Technicality Insufficient To Set Aside

As the practice of using employment contracts to minimize termination obligations has become increasingly common in Canada, so has the creativity of employee counsel in attempting to set aside these contracts. In recent years, we have seen the omission of the words "and benefits" with reference to a statutory notice period and the possibility that a termination clause might, in the future, contravene employment standards legislation suffice to set aside contractual termination provisions. Where such termination provisions are set aside, a court will substitute common law – which is the very result the employer intended to avoid, and the employee likely understood the employer intended to avoid, by drafting the contractual termination provision in the first place. Employer counsel have become very accustomed to defending drafting omissions challenged by employee counsel. A recent British Columbia Court of Appeal decision with respect to which the Supreme Court of Canada denied leave to appeal last week provides employer counsel with assistance in this endeavour.

In *Miller v. Convergys CMG Canada Limited*, 2014 BCCA 311 (CanLII), the employee worked for approximately seven years with Convergys. At the time of his first promotion, he signed a new employment contract containing a 90-day probationary period during which his employment could be terminated without notice or pay in lieu of such notice. The employment contract also contained a termination clause that permitted termination by Convergys for cause or "with notice, or pay in lieu of notice in accordance with the Employment Standards Act of British Columbia" ("ESA") and a severability clause. The employee received a further promotion, but did not sign a new contract of employment at that time. At the time of termination of employment, the employee was entitled to seven weeks' notice under the ESA and the employment contract. Convergys offered that seven weeks plus an additional seven weeks' pay and benefits in exchange for a release.

At trial, the judge rejected the employee's arguments that Convergys' offer on termination constituted a waiver of reliance on the contractual termination provision and that the probationary language – which was contrary to the ESA because it purported to apply after the employee already two years of service – rendered the contractual notice period void. With respect to the latter point, the trial judge found that the probationary clause did not apply and that, even if it did, it was severable from the employment contract.

In a unanimous decision, the B.C. Court of Appeal dismissed the appeal endorsing the trial judge's decision. As important, in its decision, the B.C. Court of Appeal, set out a number of guiding principles for interpreting employment contracts and, specifically, termination provisions. The B.C. Court of Appeal's sensible analysis

included the following:

- The court should strive to give effect to what the parties reasonably intended to agree to when the contract was made.
- The language of the contract should be given its plain and literal meaning, and be interpreted in the context of the entire agreement. Consideration also may be given to the factual matrix surrounding the creation of the contract.
- If the contractual language reveals two possible interpretations, the court should seek to resolve this ambiguity by searching for an interpretation that reflects the true intent and reasonable expectations of the parties when they entered the contract, and achieves a result consistent with commercial efficacy and good sense. Considerations of reasonableness and fairness inform this exercise.
- If these principles do not resolve the ambiguity, then extrinsic evidence may be admissible to assist in ascertaining the parties' intent.
- As a last resort only, the principle of *contra proferentem* may be invoked to favor construction of the ambiguity against the party who drafted the agreement. The principle of *contra proferentum* may not be used, however, to create or magnify an ambiguity.
- Employment contracts should be interpreted in a manner that favours employment law principles, specifically the protection of vulnerable employees in their dealings with their employers. Even so, the construction of an employment contract remains an exercise in contractual interpretation, and the intentions of the parties will generally prevail, even if this detracts from employment law goals that are otherwise presumed to apply.

The B.C. Court of Appeal's analysis provides welcome relief for employers who, despite their best efforts, have seen contractual termination provisions set aside on the basis of minor technicalities in recent years.

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