Cassels

Termination Clauses Revisited - ESA "Failsafe" Language May Not Be As Failsafe As You Think

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If there is one thing employers want to get right in a written employment agreement, crafting an ironclad termination provision would typically be at the very top of any employer's wish list. In most employment contracts, there is no more costly a mistake than to draft an unenforceable termination provision and end up invalidating the entire clause.

Given how readily the courts tend to pounce on any errors, irregularities or ambiguities in termination provisions and rely on them to strike the entire clause, prudent employers will often resort to what are sometimes informally referred to as *Employment Standards Act, 2000* (ESA) "failsafe" provisions. Such provisions can take many forms, but practically speaking, are all intended to set as a "floor" for any termination provision an employee's minimum entitlements under the ESA. The typical ESA "failsafe" clause is tacked onto the end of a termination provision and states that, no matter what happens, the terminated employee will receive their ESA minimum entitlements.

One such termination clause with an ESA "failsafe" was the focal point of the Ontario Court of Appeal's recent decision in *Andros v. Colliers Macaulay Nicolls Inc.* (*Andros*). Unlike a standard ESA "failsafe" clause, however, the clause in question in *Andros* simply made the ESA minimums one of several possible contractual entitlements. The specific termination provision in Mr. Andros' employment contract read as follows:

4. Term of Employment

...

The company may terminate the employment of the Managing Director by providing the Managing Director ***the greater of*** *the Managing Director's entitlement pursuant to the Ontario Employment Standards Act [referred to in the decision as the "first clause"]* ***or****, at the Company's sole discretion,* ***either*** *of the following:*

a. Two (2) months working notice, in which case the Managing Director will continue to perform all of his duties and his compensation and benefits will remain unchanged during the working notice period.

b. Payment in lieu of notice in the amount equivalent of two (2) months Base Salary. [Emphasis added]

Upon the termination of his employment, Mr. Andros received his entitlements under the ESA – namely, a

lump sum payment in lieu of notice of termination equal to eight weeks of salary, coverage for all benefits during that notice period, and a lump-sum severance payment of approximately 12 weeks of salary. The employer took the position that Mr. Andros' ESA entitlement was greater than either of the options in clauses 4a or 4b and, as such, that was the extent of Mr. Andros' contractual entitlement.

Mr. Andros argued that he was entitled to more because, in his view, the termination provision contravened the ESA and, as such, was not valid. Mr. Andros asserted the error arose from the provision's failure to account for his entitlement to severance pay in clause 4a and its failure to account for benefits continuation in clause 4b.

When the matter first came before the Court on a summary judgment motion, the employer argued that the ESA "failsafe" provision built into the first clause of the termination language meant that there could be no interpretation of the termination provision that was not compliant with the ESA. The motion judge sided with Mr. Andros, however, and concluded that the ESA had indeed been contracted out of and, consequently, the entire termination clause was unenforceable. In the alternative, the motion judge held that, at its very best, the termination clause was unclear as to whether clauses 4a and 4b included statutorily-compliant severance and benefits and, as such, it would have been unenforceable on this basis as well. According to the motion judge, citing the recent Ontario Court of Appeal decision in *Nemeth v. Hatch Ltd*., "a high degree of clarity is required and any ambiguity will be resolved in favour of the employee." In this case, Mr. Andros "would not have known, with certainty, when he signed the employment agreement whether he would be paid severance (if he were so entitled) in accordance with clause 4a, or whether he would be entitled to employee benefits in accordance with clause 4b."

The employer appealed and argued before the Ontario Court of Appeal that:

a) The motions judge failed to interpret the clause as a whole;

b) She read ambiguity into clauses 4a and 4b where there was none; and

c) She failed to appreciate that there was no need for a specific reference to statutory entitlements in clauses 4a and 4b for those entitlements to apply.

In particular, the employer argued that, because of the incorporation of the first clause - the "failsafe" provision - into the termination provision, the ESA minimums should properly be read into clauses 4a and 4b as well – thereby ensuring compliance with the ESA in any and every scenario. In other words, according to the employer, it was implied that severance and/or benefits would be provided under clauses 4a and 4b even though they were not explicitly referenced.

Ultimately, this argument failed. Consequently, the Court of Appeal upheld the motion judge's determination that Mr. Andros was entitled to eight months' notice at common law (rather than the approximately 4.5

months' salary he initially received). Mr. Andros was also found, on appeal, to be entitled to a pro rata share of his bonus for the period of time he actually worked before his termination and the 8-month notice period.

What employers should take away from the *Andros* decision is that the bar remains quite high for employer-drafted termination provisions. It is clearly not enough for employers to draft any old termination provision (whether compliant with the ESA or not) with the expectation that, as long as they have language referencing the ESA minimums somewhere in there, they will be fine. As the *Andros* decision has demonstrated, even ESA "failsafe" language can fail if not drafted carefully – all the more reason seeking legal advice on a termination provision remains one of the best investments a company can make when it comes to staffing.
