At Last! Employers Score A Much-needed Victory In The Ongoing Battle Over Termination Clauses

It's no secret that over the past several years, Canadian courts have taken a proactive stance in scrutinizing restrictive termination provisions in employment contracts. This judicial trend stems from a commitment to ensuring that employees are not unfairly deprived of their entitlements upon termination and, specifically, the right to receive reasonable notice at common law.

Many employers seek to include contractual provisions that aim to limit an employee's entitlements in the event of a without cause termination to the minimum notice, pay in lieu of notice and severance pay, if applicable, prescribed by applicable employment standards legislation; in Ontario, the *Employment Standards Act, 2000* (the "ESA"). However, courts have increasingly found creative ways to invalidate these provisions when they undermine employees' common law rights.

Basic principles: The ability to displace the common law

Taking a step back, it is well-established law that an employer is permitted to displace the common law presumption of reasonable notice and, specifically, to limit an employee's entitlements upon termination through clearly drafted termination provisions in employment contracts. These provisions are valid and enforceable provided (i) the clause does not run afoul the minimum requirements of the applicable employment standards legislation in the province in which the employee works, and (ii) the language is clear and unambiguous. If a termination provision fails to meet these criteria, a judge is likely to deem it unenforceable, thereby allowing employees to claim greater entitlements based on common law principles.

Judicial tension

There exists a notable tension between Canadian appellate courts and trial judges regarding the enforceability of termination provisions that seek to displace the common law presumption of reasonable notice. While appellate courts have affirmed that employers can legally include such restrictive clauses in employment contracts, emphasizing the importance of clarity and mutual agreement, trial judges frequently adopt a more protective stance for employees.

This divergence reflects a broader judicial philosophy: appellate courts focus on

upholding the freedom to contract, while trial judges emphasize safeguarding employees' rights against potential exploitation. As a result, employers face a complex landscape where their efforts to limit severance obligations may be challenged in lower courts, ultimately leading to inconsistent outcomes across jurisdictions.

Why bother?

Given the increasing scrutiny and frequent invalidation of termination provisions by trial judges, many employers question the value of including such clauses in employment contracts. The challenge lies in the realization that, despite appellate courts allowing these restrictive provisions, trial judges often prioritize employee protections and common law entitlements over contractual intent. This inconsistency creates uncertainty for employers, who may find themselves unable to enforce provisions meant to limit severance obligations. Consequently, the potential for legal disputes and the risk of having well-drafted provisions struck down may lead employers to reconsider whether these clauses are worth the effort and complexity involved in their implementation.

Because it can and does work

Despite the uncertainty surrounding the enforceability of termination provisions, it is still worthwhile for employers to include them in employment contracts as there are numerous cases where such provisions have been upheld when properly drafted. Courts have consistently reinforced that clear, unambiguous clauses that comply with the minimum standards prescribed by applicable legislation can effectively limit an employee's entitlements.

Bertsch v. Datastealth

The latest example comes courtesy of Justice Stevenson of the Ontario Superior Court of Justice in *Bertsch v. Datastealth*[1].

Background facts

The plaintiff, Gavin Bertsch, was employed by the defendant, Datastealth Inc., for roughly 8.5 months until his termination on June 7, 2024. The written employment agreement dated July 14, 2023, purports to limit Mr. Bertsch's rights on termination to the minimum entitlements prescribed by the ESA, namely one (1) week of notice or pay in lieu of notice considering his short service. The agreement also explicitly provides that the plaintiff contracts out of common law notice requirements.

Plaintiff's position

The plaintiff argued that these contractual provisions, which are reproduced at the very end of this article, were not enforceable because they are ambiguous and fail to properly reference the statutory exemptions from compensation on dismissal, in violation of the ESA and O. Reg. 288/01 – *Termination and Severance of Employment* (the "Regulation").

The argument by the plaintiff that follows is that the termination provisions are void because they purport to allow a termination for cause, without notice, whether or not there was "wilful misconduct, disobedience or wilful neglect." In other words, the plaintiff maintained that the contractual for cause provision was inconsistent with the requirements of the ESA and the Regulation and, in particular, that it established a different threshold for a termination without notice than the one referenced in the ESA and the Regulation.

The plaintiff's claim was for 12 months' pay in lieu of notice, which amounted to roughly $300,000.

Defendant's position

The defendant argued that the termination provision did not contravene the ESA and that the intention was clear and unambiguous. As such, the defendant submitted that the plaintiff's claim was untenable and ought to be dismissed.

Decision

The sole issue on the motion (the defendant brought a Rule 21.01(1) motion) to determine the interpretation of the relevant contractual provisions as a matter of law and to strike out or dismiss the claim as disclosing no tenable cause of action) was the proper interpretation of the contractual terms (refer to page 2 here).

Ultimately, Justice Stephenson held that the termination provision did not run afoul the ESA, was clear and unambiguous and was, therefore, valid and binding. In doing so, he held that there is no reasonable alternative interpretation of the relevant clauses that might result in an illegal outcome – *i.e.* there is no reasonable interpretation which would be contrary to the minimum requirements of the ESA and the Regulation.

While Justice Stephenson acknowledged the presumptive power imbalance between an employee and employer, he also noted that where the proper meaning of the provision is clear, the normal power imbalance that exists in an employment relationship is not relevant and ought not to change the outcome.

With respect to the argument that the provision essentially created a different standard for a termination without notice (*i.e.* common law cause vs what is colloquially referred to as cause under the ESA), Justice Stephenson had no trouble distinguishing this provision from the one that was at issue in the now infamous decision in *Waksdale v. Swegon North America Inc.*[2]

Whereas the provision in *Waksdale* defined "cause" more broadly than does the ESA, the verbiage in this instance did not. It simply provided that where the employee's employment was terminated with or without cause, he would receive only the minimum payments and entitlements, if any, owed to him under the ESA and the Regulation. In fact, the provision even went so far as to caution Mr. Bertsch that in accordance with the ESA, there could be circumstances in which he would have no entitlement to any notice of termination, pay in lieu of notice, severance pay or benefit continuation. This was an express recognition of the "cause" standard established within the Regulation.

Finally, Justice Stephenson commented on the difference between a "failsafe" clause and a "severability clause," which has been found to be ineffective in saving an otherwise invalid and unenforceable termination provision.

A typical severability clause indicates that if a contractual term is found to be unenforceable for any reason, that finding will not affect any other term of the agreement. While useful for other purposes, that does not have the effect of curing an invalid provision. It merely protects the remaining provisions of the agreement.

The failsafe clause that was relied upon by the defendant in *Bertsch*, however, provided only that the terminated employee would receive at least the minimum entitlements under the ESA. If anything, the failsafe confirmed that the parties had no intention of contracting out of the minimum requirements of the ESA.

Ultimately, Justice Stephenson found that the failsafe clause was not needed in this instance because the termination provision was clear and unambiguous.

In the end, the termination provision was upheld as valid and binding and the plaintiff's claim was, therefore, struck without leave to amend.

Takeaway for employers

The decision in *Bertsch* serves as a useful reminder that when it comes to the use of termination provisions that aim to displace the right to common law notice, the juice is still worth the squeeze.

By ensuring that these provisions are carefully constructed and clearly articulated, employers can navigate the complexities of employment law and potentially secure significant benefits in terms of predictability and reduced severance obligations, making the effort to include them a strategic advantage.

Footnotes

1. 2024 ONSC 5593 (CanLII)

2. 2020 ONCA 391

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