CITATION: Nogueira v Second Cup, 2017 ONSC 6315
COURT FILE NO.: CV-17-569192
DATE: 20171020

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: ANNABELLE NOGUEIRA, Plaintiff

– AND –

THE SECOND CUP LTD., Defendant

BEFORE: Justice E.M. Morgan

COUNSEL: *Patrick Summers*, for the Plaintiff

William Hayter, for the Defendant

HEARD: October 20, 2017

ENDORSEMENT

[1] In this motion and cross-motion, each side seeks summary judgment under Rule 20 of the *Rules of Civil Procedure*. The Plaintiff was employed by the Defendant from February 16, 2016 to November 29, 2016. She claims damages at common law for a reasonable notice period of 5 months, while the Defendant/employer says that she was contractually entitled to one week's pay at termination which she has received.

[2] The Plaintiff was terminated without cause and without notice. The Defendant submits that the employment agreement between them displaced the Plaintiff's right to reasonable notice and limited her rights to the compensation called for in the *Employment Standards Act* (Ontario), which she has received.

[3] The central issue between the parties is whether the Plaintiff effectively contracted out of her right to reasonable notice at common law. Clause 13 of the Employment Agreement dated February 4, 2016 is entitled "Termination of Employment". It is a short, one-sentence clause, which I set out here in full:

> If the Second Cup terminates your employment, it will comply with its obligations under the employment standards legislation in the province in which you work (the 'Employment Standards Act').

[4] It is, of course, a long established principal of common law that "a contract of employment for an indefinite period is terminable only if reasonable notice is given": *Machtinger v. HOJ Industries Ltd*., [1992] 1 SCR 986, 997. On the other hand, the principle is a "presumption, rebuttable if the contract of employment clearly specifies some other period of notice, whether expressly or impliedly": *Ibid.*, at 998.

[5] Clause 13 of the Employment Agreement is capable of two constructions, reflected in the respective positions of the Plaintiff and the Defendant.

[6] The Plaintiff understands this clause as a confirmation of what is obvious – that the employer will comply with a relevant law. Since the employer operates nationally, it can also be understood as a confirmation that the law of the employee's particular province of residence and employment will be applied. Citing the Court of Appeal in *Wood v. Fred Deeley Imports Ltd*., 2017 ONCA 158, at para. 29, counsel for the Plaintiff submits that, "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."

[7] On the other hand, the Defendant understands this clause as displacing any rights at common law that the Plaintiff may have had upon termination of employment. Since the clause makes no mention of the employee's right to reasonable notice or pay in lieu thereof, it can be understood as confirmation that the statutory rights are the only rights that the employee will enjoy. Citing the Court of Appeal in *Clarke v. Insight Components (Canada) Inc*. 2008 ONCA 837, at para 4, counsel for the Defendant submits that, "…the clause clearly provides that the reasonable notice period to which the employee is entitled is 'equal to the requirements of the applicable employment or labour standards legislation.'"

[8] The case can therefore be described in terms similar to those used by MacPherson J.A. in *Ceccol v. Ontario Gymnastic Federation* (2001), 197 DLR (4th) 633, at para. 1 (Ont CA): "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." The solution to the interpretive ambiguity can also be described in terms that parallel those used by MacPherson J.A.: "In my view, in each instance the second interpretation is preferable": *Ibid.*, at para. 1.

[9] Counsel for the Defendant analogizes clause 13 in the Employment Agreement with the termination provision at issue in the *Machtinger* case, where the Supreme Court of Canada found that the language of the contract effectively displaced any rights at common law. Iacobucci J. set out the relevant clause in *Machtinger*, as follows:

> Termination -- Employer may terminate employment at any time without notice for cause. Otherwise, Employer may terminate employment on giving Employee 0 weeks notice or salary (which does not include bonus) in lieu of notice. Bonus, if any, will be calculated and payable only to the date of the giving of notice of termination.

[10] It is evident that the clause in *Machtinger* is considerably more explanatory than that in the case at bar. In *Machtinger*, the employer went out of its way to advise the employee of what he would get (or, more accurately, what he would not get) upon termination. Likewise, in *Roden v. Toronto Humane Society*, 2005 CanLII 33578, the Court of Appeal found a termination clause displaced the common law where it provided that the employee would receive "the minimum amount of advance notice or payment in lieu thereof as required by the applicable employment standards legislation". Along similar lines, in *Farah v. EODC Inc*., 2017 ONSC 3948, the contract provided that, "Upon termination, the Applicant would *only* be entitled to the statutory entitlements prescribed under the Employment Standards Act" [emphasis added].

[11] No such explanation or warning sign appears in clause 13 of the Employment Agreement here. Using the barest possible language, it says nothing more than that the employer will obey the statute. The new employee being asked to sign this contract could be forgiven for assuming that the clause is there to reassure her that none of her rights are being curtailed, when in fact the very opposite is true.

[12] It is evident that the Defendant, as employer, is responsible for drafting the Employment Agreement. It is addressed to the Plaintiff in the form of a letter agreement and refers to the employee as "you". To the extent that an ambiguity exists in interpretation, the Employment Agreement should be interpreted *contra proferentem* against the employer as drafter. As Stinson J. stated in *Singh v. Qualified Metal Fabricators Ltd*. [2010] OJ No 4219, at para. 15, "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"…especially "having regard to the power imbalance that exists between an employer and employee as a matter of course."

[13] In my view, the words of the Employment Agreement are ambiguous at best. They do not convey the meaning that the Defendant attaches to them, and I do not see them as curtailing in any way the common law principal of reasonable notice or pay in lieu thereof.

[14] Counsel for the Plaintiff submits that the reasonable notice period here should be somewhere from 4 to 6 months, although he concedes that her entitlement is cut off at the 5 month point since that is when she mitigated her losses by starting a new job. Counsel for the Defendant submits that if the Employment Agreement is found not to curtail the notice period, the appropriate range for reasonable notice should be 3 to 4 months. The Plaintiff was a 47-year old manager and was the senior person in a 3-person marketing group, earning $125,000 per year. Her position with the Defendant lasted 8 ½ months.

[15] I find the range cited by counsel for the Plaintiff slightly high for a less than 1-year duration of employment, and the range cited by counsel for the Defendant slightly low for an employee of the Plaintiff's age and qualifications. They are not that far apart, however, and I am willing to take 4 months as the middle range of the scale and as reflecting the common denominator between them.

[16] The Plaintiff also makes a claim for an unpaid pension benefit, which would have commenced after her 1-year anniversary of starting work. Under this plan, the Plaintiff would

contribute 2% of her salary and the Defendant would add a matching 2% of her salary, all of which would go into a registered retirement fund administered on behalf of all employees. In the Employment Agreement, the commencement of the pension arrangement is set out as follows:

> Effective upon the first new pay period following your one-year anniversary with the Second Cup…you will participate in the Group RSP program.

[17] As indicated, the Plaintiff was hired in February 2016 and terminated in November 2016. The 4-month notice period takes her to March 2017, which is a month after her 1-year anniversary date. Accordingly, she has some pension entitlement. The only question is, how much?

[18] Counsel for the Plaintiff submits that the Plaintiff is entitled to a year's worth of pension contributions by her employer. He contends that once the 1-year anniversary date passes, the employer is contractually obliged to pay the pension benefits for the entire year.

[19] Counsel for the Defendant submits that the Plaintiff is entitled to just one month's worth of pension contributions by her employer. He contends that the language of the Employment Agreement makes it clear that the employee deductions and the employer matching contributions are to have been done with the arrival of each pay period – i.e. monthly – and that the timing is such that the Plaintiff only missed one month's entitlement.

[20] I agree with counsel for the Defendant that the employer's contributions to the group RSP plan were envisioned as being made on a monthly basis. The Employment Agreement specifically refers to them beginning with the first pay period after the anniversary date, suggesting that they will continue with each pay period. If the contributions were not going to follow the Defendant's payroll pay periods, the contractual clause would not have been worded that way.

[21] In the result, the Plaintiff is entitled to 4 months' pay in lieu of notice, less any amount that she has already received from the Defendant on account of her termination. She is also entitled to one-twelfth of the annual pension contribution that would have been made by the Defendant. Both counsel have assured me that they will be able to work out the precise calculations once I pronounce on the parameters.

[22] Counsel may make written submissions as to costs, which can be emailed to my assistant at patricia.lyon-mcindoo@ontario.ca. I would ask that counsel for the Plaintiff email his submissions, which should include a Costs Outline and written submissions that do not exceed 2 pages, within one week of the date of this judgment. Counsel for the Defendant may email my assistant with any responding submissions, which should also not exceed 2 pages, within one week thereafter.

Morgan J.

Date: October 20, 2017