COURT FILE NO.: CV-23-81238
DATE: 20220621

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
KIM KOPYL	)	A. Van Kralingen, for the Applicant
	)	
Applicant	)	
	)	
- and -	)	
	)	
LOSANI HOMES (1998) LTD. o/a LOSANI HOMES	)	J. Dye, for the Respondent
	)	
Respondent	)	
	)	
	)	**HEARD:** June 20, 2023

REASONS FOR DECISION

The Honourable Justice R. J Harper

The Issues

[1] This is an application that requests the interpretation of a one-year, fixed-term employment agreement between the Applicant, Kim Kopyl (Kopyl) and the Respondent, Losani Homes (1988) LTD. (Losani).

[2] Two discrete issues are presented for the court's determination:

(a) Does a fixed term of a contract of employment constitute a termination clause?

(b) If other terms of the contract contain termination clauses that are void as being noncompliant with the *Employment Standards Act*, 2000, S.O. 2000, c.41 (ESA), does that render the one-year term contract void?

The Position of Kopyl

[3] Kopyl submits that an employment contract that is for a fixed term is not the same as a termination clause. If other terms that contain termination clauses are found to be void, that does not void the term limit of the contract.

[4] Kopyl submits that she should be entitled to receive the amount of money she would have been entitled to pursuant to the employment contract until the end of the term of that contract.

[5] Kopyl relies on the Ontario Court of Appeal decision in *Howard v. Benson Group Inc. (The Benson Group Inc.)*, 2016 ONCA 256. In that case, the Ontario

Court of Appeal set out some of the general principles that are applicable to the issue of termination clauses commencing at para. 20:

> [20] There is a common law presumption that every employment contract includes an implied term that an employer must provide reasonable notice to an employee prior to the termination of employment. Absent an agreement to the contrary, an employee is entitled to common law damages as a result of the breach of that implied term: *Bowes v. Goss Power Products Ltd.*, [2012] O.J. No. 2811, 2012 ONCA 425, 351 D.L.R. (4th) 219, at para. 23. This presumption can only be rebutted if the employment contract "clearly specifies some other period of notice, whether expressly or impliedly": *Machtinger v. HOJ Industries Ltd.*, 1992 CanLII 102 (SCC), [1992] 1 S.C.R. 986, [1992] S.C.J. No. 41, at p. 998 S.C.R.; *Ceccol v. Ontario Gymnastic Federation* (2001), 2001 CanLII 8589 (ON CA), 55 O.R. (3d) 614, [2001] O.J. No. 3488 (C.A.), at para. 45. The question, then, is whether the motion judge erred in holding that the employment contract, without clause 8.1, failed to rebut that presumption by clearly specifying some other period of notice, expressly or impliedly.
>
> [21] In my view, the motion judge erred in so holding. Where an employment agreement states unambiguously that the employment is for a fixed term, the employment relationship automatically terminates at the end of the term without any obligation on the employer to provide notice or payment in lieu of notice. Such a provision, if stated unambiguously, will oust the implied term that reasonable notice must be given for termination without cause: *Lovely v. Prestige Travel Ltd.*, [2013] A.J. No. 901, 2013 ABQB 467, 568 A.R. 215, at para. 135; *Ceccol*, at para. 25.
>
> [22] Of course, parties to a fixed term employment contract can specifically provide for early termination and, as in *Bowes*, specify a fixed term of notice or payment in lieu. However, and on this point the appellant and the respondent agree, if the parties to a fixed term employment contract do not specify a predetermined notice period, an employee is entitled on early [page683] termination to the wages the employee would have received to the end of the term: *Lovely*, at para. 136; *Bowes*, at para. 26; *Canadian Ice Machine Co. v.*

> *Sinclair*, 1955 CanLII 44 (SCC), [1955] S.C.R. 777, [1955] S.C.J. No. 56, at p. 786 S.C.R.

[6] In this case, Kopyl argues that since the termination clauses are void, Kopyl is entitled to wages she would have received to the end of her term pursuant to *Howard*. In the case before me, the contract of employment did provide for early termination. The contract contains a clause that deals with "Termination for Cause" and a further clause that provides for "Termination on Notice." The termination clauses purportedly limited Kopyl's entitlement to pay upon termination. However, as alluded to earlier, counsel concede that those provisions in this contract are void as being contrary to the ESA and its associated regulations.

[7] Kopyl's employment contract had a start date of July 6, 2022. It was for a one-year term. Her base salary was $150,000.00 per annum plus company benefits.

[8] Losani submits that in a later decision, the Ontario Court of Appeal also dealt with the issue of termination clauses in *Waksdale v. Swegon North America Inc*., 2020 ONCA 391. The Court stated commencing at para. 7:

> [7] The law regarding the interpretation of termination clauses in employment contracts was helpfully summarized by Laskin J.A. at para. 28 of *Wood v. Fred Deeley Imports Ltd.*, 2017 ONCA 158, 134 O.R. (3d) 481. The following points from that summary are particularly apt for the purposes of this appeal:

- The ESA is remedial legislation, intended to protect the interests of employees. Courts should thus favour an interpretation of the ESA that "encourages employers to comply with the minimum requirements of the Act" and "extends its protections to as many employees as possible", over an interpretation that does not do so: *Machtinger*, p. 1003.

- Termination clauses should be interpreted in a way that encourages employers to draft agreements that comply with the ESA. If the only consequence employers suffer for drafting a termination clause that fails to comply with the ESA is an order that they comply, then they will have little or no incentive to draft a lawful termination clause at the beginning of the employment relationship: *Machtinger*, p. 1004.

[8] Laskin J.A. went on to observe that the enforceability of a termination provision in an employment contract must be determined as at the time the agreement was executed. The wording of the contract alone should be considered in deciding whether it contravenes the *ESA*, not what the employer might have done on termination: *Wood*, at paras, 43-44. Thus, even if an employer's actions comply with its *ESA* obligations on termination, that compliance does not have the effect of saving a termination provision that violates the *ESA*.

[9] The court went on to state at paras. 10-12:

[10] We do not give effect to that submission. An employment agreement must be interpreted as a whole and not on a piecemeal basis. The correct analytical approach is to determine whether the termination provisions in an employment agreement read as a whole violate the *ESA*. Recognizing the power imbalance between employees and employers, as well as the remedial protections offered by the *ESA*, courts should focus on whether the employer has, in restricting an employee's common law rights on termination, violated the employee's *ESA* rights. While courts will permit an employer to enforce a rights-restricting contract, they will not enforce termination provisions that are in whole or in part illegal. In conducting this analysis, it is irrelevant whether the termination

> provisions are found in one place in the agreement or separated, or whether the provisions are by their terms otherwise linked. Here the motion judge erred because he failed to read the termination provisions as a whole and instead applied a piecemeal approach without regard to their combined effect.
>
> [11] Further, it is of no moment that the respondent ultimately did not rely on the Termination for Cause provision. The court is obliged to determine the enforceability of the termination provisions as at the time the agreement was executed; non-reliance on the illegal provision is irrelevant.
>
> [12] The mischief associated with an illegal provision is readily identified. Where an employer does not rely on an illegal termination clause, it may nonetheless gain the benefit of the illegal clause. For example, an employee who is not familiar with their rights under the *ESA*, and who signs a contract that includes unenforceable termination for cause provisions, may incorrectly believe they must behave in accordance with these unenforceable provisions in order to avoid termination for cause. If an employee strives to comply with these overreaching provisions, then his or her employer may benefit from these illegal provisions even if the employee is eventually terminated without cause on terms otherwise compliant with the *ESA*.

[10] Is a term in an employment contract that fixes the term of the contract a termination clause? If so, does that clause fall along with the other illegal termination clauses?

[11] I find that a clause that fixes a term of the contract clearly and unambiguously to a defined term limit cannot be considered in the same light as a term in an employment contract that provides for early termination.

[12] I am guided in this conclusion by the Court of Appeal in *Howard*, at para. 20:

> … Where an employment agreement states unambiguously that the employment is for a fixed term, the employment relationship automatically terminates at the end of the term without any obligation on the employer to provide notice or payment in lieu of notice.

[13] The mischief in termination clauses that is to be guarded against deal with cases where early termination clauses attempt to limit payment upon early termination that an employee is otherwise entitled to by statute or operation of the common law.

[14] *Waksdale* makes it clear that:

> …An employment agreement must be interpreted as a whole and not on a piecemeal basis. The correct analytical approach is to determine whether the termination provisions in an employment agreement read as a whole violate the *ESA*. Recognizing the power imbalance between employees and employers, as well as the remedial protections offered by the *ESA*, courts should focus on whether the employer has, in restricting an employee's common law rights on termination, violated the employee's *ESA* rights. While courts will permit an employer to enforce a rights-restricting contract, they will not enforce termination provisions that are in whole or in part illegal.

[15] There is nothing illegal in setting out the term limit of an employment contract. Fixed term contracts do not offend any provision of the ESA, nor do they restrict any common law rights of an employee. There is not mischief to be protected against in such circumstances.

[16] In my view, if the separate and distinct termination clauses are void, that does not void the whole contract and that includes the time limitation set out in a fixed contract.

[17] As a result, Kopyl is entitled to the wages and benefits she would have otherwise been entitled to until the end of the term.

Justice R.J. Harper

Released: June 21, 2023

COURT FILE NO.: CV-21-75581
DATE: 20230621

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B E T W E E N:

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Applicant

- and –

LOSANI HOMES (1998) LTD. o/a LOSANI HOMES

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