

## Ontario Court of Appeal reaffirms principles of contractual interpretation in upholding a termination clause

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### In this Update

- The Ontario Court of Appeal recently released its reasons for its decision in *Amberber v. IBM Canada Ltd.*, 2018 ONCA 571 (*Amberber*).
- In *Amberber*, the Court enforced a termination clause against an employee seeking reasonable notice at common law.
- In upholding the clause, the Court reaffirmed that general principles of contractual interpretation apply to employment contracts, and also provided guidance on contractual ambiguities.
- This decision is a heartening result for employers seeking to enforce termination clauses in their employment contracts.

In its latest decision on the enforceability of termination clauses in employment contracts, the Ontario Court of Appeal recently released reasons in *Amberber v. IBM Canada Ltd.*, 2018 ONCA 571 (Osler partner [Jennifer Dolman](#) and associate [Lindsay Rauccio](#) represented IBM in this matter both before the motion judge and the Court of Appeal). The Court allowed IBM's appeal and enforced a termination clause against an employee seeking reasonable notice at common law. In upholding the clause, the Court reaffirmed that general principles of contractual interpretation apply to employment contracts, and also provided guidance on contractual ambiguities.

The law in Ontario is that an employee dismissed without cause is presumptively entitled to reasonable notice of the termination of their employment at common law, unless the parties agree to contract out of the reasonable notice period by providing for some other period of notice. In order to enforce such an agreement, it must not run afoul of the employment standards set out in the *Employment Standards Act, 2000* (the ESA) and the intention to displace the common law must be expressly or impliedly clear. In recent years, there have been a number of cases in which termination clauses have been attacked on the basis that they fail to comply with the ESA, or do not rebut the common law in sufficiently clear language.

In *Amberber*, the Court enforced a termination clause against an employee seeking reasonable notice at common law. As a result of "failsafe" language within the termination clause, there was no situation in which the clause could run afoul of the ESA. Furthermore, the intention to rebut the common law was unequivocal, and when read holistically, the placement of this language within the clause did not derogate from the clause's intent.

In upholding the clause, the Court reaffirmed that general principles of contractual interpretation apply to employment contracts, and also provided guidance on contractual ambiguities. The mere fact of an interpretative difference in opinion between counsel does not render an agreement ambiguous. Rather, the agreement must be reasonably capable of more than one meaning.

## Background facts

The Plaintiff worked for an IBM customer beginning on September 25, 2000. He commenced employment with IBM on March 30, 2015, pursuant to an offer of employment (the Offer) dated March 16, 2015, in which IBM agreed to recognize the Plaintiff's prior service for purposes of his entitlements upon termination.

The Plaintiff's employment was terminated by IBM without cause by letter dated April 19, 2016. The termination letter notified Mr. Amberber that his employment would end effective July 8, 2016.

The Offer contained a termination clause, which permitted IBM to terminate the Plaintiff's employment without cause, provided IBM paid the greater of the amount generated by a formula, or the amount required under the ESA. The termination clause provided as follows:

If you are terminated by IBM other than for cause, IBM will provide you with notice or a separation payment in lieu of notice of termination equal to the greater of (a) one (1) month of your current annual base salary or (b) one week of your current annual base salary, for each completed six months worked from your IBM service reference date to a maximum of twelve (12) months of your annual base salary. [the "option provision"] This payment includes any and all termination notice pay, and severance payments you may be entitled to under provincial employment standards legislation and Common Law. [the "inclusive payment" provision] Any separation payment will be subject to applicable statutory deductions. In addition, you will be entitled to benefit continuation for the minimum notice period under applicable provincial employment standard legislation. In the event that the applicable provincial employment standard legislation provides you with superior entitlements upon termination of employment ("statutory entitlements") than provided for in this offer of employment, IBM shall provide you with your statutory entitlements in substitution for your rights under this offer of employment [the "failsafe provision"]. [emphasis added]

In addition to working notice, the Plaintiff received \$22,675.50, which represented 18 weeks of base salary.

The Plaintiff commenced an action against IBM claiming damages for wrongful dismissal on August 16, 2016. He claimed damages in the amount of \$86,000, representing lost salary for a period of 16 months.

IBM brought a motion for summary judgment in the Superior Court of Justice to dismiss the Plaintiff's claim, in reliance on the fact that the Plaintiff had received the amounts to which he was entitled pursuant to the termination clause.

## The motion decision

The motion judge focused her decision on three principal issues:

1. Does the termination clause violate (or potentially violate) the employment standards

provided for in the *Employment Standards Act, 2000* (the ESA)?

2. Does the termination clause rebut the presumption to reasonable notice at common law?
3. Can IBM rely on the termination clause, given that it failed to pay the full amount generated by the formula in the Termination Clause, but later corrected this error?

With respect to issues 1 and 3, the motion judge found in favour of IBM. In particular, the motion judge found that the termination clause cannot violate the ESA, because of the language in the last sentence of the clause, which essentially acts as a “failsafe” to guarantee compliance with the ESA.

With respect to the second issue, the motion judge found an ambiguity in the clause as a result of her decision to subdivide the clause into two parts. She resolved this ambiguity in favour of the Plaintiff, in accordance with the principle of *contra proferentum*.

At the invitation of the Plaintiff, the motion judge characterized the clause as effectively two provisions: the first consisting of the “options provision,” together with the “inclusive payment provision,” and the second consisting of the “failsafe provision.” In the motion judge’s view, in situations when the “failsafe provision” applied, because the “inclusive payment provision” is not repeated after the “failsafe provision,” an ambiguity arises that must be resolved in favour of the employee. The motion judge suggested that IBM could have repeated the “inclusive payment provision” in order to reach the requisite level of clarity.

## The decision of the Court of Appeal

IBM appealed the decision of the motion judge with regards to whether the termination clause rebutted the Plaintiff’s entitlements to notice at common law, and the Plaintiff cross-appealed with respect to whether the clause was enforceable for failure to comply with the ESA.

The Court of Appeal allowed IBM’s appeal and dismissed the Plaintiff’s cross-appeal. In dismissing the cross-appeal, Justice Gray, writing on behalf of the Court, rejected the notion that the “failsafe clause” acted to correct an illegality after the fact, as was the case with the severability clause in the employment agreement in the Court of Appeal’s decision in *North v. Metaswitch Networks Corporation*, 2017 ONCA 790. Rather than correcting an illegality, the “failsafe clause” referentially incorporates the minimum requirements of the ESA, and ensures that any portion of the termination clause that violates the ESA is read up to comply with the ESA.

With regards to IBM’s appeal, Justice Gray approached the termination clause practically, noting that the Court should not strain to find an ambiguity where none exists. Furthermore, Justice Gray reaffirmed the application of general principles of contractual interpretation to employment agreements. Although employment contracts are interpreted differently and with a view to different policy considerations than ordinary commercial contracts,[1] the motion judge made a “fundamental error” by subdividing the termination clause into what she regarded as its constituent parts and interpreting them individually, as opposed to reading the clause as a whole. The specific placement of the “inclusive payment provision” does not change the meaning of the clause when the clause is read as a whole, and repeating it would only invite confusion.

Furthermore, when the clause is read as a whole, its meaning is clear: an employee would receive the greater of one week of base salary per completed six months (to a maximum of 12 months) or his statutory entitlements, but in neither case would the Plaintiff be entitled to reasonable notice at common law.

In sum, the clause complied with the ESA, the intention to rebut the common law was clear, and having complied with the clause, Mr. Amberber was not entitled to anything further.

## Implications

This decision is a heartening result for employers seeking to enforce termination clauses in their employment contracts. Together with the decision released by the Court earlier this year in *Nemeth v. Hatch Ltd.*, 2018 ONCA 7, this pair of judgments encourages a pragmatic approach to the interpretation of employment agreements that leans on general canons of contractual construction in order to derive meaning from the words in the agreement as a whole. Furthermore, the Court's decision assists parties in the task of separating true ambiguities from mere differences in opinion between counsel. It is no longer acceptable for an employee to latch on to the least favourable interpretation in order to manufacture an ambiguity in an effort to invalidate the agreement. For a true ambiguity to arise, there must be two or more interpretations that are reasonable. Only in such a case will the ambiguity be construed against the employer.

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[1] In view of the importance of employment in a person's life and the vulnerability of employees when their employment is terminated, the Court in *Wood v. Fred Deeley Imports Ltd.*, 2017 ONCA 158 articulated six considerations relevant to the interpretation and enforceability of a termination clause.