

COURT OF APPEAL FOR ONTARIO

CITATION: Kopyl v. Losani Homes (1998) Ltd., 2024 ONCA 199
DATE: 20240319
DOCKET: COA-23-CV-0859

Lauwers, Roberts and Monahan, JJ.A.

BETWEEN

Kim Kopyl

Applicant
(Respondent)

and

Losani Homes (1998) Ltd.

Respondent
(Appellant)

Jonathan L. Dye, for the appellant

Alex Van Kralingen and Vibhu Gairola, for the respondent

Heard: March 13, 2024

On appeal from the order of Justice R.J. Harper of the Superior Court of Justice, dated June 21, 2023.

REASONS FOR DECISION

[1] The appellant hired the respondent on a one-year fixed term contract from July 6, 2022, to July 6, 2023, (the “Term”) at an annual salary of \$150,000. The employment agreement included both for-cause and without-cause termination clauses (collectively, the “Termination Clauses”).

[2] On January 9, 2023, the appellant purported to terminate the respondent's employment on a without-cause basis and paid her four weeks salary, equal to \$11,538.46.

[3] The respondent argued that the Termination Clauses in the contract were void on the basis that they contravened requirements set out in the *Employment Standards Act, 2000*, S.O. 2000, c. 41 (the "ESA"). Therefore, the respondent claimed that the appellant did not have the right to terminate her employment prior to the expiry of the Term and that she was entitled to be paid her salary for the Term's unexpired portion, without a duty to mitigate her damages.¹

[4] The appellant did not dispute the fact that the Termination Clauses contravened the *ESA* and were therefore void. However, relying upon this court's decision in *Waksdale v. Swegon North America Inc.*, 2020 ONCA 391, 446 D.L.R. (4th) 725, the appellant argued that, where one termination clause in an employment contract contravenes the *ESA*, all the termination clauses in the contract are automatically voided. The appellant further argued that the clause establishing a one-year limit to the respondent's employment (the "Fixed Term Clause") was in effect a termination clause. Thus, because the Termination Clauses in the contract were void, so too was the Fixed Term Clause. The legal

¹ The application proceeded on the basis that the respondent had not made any efforts to mitigate her damages during the unexpired portion of the Term.

consequence was that the respondent's employment was not subject to a fixed term but, rather, was terminable upon the provision of "reasonable notice" at common law, subject to a duty on the respondent to mitigate her damages. The appellant maintained that the four-week salary that had been paid to the respondent more than satisfied its obligations upon termination.

[5] The application judge rejected the appellant's position and found that the invalidity of the Termination Clauses did not affect the validity of the Fixed Term Clause. Relying on this court's decision in *Howard v. Benson Group Inc.*, 2016 ONCA 256, 129 O.R. (3d) 677, at para. 21, the application judge found that a contractual provision providing for a fixed term of employment was not a termination clause since, upon the expiry of said fixed term, the employment relationship automatically terminates without any obligation on the employer to provide notice or payment in lieu of notice. Therefore, despite the invalidity of the Termination Clauses, the Fixed Term Clause remained in effect. The legal consequence was that the respondent's employment had been wrongfully terminated and she was entitled to receive payment equal to her salary and benefits for the unexpired portion of the Term, less any amounts paid by the appellant, without any duty to mitigate.

[6] On appeal, the appellant argues that the application judge failed to properly apply *Waksdale*, that the invalidity of the Termination Clauses should have voided the Fixed Term Clause, and that the respondent was entitled only to the provision

of reasonable notice, rather than compensation for the unexpired portion of the Term.

[7] We do not agree. Although the application judge's decision is reviewable on a correctness standard,² the application judge made no error in finding this court's decision in *Benson Group Inc.* to be dispositive of the application.

[8] In *Benson Group Inc.*, the invalidity of a clause providing for early termination of the employment agreement on a without cause basis did not alter the legal effect of the provision fixing the term of the contract. Because there was no enforceable provision providing for early termination without cause, the employee was entitled to receive the compensation they would have earned to the end of the term, without any duty to mitigate.

[9] *Waksdale*, which did not involve a fixed-term employment agreement, involved entirely different circumstances and has no application to this case. *Waksdale* merely held that the invalidity of a particular termination clause in an employment contract voided other termination provisions in the agreement, with the result that the employee was entitled to reasonable notice upon termination of their employment. *Waksdale* made no reference to *Benson Group Inc.*, nor did it suggest that the invalidity of the termination clause in an employment contract had

² In our view, the legal effect of a termination clause in a contract providing for a fixed term of employment is an extricable question of law, reviewable on a correctness standard: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 SCR 633, at para. 53; *Benson Group Inc.*, at para. 17.

the effect of converting a fixed term contract into one terminable on reasonable notice.

[10] The appeal is therefore dismissed. The respondent, as the successful party, seeks costs of the appeal on a partial indemnity basis of \$7,729.20. The appellant, which did not submit its own cost outline, estimated that its costs likely did not exceed \$5,000, and argues that the respondent should be awarded \$3,750.

[11] The costs incurred by the respondent were reasonable and in an amount that ought to have been in the contemplation of the appellant. We fix the costs of the appeal payable by the appellant to the respondent to be \$7,500, on an all inclusive basis.

“P. Lauwers J.A.”

“L.B. Roberts J.A.”

“P.J. Monahan J.A.”