Ontario Court of Appeal's "failsafe provision" decision adds more confusion than clarity

October 01, 2019

On August 30, 2019, the Ontario Court of Appeal dismissed the employer's appeal in *Andros v. Colliers Macaulay Nicolls Inc*. (*Andros*),[1] thereby affirming the motion judge's finding that the employee's termination clause was unenforceable because it represented an attempt by the employer to contract out of the employment standards provided for under the *Employment Standards Act, 2000* (ESA).

Background

This case arose following the without cause termination of an employee at a large commercial real estate company. The parties did not dispute that, upon termination, the employee received what he was entitled to under the ESA, including a lump-sum payment in lieu of notice of termination representing eight weeks of salary, coverage for all benefits during that notice period, and a lump-sum severance payment representing about 12 weeks of salary. Moreover, the parties agreed to settle the matter by summary judgment.

Where this decision gets interesting, however, is with respect to the enforceability of the termination clause in the employee's employment agreement. The employee argued that the termination clause was unenforceable because it attempted to contract out of the ESA. Accordingly, the employee maintained that he was entitled to reasonable notice under the common law.

The Termination Clause

The termination clause, found within the employee's employment agreement forces a choice between "the greater of":

1. the [employee's] entitlement pursuant to the [ESA] (the "first clause"); **or**
2. at the [employer's] sole discretion, either of the following:
    1. Two (2) months' working notice with compensation and benefits "during the working notice period" (clause 4(a)); or
    2. Payment in lieu of notice in the amount equivalent to two (2) months [b]ase [s]alary" (clause 4(b)).

Employer's Position

The employer argued that the termination clause provides at least the statutory minimum amount of pay in lieu of notice and preserves the statutory entitlements to severance pay and continuation of benefits. The employer contended that regardless of whether the "greater" entitlement was under the first clause or clauses 4(a) or 4(b), the termination clause ensured that the employee would always receive his minimum statutory entitlements under the ESA. The employer characterized the reference to the "greater of" at the outset of the termination clause as the "failsafe" clause, meaning that even if clauses 4(a) or 4(b) applied, the minimum statutory entitlements relating to benefits and severance would be provided under those clauses.

Motion Judge's Ruling

On summary judgment, the motion judge disagreed with the employer and held that the termination clause could reduce "the benefits to which [the employee] could be entitled on termination to something less than he would be entitled to under the ESA."[2] The motion judge added that if clause 4(a) applied, it did not provide for severance and, if clause 4(b) applied, it did not provide for benefits. Accordingly, the motion judge concluded that the ESA had been contracted out of and the entire termination clause is unenforceable.

Court of Appeal's Decision

On appeal, the employer argued that the motion judge made three extricable errors of law, reviewable on a correctness standard, in her interpretation of the termination clause: (a) she failed to interpret the clause as a whole; (b) she read ambiguity into clauses 4(a) and 4(b) where there was none; and (c) she failed to appreciate that there was no need for a specific reference to statutory entitlements in clauses 4(a) and 4(b) for those entitlements to apply.

Unexpectedly, the Court of Appeal found no error in the motion judge's interpretation of the termination clause, deferring to her conclusion that the termination clause is unenforceable because clauses 4(a) and 4(b) purport to limit the employer's obligations respecting employment standards.

To arrive at this conclusion, the Court distinguished *Andros* from *Amberber v. IBM Canada Ltd*.,[3] a previous decision on "failsafe provisions" where the Court held that:

The fundamental error made by the motion judge is that she subdivided the termination clause into what she regarded as its constituent parts and interpreted them individually. In my view, the individual sentences of the clause cannot be interpreted on their own. Rather, the clause must be interpreted as a whole.[4]

In *Amberber*, the termination clause contained a final sentence that if the ESA provided the employee with a greater entitlement than the employment contract, the employer would provide the ESA entitlements in substitution of the rights under the employment agreement. Thus, the Court concluded that the termination clause was enforceable because the failsafe provision in the last sentence "…ensures that any portion of the

termination clause that falls short of the ESA must be read up so that it complies with the ESA."[5]

In *Andros*, the employer argued that *Amberber* was analogous because the first clause modifies the whole termination clause so that the ESA minimum entitlements apply to clause 4(a) and 4(b). The Court did not agree and found no analogy to *Amberber.*

The Court held that:

…while the first clause in this case specifically incorporates all entitlements to ESA statutory minimums in general, including benefits and severance, clauses 4(a) and 4(b) apply in the alternative and do not cover that same ground. Again, the ESA entitlements are stuck within the first clause of a disjunctive termination clause.[6]

Based on this, the Court agreed with the motion judge and concluded that the termination clause was unenforceable.

Lessons for Employers

In light of the *Andros* decision, a termination clause can be interpreted as a whole even though the clauses within are being viewed as *separate and distinct*.[7] Understandably, this is a puzzling development for employers and their ability to rely on the termination clauses in their employment agreements. Nevertheless, the Court did not overturn previous decisions on an employer's ability to rely on a failsafe provision in a termination clause. Accordingly, to protect against a finding of an unenforceable termination clause, employers should ensure that the failsafe provision applies to the *entire* termination clause. The failsafe provision should clearly provide that greater ESA entitlements will apply and that in no circumstances will the employee receive less than their minimum entitlements under the ESA.

[1] 2019 ONCA 679 (*Andros*).

[2] *Andros v. Colliers Macauley Nicoll Inc.*, 2018 ONSC 1256 at para. 22.

[3] 2018 ONCA 571 (*Amberber*).

[4] *Ibid* at para. 59.

[5] *Ibid* at para. 54.

[6] *Andros*, *supra* note 1at para. 37.

[7] *Ibid* at para. 22.

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