

Member's Quarterly

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Feature

Courts Rule Termination Clauses Unenforceable

Drafting an enforceable clause

In our last article, we discussed the ever-expanding list of factors taken into account by courts in calculating notice periods and how this creates significant uncertainty for employers in pre-determining employees' entitlements on termination. In our view, the use of a contractual termination clause is the only means to eliminate this uncertainty.

While the Court has historically suggested that drafting enforceable termination clauses is a simple matter, in recent practice it has proved anything but. A termination clause must at least provide for an employee's minimum entitlements pursuant to the applicable employment standards legislation, failing which it is null and void. A recent line of Ontario cases has held that termination clause language must clearly and expressly provide for the provision of benefits through the statutory notice period (as is required by the *Employment Standards Act, 2000* (the "ESA")), or be struck down.

The leading case is *Stevens v. Sifton Properties Ltd.*, 2012 ONSC 5508. The Plaintiff had a written employment contract that spelled out her entitlements on termination without cause, as follows:

The Corporation may terminate your employment without cause at any time by providing you with notice or payment in lieu of notice and/or severance pay, in accordance with the *Employment Standards Act of Ontario*.

You agree to accept the notice or payment in lieu of notice and/or severance pay referenced... herein, in satisfaction of all claims and demands against the Corporation which may arise out of statute or common law with respect to the termination of your employment with the Corporation.

The Court in *Stevens* followed an earlier Ontario decision in *Wright v. Young & Rubicam Group of Cos.*, 2011 ONSC 4720, in holding that the termination clause was unenforceable because it did not provide for the continuation of benefits through the statutory notice period. The Court in *Stevens* held that the language, "payment in lieu of notice ... in accordance with the *Employment Standards Act of Ontario*" was not sufficiently broad to contemplate continuation of benefits through the statutory notice period. The Court held that it was irrelevant that the employer had, in fact, continued benefits throughout the statutory notice period following termination. The Court suggested that a provision which provided for "entitlements", rather than "payment", in satisfaction of ESA requirements would be enforceable. The Court in *Stevens* therefore seems to be interpreting the term "payment" in the termination clause very narrowly in order to find the termination clause unenforceable.

Paquette v. Quadraspec Inc., 2014 ONSC 2431 (English language translation at 121 O.R. (3d) 765), is a decision on a motion to, in part, determine whether the termination clause in the plaintiff's employment contract was null and void. The termination clause in question purported to limit the plaintiff's entitlements upon termination to a maximum of six (6) months' base salary, and expressly limited provision of benefits upon termination to any unpaid benefits up to the termination date (but not through the statutory notice period). The Court followed *Stevens* in holding that the termination clause was unenforceable because it did not provide for benefits through the statutory notice period.

In *Miller v. A.B.M. Canada Inc.*, 2014 ONSC 4062, the Court followed *Stevens* in finding a termination clause unenforceable that provided for "salary in lieu of [minimum ESA] notice or as may otherwise be



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required by applicable legislation." The Court in *Miller* held that "salary" did not include "benefits", and so held the clause to be unenforceable. Nor did the Court find the inclusion of the language "or as may otherwise be required by applicable legislation" sufficiently clear or broad so as to include the provision of benefits through the statutory notice period.

More recently in *Howard v. Benson Group Inc.*, 2015 ONSC 2638, the Court voided a termination clause that said the plaintiff's fixed-term employment could be terminated at any time, "and any amounts paid to the Employee shall be in accordance with the *Employment Standards Act of Ontario*." The Court accepted the plaintiff's argument that the clause was unenforceable for two reasons: (1) it was ambiguous, and (2) in any event, it was unenforceable because it did not provide for benefits continuation upon termination. For this second proposition, the Court followed the decision in *Miller*.

In our view, a termination clause such as that in *Stevens* should be enforceable even where it provides for "payment" in lieu of notice (rather than for "entitlements"). Since the word "notice" (meaning "working notice") undoubtedly includes both salary and benefits continuance, the phrase "payment in lieu of notice" is, in our view, sufficiently broad to encompass the provision of all benefits over the statutory notice period. This is particularly so where the termination clause expressly states that it is intended to comply with the minimum requirements of the ESA.

However, the narrow interpretation of "payment" in *Stevens* appears to have won the day as the case has consistently been followed in recent jurisprudence. It is therefore recommended that employers seeking to draft an enforceable termination clause should: (1) refer to the provision of "entitlements", rather than "payments", upon termination, (2) expressly provide for benefits through the statutory notice period, and (3) expressly state that, in any event, the employee shall be provided with his or her minimum statutory entitlements under the applicable employment standards legislation.

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