

Member's Quarterly

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Feature

Review Your Termination Clauses to Avoid Further Payouts

Use clear language regarding entitlement to common law

One of the most important things an employer can do to protect themselves from additional financial obligations in the event of termination liability when an employment relationship goes sour is to have a clear and enforceable termination clause in the employment contract. A recent decision from the Ontario Superior Court highlights the importance of clear termination clauses and is a lesson to employers in doing so.

In *Movati Athletic (Group) Inc. v Bergeron*, 2018 ONSC 7258, the Ontario Superior Court upheld the decision of a motion judge granting summary judgment in favour of an employee who had been terminated without cause. The employee, Catherine Bergeron, was employed by Movati Athletic Inc. ("Movati") as a General Manager of one of its fitness centres for almost a year and a half when she was terminated without cause.

The employment contract governing the employment relationship contained the following termination clause:

Movati Athletic Inc. 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.

There was no issue of enforceability of the contract, as Ms. Bergeron had reviewed the contract and been provided with an opportunity to obtain legal advice prior to signing. Furthermore, the termination clause complied with the Ontario *Employment Standards Act*.

Ms. Bergeron was provided with pay in lieu of notice, outstanding vacation pay and her continued group benefit coverage in accordance with the Ontario *Employment Standards Act*.

Ms. Bergeron brought an action against Movati for wrongful dismissal, followed by a motion for summary judgement seeking common law reasonable notice on the basis that the termination clause did not rebut the presumption of entitlement to common law reasonable notice.

The motion judge sided with Ms. Bergeron and found that Movati couldn't rely on the termination clause to contract out of its obligations under the common law. In coming to this conclusion, the motion judge found that the clause was ambiguous and did not clearly limit Ms. Bergeron's entitlements to the minimum provided in the *Employment Standards Act*, and thus the interpretation of the contract should be resolved in favour of Ms. Bergeron. In her decision, the motion judge also considered the language of the termination clause applicable to Ms. Bergeron when she was employed by Movati as a probationary employee.



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Feature continued

Movati appealed the decision of the motion judge, arguing that the clause was sufficiently clear to limit Ms. Bergeron's entitlement to common law reasonable notice. The reviewing judge determined that the question before the motion judge was whether the contract clearly specified some period of notice, which met or exceeded the minimum legislative requirements so as to rebut the presumption that reasonable notice in accordance with the common law applies.

In reviewing the decision of the motion judge, the reviewing judge made the following findings:

1. The use of "pursuant to the ESA" may be interpreted to mean the notice period complies with the ESA, but it does not clearly indicate that the common law no longer applies;
2. The termination clause that applied to Ms. Bergeron when she was a probationary indicated that payment upon termination would be only for the minimum notice necessary to comply with the ESA. The difference in the language of the 2 clauses reflected a difference in the intention of the drafter; and
3. The termination clause in question could be interpreted as the minimum period required by the ESA applying to both the notice provision and the group benefit coverage, or the group benefit coverage only, making it ambiguous and should be interpreted in favour of Ms. Bergeron.

The reviewing judge also found that although Ms. Bergeron's subjective opinion that she wasn't aware of the implications of the clause was considered by the motion's judge, it did not overwhelm her reasoning. Ultimately, the decision of the motion judge in favour of the employee was upheld.

The above-noted language is commonly used and often thought of as sufficient to contract out of notice obligations at common law. This decision put this language under the microscope and shed light on just how clear a termination clause must be in order to provide adequate protection to employers.

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