

Pitfalls in Termination Clauses

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Employment contracts often contain termination rights of the parties. In particular there is often a clause permitting the employer to terminate on a certain period of notice.

The Court of Appeal for Ontario in the February 23rd decision in [Wood v. Fred Deeley Imports Ltd](#) reminds us that the presumption of reasonable notice in employment termination situations can be modified by agreement to a different notice period. But, and this is the part to note, any such termination agreement or clause is only enforceable if it complies with the minimum standards in the Ontario Employment Standards Act. If the termination agreement does not meet those standards the termination clause is void and the usual common law reasonable notice principles apply.

In this case, Ms. Wood signed an employment agreement that said:

“[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, except for any amounts which may be due and remaining unpaid at the time of termination of your employment. 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.”

After 8 years of working for the employer, Ms. Wood would have been entitled to 8 weeks of notice at a minimum and her benefits paid during the period of notice. She was also entitled to severance pay (the employer having a greater than \$2.5 million payroll) equal to one week for each year or part she was employed, in this case 8.3 weeks.

In fact she was given 13 weeks working notice, and 8 weeks of severance pay (close but not quite enough). During the 13 week period her health and dental benefits were paid.

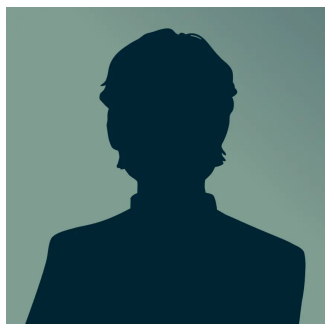
The Court of Appeal noted that the termination clause as drafted excluded and contracted out of the obligation to pay for benefits during the notice period and that made the termination clause unenforceable. What the employer paid the employee on termination on a voluntary basis did not affect the viability of the termination clause.

The court found that the termination clause was invalid and the determination of reasonable notice defaulted to the usual principles.

The moral of the story really is that termination clauses must be drafted with some care. They will be construed against the employer if it comes down to issues of “interpretation” and they must comply with the minimums set out in the ESA. If there is doubt as to the termination clauses enforceability, the employer should seriously consider dealing with the employee on a “reasonable notice” basis.

(This blog is provided for educational purposes only, and does not necessarily reflect the views of Gardiner Roberts LLP).

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