Ambiguities in employment contracts continue to trip-up employers - Ontario Court of Appeal refuses to enforce termination clause and awards common law reasonable notice

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A recent decision of the Ontario Court of Appeal drives home the importance of clear and unambiguous language in employment agreements. In *Wood v. Fred Deeley Imports Ltd.* (February, 2017), the Ontario Court of Appeal held that a termination clause in an employment contract was unenforceable because it failed to meet the minimum requirements under the *Employment Standards Act, 2000* (the "ESA"). The Court came to this conclusion despite the employer having paid the employee more than would be required under the ESA at termination. The plaintiff was awarded damages based on common law reasonable notice equivalent to nine months' salary, amounting to significantly more than what the employment agreement or the ESA provided.

To understand the decision in *Wood*, it is useful to first briefly discuss the legal landscape relating to reasonable notice and employment agreements. As most readers will be aware, under the common law, an employee hired for an indefinite period may be dismissed without cause provided that the employer gives them reasonable notice of termination. The employer and employee may "contract-out" of the common law requirement for reasonable notice by specifying some other notice period in the employment agreement. The "catch" is that whatever is agreed to in the employment agreement must meet or exceed the minimum requirements set out in the ESA. If the ESA requirements are not met, the offending clause will be unenforceable and, upon termination, the employee will be entitled to common law reasonable notice.

Turning back to the *Wood* decision, the employee was a Sales and Event Planner, who was 48 years' old and had eight years and four months of service when her employment was terminated. Her total compensation (approximately $100,000) included her base salary, a bonus, and contributions to health and dental benefits, as well as RRSP contributions. The termination clause in her employment agreement stated:

> [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*.

Upon termination, the employer provided Ms. Wood with 13 weeks of working notice during which it continued to pay her salary and benefits. The employer also paid her an additional eight weeks' pay as a lump sum. Finally, the employer offered Ms. Wood a contribution to her RRSP and a pro rata incentive bonus in exchange for a signed release. The employee refused to sign the release and sued for wrongful dismissal, arguing that her entire agreement and/or the termination clause was void and unenforceable.

The employee attempted to argue that her employment agreement was void since she had only signed it on her second day of employment. The Court of Appeal rejected this argument. Since Ms. Wood had received an electronic copy of the agreement approximately a week prior to commencing employment, and since the terms of that agreement did not differ from those of the hard-copy agreement, the Court found that there had been an offer and acceptance prior to the employee's first day.

Turning to the termination clause, it set out a notice requirement that, although less than what may be available under the common law, exceeded what was required for notice under the ESA. The problem is that the ESA sets out requirements that go beyond the provision of notice. In particular, the ESA requires an employer to continue to make benefit contributions during the notice period and to provide severance pay. It was these two requirements that the clause was found to exclude.

The termination clause was silent with respect to benefit contributions. Although that silence, by itself, may not have been fatal to the enforceability of the clause (see *Oudin* below), what was fatal was the fact that the termination clause went on to state that, "…*the Company shall not be obliged to make any payments to you other than those provided for in this paragraph*". The Court of Appeal viewed this language as an attempt to exclude the ESA requirement relating to benefit contributions. As a result, the Court found the clause to be unenforceable.

In addition, the termination clause purported to combine the employer's notice and severance obligations by stating, "*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*." The Court of Appeal found that this resulted in an ambiguity that could lead to three scenarios, only one of which would meet the ESA minimum requirement for severance. As the termination clause "did not clearly satisfy Deeley's obligation to pay Wood her statutory severance pay", the Court found the clause to be unenforceable on this ground as well. In the result, Ms. Wood was found to be entitled to common law reasonable notice.

It is worth noting that the Court of Appeal in *Wood* did not discuss its prior decision in Oudin v. Centre Francophone de Toronto, (June, 2016) in which a somewhat similar termination clause was

held to be enforceable. Like *Wood*, the termination clause in *Oudin* set out a regime for notice and was silent on other ESA requirements. The distinguishing factor may be that the clause in *Oudin* did not specifically seek to exclude the other ESA obligations, as the clause in *Wood* did. The Court of Appeal was therefore able to conclude in *Oudin* that there was no intention to contract out of the ESA and the clause was upheld. On February 2, 2017, the Supreme Court of Canada denied Mr. Oudin's application for leave to appeal from the Court of Appeal's judgment.

In our view

The lessons for employers are clear. Termination clauses in employment agreements must be clear and unambiguous and, at a minimum, meet the requirements of the ESA. While the decision in *Oudin* might be read as suggesting that a termination clause that is silent on certain requirements may nevertheless be enforceable, it will always be safer to ensure that termination provisions expressly provide for what is required under the ESA. Since employers are perceived by the courts to have greater bargaining power than employees, any ambiguity in the language of an employment agreement will likely be interpreted against the employer. This tendency of the courts is also supported by the notion that an employee is at their most vulnerable when their employment is terminated. In light of these presumptions, which operate in favour of employees, extra care must be taken in crafting employment agreements to ensure that the parties' intentions are clear, and that the ESA standards are met.

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