



What's New in HR Law

Ontario Court of Appeal Rules on Employment Termination Clause

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BOTTOM LINE

In the recent decision *Wood v. Fred Deeley Imports Ltd.*, the Ontario Court of Appeal determined that an employment termination clause in an employment contract contravened the Ontario *Employment Standards Act, 2000*, SO 2000, c 41 (the “ESA”) and was therefore unenforceable because it: (i) excluded the employer’s obligation to continue benefits during the statutory notice period; and (ii) did not satisfy the employer’s obligation to provide severance pay.

Facts: Employer terminated employee without cause and relied on the employment termination clause in the employee’s contract to limit her entitlements to notice and severance pay

Ms. Julia Wood (“Wood”) was hired by Fred Deeley Imports Ltd. (“Deeley”) as a Sales & Event Planner in April 2007. Wood received an employment contract from Deeley before she commenced working, but did not sign it until the day after she commenced working. The contract contained an employment termination clause, which provided in relevant part:

[The Company] is entitled to terminate your employment at any time without cause by providing you with 2 weeks’ notice of termination or pay in lieu thereof for each completed or partial year of employment with the Company. If the Company

terminates your employment without cause, the Company shall not be obliged to make any payments to you other than those provided for in this paragraph... The payments and notice provided for in this paragraph are inclusive of your entitlements to notice, pay in lieu of notice and severance pay pursuant to the *Employment Standards Act, 2000*.

Deeley advised Wood that her employment would be terminated without cause in August 2015. It provided her with 13 weeks' working notice, during which time Deeley continued to contribute to Wood's benefit plans, and then provided Wood with a lump sum equivalent to eight weeks' pay.

At the time of her employment termination, Wood had worked for Deeley for eight years and four months and was 48 years old. Her annual compensation, including benefits, was approximately \$100,000.

Motion Judge: Employment Contract and Termination Clause Are Enforceable

Wood commenced an action against Deeley and brought a motion for summary judgment. She argued that her entire employment contract was unenforceable. Alternatively, she argued that the termination clause in the employment contract was unenforceable.

The motion judge dismissed Wood's motion. The motion judge held that both Wood's employment contract and the termination clause in it were enforceable. However, the motion judge concluded that if he was incorrect, Wood would be entitled to reasonable notice of her employment termination equal to nine months of her salary and benefits.

Ontario Court of Appeal: Termination Clause Is Unenforceable

Wood appealed the motion judge's decision. On appeal, the Court considered the following three issues:

1. Is Wood's employment contract unenforceable because she signed it after she started working and was not provided with fresh consideration?
2. Does the termination clause contravene the ESA because it excludes Deeley's statutory obligation to make benefit contributions during the notice period and/or because it does not satisfy Deeley's statutory obligation to pay severance pay?

Did the motion judge err by fixing the period of reasonable notice at nine months?

Issue #1: Employment contract was enforceable notwithstanding that it was signed by Wood after she started working

The Court concluded that Wood's employment contract was enforceable notwithstanding that she had signed it after she started working. This was because Wood had seen a copy of the employment contract before she commenced working and the contract she signed did not differ in a material way (i.e. it did not impose any new terms of employment). The fact that Wood had

signed the employment contract after she commenced working was simply an administrative convenience, and not a basis for finding that the employment contract in its entirety was unenforceable.

Issue #2: Termination clause contravened the ESA and was therefore unenforceable

Although the Court found that Wood's employment contract was not unenforceable in its entirety, the Court concluded that the termination clause in the contract was unenforceable for two reasons.

The first reason was that the termination clause excluded Deeley's obligation under the ESA to contribute to Wood's benefit plans during the statutory notice period. The Court summarized its findings on that point as follows:

1. Wood's compensation included Deeley's contributions to two benefit plans.
2. Under sections 60 and 61 of the ESA, Deeley was required to continue to make those contributions during the notice period.
3. The termination clause's wording had the effect of excluding and therefore contracting out of that ESA requirement. This is because the termination clause gave Wood two weeks' notice of termination or pay in lieu thereof for every year or partial year of employment. It did not say anything about benefit contributions. The clause then stated that on termination, "the Company shall not be obliged to make any payments to you other than those provided for in this paragraph", and "the payments and notice provided for in this paragraph are inclusive of your entitlement to notice, pay in lieu of notice and severance pay pursuant to the [ESA]."
4. The Court found that, on its plain wording, the clause therefore excluded Deeley's obligation to contribute to Wood's benefit plans during the notice period.

The second reason was that the termination clause did not satisfy Deeley's obligation under the ESA to provide severance pay. This is because Deeley could fulfil its obligations under the termination clause in one of three ways by providing Wood with: (i) only working notice of her employment termination; (ii) only pay in lieu of notice of her employment termination; or (iii) a combination of working notice and pay in lieu thereof. Unlike statutory notice, which may be satisfied by the provision of working notice, severance must be paid. Only one of the ways Deeley could satisfy its obligations under the contract would definitely provide Wood the severance pay she was entitled to under the ESA upon her employment termination. The clause therefore permitted Deeley not to provide Wood her statutory severance pay, or to pay her less severance pay than she was entitled to under the ESA. Moreover, Wood would not have known when she signed her employment contract whether she would receive her statutory severance pay if her employment ended.

Because the termination clause in Wood's employment contract did not meet the minimum standards under the ESA, Wood was entitled to reasonable notice of her employment termination at common law.

Issue #3: Motion Judge's determination of reasonable notice entitled to deference

The Court did not interfere with the motion judge's finding that Wood was entitled to reasonable notice of her employment termination in the amount of nine months. The Court concluded that the motion judge's finding took the relevant factors into account and was within a reasonable range.

Check the Box

To limit an employee's entitlements upon employment termination to an amount other than reasonable notice at common law, employers should ensure that their employment contracts:

- Are signed by the employee before he or she starts working. While the Court in *Wood v. Fred Deeley Imports Ltd.* found that an employment contract is likely enforceable if it is provided to an employee for review before he or she starts working and not modified in any material way before the employee signs it, it is a best practice to have employees sign employment contracts before they start working;
- Clearly and unambiguously identify an employee's entitlements upon employment termination; and
- Satisfy the minimum standards in the ESA, including the requirement to continue benefits during the ESA notice period.

Prior to the Ontario Court of Appeal's decision in *Wood v. Fred Deeley Imports Ltd.*, it was somewhat unclear how the failure to address benefit continuation in a termination clause would be treated upon review by an Ontario court. Following this decision, we recommend that employers review their employment contracts to ensure they are enforceable.

Citation: *Wood v. Fred Deeley Imports Ltd.*, 2017 ONCA 158 (CanLII).

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