In the Court of Appeal of Alberta

Citation: Bryant v Parkland School Division, 2022 ABCA 220

Date: 20220615
Docket: 2103-0139AC
Registry: Edmonton

Between:

Thomas Bryant, Natalie Dzioba, and Silke Larison

Appellants

- and -

Parkland School Division

Respondent

Corrected judgment: A corrigendum was issued on June 16, 2022; the corrections have been made to the text and the corrigendum is appended to this judgment.

The Court:

The Honourable Justice Marina Paperny
The Honourable Justice Frans Slatter
The Honourable Justice Kevin Feehan

Memorandum of Judgment of the Honourable Justice Paperny and the Honourable Justice Feehan

Dissenting Memorandum of Judgment of the Honourable Justice Slatter

Appeal from the Decision by
The Honourable Justice T.G. Rothwell
Dated the 18th day of May, 2021
(2021 ABQB 391, Docket: 1503 03278)

Memorandum of Judgment

The Majority:

Introduction

[1] Thomas Bryant, Natalie Dzioba and Silke Larison, the three individual appellants, were all long-term employees of the respondent Parkland School Division (the employer). Two were hired in 1999 and the third in 2004. All three signed a standard form employment contract, the terms of which had been drafted by the employer. All three employees were terminated without cause by the employer on June 2, 2014 and each received 60 days' notice. The employees brought an action claiming notice above and beyond the 60 day period in accordance with the common law requirement of reasonable notice.

[2] Cross-applications for summary judgment and summary dismissal were heard by a chambers judge, who found that the employment contracts were neither silent nor ambiguous as to termination notice and as such there was no basis upon which the common law requirement of reasonable notice could be implied: *Bryant v Parkland School Division*, 2021 ABQB 391. The employees appeal.

Facts

[3] The appellants, all employees of Parkland School Division, worked primarily in information technology. Bryant was hired in December 2004, Dzioba in December 1999, and Larison in October 1999. On June 2, 2014, the employees were terminated without cause and each received 60 days' notice. Bryant had been employed by the respondent for almost 10 years, and Dzioba and Larison for almost 15.

[4] The chambers judge summarily dismissed the employees' claims for notice beyond the 60 days they received. In doing so, he interpreted the termination clause in the employment contracts, which reads as follows:

> This contract may be terminated by the Employee by giving to the Board thirty (30) days or more prior written notice, and by the Board upon giving the Employee *sixty (60) days or more* written notice. [emphasis added]

[5] The employees gave evidence as to their understanding of the clause, including that it was meant to set a minimum amount of notice and severance at termination would be based on years of service. Larison swore that she questioned what was meant by "60 days or more", was advised that it was intended to set a minimum, and that the amount of notice would increase with length of service.

[6] An affidavit from one of the drafters of the employment contracts was to similar effect; the intention of the clause was that as an employee's employment continued they would receive more notice.

The Decision Below

[7] In summarily dismissing the employees' claims, the chambers judge considered the meaning of the words "60 days or more" in the clause. He found that "[i]f the contract contained only the words '60 days' it would be abundantly clear that [the employer] had fixed notice at 60 days". However, he found that the inclusion of the words "or more" did not render the clause ambiguous "merely because an employee is unable to ascertain how much notice in excess of 60 days they may receive".

[8] The chambers judge found that the clause was not ambiguous and not reasonably subject to more than one meaning. He found that on a plain reading, it provided for a fixed level of notice (60 days) for all employees and allowed the employer to give a greater amount of notice at the employer's discretion. He concluded that the common law does not imply a right to reasonable notice when a contract unambiguously addresses termination, and that the clause clearly and unequivocally set a notice period.

[9] Because he did not find the contract to be ambiguous and because the contract contained an entire agreement clause, the chambers judge declined to consider the evidence that had been led by the employees with respect to the meaning of the clause.

Standard of Review

[10] The interpretation of standard form contracts is reviewed for correctness: *Ledcor Construction Ltd v Northbridge Indemnity Insurance Co*, 2016 SCC 37 at para 46. Where the contract is not properly characterized as standard form, interpretation is a question of mixed fact and law reviewable for palpable and overriding error: *Holm v AGAT Laboratories Ltd*, 2018 ABCA 23 at para 15.

[11] The chambers judge characterized the employment contract as a standard form contract. It is unnecessary to enter into that analysis for purposes of this appeal, however, as on either standard the finding of the chambers judge that the notice provision in the clause is unambiguous is not sustainable.

Analysis

[12] In Canada, different principles apply to the interpretation of employment contracts as opposed to other commercial contracts: *Globex Foreign Exchange Corporation v Kelcher*, 2011 ABCA 240 at paras 6-7; *Wallace v United Grain Growers Ltd*, [1997] 3 SCR 701 at pp 740-41. Courts recognize the power imbalance and inequality of bargaining power inherent in the

employment relationship, and the limited opportunity of employees to negotiate contractual terms. Moreover, courts have repeatedly recognized the significance of work (and the manner in which employment can be terminated) to an individual's life and well-being: see *Reference Re Public Service Employee Relations Act (Alta)*, [1987] 1 SCR 313 at p 368; *Machtinger v HOJ Industries Ltd*, [1992] 1 SCR 986 at para 30*; Wallace* at paras 93-95.

[13] Interpretive principles have therefore evolved to protect employees. One such principle is that, "in employment law, uncertainty ought to be resolved in favour of the employee": *Holm* at para 34. The Ontario Court of Appeal put it this way: "[f]aced with a termination clause that could reasonably be interpreted in more than one way, courts should prefer the interpretation that gives the greater benefit to the employee": *Wood v Fred Deeley Imports Ltd*, 2017 ONCA 158 at para 28; see also *Miller v Convergys CMG Canada Limited Partnership*, 2014 BCCA 311 at para 15; *Singh v Qualified Metal Fabricators Ltd*. (2016), 33 CCEL (4th) 308 at para 15.

[14] Another relevant and long-standing principle is that employment contracts are presumed to contain an implied term requiring an employer to provide reasonable common law notice of dismissal: *Machtinger* at 998; *Globex* at para 9; *Howard v Benson Group Inc (The Benson Group Inc)*, 2016 ONCA 256 at para 20. While it is open to an employer to include language in the contract rebutting that presumption, the language must be "clear and unambiguous" to be effective. Courts have also said the contract must contain language that is "clear and unequivocal", or that meets a requirement for a "high level of clarity", to extinguish the common law right to reasonable notice: *Howard* at para 20; *Holm* at para 21; *Matthews v Ocean Nutrition Canada Ltd*, 2020 SCC 26 at para 61.

[15] The starting point, then, is that there is a presumption of an implied term requiring the employer to provide reasonable common law notice on dismissal. Only where the employment contract unambiguously limits or removes that right will the presumption be rebutted, and the implied term ousted. The chambers judge did not begin his analysis with these principles at the forefront.

[16] When these interpretive principles are properly applied, it is clear the clause does not unambiguously limit the employees' right to common law reasonable notice. The clause does not clearly fix the employees' notice entitlement. It does not impose an upper limit on the amount of notice an employee is entitled to receive. It does not suggest that 60 days is the maximum notice to which an employee is entitled. To the contrary, it explicitly provides that an employee can be entitled to more notice. The inclusion of the words "or more" recognizes a longer notice period as a realistic possibility.

[17] The chambers judge noted that "if the contract contained only the words '60 days' it would be abundantly clear that [the employer] had fixed its notice at 60 days". We agree. Such language would have been clear and unambiguous. But that is not what the clause says. The chambers judge concluded the employer had given itself the discretion to decide the amount of notice owing to an employee. That seems a questionable conclusion. If that was intended the employer could have

written the contract to clearly say so. Another, and more reasonable, interpretation is that the employer intended the notice period to be in accordance with common law standards, subject to a minimum notice period of 60 days.

[18] The key point is that the clause is not sufficiently clear, unequivocal and unambiguous to remove or limit the presumed common law right of the employees to reasonable notice. The reading more favourable to the employee must prevail.

Conclusion

[19] The appeal from summary dismissal of the employees' claims is allowed and summary judgment is granted in favour of the appellants. They are each entitled to reasonable notice in accordance with the common law. The length of that notice is referred back to the Court of Queen's bench for determination, if the parties cannot agree.

Appeal heard on June 9, 2022

Memorandum filed at Edmonton, Alberta
this 15th day of June, 2022

Authorized to sign for: Paperny J.A.

Feehan J.A.

Slatter J.A. (dissenting):

[20] The issue on this appeal is the amount of notice to which the appellants were entitled when their employment contracts were terminated without cause. The appellants argue that they were entitled to "reasonable common law notice but not less than 60 days". The chambers judge accepted the respondent's argument that the appellants were only entitled to 60 days notice under the terms of their employment contracts: ***Bryant v Parkland School Division***, 2021 ABQB 391.

[21] The appellants' employment contracts contain the following clause:

> This contract may be terminated by the Employee by giving the Board thirty (30) days or more prior written notice, and by the Board upon giving the Employee sixty (60) days or more written notice. Notwithstanding these provisions regarding notice of termination, the Board may terminate this contract for just cause at any time.

The appellants argue this clause sets a "floor" of 60 days notice, but does not displace their entitlement to reasonable common law notice.

[22] The chambers judge commenced his analysis by examining the plain wording of the clause. He concluded that the phrase "60 days or more" was not ambiguous, because the wording did not reasonably invite more than one meaning. The contract provided for a minimum of 60 days notice, and any notice in excess of that was in the discretion of the respondent: reasons at para. 32. Further the words "or more" did not effectively mean "reasonable notice": reasons at para. 37. Since there was no ambiguity, there was no need to consider extrinsic evidence: reasons at para. 44. Finally, the termination clause was sufficient to displace the entitlement at common law to reasonable notice:

> 55. The obligation to provide common law reasonable notice is operative if the employment contract is either silent on the issue of termination or the language concerning the terms upon which notice can be provided are not clear.

The appellants argue that this approach is inconsistent with the modern case law on interpreting employment contracts.

[23] The parties cited a large number of cases concerning employment contracts, not all of which had to do with termination clauses. There are cases that confirm that contractual notice periods shorter than statutory minimums are unenforceable: ***Machtinger v HOJ Industries Ltd.***, [1992] 1 SCR 986. There are cases that discuss enhanced damages for the method of termination: ***Honda Canada Inc. v Keays***, 2008 SCC 39, [2008] 2 SCR 362. There are cases on whether an employee is entitled to benefits that vest during the notice period: ***Matthews v Ocean Nutrition Canada Ltd***, 2020 SCC 26, 449 DLR (4th) 583; ***Styles v Alberta Investment Management Corp***., 2017 ABCA 1, 44 Alta LR (6th) 214. There are cases that examine whether a contract is a "fixed term" contract which does not allow termination on reasonable notice: ***Rice v Shell Global***

Solutions Canada Inc, 2021 ABCA 408. Some of these cases discuss the principles behind interpreting employment contracts, but they are not directly applicable to the issues in this appeal.

[24] The parties also cited a large number of cases interpreting different termination wording in different contracts entered into in different circumstances. Again, these decisions are of limited assistance other than to show the application of the background principles.

[25] There are a number of cases that interpret the termination provisions found in employment standards statutes: e.g. ***Cybulski v Adecco Employment Services Ltd***, 2011 NBQB 181, 375 NBR (2d) 307. As the appellants point out, these decisions are not particularly helpful, because employment standards statutes only set minimum termination periods required by law. They do not set maximum periods. Thus, contracts that depend on this wording are generally not sufficiently clear to exclude notice longer than the statutory minimum.

[26] Another good example of this type of case is the decision of this Court in ***Holm v AGAT Laboratories Ltd***, 2018 ABCA 23, 64 Alta LR (6th) 4. The termination clause in that case provided in part:

> In the event we wish to terminate your employment without just cause, we agree that we will give you notice of the termination of your employment, or at our absolute discretion, we will pay you, in lieu of such notice, a severance payment equal to the wages only that you would have received during the applicable notice period. This will be in accordance with the provincial legislation for the province of employment.

Since this clause essentially incorporated the statutory notice period, which set a floor on notice not a ceiling, the contract was held to not be sufficiently clear to exclude the entitlement to common law notice.

[27] As the appellants acknowledge, many of the normal principles of contractual interpretation apply to the interpretation of employment contracts. For example, the meaning of the contract must be ascertained from its wording, and the subjective views of either party as to what they thought or intended the contract to mean are irrelevant: ***S.A. v Metro Vancouver Housing Corp***, 2019 SCC 4 at para. 30, [2019] 1 SCR 99. As a general rule, every provision in the contract should be given some meaning, and interpretations that render a particular clause ineffectual or devoid of any commercially reasonable application are to be avoided: ***369413 Alberta Ltd v Pocklington***, 2000 ABCA 307 at para. 19, 88 Alta LR (3d) 209, 271 AR 280.

[28] There are, however, some special rules that apply to the interpretation of employment contracts. Those rules have evolved over the years. For example, with respect to the interpretation of termination clauses, it was held in ***Machtinger*** at p. 98 (in 1992):

> . . . I would characterize the common law principle of termination only on reasonable notice as a presumption, rebuttable if the contract of employment clearly specifies some other period of notice, whether expressly or impliedly.

That rule has since been restated in subsequent cases such as ***Ocean Nutrition*** at paras. 55, 64 to be:

> . . . do the terms of the employment contract or bonus plan unambiguously take away or limit that common law right?
>
> The question is not whether these terms are ambiguous but whether the wording of the plan unambiguously limits or removes the employee's common law rights . . .

The difference may be subtle, but the appellants correctly point out that the chambers judge started from the wrong premise. The proper approach is not to examine the clause to see if it is ambiguous. The analysis starts with the assumption that the employee is entitled to common law reasonable notice, and the contract must be examined to see whether it unambiguously limits that right.

[29] The appellants concede that if their contracts stated "sixty (60) days written notice" that would be sufficient to exclude their right to common law reasonable notice. They also concede that the words "or more" would not invalidate notice that was in fact for more than 60 days. For example, termination on May 31, to be effective on July 31, would satisfy "notice of 60 days", even though this notice would actually be 61 days. This well illustrates the common sense reason why the termination clause is worded "sixty (60) days or more"; it would be rare that the factual circumstances would be such that exactly 60 days of notice would be given. It also demonstrates that the words "or more" do not change the effect or purpose of this clause.

[30] Every clause in a contract should be given some meaning. As the appellants note, ". . . it is critical that a court, in interpreting a termination provision, keep in mind the purpose and context of employment contracts generally and termination provisions specifically". The context against which the appellants' contracts were drafted included the common law presumption that reasonable notice was required to terminate an employment contract. The purpose of the termination clause was obviously to remove the uncertainty inherent in calculating the common law notice period, and cap the liability of the employer. The appellants' proposed interpretation would deprive the clause of much of its force. As the appellants point out in their factum it would make no sense for the employer to "use wording that essentially 'uncaps' liability". If the parties had intended "reasonable common law notice not less than 60 days", they would have said so. Likewise, if the length of notice was to increase as the duration of the employment increased, the contract would have said so.

[31] The appellants rely on the doctrine of *contra proferentem*, which is an interpretive tool of last resort only to be used once other means of construction have been exhausted: ***Frenette v Metropolitan Life Insurance Co***, [1992] 1 SCR 647 at p. 667. That doctrine cannot be used to

create an ambiguity, and it cannot be used to deprive a contractual term of any commercially reasonable meaning, particularly one that is obviously inconsistent with the intention of the party that drafted the contract.

[32] When the words “or more” are read in the context of the termination clause, in the context of the entire contract, and against the background of the common law, it is clear that this clause was intended to place a ceiling on the notice required. The appellants’ proposed interpretation deprives the clause of its intended efficacy. The clause cannot reasonably be interpreted to mean the exact opposite of what it is obviously intended to mean.

[33] The appellants have not shown any reviewable error in the conclusion of the chambers judge, and the appeal should be dismissed.

Appeal heard on June 9, 2022

Memorandum filed at Edmonton, Alberta
this 15th day of June, 2022

Slatter J.A.

Appearances:

A.R. Cembrowski
H. McEwan
for the Appellants

F.A.X. Lavergne
for the Respondent

Corrigendum of the Memorandum of Judgment

The appearances page has been corrected to include H. McEwan as counsel for the appellants.