
ONTARIO DECISION HIGHLIGHTS IMPORTANCE OF EMPLOYMENT CONTRACTS

*By Barry W. Kwasniewski**

A. INTRODUCTION

The recent Ontario Superior Court of Justice decision in *Bernier v. Nygard International Partnership*¹ (“*Bernier*”) highlights the importance of properly drafted written employment contracts. As will be discussed in this Bulletin, the results of this decision show why employers, including charities and not-for-profits, should have employment contracts reviewed, both to ensure the contracts are compliant with the law, and to protect employers from unexpected liabilities in the event of employee terminations.

B. THE FACTS

Diane Bernier, the plaintiff, was fifty four years of age and had worked for Nygard International Partnership (“Nygard”), the defendant, for thirteen years before she was terminated without cause on December 4, 2012. Ms. Bernier was a managerial employee, and while holding this position, she had earned a base salary, annual bonus, car allowance, health and dental benefits, and employer contributions to disability and life insurance coverage. In the last four years of her employment before she was terminated, she had earned a substantial compensation package in excess of \$190,000 annually.

When Nygard terminated Ms. Bernier on December 4th 2012, she received base pay and benefits for 21.3 weeks until April 30, 2013. She later received her bonus for the year 2012 of \$45,840. Nygard’s payments were based on its calculation of the minimum pay in lieu of notice and severance pay standards as

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¹ *Bernier v Nygard International Partnership* [2013] OJ No 3091, 2013 ONSC 4578, (“*Bernier*”).

prescribed in the *Employment Standards Act, 2000* (“*ESA*”). Unwilling to accept that amount, the plaintiff claimed that she was entitled to a significantly higher amount of compensation in accordance with her legal rights at common law. Ms. Bernier sued Nygard and filed for summary judgment² in order to receive the compensation she believed was owed. In response, Nygard argued that the plaintiff had received the proper compensation and that a full trial was required to debate the issue further.

C. THE LEGAL ISSUES AND THE DECISION

Nygard took the position that there were issues to be tried, objected to the plaintiff’s request for summary judgment and raised four questions:

- 1) Was the plaintiff’s common law entitlement to reasonable notice modified by a contract?
- 2) Did the employer’s general policy about limited termination notice periods displace reasonable notice at common law?
- 3) Should the reasonable notice period compensation include bonuses, in addition to base pay and benefits?
- 4) Did the plaintiff reasonably mitigate her losses by searching for new employment?

First, the court analyzed the question as to the employment contract potentially limiting the common law reasonable termination period. The plaintiff had signed a written employment contract in 1999 prior to commencing her employment. This contract provided a thirty day termination notice period. Given her years of service, this thirty day notice period was less than the statutory requirement, and therefore was void and unenforceable. Nygard did not dispute that the termination clause was void.

However, Nygard also claimed that a subsequent agreement regarding termination rights had been made in February 2007, at a meeting with the plaintiff and Nygard’s corporate president. Nygard asserted that the plaintiff had accepted an increase in salary and bonus, and in return had agreed to amend the notice provisions in her contract to provide that upon termination she would be provided the minimum notice and statutory payments required by the *ESA*. Nygard submitted the February letter as evidence, but it was not counter-signed by the plaintiff, and Nygard did not submit an affidavit from the corporate president confirming the February agreement.

² A summary judgment is provided in Rule 20 of the Rules of Civil Procedure. It applies to cases that do not have a genuine issue for trial and therefore a full trial is not necessary. Summary judgment motions are based on affidavit evidence of the parties.

The plaintiff asserted that she did not attend such a meeting nor did she ever receive the February 2007 letter. Although Nygard argued that a trial was necessary to determine whether the agreement had been amended in 2007, the court rejected this submission. The court stated that there was no evidence of such an agreement. It further stated that there was a negative inference drawn from the corporate president's lack of evidence, and the letter was simply "uninformed speculation." The court concluded that the plaintiff's sworn evidence about there being no 2007 agreement prevailed over the defendant's lack of evidence. As a result, the court ruled that there was no amendment to the employment agreement in 2007, and therefore the plaintiff was entitled to the common law reasonable notice period, as the thirty day termination clause in the 1999 contract was unenforceable.

The court then analyzed the issue as to whether a general corporate policy on termination notice could displace the common law notice period. Nygard contended that it had a general policy that limited the notice period to the statutory minimum, and the initial agreement and the alleged 2007 agreement both revealed this policy. Nygard also claimed that the plaintiff was fully aware of this general policy. In response, the plaintiff asserted that she had not been aware that this type of policy applied to her managerial position, nor had she ever signed a letter or other document assenting to the policy terms. Agreeing with the plaintiff, the court confirmed that the common law notice prevailed over the purported policy.

As to the issue of compensation for the loss of bonuses, the court described the circumstances when employers must pay bonuses as a component of termination compensation. The plaintiff's original contract entitled her to an annual bonus on the condition that she was employed on November 30th of each year. The defendant had paid her the bonus for 2012, but she claimed that she was entitled to the bonus for 2013. The court emphasized that in general, a terminated employee is entitled to the bonus payments as long as the bonus had been "an integral part of the employee's annual salary", which it was in the plaintiff's case. To determine whether an employee is employed on a specified date for bonus purposes, the court clarified that the employment period includes the time included in the period of reasonable notice. Therefore, the court stated that had Ms. Bernier been given the required reasonable notice under the common law, she would have been "employed" on November 30th 2013, and thus eligible to receive bonus payments with her salary and benefits package.

The court also concluded that a trial was not necessary to examine the appropriateness of the plaintiff's mitigation efforts stating that the plaintiff had attempted to reasonably mitigate her losses and had provided

the court with a “large mitigation brief” that showed the extent of her substantial, but unsuccessful, job search.

The court concluded that as there was no genuine issue requiring a trial, summary judgment was appropriate, and the plaintiff was entitled to compensation based on reasonable notice under the common law. The court conducted the reasonable notice analysis based on the factors set out in *Bardal v Globe & Mail*³ to determine Ms. Bernier’s notice period entitlement, and noted that the courts have awarded a higher notice period for those who hold a highly skilled position with considerable responsibility. As a result of Ms. Bernier’s age, experience, level of responsibility and length of employment, she was awarded compensation based on eighteen months’ pay in lieu of notice. Nygard was also ordered to pay the plaintiff’s legal costs in the amount of \$25,000.

D. CONCLUSION

Several lessons are to be learned from the *Bernier* decision. Firstly, employers, including charities and not-for-profits, should be aware that a contract that violates the *ESA* minimum statutory requirement will be void and unenforceable. An unenforceable termination clause may prove costly, as the employee will revert to their common law rights. Secondly, should an employer wish to amend a contract, the amended contract should be signed by both parties to demonstrate consent by both parties to the terms. Also, for the amended contract to be legally enforceable, the employee must receive something of value in return, such as a pay raise, bonus, additional vacation or improved benefits. Thirdly, it is risky for employers to rely on a general policy to prove that a limited termination notice period applies to an employee. An employer should not assume that the employee is aware of the policy, or that the employee understands the policy applies to his or her position. If the employer wants a notice period to apply to its employees, then it should be made clear in a written agreement so that each employee is aware of its application. Fourthly, bonus provisions should

³ *Bardal v Globe & Mail*³ (1960), 24 DLR (2d) 140 (Ont. H.C.).

form part of the written employment contract. If the employer's intent is to not include bonus entitlements on termination, or provide the employee with a contractual right to a bonus, these are matters to be specified in the contract.