**CITATION:** Rutledge v. Canaan Construction Inc.,2020 ONSC 4246
**COURT FILE NO.:** DC-19-0103-00
**DATE:** 2020 07 09

2020 ONSC 4246 (CanLII)

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

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|---|---|---|
| **B E T W E E N:** | ) | |
| CHRIS RUTLEDGE | ) | David Vaughan, for the Plaintiff, Respondent in Appeal |
| Plaintiff/ Respondent in Appeal | ) | |
| **- and -** | ) | |
| CANAAN CONSTRUCTION INC. | ) | James Prosser, for the Defendant/Appellant in Appeal |
| Defendant | ) | |
| | ) | **HEARD: June 26, 2020** |

**REASONS FOR JUDGMENT**

**Fowler Byrne J.**

[1] On October 1, 2019, the Honourable Deputy Justice Pettipierre of the Ontario Superior Court of Justice Small Claims Court, in Guelph, granted judgement in favour of the Plaintiff/Respondent in Appeal Chris Rutledge

(“Rutledge”) awarding him damages for wrongful dismissal, in the sum of $9,530, plus costs.

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[2] The Defendant/Appellant in Appeal Canaan Construction Inc. (“Canaan”) appeals that judgment. The two grounds of appeal raised by Canaan are as follows:

a) That the Deputy Judge erred in law, or mixed fact and law, by determining that Canaan had purported to contract out of the obligations under s. 60(1) the *Employment Standards Act, 2000*, S.O. 2000, c. 41, (“*ESA*”) to pay benefits during the statutory notice period despite the fact that Rutledge is a statutory “construction employee” and not entitled to statutory notice under the *ESA*; and

b) That the Deputy Judge failed to provide adequate reasons or an adequate path of reasoning to permit an appellant court to determine whether the conclusions were supportable by relevant and reliable evidence.

**Background**

[3] There are few facts in dispute. Rutledge was a construction employee employed by Canaan in the construction industry. Rutledge was first employed

as a construction employee by Canaan in 2012, and was laid off from time to time. His last continuous period of employment with Canaan started in November 2015. On that occasion, he signed an employment agreement with Canaan, dated November 10, 2015 ("Employment Contract"). The relevant parts of the Employment Contract are as follows:

> Position
>
> The Employee shall occupy the position of apprentice. The Employee will have duties and responsibilities of that position as explained to him/her and/or in accordance with a job description attached hereto.[1]
>
> Term
>
> The Employee acknowledges that he/she will be working in the construction industry and the amount of work will fluctuate or terminate for any number of reasons. Accordingly the Employee acknowledges that the term of his contract shall be of an indefinite duration but may end at any time.
>
> Remuneration
>
> The hourly wage of the Employee for his services shall be at the rate of $23.66 per hour. Benefits are provided as per the Company benefit plan.
>
> …..
>
> Overtime
>
> As this is construction work and is season and job restricted there shall be no payment of overtime.
>
> …..
>
> Termination of Employment
>
> …..

[1] No such description was attached to any of the Employment Contracts filed in this appeal.

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> The Employee may be terminated at any time without cause upon being given the minimum periods of notice as set out in the Employment Standards Act, or by being paid salary in lieu of such notice or as may otherwise be required by applicable legislation. The Employee acknowledges that pursuant to the Employment Standards Act they are not entitled to any notice or time in lieu thereof due to the nature of their job and as such they are entitle to absolutely no notice or pay and benefits in lieu thereof upon termination.
>
> The termination provisions set force above, represent all severance pay entitlement, notice of termination or termination in lieu thereof, salary, bonuses, vacation pay and other remuneration and benefits payable or otherwise provided to the Employee in relation to the termination of the Employee regardless of cause or circumstances.

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[4] Rutledge was placed on temporary layoff by Canaan on October 10, 2017. His Record of Employment indicates the reason was "A – Shortage of work/end of contract or season". Rutledge was not recalled to work and in December 2017, Rutledge found alternate employment. No notice of this lay off was given, nor did he receive any pay in lieu of notice from Canaan.

[5] In June 2018, Rutledge commenced an action in the Small Claims Court seeking damages for wrongful dismissal. No mention was made in his claim about the Employment Contract. Canaan defended claiming the Employment Contract absolves Canaan from any requirement to give any notice of the lay-off, or pay in lieu of notice. It also relied on the fact that as a construction employee, Canaan had no obligation under the *ESA* to give notice to Rutledge or termination pay in lieu thereof.

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[6] The Deputy Judge granted Judgment in favour of Rutledge, awarding him damages equivalent to 9.5 weeks salary. The reasons of the Deputy Judge are straightforward. The Deputy Judge agreed with the submissions of Rutledge that the termination clause of the Employment Contract was void because it purported to contract out of the obligation under s. 60(1)(c) of the *ESA* to pay benefits during the statutory notice period. He relied on the cases of *Wood v. Fred Deeley Imports Ltd.* 2017 ONCA 158, 134 O.R. (3d) 481, and *Hampton Securities Limited v. Dean* 2018 ONSC 101. Accordingly, the presumption of reasonable notice was not rebutted by the Employment Contract. Canaan appealed.

**Standard of Review**

[7] Appeals involving contractual interpretation encompass issues of mixed fact and law. This is because the principles of contractual interpretation are applied to the words of the written contract and considered in light of the factual matrix: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, 2 S.C.R. 633, at para. 50. In appeals of this type, the appellant must establish that the Deputy Judge made a palpable and overriding error before his or her decision may be overturned. Absent such a finding, deference is given to the trier or fact: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 10. A palpable and

overriding error is where a finding of fact is clearly wrong, unreasonable or unsupported by the evidence *and* the error affected the result of the motion or trial. This applies whether there is direct proof of the fact in issue or indirect proof of facts from which the fact in issue has been inferred: *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401, at paras. 53-56.

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**Analysis**

[8] For the reasons set forth herein, this appeal should be dismissed.

***i. Violation of* ESA**

[9] The common law principle of termination of employment on reasonable notice is a presumption, rebuttable only if a contract of employment clearly specifies some other period of notice. The contract of employment is only enforceable 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: *Wood*, at paras. 15-16, relying on *Machtinger v. HOJ Industries Ltd*. [1992] 1 S.C.R. 986 ((S.C.C.) at p. 998.

[10] It is clear that some types of employees are not protected by the *ESA*. Included in this list are “any prescribed individuals”: s. 3(5)12. Nonetheless, if an employee has two or more roles in their employment, and only one of these roles

is not protected by the *ESA*, they will be continued to be protected with respect to that other role: s. 3(6) *ESA*.

[11] Section 2(1) 9 of Regulation 288/01 under the *ESA* states that construction employees “are prescribed for the purposes of section 55 of the Act as employees who are not entitled to notice of termination or termination pay under Part XV of the Act.” In the case before me, it is not disputed that Rutledge was a construction employee for the entirety of his employment. Accordingly, at the time of his employment, the inapplicability of the *ESA* to Rutledge is limited to those employment standards set forth in s. 55 – being notice of termination, as set out in ss. 54-60 of the *ESA*, and termination pay, as set out in ss. 61-62. The regulation does not flatly disentitle Rutledge to the protection of the entire *ESA* as is the case for some of the other occupations listed in s. 3(5) of the *ESA*. Rutledge continues to be afforded the protection of all other employment standards set out in the *ESA*, unless otherwise specifically excluded by other legislation. Accordingly, if any wording of an employment contract purports to deny Rutledge those other employment standards, then those provisions are unenforceable.

[12] The Deputy Judge determined that by excluding Rutledge’s entitlement to benefits under s. 60(1)(c) during his notice period, the Employment Contract

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purported to contract out of Rutledge's *ESA* rights, and therefore the termination provisions are not enforceable.

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[13] I agree that the issue is somewhat more complicated by the fact that the Rutledge, for the duration of his employment, had no such entitlement to this particular employment standard. How can an employer be penalized for confirming in writing that an employee will not receive what he is not entitled to?

[14] The error in the Employment Contract is twofold, both of which show that even if the Deputy Judge misstated that Rutledge was disentitled to benefits which he would not have received anyway, the end result would not have changed.

[15] Firstly, 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: *Covenoho v. Pendylum Ltd.*, 2017 ONCA 284, at para. 7. Accordingly, on the chance that Rutledge's position at Canaan changed to something other than a construction employee, the effect of the Employment Contract is that it denies Rutledge his right to benefits during his notice period, which is protected by the *ESA*. While the Employment Contract does refer to Rutledge being employed as an apprentice and that he will be

working in the construction industry, it does not explicitly state that this applies only to him while occupied as a construction employee and that it would be of no force or effect if his position changed.

[16] Secondly, the termination provision of the Employment Contract also violates the *ESA* in a way that is not so remote. As a "prescribed" employee, construction employees may not be entitled to the employment standards governing the termination of employment or notice thereof, but are still entitled to the employment standards guaranteed in the event of their severance, as outlined in ss. 63-66. If Canaan grew in size, employing more than 50 employees and then discontinued its business, or else had a payroll more than $2.5 million, Rutledge would be entitled to severance pay, irrespective of his job description. The Employment Contract clearly disentitles Rutledge to these employment standards. Again, the potential violation of the *ESA* renders these provisions unenforceable.

[17] Accordingly, and being mindful of the policy considerations outlined in *Machtinger* at pp. 1002-1005, even a potential violation of the *ESA*, no matter how remote, should be unenforceable. Even though the Deputy Judge only referred to Rutledge's rights to benefits, and no other *ESA* employment standards to which Rutledge was entitled, the termination provisions, read as a

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whole, clearly show that the Employment Contract purported to contract out of the *ESA* in at least two ways. Accordingly, no palpable and overriding error has been established.

### *ii. Insufficiency of Reasons*

[18] The Deputy Judge's reasons were clear. He agreed that the termination provision was void because it purported to contract out of Mr. Rutledge's entitlement to benefits. He then found that the termination clause fell below the standard as set out in the case law, and therefore did not rebut the presumption of reasonable notice. Given the case law cited herein, whether or not Rutledge was even entitled to be paid benefits at the time of his dismissal, was irrelevant to the analysis.

[19] I am able to discern the reasoning behind the conclusions of the Deputy Judge. In addition, failure to give adequate reasons is not a free standing basis for appeal: *F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41, at para. 99. Accordingly, this argument must fail.

## Conclusion

[20] For the reasons set out herein,

a) This appeal is dismissed; and

b) The parties are encouraged to resolve the issue of costs themselves. If they are unable to do so, the Respondent Rutledge shall serve and file his written submissions, restricted to two pages, single-sided and double-spaced, exclusive of costs outline and offers to settle, no later than 4:30 p.m. on July 31, 2020; the Appellant Canaan shall serve and file his responding submissions, with the same restrictions, no later than 4:30 p.m. on August 14, 2020; any reply submissions by the Respondent, with the same size restrictions, shall be served and filed no later than 4:30 p.m. on August 21, 2020; All costs submissions shall be e-filed, by e-mailing same, with an affidavit of service to BramptonSCJCourt@ontario.ca, to be directed to my attention.

Fowler Byrne J.

**Released:** July 9, 2020

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**SUPERIOR COURT OF JUSTICE**

**B E T W E E N:**

Chris Rutledge

Plaintiff/Respondent in Appeal

**- and -**

Canaan Construction Inc.

Defendant

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**REASONS FOR JUDGMENT**

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Fowler Byrne J.

**Released:** July 9, 2020

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