What's New in HR Law

Ontario Court of Appeal Finds No Special Formula or Express Language Required to Make Clear Termination Clause Enforceable

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BOTTOM LINE

The Ontario Court of Appeal upheld a motion judge's finding that the termination clause in an employee's contract of employment was enforceable, notwithstanding that the clause did not expressly displace the employee's common law entitlements and was silent with respect to the employee's entitlement to statutory severance pay.

Facts: Termination Clause Specified Notice Period

The employee's employment was terminated after 19 years of service. The termination clause in the employee's contract of employment stated:

> The Company's policy with respect to termination is that employment may be terminated by either party with appropriate notice in writing. The notice period shall amount to

> one week per year of service with a minimum of four weeks or the notice required by the applicable labour legislation.

Upon termination, the company provided the employee with his minimum entitlements under the Ontario *Employment Standards Act, 2000* (the "*ESA*").

The employee sued for wrongful dismissal. On his motion for summary judgment, the employee contended that the termination clause in his contract of employment was unenforceable, and that he was therefore entitled to more than what the *ESA* provides.

The judge rejected this argument and dismissed the employee's motion, having found that the same clause was enforceable in a related decision. The employee appealed the motion judge's ruling to the Ontario Court of Appeal.

The Court of Appeal: Termination Clause Enforceable

On appeal, the employee challenged the enforceability of the termination clause on two grounds.

The first was that the clause did not explicitly state the parties' intention to displace the employee's entitlement to common law reasonable notice of termination.

The Court of Appeal rejected this argument. While the Court accepted that the intention to displace an employee's common law notice entitlement must be clearly and unambiguously expressed in the contract, it added that this need for clarity does not mean that the parties must use a specific phrase or formula. Nor must the parties state literally that they have agreed to limit the employee's common law rights.

The employee's second argument was that the clause purported to contract out of the *ESA* because it was silent with respect to his entitlement to severance pay.

The Court of Appeal rejected this argument as well. Given the wording of the clause, the Court held that the clause's silence with respect to severance pay was simply not indicative of an intention to provide something less than the legislated minimum standards.

Notwithstanding the above, the Court of Appeal held that the employee's entitlement to one week's notice per year of service under the clause was not limited by the words "or the notice required by the applicable labour legislation". Accordingly, the employee's appeal was allowed in part, and he was awarded additional compensation amounting to a total of 19 weeks' pay in lieu of notice. This was in addition to an amount already provided to the Plaintiff in respect of his entitlement to severance pay under the *ESA*.

Check the Box

The Court of Appeal's decision is a good one for employers seeking to defend the enforceability of a termination clause that does not expressly displace common law entitlements or that is silent with respect to an employee's entitlement to severance pay.

Nevertheless, employers should continue to keep the following in mind:

- An enforceable termination clause is one that clearly expresses the parties' intentions in a lawful manner.
- Termination clauses in contracts of employment should be carefully drafted.

Forum: Ontario Court of Appeal

Date: January 8, 2018

Citation: *Nemeth v Hatch*, 2018 ONSC 7

Need more information?

For further information, please contact Evan Daikov at 416-408-5502 or your regular lawyer at the firm.

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