CITATION: Howard v. Benson Group, 2015 ONSC 2638
COURT FILE NO.: CV-14-870-0000
DATE: 20150422

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
JOHN HOWARD	)	R. Wozniak, for the Plaintiff
	)	
Plaintiff	)	
	)	
- and -	)	
	)	
BENSON GROUP INC.	)	A. Campea, for the Defendant
	)	
Defendant	)	
	)	
	)	**HEARD:** March 23, 2015

ENDORSEMENT RE: RULES 20 and 21 MOTIONS BY THE PLAINTIFF

MacKENZIE J.

[1] The plaintiff moves under Rule 21 for a ruling on the question of law relating to the validity and enforceability of the termination clause in the plaintiff's

Employment Contract with the defendant. In this regard, the plaintiff seeks an order declaring the termination clause to be null and void or, in the alternative, to be unenforceable.

[2] The plaintiff further moves under Rule 20 for summary judgment against the defendant for $194,284.93 representing damages claimed by the plaintiff as a result of the termination of his employment by the defendant.

Background

[3] The plaintiff was hired by the defendant for the position of Truck Shop Manager for the defendant's business of automotive parts and service repair.

[4] The defendant signed a contract with the plaintiff in this regard dated August 31, 2012 (the Employment Contract) and the plaintiff commenced his work and duties of Truck Shop Manager with the defendant on or about September 4, 2012.

[5] The terms and conditions of the plaintiff's employment with the defendant are set out in the Employment Contract and the term of his employment in the capacity of Truck Shop Manager was for a period of five years commencing September 4, 2012.

[6] In or about May 2013, the plaintiff was transferred to the position of Sales Development Manager. In that capacity, the plaintiff's duties comprised, among other things, operating the defendant's automotive service centre in Bowmanville, Ontario; managing and supervising the staff at such automotive service centre; managing and overseeing the budget and costs of operating the Bowmanville service centre, and managing, implementing and overseeing the workplace policies and procedures at the Bowmanville service centre.

[7] The plaintiff's employment with the defendant continued without interruption until July 28, 2014. On this date, the defendant terminated the plaintiff's employment in a letter in which the defendant advised the plaintiff he would be paid until August 11, 2014, in effect two weeks' severance pay.

[8] As of the date of his dismissal, the plaintiff's compensation package with the defendant was composed of the following:

a) annual base salary of $60,000;

b) full participation in the defendant's group benefits program, including medical, dental, group life, short time and long term disability insurance coverage;

c) participation in the defendant's Store Manager Bonus Program;

d) three weeks annual paid vacation; and,

e) a company car with credit card facility for business use and allowance for mobile phone usage.

[9] In arriving at the above severance pay to the plaintiff, the defendant relies on the following clause in the Employment Contract:

> 8. **Termination**
>
> > 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. [sic]

The Issues

1. Whether the termination clause (8.1) in the Employment Contract is enforceable thereby entitling the defendant to rely on the effects of the same in terms of its rights and its obligations relating to the defendant's dismissal of the plaintiff;

2. If there is no genuine issue requiring a trial, and the defendant is not entitled to rely on the termination clause (8.1) in the Employment Contract, what if any damages is the plaintiff entitled to arising out of the termination of his employment by the defendant.

3. Whether the plaintiff had a duty to mitigate his damages if he were entitled to damages in this case.

The Applicable Law

[10] The jurisdictional basis for determining the enforceability of the termination clause (8.1) in the Employment Contract is found in Rule 21.01 of the *Rules of Civil Procedure,* in the following language:

> **21.01** (1) A party may move before a judge,
>
> (a) for the determination, before trial, of a question of law raised by a pleading in an action where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs; or
>
> …
>
> [emphasis added]

[11] As noted above, the question of law to be determined on the motion is the validity or enforceability of the termination clause (8.1) of the Employment Contract. Both parties are agreed there are no material facts in dispute giving rise to the question.

[12] The jurisdictional basis for disposing of the other issues respecting the plaintiff's entitlement to damages in the event the court determines that the termination clause (8.1) in the Employment Contract is unenforceable is found in

Rule 20.04 of the *Rules of Civil Procedure*. The pertinent terms of Rule 20.04 are as follows:

> **R. 20.04**
>
> (1) …
>
> (2) The court shall grant summary judgment if,
>
> (a) the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence; or
>
> (b) the parties agree to have all or part of the claim determined by a summary judgment and the court is satisfied that it is appropriate to grant summary judgment. O. Reg. 284/01, s. 6; O. Reg. 438/08, s. 13 (2).
>
> ***Powers***
>
> (2.1) In determining under clause (2) (a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:
>
> 1. Weighing the evidence.
> 2. Evaluating the credibility of a deponent.
> 3. Drawing any reasonable inference from the evidence.
>
> (2.2) A judge may, for the purposes of exercising any of the powers set out in subrule (2.1), order that oral evidence be presented by one or more parties, with or without time limits on its presentation.
>
> …

[13] The validity or enforceability of the termination clause (8.1) in the Employment Contract invokes an amalgam of the statutory terms and provisions in the *Employment Standards Act*, 2000, S.O. 2000 c. 41 (the *E.S.A.*), and the law interpreting the relevant sections of the *E.S.A.* (For ready reference the relevant terms are appended to this endorsement as Schedule "A". My analysis will refer to the relevant sections only in part.)

The Position of the Plaintiff

[14] The essential position taken by the plaintiff in relation to the determination of the question of law as stipulated above is that the termination clause (8.1) of the Employment Contract is void and unenforceable. Counsel submits that Clause (8.1) states that the defendant as employer may terminate the plaintiff's employment "at any time", in which case "any amounts paid" to him shall be in accordance with the *E.S.A.* The plaintiff contends that there are three ambiguities contained in the text of clause (8.1), which ambiguities are fatal to its enforceability.

[15] The first of these ambiguities according to counsel is that clause (8.1) fails to explain what is meant by the words therein, "amounts paid". Counsel contends there is an inherent ambiguity by posing the question: does this payment ("amounts paid") include the plaintiff's base salary as well as benefits or any bonuses, or is the payment limited to base salary alone? If the latter option is the true meaning then counsel contends that would be a violation of ss. 60 and 61 of the *E.S.A.*

[16] The next ambiguity alleged by the plaintiff is caught by the question posed by counsel, namely, what is meant by the term "any"? Does this mean that the defendant retained a discretion to decide whether or not it would provide the

plaintiff as employee with any payments upon dismissal of his employment? If so, counsel contends that such a discretion would be contrary to the *E.S.A.*

[17] The final ambiguity alleged by counsel for the plaintiff arises from the interpretation of the word “amounts” in the phrase “any amounts paid”, as found in clause (8.1). Counsel poses a question relating to this alleged ambiguity as follows:

> Does the payment of the “amounts” extinguish all of the defendant’s obligations to the plaintiff on the dismissal of the latter, namely, are such payments in full satisfaction of the defendant’s obligations to the plaintiff arising out of statute, common law or otherwise, including benefits and any bonuses?

As counsel puts it, the “[Employment Contract] does not say”: see plaintiff’s factum, para. 29

[18] In aid of his position that clause (8.1) is unenforceable and void in light of the alleged ambiguities previously described, counsel for the plaintiff deals with the case law involving the manner in which courts have interpreted termination clauses in employment contracts with particular reference to ambiguities in the language used in such clauses. In essence, the plaintiff contends that the weight of authority on such issues is that the courts require employers to use clear and unambiguous language in employment contracts when the employer wishes to

significantly limit or circumscribe the entitlement of an employee upon his or her dismissal.

[19] Beginning with *Machtinger v. Hoj Industries Ltd.,* [1992] 1 SCR 986 (S.C.C.) and continuing in *Ceccol v. Ontario Gymnastic Corporation,* [2001] 55 O.R. (3d) 614 (OCA), the court observes that a common thread may be discerned which imposes on employers an obligation to draft termination of employment clauses which achieve a high degree of clarity and that language in such clauses which fails to meet the high degree of clarity requirement will be construed against the employer in accordance with the principle of *contra proferentem*. In aid of this argument, counsel for the plaintiff refers to the case of *Dwyer v Advanis Inc.,* [2009] O.J. 1956 (SCJ). In that case which also involved the interpretation of a termination clause, the clause in *Dwyer* on the argument of counsel for the plaintiff was drafted in language similar to a significant degree to the termination clause (8.1) in this case. The clause in the *Dwyer* case provided as follows:

> "…should it be determined at any time that there is not a fit between your skills and the requirements of the job your employment with Advanis [the employer] will be terminated [i.e. without cause] and <u>you will receive severance as determined by the applicable provincial employment standards act.</u>" [Emphasis added.]

[20] It is not in issue that the applicable provincial employment standards act in the *Dwyer* case was the Ontario *E.S.A.*

[21] In this situation, Aston J. in *Dwyer* concluded that the termination clause there was sufficiently ambiguous to trigger the application of the *contra proferentem* doctrine in the favour of Dwyer, the employee.

[22] Aston J. stated his conclusion in the following language:

> "…the clause is at least ambiguous as to whether it limits the Plaintiff's entitlement to "the applicable *Employment Standards Act*" and nothing more. Any ambiguity should be construed against the Defendant as the author of the document, particularly given the disparity in the bargaining position of the parties.": para 36, in part
>
> and
>
> "Therefore, I find the written Employment Contract does not oust or limit an implied term created by common law requiring "reasonable notice" for the termination of the Plaintiff's employment.": para 38.

[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:

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.

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] O.J. 4960 SCJ, paras. 9 and 16.

[24] Counsel for the plaintiff refers to the words in clause (8.1) to the effect that "any amounts paid to Howard upon dismissal" shall be in accordance with the Employment Standards Act of Ontario [sic]." Counsel contends that the word "paid" in clause (8.1) by necessary implication limits the plaintiff's entitlement on dismissal to pay in lieu of notice only, since benefits continuation is not a "payment" within the meaning the *E.S.A.*. Counsel continues the argument by

saying that if benefits continuation were a "payment" within the meaning of the *E.S.A.,* the legislative drafters of s. 61 presumably would have used the words "payment of wages and benefits" as opposed to expressly imposing two separate and distinct obligations on employers at the time of dismissal, namely, to provide termination pay in a lump sum equal to what the employee would have received had he or she received working notice of dismissal (subs. 61(1)(a)) and to continue making "whatever benefit plan contributions [emphasis added] that are required to maintain the employee's benefits during his or her statutory notice period (subs. 61(1)(b)): see plaintiff's factum para. 37

[25] Counsel continues the argument by referring to clause 10.4 of the Employment Contract which states the "this agreement shall be the entire agreement between the employee [Howard] and the employer [Benson]." From this, counsel contends the obligation on the defendant to pay the defendant any amounts in accordance with the *E.S.A.* constitutes its "entire agreement" with Howard regarding his entitlements on dismissal. As such, counsel submits the Employment Contract expressly purports to limit the plaintiff's recovery on termination to only those "payments" required by the *E.S.A.* Finally, in this argument, counsel submits that when read together and in the proper context, clauses (8.1) and 10.4 indicate an intention on the part of the defendant to treat "any payment" in lieu of notice under clause (8.1) as the totality of the plaintiff's

entitlement to compensation on termination. Accordingly, it is argued these provisions constitute in law an attempt by the defendant to contract out of s. 61 of the *E.S.A.*, and as a result, clause (8.1) is "null and void for all purposes." *Machtinger*, paras. 28 and 34; *Wright*, para. 28.

[26] In further aid of the plaintiff's position that clause (8.1) is unenforceable, counsel refers to a recent decision of this court, *Miller v. A.B.M. Canada Inc.* (2014) 16 C.C.E.L. (4th) 294 (Ont. SCJ). There the court ruled on a termination clause similar in substance to clause 8.1. The text of the termination clause in *Miller* is as follows:

> Regular employees may be terminated at any time without cause upon being given the minimum period of notice prescribed by applicable legislation, or by being paid salary in lieu of such notice or as may otherwise be required by applicable legislation…
>
> I [the employee] have been given a copy of this contract of employment as well as the bonus plan and I have read and understood their respective terms.
>
> I hereby accept the terms and conditions of employment outlined above. [emphasis added]

[27] Counsel notes that the court in *Miller* (Glithero J.) held the above termination clause was unenforceable on the basis that it failed to provide for the continuation of benefits during the notice period for the plaintiff under the *E.S.A.* "or in the alternative, it is ambiguous in this respect, hence attracting resolution of that ambiguity against the defendant pursuant to the principle of *contra*

proferentem": paras. 47 – 49. In the event, counsel contends that clause (8.1) is clearly ambiguous as to whether it includes benefits continuation and should therefore be resolved against the defendant pursuant to the principle of *contra proferentem*: see also the court in *Stevens*, para. 60.

[28] Counsel for the plaintiff submits that the damages properly payable to the plaintiff by the defendant arising out of his dismissal by the defendant from his employment are not governed by clause (8.1) of the Employment Contract inasmuch as the same is unenforceable; rather the damages due to the plaintiff arising out of the defendant's dismissal of him from his employment will be the amount of his salary remaining under the fixed term of his Employment Contract. Further, it is argued that where a contract of employment is silent on the issue of an employee's duty to mitigate in the event of early termination, the employee thus dismissed under a fixed term contract will not be under any obligation to mitigate.

[29] In support of this position, counsel for the plaintiff refers to the judgment of the Court of Appeal in *Bowes v. Goss Power Products Ltd.,* (2012) 99 C.C.E.L. (3d) 152. In *Bowes*, the court (per Winkler, C.J.O.) held that an employment contract which stipulates a fixed term of notice or payment in lieu shall be treated as fixing liquidated damages or a contractual amount and that in such a case

there is no obligation on the employee to mitigate his or her damages: paras. 34 – 38.

[30] The final submission of counsel for the plaintiff is that the Employment Contract was for a fixed term of five years commencing September 4, 2012. Clause (8.1) is unenforceable and there is no provision in the Employment Contract relating to a mitigation obligation on the part of the plaintiff. In the result, it is submitted on behalf of the plaintiff that he is entitled to payment from the defendant in the amount of $194,284.93, being the balance owing under the Employment Contract from the termination date of July 28, 2014 to the date the 5 year fixed term Employment Contract expired, namely, September 4, 2017.

The Position of the Defendant

[31] Counsel for the defendant addresses the issue of the enforceability of the termination clause (8.1) of the Employment Contract along the following argument.

[32] Counsel acknowledges that the termination of a fixed term employment contract prior to the end of the term entitles an employee to the compensation he or she would have earned for the remainder of the term subject to the proviso

where the employment contract on its face permits a party to terminate that contract prior to the end of its term.

[33] Counsel submits that where an employment contract setting out the term of the employment refers to an early termination, the early termination language is viewed as qualifying the fixed term rather than competing with it and creating ambiguity: see *Ahmad v. Athabasca Tribal Council Ltd.,* 2010 ABCA 341 (CanLII), paras 34, 36.

[34] The defendant, in addition to the termination clause (8.1), refers to other relevant clauses of the Employment Contract. These clauses are the following:

> 1.1 The Employer Agrees to Employ the Employee as Manager upon such terms and conditions as set out herein…and the Employee agrees to be so employed.
>
> 1.2 The Employment of the Employee by the Employer shall be for a period of five (5) years commencing September 4, 2012…
>
> 1.3 The Employee and the Employer may terminate the Employees employment at any time in accordance with the terms and conditions of this agreement.

plus (8.1) as previously described

[35] Counsel for the defendant argues that clause 1.3 of the Employment Contract, above, expressly provides for the termination of the Employment Contract at <u>any time</u> prior to the end of its term and is a qualifier to the five year term of the Employment Contract [emphasis added].

[36] Further, the termination clause (8.1) allows the defendant to terminate the plaintiff's employment at any time, in which event the plaintiff will be paid in accordance with the *E.S.A.* Counsel then notes that the *E.S.A.* sets out an employee's minimum statutory entitlements during the course of employment and upon the termination of employment. These standards represent a minimum level of rights which cannot be undercut by the terms of an employment contract. See *Machtinger*, above.

[37] Counsel then submits that if a termination provision in an employment contract provides for less than the minimum entitlements under the *E.S.A.*, such termination provision is null and void and unenforceable.

[38] Counsel refers to other relevant sections of the *E.S.A.* S. 57 sets out an employee's minimum notice of termination entitlements by indicating that an employee must receive "at least" the stated amount. S. 61 of the *E.S.A.* permits employers to pay in lieu of notice of termination and requires employers to continue to pay benefit plan contributions in order to maintain the employee's benefits over the applicable notice period. From these provisions, counsel argues that where an employee's termination entitlement under an employment contract is not clearly limited to the minimums in the governing employment standards legislation, that employee is entitled to reasonable notice of termination in

accordance with the common law: see *Machtinger*, above at paras. 26, 27, and *Wright*, above, at para. 37. [emphasis added]

[39] Turning from the general to the specific, counsel argues that the termination clause (8.1) does not purport to limit the plaintiff's entitlement upon termination to the minimums under the *E.S.A.* and that the Employment Contract provides for all payments to the employee to be made in accordance with the *E.S.A.* including the payment of benefits pursuant to s. 61 of the *E.S.A.* Counsel further argues that the termination provision (8.1) does not stipulate that the payments outlined in that clause are exhaustive and are all the payments to which an employee is entitled.

[40] On the basis of the foregoing, counsel submits the termination clause (clause 8.1) does not provide for less than the minimum standards in the *E.S.A.* and accordingly cannot be found null and void. Counsel nonetheless argues, in the alternative, that if the termination clause (8.1) is found to be null and void, clause 1.3 of the Employment Contract, above, still qualifies the five year term in the Employment Contract and permits early termination.

[41] In this regard, counsel argues that when reading the Employment Contract in its entirety, the early termination therein was contemplated by the parties and terms were included in the Employment Contract to qualify the five

year term, with the ability to terminate at any time: see *Mississauga Motors Mart Inc. v. Sovereign General Insurance Company*, 2013 ONSC 6360, para. 12. However, in *Mississauga Motors Mart*, the court was not dealing with an interpretation of an employment contract but rather an insurance policy. The portion of paragraph 12 cited by counsel for the defendants in aid of the above proposition quite simply reads that, "…when interpreting a policy, the court should avoid an interpretation that would not have been in the contemplation of the parties at the time the policy was concluded."

[42] Counsel contends that since the Employment Contract is subject to termination at any time prior to the end of the five year term, but the entitlements on termination are not limited to the minimums under the *E.S.A.*, the plaintiff would be entitled to reasonable notice of termination or payment in lieu thereof, in accordance with the common law. However, in the alternative, counsel submits that the termination clause (8.1) which limits the entitlement upon termination to those "in accordance with the *E.S.A.*" is sufficiently clear and unambiguous to rebut the presumption of common law reasonable notice.

[43] The defendant then addresses the question of whether there is a genuine issue requiring a trial.

[44] Counsel refers at length to Rule 20.04 and the Supreme Court of Canada's decision in *Hyrniak v. Mauldin*, [2014] SCC 7. Counsel notes under Rule 20.04(2)(a) and the *Hryniak* decision, there will be no genuine issue requiring a trial if the summary judgment process provides the motion judge with the evidence required to fairly and justly adjudicate the dispute and is a timely, affordable and proportionate procedure within the meaning of Rule 20.04(2)(a).

[45] Counsel then notes the provisions of Rule 20.04(2.1) and (2.2) creating new powers to the motion judge on a summary judgment application. In essence, if it appears to the presiding motion judge that there is a genuine issue requiring a trial that judge should then determine if the need for a trial can be avoided by using these powers. In determining this question, the motion judge must conclude whether the use of those powers would not be against the interest of justice, meaning that their use will lead a to a fair and just result that will serve the goals of timeliness, affordability and proportionality in light of the litigation as a whole.

[46] Counsel acknowledges that the reasonableness of the plaintiff's efforts to obtain alternate employment is a genuine issue requiring a trial, and states that an assessment of the plaintiff's employment search is a genuine issue in a wrongful dismissal case in two respects: first, it relates to the mitigation of

damages; and second, it relates to the reasonable notice period: see para. 37 of defendant's factum and cases cited in support of the proposition.

[47] Counsel further contends that unless an employment contract expressly stipulates the exact amount of notice upon termination, a dismissed employee has a duty to mitigate his damages by taking all reasonable steps to obtain alternate employment. If the court finds that the employee's efforts to secure alternate employment were not reasonable, the court can deduct an amount from the award of damages in respect of reasonable efforts at mitigating the damages pursuant to the dismissal: see para. 38 of defendant's factum and cases cited therein.

[48] The defendant submits that the plaintiff has failed to put his best foot forward and has failed to provide any evidence as to whether he has engaged in any efforts to secure alternate employment or earn mitigation income. Therefore the evidence before the court on this motion is inadequate to make a dispositive finding with respect to the reasonableness of the plaintiff's search for reemployment and further that it is not in the interest of justice for this court to use its powers on the motion for summary judgment in order to gather and assess the necessary evidence to make such a finding. In the result, the defendant asserts that a trial is required in this matter and that it is the onus of

the plaintiff to demonstrate to the court that his employment search and mitigation efforts are not genuine mitigation efforts requiring a trial.

[49] Finally, counsel by way of an alternate submission contends that any damages awarded on a summary judgment should be no more than the plaintiff's entitlement to reasonable notice of termination in accordance with the common law and that the applicable notice period should be reduced due to the failure of the plaintiff to make any reasonable efforts to mitigate his damages.

[50] In a further alternative, counsel for the defendant submits that any damages awarded on summary judgment should be no more than the amounts received by the plaintiff upon his termination in accordance with the *E.S.A.*

Analysis

Is the Termination Clause (8.1) in the Employment Contract Enforceable?

[51] As noted above, the position of the plaintiff is that there is in the language of clause (8.1) a sufficient level of ambiguity in the terminology used therein so as to render the termination clause unenforceable in law. Counsel for the plaintiff has referred to the power imbalance inherent in the typical employer/employee relationship, indicating that such power imbalance leads to less deference in the contractual arrangements in employment law than in commercial matters: see

Slaight Communications Inc. v. Davidson [1989] 1 SCR 1038, and *Wallace v. United Growers Ltd.* [1997] 3 SCR 701.

[52] Counsel for the plaintiff relies also on *Bowes* to support his position that the plaintiff here is entitled to the salary remaining under the fixed term of the Employment Contract. However, the termination clause (8.1) does not stipulate a fixed term of notice or payment in lieu as fixing liquidated damages or a contractual amount. I am thus unable to treat the plaintiff's claim for the balance of unpaid salary to the end of the Employment Contract as liquidated damages or a contractual amount within the ambit of the *Bowes* decision.

[53] Counsel contends that the presumption of reasonable notice required of an employer to an employee who was dismissed will only be rebutted if the terms of the Employment Contract "clearly specify" some other period of notice and do not run afoul of the applicable employment standards legislation: see *Machtinger*, above; and *Ceccol v. Ontario Gymnastic Corporation,* [2001] O.J. 3488, in which the Ontario Court of Appeal followed the finding by the Supreme Court of Canada in *Machtinger* that the presumption of reasonable notice can be rebutted only if the employment contract "clearly specifies" some other period of notice: …para. 45.

[54] Counsel contends that a failure to achieve that high degree of clarity will be construed against the employer in accordance with the principle of *contra proferentem*.

[55] As previously noted, the plaintiff has two bases of attack on the enforceability of the termination provisions (8.1), the first being ambiguity in the terminology used in the clause (8.1) sufficient to trigger the *contra proferentem* doctrine in the plaintiff's favor, as enunciated in *Dwyer v. Advanis Inc*., above; and secondly, the wording in clause (8.1) stating that "any amounts paid" to Howard upon dismissal shall be in accordance with the Employment Standards Act of Ontario [sic]. I accept the submissions of the plaintiff in this regard and I reject the contrary submissions of the defendant.

[56] Counsel for the plaintiff also refers to the dictum in *Miller*, above, in which dealing with the termination clause of an employment contract substantially similar in effect to clause (8.1), Glithero J. held the clause was unenforceable on the basis that it failed to provide for the continuation of benefits during the plaintiff's *E.S.A.* notice period, "or in the alternative, the clause was ambiguous in this respect, hence attacking resolution of that ambiguity against the defendant pursuant to the principle of *contra proferentem*."

[57] As previously noted, the position of the defendant is that there is no ambiguity in clause (8.1) and the provisions in clause (8.1) do not provide for less than the minimum standards in the *E.S.A.* and accordingly cannot be found to be null and void and thus unenforceable. In any event, as an alternative argument, counsel for the defendant contends that the entitlement set out in clause (8.1) to amounts to be paid and determined in accordance with the *E.S.A.* is sufficiently clear and unambiguous to rebut the presumption of common law reasonable notice.

[58] I am persuaded that having regard to the context of the plaintiff's employment with the defendant, the provisions of the Employment Contract as a whole subject to the provisions of the *E.S.A.* and the language used in clause (8.1) in particular do not support the proposition put forward by the defendant. I regard the language used in clause (8.1) to be sufficiently ambiguous as to the true extent of the plaintiff's entitlement under the *E.S.A.* and in the result, that ambiguity must be construed against the defendant again having regard to the power imbalance that exists between an employer and employee as a matter of course. Although an employment contract in most instances, such as the present, is not a contract of adhesion in the same way a policy of insurance is a contract of adhesion, I am not prepared to find that the Employment Contract as a whole and clause (8.1) in particular operate to nullify, or detract from, an

implied term under the common law requiring "reasonable notice" for the termination of the employment of the plaintiff.

[59] In this regard, I adopt the approach taken by Aston J. in *Dwyer v. Advanis Inc.,* above.

Whether There is a Genuine Issue for Trial

[60] My conclusion that clause (8.1) is unenforceable leads to consideration of whether there remains a genuine issue for trial. I conclude there remains a genuine issue for trial which I interpret as a question of mixed fact and law. This issue may be simply put as follows: what is the reasonable notice period attributable to the defendant's termination of the plaintiff's employment according to common law.

[61] Counsel for the defendant in dealing with the requirement of a genuine issue for trial refers at length to the provisions of Rule 20.04(2) of the *Rules of Civil Procedure*. Counsel directs the courtès attention to Rule 20.04(2)(a) and (2.1), as follows:

> **R. 20.04**
>
> (2) The court shall grant summary judgment if,
>
> (a) the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence; or
>
> …

> (2.1) In determining under clause (2) (a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:
>
> 1. Weighing the evidence.
> 2. Evaluating the credibility of a deponent.
> 3. Drawing any reasonable inference from the evidence.
>
> …

[62] Counsel submits that a judge hearing a Rule 20 motion must determine if the use of the powers under clause (2.1), above, would not be against the interest of justice meaning that their use will lead to a fair and just result that will serve the goals of timeliness, affordability and proportionality in light of the litigation as a whole. Counsel also notes that the moving party on a motion for summary judgment is required to put his or her best foot forward on the motion. At a minimum this would require providing sworn evidence on critical points, thus exposing those points to cross-examination. Absent such evidence, the motion should be dismissed or an assumption drawn that the moving party is unable to attest to such facts: see *Combined Air Mechanical Services Inc. v. Flesch,* 2011 ONCA 764 (CanLII).

[63] Counsel for the defendant submits the plaintiff on this motion has failed to put his best foot forward and has failed to produce any evidence as to whether he has engaged in any efforts to secure alternate employment or earn mitigation income. Therefore counsel contends the evidence before the court is inadequate

to make dispositive findings with respect to the reasonableness of the plaintiff's search for reemployment which has a bearing on mitigation and the determination of the reasonable notice period. In the result, counsel argues that it is not in the interest of justice for the court to use its powers on this summary judgment motion to gather and assess the necessary evidence to make such a finding and that in the result the motion for summary judgment should be dismissed and a trial should be directed.

[64] I do not accept the argument of the defendant that a trial in the primary sense is required to determine the issue of the appropriate amount of reasonable notice having regard to mitigation issues.

[65] Rule 20.04(2.2) is of assistance in this regard.

> A judge may, for the purpose of exercising any of the powers set out in subrule (2.1), order that oral evidence be presented by one or more parties, with or without time limits on its presentation.

[66] Rule 20.04(3) provides:

> Where the court is satisfied that the only genuine issue is the amount to which the moving party is entitled, the court may order a trial of that issue or grant judgment with a reference to determine the amount.

[67] In my view, the question of the reasonable notice period and mitigation issues can be disposed of without the requirement of a full trial by using the powers under Rules 20.04(2.1) and (2.2). The court should be entitled to hear

oral evidence where such a procedure allows a just and fair adjudication on the merits and is a proportionate course of action in the circumstances.

[68] I believe this to be appropriate where the oral evidence required here is limited.

Disposition

[69] For the above reasons, a hearing (mini-trial) utilizing the powers under Rule 20.04(2.1) and (2.2) shall be held before me.

[70] In the interests of proportionality, I direct the parties to prepare concise affidavits respecting the efforts by the plaintiff to discharge his mitigation duties as well as any factors relating to reasonable notice. It shall then be open for the defendant to file any responding material by way of affidavit with respect to the mitigation issues and reasonable notice issues raised by the plaintiff. The parties will then have the opportunity to conduct such cross-examinations on the affidavit materials before me as they may deem appropriate.

[71] The parties then shall be in a position to make oral submissions on the appropriate notice period and mitigation issues in this case.

[72] I have allocated two full days for this hearing (mini-trial) which I anticipate should be more than sufficient. The dates for this hearing (mini-trial) will be

Tuesday the 20th and Wednesday the 21st of October, 2015. As of April 22, 2015, these dates are the only dates available in the interval. I am seized of this matter.

[73] Order accordingly.

_____

MacKenzie J.

Released: April 22, 2015

CITATION: Howard v. Benson Group, 2015 ONSC 2638
COURT FILE NO.: CV-14-870-0000
DATE: 20150422

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

JOHN HOWARD

Plaintiff

- and –

BENSON GROUP INC.

Defendant

REASONS FOR JUDGMENT

MacKenzie J.

Released: April 22, 2015

SCHEDULE "A" TO ENDORSEMENT DATED APRIL 22, 2015

Howard v. Benson

***Rules of Civil Procedure*, R.R.O. 1990, Regulation 194**

20.01 (1) A plaintiff may, after the defendant has delivered a statement of defence or served a notice of motion, move with supporting affidavit material or other evidence for summary judgment on all or part of the claim in the statement of claim.

20.04

(2) The court shall grant summary judgment if,

(a) the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence; or

(b) the parties agree to have all or part of the claim determined by a summary judgment and the court is satisfied that it is appropriate to grant summary judgment…

(2.1) In determining under clause (2) (a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:

1. Weighing the evidence.
2. Evaluating the credibility of a deponent.
3. Drawing any reasonable inference from the evidence…

Oral Evidence (Mini-Trial)

(2.2) A judge may, for the purposes of exercising any of the powers set out in subrule (2.1), order that oral evidence be presented by one or more parties, with or without time limits on its presentation…

Only Genuine Issue Is Amount

(3) Where the court is satisfied that the only genuine issue is the amount to which the moving party is entitled, the court may order a trial of that issue or grant judgment with a reference to determine the amount.

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

Definitions
1. (1) In this Act…

"benefit plan" means a benefit plan provided for an employee by or through his or her employer…

"prescribed" means prescribed by the regulations…

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…

Greater contractual or statutory right

(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…

No termination without notice

54. No employer shall terminate the employment of an employee who has been continuously employed for three months or more unless the employer,

(a) has given to the employee written notice of termination in accordance with section 57 or 58 and the notice has expired; or

(b) has complied with section 61.

Prescribed employees not entitled

55. Prescribed employees are not entitled to notice of termination or termination pay under this Part…

Employer notice period

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

(a) at least one week before the termination, if the employee's period of employment is less than one year;

(b) at least two weeks before the termination, if the employee's period of employment is one year or more and fewer than three years;

(c) at least three weeks before the termination, if the employee's period of employment is three years or more and fewer than four years;

(d) at least four weeks before the termination, if the employee's period of employment is four years or more and fewer than five years;

(e) at least five weeks before the termination, if the employee's period of employment is five years or more and fewer than six years;

(f) at least six weeks before the termination, if the employee's period of employment is six years or more and fewer than seven years;

(g) at least seven weeks before the termination, if the employee's period of employment is seven years or more and fewer than eight years; or

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

Notice, 50 or more employees

58. (1) Despite section 57, the employer shall give notice of termination in the prescribed manner and for the prescribed period if the employer terminates the employment of 50 or more employees at the employer's establishment in the same four-week period…

Requirements during notice period

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…

Pay instead of notice

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…

What constitutes severance

63. (1) An employer severs the employment of an employee if,

(a) the employer dismisses the employee or otherwise refuses or is unable to continue employing the employee…

Entitlement to severance pay

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.

Exceptions

(3) Prescribed employees are not entitled to severance pay under this section.

Calculating severance pay

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.