

# DRAFTING TERMINATION CLAUSES – BE CAREFUL THAT YOUR FAIL-SAFE PROVISION IS SAFE AND DOESN'T FAIL

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Recently, commentary on Ontario employment law developments has been heavily focused on the use and construction of termination clauses in employment contract (when not covering Bill 148, of course). The late 2017 decision in *Amberber v. IBM Canada Ltd.* adds another wrinkle to the termination clause discussion. In this case, the wrinkle involves the proper use of “fail-safe provisions” – catch-all concluding statements added to termination clauses which typically state that employees shall always receive at least their minimum notice/severance entitlement under the applicable employment standards legislation.

In *Amberber*, the defendant brought a motion for summary judgment to dismiss a wrongful termination claim on the ground that it had given the plaintiff pay in lieu of notice in accordance with his employment contract. The contract contained a termination clause which had two options for calculating the notice payment. It also stated the following:

“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 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.”

In support of his claim, the plaintiff made three arguments: (1) the termination clause denied entitlement to statutory severance and was, therefore, invalid; (2) the employer didn't abide by its full payment obligations and therefore could not rely on the clause; and (3) the clause was invalid because it was ambiguous.

The plaintiff's first two positions were refused by the Court. Justice Hebner found that while the defendant employer didn't immediately pay its full contractual obligation, the incorrect payment was a mere mistake and was properly corrected. Justice Hebner also held that the fail-safe provision (underlined above) had the effect of ensuring that the plaintiff received his minimum entitlement under the *Employment Standards Act, 2000*.

However, Justice Hebner agreed with the plaintiff's third submission – that the termination clause was

ambiguous and, therefore, had to be construed against the employer. She focused on the placement of the fail-safe provision vis-a-vis the earlier “inclusive payment provision” which stated the termination pay options available to the employee were inclusive of statutory and common law entitlements. The judge held that it was not clear that the inclusive payment provision was meant to apply to the fail-safe provision, adding that the inclusive payment provision could have been included at the end of the paragraph. Because the inclusive payment provision was placed before the fail-safe provision, the termination clause was deemed to not clearly exclude common law notice and, therefore, did not rebut the presumption that an employee is entitled to common law notice upon termination without cause. *Amberber v. IBM Canada Ltd.* was then directed to trial on the issues of reasonable notice and damages.

*Amberber* provides both specific and general lessons to employers. On a more particular level, employers should be careful when relying on fail-safe provisions and ensure that contracts are drafted so that fail-safe language is clearly applicable as intended. More broadly, and as employers learned with the decisions in *Wood v. Fred Deeley Imports Ltd.* and *North v. Metaswitch* in 2017, the entirety of a termination clause must be drafted with the utmost caution. Language that worked even a short while ago may no longer be effective in Ontario today.

### **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.

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