Ont. C.A. on Damages in a Fixed Term Employment Contract

A Commentary on *Howard v. Benson Group Inc.*
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On April 8, 2016, the Ontario Court of Appeal delivered its decision in *Howard v. Benson Group Inc.*, 2016 ONCA 256, in which it determined the issue of the measure of damages when an employer terminates a fixed term employment contract before its expiry date.

The employer argued for the usual "reasonable notice" standard and argued the employee's duty to mitigate. The employee argued he was entitled to be paid in full to the end of the fixed term and had no duty to mitigate.

The employment contract contained "Clause 8.1" which stated:

> "Employment may be terminated at any time by the Employer and any amounts paid to the Employee shall be in accordance with the Employment Standards Act of Ontario."

The motion court judge, Justice Justice Donald MacKenzie of the Superior Court of Justice, determined that this clause was void for ambiguity and the contract had to be construed in its absence. (More about this later!)

Justice MacKenzie ruled that in the absence of an enforceable early termination clause, the employer's obligations were governed by "an implied term under the common law requiring 'reasonable notice' for termination.

The employee appealed, arguing that he was entitled to be paid to the end of the contract. Oddly enough, the employer did not cross-appeal the finding that clause 8.1 was void for ambiguity.

The Court of Appeal held:

> [20] There is a common law presumption that every employment contract includes an implied term that an employer must provide reasonable notice to an employee prior to the termination of employment. Absent an agreement to the contrary, an employee is entitled to common law damages as a result of the breach of that implied term: *Bowes v. Goss Power Products Ltd.*, 2012 ONCA 425, 351 D.L.R. (4th) 219, at para. 23. This presumption can only be rebutted if the employment contract "clearly specifies some other period of notice, whether expressly or impliedly": *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, at

> p. 998; *Ceccol v. Ontario Gymnastic Federation* (2001), 55 O.R. (3d) 614 (C.A.), at para. 45.

However, the Court went on to hold:

> [21] … Where an employment agreement states unambiguously that the employment is for a fixed term, the employment relationship automatically terminates at the end of the term without any obligation on the employer to provide notice or payment in lieu of notice. Such a provision, if stated unambiguously, will oust the implied term that reasonable notice must be given for termination without cause: Lovely v. Prestige Travel Ltd., 2013 ABQB 467, 568 A.R. 215, at para. 135; Ceccol, at para. 25.
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> [22] Of course, parties to a fixed term employment contract can specifically provide for early termination and, as in Bowes, specify a fixed term of notice or payment in lieu. However, and on this point the appellant and the respondent agree, if the parties to a fixed term employment contract do not specify a pre-determined notice period, an employee is entitled on early termination to the wages the employee would have received to the end of the term: Lovely, at para. 136; Bowes, at para. 26; Canadian Ice Machine Co. v. Sinclair, [1955] S.C.R. 777, at p. 786.
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> …
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> [26] The Employment Contract, without Clause 8.1, unambiguously remains a fixed term contract. Without Clause 8.1, it contains no provision for early termination without cause. In keeping with Machtinger and Ceccol, the Employment Contract is sufficiently clear to oust the common law presumption of reasonable notice on termination. It follows that the appellant is entitled to the compensation that he would have earned to the end of the Employment Contract.

On the subject of mitigation, the Court held:

> [44] In the absence of an enforceable contractual provision stipulating a fixed term of notice, or any other provision to the contrary, a fixed term employment contract obligates an employer to pay an employee to the end of the term, and that obligation will not be subject to mitigation. Just as parties who contract for a specified period of notice (or pay in lieu) are contracting out of the common law approach in Bardal v. Globe & Mail Ltd. (1960), 24 D.L.R. (3d) 140 (Ont. H.C.), so, too, are parties who contract for a fixed term without providing in an enforceable manner for any other specified period of notice (or pay in lieu).

In effect, the Court treated the monies owing to the fixed termination date of the contract as liquidated damages.

Of interest to me was the portion of the decision of Justice MacKenzie that was not appealed – the decision that clause 8.1, which read:

> 8.1. Employment may be terminated at any time by the Employer [the defendant] and any amounts paid to the Employee [the plaintiff] shall be in accordance with the Employment Standards Act of Ontario.

was void for ambiguity.

The motion court decision can be found at *Howard v. Benson Group*, 2015 ONSC 2638.

The motion court judge agreed with the employee's argument as follows:

> [23] In aid of his position that the termination clause (8.1) is void and unenforceable, the plaintiff submits that clause (8.1) on its language contravenes s. 61 of the Act. Counsel develops the argument in support of this position in the following manner:
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> 1. the defendant's dismissal of the plaintiff was subject to s. 61 of the E.S.A. which requires an employer to "continue" an employee's benefits for the duration of his or her statutory notice period as defined by either s. 57 or 58 of the E.S.A., as the case may be.
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> 2. s. 5 of the E.S.A. prohibits any employee or employer from contracting out of s. 61, using the language that "any such contracting out or waiver [of the Act] is void." Counsel cites law in Ontario in which the courts have interpreted the above terms to mean that any language in a contract which is on its face inconsistent with the minimum requirements prescribed by the E.S.A. cannot be saved by an employer's voluntary provision of E.S.A. entitlements after the fact of dismissal: see Stevens v. Sifton Properties Ltd., (2012) 5 C.C.E.L. (4th) 27 (Ont. SCJ) para. 65; and Wright v. The Young and Rubicam Group of Companies (Wunderman) 2011 ONSC 4720 (CanLII), [2011] O.J. 4960 SCJ, paras. 9 and 16.

What puzzles me is as to why the motion court judge took the rather draconian position of nullifying the clause altogether rather than allowing the clause to stand and interpreting the ambiguity in the defendant's favour pursuant to the contra proferentem rule, which, it seems to me, would have been more consistent with the expectations of the parties than the result that followed.

Update:

In *Oudin v. Centre Francophone de Toronto*, 2016 ONCA 514, the Court of Appeal gave deference to a motion court judge who came to the opposite decision with respect to whether as similar clause should be considered void as attempting to contract out of the Employment Standards Act.

The Court stated:

> [7] The motion judge clearly understood that section 9.2 [of the contract of employment] referred only to minimum notice. This is apparent from his conclusion at paragraph 56 where he stated that "the [respondent] agreed to provide only the notice period prescribed by the ESA". The translation therefore did not factor into his analysis of the clause.
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> [8] The motion judge's reasons make it clear that he understood and considered the appellant's submission that - by referring only to "notice" - the clause ought to be interpreted as an attempt to contract out of all obligations under the ESA. The motion judge rejected this submission and found that there was no attempt to contract out of the ESA and that the parties had agreed that the ESA would be respected.
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> [9] The motion judge's decision was based on his interpretation of a contract. He considered the circumstances of parties, the words of the agreement as a whole and the legal obligations between the parties. He concluded at paragraph 54:
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> > Contracts are to be interpreted in their context and I can find no basis to interpret this employment agreement in a way that neither party reasonable expected it would be interpreted when they entered into it. There was no intent to contract out of the ESA in fact; to the contrary, the intent to apply the ESA is manifest.
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> [10] The motion judge's interpretation of the contract is entitled to deference: see Sattva Capital Corp v. Creston Moly Corp, 2014 SCC 633 at para 52. As a result, we see no error in his conclusion that the clause is enforceable.

This seems to me to be a much more reasonable approach than that found in *Howard v. Benson.*