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THIS IS A SUMMARY OF EMPLOYMENT MATTERS OF INTEREST TO THE  
BUSINESS COMMUNITY, FROM A LITIGATOR'S POINT OF VIEW

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## ESA MINIMUM TERMINATION CLAUSE ENFORCED – PART I

Employers and employment lawyers alike are always questioning what termination provisions in contracts will be enforced. The Ontario Court of Appeal has now offered us another example of an enforceable clause that effectively limits the unfortunate employee's entitlement solely to that required as the minimum payment by the *Employment Standards Act, 2000*.

The clause reads as follows:

**Termination of Employment** – Your employment may be terminated for cause at any time in which event you shall be entitled to only the amount of your salary and vacation pay earned up to the effective date of termination. Your employment may be terminated without cause for any reason upon the *provision of reasonable notice equal to the requirements of the applicable employment or labour standards legislation. By signing below, you agree that upon the receipt of your entitlements in accordance with this legislation, no further amounts will be due and payable to you whether under statute or common law.* [Emphasis added.]"

Rejecting arguments of ambiguity, the Court of Appeal held that the context of the clause considered as a whole, was clear and unambiguous. In short, the clause was enforceable.

Therefore, the ESA minimum to be the only compensation to which the employee was entitled. Another employer who breaths a sign of relief that its contracts are enforceable and another employee who should have negotiated the termination provision of the contract.

*Clarke v. Insight Components (Canada) Inc., 2008 (O.C.A), 837*

## **COURT REJECTS CHALLENGES TO EMPLOYEE'S CLAIM FOR WRONGFUL DISMISSAL**

In *Andrachuk v. Bell Globe Media Publishing Inc.*, the plaintiff claimed damages for wrongful dismissal and discrimination. The claim was challenged by way of motion on the basis that the termination occurred outside the two year limitation period.

Leslie Andrachuk was a senior level marketing employee who was terminated without cause 11 days after announcing her pregnancy and intention to take a maternity/parental leave to her employer. A few months after her termination, a young male employee was hired to fulfill many of her functions. Seventeen months after Andrachuk's termination, the same young male employee was promoted to a position with the same responsibilities that Andrachuk had performed in her former position. Andrachuk alleges that her termination and replacement with a male employee was based on gender, age, and pregnancy discrimination.

The defendant brought a motion to determine a question of law before trial, alleging that the plaintiff failed to bring the action within the applicable 2 year limitation period, and thus the case should not proceed. The court held that the question of whether there had been a fraudulent concealment of a sham-reorganization by the employer will determine when the limitation "clock" began to run, which is a question of fact that could only be determined at trial.

The case has not yet proceeded to trial.

*Andrachuk v. Bell Globe Media Publishing Inc. 2009 Canlii 3974 (Ont. S.C.)*

## **ESA MINIMUM TERMINATION CLAUSE ENFORCED – PART II**

The Ontario Superior Court of Justice issued a decision in *King v. Weber Manufacturing Technology Inc.* which underscores the benefits to be had by employers when they seek legal advice before issuing offers of employment. The decision also serves as a reminder to employees that they ought to seek legal advice before accepting any employment offers.

Weber Manufacturing Technology Inc. had recently purchased the company that John King worked for. As part of this purchase, Weber presented Mr. King with an offer of employment on April 17, 2007. This offer contained specific language that stated that Weber could terminate Mr. King's employment "at any time upon giving him the length of notice or equivalent pay in lieu of notice, and severance pay (if applicable) to which he may be entitled to under the *Employment Standards Act*". Mr. King signed the offer and returned it to Weber.

A little over four months later, Weber terminated Mr. King's employment, without cause, by paying him the statutory minimums set out in the *Employment Standards Act*. Mr. King refused to accept the payment and instead commenced an action for wrongful dismissal seeking recovery of his common law damages. Weber brought a motion for summary judgment relying upon the language in its offer of employment.

The court found that the language in the offer was clear and unambiguous and did away with Mr. King's common law claims. It held that Mr. King did not have to "accept" the actual payment of the statutory minimums from Weber in order for the language in the offer to have any binding effect nor did it matter that he had not signed back the offer letter.

*King v. Weber Manufacturing Technology Inc., [2008] O.J. No. 4033*

## **SUPREME COURT OF CANADA SAYS COURTS ARE NOT TO RE-WRITE UNREASONABLE NON-COMPETITION AGREEMENTS**

Mr. Shafron was employed by KRG Insurance Brokers Inc. ("KRG"). His employment agreement included a non-competition clause which restricted Shafron from competing with KRG in the "Metropolitan City of Vancouver" for a period of 3 years after his employment ended. When Shafron left KRG he began employment as an insurance salesman in Richmond, British Columbia, a suburb of Vancouver.

KRG commenced an action against Shafron for, amongst other things, a breach of the non-competition clause. The trial judge found that the term "Metropolitan City of Vancouver" was unclear, uncertain and unreasonable on the basis that this term did not have any accepted meaning and refused to enforce it. While finding that the term was ambiguous, the Court of Appeal nevertheless overturned the trial judge's ruling as the court read the term to include the City of Vancouver, the University of British Columbia Endowment Lands, Richmond and Burnaby, by applying the doctrine of severance to rectify the ambiguity in the clause. The doctrine of severance refers to the reading down of an illegal provision in a contract to make it legal and enforceable.

The Supreme Court of Canada ("SCC") overturned the Court of Appeal's decision. The SCC reaffirmed the view that non-competition agreements which have the effect of retraining a person's trade will only be enforced if they are reasonable and will require rigorous scrutiny in the employment context. In determining whether such a clause is reasonable, the clause itself must be unambiguous. The SCC held that the doctrine of severance has no place in the interpretation of employment contracts as its application would amount to the courts re-writing covenants in a manner they sought fit and as it would give employers the incentive to draft overly broad restrictive covenants with the prospect that the courts will read them down to what it thinks is reasonable, both leading to uncertainty. It held the clause to be unenforceable.

This case should be a reminder to employers that courts will not easily enforce non-competition clauses and other restrictive covenants in restraint of trade in employment agreements. Such covenants will be rigorously reviewed by the courts and will not be read-down or re-written to make them enforceable. Clear wording of the scope of such covenants will be required for them to be enforced.

*Shafron v KRG Insurance Brokers (Western) Inc.*, [2009] O.J. No. 6

## **EMPLOYEE'S CLAIM FOR 3,300 HOURS OF OVERTIME GIVEN JUDGMENT OF \$1.00**

In *Matiowski v. Lake of the Woods Business Incentive Corp.*, the plaintiff employee sued his former employer for payment of 3,300 hours of overtime worked by him between January 2000 and May 31, 2006.

Matiowski was terminated by Lake and claimed that Lake knew he was accumulating overtime and repeatedly encouraged him to do so but failed to compensate him.

Although the court found that Lake had breached *Ontario's Employment Standards Act* by failing to keep proper records of overtime worked and failing to pay Matiowski for his unused overtime within the time limits set out in the legislation, the court only granted Matiowski \$1.00 in damages.

The court held that the employee had the onus to prove the number of overtime hours he worked and his evidence was unreliable. The employee knew that his employer was not tracking his overtime, yet his evidence consisted of a household calendar which proved to be inaccurate and based on estimates.

The court stated that it: "...cannot accept speculation or guesses but must receive evidence that has sufficient validity on which to found its judgment."

The nominal damage award of \$1.00 was to "serve as a declaration of the plaintiff's rights and a minor deterrent to the defendant."

In awarding costs, the court granted Matiowski \$15,000 in costs plus \$4,281 in disbursements. This was despite Lake's pre-trial formal offer to settle in the amount of \$15,000.00. The costs award was reflective of Mr. Matiowski's years of hard work for Lake and Lake's assurances that his overtime would be looked after.

In the circumstances, the court found that it would be unconscionable and punitive to adhere to the provisions of Rule 49 or to make a no costs award as advocated by Lake.

*Matiowski v. Lake of the Woods Business Incentive Corp. [2008] O.J. No. 4179; and [2008] O.J. No. 5101*

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