

(Short title of proceeding)

Divisional Court file no. 756/18
Toronto Small Claims Court file no. SC-18-00001878-0000

February 21, 2020

Mr. Holl appeals from the decision of Deputy Judge Taveling dated October 31, 2018 dismissing his claim for wrongful dismissal. The Deputy Judge held that the termination clause in the written employment contract was enforceable and had been complied with by the respondent. Specifically, he found that the termination clause complied with the provisions of the Employment Standards Act (ESA) concerning termination before the Deputy Judge, that the termination clause is valid but excludes both back pay and severance pay owing at the time of termination. Alternatively, he submits the clause is ambiguous and should be interpreted in favour of the employee.

The interpretation of a termination clause is an employment contract. In a question of mixed fact and law, the court of review is accordingly permitted to apply the principle of construction. Commies v. 177-2887 Ontario Limited, 2019 ONCA 965 at para. 15. The court which provides for termination with notice or pay in lieu thereof, benefit continuation during the statutory notice period and, if applicable, severance pay, in accordance (over)

**DIVISIONAL COURT,
SUPERIOR COURT OF JUSTICE**
Proceeding commenced at Toronto

APPEAL BOOK AND COMPENDIUM
of the appellant/plaintiff

MARKOWITZ, LLP
Barristers & Solicitors
Suite #2000 – 393 University Avenue
Toronto, Ontario M5G 1E6

Att: Howard Markowitz
(LSUC #43121M)

Tel: (416) 590-1900 x 222
Fax: (416) 590-1600

Solicitors for the Plaintiff/Appellant

with the minimum requirements of the Employment Standards Act, 2000." It then goes on to say: "In the event that your employment is terminated under this provision, you will have no further entitlements beyond those set out herein."

It is this last sentence that Mr. Holl submits excludes outstanding vacation pay and wages owing at the time of termination. Accordingly, he submits it "modifies these minimum ESA employee protections" in S. 11(5) of the ESA (the requirement to pay any wages owing at termination within a certain period) and S. 38 (requirement to pay accrued vacation pay at time of termination).

In interpreting the termination clause, regard must be had to the entire clause, not just the last sentence. On that basis, the purpose of the clause is to inform the employee what his or her entitlements are upon termination. The clause sets out those entitlements. In that context, it is clear that the last sentence is referring to the entitlements provided for on termination. It does not exclude other entitlements or standards in the ESA such as wages and vacation pay owing at the time of termination.

A termination clause will be invalid if it fails to comply with the minimum notice provisions of the ESA. See: Webb v. Derby, 2017 ONCA 158; Machtinger v. HOS Industries Ltd., 1992 CanLII 102 (SCC). Here, the Deputy Judge set out the "salient" principles from the case law concerning the interpretation of termination clauses and their compliance with the ESA. He found that the termination clause here complied with the notice provisions of the ESA. In my view, having regard to the case and the clause itself, he was correct.

The Deputy Judge dismissed Mr. Holl's argument concerning the clause excluding other entitlements under the ESA. He concluded there was no need to reference wages or accrued vacation pay owing at the time of termination and that they were included by reference. In my view, the Deputy Judge was correct - Those requirements arise elsewhere in the ESA and are not excluded by the wording of the clause.

Finally, given my interpretation of the clause, I do

not consider that it is ambiguous.

To conclude, the trial judge was correct in concluding the termination clause is valid and enforceable and accordingly dismissing Mr. Holl's action. The Appeal is dismissed.

A note about Mr. Holl's common law notice period. The Deputy Judge did not decide the notice period which would apply. I was asked to determine it in the event I found the clause void and allowed the appeal. In my view, in such circumstances, the matter should be remitted back to the Deputy Judge but, given the money involved, hopefully resolved by the parties.

The respondent is entitled to its costs of the appeal. Based on the submissions of counsel, I am satisfied that a fair and reasonable award of costs having regard to the issues raised is \$10,000.00 in total. Payable with costs.

R
J. Abbott, J.