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Potpourri of employment termination issues – How to come up smelling like roses

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March 15, 2018

Enforceability of termination provisions

Agenda

- Today's employee friendly climate
- Enforceability of termination provisions
- Limiting entitlements to other types of compensation

Today's employee friendly climate

- If the only consequence employers suffer for drafting termination clauses that don't comply with the *Employment Standards Code* (ESC) is an order that they comply, they will have little or no incentive to draft a lawful clause at the beginning of the employment relationship (*Machtinger v HOJ Inustries Ltd.* [1992] 1 S.C.R. 986)
- Therefore, failure to carefully draft termination provisions may result in:
 - Favourable decisions for employees
 - Harsh outcomes for employers

Enforceability of termination provisions

Holm v AGAT Laboratories Ltd. 2018 ABCA 23

Facts:

- Employee sought damages for constructive dismissal
- Employer limited damages to one week pursuant to the ESC minimum

Termination Clause:

In the event we wish to terminate your employment without just cause, we agree that we will give you notice of the termination of your employment, or at our absolute discretion, we will pay you, in lieu of such notice, a severance payment equal to the wages only that you would have received during the applicable notice period. This will be in accordance with the provincial legislation for the province of employment.

Enforceability of termination provisions

Holm v AGAT Laboratories Ltd. 2018 ABCA 23

Alberta Court of Appeal:

- Termination clause not enforceable
- Wording does not clearly restrict the applicable notice period to the statutory minimum set out in the *Code*
- The clause is “ambiguous at best”; any uncertainty must be resolved in favour of the employee

Enforceability of termination provisions

Nemeth v Hatch Ltd. 2018 ONCA 7

Facts:

- 19 year employee, terminated
- Given 8 weeks' working notice and benefits, plus 19.42 weeks' additional notice

Termination Clause:

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 one week per year of service with a minimum of four weeks or the notice required by the applicable labour legislation.

Enforceability of termination provisions

Nemeth v Hatch Ltd. 2018 ONCA 7

Ontario Court of Appeal

- Termination clause enforceable
- No need to explicitly state that an employee's entitlement to common law reasonable notice is displaced – language indicating an intention to displace is sufficient
- Position **directly contrary** to Alberta Court of Appeal in *Holm*

Enforceability of termination provisions

Wood v Fred Deeley Imports Ltd. 2017 ONCA 158

Facts:

- 8 year employee, terminated at age 48
- Given 13 weeks' working notice, plus 8 weeks' additional notice

Termination Clause:

[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 for each completed or partial year of employment with the Company. 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 (ESA)*, 2000.

Enforceability of termination provisions

Wood v Fred Deeley Imports Ltd. 2017 ONCA 158

Ontario Court of Appeal

- Termination clause is unenforceable
- Not clear if “pay” included benefits or not
- Termination clause did not satisfy ESA obligation to pay severance pay
- “After-the-fact” ESA compliance does not render clause enforceable

Enforceability of termination provisions

Gillespie v 1200333 Alberta Ltd. 2012 ABQB 105

Facts:

- 1 year employee terminated
- Given 2 weeks' pay in lieu of notice

Termination Clause:

"[n]otice of termination for regular full or part-time employees will for (sic) the guidelines as set out by Albert (sic) Labour - Employment Standards."

Enforceability of termination provisions

Gillespie v 1200333 Alberta Ltd. 2012 ABQB 105

Alberta Court of Queen's Bench:

- Termination clause not enforceable
- “Guidelines” are not specific enough; must point to the relevant section of the *Code*
- The clause did not **clearly and unambiguously** confine the employee to the notice provided for in the *Code*

Enforceability of termination provisions

Examples of enforceable termination clauses

“In the absence of just cause, the Employer may terminate the employment of the Instructor by giving notice of termination or payment in lieu of notice of termination in accordance with the provisions of the *Alberta Employment Standards Code* and the Employment Standards Regulation, as amended. The Instructor is not entitled to any additional notice or payment in lieu of notice in excess of what is required to be given or paid under the provisions of the Alberta Employment Standards Code and the Employment Standards Regulations, as amended.”

Inayat v Vancouver Career College (Burnaby) Inc. 2017 ABPC 124

“The notice period of (pay in lieu of notice) will be limited to the terms of Division 8 of the Code.”

Carrel v Worley Parsons Canada Ltd., 2008 ABPC 345

Enforceability of termination provisions

Examples of unenforceable termination clauses

“The company reserves the right to terminate your employment at any time. Should you be terminated for cause, then you will not be entitled to any advance notice of termination or severance pay in lieu thereof. Should you be terminated for reasons other [than] cause then you will be entitled to advance notice or severance pay thereof in accordance with the *Employment Standards Act* of Alberta.”

Kosowan v Concept Electric Ltd. 2007 ABCA 85, 2007

“The Employer may terminate this Agreement without cause by providing the Employee with written notice of termination of this Agreement, subject to the Employer complying with its minimal obligations, if any, under the Alberta Employment Standards Code.”

Joseph v. June Warren Publishing Ltd. 2007 ABPC 309

Enforceability of termination provisions

*Examples of **unenforceable** termination clauses*

2.1 The term of this Agreement will commence on the date of this Agreement and will continue in full force and effect unless the Agreement is terminated as follows:

(a) immediately by PENDYLUM providing written notice to you if you violate or fail to honor any of these provisions of this Agreement or fail to perform your duties as set out in Appendix A in a satisfactory manner as determined by PENDYLUM (known as Cause); **or if the PENDYLUM Client to which you have been contracted terminate[s] its contract with PENDYLUM for your services; OR**

(b) by either party providing written notice of at least two (2) weeks to the other.

Covenoho v Pendylum Ltd., 2017 ONCA 284

Enforceability of termination provisions

Review of General Requirements

- ESC minimums
 - Must satisfy ESC minimum requirements for notice, severance pay (if applicable) and benefit continuation
- Cannot result in potential ESC violation
 - Any potential or future violation of the ESC will void the provision entirely (*Covenoho v Pendylum Ltd.*)
- Must be explicit
 - Ambiguous language may render the provision void (*Holm v AGAT Laboratories Ltd.*)
- Risk of fixed term contracts
 - If the termination provision is unenforceable, the employer is liable to pay the employee for the balance of the fixed term (*Covenoho v Pendylum Ltd.*)

Limiting entitlements to discretionary compensation

- At common law, employees who are terminated without cause are entitled to bonus income from the reasonable notice period
- Employment contracts *may* exclude discretionary incentive compensation during notice period with right language
 - The question is whether the wording is sufficient to limit the employee's common law right to receive that compensation during the period of reasonable notice

Limiting entitlements to discretionary compensation

Lin v Ontario Teacher's Pension Plan Board 2016 ONCA 619

LTIP Clause:

- “In the case the Participant resigns or the Participant's employment is terminated by [Teachers'], the Participant's Dollar Grants not yet vested at the time of termination shall be forfeited forthwith without any right to compensation.”

Ontario Court of Appeal:

- Clause did not unambiguously alter or remove the respondent's common law rights to damages including the bonus he would have received *during the reasonable notice period*.

Limiting entitlements to discretionary compensation

Styles v Alberta Investment Management Corp. 2017 ABCA 1

LTIP Clause:

- “Unless otherwise stipulated, participants must be actively employed by AIMCo, without regard to whether the Participant is receiving, or will receive, any compensatory payments or salary in lieu of notice of termination on the date of payout, in order to be eligible to receive any payment.”

Alberta Court of Appeal:

- Eligibility restricted to “active employment” sufficiently clear to restrict employee’s entitlement



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The logo consists of a stylized, upward-pointing chevron shape in a gold color, positioned above the first letter of the text.

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