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Employers Emerge Victorious in Rule 21 Motion Regarding the Enforceability of an ESA-Minimum Termination Clause

In *Bertsch v Datastealth Inc,* the Superior Court confirmed the enforceability of an *ESA*-minimum termination clause that excluded common law notice periods. This decision, resulting from a Rule 21 motion to strike, marks a welcome shift for employers in the court's longstanding reluctance to uphold termination provisions in employment contracts.

Facts

After 8.5 months of employment with Datastealth Inc. ("Datastealth"), Mr. Bertsch was terminated without cause. Pursuant to the terms of his employment contract, Mr. Bertsch's termination entitlements were limited to minimum amounts under the *Employment Standards Act*, *2000* ("ESA"). The contract sought to oust any entitlement to common law reasonable notice. Mr. Bertsch was given four weeks' pay in lieu of notice, which was higher than his entitlements under the ESA and his contract.

The employment contract contained the following termination provision:

> 5. Termination of Employment by the Company: If your employment is terminated with or without cause, you will be provided with only the minimum payments and entitlements, if any, owed to you under the [ESA] and its Regulations,… You understand and agree that, in accordance with the ESA, there are circumstances in which you would have no entitlement to notice of termination, termination pay, severance pay or benefit continuation.
>
> You understand and agree that compliance with the minimum requirements of the ESA satisfies any common law or contractual entitlement you may have to notice of termination of your employment, or pay in lieu thereof…
>
> 11.(a) If any of your entitlements under this Agreement are, or could be, less than your minimum entitlements owning under the [ESA]… you shall instead receive your

> minimum entitlements under the [ESA]…

Mr. Bersch filed a claim against Datastealth for wrongful dismissal of his employment. He argued the termination provisions within his employment contract violated the ESA for failing to specify that statutory termination pay and severance pay (where applicable) would be provided in the event of a termination without cause. Mr. Bersch sought damages for the common law reasonable notice period.

Datastealth moved to have the issue of contract enforceability determined on a Rule 21 motion, as an issue of law that could be settled without a trial, given there were no facts in dispute.

The Court Upheld the Termination Clause

The Court held that a Rule 21 motion was appropriate in this case, and can be relied upon to resolve issues of law relating to contractual interpretation. The Court noted that the use of Rule 21 in a situation such as this one is an efficient use of the Court's processes, and will result in a useful, efficient, and just outcome.

Ultimately, the Court agreed with Datastealth that the terms of the contract were unambiguous, and that there is no reasonable interpretation of the provisions which result in a violation of the minimum requirements of the ESA and its regulations. The claim by Mr. Bertsch was struck without leave to amend.

Key Takeaways

Rule 21 motions can be an effective tool for employers to resolve narrow legal issues pertaining to termination clauses in an employment contract.

Historically, employers have cautiously avoided Rule 21 motions due to a significant body of case law finding termination provisions in employment agreements unenforceable. *Bertsch* is a reminder that where there are no clear enforceability issues with the termination language, employers can bring Rule 21 motions to oust frivolous claims seeking wrongful dismissal damages. This is an efficient and cost-effective way to deal with narrow contractual disputes.

The Court is open to upholding an ESA-minimum termination clause, where drafted appropriately and clearly.

Bertsch is one of the few decisions in the past five years to enforce termination clauses in employment agreements. Despite Mr. Bertsch's attempts to find ambiguity in the contract language, the Court was satisfied that there was no reasonable alternative interpretation of the provisions that would violate the ESA.

Conclusion

Bertsch is a significant win for employers. Not only has the Court shown a willingness to uphold an ESA-minimum termination clause, but also to do so on a Rule 21 motion.

Employers now have a road map to drafting enforceable termination clauses. It is recommended to review and revise termination clauses annually to incorporate necessary updates resulting from case law. Now that we are in promotion and bonus season, it is a good time to review and update any outdated contracts.