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Feature

Decoding Termination Provisions -

A simpler way to draft

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Termination notice is often tricky territory for employers to navigate, especially when the law in this area continues to evolve. The starting point is that employees are entitled to common law reasonable notice (not just the statutory termination notice) upon termination without cause, which is generally significantly higher than statutory termination notice, unless the employment agreement clearly specifies some other period of notice. Because of this, employers often attempt to provide clarity on an employee's termination entitlements by including a termination provision in the employment agreement. However, such provisions need to find the "Goldilocks zone" for termination notice: not too low that the provision contravenes employment standards, but not too high that it results in overcompensation. A recent Alberta decision indicates that this zone may be easier to find than employers think.

Employment Standards Legislation Sets the Floor

The obvious solution appears to be explicitly limiting termination notice in the employment agreement. However, the notice set out in the limitation provision cannot be so low that it contravenes employment standards. In *Machtinger v. HOJ Industries Ltd.*, [1992] 1 SCR 986 (SCC), the Supreme Court of Canada found that if an employment contract fails to comply with the minimum statutory notice provisions of employment standards legislation, then the presumption of common law reasonable notice will not have been rebutted.

As a result, employers often heed the Supreme Court of Canada's advice in *Machtinger*, which stated, "an employer can readily make contracts with his or her employees which referentially incorporate the minimum notice periods set out in the Act or otherwise take into account later changes to the Act or to the employees' notice entitlement under the Act. Such contractual notice provisions would be sufficient to displace the presumption that the contract is terminable without cause only on reasonable notice."

What about a Ceiling?

However, simply incorporating references to employment standards legislation is not enough. In *Kosowan v. Concept Electric Ltd.*, 2007 ABCA 85, the Alberta Court of Appeal stated that, "As we read it, the term of the agreement provides only that in the event of termination without cause, the Appellant is entitled to severance pay 'in accordance with the Employment Standards Act of Alberta.' (It is conceded here that the reference is to the Code.) The clause does not, on its face, confine the Appellant to compensation pursuant to ss. 56 and 57(1) of the Code." This becomes an issue because common law remedies remain available under most provincial employment standards legislation, such as under section 3 of the Alberta *Employment Standards Code*, which states, "Nothing in this Act affects any civil remedy of an employee or an employer". Because of this, reference to the employment standards legislation only sets a minimum or a floor to termination notice but does not eliminate the right to common law reasonable notice, and additional language must be added to set a maximum or a ceiling on termination notice to address section 3 of the Code.

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An Alternative: Removing References to the Code?

A recent Alberta decision suggests there may be a simpler option for employers. In *Bryant v. Parkland School Division*, 2021 ABQB 391, the termination provision at issue stated, "This contract may be terminated by the Board upon giving the Employee sixty (60) days or more written notice." This provision did not reference the employment standards legislation nor did it set a ceiling. However, because the maximum amount of statutory termination notice under the Alberta *Employment Standards Code* is 8 weeks, a floor of 60 days is compliant with the legislation.

The Court found the provision to be enforceable on the basis that, "the common law right to reasonable notice is only implied into an indefinite employment contract if the contract is silent or it is ambiguous". The court found the provision to be clear and unequivocal in setting a notice period for termination.

The Court clarified the "ceiling" issue by stating that, "Section 3 of the Code clarifies that the Code does not affect an employee's common law rights. Therefore, if employers reference the Code, they need to be clear in rebutting the common law presumption if they wish to extinguish it", but since the provision at issue did not reference the Code, and was neither silent nor ambiguous regarding termination notice, it was effective in rebutting the presumption that the employee is entitled to common law reasonable notice.

Takeaway for Employers

Although the *Bryant* decision suggests that termination provisions can be quite simple in rebutting the presumption of common law reasonable notice without using explicit waiver language, employers should nonetheless be careful in drafting termination provisions for without cause terminations and should consult legal counsel. It will be important to consider:

1. Setting a floor for termination notice that is compliant with the applicable employment standards legislation, either by: (a) setting a minimum amount that is higher than the maximum statutory requirements under the applicable employment standards legislation (however, the risk remains that the provision may become non-compliant and void if statutory requirements are increased in the future), or (b) making reference to the employment standards legislation and any future amendments as the minimum, and
2. Setting a ceiling for termination notice by either: (a) setting a maximum length of notice (again, there is a risk that this provision may become non-compliant and void if statutory requirements are increased in the future), or (b) being explicit that the employee is waiving their rights to common law reasonable notice to address section 3 of the Alberta Employment Standards Code or similar employment standards legislation.

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