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Burying termination provision in a confidentiality clause voids executive employment contract

By **Frank Portman**

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Law360 Canada (July 26, 2024, 7:54 AM EDT) -- Executive employment contracts, particularly for C-suite executives of organizations, can be lengthy and complex. A well-drafted, thorough contract may deal with a great number of different matters, including compensation, performance expectations, post-employment obligations, termination and others, which may not always interact.

There is a temptation to interpret executive employment contracts looking only at the clearly applicable section to determine any right or responsibility thereunder.

Recent case law shows that such an approach is prone to error.

In *Slavkin v. Henderson et al*., 2022, ONSC 2964, a former employee who had been dismissed further to the winding down of a dental surgery office brought a court action asserting that the five months of working notice she had been given was not enough and that she was entitled to common law notice. Prior to trial, the parties agreed that if the employment contract she signed was valid, she would have no further claim, but that if it was not, she would be entitled to additional compensation subject to her obligation to mitigate.

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The primary question before the court was whether the contract's attempts to limit the employee's entitlements at termination were valid.

The court first looked where one would expect — at the clause that dealt explicitly with the employee's entitlements on termination — to determine whether what it provided was consistent with the requirements of the *Employment Standards Act*. The court found that it did.

However, that did not resolve the issue.

The employee also suggested that aspects of the contract's non-solicitation and conflict of interest clauses, which provided that the employee would be terminated without notice if they were violated, breached the ESA.

The court agreed, finding that the two clauses would have permitted the employer to avoid paying the employee any notice or severance in some circumstances where the *Employment Standards Act*, 2000, would have required such payments. This had the effect of rendering those clauses unenforceable.

Even more important, because the illegal termination provision was buried in the confidentiality clause, this voided the otherwise valid termination clause.

This resulted in the employee receiving more than a year of additional compensation arising from the termination of her employment.

The decision in *Slavkin* underscores the need to be cautious in drafting and interpreting every section of an executive employment contract.

Decisions like *Waksdale* underscore that an employment contract should be interpreted not so much like a book filled with unique and distinct chapters but as a spiderweb of overlapping and interrelated obligations (*Waksdale v. Swegon North America Inc*. [2019] O.J. No. 5021). The failure of one clause, even on technical grounds, can have a significant impact and invalidate other clauses that, on their own, appear enforceable. This can lead to massive differences in entitlements for dismissed employees — extra salary, benefits, even stock options or grants.

Reading or interpreting an employment contract, particularly a complex executive employment contract, is a task requiring expertise and experience. Executives who do not do so run the risk of fundamentally misunderstanding their rights and obligations and leaving money on the table.

Frank Portman is an employment lawyer at Massey LLP. His specialty is executive employment law where he assists presidents, vice-presidents and other C-level executives and the organization seeking to hire their talents, to complete the deal through effective executive employment contracts.

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