

Employers Lose the Benefit of Termination Clauses for Failing to Include Benefits

by Justin Tetreault

Introduction

In *Machtiger v. HOJ Industries Ltd.* (1992), 91 D.L.R. (4th) 491, [1992] 1 S.C.R. 986, the Supreme Court of Canada held that a termination clause which fails to comply with minimum standards contained in employment standards legislation is not enforceable. In typical cases involving the *Machtiger* principle, the issue is whether or not the agreement provides for an adequate period of reasonable notice and/or severance for the termination of employment.

However, two recent Ontario cases demonstrate that employers must be concerned not only with providing employees with the proper length of notice, but also ensuring that employees receive their full statutory entitlements during that period.

In *Wright v. Young & Rubicam Group of Cos.*, 2012 C.L.L.C. 210-018, 2011 ONSC 4720, and *Stevens v. Sifton Properties Ltd.*, 2012 ONSC 5508, 2012 CarswellOnt

16792, the court considered two termination clauses which failed to specifically provide for the continuation of benefits during the statutory notice period. In both cases, the clauses were found to be unenforceable and the employee was provided with reasonable notice at common law, rather than the notice period contained in their contracts of employment.

The Law

Section 61(1) of the *Employment Standards Act, 2000* ("ESA") states (emphasis added):

61. An employer may terminate the employment of an employee without notice or with less notice than is required under section 57 or 58 if the employer,
- (a) pays to the employee termination pay in a lump sum equal to the amount the employee would have been entitled to receive under section 60 had the notice been given in accordance with that section; and
 - (b) continues to make whatever benefit plan contributions would be required to be made in order to maintain the benefits to which the employee would have been entitled had he or she continued to be employed during the period of notice that he or she would otherwise have been entitled to receive.

Wright v. Young & Rubicam Group of Cos.

In January 2005, John Wright joined Young and Rubicam Group of Companies as executive vice president and director of integrated marketing pursuant to a written contract of employment. The contract contained a termination clause which stated:

The employment of the Employee may be terminated by the Employee at any time on 2 weeks prior written notice (one week's notice during Probationary Term), and by the Company upon payment in lieu of notice, including severance pay as follows:

- a) during Probationary Term - one week's notice;
- b) within two years of commencement of employment - four (4) weeks Base Salary;
- c) after two and up to three years after commencement of employment - six (6) weeks' Base Salary;
- d) after three but less than five years after commencement of employment eight (8) weeks' Base Salary;
- e) five years or more and up to ten years after commencement of employment - thirteen (13) weeks' Base Salary, plus one (1) additional week of Base Salary for every year from 6-10 years of service up to a maximum of 18 weeks;
- f) after more than ten years but less than 19 years from the commencement of employment six months' Base Salary;
- g) after 19 years or more from the commencement of employment - 34 weeks' Base Salary (or eight months)

This payment will be inclusive of all notice statutory, contractual and other entitlements to compensation and statutory severance and termination pay you have in respect of the termination of your employment and no other severance, separation pay or other payments shall be made.

On February 1, 2010, or just over five years after he commenced employment with the employer, **Mr. Wright** was terminated without just cause and provided with 13 weeks of base salary, RRSP contributions, car allowance payments, parking allowance payments, and continued benefits coverage for the 13 weeks, with the exception of disability and life insurance, which were discontinued at the end of his ten week statutory notice period.

It was not disputed by Mr. Wright that his employer provided him with all payments required by the *ESA*, however, he argued that the termination clause was unenforceable because, notwithstanding the fact that his employer actually provided him with continued benefit coverage, those benefits were excluded from his termination clause, contrary to s. 61 of the *ESA*.

The court agreed. The employer argued that the termination clause did not exclude benefits, that the clause only referred to payments to be made directly to the employee, and that it was implicit that benefits would be continued in accordance with the *ESA*. The court rejected this argument out of hand, stating [at para. 16]:

I do not accept that submission. Benefits are part of the compensation... The agreement provides for payment of base salary only. Payment of base salary, if treated as inclusive of all entitlements to compensation, means that there will be no other compensation flowing to the employee -- in short, no benefits.

According to the court, the fact that the employer actually continued the employee's benefits did not change the meaning of the language used in the agreement and, as the language violated the *ESA*, the clause was struck down. As a result, the employee received 12 months' notice, rather than the 13 weeks provided for in the agreement.

Stevens v. Sifton Properties Ltd.

In *Stevens v. Sifton Properties Ltd.*, Deborah Stevens was employed by Sifton Properties Ltd. as Head Golf Professional. Her employment contract contained a termination clause which read as follows:

13. With respect to termination of employment, the following terms and conditions will apply:

- (a) The Corporation may terminate your employment for what it considers to be just cause without notice or payment in lieu of notice;
- (b) The Corporation may terminate your employment without cause at any time by providing you with the notice or payment in lieu of notice, and/or severance pay, in accordance with the Employment Standards Act of Ontario.
- (c) You agree to accept the notice or payment in lieu of notice and/or severance pay referenced in paragraph 13(b) herein, in satisfaction of all claims and demands against the Corporation which may arise out of statute or common law with respect to the termination of your employment with the Corporation.

As this case followed the decision in *Wright*, Ms. Stevens argued that the termination clause was unenforceable as it treated her termination and severance pay as her entire entitlement and failed to provide her with continued benefits during her *ESA* notice period.

After considering *Wright*, the court agreed, writing [at paras. 64-5]:

*The failing of the particular termination provisions in the case before me is that they attempt to "draw the circle" of employee rights and entitlements on termination with an all-encompassing specificity that results in the effective and impermissible exclusion and denial of the benefit continuation rights mandated by the legislation. This is what puts paragraph 13 offside, and requires the "termination provision package" of paragraph 13 to be regarded as null and void, in accordance with the policy considerations and directive outlined by the Supreme Court of Canada in *Machtiger*.*

*In particular, employers should be provided with incentive to ensure that their contracts comply with all aspects of the employment standards legislation, including adequate notice (or pay in lieu thereof) and mandated benefit continuation. As emphasized by Justice Low in *Wright*, supra, an employer's voluntary provision of additional benefits after the fact does not alter the reality that the employment contract drafted by the employer is contrary to law.*

As a result, the court held that Ms. Stevens was entitled to reasonable notice at common law.

Conclusion

These cases demonstrate the importance of employers being aware of their employees' entitlements under the *ESA* and ensuring that their company's employment contracts comply. If a termination clause violates the *ESA*, or has the potential of violating the *ESA*, it will be found void, even if the company provides the employee with their full statutory entitlements. In particular, employers should ensure that any without cause termination clause makes clear that employees will be provided with continued benefit coverage for the duration of their statutory notice period.