Employers' Alert – September, 2013

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Late last year, Diane Bernier was fired from her management position with Nygard International Partnership after having worked for the company for 13 years. She was 54 years old at the time, and was earning total compensation of approximately $190,000. Although she was fired on a "without cause" basis, Nygard paid her only those minimum amounts to which she was entitled under the Ontario *Employment Standards Act, 2000* ("the ESA"), which amounted to just over 21 weeks. Ms. Bernier sued Nygard claiming that she should have received 18 months' pay in lieu of common law notice.

Recent case provides tips for termination clauses

Before the Court, Nygard tried initially to rely on an employment contract that Ms. Bernier had signed as limiting her entitlements to the ESA. However, even her counsel agreed that the clause, as drafted, was void because it provided that she would only receive 30 days' notice and therefore failed to even satisfy Ms. Bernier's minimum ESA entitlements.

Nygard then sought to rely on a subsequent amendment that they had tried to implement some years later. One can only assume that they realized that their employment agreement was invalid and they tried to fix it by getting Ms. Bernier to sign an amendment. However, Ms. Bernier denied ever agreeing to the amendment and Nygard was unable to produce a copy of the amending letter signed by her or lead any evidence that she had otherwise agreed to the new terms.

Finally, Nygard attempted to prove that Ms. Bernier must have known that she would only receive the minimums under the ESA on her termination because she was aware that this was the general policy at Nygard. Here, they pointed to the fact that Ms. Bernier had presented similar letters, restricting notice to ESA minimums, to employees under her supervision. Based on this and the fact that Nygard had attempted to use language in her own letters limiting her entitlements (albeit poorly), they tried to establish that Ms. Bernier was aware of the policy and therefore not entitled to full amounts at common law. The Court rejected all of the above arguments and ultimately held that Ms. Bernier was entitled to 18 months' notice at common law.[1]

What does this mean for employers?

1. Be mindful of minimum employment standards. The *Bernier* case stands as a good reminder that, in order to be enforceable, all termination clauses in employment contracts must provide that employees will receive at least those minimum amounts required by the ESA. This includes not just notice of termination, but also statutory severance pay for those employers with an Ontario payroll in excess of $2.5 million, and benefit continuation for the minimum period required by the ESA.

2. Take care with amendments. Whether you wish to amend the employment contract to bring an otherwise unenforceable termination clause into compliance or for some other reason, changing the terms of a contract after the contract has already been entered into, is tricky business. Employers would be wise not to attempt this on their own, and rather use the assistance of experienced employment law counsel.

3. Don't be tempted by the "termination policy". When judges are considering cases involving enforcement of employment contracts, there seems to be a recurring theme: unless the employee truly understood what they were signing and agreed to it, a judge will be loathe to see an employee deprived of his or her entitlement to reasonable notice at common law. Termination policies are often problematic because the employees are not aware of them, have never seen them and can therefore not be said to have agreed to the terms. Again, there are ways to incorporate the terms of a policy into a written employment contract, but this must be done with care.

Footnotes

1. *Bernier v. Nygard International Partnership* (2013) ONSC 4578.