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## Alberta Court of Appeal confirms ambiguous termination provisions should be interpreted in favour of employees

A recent decision of the Alberta Court of Appeal provides a clear reminder to employers who wish to contractually limit termination notice or pay in lieu to the statutory employment standards minimum that, in order to rebut the common law presumption of reasonable notice, extreme care must be taken to use clear and unambiguous language.

In *Holm v. AGAT Laboratories Ltd.* (2018 ABCA 23), the Alberta Court of Appeal upheld the decision of the trial court judge that the termination provision in the employment agreement between the employee and AGAT Laboratories lacked sufficiently clear limiting language and thus failed to meet the “high level of clarity” test which is required to extinguish an employee’s common law right to reasonable notice.

The AGAT Laboratories employment agreement provided, in part, that on termination without cause, the employee would be given termination notice, or in lieu of notice

... a severance payment equal to the wages only that you would have received during the applicable notice period. This will be in accordance with the provincial legislation for the province of employment.

The trial court judge determined that the words “...in accordance with the provincial legislation...” did not clearly limit the employee’s claim

only to the minimum notice required under the applicable provincial legislation, the *Alberta Employment Standards Code* (the "Act"). The trial court judge concluded that because the employee's termination entitlement "will be in accordance" with the Act, the right to pursue a civil law claim remained open. Section 3(1)(a) of the Act provides that nothing in the Act affects any civil remedy of an employer or an employee. Therefore the trial court judge reasoned that pursuing a civil claim for payment in lieu of reasonable notice at common law was also "in accordance" with the Act. The Court of Appeal agreed with this interpretation.

Although the Alberta Court of Appeal decision in *AGAT Laboratories* is based on the particular wording contained in the employment agreement and also on the Alberta legislation, the case is broadly significant in confirming that in employment law, any ambiguity or uncertainty is to be resolved in favour of the employee. The majority of the Court of Appeal agreed with the decision of the trial court judge that this particular termination clause did not meet the necessary threshold of certainty:

At its essence, an enforceable employment contract must contain clear and unequivocal language to extinguish, or limit, an employee's common law rights...

In separate reasons, O'Ferrall J.A. stated that he was "compelled to concur" in the result reached by the majority that the trial court judge had properly applied judicially-approved principles which govern the interpretation of employment contracts. In *AGAT Laboratories* the applicable judicial principles are that employment termination clauses must be absolutely clear in order to rebut the presumption of reasonable notice, and where a clause in an employment contract could reasonably be interpreted in more than one way, courts are required to prefer the interpretation giving the greatest benefit to the employee.

However, the concurring judge also stated that in being required to apply judicially-approved principles governing the interpretation of employment contracts, courts may be forced to ignore the intentions of the parties:

... in employment law it is sometimes not as much about ascertaining the party's intention as it is about applying judicially-mandated principles of interpretation designed to

protect employees because of perceived, and sometimes very real, inequality of bargaining power as between employers and employees.

As the concurring judge reasonably observed, it is not always the case that there is an inequality of bargaining power between employers and employees which justifies judicial presumptions against employers. Particularly, small business employers and employers in the not-for-profit sector may well be on more of a level playing field. Also, prospective employers and employees may not have access to employment lawyers who are aware of the rules governing the interpretation of employment contracts.

Notwithstanding the comments of the concurring judge suggesting that more emphasis perhaps ought to be placed on ascertaining what the parties intended, rather than on focusing on whether the words chosen “satisfy judicial canons of construction”, it is critical for employers to understand that the obligation of the courts, as the law presently stands, is to interpret any ambiguity or uncertainty in a termination provision in favour of the employee.

Accordingly, employers must be certain that any termination provision which is drafted must clearly state that the employee is entitled to the applicable statutory employment standards minimum, and also, just as clearly state that the employee has no additional or other entitlement, including any entitlement at common law.

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