shortcomings of such clauses. Before diving into the facts in *Groves*, however, it's important to clarify what exactly is meant by the term "ESA 'failsafe' clause".

**What is an ESA "Failsafe" Clause?**

To use an analogy, think of a well-drafted termination provision as a tightly buckled "belt" worn to securely hold an employee's entitlements on termination to a fixed level or formula. An ESA "failsafe" clause, meanwhile, can be viewed as the "suspenders" – a back-up mechanism designed to set as an absolute "floor" for any termination provision an employee's minimum entitlements under the ESA. By employing a "belt" ***and*** "suspenders" approach, an employer with any concerns about the enforceability of a termination provision, could rest a little easier knowing that, even if the main provision were held to be invalid for offering compensation or benefits that fell short of the ESA minimums, it could still rely on the ESA "failsafe" clause to avoid having the whole provision wiped out and replaced by a more generous common law notice obligation. That is, at least, the logic behind such an approach. How effectively the "suspenders" work, however, is another matter altogether, as will be clear from the following overview of the *Groves* decision.

***Groves v. UTS Consultants Inc.***

**The Facts:**

The Plaintiff, Wayne Groves, was the founder of UTS Consultants Inc. (UTS), serving as its President since 1992. In 2014, he, along with his spouse and a third shareholder of UTS, sold 100% of the shares in the company to Oakville Enterprise Corporation (OEC). On the day he executed the share purchase agreement, the Plaintiff also signed a notice of resignation stating that he was resigning "as an officer and director [of UTS], such resignation to take effect immediately". The Plaintiff likewise signed a release releasing UTS and the purchaser from, among other things, any claims "existing up to the present time" including "any

Claims for unpaid remuneration, termination or severance pay".

On the same date the Plaintiff signed both the resignation and the release, he signed a letter of employment confirming his new role with the company as a senior manager ("the Employment Agreement"). The Employment Agreement included the following termination provision:

> *This agreement may be terminated in the following manner in the specific circumstances:*
> *…*
> *c) By the Company at any time without cause provided that the Company provides you with notice in writing or pay in lieu of notice (as salary continuation) or some combination thereof equal to four (4) weeks base salary for each year of service that you have with the Company calculated from the date of this letter (and, for greater certainty, excluding any period of service you had with the Company prior to the date of this letter) with a guaranteed minimum notice or pay in lieu of notice equal to three (3) months base salary; provided that the maximum notice period or pay in lieu of notice that you will receive shall in no circumstances exceed twelve (12) months.* ***Notwithstanding the foregoing, the Company guarantees that the amounts payable upon termination, without cause, shall not be less than that required under the notice and severance provisions of the Employment Standards Act (Ontario)***[1]*. In addition, the severance package will also include continuation of medical and dental benefits during the severance period. Any variable pay owing to you will be prorated for the year's service and paid at the time of termination. For greater certainty, you agree that for purposes of calculating any entitlement which you may have arising from the termination, without cause, of your employment with the Company, any prior service with the Company is excluded and you hereby waive and release any prior service entitlements.*

When the Plaintiff's employment was terminated without cause less than three years after signing the Employment Agreement, he commenced an action for wrongful dismissal and claimed his common law notice entitlement, asserting that the termination provision was unenforceable. Among other arguments, the Plaintiff asserted that the termination provision failed to comply with the ESA because it:

i. purported to waive termination pay and severance pay entitlements under the ESA[2];

ii. provided for termination pay and severance pay to be determined based on "base salary" only; and

iii. had no provision for severance pay if pay in lieu of notice is provided.

UTS, meanwhile, maintained that the Plaintiff had resigned in 2014 and consequently, had not been

continuously employed by UTS for more than five years so as to trigger an entitlement to severance pay. Moreover, UTS argued that, even if the provision otherwise failed to comply with the ESA, the ESA "failsafe" language effectively operated so as to replace the termination entitlement with the ESA minimums.

**The Decision:**

The Court began by examining section 9(1) of the ESA which deems the employment of an employee of a business that has been sold to be continuous when that same employment continues with the purchaser. Relying on the 2018 Court of Appeal decision in *Kerzner v. American Iron Metal Company Inc.*, the Court held that an employee cannot waive his or her statutory entitlements, as the Plaintiff purportedly did, by signing a new employment agreement and release in exchange for consideration under a share purchase agreement. To the extent then that the last sentence of the termination provision required the Plaintiff to waive his prior service entitlements, it was contrary to the ESA and unenforceable.

The Court then considered whether the Plaintiff's ostensible resignation altered the analysis by creating a break in the prior employment relationship. On this front, the Court held that UTS had not discharged its burden of proving on "clear and unequivocal evidence" that the Plaintiff had resigned. According to the Court, the resignation was, in reality, "an entirely artificial attempt to create an interruption in employment when in fact there was none".

This left open the question, however, of whether the ESA "failsafe" clause could nonetheless be relied upon to save the provision. In support of this position, UTS relied on the Ontario Court of Appeal's 2018 decision in *Amberber v. IBM Canada Ltd.* (*Amberber*) (about which we have written previously). The Court rejected the comparison, however, noting that, "in *Amberber*, the Court of Appeal 'read up' a termination provision to comply with the ESA <u>because the provision was capable of an interpretation that would be in compliance with the ESA</u>."

In this case, it was clear from the last sentence of the termination provision that UTS had, in fact, ***intended*** to contract out of the ESA. Consequently, the Court held that when an employer, such as UTS, has sought to contract out of the ESA, an ESA "failsafe" clause "cannot be used to rewrite the express language in an agreement to cause it to comply." Because the termination provision in question specifically precluded an interpretation that would include the Plaintiff's prior service with UTS in the calculation of his entitlements, it simply could not, under any scenario, be interpreted so as to comply with the ESA.

As such, the Court invalidated the entirety of the termination provision and ultimately awarded the Plaintiff his common law notice entitlement which was determined by the Court to be 24 months' compensation ($340,000 plus 24 months' lost bonus potential) – a payment that OEC likely had not bargained on when acquiring UTS.

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**Takeaway for Employers**

As is clear from the *Groves* decision, including an ESA “failsafe” clause in a termination provision, while still good practice, is not a cure-all for any and every deficiency. Such clauses have their limitations and, by no means, grant employers license to get careless in drafting termination provisions.

After all, not even the best pair of suspenders can prevent a wardrobe malfunction if they’re not actually clipped onto your pants.

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[1] Underlined text referred to herein as “ESA “failsafe” language”
[2] Notably, UTS had a payroll in excess of $2.5 million so as to trigger a potential ESA severance pay entitlement.

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