COURT OF APPEAL FOR ONTARIO

CITATION: Amberber v. IBM Canada Ltd., 2018 ONCA 571
DATE: 20180622
DOCKET: C64633

Doherty and Pepall JJ.A. and Gray J. (*ad hoc*)

BETWEEN

Noah Amberber

Plaintiff
(Respondent/Appellant by Cross-Appeal)

and

IBM Canada Ltd.

Defendant
(Appellant/Respondent by Cross-Appeal)

Jennifer Dolman and Lindsay Rauccio, for the appellant

Paul J. Willetts and Andrew N. Vey, for the respondent

Heard: April 26, 2018

On appeal from the judgment of Justice Pamela L. Hebner of the Superior Court of Justice dated October 30, 2017 with reasons reported at 2017 ONSC 6470.

Gray J. (*ad hoc*):

[1] The issue in this case is the enforceability of a termination clause in a written contract of employment. On a motion for summary judgment brought by the employer, the motion judge held that the termination clause was ambiguous,

and did not clearly set out an intention to deprive the respondent of his entitlement to damages at common law. She held the clause to be unenforceable and dismissed the motion. The employer, IBM, appeals.

[2] For the reasons that follow, I would allow the appeal.

A. FACTUAL BACKGROUND

[3] The respondent, Mr. Amberber, became employed by IBM on March 30, 2015. He had previously been employed by an IBM customer, “Team Detroit”, in the United States. Upon his hiring by IBM, Mr. Amberber’s start date of September 25, 2000 with Team Detroit was recognized for most purposes, including severance under the termination provision of the contract of employment entered into between the parties.

[4] Mr. Amberber was advised on April 19, 2016 that his employment with IBM would be terminated, without cause, effective July 8, 2016. Mr. Amberber continued working for IBM until July 8, 2016. His salary as of the date of termination was $65,507 per year.

[5] During the period of Mr. Amberber’s working notice, between April 19, 2016 and July 8, 2016, he continued to receive benefits coverage and pension contributions from IBM. In addition to the working notice, for which he was paid, Mr. Amberber received $24,121.59 as a termination payment, which was equivalent to 19.4 weeks of salary. He actually received $22,675.50 initially, and

subsequently received an additional $1,446.09 after the litigation had been commenced.

[6] When Mr. Amberber was hired by IBM, he was subject to a written contract of employment, which included the following provisions:

> SERVICE REFERENCE DATE
>
> Your Service Reference Date (SRD) is 09/25/2000, which includes your previous service with Team Detroit. Your SRD will be used to determine vacation entitlement, retirement eligibility, entitlements upon termination of employment, eligibility for Short Term Disability benefit payments, eligibility for the Quarter Century Luncheon, eligibility for IBM's Stock/RSU equity programs, and eligibility for a Retirement Event/Gift.
>
> TERMINATION OF EMPLOYMENT
>
> If you are terminated by IBM other than for cause, IBM will provide you with notice or a separation payment in lieu of notice of termination equal to the greater of (a) one (1) month of your current annual base salary or (b) one week of your current annual base salary, for each completed six months worked from your IBM service reference date to a maximum of twelve (12) months of your annual base salary. This payment includes any and all termination notice pay, and severance payments you may be entitled to under provincial employment standards legislation and Common Law. Any separation payment will be subject to applicable statutory deductions. In addition, you will be entitled to benefit continuation for the minimum notice period under applicable provincial employment standard legislation. 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.

[7] By Statement of Claim issued on August 16, 2016, Mr. Amberber claimed an entitlement to pay in lieu of notice at common law based upon a notice period of 16 months.

B. PROCEEDINGS BEFORE THE MOTION JUDGE

[8] IBM brought a motion for summary judgment, contending that Mr. Amberber's claim for damages at common law was precluded by the termination clause in the contract of employment. Mr. Amberber advanced three arguments in support of his position that the termination clause is not enforceable:

> (a) the termination clause violates, or potentially violates, the minimum requirements of the *Employment Standards Act, 2000*, S.O. 2000, c.41, as amended (the "ESA");
>
> (b) the termination clause fails to rebut the presumption at common law that the employee is entitled to reasonable notice of termination; and
>
> (c) IBM failed to comply with the requirements of the termination clause, and is not entitled to rely on it.

[9] The motion judge rejected the first and third arguments, but accepted the second. She declared that the termination provision is ambiguous, that it fails to rebut the common law presumption of reasonable notice, and that Mr. Amberber is entitled to damages at common law. She remained seized of the issues of the applicable reasonable notice period and damages.

[10] With respect to the first argument, the motion judge held that the termination clause does not violate the minimum requirements of the ESA. She held that the last sentence of the termination clause, which she termed the "failsafe" provision, ensures that a terminated employee receives what he or she is entitled to under the ESA. Accordingly, it cannot be said that the clause violates, or potentially violates, the ESA.

[11] The motion judge also rejected the third argument, which was to the effect that IBM had failed to comply with the termination clause as written, by providing only $22,675.50 as a termination payment instead of the required amount of $24,121.59, and IBM's subsequent payment of $1,446.09 did not cure the breach. The motion judge held that the initial payment was a simple error that was subsequently corrected, and was not sufficient to constitute a breach of the agreement. Mr. Amberber does not challenge the motion judge's conclusion in this respect on appeal.

[12] On the second argument, the motion judge gave effect to Mr. Amberber's position.

[13] The motion judge effectively held that the termination clause consists of three parts: the "options provision"; the "inclusive payment provision"; and the "failsafe provision" as follows:

> Options Provision
>
> If you are terminated by IBM other than for cause, IBM will provide you with notice or a separation payment in lieu of notice of termination equal to the greater of (a) one (1) month of your current annual base salary or (b) one week of your current annual base salary, for each completed six months worked from your IBM service reference date to a maximum of twelve (12) months of your annual base salary.
>
> Inclusive Payment Provision
>
> This payment includes any and all termination notice pay, and severance payments you may be entitled to under provincial employment standards legislation and Common Law. Any separation payment will be subject to applicable statutory deductions. In addition, you will be entitled to benefit continuation for the minimum notice period under applicable provincial employment standard legislation.
>
> Failsafe Provision
>
> 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.

[14] At para. 36 of her reasons, the motion judge noted that the inclusive payment provision immediately follows the options provision. She stated: "Clearly, the inclusive payment provision applies to the first part."

[15] The motion judge then noted that the failsafe provision follows the inclusive payment provision, but the inclusive payment provision is not repeated after the failsafe provision. At para. 38 of her reasons, she stated:

> The inclusive payment provision is not repeated. In my view, it is not clear from a reading of the clause that the inclusive payment provision was meant to apply to the failsafe provision. If that were the case, then the inclusive payment provision could just as easily have been included at the end of the paragraph and could have just as easily been specified to apply to both scenarios.

[16] At para. 39 of her reasons, the motion judge referred to the principle that any intention to rebut common law reasonable notice requirements must be clear in order to be enforceable, and any ambiguity is to be resolved in favour of the employee. She referred in this respect to the judgment of Stinson J. in *Singh v. Qualified Metal Fabricators Ltd.* (2016), 33 C.C.E.L. (4th) 308 (Ont. S.C.J.).

[17] The motion judge's conclusion, at para. 40 of her reasons, was as follows:

> In the case at hand, IBM could easily have drafted a termination clause that clearly excluded the common law notice entitlement in both the options provision scenario and the failsafe provision scenario. In my view, the clause drafted is ambiguous. It is not clear that the exclusion of the common law notice entitlement applies to the failsafe provision scenario. As in *Singh*¸ the ambiguity must be construed against the employer.

C. ARGUMENTS ON APPEAL

(1) IBM's Appeal

[18] On appeal, IBM seeks to overturn the motion judge's conclusion that the termination clause is ambiguous and does not clearly exclude an entitlement to damages at common law.

[19] IBM submits that the motion judge erred in failing to consider the termination clause as a whole. Rather, she artificially bifurcated the clause, and created an ambiguity that does not reasonably exist. IBM submits that the motion judge erred by disregarding ordinary principles of contract interpretation and arrived at an unreasonable interpretation of the clause.

[20] IBM acknowledges that to some extent, employment contracts are to be interpreted differently than ordinary commercial contracts. In interpreting an employment contract, the court must be cognizant of the fact that, generally speaking, employees are in a weaker bargaining position than the employer, and, as is the case here, an employment contract is often drafted by the employer, with the result that the *contra proferentem* principle applies.

[21] However, IBM submits that these principles do not assist an employee if the contract, on any reasonable construction, is not ambiguous. If the contract is not ambiguous, it must be given its full effect. The ordinary principles of contract interpretation must be applied in order to determine whether there is an ambiguity.

[22] IBM submits that the termination clause cannot be read as if it were two or three separate provisions. Rather, it is a single clause and must be interpreted as a whole.

[23] IBM submits that if the clause is read as a whole, as it must be, an employee is entitled to notice and/or pay in lieu of notice in accordance with a

specified formula which satisfies the employee's statutory and common law entitlements. If the statutory amount is greater, the employee will get that amount instead of that provided by the formula, but not damages at common law.

[24] IBM submits that an ambiguity does not arise simply because there may be two competing interpretations of an agreement. An ambiguity exists only where there is genuine uncertainty as to which of two meanings applies, or that there are two plausible or reasonable interpretations.

[25] IBM submits that the motion judge's finding of ambiguity was based on where the inclusive payment provision is positioned within the termination clause. Because of where it is placed, she held that it is not clear that it was intended to apply to the amounts that may be required to be paid by the failsafe provision. She held that it would have been clearer if the options provision had been repeated after the failsafe provision, or it had simply been moved to the end of the clause.

[26] IBM submits that the motion judge's reading of the termination clause is strained and artificial, and is not reasonable or plausible.

[27] Mr. Amberber submits that the motion judge was correct in holding that the termination clause is ambiguous, and does not clearly exclude any claim for common law damages.

[28] Mr. Amberber submits that the motion judge's task was to interpret a contract of employment, and her conclusion is one of mixed fact and law.

Accordingly, pursuant to the reasons of the Supreme Court of Canada in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, the motion judge's interpretation is reviewable on a standard of palpable and overriding error, unless an extricable question of law is identified. The issue in this case was a pure issue of interpretation in light of the surrounding circumstances, and thus the motion judge's interpretation is reviewable only on a standard of palpable and overriding error.

[29] Mr. Amberber submits that there is a common law presumption that employees can be dismissed without cause only upon the provision of reasonable notice or pay in lieu of such notice. This presumption can only be rebutted where an employment agreement specifies some other period of notice or pay in lieu, and where there is a high level of clarity that this is the intention, using clear and unambiguous language. Where a termination provision can reasonably be interpreted in more than one way, the ambiguity will be resolved by adopting the interpretation that gives the greater right or benefit to the employee.

[30] Mr. Amberber submits that the termination clause is bifurcated, and it limits an employee's common law entitlements in certain circumstances but not in others.

[31] Mr. Amberber submits that the motion judge, contrary to the submission of IBM, did interpret the termination clause as a whole. By including the inclusive

provision after the options provision, it seems clear that it is intended to apply only to the options provision. By placing the failsafe provision after the inclusive provision, it is entirely unclear as to whether the inclusive provision is intended to apply where the failsafe provision is operative. As required by well-understood legal principles, any ambiguity is to be resolved against IBM.

[32] That being the case, it is clear that the termination clause, as drafted, does not exclude Mr. Amberber's entitlement to common law damages in unambiguous language. Thus, he is properly entitled to maintain his claim for common law damages.

(2) Mr. Amberber's Cross-Appeal

[33] By way of a purported cross-appeal, Mr. Amberber seeks to overturn the motion judge's conclusion that the termination clause does not violate the ESA. He argues that the failsafe provision operates in the same fashion as a severability clause which, as held by this court in *North v. Metaswitch Networks Corp.* 2017 ONCA 790, 417 D.L.R. (4th) 429*,* is ineffective to make lawful a provision that is void on account of its conflict with the ESA.

[34] I do not regard Mr. Amberber's argument as the proper subject of a cross-appeal. In my view, it is simply another argument that may serve to uphold the decision of the motion judge, and it does not require a cross-appeal in order to be pursued. Be that as it may, there is no dispute that Mr. Amberber's argument is properly raised, and must be considered by this court.

[35] As far as Mr. Amberber's alternate argument, or cross-appeal, is concerned, IBM submits that the motion judge's decision is correct. IBM submits that there is a fundamental difference between a severability clause, held to be inoperative in *Metaswitch*, and the failsafe provision in issue here.

[36] IBM submits that a severability clause seeks to delete from the contract a clause that is unlawful on account of its failure to comply with the ESA. The failsafe clause in this agreement does not seek to sever any provision of the agreement. Rather, it ensures that every part of the agreement will comply with the ESA. The particular failsafe clause in this agreement ensures that every part of the termination provision will comply with the ESA.

[37] Mr. Amberber submits that the effect of the failsafe provision is to attempt to render lawful what is clearly unlawful. Viewed in this light, this situation is exactly the same as that dealt with by this court in *Metaswitch*. While the wording is different, the effect of the failsafe provision is exactly the same as the effect of the severability clause that was held by this court to be ineffective in *Metaswitch*.

[38] For the same policy reasons discussed in *Metaswitch*, any attempt to legalize what is clearly unlawful in a contract of employment must be rendered ineffective.

D. APPLICABLE LEGAL PRINCIPLES

(1) The ESA

[39] The *Employment Standards Act, 2000* has had a marked impact on employment law. Particularly, it has had an impact on the issue of damages payable on termination of employment. The relevant provisions of the ESA are attached as an Appendix to these reasons.

[40] The impact of the statutory minimum provisions on termination of employment at common law was considered by the Supreme Court of Canada in *Machtinger v. HOJ Industries Ltd.,* [1992] 1 S.C.R. 986. In that case, the Supreme Court held that a clause in an employment contract that provided considerably less to a dismissed employee than the minimum required by the ESA was void. In the result, the employee was entitled to damages calculated in accordance with common law principles, and the void provision in the employment contract could not be used as a yardstick to determine what was reasonable.

[41] However, Iacobucci J. for the majority made it clear that the parties are free to contract for something less than what might be awarded at common law, provided that the minimum standards in the ESA are observed. At pp. 1004 and 1005, he stated:

> Absent considerations of unconscionability, an employer can readily make contracts with his or her employees which referentially incorporate the minimum notice

> periods set out in the *Act* or otherwise take into account later changes to the *Act* or to the employees' notice entitlement under the *Act*. Such contractual notice provisions would be sufficient to displace the presumption that the contract is terminable without cause only on reasonable notice.

(2) Interpreting Employment Agreements

[42] Since *Machtinger*, there have been a myriad of cases in which various courts, including this court, other appellate courts across Canada, and the Superior Court of Justice, have considered whether termination clauses are compliant with the ESA and whether they unambiguously exclude claims for common law damages. It is fair to say that not all of the cases can be easily reconciled.

[43] It is generally accepted that employment contracts are to be interpreted somewhat differently from other contracts: *Wood v. Fred Deeley Imports Ltd.*, 2017 ONCA 158, 134 O.R. (3d) 481, at paras. 26-28. This is so particularly because employees usually have less bargaining power than employers. Where a termination clause can reasonably be interpreted in more than one way, the interpretation that favours the employee should be preferred: *Wood*, at para. 28.

[44] Furthermore, where an employment contract is prepared by the employer, on a more or less take-it-or-leave-it basis, the ordinary *contra proferentem* rule would require that, in the case of ambiguity, the more favourable interpretation should be given to the non-drafting party: *Consolidated-Bathurst Export Ltd. v.*

Mutual Boiler and Machinery Insurance Co., [1980] 1 S.C.R. 888, at pp. 899 and 900.

[45] The *contra proferentem* principle applies only where there is a genuine ambiguity: *Oudin v. Le Centre Francaphone de Toronto*, 2015 ONSC 6494, 27 C.C.E.L. (4th) 86; aff'd 2016 ONCA 514, 34 C.C.E.L. (4th) 271, leave to appeal refused [2016] S.C.C.A No.391. As stated by Dunphy J. at para. 53, "*Contra proferentem* is not a means of finding the *least favourable* interpretation to the employee with a view to invalidating the contract in whole or in part." Also see Geoff R. Hall, *Canadian Contractual Interpretation Law*, 3rd ed. (LexisNexis Canada: 2016), at p. 80, where the author states:

> Ambiguity means something more than the mere existence of competing interpretations, otherwise parol evidence would be admitted in virtually every case. Thus the question of whether there is ambiguity is to be determined by an objective evaluation of whether there are two or more reasonable interpretations.

[46] While the intention to exclude damages at common law must be clear, no particular form of words is required in order to achieve that result: *Clarke v. Insight Components (Canada) Inc.*, 2008 ONCA 837, 243 O.A.C. 196; and *Nemeth v. Hatch Ltd.*, 2018 ONCA 7, 418 D.L.R. (4th) 542.

(3) Contractual Interpretation Generally

[47] Contractual interpretation is now considered to be a question of mixed fact and law, to be reviewed on a standard of palpable and overriding error: *Sattva*, at

para. 50; and *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 S.C.R. 23, at para. 21. An exception exists in the case of a standard form contract, the interpretation of which is to be reviewed on a standard of correctness: *Ledcor*, at para. 4.

[48] In *Sattva*, Rothstein J. noted that it may be possible to identify extricable questions of law, which would be reviewed on a correctness standard. At para. 53, he stated, "[l]egal errors made in the course of contractual interpretation include 'the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor.'" At para. 54, he stated that courts should be cautious in identifying extricable questions of law.

[49] At para. 57, he emphasized that while surrounding circumstances will be considered in interpreting a contract, they must not overwhelm the words of the agreement. He stated:

> While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement. The goal of examining such evidence is to deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract. The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract. While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement. [Citations omitted.]

[50] An important canon of construction is that a contract must be interpreted as a whole, and not piecemeal. As stated by Doherty J.A. in *Dumbrell v. The Regional Group of Companies Inc.* 2007 ONCA 59, 85 O.R. (3d) 616, at para. 53, "[t]he text of the written agreement must be read as a whole and in the context of the circumstances as they existed when the agreement was created." See also La Forest and McLachlin JJ. in *BG Checo International Ltd. v. British Columbia Hydro and Power Authority*, [1993] 1 S.C.R. 12, at pp. 23 and 24, wherein they wrote, "[i]t is a cardinal rule of the construction of contracts that the various parts of the contract are to be interpreted in the context of the intentions of the parties as evident from the contract as whole."

E. THE PRINCIPLES APPLIED

[51] For ease of reference, I will reproduce the termination clause again:

> TERMINATION OF EMPLOYMENT
>
> If you are terminated by IBM other than for cause, IBM will provide you with notice or a separation payment in lieu of notice of termination equal to the greater of (a) one (1) month of your current annual base salary or (b) one week of your current annual base salary, for each completed six months worked from your IBM service reference date to a maximum of twelve (12) months of your annual base salary. This payment includes any and all termination notice pay, and severance payments you may be entitled to under provincial employment standards legislation and Common Law. Any separation payment will be subject to applicable statutory deductions. In addition, you will be entitled to benefit continuation for the minimum notice period under applicable provincial employment standard legislation. 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.

[52] I will first address Mr. Amberber's alternate argument, which he characterizes as a cross-appeal, that the termination clause violates the ESA and is not saved by the last sentence of the clause. Mr. Amberber likens that sentence to a severability clause, held to be ineffective by this court in *Metaswitch, supra*. I disagree.

[53] In my view, the motion judge was correct in holding that the last sentence of the clause is effective to ensure that a terminated employee receives what he or she is entitled to under the ESA. As Iacobucci J. stated in *Machtinger,* at pp. 1004-05, employers can readily make contracts with employees which referentially incorporate the minimum notice requirements of employment standards legislation, or otherwise take into account later changes to such acts. That being the case, the clause as a whole does not violate the ESA.

[54] The sentence in issue here is not analogous to a severability clause. It does not purport to sever any part of the termination provision. Rather, it ensures that any portion of the termination clause that falls short of the ESA must be read up so that it complies with the ESA.

[55] In the final analysis, there is no violation of the ESA, and the clause is not unlawful on that account.

[56] I will now move to the issue on which the motion judge found in favour of Mr. Amberber. She held that the clause as a whole is ambiguous, and does not exclude Mr. Amberber's entitlement to damages at common law. She did so by construing the "inclusive payment" provision as applying only to the first part of the clause, which she characterized as the "options provision". Because the inclusive payment provision is not repeated after the concluding sentence of the clause, (the "failsafe" provision) she held that it is not clear that the inclusive payment provision is meant to apply to the failsafe provision. Thus, according to the motion judge, it is ambiguous as to whether, in a case that is governed by the failsafe provision (that is, where the employee is guaranteed the minimum standard under the ESA), the parties intended to exclude entitlements at common law.

[57] In the result, the motion judge held that the provision is unenforceable, and that Mr. Amberber is entitled to damages at common law rather than the amounts required to be paid pursuant to the termination clause.

[58] With respect, I am unable to agree with the motion judge's reasoning or the result.

[59] The fundamental error made by the motion judge is that she subdivided the termination clause into what she regarded as its constituent parts and interpreted them individually. In my view, the individual sentences of the clause

cannot be interpreted on their own. Rather, the clause must be interpreted as a whole.

[60] When read as a whole, there can be no doubt as to the clause's meaning.

[61] The parties have set out a formula for calculating the amounts owing to a terminated employee. The amounts owing include any entitlement under employment standards legislation and the common law. To the extent that employment standards legislation provides for something superior, the employee will receive the statutory entitlement.

[62] To the extent that the motion judge relied on the placement of the inclusive payment provision within the clause, she erred. By holding that because it was placed between the options provision and the failsafe provision it only applies to the options provision, she failed to read the clause as a whole. The failsafe provision itself modifies the options provision, and ensures that it is read up so that it complies with the ESA. To hold that the inclusive payment provision applies to only one part of the clause, but not the other, gives the clause as a whole a strained and unreasonable interpretation. In fact, if the inclusive payment provision were repeated at the end of the clause, as suggested by the motion judge, it would likely do little more than create confusion.

[63] In my view, there is no ambiguity. As stated by Laskin J.A. in *Chilton v. Co-Operators General Insurance Co.* (1997), 32 O.R. 161 (C.A.), at p. 169, "[t]he

court should not strain to create an ambiguity where none exists." In my view, the motion judge strained to create an ambiguity where none exists.

[64] As stated by this court in *Deslaurier Custom Cabinets Inc. v. 1728106 Ontario Inc.,* 2017 ONCA 293, 135 O.R. (3d) 241, at para. 68, "[t]he goals of certainty, clarity and consistency in the law dictate that missteps in the identification of controlling legal principles be characterized as questions of law subject to correctness review." Failure to read a disputed contract as a whole is a question of law that is extricable from a finding of mixed fact and law: *Deslaurier*, at para. 75.

[65] The motion judge failed to apply well-established principles of construction. She did not interpret the termination clause as a whole; she strained to find an ambiguity where none reasonably exists; and she deviated significantly from the text of the clause. In so doing, she committed extricable errors of law that are reviewable on a correctness standard.

[66] It is clear that IBM complied with the termination clause, and in so doing also complied with the ESA. Mr. Amberber is entitled to nothing more.

F. DISPOSITION

[67] For the foregoing reasons, I would allow the appeal and dismiss the action.

[68] I would award IBM costs of the appeal in the agreed-upon amount of $8,000, inclusive of disbursements and applicable taxes. The motion judge

awarded Mr. Amberber $12,500 in costs for the motion. I would reverse that order and award IBM costs of the motion in the amount of $12,500, inclusive of disbursements and applicable taxes.

Released: June22, 2018

"D.K. Gray J. (*ad hoc*)"
"I agree Doherty J.A."
"I agree S.E. Pepall J.A."

APPENDIX

Excerpts from the *Employment Standards Act, 2000*, S.O. 2000, c. 41

5 (1) Subject to subsection (2), no employer or agent of an employer and no employee or agent of an employee shall contract out of or waive an employment standard and any such contracting out or waiver is void.

(2) If one or more provisions in an employment contract or in another Act that directly relate to the same subject matter as an employment standard provide a greater benefit to an employee than the employment standard, the provision or provisions in the contract or Act apply and the employment standard does not apply.

54 No employer shall terminate the employment of an employee who has been continuously employed for three months or more unless the employer,

(a) has given to the employee written notice of termination in accordance with section 57 or 58 and the notice has expired; or

(b) has complied with section 61.

57 The notice of termination under section 54 shall be given,

(a) at least one week before the termination, if the employee's period of employment is less than one year;

(b) at least two weeks before the termination, if the employee's period of employment is one year or more and fewer than three years;

(c) at least three weeks before the termination, if the employee's period of employment is three years or more and fewer than four years;

(d) at least four weeks before the termination, if the employee's period of employment is four years or more and fewer than five years;

(e) at least five weeks before the termination, if the employee's period of employment is five years or more and fewer than six years;

(f) at least six weeks before the termination, if the employee's period of employment is six years or more and fewer than seven years;

(g) at least seven weeks before the termination, if the employee's period of employment is seven years or more and fewer than eight years; or

(h) at least eight weeks before the termination, if the employee's period of employment is eight years or more.

58 (1) Despite section 57, the employer shall give notice of termination in the prescribed manner and for the prescribed period if the employer terminates the employment of 50 or more employees at the employer's establishment in the same four-week period.

60 (1) During a notice period under section 57 or 58, the employer,

(a) shall not reduce the employee's wage rate or alter any other term or condition of employment;

(b) shall in each week pay the employee the wages the employee is entitled to receive, which in no case shall be less than his or her regular wages for a regular work week; and

(c) shall continue to make whatever benefit plan contributions would be required to be made in order to maintain the employee's benefits under the plan until the end of the notice period.

61 (1) 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 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.

63 (1) An employer severs the employment of an employee if,

(a) the employer dismisses the employee or otherwise refuses or is unable to continue employing the employee;

(b) the employer constructively dismisses the employee and the employee resigns from his or her employment in response within a reasonable period;

(c) the employer lays the employee off for 35 weeks or more in any period of 52 consecutive weeks;

(d) the employer lays the employee off because of a permanent discontinuance of all of the employer's business at an establishment; or

(e) the employer gives the employee notice of termination in accordance with section 57 or 58, the employee gives the employer written notice at least two weeks before resigning and the employee's notice of resignation is to take effect during the statutory notice period.

64 (1) An employer who severs an employment relationship with an employee shall pay severance pay to the employee if the employee was employed by the employer for five years or more and,

(a) the severance occurred because of a permanent discontinuance of all or part of the employer's business at an establishment and the employee is one of 50 or more employees who have their employment relationship severed within a six-month period as a result; or

(b) the employer has a payroll of $2.5 million or more.

65 (1) Severance pay under this section shall be calculated by multiplying the employee's regular wages for a regular work week by the sum of,

(a) the number of years of employment the employee has completed; and

(b) the number of months of employment not included in clause (a) that the employee has completed, divided by 12.

****

(5) An employee's severance pay entitlement under this section shall not exceed an amount equal to the employee's regular wages for a regular work week for 26 weeks.

***

(7) Subject to subsection (8), severance pay under this section is in addition to any other amount to which an employee is entitled under this Act or his or her employment contract.

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(8) Only the following set-offs and deductions may be made in calculating severance pay under this section:

1. Supplementary unemployment benefits the employee receives after his or her employment is severed and before the severance pay becomes payable to the employee.

2. An amount paid to an employee for loss of employment under a provision of the employment contract if it is based upon length of employment, length of service or seniority.

3. Severance pay that was previously paid to the employee under this Act, a predecessor of this Act or a contractual provision described in paragraph 2.

66 (1) An employer may pay severance pay to an employee who is entitled to it in instalments with the agreement of the employee or the approval of the Director.

(2) The period over which instalments can be paid must not exceed three years.

(3) If the employer fails to make an instalment payment, all severance pay not previously paid shall become payable immediately.