Ontario Court Upholds Termination Clause Excluding Employee's Common Law Entitlements, Ends Employee's Lawsuit Against Former Employer



In the recent decision of *Bertsch v. Datastealth Inc.*, the Ontario Superior Court of Justice upheld the enforceability of a termination clause in an employment agreement that limited the plaintiff's entitlement to only the minimum standards under the *Employment Standards Act, 2000* (*ESA*). The Court held the clause was valid and enforceable and consequently dismissed the plaintiff's claim for wrongful dismissal common law damages.

The clause in question read, in part, as follows:

The Contractual Terms

5. Termination of Employment by the Company: If your employment is terminated with or without cause, you will be provided with only the minimum payments and entitlements, if any, owed to you under the [ESA] and its Regulations…including but not limited to outstanding wages, vacation pay, and any minimum entitlement to notice of termination (or termination pay), severance pay (if applicable) and benefit continuation. You understand and agree that, in accordance with the ESA, there are circumstances in which you would have no entitlement to notice of termination, termination pay, severance pay or benefit continuation.

You understand and agree that compliance with the minimum requirements of the ESA satisfies any common law or contractual entitlement you may have to notice of termination of your employment, or pay in lieu thereof. You further understand and agree that this provision shall apply to you throughout your employment with the Company, regardless of its duration or any changes to your position or compensation.

The Court rejected the plaintiff's argument that the termination clause was void for not clearly referencing what entitlements the employee would receive in the event of a termination that falls within the circumstances set out in *ESA* Regulation O. Reg. 288/01 (i.e., confirming that the employee would receive their statutory minimum entitlements in the instance of a termination for "wilful misconduct, disobedience, or wilful neglect of duty"). Justice Stevenson found the provision to be clear and unambiguous and consequently struck the plaintiff's claim without leave to amend.

The case is a helpful reminder to employers and employees alike that the language used in employment contracts matters—enforceable language can and will take an employee's common law entitlements off the table, even in a post-*Waksdale* world.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

Author: Lesley A. Campbell

Hicks Morley