

Clause limiting wrongful dismissal damages to *Employment Standards Act* minimum upheld by Court

Readers of *FOCUS* will recall that Canadian courts tend to subject employment contracts to closer scrutiny than is the case with other types of commercial and business agreements (see "[The effective employment contract](#)"). Aware of the fact that, more often than not, a greater share of bargaining power and expertise resides with the employer than the employee, courts are likely to refuse to enforce contract terms that appear unreasonable or unfair in the context of an employment relationship.

That being said, non-generous contract terms will be enforced when there is no compelling reason not to do so. This can be seen in the recent decision of the Ontario Superior Court of Justice in *Mesgarlou v. 3XS Enterprises Inc.* (September 9, 2002).

The employee in the case was a sales manager for a franchise whose business was selling memberships in a club through which members could obtain discount household products. The employee was hired in May 2000 to improve the employer's sales of new memberships. He was successful in this and, by August 2000, he felt emboldened to negotiate a salary increase. As a result of this increase, the plaintiff earned just over \$86,000 in salary and bonuses during the year he was employed.

By the spring of 2001, the employer decided that it could no longer afford the remuneration being paid to the employee. Consequently, the employee was terminated without cause in May of 2001.

STATUTORY MINIMUM OR COMMON LAW REASONABLE NOTICE

At the trial of the employee's wrongful dismissal action, the issue to be decided was whether he was entitled to common law reasonable notice, or the notice provided for in his employment contract. The applicable provision read as follows:

"9. After the first three (3) months of employment, both parties shall give notice in accordance to the Ontario Employment Standards Act prior to terminating this employment agreement."

If this provision were to apply, the employee would be entitled to one week's notice, the statutory minimum provided under the *Employment Standards Act* for employees with his length of service. Wishing to avoid this result, the employee argued that the above clause was too vague to displace the presumption that he was entitled to reasonable notice, and pointed to the Ontario Court of Appeal's decision in *Ceccol v. Ontario Gymnastic Federation* for support (see "[Court of Appeal upholds ruling that employee isn't on 'fixed term'](#)")

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The Court disagreed, holding that paragraph 9 in the employment contract was "a sufficiently clear and unambiguous provision as to rebut the common law presumption that reasonable notice is required to terminate the employment". Accordingly, the employee was entitled only to the statutory minimum notice period. While the employee may not have paid much attention to the terms of the contract, the Court noted that he should not be regarded as a babe in the woods:

"He has obviously sought professional advice in relation to his income tax affairs and is, from his testimony before me, a competent and sophisticated businessman, well used to looking out for his interests. Nor can it be said that he was in a vulnerable bargaining position in relation to the [employer]. He showed that by negotiating such significant increases in his production bonuses. In my view the [employee] was simply not particularly concerned about termination and periods of notice."

Accordingly, the Court held that the employee was entitled only to one week's pay in lieu of notice. The Court added that, had it held the employee was entitled to reasonable notice under the common law, the reasonable notice period would have been three months.

In Our View

It should be noted that in *Ceccol*, the case relied on by the employee, the Ontario Court of Appeal had expressed its "hesitation" when rejecting the employer's argument that the employment contract provided only statutory minimum notice. In *Ceccol*, the parties had agreed in the contract "to abide by the Ontario *Employment Standards Act* and regulations concerning notice of termination of employment" - wording that was not significantly different from the wording in this case.

While both the court in this case and the Court of Appeal in *Ceccol* stressed the contract language as the basis for their decisions, it is possible that the facts of the two cases also played a role in the differing results: *Ceccol* involved an employee with some 15 years of service whom the employer purported to terminate without any notice at all, based on the fact that she had been employed under a series of yearly term contracts. This case involved a well-paid employee of only a year's service, with an indefinite term contract which, the court held, was not as complex as that at issue in *Ceccol*.

For another case in which the Ontario Court of Appeal held that an employment contract was not sufficiently clear to rebut the presumption of entitlement to common law notice, see ["Employer's policy manual no bar to reasonable notice for employee, Court of Appeal rules"](#).

For further information, please contact [Jock Climie](#), who argued the case for the employer, at (613) 563-7660, Extension 261.

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