THE CURE FOR WHAT AILS YOU: COURT REJECTS "TECHNICAL OBJECTIONS" TO TERMINATION PROVISION

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Termination provisions in employment agreements have come under intense scrutiny in recent years from Ontario courts. But if the Ontario Court of Appeal's decision in *Oudin v Le Centre Francophone de Toronto* ("***Oudin***")[1] is any indication, the tide may finally be turning in favour of employers.

Background

Mr. Oudin was hired by the Centre Francophone de Toronto in 2000. He worked as a project manager for the Centre for 13 years until his employment was terminated, on a without cause basis, in 2013.

Mr. Oudin's employment agreement contained a termination provision that allowed the Centre to terminate his employment on "15 days notice or the minimum notice required under the *Employment Standards Act* or by paying an amount of salary equal to the salary the employee would have had the right to receive during the notice period". Relying on this provision, the Centre provided Mr. Oudin with his minimum statutory entitlements of eight weeks' pay in lieu of notice and 13 weeks' severance pay. The Centre also "voluntarily" continued Mr. Oudin's benefits for six months.

Despite the termination provision, Mr. Oudin commenced an action for wrongful dismissal against the Centre. According to Mr. Oudin, the provision was void and unenforceable because it marked an attempt to contract out of the *Employment Standards Act, 2000* ("**ESA**") as it didn't provide for continuation of benefits or severance pay.

"Curative Language" Saves the Day

At trial, the Centre admitted that certain provisions in Mr. Oudin's agreement fell below the minimum statutory entitlements, contrary to s. 5(1) of the ESA[2]. Nevertheless, the trial judge upheld the termination provision and dismissed Mr. Oudin's action.

In doing so, the trial judge relied in part on "curative language" in the agreement which provided that any provision that was invalid by virtue of law (e.g., because it fell below the minimum ESA entitlements) could be "modified" to the extent necessary in order to make the provision compliant. Based on this language the trial

judge concluded that there had been no attempt to contract out of the ESA, and further that the parties had agreed that the ESA would be respected:

Contracts are to be interpreted in their context and I can find no basis to interpret this employment agreement in a way that neither party reasonably expected it would be interpreted when they entered into it. There was no intent to contract out of the ESA in fact; to the contrary, the intent to apply the ESA is manifest.

On appeal, Mr. Oudin tried to argue that the trial judge had erred because the termination provision provided that the Centre could terminate his employment with ESA minimum notice, but made no mention of ESA severance pay. However, the Court of Appeal rejected this argument and agreed with the trial judge that the intention of the parties was to comply with the ESA in all respects.

What Employers Should Know

The decision in *Oudin* comes on the heels of another recent victory for employers: the decision in *King v. Cannon Design Architecture Inc.* ("**King**"). In that case, a termination provision that failed to mention benefits continuation contrary to s. 61(1)(b) of the ESA was saved by curative language which provided that the employer would comply with the ESA if a greater benefit to the employee was provided therein.

The results in *Oudin* and *King* suggest that the courts may be moving away from the highly technical approach to interpretation that has seen numerous termination provisions recently struck down. Instead, it appears as though the courts have started favouring an approach that focuses more on the intention of the parties to the employment agreement and not permit "after-the-fact" attacks on the language.

Despite this development, employers are still wise to draft termination provisions with great care. While *Oudin* and *King* are clearly of assistance to employers that include curative language in their agreements, each case will always turn on its own facts. The best way to avoid a dispute about the enforceability of a termination provision is to ensure that such provisions provide for at least the minimum amount of notice, severance pay (if applicable), benefits continuation and other entitlements required by applicable employment standards legislation. Employers should ensure that their precedent offer letters are updated to reflect the new language.

by Paul Boshyk and Dave J.G. McKechnie

1. 2015 ONSC 6494 aff'd 2016 ONCA 514[ps2id id='1' target='/]
2. Subsection 5(1) of the ESA provides that "no employer or agent of an employer and no employee or agent of an employee shall contract out of or waive an employment standard and any such contracting out or waiver is void".[ps2id id='2' target='/]
3. 2015 CarswellOnt 20496 (ONSCC)
4. Also see *BlackBerry Ltd. v. Marineau-Mes*, 2014 ONSC 1790.

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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