2017 ONCA 790
Ontario Court of Appeal

North v. Metaswitch Networks Corp.

2017 CarswellOnt 15733, 2017 ONCA 790, [2017] O.J. No. 5327, 2018 C.L.L.C. 210-012, 284 A.C.W.S. (3d) 101, 417 D.L.R. (4th) 429, 43 C.C.E.L. (4th) 1

Doug North (Applicant / Appellant) and Metaswitch Networks Corporation (Respondent / Respondent)

K. Feldman, Robert J. Sharpe, L.B. Roberts JJ.A.

Heard: March 27, 2017
Judgment: October 16, 2017
Docket: CA C62624

Counsel: Ben Hahn, for Appellant
Tracy Kay, Carrington Hickey, for Respondent

Subject: Civil Practice and Procedure; Public; Employment
Related Abridgment Classifications
Labour and employment law
II Employment law
II.3 Interpretation of employment contract
II.3.i Frustration of contract
Headnote
Labour and employment law --- Employment law — Interpretation of employment contract — Frustration of contract
Employee's employment with M Corp. was governed by written employment contract ("agreement") — When employee's employment was terminated without cause, dispute arose as to whether he was entitled to be paid in accordance with agreement, or based on common law reasonable notice — Agreement contained termination clause that amounted to contracting out of employment standard mandated by Employment Standards Act, 2000 ("ESA") — However, agreement also contained severability clause — Application judge used severability clause to excise what she found to be offending part of termination clause — Employee appealed — Appeal allowed — Decision of application judge was set aside and employee was entitled to receive termination pay based on common law pay in lieu of reasonable notice — Severability clause directed that part of agreement that was to be severed was part that court would find to be illegal — Where termination clause contracted out of employment standard, court was to find entire termination clause to be void, in accordance with s. 5(1) of ESA — It was error in law to merely void offending portion and leave rest of termination clause to be enforced — As result, application judge erred in law by severing only offending sentence that referred to using only base salary to calculate termination pay in lieu of notice, rather than entire termination clause — Part to be severed was part that court would find to be illegal, which must be entire termination clause Employment Standards Act, 2000, S.O. 2000, c. 41, s 5(1).
Table of Authorities
Cases considered by *K. Feldman J.A.*:
KRG Insurance Brokers (Western) Inc. v. Shafron (2009), 2009 SCC 6, 2009 CarswellBC 79, 2009 CarswellBC 80, 70 C.C.E.L. (3d) 157, 68 C.C.L.I. (4th) 161, 87 B.C.L.R. (4th) 1, (sub nom. *Shafron v. KRG Insurance Brokers (Western) Inc.)*

2009 C.L.L.C. 210-010, [2009] 3 W.W.R. 577, 52 B.L.R. (4th) 165, 383 N.R. 217, *(*sub nom. *Shafron v. KRG Insurance Brokers (Western) Inc.)* 301 D.L.R. (4th) 522, 265 B.C.A.C. 1, 446 W.A.C. 1, *(*sub nom. *Shafron v. KRG Insurance Brokers (Western) Inc.)* [2009] 1 S.C.R. 157, D.T.E. 2009T-86 (S.C.C.) — considered

Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co. (2016), 2016 SCC 37, 2016 CSC 37, 2016 CarswellAlta 1699, 2016 CarswellAlta 1700, [2016] 10 W.W.R. 419, 54 B.L.R. (5th) 1, 59 C.C.L.I. (5th) 173, 56 C.L.R. (4th) 1, 487 N.R. 1, [2016] I.L.R. I-5917, 404 D.L.R. (4th) 258, [2016] 2 S.C.R. 23, 19 Admin. L.R. (6th) 1 (S.C.C.) — referred to

Machtinger v. HOJ Industries Ltd. (1992), 40 C.C.E.L. 1, *(*sub nom. *Lefebvre v. HOJ Industries Ltd.; Machtinger v. HOJ Industries Ltd.)* 53 O.A.C. 200, 91 D.L.R. (4th) 491, 7 O.R. (3d) 480n, *(*sub nom. *Lefebvre v. HOJ Industries Ltd.; Machtinger v. HOJ Industries Ltd.)* 136 N.R. 40, 92 C.L.L.C. 14,022, 1992 CarswellOnt 989, [1992] 1 S.C.R. 986, 1992 CarswellOnt 892, 7 O.R. (3d) 480, 7 O.R. (3d) 480 (note) (S.C.C.) — followed

Miller v. Convergys CMG Canada Limited Partnership (2014), 2014 BCCA 311, 2014 CarswellBC 2260, 16 C.C.E.L. (4th) 49, [2014] 9 W.W.R. 641, 375 D.L.R. (4th) 171, 62 B.C.L.R. (5th) 72, 2014 C.L.L.C. 210-052, 359 B.C.A.C. 185, 615 W.A.C. 185 (B.C. C.A.) — considered

Miller v. Convergys CMG Canada Limited Partnership (2015), 2015 CarswellBC 252, 2015 CarswellBC 253 (S.C.C.) — referred to

Oudin v. Centre Francophone de Toronto, Inc. (2015), 2015 ONSC 6494, 2015 CarswellOnt 16476, 27 C.C.E.L. (4th) 86, 2016 C.L.L.C. 210-010 (Ont. S.C.J.) — considered

Oudin v. Centre Francophone de Toronto, Inc. (2016), 2016 ONCA 514, 2016 CarswellOnt 10299, 34 C.C.E.L. (4th) 271, 2016 C.L.L.C. 210-050 (Ont. C.A.) — referred to

Oudin v. Centre Francophone de Toronto, Inc. (2017), 2017 CarswellOnt 1209, 2017 CarswellOnt 1210 (S.C.C.) — referred to

Paquette c. Quadraspec Inc. (2014), 2014 CarswellOnt 5338, 2014 ONCS 2431, 121 O.R. (3d) 765 (Ont. S.C.J.) — referred to

R. v. Singh (2014), 2014 ONCA 293, 2014 CarswellOnt 4953, 120 O.R. (3d) 76, 310 C.C.C. (3d) 285, 64 M.V.R. (6th) 1, 318 O.A.C. 232 (Ont. C.A.) — referred to

R. v. Timminco Ltd. (2001), 2001 CarswellOnt 1277, 153 C.C.C. (3d) 521, 42 C.R. (5th) 279, 144 O.A.C. 231, *(*sub nom. *R. v. Timminco Ltd./Timminco Ltée)* 54 O.R. (3d) 21, 11 C.C.E.L. (3d) 46 (Ont. C.A.) — referred to

Wood v. Fred Deeley Imports Ltd. (2017), 2017 ONCA 158, 2017 CarswellOnt 2408, 134 O.R. (3d) 481, 2017 C.L.L.C. 210-031, 412 D.L.R. (4th) 261 (Ont. C.A.) — followed

2176693 Ontario Ltd. v. Cora Franchise Group Inc. (2015), 2015 ONCA 152, 2015 CarswellOnt 3220, 383 D.L.R. (4th) 361, 124 O.R. (3d) 776, 330 O.A.C. 271, 39 B.L.R. (5th) 211 (Ont. C.A.) — considered

Statutes considered:

Employment Standards Act, 2000, S.O. 2000, c. 41

Generally — referred to

s. 1(1) "employment standard" — considered

s. 1(1) "wages" (a) — considered

s. 1(1) "wages" (b) — considered

s. 1(1) "wages" (c) — considered

s. 5 — considered

s. 5(1) — considered

s. 57 — considered

s. 60 — considered

s. 61 — considered

Rules considered:
Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 14 — considered

APPEAL by employee from decision of application judge which used severability clause to excise what she found to be offending part of termination clause.

***K. Feldman J.A.*:**

1 Doug North's employment with Metaswitch Networks Corporation was governed by a written employment contract (the "Agreement"). When North's employment was terminated without cause, a dispute arose as to whether he was entitled to be paid in accordance with the Agreement, or based on common law reasonable notice.

2 The Agreement contained a termination clause that amounted to contracting out of an employment standard mandated by the Employment Standards Act, 2000, S.O. 2000, c. 41 (the "ESA"). However, the Agreement also contained a severability clause. The issue before the application judge and on this appeal is the interpretation and application of the two clauses in light of s. 5 of the ESA, which prohibits employers and employees from waiving or contracting out of any employment standard prescribed by the ESA, except to provide a greater benefit to the employee.

3 The application judge used the severability clause to excise what she found to be the offending part of the termination clause. For the reasons that follow, I would set aside the decision of the application judge and find that North is entitled to receive termination pay based on common law pay in lieu of reasonable notice.

FACTS

4 The appellant was employed from November 2012 to March 2016 with the respondent, pursuant to the Agreement. His earnings consisted of salary plus commission.

5 His employment was terminated in accordance with paragraph 9(c) of the Agreement, under Termination of Employment, the relevant part of which provides:

> **9. Termination of Employment**
>
> (c) Without Cause — The Company may terminate your employment at any time in its sole discretion for any reason, without cause, upon by [sic] providing you with notice and severance, if applicable, in accordance with the provisions of the Ontario *Employment Standards Act* (the "Act"). In addition, the Company will continue to pay its share all [sic] of your employee benefits, if any, and only for that period required by the Act.
>
> The reference to notice in paragraphs 9(b) and (c) can, at the Company's option, be satisfied by our provision to you of pay in lieu of such notice. The decision to provide actual notice or pay in lieu, or any combination thereof, shall be in the sole discretion of the Company. All pay in lieu of notice will be subject to all required tax withholdings and statutory deductions.
>
> In the event of the termination of your employment, any payments owing to you shall be based on your Base Salary, as defined in the Agreement.

6 The appellant took the position that this part of the Agreement was void under s. 5(1) of the ESA, because the sentence that provides that payments are to be based "on your Base Salary" contravened the ESA by excluding his commission. Therefore, he was entitled to receive termination compensation based on common law pay in lieu of reasonable notice.

7 The respondent's position was that if the termination clause was illegal because of the one offending sentence, then that sentence should be excised from the Agreement, using the severability clause contained in para. 17(a) which provides:

> **17. General Provisions**

> (a) If any part of the Agreement is found to be illegal or otherwise unenforceable by any court of competent jurisdiction, that part shall be severed from this Agreement and the rest of the Agreement's provisions shall remain in full force and effect.

8 That would leave the balance of para. 9 in force, and the appellant would be paid termination pay calculated in accordance with the ESA.

9 The appellant sought to have the issue of the applicability and effect of the severability clause determined by the court on an application under Rule 14 of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194, where the determination of rights depends on the interpretation of a contract and there are unlikely to be any material facts in dispute.

THE FINDINGS OF THE APPLICATION JUDGE

10 The application judge accepted that the sentence in the termination clause, para. 9 of the Agreement, that reads: "[i]n the event of the termination of your employment, any payments owing to you shall be based on your Base Salary, as defined in the Agreement", had the effect of excluding payment of commission to which the appellant was entitled, and therefore contravened the ESA.

11 "Employment standard" is defined in s. 1(1) of the ESA as "a requirement or prohibition under this Act that applies to an employer for the benefit of an employee". Sections 57, 60 and 61 set out employment standards in relation to termination of employment. Section 57 of the ESA stipulates minimum notice periods for termination. Section 60 provides that during such a notice period, wages cannot be reduced and employees are entitled to their regular wages. Section 61 allows an employer to terminate the employment of an employee without notice, so long as the employer makes a lump sum payment equivalent to the amount that would have been received under s. 60 (i.e., based on regular wages) and continues to make benefit plan contributions. The definition of regular wages includes wages, which are defined broadly in the ESA, in s. 1(1), as:

> (a) monetary remuneration payable by an employer to an employee under the terms of an employment contract, oral or written, express or implied,
>
> (b) any payment required to be made by an employer to an employee under this Act, and
>
> (c) any allowances for room or board under an employment contract or prescribed allowances[.]

12 The definition goes on to list certain exclusions that are not relevant in this case. Wages have been held to include commissions: see Kimberly A. Parry and David A. Ryan, *Employment Standards Handbook*, 3d ed. (Toronto: Thomson Reuters, 2017) vol. 1, at p. 1-29; and *Paquette c. Quadraspec Inc.*, 2014 ONCS 2431, 121 O.R. (3d) 765 (Ont. S.C.J.), at para. 27. By excluding commissions, the employer therefore contravened the employment standard of ss. 60 and 61. In oral argument before this court, the respondent did not dispute this illegality.

13 The application judge addressed the severability clause and found that para. 17(a) expressed the intention of the parties that "any illegal or unenforceable parts were to be severed to allow the rest of the agreement to stand." She then recited the portion of the termination clause, para. 9(c), which states that notice and severance, if applicable, were to be provided "in accordance with the provisions of the Ontario Employment Standards Act". She concluded that the parties' intention was to comply with the ESA.

14 In interpreting and giving effect to the severability clause, the application judge referred to the reasoning of Dunphy J. in *Oudin v. Centre Francophone de Toronto, Inc.*, 2015 ONSC 6494, 27 C.C.E.L. (4th) 86Ont. S.C.J., aff'd 2016 ONCA 51434 C.C.E.L. (4th) 271 (Ont. C.A.), leave to appeal to SCC refused, (2017), [2016] S.C.C.A. No. 391 (S.C.C.), where, using a severability provision, he excised from a termination provision one reason among a list of reasons for dismissal without pay, stating, at para. 41, that "[t]he excision of the offending reason from the list does no violence to the integrity of the remainder of s. 4 which contains a list of other unrelated grounds for termination."

15 The application judge found that the same reasoning would apply to the Agreement: the illegal clause limiting the pay upon termination to be based on base salary only "could be removed in its entirety pursuant to the para. 17(a) severability clause. The parties would be left with [para.] 9(c) as to what payments would be owing." She was satisfied that the term "any part" in para. 17(a) was not ambiguous and could apply to the offending sentence. She rejected the argument that the severability clause was void as a result of s. 5(1) of the ESA.

ISSUES

16 The issues on this appeal are:

1) Did the application judge err in law by using the severability clause of the Agreement to save the termination clause that contravened the ESA?

2) Did the application judge err in law by failing to find that the severability clause had no application to a clause of the Agreement that was rendered void by s. 5(1) of the ESA?

ANALYSIS

(1) Did the application judge err in law by using the severability clause of the Agreement to save the termination clause that contravened the ESA?

(a) The employment law framework

17 When deciding this case, the application judge did not have the benefit of this court's recent decision in *Wood v. Fred Deeley Imports Ltd.*, 2017 ONCA 158, 134 O.R. (3d) 481 (Ont. C.A.), on the issue of the interpretation and treatment of termination clauses in an employment contract. While deference is owed to the application judge on issues of contractual interpretation, no deference is owed where there is an extricable error of law: see Wood, at para. 43; and *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 S.C.R. 23 (S.C.C.), at paras. 21, 36.

18 In *Wood*, Laskin J.A. set out the principles that govern the payment owed to an Ontario employee whose employment is terminated without cause. He summarized the law as follows, beginning at paras. 15-16:

> At common law, an employee hired for an indefinite period can be dismissed without cause, but only if the employer gives the employee reasonable notice. In *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, at p. 998, the Supreme Court characterized the common law principle of termination of employment on reasonable notice "as a presumption, rebuttable if the contract of employment clearly specifies some other period of notice".
>
> Ontario employers and employees can rebut the presumption of reasonable notice by agreeing to a different notice period. But their agreement will be enforceable only if it complies with the minimum employment standards in the ESA. If it does not do so, then the presumption is not rebutted, and the employee is entitled to reasonable notice of termination.

19 And continuing at paras. 25-28:

> The question of the enforceability of the termination clause turns on the wording of the clause, the purpose and language of the ESA, and the jurisprudence on interpreting employment agreements. That jurisprudence is now well-established. I will summarize it briefly.
>
> In general, courts interpret employment agreements differently from other commercial agreements. They do so mainly because of the importance of employment in a person's life. As Dickson C.J.C. said in an oft-quoted passage:
>
> > Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being.

> As important as employment itself is the way a person's employment is terminated. It is on termination of employment that a person is most vulnerable and thus is most in need of protection.
>
> The importance of employment and the vulnerability of employees when their employment is terminated give rise to a number of considerations relevant to the interpretation and enforceability of a termination clause:
>
> • When employment agreements are made, usually employees have less bargaining power than employers. Employees rarely have enough information or leverage to bargain with employers on an equal footing.
>
> • Many employees are likely unfamiliar with the employment standards in the ESA and the obligations the statute imposes on employers. These employees may not seek to challenge unlawful termination clauses.
>
> • The ESA is remedial legislation, intended to protect the interests of employees. Courts should thus favour an interpretation of the ESA that "encourages employers to comply with the minimum requirements of the Act" and "extends its protections to as many employees as possible", over an interpretation that does not do so.
>
> • Termination clauses should be interpreted in a way that encourages employers to draft agreements that comply with the ESA. If the only consequence employers suffer for drafting a termination clause that fails to comply with the ESA is an order that they comply, then they will have little or no incentive to draft a lawful termination clause at the beginning of the employment relationship.
>
> • A termination clause will rebut the presumption of reasonable notice only if its wording is clear. Employees should know at the beginning of their employment what their entitlement will be at the end of their employment.
>
> • Faced with a termination clause that could reasonably be interpreted in more than one way, courts should prefer the interpretation that gives the greater benefit to the employee. [Citations omitted.]

20 Section 5 of the ESA prohibits employers and employees from waiving or contracting out of any of the employment standards prescribed in the ESA, except to provide a greater benefit to the employee. Any such contracting out is void. The text of s. 5 is as follows:

> 5. (1) Subject to subsection (2), no employer or agent of an employer and no employee or agent of an employee shall contract out of or waive an employment standard and any such contracting out or waiver is void.
>
> (2) If one or more provisions in an employment contract or in another Act that directly relate to the same subject matter as an employment standard provide a greater benefit to an employee than the employment standard, the provision or provisions in the contract or Act apply and the employment standard does not apply.

21 Most importantly, in Wood, at para. 21, the court explained the effect of the principles established by the Supreme Court in Machtinger v. HOJ Industries Ltd. [1992 CarswellOnt 892 (S.C.C.)] regarding the consequences of s. 5(1) of the ESA:

> Contracting out of even one of the employment standards and not substituting a greater benefit would render the termination clause void and thus unenforceable, in which case [the employee] would be entitled to reasonable notice of termination of her employment at common law.

22 This interpretation of the operation and effect of s. 5(1) of the ESA explains how a court is to approach the interpretation of termination clauses that waive or contract out of one employment standard, but comply with others.

(b) Application of the principles

23 In my view, the application judge erred in her approach to the interpretation and application of the severability clause. It is convenient to restate para. 17(a) of the agreement here for ease of reference:

17. General Provisions

> (a) If any part of the Agreement is found to be illegal or otherwise unenforceable by any court of competent jurisdiction, that part shall be severed from this Agreement and the rest of the Agreement's provisions shall remain in full force and effect.

24 The severability clause directs that the part of the agreement that is to be severed is the part that a court would find to be illegal. The rule from *Wood*, following *Machtinger*, is that where a termination clause contracts out of one employment standard, the court is to find the entire termination clause to be void, in accordance with s. 5(1) of the ESA. It is an error in law to merely void the offending portion and leave the rest of the termination clause to be enforced.

25 As a result, the application judge erred in law by severing only the offending sentence that referred to using only base salary to calculate termination pay in lieu of notice, rather than the entire termination clause. Para. 17(a) requires that the part to be severed is the part that a court would find to be illegal, which must be the entire termination clause.

26 Because of the conclusion I have reached based on the meaning and application of para. 17(a), there is no need in this case to address the Supreme Court decision in *KRG Insurance Brokers (Western) Inc. v. Shafron*, 2009 SCC 6, [2009] 1 S.C.R. 157 (S.C.C.), referred to by the appellant, and to what extent the rules regarding blue pencil and notional severance may apply in the context of the severability clause drafted by the parties.

(2) Did the application judge err in law by failing to find that the severability clause had no application to a clause of the Agreement that was rendered void by s. 5(1) of the ESA?

27 The appellant also argued, in the alternative, that the effect of s. 5(1) of the ESA is to make the severability clause void. The application judge rejected that submission.

28 While I agree with the application judge that the severability clause is not rendered void by s. 5(1), I would frame the issue differently. The issue is not whether the severability clause is void, but whether it can have any application on the termination clause, if that clause is void as a result of s. 5(1).

(a) Consequences of a voided clause, absent a severability clause

29 Section 5(1) prohibits contracting out of or waiving an employment standard, and provides that any such contracting out or waiver is void. An employment standard is defined in s. 1(1) as: "a requirement or prohibition under this Act that applies to an employer for the benefit of an employee".

30 The result is that an offending termination clause that is void has no application to oust the common law, which again applies, requiring pay in lieu of reasonable notice. As discussed above, in Wood, at para. 21, this court explained that where a termination clause contains "even one" instance of contracting out of an ESA employment standard, the clause is void.

31 In *Machtinger*, Iacobucci J. gave a number of policy reasons for finding that where there is contracting out of an employment standard within a termination clause, the effect is to void the entire clause (resulting in entitlement to reasonable notice), and not just the removal of the impugned clause (resulting in entitlement to the statutory minimum termination pay provisions).

32 He stated at p. 1003, that in light of the objective of the ESA to protect the interests of employees:

> [A]n interpretation of the [ESA] which encourages employers to comply with the minimum requirements of the [ESA], and so extends its protections to as many employees as possible, is to be favoured over one that does not.

33 He continued at p. 1004:

> If the only sanction which employers potentially face for failure to comply with the minimum notice periods prescribed by the [ESA] is an order that they minimally comply with the [ESA], employers will have little incentive to make contracts with their employees that comply with the [ESA].

34 And as many employees are not aware of their legal rights or will not go to the trouble or expense of trying to have the contract set aside in court, they will accept the illegality: see Machtinger, at p. 1004.

35 Nor would it be a hardship for the employer to draft a contract that complies with or accounts for potential changes in the ESA. As Iacobucci J. stated, at pp. 1004-1005:

> Absent considerations of unconscionability, an employer can readily make contracts with his or her employees which referentially incorporate the minimum notice periods set out in the [ESA] or otherwise take into account later changes to the [ESA] or to the employees' notice entitlement under the [ESA].

36 Justice Iacobucci concluded his analysis by observing, at p. 1005:

> Given that the employer has attempted, whether deliberately or not, to frustrate the intention of the legislature, it would indeed be perverse to allow the employer to avail itself of legislative provisions intended to protect employees, so as to deny the employees their common law right to reasonable notice.

37 In my view, these same policy considerations should inform the approach to be taken when considering the operation of s. 5(1), where an employment contract contains a severability clause.

(b) Approaches to interpreting and applying a severability clause

38 When a severability clause is introduced into the contract, the issue is whether: (i) the severability clause can be used to remove the illegality in the termination clause; or (ii) because the termination clause as drafted is void as a result of s. 5(1), there is nothing on which the severability clause can act.

(i) First approach

39 In *Oudin*, the motion judge relied on the wording of the specific severability provision in the employment contract that directed modification "only to the extent necessary" to comply with the law: see *Oudin*, at paras. 35, 40. The motion judge found that this established the clear intention of the parties: see Oudin, at para. 42. Similarly in *Miller v. Convergys CMG Canada Limited Partnership*, 2014 BCCA 311, 16 C.C.E.L. (4th) 49 (B.C. C.A.), leave to appeal to SCC refused, (2015), [2014] S.C.C.A. No. 424 (S.C.C.), the court stated at para. 42:

> Where the parties anticipated the possibility of severance and chose contractual language to govern this eventuality, severability is not just a remedial question. Before turning to remedy, the starting point must be to give effect to what the parties reasonably intended if a provision of the contract is found unenforceable by reason of illegality.

40 The problem with this approach is that, to the extent that it effectively rewrites or reads down the offending provisions, it has the very effect referred to by Iacobucci J. in *Machtinger* — employers will be incentivized to contract out of the ESA but include a severability clause to save the offending provision in the event that an employee has the time and money to challenge the contract in court. Similar concerns were recognized by this court in *2176693 Ontario Ltd. v. Cora Franchise Group Inc.*, 2015 ONCA 152, 124 O.R. (3d) 776 (Ont. C.A.), where the court declined to order severance of an illegal clause in a franchise agreement because, if the only consequence to a franchisor is that the illegal clause is read down to make it legal, franchisors would be encouraged to draft illegal contracts.

(ii) Second approach

41 The other approach is to first assess the termination clause to see whether there is any contracting out of an employment standard. If there is, then the termination clause is void, and there is nothing to which the severability clause can be applied. In that way, the severability clause is not void, but it is inoperative where the agreement contracts out of or waives an employment standard.

42 In my view, this approach is the one that is consistent with the intent of the ESA and the Supreme Court decision in *Machtinger*. Nor does it do any injustice to the contractual interpretation principle of ascertaining the intention of the parties. Because the termination clause is void, it cannot be used as evidence of the parties' intentions to comply with the ESA: see Machtinger, at p. 1001.

43 This approach also causes no disadvantage to employers, who, as noted by Iacobucci J., are free to make a legal contract that limits an employee's rights on termination to the standards set by the ESA.

44 As noted above, this conclusion does not make the severability clause void. It continues to have application to the rest of the agreement. However, it cannot have any effect on clauses of the contract that have been made void by statute. Those terms are null and void for all purposes and cannot be rewritten, read down or interpreted through the application of a severability clause to provide for the minimum standard imposed by the ESA.

45 I would therefore hold that s. 5(1) of the ESA makes the severability clause, para. 17(a), inoperative on the termination clause, which contracts out of an employment standard.

46 This result may appear to be inconsistent with this court's dismissal of the appeal in *Oudin*. The application judge found the motion judge's reasons in *Oudin* to be analogous. However, the courts in *Oudin* also did not have the benefit of this court's subsequent decision in *Wood*. Further, the issue of the applicability of the severability provision in light of s. 5(1) of the ESA was not discussed in the endorsement as the basis of the appeal. Rather, the basis of the appeal was primarily focused on the correctness of the motion judge's determination that the termination provisions respecting notice did not offend the ESA. Therefore, this court's endorsement in *Oudin* should not be viewed as supporting a broad, overarching principle regarding the motion judge's application of the severability provision in that case: see *R. v. Timminco Ltd.* (2001), 54 O.R. (3d) 21 (Ont. C.A.), at para. 36; and *R. v. Singh*, 2014 ONCA 293, 120 O.R. (3d) 76 (Ont. C.A.), at para. 12.

RESULT

47 I would allow the appeal with costs, set aside the decision of the application judge, and order that the appellant is entitled to receive termination pay based on common law reasonable notice. I would fix the costs of the appeal at $17,000 inclusive of HST and disbursements, and the costs of the application at $8,000 inclusive of disbursements and HST.

***Robert J. Sharpe J.A.*:**

I agree.

***L.B. Roberts J.A.*:**

I agree.

Appeal allowed.

End of Document

Most Negative Treatment: Distinguished
Most Recent Distinguished: Kopyl v. Losani Homes (1998) Ltd. | 2024 ONCA 199, 2024 CarswellOnt 3701, 2024 A.C.W.S. 1235 | (Ont. C.A., Mar 19, 2024)

2020 ONCA 391
Ontario Court of Appeal

Waksdale v. Swegon North America Inc.

2020 CarswellOnt 8319, 2020 ONCA 391, [2020] O.J. No. 2703, 2020 C.L.L.C. 210-056, 319 A.C.W.S. (3d) 238, 446 D.L.R. (4th) 725, 64 C.C.E.L. (4th) 253

Benjamin Waksdale (Plaintiff / Appellant) and Swegon North America Inc. (Defendant / Respondent)

S.E. Pepall, C.W. Hourigan, L.B. Roberts JJ.A.

Judgment: June 17, 2020
Docket: CA C67616

Proceedings: reversing *Waksdale v. Swegon North America Inc.* (2019), 57 C.C.E.L. (4th) 223, 2020 C.L.L.C. 210-010, 2019 ONSC 5705, 2019 CarswellOnt 15653, E.M. Morgan J. (Ont. S.C.J.)

Counsel: Philip R. White, Jason K. Wong, for Appellant
Landon Young, Amanda Boyce, for Respondent

Subject: Civil Practice and Procedure; Public; Employment; Labour
Related Abridgment Classifications
Labour and employment law
II Employment law
II.6 Termination and dismissal
II.6.b Notice
II.6.b.iii Effect of contractual terms regarding notice
Headnote
Labour and employment law --- Employment law — Termination and dismissal — Notice — Effect of contractual terms regarding notice
Employer terminated employee's employment as director of sales, without cause, after eight months' employment — Parties had employment agreement that provided for one week pay in addition to minimum pay in lieu of notice under Employment Standards Act, 2000 — Agreement contained clause for termination for cause, which parties agreed was unenforceable, and contained clause rendering any illegal clause severable from rest of agreement — Employee asserted that unenforceable clause rendered entire agreement void — Employee brought action for wrongful dismissal damages, and employer brought successful motion for summary judgment dismissing action — Motion judge concluded that termination with notice clause was stand-alone, unambiguous, and enforceable clause — Employee appealed — Appeal allowed — Motion judge erred in his interpretation of employment contract by failing to read termination provisions as whole and instead applying piecemeal approach without regard to their combined effect — Given conclusion that termination for cause provision and termination with notice provision were to be understood together, severability clause could not apply to sever offending portion of termination provisions — Motion judge's order was set aside, and matter was remitted for motion judge to determine quantum of employee's damages and costs of action.

Table of Authorities

Cases considered:

North v. Metaswitch Networks Corp. (2017), 2017 ONCA 790, 2017 CarswellOnt 15733, 43 C.C.E.L. (4th) 1, 2018 C.L.L.C. 210-012, 417 D.L.R. (4th) 429 (Ont. C.A.) — referred to

Wood v. Fred Deeley Imports Ltd. (2017), 2017 ONCA 158, 2017 CarswellOnt 2408, 134 O.R. (3d) 481, 2017 C.L.L.C. 210-031, 412 D.L.R. (4th) 261 (Ont. C.A.) — followed

Statutes considered:

Employment Standards Act, 2000, S.O. 2000, c. 41

Generally — referred to

APPEAL by employee from judgment reported at *Waksdale v. Swegon North America Inc.* (2019), 2019 ONSC 5705, 2019 CarswellOnt 15653, 57 C.C.E.L. (4th) 223, 2020 C.L.L.C. 210-010 (Ont. S.C.J.), granting employer's motion for summary judgment dismissing employee's wrongful dismissal action.

***Per curiam*:**

Introduction

1 The appellant sued the respondent for wrongful dismissal and moved for summary judgment, arguing that he was entitled to damages because the respondent did not provide him with reasonable notice of dismissal.

2 The primary issue on the motion was the legal effect of the written employment contract between the parties. The appellant took the position that the termination clause in his employment contract was void because it was an attempt to contract out of the minimum standards of the *Employment Standards Act, 2000*, S.O. 2000, c. 41 (the "*ESA*"). The respondent conceded that the "Termination for Cause" provision in the contract was void because it violated the *ESA*. However, it argued that the "Termination of Employment with Notice" provision in the agreement was valid and, because it was not alleging cause, it could rely on the latter provision.

3 The motion judge dismissed both the motion for summary judgment and the appellant's action, and awarded the respondent $16,000 for costs of the action. He concluded that the Termination of Employment with Notice provision is a stand-alone, unambiguous, and enforceable clause.

4 In our view, the motion judge erred in law in his interpretation of the employment contract. The termination provisions are unenforceable because they violate the *ESA*. Therefore, we allow the appeal, set aside the motion judge's order, and order that the matter be remitted to the motion judge to determine the quantum of the appellant's damages.

Analysis

5 The appellant began his employment with the respondent on January 8, 2018 as a director of sales. His total income was approximately $200,000 per annum. The respondent terminated the appellant without cause on October 18, 2018 and paid the appellant two weeks' pay in lieu of notice.

6 The respondent conceded on the motion that the Termination for Cause provision in the employment contract breached the *ESA*. Likewise, the appellant acknowledged that the Termination of Employment with Notice provision complied with the minimum requirements of the *ESA*. Therefore, the issue for the motion judge was the discrete question of whether the illegality of the Termination for Cause provision rendered the Termination of Employment with Notice provision unenforceable.

7 The law regarding the interpretation of termination clauses in employment contracts was helpfully summarized by Laskin J.A. at para. 28 of *Wood v. Fred Deeley Imports Ltd.*, 2017 ONCA 158, 134 O.R. (3d) 481 (Ont. C.A.). The following points from that summary are particularly apt for the purposes of this appeal:

- The ESA is remedial legislation, intended to protect the interests of employees. Courts should thus favour an interpretation of the ESA that "encourages employers to comply with the minimum requirements of the Act" and

> "extends its protections to as many employees as possible", over an interpretation that does not do so: *Machtinger*, p. 1003.
>
> • Termination clauses should be interpreted in a way that encourages employers to draft agreements that comply with the ESA. If the only consequence employers suffer for drafting a termination clause that fails to comply with the ESA is an order that they comply, then they will have little or no incentive to draft a lawful termination clause at the beginning of the employment relationship: *Machtinger*, p. 1004.

8 Laskin J.A. went on to observe that the enforceability of a termination provision in an employment contract must be determined as at the time the agreement was executed. The wording of the contract alone should be considered in deciding whether it contravenes the *ESA*, not what the employer might have done on termination: *Wood* , at paras, 43-44. Thus, even if an employer's actions comply with its *ESA* obligations on termination, that compliance does not have the effect of saving a termination provision that violates the *ESA*.

9 In the present case, there is no question that the respondent would not be permitted to rely on the Termination for Cause provision. The issue is whether the two clauses should be considered separately or whether the illegality of the Termination for Cause provision impacts the enforceability of the Termination of Employment with Notice provision. The respondent submits that where there are two discrete termination provisions that by their terms apply to different situations, courts should consider whether one provision impacts upon the other and whether the provisions are "entangled" in any way. If they are not, the respondent argues, then there is no reason why the invalidity of one should impact on the enforceability of the other.

10 We do not give effect to that submission. An employment agreement must be interpreted as a whole and not on a piecemeal basis. The correct analytical approach is to determine whether the termination provisions in an employment agreement read as a whole violate the *ESA*. Recognizing the power imbalance between employees and employers, as well as the remedial protections offered by the *ESA*, courts should focus on whether the employer has, in restricting an employee's common law rights on termination, violated the employee's *ESA* rights. While courts will permit an employer to enforce a rights-restricting contract, they will not enforce termination provisions that are in whole or in part illegal. In conducting this analysis, it is irrelevant whether the termination provisions are found in one place in the agreement or separated, or whether the provisions are by their terms otherwise linked. Here the motion judge erred because he failed to read the termination provisions as a whole and instead applied a piecemeal approach without regard to their combined effect.

11 Further, it is of no moment that the respondent ultimately did not rely on the Termination for Cause provision. The court is obliged to determine the enforceability of the termination provisions as at the time the agreement was executed; non-reliance on the illegal provision is irrelevant.

12 The mischief associated with an illegal provision is readily identified. Where an employer does not rely on an illegal termination clause, it may nonetheless gain the benefit of the illegal clause. For example, an employee who is not familiar with their rights under the *ESA*, and who signs a contract that includes unenforceable termination for cause provisions, may incorrectly believe they must behave in accordance with these unenforceable provisions in order to avoid termination for cause. If an employee strives to comply with these overreaching provisions, then his or her employer may benefit from these illegal provisions even if the employee is eventually terminated without cause on terms otherwise compliant with the *ESA*.

13 In the alternative, the respondent relies on a severability clause in the employment contract which reads as follows:

> You agree that if any covenant, term, condition or provision of this letter outlining the offer of employment with the Company is found to be invalid, illegal or incapable of being enforced by a rule of law or public policy, all remaining covenants, terms, conditions and provisions shall be considered severable and shall remain in full force and effect.

14 We decline to apply this clause to termination provisions that purport to contract out of the provisions of the *ESA*. A severability clause cannot have any effect on clauses of a contract that have been made void by statute: *North v. Metaswitch Networks Corp.*, 2017 ONCA 790, 417 D.L.R. (4th) 429 (Ont. C.A.), at para. 44. Having concluded that the Termination for

Cause provision and the Termination of Employment with Notice provision are to be understood together, the severability clause cannot apply to sever the offending portion of the termination provisions.

Disposition

15 The motion judge's order is set aside. The only defence the respondent had to the action and the motion for summary judgment was its reliance on the Termination of Employment with Notice provision. Accordingly, we order that the matter be remitted to the motion judge to determine the quantum of the appellant's damages and the costs of the action. If the parties cannot agree on the costs of the appeal, they may file written submissions together with a bill of costs within ten days of the release of these reasons. Those submissions shall be no more than three pages in length.

Appeal allowed.

End of Document

Most Negative Treatment: Check subsequent history and related treatments.

2022 ONSC 2964
Ontario Superior Court of Justice

Henderson v. Slavkin et al.

2022 CarswellOnt 11594, 2022 ONSC 2964, 2022 A.C.W.S. 1528, 2023 C.L.L.C. 210-011, 81 C.C.E.L. (4th) 244

Rose Henderson (Plaintiff) and David Slavkin and Melvyn Kellner (Defendants)

Carole J. Brown J.

Heard: February 14-15, 2022
Judgment: August 10, 2022
Docket: CV-20-00644914

Counsel: Lluc Cerda, for Plaintiff
Frank Portman, for Defendants

Subject: Civil Practice and Procedure; Public; Employment
Related Abridgment Classifications
Labour and employment law
II Employment law
II.6 Termination and dismissal
II.6.b Notice
II.6.b.iii Effect of contractual terms regarding notice
Labour and employment law
II Employment law
II.6 Termination and dismissal
II.6.c Remedies
II.6.c.i Damages
II.6.c.i.C Calculation of quantum
Labour and employment law
II Employment law
II.6 Termination and dismissal
II.6.c Remedies
II.6.c.i Damages
II.6.c.i.M Reduction for failure to mitigate

Headnote

Labour and employment law --- Employment law — Termination and dismissal — Remedies — Damages — Calculation of quantum

Plaintiff former employee was receptionist at oral surgeon's practice — Former employee commenced employment with defendant employers in April 1990 and her employment terminated in April 2020 — In 2019, defendants convened meeting of all staff to advise that defendant MK would be retiring in March 2020, defendant DS having already retired, and that all staffs' employment would terminate on that date — At time of termination of oral surgery practice and, as consequence, former employee's employment, COVID-19 pandemic had just been announced, and dental practices were closed pursuant to government requirements until approximately June 2020 — Former employee received income support payments under Canada Emergency Response Benefit Act, during reasonable notice period, totalling $10,000 — Former employee brought wrongful dismissal action against her employers — Canada Emergency Response Benefit (CERB) at issue did not amount to compensating advantage — CERB was not advantage or gain that flowed to former employee because there was real risk that

she would be required to repay it in due course — Based on evidence, former employee did not "cease working" for reasons related to COVID-19; in fact, her notice of termination long predated pandemic and availability of CERB program — Evidence did not lead to conclusion that CERB would not have accrued to former employee's 'but for' her wrongful dismissal — It was not found that CERB was benefit intended to be indemnity for wage loss arising from employers' breach of employment contract — Former employee's CERB did not amount to collateral benefit.

Labour and employment law --- Employment law — Termination and dismissal — Remedies — Damages — Reduction for failure to mitigate

Plaintiff former employee was receptionist at oral surgeon's practice — Former employee commenced employment with defendant employers in April 1990 and her employment terminated in April 2020, at which time received annual base salary of $46,000 — In 2019, defendants convened meeting of all staff to advise that defendant MK would be retiring in March 2020, defendant DS having already retired, and that all staffs' employment would terminate on that date — At time of termination of oral surgery practice and, as consequence, former employee's employment, COVID-19 pandemic had just been announced, and dental practices were closed pursuant to government requirements until approximately June 2020 — Former employee, based on her own admission, did not seek other employment from time she received her working notice through end of 2020, and she was able to secure employment in May 2021 as frontline worker in long-term care home — Former employee brought wrongful dismissal action against her employers — Notice period should have reduced by three months — Given pandemic, long economic recovery, difficulty in finding work as businesses slowly began to open, as well as former employee's age and her move to smaller centre where rent was cheaper, there should have been only small deduction for length of time it took her to mitigate — Former employee acted reasonably and did her best to find work once she moved from Toronto to Glencoe.

Labour and employment law --- Employment law — Termination and dismissal — Notice — Effect of contractual terms regarding notice

Table of Authorities

Cases considered by *Carole J. Brown J.*:

Abdon v. Brandt Industries Canada Ltd. (2021), 2021 SKPC 37, 2021 CarswellSask 414 (Sask. Prov. Ct.) — referred to

Adjemian v. Brook Crompton North America (2008), 2008 CarswellOnt 3304, 67 C.C.E.L. (3d) 118 (Ont. S.C.J.) — referred to

Alarashi v. Big Brothers Big Sisters of Toronto (2019), 2019 ONSC 4510, 2019 CarswellOnt 12915, 57 C.C.E.L. (4th) 321 (Ont. S.C.J.) — referred to

Amberber v. IBM Canada Ltd. (2018), 2018 ONCA 571, 2018 CarswellOnt 10197, 48 C.C.E.L. (4th) 68, 424 D.L.R. (4th) 169, 2018 C.L.L.C. 210-062 (Ont. C.A.) — referred to

Andrews v. Allnorth Consultants Limited (2021), 2021 BCSC 1246, 2021 CarswellBC 2021, 2021 C.L.L.C. 210-061 (B.C. S.C.) — referred to

Chilton v. Co-operators General Insurance Co. (1997), 41 C.C.L.I. (2d) 35, 32 O.R. (3d) 161, 97 O.A.C. 369, 143 D.L.R. (4th) 647, [1997] I.L.R. I-3423, 1997 CarswellOnt 360 (Ont. C.A.) — referred to

Cook v. Hatch Ltd. (2017), 2017 ONSC 47, 2017 CarswellOnt 1071, 40 C.C.E.L. (4th) 296, 2017 C.L.L.C. 210-024 (Ont. S.C.J.) — referred to

Dobson v. Winton & Robbins Ltd. (1959), [1959] S.C.R. 775, 20 D.L.R. (2d) 164, 1959 CarswellOnt 86 (S.C.C.) — referred to

Donovan v. Quincaillerie Richelieu Hardware LTD. (2021), 2021 NBBR 189, 2021 NBQB 189, 2021 CarswellNB 704, 2021 CarswellNB 705 (N.B. Q.B.) — referred to

Drysdale v. Panasonic Canada Inc. (2015), 2015 ONSC 6878, 2015 CarswellOnt 18495 (Ont. S.C.J.) — referred to

Gracias v. Dr. David Walt Dentistry (2022), 2022 ONSC 2967, 2022 CarswellOnt 7132, 79 C.C.E.L. (4th) 224 (Ont. S.C.J.) — considered

Hogan v. 1187938 B.C. Ltd. (2021), 2021 BCSC 1021, 2021 CarswellBC 1692, 2021 C.L.L.C. 210-054 (B.C. S.C.) — followed

Iriotakis v. Peninsula Employment Services Limited (2021), 2021 ONSC 998, 2021 CarswellOnt 1663, 69 C.C.E.L. (4th) 144, 154 O.R. (3d) 373, 2021 C.L.L.C. 210-031 (Ont. S.C.J.) — considered

Lalani v. Canadian Standards Assn. (2015), 2015 ONSC 7634, 2015 CarswellOnt 19003, 27 C.C.E.L. (4th) 279 (Ont. S.C.J.) — referred to

Livshin v. The Clinic Network Canada Inc. (2021), 2021 ONSC 6796, 2021 CarswellOnt 14315, 2022 C.L.L.C. 210-009, 159 O.R. (3d) 430 (Ont. S.C.J.) — referred to
Michaels v. Red Deer College (1975), [1976] 2 S.C.R. 324, [1975] 5 W.W.R. 575, 5 N.R. 99, 75 C.L.L.C. 14,280, 57 D.L.R. (3d) 386, 1975 CarswellAlta 57, 1975 CarswellAlta 142 (S.C.C.) — referred to
Nemeth v. Hatch Ltd. (2018), 2018 ONCA 7, 2018 CarswellOnt 142, 44 C.C.E.L. (4th) 19, 418 D.L.R. (4th) 542, 2018 C.L.L.C. 210-026 (Ont. C.A.) — referred to
Nicolas Jr. v. Ocean Pacific Hotels Ltd. (2022), 2022 BCSC 1052, 2022 CarswellBC 1682 (B.C. S.C.) — considered
Oostlander v. Cervus Equipment Corporation (2022), 2022 ABQB 200, 2022 CarswellAlta 678, 38 Alta. L.R. (7th) 127, 77 C.C.E.L. (4th) 252, 2022 C.L.L.C. 210-035 (Alta. Q.B.) — referred to
Oudin v. Centre Francophone de Toronto, Inc. (2016), 2016 ONCA 514, 2016 CarswellOnt 10299, 34 C.C.E.L. (4th) 271, 2016 C.L.L.C. 210-050 (Ont. C.A.) — referred to
Peticca v. Oracle Canada ULC (2015), 2015 CarswellOnt 5450 (Ont. S.C.J.) — referred to
Reotech Construction Ltd. v. Snider (2022), 2022 BCSC 317, 2022 CarswellBC 517, 2022 C.L.L.C. 210-034 (B.C. S.C.) — considered
Rutledge v. Canaan Construction Inc. (2020), 2020 ONSC 4246, 2020 CarswellOnt 9578, 2020 C.L.L.C. 210-058, 65 C.C.E.L. (4th) 178 (Ont. S.C.J.) — referred to
Shalagin v. Mercer Celgar Limited Partnership (2022), 2022 BCSC 112, 2022 CarswellBC 163, 76 C.C.E.L. (4th) 250, 2022 C.L.L.C. 210-029 (B.C. S.C.) — considered
Slater v. Halifax Herald Limited (2021), 2021 NSSC 210, 2021 CarswellNS 438 (N.S. S.C.) — considered
Somir v. Canac Kitchens (2006), 2006 CarswellOnt 8108, 2007 C.L.L.C. 210-004, 56 C.C.E.L. (3d) 234 (Ont. S.C.J.) — referred to
Waksdale v. Swegon North America Inc. (2020), 2020 ONCA 391, 2020 CarswellOnt 8319, 446 D.L.R. (4th) 725, 64 C.C.E.L. (4th) 253, 2020 C.L.L.C. 210-056 (Ont. C.A.) — referred to
Waterman v. IBM Canada Ltd. (2013), 2013 SCC 70, 2013 CarswellBC 3726, 2013 CarswellBC 3727, D.T.E. 2013T-851, 366 D.L.R. (4th) 287, [2014] 2 W.W.R. 452, 52 B.C.L.R. (5th) 1, 11 C.C.E.L. (4th) 169, (sub nom. *IBM Canada Ltd. v. Waterman)* 2013 C.E.B. & P.G.R. 8060 (headnote only), (sub nom. *IBM Canada Ltd. v. Waterman)* 2014 C.L.L.C. 210-008, 452 N.R. 207, (sub nom. *IBM Canada Limited v. Waterman)* [2013] 3 S.C.R. 985, 347 B.C.A.C. 43, 593 W.A.C. 43, 9 C.C.L.T. (4th) 173, 8 C.C.P.B. (2nd) 1 (S.C.C.) — followed
Wood v. Fred Deeley Imports Ltd. (2017), 2017 ONCA 158, 2017 CarswellOnt 2408, 134 O.R. (3d) 481, 2017 C.L.L.C. 210-031, 412 D.L.R. (4th) 261 (Ont. C.A.) — followed
Yates v. Langley Motor Sport Centre Ltd. (2021), 2021 BCSC 2175, 2021 CarswellBC 3519, 75 C.C.E.L. (4th) 122, 2022 C.L.L.C. 210-017 (B.C. S.C.) — followed

Statutes considered:

Canada Emergency Response Benefit Act, S.C. 2020, c. 5, s. 8
Generally — referred to

s. 2 "worker" — considered

s. 6(1)(a) — considered

Employment Standards Act, 2000, S.O. 2000, c. 41
Generally — referred to

s. 5(1) — referred to

s. 64 — referred to

Human Rights Code, R.S.O. 1990, c. H.19
Generally — referred to

Occupational Health and Safety Act, R.S.O. 1990, c. O.1
Generally — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 5.04(2) — referred to
Regulations considered:
Employment Standards Act, 2000, S.O. 2000, c. 41
Termination and Severance of Employment, O. Reg. 288/01

s. 2(1) ¶ 3 — referred to

ACTION by former employee against her employers for wrongful dismissal.

***Carole J. Brown J.*:**

1 At the commencement of trial, a misnomer, namely the spelling of the defendant's surname as "Slavki", was amended pursuant to Rule 5.04 (2) to his correct name "Slavkin".

2 The plaintiff brings this wrongful dismissal action against her employers, the defendants, Drs. David Slavkin and Melvyn Kellner, in the form of a summary trial.

3 The parties, at the commencement of trial, advised that they had agreed upon a notice period of 18 months, in the event that the court finds that the plaintiff was wrongfully dismissed.

The Facts

4 The parties have agreed upon numerous facts. Others were presented by the affidavits of the parties, with exhibits appended and cross-examinations and re-examinations conducted at trial.

5 The defendants, Dr. David Slavkin and Dr. Melvyn Kellner, operated oral surgery dental offices in the Greater Toronto Area (GTA) and in Bolton, Ontario. Both doctors are now retired, Dr. Slavkin having retired on December 31, 2020 and Dr. Kellner on April 28, 2021. Dr. Slavkin is 74 years old and Dr. Kellner is 71 years old.

6 The plaintiff, Rose Henderson, was the receptionist at the Bolton office. She commenced employment with the defendants in April 1990. Her employment terminated on April 30, 2020. She had been a loyal and dedicated employee throughout her employment, which was reflected in the letter of reference provided by her employers at the time of her termination.

7 At the time of her termination, she received an annual base salary of $46,000 and 20 days of paid vacation per year.

8 The defendants worked as oral surgeons, not as general family dentists. In general dentistry, practices are built on the basis of a regularly recurring patient base that returns regularly for scheduled checkups and dental hygiene. By contrast, most patients of oral surgeons require only a single or a few procedures. Consequently, the majority of work at an oral surgery practice is by way of referrals from general practice dentists. Thus, it is more difficult to sell an oral surgeon's practice than a family dentistry practice, the charts and records of which would have inherent value to a purchasing family dentistry practice.

9 Dr. Slavkin began business with another oral surgeon, Dr. John Gryfe, in Downsview in 1976. Dr. Kellner began working with them in September 1981. The three partners opened the third office in Bolton in April 1990, which is the office at which Ms. Henderson was employed. In 2006, Dr. Gryfe left the practice and the Weston office was closed.

10 In 2015, Dr. Slavkin and Dr. Kellner, who were 68 and 65 respectively, began to make plans for their future retirement. They reduced their hours worked per week. They had hoped that they might sell to another oral surgeon and, to that end, had brought a third person, Dr. Gregory Duviner, into the practice. However, he was not interested in purchasing the practice and left in October 2019.

11 Given their plans to retire, the defendants sought to implement employment contracts so that the employees would know what they could expect from the defendants' impending retirements. On May 26, 2015, the defendants offered all of the staff

employed by them, including the plaintiff, new employment contracts. There had not previously been written contracts. These new employment contracts were accompanied by an explanatory letter.

12 The letter sent to the plaintiff read as follows:

> It has become necessary for the Practice to adopt new employment policies. While neither of us has any immediate plans for retirement, you are all aware that we are both of advancing age and there may have been uncertainty as to future working conditions, hours, and/or terms of employment. We appreciate and look forward to your continued employment with the Practice, and this is not a reflection of your value to the practice
>
> . . .
>
> You have two choices as to how your agreement will be implemented. The first choice is that we are prepared to pay you $500.00 for your signature on the enclosed letter agreement. If you are not prepared to sign the agreement in exchange for the $500.00 payment, then we are herein providing you with actual working notice (based on the length of your employment here) that effective May 26, 2017 your employment on your current terms will terminate and you will be offered a contract in the wording attached. If at that point you are not prepared to sign the letter agreement, then your employment with us will terminate effective May 26, 2017.
>
> We are taking these steps to protect the practice goodwill and to provide clarity and stability in the workplace. We look forward to discussing this with you.

13 The new employment agreement accompanied the letter. The three clauses of that employment agreement which the plaintiff asserts are illegal are paragraphs 13, 18 and 19, which read as follows:

> 13. Your employment may be terminated without cause for any reason upon the provision of notice equal to the minimum notice or pay in lieu of notice and any other benefits required to be paid under the terms of the *Employment Standards Act*, if any. By signing below, you agree that upon receipt of your entitlement under the *Employment Standards Act*, no further amount shall be due and payable to you, whether under the *Employment Standards Act*, any other statute or common law.
>
> 18. Conflict of Interest. You agree that you will ensure that your direct or indirect personal interests do not, whether potentially or actually, conflict with the Employer's interests. You further covenant and agree to promptly report any potential or actual conflicts of interest to the employer. A conflict of interest includes, but is not expressly limited to the following:
>
> > (a) Private or financial interest in an organization with which does business *[sic]* or which competes with our business interests;
> >
> > (b) A private or financial interest, direct or indirect, in any concern or activity of ours of which you are aware or ought reasonably to be aware;
> >
> > (c) Financial interests include the financial interest of your parent, spouse, partner, child or relative, a private corporation of which the [*sic*] you are a shareholder, director or senior officer, and a partner or other employer;
> >
> > (d) Engage in unacceptable conduct, including but not limited to soliciting patients for dental work, which could jeopardize the patient's relationship with us.
>
> A failure to comply with this clause above constitutes both a breach of this agreement and cause for termination without notice or compensation in lieu of notice.
>
> 19. Confidential Information. You recognize that in the performance of your duties, you will acquire detailed and confidential knowledge of our business, patient information, and other confidential information, documents, and records. You agree that you will not in any way use, disclose, copy, reproduce, remove or make accessible to any person or other

third party, either during your employment or any time thereafter, any confidential information relating to our business, including office forms, instruction sheets, standard form letters to patients or other documents drafted and utilized in the Employer's practice except as required by law or as required in the performance of your job duties.

For clarity, confidential information includes, without limitation, all information (in written, oral, tape, cd rom, diskette, and USB keys or any electronic form) which relates to the business, affairs, properties, assets, financial condition and plans, concerning or relating to the Employer, our dental practice or patients and specifically includes all records, patient files, patient lists, patient names, patient addresses, patient telephone numbers, email addresses, invoices and/or statements, daily appointment sheets, radiographs, marketing information and strategies, advertising information and strategies, and financial information,

In the event that you breach this clause while employed by the Employer, your employment will be terminated without notice or compensation in lieu thereof, for cause.

This provision shall survive the termination of this Agreement.

14 The plaintiff, after two days, signed the agreement. She continued her work with the defendants in her position as receptionist.

15 In January 2019, the defendants closed the office in the GTA, leaving the Bolton clinic as the only office left. By February 2019, Dr. Kellner had reduced his office hours to 2.5 days per week. In the late spring of 2019, Dr. Slavkin announced that he would retire effective August 26, 2019.

16 In October 2019, Dr. Duviner advised that he would not be continuing with the practice and was not interested in purchasing it. The defendants determined that they could not feasibly sell their practice.

17 On November 1, 2019, the defendants convened a meeting of all staff to advise that Dr. Kellner would be retiring in March 2020 - Dr. Slavkin having already retired - and that all staffs' employment would terminate on that date. At the meeting, the defendants provided to all staff, including the plaintiff, confirmation in writing of the termination of their employment effective April 30, 2020.

18 The plaintiff, in accordance with her working notice of six months, continued to work until February 2020. After that time, she went on a preplanned vacation. Thereafter, she went on paid sick leave. Throughout this, she was paid her full salary by the defendants.

19 Thereafter, the plaintiff, whose only income source had been her position with the defendants, chose to move back to her childhood home town, Glencoe. She did not own the house in which she lived, but only rented the house, and chose to move to Glencoe where she had family and friends, and where the rent was not as expensive.

20 At the time of the termination of the oral surgery practice and, as a consequence, her employment, the COVID-19 pandemic had just been announced. Dental practices were closed pursuant to government requirements until approximately June 2020.

21 The plaintiff, based on her own admission, did not seek other employment from the time she received her working notice through the end of 2020. As of January 2021, she began to search for new employment and was able to secure employment in May 2021 as a frontline worker in a long-term care home. I note that, pursuant to the evidence adduced, she had made application to numerous optometrist offices in the vicinity, as well as a variety of other advertised positions.

Positions of the Parties

22 It is the position of the plaintiff that the contract of employment which she was asked to sign in 2015 was unconscionable, contained provisions that were contrary to the Employment Standards Act, 2000, S.O. 2000, c.41 (“ESA”), the Occupational Health and Safety Act, R.S.O. 1990, c.O.1 ("OHSA") and/or the Human Rights Code, R.S.O. 1990, c. H.19 (“HRC”), and therefore illegal, and that, as a result, she was wrongfully terminated. It is the position of the plaintiff that the employment

contract must be set aside and, as a result, she is entitled to common-law damages. Further, it is the plaintiff's position that she has reasonably mitigated her damages.

23 It is the position of the defendants that the contract signed by the plaintiff in 2015 was not unconscionable or illegal. It is the position of the defendants that they, in planning for their upcoming retirement, did everything they could to ensure that the employees were terminated professionally and with significant notice. It is their position that the plaintiff's entitlements pursuant to the ESA were fully satisfied. It is their position that the plaintiff failed to mitigate her damages.

The Issues

24 The issues to be determined in this case are as follows:

1. Whether the plaintiff was wrongfully terminated;

    (a) Whether the termination clause was unenforceable;

    (b) If so, whether the termination clause is unconscionable;

2. If so, what measure of damages is to be applied;

3. If damages are awarded, whether the plaintiff mitigated said damages; and

4. Whether CERB payments received by the plaintiff should be deducted from an award for wrongful dismissal.

The Law

25 The basic principles forming the framework for the determination of the enforcement of a termination clause are set forth concisely in Wood v. Fred Deeley Imports Ltd., 2017 ONCA 158, 134 O.R. (3d) 481, at para. 28, as follows:

> 1. Employees have less bargaining power than employers when employment agreements are made;
>
> 2. Employees are likely unfamiliar with employment standards in the ESA and thus are unlikely to challenge termination clauses;
>
> 3. The ESA is remedial legislation, and courts should therefore favour interpretations of the ESA that encourage employers to comply with the minimum requirements of the Act, and extend its protection to employees;
>
> 4. The ESA should be interpreted in a way that encourages employers to draft agreements which comply with the ESA;
>
> 5. A termination clause will rebut the presumption of reasonable notice only if its wording is clear, since employees are entitled to know at the beginning of an employment relationship what their employment will be at the end of their employment; and
>
> 6. Courts should prefer an interpretation of the termination clause that gives the greater benefit to the employee.

And see: Alarashi v. Big Brothers Big Sisters of Toronto, 2019 ONSC 4510, 57 C.C.E.L. (4th) 321, at para 20.

26 Where an employment agreement is not consistent with the ESA, it becomes invalid irrespective of the actual arrangements made with an employee on termination, and the terminated employee becomes entitled to common-law damages.

27 In interpreting an employment agreement, it must be remembered that contracts are to be interpreted in their context in a way that the parties reasonably expected the contract would be interpreted when they entered into it: see *Oudin v. Centre Francophone de Toronto,*, 2016 ONCA 514, 34 C.C.E.L (4th) 271. The court should not strain to create ambiguity where none exists in the context of interpreting the termination clause: see Amberber v. IBM Canada Ltd., 2018 ONCA 571, 424 D.L.R. (4th) 169, at para. 63; see also *Chilton v. Co-operators General Insurance Co.*, (1997), 32 O.R. (3d) 161 (C.A.), at p. 169.

28 The role of a judge in interpreting a termination clause in relation to the ESA requirements is to "look for the true intention of the parties, not to disaggregate the words looking for any ambiguity that can be used to set aside the agreement and, on that basis, apply notice as provided for by the common law: Cook v. Hatch2017 ONSC 47, at para 25.

29 I have kept the foregoing principles in mind in my analysis.

Analysis

30 It is the position of the plaintiff that the employment contract the plaintiff signed in 2015 contained three problematic and illegal provisions, including clauses 13, 18 and 19, all of which are set forth above at pages 3 and 4.

Clause 13

31 The plaintiff submits that the clause does not exhibit the high degree of clarity that is required of termination clauses and cites *Nemeth v. Hatch Ltd*, 2018 ONCA 7, 418 D.L.R. (4th) 542, where the Court of Appeal stated, at para. 12, that in assessing the validity of a termination clause, "a high degree of clarity is required and any ambiguity will be resolved in favour of the employee and against the employer who drafted the termination clause in accordance with the principle of *contra proferentem*". The plaintiff submits that the clause did not provide for the payment of severance pay as required by section 64 of the ESA and the payment of vacation pay during the statutory notice period. Further, the plaintiff argues that by providing that benefits must be paid during the statutory notice, rather than "continued", the clause attempts to illegally contract out of the ESA. The plaintiff submits that, at best, the clause lacks clarity as to whether Ms. Henderson would be paid severance pay or continued benefits.

32 In this case, the plaintiff was not provided with benefits in the context of her employment, nor were the defendants severance-paying employers. However, an employee cannot contract out of a protected employment standard under the ESA, even if that particular standard does not yet apply to them: ESA, s. 5(1). "It is sufficient if a provision of an employment contract *potentially* violates the ESA at any date after hiring" (original emphasis): Rutledge v. Canaan Construction Inc, 2020 ONSC 4246, at para. 15. In Waksdale v. Swegon North America Inc, 2020 ONCA 391, 446 D.L.R. (4th) 725, at para. 11, the Court of Appeal for Ontario stated that "the court is obliged to determine the enforceability of the termination provisions as at the time the agreement was executed; non-reliance on the illegal provision is irrelevant."

33 The plaintiff further argues that an employer cannot terminate an employee for any reason and, indeed, there are 47 circumstances pursuant to the ESA, OHSA and the HCR which specifically prohibit termination.

34 The plaintiff challenges the termination clause not on the basis of the actual conduct of the defendants in relation to her termination but, rather, on the ground that it is not open to parties to contract out of the ESA.

35 It is the position of the defendants that the termination clause should be read in context and as a reflection of the clear intent of the parties that the minimum requirements of the ESA apply. The defendants cite *Oudin* as a framework for the analysis of the enforcement of a termination clause.

36 As stated in *Amberber* , the court should not strain to create ambiguity where none exists in the context of interpreting a termination clause. Further, as stated in *Cook v. Hatch*, a judge, in interpreting a termination clause, must look for the true intention of the parties, not to disaggregate the words looking for any ambiguity that can be used to set aside the agreement and, on that basis, apply notice as provided for by the common law.

37 In my view, there is no inconsistency between the termination clause and the ESA provisions which could give rise to any ambiguity in the plaintiff's right to continue to receive benefits pursuant to the ESA. When considering the wording of the clause in issue and the intent of the parties demonstrated in the wording of the clause, indicating compliance with the requirements of the ESA, I cannot conclude that the clause could or should be interpreted as contrary to or inconsistent with the provisions of the ESA. I do not find anything which would suggest that the termination clause should be interpreted as contrary to the ESA.

Clause 18

38 It is the position of the plaintiff that conduct that falls short of wilful misconduct cannot constitute dismissal for cause. The standard for just cause termination under the ESA entitles even those terminated with cause to minimal entitlements unless the employer can establish, pursuant to s. 2(1)(3) of *Termination and Severance of Employment*, O. Reg. 288/01, that the employee is guilty of wilful misconduct or wilful neglect of duty. While the defendants argue that the provisions enumerated above all bespeak wilful misconduct or wilful neglect of duty, I am unable to conclude that that is indeed the case, based on the wording thereof. I am, however, of the view that the provisions are overly broad and ambiguous. Sub-paragraph (a) does not represent a complete sentence, as a word or words are missing. One would have to guess as to what words are missing such that an employee would not be able to know, upon entering the contract, what conduct in that case might cause termination without notice or compensation in lieu thereof. I am further of the view that sub-paragraph (b) is equally broad, unspecific and ambiguous. I find equally that sub-paragraphs (c) and (d) fall into the same category of broad, unspecific and ambiguous wording.

39 In light of my findings regarding clause 18, the clause is invalid and must be set aside.

Clause 19

40 It is the position of the plaintiff that clause 19 defines confidential information and forbids its disclosure, with termination for cause being the penalty for the breach. However, the clause does not stipulate that any misconduct must be wilful and not trivial to support a termination without notice, as required by the ESA.

41 As set forth in *Wood v. Fred Deeley*, a termination clause will rebut the presumption of reasonable notice only if its wording is clear, as employees are entitled to know at the beginning of an employment relationship what their employment will be at the end of their employment.

42 Again, an employee is entitled to know at the beginning of an employment relationship what the employment will be at the end of their employment and how and when it may be terminated without cause. In this case, it is not clear in what circumstances the disclosure of confidential information may occur without immediate termination for cause without notice. One can conceive of a situation where confidential information may have been inadvertently disclosed in a situation where it is not wilful and/or where it is a trivial breach. This clause does not respect the ESA provisions in this regard.

43 Based on my findings regarding clause 19, this clause is also invalid and must be set aside.

Mitigation of Damages

44 The defendants submit that Ms. Henderson failed to mitigate her damages. They point to the fact that she did not obtain employment for 18 months after her termination. Further, they state that she did not apply to any dental or oral dental surgeon offices. They maintain that she was highly and easily employable given her experience.

45 It is the position of the plaintiff that her termination occurred at the height of the COVID-19 pandemic in April 2020, when many businesses, including dental offices, were closed. She maintains that positions were not easily obtainable at that time, nor when businesses slowly began to reopen. She takes the position that she acted reasonably in her efforts to mitigate her damages and made significant efforts to secure alternate employment.

46 The onus of demonstrating that the plaintiff has failed to act reasonably in an attempt to mitigate her losses is that of the defendants and is typically a high onus: Lalani v. Canadian Standards Association, 2015 ONSC 7634, 27 C.C.E.L. (4th) 279, at para. 27; *Red Deer College v. Michaels*, [1976] 2 S.C.R. 324; *Dobson v. Winton and Robbins Ltd*, [1959] S.C.R. 775. The Supreme Court of Canada, in *Red Deer College* , at p. 332, stated as follows: "The burden which lies on the defendant of proving that the plaintiff has failed in his duty of mitigation is by no means a light one, for this is a case where a party already in breach of contract demands positive action from one who is often innocent of blame."

47 In Somir v. Canac Kitchens200656 C.C.E.L. (3d) 234 (Ont. S.C.), at para. 58, the court stated that "the onus rests on the defendant to show either that the plaintiff 'found, or by the exercise of proper industry in the search, could have procured

other employment of an approximately similar kind reasonably adapted to his abilities' . . . The defendant must establish that the plaintiff's conduct in seeking to find alternate employment was unreasonable in all respects" (citations omitted).

48 The onus is on the employer to prove that the employee failed to take reasonable steps to find a comparable position: Gracias v. Dr. David Walt Dentistry, 2022 ONSC 2967, at para. 106.

49 In Adjemian v. Brook Crompton North America200867 C.C.E.L. (3d) 118(Ont. S.C.J.) , at para. 21, the court emphasized that mitigation need not be perfect, only reasonable. To meet its onus, the employer must advance evidence of comparable positions to which the plaintiff is reasonably adapted and cannot "pick away at the plaintiff's performance with a bald suggestion that she could have done better": *Peticca v. Oracle Canada ULC*, [2015] O.J. No. 1985 (S.C.), at paras. 18-20; see also Drysdale v. Panasonic Canada Inc, 2015 ONSC 6878, at paras 18–23.

50 This is a somewhat unique situation, given the timing of closing of the business and the termination at the height of the pandemic. I have no doubt that the pandemic and the significant closures of businesses across the province and the country had an impact on the plaintiff's search for employment and the success of that search.

51 Based on the evidence adduced, dental offices were closed through at least June of 2020, and opened again with restricted capacity, as did other businesses.

52 In addition, consideration must be had to her age - 63 years old at the time of termination - which may have made finding another comparable position more difficult.

53 Further, following her termination, Ms. Henderson decided not to remain in Toronto, where she rented a house and where the rent was high. She was single and had lost her only source of income. She moved to Glencoe, where she had grown up, where she had family, and where rents were lower. This must also be considered in assessing the reasonableness of her ability to mitigate her damages and find comparable employment in a smaller market outside the Toronto area.

54 After moving to Glencoe, Ms. Henderson began to look for work. She applied to numerous positions, including medical offices, and finally secured employment as a frontline worker in a long-term care home.

55 This took 18 months from her notice of termination, 12 months from her last day of work. In normal circumstances, this would not meet the test for mitigation. However, given the pandemic, the long economic recovery, the difficulty in finding work as businesses slowly began to open, as well as the plaintiff's age and her move to a smaller centre where rent was cheaper, I am of the view that there should be only a small deduction for the length of time it took her to mitigate in the circumstances. The plaintiff acted reasonably and did her best to find work once she moved from Toronto to Glencoe. I am of the view that the notice period should be reduced by 3 months in the circumstances.

56 I note that the defendants have failed to demonstrate that there were other positions open to which Ms. Henderson could and should have applied.

57 Again, this is a somewhat unique set of circumstances and this issue has been decided in this unique context.

CERB

58 Ms. Henderson received income support payments under the Canada Emergency Response Benefit Act, S.C. 2020, c. 5, s. 8 ("*CERB Act*"), during the reasonable notice period, totalling $10,000.

59 The defendants' position is that this amount should be deducted from the damages award; otherwise, Ms. Henderson will be in a better position than she would have been in had she not been terminated. They argue that, since there is no basis for repayment under the CERB Act or a regulation promulgated under it, her CERB is a gain that will not need to be repaid. Further, an award of pay in lieu of notice does not amount to employment income or any other source of income enumerated in the CERB Act disentitling an individual from receiving the benefit.

60 The plaintiff argues that her CERB does not amount to a collateral benefit because she may need to repay it. She was not eligible to receive it in the first place because she did not stop working "for reasons related to COVID-19". Further, the benefits she received are not sufficiently connected to the defendants' breach. She received CERB because she was terminated during the pandemic. That benefit, she says, was not designed to indemnify her for the sort of loss occasioned by the defendants' breach.

The Law

61 This case raises the two-fold question of whether Ms. Henderson's CERB creates a compensating advantage and, if so, whether that advantage should be deducted from the damages award.

62 Collateral benefits were most recently considered by the Supreme Court of Canada in *IBM Canada Limited v. Waterman*, [2013] 3 S.C.R. 985. In *Waterman* , the Court addressed the question of when a collateral benefit or "compensating advantage" the plaintiff receives (pension benefits, in that case) should be deducted from damages otherwise payable for a wrongful dismissal.

63 The Court indicated that a collateral benefit is an advantage or gain that flows to a plaintiff: *Waterman* , para. 15. Further, that advantage or gain must also be connected to the defendant's breach on a 'but for' causal basis or because the gain was intended to provide the plaintiff with an indemnity for the type of loss caused by the breach: *Waterman* , para. 15. However, even if a collateral benefit is recognized as such, it is not necessarily deductible. A strict application of the compensation principle, *i.e.*, that a defendant should compensate the plaintiff only for his or her actual loss, will in some cases not do justice between the parties: *Waterman* , at para. 36. These "exceptions" include the two well-known ones of charitable gifts and private insurance, which are justified on the basis of "justice, reasonableness and public policy": *Waterman* , at para. 37.

64 The caselaw is split on whether CERB, specifically, is deductible from wrongful dismissal damages.

65 In *Iriotakis v. Peninsula Employment Services Ltd*, 2021 ONSC 998, 154 O.R. (3d) 373, CERB was not deducted. The 56-year-old plaintiff was dismissed without cause from his sales position in March 2020, after 28 months of service. In his last year of employment, he received a base salary of $60,000 and $145,000 in compensation, including commissions. The court noted that CERB was "an *ad hoc* programme and neither employer nor employee can be said to have paid into [it] or 'earned' an entitlement over time beyond their general status as taxpayers". Dunphy J. found that there was a significant difference between the plaintiff's CERB and his salary and compensation and concluded, at para. 21, that "[o]n balance *and on these facts*, it would not be equitable to reduce Mr. Iriotakis' entitlements to damages . . . given his limited entitlements from the employer post-termination relative to his actual pre-termination earnings" (emphasis in original).

66 *Iriotakis* was applied in Fogelman v. IFG2021 ONSC 4042. At paras. 94-95, Vella J. stated her agreement with *Iriotakis* and declined to deduct CERB. Similarly, in *Dr. David Walt Dentistry* , Perell J. indicated that he agreed with the reasons in *Iriotakis* (but also *Slater* and *Snider* — discussed below) and held that CERB was not a "mitigation credit" in the case before him.

67 A different approach was taken in *Slater v. Halifax Herald Limited*, 2021 NSSC 210. The plaintiff was laid off in March 2020 after 39 years of service. He was awarded damages of $88,000. The court declined to deduct CERB. Campbell J. found that Mr. Slater might have to repay CERB because the damages were a "form of payment" for the period he would have otherwise been working and the CERB Act requires repayment if a recipient is rehired or receives retroactive pay: paras. 53-4. In that case, it would be unfair to reduce the damages award. Further, even if he were not required to repay CERB, this "windfall" would not require his employer to pay more damages than it would have had to pay had CERB not existed: para. 54. The alternative would be that his employer "would benefit from the taxpayer funded CERB payments by having a reduced damage award and Mr. Slater would be left providing an explanation" (para. 60).

68 *Slater* was applied in *Donovan v. Quincaillerie Richelieu Hardware LTD*, 2021 NBQB 189, another instance in which CERB was not deducted.

69 Courts have come to the opposite conclusion in several cases, mostly from British Columbia. [1]

70 In *Hogan v. 1187938 B.C. Ltd*, 2021 BCSC 1021, CERB was deducted from the damages award. Mr. Hogan was laid off in March 2020, after nearly 22 years, at a then-annual salary of $86,000 and bonuses of up to $12,000 a year. Gerow J., applying *Waterman* , concluded that CERB was to be deducted so as not to put the plaintiff in a better position than he would have been in had he not been terminated. 'But for' his dismissal, he would not have received CERB, and the "nature of that benefit is an indemnity for the wage loss caused by the employer's breach of contract": para. 101. Gerow J. distinguished *Iriotakis* on the basis that there was a large disparity between Mr. Iriotakis' loss and the damages he received, one that would allow him to retain CERB without putting him in a better economic position that he otherwise would have been in: paras. 102-104. Gerow J. further noted, at para. 105, that there was no evidence that Mr. Hogan would have to repay CERB.

71 *Hogan* was followed in *Yates v. Langley Motor Sport Centre Ltd*, 2021 BCSC 2175. The plaintiff was laid off in March 2020. Following *Hogan*, the court concluded, at para. 43, that if the plaintiff's CERB was not deducted, she would be in a better position than she otherwise would have been in. The court found that 'but for' her termination, she would not have been eligible for CERB; that it was a benefit intended to be an indemnity for the loss of regular salary arising from the employer's breach; and that she had not contributed to that benefit: para. 43. The court also declined to find that an award of damages would trigger a CERB repayment obligation, chiefly on the basis that payment in lieu of notice does not constitute employment income and is not prescribed as "other income" by regulation under the CERB Act: para. 44. Finally, the court declined to apply *Andrews v. Allnorth Consultants Limited*, 2021 BCSC 1246, in which CERB was not deducted, on the basis that it was decided without the benefit of the reasons in *Hogan* and *IBM* (para. 46).

72 *Hogan* and *Yates* were followed in *Shalagin v. Mercer Celgar Limited Partnership*, 2022 BCSC 112; *Reotech Construction Ltd. v. Snider*, 2022 BCSC 317; and *Nicolas Jr. v Ocean Pacific Hotels Ltd*, 2022 BCSC 1052.

73 In *Shalagin*, the court concluded that CERB would be deducted if the plaintiff had been wrongfully dismissed. He was terminated in March 2020 after ten years of service for reasons unrelated to the pandemic. Branch J. stated, at paras. 85-86, that *Horgan* and *Yates* were binding and offered the "more compelling" analysis, one that "better accords with a foundational principle of contract law — ensuring that the plaintiff is put in the same position they would have been in had the contract been performed." The court also stated that *Iriotakis* and *Slater* were distinguishable for the reasons set out in *Hogan* and declined, for lack of evidence, to find as the court did in *Slater* that "the requirement for repayment makes [CERB] analogous to EI benefits" (para. 85).

74 In *Reotech*, the Supreme Court of British Columbia allowed an appeal in part of the trial judge's decision not to deduct CERB. The court endorsed *Hogan* and *Yates* and indicated that *Yates* , which was released after the trial decision, "established that CERB payments are a collateral benefit" (para. 88). Fleming J. concluded that, given the lack of evidence that the plaintiff's CERB would have to be repaid, the trial judge had erred in law in declining to deduct it (para. 89).

75 Finally, in *Ocean Pacific Hotels*, Ross J. stated, at para. 56, that he was bound by *Hogan* and *Yates* , considered them to be correct, and concluded that CERB would be deducted.

Analysis

76 After considering the caselaw, including *Dr. David Walt Dentistry* , and the parties' submissions, I conclude that the CERB at issue does not amount to a compensating advantage, for the following reasons.

77 The CERB is not an advantage or gain that flowed to Ms. Henderson because there is a real risk that she will be required to repay it, in due course. Pursuant to s. 6(1)(a) of the CERB Act, a "worker" is entitled to CERB if he or she, "whether employed or self-employed, ceases working for reasons related to COVID-19". Based on the evidence before me, Ms. Henderson did not "cease working" for reasons related to COVID-19; in fact, her notice of termination long predated the pandemic and the availability of the CERB program. There is also the question, which I need not decide here, of whether Ms. Henderson met the definition of "worker" under s. 2 of the CERB Act at the time of her application.

78 Further, Ms. Henderson's receipt of CERB was not sufficiently connected to the defendants' breach. First, it was not connected on a 'but for' causal basis. To be eligible for CERB, a worker must have stopped working for COVID-related reasons. This was the case in *Yates* and *Hogan* . The plaintiffs stopped working for COVID-related reasons because the pandemic prompted their employers to terminate their positions in March 2020. In this case, Ms. Henderson was dismissed in November 2019, months before the pandemic arrived and for reasons completely unrelated to it. While her dismissal left her unemployed during the period when she received CERB, this is an insufficient basis on which to find a strong causal connection between the defendants' breach and the receipt of a benefit meant to support those who have stopped working for pandemic-related reasons. The evidence does not lead me to the conclusion that CERB would not have accrued to Ms. Henderson 'but for' her wrongful dismissal.

79 Second, I do not find, as the court did in *Hogan* and *Yates* , that CERB is a benefit intended to be an indemnity for wage loss arising from the employer's breach of the employment contract. In *Hogan* (at paras. 10-11) and *Yates* (at para. 2), the employers' breach was prompted by the pandemic. Under the CERB Act, however, a worker is eligible for the benefit if, among others, he or she "ceases working for reasons related to COVID-19". This suggests that CERB is a benefit intended as an indemnity for wage loss related to COVID-19, not for wage loss arising from an employer's breach of an employment contract.

80 As a result, I find that Ms. Henderson's CERB does not amount to a collateral benefit.

81 Nevertheless, even if I am found to be wrong in this regard, this case does not merit an unyielding application of the compensation principle. In particular, I find compelling the reasoning in *Slater* regarding the allocation of risk in case of a windfall. Ms. Henderson was wrongfully dismissed. She should not have to bear the risk of not being made whole, especially at her advancing age and after being a loyal and dedicated employee for 30 years — a length of service reflected in the 18-month notice period agreed to by the parties. The Supreme Court in *Waterman* recognized that in some cases a strict application of the compensation principle can lead to injustice. I find that this is one of those cases.

82 The damages award should not be reduced by the CERB payments that Ms. Henderson received.

Conclusion

83 Based on the foregoing, I find that the plaintiff was wrongfully dismissed. Clauses 18 and 19 of the employment contract were not in compliance with the ESA, and therefore invalidated the employment contract.

84 The parties have advised me that they have agreed on an applicable notice period of 18 months, from which, as set forth above in my finding on mitigation, 3 months should be deducted.

85 Finally, as set forth above, I find that the CERB payments should not be deducted from the award of damages.

Costs

86 I strongly urge the parties to come to an agreement as regards costs in this matter. Should they be unable to do so, the parties are to provide me with their bills of costs, limited to three pages total within 60 days of release of these Reasons for Judgment.

Order accordingly.

Footnotes

1 See also Livshin v. The Clinic Network Canada Inc, 2021 ONSC 6796, at para. 93; Oostlander v. Cervus Equipment Corporation, 2022 ABQB 200, at paras. 41–44; Abdon v. Brandt Industries Canada Ltd, 2021 SKPC 37, at para. 70.

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2024 ONSC 1029
Ontario Superior Court of Justice

Dufault v. The Corporation of the Township of Ignace

2024 CarswellOnt 5794, 2024 ONSC 1029, 2024 C.L.L.C. 210-040, 2024 A.C.W.S. 792

Karen Dufault (Plaintiff) and The Corporation of the Township of Ignace (Defendant)

H.M. Pierce J.

Heard: November 17, 2023
Judgment: February 16, 2024
Docket: Thunder Bay CV-23-0098-00

Counsel: Mr. J. Pinkus, for Plaintiff
Mr. J. Lester, for Defendant

Subject: Civil Practice and Procedure; Public; Employment
Related Abridgment Classifications
Labour and employment law
II Employment law
II.6 Termination and dismissal
II.6.b Notice
II.6.b.iii Effect of contractual terms regarding notice
Labour and employment law
II Employment law
II.6 Termination and dismissal
II.6.c Remedies
II.6.c.i Damages
II.6.c.i.C Calculation of quantum

Headnote

Labour and employment law --- Employment law — Termination and dismissal — Notice — Effect of contractual terms regarding notice

Plaintiff employee started work at defendant municipality ("employer") starting October 2021 — In January 2022 employee commenced new position of youth engagement coordinator at base annual salary of $75,000 — In November 2022, employee signed fixed duration contract ending December 2024 — In January 2023, employer terminated employee effective immediately, on without cause basis — Employer paid two weeks termination pay and continued employee's benefits for two weeks — Employee brought motion for summary judgment for wrongful dismissal and damages for duration of fixed term contract — Motion granted; employee entitled to total damages of $157,071.57 — Employment contracts were generally interpreted differently than other commercial agreements in order to protect interests of employees — Employer could not contract out of, or waive, employment standards under Employment Standards Act ("ESA") — Court had to evaluate wording of employment contract at time it was entered into, and not what employer did upon termination — Termination clause in employee's employment contract contravened ESA thus was not enforceable — Employee, terminated without cause without enforceable provisions for early termination without cause, was entitled to be paid balance of contract — Employee was entitled to 101 weeks' base salary and 101 weeks' benefits, less two weeks termination pay and benefits already provided.

Labour and employment law --- Employment law — Termination and dismissal — Remedies — Damages — Calculation of quantum

Table of Authorities

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Henderson v. Slavkin et al. (2022), 2022 ONSC 2964, 2022 CarswellOnt 11594, 81 C.C.E.L. (4th) 244, 2023 C.L.L.C. 210-011 (Ont. S.C.J.) — considered

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Meridian Credit Union Ltd. v. Baig (2016), 2016 ONCA 150, 2016 CarswellOnt 2664, 63 R.P.R. (5th) 179, 394 D.L.R. (4th) 601, 35 C.B.R. (6th) 158, 346 O.A.C. 57 (Ont. C.A.) — referred to

North v. Metaswitch Networks Corp. (2017), 2017 ONCA 790, 2017 CarswellOnt 15733, 43 C.C.E.L. (4th) 1, 2018 C.L.L.C. 210-012, 417 D.L.R. (4th) 429 (Ont. C.A.) — referred to

Oudin v. Centre Francophone de Toronto, Inc. (2015), 2015 ONSC 6494, 2015 CarswellOnt 16476, 27 C.C.E.L. (4th) 86, 2016 C.L.L.C. 210-010 (Ont. S.C.J.) — referred to

Oudin v. Centre Francophone de Toronto, Inc. (2016), 2016 ONCA 514, 2016 CarswellOnt 10299, 34 C.C.E.L. (4th) 271, 2016 C.L.L.C. 210-050 (Ont. C.A.) — referred to

Plester v. PolyOne Canada Inc. (2011), 2011 ONSC 6068, 2011 CarswellOnt 15516, 2012 C.L.L.C. 210-022 (Ont. S.C.J.) — considered

Rahman v. Cannon Design Architecture Inc. (2022), 2022 ONCA 451, 2022 CarswellOnt 7864, 81 C.C.E.L. (4th) 1, 2022 C.L.L.C. 210-054 (Ont. C.A.) — referred to

Stevens v. Sifton Properties Ltd. (2012), 2012 ONSC 5508, 2012 CarswellOnt 16792, 5 C.C.E.L. (4th) 27 (Ont. S.C.J.) — considered

Waksdale v. Swegon North America Inc. (2020), 2020 ONCA 391, 2020 CarswellOnt 8319, 446 D.L.R. (4th) 725, 64 C.C.E.L. (4th) 253, 2020 C.L.L.C. 210-056 (Ont. C.A.) — considered

Wood v. Fred Deeley Imports Ltd. (2017), 2017 ONCA 158, 2017 CarswellOnt 2408, 134 O.R. (3d) 481, 2017 C.L.L.C. 210-031, 412 D.L.R. (4th) 261 (Ont. C.A.) — considered

1062484 Ontario Inc. v. McEnery (2021), 2021 ONCA 129, 2021 CarswellOnt 2606 (Ont. C.A.) — referred to

Statutes considered:

Employment Standards Act, 2000, S.O. 2000, c. 41

Generally — referred to

s. 53 — referred to

s. 60 — referred to

s. 61 — referred to

s. 74 — referred to

Regulations considered:

Employment Standards Act, 2000, S.O. 2000, c. 41

Termination and Severance of Employment, O. Reg. 288/01

Generally — referred to

s. 2(1) ¶ 3 — referred to

s. 9(1) ¶ 6 — referred to

MOTION for summary judgment for wrongful dismissal and damages.

***H.M. Pierce J.*:**

Reasons on Summary Judgment Motion

Introduction

1 The plaintiff moves for summary judgment for wrongful dismissal and damages for the duration of the fixed-term contract, together with costs.

2 The defendant did not file a responding affidavit on the motion. The claim is for breach of an employment contract. The case involves interpretation of that contract.

3 The defendant did not file a cross-motion to dismiss the plaintiff's claim but characterizes this as a "boomerang summary judgment", where the party that brought the motion for summary judgement ends up with a summary judgment order against itself. The Court of Appeal for Ontario has made it abundantly clear that this is a proper plea: see Meridian Credit Union Limited v. Baig,2016 ONCA 150, at para. 17; 1062484 Ontario Inc. v. McEnery, 2021 ONCA 129 at paras. 36–40; and Graham v. Toronto (City), 2022 ONCA 149, at para. 4.

4 The parties agree that all the relevant evidence is before the court, and that no facts are in dispute. It is therefore an appropriate case for summary judgment, one in which the court can render a decision in favour of either party. Accordingly, the motion will be considered on this basis.

The Facts

5 At the time of her dismissal from the position of Youth Engagement Coordinator, the plaintiff's compensation included an annual base salary of $75,000, benefits including life insurance, critical illness insurance, accidental death and dismemberment insurance, extended health and dental benefits, long-term disability benefits, and participation in a pension plan.

6 The defendant accepts the facts as set out in the plaintiff's factum, as follows:

a) The plaintiff commenced employment with the defendant on or about October 31, 2021;

b) On January 31, 2022, the plaintiff commenced the new position of Youth Engagement Coordinator;

c) On or about November 24, 2022, a fixed-term agreement was signed by the plaintiff and the defendant, wherein it was agreed that the plaintiff's employment would continue for a fixed duration, ending on December 31, 2024;

d) On January 26, 2023, the plaintiff's employment was terminated effective immediately on a without cause basis. In terminating the plaintiff's employment, the defendant paid the plaintiff two weeks' termination pay in the gross amount of $2,884.61 and continued her benefits for two weeks (with the exception of her pension plan, which was terminated effective immediately).

7 The plaintiff contends that the termination clause is illegal and unenforceable and seeks damages in the amount of 101 weeks' base salary and benefits (less damages already paid), for a total award of $157,071.57.

8 The defendant submits that the wording of the contract is clear and that the plaintiff has been paid the damages to which she is entitled under the Employment Standards Act, O. Reg. 288/01 (“ESA”).

Clause 4.0: The Termination Clause

9 The termination clauses in Article 4.0 of the employment contract state:

4.01 The Township may terminate this Agreement and terminate the Employee's employment at any time and without notice or pay in lieu of notice for cause. If this Agreement and the Employee's employment is terminated with cause, no further payments of any nature, including but not limited to, damages are payable to the Employee, except as otherwise specifically provided for herein and the Township's obligations under this agreement shall cease at that time. For the purposes of this Agreement, "cause" shall include but is not limited to the following:

(i) upon the failure of the Employee to perform the services as hereinbefore specified without written approval of Municipal Council and such failure shall be considered cause and this Agreement and the Employee's employment terminates immediately;

(ii) in the event of acts of willful negligence or disobedience by the Employee not condoned by the Township or resulting in injury or damages to the Township, such acts shall be considered cause and this Agreement and the Employee's employment terminates immediately without further notice.

4.02 The Township may at its sole discretion and without cause, terminate this Agreement and the Employee's employment thereunder at any time upon giving to the Employee written notice as follows:

(i) the Township will continue to pay the Employee's base salary for a period of two (2) weeks per full year of service to a maximum payment of four (4) months or the period required by the Employment Standards Act, 2000 whichever is greater. This payment in lieu of notice will be made from the date of termination, payable in bi-weekly installments on the normal payroll day or on a lump sum basis at the discretion of the Township, subject at all times to the provisions of the *Employment Standards Act*, 2000.

(ii) with the exception of short-term and long-term disability benefits, the Township will continue the Employee's employment benefits throughout the notice period in which the Township continues to pay the Employee's salary. The Township will continue the Employee's short-term and long-term disability benefits during the period required by the *Employment Standards Act*, 2000 and will pay all other required accrued benefits or payments required by that Act.

(iii) all payments provided under this paragraph will be subject to all deductions required under the Township's policies and by-laws.

(iv) any further entitlements to salary continuation terminate immediately upon the death of the Employee.

(v) such payment and benefits contributions will be calculated on the basis of the Employee's salary and benefits at the time of their termination.

10 Article 4.03 deals with the employee's right to terminate her employment and has no application in this case.

Issues for Determination

11 The parties agree that the case is appropriate for summary judgment. The following issues remain to be determined:

1. Is the termination clause enforceable?

2. If the termination clause is not enforceable, what was the plaintiff entitled to under the contract, and what damages is the plaintiff entitled to now?

3. Alternatively, if the termination clause is enforceable, has the defendant paid the plaintiff in full?

The Position of the Plaintiff

12 The plaintiff submits that the termination clause is illegal and unenforceable because:

1. Article 4.01 of the "for cause" portion of the agreement violates the ESA by giving the Township the right to withhold termination pay and severance pay where they must be provided under the statute;

2. The termination "for cause" wording in the agreement gives the Township the right to withhold the employee's statutory termination and severance pay if it has "cause" for termination, invoking the common law standard that is lower than and does not apply to the ESA.

3. The employment contract encompasses employee conduct not specified in the ESA. For instance, the ESA does not disentitle an employee from receiving the minimum requirements of notice of termination, severance or termination pay if terminated "for cause," because neither the ESA nor its regulations refer to a "for cause" dismissal. Instead, the ESA stipulates a narrow exemption from notice of termination, termination pay, and severance pay, for an employee who has been "guilty of wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned by the employer": ESA, Ont. Reg.288/01, ss. 2(1)(3) and 9(1)(6).

4. Article 4.02 of the termination clause in the employee contract excludes payment of all "regular wages," and refers only to the employee's base salary, contrary to s. 60 of the ESA. No mention is made of vacation pay.

5. The plaintiff contends that Article 4.02 misstates the ESA when it purports to have "sole discretion" to terminate the plaintiff's employment "at any time," when the ESA prohibits the employer from doing so in certain circumstances.

The Position of the Defendant

13 The defendant distinguishes the cases relied upon by the plaintiff and submits that Articles 4.01 and 4.02 of the employment contract are compliant with the ESA.

14 The defendant argues that the mandatory language in Article 4.01 of the employment contract, "shall include but is not limited to" is restrictive in that it limits how employment may be terminated for cause: failure to perform services (i.e. wilful misconduct); wilful negligence (i.e. wilful neglect of duty); or disobedience not condoned by the Township. The defendant submits that its power to terminate for cause is limited to these criteria, and that the wording of Article 4.01 establishes a minimum standard, in line with the ESA minimum standard.

15 The defendant submits that the employment contract should be interpreted as the parties would reasonably have expected, which is not as the plaintiff proposes. It contends there is no ambiguity in the terms of the contract.

16 The defendant relies on Henderson v. Slavkin et al.,2022 ONSC 2964 in which the court held that the "without cause" termination clause was valid. It also cites Oudin v. Le Centre Francophone de Toronto,2015 ONSC 6494 [, in which the trial judge rejected the plaintiff's argument that any potential interpretation that might, in a hypothetical circumstance, potentially violate the *ESA*, the entirety of that section of the agreement ought to be struck out. The trial judge determined that this was not the law, and rejected this argument, which was upheld on appeal in 2016 ONCA 514.

17 The defendant contends that the plaintiff's guaranteed rights under the ESA are protected when Article 4.02 is read in its entirety.

The Law

18 Employment contracts are generally interpreted differently than other commercial agreements in order to protect the interests of employees: see Wood v. Fred Deeley Imports Ltd.,2017 ONCA 158 [, at paras. 26 - 28.

19 At para. 25 of Henderson v. Slavkin et al.,2022 ONSC 2964 [, Madam Justice Brown concisely summarized the basic principles for the determination of the enforcement of a termination clause, as set out in *Wood* at para. 28, as follows:

1. Employees have less bargaining power than employers when employment agreements are made;

2. Employees are likely unfamiliar with employment standards in the ESA and thus are unlikely to challenge termination clauses;

3. The ESA is remedial legislation, and courts should therefore favour interpretations of the ESA that encourage employers to comply with the minimum requirements of the Act, and extend its protection to employees;

4. The ESA should be interpreted in a way that encourages employers to draft agreements which comply with the ESA;

5. A termination clause will rebut the presumption of reasonable notice only if its wording is clear, since employees are entitled to know at the beginning of an employment relationship what their employment will be at the end of their employment; and

6. Courts should prefer an interpretation of the termination clause that gives the greater benefit to the employee.

20 At paras. 26-28, in *Henderson* , the court also summarized the following principles for interpreting employment contracts:

1. an employment agreement that is not consistent with the ESA is invalid regardless of the actual arrangements made with the employee on termination, and the employee becomes entitled to common law damages;

2. employment contracts must be interpreted in their context in a way the parties reasonably expected them to be interpreted at the time when they entered into it. The court should not strain to create ambiguity where none exists when interpreting the termination clause;

3. when the court interprets a termination clause in relation to the ESA, the court should look for the true intention of the parties - rather than parse the words looking for ambiguity that can be used to set aside the agreement - and therefore award notice based on common law.

21 In Waksdale v. Swegon North America Inc.,2020 ONCA 391 [, the Court of Appeal rejected the argument that the invalidity of the termination for cause provision had no impact on the termination with notice provision. At para. 10, the court held:

An employment agreement must be interpreted as a whole and not on a piecemeal basis. The correct analytical approach is to determine whether the termination provisions in an employment agreement read as a whole violate the ESA. While courts will permit an employer to enforce a rights-restricting contract, they will not enforce termination provisions that are in whole or in part illegal.

22 The Court of Appeal also took this approach in Rahman v. Cannon Design Architecture Inc.2022 ONCA 451, at para. 30. The court held that if a particular termination provision in the contract violates the ESA, all the other termination provisions in the contract are invalid and unenforceable.

23 In Machtinger v. HOJ Industries Ltd.,[1992] 1 S.C.R. 986, p. 1,001 the Supreme Court of Canada discussed the circumstance where one clause of an employment contract is null and void by operation of statute:

[I]f a term is null and void, then it is null and void for all purposes, and cannot be used as evidence of the parties' intention.

24 In *Waksdale*, the Court of Appeal determined that it did not matter that the employer did not rely on the termination for cause provision. At para. 11, it explained:

The court is obliged to determine the enforceability of the termination provisions as at the time the agreement was executed; non-reliance on the illegal provision is irrelevant.

25 In Howard v. Benson Group Inc. (The Benson Group Inc.),2016 ONCA 256 [, the employee was terminated without cause 23 months into a five-year fixed term contract. The Court of Appeal held that an employee who is terminated without cause

during a fixed-term employment contract that does not include an enforceable provision for early termination without cause is entitled to receive the wages and benefits for the unexpired term of the contract: at para. 44.

Analysis

Is the Termination Clause Enforceable?

26 I have concluded that the termination clauses in Article 4.0 in the employment contract are not enforceable for the following reasons.

27 Appellate jurisprudence about interpreting employment contracts has demanded stricter standards to achieve compliance with the ESA since the *Oudin case* was decided in 2015.

28 The Court of Appeal's intention to strictly enforce employees' rights under the ESA emerged in the *Wood* decision in 2017, and subsequent decisions from the Court of Appeal.

29 In para. 46 of *Wood*, the court held that "an employer cannot contract out of, or waive, an employment standard" by subsequent compliance with an employment standard. Thus, it is the wording of the employment contract at the time it is entered into, and not what the employer does upon termination, that the court must evaluate.

30 In *Wood*, at para. 50, the Court of Appeal cited with approval the reasoning in Stevens v. Sifton Properties Ltd.,2012 ONSC 5508, [2012] O.J. No. 6244, as follows:

> Similarly, in *Stevens*, Leach J. held that even though the employer had provided the employee with all of his statutory entitlements, the termination clause was still unenforceable because it precluded the continuation of benefit contributions during the notice period. In Leach J.'s opinion, the employer's later voluntary compliance with its statutory obligations did not remedy the illegality of the termination clause. In a passage with which I also agree, Leach J. wrote, at para. 65:
>
> > [E]mployers should be provided with incentive to ensure that their employment contracts comply with *all* aspects of the employment standards legislation, including provision of adequate notice (or pay in lieu thereof) *and* mandated benefit continuation. As emphasized by Justice Low in *Wright*, *supra*, an employer's voluntary provision of additional benefits after the fact does not alter the reality that the employment contract drafted by the employer is contrary to law. [Italics in original; underlining added in *Wood*]

31 The termination provisions of this employment contract, as drawn, contravene the ESA in several respects.

32 Firstly, neither the ESA, nor its regulations refer to a "for cause" dismissal.

33 Section. 2(1)(3) of Ontario Regulation 288/01 of the ESA defines employees who are *not* entitled to notice of termination or termination pay as, "An employee who has been guilty of wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned by the employer."

34 Article 4.01 of this employment contract deals with termination "for cause," a term that implies a common law approach to wrongful dismissal. It gives the Township the right to withhold termination pay and severance pay in the event of dismissal for cause, whereas the ESA provides for their payment.

35 Furthermore, Article 4.01 defines conduct that will justify termination "for cause" as including, *but not limited to*, failure to perform services, wilful negligence or disobedience not condoned by the Township or resulting in injury or damages.

36 The defendant argues that the grounds "for cause" termination in the employment contract essentially equate with grounds for termination of employment specified in O. Reg 288/01 of the ESA, s. 2(1)(3), even though they are stated not to be limited to the specified grounds.

37 I do not agree. For example, "failure to perform services" is not the same as wilful misconduct. The expansive language used in the contract enlarges the criteria for dismissal without notice. As well, no mention is made in the employment contract of the saving provision in the ESA limiting dismissal for conduct "that is not trivial."

38 By inserting a "for cause" standard permitting the employer to withhold statutory and severance pay that does not appear in the ESA, the employer conflates grounds for dismissal under the ESA with a common law standard that does not appear in the ESA.

39 In Plester v. PolyOne Canada Inc.,2011 ONSC 6068, the court made the distinction between the common law standard for "just cause" dismissal and the misconduct provisions in the ESA, finding that a higher test applies under the Act. At para. 55, the court observed:

> The test is higher than the test for "just cause".
>
> In addition to providing that the misconduct is serious, the employer must demonstrate, and this is the aspect of the standard which distinguishes it from 'just cause', that the conduct complained of is 'wilful'. Careless, thoughtless, heedless, or inadvertent conduct, no matter how serious, does not meet the standard. Rather, the employer must show that the misconduct was intentional or deliberate. The employer must show that the employee purposefully engaged in conduct that he or she knew to be serious misconduct. It is, to put it colloquially, being bad on purpose.

40 The absence of protections available under the ESA would not be specifically apparent to the employee as the agreement is drafted. This is an example of circumstances where the court should favour an interpretation of the ESA that encourages employers to comply with the minimum requirements of the Act and extend its protection to employees.

41 Secondly, the "without cause" provisions at Article 4.02 of the employment contract also contravene the ESA.

42 The termination clause provides for payment of "the employee's base salary for two weeks per year of service to a maximum of four months or the period required by the ESA, whichever is greater." However, s. 60 of the ESA provides that wages may not be reduced during the notice period, when the employee is entitled to receive all "regular wages."

43 In addition, s. 61 of the Act requires an employer to pay a lump sum equal to the amount that would have been paid if working notice of termination had been given pursuant to s. 60. For example, the Court of Appeal determined in North v. Metaswitch Networks Corporation,2017 ONCA 790, the expansive definition of "regular wages" included commissions.

44 I conclude that vacation pay forms part of "regular wages," identified at Article 2 of the employment contract. However, Article 4.02 does not reference vacation pay on termination; nor is there any mention of sick days that are provided in the employment contract.

45 As well, the employment contract provides for five days of paid leave annually to compensate for unpaid overtime hours worked for attendance at public and other meetings outside of normal business hours. This compensation is not mentioned in Article 4.02.

46 Thirdly, the plaintiff submits that Article 4.02 misstates the ESA when it gives the employer "sole discretion" to terminate the employee's employment at any time. I agree with this submission. The Act prohibits the employer from terminating an employee on the conclusion of an employee's leave (s. 53) or in reprisal for attempting to exercise a right under the Act (s. 74). Thus, the right of the employer to dismiss is not absolute.

47 The termination clauses in the employment contract contravene the ESA and are therefore not enforceable.

Damages

48 The defendant submits that it has paid all payments owing to the plaintiff.

49 In my view, the quantum of damages the plaintiff is entitled to are set out in *Benson Group*, in which the Court of Appeal held that an employee who was terminated without cause 23 months into a five-year contract without enforceable provisions for early termination without cause was entitled to be paid the balance of his contract. At para. 44 of the decision, the court concluded:

> In the absence of an enforceable contractual provision stipulating a fixed term of notice, or any other provision to the contrary, a fixed term employment contract obligates an employer to pay an employee to the end of the term, and that obligation will not be subject to mitigation.

50 The defendant does not specifically take issue with the calculations the plaintiff set out in their factum.

51 The plaintiff shall therefore have summary judgment for wrongful dismissal against the defendant with damages calculated as follows:

101 weeks' base salary @ $1,442.31 per week $145,673.31

101 weeks' benefits @ $144.23 per week $14,567.33

Less 2 weeks' termination pay provided ($2,884.61)

Less 2 weeks' benefits provided to date ($284.46)

Total Damages $157,071.57

52 The plaintiff is also entitled to pre-judgment interest.

Costs

53 If the parties cannot agree on costs, either party may apply to the trial coordinator within 30 days to schedule an appointment to argue costs, failing which, costs will be deemed to be settled. Costs submissions are not to exceed 5 pages and shall be uploaded to Caselines.

Motion granted.

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