

Termination Clause Declared Void On Appeal

In late February, the Court of Appeal for Ontario declared the termination clause in a contract of employment to be void and awarded the employee 39 weeks of notice of termination.

The case was *Wood v. Fred Deeley Imports Ltd.* and it again stresses the importance of properly worded termination provisions in employment contracts.

Employers often use written employment contracts, as they provide a level of certainty regarding the obligations of the employer and the employee. One clause in particular can potentially provide significant benefits to employers – a termination clause that limits termination entitlements to something less than common law reasonable notice of termination.

However, to be enforceable, a termination clause cannot promise less than the minimum entitlements provided by the *Employment Standards Act, 2000*. This is the statutory “floor” below which a contract cannot be validly drafted. If a court determines that a termination clause dips below that floor, the court will declare it void and the situation will revert to the scenario in which the common law implies a term in the contract requiring reasonable notice of termination – which can be quite lengthy.

Since this concept was described by the Supreme Court of Canada in the *Machtiger* case in 1992, courts have been very careful in their examination of these clauses.

In *Wood v. Fred Deeley Imports Ltd.*, the Court of Appeal continued in this vein, by declaring a termination provision to be void for excluding the payment of benefits premiums during the *Employment Standards Act* notice period. The clause provided an amount of notice or pay in lieu of notice based on years of service, stated “the Company shall not be obliged to make any payments to you other than those provided for in this paragraph” and then stated that the notice and/or pay in lieu was “inclusive of your entitlements to notice, pay in lieu of notice and severance pay pursuant to the *Employment Standards Act, 2000*.” Notice and pay in lieu of notice under the *Employment Standards Act, 2000* must include continuation of benefit premiums. However this termination clause made no mention of them and was quite definitive as to not paying anything else. Therefore the clause was void. The Court also held the clause to be void for not properly dealing with the concept of *Employment Standards Act* severance pay. The result was an employee who could have been terminated with eight (8) weeks’ notice (with benefits) and 8.3 weeks of severance pay instead being awarded 39 weeks of notice. The fact that the employer actually complied with all the requirements of the *Act*, including paying the premiums despite what the contract said, did not help the employer in the result.

If your business would like assistance in drafting employment contracts, please do not hesitate to contact Bergs Law.

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