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PUBLICATION

A New Direction for the Enforceability of Termination Clauses?

Date: April 26, 2016
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Original Newsletter(s) this article was published in: Employment Update: April 2016

Many employers are often surprised to hear that the *Employment Standards Act, 2000* (the "*ESA"*) is not the starting point for determining how much notice of termination an employee is owed. Rather, an employee is presumptively owed reasonable notice at common law, which is rebuttable if the employment agreement clearly sets out an entitlement to notice which does not violate the *ESA* or some other statute, such as the *Human Rights Code*.[1]

Recently, several cases have highlighted the difficulty that employers face when drafting termination clauses that comply with the minimum requirements set out in the *ESA*. In *Wright v The Young and Rubicam Group of Companies (Wunderman)*,[2] the court held that if a termination clause does not provide for an employee's minimum notice period and full benefit continuation as required by the *ESA*, the clause is void and unenforceable. Subsequent cases have struggled with the further issue of whether a termination clause must comply with the *ESA* in all possible termination scenarios and not just for the circumstances in question.[3]

Recently, another court has weighed in on the issue and has delivered a surprising judgment that poses new questions for both employers and employees.

***Oudin v Le Centre Francophone de Toronto*[4]**

In *Oudin*, the defendant hired the plaintiff, pursuant to a written employment agreement, to manage the production of a glossy magazine containing advertisements and a listing of various cultural, educational, professional and business resources available to serve members of the francophone community of Toronto. The plaintiff commenced his employment in or about December 2000 and worked under a series of one year contracts. In 2007, the parties entered into an indefinite term employment agreement. When the defendant started to incur significant financial losses as a result of a decline in the magazine's sales, the defendant terminated the plaintiff's employment without cause and with immediate effect.

The employment agreement provided the following terms with respect to the termination of the plaintiff's employment:

9. Termination of Employment

9.2 Termination and contractual rescission: This agreement may be terminated without notice or compensation by CFT for the reasons mentioned in article 4 of this agreement. The CFT may also terminate this agreement for any other reason by giving the employee 15 days notice or the minimum prescribed by *the Employment Standards Act* or by paying an amount of salary equal to the salary the employee would have had the right to receive during the notice period (after deduction and/or withholding at source), in the entire discretion of CFT.

12. Waiver and Severability

12.2 If any of the provisions of the present agreement is invalid or unable to be performed by virtue of any law, regulation, order or any other requirement or other principle of law, this modality shall in such case be considered to be modified or nullified, but only to the extent necessary to comply with the statute, regulation, order, legal requirement or principle and the other dispositions of the present agreement shall remain in force.

Upon termination, the plaintiff received 21 weeks' termination and severance pay. In addition, he was offered an additional 12 weeks equivalent salary and an extension of benefits coverage if he would sign a standard form release. The plaintiff did not sign the release but the defendant voluntarily maintained the plaintiff's benefits. The plaintiff commenced an action for wrongful dismissal, arguing that s. 9.2 of the employment agreement was unenforceable and seeking damages for common law reasonable notice.

The plaintiff's first argument was that art. 4 of the employment agreement violated the *ESA* because it purported to authorize termination without notice by reason of permanent disability. As art. 9.2 of the employment agreement referenced art. 4 it was argued that it was also void.

The plaintiff's second argument was that art. 9.2 was void because it could be viewed as permitting the defendant to provide only 15 days' notice whereas the *ESA* requires greater notice. It was argued that since the plaintiff was already entitled to more than 15 days' notice at the time of entering into the contract, the reference to that shorter notice period in art. 9.2 was ambiguous or alternatively a disguised attempt to contract out of the minimum standards of the *ESA*.

Justice Dunphy rejected both of the plaintiff's arguments and held that art. 9.2 was enforceable. The court's principal reason for so holding was that art. 12.2 operated to save art. 9.2 from any inconsistency with the *ESA*. On a proper construction of the contract, the parties had explicitly spelled out what they intended to do in the event any part of the contract was found to be unenforceable. Justice Dunphy found that the offending words - "continuing incapacity considered permanent" in art. 4 and the reference to 15 days in art. 9.2 - could be excised without doing violence to the remainder of the provisions.

Justice Dunphy further held that on a “true and fair” construction of the employment agreement, the reference to 15 days’ notice in art. 9.2 was not an attempt to contract out of the minimum *ESA* requirements. The plaintiff was entitled to more than 15 days’ notice when he entered into the indefinite term employment agreement with the defendant. Furthermore, the defendant adduced uncontradicted evidence that it was the defendant’s practice to apply the termination clause to the advantage of the employee by giving the employee the greater of the two notice periods specified (15 days or the *ESA*).

Commentary

The result in *Oudin* adds fresh water to the murky pond.

Pursuant to the court’s analysis, a potential interpretation of a termination clause that would render it unenforceable under the *ESA*, does not necessarily render it unenforceable if the parties did not objectively intend that result:

“[50] The plaintiff appeared to advocate for the view that if *any* potential interpretation can be posited that might in some hypothetical circumstance entail a potential violation of the *ESA*, however absurd or implausible the interpretation may be, then the only possible result is to strike out the entire section of the agreement. That is not the law.” [emphasis in original]

Furthermore, the court adopts a robust approach in applying the Waiver and Severability clause in the employment agreement. This approach may be a good signal for employers and provides a useful tool to enforce a termination clause when it is challenged by a terminated employee. The *Oudin* decision does raise questions however as to the extent that employers can rely on severability clauses to cure a termination provision that clearly does not provide an employee with his or her minimum entitlements under the *ESA*. Courts will only go so far in applying a severability clause to cure a defective termination provision. Employers should always ensure that they have well-drafted termination clauses in their employment agreements.

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[1] *Machtinger v HOJ Industries Ltd.*, [1992] 1 SCR 986

[2] 2011 ONSC 4720 [“*Wunderman*”]

[3] See for example the conflicting decisions in *Wunderman* and *John A. Ford & Associates Inc. v Keegan*, 2014 ONSC 4989. The recent decision in *Garreton v Complete Innovations Inc.*, 2016 ONSC 1178 (Div. Ct.) favours the approach taken in *Wunderman*, namely, that “the employment contract must be considered at the time it is executed. If the termination provision is not complaint with notice provisions and severance provisions (if applicable) of the *Act* at the outset, then it is void and unenforceable. Potential violation in the future is sufficient.”

[4] 2015 ONSC 6494 [“*Oudin*”]