

# Termination Provisions In Employment Contracts Are Not Always Enforceable



The recent decision in *Miller v. A.B.M. Canada Inc.* provides a useful lesson on the extent to which one can rely on the termination provisions in an employment contract.

In this case, Mr. Miller joined ABM in 2009. He was given a draft employment contract with no deadline for him to sign it. It was set up with a series of appropriate headings and a plain language description of the terms appropriate to each heading. It contained a clause entitled “Termination” and at trial, Mr. Miller testified that he saw the heading and knew what it meant but did not read the terms set out under it.

The contract provided for a salary and in addition, ABM agreed to match Mr. Miller’s personal pension contributions up to a maximum of six percent of base salary. Mr. Miller was also to be provided with a monthly car allowance. These additional items appeared under the headings “Remuneration” and “Fringe Benefits” respectively.

Under “Termination”, the contract provided that Mr. Miller’s employment could be terminated without cause “upon being given the minimum period of notice prescribed by applicable legislation, or by being paid salary in lieu of such notice or as may otherwise be required by the applicable legislation”.

Mr. Miller began work in September 2009. His employment was terminated in January 2011. At that point, ABM provided Mr. Miller with two weeks of salary in lieu of notice, being salary in lieu of the minimum period of notice prescribed by Ontario’s legislation. He ultimately received a pay cheque for the two weeks’ salary plus vacation pay. The cheque did not include anything for his car allowance component or pension contributions.

Mr. Miller sued for damages, taking the position that the termination provision was null and void so that his entitlement should be determined on the basis of the common law. ABM’s position was that its obligations were limited to payment of salary under the contract, which payment was made. ABM acknowledged that Mr. Miller might be entitled to the pension contribution of six percent of base salary for two weeks plus a car allowance for two weeks, but nothing more.

The court observed that employees under a contract of employment for an indefinite period are entitled to reasonable notice of termination. This is to be treated as a presumption, rebutted only if there is a contract clearly specifying another period

of notice and that other period is not inconsistent with legislated minimums.

The court felt that a termination provision specifying a minimum period of notice would be effective to rebut the common law presumption if the period is not contrary to the minimum provided by the legislation. However, the court observed that the length of the notice period is only part of the termination equation. One aspect is the length of time during which the employee is to be paid in lieu of notice. The amount to be paid to the employee during that period is a separate issue.

The law is clear that any provisions that attempt to contract out of minimum employment standards by providing for lesser benefits than those legislated as minimums, are null and void.

In this case, the termination clause provided that Mr. Miller's employment could be terminated upon being paid **salary** in lieu of the minimum period of notice prescribed by the legislation. Mr. Miller, however, was also entitled to additional amounts for pension contributions and car allowance as part of his remuneration package.

The court found that the termination clause actually provided for compensation in an amount that was less than required by the legislation. The minimum employment standards legislation includes benefits. Salary, as defined in the contract and specified in the termination clause, did not.

As a result, the termination clause failed to comply with the provisions of the legislation. For that reason, it was null and void and incapable of rebutting the common law presumption that Mr. Miller would be entitled to reasonable notice under common law principles. The court went on to award damages equivalent to 2.5 months of base salary together with additional amounts for benefits.

It is easy to criticize this decision for being overly technical. One would have to assume that if the person at ABM who prepared that contract had been properly advised, the word "salary" in the termination clause would have been changed to take into account the entire remuneration package being provided to Mr. Miller. The additional amounts in issue were quite trivial. Nevertheless, as technical as this approach may appear, this is a reflection of the way courts interpret employment agreements. Generally speaking, employees tend to be given the benefit of any doubt. This case is yet another illustration of the care that has to be taken in drafting employment contracts and particularly their termination provisions.

Last Updated: July 21 2014

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