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COURT OF APPEAL FOR ONTARIO
MCKINLAY, OSBORNE and ABELLA JJ.A.

B E T W E E N :	)	
	)	
JOHN C. MacDONALD	)	**Stephen Bird**
	)	**for the appellant**
Plaintiff/	)	
Respondent	)	
	)	
- and -	)	
	)	**Phillip G. Hunt**
ADGA SYSTEMS INTERNATIONAL LTD.	)	**for the respondent**
	)	
Defendant/	)	
Appellant	)	**Heard: December 11, 1998**
	)	

ABELLA J.A.:

[1] On May 2, 1988, John MacDonald started working for ADGA Systems International Ltd. He had previously spent 35 years with the Canadian Air Force, reaching the rank of Lieutenant Colonel. He was an engineer, and developed an expertise with CF-18 fighter planes in his last years with the Air Force. When he was recruited by ADGA, he was living in Lahr, Germany and was about to retire.

[2] His retirement plan had been to move with his family to Vancouver, but he decided instead to accept a contract of employment with ADGA in Ottawa. He signed the contract on April 29, 1988.

[3] The termination clause of that contract states:

> 12. The Company may terminate this Agreement without notice at any time by reason of the Employee's dissipations, violation of any instruction or rule of the Company, or failure to comply with any of the agreements on the part of the Employee as herein set out. In addition it is also agreed that either party to this Agreement may terminate this Agreement at any time by giving not less than one (1) month's prior written notice sent either by registered mail or bailiff.

[4] ADGA is a professional consulting engineering company. It provides its services primarily to the federal government, determining what projects the government wants to have completed by the private sector, and finding the appropriate people for the particular project. It makes clear to these employees that their employment will likely end with the project. ADGA often hires retirees from the Canadian Armed Forces for contracts with the Department of National Defence.

[5] John MacDonald was hired because ADGA hoped that his skill

and connections would attract contracts with the Department of National Defence, particularly a service contract for CF-18 fighters.

[6] As the letter making a conditional offer of employment to MacDonald clearly demonstrates, his employment with ADGA was linked to the awarding of the CF-18 contract:

> ADGA Systems International Limited (ADGA) is pleased to make you a contingent offer of employment with our firm, when you are available for civilian employment, to the following conditions:
> a) ADGA obtains the projected contract with the Department of National Defence for services in the management of certain CF-18 sub-systems.

[7] ADGA's aspirations were realized when it was awarded a CF-18 contract in 1988, which John MacDonald oversaw. MacDonald's salary was billed back to the Department of National Defence. The contract was renewed in 1990 and again in 1992.

[8] In 1994, the contract was not awarded to ADGA. MacDonald's employment was therefore terminated by letter dated June 15, 1994, and he received 13.2 weeks compensation from ADGA, a total of $23,951.22.

[9] MacDonald sued ADGA, claiming he was wrongfully dismissed and entitled to 14 months' compensation in lieu of notice, an amount totalling $87,964.72 exclusive of the $23,951.22 he had already received from ADGA.

[10] The trial was essentially a dispute over whether ADGA had just cause to terminate MacDonald's employment. ADGA blamed the failure to win the 1994 CF-18 contract on MacDonald's behaviour; MacDonald denied any inappropriate conduct.

[11] The secondary issue was the notice entitlement: ADGA argued that it had complied with its contractual (and statutory) obligations by giving MacDonald more than 3 months' compensation; MacDonald argued that the contractual term was essentially meaningless given the length and nature of his employment.

[12] MacDonald was successful at trial, and was awarded the full amount requested. The trial judge found there was no just cause for his dismissal, that MacDonald was wrongfully dismissed, and that he was entitled to "reasonable notice" - a period of 14 months in the circumstances of this case.

[13] The trial judge treated the termination clause as a base only, and was of the view that it did not insulate ADGA from its common law requirement to provide reasonable notice to an employee who is wrongfully dismissed. He explained his approach in his oral reasons:

> ... Some time was spent on the contract provision. I have no difficulty with it. The contract document said ... that it is agreed either party may terminate the agreement at any time by giving not less than one month prior written notice sent either by registered mail. I've taken it quite simply that that was a commitment in the event of discharge by ADGA that they would give at least one month's written notice or one month's pay in lieu of notice. The case law amply supports that a requirement for written notice can be substituted by payment in lieu thereof.
>
> In any event, I simply view that as a base, an agreement by ADGA that, in fact, if Mr. MacDonald had performed so poorly, they wanted to let him go in the first few weeks, they would nevertheless owe him a month's pay. It does not, in any way create a ceiling, and I do not accept any suggestion that because a month is mentioned here, that the month should be taken as a base figure from which additions or subtractions can be made. Certainly the contract says, no subtractions. [Emphasis added.]

Analysis

[14] On appeal, ADGA did not quarrel with the "no just cause" finding. Instead, the appeal focused exclusively on the interpretation to be given to the termination clause.

[15] Both MacDonald and ADGA relied on the analysis in Machtinger v. HOJ Industries Ltd. (1992), 91 D.L.R. (4th) 491 (S.C.C.). In Machtinger, the termination provisions in two employment contracts were found to be void because they provided for a notice period less than the applicable statutory minimum in the Employment Standards Act. As a result, there no longer being a contractual provision setting a notice period, the dismissed employees were entitled to rely on their common law presumptive entitlement to an implied term of reasonable notice.

[16] On behalf of MacDonald, it was argued that the termination clause in his contract, which obliged the employer to give "not less than" one month's notice, sets out a term of notice less than that required by the Employment Standards Act, R.S.O. 1990, c. E.14. Pursuant to s. 57(f) of that Act, an employee who has worked between 6 and 7 years for an employer, as MacDonald had, is entitled to 6 weeks' notice. ADGA argued that the provision, as worded, does not set out a notice period less than that required by statute and is therefore binding.

[17] There is no dispute about the applicable law. Both parties acknowledge that where an employment contract is for an indefinite period and the dismissal is without cause, an employee is entitled at common law to the presumption of an implied right to reasonable notice of an intention to terminate the contract,

unless the employment contract clearly stipulates a notice period: Carter v. Bell & Sons, [1936] 2 D.L.R. 438 (Ont. C.A.). But if the stipulated notice period in the contract provides for a term less than the minimum notice requirements of the Employment Standards Act, that provision is "null and void": Machtinger at p. 505. Since voiding the contractual notice period renders the contract silent on the question of notice, there is no contractual rebuttal to the presumption of reasonable notice. The employee will therefore be entitled to the reasonable notice period implied at common law, a period which usually exceeds the period expressed in employment standards legislation: Machtinger at p. 508.

[18] It is helpful to compare the language of the termination clause in MacDonald's employment contract with that found in Machtinger's contract with HOJ. The termination clause in MacDonald's contract states:

> 12. The Company may terminate this Agreement without notice at any time by reason of the Employee's dissipations, violation of any instruction or rule of the Company, or failure to comply with any of the agreements on the part of the Employee as herein set out. In addition it is also agreed that either party to this Agreement may terminate this Agreement at any time by giving not less than one (1) month's prior written notice sent either by registered mail or bailiff. [Emphasis added.]

[19] Machtinger's termination clause stated:

> Termination - Employer may terminate employment at any time without notice for cause. Otherwise, Employer may terminate employment on giving Employee 2 weeks' notice or salary ... in lieu of notice. ...

[20] In my view, the clause in Machtinger is easily distinguishable from the termination provision in MacDonald's contract. The Machtinger clause sets out a specific notice period which, on its face, violates the four week notice provisions required for these employees under the Employment Standards Act.

[21] The MacDonald clause, on the other hand, does not, on a plain reading, conflict with any legislative entitlement. ADGA is required to give MacDonald not less than 1 month's notice. This does not contravene the duty to comply with the Employment Standards Act's minimal requirement of one week's notice per year of service, up to a maximum of eight weeks.

[22] While not determinative, moreover, ADGA's payment of both the minimal six weeks' compensation to which MacDonald was entitled by statute, as well as an additional seven weeks' severance pay, reflects an understanding of the termination clause as requiring, at the very least, compliance with the notice requirements under the Employment Standards Act. Unlike

Machtinger, there is no "attempt to contract out of the minimum notice requirements of the Act": Machtinger at p. 502. To find that the clause in MacDonald's contract violates the Employment Standards Act requires an interpretation of the clause which injects an illegal term into what is, on its face, apparently legal.

[23] It would no doubt have been linguistically preferable had the termination provision in MacDonald's contract contained words after the term of notice such as "in accordance with the relevant provisions of the Employment Standards Act." But while this layer of specificity might have enhanced the clarity of the parties' intentions, its absence does not detract from the provision's legality.

[24] In this case, the common law presumption in favour of reasonable notice has been rebutted. There is a clear - and clearly expressed - term providing for not less than one month's notice. Neither on its face, nor inferentially, does this term provide for a notice period less than that required by the Employment Standards Act, nor reflect an attempt to contract out of that requirement. Accordingly, the contractual term prevails over the common law presumption.

[25] The appeal is therefore allowed, the trial judgment is set aside, and the action is dismissed with costs of both the appeal and the trial.

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