CITATION: Miller v. A.B.M. Canada Inc., 2015 ONSC 1566
DIVISIONAL COURT FILE NO.: 14-600
Kitchener Court File No. 11-4228-SR
DATE: 20150319

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

MARROCCO A.C.J.S.C., KENT AND EDWARDS JJ.

BETWEEN:	
PAUL MILLER Plaintiff/Respondent	*J.A. Byrne*, for the Plaintiff/Respondent
– and –	
A.B.M. CANADA INC. Defendant/Appellant	*R. B. Bissell*, for the Defendant/Appellant
	HEARD: February 25, 2015

MARROCCO A.C.J.S.C.:

[1] In July 2009 the appellant offered the respondent employment. The terms and conditions of this offer of employment were set out in writing. The offer of employment had been prepared by Christopher Kohler who at that time was the president of the appellant company. Mr. Kohler is not a lawyer. He prepared the employment contract using precedents that he had obtained from a former employer and its legal department. The respondent accepted the offer of employment approximately six days after receiving it.

[2] The respondent's employment with the appellant was terminated without cause.

[3] The January 26, 2011 letter of termination stated that the respondent was entitled to two weeks' salary in lieu of notice inclusive of a car allowance and a factual reference letter. The termination letter offered an "enhanced separation offer" of four weeks of base salary plus car allowance "as a sign of good faith and in order to assist you while you seek alternative employment…." The termination letter indicated that the enhanced offer of additional salary was open for one week.

[4] The respondent did not accept the enhanced offer. The respondent was not paid his car allowance or pension contributions.

[5] At trial the respondent contended that the termination provision in his contract of employment was unenforceable because it was contrary to s. 5(1) of the *Employment Standards Act, 2000*, S.O. 2000, c. 41, with the result that the respondent's entitlement upon termination was to be determined on common law principles. The trial judge agreed.

[6] The trial judge found that s. 61(1) of the *Employment Standards Act* permits termination without notice if the employer pays the amount the employee would have been entitled to receive during the notice period together with benefits. The trial judge found that the termination clause with which we are concerned provided for the minimum period of notice required by the *Employment Standards Act*. However, the trial judge also found that the termination section of the contract provided for termination without the payment of a car allowance and pension benefit with the result that it was contrary to s. 61(1)(a) and for that reason void and incapable of displacing the common law presumption that Mr. Miller was entitled to a reasonable period of notice calculated according to common law principles.

[7] The appellant appeals on the basis that the written employment agreement limits the respondent's notice of termination to the statutory minimum. The appellant relies on *Roden v. The Toronto Humane Society* (2005), 259 D.L.R. (4th) 89 (Ont. C.A.). In that case one of the issues which the Court of Appeal had to decide was whether the trial judge was correct in determining that the "without cause provisions" of the appellant's employment contract was valid and enforceable. The Court of Appeal upheld the trial judge on this question.

[8] In *Roden* there were two employment contracts containing a similar termination provision which provided as follows: "Otherwise, the Employer may terminate the Employee's employment at any other time, without cause, upon providing the Employee with the minimum amount of advance notice or **payment** in lieu thereof as required by the applicable employment standards legislation." (Emphasis added). The Court of Appeal was satisfied that this provision did not attempt to provide something less than the legislated minimum standard and that the provision was therefore valid.

[9] In this case the trial judge was confronted with a differently worded employment termination provision as follows: "Regular employees may be terminated at any time without cause upon being given the minimum period of notice prescribed by applicable legislation, or by being paid **salary** in lieu of such notice or as may otherwise be required by applicable legislation." This provision was located in a portion of the employment agreement bearing the heading Termination.

[10] The plaintiff/respondent argued at trial that the termination provision specifically excluded the payment of pension contributions and car allowance benefits in lieu of notice.

[11] The trial judge agreed. His Honour interpreted the reference to salary in the Termination section as a reference to the respondent's stipulated salary in the employment agreement ($135,000) and nothing else. As a result the trial judge was of the view that the Termination

provision excluded payment of pension and car allowance benefits and was therefore contrary to s. 61(1)(a) of the *Employment Standards Act* and therefore void pursuant to s. 5(1) of that Act.

[12] It is obvious that the word **payment** is different than the word **salary**. The difference in wording is significant because the employment agreement with which we are concerned distinguishes salary, pension contributions and a car allowance. Under the heading Remuneration the employment agreement provides: "Your starting salary is CAD $135,000… per annum payable biweekly… Salary increases are wholly within the discretion of A.B.M. Canada. In addition to salary A.B.M. Canada may from time to time pay additional amounts of compensation under a bonus, incentive, profit-sharing or other plan." In a separate paragraph in the Remuneration section the employment agreement provides: "A.B.M. Canada will equal your personal pension contributions up to a maximum of 6% of base salary." Under a separate heading entitled Fringe Benefits, the employment agreement provides for a car allowance.

[13] The Termination section specifically references salary. The pension contribution is referred to separately from salary in the Remuneration section; it is part of the respondent's remuneration but not part of his salary. The car allowance is not referenced in the section referencing salary (i.e. the Remuneration section).

[14] The *Roden* decision did not require the trial judge to come to a different conclusion. The fact that the trial judge was dealing with differently worded termination provisions sufficiently explains the fact that the *Roden* decision is not referred to in His Honour's reasons.

[15] The appellant argued that the Employment Agreement's silence on paying benefits during the notice period should lead to a presumption that benefits would be paid. Apart from the fact that the trial judge found and we agree that the Employment Agreement was not silent and that the wording of the agreement provided that benefits were not to be paid during the notice period, the appellant's argument at best leads to the conclusion that the Termination section is ambiguous. The trial judge found that the contract of employment was drafted by the appellant. Therefore if there is an ambiguity in the Termination section it is to be interpreted unfavorably to the appellant: *Manulife Bank of Canada v. Conlin,* [1996] 3 S.C.R. 415, at paras. 8-9.

[16] In addition, when dealing with a clause in an employment contract which was capable of more than one interpretation in *Ceccol v. Ontario Gymnastic Federation*, (2001), 55 O.R. (3d) 614, (C.A.), the Ontario Court of Appeal made the following observation at para. 47: "In an important line of cases in recent years, the Supreme Court of Canada has discussed, often with genuine eloquence, the role work plays in a person's life, the imbalance in many employer-employee relationships and the desirability of interpreting legislation and the common law to provide a measure of protection to vulnerable employees."

[17] At para. 49 of the same decision the court made a further observation to the same effect: "In the present appeal, there are, as I have tried to demonstrate, two plausible interpretations

> of article 5.4 of the employment contract. One interpretation would remove the common law entitlement to reasonable notice; the other would preserve it. One interpretation would result in a termination provision which the Trial Judge described as especially stringent and onerous; the other would provide an employee with notice which at common law, both parties accept, is reasonable.… In my view, in each instance the second interpretation is preferable. It is also, in my view, consistent with the leading decisions of the Supreme Court of Canada in the employment law domain."

[18] The appellant suggested that the standard of review was correctness because the appeal was exclusively about the interpretation of the employment agreement. The respondent submitted that the appeal involved issues of mixed law and fact and that as a result the trial judge's decision deserves deference unless it could be shown that the trial judge had made a palpable and overriding error. In the respondent's view there was no extractable question of law embedded within the interpretation of the contract which mandated the correctness standard.

[19] We agree that the question of the application of the *Roden* decision to the contract with which we are concerned is a matter to be reviewed on the correctness standard. However, it is also our view that the trial judge was correct in concluding that the Termination section with which we are concerned does not referentially incorporate the minimum requirements set out in the *Employment Standards Act*.

[20] Accordingly this appeal is dismissed. The parties have agreed that the successful party should receive a costs award in the amount of $10,000 including disbursements and applicable taxes. We agree that this is a reasonable amount and accordingly the respondent is entitled to costs in the amount of $10,000 inclusive of disbursements and applicable taxes.

MARROCCO A.C.J.S.C.

J.C. KENT J.

M.L. EDWARDS J.

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REASONS FOR JUDGMENT

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