Termination provision not perfect? Recent cases may help

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The enforceability of contractual termination provisions can be a contentious issue when they limit an employee's entitlements in the event of a termination without cause to the bare statutory minimum. Canadian courts have often declared such provisions to be unenforceable due to technical deficiencies (see for example our **previous blog post** on this topic). In such cases, employees are awarded payment in lieu of reasonable notice at common law (which almost always exceeds the statutory minimum). There have, however, been two decisions (one in Ontario and one in British Columbia) that seem to indicate an employer-friendly change in direction. These cases are discussed below:

Ontario

In *Oudin v Centre Francophone de Toronto* (***Oudin***), the Ontario Court of Appeal affirmed a motion judge's decision to uphold a contractual termination provision which limited an employee's entitlements upon termination without cause to the statutory minimum, despite the fact that the contract did not specifically reference each and every entitlement required by the ***Employment Standards Act, 2000*** (Ontario) (the ESA).

Drawing on previous decisions (discussed **here**), the employee argued that the termination provision was not enforceable because it did not specifically reference benefit continuation or severance pay (both of which he was entitled to receive under the ESA) and for that reason was an improper contracting out of minimum employment standards.

The motions judge specifically confirmed that "[t]here is nothing unconscionable or contrary to public policy in permitting the parties to an employment agreement to contract out of the common law" and that choosing to provide only the employment standards minimums did not "justify subverting the application of the contract the parties have chosen in favour of searching for a means to defeat it." Further, the motions judge stated that it was only after the parties' intentions had been determined, based on a true and fair construction of the contract, that it could be ascertained whether, based on that construction of the contract, "the parties intended to contract out of one or more employment standards prescribed by the ESA." The motions judge ultimately found that the parties' intentions were clear and that the only reasonable interpretation of the termination provision was that it was intended to limit the employee's entitlements upon a termination without cause to the ESA minimums. Moreover, the motions judge found, on the proper construction of the contract, there was no intention to contract out of the ESA - "in fact; to the contrary, the intent to apply the ESA is manifest."

Moreover, in dismissing the employee's argument that the doctrine of *contra proferentem* should be applied to strike the termination provision if any potential interpretation could result in a possible violation of the ESA, the motions judge specifically held that "*[c]ontra proferentem* is not a means of finding the

least favourable interpretation to the employee with a view to invalidating the contract in whole or in part", and that a contract should not be interpreted in a manner that neither party reasonably expected when it was entered into, simply because the outcome of doing so favoured one party or the other in hindsight.

The employee in ***Oudin***, has made an application for leave to appeal to the Supreme Court of Canada.

British Columbia

Oudin echoes the earlier decision of the British Columbia Court of Appeal in *Miller v. Convergys CMG Canada Limited Partnership (**Miller**)*.

In ***Miller***, the employee also argued that the termination provision in the employment contract was void for failing to comply with the minimum statutory notice requirements of the ***Employment Standards Act*** (the Act) because a probationary employment provision in the employment contract provided that the employee's employment could be terminated at any time during a probationary period without the requirement to provide notice or pay in lieu thereof, notwithstanding the fact that at the time the contract was signed, the employee had been employed for three years (and therefore was entitled to 3 weeks of statutory notice or pay in lieu).

The Court of Appeal, in upholding the trial judge's decision to uphold the termination provision (which limited the employee's entitlement to the employment standards minimum), found that reading the contract as a whole, it was unlikely that a reasonable person would "accept that, having agreed that the Act would govern all but probationary termination, the parties nevertheless decided to subvert the employment standards legislation for 90 days" and that such an interpretation bordered on the absurd. However, as the Court found that there was no evidence on which it could determine whether the probationary provision had been purposely included in the employment contract or was simply standard "boilerplate" language which was mistakenly not removed, the Court ultimately held that the parties' intentions as to whether the probationary provision applied to the employee remained an open question. Therefore, the Court found it preferable to determine the appeal on the basis of the appellant's second ground of appeal; namely that the trial judge had erred in finding the probationary clause was severable from the contract.

The Court then went on to find that, even if the probationary provision was intended to apply to the employee, the trial judge did not err in concluding that it could be severed from the contract. The contract contained a severability provision and the Court stated that "where the parties anticipated the possibility of severance and chose contractual language to govern this eventuality . . . the starting point must be to give effect to what the parties reasonably intended if a provision of the contract is found unenforceable by reason of illegality". Specifically, the Court held that the plain meaning of the severability provision should be given effect with the question being "whether the removal of the probation clause affects the substance of the remainder of the Agreement". The Court ultimately concluded that severance of the probationary provision had no impact on the termination provision, the balance of the contract, or the employment relationship.

The employee's application for leave to appeal to the Supreme Court of Canada was dismissed.

Our Views

Taken together, these two decisions appear to bolster an employer's chances of enforcing a less than perfectly drafted contractual termination provision and perhaps signal a move away from the previously technical approach to the interpretation of such provisions. Regardless, employers are well advised to ensure they use carefully drafted termination provisions that reference all minimum statutory entitlements and make it clear that they are all the employee is entitled to receive (if that is the intention). Employers

should also include a provision that expressly contemplates the severance of any provision that may be found to be unenforceable for any reason.