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COURT OF APPEAL RULES TERMINATION CLAUSE UNENFORCEABLE

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A. INTRODUCTION

On February 23, 2017, the Ontario Court of Appeal (the "Court") released its decision in *Wood v Fred Deeley Imports Ltd.*,[1] which held that a termination clause that contravened the minimum standards prescribed by the *Employment Standards Act, 2000* ("ESA")[2] was unenforceable. Deeley Imports Ltd. employed Julia Wood as a Sales & Event Planner for eight years, from April 2007 to April 2015. As the termination clause was interpreted by the Court as excluding Deeley's statutory obligations to make benefit contributions during the notice period and to pay severance pay, it was held to be unenforceable. In the result, Ms. Wood was entitled to termination compensation based on common law principles, as opposed to the contractual amount. For charities and not-for-profits, the *Deeley* decision demonstrates the importance of carefully drafted employment contracts, which include termination clauses that meet at least the minimum requirements of the ESA.

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[1] *Wood v Fred Deeley Imports Ltd*, 2017 ONCA 158, http://canlii.ca/t/gxn69.
[2] *Employment Standards Act*, 2000, SO 2000, c 41, http://canlii.ca/t/52wcz.

B. RELEVANT FACTS

1. Termination Clause

The employer in this case sought to limit its liability upon termination by entering into an employment contract with Ms. Wood. The termination clause relied upon by the employer, and included in the employment contract, read:

> [The Company] is entitled to terminate your employment at any time without cause by providing you with 2 weeks' notice of termination or pay in lieu thereof for each completed or partial year of employment with the Company. If the Company terminates your employment without cause, the Company shall not be obliged to make any payments to you other than those provided for in this paragraph, except for any amounts which may be due and remaining unpaid at the time of termination of your employment. The payments and notice provided for in this paragraph are inclusive of your entitlements to notice, pay in lieu of notice and severance pay pursuant to the *Employment Standards Act, 2000*. [Emphasis added by Court removed].[3]

2. ESA Standards on Termination

The ESA prescribes minimum standards in respect of the termination of employees, which cannot be reduced by contract. In this case, as Ms. Wood had been employed for more than eight years, and the employer had a payroll of more than $2.5 million, she was entitled under the provisions of the ESA to a minimum of eight weeks' notice or pay in lieu of notice, eight and one-third weeks of severance pay, and a continued contribution to her benefit plans for an eight week period.

C. COURT'S ANALYSIS

Ms. Wood argued that the termination clause was not enforceable as it did not include the ESA obligation for the employer to contribute to her benefit plans during the eight week ESA notice period. The Court agreed with this position, stating at paragraph 37:

> I agree with Wood's submissions and for that reason find the termination clause unenforceable. I would summarize my conclusion as follows. Wood's compensation included Deeley's contributions to her two benefit plans. Under ss. 60 and 61 of the ESA, Deeley was required to continue to make those contributions during the notice period. Its obligation to do so was an employment standard under the ESA. Yet the termination clause's wording excludes and therefore contracts out of that obligation.

[3] *Supra*, note 1 at para 19.

The Court further stated that the employer's offer to continue benefits during the notice period, and the fact that it did so for thirteen weeks after the termination, did not remedy the fact of an otherwise unenforceable termination clause. The Court cited the judgment of the Supreme Court of Canada in *Machtinger v. HOJ Industries Ltd*., [1992] 1 S.C.R. 986 at paragraph 44:

> That the enforceability of the termination clause depends only on the wording of the clause itself, and not on what the employer may have done on termination, is implicit in the judgment of Iacobucci J. in *Machtinger*, explicit in the ESA, consistent with the considerations governing the interpretation of employment agreements, and supported by at least two decisions of the Ontario Superior Court of Justice.

The Court also held that the termination clause did not meet the employer's minimum obligations to Ms. Wood with respect to ESA severance pay obligations.[4] For example, under the clause the employer could have provided eighteen weeks' of working notice (*i.e.* two weeks' notice for every year or partial year of service), or pay in lieu of that notice. However, as ESA severance pay is a monetary entitlement, and the termination clause would potentially exclude such a payment, it would therefore not meet minimum ESA standards. As a consequence, as the Court held that it was not clear that the termination clause satisfied the employer's obligation to pay Ms. Wood ESA severance pay, the clause was found to be unenforceable.

In the result, the Court held that Ms. Wood was entitled to compensation based on a nine month reasonable notice period. This aspect of the Court's decision agreed with that of the motions judge, whose decision was under appeal to the Court.[5]

D. CONCLUSION

The *Deeley* decision demonstrates that contractual employment termination clauses must be drafted in clear and explicit language to include all statutory obligations under the applicable employment standards laws. Courts will very carefully scrutinize termination clauses to ensure that the contract does in fact meet at least these minimum statutory obligations, and will not hesitate to declare them unenforceable if they do not. An unenforceable clause cannot later be remedied by the employer providing compensation based on those minimum standards at the time of termination. This means the contractual clauses must be valid

[4] *Ibid* at paras 60-69.
[5] *Wood v Fred Deeley Imports Ltd*, 2016 ONSC 1412, online: http://canlii.ca/t/gpnj3.

at the time they are entered into between the parties. Charities and not-for-profits who have employees need to make sure that their contracts will survive a close scrutiny by the courts, otherwise they may face substantial and unexpected liabilities on termination of any employees.

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