Member's Quarterly Winter 2017 Edition

Feature

Contracting Out of Common Law Reasonable Notice

"Enforceable" termination clauses deemed "unenforceable"

Kyle MacIsaac
LL.B.
Associate, McInnes Cooper

The Nova Scotia Supreme Court had a recent opportunity to assess the enforceability of a termination clause found in an employment agreement. The Court took a strict approach to the language required to oust entitlement to common law reasonable notice and expressly rejected the "rule of thumb" regarding common law reasonable notice.

The Decision

Caroline Spindler
J.D.
Associate, McInnes Cooper

In *Bellini v Ausenco Engineering Alberta Inc.*, 2016 NSSC 237, Mr. Bellini, a Senior Mechanical Engineer, was terminated by Ausenco without cause. Following termination, Mr. Bellini brought an action for damages for wrongful dismissal against Ausenco. Mr. Bellini's employment contract with Ausenco included a provision governing termination without just cause which stated:

...If it becomes necessary for us to terminate your employment for any reason other than cause, your entitlement to advance working notice or pay in lieu of such notice will be in accordance with the provincial employment standards legislation.

It is a general principle of employment law that clear and unambiguous language is required to effectively rebut the presumption to an employee's right to common law reasonable notice. Mr. Bellini argued that the language in the termination provision was not sufficiently clear to limit his entitlement to the minimum amounts set out in the *Nova Scotia Labour Standards Code*, and as a result, he was entitled to reasonable notice in accordance with the common law.

Justice LeBlanc examined several cases from jurisdictions across Canada and determined that the language contained in the termination provision did not effectively limit the employee's entitlement to the statutory minimum. Importantly, Justice LeBlanc stated the following at paragraph 43:

…The provision in this case is at best ambiguous as to whether the parties intended the statutory minimum to apply, or simply whether the applicable notice would be consistent with the legislation. It would not be difficult for an employer to draft a termination clause that leaves no doubt as to the parties' intention to oust common law notice. This language does not do that. I am not convinced that the court should apply a strained interpretation to attribute such meaning to contract language that does not specifically say so. As such, I am not convinced that the termination provision ousted Mr. Bellini's right to common law notice." (emphasis added)

In determining reasonable notice, Justice LeBlanc considered the character of employment, length of service, age and availability of similar employment and expressly rejected the "rule of thumb" of one (1) month of notice per year of service, as not being an individualized approach to determining reasonable notice. Ultimately, Mr. Bellini was awarded six (6) months' reasonable notice and CPP contributions.

Continued...

Member's Quarterly Winter 2017 Edition

Feature continued

Important Considerations for Employers

Employers in Nova Scotia and all jurisdictions in Canada should carefully review termination clauses in their employment agreements to ensure they are enforceable. Termination clauses with reference to statutory minimums should also contain express language rebutting the employee's entitlement to common law notice. Courts will critically assess a termination clause to ensure that it meets the test of clearly and unequivocally rebutting the employee's common law entitlements.

Kyle MacIsaac is an Associate with McInnes Cooper in Halifax and can be reached at kyle.macisaac@mcinnescooper.com.

Caroline Spindler is an Associate with McInnes Cooper in Halifax and can be reached at caroline.spindler@mcinnescooper.com.