BLG Wins Appeal for Employer in Contract Enforceability Case

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In a decision released earlier this month, Oudin v. Centre Francophone de Toronto, 2016 ONCA 514, the Court of Appeal upheld the decision of Dunphy J. regarding the validity of a termination provision in an employment contract. The Court of Appeal's decision confirms two important points:

1. a termination provision that deals with entitlement to notice and makes no mention of entitlements to severance pay or benefit contributions is valid, and
2. a motion judge's interpretation of a termination provision in an employment contract is entitled to deference.

Summary Judgment Decision

Mr. Oudin brought a claim against CFT for wrongful dismissal and sought summary judgment on the enforceability of the termination provision contained in his employment contract and, if successful on this first issue, his entitlement to reasonable notice at common law.[1] The official translation from French of the termination provision reads as follow:

Dismissal and cancellation of contract: This agreement may be terminated by the CFT without prior notice or compensation for the reasons set out in section 4 of this agreement. The CFT may also terminate this agreement for any other reason by giving the employee fifteen (15) days' notice or the minimum notice required under the *Employment Standards Act*, or by paying them monetary compensation equal to the wage they would have been entitled to receive during the notice period (after deduction and/or withholding at source), at the sole discretion of the CFT.

The Centre conceded s. 4 of the contract was null and void, in particular because it did not allow for any notice in case of termination due to permanent incapacity. The question at the motion was what consequence flowed from this. Oudin argued the reference to s. 4 made the termination provision null and void in its entirety. The Centre argued that the divisibility clause contained in the employment contract was applicable and that the court could sever the first sentence without affecting the rest of the termination provision. Dunphy J. agreed with the Centre.

In addition, Oudin argued that the termination provision was void for ambiguity because the use of the word “or” made it possible to interpret the provision as permitting the Centre to provide only 15 days' notice even where the *Employment Standards Act* (ESA) required a greater notice. He argued that any ambiguity ought to be resolved in favour of the employee according to the doctrine of *contra proferentem*. This argument has been commonly used by employee counsel in recent years, with some success.

Dunphy J. rejected that argument. Noting that the first task in contractual interpretation is to ascertain the objective intention of the parties, he found that a fair construction of the employment agreement did not permit the Centre to provide Oudin with anything less than the minimum notice required by the ESA. He wrote: "The only reasonable interpretation of the language employed in [the termination provision] was that the parties — both parties — fully intended the greater of the two notice periods to apply and the very law they incorporated by specific reference so required… I do not accept that I should strive to find the least plausible interpretation the language will bear simply because the outcome happens to favour one party or another in hindsight."

The Appeal

At the appeal, Oudin argued that in improperly translating the termination provision Dunphy J. rewrote the contract between the parties. Dunphy J. had translated "le préavis minimum prescrit par la *Loi sur les normes d'emploi*" by "the minimum prescribed by the *Employment Standard Act*" instead of “the minimum notice required by the *Employment Standard Act*." Oudin went on to argue that the termination provision was null and void because it only dealt with notice and did not expressly provide for Oudin's entitlement to the continuation of benefit contributions during the notice period (ESA s. 61(1)(b)) and to severance pay (ESA s. 64(1)).

The Centre argued the translation error was of no consequence and that the termination provision could not reasonably be interpreted as an attempt to contract out of the ESA. The Court agreed and wrote:

The motion judge's reasons make it clear that he understood and considered the appellant's submission that — by referring only to "notice" — the clause ought to be interpreted as an attempt to contract out of all obligations under the ESA. The motion judge rejected this submission and found that there was no attempt to contract out of the ESA and that the parties had agreed that the ESA would be respected.

The decision confirms that a termination provision need not expressly provide for the employee's entitlement to benefit contributions or to severance pay.

The Court's decision on the standard of appellate review is also notable. Oudin argued the interpretation of the termination provision amounted to an extricable question of law that warranted appellate review on a correctness standard. The Centre argued that, following the Supreme Court Decision in *Sattva*,[2] a judge's interpretation of a contract, which involves consideration of the circumstances of the parties, the word of the agreement, and the legal obligations between the parties, is entitled to deference. The Court agreed with the Centre.

What is more, the Court found there was no error in the conclusion of Dunphy J. and cited with approval his conclusion: "Contracts are to be interpreted in their context and I can find no basis to interpret this employment agreement in a way that neither party reasonably expected it would be interpreted when they entered into it. There was no intent to contract out of the ESA in fact; to the contrary, the intent to apply the ESA is manifest."

The Court of Appeal's decision is welcome news for employers. It questions recent decisions in which judges have accepted strained or technical interpretations of termination provisions, often relying on the doctrine of *contra proferentem*, with a view to invalidate seemingly fair termination provisions.

[1] "BLG Wins Summary Judgment Motion for Employer in Contract Enforceability Case" for a summary of the decision: *Oudin v Le Centre Francophone de Toronto, 2015 ONSC 6494.*

[2] *Sattva Capital Corp v. Creston Moly Corp, 2014 SCC 633 at 54*.

By

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