



Close judicial scrutiny renders termination provision unenforceable

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A **recent decision** of the Ontario Superior Court of Justice proves that employers cannot be too careful when drafting termination provisions. The Court held, among other things, a potential contravention of the ***Employment Standards Act, 2000*** was sufficient to render a termination provision unenforceable, even if at the time of termination the provision provided the employee with an amount in excess of his ESA entitlements.

At the time of termination, the Plaintiff had served the Defendant for more than five years, and most recently was President of the Defendant's organization. The Plaintiff's employment was governed by an employment agreement, which contained the following termination provision:

The employment of the Employee may be terminated by the Employee at any time on 2 weeks prior written notice (one weeks' notice during Probationary Term), and by the Company upon payment in lieu of notice, including severance pay as follows:

- a) During Probationary Term – one weeks' notice*
- b) Within two years of commencement of employment – four (4) weeks Base Salary;*
- c) After two and up to three years after commencement of employment – six (6) weeks' Base Salary;*
- d) After three but less than five years after commencement of employment – eight (8) weeks' Base Salary;*
- e) Five years or more and up to ten years after commencement of employment – thirteen (13) weeks' Base Salary, plus one (1) additional week of Base Salary for every year from 6-10 years of service up to a maximum of 18 weeks.*
- f) After more than ten years but less than 19 years from the commencement of employment – six (6) months' Base Salary;*
- g) After 19 years or more from the commencement of employment – 34 weeks' Base Salary (or eight months).*

The 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.

In accordance with the provision, upon the termination of his employment the Plaintiff was provided with the equivalent of thirteen weeks of: base salary; RRSP matching contributions; car allowance payments; parking allowance payments. The Plaintiff was also provided with group benefits coverage for the thirteen week period, and disability and life insurance coverage for the duration of his statutory notice period.

The Plaintiff commenced an action for wrongful dismissal and moved for summary judgment. The Plaintiff argued that the termination provision was unenforceable due to two deviations from the ESA: (i) that it did not provide for benefits but instead, specifically excluded them; and (ii) that under certain circumstances the amount of pay in lieu of notice stipulated would be less than that required by the ESA. To illustrate this point, the Plaintiff prepared a chart contrasting the contractual entitlement with the notice and severance amounts required by the ESA. The chart indicated that at certain points in time, i.e. 8.5 years of service, the base salary of 16 weeks would not have met the statutory minimum of 16.5 weeks of combined termination and severance pay.

Regarding the issue of benefits, the Defendant argued that while the termination provision did not explicitly reference benefits during a period of notice, it did not exclude them, as evidenced by the Plaintiff's receipt of benefits during the thirteen-week notice period. Benefits were not referred to in the provision because it contemplated only those payments to be made directly to the Plaintiff, and not those that would implicitly continue for the statutory notice period.

Regarding the issue of payment in lieu of notice, the Defendant argued that as the Plaintiff was provided with a contractual amount that was in excess of his ESA entitlements; the provision could not be rendered unenforceable with reference to the circumstances at hand.

The Court disagreed, and held that: (i) the termination provision excluded benefits and was therefore in violation of the ESA; and (ii) the language of the termination provision evidenced an intention to treat the payment of base pay as the totality of the Plaintiff's entitlements to compensation on termination regardless of whether the provision met the statutory minimums or not. As at certain points in time the termination provision would fall short of the statutory minimums, it was found to be in violation of the ESA, and unenforceable.

Of particular note is the following passage from the decision, which clearly illustrates that termination provisions will be strictly interpreted:

There is, in my view, no particular difficulty in fashioning a termination clause that does not violate either the minimum standards imposed by the *Employment Standards Act* or the prohibition against waiving statutory minimum requirements and there is no compelling reason to uphold a termination clause which the draftsman may be reasonably understood to have known was not enforceable in all or under certain circumstances.

The Court then turned its attention to the amount of reasonable notice appropriate in the circumstances, and held that the Plaintiff was entitled to twelve (12) months.

Our view:

This decision confirms what legal practitioners have speculated for some time, that while a faulty termination provision may not be problematic at the time of the actual termination, the fact that it contemplates a violation of the ESA at some point in the future may be sufficient to render the provision unenforceable. Employers are cautioned to seek legal counsel when drafting termination provisions, as any ambiguity will be construed against the employer and the provision may be unenforceable if it runs afoul of one of the many legislative and common law pitfalls.

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