

ONTARIO SUPERIOR COURT OF JUSTICE SENDS ONTARIO CONSTRUCTION EMPLOYERS BACK TO THE DRAWING BOARD

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In Ontario, employees are presumed to be entitled to reasonable notice of termination under common law unless an employment agreement clearly specifies some other period of notice.

The [Employment Standards Act, 2000](#) (“**ESA**”) requires certain minimum entitlements to employees at the time of termination. Such entitlements include [statutory notice of termination](#) (or pay in lieu)[1], [benefits continuation](#) during the statutory notice period[2], and [statutory severance pay](#)[3]. Termination provisions of an employment agreement that provide less than the minimum entitlements under the ESA are void and the employee’s entitlements upon termination are then governed by the common law.

However, not every employee is entitled to all of the termination entitlements under the ESA. In particular, [Sections 2\(1\)9 and 9\(1\)7 of Regulation 288/01](#) (the “**Regulation**”) under the ESA provides that “construction employees” are not entitled to notice of termination (or pay in lieu) and statutory severance pay under the ESA.

The recent Ontario Superior Court of Justice (the “**Court**”) decision in [Rutledge v. Canaan Construction Inc.](#)[4] involved a construction employee whose employment agreement contained the following termination provision (the “Termination Provision”):

Termination of Employment

... The Employee may be terminated at any time without cause upon being given the minimum periods of notice as set out in the *Employment Standards Act*, or by being paid salary in lieu of such notice or as may otherwise be required by applicable legislation. The Employee acknowledges that pursuant to the *Employment Standards Act* they are not entitled to any notice or time in lieu thereof due to the nature of their job and as such they are entitle [sic] to absolutely no notice or pay and benefits in lieu thereof upon termination. ... [emphasis added]

At issue was whether the Termination Provision complied with the minimum requirements under the ESA.

The Court’s Decision

In dismissing the Employer's appeal, the Court noted that while the Regulation disentitled an employee from statutory notice of termination (or pay in lieu), the Regulation did not flatly disentitle the employee to other protections of the ESA.

The Court found two errors in the Termination Provision:

1. While the employee was employed as a construction employee at the time of hiring, the employee's position could have changed to something other than a construction employee. The effect of the Termination Provision was that it denied the employee his protections under the ESA as a non-construction employee. According to the Court, the fact that the Termination Provision potentially violated the ESA any date after hiring was sufficient to render it void.
2. The Court held that the Termination Provision violated the ESA as it contracted out of the employee's potential entitlement to statutory severance pay. In this regard, the Court noted it was not so remote that the employee would one day satisfy the eligibility criteria for statutory severance pay regardless of his status as a construction employee.[5] Again, the potential violation of the ESA rendered the Termination Provision void.

Takeaways for Ontario Construction Employers

Employment in the construction industry is often cyclical and transient. Given the frequency of layoffs and terminations in the industry, construction employers often want to minimize the costs associated with ending employment relationships. As such, it is not unusual to see the employment agreements containing termination provisions similar to the above.

However, construction employers should tread carefully in drafting employment agreements. Even a potential violation of the ESA, no matter how remote, can render a termination provision unenforceable. Employers should ensure that employment contracts contain "failsafe" clauses, which specifically provide that in no event will an employee receive less than his or her minimum statutory entitlements.

Employers should also have their offer letters frequently reviewed to ensure that their agreements comply with the ESA.

If you have any questions relating to the above, please do not hesitate to contact a member of the [Employment and Labour Relations Group](#).

by Victor Kim and Dave McKechnie

[1] See s. 54 – 62 of the ESA.

[2] See s. 60 of the ESA.

[3] See s. 63 – 66 of the ESA.

[4] 2020 ONSC 4246 (CanLII).

[5] On this point, our respectful submission is that the judge may have misunderstood the law. Per s. 9(1)7 of Regulation 288/01, construction employees are not entitled to statutory severance pay.

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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