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PUBLICATION

Risk in Use of an ESA Termination Clause?

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It is relatively common for Canadian employers to use an "ESA termination clause" in their employment agreements. This type of clause limits the employee's entitlement on termination to the statutory minimums in the provincial employment standards legislation. However, a recent case out of British Columbia, *Bailey v. Service Corporation International*, highlights a potentially unforeseen risk associated with the use of ESA termination clauses.

FACT SITUATION

Donald Bailey was a 17+ year employee. During his employment he executed a series of written employment agreements, each of which contained an ESA termination clause restricting his entitlement on termination without cause to the statutory minimums in the British Columbia employment standards legislation.

In 2013 Bailey experienced health issues. Supported by a note from his doctor that he was unable to work, he absented himself from the workplace. Because his salary was not continued he made a claim to the group policy insurer for short-term disability benefits. Processing of the claim took some time and, ultimately, his claim was denied as being excluded from the scope of coverage under the group policy.

During the course of Bailey's appeal of the denial of his claim for STD benefits, but before the appeal was concluded, the employer terminated his employment alleging that by taking the time off work he had, in effect, abandoned his employment. The employer therefore took the position that it had cause to terminate Bailey and that no amounts were owing to him.

Not surprisingly, the employer's allegation of abandonment was not accepted, and Bailey's claim for wrongful dismissal was upheld. In determining Bailey's entitlement, the court found that the ESA termination clause in his written employment agreement was valid, thus restricting his entitlement on termination without cause to the statutory minimum of 8 weeks' pay. In upholding the clause the court did, however, comment on the "ungenerous" nature of an ESA termination

clause and found a way to increase Bailey's entitlement by awarding damages under a different heading.

AN INTERESTING FINDING OF PUNITIVE DAMAGES

The court determined that the employer's conduct (including terminating Bailey while he continued to seek STD benefits) was abusive and deserving of punitive damages. In assessing an appropriate quantum, emphasis was given to the fact that the employer had chosen to utilize a termination clause restricting Bailey's rights on termination without cause to the notice provisions of the British Columbia *Employment Standards Act*. At paragraphs 224-226 of the judgment, Madam Justice Griffin of the B.C. Supreme Court states (emphasis added):

SCI [the employer] is part of a large corporate group with over 22,000 employees in its operations in the United States and Canada. *It has chosen to impose quite ungenerous terms of dismissal on its employees*. *Because of its contract terms, SCI is in a position of being able to make a calculated choice to treat employees abusively when firing them, as employees will seldom be willing to risk the costs of litigation*.

In my view there needs to be a meaningful award of punitive damages if it is to serve as a deterrent to SCI so that it does not choose to treat its employees so maliciously and callously as it did in this case. In order to effectively deter the defendant, I award punitive damages of $110,000. This is a meaningful award but in my view it is proportionate.

I note that the total damages that SCI will be required to pay, namely general, aggravated and punitive damages, is still less than what would it have likely been required to pay in general damages if the common law regarding implied reasonable notice applied…

IMPLICATIONS – WHAT DO WE TAKE FROM THIS CASE?

Employment lawyers consistently advise their employer clients to limit their exposure on termination by means of enforceable termination clauses. These clauses have significant benefits to an employer, as they allow for some level of certainty in a termination situation and can assist in avoiding costly wrongful dismissal litigation. However, as this B.C. decision points out, if the employer's termination clause limits exposure to the ESA, the employer may have little incentive to treat its employees fairly during their employment or in the manner of termination, knowing that its maximum exposure to contractual damages is limited to the somewhat modest provisions of the employment standards legislation. As a result, if the court senses that this is case it may, as in the *Bailey* decision, increase the total award to more closely resemble what the employee would have received had there been no ESA termination clause.

Two lessons employers can take from this judgment:

1. Treat your employees fairly at the time of termination;
2. Even where a valid ESA termination clause exists, consider offering more, particularly for long term employees.