CITATION: Dufault v. The Corporation of the Township of Ignace, 2024 ONSC 1029
COURT FILE NO.: CV-23-0098-00
DATE: 2024-02-16

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:	
Karen Dufault	*Mr. J. Pinkus* for the Plaintiff
Plaintiff	
- and -	
The Corporation of the Township of Ignace	*Mr. J. Lester* for the Defendant
Defendant	
	HEARD: November 17, 2023, at Thunder Bay, 2023 via Zoom

Madam Justice H. M Pierce

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 [*Oudin*], 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 [*Wood*], at paras. 26 – 28.

[19] At para. 25 of *Henderson v. Slavkin et al.,* 2022 ONSC 2964 [*Henderson*], 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 [*Waksdale*], 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 [*Benson Group*], 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.

"original signed by"
The Hon. Justice H. M. Pierce

Released: February 16, 2024

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REASONS ON SUMMARY JUDGMENT MOTION

Pierce J.

Released: February 16, 2024