Toronto Law Journal

Termination Provisions: Challenges and Strategies

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There has been a rise in recent years in the use of summary judgment motions by employees alleging that they have been wrongfully dismissed.[1] Not only can employees obtain a speedy hearing date via the summary judgment rules, the fact that the notice period has not run its course will not be a barrier for courts to award the maximum damages over the notice period.[2]

The summary judgment trend means it is even more imperative that termination provisions in employment contracts are drafted properly. A sound termination clause can leave little room for litigation over common law notice periods.

The general rule is that termination clauses must not be ambiguous and must comply with the minimum requirements set out by the Act. However, as the case law suggests, these requirements are not as straightforward as one might think.

1. Ensure that the termination provisions continue to comply with the statutory minimums

Employers must ensure that the reasonable notice period under the termination provisions meets the minimum standards under the *Employment Standards Act, 2000* (the "Act").[3] Courts have consistently held that if the amount of pay in lieu of notice falls below the statutory minimum requirements, the entire clause will be unenforceable and the court will consider the *Bardal* factors to determine what the reasonable notice should have been.[4] This common law reasonable notice period is typically much longer and more robust than the minimum standards imposed by the Act, which is why many employers aim to limit their employees' entitlements upon termination to the statutory minimums.

An express termination provision must not provide for less than what an employee would be entitled to under the Act. In this respect, often overlooked is the fact that the reasonable notice period will change over the course of an employee's employment. For example, a termination that provides for "*30 days' pay in lieu of notice*" exceeds the minimum entitlements under the Act for the first four years of the employment relationship. However,

[1] *Paquette v. TeraGo Networks Inc.*, 2015 ONSC 4189; *Markoulakis v. Snc-lavalin Inc.*, 2015 ONSC 1081 [*Markoulakis*].
[2] See *Markoulakis* supra note 1.
[3] *Employment Standards Act, 2000*, S.O. 2000, c. 41, ss. 57-8.
[4] *Bardal v. Globe & Mail Ltd.*, [1960] O.W.N. 253 (Ont. H.C.); *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986 (S.C.C.); *Shore v. Ladner Downs* [1998] B.C.J. No. 1045 (B.C.C.A.), and *Slepenkova v. Ivanov*, [2007] O.J. No. 4708 (Ont. S.C.J.), aff'd [2009] O.J. No. 2680 (Ont. C.A.).

such a provision falls below the minimum entitlement provided for under the Act after the fifth year. As a result, many courts have decided that where a clause *could* breach the minimum standards under the Act – i.e. at a hypothetical point in the future – the clause is void. Similar language was recently impugned in *Bernier v. Nygard International Partnership*.[5]

One way to address this problem is to include language to the effect that the employee is entitled to the *greater of* his or her rights under the Agreement or the Act.

2. Ensure that benefit and vacation pay entitlements are not excluded from the termination clause

Employers are required to continue paying any employee benefits over the course of the reasonable notice period and cannot contract out of any minimum requirements under the Act. In a recent decision, *Wright v. Young & Rubicam Group of Cos.*,[6] the employer had no ill intention and did in fact continue to pay all benefits to its former employee in full compliance with the law, but the Ontario Superior Court of Justice agreed with the employee's position that a poorly drafted termination clause which suggested a contrary intention was unenforceable. Therefore, the employee was entitled to a common law reasonable notice period. The impugned clause was silent on benefits continuation. It stated that:

> *"[T]his payment will be inclusive of all notice statutory, contractual and other entitlements to compensation and statutory severance and termination pay you have in respect of the termination of your employment and no other severance, separation pay or other payments shall be made."*[7]

Ultimately, the Court held that because the clause referred solely to compensation, it arguably excluded the continuation of benefits and other entitlements required by the Act. As a result, the Court held that to the extent there was any ambiguity in the provision, *contra proferentem* applied.

The *Wright* decision was recently followed in a second case, *Stevens v. Sifton Properties Ltd.*, dealing with a termination clause that purported to satisfy all requirements but made no reference to statutory benefits. The clause was found unenforceable despite the fact that the employer did pay all benefits over the notice period.[8] The Court held that the employment agreement appeared to take away the plaintiff's statutory right to benefits during the notice period, and therefore, the agreement was ambiguous and supported the plaintiff's argument through *contra proferentem*.

[5] *Bernier v. Nygard International Partnership*, [2013] O.J. No. 3091 (S.C.J), aff'd [2013] O.J. No. 5884 (C.A.).
[6] 2011 ONSC 4720 [*Wright*].
[7] *Ibid* at para 4.
[8] *Stevens v. Sifton Properties Ltd.*, 2012 ONSC 5508 (S.C.J.).

Another recent case dealing with this issue was *Howard v. Benson Group Inc.*[9] In that case, the Ontario Superior Court of Justice held that the following termination provision was unenforceable:

> "*8.1. Employment may be terminated at any time by the Employer and <u>any amounts</u> paid to the Employee* [the employee] *shall be in accordance with the Employment Standards Act of Ontario.* [sic]."[10] [Emphasis added.]

The Court held that the termination provision, and in particular the term "*any amounts paid*" was "*sufficiently ambiguous as to the true extent of the plaintiff's entitlement*" under the Act, and such ambiguity was construed against the employer.

These cases demonstrate that to the extent an employment contract seeks to satisfy all requirements under the Act, it is important that proper reference is made to reasonable notice and severance as well as statutory benefits. Failure to do so will create the risk that a court will interpret that provision as ambiguous, and therefore the possibility that an employee will have the right to his or her entitlements under common law.

3. Ensure that mitigation is properly addressed

Under the common law, employees have an obligation to mitigate their losses over the notice period. Where a termination provision provides for more generous termination pay, for example 12 months' pay in lieu of notice, there should also be a mitigation provision in that agreement to avoid having to pay the full amount. The Ontario Court of Appeal's decision in *Bowes v. Goss Power Products Ltd.*, represented a shift with respect to the implied duty to mitigate in the context of an express contractual notice period. The Court held that no obligation to mitigate should be implied in circumstances where a contractual termination clause is silent on the requirement to mitigate any losses:

> "*An employment agreement that stipulates a fixed term of notice or payment in lieu should be treated as fixing liquidated damages or a contractual amount. It follows that, in such cases, there is no obligation on the employee to mitigate his or her damages.*"[11]

Thus, where a termination clause contains a fixed notice period which exceeds statutory minimums, employers should include clear and express language that the employee is subject to a duty to mitigate, and include corresponding reduction in the event of successful mitigation efforts.

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[9] 2015 ONSC 2638.
[10] *Ibid* at para 58.
[11] *Bowes v. Goss Power Products Ltd.*, 2012 ONCA 425.

4. Enumerate grounds for terminating an employee for just cause

Employers are permitted to dismiss employees for just cause. While the general question is whether the employee's conduct was incompatible with the fundamental terms of the employment arrangement, it is worthwhile to list potential grounds of termination so that an employer can demonstrate that the employee ought to have known that his or her conduct would lead to termination with just cause. That being said, courts may still find that an employee was wrongfully dismissed even where the ground for dismissal was stipulated in the agreement.

Practising in the Far North

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About ten years ago I visited Iqaluit, Nunavut for the first time. There's not too much to see: a modest museum, a visitor centre, a legislative building and a Anglican Cathedral in the shape of an igloo. There is a full sized Courthouse – say about the size of the Milton Courthouse if that helps to give context. For a lawyer, the Court system structure is interesting – there are only Superior Court judges and justices of the peace to do the trial work in minor criminal matters that would, in Ontario, be heard by judges of the Ontario Court of Justice.

I left Iqaluit having thought "that was an experience" and then forgot about it.

But the next year I got my first file in Nunavut. It was a criminal matter and fairly straightforward but it required me to spend a few days in Iqaluit. The first time I went "on the land" – leaving town by foot – I saw the Arctic landscape and was entranced. Coming over a small hill I literally stumbling into a valley with a huge river, rushing waterfalls and fish in a quantity I had never before seen. Like some of those fish (and Iqaluit means "place of fishes") I was hooked.

Over the years I have taken commercial and civil litigation, family, criminal and administrative matters. The practicing bar in Nunavut is small and almost everyone does a bit of everything, which, perhaps surprisingly, does not seem to lower the quality of justice. As I write this piece from the Courthouse in Iqaluit I am working on an interlocutory injunction dealing with a real estate transaction gone sour. The details do not matter, but counsel (and the materials delivered) are as subtle legally as any I have dealt with in Toronto. And opposing counsel also does family and other work. Somehow the generalist survives in the far north.

Obviously there are peculiar features to practice in Nunavut. Only people called to the bar or holding a temporary licence have the right of audience in the courts. And the courts, outside of Iqaluit, sit in temporary and often primitive conditions. Court in a C-Hall (community hall) or boardroom at a hotel or hamlet office is normal. Sometimes there is little or no plumbing. Sometimes the heat is limited – I did a murder trial wearing a parka and gloves a couple of years ago. Accommodation can be limited and it is common to have to share a room with someone else – sometimes someone who isn't connected to the court and is a total stranger (so you learn to pack pajamas!).

Travel to the hamlets can be an adventure. From the South to Nunavut the planes are large modern jets. Once in the territory, travel can be less modern and flying in planes built 30, 40 or 70 years old is not uncommon. Small prop planes provide a very different flight experience than say a 737. Security is nonexistent. When a flight is called you just board.

And it does get cold. I have seen minus 61 without wind-chill.

Nunavut is careful to preserve Inuit languages as viable ways to communicate and trials can be held (and are held) in Inuktitut. My first Nunavut jury trial was conducted in Inuktitut with a unilingual Inuktitut jury. Translation issues are huge and almost every hearing – up to and including the Court of Appeal (which, broadly put is the Alberta Court of Appeal sitting as the Nunavut Court of Appeal) – is halted at some point to ensure the interpretation is properly proceeding.

Work in the Arctic is a great adventure and worth the effort – but it's challenging for sure!

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Rare Interlocutory Injunction Upheld on Appeal

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Interlocutory injunction orders in the context of intellectual property disputes are notoriously difficult to obtain in Canada and are granted sparingly by Canadian Courts.

However, in a decision released in 2015, the Federal Court of Appeal in *Reckitt Benckiser LLC et. al v. Jamieson Laboratories Ltd.,* 2015 FCA 104 upheld an earlier decision of the Federal Court, in which the Court had issued an interlocutory injunction in a trademark infringement action prohibiting the Defendant from using the impugned mark pending trial – the first time the Court had done so (absent evidence of outright counterfeiting) in many years.

It is settled law in Canada that an applicant seeking an injunction must satisfy the requirements of a tripartite legal test:

(1) Is there a serious issue to be tried;
(2) Will the applicant suffer irreparable harm if the injunction Is not granted?; and
(3) Which party will suffer the greater harm if the injunction is not granted (referred to as the “balance of convenience”).

Applicants seeking an interlocutory injunction often fail at stage two of the test, due to the high burden placed on applicants to show irreparable harm, which the Federal Court has previously defined as harm which is “clear and non-speculative” and which is not compensable in monetary terms. The mere possibility that harm would result has, traditionally, not been seen by the Courts to be sufficient to establish irreparable harm and, generally speaking, where an award of monetary damages after trial would adequately compensate a plaintiff, the Courts have declined to make a finding of irreparable harm.

In this case, the Plaintiff, Reckitt Benckiser LLC (“Reckitt”), sought an interlocutory injunction in the context of a trademark infringement action against the defendant, Jamieson Laboratories Ltd. (“Jamieson”), for Jamieson’s use of the trademark OMEGARED in association with krill oil omega-3 fatty acid supplements, alleged to be confusingly similar to the Plaintiff’s registered MEGARED trademark for the same goods. The MEGARED mark was registered in Canada in 2011 on the basis of use and registration in the United States, as opposed to use in Canada. However, prior to the launch of the MEGARED product in Canada in late 2013, Jamieson rebranded its existing SUPER KRILL product as OMEGARED and launched a marketing campaign for the re-branded product. In seeking the interlocutory injunction, Reckitt argued that Jamieson deliberately rebranded its product as OMEGARED in anticipation of Reckitt's plans to launch the MEGARED supplements in Canada and with knowledge of Reckitt's prior registration for MEGARED.

The Federal Court ultimately granted the interlocutory injunction. With respect to the first part of the tripartite test, the Court found that there was a "very" serious issue as to whether the Plaintiff's trademark registration for MEGARED was infringement by Jamieson's use of OMEGARED. On this point, the Court appeared to regard Jamieson's motive – specifically, its "massive marketing campaign" to "defeat the Plaintiffs' marketing efforts by creating a dominant brand before the Plaintiffs could begin to sell, notwithstanding that the Plaintiffs enjoyed exclusive rights in Canada to the MEGARED registered trademark" – as a factor to be considered in determining whether there was a serious issue.

More interestingly, however, were the Court's findings with respect to irreparable harm. In finding that Reckitt had established that irreparable harm would occur were the injunction not granted, Justice Brown found that it would be "difficult to the point of impossibility" to quantify Reckitt's damages, since there was no way to accurately quantify what Reckitt's launch market would have been if it had the market exclusivity to which it was entitled as the trademark registration owner:

> It will not be possible to ascertain the Plaintiffs' before-OMEGARED launch market as a comparator to the after-launch market because the Plaintiffs never had the proper opportunity they ought lawfully to have had to enter the market with the exclusive rights to which they are entitled". …
>
> In my view, where use of a confusing mark will cause the Plaintiffs' mark to lose its distinctiveness, that is, its ability to act as a distinctive and unique signifier of the Plaintiffs' wares or business, such damage to goodwill and the value of the mark is impossible to calculate in monetary terms. The courts have found that distinctiveness is lost when the infringer engages in national marketing which repeatedly emphasizes the confusing mark to the Canadian public. In my view, the evidence of confusion and my findings in relation to confusion provide clear and sufficient support to find irreparable loss of the MEGARED "name" goodwill and reputation if Jamieson's conduct is not enjoined. …
>
> In my view, the likely infringing and confusing market entry by OMEGARED is the very situation contemplated by ***RJR*** at para 59 where our highest Court said that injunctive relief is available to prevent permanent market loss or irrevocable damage to business reputation. That is the situation here, irrevocable damage to the reputation of the registered trade-mark.

Notably, Reckitt's delay in seeking injunctive relief did not seem to bear on the assessment of irreparable harm.

In response, Jamieson had argued that Reckitt was a "second comer" to Jamieson in the supplement market. Justice Brown dismissed that argument, noting that "as between the holder of a registered Canadian trademark and a likely infringer, <u>the likely infringer can only be a second comer, if the infringer has any rights at all</u>." [emphasis added]

Finally, as to Jamieson's argument that there are many other health and nutrition supplements with the words OMEGA and RED and, further, that both words are descriptive, Justice Brown suggested that the proper course of action for Jamieson was to have challenged the MEGARED registration.

In a rare move, the Federal Court of Appeal agreed to hear an appeal of Justice Brown's decision on an expedited basis and issued a stay of the decision pending appeal. Although it was anticipated in those circumstances that the appeal would be successful and the injunction reversed, the Federal Court of Appeal upheld the lower Court's decision and dismissed the appeal. In particular, on the issue of irreparable harm, the Court of Appeal found that Justice Brown had not erred in determining that irreparable harm would "befall" Reckitt, observing that Jamieson's submissions on the appeal did not undermine "Reckitt's contention that its potential harm would be impossible to quantify". As to Jamieson's submission that Reckitt had failed to provide "clear and specific" evidence of irreparable harm – such as, for example, price reductions or lost claims – as had been established by prior jurisprudence, the Court of Appeal held that, in cases such as this one, wherein the plaintiff entered the market after the alleged infringer:

> …it makes no practical sense to require a plaintiff to demonstrate such damages as lost sales or price reductions when the only market environment in which the plaintiff has ever operated has been one in which the alleged infringer has operated as well.

With respect to Jamieson's argument that the Federal Court erred in relying on jurisprudence from the *quia timet* setting, the Court of Appeal noted that Jamieson had failed to demonstrate that Justice Brown had erred in determining that Reckitt's losses would be incalculable and therefore irreparable, should it succeed in the underlying motion.

This decision signals a clear acknowledgement by the Federal Court that where the facts of a given case provide no methodology for calculating a plaintiff's potential loss, irreparable harm may be found. Perhaps even more notable is the Court's apparent recognition that damage to goodwill can constitute irreparable harm. This represents a notable shift from prior jurisprudence on the concept of irreparable harm, and may provide potential litigants with an easier path to obtaining pre-trial injunctive relief, at least in appropriate circumstances, than was previously available.

Of note for trademark practitioners and owners is that this decision provides potential litigants with at least one roadmap to the types of evidence argument that may ultimately result in a successful interlocutory injunction application. In granting the injunction, the lower Court considered a number of factors, including:

(a) The timing of the Defendant’s decision to sell its OMEGARED product, which the Court characterized as being designed to “knowingly and pre-emptively strike out and frustrate the marketing efforts of the Plaintiffs”;

(b) The Defendant knowingly, “with its eyes wide open” assuming the risks of infringing the Plaintiff’s registered mark;

(c) The “very great aural similarity” and written similarity between the respective marks;

(d) The “similarity of packaging both in terms of colour and design”;

(e) The fact that the parties were direct competitors; and

(f) Evidence of actual confusion in the marketplace.

Although the Court’s decision was ultimately based on the particular and rather unique facts of the case, trademark owners can be hopeful that, in appropriate cases, the Federal Court is prepared to grant pre-trial injunctive relief.

A final interesting observation that follows from the Courts’ reasoning in this case is that, arguably, registrants who have not actually used their marks in Canada may, in fact, be in a better position to obtain pre-trial injunctive relief than those parties with an active market presence. This observation is of particular note in light of impending changes to Canadian trademark law expected to come into force in the next two years. Among the many changes to Canadian trademark law that will result from the coming changes is the ability of an applicant to secure a trademark registration in Canada without having previously used the mark anywhere. Ironically, and we expect not an anticipated and desired result of the impending changes, is that it may very well be that non-use based trademark registrations permitted as a result of the changes will stand a better chance at attracting pre-trial injunctive relief.

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The Art of Awarding Costs in Tax Cases

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In recent years, costs have played a more significant role in tax litigation. Appeals to the Tax Court of Canada are becoming significantly more complex and are taking longer to litigate. In this environment, taxpayers have been seeking enhanced costs more frequently than before, and the Crown has been vigorously contesting these applications.

These contests have resulted in an evolving body of law and the development of what many perceive to be a "new" or more modern approach to awarding costs in tax cases. In applying this approach, the Tax Court has recognized that this approach is not an exact science (nor an accounting exercise) but rather involves a principled analysis of the facts, and the exercise of judgment as to what is appropriate in the circumstances.

The Tax Court has absolute and unfettered discretion over the amount and allocation of costs. In exercising this discretion, the Court may fix costs in excess of the amounts set out in the Tariff. The mere fact that a case is unique, complicated, difficult, or involves large sum of money does not necessarily imply that the Court will be inclined to depart from the Tariff. Nor is the mere fact that the successful party has incurred legal expenses greatly in excess of the Tariff.

The Court typically considers a number of factors, including those enumerated in the *Tax Court of Canada Rules (General Procedure)*, and "any other matter relevant to the question of costs."[1] Where the Court determines that costs under the Tariff would be inadequate having regard to these factors, a lump sum award may be considered appropriate.

Enhanced costs have been awarded against the Crown in cases where the taxpayer was entirely successful in its appeal; the amount of tax in issue was substantial (or of particular consequence to the taxpayer); the issues raised in the appeal were either of national and international importance or of importance to a particular industry; the novelty of the issues dictated that the taxpayer spend an extensive amount of time and resources in litigating the appeal; or where the taxpayer went to some lengths to cooperate with the Canada Revenue Agency and it was clear that some or all of the issues could have been resolved during the audit process.

In this regard, the Tax Court has acknowledged the unique context in which tax cases unfold, the inherent imbalance of power between the parties in these cases, and the role of costs in ensuring that, in administering its statutory duties, the CRA does not overstep its boundaries.[2] Costs will generally not be awarded for expenses incurred prior to commencing litigation

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[1] Rule 147(3).

[2] See, for example, *Jolly Farmer Products Inc. v. The Queen*, 2008 TCC 693.

(*i.e.*, at the audit and objection stages), even in cases where the CRA has engaged in "inconsistent and irrational conduct"[3] at those earlier stages. However, the conduct of the CRA in such cases may be taken into account if it has the effect of unduly and unnecessarily prolonging the appeal.

The more modern approach to costs awards is also reflected in the statutory authority granted to the Court under the *Rules*, which contemplates that a party will be entitled to "substantial indemnity" costs (defined as 80 percent of solicitor and client costs) subsequent to the date of a written settlement offer, if the party ultimately obtains a judgment more favourable than the terms of the offer. Where a party has demonstrated its willingness to negotiate, and that is reflected in the reasonableness of its settlement proposals, the opposing party's refusal to participate in any meaningful manner in the negotiation process may also factor into the analysis.[4]

When a party relies on a previous settlement offer to justify a request for enhanced costs, it is precluded from recounting discussions, positions and proposals made in a pre-hearing or settlement conference that are not embodied in the offer itself.[5] Similarly, in exercising its discretion to grant the request, the Court cannot consider any remarks made by the judge presiding at the conference as to the prospects of settlement. However, the Court will consider the existence of the offer as a factor in exercising its discretion and, while the offer can speak for itself, the Court may have to be apprised of the reason(s) for rejection to ascertain whether there was a legal impediment to accepting the offer.[6]

In principle, a lump sum award is not meant to be punitive. It will not equate to an award of solicitor and client costs and, in the past, has varied between 50 to 75 percent of such costs. Lump sum costs awards (and disbursements) are also not generally distributive (*i.e.*, the amounts are not ordinarily based on the merits of particular arguments).[7] In all cases, however, a costs award will reflect what the Court considers to be fair and reasonable in the circumstances.

From a timing perspective, a taxpayer may apply to the Tax Court for enhanced costs within 30 days after it has knowledge of the judgment. Likewise, any appeal of the judgment itself must be commenced within 30 days of its release. The Court has not been lenient in granting extensions of time, even in circumstances where, as a matter common practice, the successful party was waiting to see if the opposing party would appeal. Thus, the 30 day time limit applies without regard to whether an appeal has been initiated, and is strictly followed.

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3 *Canada v. Martin*, 2015 FCA 95 at para 9.

4 In *ACSIS EHR (Electronic Health Record) Inc. v. The Queen*, 2016 TCC 50, the Court awarded the taxpayer costs equivalent to 95 percent of its invoiced fees and disbursements from the date of its first written settlement offer.

5 *CIBC World Markets Inc. v. Canada*, 2012 FCA 3 at para 11.

6 *Potash Corporation of Saskatchewan Inc. v. The Queen*, 2012 TCC 235.

7 But see *Kruger Incorporated v. The Queen*, 2016 TCC 14 (currently under appeal to the Federal Court of Appeal on the merits), as an unconventional example of a case where success was divided, and the Court awarded certain costs to the Crown.

The current approach of the Tax Court (although not "new" when compared with that of other Canadian courts) aligns more closely with manner which cost awards are used to compensate litigants and regulate their pre-trial conduct. Although it raises the stakes in tax cases, this approach is a welcome development that should serve for this very reason to keep litigation in the Tax Court within reasonable bounds.