CITATION: *Bertsch v. DatastealthInc.*, 2024 ONSC 5593
COURT FILE NO.: CV-24-00724025-0000
DATE: 20241008

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
GAVIN BERTSCH	)	*Harleen Pentlia*, for the Plaintiff
	)	
Plaintiff	)	
– and –	)	
	)	
	)	
DATASTEALTH INC.	)	*Gabriel Latner*, for the Defendant
Defendant	)	
	)	
	)	
	)	
	)	
	)	**HEARD: OCTOBER 7, 2024**

STEVENSON J.

REASONS FOR DECISION

Introduction

[1] The plaintiff was employed by the defendant for about eight and a half months until his termination on June 7, 2024. The written employment agreement dated July 14, 2023 at paras. 5 and 11 (quoted below) limit his rights on termination to the minimal entitlements under the *Employment Standards Act*, 2000, S.O. 2000, c. 41 (the ESA). The agreement also provides that the plaintiff contracts out of common law notice requirements.

[2] On termination he was given four weeks' pay in lieu of notice, which was higher than the one week's pay he would have been entitled to under s. 57(a) of the ESA.

[3] The Plaintiff alleges these contractual provisions, which provide more limited compensation than he would obtain at common law, are not enforceable because they are ambiguous and fail to properly reference the statutory exemptions from compensation on

dismissal, in violation of the ESA and the relevant regulation, *Termination and Severance of Employment*, O. Reg. 288/01. The argument by the plaintiff that follows is that the termination provisions are void because they purport to allow termination for cause, without notice, "whether or not there was "wilful misconduct, disobedience or wilful neglect".

[4] On the basis that the contractual limitations are invalid the Plaintiff claims twelve months' pay in lieu of notice, i.e., about $300,000.

[5] This is a rule 21.01(1) motion by the defendant, employer, to determine the interpretation of the relevant contractual provisions as a matter of law and to strike out or dismiss the claim as disclosing no tenable cause of action.

[6] At the motion the plaintiff abandoned his secondary argument that the termination provisions wrongly denied the plaintiff his right to benefits' continuation by leaving that issue to the insurer's approval at termination.

[7] The sole issue on the motion therefore was the proper interpretation of the following terms and whether they breached the ESA and O.Reg 288/01.

The Contractual Terms

> 5. Termination of Employment by the Company: If your employment is terminated with or without cause, you will be provided with only the minimum payments and entitlements, if any, owed to you under the [ESA] and its Regulations,…including but not limited to outstanding wages, vacation pay, and any minimum entitlement to notice of termination (or termination pay), severance pay (if applicable) and benefit continuation. You understand and agree that, in accordance with the ESA, there are circumstances in which you would have no entitlement to notice of termination, termination pay, severance pay or benefit continuation.
>
> You understand and agree that compliance with the minimum requirements of the ESA satisfies any common law or contractual entitlement you may have to notice of termination of your employment, or pay in lieu thereof. You further understand and agree that this provision shall apply to you throughout your employment with the Company, regardless of its duration or any changes to your position or compensation."
>
> 11.(a) If any of your entitlements under this Agreement are, or could be, less than your minimum entitlements owning under the [ESA] …you shall instead receive your minimum entitlements under the [ESA]…
>
> (h) This Agreement constitutes the complete understanding between you and the Company with respect to your employment, and no statement, representation, warranty or covenant have been made by you or the Company with respect to this Agreement except as expressly set forth herein. The parties have expressly contemplated whether there are any additional implied duties owed by the

> Company to you, at common law or otherwise, outside the written terms of the Agreement or under statute and confirm that there are no such obligations. This Agreement shall not be altered, modified, amended or terminated unless evidenced in writing by the Company."
>
> (k)… The invalidity, for any reason, of any term of this Agreement shall not in any manner invalidate or cause the invalidation of any other term thereof…"

Arguments

[8] The question of invalidity turns on whether these contractual terms fail to properly reference the employer's obligation in O.Reg. 288/01 to pay termination pay and severance (if the latter is applicable) unless the employee engaged in "wilful misconduct, disobedience or wilful neglect of duty".

[9] There is no doubt that these categories of "cause" are only a limited subset of what would constitute "just cause" for dismissal at common law.

[10] It is common ground that a contractual term which precludes compensation for any "just cause" dismissal would be unenforceable because it would breach the ESA, and specifically O.Reg 288/01. This is because it would deny compensation to employees who may have been dismissed for a common law "just cause" but not for a reason which precludes mandatory payment under the ESA because it is not e.g., "wilful misconduct, disobedience or wilful neglect of duty."

[11] It is argued by the Plaintiff that the relevant clause here is void and unenforceable because it fails to properly reference the statutory exemptions under the regulation.

[12] The plaintiff also says that rule 21 cannot be applied in circumstances like these because the contractual provisions must be interpretated having regard to all the circumstances which surrounded the formation of the contract.

[13] The defendant employer says this termination provision does not contravene the ESA. It argues that the Plaintiff's claim is untenable and should be dismissed.

[14] The defendant says that the use of rule 21 is just and proportionate given that there are no facts in dispute. In relying on rule 21 the Defendant agrees that it must satisfy the court that it is plain and obvious that the termination provision is not illegal.

Rule 21

[15] There is no reason why a rule 21 motion cannot succeed in a claim for breach of contract. While the circumstances in which the contract was signed may sometimes be in dispute and may require a trial for a fair adjudication, this is not always the case. Conway J. in *Lincoln Canada Services LP v. First Gulf Design Build Inc.*, 2007 CanLII 45712 at para. 6-12, aff'd 2008 ONCA 528, found in that case that no facts were in dispute relating to circumstances when the contract was made. Deciding the case under rule 21 was an efficient use of the court process. No additional evidence would be available at trial which would be relevant to the determination of the points of

law. The claim was struck out as disclosing no tenable cause of action because it was barred by the terms of a lease.

[16] Under Rule 21.01(1)(a) no evidence is admissible except with leave or on consent. The pleaded facts are assumed to be true. While the interpretation of this employment agreement is a mixed question of fact and law this does not mean that all issues of contract interpretation must proceed to a trial. *Sattva Capital v. Creston Moly Corp*, 2014 SCC 53 at para 58.

[17] The current case is a good example where the court's interpretation of the agreement at this stage will be useful, efficient and just. The question whether the plaintiff is to be paid the minimum ESA requirements or whether the clause is void and unenforceable can readily be determined now. There are no disputed facts with respect to the interpretation of the contract, as opposed to whether the plaintiff was wrongfully dismissed. *OHL Construcion Canada v. TTC* 2015 ONCS 2712 at para. 23

Decision

[18] I accept that employment termination provisions must clearly comply with the ESA and if they do not, they will be treated as void.

[19] The termination provision to be valid must not potentially contravene the ESA and its regulations; and it must properly exclude common law notice. *Machtinger v. HOJ Industries* [1992] 1 S.C.R. 986, at 1104.

[20] I find that this clause does not result in any breach of the ESA or O.Reg 288/01. In that respect it is like *Amberger v. IBM Canada Ltd.*, 2018 ONCA 571 at paras 13-14. *Nemeth v. Hatch Ltd.* 2018 ONCA 7 at para.3, *Roden v. Toronto Humane Society* 2005, CanLII 33578 at paras. 55 and 62 and *Clarke v. Insight Components (Canada) Inc.*, 2008 ONCA 837.

[21] There is no reasonable alternative interpretation of the relevant clauses here that might result in an illegal outcome i.e., there is no reasonable interpretation which would be contrary to the minimum requirements of the ESA and regulations.

[22] I accept there is a presumptive power imbalance between the employer and the employee, and that any ambiguity will be read to the benefit of the employee. But I do not find any ambiguity here.

[23] I agree that the interpretation and application of the termination clause is not a simple matter. But that is partly because the law is not very straight forward in respect of these issues. Many a lawyer has struggled to understand the distinctions being discussed and to predict the likely outcome if one of these claims is litigated. Any employee would benefit from legal advice before signing any such agreement. But the contractual terms here, while not simple, are clear and unambiguous.

[24] The defendant relies on *Donaghy v. Seasons Retirement Communities* 2021 ONSC 6197 at paras. 16-17 to argue that rule 21 is inapplicable. But in *Donaghy* the employee argued the lack of benefits' continuation upon notice of termination was a basis for claiming illegality under the

ESA regulations. But in that case the issue of whether the employer breached O.Reg 288/01 when the contract did not specify continuation of benefits on termination required trial because the issues around the compensation package would still have had to be dealt with at the simplified trial. (*Donaghy* at para. 24). In this case, unlike *Donaghy*, granting the motion will dispose of the claim in its entirety.

[25] The leading case of *Waksdale v. Swegon North America Inc.*, 2020 ONCA 391 paras. 2-7 establishes that even if a "without cause" provision complies with the ESA it will be unenforceable if the "with cause" provision does not comply with the ESA. The "correct analytical approach is to determine whether the termination provisions in an employment agreement read as a whole violate the ESA." (para. 10).

[26] I have done that I have also considered *Summers v. Oz Optics Limited* 2022 ONSC 6225 at para. 5, aff'd 2023 ONSC (Div Ct) 5558 at paras 15 (re interpretation of employment agreements) and 20-31 (re the application of *Waksdale*). I agree with the plaintiff's observation that the fact that the employee was paid more than the ESA provision is irrelevant if the term otherwise violates the ESA. But the terms here do not violate the ESA.

[27] This is not a case like *Tan v. Stostac Inc.* 2023 ONSC 2121 or *Livshin v. The Clinic Network Canada Inc.* 2021 ONSC 6796. *Livshin* dealt with an employment agreement negotiated as part of a commercial transaction and it was argued the usual power imbalance between employer and employee was absent. The clause there was found to be contrary to the ESA because it allowed the employer to terminate the employee at any time, without notice for just cause.

[28] This is very different from the clause before the court because in *Livshin* the terms contravened the ESA for the reasons set out in *Waksdale*. That is not the case here. The arguable lack of power imbalance which normally exists (*Fred Deeley* at para. 28; *Livshin* at para. 54) did not affect the court's analysis in *Livshin* and in any event, I accept that a presumed power imbalance exists in this case. But that does not change the outcome where the proper meaning of the clause is clear.

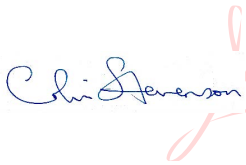
[29] There was also a "failsafe" clause in *Livshin* but it stated only that if a contractual term was found to be unenforceable for any reason, that finding would not affect any other term of the agreement. Such a clause could not, however, save an illegal clause. *Livshin* at para 59-68 and *Amberger v. IBM Canada Ltd.*, 2018 ONCA 571 at paras 13-14.

[30] But the failsafe clause relied on here is s. 11(a) which provides only that the terminated employee gets at least the minimum they are entitled to under the ESA. This is not the same as the severability clause in s. 11(k) which, as in *Livshin*, has no application to this case. In any event the failsafe clause is not needed here. Para. 5 is clear and unambiguous. The defendant did not breach the contract when it gave notice as it did.

[31] The exclusion of common law notice in this case is clear and it is enforceable. The limitation of compensation is also clear and enforceable.

[32] The claim is struck out without leave to amend.

[33] The parties agreed that the fair and reasonable quantum of costs on a partial indemnity basis is $6000 all inclusive. This sum is payable by the plaintiff to the defendant within 30 days.



Justice C. Stevenson

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