



Employment Update

EMPLOYMENT AND LABOUR GROUP:

Maria Kotsopoulos
(Editor)
Direct 416.593.2987
mkotsopoulos@blaney.com

William D. Anderson, Chair
Direct 416.593.3901
banderson@blaney.com

Elizabeth J. Forster
Direct 416.593.3919
eforster@blaney.com

Mark E. Geiger
Direct 416.593.3926
mgeiger@blaney.com

David E. Greenwood
Direct 416.596.2879
dgreenwood@blaney.com

Catherine Longo
Direct 416.593.2998
clongo@blaney.com

Christopher McClelland
Direct 416.597.4882
cmcclelland@blaney.com

Michael J. Penman
Direct 416.593.3966
mpenman@blaney.com

D. Barry Prentice
Direct 416.593.3953
bprentice@blaney.com

Jack B. Siegel
Direct 416.593.2958
jsiegel@blaney.com

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“DRAWING THE CIRCLE” AROUND ESA TERMINATION CLAUSES

Christopher McClelland

Employees may have a further basis upon which to challenge termination clauses in their employment contracts following a pair of recent Ontario Superior Court decisions. Ironically, the source of the challenge in these cases was the use of inexact “catch-all” language purporting to clarify an employee’s entitlement on termination. The two highlighted cases point to the importance of using precise language to ensure termination clauses do not run afoul of the *Employment Standards Act, 2000* (the “ESA”).

Stevens

The Plaintiff in *Stevens v. Sifton Properties Ltd.* was employed by the Defendant as the Head Golf Professional at a golf course in London, Ontario. After approximately 3.5 years, the Plaintiff’s employment was terminated without cause. In preparing the Plaintiff’s termination package, the Defendant relied upon the termination clause in the Plaintiff’s offer letter, which provided as follows:

With respect to termination of employment, the following terms and conditions will apply:

...

- (b) The Corporation may terminate your employment without cause at any time by providing you with notice or payment in lieu of notice, and/or severance pay, in accordance with the Employment Standards Act of Ontario.
- (c) You agree to accept the notice or payment in lieu of notice and/or severance pay referenced in paragraph 13(b) herein, in satisfaction of all claims and demands against the Corporation which may arise out of statute or common law with respect to the termination of your employment with the Corporation.

The Plaintiff sued for wrongful dismissal, claiming that she was entitled to reasonable notice at common law. She subsequently brought a motion for summary judgment. One of the Plaintiff’s arguments on the motion was that the termination clause was unenforceable because it violated the ESA by denying her benefits during the statutory notice period.

The Court ultimately accepted this argument and declared the termination clause to be void.

“...employers face a number of challenges in drafting termination clauses... [as] terminated employees will continue to search for creative arguments as to why such termination clauses are void.”



Christopher McClelland is a member of Blaney McMurtry's Employment and Labour Group, whose practice includes labour, employment and human rights law. Christopher joined the firm following his call to the Bar of Ontario in 2008.

Christopher has been involved in matters before the Superior Court of Justice, the Divisional Court, the Labour Relations Board and the Human Rights Tribunal.

Christopher can be reached at 416.597.4882 or cmclelland@blaney.com.

In doing so, the Court relied on the last paragraph of the termination clause, which indicated that the Plaintiff would receive notice, pay in lieu of notice, and severance pay under the ESA *in satisfaction of all claims and demands arising out of statute or common law*. The Court characterized this “catch-all” language as an attempt to “draw the circle” around those rights and entitlements the Plaintiff would receive on termination. As such, because the Defendant had not specifically identified provision of ongoing benefits during the statutory notice period, the termination clause was unenforceable.

Wright

A similar analysis was conducted in *Wright v. The Young and Rubicam Group of Companies (Wunderman)*. In this case, the Plaintiff also brought a motion for summary judgment regarding the enforceability of a termination clause which provided for pay in lieu of statutory notice upon termination, but not benefits. The clause in question included the following language:

This payment will be inclusive of all notice statutory, contractual and other entitlements to compensation and statutory severance and termination pay you have in respect of the termination of your employment and no other severance, separation pay or other payments shall be made.

The “payment” referred to in this clause was limited to base salary. As such, the Court held

that the termination clause violated the ESA by excluding benefits. Rephrasing the Court’s decision using the language from *Stevens*, the Court effectively found that the Defendant had drawn a circle around its termination clause by providing for a specific payment in satisfaction of “all...entitlements to compensation”. The Defendant was therefore precluded from arguing that the employment agreement implicitly provided for the continuation of benefits.

Summary

In both *Stevens* and *Wright* the Court was required to comment on previous cases in which similar termination clauses had been upheld. In some cases, the Court was able to reconcile these decisions on the basis that the termination clause provided that the employee would receive his or her “entitlements” under the ESA, which presumably could include benefits. In other cases, the termination clause did not attempt to draw the circle using “catch-all” language.

As these cases demonstrate, employers face a number of challenges in drafting termination clauses that comply with the ESA. It is to be expected that terminated employees will continue to search for creative arguments as to why such termination clauses are void. Employers must therefore closely scrutinize their termination clauses to ensure that they comply with all aspects of employment standards legislation. ■

EMPLOYMENT UPDATE



Maria Kotsopoulos practices with Blaney's Employment and Labour Group in all areas of labour, employment and human rights law.

Maria advocates on behalf of employers, not for profit organizations, trade unions, and employees, and has been involved in matters before the Superior Court of Justice, the Federal Court, the Labour Board, the Human Rights Tribunal, the Workplace Safety and Insurance Appeals Tribunal, and other tribunals.

Maria can be reached directly at 416.593.2987 or mkotsopoulos@blaney.com.

ONTARIO CONSIDERS NEW FAMILY-RELATED LEAVES OF ABSENCE UNDER THE ESA

Maria Kotsopoulos

Proposed amending legislation to the *Employment Standards Act, 2000*, ("Act") introduced earlier this March by Ontario's government will, if passed, result in three new unpaid, job-protected leaves:

1. Family Caregiver Leave is up to 8 weeks of leave for employees to provide care and support to a family member with a serious medical condition. A doctor's note will be required. This leave creates a separate entitlement from the current Family Medical Leave in the Act.
2. Critically Ill Child Care Leave is up to 37 weeks of leave to provide care to a critically ill child upon provision of a doctor's note. This leave is intended to complement new benefits under the federal *Helping Families In Need Act*.
3. *Crime-Related Child Death and Disappearance Act* is up to 52 weeks of leave for parents of a missing child and up to 104 weeks of leave for parents of a child who has died as a result of a crime. As above, this leave is intended to complement benefits available under the federal *Helping Families In Need Act*.

We will keep you updated on the progress of this legislation. ■

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**Blaney
McMurtry**
BARRISTERS & SOLICITORS LLP

2 Queen St. East, Suite 1500
Toronto, Canada M5C 3G5
416.593.1221 TEL
416.593.5437 FAX
www.blaney.com

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