

Another Year of (Mostly) Unenforceable Termination Clauses:

Case Law Update and Where Do We Go From Here?

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General Principles

- Termination clauses should be interpreted in a way that incentivizes employers to draft termination clauses compliant with the *Employment Standards Act, 2000* (“**ESA**”)
- Termination clauses must be clear that they are providing different entitlements other than common law reasonable notice
- If the termination clause violates the ESA in one aspect, then the *entire* termination clause is void
- If the termination clause allows the employer to *potentially* violate the ESA, then the termination clause is void
- A termination clause that violates the ESA will be void, and a severability clause cannot remove it because there is nothing upon which the severability clause can operate
- It does not matter whether the employer actually complied with the ESA

Termination Clause #1: Is this Enforceable?

The Company's policy with respect to termination is that employment may be terminated by either party with notice in writing. The notice period shall amount to 1 week per year of service with a minimum of 4 weeks or the notice required by the applicable labour legislation.

Nemeth v. Hatch Ltd., 2018 ONCA 7

- Termination clause is enforceable
- Intention to displace common law notice must be clear and unambiguous
 - Does not mean that a specific phrase or particular formula must be used
- But, termination clause has 2 possible interpretations
 - Court should prefer the interpretation that gives the greater benefit to the employee
- Silence on severance pay does not mean intention to contract out of ESA
 - Termination clause only purports to limit notice

Termination Clause #2: Is the Common Law Excluded?

The Company may terminate your employment without cause at any time during the term of your employment **upon providing you with notice or pay in lieu of notice, and severance, if applicable, pursuant to the *Employment Standards Act, 2000*** and subject to the continuation of your group benefits coverage, if applicable, for the minimum period required by the *Employment Standards Act, 2000*, as amended from time to time.

Bergeron v. Movati Athletic (Group) Inc., 2018 ONSC 885

- Termination clause does not exclude common law reasonable notice
- Termination clause was unclear and ambiguous
- Ambiguity must be resolved in the employee's favour
- The word, “**only**” would indicate that employee would *only* be entitled to notice under the ESA:
 - The Company may terminate your employment without cause at any time during the term of your employment upon providing you with notice or pay in lieu of notice, and severance, if applicable, **only** pursuant to the *Employment Standards Act, 2000* and subject to the continuation of your group benefits coverage, if applicable, **only** for the minimum period required by the *Employment Standards Act, 2000*, as amended from time to time.

Termination Clause #3: Does this Contract Out of the ESA?

During the Term, the Employee's employment may be terminated without cause, upon providing the Employee with the **minimum notice** for the time employed as determined under the *Employment Standards Act, 2000* (Ontario), as amended or replaced from time to time,

And the Employee specifically acknowledges and agrees to the above and hereby **waives any claim to further notice or payment or compensation.**

Menard v. The Centre for International Governance Innovation, 2019 ONSC 858

- Termination clause is unenforceable for contracting out of the ESA
- Termination clause is silent on providing for severance pay and benefit continuation
- The language “waives any claim to further notice or payment or compensation” makes clear that severance pay and benefit continuation are excluded

Termination Clause #4(a): Is this Enforceable?

This agreement may be terminated by the Company at any time without cause provided that the Company provides you with notice in writing or **pay in lieu of notice (as salary continuation) or some combination thereof equal to four (4) weeks base salary** for each year of service that you have with the Company calculated from the date of this letter (and, for greater certainty, excluding any period of service you had with the Company prior to the date of this letter) with a guaranteed minimum notice or **pay in lieu of notice equal to three (3) months base salary**; provided that the maximum notice period or pay in lieu of notice that you will receive shall in no circumstances exceed twelve (12) months.

For greater certainty, you agree that for purposes of calculating any entitlement which you may have arising from the termination, without cause, of your employment with the Company, any prior service with the Company is excluded and you hereby waive and release any prior service entitlements.

Groves v. UTS Consultants Inc., 2019 ONSC 5605

- Termination clause is unenforceable for contracting out of the ESA
- Reference that pay in lieu of notice is calculated only on base salary
 - Section 60 of the ESA requires an employer to provide **all** entitlements that would have been received had the employee worked the statutory notice period, including **all** wages and benefits without reduction
- There would be no recognition of past years of service
 - If there is a sale of business, section 9 of the ESA deems employment to be continuous
 - Section 65(2) of the ESA requires an employer to recognize previous service when calculating severance payment, whether or not continuous and whether or not active

Termination Clause #4(b): Can You Fix a Broken Clause?

What if we added the following language?

Notwithstanding the foregoing, the Company guarantees that the amounts payable upon termination, without cause, shall not be less than that required under the notice and severance provisions of the Employment Standard Act (Ontario).

Groves v. UTS Consultants Inc., 2019 ONSC 5605

- Termination clause is still unenforceable for contracting out of the ESA
- Employer argued that the termination clause had a saving clause that would allow a court to “read up” a termination provision to comply with the ESA
- Court disagreed:
 - When a clause contracts out of the ESA, a saving clause cannot be used to rewrite language to make it comply

Termination Clause #4(c): Can You Fix a Broken Clause?

What if we added the following language?

...In the event that the applicable provincial employment standard legislation provides you with superior entitlements upon termination of employment (“statutory entitlements”) than provided for in this offer of employment, **the Company shall provide you with your statutory entitlements in substitution for your rights under this offer of employment.**

Amberber v. IBM Canada Ltd., 2018 ONCA 571

- It's possible to “read up”
- The Court of Appeal held:
 - Sentence is effective to ensure that a terminated employee receives entitlements under the ESA
 - Severability clauses are ineffective, but this is not a severability clause. This sentence does not purport to sever any part of the termination provision
 - Instead, this sentence “reads up” any part of a termination clause so that it complies with the ESA

Termination Clauses #4(b) and 4(c): What's the Difference?

The language in *UTS Consultants*:

Notwithstanding the foregoing, **the Company guarantees that the amounts payable upon termination, without cause, shall not be less than that required under the notice and severance provisions of the Employment Standard Act (Ontario).**

Compared to the language in *Amberber*:

...In the event that the applicable provincial employment standard legislation provides you with superior entitlements upon termination of employment (“statutory entitlements”) than provided for in this offer of employment, the Company shall provide you with your statutory entitlements in substitution for your rights under this offer of employment.

Termination Clause #5: Does this Contract out of the ESA?

- a) **Termination for Cause**: The Company may, at its option, terminate your employment immediately for cause, without prior written notice or compensation of any nature. For these purposes, “**cause**” means **any grounds at common law for which an employer is entitled to dismiss an employee summarily without notice or compensation in lieu of notice.**

Termination Clause #5: Does this Contract out of the ESA?

- b) Termination without Cause:** The Company may terminate your employment without cause at any time by providing you with only the minimum amount of notice of termination or pay in lieu thereof (at the Company's sole discretion, in any combination), minimum benefits continuation (if applicable), and minimum severance pay (if applicable), as required by the ESA, as well as accrued wages and vacation pay up to and including the date of termination. In no event will you receive less than your minimum entitlements under the ESA. **If a greater entitlement is required under the ESA than this provision grants to you, your entitlements shall automatically be increased to satisfy only the minimum entitlements required by the ESA on the termination of your employment.** You understand and agree that the entitlements set out in this paragraph will constitute your full, exclusive and final entitlements to notice or pay in lieu of notice, severance pay (if applicable), and benefits continuation (if applicable), and by your acceptance of this Agreement waive any further other claim at common law relating to such termination.

Khashaba v. Procom Consultants Group Ltd., 2018 ONSC 7617

- Termination *for cause* provision is unenforceable for contracting out of the ESA
- ESA allows for termination without notice or pay in lieu for conduct that is willful misconduct
 - Higher standard than just cause at common law
- Saving provision in termination *without cause* provision does not save termination *for cause* provision because the provisions are separate
- But, termination *without cause* provision is unaffected, and enforceable
 - It is the entire clause containing the illegality that should be void and in this case, the illegality is only in the termination *for cause* provision

Termination Clause #6: But, isn't there a Failsafe?

The Company may terminate the employment of the Employee by providing the Employee **the greater of** the Employee's entitlement pursuant to the Ontario Employment Standards Act **or**, at the Company's sole discretion, **either of the following**:

- a) 2 months working notice, in which case the Employee will continue to perform all duties and their compensation and benefits will remain unchanged during the working notice period.
- b) Payment in lieu of notice in the amount equivalent of 2 months' Base Salary.

- Termination clause is unenforceable for contracting out of the ESA
- On appeal, employer argued that the reference to the “greater of” at the outset of the termination clause was a failsafe clause
- Court of Appeal disagreed:
 - Because of the disjunctive, “or”, it was not clear that subclauses 4(a) or 4(b) included the minimum ESA entitlements
 - Clause appeared to require a choice between the ESA entitlements or the entitlements under subclauses 4(a) or 4(b)
 - Clause provided for the greater of the ESA entitlements under the first clause or the entitlements under 4(a) or 4(b), and not the greater of the first clause or the latter subclauses, combined with elements of the first clause

Takeaways: Is Perfection the Standard?

- Express language that the termination clause is contracting out of common law entitlements (*Movati*)
- When a termination clause is silent on certain ESA entitlements, but does not include all-inclusive language, it can still be enforceable (*Nemeth*)
 - Conversely, when a termination clause is silent on certain ESA entitlements, but includes all-inclusive language, it will not be enforceable (*Menard*)
- Saving clauses will not save illegal clauses
- Consider a failsafe clause such as the example in *Amberber*
- Separate clauses for termination *for cause* and *without cause* (*Procom*)
- Review your termination clauses regularly (and ideally, every year)

Thank you

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