**CITATION:** Amberber v. IBM Canada Limited, 2017 ONSC 6470
**COURT FILE NO.:** CV-16-24008
**DATE:** 20171030

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

| | | |
|---|---|---|
| **BETWEEN:** | ) | |
| Noah Amberber | ) | |
| Plaintiff | ) | Paul J. Willetts and Andrew N. Vey, for the Plaintiff |
| **– and –** | ) | |
| IBM Canada Limited | ) | Jennifer Dolman and Lindsay Rauccio, for the Defendant |
| Defendant | ) | |
| | ) | **HEARD:** June 1, 2017 |



## REASONS ON MOTION FOR SUMMARY JUDGMENT

**HEBNER J.**

[1] This motion was brought by the defendant, IBM Canada Limited ("IBM" or "the defendant"), for summary judgment against the plaintiff, Noah Amberber ("Noah" or "the plaintiff"). This case is a wrongful dismissal case. The plaintiff was dismissed from his employment with the defendant without cause on July 8, 2016. The plaintiff had an employment contract with the defendant, dated March 16, 2015, that included a termination clause.

[2] The parties are agreed that the issue before the court is whether that termination clause is enforceable. If so, the plaintiff's claim ought to be dismissed. If not, the issue of damages and period of reasonable notice ought to proceed to trial. The parties are further agreed that there are no facts in dispute and, as such, this is an appropriate case for a summary judgment motion.

### Background Facts

[3] Noah begn to work for Team Detroit in September 2000. Team Detroit was an IBM customer who had retained IBM to provide information technology services. In early 2015, IBM acquired Team Detroit and its operations. Noah's employment continued unchanged and uninterrupted.

[4] IBM offered Noah continued employment in an offer letter dated March 16, 2015. Noah signed and returned the employment offer to IBM on March 20, 2015 and commenced employment for IBM on March 30, 2015 in the role of senior support representative. His responsibilities included troubleshooting computer issues, troubleshooting software application issues, creating user accounts, answering the help desk telephone and providing telephone system setup support. Noah's annual base salary was $65,507. In addition, he received three weeks annual paid vacation, group employment benefits and was entitled to participate in the IBM defined contribution pension plan.

[5] The offer of employment, signed by both parties, contained the following clauses:

> SERVICE REFERENCE DATE
>
> Your service reference date (SRD) is 09/25/2000, which includes your previous service with Team Detroit. Your SRD will be used to determine vacation entitlement, retirement eligibility, entitlements upon termination of employment, eligibility for Short Term Disability benefit payments, eligibility for the Quarter Century Luncheon, eligibility for IBM's Stock/RSU equity programs, and eligibility for a Retirement Event/Gift.
>
> TERMINATION OF EMPLOYMENT
>
> If you are terminated by IBM other than for cause, IBM will provide you with notice or a separation payment in lieu of notice of termination equal to the greater of (a) one (1) month of your current annual base salary or (b) one week of your current annual base salary, for each completed six months worked from your IBM service reference date to a maximum of twelve (12) months of your annual base salary. This payment includes any and all termination notice pay, and severance payments you may be entitled to under provincial employment standards legislation and Common Law. Any separation payment will be subject to applicable statutory deductions. In addition, you will be entitled to benefit continuation for the minimum notice period under applicable provincial employment standard legislation. In the event that the applicable provincial employment standard legislation provides you with superior entitlements upon termination of employment ("statutory entitlements") than provided for in this offer of employment, IBM shall provide you with your statutory entitlements in substitution for your rights under this offer of employment.

[6] IBM terminated Noah's employment as a result of its decision to reduce costs. By letter dated April 19, 2016, Noah was advised that his employment with IBM would be terminated on July 8, 2016. The letter provided as follows:

> "For the reasons discussed with you today, your employment with IBM Canada LTD. (IBM), will be terminated on July 8, 2016."

> "In addition to the working notice provided to you today, IBM will provide you with a separation payment of $22,675.50 (less required deductions including any money owed to IBM). This "separation payment" is in accordance with the termination clause in your employment letter dated March 16, 2015 and includes any and all entitlements for termination pay and severance pay under the Ontario Employment Standards Act."

[7] As of the date of his termination, Noah was 57 years old and had recognized service with IBM totalling 15 years and 10 months. Based upon his annual salary of $65,507, a severance payment of $22,675.50 represented 18 weeks of base salary. In addition, Noah received working notice from IBM for a period of 11 weeks and three days. In total, IBM's termination package provided Noah with 29 weeks and three days' notice or pay in lieu thereof.

[8] Noah retained his current counsel, Mr. Willetts, in late May 2016. Mr. Willetts sent a letter to IBM dated June 3, 2016 that, among other things, informed IBM that it had failed to comply with the requirement of the termination clause. The termination clause entitled Noah to 31 weeks' notice or pay in lieu thereof. IBM did not respond to the letter.

[9] Noah received the sum of $22,675.50 from IBM by wire transfer in early August, 2016. He commenced this action on August 16, 2016. In the statement of claim, Noah pled, in para. 14, that:

> "IBM provided total notice of termination to Amberber, including working notice and pay in lieu thereof, in an amount less than the 31 weeks required by the termination clause for an employee of his tenure. As such, IBM is precluded from seeking to enforce against Amberber a clause that it unilaterally drafted, and subsequently breached."

[10] IBM provided its statement of defence dated October 28, 2016. On November 4, 2016, without first providing any explanation, IBM deposited two amounts into Noah's bank account: $1,133.77 and $312.32 respectively (for a total of $1,446.09). Noah contacted IBM to inquire as to the reason for the deposits. He received an e-mail from the IBM employee services centre advising that the monies represented "a legal residual payment of 0.4 weeks in lieu of notice and a one week of severance payment."

**The Issues**

[11] It is well settled law that, in the absence of a contract that defines an employee's entitlement upon termination, an employee who is dismissed without cause is entitled to reasonable notice. The common law principle of termination only on reasonable notice is a presumption that is rebuttable if the contract of employment clearly specifies some other period of notice: see *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986.

[12] The question, therefore, for this court is whether the termination clause in the contract is enforceable. The plaintiff has advanced three arguments in support of his position that the termination clause is not enforceable. They are:

1. The termination clause violates, or potentially violates, the minimum requirements of the *Employment Standards Act* ("The *ESA*");

2. The termination clause fails to rebut the presumption of common law reasonable notice of termination; and

3. IBM failed to comply with the requirements of the termination clause and, as such, is not entitled to rely on it.

[13] I shall summarize each of these arguments in turn.

**<u>Argument #1</u>: Does the termination clause violate, or potentially violate, the minimum requirement of the *ESA*?**

[14] The *ESA* requires that in the event of a termination of an individual employee without cause, an employer must:

> a) provide notice of termination, or pay in lieu of notice, of up to at least eight weeks (s. 57 and s. 61), and for the duration of the notice, continue all aspects of compensation, including wages, vacation pay and benefits (s. 60); and
>
> b) pay severance of up to a maximum of 26 weeks if the employee was employed by the employer for five years or more and the employer has a payroll of $2.5 million or more (s.64(1)(b)).

[15] These two clauses are conjunctive. An employer must comply with both of them.

[16] The first part of the termination clause contains two payment options:

> "If you are terminated by IBM other than for cause, IBM will provide you with notice or a separation payment in lieu of notice of termination equal to the greater of (a) one (1) month of your current annual base salary or (b) one week of your current annual base salary, for each completed six months worked from your IBM service reference date to a maximum of twelve (12) months of your annual base salary. ("the options provision")"

[17] The plaintiff takes the position that the termination clause is unenforceable because it permits IBM to comply with the greater of option (a) or option (b) in a manner that denies Noah his entitlement to statutory severance pay. In support of that argument, the plaintiff relies on the Court of Appeal decision in *Wood v. Fred Deeley Imports Ltd.*, 2017 ONCA 158. That decision, and the Court of Appeal decision in *Covenoho v. Pendylum Ltd.*, 2017 ONCA 284, make it clear that if the termination clause potentially

violates the *ESA* at any date after the employee is hired, it is void and the common law standards apply: see *Covenoho*, at para. 7.

[18] In *Wood*, the termination provision provided that the employer was entitled to terminate the employee without cause by providing the employee "with 2 weeks' notice of termination or pay in lieu thereof for each completed or partial year of employment with the Company." The clause went on to provide that the employer was not required to make any other payments to the employee and "[T]he payments and notice provided for in this paragraph are inclusive of your entitlements to notice, pay in lieu of notice and severance pay pursuant to the *Employment Standards Act, 2000*." Laskin J.A. found, at para. 62, that:

> In my view, drafted in this way, the clause does not satisfy Deeley's statutory obligation to pay severance pay. Deeley could fulfil its obligations under the clause in ways that would deprive Wood of her statutory severance pay. The termination clause is thus unenforceable, and Wood is entitled to common law reasonable notice.

[19] The plaintiff submits that the termination clause in this case would permit IBM to comply with option (a) or option (b) in a manner that fails to meet its obligation under the *ESA* to pay severance pay. As an example, the plaintiff points out that the *ESA* would require that an employer with an annual payroll of at least $2.5 million that dismisses an employee with five years and four months' service must provide: five weeks of notice, or payment in lieu of notice, and severance pay of 5.33 weeks, for a total of 10.33 weeks. Under option (b), the same employee would receive only ten weeks of base annual salary. Under option (a) the employee would receive only one month of base annual salary.

[20] IBM points out that in the plaintiff's circumstances, having completed 15 years and eight months of employment, the plaintiff was entitled to 31 weeks' pay under the termination clause. The *ESA* would provide for eight weeks' working notice (or pay in lieu) and 15.75 weeks' severance pay, for a total of 23.75 weeks' pay.

[21] IBM further submits that, even if an application of the formula set out in the termination clause would produce a result that conflicts with the *ESA*, the termination clause contains a failsafe provision in the last sentence that reads:

> "In the event that the applicable provincial employment standards legislation provides you with superior entitlements upon termination of employment ("statutory entitlements") than provided for in this offer of employment, IBM shall provide you with your statutory entitlements in substitution for your rights under this offer of employment. ("the failsafe provision")."

**<u>Argument #2</u>: Does the termination clause fail to rebut the presumption of common law reasonable notice of termination?**

[22] In the termination clause, after addressing an employee's entitlement to the greater of two options, the clause continues: "[T]his payment includes any and all termination notice pay, and severance payments you may be entitled to under provincial employment standards legislation and common law." (the "inclusive payment provision"). The failsafe provision then appears.

[23] The plaintiff takes the position that IBM has drafted a bifurcated clause with a clear distinction as to the circumstances in which the plaintiff's entitlement under the termination clause would, or would not, be inclusive of his entitlement to common law reasonable notice. Namely:

a) the plaintiff receives the greater of option (a) or (b) in fulfillment of his statutory and common law rights; or

b) the plaintiff receives his statutory entitlements without any such similar caveat that this entitlement is inclusive of his common law rights.

[24] The defendant takes the position that the clause must be read as a whole and, when the clause is read as a whole, the inclusive payment provision clearly applies to both the options provision and the failsafe provision. To include the inclusive payment provision again at the end of the paragraph would be redundant.

**Argument #3: Is IBM entitled to rely on the termination clause?**

[25] By operation of the termination clause, IBM was required to comply with option (b). This would oblige IBM to provide 31 weeks of notice or payment. IBM, however, provided only 29 weeks and three days' notice or payment. IBM did not comply with the requirement for a period of over five months, and not until after litigation had been commenced. The plaintiff takes the position that, as a result, IBM is not entitled to rely on the termination clause it had breached.

[26] The plaintiff relies on the case of *Holmes v. Hatch Ltd.,* 2017 ONSC 379, a case that involved the breach of an employment contract by the employer. Pollock J. said, at para. 24:

> Mr. Holmes relies on Ebert to support his arguments that Hatch cannot breach the contract "and then rely on the termination clause which it had breached, to limit its liability." I agree with the submissions.

[27] IBM takes the position that it simply miscalculated the amount the plaintiff was entitled to under the termination clause. The plaintiff received the bulk of what he was entitled to at the time of termination and it is clear from the termination letter that IBM's intention was to comply with the clause. They were off by less than two weeks. When the error was discovered, it was remedied. The error was not intentional and not so egregious that IBM should be disentitled to rely on the clause.

**Analysis**

[28] I start the analysis by reviewing the principles to be applied when interpreting employment agreements. Employment agreements are interpreted differently from other commercial contracts. The interpretation must reflect the importance of employment in a person's life. In *Reference re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313 at p. 368, Dickson C.J.C. said:

> Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being.

[29] In *Wood*, the Court of Appeal set out considerations relevant to the interpretation and enforceability of a termination clause at para. 28. Those considerations include:

- When employment agreements are made, usually employees have less bargaining power than employers. Employees rarely have enough information or leverage to bargain with employers on an equal footing: *Machtinger*, p. 1003

- Many employees are likely unfamiliar with the employment standards in the ESA and the obligations the statute imposes on employers. These employees may not seek to challenge unlawful termination clauses: *Machtinger* p. 1003

- The *ESA* is remedial legislation, intended to protect the interests of employees. Courts should thus favour an interpretation of the *ESA* that "encourages employers to comply with the minimum requirements of the Act" and "extends its protections to as many employees as possible", over an interpretation that does not do so: *Machtinger* p. 1003

- Termination clauses should be interpreted in a way that encourages employers to draft agreements that comply with the *ESA*. If the only consequence employers suffer for drafting a termination clause that fails to comply with the *ESA* is an order that they comply, then they will have little or no incentive to draft a lawful termination clause at the beginning of the employment relationship: *Machtinger*, p. 1004

- A termination clause will rebut the presumption of reasonable notice only if its wording is clear. Employees should know at the beginning of their employment what their entitlement will be at the end of their employment: *Machtinger* p. 998

- Faced with a termination clause that could reasonably be interpreted in more than one way, courts should prefer the interpretation that gives

> the greater benefit to the employee: *Ceccol v. Ontario Gymnastics Federation* (2001), 149 O.A.C. 315, *Christensen v. Family Counselling Centre of Sault Ste. Marie and District* (2001), 151 O.A.C. 35.

[30] With those principles in mind, I turn to each of the arguments raised by the plaintiff.

[31] I would not give effect to the plaintiff's argument number 1. The plaintiff quite properly points out that there are circumstances in which a payment to a terminated employee under the options provision would violate the *ESA*. However, in that event, the failsafe provision is effective to ensure that the terminated employee receives what he/she is entitled to under the *ESA*. Given that, it cannot be said that the clause violates, or potentially violates, the *ESA*.

[32] Moreover, I would not give effect to the plaintiff's argument #3. Although IBM technically breached the contract by failing to provide 31 weeks' notice, there is no evidence that the breach was intentional. A similar situation occurred in the Divisional Court case of *Simpson v. Global Warranty Management Corp.*, 2014 ONSC 6916. In that case, the Divisional Court said:

> ..., while the respondent was technically in breach of the employment agreement by not immediately paying the appellant what he was owed upon his termination, that breach is not of an order of magnitude, in the circumstances of this case, as to disentitle the respondent from the benefit of the termination provision.

[33] Similarly, in *Oudin v. Le Centre Francophone de Toronto*, 2015 ONSC 6494, the plaintiff originally received 20.25 weeks of severance pay on termination when he was entitled to 21 weeks under the employment contract. He received the additional entitlement when the mistake was discovered. At para. 29, Dunphy J. said:

> Firstly, it is said that the respondent failed to pay all of the ESA termination payments prescribed after having terminated the employment of the plaintiff. The failure amounted to less than a week's pay out of 21 weeks actually paid. It arose from an honest mistake as to the actual start date of the plaintiff's employment. When the mistake was discovered and verified, the defendant corrected its error and paid the extra amount due. This cannot reasonably be construed as anything but an honest and relatively minor error as to a single fact and does not come close to the standard of a deliberate and clear repudiation of an entire legal relationship.

[34] The same can be said of this case. The plaintiff was paid the bulk of his entitlement on termination. He received the balance within a reasonable period of time. There is no evidence that the initial insufficient payment was anything other than a mistake on the part of IBM. It is inconceivable that IBM, knowing it wished to rely on the termination

clause, would purposely pay less than the plaintiff was entitled to under that cause. There was no "deliberate and clear repudiation" of the employment contract on the part of IBM.

[35] The plaintiff's argument #2 is the argument that causes significant difficulty for the defence. On reading the termination clause, although it is one entire paragraph, it breaks down into two parts. The first part of the clause (the options provision) entitles the employee to:

> "…notice or a separation payment in lieu of notice of termination equal to the greater of (a) one (1) month of your current annual base salary or (b) one week of your current annual base salary, for each completed six months worked from your IBM service reference date to a maximum of twelve (12) months of your annual base salary."

[36] The inclusive payment provision immediately follows the options provision. Clearly, the inclusive payment provision applies to the first part.

[37] The second part of the clause (the failsafe provision) then follows:

> "In the event that the applicable provincial employment standard legislation provides you with superior entitlements upon termination of employment ("statutory entitlements") than provided for in this offer of employment, IBM shall provide you with your statutory entitlements in substitution for your rights under this offer of employment."

[38] The inclusive payment provision is not repeated. In my view, it is not clear from a reading of the clause that the inclusive payment provision was meant to apply to the failsafe provision. If that were the case, then the inclusive payment provision could just as easily have been included at the end of the paragraph and could have just as easily been specified to apply to both scenarios.

[39] The considerations in interpreting an employment contract, set out above, include the principle that any intention to rebut common law reasonable notice provisions must be clear in order to be enforceable. In addition, any ambiguity is to be resolved in favour of the employee. In *Singh v. Qualified Metal Fabricators Ltd.*, 2016 CarswellOnt 8795, Stinson J. considered a termination clause that made no reference to the common law entitlement to reasonable notice. At para. 15, he said:

> In our case, it was open to the employer to draft a contract that excluded common law notice. It instead proffered an employment agreement that was silent on the subject. At best it is an open question whether it was or was not intended to override common law notice entitlement. I would, therefore, construe it as ambiguous. That ambiguity must be construed against the defendants, having regard to the power imbalance that exists between an employer and an employee as a matter of course. I am not prepared to find that the employment agreement operated to nullify or

detract from the implied common law requirement of reasonable notice of termination.

[40] In the case at hand, IBM could easily have drafted a termination clause that clearly excluded the common law notice entitlement in both the options provision scenario and the failsafe provision scenario. In my view, the clause drafted is ambiguous. It is not clear that the exclusion of the common law notice entitlement applies to the failsafe provision scenario. As in *Singh*, the ambiguity must be construed against the employer.

**Disposition**

[41] For the foregoing reasons, I make the following order:

1. The defendant's motion is dismissed.

2. The issues of reasonable notice and damages shall proceed to trial before me. I remain seized of this case.

3. In the event the parties are unable to agree on costs, they may make brief written submissions, to include a costs outline, according to the following timetable:

   a) the plaintiff may provide his submissions within 20 days;

   b) the defendant may provide its submissions within 20 days thereafter; and

   c) the plaintiff may provide any reply submissions within 20 days thereafter.

"original signed and released by *Hebner J.*"

Pamela L. Hebner
Justice

**Released:** October 30, 2017

**CITATION:** Amberber v. IBM Canada Limited, 2017 ONSC 6470
**COURT FILE NO.:** CV-16-24008



**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

Noah Amberber

Plaintiff

**– and –**

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**REASONS ON MOTION**
**FOR SUMMARY JUDGMENT**

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Pamela L. Hebner
Justice

**Released:** October 30, 2017