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A recent lesson from our courts: The importance of well drafted termination clauses

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Increasingly Generous Notice Periods

A recent Ontario court decision serves as an important reminder of the risks to employers in failing to use effective termination clauses in employment contracts.

Employees who have their employment terminated without just cause are entitled to advance notice of termination or payments instead of notice. In the absence of a binding written termination provision limiting these entitlements, the common law entitles employees to "reasonable" advance notice of termination or payments instead.

Ontario courts have historically considered 24 months notice to represent the upper "limit" or "cap" on awards of reasonable notice or pay. This upper ceiling has been typically reserved for the most extreme cases. More recently, however, our courts have indicated a readiness to exceed this traditional maximum in "exceptional" circumstances.

The Ontario Court's decision in *Hussain v. Suzuki Canada Ltd.* is an example of one such case. When Hussain's employment was terminated, he was 65 years old and had accumulated 36 years of service with Suzuki in a supervisory capacity. There was no allegation of just cause. The Court found that Hussein's circumstances were the kind of "exceptional" facts permitting an award in excess of the historical maximum, awarding him 26 months notice or pay instead.

The *Hussain* decision reminds employers that long-service employees terminated without cause often require a generous (and perhaps unanticipated) payout, and that employers may not be able to expect that their exposure will be limited by the traditional 24 month "cap" on notice awards.

Ineffective Termination Clauses

A recent decision of the Ontario Court also serves as a strong reminder of the importance of professional expertise and precision in the drafting of employment contracts.

In *Wright v. Young and Rubicam Group of Companies*, Wright had been employed for some 5 years, most recently as President, when his employment was terminated without just cause. The employer sought to rely on the terms of Wright's written contract of employment, which limited his entitlements on termination.

Wright, however, challenged the enforceability of the contractual provision in Court. Specifically, while the contract appeared to meet minimum statutory (*Employment Standards Act, 2000*) notice requirements at the time of termination, it would have failed to have met such standards at certain points in the future.

The Court agreed with Wright, relying on a line of court decisions holding that the future failure of a contract to comply with statutory minimum requirements may render the contract invalid from the very beginning. The Court consequently struck down the contractual termination provision as unenforceable and awarded Wright 12 months pay in lieu of notice of termination instead of the 13 weeks of salary in lieu of notice required by the contract.

The *Wright* case illustrates the importance of care and expertise in drafting termination provisions to ensure that they are never at risk of violating minimum employment standards.

Wise employers will have their forms of employment agreement reviewed by experienced counsel from time to time to make sure that termination clauses remain compliant with current employment law.

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