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COURT OF APPEAL UPHOLDS COMMON LAW EXCLUSION IN TERMINATION CLAUSE

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A. INTRODUCTION

On January 8, 2018, the Court of Appeal for Ontario released its decision in *Nemeth v Hatch Ltd.*[1] In this case, the court considered an appeal of the dismissal of an action by Joseph Nemeth ("Nemeth") against Hatch Ltd., his former employer, for damages resulting from the termination of his employment without cause. In its decision, the court determined that the termination clause in Nemeth's employment contract, which did not explicitly limit his common law notice entitlement, was nonetheless legally enforceable and did in fact limit his entitlement. This *Bulletin* reviews this decision with regard to the termination clause, and will focus on the importance of properly drafted termination clauses for charities and not-for-profits when negotiating employment contracts with their employees.

B. BACKGROUND

Nemeth had been employed by Hatch Ltd. for over 19 years prior to his termination. At the time of his termination, Hatch Ltd. gave Nemeth eight weeks' notice of termination, 19.42 weeks' severance pay, as well as continued benefits during that eight-week notice period. This was consistent with the minimum entitlements available to Nemeth under the *Employment Standards Act, 2000* ("ESA").[2] In this regard,

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[1] 2018 ONCA 7.

[2] SO 2000, c 41.

Hatch Ltd. maintained that the termination clause in Nemeth's employment contract did not entitle him to more than the statutory minimum. The termination clause stated:

> The Company's policy with respect to termination is that employment may be terminated by either party with notice in writing. The notice period shall amount to one week per year of service with a minimum of four weeks or the notice required by the applicable labour legislation.

At the trial level, the Ontario Superior Court of Justice had dismissed Nemeth's action for damages for termination without cause, holding that the termination clause was enforceable and that Nemeth was not entitled to more than the statutory minimum.[3] At the Court of Appeal for Ontario, the court considered, in part, whether it was necessary to include an explicit stipulation in a termination clause in order to displace the common law, as well as whether the termination clause entitled Nemeth to 19 weeks' notice on termination of his employment.

C. COURT OF APPEAL ANALYSIS

As to the issue of whether it is necessary to include an explicit stipulation in a termination clause in order to displace the common law, the court stated that the well-established presumption is that employees are entitled to common law reasonable notice of termination of their employment. However, the court clarified that this presumption can be rebutted where such a contract "clearly specifies some other period of notice, whether expressly or impliedly", as long as it meets the ESA prescribed minimum entitlements and as long as "the intention of the parties to displace an employee's common law notice entitlement [is] clearly and unambiguously expressed in the contractual language used by the parties".[4] Concerning the clarity of expression, it further stated that it is sufficient for the parties' intention if it "can be readily gleaned from the language agreed to by the parties."[5]

In deciding that express language is not required, the court further relied on the Supreme Court of Canada's decision in *Machtinger v HOJ Industries Ltd.*, which states:

> Absent considerations of unconscionability, an employer can readily make contracts with his or her employees which referentially incorporate the minimum notice periods set out in the [ESA] or otherwise take into account later changes to

[3] *Nemeth v Hatch Ltd.*, 2017 ONSC 1356.
[4] *Supra* note 1 at para 8.
[5] *Ibid* at para 9.

> the [ESA] or to the employees' notice entitlement under the [ESA]. Such contractual notice provisions would be sufficient to displace the presumption that the contract is terminable without cause only on reasonable notice.

In light of the termination clause at hand, the court held that it was clear from the plain language that the parties intended to limit the common law notice entitlement, as it clearly contemplated the appellant receiving "one week per year of service with a minimum of four weeks or the notice required by the applicable labour legislation," which the court stated denotes an intent to the opposite effect of the common law.[6]

In its interpretation of the termination clause to determine Nemeth's entitlement, the court relied on its 2017 decision in *Wood v Fred Deeley Imports Ltd.*,[7] which stated that "[f]aced with a termination clause that could reasonably be interpreted in more than one way, courts should prefer the interpretation that gives the greater benefit to the employee".[8] It therefore held the correct interpretation of the termination clause would have been that which was the most favourable to Nemeth, and that which would not limit his notice entitlement to the ESA minimum. Given that the termination clause stated that Nemeth was entitled to a notice period of "one week per year of service with a minimum of four weeks or the notice required by the applicable labour legislation," it held that the correct interpretation of this meant that Nemeth was entitled to 19 rather than 8 weeks' notice of the termination of his employment. Therefore, while the court did not agree that Nemeth was entitled to his full rights to common law reasonable notice, it did rule that the termination clause accorded him more notice of termination (*i.e.* 19 weeks based on 19 years of service) than the ESA minimum. The end result was that Nemeth was entitled to an additional 11 weeks of pay in lieu of notice, as the eight weeks' ESA notice had already been provided. If the common law reasonable notice had applied as he had argued on the appeal, Nemeth would have likely been awarded a significantly higher amount. However, as Nemeth was partially successful in the appeal, he was also awarded legal costs in the amount of $20,000.00.

D. CONCLUSION

This decision may signify a judicial trend in Ontario employment law cases where the enforceability of contractual termination clauses is in issue. Several previous decisions have declared "ESA minimum"

[6] *Ibid* at para 14.
[7] 2017 ONCA 158.
[8] *Supra* note 1 at para 20.

termination clauses unenforceable for various reasons, and courts have closely scrutinized such clauses, and have not been hesitant to strike them down, resulting in favourable judgments for employees. In this decision, the court demonstrated a willingness to take a more flexible approach to the interpretation of termination clauses by looking beyond explicit language of the clause to the parties' intentions as can be clearly determined by the contractual language. However, given the potential for significant monetary judgments in the absence of an enforceable termination clause limiting an employee's common law entitlements, charities and not-for-profits should include clear and unambiguous language in employment contracts to limit risk and rebut the presumption of common law notice.