EMPLOYMENT LAW

CAN A DEFICIENT TERMINATION PROVISION EVER BE 'SAVED'?

It's good practice to include a saving provision in any termination provision to ensure a terminated employee receives no less than the minimum standards under prevailing employment standards, say **Priya Sarin and Matthew Badrov of Sherrard Kuzz**

A properly drafted termination clause in an employment agreement is an effective way to limit an employee's entitlement on termination of employment. However, courts will carefully scrutinize a termination clause and if it is found to be ambiguous or otherwise unenforceable, the employee will be entitled to reasonable notice at common law.

Frequently, a termination clause will be declared unenforceable because it provides the employee with less than the minimum entitlements owed (or potentially owed) under employment standards legislation. In order to protect against this possibility, many employment agreements will include a "saving" provision stating that, despite the language of the termination clause, the employer will comply with all minimum statutory obligations.

Although a saving provision can offer some protection, not all saving provisions are created equally. The Court of Appeal for Ontario recently issued two decisions in which the court demonstrated it will critically examine the language of the saving provision itself to ensure it meets the test of enforceability.

Amberber v. IBM Canada Ltd.

Noah Amberber was employed by IBM Canada for just over a year when his employment was terminated without cause. The termination clause in Amberber's employment agreement stated:

"If you are terminated by IBM other than for cause, IBM will provide you with notice or a separation payment in lieu of notice of termination equal to the greater of (a) one (1) month of your current annual base salary or (b) one week of your current annual base salary, for each completed six months worked from your IBM service reference date to a maximum of twelve (12) months of your annual base salary. This payment includes any and all termination notice pay, and severance payments you may be entitled to under provincial employment standards legislation and Common Law. Any separation payment will be subject to applicable statutory deductions. In addition, you will be entitled to benefit continuation for the minimum notice period under applicable provincial employment standard legislation. In the event that the applicable provincial employment standard legislation provides you with superior entitlements upon termination of employment ('statutory entitlements') than provided for in this offer of employment, IBM shall provide you with your statutory entitlements in substitution for your rights under this offer of employment."

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Amberber alleged he was wrongfully dismissed by IBM and claimed entitlement to reasonable notice on a common law standard. He argued the termination clause provided less than his minimum entitlements under the Employment Standards Act, 2000 (ESA) and failed to rebut the presumption he was entitled to notice at common law.

The court rejected the first argument and referred to the language of the saving provision. However, the court accepted the second argument and found the termination clause to be ambiguous as it did not clearly rebut the presumption of common law notice.

This ambiguity had to be resolved in favour of Amberber who was therefore entitled to reasonable notice at common law.

IBM successfully appealed this decision to the Court of Appeal for Ontario which found the termination clause, interpreted as a whole, was not ambiguous and clearly evidenced an intention of the parties to limit Amberber's entitlement to the statutory minimums. The court stated the saving provision "ensures that any portion of the termination clause that falls short of the ESA must be read up so that it complies with the ESA."

> IBM appealed the decision to the Court of Appeal which found the termination clause clearly evidenced an intention to limit entitlement to statutory minimums.

Rossman v. Canadian Solar Inc.

Although *IBM Canada* provided clarity to employers on the use of a saving provision, this appeared to be short-lived. Approximately one year after *IBM Canada*, the Court of Appeal issued the *Canadian Solar* decision, in which it took a more restrictive approach to the use of a saving provision.

Noah Rossman was employed by Canadian Solar for three years when his employment was terminated without cause. He signed two employment agreements during his tenure, both of which contained a termination clause that limited his rights on termination of employment:

"(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

RELATED CASES

ANDROS V. COLLIERS MACAULAY NICOLLS INC.,
2019 ONCA 679 (Ont. C.A.).
A termination clause was unenforceable because the failsafe provision was worded as the employer's choice. Other options didn't meet ESA minimums.

NEMETH V. HATCH LTD.,
2018 CarswellOnt 142 (Ont. C.A.).
A termination clause's silence on severance pay did not indicate an intention to contract out of it. Clause was enforceable.

NORTH V. METASWITCH NETWORKS CORPORATION,
2017 Carswell 15733 (Ont. C.A.).
Termination clause stating entitlements were based on base salary was unenforceable because commissions were excluded. Paragraph couldn't be deleted to make it enforceable; only entire clause could be removed.

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."

The motions judge concluded this termination clause was void and unenforceable as the final sentence was either (a) ambiguous as it was inconsistent with the rest of the clause, or (b) an attempt to contract out of the minimum requirement of the ESA to provide benefit continuation during the statutory notice period, which could exceed four weeks.

The Court of Appeal agreed, noting the language used in the saving provision was virtually identical to the language in *IBM Canada*. However, this provision was distinguished on the basis the final sentence referencing termination of benefits after four weeks, was in direct conflict with the ESA:

"In the present case, there is this terse and final sentence in the Termination Clause: 'Benefits shall cease 4 weeks from the written notice.' There is no similar language in the employment contract at issue in *Amberber*. Accordingly, the 2012 Employment Agreement contains, as the motions judge found, a genuine ambiguity created by the duelling language in the termination clause — the initial 'ESA trumps' language versus the concluding 'but nothing above 4 weeks' language.

"Unlike the rest of the language in the Termination Clause, the four-week benefits clause is not future facing, nor does it express an intention to conform to the ESA. It cannot be the case that the saving provision here — designed to make the Termination Clause compatible with future changes to the ESA — could reconcile a conclusory provision that is in direct conflict with the ESA from the outset."

The court then explained the policy reasons why a saving provision must be reviewed critically:

"Employees need to know the conditions, including entitlements, of their employment with certainty. This is especially so with respect to an employee's termination – a fragile moment of stress and uncertainty.

"In this context, saving provisions in termination clauses cannot save employers who attempt to contract out of the ESA's minimum standards. Holding otherwise creates the risk employers will slip sentences, like the four-week benefits clause, into employment contracts in the hope that employees will accept the terms. This outcome exploits vulnerable employees who hold unequal bargaining power in contract negotiations. Moreover, it flouts the purpose of the ESA — to protect employees and to ensure that employers treat them fairly upon termination."

Lessons for employers

Even with the best of intentions and the services of a skilled employment lawyer, there is always the possibility of ambiguity in the language of an agreement. Moreover, the law as it relates to the enforceability of termination clauses has undergone enormous change in the past few years, rendering language that may have once been enforceable, no longer so, exposing an employer to the risk of liability. It therefore remains good practice to include a saving provision in any termination provision to ensure, to the extent possible, a terminated employee receives no less than the minimum standards under prevailing employment standards legislation.

The most effective way to address these risks is to proactively review and revise your organization's employment agreements on a regular basis — at least once a year. Doing nothing and hoping for the best is a not a prudent strategy. Even long-standing employment agreements can be addressed with careful planning. CHRR

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