

ONTARIO SUPERIOR COURT OF JUSTICE OPINES ON FEDERAL TERMINATION OBLIGATIONS

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In recent years, Ontario courts have frequently ruled on employers' termination obligations under the Ontario *Employment Standards Act*, 2000. However, Ontario courts do not often adjudicate matters related to the enforceability of termination clauses under the *Canada Labour Code*, RSC 1985, c L-2 ("**CLC**"). In *Sager v TFI International Inc.* [1], the Ontario Superior Court of Justice considered a federal employer's obligations when terminating an employee under the *CLC* and confirmed that any termination provisions agreed upon in an employment agreement must maintain all terms and conditions of the employment during the notice period.

Facts

The Plaintiff worked as the Vice-President of Sales and Customer Care at Loomis Express, a subsidiary of TFI International Inc. ("**TFI**"), from November 2016 to July 31, 2019, when it terminated the Plaintiff without cause.

At the time of termination, Mr. Sager's compensation included his base salary along with a car allowance, group benefits, a pension, and a potential bonus. Upon termination, Mr. Sager was provided termination pay in accordance with his employment agreement (the "**Agreement**"), which entitled him to "the greater of three (3) months' base salary or one (1) month base salary per year of completed service to a maximum of 12 months." Mr. Sager alleged that the Agreement's termination clause was unenforceable because it attempted to restrict his entitlements to a lump-sum payment based on his salary, without consideration for his additional benefits. Mr. Sager did not dispute whether his termination without cause was permitted or argue that he was unjustly dismissed under s. 240 of the *CLC*.

Decision

In its decision, the court considered several issues, including the enforceability of the Agreement's termination clause and the Plaintiff's entitlement to a bonus during the applicable notice period.

Enforceability of the Termination Clause

The court emphasized an employer's obligation to provide reasonable notice of termination or pay in lieu thereof, meaning reasonable notice at common law unless there is a contract that unambiguously limits the

employee's entitlements. As a transportation sector employer, TFI is federally regulated and was obligated under the *CLC* to provide the following minimum entitlements:

- 2 weeks' notice or 2 weeks' pay in lieu of notice if the employee has completed 3 consecutive months of continuous employment; and,
- severance pay in an amount that is the greater of (a) 2 days wages for each completed year of employment or (b) 5 days wages if the employee has completed twelve consecutive months of continuous service with the employer.

The court heavily emphasized the requirement under s. 231(a) of the *CLC* to maintain an employee's conditions of employment during the notice period. Section 231 states:

"Where notice is given by an employer pursuant to subsection 230(1), the employer

(a) shall not thereafter reduce the rate of wages or alter any other term or condition of employment of the employee to whom the notice was given except with the written consent of the employee; and

(b) shall, between the time when the notice is given and the date specified therein, pay to the employee his regular rate of wages for his regular hours of work."

Although TFI provided payment to Mr. Sager in an amount greater than his entitlements under the *CLC*, the court nonetheless found that the termination provision in the Agreement violated the *CLC* because it altered the terms and conditions of Mr. Sager's employment during the notice period.

In its decision, the court noted that unlike certain termination clauses that are simply silent on an employer's obligations in relation to benefits or severance pay,^[2] the termination provision in this case expressly violated section 231(a) because, in providing a lump-sum payment that was inclusive of *all requirements* under the *CLC*, the Agreement had the effect of excluding Mr. Sager's pension, benefits, car allowance and/or bonus. The court found that TFI's failure to provide compensation for those entitlements throughout at least the statutory notice period amounted to a change in the terms of his employment and rendered the termination provision unenforceable. The court, therefore, found that Mr. Sager was entitled to common law notice.

Interestingly, despite finding that the Employment Agreement provided Mr. Sager with a greater benefit than the *CLC* minimum, the court failed to consider section 168 of the *CLC*, which states that:

"This Part and all regulations made under this Part apply notwithstanding any other law or any custom, contract or arrangement, but nothing in this Part shall be construed as affecting any rights or benefits of an employee under any law, custom, contract or arrangement that are more favourable to the employee than his rights or benefits under this Part."

Bonus

The Court also determined whether Mr. Sager was entitled to damages in lieu of a bonus under his Short Term Incentive Plan (the “**Bonus Plan**”) during the notice period. In doing so, the Court followed a two-pronged approach.

First, the court found that the Plaintiff would have been entitled to a bonus during the notice period. Second, the court interpreted the Bonus Plan and found that even though it required Mr. Sager to be “actively employed” to receive a bonus, the Bonus Plan failed to unambiguously alter and/or remove Mr. Sager’s common law right to a bonus. Even though TFI appropriately brought the “active employment” requirement to Mr. Sager’s attention, the court found that the Bonus Plan failed to address whether employees terminated without cause were considered as “actively employed” during the notice period. Therefore, the court awarded Mr. Sager an amount equivalent to the bonus that he would have received during the applicable notice period.

Takeaways for Employers

The Superior Court’s decision is a reminder to federally regulated employers that termination clauses must not exclude components of an employee’s compensation during their statutory notice period. Employers should carefully consider their obligations under s. 231 of the *CLC* to ensure that termination clauses are compliant with statutory requirements.

Employers should also carefully draft any incentive compensation plans if they want to limit an employee’s incentive compensation over any common law notice period. Both provincially and federally regulated employers have been faced with several recent decisions confirming that merely requiring “active employment” is not enough to exclude a bonus entitlement during a common law notice period.

[1][ps2id id='1' target=''] 2020 ONSC 6608.

[2][ps2id id='2' target=''] The Court distinguished the termination provision in the case at hand from those in *Roden v Toronto Humane Society*, 2005 CanLII 33578 (ONCA) and *Nemeth v Hatch Ltd*, 2018 ONCA 7.

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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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