Ambiguous termination clauses: saving provisions

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In yet another decision pertaining to the enforceability of a termination clause, the Ontario Court of Appeal has upheld a lower court holding that will require employers to take greater care in how significantly they rely on oft-utilized “saving” provisions in employment contracts.

Background

In *Rossman v. Canadian Solar Inc.,* 2019 ONCA 992, Justice James MacPherson determined that an “ambiguous” termination clause in an employment contract was unenforceable, notwithstanding the presence of a “saving” provision in the same contract designed to ensure the clause remained valid.

In 2010, Noah Rossman commenced employment as a regional sales manager with Canadian Solar Inc. and Canadian Solar Solutions Inc. (collectively, Canadian Solar), pursuant to a written employment agreement. Rossman was presented with a new employment contract when he was promoted two years later, which he signed. Both agreements contained identical termination clauses, which included the stipulation that upon termination, “**Benefits shall cease 4 weeks from the written notice**.”

Two years later when Canadian Solar terminated Rossman without cause, this singular line lay at the core of Rossman’s wrongful dismissal lawsuit.

As part of the ensuing litigation, both parties brought forth competing motions for summary judgment. While Canadian Solar requested the dismissal of the suit, Rossman sought common law damages assessed on a reasonable notice basis. He was successful, with the motions judge determining the termination clause to be unenforceable, and subsequently awarding Rossman five months’ worth of pay in lieu of notice.

The Saving Provision

As has long been established by employment law jurisprudence such as *Machtinger v. HOJ Industries Ltd.*, a termination clause that attempts to contract out of a standard

established by the *Employment Standards Act, 2000* (the Act) will be rendered void and unenforceable.

In recent years, however, employers have regularly utilized "saving provisions," designed to act as catch-all emergency valves to ensure termination clauses don't run afoul of the law. These clauses effectively operate to guarantee that an employee will receive his or her minimum statutory entitlements regardless of how a termination clause is interpreted, thus "saving" the clause from being declared a legal nullity.

In *Rossman*, the saving provision relied upon by Canadian Solar read as follows:

> "In the event that the minimum statutory requirements as at the date of termination provide for any greater right or benefit than that provided in this agreement such statutory requirements will replace the notice or payments in lieu of notice contemplated under this agreement"

Canadian Solar argued that this provision guaranteed employer compliance with the Act, and that it ensured an employee would receives his or her minimum statutory entitlements upon termination. The motions judge disagreed, finding that the termination provision itself was ambiguous and "[flew] in the face of the rest of the provision." The termination clause was found to be an "attempt to contract out of the minimum standards under the ESA by limiting benefits to four weeks regardless of the term of employment," and as such was declared unenforceable despite the presence of the provision specifically designed to "save" it.

Canadian Solar appealed the decision, asserting that the motions judge erred by holding the termination clause "void and unenforceable." As such, the matter escalated to the Court of Appeal.

Court of Appeal Decision

At the Court of Appeal, Canadian Solar attempted to rely on *Amberber v. IBM Canada Ltd.,* 2018 ONCA 571, a case in which the Court of Appeal had overturned a motion judge's holding that a termination provision was ambiguous on the basis that a termination clause should be read as a whole and not "piecemeal." Notably in *Amberber*, the Court emphasized that courts should not strain to create ambiguity in termination cases where none exists.

The Court did not accept the employer's argument, instead finding that the clause contained "genuine ambiguity," and noting that the "four-week benefits clause" did not contain "future facing" language, nor did it "express an intention to conform to the ESA." Deciding in favour of Rossman, the Court made the following key observations that employers should heed as they draft future employment contracts:

> [39] I make a final observation. Employees need to know the conditions, including entitlements, of their employment with certainty. This is especially so with respect to an employee's termination – a fragile moment of stress and uncertainty.
>
> [40] In this context, saving provisions in termination clauses cannot save employers who attempt to contract out of the ESA's minimum standards. Holding

otherwise creates the risk employers will slip sentences, like the four-week benefits clause, into employment contracts in the hope that employees will accept the terms. This outcome exploits vulnerable employees who hold unequal bargaining power in contract negotiations. Moreover, it flouts the purpose of the ESA — to protect employees and to ensure that employers treat them fairly upon termination: *Machtinger*, at pp. 1002-3.

[41] While employers are entitled to contractually amend the ESA's notice requirements, as long as they respect the minimum standards, they are not entitled to offend them. Employers must have an incentive to comply with the ESA's minimum notice requirements. They cannot be permitted to draft provisions that capitalize on the fact many employees are unaware of their legal rights and will often refrain from challenging notice provisions in court: *Machtinger*, at p. 1004. Attempting to reconcile the provisions of the Termination Clause with the benefit of hindsight runs counter to the remedial purpose of the ESA.

Takeaways

This decision should signal to employers that they can no longer rely on boilerplate "saving" provisions to act as guardians of heavy-handed, backwards-facing termination clauses that potentially limit an employee's entitlements upon termination to less than the ESA minimums.

In what amounts to a policy statement from the Court, employers should take heed that merely adding a "catch-all" saving provision will no longer excuse employers who use lazily drafted "saving" provisions to justify limiting the entitlements of employees who are often unaware of their rights upon termination.

Moving forward, employers must take note of this decision and the policy directive it stands for — and should ensure that the termination provisions they employ are clearly and fairly drafted, easily comprehendible by the average employee, and designed to operate without ambiguity in termination cases regardless of the length of service of an employee.

By

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