
COURT OF APPEAL: TERMINATION CLAUSE EXCLUDES COMMON LAW DAMAGES

*By Barry W. Kwasniewski**

A. INTRODUCTION

On June 22, 2018, the Ontario Court of Appeal released its decision in *Amberber v IBM Canada Ltd.*,¹ which case dealt with the enforceability of a termination clause within a written contract of employment. In this case, the employer, IBM Canada Ltd. (“IBM”), successfully appealed a summary judgment where the motion judge held that the termination clause was unenforceable in precluding an employee from claiming common law damages regarding reasonable notice. The Court of Appeal, in reversing the summary judgment order and declaring that the clause was in fact enforceable, clarified certain contract interpretation principles pertaining to the termination clause. Of particular importance to the construction and interpretation of contracts was the aspect of the decision dealing with the need to read the entire clause as a whole and avoiding ambiguity when interpreting contracts. This decision is relevant to charities and not-for-profits that are seeking to enforce termination clauses in employment contracts with their employees.

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¹ 2018 ONCA 571 [*“Amberber”*].

B. BACKGROUND

On April 19, 2016, Mr. Amberber was given notice that his employment with IBM would be terminated without cause, effective July 8, 2016. The employment contract, which recognized Mr. Amberber's employment period of nearly 16 years, contained a termination clause that stated the following:²

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.

In addition to the working notice of 11 weeks and three days, Mr. Amberber received a termination payment pursuant to the terms of his contract, which amounted to about 19.4 weeks of his base salary. Therefore, the combined working notice and pay in lieu of notice totalled approximately 30 weeks. IBM initially paid Mr. Amberber only \$22,675.50 as pay in lieu of notice initially, and an additional \$1,446.09 after the litigation had been commenced, as IBM had made an error in calculating the termination pay owed.

On August 16, 2016, Mr. Amberber sued IBM for damages for reasonable notice under the common law, claiming 16 months of salary. In response, IBM brought a motion for summary judgment contending that the termination clause in the contract prevented Mr. Amberber from making a claim at common law. Of the three arguments that Mr. Amberber provided to support his claim, the motion judge accepted the second argument, which was that the termination clause failed to clearly rebut the common law presumption that an employee is entitled to reasonable notice of termination, and accordingly held that

² *Ibid* at para 6.

Mr. Amberber was entitled to damages at common law.³ In her analysis, the motion judge split the termination clause into three parts, adding her own sub-headings to the clause, as follows:⁴

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.

The motion judge focused heavily on the placement of the inclusive payment provision (which rebuts the common law presumption of reasonable notice) in concluding that the termination clause was ambiguous with regard to whether Mr. Amberber was precluded from making a claim for common law entitlements. She held that the placement of the inclusive payment provision immediately after the options provision and its absence immediately after the failsafe provision gave rise to uncertainty and ambiguity as to whether the inclusive payment provision applied to the failsafe provision.⁵ The motion judge therefore resolved this ambiguity in favour of the employee pursuant to common law principles, holding that Mr. Amberber could rely on the common law presumption for reasonable notice damages.⁶

³ *Ibid* at para 8.

⁴ *Ibid* at para 13.

⁵ *Ibid* at para 15.

⁶ *Ibid* at para 16-17.

IBM appealed the decision on grounds that the motion judge had erred in her interpretation of the clause and that there was no ambiguity.⁷

C. ANALYSIS

The court agreed with IBM that the termination clause in the employment contract was enforceable and precluded Mr. Amberber's common law entitlement to reasonable notice. It affirmed that there is no set form or combination of words that must be used to demonstrate a clear intention to exclude common law damages.⁸ However, the court also held that general principles of contractual interpretation must apply in determining whether this intention to exclude exists in the clause and found that the motion judge had made a "fundamental error" in her interpretation of the clause when she "subdivided the termination clause into what she regarded as its constituent parts and interpreted them individually."⁹ Rather, the court clarified that "a contract must be interpreted as a whole, and not piecemeal."¹⁰

Accordingly, the court found that the termination clause, when viewed as a whole, set out a formula calculating the amounts that were owed to a terminated employee, and included the inclusive payment provision that prevented the employee from pursuing common law remedies. The failsafe provision did not operate independently from the other two provisions as held by the motion judge, but instead modified the options and inclusive payment provisions to read up any clause that might not comply with the statutory minimum under Ontario's *Employment Standards Act, 2000* ("ESA")¹¹ such that it would become lawful. The court stated:¹²

...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.

The court therefore allowed IBM's appeal and dismissed Mr. Amberber's action, holding that IBM complied with the ESA by complying with the termination clause, and that Mr. Amberber was not entitled

⁷ *Ibid* at para 18.

⁸ *Ibid* at para 46.

⁹ *Ibid* at para 59.

¹⁰ *Ibid* at para 50.

¹¹ SO 2000, c 41.

¹² *Amberber*, supra note 1 at para 62.

to anything further. The court also ordered Mr. Amberber to pay IBM's costs of the appeal in the amount of \$8,000.00, as well as IBM's costs of the summary judgment motion in the amount of \$12,500.00.

D. CONCLUSION

Termination clauses in employment contracts need to be carefully drafted. This is particularly important when the termination clause seeks to exclude an employee's rights to reasonable notice at common law. While there is no set form of words that must be used to demonstrate an intention to exclude common law reasonable notice, the termination clause examined in this case is one specific example of a clause that successfully excluded such a claim. While the termination clause was somewhat complicated and was subject to differing judicial interpretation by the motions judge and the Court of Appeal, in the end the employer owed the terminated employee substantially less than what it would have owed at common law. Further, this appeal decision clarifies how termination clauses ought to be approached and interpreted: most importantly, clauses must be interpreted as a whole and should not be given a strained or unreasonable interpretation.