Employers get it Right: Court Upholds Contractual Termination Provisions

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A recent decision of the Ontario Court,*Burton v. Aronovitch McCauley Rollo LLP*, 2018 ONSC 3018 (*Burton*), adds to the considerable case law that addresses when a termination provision is void for failure to comply with the provisions of the Ontario *Employment Standards Act, 2000*(the ESA).

In brief, the ESA sets minimum standards, including the following rights on termination (unless an exception, such as "wilful misconduct," applies):

- Notice of termination, or termination pay with benefit continuance, for up to eight weeks; and
- Subject to certain conditions (such as the size of the employer's payroll and the employee's length of service), severance pay of up to 26 weeks.

Employers frequently try to avoid the more generous "common law" entitlements on termination by contracting with employees to provide a specific amount of notice or pay in lieu of notice. Such contracts are binding, provided that they comply with the minimum ESA provisions.

The clause at issue in Burton was the following:

"(a) AMR may, at its sole discretion, terminate your employment without cause (a Non-Cause Termination). In the event of a Non-Cause Termination, AMR shall provide you with severance pay in accordance with the *Employment Standards Act*, as amended, and any successor legislation, if so required as at the time of a Non-Cause Termination; and
(b) Notwithstanding the foregoing, and for greater certainty, if the amounts which you would receive upon a Non-Cause Termination, as set out above, are less than the amounts to which you would be entitled under the *Employment Standards Act*, as amended or any successor legislation, then you shall be entitled to notice, severance pay, and any other payment required by the relevant legislation in force as at the time of the termination."

The employee argued that the Termination Clause was invalid, since it did not explicitly provide for the continuation of benefit plan contributions over the termination pay period

as required by the ESA, and accordingly the employee was entitled to the more generous “common law.”

After reviewing several recent cases, the court rejected the employee’s argument, holding that the Termination Clause did in fact provide for the continuation of benefit plan contributions during the termination pay period. The court held that the phrase “any other payment required by the relevant legislation” included the payment of premiums for benefit contributions over the termination pay period, and therefore the Termination Clause did require the employer to continue benefits in accordance with the ESA. The court concluded that the intention of the Termination Clause was to ensure that the employee received no less than all of the amounts to which she was entitled under the ESA. As such, the Termination Clause complied with the ESA, and effectively limited the employee’s termination entitlements to the minimum ESA entitlements. The court further found that the Termination Clause was not unconscionable (the alternative argument of the employee).

The invalidity of a contractual termination provision was considered again in *Khashaba v. Procom Consultants Group Ltd.*, 2018 ONSC 7617 (*Khashaba*). In *Khashaba*, the contract had a section that provided for termination without notice for “just cause,” and a separate provision that limited the employee’s entitlements on a without cause termination to the minimum ESA provisions. The employee argued that since “just cause” is not a basis for denying termination and severance pay under the ESA (the ESA standard is “wilful misconduct”), the contract violated the ESA and was void.

While the court agreed with the employee that the “just cause” provision violated the ESA and was not enforceable, the court nonetheless upheld the “without cause” termination provision in the contract. The court did so on the basis that although the “just cause” clause itself was void, it did not affect the validity of the “without cause” termination clause, since that clause was contained in a separate paragraph. As such, the invalidity of the “just cause” paragraph did not affect the validity of the “without cause” paragraph, which was enforceable to limit the employee’s entitlement to the minimum ESA amount on a without cause termination.

Takeaway for Employers

These decisions underscore the importance of reviewing your contracts periodically, to carefully consider whether the termination provisions comply with the ESA in light of recent case law. While both of these decisions found in favour of the employer, there are many recent cases holding that a non-compliant clause results in the employee being entitled to common law pay in lieu of notice. The takeaway is clear: a well-drafted clause can displace the common law, but an unclear clause can result in costly litigation and an uncertain result.

By

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