CITATION: De Castro v. Arista Homes Limited 2024 ONSC 1035
COURT FILE NO.: CV-22-00678085-0000
DATE: 20240223

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: Ellen De Castro

Plaintiff

AND:

Arista Homes Limited

Defendants

BEFORE: Koehnen J.

COUNSEL: *Tim Lee* for the plaintiff

Wei Jiang for the defendant

HEARD: February 13, 2024

ENDORSEMENT

[1] The plaintiff moves for summary judgment in this employment matter. The defendants oppose summary judgment on the basis that it is unfair because: (i) This is a simplified procedures actin in which it says cross-examinations on affidavits are not permitted; (ii) The plaintiff's written employment contract excludes common law notice and limits her to statutory severance pay; and (iii) The plaintiff has failed to mitigate her damages.

[2] I disagree with each of the defendants' arguments. It suffers no unfairness as a result of summary judgment being awarded. The Court ordered timetable for this motion provided for cross-examinations notwithstanding the ordinary practice for motions in simplified procedures claims. Although the written contract of employment purported to exclude common law notice, the termination provisions of that contract are unenforceable because they purport to provide even less than the statutory minimum requirements. The defendant has not met its burden to prove lack of mitigation.

[3] I find the appropriate notice period to be 8 months plus 10% of that amount for lost benefits.

Alleged Unfairness of Summary Judgment

[4] The defendant submits that this is a simplified procedures action and that cross examinations on affidavits are prohibited in such proceedings, as a result of which it is seriously prejudiced. The defendant notes that there have been no examinations for discovery and asserts that it is precluded from examining the plaintiff on her affidavit sworn on the motion for summary judgment. The defendant relies on *Bomhof v. Eunoia Inc. et al*,[1] and *Singh v. Concept Plastics Limited*,[2] in support of this proposition.

[1] *Bomhof v. Eunoia Inc. et al*, 2012 ONSC 3191
[2] *Singh v. Concept Plastics Limited*, 2016 ONCA 815

[5] Both of these cases are distinguishable. *Bomhof* was decided before the Supreme Court of Canada's decision in *Hryniak v. Mauldin,*[3] which substantially expanded the availability of summary judgment. In addition, in *Bomhof* there was a conflict of evidence about whether the plaintiff had mitigated his damages. There is no such conflict in this case. Rather there is merely an allegation that the plaintiff failed to mitigate adequately; an allegation that I do not accept as set out later in these reasons.

[6] *Singh* was a simplified procedures matter in which the Court of Appeal set aside an order for summary judgment because the Rules did not allow cross-examination on affidavits in simplified procedures actions which placed serious limitations on the ability of the defendant to establish its case.

[7] In the case at bar, however, Chalmers J. established a case timetable that clearly indicated that the parties were entitled to cross-examine each other. The defendant nevertheless submits that it was not entitled to cross-examine the plaintiff notwithstanding the endorsement of Justice Chalmers because the Rules provide otherwise. Justice Chalmers's endorsement amounted to a binding court order. If the defendant thought Justice Chalmers was in error, it should have appealed. It did not do so. As a result, the case timetable of Justice Chalmers

[3] *Hryniak v. Mauldin*, 2014 SCC 7 (CanLII), [2014] 1 SCR 87

stands. If the defendant chose not to cross-examine the plaintiff on her affidavit, it did that at its own risk.

The Written Employment Contract

[8] The defendant submits that the plaintiff's written employment contract limited her entitlement on termination to statutory severance pay under the *Employment Standards Act*[4] (the "ESA"). That amounted to four weeks salary which the defendant paid; as a result of which, the defendant submits that the plaintiff's entitlement to salary in lieu of notice has been fully satisfied.

[9] The plaintiff argues that the termination provisions of her employment contract are unenforceable. She submits that since the Ontario Court of Appeal's decision in *Waksdale v. Swegon North America Inc*.,[5] it has been clear that if an employment contract contains a termination provision that is contrary to the minimum standards in the ESA, then all termination provisions in the contract are unenforceable and the employee will be entitled to common-law notice. This is the case even if the offending provision in the employment contract is not at issue. This reflects a concern that the employment contract be read as a whole and that the reading of such contracts recognizes the power imbalance between employees and

[4] *Employment Standards Act*, 2000, S.0. 2000, c. 41
[5] *Waksdale v. Swegon North America Inc*., 2020 ONCA 391; 446 D.L.R. (4th) 725, at para. 10, leave to appeal refused, [2020] S.C.C.A. No. 292. See also: *Rossman v. Canadian Solar Inc*., 2019 ONCA 992, 444 D.L.R. (4th) 131, at para. 18; *Rahman v. Cannon Design Architecture Inc*., 2022 ONCA 451 at para. 30; *Gracias v. Dr. David Walt Dentistry*, 2022 ONSC 2967 at para. 94.

employers.[6] The offending provision here deals with termination for cause. The plaintiff was not terminated for cause. Defence counsel agreed during argument that if the termination for cause provision falls afoul of the ESA, then the termination without cause provision in the employment contract must also be struck out.

[10] In my view, the contract's terms concerning termination for cause breach the provisions of the ESA because they define "cause" more broadly than the ESA does. As a result, all of the termination provisions in the plaintiff's employment contract fall.

[11] The parties agree that the circumstances in which an employee be terminated without any form of compensation are now regulated by section 2 (1) (3) of the ESA's regulation 288/01.[7] That section provides that the following employees are not entitled to notice of termination or termination pay under Part XV of the ESA:

> 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.

[12] The parties also agree that this provision narrows the circumstances that were once available for just cause at common law.

[13] The plaintiff's employment contract provides that:

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[6] *Waksdale v. Swegon North America Inc*., 2020 ONCA 391 at para. 10.
[7] See also *Tan v. Stostac Inc*, 2023 ONSC 2121 at para. 10.

> If you are **terminated for Cause or** you have been guilty of wilful misconduct, disobedience, **breach of Employment Agreement** or wilful neglect of duty that is not trivial and has not been condoned by ARISTA, then ARISTA will be under no further obligation to provide you with pay in lieu of reasonable notice or severance pay whether under statute or common law. For the purposes of this Agreement **"Cause" shall include your involvement in any act or omission which would in law permit ARISTA to,** without notice or payment in lieu of notice, **terminate your employment**. (Emphasis added)

[14] The bolded portions of that clause contain provisions that go beyond the limited circumstances in which Regulation 288/01 authorizes termination without notice.

[15] The first bolded portion of the contract purports to allow the defendant to terminate the plaintiff without notice for "Cause." The plaintiff says this refers to the common law concept of cause which has been specifically narrowed Regulation 288/01. As a result, the termination provision violates the ESA. The defendant disputes this. It argues that the word "Cause" has been capitalized which makes it a defined term. The definition of cause is found later on in the same provision quoted above. That "definition" is as follows:

> For the purposes of this Agreement "Cause" shall include your involvement in any act or omission which would in law permit ARISTA to, without notice or payment in lieu of notice, terminate your employment.

[16] The defendant focuses on the latter words of the provision that would allow termination without notice for "any act or omission which would in law permit" the defendant to terminate without notice. Given that Regulation 288/01 now defines

the circumstances in which an employee can be terminated without notice, the defendant argues that the definition is limited to the circumstances in Regulation 288/01. In my view, the defendant's reading does not accord with the plain language of the provision. The defendant's reading ignores the fact that what it refers to as a "definition" of cause begins by indicating that **"Cause shall include"** conduct that allows the defendant to terminate without notice. In other words, it purports to include more than just the provisions of Regulation 288/01. On my reading of the clauses and the case law, that breaches the ESA and requires all termination provisions in the employment contract to be struck out.

[17] The defendant submits that I am taking an overly technical reading of the employment contract and cites *Sattva Capital Corp. v. Creston Moly Corp*.,[8] to the effect that: "the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction."[9] The same paragraph, however, reminds courts to "read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract."[10] The defendant's interpretation would ignore certain words of the contract. Applying all of the words of the contract in their plain grammatical reading is not an overly technical approach to contractual interpretation.

[8] *Sattva Capital Corp. v. Creston Moly Corp*., 2014 SCC 53 (CanLII), [2014] 2 SCR 633
[9] *Sattva Capital Corp. v. Creston Moly Corp*., 2014 SCC 53 (CanLII), [2014] 2 SCR 633 at para. 47.
[10] *Sattva Capital Corp. v. Creston Moly Corp*., 2014 SCC 53 (CanLII), [2014] 2 SCR 633 at para. 47.

[18] The second provision that the written employment agreement purports to contain as a basis for termination without notice is a “breach of Employment Agreement”. The defendant contests this and argues that any breach of the Employment Agreement must be “wilful” which brings it within the wording of Regulation 288/01.

[19] I do not agree that the written contract of employment requires the breach of the employment agreement to be wilful before it purports to amount to grounds for termination without notice. I repeat the relevant portion of the clause here for convenience:

> If you … have been guilty of **wilful** misconduct, disobedience, breach of Employment Agreement **or wilful** neglect of duty that is not trivial and has not been condoned by ARISTA, then ARISTA will be under no further obligation to provide you with pay in lieu of reasonable notice or severance pay whether under statute or common law. (Emphasis added)

[20] The defendant argues that the first “wilful” in the extract quoted above refers to each of misconduct, disobedience and breach of Employment Agreement. I do not agree with that reading. If the adjective “wilful” were intended to apply to each of the behaviours that follow it, then there would be no need to add the second “wilful” before the concept of neglect of duty.

[21] If the defendant intended the interpretation that it now argues for it could have achieved that outcome with a simple colon and have the clause read:

> If you … have been guilty of wilful: misconduct, disobedience, breach of Employment Agreement or neglect of duty ….

[22] If I am wrong in this, then at a minimum the provision is ambiguous and should be construed against the employer who drafted the contract.

[23] Moreover, even if it is only a wilful breach of the employment agreement that would lead to a termination without notice, there are terms of the employment agreement which, even if wilfully breached, would not amount to a grounds for termination without notice either under Regulation 288/01 or at common law. For example, the employment agreement provides that the plaintiff's regular working hours will be Monday to Friday 8 AM to 5 PM. Thus, if the plaintiff on one occasion wilfully came in at 8:30 without prior agreement, that would amount to cause to terminate without notice. Similarly, another term of the employment agreement is that the plaintiff "observe all policies and guidelines" of the defendant. A deliberate breach of one policy or guideline, no matter how minor, would purportedly amount to cause to terminate without notice.

[24] In response to this, the defendant may try to argue that the breach of the employment agreement has to be "not trivial" under the termination clause. I disagree with that interpretation. The qualifier "not trivial" applies only to wilful neglect of duty and not to the earlier forms of misconduct. The word "or" between the concept of breach of the employment agreement and the concept of wilful neglect of duty separates the latter clause from the former and limits the qualifier of "not trivial…" to the concept of wilful neglect of duty.

Alleged Lack of Mitigation

[25] The defendant also argues that summary judgment is not appropriate because it alleges that the defendant has failed to mitigate her damages appropriately. The defendant bears the burden of proof on a balance of probabilities that the plaintiff failed to take steps to mitigate her damages and that if she had done so she would have been expected to secure comparable employment reasonably adapted to her abilities.[11]

[26] The defendant has put forward no evidence in this regard. It has been repeatedly said that the responding party on a motion for summary judgment must put it best foot forward. It cannot rely on a bald allegation that it expects further evidence to be obtained through discovery or by the time of trial.

[27] The timing of the plaintiff's termination is particularly noteworthy here. Her employment was terminated on October 26, 2020. That was during the height of the Covid pandemic. Vaccines had not yet become available and in person contact continued to be heavily discouraged.

[28] Courts have noted that if employers want to argue that a former employee has failed to mitigate her damages, the employer will be well advised to present evidence of help that it offered to the employee during his or her job search.[12] Here

[11] *Lake v. LaPresse*, 2022 ON CA 742 at para. 12
[12] *Drysdale v Panasonic Canada Inc.*, 2015 ONSC 6878 at para. 22; *Maxwell v. United Rentals of Canada Inc.*, 2015 ONSC 2580 at para. 40

there is no evidence that the defendant offered the plaintiff any help in a job search. It provided no job counselling. It provided no leads for any jobs. It did not provide the plaintiff with a reference letter.

[29] The defendant has also not pointed to any positions that were available that the plaintiff should have applied for. Instead, the defendant has produced several few LinkedIn biographies of individuals in similar positions who obtained new jobs during the period in which the plaintiff remained unemployed. Of those LinkedIn profiles, one shows someone starting a new position in December of 2020, a second in April 2021 and a third in June 2021. The remaining LinkedIn profiles show people who started new positions in 2022 (like the plaintiff), one case of a person who became self-employed during the Covid pandemic and one who accepted a new position with the same employer during the Covid pandemic. That does not strike me as evidence of inadequate mitigation. Especially given the total lack of assistance from the defendant.

[30] The defendant complains that the plaintiff's job search summary shows that the first position she applied for was in November 2021 and that she did not apply for any positions during the 8 month notice period that she claims.

[31] The plaintiff has explained that delay. At about the time of her termination, the plaintiff's daughter was diagnosed with cancer. The plaintiff's daughter died in October 2021. After her daughter's death, the plaintiff began looking for employment and found a new job in September 2022. As Perell J. noted in *Gracias*

v. Dr. David Walt Dentistry:[13] "In assessing the innocent party's efforts at mitigation, the courts are tolerant, and the innocent party need only be reasonable, not perfect." In my view there is nothing unreasonable about deferring the commencement of a job search to take care of a child with cancer and to allow a period of mourning after the child's death. The time that it takes to find new employment is the time that it takes regardless of whether the plaintiff started in November 2020 or November 2021.

The Appropriate Notice Period

[32] Reasonable notice must be determined by reference to the facts of each particular case, with the Courts considering, 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. [14] The more specialized the position, the longer the duration of employment and the older the employee, the longer the reasonable notice period tends to be.[15]

[33] At the time of her termination, the plaintiff was 49 years old, had been employed with the defendant for approximately 5 years, held the position of Décor Store

[13] *Gracias v. Dr. David Walt Dentistry*, 2022 ONSC 2967 at para. 106.
[14] Commonly referred to as the Bardal factors after *Bardal v. Globe & Mail*, 1960 CanLII 294 (ON SC), [1960] O.J. No. 149 (H.C.J.). See *Gracias v. Dr. David Walt Dentistry*, 2022 ONSC 2967 at para. 99 for a recent example of those principles being applied.
[15] *Gracias v. Dr. David Walt Dentistry*, 2022 ONSC 2967 at para. 100-102.

Manager and earned an annual salary of $80,000 plus an annual bonus of approximately $5,000. She was also a member of the defendant's group benefits plan. She had a wide range of managerial job duties including hiring staff with the approval of the Vice President of construction and President, training staff on work duties, arranging training seminars and general oversight of day-to-day operations.[16]

[34] The plaintiff has directed me to 3 cases which she submits provide a relevant range of notice. In *Nemirovski v Socast Inc*,[17] a 40-year-old Product Manager with 1.7 years of service who earned $100,000 received 9-months notice. In *Cassidy v 277033 Ontario Ltd,*[18] a 46-year-old sales Manager with 1.5 years of service who earned $50,000 received 6-months notice. In *Branch v CIBC*,[19] a 42-year-old Credit Analyst and Designer with 1.5 years of service who earned $55,000 received 4-months notice.

[35] The plaintiff submits that she should have received 8 months notice. The defendant made no submissions with respect to the appropriate notice period.

[36] I find that 8 months is appropriate. The *Nemirovski* and *Cassidy* cases, in my view, most closely approximate the combination of age, salary and position of the plaintiff. I note that in those cases notice of 6 months and 9 months were awarded

[16] A detailed job description is found attached to the plaintiff's contract of employment at Exhibit "A" to her affidavit of September 1, 2023.
[17] *Nemirovski v Socast Inc*, 2017 ONSC 5616.
[18] *Cassidy v 277033 Ontario Ltd*, 2013 CanLII 40849;
[19] *Branch v CIBC*, 2010 ONSC 1103.

for a shorter period of service long before the Covid pandemic. Courts have also recognized that the Covid pandemic made it more difficult for employees to find positions.[20]

[37] The plaintiff was also entitled to compensation for the value of lost benefits during the notice period.[21]

[38] The defendant has failed to lead any evidence about the cost of maintaining the plaintiff's group benefits coverage. In the absence of such evidence, courts have awarded payments of 10% of group benefits.[22]

[39] The plaintiff is therefore entitled to eight-months salary in lieu of notice which comes to $54,933.15 less the 4 weeks of ESA notice she was given of $6,338.44 for a total salary of $48,594.71. I would add to that amount, 10% for lost benefits or $4,859.48. I would prorate the plaintiff's annual bonus of $5,000 to reflect 10 months work or the sum of $4,166.66. on account of the cost of benefits for a total award of $57,620.85.

Summary Judgment

[20] *Amerato v. TST-CF Solutions LP*, 2022 ONSC 5339 at paras. 30 and 58.
[21] *Bernier v. Nygard International Partnership*., 2013 ONSC 4578 at para. 45.
[22] *Camaganacan v. St. Joesph's Printing Ltd*., 2010 ONSC 5184, at para. 23; *Nasager v. Northern Reflections Ltd.*, 2010 ONSC 5840 at para. 8.

[40] The test for summary judgment is not in dispute and was summarized in *Waxman v. Waxman*,[23] as follows:

> [57] The rules provide that the court shall grant summary judgment if "the court is satisfied that there is no genuine issue" that requires a trial. Put another way, I must grant summary judgment unless a trial is required.
>
> [58] There is no genuine issue that requires a trial if the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. "This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result."
>
> [59] In determining whether a trial is required, rule 20.04(2.1) allows the court to weigh evidence, evaluate credibility and draw any reasonable inference from the evidence, unless it is "in the interest of justice for such power to be exercised only at a trial". If these expanded fact-finding powers do not enable me to decide the matter, I may direct that a mini-trial be conducted if doing so will allow me to resolve the matter.
>
> [60] It is well-established that on a motion for summary judgment: (a) each party must put its best foot forward; (b) the responding party "must lead trump or risk losing"; and (c) the motion judge is entitled to assume that all evidence that might be adduced by the respondent at trial has been adduced on the motion. [Citations omitted]

[41] I am satisfied that the plaintiff has met that test. There is no genuine issue here that requires a trial. The only potential issue the defendant has pointed to in this regard is mitigation. The plaintiff's delay in starting a job search is reasonable.

[23] *Waxman v. Waxman*, 2021 ONSC 2180; affirmed *Waxman v. Waxman*, 2022 ONCA 311

The defendant has raised allegations of inadequate mitigation but has not introduced evidence that persuades me on a balance of probabilities that the plaintiff failed to mitigate. If the defendant wishes to allege inadequate mitigation it must put its best foot forward. Showing LinkedIn biographies that show that three people got jobs similar to the plaintiff's job in the 8 months following her termination is not evidence of inadequate mitigation. If anything the fact that the defendant cannot point to a single position that it knew of and that the plaintiff should have applied for suggests that there were relatively few positions available.

[42] The other issues on this motion such as the interpretation of the contract and the appropriate notice period are issues of law or mixed law and fact on which there are no facts in dispute.[24]

Disposition and Costs

[43] For the reasons set out above, I award judgment in favour of the plaintiff in the amount of $57,620.85 plus pre-judgment interest.

[44] Any party seeking costs arising out of these reasons will have two weeks to deliver written submissions. The responding party will have two weeks to deliver its answer with a further one week for reply.

[24] The parties debated about whether the plaintiff's position was a "niche" position or not. I give no weight to that issue and do not consider her position to have been a "niche" position.

Date: February 23, 2024

Koehnen J.