Cassels

If Only It Read "Only" - Ontario Court Nullifies Termination Clause then Proposes a Corrected Version

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While the Ontario Court of Appeal has had a number of occasions in the last couple of years to weigh in on the question of what makes for an enforceable termination provision in an employment agreement, whether it has in any way stemmed the flow of litigation in this area is a matter of some debate.

We know from the Ontario Court of Appeal's decision in *Nemeth v. Hatch Ltd.*, 2018 ONCA 7 (*Nemeth*), that "a high degree of clarity" is required in any termination provision and that "any ambiguity will be resolved in favour of the employee and against the employer who drafted the termination clause." We are reminded by the decision in *Oudin v. Centre Francophone de Toronto, Inc.* 2016 ONCA 514, meanwhile, that "contracts are to be interpreted in their context" and that, rather than disaggregate the words in a clause looking for any potential ambiguity, regard should be had to whether there was an intent to contract out of the *Employment Standards Act, 2000 (ESA)*. Putting those sometimes competing principles into practice, however, has often been a challenge – leading employers and terminated employees to look to the Court to resolve any disputes in interpreting specific termination clauses.

Background

The Ontario Superior Court of Justice very recently had occasion to consider the enforceability of an ESA termination provision in *Bergeron v. Movati Athletic (Group) Inc.*, 2018 ONSC 885 (*Bergeron*). However, unlike in most decisions on the subject, the Court in *Bergeron* not only weighed in on the enforceability of the termination provision in question, but offered up some advice of its own on how to correct the provision to ensure it has the legal effect the employer intended.

The decision in *Bergeron* arose out of a motion for Summary Judgment in respect of an action by Ms. Bergeron for wrongful dismissal. Ms. Bergeron was a fairly short-term employee of a Movati Athletic (Group) Inc. (Movati), having worked for the company as a General Manager for one of its health and fitness facilities for 16 months. On hiring, Ms. Bergeron signed an employment agreement containing the following termination clause:

> *Movati Athletic Inc. may terminate your employment without cause at any time during the term of your employment upon providing you with notice or pay in lieu of notice, and severance, if applicable, pursuant to the Employment Standards Act, 2000 and subject to the continuation of your*

> *group benefits coverage, if applicable, for the minimum period required by the Employment Standards Act, 2000, as amended from time to time.*

Based on the above provision, which it believed limited Ms. Bergeron's entitlement on termination to the *ESA* minimums, Movati terminated Ms. Bergeron's employment without cause and intended to pay her two weeks of pay in lieu of notice and to continue her group benefits coverage for two weeks (it erroneously paid her four weeks of pay in lieu of notice, however). Ms. Bergeron argued that the provision, as drafted, failed to rebut her presumed entitlement to common law reasonable notice which, according to Ms. Bergeron, would have amounted to six months.

Decision

Relying, in part, on the decision in *Nemeth*, the Court concluded that there was not a "high degree of clarity in [Ms. Bergeron's] termination clause." Specifically, the Court noted that the clause "did not contain any explanation or warning sign and it said nothing more than Movati will obey the ESA." As such, the Court concluded that Movati could not rely on the termination clause to contract out of its obligations under the common law and held that the appropriate notice period ought to be three months (and not the two-week statutory minimum).

In coming to this conclusion, however, the Court went out of its way to explain what Movati could have done to ensure that the provision ousted Ms. Bergeron's common law notice entitlement and restricted it to ESA minimums. In the Court's view, all that was missing was the insertion of a couple of "only"s. The following "corrected" provision was proposed by the Court as one approach that would have enabled Movati to be successful in its argument:

> *Movati Athletic Inc. may terminate your employment without cause at any time during the term of your employment upon providing you with notice or pay in lieu of notice, and severance, if applicable,* ***only*** *pursuant to the Employment Standards Act, 2000 and subject to the continuation of your group benefits coverage, if applicable,* ***only*** *for the minimum period required by the Employment Standards Act, 2000, as amended from time to time.*

Commentary

If there is one take-away that employers should draw from the decision in *Bergeron*, it is that the exercise of

drafting an enforceable ESA termination clause can be a delicate process where one ill-advised word or one omission can tip the balance from having an enforceable, cost-saving provision to simply wasting ink. To use a fitness/sports analogy, contract drafting, like football, can be a “game of inches.” Even if an employer crafts a termination provision that cites the ESA, considers potential severance pay obligations and remembers to refer to benefits entitlements during the notice period, sometimes the *only* thing it takes to have it all fall apart is an “only.”

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