CITATION: Alarashi v. Big Brothers Big Sisters of Toronto, 2019 ONSC 4510
COURT FILE NO.: CV-18-608514
DATE: 2019-07-29

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: EMAD ALARASHI, Plaintiff

AND:

BIG BROTHERS BIG SISTERS OF TORONTO, Defendant

BEFORE: Sossin J.

COUNSEL: David Vaughan, Counsel for the Plaintiff

Angela Wiggins, Counsel for the Defendant

HEARD: July 10, 2019

REASONS FOR JUDGMENT

Overview

[1] The plaintiff, Emad Alarashi ("Alarashi"), brings this motion for summary judgment under Rule 20.03(1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg 194 ("*Rules of Civil Procedure*") with respect to his claim against the defendant, Big Brothers Big Sisters of Toronto ("BBBST"), for damages relating to wrongful dismissal.

[2] Alarashi commenced employment with BBBST in April, 2014, as a part-time, contractual program coordinator with the "Match Support Team," for a salary of $24,000.00 per annum. This first employment contract was dated April 24, 2014.

[3] In July 2014, Alarashi accepted full-time employment with BBBST in the coordinator role for a salary of $40,000.00 per annum. This second employment contract was dated July 14, 2014.

[4] In December, 2016, Alarashi was promoted to the position of Team Lead of the Match Support Team, an intermediate, supervisory position, effective January, 2017. His salary increased to $46,000.00. The other terms and conditions remained the same as in the July 14, 2014 contract, as confirmed by memorandum dated December 1, 2016.

[5] In January, 2018, Alarashi's salary increased again to $47,150.00 pursuant to a cost of living increase.

[6] All of the employment contracts between Alarashi and BBBST had the same termination clause.

[7] As a result of funding shortfalls, Alarashi's position was eliminated and he was terminated without cause on September 6, 2018.

[8] Following his termination, Alarashi was paid out his statutory entitlements, benefit contributions, and vacation accrual, in accordance with the *Employment Standards Act, 2000* ("*ESA*"). He was provided with five weeks salary in lieu of notice (which BBBST asserts is a week's salary in excess of the four weeks required under the *ESA).*

[9] On November 8, 2018, Alarashi commenced this action by way of a statement of claim.

[10] On December 10, 2018, BBBST filed a statement of defence.

[11] Originally, in his statement of claim, Alarashi sought approximately eight months' common law reasonable notice damages, lost vacation pay, benefit coverage and RRSP program entitlements, in addition to pre-judgment and post-judgment interest and costs.

[12] Alarashi accepted a new position with another agency commencing December 10, 2018. At the time of the hearing, Alarashi had revised the remedy sought to be his common law reasonable notice damages between September 6, 2018 and December 10, 2018, less the five weeks salary in lieu of notice with which he was originally provided.

Analysis

[13] Rule 20.04(2)(a) of the *Rules of Professional Conduct* provides that summary judgment shall be granted where the judge is satisfied that "there is no genuine issue requiring a trial with respect to a claim or a defence." Under Rule 20, the Court can where necessary weigh the evidence, evaluate credibility and draw reasonable inferences from the evidence in the record.

[14] In this case, the parties agree that there is no genuine issue for trial. Alarashi argues that the record is sufficient to justify judgment on his claim for wrongful dismissal and common law damages in light of the unenforceability of the termination clause in the employment agreement. BBBST argues that the record shows that the termination clause is enforceable, and that the termination benefits provided to Alarashi pursuant to the clause meet its obligations under the *ESA*.

[15] The main issue in this summary judgment motion is whether the termination clause in Alarashi's employment contract with BBST was valid and enforceable.

[16] The relevant provisions in the termination clause provide:

> Following the probationary period, in the event that it becomes necessary to terminate your employment without cause BBBST will provide you with such notice (or payment in lieu of notice) or severance pay that may be required to meet the requirements of the *Employment Standards Act, 2000*. Notice is based on the length of service as follows
>
> ...
>
> 4 years or more but fewer than 5 years – 4 weeks
>
> ...

> You understand and agree that BBBST has no obligation to make any additional payments to you or to provide you with additional notice upon termination. You also understand and agree that BBBST would not have entered into this agreement if it were required to provide notice in excess of the *Employment Standards Act, 2000*.
>
> If your employment is terminated without cause, BBBST will continue your group insurance benefit coverage for such period as the *Employment Standards Act, 2000* shall require, provided such coverage is available from the insurer.
>
> Your employment may be terminated for cause and without pay in lieu of notice at any time for serious breaches of the terms of this Agreement and/or BBBST's policies set out in the Human Resources Manual, and/or for any cause recognized at law...

[17] Alarashi advances three grounds for why the termination clause was not valid:

a. First, the termination clause indicates insurance benefits will continue makes coverage contingent on the insurer, contrary to the *ESA*;

b. Second, the termination for cause provision allows for termination for conduct which falls short of willful misconduct, contrary to the *ESA*; and

c. Third, the termination clause sets out an entitlement on termination to payment in lieu of notice (termination pay) or severance pay, whereas these are both available where an employee is eligible.

[18] Alarashi challenges the termination clause not on the basis of the actual conduct of BBST in relation to his termination, but rather on the grounds that it is not open to parties to contract out of the *ESA*.

[19] Section 5 of the *ESA* provides:

> No contracting out
>
> 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.

[20] Alarashi relies generally on the framework for the determination of the enforcement of termination clauses set out by Laskin J.A. in *Wood v. Fred Deeley Imports Ltd.*, 2017 ONCA 158 ("*Wood*"). That framework includes the following principles:

a. Employees have less bargaining power than employers when employment agreements are made;

b. Employees are likely unfamiliar with employment standards in the *ESA* and thus are unlikely to challenge termination clauses;

c. The *ESA* is remedial legislation, and courts should therefore favour interpretations of the *ESA* that encourages employers to comply with the minimum requirements of the Act, and extends its protection to employees;

d. The *ESA* should be interpreted in a way that encourages employers to draft agreements which comply with the *ESA*;

e. A termination clause will rebut the presumption of reasonable notice only if its wording is clear as employees are entitled to know at the beginning of an employment relationship what their entitlement will be at the end of their employment; and

f. Courts should prefer an interpretation of the termination clause that gives the greater benefit to the employee.

[21] As Justice Laskin's reasons in *Wood* make clear, where an employment agreement is not consistent with the *ESA*, it becomes invalid irrespective of the actual arrangements made with an employee on termination, and the terminated employee then becomes entitled to common law damages.

[22] In *Wood*, the Court held a termination clause was unenforceable and could not be relied upon to limit an employee's termination benefits under the *ESA*, and that the employee was instead entitled to wrongful dismissal damages at common law. Alarashi argues a similar outcome is appropriate in this case.

[23] BBBST submits that the termination clause should be read in context, and as a reflection of the clear intent of the parties that the minimum requirements of the *ESA* apply. BBBST accepts that the drafting of the termination clause could be improved, but rejects the contention that any aspect of the termination clause is invalid and therefore unenforceable.

[24] BBBST looks to *Oudin v. Centre Francophone de Toronto*, 2016 ONCA 514 ("Oudin"), as a framework for the analysis of the enforcement of termination clauses, where the Court found that the employer had not intended to contract out of the provisions of the *ESA*. The Court held:

> [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.
>
> [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:
>
> > 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 reasonably 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.

> [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.

[25] BBBST also relies on the Court of Appeal's subsequent decision in *Amberber v. IBM Canada Ltd.*, [2018] O.J. No. 3370 at para. 63, where Gray J. (ad hoc) reiterated that the Court should not strain to create ambiguity where none exists in the context of interpreting a termination clause (citing Laskin J.A. in *Chilton v. Co-Operators General Insurance Co.* (1997), 32 O.R. (3d) 161 (C.A.) at p.169).

[26] Finally, BBST relies on Justice Lederer's statement in *Cook v. Hatch*, 2917 ONSC 47, that the role of the motions judge in interpreting a termination clause in relation to the *ESA* requirements is to "look for the true intention of the parties, not to disaggregate the words looking for any ambiguity that can be used to set aside the agreement and, on that basis, apply notice as provided for by the common law." (at para. 25).

[27] I note that the Court of Appeal in *Wood*, decided a year after *Oudin* on a similar question of the interpretation of termination clauses, does not cite its earlier finding in *Oudin*. I take from these cases that ambiguous drafting language should be interpreted so as to benefit the employee asserting termination rights, but that the Court should not impute ambiguity where the intention of the parties is clear.

[28] With these principles in mind, I will address each of Alarashi's arguments in relation to the termination clause in turn.

1. Continuation of Health Benefits

[29] Under sections 54, 57, 60 and 61 of the *ESA*, an employer is required to continue health benefits to an employee who has been terminated without cause.

[30] There is no dispute that BBST in fact did continue Alarashi's benefits for the full statutory notice period of 5 weeks.

[31] With respect to the unenforceability of the termination clause which entitled Alarashi to the continuation of group insurance benefits coverage on termination "provided the benefits are available from the insurer," Alarashi relies on this Court's decision in *Cormier v. 1772887 Ontario Ltd. c.o.b. as St. Joseph Communications*, 2019 ONSC 587 ("*Cormier*").

[32] In *Cormier*, Justice Perrell found a termination clause was unenforceable which continued statutory health benefits subject to the "consent" of the company's insurer (at para. 88):

> ... the termination clause in the 2012 employment contract purports to allow St. Joseph Communication upon termination to provide Ms. Cormier with only some of the employee benefits that she received before termination and even then, only subject to the consent of St. Joseph's insurers. With respect to the employee benefits, the termination clause therefore provides Ms. Cormier with a lesser right than the rights set out in the *Employment Standards Act, 2000* and therefore, the entire termination clause is void.

[33] In my view, the termination clause in *Cormier* is distinct from the termination clause in this case. The clear intent of the provision in this case is the continuation of benefits as required by the *ESA*. The reference to "availability" is not equivalent to consent. Availability refers to the reality that the employer does not control what insurers offer as part of a group benefits plan. There is always the possibility that there may be a change in the insurance coverage for all employees during the time a terminated employee is eligible for the benefits (this could include a change from one insurance carrier to another and/or a change to specific benefits within an insurance plan). Unlike *Cormier*, there is no indication in this termination clause language that an insurer would have the discretion to deny any coverage to a terminated employee that it would make available to other employees.

[34] On this ground, I am satisfied that there is no inconsistency between this provision and the *ESA* that could give rise to ambiguity in Alarashi's right to continue to receive benefits as required under the *ESA*.

2. Termination for Cause short of Willful Misconduct

[35] With respect to the argument that conduct that falls short of willful misconduct could nonetheless constitute dismissal for cause, Alarashi alleges the following provision of the termination clause is unenforceable:

> Your employment may be terminated for cause and without pay in lieu of notice at any time for serious breaches of the terms of this Agreement and/or BBBST's policies set out in the Human Resources Manual, and/or for any cause recognized at law…

[36] The standard for "just cause" termination under the *ESA* is set out in s.2(1)(3) Regulation 288/01 which entitles even those terminated with cause to minimal entitlements unless the employer can establish that the employee is guilty of willful misconduct or willful neglect of duty.

[37] Alarashi argues (at paras. 43-44 of his factum) that, "the Termination Provision purports to give the Defendant just cause for dismissal for behaviour that does not even meet the lower common law standard of just cause. Specifically, it allows the Defendant to assert just cause for "serious breaches of the employment contract and/or Human Resources manual." Breaching a term of the human resource policy often will not amount to just cause for termination under the common law, let alone just cause under the *ESA*, which requires willful misconduct and willful neglect of duty that is not trivial."

[38] Once again, it is important to reiterate that Alarashi was terminated without cause, so this provision did not apply in the context of his termination.

[39] I find no language in this provision which is inconsistent with the *ESA*. In other words, given the intent of the parties to comply with the requirements of the *ESA*, it is appropriate to read this provision as enabling BBBST to terminate an employee only for cause where the "serious breach" of the employment agreement, the human resources manual and/or another law constituted willful misconduct. There is no indication in this language of a limit to rights that contradicts the *ESA* or of an intent to contract out of the *ESA* or waive *ESA* rights on termination.

[40] In my view, this is another setting where a court would need to strain to find ambiguity capable of invalidating the termination clause.

[41] I am satisfied that this provision in the termination clause is enforceable.

Excluding Termination Pay or Severance Pay

[42] The third and final area Alarashi raises to invalidate the termination clause in the employment agreement is the reference to a terminated employee's entitlement to "such notice (or payment in lieu of notice) or severance pay that may be required to meet the requirements of the *Employment Standards Act, 2000*." (Emphasis added.)

[43] The parties agree that under the *ESA*, BBST would have an obligation to pay a terminated employee both payment in lieu of notice ("termination pay") and severance pay, if the employee were entitled to it.

[44] Once again, the challenge to this provision in the termination clause does not relate to Alarashi's own circumstances, as he received payment in lieu of notice of five weeks which meets or exceeds any interpretation of the minimum requirements for termination pay under the *ESA*, and he was not eligible for severance pay.

[45] BBBST argues that this clause is clearly intended to convey that BBBST will be bound by the requirements of the *ESA* and therefore while the drafting could more clearly convey these benefits are additive rather than alternatives, the provision remains clearly enforceable.

[46] Alarashi relies on *Andros v. Colliers Macaulay Nicolls Inc.*, 2018 ONSC 1256 ("*Andros*") for the proposition that even if the termination provision could be read in a manner which complies with the *ESA*, it remains invalid where it is unclear or ambiguous with respect to whether the termination benefits included severance pay.

[47] Writing in *Andros*, Dietrich J. highlighted the significance of whether the termination clause specifically adverts to compliance with employment standards legislation. Distinguishing the termination clause at issue in *Andros* from the Court of Appeal's decision in *Roden v. Toronto Humane Society*, (2005), 259 D.L.R. (4th) 89 (Ont C.A.) ("*Roden*"), Dietrich J. stated (at para. 32), "A key distinction between *Roden* and the case at bar is that the clause in question in the *Roden* case made specific reference to the applicable employment standards legislation. No such reference in made in clauses 4a and 4b. In this case, as in *Roden*, the termination clause makes specific reference to the *ESA*.

[48] In *Wood*, also relied upon by Alarashi, Laskin J.A., writing for the Court, distinguishes that case from *Roden* as well, stating (at para. 55-56), "The difference between *Roden* and this case lies in the wording of each termination clause. In *Roden*, the clause dealt only with the Toronto Human Society's obligation to give the notice of termination, as required by the *ESA*, or to pay 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. 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..."

[49] Therefore, in light of the Court of Appeal's analysis in *Wood*, the question I must address is whether the language of the termination clause excludes severance pay if termination pay is provided.

[50] In Alarashi's case, the severance pay clause would not arise as only employees with five years or more experience can be eligible for severance pay under the *ESA*.

[51] I do not think BBBST intended to exclude severance pay by this provision. The intent of the parties appears to be to abide by the requirements of the *ESA*, not contract out of them or waive them.

[52] Under the *ESA*, it is possible to be entitled to termination pay and not severance pay (as in the case of Alarashi, who had worked less than five years), but it is not possible to be entitled to severance pay and not termination pay (or notice). In my view, this provision could be read simply as setting out the distinction between two different pathways to entitlement under the *ESA*.

[53] In other words, in this clause, BBBST could be conveying to Alarashi at the time he commenced employment that in the event of his termination without cause, he will receive what he is entitled to receive under the *ESA*, whether termination pay or severance pay. Where his entitlement is to both termination pay and severance pay under the *ESA*, nothing in the wording of this provision is inconsistent with his being paid both.

[54] While the clause can be read in a way that is compatible with the *ESA*, that is not the test for a valid termination clause, as affirmed in *Andros*. Because the clause could also be conveying to Alarashi that he may not be entitled both to termination pay and severance pay, the clause is at best ambiguous.

[55] In the face of ambiguous wording, the terminated employee is entitled to an interpretation which would lead to the highest level of benefit. In this case, such an interpretation would be that the reference to "or" in the clause excludes either termination or severance pay, and thus constitutes an invalid termination clause.

[56] In light of this finding, Alarashi is entitled to common law damages.

[57] Alarashi was 32 years old at the time of termination, with four years' experience in his different roles at BBBST and a salary of $47,150.00. While there was some dispute as to the application of the *Bardal* factors (*Bardal v. Globe & Mail Ltd.*, 1960 CarswellOnt 144 (Ont H. Ct. J.) in his case, I am satisfied that the analogous cases place Alarashi's entitlement in the four to six month range (see *Sommerard v. I.B.M. Canada Ltd.*, [2006] O.J. No. 1209; and the cases cited in *Lau v. Royal Bank of Canada*, 2015 BCSC 1639 at para. 207).

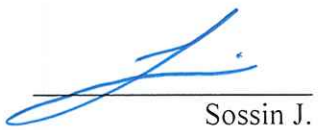
[58] The parties agree that Alarashi received five weeks of salary and benefits after his termination on September 6, 2018 and mitigated his damages by taking a new position on December 10, 2018. His damages at common law between the date of his termination and the date of his mitigation amounts to $9,033.44.

[59] For the reasons set out above, Alarashi's motion for summary judgment is granted.

Costs

[60] The parties each provided a bill of costs in the range of $8,000.00 on a partial indemnity scale for this motion, which I find to be reasonable. While Alarashi argues in his factum that costs on a substantial indemnity scale are warranted, this position was not pursued in submissions, and in my view, is not justified.

[61] Therefore, Alarashi is entitled to damages of $9,033.44, together with pre-judgment interest, and costs of $8,000.00, all-inclusive, payable by BBBST within 30 days of this judgment.



Sossin J.

Released: July 29, 2019