CITATION: Movati Athletic (Group) Inc. v. Bergeron, 2018 ONSC 7258
DIVISIONAL COURT FILE NO.: DC-18-2411
DATE: 20181206

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

SWINTON, THORBURN, and COPELAND JJ.

BETWEEN:	
MOVATI ATHLETIC (GROUP) INC. **Appellant (Defendant)**	*Casey Dockendorff and Giovanna Di Sauro*, for the Appellant Movati Athletic (Group) Inc.
– and –	
CATHERINE BERGERON **Respondent (Plaintiff)**	*Paul J. Willetts and Andrew Vey*, for the Respondent, Catherine Bergeron
	HEARD at Ottawa: November 20, 2018

THORBURN J.

OVERVIEW

[1] This is an appeal of the motion judge, O'Bonsawin J.'s Order granting summary judgment in favour of the Respondent, Catherine Bergeron ("**Ms. Bergeron**").

[2] The Appellant, Movati Athletic (Group) Inc. ("**Movati**"), operates health and fitness facilities at 13 locations across Ontario.

[3] Ms. Bergeron was General Manager of Movati's health and fitness facility in Orleans, from August 4, 2015 to December 5, 2016. She was paid a salary of approximately $90,000 per year.

[4] Her terms of employment were set out in a written employment agreement. Ms. Bergeron reviewed the Agreement and had an opportunity to obtain legal advice before signing the Agreement. The termination clause in her contract of employment ("**the termination clause**") provides as follows:

> Movati Athletic Inc. may terminate your employment without cause at any time during the term of your employment upon providing you with notice or pay in lieu of notice, and severance, if applicable, pursuant to the *Employment Standards Act*, 2000 and subject to the continuation of your group benefits coverage, if applicable, for the minimum period required by the *Employment Standards Act*, 2000 as amended from time to time.

[5] It is agreed that the employment agreement complies with the *Employment Standards Act, 2000*, S.O. 2000, c. 41 ("***ESA***").

[6] Movati terminated Ms. Bergeron's employment without cause on December 5, 2016.

[7] Movati agreed to pay Ms. Bergeron two weeks' pay in lieu of notice pursuant to the minimum period required by the *ESA*. Movati in fact paid Ms. Bergeron for four weeks and does not seek to recover the two weeks of pay paid in error. Ms. Bergeron was also paid her outstanding vacation pay and maintained her group benefits coverage for two weeks following her termination.

[8] Ms. Bergeron secured alternative work as a Mortgage Representative on January 1, 2017. She did not seek further employment as of February 2017.

[9] In granting Ms. Bergeron's motion for summary judgment, the motion judge held at paragraph 25 of her decision that,

> Movati cannot rely on the termination clause in Ms. Bergeron's employment agreement to contract out of its obligations under the common law. Consequently, Ms. Bergeron is entitled to a notice period as per the common law [of three months' pay].

[10] She held that in order for a termination provision to displace common law rights, "a high degree of clarity is required. Any ambiguity will be resolved in favour of the employee and against the employer who drafted the agreement". She held that the termination clause was not clear and that because it was ambiguous, the interpretation of the words must be resolved in Ms. Bergeron's favour.

[11] She noted that the wording did not contain any explanation or warning sign. She held that if the termination provision had contained wording such as, "upon termination, severance, if applicable will be paid **only** pursuant to the *Employment Standards Act*…**only** for the minimum

period required by the *Employment Standards Act*…" the language would be rendered clear such that the presumption of reasonable notice at common law could be rebutted.

[12] Lastly she noted that Ms. Bergeron would not be aware of the implication of the termination clause and was vulnerable as an employee signing an employment agreement.

[13] The motion judge determined that Movati must pay to Ms. Bergeron $3,067.71 in lieu of notice, $15,345.07 for her 2016 bonus and one month and one week for her 2017 bonus, and damages for the lost employment benefits during the three months of the notice period fixed at 10% of Ms. Bergeron's base salary minus the two weeks already paid.

THE ISSUE:

[14] The Appellant Movati seeks to overturn the Order granting summary judgment and awarding the Respondent, Ms. Bergeron's claim for damages, including damages in lieu of reasonable notice at common law, bonus payments during the notice period, and the value of the Respondent's employment benefits during this period. The Appellant does not challenge the quantum *per se*, but rather the fact that there is a right to reasonable notice at common law (not the minimum allowed pursuant to the *ESA*).

[15] The central issue before the motion judge was whether the termination clause was sufficiently clear to rebut the presumption of reasonable notice at common law.

COURT'S JURISDICTION:

[16] The Divisional Court has jurisdiction to hear this appeal pursuant to s. 19(1.2) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 as this is a final order of a judge of the Superior Court of Justice, as described in s. 19 and the appeal pertains to a payment of less than $50,000, excluding costs.

STANDARD OF REVIEW:

[17] On a pure question of law, the standard of review is correctness. An appellate court is free to replace the opinion of the trial judge with its own: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 8.

[18] Legal errors made in the course of contractual interpretation include "the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor": *Creston Moly Corp v. Sattva Capital Corporation*, 2014 SCC 53 (SCC) at para. 53. Findings of fact by contrast, are not to be reversed unless the trial judge made a "palpable and overriding error": *Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802; *Housen*, at para.10.

[19] Contractual interpretation however is considered to be a question of mixed fact and law to be reviewed on a standard of palpable and overriding error: *Sattva* at para. 50 and *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Corp*., 2016 SCC 37, [2016] 2 S.C.R. 23 at para. 21.

[20] The issue of whether the wording in this termination clause displaces the common law right is an issue of mixed fact and law subject to the more deferential standard of review of palpable and overriding error.

ANALYSIS AND CONCLUSION:

[21] The motion judge held that the termination clause was not sufficiently clear to displace the right to common law notice. The issue is whether in so doing, she made a palpable and overriding error.

The Position of the Parties

[22] The Appellant submits that:

i. The motion judge erred in law in finding that the termination clause was not sufficiently clear. The inclusion of the reference in the termination clause that Movati may terminate without cause upon "providing you with notice or pay in lieu of notice, and severance, if applicable, pursuant to the *Employment Standards Act, 2000* and subject to the continuation of group benefits … for the minimum period required by the *Employment Standards Act"* is clear, unambiguous and therefore sufficient to rebut the common law presumptive right to reasonable notice;

ii. The motion judge erred in law in finding ambiguity as ambiguity requires a finding that there are two reasonable interpretations. The motion judge failed to articulate a second reasonable interpretation of the provision;

iii. The motion judge erred in finding that the termination clause should have contained an "explanation or warning sign" or specific words as there is no such requirement at law; and

iv. The motion judge erred in placing overwhelming emphasis on the importance of Ms. Bergeron's subjective assertion that she did not understand the implications of the provision in interpreting the termination clause.

[23] The Respondent submits that:

i. The termination clause is not clear and the mere reference to the *ESA* is not sufficient to show that the *ESA* is a ceiling rather than a floor;

ii. The employment agreement must be read as a whole. In so doing, there is an ambiguity when the wording of the termination clause is compared

with the wording of the probation termination clause in the agreement; and

iii. While the motion judge did refer to Ms. Bergeron's assertion that she did not understand the implications of the provision, the judge did not place overwhelming emphasis on this factor.

The Process to Determine whether the Contract Displaces the Common Law Right to Reasonable Notice

[24] The steps to be followed in determining whether a contractual provision can rebut common law notice are as follows:

1. All contractual provisions must meet the minimum notice requirements for termination without cause set out in the *ESA*: *Machtinger v. HOJ Industries Ltd.*, 1992 CanLII 102 (SCC), [1992] 1 S.C.R. 986, [1992] S.C.J. No. 41, at p. 998;
2. There is a presumption that an employee is entitled to common law notice upon termination of employment without cause;
3. Provided minimum legislative requirements are met, an employer can enter into an agreement to contract out of the provision for reasonable notice at common law upon termination without cause: *Nemeth v. Hatch Ltd.*, 2018 ONCA 7, 287 A.C.W.S. (3d) 291 (Ont. C.A.) at para. 11 citing *Machtinger* at pp. 1004-1005;
4. The presumption that an employee is entitled to reasonable notice at common law may be rebutted if the contract specifies some other period of notice as long as that other notice period meets or exceeds the minimum requirements in the *ESA*: *Machtinger supra*, at p. 998;
5. The intention to rebut the right to reasonable notice at common law "must be clearly and unambiguously expressed in the contractual language used by the parties": *Wood v. Fred Deeley Imports Ltd.*, 2017 ONCA 158 (CanLII), 134 O.R. (3d) 481, at para. 40;
6. The need for clarity does not mean a specific phrase or particular formula must be used, or require the contract to state that "the parties have agreed to limit an employee's common law rights on termination". The wording must however, be "readily gleaned" from the language agreed to by the parties: *Nemeth* at para. 9;
7. Any ambiguity will be resolved in favour of the employee and against the employer who drafted the termination clause in accordance with the

principle of *contra proferentum*: *Miller v. A.B.M. Canada Inc.*, 2015 ONSC 1566 (CanLII), 27 C.C.E.L. (4th) 190, at para. 15 (Div. Ct.); *Ceccol v. Ontario Gymnastic Federation* (2001), 2001 CanLII 8589 (ON CA), 55 O.R. (3d) 614 (C.A.), at para. 45; and

8. Surrounding circumstances may be considered when interpreting the terms of a contract but they must never be allowed to overwhelm the words of the agreement itself: *Sattva* at para. 57.

The Motion Judge's Interpretation of the Termination Clause in this Case

[25] The parties on this appeal agree that the termination clause is enforceable as it meets the minimum requirements set out in the *ESA*.

[26] The motion judge acknowledged that employers can rebut the presumption of reasonable notice by clearly agreeing to a different notice period provided that agreement complies with the minimum requirements set out in the *ESA*.

[27] She found however, that, "In my view, with regards to Ms. Bergeron's Employment Agreement, there was not a high degree of clarity in her termination clause. … The wording of the termination clause must be clear to rebut the presumption of reasonable notice. …The wording of the termination clause was ambiguous and… must be resolved in Ms. Bergeron's favour."

[28] She also held that, "Ms. Bergeron's termination clause did not contain any explanation or warning sign and it said nothing more than Movati will obey the *ESA*. The motion judge then cited an example of language that would be sufficiently clear and added, "The use of the term 'only' would clearly indicate to the prospective employee that she would only be entitled to a notice period as per the *ESA*."

[29] She added that, "While it may be true that Ms. Bergeron had hired and fired employees on behalf of Movati, she would not have been aware of the implication of the termination clause as it read in her Employment Agreement at the time of signature since at that time, she had less bargaining power than Movati. It is quite common that prospective employees are in a more vulnerable state when signing an employment contract."

[30] She concluded by saying that, "Based on the reasons above, I find that Movati cannot rely on the termination clause in Ms. Bergeron's Employment Agreement to contract out of its obligations under the common law. Consequently, I find that Ms. Bergeron is entitled to a notice period as per the common law."

The Clarity of the Wording of the Termination Clause

(a) Wording of the Legislation and the Termination Clause

[31] The *Employment Standards Act* outlines what provincial legislators deem to be fair minimum notice provisions on termination.

[32] Section 57 of the *ESA* provides that notice of termination shall be given "at least two weeks before the termination", if the employee's period of employment is one year or more and fewer than three years. This sets out the statutory minimum notice to be met, given Ms. Bergeron's length of service.

[33] The termination clause in the Agreement provides that Movati may terminate the employment without cause "at any time during the term of your employment upon providing you with notice or pay in lieu of notice, and severance, if applicable, pursuant to the *Employment Standards Act*, *2000* and subject to the continuation of your group benefits coverage, if applicable, for the minimum period required by the *Employment Standards Act*, *2000* as amended from time to time." (Emphasis added)

[34] Section 60 of the *ESA* provides that, "[d]uring a notice period under section 57… the employer … shall continue to make whatever benefit plan contributions would be required to be made in order to maintain the employee's benefits under the plan until the end of the notice period". Nothing in the *ESA* requires group benefits to be paid for the duration of the notice period if that notice period exceeds the notice requirements set out in s. 57 of the *ESA*.

[35] The question before the motion judge was whether the Agreement clearly specifies some period of notice, which meets or exceeds the minimum requirements set out in the legislation so as to rebut the presumption that reasonable notice in accordance with the common law applies: *Machtinger* at p. 998; and *Nemeth* at para. 8.

[36] The words "pursuant to the *ESA*" may be interpreted to mean that the notice period in the termination clause complies with the minimum requirements in the legislation, but they do not clearly provide that reasonable notice at common law no longer applies.

(b) Reading the Termination Clause in the Context of the Agreement as a Whole

[37] The Supreme Court of Canada has confirmed that "contracts must be read as a whole, giving the words their ordinary and grammatical meaning": *Sattva* at para. 47. This assists the court to determine the objective intentions of the parties to the agreement.

[38] When the language of the termination clause is compared with the language in the termination clause for Ms. Bergeron while she was on probation ("**the probation clause**"), it is apparent that Movati used different wording.

[39] The probation clause limits Ms. Bergeron's receipt of notice of termination during the probationary period to: "only providing you with the minimum notice necessary to ensure compliance with the [*ESA*] as amended from time to time" (emphasis added).

[40] The differences between the language in the two clauses are as follows:

a. The *ESA* requires both payment during the notice period and group benefits to continue for a minimum two week period for a person in Ms. Bergeron's situation;

b. The notice provision in the probation clause provides that payment upon termination during the probation period, will be made "only" for the "minimum notice necessary" to comply with the *ESA*;

c. The group benefits provision in the termination clause provides that group benefit payments will be made only for the "minimum period required" by the *ESA*; but

d. By contrast, the notice provision in the termination clause provides only that notice or payment in lieu of notice is made "pursuant to the *Employment Standards Act"*. There is no clear limitation of payments in lieu of notice in the termination clause to the minimum under the *ESA* as there is in the termination provision in the probation clause and the group benefits provision in the termination clause.

[41] The words "only" or "minimum" are not required language. However, the fact that the words "only" and "minimum" are used in the probation clause, and the word "minimum" is used in the group benefits provision of the termination clause, but neither is used in the notice provision in the termination clause, reflects a difference in the intention of the drafter.

[42] Based on the wording of the termination clause as seen in the context of the Agreement as a whole, the motion judge made no palpable and overriding error in concluding that the termination clause was not sufficiently clear and unequivocal to rebut the presumption that the reasonable notice requirements at common law apply: *Holm v. AGAT Laboratories Ltd.*, 2018 ABCA 23 at paras. 22 and 33-36.

(c) Ambiguity

[43] The motion judge found the termination clause was ambiguous and therefore invoked the *contra proferentum* principle.

[44] To invoke the *contra proferentum* principle, there must be genuine uncertainty and two possible meanings: *Oudin v. Centre Francophone de Toronto*, 2015 ONSC 6494, 2015 CarswellOnt 16476 at para. 51. It is not a means of finding the least favourable interpretation with a view to invalidating the agreement in whole or in part: *Amberber v. IBM Canada Ltd*, 2018 ONCA 571 at para. 45.

[45] The words in this termination clause provide that "the notice provision" is "pursuant to the *Employment Standards Act*" and group benefits coverage payments must be in accordance with the "minimum period required by the *Employment Standards Act*". Read together, the minimum period required by the *ESA* could refer to both the notice provision and the group benefits coverage, or only to the group benefits coverage.

[46] The rule of *contra proferentum* provides that, where there are two plausible interpretations, the courts should prefer the interpretation that grants better rights to the employee, who did not draft the provision: *Wood* at para. 28.

[47] Given these two possible interpretations, the motion judge made no palpable and overriding error in concluding that the provision should be interpreted in the manner that was more favourable to Ms. Bergeron.

(d) The Need for Specific Words or Warning Signs

[48] The motion judge held that if the employer had used the term "only" that would "clearly indicate to the prospective employee that she would only be entitled to a notice period as per the *ESA*." Contrary to the submission made by the Appellant Movati, the motion judge did not say that specific wording was required, but simply provided an example of wording that would be clear.

[49] Secondly, the Appellant correctly notes that there is no requirement at law to include a warning sign in a termination clause. However, although the motion judge did observe that the termination clause "did not contain any explanation of warning sign", the legal standard she applied was whether the termination clause was sufficiently clear to rebut the presumption that Ms. Bergeron was entitled to reasonable notice in accordance with the common law. There was no palpable and overriding error in her determination that the clause was not sufficiently clear to rebut the presumption that the reasonable notice in accordance with the common law applied. (The reference to the necessity of a "warning sign" is based on the reasons in *Noguiera v. Second Cup*, 2017 ONSC 6315 that contain a misreading of *Farah v. EODC*, 2017 ONSC 3948).

(e) Consideration of Ms. Bergeron's View

[50] Lastly, the Appellant submits that the motion judge alluded to the subjective view of Ms. Bergeron when it is the objective intention of the parties to the agreement that is relevant. A review of the reasons of the motion judge as a whole demonstrates that she did not allow Ms. Bergeron's evidence of her subjective intentions to overwhelm her reasoning. She reviewed the surrounding circumstances of the Agreement to deepen her understanding of the objective intentions of the parties and this evidence did not drive her analysis of the interpretation of the termination clause: *Amberer* at para. 49.

Conclusion

[51] The central question on this appeal is whether the motion judge made a palpable and overriding error in her interpretation of the Agreement. She determined that the language in the termination clause was not sufficiently clear to rebut the presumption that common law notice applies.

[52] There was no palpable and overriding error in the motion judge's determination that the parties' intention to rebut the presumption was not "readily gleaned" from the language of the termination clause given:

a. the presumption that reasonable notice at common law applies upon termination without cause;

b. the wording of the termination clause (namely the difference between the wording in respect of notice and group benefit payments), and

c. the difference between the wording of the notice provision in the probation clause and the wording of the notice provision in the termination clause.

[53] For these reasons, the appeal is dismissed.

[54] On the agreement of both parties, costs of this appeal and the motion below are fixed in the amount of $17,500.00 and payable to the Respondent.

_____
THORBURN J.

I agree _____
SWINTON J.

I agree _____
COPELAND J.

Released: December 6, 2018

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REASONS FOR JUDGMENT

THORBURN J.

Date of Release: December 6, 2018