# Compliant but not enforceable: beware of ambiguous language in termination clauses

Employment Update

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**Employers take note: Ontario Divisional Court finds termination clause providing for "notice or pay in lieu of notice … pursuant to the *Employment Standards Act, 2000* (the '*ESA* ')" ambiguous and awards pay in lieu of common law reasonable notice of termination.**

The recent decision in *Movati Athletic Group Inc. v. Bergeron* ("*Movati*") highlights how careful drafting is critical to ensuring employment agreements withstand judicial scrutiny.

In *Movati*, an employee claiming damages for wrongful dismissal argued that the termination clause in her employment contract was insufficiently clear to rebut the presumption that she was entitled to common law reasonable notice of termination.

The termination clause provided for

> notice or pay in lieu of notice, and severance, if applicable, pursuant to the

> *Employment Standards Act, 2000* and subject to the continuation of your group benefits coverage, if applicable, for the minimum period required by the *Employment Standards Act, 2000*, as amended from time to time.
>
> (para 2)

The judge ruled in favour of the employee, finding that the termination clause was insufficiently clear to rebut the presumption of entitlement to common law reasonable notice of termination because it was ambiguous as to whether the employee was entitled only to the minimum notice required by the *ESA* or to some other, unspecified amount in excess of the minimum notice.

The employer appealed to the Divisional Court, which upheld the lower court decision:

> The question before the motion judge was whether the Agreement clearly specifies some period of notice, which meets or exceeds the minimum requirements set out in the legislation so as to rebut the presumption that reasonable notice in accordance with the common law applies.…
>
> The words "pursuant to the *ESA*" may be interpreted to mean that the notice period in the termination clause complies with the minimum requirements of the legislation, but they do not clearly provide that reasonable notice at common law no longer applies.
>
> (paras 35-36)

The Divisional Court also found that language elsewhere in the contract which plainly limited the employee's entitlements to the *ESA* minimums contributed to the ambiguity:

> [T]he fact that the words "only" and "minimum" are used in the probation clause … but neither is used in the notice provision in the termination clause, reflects a difference in the intention of the drafter....
>
> [T]he wording of the termination clause … in the context of the Agreement as a whole [is] not sufficiently clear and unequivocal to rebut the presumption that the reasonable notice requirements at common law apply. …
>
> (paras 41-42)

As a result, the employee received three months' pay in lieu of reasonable notice of termination instead of her statutory minimum entitlements. Had the court found the termination clause sufficiently clear to rebut the common law presumption of reasonable notice of termination, the employee would have been entitled to only two weeks' pay in lieu of notice.

## Lessons for employers

While unfortunate for the Movati Athletic Group, the decisions do provide some useful advice for other employers.

The lower court held that the termination clause would have been sufficiently clear to rebut the presumption of entitlement to common law reasonable notice of termination had it provided for pay in lieu of notice "only pursuant to" the *ESA* rather than "pursuant to" the *ESA* (para 23). Therefore, employers may choose to copy the specific wording expressly approved by the court in future employment agreements when seeking to limit employee entitlements upon termination to the statutory minimums.

However, the Divisional Court made clear that "[t]he words 'only' or 'minimum' are not required language" in a termination clause (para 41). As long as a termination clause clearly specifies some period of notice equal to or in excess of the minimum requirements under the *ESA,* it will be sufficient to rebut the presumption of entitlement to common law reasonable notice of termination — provided that the employment agreement is otherwise consistent in its drafting and intent. While the absence of "only" *per se* may not have been fatal to the termination clause at

the Divisional Court, its use elsewhere in the agreement suggested that it had been deliberately omitted in the termination clause, resulting in an additional 11 weeks' pay in lieu of notice for the employee.

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