GOOD NEWS/OLD NEWS: WHY *WOOD V DEELEY* IS NOTHING (NEW) FOR EMPLOYERS TO SWEAT

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Much has been said about the impact of the Ontario Court of Appeal's decision in *Wood v Fred Deeley Imports* Ltd.[i] since its release in February 2017. Some commentators have even hailed it as a major victory for dismissed employees. However, a sober second reading of the Court's decision suggests that the news may not be so bad for employers after all.

Background

Ms. Wood was dismissed from her employment with Fred Deeley Imports ("Deeley") on a without cause basis after eight years of service. In terminating Ms. Wood's employment, Deeley purported to rely on the following "all-inclusive" termination clause in her employment contract:

> *The Company is entitled to terminate your employment at any time without cause by providing you with 2 weeks' notice of termination or pay in lieu thereof for each completed or partial year of employment with the Company. If the Company terminates your employment without cause, the Company shall not be obliged to make any payments to you other than those provided for in this paragraph [...] The payments and notice provided for in this paragraph are inclusive of your entitlements to notice, pay in lieu of notice and severance pay pursuant to the Employment Standards Act, 2000.*

In fact, Deeley provided Ms. Wood with entitlements in excess of those set out in her contract, namely: 13 weeks' working notice plus a lump sum payment equal to eight weeks' pay. Nevertheless, Ms. Wood sued Deeley for wrongful dismissal on the grounds that (1) the contract was unenforceable because it was signed after she started working for Deeley, and (2) the termination clause was void because it contravened the *Employment Standards Act, 2000* (the "ESA").

The "Good News" for Employers

Ms. Wood's first argument was based on the legal doctrine of consideration.

In employment law, the doctrine of consideration requires that an employer provide something new and of

value to an employee (e.g., a bonus) if the employer wishes to obtain a new contract or term from an employee that negatively affects his or her interests (e.g., a termination clause). Where an employee has already started working for the employer, he or she can take the position that an unwritten contract has already been formed and that no "fresh" consideration was provided in exchange for the new contract or term. Absent fresh consideration, the new contract or term is likely unenforceable.

In this case, Ms. Wood was offered and accepted a job with Deeley during a phone call on April 17, 2007. A representative of Deeley then sent her an email outlining the terms of her employment (including the termination clause). Ms. Wood started working for Deeley on April 23, 2007. The following day, she met with a human resources representative and finally signed the contract. Therefore, Ms. Wood argued that the contract was unenforceable for lack of fresh consideration.

Surprisingly, the Court disagreed with Ms. Wood. According to the Court, a written contract is not unenforceable merely because the employee signs it after he or she starts work – provided that the material terms in the contract were part of the "original employment relationship" (e.g., the key terms were communicated prior to the commencement of employment). The fact that Ms. Wood signed the contract after she started working for Deeley was a matter of administrative convenience. As such, fresh consideration was not required.

The "Old News" for Employers

Ms. Wood's second argument was that even if the contract was enforceable, the termination clause in it was still void.

In particular, Ms. Wood argued that the termination clause improperly excluded Deeley's statutory obligation to make benefit contributions during the notice period (contrary to ss. 60 and 61 of the ESA) and pay severance pay (contrary to ss. 64 and 65 of the ESA). In its defence, Deeley argued that the word "pay" in the phrase "two weeks' notice of termination or pay in lieu thereof" was broad enough to include both wages and benefits. It also argued that the 21 weeks of combined notice and pay in lieu of notice actually provided to Ms. Wood exceeded her entitlements under the ESA.

The Court agreed with Ms. Wood that Deeley had improperly tried to contract out of the ESA.

According to the Court, the word "pay" was, at best, ambiguous. Adopting the interpretation most favourable to Ms. Wood, the Court concluded that "pay" referred only to wages, not to benefits. The termination clause was also deficient because Deeley had unwisely combined its separate obligations to give notice and pay severance pay. In the result, the clause permitted Deeley to discharge all of its statutory obligations to Ms. Wood by way of working notice. Under this scenario, Ms. Wood would have received more notice than she was

entitled to under the ESA, but she would not have received any severance pay.

By reason of the foregoing, the Court held that the termination clause was void. The Court added that Deeley's actual compliance with the ESA did not cure the clause's deficiencies because "illegal" termination clauses cannot be remedied after the fact. Therefore, Deeley was ordered to pay damages equal to nine months of reasonable notice at common law.

What Employers Should Know

In the well-known cases of *Wright v The Young and Rubicam Group of Companies*[ii] and *Stevens v Sifton Properties Ltd.*,[iii] the Ontario Superior Court of Justice held that all-inclusive termination provisions that could result in an employee receiving less than his or her statutory entitlements notice, severance pay or benefits continuation are void and unenforceable. *Wood v Fred Deeley Imports Ltd.* effectively confirms these lower court decisions. It does not create new law.

Meanwhile, the Court's decision to uphold Ms. Wood's contract – notwithstanding the fact that it was signed after she started working for Deeley – is significant. Historically, the courts have struck down written contracts that were signed after the employee started working for the employer, even if the key terms were communicated prior to the commencement of employment. It is apparent that the Court in Wood v Fred Deeley Imports Ltd. favoured a more practical and business-minded approach.

That said, employers are still cautioned to ensure that employment contracts are signed by new hires before they start working. This "best practice" remains the most effective way to avoid disputes about whether or not employees received sufficient consideration for their new contracts.

by Paul Boshyk and Shahram Khalili, Student-at-Law

[i] 2017 ONCA 158.
[ii] 2011 ONSC 4720.
[iii] 2012 ONSC 5508.

A Cautionary Note