Termination payment of 'salary' in breach of ESA: Appeal court

Provision calling for salary paid in event of termination neglected to include car allowance and benefits

BY RONALD MINKEN

SOMETIMES ONE WORD can be the difference between a valid contract and one that gets thrown out.

On Feb. 25, 2015, in the case of *Miller v. A.B.M. Canada Inc.*, the Divisional Court of Ontario upheld a Superior Court of Justice decision to strike down the termination provision of an employment agreement because it did not include all the compensation to which the employee was entitled during the notice period. The termination provision was found to be contrary to the Ontario Employment Standards Act, 2000, as it only provided for salary during the notice period, but not benefits, car allowance or pension participation.

Paul Miller was offered employment by A.B.M. Canada in July 2009, the terms and conditions of which were set out in writing. The employment agreement, including termination clause, were not drafted by a lawyer but were cobbled together from other documents. Miller accepted the offer of employment six days after receiving it. A.B.M. Canada later terminated Miller's employment without cause.

The Jan. 26, 2011, letter of termination stated that Miller was entitled to two weeks' salary in lieu of notice, including car allowance and a reference letter. The termination letter also offered an "enhanced separation offer" open for one week, consisting of four weeks' salary plus car allowance "as a sign of good faith and in order to assist you while you seek alternative employment." Miller did not accept the enhanced offer and was not paid his car allowance or pension contributions.

At trial, the Ontario Superior Court of Justice analyzed s. 61(1) of the Employment Standards Act, which permits termination without advanced notice as long as the employer pays the amount to which the employee would have been entitled during the notice period based on total compensation, including benefits. If done properly, this will limit an employee's entitlements to statutory notice only and will eliminate the employee's entitlement to common law notice. However, the court determined that the termination clause in the employment agreement provided for termination without payment of car allowance, pension and benefits over the statutory notice period, thereby rendering it invalid and contrary to the act. As a result, the termination clause was void and incapable of displacing the common law presumption that the employee was entitled to a reasonable period of notice according to common law principles.

A.B.M. Canada appealed this decision, seeking to overturn the trial court's decision and have the termination clause in the employment agreement upheld.

The Ontario Divisional Court dismissed the appeal due to the specific wording of the termination clause in question. The termination clause stated:

"Regular employees may be terminated at any time without cause upon being given the minimum period of notice prescribed by applicable legislation, or by being paid salary in lieu of such notice or as may otherwise be required by applicable legislation."

In a similar case relied upon by the employer, *Roden v. Toronto Humane Society*, the termination provisions stated:

"Otherwise, the employer may terminate the employee's employment at any other time, without cause, upon providing the employee with the minimum amount of advance notice or payment in lieu thereof as required by the applicable employment standards legislation."

The court determined that in *Roden*, unlike in *Miller*, the termination provision did not attempt to provide less than the legislated minimum and was therefore valid.

The key difference in wording between the two termination provisions in these two contracts are the words "payment" and "salary." "Salary" was interpreted to refer to the employee's base salary only and excluding other aspects of the employee's compensation, specifically pension contributions, car allowance and benefits, as required by the act. The word "payment," on other hand, was interpreted to include all aspects of compensation owing to the employee in the *Roden* decision. Due to this distinction, the termination provision in *Miller* was deemed invalid for violating s. 61(1)(a) of the act.

Lessons for employers

When drafting termination clauses in employment agreements, even one word can mean the difference between the clause being valid or invalid. As a properly worded termination clause can also mean the difference between owing a terminated employee only statutory notice in accordance with the act, or additional common law notice, it is critical that termination clauses are carefully drafted. While it may be tempting for an employer to rely on old or new precedents that are readily available, these precedents may not provide all of the protections the employer needs to ensure the termination clause, and employment agreement as a whole, will be upheld.

Lessons for employees

It is important for employees to carefully review employment agreements, including termination clauses, prior to entering into these agreements and again at the time of termination. Signing an employment agreement containing a termination clause does not necessarily mean the document or its terms are valid at the time of signing. New law or clarifications can also render the termination clause invalid at the time of termination. As demonstrated by *Miller*, sometimes one improperly selected word can render an entire termination clause invalid.

For more information see:

- *Miller v. A.B.M. Canada Inc.*, 2015 CarswellOnt 6977 (Ont. Div. Ct.).
- *Roden v. Toronto Humane Society*, 2005 CarswellOnt 4479 (Ont. C.A.).

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