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Holding Employees to their Agreements: Ontario Court Confirms Enforceability of ESA-Only Termination Provision

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The principle that employers and employees are permitted to contract out of the common law and agree upon an employee's entitlements upon termination (provided they meet or exceed the statutory minimums) is long-standing.

However, achieving this in practice is something that has eluded many employers, particularly in recent years as Ontario Courts (and others across Canada) have increasingly scrutinized termination provisions and found new ways in which they may be deemed invalid. A recent example of common pitfalls employers make when drafting termination clauses in employment contracts was reviewed here.

But employers should not give up hope: the Ontario Superior Court of Justice's recent decision in *Bertsch* v. *Datastealth Inc.,* 2024 ONSC 5593 is welcome news to employers and reaffirms that termination provisions will indeed be enforced in appropriate cases, including those that limit an employee's termination entitlements to the statutory minimums under the Ontario *Employment Standards Act, 2000* (the ESA). In addition, *Bertsch* provides a helpful example of how parties can seek to have pure issues of contractual interpretation determined via a motion under Rule 21 of the *Rules of Civil Procedure* in appropriate cases, without the need for a full trial.

Background

Bertsch involved an employee who was terminated on a without cause basis after being employed for 8.5 months. The termination provision in the employment agreement sought to limit the employee to the minimum statutory entitlements on termination as prescribed by the ESA.

The termination provision read, in part, as follows:

5. **Termination of Employment by the Company:** If your employment is terminated with or without cause, you will be provided with only the minimum payments and entitlements, if any, owed to you under the [ESA] and its Regulations,… including but not limited to outstanding wages, vacation pay, and any minimum entitlement to notice of termination (or termination pay), severance pay (if applicable) and benefit continuation. You understand and agree that, in accordance with the ESA, there are circumstances in which you would have no entitlement to notice of termination, termination pay, severance pay or benefit

continuation.

You understand and agree that compliance with the minimum requirements of the ESA satisfies any common law or contractual entitlement you may have to notice of termination of your employment, or pay in lieu thereof. You further understand and agree that this provision shall apply to you throughout your employment with the Company, regardless of its duration or any changes to your position or compensation.

Given his 8.5 months of service, the employee was entitled to one week of notice or pay in lieu of notice under the ESA. Nonetheless, the employer provided the employee with four weeks' pay in lieu of notice, in excess of his minimum statutory entitlements.

The Parties' Positions

The employee argued that the termination provision was unenforceable because it contravened the ESA and sued the employer seeking 12 months' pay in lieu of notice or approximately $300,000. The plaintiff based his argument on the fact that the ESA establishes a higher burden for terminating an employee without any notice than under the common law. In short, the plaintiff argued that the termination provision was void because it allowed for a termination for cause, without notice, even if there was not "wilful misconduct, disobedience or wilful neglect of duty" under the higher ESA standard.

The employer argued that the termination provision was enforceable as it was clear, unambiguous, and did not violate the ESA. Accordingly, the employer brought a motion under Rule 21 requesting that the Court determine the proper interpretation of the termination provision and to dismiss the claim as the employee had already received his entitlements under the ESA and his employment contract.

The Decision

The Ontario Superior Court of Justice confirmed that this was an appropriate case to be determined via a Rule 21 motion. Given the stage of the proceedings, the Court found that this case was a good example of where the Court's interpretation of the agreement would be useful, efficient and just. In particular, there were no disputed facts regarding the circumstances in which the employment agreement was signed that required a trial, and the Court was readily able to make a determination regarding the enforceability of the termination provision based upon the facts as pleaded.

While the Court agreed that the ESA's categories of "wilful misconduct, disobedience or wilful neglect of duty" were only a limited subset of what constitutes "just cause" at common law, the Court nonetheless found that the termination provision was valid and did not result in any breach of the ESA. In particular, the Court found that there was "no reasonable alternative interpretation of the relevant clauses here that might

result in an illegal outcome.”

In reaching this conclusion, the Court made a number of other comments that employers will find welcome. To begin, the Court acknowledged that the interpretation and application of termination clauses is not a simple matter, and that it can be difficult to predict the outcome of litigation given that the law regarding these issues is not very straightforward. However, in this case, the Court found that the contractual terms were clear and unambiguous: the mere fact that the termination provision was not simple did not mean that it was unenforceable.

The Court also readily accepted that there is a presumptive power imbalance that existed between the employer and the employee regarding the negotiation of the employment contract, and that any ambiguity would therefore be interpreted in favour of the employee. However, here there was no ambiguity in the termination provision so this presumption was immaterial: a presumptive power imbalance in an employment relationship will not change the outcome where the proper meaning of the termination provision is clear.

As the termination provision in this case was clear, unambiguous, and did not violate the ESA, it successfully excluded any claim for additional pay in lieu of notice under the common law. Accordingly, the Court struck the employee’s claim without leave to amend.

Takeaways

Despite the complexities and challenges employers’ face when drafting enforceable termination provisions, this decision highlights the value to employers of including well-drafted termination provisions in their employment agreements. Doing so can result in substantial cost savings both in terms of payments to employees on termination, as well as reduced legal costs if litigation is required.

As the case law regarding the interpretation and the enforceability of termination clauses is constantly evolving, employers are encouraged to pay close attention to these developments and update their employment agreements periodically as appropriate.

For assistance reviewing your employment agreements, please contact a member of the Cassels Employment & Labour Group.
