CITATION: Tan v. Stostac Inc., 2023 ONSC 2121
COURT FILE NO.: CV-20-00646169-0000
DATE: 20230404

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
HANS TAN	)	Andrew Harold Monkhouse, for the Plaintiff
Plaintiff	)	
– and –	)	
STOSTAC INC.	)	Domenic Saverino, for the Defendant
Defendant	)	
	)	**HEARD:** February 22, 2023

DINEEN J.

[1] This is a wrongful dismissal action heard by summary trial. The plaintiff worked as a depot manager for the defendant, a company dealing in supply containers. He was laid off just before the fifth anniversary of his hiring near the beginning of the COVID-19 pandemic.

[2] The issues have been narrowed substantially. There are three main questions to resolve:

- Should the termination clause in the plaintiff's employment agreement be enforced?
- If not, what period of notice should be paid?
- Should the Covid relief benefits the plaintiff received from the government be deducted from the payment he receives?

Factual background

[3] The plaintiff began working for the defendant on June 1, 2015. During his probationary period, he had the position of container controller but he was soon promoted to depot manager. This was classified as a managerial position and largely involved supervising a small number of staff on site at the depot where he worked and overseeing the containers that were stored and serviced there.

[4] The plaintiff's salary was $67,500 and he was enrolled in the company's benefits plan for which the company paid 70% of the cost. He also received a Christmas gift or bonus every year. The amount of the gift varied between a low of $500 up to a high of $3500 which he received in his last year of work.

[5] The defendant gave notice of termination to the plaintiff on May 28, 2020, informing him that he was being laid off effective the following day. The defendant attributes this decision to adverse economic conditions relating to either the pandemic or to supply chain difficulties that caused revenue in the division employing the plaintiff to drop substantially.

[6] The plaintiff was unable to find another job. He kept a log of all of the comparable positions he applied to which total more than 80. He applied for and received Canada Emergency Response Benefits ("CERB").

Issue 1: Should the termination clause in the plaintiff's employment agreement be enforced?

[7] At common law, an employee terminated without cause is entitled to reasonable notice. Employers and employees may contract out of this entitlement but may not do so in a way inconsistent with the employee's statutory rights upon termination. As a result of the power imbalance between employers and employees and the likelihood that many terminated employees may not be aware of or able to enforce their statutory rights, courts are especially vigilant to interpret employment contracts in a way that encourages employers to draft contracts that comply with their statutory obligations.

[8] In this case, the plaintiff signed an employment agreement that includes the following term with respect to benefits upon termination:

> Termination
>
> The Employer may end the employment relationship at any time without advanced notice and without pay in lieu of such notice for any just cause recognized at law.
>
> Subsequent to the probationary period, the Employee understands and agrees that employment may be terminated at any time by the Employer providing the Employee with two (2) weeks of notice, pay in lieu of notice or a combination of both, at the Employer's option, plus one additional week of notice (or pay in lieu) for each year of completed service to a maximum of eight (8) weeks. In addition, after completing five (5) years of continuous employment, severance pay pursuant to the *Ontario Employment Standards Act, 2000* may be payable upon termination of employment in accordance with the terms of the *Ontario Employment Standards Act, 2000*. Upon receipt of the above notice (and severance pay if applicable) the Employee agrees that no further amounts shall be

> owing to him/her on account of the termination of the Employee's employment under statute or at common law. The provisions of the *Ontario Employment Standards Act, 2000*, as they may from time to time be amended, are deemed to be incorporated herein and shall prevail if greater.

[9] The plaintiff submits that this term is unenforceable for inconsistency with the *Employment Standards Act, 2000* (the "*ESA*"). I agree.

[10] The termination clause provides that the employer can terminate the plaintiff without notice or pay for "any just cause." The Court of Appeal and this Court have consistently held that equivalent language is inconsistent with the standard in s. 2(1)(3) of the *ESA*'s regulation 288/01 which provides that termination without notice or payment is only permissible for employees who are "guilty of wilful misconduct, disobedience or wilful neglectful duty that is not trivial and has not been condoned by the employer." This is a narrower set of circumstances than those recognized as just cause at common law. See *Waksdale v. Swegon North America Inc.* 2020 ONCA 391 at para. 10; *Rahman v. Cannon Design Architecture Inc*. 2022 ONCA 451 at para. 26-30; *Ojo v. Crystal Claire Cosmetics Inc.*, 2021 ONSC 1428 at para. 11-18; *Sewell v. Provincial Fruit Co. Ltd* 2020 ONSC 4406 at para 19-20; 2022 ONSC 6225 at para. 4-12.

[11] In my view, the termination clause in this case suffers from the same flaw identified in the line of cases cited above by giving the defendant the right to terminate the plaintiff's employment without notice of payment for just cause that might fall short of non-trivial willful misconduct. I do not accept that the attempt to incorporate the *ESA*'s provisions in the final sentence of the clause's "without cause" portion detracts from the clear assertion of a right to terminate without notice for any just cause.

[12] As held in *Wagsdale*, the fact that the with cause portion of the clause violates the *ESA* renders the entire clause void and unenforceable. It does not matter that the plaintiff was not terminated for cause and that the inconsistency with the *ESA* was not engaged on the facts of this case.

[13] Accordingly, I find that the plaintiff is entitled to reasonable notice at common law.

Issue 2: What period of reasonable notice is appropriate?

[14] The governing authorities recognize that fixing a period of reasonable notice is not a mathematical exercise that can be reduced to a particular formula. In *Paquette v. TeraGo Networks Inc* 2015 ONSC 4189, Perrell J. outlined the relevant considerations as follows:

> In determining the length of notice, the court should consider, among other possible factors: (1) the character of employment; (2) the length of service; (3) the age of the employee; and (4) the availability of similar employment having regard to the experience, training, and qualifications of the employee: *Machinter v. HOJ*

Industries Ltd., 1992 CanLII 102 (SCC), [1992] 1 S.C.R. 986; *Cronk v. Canadian General Insurance Co.* (1995), 1995 CanLII 814 (ON CA), 25 O.R. (3d) 505 (C.A.); *Bardal v. Globe & Mail, supra*. The factors are not exhaustive, and what is a reasonable notice period will depend on the circumstances of the particular case: *Honda Canada Inc. v. Keays*, 2008 SCC 39 (CanLII), [2008] 2 S.C.R. 362; *Wallace v. United Grain Growers Ltd*., 1997 CanLII 332 (SCC), [1997] 3 S.C.R. 701 at para. 83; *Minott v. O'Shanter Development Co.* (1999), 1999 CanLII 3686 (ON CA), 42 O.R. (3d) 321 (C.A.) at para. 66; *Duynstee v. Sobeys Inc.*, 2013 ONSC 2050 at para. 17.

The determination of a reasonable notice period is a principled art and not a mathematical science. In *Minott v. O'Shanter Development Co., supra*, Justice Laskin wrote at para. 62:

> Determining the period of reasonable notice is an art not a science. In each case trial judges must weigh and balance a catalogue of relevant factors. No two cases are identical; and ordinarily, there is no "right" figure for reasonable notice. Instead, most cases yield a range of reasonableness.

In *Cronk v. Canadian General Insurance Company, supra*, Associate Chief Justice Morden stated at para. 85:

> The governing rule is that a dismissed employee, in the position of Ms. Cronk, is entitled to reasonable notice or payment in lieu of it. The legal precept of reasonable notice, which is the essence of this rule, is a standard and not, itself, a rule. Unlike a rule, it does not specify any detailed definite state of facts which, if present, will inevitably entail a particular legal consequence. Rather, its application enables a court to take all of the circumstances of the case into account. It allows for individualization of application and, obviously, involves the exercise of judgment.
>
> Economic factors such as a downturn in the economy or in a particular industry or sector of the economy that indicate that an employee may have difficulty finding another position may justify a longer notice period: *Bullen v. Proctor & Redfern Ltd.*, 1996 CanLII 8135 (ON SC), [1996] O.J. No. 340 (Gen. Div.) at paras. 24-29; *Thomson v. Bechtel Canada*, [1983] O.J. No. 2397 (H.C.J.); *Corbin v. Standard Life Assurance*, 1995 CanLII 3852 (NB CA), [1995] N.B.J. No. 461 (C.A.); *Leduc v. Canadian Erectors Ltd*., [1966] O.J. No. 897 (Gen. Div.) at para. 34-36.

[15] The plaintiff argues that a reasonable notice period would be between 8-10 months. The defendant suggests that a period of 4-5 months reflecting a month per year of service would be appropriate.

[16] The plaintiff points out that this was a managerial position, which tends to weigh in favour of a longer notice period. While I accept that this is a relevant consideration, I also accept the submission of the defendants that the managerial aspects of the job were more limited than might be suggested by the title and that the position here was a less senior one than in the cases relied upon by the plaintiff.

[17] The plaintiff was 40 years old at the time he was laid off and I accept that he made reasonable and unsuccessful efforts to find another comparable position. I also accept the plaintiff's submission that the sector of the economy in which he worked was faced with particularly difficult economic conditions at the time. This is also consistent with the evidence of the defendant in explaining why the plaintiff was laid off.

[18] In view of the nature of the plaintiff's position and his personal circumstances, I would fix reasonable notice at an amount modestly higher than the defendant has proposed and would grant seven months.

[19] The parties agree that if the plaintiff is awarded notice at common law then he should also receive $283.95 per month to reflect the company's payment of its share of his benefits.

[20] The plaintiff also seeks inclusion of compensation for a Christmas bonus, suggesting that the $3,500 he received the year before his termination should be prorated. I am not satisfied that the plaintiff would have received such a bonus had he not been terminated. While he received a relatively large bonus in 2019, in previous years it had been much lower – sometimes less than 1% of the plaintiff's salary – and I do not find that it was traditionally a significant component of the plaintiff's compensation. I have accepted that the business was suffering from particularly adverse economic conditions in fixing the notice period, and in my view that militates against any assumption that the plaintiff would have received a large bonus in 2020.

Issue 3: Should the CERB payments made to the plaintiff be deducted?

[21] The final disputed issue concerns the CERB payments received by the plaintiff following his termination. The defendant takes the position that these should be deducted as an indemnity to the plaintiff for his termination and that this would constitute a windfall if the plaintiff received his full reasonable notice in addition to the CERB payments.

[22] However, I accept the submission of the plaintiff that these payments should not be deducted. Prior decisions of this Court have been consistent with the plaintiff's position: *Iriotakis v. Peninsula Employment Services Limited* 2021 ONSC 998; *Gracias v. Dr. David Walt Dentistry* 2022 ONSC 2967; *Henderson v. Slavkin et al* 2022 ONSC 2964. The two appellate courts that have considered the issue have also ruled against the deduction of CERB payments: see *Yates v. Langley Motor Sport Centre Ltd*, 2022 BCCA 398 and

Osstlander v. Cervus Equipment Corporation 2023 ABCA 13. I would follow the analysis in those decisions and would not treat the CERB payments as a mitigation credit.

Disposition

[23] I award the plaintiff seven months of base salary and benefits less the amount already paid in addition to pre-judgment interest.

[24] If the parties are unable to agree on costs, the plaintiff may provide brief cost submissions by email to my assistant at josie.harvey@ontario.ca within three weeks of the release of these reasons. The defendant shall have three weeks to respond.

Dineen J.

Released: April 4, 2023

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REASONS FOR JUDGMENT

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Released: April 4, 2023