

# “Drawing the Circle” Around ESA Termination Clauses

Date: March 27, 2013

Lawyers You Should Know: Christopher McClelland

Original Newsletter(s) this article was published in: Employment Update: March 2013

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. 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.