# COURT OF APPEAL FOR ONTARIO

CITATION: Nemeth v. Hatch Ltd., 2018 ONCA 7
DATE: 20180108
DOCKET: C63582



Sharpe, Benotto and Roberts JJ.A.

BETWEEN

Joseph Nemeth

Plaintiff (Appellant)

and

Hatch Ltd.

Defendant (Respondent)

Dorian N. Persaud and Stephanie Pope, for the appellant

William D. Anderson, for the respondent

Heard: November 29, 2017

On appeal from the judgment of Justice Thomas R. Lederer, dated March 2, 2017, with reasons reported at 2017 ONSC 1356.

*EMPLOYMENT – Employment standards – Termination clause – Notice – Displacement of common law rights – Termination clause may displace an employee's right to common law notice without an express stipulation to that effect.*

**L.B. Roberts J.A.**:

[1] The appellant appeals from the dismissal of his action for damages arising out of the termination of his employment without cause, following his motion for summary judgment.

[2] The appellant was employed by the defendant for just over 19 years when his employment was terminated. The defendant gave the appellant 8 weeks' notice of termination, paid him 19.42 weeks' salary as severance pay, and continued his benefits, including his pension benefits, during the 8-week notice period. This was consistent with the appellant's minimum entitlements under the *Employment Standards Act, 2000*, S.O. 2000, c. 41 (the "*ESA*"), and reflected the defendant's interpretation of the termination clause in the appellant's employment contract.

[3] The termination clause provides as follows:

> The Company's policy with respect to termination is that employment may be terminated by either party with notice in writing. The notice period shall amount to one week per year of service with a minimum of four weeks or the notice required by the applicable labour legislation.

[4] The appellant submits that the motion judge erred in failing to find that:

> i. the appellant retained his rights to common law notice because the termination clause does not contain express language excluding entitlements under the common law; and

ii. the termination clause is void under s. 5(1) of the *ESA* because it purports to contract out of the appellant's statutory entitlement to severance pay by the absence of any reference to this entitlement.

[5] In the alternative, the appellant submits that the motion judge erred in failing to consider the appellant's alternate argument that he is entitled to one week's notice for every year of employment under the termination clause, with the result that he should have received 19 weeks' notice.

[6] I shall consider each of these arguments in turn.

**(i) Is it necessary to include an explicit stipulation in a termination clause in order to displace the common law?**

[7] I do not agree that the appellant retains his common law entitlement to notice on termination of his employment because the termination clause does not explicitly state that the parties' intent is to that effect.

[8] The well-established presumption is that on termination, an employee is entitled to common law notice; however, this presumption may be rebutted if the contract of employment "clearly specifies some other period of notice, whether expressly or impliedly", provided that it meets the minimum entitlements prescribed under the *ESA*: *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, [1992] S.C.J. No. 41, at p. 998. That said, the intention of the parties to

displace an employee's common law notice entitlement must be clearly and unambiguously expressed in the contractual language used by the parties: *Wood v. Fred Deeley Imports Ltd.*, 2017 ONCA 158, 134 O.R. (3d) 481, at para. 40.



[9] The need for clarity does not mean that the parties must use a specific phrase or particular formula, or state literally that "the parties have agreed to limit an employee's common law rights on termination". It suffices that the parties' intention to displace an employee's common law notice rights can be readily gleaned from the language agreed to by the parties.

[10] The appellant relies upon three recent decisions from the Ontario Superior Court of Justice for the proposition that the clause must expressly stipulate that it displaces an employee's common law notice entitlement in order to effectively do so: *Singh v. Qualified Metal Fabricators Ltd.*, 33 C.C.E.L. (4th) 308 (S.C.); *Nogueira v. Second Cup*, 2017 ONSC 6315, [2017] O.J. No. 5456; and *Amberber v. IBM Canada Limited*, 2017 ONSC 6470, [2017] O.J. No. 5587.

[11] I do not read these cases as standing for the appellant's proposition, which is inconsistent with the governing jurisprudence. In my view, the Supreme Court in *Machtinger*, at pp. 1004-1005, made it very clear that the kind of specific, express language advocated by the appellant is not required:

> Absent considerations of unconscionability, an employer can readily make contracts with his or her employees which referentially incorporate the minimum notice

> periods set out in the [ESA] or otherwise take into account later changes to the [ESA] or to the employees' notice entitlement under the [ESA]. ***Such contractual notice provisions would be sufficient to displace the presumption that the contract is terminable without cause only on reasonable notice***. [Emphasis added.]

[12] While the parties are free to express their agreement in language of their choice, a high degree of clarity is required and 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 proferentem*: *Miller v. A.B.M. Canada Inc.*, 2015 ONSC 1566, 27 C.C.E.L. (4th) 190, at para. 15 (Div. Ct.); *Ceccol v. Ontario Gymnastic Federation* (2001), 55 O.R. (3d) 614 (C.A.), at para. 45. As this court recently reiterated in *Wood*, at para. 28:

> 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*, at p. 1004.

[13] In consequence, if employers do not make clear the parties' intention to displace common law notice, they cannot complain if the fruits of their drafting are found to be ambiguous and unenforceable.

[14] It is clear from the plain language of the termination clause in the present case that the parties intended and agreed to limit the appellant's common law

notice entitlement. The clause clearly "specifies some other period of notice" that meets the minimum entitlements prescribed under the *ESA*: it contemplates the appellant receiving "one week per year of service with a minimum of four weeks or the notice required by the applicable labour legislation." It cannot be said that the appellant retained his common law entitlements in the face of this explicit language, which denotes an intent to the opposite effect. I agree that there is no ambiguity that the parties intended and agreed to displace the appellant's common law notice entitlement. Whether they agreed to limit it to the minimum entitlements under the *ESA* is a question to which I return later in these reasons.

**(ii) Is the termination clause void because it purports to contract out of the *ESA*?**

[15] With respect to the second argument, I do not accept that the silence of the termination clause concerning the appellant's entitlement to severance pay denotes an intention to contract out of the *ESA*. I agree with the motion judge's conclusion that the termination clause purports to limit notice but not the severance pay that the appellant would receive on termination. This is a very important distinction.

[16] As such, this case falls within *Roden v. Toronto Humane Society* (2005), 259 D.L.R. (4th) 89 (Ont. C.A.), and is entirely distinguishable from *Wood*, for the reasons noted in the latter by Laskin J.A., at paras. 53 to 55:

53 In *Roden*, the termination clause in issue stated that the employer, The Toronto Humane Society, could terminate the employment of the plaintiff Roden "upon providing the Employee with the minimum amount of advance notice or payment in lieu thereof as required by the applicable employment standards legislation": see para. 55. Roden made the same argument as Wood: the termination clause contravened the ESA and was void because it failed to include The Toronto Humane Society's obligation to continue its contributions to Roden's benefit plans during the notice period.

54 Gillese J.A., writing for the panel, rejected this argument. In her view, the termination clause was simply silent about The Toronto Humane Society's obligation to continue to contribute to Roden's benefit plans. The clause did not contract out of an employment standard and thus was not void. She wrote, at para. 62:

> The without cause provisions in question are of precisely the type that Iacobucci J. says are valid: they referentially incorporate the minimum notice period set out in the *Act*. The without cause provisions do not attempt to provide something less than the legislated minimum standards; rather, they expressly require the Society to comply with those standards. As I have said, in my view, the provisions do not purport to limit the Society's obligations to payment of such amounts. That is, they do not attempt to contract out of the requirement to make benefit plan contributions. Because the contracts are silent about the Society's obligations in respect of benefit plan contributions, the Society was obliged to – and did – comply with the requirements of the Act in that regard.

55 The difference between *Roden* and this case lies in the wording of each termination clause. In *Roden*, the clause dealt only with The Toronto Humane Society's obligation to give the notice of termination, as required

> by the ESA, or to pay Roden a lump sum for the notice period. It did not exclude The Toronto Humane Society's additional obligation to continue to contribute to Roden's benefit plans during the notice period. It said nothing about that obligation.

[17] As a result, I am of the view that the termination clause in this case does not provide less than the minimum severance obligations under the *ESA*, and is not void pursuant to s. 5(1).

**(iii) Does the termination clause entitle the appellant to 19 weeks' notice on termination of his employment?**

[18] I agree that the appellant was entitled to receive 19 weeks' notice under the termination clause.

[19] I do not accept the respondent's submission that the motion judge's dismissal of the appellant's action means that he considered the appellant's argument on this point and rejected it. The motion judge's reasons do not explicitly address the interpretation of the termination clause from the perspective of the appellant's alternate argument.

[20] However, even if the motion judge did consider this argument, I am of the view that at best, the termination clause gives rise to two possible interpretations – one that would limit the appellant's notice entitlement to the minimum prescribed by the *ESA*; the other that would not. As this court recently stated in *Wood*, at para. 28: "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". As a result, the correct interpretation of the termination clause would have been the one most favorable to the appellant that does not limit the appellant's notice entitlement to the *ESA* minimum.

[21] With these principles in mind, I am of the view that the second sentence of the termination clause provides that the appellant is entitled to receive one week's notice for every year of service. It is not limited by the subordinate clause following the preposition "with". Rather, the words "a minimum of four weeks or the notice required by the applicable labour legislation" prescribe the minimum floor of the appellant's notice entitlement under the agreement, in order that the notice provision of "one week per year of service" does not run afoul of the minimum requirements of the *ESA*.

[22] There is no language restricting the appellant's entitlements to ***only*** the minimum notice stipulated under the *ESA*. If the respondent had wished to include such a limitation, it was free to draft the termination clause differently, using language that "converts the statutory floor into a ceiling": *Machtinger*, at pp. 1005, quoting from *Suleman v. British Columbia Research Council* (1989), 38 B.C.L.R. (2d) 208, at p. 214. It did not do so. As a result, the termination clause provides for a maximum notice period of one week per year of service. The

notice owing under the clause cannot fall below the statutory minimum, but, depending on the length of the employee's service, it might meet or exceed the statutory minimum.

[23] For these reasons, I conclude that in accordance with his employment contract, the appellant was entitled to receive 19 weeks' notice of the termination of his employment.

**Disposition**

[24] Accordingly, I would allow the appeal in part, set aside para. 2 of the order, and order that the appellant is entitled to compensation for an additional 11 weeks, plus interest.

[25] In my view, the appellant is entitled to costs reflecting his partial success on the appeal, as well as the costs of the motion below. I would fix the appellant's costs on the appeal and the underlying motion in the total amount of $20,000, inclusive of disbursements and applicable taxes.

Released: January 8, 2018

"L.B. Roberts J.A."

"I agree Robert J. Sharpe J.A."

"I agree M.L. Benotto J.A."