Goodmans LLP Update

"Failsafe" Termination Clauses Are Not Necessarily Failsafe After All

In the recent decision *Andros v. Colliers Macaulay Nicolls Inc.*, the Ontario Court of Appeal considered the enforceability of a termination clause which provided two options for calculating entitlements on termination: one was a "failsafe" clause which provided the employee with the minimum requirements under the *Employment Standards Act ("ESA")*, and the other provided two months' working notice or pay in lieu of notice but was silent on other statutory entitlements. The Court of Appeal's decision is the most recent in a line of cases considering enforceability of termination clauses that purport to modify *ESA* notice periods but remain silent on other *ESA* entitlements. The decision serves as a warning to employers who wish to delineate an employee's entitlements on termination that courts are prepared to apply a more technical interpretation to "failsafe clauses," which makes careful drafting crucial for their enforceability.

Background

At issue in *Andros v. Colliers* was the enforceability of a termination clause in the employment agreement between a former employee, Demetri Andros, and his employer, Colliers Macaulay Nichols Inc. Having previously worked for Colliers before leaving for other employment, Mr. Andros was rehired by Colliers in February of 2009 and worked as a Managing Director until his employment was terminated without cause on January 19, 2017.

Under the *ESA*, Mr. Andros was entitled to eight weeks' notice or pay in lieu of notice, eight weeks' continuation of benefits, and eleven weeks' severance pay. While employees are also entitled to common law reasonable notice, which can be substantially greater than the minimum notice period required by the *ESA*, employers may limit entitlement under the common law and contract out of the *ESA* so long as a greater benefit is substituted. If a greater benefit is not substituted, contracting out of even one of the statutory entitlements will render the entire termination clause void and unenforceable.

Mr. Andros' employment contract contained the following termination provision, which provided two options for calculating entitlements on termination:

> 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.

Relying on the above termination provision, Colliers paid Mr. Andros the statutory entitlements required by the *ESA*. Unsatisfied with the statutory minimums, Mr. Andros brought an action for wrongful dismissal, claiming that the entire termination clause was unenforceable because clauses 4(a) and 4(b) failed to provide entitlement to severance or benefits, two minimum statutory entitlements under the *ESA*.

Authors

Amanda Bertucci
abertucci@goodmans.ca
416.849.6922

Lauren Butti
lbutti@goodmans.ca
416.597.6259

Joe Conforti
jconforti@goodmans.ca
416.597.4177

The authors would like to thank Megan Brooks, Student-at-law, for her assistance in writing this Update.

Colliers argued that the termination provision afforded Mr. Andros *the greater of* his entitlement pursuant to the *ESA* or clauses 4(a) or 4(b). Regardless of which entitlement was greater (under the *ESA* or under 4(a) and 4(b)), Mr. Andros would always be guaranteed his minimum statutory entitlements under the first half of the clause, which served as a "failsafe" if the rest of the termination provision fell below *ESA* requirements. Accordingly, the termination provision was not invalid since it provided at least the statutory minimum amount of pay in lieu of notice and preserved Mr. Andros' minimum *ESA* entitlements to severance and benefits.

The Court of Appeal Decision

Invalid Termination Clause

The Court of Appeal upheld the lower court's decision that the termination clause was unenforceable since it "potentially reduces benefits to which [Mr. Andros] could be entitled on termination to something less than he would be entitled to under the *ESA*." While the employer provided a greater notice period, it also contracted out of its *ESA* obligation to provide severance and benefits, rendering the entire termination clause unenforceable.

In reaching its decision, the Court of Appeal considered the termination clause in *Amberber v IBM Canada Ltd.*, which contained a clause that modified the other parts of the termination clause, making them compliant with the *ESA*. The "failsafe" clause in *Amberber*, which the Court of Appeal noted fell at the end of the termination provision, was held to be enforceable:

> In the event that the applicable provincial employment standard legislation provides you with superior entitlements upon termination of employment ("statutory entitlements") than provided for in this offer of employment, IBM shall provide you with your statutory entitlements in substitution for your rights under this offer of employment.

The Court of Appeal distinguished the failsafe clause in Mr. Andros' employment contract from the one upheld in *Amberber*, accepting the finding of the lower court that the "greater of" language in the first clause of the termination provision did not extend to the latter half of the termination provision. The word "or" was held to have isolated the first part of the clause from the latter half, requiring a choice to be made between entitlements pursuant to the *ESA* or either (a) two months' working notice with compensation or benefits or (b) two months' payment in lieu of notice. Given that the second part of the termination clause contracted out of statutory entitlements without substituting a greater benefit, the entire termination clause was unenforceable and Mr. Andros was entitled to pay in lieu of reasonable notice under the common law.

The Court of Appeal also considered the cases *Roden v. Toronto Humane Society* and *Nemeth v. Hatch Ltd.*, two cases where an employer's silence regarding certain statutory entitlements were held not to mean the employer had contracted out of *ESA* entitlements. In *Andros v. Colliers*, the Court of Appeal distinguished the termination provision from those in *Roden and Nemeth*, since the Colliers termination provision was not silent on everything but notice. Clause 4(a) specifically referred to notice and benefits, which suggests that the employer would have included references to severance and benefits in clause 4(b) had that been the parties' intention.

Having considered the lower court's interpretation of the termination clause, the Court of Appeal held that the termination clause was unenforceable because it fell below what was required under the *ESA*.

Entitlement to Damages for Loss of Bonus

The Court of Appeal also considered whether the requirement that an employee be in "good standing" at the time a bonus is paid out restricts entitlement to damages for the loss of bonus an employee would have earned during the notice period. Generally speaking, where a bonus is non-discretionary and forms an integral part of an employee's compensation, wrongful dismissal damages include the portion of the bonus earned before termination as well as what would have been earned during the reasonable notice period. Pursuant to *Paquette v. TeraGo Networks Inc.*, the requirement that a bonus recipient be "actively employed" on the date of the bonus payout does not disentitle terminated employees from claiming damages in lieu of the bonus they would have earned during the reasonable notice period. Accordingly, while parties may contract for terms that differ from what the common law provides, clear language is required to take away or limit a dismissed employee's common law rights. The Court of Appeal held that the "good standing" clause in Mr. Andros' employment contract was analogous to the "actively employed" clause in *Paquette* and did not disentitle Mr. Andros from claiming a pro-rata share of his 2017 bonus as damages.

Implications

The Court of Appeal's decision in *Andros v. Colliers* serves as an important warning to employers of the risks of drafting complex termination provisions that seek to limit common law entitlements but remain compliant with the *ESA*. The decision likely adds further uncertainty to the law since it was distinguished from cases where silence on *ESA* entitlements was determined not to be fatal to the termination clause. What has been made clear is that the interpretation of termination provisions has become a technical exercise, making the careful drafting of any failsafe provision crucial. The *Andros v. Colliers* decision also serves as a reminder of the importance of clear drafting in bonus provisions.

For further information about this case or its potential implications, please contact any member of our Employment and Labour Group.

All Updates are available at www.goodmans.ca. This Update is intended to provide general comment only and should not be relied upon as legal advice.
© Goodmans LLP, 2019.