HAPPY NEW YEAR: TERMINATION CLAUSE UPHELD BY COURT OF APPEAL

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2017 produced several notable decisions on the interpretation and enforceability of termination clauses. The Court of Appeal for Ontario has kicked off 2018 with another decision which opines on the use of termination clauses to limit an employee's notice entitlement.

In *Nemeth v. Hatch Ltd.* (2018 ONCA 7), the Court of Appeal (decision written by Roberts J.A.) upheld the Superior Court's finding that the termination clause in the plaintiff's employment contract limited his notice entitlement. The clause read as follows:

> "... employment may be terminated by either party with notice in writing. The notice period shall amount to one week per year of service with a minimum of four weeks or the notice required by the applicable labour legislation." [emphasis added]

The appellant employee argued both that: (1) he retained an entitlement to common law notice because the contract did not expressly exclude common law notice; and (2) that the clause was ineffective because it purported to contract out of the *Employment Standards Act, 2000 (ESA)* by failing to mention the employee's severance entitlement.

On the first point, the Court held that the plain language of the clause intended to limit the employee's common law notice. More importantly, on the second point, *Nemeth* can be seen as a small victory for employers as it stands for the principle, first set out in *Roden v. Toronto Humane Society* (2005 CanLII 33578 (ON CA)), that a termination clause need not expressly include all possible statutory entitlements; it must only not exclude them. Roberts J.A. wrote:

> "I do not accept that the silence of the termination clause concerning the appellant's entitlement to severance pay denotes an intention to contract out of the *ESA*... the termination clause purports to limit notice but not the severance pay that the appellant would receive on termination. This is an important distinction."

As a result, the employee was entitled to a week's notice per year of service in accordance with the termination

clause, and would have been entitled to full severance pay under the *ESA* if he qualified, since the termination clause did not purport to restrict severance.

Takeaways for Employers

Employers should be pleased with this decision, while still bearing in mind the importance of drafting termination clauses that do not in any way limit an employee's entitlement to less than the statutory minimums. For example, had the relevant termination clause restricted notice and severance to one week per year, there would have been the possibility that the employee received less than his statutory entitlement and the clause very likely would have been struck.

Since the courts continue to closely scrutinize the wording of termination clauses – seemingly at a rapid pace - employers must remain cautious when drafting or relying on ESA-only termination clauses that limit an employee's entitlements.

by Martin Thompson and Kyle Lambert

A Cautionary Note