2018: YEAR OF THE EMPLOYER? TWO (MORE) HELPFUL DECISIONS ON TERMINATION CLAUSES

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Two recent Ontario cases have continued a recent trend of employer-friendly decisions regarding the enforceability of termination clauses. These cases reinforce the Ontario Court of Appeal's decision in *Amberber v IBM Canada Ltd*[1] (which we wrote about here) which found that judges should not strain themselves to try and find ambiguity in employment contracts.

Raposo v CA Canada Company[2]

Mr. Raposo was a Senior Business Technical Architect employed by CA Canada Company, the Canadian subsidiary of an American software provider. He was employed for two years and eight months, earning $150,000 a year plus commissions, when his employment was terminated without cause. Upon termination, he was provided with his minimum entitlements under the *Employment Standards Act, 2000 ("ESA")*.[3]

When Mr. Raposo was hired, he had accepted a written offer of employment with an ESA-only termination clause, as well as an accompanying confidentiality agreement. The employer had also sent "Corporate New Hire Paperwork" (including a "Compensation Schedule") for Mr. Raposo to sign and return on his start date. The "Corporate New Hire Paperwork" characterized Mr. Raposo's employment as being "at will".

Mr. Raposo argued that these documents were inconsistent and ambiguous. While the termination clause in the offer letter specifically provided for notice, severance pay and benefits continuation in accordance with the ESA, the other documents (including the accompanying confidentiality agreement) were silent as to benefits. Mr. Raposo also argued that the "at will" characterization of his employment in the "Corporate New Hire Paperwork" further confused the terms of his employment.

Decision

The Court found that the offer letter and the accompanying confidentiality agreement together formed the applicable employment contract. Although the confidentiality agreement was silent as to benefits, it was not inconsistent with the offer letter because it did not specifically exclude benefits continuation during the notice period. Reasonably interpreted as a whole, the offer letter and confidentiality agreement stipulated that the

employer would provide benefits continuation in compliance with the ESA.

Further, the Court found that the contradictory "Corporate New Hire Paperwork" was presented after the parties had already settled the terms of the employment relationship, it was never executed, and the "at will" language was intended for the employer's American employees only. In the result, the Court upheld the termination clause in Mr. Raposo's offer letter and dismissed his action.

Burton v Aronovitch McCauley Rollo LLP[4]

Ms. Burton was a clerk at the law firm Aronovitch McCault Rollo LLP for 13 years. When she was dismissed by her employer without cause, she was given her minimum entitlements under the ESA as per her employment contract. The termination clause in her contract specifically stated that she was entitled to receive "severance pay in accordance with the [ESA]" or, if less than the amounts to which she would be entitled under the ESA, "notice, severance pay, and any other payment required by the relevant legislation".

However, Ms. Burton argued that the termination clause was unenforceable because it did not explicitly provide for benefits continuation during the ESA notice period. In the alternative, Ms. Burton argued that the termination clause was unconscionable.

Decision

The Court upheld the termination clause and dismissed Ms. Burton's action. The Court concluded that where a termination clause references the applicable minimum entitlements, mere silence as to benefits continuation does not render the clause unenforceable.

Since Ms. Burton's termination clause provided for "any other payment required" by the applicable legislation (in addition to the notice and severance pay already listed), it implicitly included benefits continuation. The Court also cited the clause as evidence that the employer intended to comply with the ESA. Finally, the Court held that a termination clause which provides for the ESA minimum entitlements cannot be "grossly unfair or improvident" and is therefore not unconscionable.

What Employers Should Know

Although the Court sided with the employers in these cases, they still highlight the importance of precise and consistent wording in employment contracts. Termination clauses should be uniform, not just in substance, but also in terms of wording. Further, American employers should take special care to remove inapplicable "at will" language from contracts intended for employees in Canada, as this may create uncertainty as to the terms of employment. For assistance in preparing employment contracts, please contact a member of our Employment and Labour Relations Group.

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[1] 2018 ONCA 571.
[2] 2018 ONSC 4226.
[3] SO 2000, c 41.
[4] 2018 ONSC 3018.

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.