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Limiting Common Law Notice in Employment Contracts

It is settled law in Canada that an employer may displace an employee's right under the common law to reasonable notice of termination by contracting to a lesser notice or severance entitlement. However, the notice or severance period must meet the statutory notice requirements outlined in the applicable provincial employment standards legislation; otherwise it will be of no effect. In British Columbia for instance, Section 4 of the *Employment Standards Act* provides that the requirements of the *Act* are minimum requirements and any agreement to waive those requirements has no effect In *Machtinger v. HOJ Industries Ltd.*[1], where the employer had contracted to give its employees notice or severance below the minimum provided in the Ontario *Employment Standards Act*, the Supreme Court of Canada declared the provision null and void for all purposes and held that the provision could not be used to interpret the parties' intentions with respect to notice entitlement upon termination. The Court then went on to conclude that the employees were entitled to reasonable notice because the presumption of reasonable notice was not rebutted. In so concluding, the Court reasoned that such a conclusion was consistent with the legislative intent of the *Act* which expressly preserved the civil remedies otherwise available to an employee against his or her employer and provided employers an incentive to comply with the minimum statutory provisions of the *Act*. Not only must the notice provision comply with the minimum applicable employment standards legislation, it must be drafted carefully if the employer is to successfully limit the common law notice. In British Columbia, in ***McLennan v. Apollo Forest Products Ltd***.[2], the province's Supreme Court considered a wrongful dismissal action brought by Marvin McLennan, a former "bin chaser" at a sawmill. Part of Mr. McLennan's employment contract was contained in an employee handbook. The handbook contained the following termination provision:

> The terms and conditions of employment at Apollo Forest Products Ltd. are in accordance with the *Employment Standards Act* and other legislation of the Province of British Columbia governing the Employer/Employee relationship in the workplace.

Upon being dismissed, Mr. McLennan brought a wrongful dismissal action against his employer arguing that he was entitled to common law severance pay. In response, the employer argued that the two weeks' pay that was provided as severance pay pursuant to the *Employment Standards Act*[3] was adequate. The B.C. Supreme Court held that the express provisions of the contract did not restrict the notice to the minimum set out in the *Employment Standards Act;* therefore, making it necessary and appropriate for the Court to determine the reasonable notice period to which the employee was entitled at common law.

McLennan provides support for the proposition that an employment contract, which incorporates provisions of employment standards legislation by reference, will not be sufficient to provide the clarity of intention required to rebut the presumption that reasonable notice in accordance with the common law applies. In order to do so, the contract would have to go further and clearly limit the reasonable notice period to the applicable statutory legislation.

Recommendations for Employers

It is recommended that employers, when attempting to limit common law notice or severance, do not violate the minimum provincial employment standards legislation. Where the employer is

trying to limit the notice to the minimum in the employment standards legislation, it is recommended that the employer draft the limiting clause in very clear and unambiguous terms limiting to such statutory notice or payment in lieu of notice.

Shafik Bhalloo has been a partner of Kornfeld LLP since 2000. His practice is focused on labour and employment law, and on commercial and civil litigation. He is also an Adjudicator on the Employment Standards Tribunal and an Adjunct Professor in the Faculty of Business Administration at Simon Fraser University.

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[1] [1992] 1 S.C.R. 986

[2] 1993 CarswellBC 1250.

[3] R.S.B.C. 1996, c. 113.