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Nova Scotia Court Voids Cross-Canada Termination Clause: A Cautionary Tale for National Employers?

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Employers operating across multiple Canadian provinces or territories sometimes prefer to use a single cross-Canada employment agreement template, referencing any potential entitlements an employee may have under the "applicable employment standards legislation," rather than creating separate templates for each province or territory where their employees are based. The Supreme Court of Nova Scotia's recent decision in *Brocklehurst* v. *Micco Companies Limited*[1] highlights the potential risks of such an approach.

Legislative Background

In Canada, provincially and territorially regulated employment relationships are governed by the laws of the province or territory in which the employee is working. Employers that operate and have employees in more than one province or territory must comply with each jurisdiction's employment standards legislation. While employment standards laws are very similar across Canada, there are important variations, including with respect to entitlements on termination. For example, Ontario is the only Canadian province where employees are entitled to statutory severance pay on termination, in addition to notice of termination or pay in lieu, if the employee has completed five or more years of service at the time of termination and their employer's annual global payroll is C$2.5 million or more. In addition, Ontario is the only province that requires employers to maintain an employee's benefits coverage for the duration of the statutory notice period when providing pay in lieu of notice.

Despite these Ontario-specific termination entitlements, some employers use the same form of employment agreement across Canada, with a termination provision referencing the obligation to provide the minimum entitlements required under the applicable employment standards legislation, including statutory severance pay and/or continued benefit coverage "if applicable" under that legislation.

Brocklehurst v. Micco Companies Limited

Mr. Brocklehust was employed by Micco Companies Limited (Micco) as a sales representative for 8.5 years. At the time of his termination without cause, he was 52 years old and received an annual salary of $36,000, along with considerably higher commission earnings. The without-cause termination provision in his employment agreement (the Termination Provision) read as follows:

Termination Without Cause:

Your employment may be terminated by Micco without cause, upon provision to you of the following payments:

(i) any portion of the annual salary and accrued vacation pay, if any, that has been earned by your [sic you] prior to the date of termination by [sic, but] not yet paid;
(ii) continued participation in Micco group health plan for such time as may be required under Nova Scotia Labour Standards legislation; and
(iii) only such minimum notice of termination, or pay in lieu thereof, and severance pay (if applicable) to which you are entitled under the Nova Scotia Labour Standards legislation.

Mr. Brocklehurst argued that the termination provision did not limit his common law termination entitlements because it was ambiguous, unclear, and attempted to contract out of the Nova Scotia *Labour Standards Code* (the Code). Micco argued that there was no ambiguity in the termination provision and that it clearly limited Mr. Brocklehurst to the minimum pay in lieu of notice required by the Code.

In interpreting the termination provision, Justice Chipman cited the Ontario Court of Appeal's recent decisions in *Waksdale* v*. Swegon North America Inc.* and *Bertsch* v*. Datastealth Inc.*, confirming that employers may enforce an agreement that restricts an employee's common law rights on termination, but not in a manner that will violate the employee's rights under the applicable employment standards legislation. Termination provisions require "express language" with a "high level of clarity" to displace the presumption that an employee is entitled to reasonable notice of termination at common law.

Applying the relevant authorities, Justice Chipman determined that subsection (iii) of the Termination Provision was ambiguous, as there were reasonable interpretations of that provision that did not limit Mr. Brocklehurst's entitlement to reasonable notice of termination at common law. For example, the qualifier "to which you are entitled under the Nova Scotia Labour Standards legislation" could reasonably be interpreted to apply only to severance pay and not to "minimum notice of termination." Moreover, the term "severance pay" does not appear anywhere in the Code; the only payment required upon termination without cause in Nova Scotia is pay in lieu of notice. Accordingly, Justice Chipman opined that the reference to "severance pay" may have been a colloquial way of referring to common law notice. Given these ambiguities, Justice Chipman concluded that the termination provision did not meet the high standard required to limit an employee's entitlement to common law notice. Mr. Brocklehurst was awarded damages based on an eight-month notice period.

Conclusion

The Court's decision in *Brocklehurst* is a good reminder that termination provisions in employment

agreements are held to a higher standard of clarity than ordinary contracts and must be drafted with meticulous attention to the applicable employment standards legislation. In most cases, the optimal approach for employers in Canada is to tailor their employment contracts and the termination provisions within those contracts to the specific province or territory where the employee is working. Referencing an entitlement to statutory severance pay or benefits coverage upon termination “if applicable” under the “applicable employment standards legislation” could result in the termination provision being deemed vague and unenforceable if the employee is not based in Ontario. From a practical standpoint, this could also create a false expectation on the part of an employee that they will receive an additional severance payment and/or extended period of benefits continuation upon termination when an employer has no intention of offering anything beyond the statutory minimum period of notice or pay in lieu.

If you have questions regarding the enforceability of your current employment agreement templates, please contact any member of the Cassels Employment & Labour Group.

[1] 2025 NSSC 192.

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