Member's Quarterly Summer 2020 Edition

Feature

Termination Clauses Take Another Hit

Make sure your template clauses are enforceable

Dan Palayew
LL.B.
Partner, Borden Ladner Gervais LLP

Odessa O'Dell
J.D.
Associate, Borden Ladner Gervais LLP

The termination clause has always been the subject of much litigation in Ontario. Consequently, employers are always adapting their template termination provisions to keep up with an evolving body of case law.

The Ontario Court of Appeal ("ONCA") recently dealt employers another challenge when it comes to drafting enforceable termination clauses, this time, attacking the "saving language" that employers often incorporate into termination clauses as a way to avoid having them found to be void.

The Facts

The employee, Noah Rossman, was advised that his employment was being transferred from DAI Inc. to Canadian Solar Solutions Inc. ("CSSI") in 2010. Following the transfer, Mr. Rossman and CSSI subsequently entered into two employment agreements, one in 2010 and the second in 2012.

In 2014, after three years of employment with CSSI, Mr. Rossman's employment was terminated on a without cause basis. He was 33 years of age and earning a salary of $82,500.00 per year, in addition to benefits and a bonus plan.

He commenced an action for wrongful dismissal.

The Termination Clause

Both of Mr. Rossman's employment agreements contained the same termination clause, included the following language:

9. Termination of Employment

9.01 The parties understand and agree that employment pursuant to this agreement may be terminated in the following manner in the specified circumstances:

…

c) by the Employer, after the probation period, in its absolute discretion and for any reason on giving the Employee written notice for a period which is the greater of:

i) 2 weeks, or

ii) In accordance with the provisions of the *Employment Standards Act* (Ontario) or other applicable legislation, or on paying to the Employee the equivalent termination pay in lieu of such period of notice. The payments contemplated in this paragraph include all entitlement to either notice of pay in lieu of notice and severance pay under the *Employment Standards Act* Ontario. In the event the minimum statutory requirements as at the date of termination provide for any greater right or benefit than that provided in this agreement, such statutory requirements will replace the notice or payments in lieu of notice contemplated under this agreement. The Employee agrees to accept the notice or pay in lieu of notice as set out in this paragraph as full and final settlement of all amounts owing by the Employer on termination, including any payment in lieu of notice of termination, entitlement of the Employee under any applicable statute and any rights which the Employee may have at common law, and the Employee thereby waives any claim to any other payment or benefits from the Employer. Benefits shall cease 4 weeks from the written notice.

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The Court Proceedings

According to the courts, the problem with the termination clause in Mr. Rossman's employment agreements was two-fold.

The courts found that the saving language included in the clause provided that Mr. Rossman would receive the "minimum statutory requirements" upon termination, and yet, the termination clause also limited his entitlement to four weeks of benefits upon termination. Notably, the ESA provides for notice of termination for up to eight weeks, and it is well established that benefits must be continued for that period of time.

Motion for Summary Judgement

In a Motion for Summary Judgement, the judge held that the termination clause was void and unenforceable. First, he held that the fact that the portion of the clause, which stated that benefits would cease four weeks from the written notice was ambiguous and an attempt to contract out of the minimum ESA standards which calls for benefit continuation of a maximum of eight weeks. Secondly, the judge held that the saving language did not "cure" the rest of the termination clause.

Consequently, the termination clause was found to be void and unenforceable. Mr. Rossman was granted partial summary judgement and was awarded pay in lieu of reasonable notice for five months. CSSI appealed the decision.

The Appeal

The ONCA upheld the partial summary judgement in December 2019, agreeing that the termination clause was void and unenforceable.

They began with an analysis of contractual interpretation in the context of employment law. In doing so, the ONCA reinforced the vulnerability of employees and the remedial nature of the ESA, thus reaffirming that where a termination clause can be interpreted in more than one way, they must be interpreted in a manner that gives the greater benefit to the employee.

With respect to the termination clause at issue, the ONCA determined it to be void at the outset given that the benefits portion of the provision contravened the ESA. This is particularly interesting given, as CSSI argued, that in the case of Mr. Rossman, the termination clause provided him with an extra week to which he was not entitled to under the ESA and thus constituted a greater benefit (under the ESA, Mr. Rossman was only entitled to three weeks' of benefits). The ONCA rejected this argument on the basis that the mere fact that the termination clause had the potential to contravene the ESA was sufficient to render it void.

Finally, the ONCA held that the termination clause was ambiguous and that this could not be rectified by the clause's saving language because the benefits portion of the provision was not "forward-facing" and did not expressly provide for an intention to conform with the ESA with respect to the benefits requirement.

Takeaways for Employers

Notwithstanding the fact that saving language has previously been supported by the ONCA, Rossman is yet another reminder that termination provisions must not, even inadvertently, attempt to contract out of an employer's obligations under the ESA. Indeed, meticulously drafted termination clauses are more important than ever.

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Additionally, Rossman provides a warning that even where the issues identified by the court in the termination clause have no impact on the employee in question, the saving language cure the clause of those issues.

In light of constantly evolving case law on this issue, it is recommended that employers regularly review their template termination clauses and have them vetted by their legal counsel.

Dan Palayew is Partner/Regional Leader, Labour & Employment Group with Borden Ladner Gervais LLP and can be reached at dpalayew@blg.com.

Odessa O'Dell is an Associate with Borden Ladner Gervais LLP and can be reached at oodell@blg.com.