

Employment Contracts and Termination Clauses



In Canada, employers are permitted to terminate an employment relationship at any time without cause, provided they give the employee being terminated, notice of termination, or pay in lieu.

Contractual Notice

If there is a written contract of employment, which contains an enforceable termination clause, the amount of notice (or pay in lieu) that the employer is required to give the employee, will be limited to what is stated in the clause. Often, employers will try to limit this contractual severance to employment standards minimums.

Enforceable Termination Clauses

The recent decision of the Ontario Court of Appeal in *Wood v. Fred Deeley Imports Ltd.*, 2017 ONCA 158 highlights the need for vigilance in the crafting of contractual termination provisions.

In the Wood case, Julie Wood, an eight-year employee, was terminated without cause and given a severance package of 21 weeks comprising 13 weeks of working notice and a lump sum payment of eight weeks pay. The employer also continued her benefits for 13 weeks although her contractual termination clause did not mention benefits.

The termination clause in Ms. Wood's contract 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... 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.... 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.

While the employer fully honoured its contractual commitments and Ms. Wood received more than what she would have received under the *Employment Standards*

Act (Ontario), Ms. Wood sued the employer for wrongful dismissal. Her argument was that the termination clause was unenforceable because it did not: (a) specifically refer to the employer's obligation to contribute to her benefits plans during the statutory notice period; and (b) clearly require the employer to pay severance pay.

The Ontario Court of Appeal agreed with Ms. Wood on both points and held that the contractual termination clause was unenforceable. As a result, Ms. Wood was awarded a notice period of 39 weeks, which was 4.5 months more than what the employer had given her.

Employer Takeaways & Tips

One of the problems with the termination clause in Ms. Wood's employment agreement was that it was ambiguous i.e., it could be interpreted in a number of different ways. Thus, while the employer argued that it complied with the *Employment Standards Act* (Ontario), it could also be argued, as Ms. Wood successfully did, that the wording permitted the employer to avoid paying severance pay.

The other problem with the termination clause was that it did not reference benefits, although the *Employment Standards Act* (Ontario) specifically requires benefits continuance.

The fact that the employer had complied fully with the *Employment Standards Act* (Ontario) by: (a) continuing Ms. Wood's benefits; and (b) paying her statutory severance pay upon termination, did not matter and was insufficient to validate the clause.

For a contractual termination clause to be enforceable:

- It must be clear;
- It must be unambiguous;
- The severance that is offered, must always meet, or exceed the applicable employment standards minimum;
- It must clearly specify benefits, etc., if it is an employment standards requirement
- It must clearly distinguish and comply with entitlements such as "notice of termination", "pay in lieu" and "severance pay" as stated in the applicable employment standards legislation

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Heather Hettiarachchi is a lawyer, mediator and workplace investigator. She is called to the British Columbia Bar and holds a MSc in Training and Human Resources Management from the University of Leicester, UK. Heather is the owner of Integritas Workplace Law Corporation. Heather advises unionized as well as non-union employers on all aspects of employment and labour issues arising in the workplace. She also provides workplace mediation services, general human resources support and workplace investigation services.

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