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Court of Appeal upholds termination provision

Over the past couple of years, in order to uphold termination provisions, we have seen the Courts look for language that specifically ousts the common law right to reasonable notice and explicitly references all entitlements under the *Employment Standards Act, 2000* (ex. benefits and statutory severance pay). However, a recent Ontario Court of Appeal decision suggests that this may not be the case.

In *Nemeth v Hatch*, Joseph Nemeth was employed by Hatch Ltd. for just over 19 years when his employment was terminated. Upon termination, Hatch relied on the termination provision in Nemeth's employment agreement, which read as follows:

> The Company's policy with respect to termination is that employment may be terminated by either party with notice in writing. The notice period shall amount to one week per year of service with a minimum of four weeks or the notice required by the applicable labour legislation.

Nemeth was provided with 8 weeks' notice of his termination along with 19.42 weeks' salary as severance pay. Nemeth subsequently brought a claim against Hatch arguing that the termination provision in his employment agreement did not limit his entitlement to common law reasonable notice. The motion's judge disagreed, concluding that the termination provision in Nemeth's employment agreement was enforceable. Nemeth appealed the motion judge's decision arguing: (i) that the termination provision did not expressly state that it limited his entitlement to reasonable notice, and; (ii) that the termination provision attempted to contract out of the ESA, as it did not reference his entitlement to statutory severance pay.

The Court of Appeal held that a termination provision does not need to explicitly state that an employee's entitlement to reasonable notice is displaced. The Court found that it is sufficient that the language indicates an intention to displace reasonable notice. In upholding and enforcing the termination provision, the Court found that the "intention to displace an employee's common law notice rights can be readily gleaned from the language agreed to by the parties". Further, the Court found that the termination provision's silence with respect to Nemeth's entitlement to statutory severance pay did not contravene the ESA and did not render the clause unenforceable.

Notwithstanding, the Court held that at best, the termination provision gave rise to two possible interpretations – one that would limit Nemeth's notice entitlement to the minimum prescribed by the ESA; the other that would not. As a result, the Court went on to award Nemeth an additional 11 weeks' notice in addition to the 8 weeks already provided, stating:

> As this court recently stated in Wood, at para. 28: "Faced with a termination clause that could reasonably be interpreted in more than one way, courts should prefer the interpretation that gives the greater benefit to the employee". As a result, the correct interpretation of the termination clause would have been the one most favorable to the appellant that does not limit the appellant's notice entitlement to the ESA minimum.

This decision serves as an important confirmation that the intent of the parties must be clearly articulated within contractual terms, but especially with respect to termination provisions in employment contracts. Despite the suggestion that explicit language regarding the displacement of common law rights and/or reference to all ESA entitlements may not be required in order for a termination provision to be upheld, it is recommended that termination clauses continue to use clear, detailed and explicit language so as to avoid any opportunity for ambiguity or differing interpretations. This is especially important for employers given the confirmation provided by *Nemeth v. Hatch* that courts will prefer the interpretation that provides the employee with the greater benefit.

The law regarding the enforceability of termination provisions continues to quickly grow and evolve. Drafting termination provisions requires much care and attention. Employers are well advised to seek the advice of employment law counsel when preparing such provisions.