



The Saga Continues: The Ontario Court of Appeal Strikes Down a Termination Provision in *Wood v. Fred Deeley Imports Ltd.*

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In recent years, there have been a number of cases where contractual termination provisions that attempt to limit an employee's entitlements upon termination have been found to be unenforceable because they did not comply with employment standards legislation. However, as mentioned in our previous post ([discussed here](#)) the Ontario Court of Appeal's decision in *Oudin v. Centre Francophone de Toronto*, (Oudin) appeared to have provided some optimism to employers that non-conforming provisions might be upheld as enforceable.

Unfortunately, that optimism may be short-lived. On February 23, 2017, the Ontario Court of Appeal released its decision in *Wood v. Fred Deeley Imports Ltd.*, (Fred Deeley). After eight years of service with Fred Deeley, Ms. Wood was terminated without cause. Ms. Wood was provided with 13 weeks' working notice (with benefits continued during this period) and a lump sum payment equal to eight weeks' pay.

Ms. Wood argued that she should be entitled to common law reasonable notice, as her employment agreement failed to provide for the minimum requirements under the *Employment Standards Act, 2000* (the ESA). The relevant provision of her agreement is reproduced below:

"[The Company] is entitled to terminate your employment at any time without cause by providing you with 2 weeks' notice of termination or pay in lieu thereof for each completed or partial year of employment with the Company. If the Company terminates your employment without cause, the Company shall not be obliged to make any payments to you other than those provided for in this paragraph, except for any amounts which may be due and remaining unpaid at the time of termination of your employment. The payments and notice provided for in this paragraph are inclusive of your entitlements to notice, pay in lieu of notice and severance pay pursuant to the *Employment Standards Act, 2000*

." [Emphasis added.]

The Ontario Court of Appeal in reversing the motion judge's decision found that the termination provision was unenforceable, as it failed to provide for the minimum standards under the ESA. The decision seemed to turn on the fact that the provision was not only silent on the matter of continuation of benefits during the notice period, but expressly excluded it. Further, the Ontario Court of Appeal found that despite the continuation of benefits during the notice period, an employer cannot rectify an invalid termination clause based on post-termination conduct.

Notably, the Fred Deeley decision makes no reference to Oudin. In 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 ESA. Oudin and the case of *Roden v. The Toronto Humane Society*, (Roden) are arguably distinguishable from Wood, as they did not expressly exclude the continuation of benefits, but rather remained silent on the matter.

Our Views

Despite some “wiggle” room in Oudin and Roden, the Fred Deeley case supports the view that termination provisions must be drafted to ensure enforceability and compliance with the ESA. A silver lining to Fred Deeley is that it supports the proposition that an employment contract delivered prior to the commencement of employment but signed following the start date may not always be struck down for lack of consideration.

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