CARTERS
BARRISTERS
SOLICITORS
TRADEMARK AGENTS

CHARITY LAW BULLETIN NO. 367

JUNE 24, 2015

EDITOR: TERRANCE S. CARTER

AMBIGUOUS TERMINATION PROVISION DEEMED UNENFORCEABLE

By Barry W. Kwasniewski*

A. INTRODUCTION

In *Miller v A.B.M. Canada Inc* ("*Miller*"),[1] the Ontario Superior Court of Justice Divisional Court affirmed an earlier decision from the lower court,[2] in the process providing key insight into how the courts will interpret termination provisions in written employment contracts. On March 19, 2015, Associate Chief Justice Marrocco upheld the trial judge's reasoning and dismissed the appeal by the former employer, A.B.M. Canada Inc. In the reasons for judgment, the Divisional Court affirmed the original conclusion that the termination clause in question was null and void because it provided lesser benefits than those provided for in the Ontario *Employment Standards Act, 2000* ("ESA"),[3] despite the fact that the clause adequately considered the minimum notice period. The decision in *Miller* therefore underscores the importance of including all forms of remuneration in a termination clause, including benefits. If employers fail to do so they run the risk of having the termination clause declared unenforceable.

The decision also emphasizes that any ambiguity in contract clauses will likely be interpreted in favour of the employee. As such, the case stands as a warning to all employers, including charities and not-for-profits, about the importance of ensuring that termination clauses in employment contracts do not

* Barry W. Kwasniewski, B.B.A., LL.B., a partner, practices employment and risk management law with Carters' Ottawa office and would like to thank Anna M. Du Vent, B.A., M.A., J.D., for her assistance in preparing this *Bulletin.*
[1] 2015 ONSC 1566 (CanLII).
[2] *Miller v A.B.M. Canada Inc*, 2014 ONSC 4062. The Divisional Court can hear appeals from a final order of the Superior Court where the award does not exceed $50,000.
[3] SO 2000, c 41.

undercut the ESA minimum provisions. If such clauses do not reflect ESA minimum requirements, common law notice periods will apply. This *Charity Law Bulletin* summarizes the comments from both court decisions in *Miller*.

B. FACTS

Mr. Paul Miller began work for A.B.M. Canada Inc. ("A.B.M.") on September 1, 2009 as Director, Finance and Business Process Development. Prior to starting his employment, Mr. Miller signed an employment contract on July 15, 2009, which contained the following termination provision:

> You are not entitled to any notice of the termination of your employment or **salary** in lieu of notice where your employment is terminated for any breach of this Agreement or any other cause deemed sufficient in law or in any other circumstances in which no notice or salary in lieu thereof is required by law...
>
> Regular employees may be terminated at any time without cause **upon being given the minimum period of notice prescribed by applicable legislation**, or by being paid salary in lieu of such notice or as may otherwise be required by applicable legislation.[4] (Emphasis added)

Mr. Miller claimed that he only read the portions of the contract which he was most interested in. This did not include the termination provisions.

The wording of the remuneration section of Mr. Miller's employment contract is also relevant. Under the subheading of remuneration, the employment contract provided for Mr. Miller's salary, as well as pension contributions up to a maximum of 6 percent of base salary and a monthly car allowance.

On January 26, 2011, Mr. Miller received a termination letter from A.B.M., which reiterated that he was entitled to two weeks of salary in lieu of notice, inclusive of the car allowance, and which then stated that "as a sign of good faith and in order to assist you while you seek alternative employment, the company was offering four weeks base salary, plus car allowance."[5] Mr. Miller did not accept this offer and subsequently received a pay cheque for two weeks base salary. This cheque did not include any compensation for the car allowance or the pension contribution.

[4] *Ibid* at para 11.
[5] *Ibid* at para 13.

C. RELEVANT LEGISLATION

Part XV of the ESA includes employment standards related to termination and severance of employment. Within Part XV, section 57 describes minimum statutory notice periods. Also applicable is section 5(1) of the ESA, which provides that:

> 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.

In the context of the facts in *Miller*, sections 60 and 61 of the ESA are particularly relevant. Each of these sections refer to the fact that benefit plans must be considered when establishing the minimum amount that must be provided to the employee during the notice period. Subsection 60(1)(c) states that:

> During the notice period under section 57 or 58, the employer (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.

Additionally, subsection 61(1)(b) states that:

> 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 (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.

D. JUDICIAL ANALYSIS

In his analysis, Associate Chief Justice Marrocco reviewed how the trial judge had arrived at the decision that the termination clause in Mr. Miller's contract did not meet the requirements of section 61(1). To do so, both judges considered the contractual language. They emphasized that the original termination provision referenced only "salary," while the remuneration section of the employment contract referred to salary, pension contributions and a car allowance. Associate Chief Justice Marrocco therefore affirmed the trial judge's conclusion that the language of the contract meant that salary did not include benefits and that only salary was meant to be paid upon termination. In this case, the termination clause was contrary to section 61(1) and was therefore "void and incapable of displacing the common law presumption that Mr. Miller was entitled to a reasonable period of notice calculated according to common law principles."[6]

[6] *Supra* note 1 at para 6.

Associate Chief Justice Marrocco also considered the employer's argument that because the employment contract was silent about paying benefits during the notice period, this "should lead to a presumption that benefits would be paid."[7] In response, the Court re-emphasized the contractual principle that any ambiguity in a contract should be interpreted against the drafter. In the case of employment contracts, the courts have consistently found that because of the "imbalance in many employer-employee relationships" such interpretation should be done with an intent to "provide a measure of protection to vulnerable employees."[8]

The Divisional Court therefore upheld the original trial decision and awarded $10,000 in appeal costs to Mr. Miller. The award of appeal costs added to the $32,425.39 that the trial judge originally awarded in base salary, car allowance, pension contributions and special damages. Subsequent to the trial decision, Justice Glithero released a ruling on costs, in which he awarded Mr. Miller $25,000 in costs.[9]

E. CONCLUSION

The *Miller* decision provides an important reminder about the care that employers must use when drafting termination provisions in employment contracts. Termination provisions cannot undercut ESA or other provincial statutory minimum requirements. In Ontario, this means that termination provisions that do not explicitly include benefit continuance for at least the ESA prescribed period may be set aside by a court. It is important that all employers, including charities and not-for-profits, are aware of the potential result of a court finding a termination provision void. In such cases the common law principles will apply, which will often provide for much higher entitlements than provided by the ESA. Charities and not-for-profits which use termination provisions in their employment contracts should ensure that the provisions are fully compliant with the ESA requirements.

[7] *Ibid* at para 15.
[8] *Ibid* at para 16 quoting from *Ceccol v Ontario Gymnastic Federation*, (2001), 55 OR (3d) 614, (ONCA) at para 47.
[9] *Miller v A.B.M. Canada Inc*, 2014 ONSC 5549 (CanLII) at paras 14-16.

CARTERS

Carters Professional Corporation / Société professionnelle Carters
Barristers · Solicitors · Trade-mark Agents / Avocats et agents de marques de commerce
www.carters.ca www.charitylaw.ca www.antiterrorismlaw.ca

Ottawa · Toronto
Mississauga · Orangeville
Toll Free: 1-877-942-0001