

## Court of Appeal finds termination clause void for contravening ESA – employer required to pay salary for remainder of fixed term contract

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The recent decision of the Ontario Court of Appeal in [Covenoho v. Pendylum Ltd.](#) (April, 2017) drives home two important lessons for employers. First, termination clauses in employment contracts must comply with the minimum requirements of the *Employment Standards Act* (“ESA”). Where they do not, the more generous common law notice period will apply. Second, when terminating a fixed term employment contract, in the absence of a valid contractual provision stipulating a notice period, the employer is required to pay an employee to the end of the term. The employee is not required to mitigate his or her damages.

The employee in *Covenoho* was hired under a one-year fixed term contract. The contract contained the following termination clauses:

2.1 The term of this Agreement will commence on the date of this Agreement and will continue in full force and effect unless the Agreement is terminated as follows:

(a) Immediately by PENDYLUM providing written notice to you if you violate or fail to honor any of these provisions of this Agreement or fail to perform your duties as set out in Appendix A in a satisfactory manner as determined by PENDYLUM (known as Cause); or if the PENDYLUM Client to which you have been contracted terminate[s] its contact with PENDYLUM for your services; OR

(b) By either party providing written notice of **at least two (2) weeks** to the other.

2.2 In the event of termination, we will have no liability to you, save and except to pay any accrued and earned compensation up to and including the date of termination.

Less than three months into the term of her contract, Ms. Covenoho’s employment was terminated without notice or pay in lieu of notice. The employer relied on clause 2.1(a) as set out above and in particular, the fact that its client terminated its contract with Pendylum.

Ms. Covenoho commenced an action for wrongful dismissal and brought a motion for summary judgment. The motion judge held that because Ms. Covenoho had been employed for less than three months, she was not entitled to notice under the ESA. The motion judge also concluded that common law notice was not required under section 2.1 of the employment contract. Her action for wrongful dismissal was dismissed.

Ms. Covenoho appealed this decision on the basis that Article 2 of the employment contract failed

to comply with the ESA and was therefore unenforceable. Her argument was that section 2.1 and 2.2 would permit the employer to terminate the employment contract without cause and without paying the statutory minimum required under the ESA.

The Court of Appeal agreed. It stated that in order to determine whether the employment contract was enforceable, the terms of the contract had to be construed as if the appellant had continued to be employed beyond three months. It noted that *“if a provision’s application potentially violates the ESA at any date after hiring, it is void...”* The appellate court went on to find that section 2.1(a) and 2.2 of the employment contract were contrary to the ESA. In the court’s view, these provisions would operate to allow the employer to terminate the employment contract, without cause, and without paying the statutory minimum required under the ESA, even if the employee had been employed for more than three months.

Having found that the employment contract was void for failing to comply with the ESA, the Court applied the common law notice requirements as they apply to fixed term contracts. It quoted the following principle from the decision in *Howard v. Benson Group Inc.* (2016):

In the absence of an enforceable contractual provision stipulating a fixed term of notice, or any other provision to the contrary, a fixed term employment contract obligates an employer to pay an employee to the end of the term and that obligation will not be subject to mitigation.”

Based on the above principle, the Court of Appeal proceeded to award Ms. Covenoho damages in the amount of \$56,000 representing her salary for the 40 weeks that remained on the term of her contract.

## **In our view**

Although employers and employees are entitled to contract out of the common law notice requirements, when they choose to do so, they must ensure that the contract language is clear and unambiguous, and that the minimum statutory requirements under the ESA are met. In the event of an ambiguity, or where an ESA standard is not met, the more generous common law notice requirements will apply.

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