Termination clause upheld – 2 years work, only 2 weeks wages!

Despite the fact the termination clause would not have met legislative minimums over a longer period of time, it did meet the minimums at time of termination

BY RONALD MINKEN

THERE IS much debate about the enforceability of termination clauses in employment agreements and hiring letters. Whether a termination clause will be enforced depends on many factors including the wording of the clause, how it was implemented, how long an employee was employed prior to termination, their total compensation at the time of termination and, to a large extent, who is interpreting the clause.

In *Shapka v. Interbase Consultants Ltd.*, the Ontario Superior Court of Justice Small Claims Court analyzed the facts surrounding the termination clause in the employee's contract of employment and determined it was valid and enforceable leaving the employee only statutory notice of two weeks.

At the time of hiring, the employee signed an employment contract containing a termination clause limiting his notice entitlement. The clause allowed both the employee and the employer to terminate the employment relationship at any time without cause upon giving two weeks' notice. Two years later, the employer terminated the employee without cause and provided him with two weeks' notice in accordance with the termination clause. The notice was also the same amount of statutory notice owing to the employee based on his period of employment prior to termination. The employee brought legal proceedings against the employer seeking common law notice, along with punitive and special damages.

The court ultimately dismissed the action on the basis that the termination clause was valid and no further notice was owing.

The court noted that the termination clause did not provide the employee with less than his statutory notice entitlement at the time of termination and therefore there was no violation of the Ontario Employment Standards Act, 2000 (ESA), which would have rendered the clause invalid.

"The clause at issue in this case is a full answer to the (employee's) claim for additional notice beyond the amounts he has been paid. Given the wording of the contract clause, the fact of payment in accordance with that clause and the fact that the amount paid is equal to the amount which would have been paid under the ESA, the (employee) is not entitled to more notice." said the court. "A bargain which complies with the ESA on a present set of facts is not a bad bargain for an employee. The idea that a contract might on some further hypothetical set of facts create the 'potential' for non-compliance is an unreasonable basis for treating an otherwise complaint provision on a current set of facts as void."

While this case is very fact specific, it does provide some interesting food for thought!

Lessons for employers

This decision demonstrates that the courts may in some situations uphold termination clauses that provide a calculation of notice equal to an employee's statutory entitlements at the time of termination, even if the calculation may at some future time, provide the employee with less than statutory entitlements. A properly drafted and implemented termination clause is an employer's best defense against claims for additional notice and should be drafted with the utmost care to ensure enforceability.

Lessons for employees

Employees should be aware that while termination clauses may limit their common law notice entitlements, this is not always the case. When presented with an employment agreement at the time of hiring that contains a termination clause, it is critical for the employee to have the agreement and the termination clause reviewed to see whether it will be valid and enforceable at the time of termination. The employment agreement and termination clause should also be revisited at ttermination to see if the clause is still valid based on the facts existing at the time of termination. See *Shapka v. Interbase Consultants Ltd.* (2014), (Ont. S.C.J.).

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