COURT OF APPEAL FOR ONTARIO

CITATION: Wood v. Fred Deeley Imports Ltd., 2017 ONCA 158
DATE: 20170223
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Laskin, Feldman and Hourigan JJ.A.

BETWEEN

Julia Wood

Plaintiff (Appellant)

and

Fred Deeley Imports Ltd.

Defendant (Respondent)

Eugene Meehan, Q.C., Daniel A. Lublin and Marc W. Kitay, for the appellant

Abdul-Basit Khan and S. Priya Morley, for the respondent

Heard: September 6, 2016

On appeal from the order of Justice Grant R. Dow of the Superior Court of Justice, dated April 19, 2016, with reasons reported at 2016 ONSC 1412, [2016] O.J. No. 2111.

Laskin J.A.:

A. OVERVIEW

[1] The main issue on this appeal is whether a termination clause in an employment agreement between the parties is unenforceable because it contravenes Ontario's *Employment Standards Act*, *2000*[1] ("ESA").

[2] The respondent, Fred Deeley Imports, was the exclusive Canadian distributor for Harley-Davidson motorcycles, parts, apparel and accessories. In April 2007, Deeley hired the appellant, Julia Wood, as a Sales & Event Planner. Eight years later, at the end of April 2015, Harley-Davidson Canada entered into an agreement with Deeley to buy all of its assets. As a result of the buyout, Deeley immediately told all of its employees, including Wood, that their employment would terminate on August 4, 2015. By the date of termination, Wood had worked for Deeley for eight years and four months. Her last annual compensation, including benefits, was approximately $100,000. When her employment ended, she was 48 years old.

[3] Wood signed an employment agreement the day after she started working for Deeley in 2007. The agreement contained the termination clause at issue in this appeal. In its material parts, the clause provided:

> [The Company] is entitled to terminate your employment at any time without cause by providing you with 2 weeks' notice of termination or pay in lieu thereof for

[1] S.O. 2000 c. 41.

> each completed or partial year of employment with the Company. If the Company terminates your employment without cause, the Company shall not be obliged to make any payments to you other than those provided for in this paragraph…. The payments and notice provided for in this paragraph are inclusive of your entitlements to notice, pay in lieu of notice and severance pay pursuant to the *Employment Standards Act, 2000*.

[4] Deeley paid Wood her salary and benefits for her 13 weeks of working notice (May 1 to August 4, 2015). Deeley also paid her additional compensation, including a lump sum equivalent to eight weeks' pay.

[5] Nonetheless, Wood started an action against Deeley and brought a motion for summary judgment. She contended that the entire employment agreement was unenforceable, and, in the alternative, that the termination clause was unenforceable. She asked for damages equivalent to 12 months' notice of termination.

[6] The motion judge dismissed Wood's motion and held that both the employment agreement and the termination clause were enforceable. But he also held that if he was wrong, Wood would be entitled to damages equal to her salary and benefits for a reasonable period of notice. In his view, reasonable notice was 39 weeks (nine months).

[7] On appeal, Wood renews the arguments she made on her motion. She raises the following three issues:

1. Is Wood's employment agreement unenforceable because she signed it after she started working and was not provided with fresh consideration?

2. Does the termination clause contravene the ESA because it excludes Deeley's statutory obligation to make benefit contributions during the notice period and it does not satisfy Deeley's statutory obligation to pay severance pay?

3. Did the motion judge err by fixing the period of reasonable notice at nine months?

[8] I would give effect to Wood's argument on the second issue. I would therefore allow her appeal, and declare that she is entitled to damages equal to her salary and benefits for nine months.

B. ISSUES

(1) Is Wood's employment agreement unenforceable?

[9] Wood was offered a job with Deeley during a phone call on April 17, 2007. She accepted the offer over the phone. A representative of Deeley then sent her an email outlining the terms of her employment. She cannot recall when she received the email, and neither side was able to produce a copy. The motion judge, however, found that the employment agreement "was received by the plaintiff before she started working".

[10] Wood started working for Deeley on April 23, 2007. The next day, April 24, she met with a human resources representative and signed various documents, including her employment agreement. The employment agreement itself is dated

April 17, which was the day Wood accepted Deeley's offer of employment over the phone.

[11] Wood submits that her employment agreement is unenforceable. She argues that because she signed it after she started working, it would be enforceable only if Deeley provided fresh consideration for her willingness to sign it, and Deeley did not do so.

[12] Wood's submission has no merit. A written employment agreement is not unenforceable merely because the employee signs it after starting to work. A written employment agreement might well be unenforceable if an employer includes in it a material term that was not part of the original employment relationship: see *Holland v. Hostopia.com Inc.*, 2015 ONCA 762, 342 O.A.C. 99. But Deeley did not do so.

[13] The motion judge inferred that the terms of Wood's employment with Deeley were contained in the email and that she received the email before she started working on April 23, 2007. The motion judge's inferences were reasonable. In her evidence, Wood never claimed that on April 24, 2007, she was seeing her employment agreement for the first time. Nor did she claim that the agreement she signed contained any additional material term. The signing the day after she started working was no doubt a matter of administrative

convenience. Deeley did not unilaterally impose a new term of her employment. Fresh consideration was therefore not required.

[14] I would not give effect to this ground of appeal.

(2) Does the termination clause contravene the ESA because it excludes Deeley's statutory obligation to make benefit contributions during the notice period and it does not satisfy Deeley's statutory obligation to pay severance pay?

[15] At common law, an employee hired for an indefinite period can be dismissed without cause, but only if the employer gives the employee reasonable notice. In *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, at p. 998, the Supreme Court characterized the common law principle of termination of employment on reasonable notice "as a presumption, rebuttable if the contract of employment clearly specifies some other period of notice".

[16] Ontario employers and employees can rebut the presumption of reasonable notice by agreeing to a different notice period. But their agreement will be enforceable only if it complies with the minimum employment standards in the ESA. If it does not do so, then the presumption is not rebutted, and the employee is entitled to reasonable notice of termination.

[17] Deeley and Wood did agree to a different notice period. Thus, the main question on this appeal is whether the termination clause they agreed to contravenes the ESA. Wood submits that the clause does contravene the ESA because it excludes Deeley's statutory obligation to contribute to Wood's benefit

plans during the notice period and does not clearly satisfy Deeley's statutory obligation to pay severance pay on termination.

[18] Before dealing specifically with the benefits and severance questions, I will set out the full termination clause and the relevant employment standards under the ESA, and then review the motion judge's decision and the jurisprudence on interpreting employment agreements.

(a) The termination clause and the relevant provisions of the ESA

[19] The termination clause provides:

> [The Company] is entitled to terminate your employment at any time without cause by providing you with 2 weeks' notice of termination or pay in lieu thereof for each completed or partial year of employment with the Company. If the Company terminates your employment without cause, the Company shall not be obliged to make any payments to you other than those provided for in this paragraph, except for any amounts which may be due and remaining unpaid at the time of termination of your employment. The payments and notice provided for in this paragraph are inclusive of your entitlements to notice, pay in lieu of notice and severance pay pursuant to the *Employment Standards Act, 2000*. [Emphasis added.]

[20] An employment standard is a requirement or prohibition under the ESA that applies to an employer for the benefit of an employee. The following

employment standards in the ESA are relevant to the interpretation of the termination clause[2]:

- As Wood was employed for over eight years, Deeley was required to give her at least eight weeks' notice of termination (s. 57(h)) ("working notice");
- Deeley could give Wood less than eight weeks' notice, but only if it paid her a lump sum equal to the amount she would have received during the eight-week notice period (s. 61(1)(a)) ("pay in lieu of notice");
- Deeley was required to continue to contribute to Wood's benefit plans during the eight-week period (ss. 60(1)(c) and 60(1)(b));
- Because Deeley had a payroll of at least $2.5 million, and Wood was employed for over five years, Deeley was required to pay Wood severance pay on termination (s. 64(1));
- Deeley was required to pay Wood severance pay equal to one week's salary for every year or part of a year she was employed. Therefore, Deeley was required to pay Wood severance pay equal to eight and one-third weeks' salary (s. 65(1));
- Deeley could not contract out of these employment standards, and any termination clause that did so would be void (s. 5(1));
- Deeley could provide Wood with a greater benefit than any of the employment standards, and if it did so, that employment standard would not apply (s. 5(2)). Deeley, in fact, did provide Wood with greater notice than the employment standard of one week's notice for every year of employment.

[21] In summary, Deeley's statutory obligations to give Wood at least eight weeks' notice of termination of her employment, to continue its contributions to her benefit plans during the notice period, and to pay her severance pay of eight and one-third weeks' salary were employment standards. Deeley was precluded

[2] See Appendix A for the full text of the relevant provisions of the ESA.

from contracting out of any of these employment standards, unless it substituted a greater benefit for Wood. Contracting out of even one of the employment standards and not substituting a greater benefit would render the termination clause void and thus unenforceable, in which case Wood would be entitled to reasonable notice of termination of her employment at common law.

(b) The motion judge's decision

[22] Wood was dismissed without cause. Deeley terminated her employment and the employment of all of its other employees because it sold all of its assets. Thus, the enforceability of the termination clause became the main issue on the summary judgment motion.

[23] The motion judge held that the termination clause was enforceable. He pointed out that the clause itself provided Wood with greater notice – 18 weeks – than the employment standard in the ESA of eight weeks. He also pointed out that Deeley had given Wood working notice of 13 weeks, during which time it continued to contribute to her benefit plans, and had then given Wood a lump sum payment equivalent to eight weeks' notice, for a total of 21 weeks' of combined notice and pay in lieu of notice.

[24] Finally, the motion judge noted that in *Roden v. Toronto Humane Society* (2005), 202 O.A.C. 351, this court upheld a termination clause, even though the clause did not refer to the employer's obligation to continue its contributions to the employee's benefit plans during the notice period.

(c) The jurisprudence on interpreting employment agreements

[25] The question of the enforceability of the termination clause turns on the wording of the clause, the purpose and language of the ESA, and the jurisprudence on interpreting employment agreements. That jurisprudence is now well-established. I will summarize it briefly.

[26] In general, courts interpret employment agreements differently from other commercial agreements. They do so mainly because of the importance of employment in a person's life. As Dickson C.J.C. said in an oft-quoted passage from his judgment in *Reference re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313, at p. 368:

> Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being.

[27] As important as employment itself is the way a person's employment is terminated. It is on termination of employment that a person is most vulnerable and thus is most in need of protection: see *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701.

[28] The importance of employment and the vulnerability of employees when their employment is terminated give rise to a number of considerations relevant to the interpretation and enforceability of a termination clause:

- When employment agreements are made, usually employees have less bargaining power than employers. Employees rarely have enough information or leverage to bargain with employers on an equal footing: *Machtinger*, p. 1003

- Many employees are likely unfamiliar with the employment standards in the ESA and the obligations the statute imposes on employers. These employees may not seek to challenge unlawful termination clauses: *Machtinger*, p. 1003

- The ESA is remedial legislation, intended to protect the interests of employees. Courts should thus favour an interpretation of the ESA that "encourages employers to comply with the minimum requirements of the Act" and "extends its protections to as many employees as possible", over an interpretation that does not do so: *Machtinger*, p. 1003.

- 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*, p. 1004.

- A termination clause will rebut the presumption of reasonable notice only if its wording is clear. Employees should know at the beginning of their employment what their entitlement will be at the end of their employment: *Machtinger*, p. 998.

- 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: *Ceccol v. Ontario Gymnastics Federation* (2001), 149 O.A.C. 315, *Family Counselling Centre of Sault Ste. Marie and District* (2001), 151 O.A.C. 35.

(d) Does the termination clause contravene the ESA because it excludes Deeley's statutory obligation to contribute to Wood's benefit plans during the notice period?

[29] Wood's compensation included a base salary, an incentive bonus, and contributions by Deeley to two benefit plans: a health and dental plan and a registered retirement savings plan (RRSP).

[30] In her last year of employment, Wood's annual base salary was $81,041.48. She was entitled to an annual incentive bonus of up to 14 percent of her base salary. Deeley's contributions to Wood's health and dental plan were valued at $538.55 monthly, and Deeley contributed an amount equal to nine percent of Wood's salary to her RRSP ($7,196 in 2014). Wood also received a clothing allowance and was entitled to 18 days' vacation. In her last full year of employment, Wood's total taxable income was $101,020.24.

[31] When Wood's employment was terminated, she was given 13 weeks' working notice (May 1 to August 4, 2015). During that 13-week period, Deeley paid her base salary and made its required contributions to her health and dental plan. At the end of the 13-week period, Deeley paid Wood the following additional amounts:

- $13,778, which was equal to eight weeks' salary, and which Deeley claimed was compensation for Wood's entitlement to severance pay under the ESA and any remaining entitlement under the termination clause;
- $7,131, which was a pro-rated amount (for January to July) for her 2015 annual incentive bonus;
- A payment for accrued and unused vacation pay; and
- A payment for outplacement services.

[32] Deeley also offered to pay Wood an additional $12,470, if she signed a release. That figure consisted of an RRSP contribution of $7,376 and a further

pro-rated incentive bonus of $5,094 (for August to December 2015). But Wood refused to sign a release and therefore did not receive that payment.

[33] If one looks at the termination clause itself, together with the actual payments Deeley made (or offered to make), Wood received more compensation than she would have received under the ESA. The termination clause provided for more than twice as much notice as the employment standard under the ESA – 18 weeks, instead of 8 weeks. Wood received a total of 21 weeks' salary (13 weeks' working notice plus a lump sum payment for eight weeks), which was more than the 16.3 weeks' salary she was entitled to under the ESA for notice (8 weeks) and severance pay (8.3 weeks). Deeley made contributions to Wood's health and dental plan throughout the 13 weeks of working notice and offered to make its annual contribution to her RRSP (in exchange for signing a release).

[34] Nonetheless, Wood contends that the termination clause is unenforceable because the clause expressly excludes Deeley's statutory obligation to contribute to Wood's benefit plans during the notice period. Deeley's contributions to Wood's health and dental plan and her RRSP formed part of her compensation package. Thus, Wood argues, the termination clause contravenes ss. 60 and 61 of the ESA and, under s. 5(1), is void.

[35] In support of her argument, Wood makes two specific submissions. First, Deeley's voluntary contributions or offer to contribute to Wood's benefit plans

after giving her notice her employment was being terminated cannot remedy an otherwise unenforceable termination clause. The enforceability of the clause stands or falls on its own wording, not on what Deeley may have done during the notice period or after Wood's employment was terminated. Second, this court's decision in *Roden* should be distinguished because of the different wording of the termination clause in that case.

[36] In response, and to support the enforceability of the termination clause, Deeley makes the following three submissions. First, the phrase "two weeks' notice of termination or pay in lieu thereof" in the termination clause is broad enough to include both base salary and Deeley's benefit contributions for the notice period. Second, contrary to Wood's position, Deeley says that what it paid Wood on termination is relevant to the enforceability of the termination clause because Deeley paid Wood more than she would have been entitled to under the ESA. Third, and also contrary to Wood's position, Deeley says the motion judge's interpretation of the termination clause is consistent with this court's decision in *Roden*.

[37] I agree with Wood's submissions and for that reason find the termination clause unenforceable. I would summarize my conclusion as follows. Wood's compensation included Deeley's contributions to her two benefit plans. Under ss. 60 and 61 of the ESA, Deeley was required to continue to make those contributions during the notice period. Its obligation to do so was an employment

standard under the ESA. Yet the termination clause's wording excludes and therefore contracts out of that obligation.

[38] The termination clause gives Wood two weeks' notice of termination or pay in lieu thereof for every year or partial year of employment. It says nothing about benefit contributions. The clause then goes on to state that on termination, "the Company shall not be obliged to make any payments to you other than those provided for in this paragraph", and "the payments and notice provided for in this paragraph are inclusive of your entitlement to notice, pay in lieu of notice and severance pay pursuant to the [ESA]." On its plain wording, the clause excludes Deeley's obligation to contribute to Wood's benefit plans during the notice period. I will now address the parties' specific submissions.

(i) Does the termination clause implicitly provide that Deeley will contribute to Wood's benefit plans during the notice period?

[39] Deeley submits that though the termination clause does not expressly require it to continue to contribute to Wood's benefit plans during the notice period, we can read this obligation into the wording of the clause. Deeley argues that the word "pay" – in the phrase "two weeks' notice of termination or pay in lieu thereof" – is broad enough to include both base salary and benefits.

[40] This argument cannot succeed. An employer and an employee can contract out of common law reasonable notice, but they must do so in clear and unambiguous language. The word "pay" does not clearly include both salary and

benefits. At best for Deeley the word is ambiguous. I would therefore interpret "pay" as referring only to salary or wages, not to benefits. That interpretation is consistent with the consideration I referred to earlier: where the language of a termination clause is unclear or can be interpreted in more than one way, the court should adopt the interpretation most favourable to the employee: *Ceccol*.

(ii) Do Deeley's contributions or its offer to contribute to Wood's benefit plans after giving Wood notice of termination affect the enforceability of the termination clause?

[41] Deeley did contribute to Wood's health and dental plan for 13 weeks after giving her notice of termination, and it offered to make its annual contribution to her RRSP (though conditional on a release). The motion judge relied on Deeley's payments made during the notice period to uphold the enforceability of the termination clause. At para. 15 of his reasons, he wrote:

> There is no evidence that the defendant did not continue to make the requisite premium payments on behalf of the plaintiff. For example, there is no evidence that the plaintiff submitted a claim during her working notice which was rejected on the basis she no longer had coverage.

[42] Deeley argues that the motion judge's analysis and interpretation are reasonable and we should defer to his holding. I do not accept this argument.

[43] The motion judge's interpretation of a contractual provision – other than a provision in a standard form contract – is now entitled to deference from an appellate court: see *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53,

[2014] 2 S.C.R. 633. But no deference is owed if the motion judge made an error of law that can be extricated from the judge's interpretation of the contractual clause in question. And that is the case here. The motion judge made an "extricable error of law" in holding that Deeley's actual contributions to Wood's benefit plans were material to the interpretation of the termination clause. Its contributions on termination should have no bearing on whether the termination clause itself contravenes the ESA. The wording of the clause alone must be looked at to decide whether it contravenes or complies with the ESA.

[44] That the enforceability of the termination clause depends only on the wording of the clause itself, and not on what the employer may have done on termination, is implicit in the judgment of Iacobucci J. in *Machtinger*, explicit in the ESA, consistent with the considerations governing the interpretation of employment agreements, and supported by at least two decisions of the Ontario Superior Court of Justice. I will elaborate on these four points.

[45] First, nothing in *Machtinger* suggests that an employer's conduct on termination, or during the notice period, can remedy an otherwise illegal and unenforceable termination clause. Instead, Iacobucci J. states, at p. 1004, "[I]f an employment contract fails to comply with the minimum statutory notice provisions of the Act, then the presumption of reasonable notice will not have been rebutted".

[46] Second, the ESA itself is perhaps more explicit. An employer's obligation to continue its contributions to an employee's benefit plans during the notice period is an employment standard (ss. 60-61), and s. 5(1) of the ESA states expressly that an employer cannot contract out of, or waive, an employment standard. In other words, an employer's later compliance with an employment standard – here, Deeley's contributions to Wood's benefit plans – cannot cure the termination clause's exclusion of the employer's obligation to contribute to those benefit plans during the notice period.

[47] Third, allowing employers to rely on their conduct at the time of termination of employment would also be inconsistent with one of the important considerations governing the interpretation of termination clauses: these clauses should be interpreted in a way that encourages employers to draft agreements to comply with the ESA. If employers can always remedy illegal termination clauses by making payments to employees on termination of employment, then employers will have little incentive to draft legal and enforceable termination clauses at the beginning of the employment relationship: see *Machtinger*, p. 1004.

[48] Finally, two well-reasoned Superior Court decisions reject the argument that an employer's later compliance with its statutory obligations can affect the interpretation of a termination clause in an employment agreement: the decision of Low J. in *Wright v. Young and Rubicam Group of Cos. (Wunderman)*, 2011

ONSC 4720, [2012] C.L.L.C. 210-018; and the decision of Leach J. in *Stevens v. Sifton Properties Ltd.*, 2012 ONSC 5508, 5 C.C.E.L. (4th) 27.

[49] In *Wright*, Low J. held that the termination clause was void because it precluded the continuation of benefit contributions during the notice period. The employer had actually complied entirely with its obligations under the ESA to make contributions to the employee's benefit plans. Low J. held, however, that its compliance was irrelevant. In a passage I agree with, she wrote, at para. 16:

> The fact that the defendant continued benefits for the statutory notice period under the Act does not change the meaning of the language used in the agreement stipulating that the payments under the termination provision are to be inclusive of "all … entitlements to compensation".

[50] Similarly, in *Stevens*, Leach J. held that even though the employer had provided the employee with all of his statutory entitlements, the termination clause was still unenforceable because it precluded the continuation of benefit contributions during the notice period. In Leach J.'s opinion, the employer's later voluntary compliance with its statutory obligations did not remedy the illegality of the termination clause. In a passage with which I also agree, Leach J. wrote, at para. 65:

> Employers should be provided with incentive to ensure that their employment contracts comply with *all* aspects of the employment standards legislation, including provision of adequate notice (or pay in lieu thereof) *and* mandated benefit continuation. As emphasized by Justice Low in *Wright*, *supra*, an employer's voluntary

> provision of additional benefits after the fact does not alter the reality that the employment contract drafted by the employer is contrary to law. [Italics in original; underlining added.]

[51] For these reasons, Deeley's actual contributions to Wood's benefit plans during the notice period cannot affect the enforceability of the termination clause. Its enforceability or unenforceability depends on whether the termination clause itself included or excluded Deeley's obligation to make those contributions.

(iii) Does this court's decision in Roden support the enforceability of the termination clause?

[52] The last basis on which Deeley seeks to uphold the motion judge is this court's decision in *Roden*. Wood, however, says that the case is distinguishable because of the different wording of the termination clause in *Roden*. I agree.

[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.

[56] In this case, by contrast, the termination clause is not merely silent about Deeley's obligation to contribute to Wood's benefit plans during the notice period. It uses language that excludes that obligation: the payments Deeley agreed to

make are the only payments Wood is entitled to; they are "inclusive" of her entitlements under the ESA.

[57] The "all inclusive" language in Wood's termination clause, and its absence in Roden's termination clause, is what distinguishes the two cases. Deeley limited its obligations on the termination of Wood's employment to the payments specified in the termination clause. And those payments did not include its required contributions to Wood's two benefit plans during the notice period. The termination clause is therefore void and unenforceable.

[58] And, because the clause is void, it cannot be used as evidence of the parties' intention. It would therefore be wrong to infer that the parties would have intended to substitute for the void termination clause, a clause that complied with the ESA: *Machtinger*, at pp. 1001-2.

[59] Holding that the termination clause contravenes the ESA because it excludes Deeley's obligation to contribute to Wood's benefit plans is sufficient to decide this appeal. Nonetheless, I will consider the more difficult question whether the clause also contravenes the ESA because it does not satisfy Deeley's statutory obligation to pay severance pay.

(e) Does the termination clause contravene the ESA because it does not satisfy Deeley's statutory obligation to pay severance pay?

[60] As Wood worked for Deeley for eight years and four months, under s. 65(1) of the ESA, Deeley was required to pay Wood severance pay equivalent to

her salary for 8.3 weeks. On termination, Deeley paid Wood a lump sum equivalent to eight weeks' salary, which it characterized as her severance pay. Deeley now concedes that it paid her less than she was entitled to under the ESA. But as I said in discussing Deeley's benefit contributions, what Deeley may have voluntarily paid Wood on termination has no bearing on whether the termination clause itself is enforceable. Its enforceability depends on what it required Deeley to pay Wood.

[61] However, the severance pay issue differs from the benefit contributions issue. The termination clause does not refer to Deeley's obligation to contribute to Wood's benefit plans during the notice period, and indeed excludes that obligation. In contrast, the termination clause refers to and includes Deeley's obligation to pay severance pay. The question on this appeal is whether it does so in a way that complies with the ESA.

[62] The termination clause required Deeley to give Wood "two weeks' notice of termination or pay in lieu thereof for each year or partial year of employment". These payments and notice were "inclusive of [Wood's] entitlements to notice, pay in lieu of notice and severance pay". In my view, drafted in this way, the clause does not satisfy Deeley's statutory obligation to pay severance pay. Deeley could fulfil its obligations under the clause in ways that would deprive Wood of her statutory severance pay. The termination clause is thus unenforceable, and Wood is entitled to common law reasonable notice.

[63] Under the ESA, an employer's obligation to give an employee notice, or pay instead of notice, and its obligation to pay an employee severance pay are separate obligations. So, under the ESA, Wood was entitled to eight weeks' notice of termination (or pay instead), and severance pay of 8.3 weeks' salary. If Deeley had drafted the termination clause to reflect these separate obligations, the clause would be enforceable. For example, the clause would be enforceable if it provided: "Deeley is entitled to terminate your employment … by providing you with one week's notice of termination or pay in lieu thereof for each completed or partial year of employment, and severance pay equal to one week's salary for each completed or partial year of employment".

[64] But in the termination clause, Deeley combined its separate obligations. Doing so raises problems with the clause's enforceability. The problems arise because there are three ways in which Deeley could meet its obligations under the clause, and only one of those three ways would clearly satisfy its obligation under the ESA to pay severance pay.

[65] First, Deeley could have given Wood a lump sum payment equal to 18 weeks' salary (pay equal to 2 weeks' notice for every completed or partial year of employment – 9 x 2 weeks' salary). Under this scenario, Wood would have received pay instead of notice and the severance pay she was entitled to under the ESA. In fact, Wood would have received slightly more than the ESA minimums – 18 weeks' salary, instead of 16.3 weeks.

[66] Second, Deeley could have given Wood working notice of 18 weeks. Under this scenario, Wood would receive more notice than she was entitled to under the ESA, but she would not receive any severance pay.

[67] Third, Deeley could do what it actually did and give Wood a combination of working notice and a lump sum payment. Depending on how much working notice it gave, Wood may or may not receive the severance pay she was entitled to under the ESA. In this case, Deeley gave Wood 13 weeks' notice. Under the termination clause, it was required to give her a further lump sum payment of five weeks' salary (18 minus 13). But a lump sum payment of five weeks is less than the severance pay of 8.3 weeks she was entitled to under the ESA. Thus under this scenario, Wood would not receive enough severance pay. If, however, Deeley had given Wood nine weeks' notice of termination and a lump sum payment equal to nine weeks' salary, then Wood would receive the severance pay, to which she was entitled.

[68] In summary, Deeley could fulfil its obligations under the termination clause it drafted in one of three ways. One of those ways would give Wood the severance pay she was entitled to under the ESA. One would not. And the other may or may not, depending on how much working notice Deeley gave Wood.

[69] Thus, the clause allowed Deeley not to pay Wood her statutory severance pay, or to pay her less severance pay than she was entitled to under the ESA.

And from Wood's perspective, when she signed her employment agreement she would not know whether she would receive her statutory severance pay if her employment ended. As the termination clause did not clearly satisfy Deeley's obligation to pay Wood her statutory severance pay, the clause is unenforceable, and Wood is entitled to reasonable notice of the termination of her employment at common law.

(3) Did the motion judge err by fixing the period of reasonable notice at nine months?

[70] The motion judge correctly recognized that if either the employment agreement as a whole, or the termination clause, was unenforceable, then Wood would be entitled to damages equal to a period of reasonable notice at common law. He fixed the notice period at 39 weeks (nine months). Wood submits that he erred in doing so. She contends that the appropriate period of notice is 12 months and that we should substitute 12 months for the motion judge's determination of nine months.

[71] I would not give effect to Wood's submission. The motion judge's figure of nine months took account of the relevant factors and was within a reasonable range. And even though he found the agreement enforceable and thus did not need to determine reasonable notice, his determination is still entitled to deference on appeal.

[72] In finding that the period of reasonable notice was nine months, the motion judge took into account the well-established *Bardal*[3] factors: the character of Wood's employment, her length of her service, her age, and the availability of similar employment in the light of her experience, training, and qualifications. The motion judge also noted Wood's submission that though her position was "clerical" – she had no managerial duties – her high income together with her age would make it more difficult for her to find a new, but comparable job. Indeed, Wood's evidence was that over a nine-month period, she had applied for 65 positions and received only six interviews, none of which resulted in employment.

[73] The motion judge considered the case law presented by both parties on comparative dismissals, relied on the case law submitted by Wood, and concluded that a reasonable range of notice was 8.5 to 11 months. Within that range, he chose nine months.

[74] Is his determination of nine months entitled to deference from this court, or are we free to substitute our own figure? Our court has recognized two kinds of cases: cases where a trial or motion judge concludes that a plaintiff is entitled to reasonable notice, but errs in principle in calculating the notice period; and cases such as this one, where a trial or motion judge concludes wrongly that a

[3] *Bardal v. Globe and Mail Ltd.* (1960), 24 D.L.R. (2d) 140, at para. 21 (Ont. H.C.J.).

termination clause excluding reasonable notice is enforceable, but still goes on to fix a reasonable notice period.

[75] This court's decision in *Minott v. O'Shanter Development Co. Ltd.* (1999), 42 O.R. (3d) 321 (C.A.) is an example of the first kind of case. There, the trial judge found that the plaintiff was entitled to reasonable notice of his dismissal, but she made two errors in principle in determining the notice period. Still, this court did not interfere with the trial judge's determination. Instead, at pp. 343-4, we held that we should ordinarily defer to the trial judge's determination, as long as it was within a reasonable range:

> If the trial judge erred in principle, an appellate court may substitute its own figure. But it should do so sparingly if the trial judge's award is within an acceptable range despite the error in principle.

[76] This court's recent decision in *Holland*, referenced above, is an example of the second kind of case. There, the trial judge had dismissed the plaintiff's wrongful dismissal action on the ground that his employment contract – which limited notice to the minimum statutory standard – was enforceable. Nonetheless, the trial judge addressed the issue of reasonable notice, "for completeness", and concluded that were it not for the termination provision in the employment agreement, the plaintiff would have been entitled to eight months' notice at common law.

[77] On appeal, this court overturned the trial judge on the enforceability of the termination provision and held that it was unenforceable. And though the trial judge's determination of reasonable notice was not necessary to his decision, Strathy C.J.O., writing for the panel, applied *Minott* and upheld eight months' notice because it was within a reasonable range.

[78] In the present case, as in *Holland*, the motion judge determined the period of reasonable notice for completeness. Doing so was not necessary to his decision because he found the employment agreement enforceable. Following *Holland*, the motion judge's determination is still entitled to deference. As I cannot say that nine months was outside a reasonable range, I would defer to the motion judge's determination. I would therefore not give effect to this ground of appeal.

C. CONCLUSION

[79] The termination clause in Wood's employment agreement contravenes the *Employment Standards Act, 2000* for two reasons. First, it excludes Deeley's statutory obligation to contribute to Wood's benefit plans during the notice period. Second, it does not satisfy Deeley's statutory obligation to pay severance pay. On either ground the clause is unenforceable. Wood is entitled to reasonable notice of termination or the equivalent in damages. The motion judge's award of nine months' notice was within a reasonable range, and I would defer to it.

[80] I would allow Wood's appeal, set aside the order of the motion judge, and in its place declare that the termination clause in Wood's employment agreement is unenforceable. Wood is entitled to reasonable notice of nine months or pay instead of reasonable notice.

[81] Wood is also entitled to her costs of the motion and of the appeal. I would fix the costs of the motion at $14,000, and the costs of the appeal at $25,000, each amount inclusive of disbursements and applicable taxes.

Released: February 23, 2017 ("J.L.")

"John Laskin J.A."
"I agree. K. Feldman J.A."
"I agree. C.W. Hourigan J.A."

APPENDIX A

***Employment Standards Act, 2000*, S.O. 2000, c. 41**

5. (1) Subject to subsection (2), no employer or agent of an employer and no employee or agent of an employee shall contract out of or waive an employment standard and any such contracting out or waiver is void.

(2) If one or more provisions in an employment contract or in another Act that directly relate to the same subject matter as an employment standard provide a greater benefit to an employee than the employment standard, the provision or provisions in the contract or Act apply and the employment standard does not apply.

57. The notice of termination under section 54 shall be given,

…

(h) at least eight weeks before the termination, if the employee's period of employment is eight years or more.

60. (1) During a notice period under section 57 or 58, the employer,

(a) shall not reduce the employee's wage rate or alter any other term or condition of employment;

(b) shall in each week pay the employee the wages the employee is entitled to receive, which in no case shall be less than his or her regular wages for a regular work week; and

(c) 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.

…

(3) If an employer fails to contribute to a benefit plan contrary to clause (1) (c), an amount equal to the amount the employer should have contributed shall be deemed to be unpaid wages for the purpose of section 103.

…

61. (1) An employer may terminate the employment of an employee without notice or with less notice than is required under section 57 or 58 if the employer,

(a) pays to the employee termination pay in a lump sum equal to the amount the employee would have been entitled to receive under section 60 had notice been given in accordance with that section; and

(b) continues to make whatever benefit plan contributions would be required to be made in order to maintain the benefits to which the employee would have been entitled had he or she continued to be employed during the period of notice that he or she would otherwise have been entitled to receive.

…

64. (1) An employer who severs an employment relationship with an employee shall pay severance pay to the employee if the employee was employed by the employer for five years or more and,

(a) the severance occurred because of a permanent discontinuance of all or part of the employer's business at an establishment and the employee is one of 50 or more employees who have their employment relationship severed within a six-month period as a result; or

(b) the employer has a payroll of $2.5 million or more.

…

65. (1) Severance pay under this section shall be calculated by multiplying the employee's regular wages for a regular work week by the sum of,

(a) the number of years of employment the employee has completed; and

(b) the number of months of employment not included in clause (a) that the employee has completed, divided by 12.

…