What's New in HR Law

Court of Appeal Finds Another Termination Clause Unenforceable

September 26, 2019

Bottom Line

In the recent case of *Andros v. Colliers Macaulay Nicolls Inc*., the Ontario Court of Appeal held that a termination clause was unenforceable, despite the fact that it explicitly referred to statutory minimums. The Court of Appeal also found that the employee was entitled to a prorated share of an annual bonus during the common law notice period even though the bonus only became payable after the expiry of the notice period.

Facts: Managing Director Terminated Without Cause

Mr. Andros had worked for Colliers, a large commercial real estate company, for eight years when, in January of 2017, the employer terminated his employment without cause.

As Managing Director, Mr. Andros worked under a written contract of employment and received both a base salary and an annual bonus. The employment contract contained the following termination clause:

> 4. The Company may terminate the employment of the Managing Director by providing the Managing Director the greater of the Managing Director's entitlement pursuant to the *Ontario Employment Standards Act* or, at the Company's sole discretion, either of the following:

a. Two (2) months working notice, in which case the Managing Director will continue to perform all of his duties and his compensation and benefits will remain unchanged during the working notice period.

b. Payment in lieu of notice in the amount equivalent of two (2) months Base Salary.

With respect to his bonus entitlement, the bonus plan stipulated that Mr. Andros was required to be an employee "in good standing" at the time that the bonus was payable in order to receive a bonus.

Upon termination, Colliers provided Mr. Andros with his minimum entitlements under the Ontario *Employment Standards Act, 2000* (the "*ESA*") in accordance with the termination clause. Mr. Andros did not meet the requirement of being an employee in good standing in February of 2018 (when the 2017 bonus became payable) and therefore Colliers did not provide Mr. Andros with any amounts for 2017 under the bonus plan.

Mr. Andros sued for wrongful dismissal, arguing that the termination clause was not enforceable and that he was entitled to reasonable notice of termination at common law. Mr. Andros further argued that he was entitled to a prorated portion of his 2017 bonus for the duration of the common law reasonable notice period.

Lower Court Decision

On summary judgement, the motion judge agreed with Mr. Andros, finding that the termination clause was not enforceable and that Mr. Andros was entitled to eight months of reasonable notice of termination. In doing so, the motion judge found that the termination clause purported to provide less than the minimum entitlements under the *ESA* by not explicitly providing for severance pay under clause 4(a) and not explicitly providing for the continuation of benefits during the statutory notice period under clause 4(b).

The motion judge also found that Mr. Andros was entitled to a prorated share of the 2017 bonus for the eight-month notice period, notwithstanding the fact that the 2017 bonus became payable in February of 2018, almost six months after the expiry of the reasonable notice period.

Ontario Court of Appeal Dismisses Appeal

Enforceability of the Termination Clause

The Ontario Court of Appeal agreed with the motion judge and found that the termination clause was unenforceable.

First, the Court of Appeal found that the termination clause distinguished between entitlements under the *ESA* and entitlements under clauses 4(a) or 4(b). The Court reasoned that "in light of the disjunctive nature of the clause, it was open to the motion judge to find that the first clause did not cast the *ESA* statutory entitlements upon clauses 4(a) and 4(b)." Therefore, clauses 4(a) and 4(b) were interpreted on their own and without regard to the earlier reference to the employee's *ESA* minimum entitlements.

Second, the Court found that the termination clause was unclear or could be interpreted in more than one way. In such cases, the Court held, the interpretation that favours the employee should be preferred.

Finally, the Court held that the reference to compensation and benefits continuing during the working notice period in clause 4(a), and the absence of any reference to compensation and benefits in clause 4(b), had the effect of contracting out of the *ESA*'s guarantee of benefit continuation during the statutory notice period. Therefore, the Court held that the termination clause was unenforceable because it purported to contract out of the *ESA.*

Entitlement to Bonus

The Court of Appeal also agreed with the motion judge with respect to bonus entitlement.

The Court held that Mr. Andros was entitled to receive a prorated share of his annual bonus, notwithstanding the fact that the eight-month notice period had expired when the 2017 bonus became payable in February of 2018. Mr. Andros was awarded prorated damages for the portion of the 2017 bonus that he earned prior to his termination, as well as a prorated portion of the 2017 bonus for the eight-month notice period.

The Court made a significant distinction between "earning" and "receiving" a bonus. The Court found that an employee may earn a bonus before it becomes payable.

Accordingly, the Court found that an employee should be compensated for any bonus amounts that were earned or would have been earned during the notice period. The Court found that "inherent unfairness" would arise if the employee did not receive a prorated share of the bonus that they had earned during the notice period, regardless of when the bonus became payable.

The Court did, however, helpfully state that it is *possible* to contract out of damages for loss of a bonus during the notice period, but that in order to do so effectively, the contract would need to be clear and unambiguous. The Court ruled that the contract at issue in this case did not meet this threshold.

Check the Box

This case adds to the complexity of the existing body of case law on the enforceability of contractual termination clauses in Ontario. This latest decision highlights the need for a careful and deliberate approach when preparing employment contracts.

The instant case does not overturn *Nemeth v. Hatch Ltd*., in which the Ontario Court of Appeal found that silence in the termination clause with respect to severance pay did not denote an intention to contract out of the *ESA.* However, the instant case demonstrates that relying on silence regarding statutory minimums can be risky. Accordingly, termination clauses should instead expressly provide for benefit continuation during the statutory notice period and any applicable severance payments.

Further, this case also suggests that bonus plans should also be drafted in a clear manner and should indicate when an employee actually "earns" a bonus. As this case highlights, a requirement that an employee be "actively employed" or be "an employee in good standing" on

the date that the bonus becomes payable will not be enough to limit damages for loss of a bonus during the notice period.

Date: August 30, 2019

Forum: Ontario Court of Appeal

Citation: *Andros v. Colliers Macaulay Nicolls Inc.,* 2019 ONCA 679

Need more information?

If you need more information about employment contracts or incentive payment plans, please contact Jessica Fay at 416-408-5566 or your regular lawyer at the firm.

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