BLOWN SAVE: ONCA DELIVERS "BAD NEWS" TO EMPLOYERS REGARDING SEVERABILITY CLAUSES

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Last year, we told you about a rare "good news" case for employers: *Oudin v. Le Centre Francophone de Toronto* ("*Oudin*").[1] In that case, the Ontario Court of Appeal ("**ONCA**") relied on a severability clause to save an otherwise void and unenforceable termination clause in an employment contract.

This year, the ONCA has taken the wind out of the sails of employers. In North v. Metaswitch Networks Corporation ("Metaswitch"),[2] released in October 2017, the ONCA delivered some "bad news" about the utility of severability clauses in employment contracts.

Background

Doug North was employed by Metaswitch Networks Corporation for 3 years, 4 months. His wages consisted of a base salary plus commissions. North's employment contract with Metaswitch contained a "without cause" termination clause which capped his entitlements at the minimum amount of notice, severance pay and benefits continuation required by the *Ontario Employment Standards Act, 2000* ("**ESA**"). The clause also stipulated that any termination payments made to North would be based on his base salary only – not his commissions.

When North's employment was terminated without cause, Metaswitch purported to rely on the termination clause in his contract. North subsequently sued for reasonable notice at common law alleging that the termination clause was void and unenforceable. In particular, North argued that the clause illegally contracted out of the ESA, which provides that pay in lieu of notice and severance pay must be calculated based on "regular wages" – including commissions (as opposed to base salary only).

In its defence, Metaswitch relied on the Oudin decision and argued that the termination clause was saved by the following severability clause in the contract:

> *"If any part of the Agreement is found to be illegal or otherwise unenforceable by any court of competent jurisdiction, that part shall be severed from this Agreement and the rest of the Agreement's provisions shall remain in full force and effect."*

The case eventually made its way up to the ONCA.

No Saving the Day

Section 5(1) of the ESA prohibits employers and employees from waiving or contracting out of the minimum employment standards other than to provide a greater right or benefit to an employee. A clause in an employment contract that attempts to contract out of the ESA is void and unenforceable (i.e., of no effect). In this case, there was no question that the termination clause contravened the minimum employment standards by attempting to exclude North's commission entitlements.

The real question in this case was whether or not the severability clause could allow the ONCA to strike out the offending "base salary" language and leave the rest of the termination clause intact (meaning that North would receive his entitlements in accordance with the ESA and not under the common law).

Unfortunately for Metaswitch, the ONCA sided with North. In its reasons, the ONCA opined that where there is contracting out of a minimum employment standard within a termination clause, the effect is to void the entire clause and not just the removal of the impugned part of the clause. Because the termination clause in North's contract was void and unenforceable as a result of s. 5(1) of the ESA, there was nothing on which the severability clause could act.

In the result, the ONCA held that North was entitled to receive termination pay based on common law reasonable notice.

What Employers Should Know

The ONCA's decision in Metaswitch makes it clear that if any part of a termination clause violates the ESA's notice, severance pay or benefits continuation provisions, the entire termination clause will be void and unenforceable and a severability clause will not save it. The offending termination clause is null and void for all purposes and cannot be rewritten, read down or interpreted through the application of a severability clause to provide for the minimum standards prescribed by the ESA.

Therefore, the *Metaswitch* decision underscores the importance of drafting termination clauses with great care. The only way to avoid a dispute about the enforceability of a termination clause is to ensure that it is clear, unambiguous and provides for at least the minimum entitlements required by the ESA.

by Paul Boshyk, Kyle Lambert and Alan Laking, Articling Student

[1] 2015 ONSC 6494 aff'd 2016 ONCA 514[ps2id id='1' target='/]
[2] 2017 ONCA 790[ps2id id='2' target='/]

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.