Court File No. SC-18-00001878-0000

ONTARIO

SUPERIOR COURT OF JUSTICE

SMALL CLAIMS COURT

B E T W E E N:

ANTHONY HOLL

Plaintiff

- and -

THE FOUNDATION FOR STUDENT ACHIEVEMENT

Defendants

R E A S O N S F O R J U D G M E N T

DEPUTY JUDGE TWOHIG
on October 31, 2018
at Toronto, Ontario.

APPEARANCES:

H. Markowitz	Counsel for the Plaintiff
N. Chsherbinin	Counsel for the Defendant

WEDNESDAY, OCTOBER 21, 2018

R E A S O N S F O R J U D G M E N T

TWOHIG, DJ: (Orally)

Today I heard a claim brought by Anthony Holl, against The Foundation for Student Achievement. Mr. Holl was dismissed from his position with the Foundation in January of this year. He brings this claim seeking compensation for what he perceived was a lack of adequate notice from his dismissal from his position.

We heard evidence from Mr. Holl. He clearly is an educated man who has a great deal of experience in the field of fundraising. He has worked in the field for over 20 years and I accept the assertions made by Mr. Markowitz that this is a specialized skill and clearly, Mr. Holl has that skill. I don't think that point was disputed by the Foundation.

As for the Defendant, the Foundation, it was established to provide educational assistance for the most needy students in our city, to assist underprivileged young students to help them improve their educational prospects; a most noteworthy goal. It is a charitable Foundation, recognized by the Federal Government, and it received that charitable status in November of 2017. Before that, it had operated as a Not for

Profit Foundation.

The Defendant's evidence included reference to the fact that the Board of Directors had decided to take the Foundation in another direction. Rather than approaching donors directly for funds, the Foundation decided to host a series of events in order to raise money for the Foundation. As a result, a Chief Fundraiser, such as the position Mr. Holl had, was no longer necessary and that position was replaced by a number of event coordinators.

Mr. Holl's employment commenced on January 30th, 2017. This followed the execution of a contract of employment which was signed on January 24th. The contract of employment is three pages long and was signed by Mr. Holl and co-signed by Dennis Ackerman, a Director, with the Foundation for Student Achievement. Mr. Holl negotiated a start date of January 30th, 2017 and he managed to secure annual compensation of $100,000 which Mr. Ackerman testified was more than the Foundation wanted to pay, but I believe in the submissions of the Defendant show that Mr. Holl was astute, he had great experience, he was educated, and he knew how to negotiate a position for himself.

The contract of employment included at paragraph eight reference to independent legal advice, and it says the employee acknowledges that the

Foundation has provided the employee with a reasonable opportunity to obtain independent legal advice with respect to this agreement, and that either (a) the employee has had legal advice prior to executing this agreement, or (b) the employee has willingly chosen not to obtain such advice and to execute this agreement without having obtained such advice. Mr. Holl decided not to obtain advice and went ahead and signed the agreement and commenced employment on January 30th, 2017.

His employment was terminated on January 24th, 2018 for the reasons that I have already stated and fortunately, he has been able to secure new employment, effective in June of this year, with the Salvation Army, which in fact, now pays him a salary of $110,000.

The issues brought before me are whether the termination clause, which is found at paragraph six of the contract of employment, is enforceable. For purposes of the record, the effective portion of the termination clause reads as follows.

> "The Foundation may terminate the employment of the employee at its sole discretion and for any reason whatsoever, upon providing the employee with notice or pay in lieu thereof, benefit continuation during the statutory notice period, and if applicable,

> severance pay, in accordance with the minimum requirements of the *Employment Standards Act*, 2000. In the event your employment is terminated under this provision, you will have no further entitlements beyond those set out herein."

Mr. Markowitz, on behalf of the Plaintiff went on to say that if this clause is found to be void, then the question arises as to what is a reasonable notice period under a common law, and thirdly, I am to take consideration as to whether or not the Plaintiff took reasonable efforts to mitigate his losses.

So the major issue here then: Does the clause limit the employee's common law rights upon termination? I was taken through a wonderous tour of the current state of the law, which is always in flux, and which has had several different developments in the past few years. Some of the salient principles that I am to have regard of are the following.

One, Courts will scrutinize termination clauses closely, to ensure compliance with the *Employment Standards Act*. A reference, the *Olympus Canada* case, 2017 O.N.C.A. at 873. No specific formula to limit the common law notice on termination clauses is to be used, but the intention must be clear. Again, another case from the Court of Appeal in *Nemeth*, 2018 O.N.C.A

at 7 and also the *Oudin* case, 2015 O.N.S.C. at 6494 which set out that the Court is to apply contractual termination clauses in accordance with the clear intention of the parties, and not to let minor inconsistencies in the language of those clauses defeat the enforcement of the parties' obvious intention to be bound by them.

There is also the case in *Fara*, at 2017 O.N.S.C. at 393, a decision of Mr. Justice Kirshman, of the Superior Court of Justice, who said that to limit the termination remedies to the *E.S.A.* minimums, a contract must be clear and unambiguous. Is there a clear intent agreed to by the parties to limit the employee's common law rights upon termination?

And lastly, the most recent case is the *Amber v. I.B.M.* case of the Court of Appeal found at 2018 O.N.C.A. at 571 where the Court urged judges not to strain to create ambiguity in contracts where it does not exist, and to look for a subdivision or to examine termination clauses by subdividing them into their constituent elements, but rather to interpret them as an organic whole.

It is with these principles in mind that I have reviewed the facts as presented in the evidence at this case. I approach the facts as follows:

Does the termination clause provide for a continuation of benefits? I find that it does.

Does the clause provide for severance pay? I find that it does.

Does the clause provide for notice or pay in lieu of notice? I find that it does.

I took careful consideration of the argument made by Mr. Markowitz to the effect that the clause did not specifically refer to outstanding wages or to outstanding vacation pay. I congratulate him on his creativity in raising these issues, but in my view, number one, there's no need to specifically reference those things. The Court of Appeal has not told me to look for those things. And secondly, I find they're included by reference in any event.

As a result of this, I find that the termination clause is not void. It is legal. The parties adhered - at least the Foundation adhered to the contract. They paid Mr. Holl a week's severance. In addition, they gave him a further week of vacation pay, and unfortunately for Mr. Holl, they had initially offered him two weeks of severance, but he declined that. As a result, I have endorsed the record here, and for oral reasons delivered at the end of the trial, the claim is dismissed.

I should note, because of my finding on the first issue, about the enforceability of the

clause, it is not necessary for me to consider what a reasonable notice would be, nor is it necessary for me to consider the mitigation efforts that Mr. Holl undertook. Mr. Holl's efforts were scrutinized by the Defendant. There were suggestions that he may not have been entirely forthcoming and truth-worthy in his applications, but I see no need to comment on the credibility of Mr. Holl having made the findings that I have concerning the termination clause.

THE COURT: Mr. Chsherbinin, do you have any submissions as to costs?
...SUBMISSIONS ON COSTS...

THE COURT: Well, let me say to you, Mr. Chsherbinin, and for the benefit of Mr. Ackerman, and the Foundation. There are pros and cons to being in the Small Claims Court. Some of the pros are, a claim is issued in February of 2018, you have a trial completed by the end of October 2018. There is really only one step in the procedure beside the pleadings, and that was the settlement conference, and a very brief case conference by telephone. So the Court is expeditious, and you'll get reasons, however satisfactorily or not, on the same day. So despite the costs to your client, and I appreciate the effort that both counsel went to, to suggest double costs, and to suggest unreasonableness, I should say before I even

turn to Mr. Markowitz, it's not as if he did not raise some interesting arguments. He did not waste time in terms of examination or cross-examination. I think it would be unreasonable for me to find that his conduct was unreasonable. It was perfectly reasonable and he raised very interesting and creative arguments. So I can't accede to any doubling of costs. In fact, I'm even questioning whether I should even go to the maximum. But unless you have something else to say, I will turn to Mr. Markowitz.

MR. CHSHERBININ: No, Your Honour, I will leave it in your capable hands.

THE COURT: But I wanted you and your client to hear that because I'm certainly appreciative of the fact that you did go to a great deal of effort. Both - both parties did, and we're dealing with a charitable foundation, but they put caps on the costs in this court for a reason. Thank you. Mr. Markowitz?

...SUBMISSIONS ON COSTS...

R E A S O N S F O R R U L I N G - C O S T S

TWOHIG, DJ: (Orally)

I have heard your submission, Mr. Markowitz, and I have endorsed as follows. Costs to the Defendant in the amount of $2,500 which includes disbursements, because there was of course, costs to the court for the Defendant and paying

various court fees, and of course putting all this material together.

THE COURT: So that concludes our matters here.

M A T T E R C O N C L U D E D

Form 2

CERTIFICATE OF TRANSCRIPT (SUBSECTION 5 (2))

Evidence Act

I, **Tricia Rudy, A.C.T.**, certify that this document is a true and accurate transcript of the recording of **Anthony Holl v. The Foundation for Student Achievement** in the Superior Court of Justice, Small Claims Court, held at Toronto, Ontario, on October 31, 2018 taken from Recording 4816_111_20181031_092212 and 4911-404-091656/15 which has been certified in Form 1.

26 Nov 18 _____

(Date) (Signature of authorized person)

Transcript Order Received:	November 5, 2018
Transcript Completed:	November 21, 2018
Notified Ordering Party:	November 26, 2018

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