

CITATION: Clarke v. Insight Components (Canada) Inc., 2008 ONCA 837
DATE: 20081211
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COURT OF APPEAL FOR ONTARIO

Sharpe, Blair and Rouleau JJ.A.

BETWEEN

Robert Clarke

Plaintiff (Appellant)

and

Insight Components (Canada) Inc.

Defendant (Respondent)

Warren Rapoport and Wojtek Jaskiewicz, for the appellant

Jonathan Dye and Sébastien Lorquet, for the respondent

Heard: December 4, 2008

On appeal from the judgment of Justice G. Gordon Sedgwick of the Superior Court of Justice dated June 25, 2007.

By the Court:

[1] The appellant appeals the dismissal of his claim for common law severance damages for wrongful dismissal. The central issue on this appeal is whether the trial judge erred in limiting the appellant's entitlement to the minimum required by the *Employment Standards Act*, S.O. 2000, c. 41 ("ESA") on the basis of the following clause incorporated into the written memorandum, signed by the appellant, setting out the terms of his employment:

Termination of Employment – Your employment may be terminated for cause at any time in which event you shall be entitled to only the amount of your salary and vacation pay earned up to the effective date of termination. Your employment may be terminated without cause for any reason *upon the provision of reasonable notice equal to the requirements of the applicable employment or labour standards legislation. By signing below, you agree that upon the receipt of your entitlements in accordance with this legislation, no further amounts will be due and payable to you whether under statute or common law.* [Emphasis added.]

[2] The trial judge provided detailed reasons for judgment rejecting the submission that this clause was ambiguous and holding that it was supported by consideration and enforceable against the appellant. The appellant raises four grounds of appeal.

1. Is the termination clause ambiguous?

[3] The appellant submits that this clause is ambiguous because it provides for “reasonable notice”. As s. 5(2) of the *ESA* provides that an employee is entitled to the benefit of any contractual provision for greater benefits than those conferred by the Act, the appellant submits that he is entitled to reasonable notice according to the common law standard.

[4] We disagree. In our view the effect of this clause is clear. The words “reasonable notice” cannot be read in isolation. They must be read in the context of the clause as a whole. When read in their proper context, the words “reasonable notice” cannot be taken to import the general common law standard. Rather, the clause clearly provides that the reasonable notice period to which the employee is entitled is “equal to the requirements of the applicable employment or labour standards legislation.” To resolve any possible doubt, the concluding words of the clause exclude any further amounts “whether under statute or common law.”

2. Is the termination provision void at law?

[5] The appellant submits that the termination provision is void because it excludes entitlement to claims that could arise under other statutes, for example, the *Human Rights Code*. In support of this argument, the appellant relies on *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986.

[6] *Machtinger* is distinguishable. It considered an employment contract which failed to meet the minimum notice requirements of the *ESA*. The rationale behind *Machtinger* is that an employer who drafts a clause that attempts to avoid the minimum statutory

notice requirements cannot rely on such a clause to show that the intent of the parties was to provide the minimum statutory notice. The provision at issue here meets that statutory standard. The *ESA* is the only statute applicable in this case. Whether the provision would be effective to bar other statutory claims simply does not arise. In our view, the possibility that a court might not enforce the provision in the face of some other statute has no bearing on its enforceability in relation to the minimum notice period.

3. Is the termination provision supported by consideration?

[7] The appellant was first employed by the respondent in July 1995. The termination provision was first introduced into the appellant's employment contract in December 2000 under a company-wide policy that all employees at his level should be subject to such a provision. In April 2001 the appellant was given a significant promotion: he became the “Managing Director for the Canada Region”. The appellant signed a written memorandum indicating his agreement to the terms for this position. That memorandum included details of the compensation he would receive and also included the impugned termination provision.

[8] The appellant submits that the termination provision is unsupported by consideration. He argues that as he had assumed the position of managing director some two and a half weeks before he signed the memorandum, the termination provision was unilaterally imposed by the respondent after the fact.

[9] The trial judge rejected this submission and we see no error in that regard.

[10] First, the trial judge held that when the termination provision was first included as a term of the appellant's employment contract in December 2000, effective January 2001, it was supported by consideration. At that time significant changes were made to the appellant's remuneration package including some improvements. We agree with the trial judge that these changes provided consideration to support the termination provision. If the termination provision was enforceable as of January 2001, it clearly remained enforceable under the April 2001 agreement.

[11] Second, and in any event, we agree with the trial judge's conclusion that the termination provision in the April 2001 agreement was supported by consideration given at the time the appellant was promoted. There is no doubt that the enhanced position and remuneration attached to the position of Managing Director was capable of providing any consideration that might be necessary to support the enforceability of the termination clause. The fact that the memorandum of agreement containing this provision was not signed until some time after the appellant was awarded the position did not render the

termination clause unenforceable. The trial judge found as a fact that when the appellant agreed to assume his new position in April 2001, he was aware of the company-wide policy that required this termination provision. We see no basis to interfere with this factual finding. The appellant was a senior management employee (the company's most senior in Canada) who had been involved in terminations and his own agreement already contained a termination clause in precisely the same terms. Simply put, when the appellant agreed to accept promotion to the position of managing director with all the benefits that position entailed, on the findings of the trial judge which were supported by the evidence, he knew that the termination clause was a necessary part of his employment package. The situation is distinguishable from cases such as *Francis v. Canadian Imperial Bank of Commerce* (1994), 21 O.R. (3d) 75 (C.A.) and *Braiden v. La-Z-Boy Canada Ltd.* (2008), 294 D.L.R. (4th) 172 (C.A.) where termination clauses were unilaterally inserted by the employer with no countervailing benefit being extended to the employee.

4. Is the respondent disentitled to rely on the termination clause because of repudiation or failure to pay the minimum ESA requirements?

[12] The appellant submits that the respondent repudiated its agreement by failing to give the time prescribed by a company policy to consider its initial severance offer which included benefits in excess of the minimum *ESA* requirements.

[13] It is clear on the record that the appellant immediately rejected the respondent's offer. He did not ask for more time to consider it. In the face of his immediate rejection we fail to see how the minimum time period in the company's policy can have any bearing on this case.

[14] The appellant further submits that the respondent failed to pay him all the amounts required under the *ESA* and, having failed to meet that minimum standard, it cannot rely on the termination clause. In this regard, the appellant asserts a claim for a car allowance and for an "EBITDA bonus".

[15] We reject this submission on the ground that these claims were not pleaded, no evidence was led at trial to make the case that the appellant was entitled to these amounts, and the ground was not raised in the Notice of Appeal. Moreover, we note that a claim for the EBITDA bonus was raised in argument before the trial judge as to the appropriate common law damages. In his consideration of common law damages, the trial judge found that the appellant did not qualify for the amount claimed under the terms of the EBITDA program. We see no reason to interfere with that finding.

[16] Finally, even if the appellant were entitled to something for the car allowance and the EBITDA bonus, this would not amount to a repudiation requiring the respondent to

pay full common law damages for wrongful dismissal. The appellant's only remedy would be judgment for any amount he was owed.

Conclusion

[17] Accordingly, the appeal is dismissed. We were alerted by counsel that offers to settle could have a bearing on costs. Unless we receive written submissions within 10 days from the release of these reasons indicating that we should make some other award in view of an offer to settle, the respondent is awarded costs fixed at \$30,000 inclusive of disbursements and GST.

“Robert J. Sharpe J.A.”

“R.A. Blair J.A.”

“Paul Rouleau J.A.”

RELEASED: December 11, 2008