IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Forbes v. Glenmore Printing Ltd.,* 2023 BCSC 25

Date: 20230106
Docket: S-211311
Registry: Vancouver

2023 BCSC 25 (CanLII)

Between:

Ross Cameron Forbes

Plaintiff

And

Glenmore Printing Ltd.

Defendant

Corrected Reasons: Date of Judgment was corrected on January 11, 2023

Before: The Honourable Justice Ahmad

Reasons for Judgment

Counsel for the Plaintiff:	S. K. W. Chen M. Viksne O. Obaseki
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Place and Date of Trial:	Vancouver, B.C. July 7, 8 and 11, 2022
Place and Date of Judgment:	Vancouver, B.C. January 6, 2023

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I. Introduction

[1] Citing the downturn in business relating to COVID-19 pandemic, on December 16, 2020, Glenmore Printing Ltd. ("Glenmore") placed the plaintiff, Ross Forbes, on a layoff from his employment as a senior pressman in its printing department. The parties have since agreed that the layoff amounted to a constructive dismissal.

II. Issues

[2] There is no dispute that Mr. Forbes is entitled to a severance payment in respect of the dismissal. The issue in this wrongful dismissal action is the amount of severance payable.

[3] On that issue, Glenmore relies on the termination clause (the "Termination Clause") contained in Mr. Forbes' written employment agreement (the "Employment Agreement"). The Termination Clause provides, in part:

> Glenmore Printing may terminate this Agreement by giving the Employee,
>
> (a) After the first three months of continuous employment, one week's notice or wages,
>
> (b) After the first year of continuous employment, two weeks' notice or wages, and
>
> (c) After three consecutive years of employment three weeks' notice or wages, plus one additional week's notice or wages for each additional year of employment to a maximum of eight weeks' notice or wages.

[4] Glenmore says that given Mr. Forbes' six year and four-month period of employment, it discharged its liability to Mr. Forbes by paying him six weeks' pay in accordance with the Termination Clause.

[5] Mr. Forbes disagrees. He argues that the Termination Clause is not enforceable in that it provides for less entitlement than contemplated by the minimum requirements of the group termination provisions of the *Employment Standards Act*, R.S.B.C. 1996, c. 113 [*ESA*]. Although Mr. Forbes was not part of a "group dismissal" as contemplated by s. 64 of the *ESA*, he argues that the possible contravention of the minimum requirement of the *ESA* renders the Termination

Clause void. As a result, he argues that he is entitled to reasonable notice in accordance with the common law.

[6] Glenmore agrees that if the Termination Clause is not enforceable, Mr. Forbes is entitled to reasonable notice, or pay in lieu of notice, in accordance with the common law. The parties agree that the common law notice period in this case is eight months.

[7] However, if Mr. Forbes is entitled to the common law notice period, Glenmore argues that Mr. Forbes failed to mitigate his damages by failing to accept other employment offered to him by Glenmore or, alternatively, by failing to make reasonable efforts to search for alternate employment.

[8] The first issue to be determined is whether the Termination Clause is enforceable.

III. Discussion and Analysis

A. Is the Termination Clause Enforceable?

1. Legal Framework

[9] It is a long-established common law principle that within indefinite contracts of employment there is an implied contract term that employment can only be terminated if reasonable notice is given: *Machtinger v. HOJ Industries Ltd.*, 1992 CanLII 102 (SCC), [1992] 1 S.C.R. 986 at 997 [*Machtinger*].

[10] What constitutes reasonable notice will vary depending on the circumstances of the case: *Machtinger* at 998. The well-known factors guiding an assessment of reasonable notice are:

> “the character of the employment, the length of service of the servant, the age of the servant and the availability of similar employment, having regard to the experience, training and qualifications of the servant”

Machtinger at 998–999 citing *Bardal v. The Globe & Mail Ltd. (1960)*, 1960 CanLII 294 (ON SC), 24 D.L.R. (2d) 140 at 145.

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[11] In *Medis Health and Pharmaceutical Services Inc. v. Bramble*, 1999 CanLII 13124 (NB CA), 214 N.B.R. (2d) 111, [*Medis Health*], the New Brunswick Court of Appeal succinctly summarized the purpose of providing reasonable notice:

> [57] The relevance of any factor is a function of the objectives that the law seeks to attain through notice of termination of employment. The primary objective of notice is to provide the terminated employee with a reasonable opportunity to seek alternate suitable employment … Its secondary objectives include the protection of the reliance and expectation interests of terminated employees, at least in cases where inducements have been offered by the employer, and the satisfaction of certain moral claims by an employee ...
>
> [Added emphasis.]

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[12] The implied term of reasonable notice, while presumptive, is rebuttable by express contractual language to the contrary, but to rebut this presumption, the contractual term must: (a) clearly specify some other period of notice, whether expressly or impliedly, and (b) at a minimum, must comply with the minimum statutory requirements for notice: *Machtinger* at 997–998 and 1000.

[13] A contractual notice provision that does not comply with the minimum statutory requirements is null and void. In such a case where the employment contract is non-compliant with the relevant employment standards, the common law presumption of reasonable notice, not the statutory minimum, will apply: *Machtinger* at 1004–1005.

[14] In *Machtinger*, two employees were dismissed without cause after seven years of employment. Their employment contracts provided for no notice in one case, and two weeks' notice in the other. It was not disputed that both of those clauses violated the minimum notice requirements provided in Ontario's employment standards legislation at the time.

[15] Since the employer in *Machtinger* had attempted to contract out of the minimum employment standards by specifying lesser notice periods than the legislation provided for, the Court found that the terms of the employment contracts specifying the notice periods were "null and void," meaning then that the common law reasonable notice would apply: *Machtinger* at 1007.

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[16] In *Shore v. Ladner Downs*, 1998 CanLII 5755 (BC CA), [1998] 52 BCLR (3d) 336 [*Shore*], the Court of Appeal of this province considered a situation in which the contractual notice was sufficient at the time it was given, but would be insufficient if the employee had been employed for a longer period of time.

[17] In *Shore*, the employment contract provided for 30 days' notice of termination. The employee was dismissed after nine months and given four weeks' pay in lieu of notice. Given the length of employment at the date of termination, the four weeks' pay was two weeks more than the statutory minimum. Nonetheless, the employee sued for wrongful dismissal. He argued that, although sufficient at the time of his dismissal, the 30 day contractual notice period would eventually be less than the statutory minimum after he been employed for five years and, therefore, was void.

[18] In deciding the issue, the Court referred to the policy considerations in *Machtinger* and concluded that those considerations:

> "would not be served if the contract were to be interpreted in favour of the employer so as to leave the individual employee responsible for determining, at the point of termination, whether the statutory minimum had risen above the notice period stated in the contract"

(*Shore* at para. 16). On that basis it concluded that a contractual term that could potentially violate the statutory minimum (in that case by the effluxion of time) should be held to be void from the beginning, not only when it falls below the statutory minimum during the hiring, employment, or termination of an employee: *Shore* at para. 16.

[19] Like the common law, the *ESA* also expressly requires compliance with its provisions. Section 4 of the *ESA* states:

> 4 The requirements of this Act and the regulations are minimum requirements and an agreement to waive any of those requirements [other than a collective agreement] has no effect.

[20] The fundamental principles to be derived from *Machtinger*, *Shore*, and s. 4 of the *ESA* are:

a) Absent express contractual language to the contrary, an employer must give reasonable notice of an intention to terminate an employment contract if the dismissal is without cause: *Machtinger* at 997;

b) The implied term of reasonable notice, while presumptive, is rebuttable by express contractual language to the contrary. However, to oust the common law presumption of reasonable notice, the contractual term must clearly specify some other period of notice, whether expressly or impliedly, and must comply with the statutory minimum requirements for notice: *Machtinger* at 997–998 and 1000;

c) A contractual term regarding notice that does meet the statutory minimum is null and void: *Machtinger* at 1000; *ESA* s. 4;

d) A termination clause that has the potential of not meeting statutory minimum standards is also null and void: *Shore* at para. 16; and

e) If a termination clause is found to be null and void, the employee is entitled to the common law reasonable notice period: *Machtinger* at 1013.

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2. Position of the Parties

[21] The parties agree that the fundamental principles derived from *Machtinger, Shore*, and s. 4 of the *ESA* apply to the present case. In particular, they agree that the Termination Clause in Mr. Forbes' Employment Agreement will be void if it does not meet the minimum standards set out in the *ESA*, and further, that even a potential breach of the minimum standards will render the Termination Clause void. They also agree that if the Termination Clause is void, Mr. Forbes will be entitled to reasonable notice at common law. They do not agree, however, on the minimum statutory requirements that must be met to avoid a finding that the Termination Clause is null and void.

[22] Glenmore argues that an employee's minimum severance entitlement is set out in s. 63 of the *ESA*, which provides an employer's liability to individual employees on the without cause termination of their employment:

> 63 (1) After 3 consecutive months of employment, the employer becomes liable to pay an employee an amount equal to one week's wages as compensation for length of service.
>
> (2) The employer's liability for compensation for length of service increases as follows:
>
> > (a) after 12 consecutive months of employment, to an amount equal to 2 weeks' wages;
> >
> > (b) after 3 consecutive years of employment, to an amount equal to 3 weeks' wages plus one additional week's wages for each additional year of employment, to a maximum of 8 weeks' wages.

[23] Under s. 63(2)(b), an employee's maximum severance entitlement is eight weeks.

[24] Mr. Forbes disputes that s. 63 sets the minimum liability an employer must provide a dismissed employee under the *ESA*. He argues that the minimum requirements are set out in s. 64 of the *ESA* for group terminations*.*

[25] Among other things, s. 64 requires an employer to provide for notice in addition to the s. 63 notice for individual terminations. Specifically, when an employer terminates 50 or more employees at one location with a two-month period, s. 64(1) requires that the employer give written notice to each affected employee, any trade union certified to represent the affected employees, and the Minister. Subsection 64(2) sets out the information that must be included in the notice of group termination.

[26] The notice provisions for group terminations are set out in ss. 64(3) to (5), which provide:

> (3) The notice of group termination must be given as follows:
>
> > (a) at least 8 weeks before the effective date of the first termination, if 50 to 100 employees will be affected;
> >
> > (b) at least 12 weeks before the effective date of the first termination, if 101 to 300 employees will be affected;

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> (c) at least 16 weeks before the effective date of the first termination, if 301 or more employees will be affected.
>
> (4) If an employee is not given notice as required by this section, the employer must give the employee termination pay instead of the required notice or a combination of notice and termination pay.
>
> (5) The notice and termination pay requirements of this section are <u>in addition to the employer's liability, if any, to the employee in respect of individual termination under section 63</u> or under the collective agreement, as the case may be.
>
> [Added emphasis.]

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[27] Relying on the decision in *Shore*, Mr. Forbes argues that whether the circumstances of his termination actually triggered the additional notice under s. 64 is immaterial. He argues that, <u>if</u> he had been employed for more than eight years and was subject to a group termination, he would be entitled to 24 weeks' notice (i.e. the eight weeks contemplated by s. 63(2)(b) plus the additional 16 weeks contemplated by s. 64(3)(c)).

[28] Mr. Forbes argues that the Termination Clause, which caps his notice entitlement to eight weeks, effectively waives the minimum notice to which he would be entitled under s. 64. As such, he argues it is void.

[29] Glenmore does not agree that s. 64 establishes the minimum statutory requirement on termination. However, it argues that nothing in the Termination Clause precludes or purports to circumvent the application of s. 64 regarding group terminations. Glenmore says it remains bound by the terms of the Termination Clause.

[30] The issues to be determined at the first stage of the analysis is twofold:

a) Is the minimum statutory entitlement required to oust the common law requirement of reasonable notice eight weeks, which is the maximum entitlement contemplated by s. 63 of the *ESA*, or 24 weeks, which is the maximum entitlement contemplated by s. 64*;* and,

b) In any event, does the Termination Clause purport to waive Glenmore's obligation under s. 64 of the *ESA* so as to render the Termination Clause void?

3. Analysis

a. Does s. 63 or does s. 64 establish the "minimum statutory requirements" required to oust the common law entitlement to reasonable notice?

[31] In *Sullivan et. Al. v. Graydon et. al.*, 2000 BCSC 999 [*Sullivan*], this Court was satisfied that the minimum notice requirement in s. 63 of the *ESA* was sufficient to oust the common law notice requirement. In that case, a termination clause had incorporated the lower notice requirements of a predecessor version of the *ESA*, which had then fallen below the requirements of a later version of the *ESA*. Accordingly, the termination clause was null and void. However, a letter agreement signed at the time of the Employment Agreement stated that termination would be "in accordance with the *Employment Standards Act*". The Court held that such language distinguished that case from *Machtinger* where the employer deliberately attempted to avoid the minimum statutory requirements, stating at para. 52:

> [52] I am sympathetic to the policy considerations set out by Mr. Justice Iacobucci in *Machtinger*, in cases where an employer has deliberately attempted to avoid the provisions of the *Employment Standards Act*. However, that does not appear to have been the intent of [the employer] here. Rather, I conclude that both parties intended the statutory minimum to apply in the case of dismissal without cause. Accordingly, I find that the void notice provision should be replaced with s. 63(1) of the *Employment Standards Act*, which entitles Mr. Sullivan to compensation for one week of wages on dismissal without cause.
>
> [Added emphasis.]

[32] By replacing the void notice provision with s. 63(1), the Court appears to endorse the proposition that the minimum notice requirements set out in s. 63 are sufficient to oust the common law requirement for reasonable notice. However, the issue of whether s. 64, and not s. 63, should establish the minimum statutory requirement was not before the Court in *Sullivan*. As such, although instructive, that decision is not wholly determinative of the issue raised by Mr. Forbes in this case.

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[33] More instructive is the purpose of the statutory minimums set out in ss. 63 and 64 of the *ESA*, in light of the purpose of reasonable notice at common law that the statutory minimum is intended to replace.

[34] As set out above, the primary objective of the common law requirement for reasonable notice is to provide a dismissed employee with a reasonable opportunity to seek alternate suitable employment: *Medis Health* at para. 57. The notice period provides a dismissed employee with sufficient time (or pay) to support their search for such employment. The purpose of the notice entitlement under s. 64 is different.

[35] In fact, as noted by the British Columbia Labour Relations Board in *Canadian Forest Product Ltd. v. Public and Private Workers of Canada, Local 18*, 2022 B.C.L.R.B. 31, the s. 64 notice provisions are <u>not</u> to compensate a dismissed employee for wages or benefits that they would have earned during a reasonable notice period. It noted the distinct nature of notice or payments made under s. 63 of the *ESA* from the notice or payments made under s. 64 at paras. 36 – 38 as follows:

> [36] Section 64(5) of the *ESA*, however, provides that notice and termination pay requirements of Section 64 are "in addition to the employer's liability, if any, to the employee in respect of individual termination under Section 63 or under the collective agreement, as the case may be", and Section 68(2) provides that Section 64 group termination pay requirements "apply whether or not the employee has obtained other employment or has in ant other way realized or recovered any money for the notice period".
>
> [37] <u>I am satisfied that amount payable pursuant to Section 64 of the ESA do not, on the face of that provision, compensate for lost earnings during the notice period</u>. If they did, they would presumably be subject to mitigation and the deduction of wages and benefits earned during that period.
>
> [38] <u>Consequently, I am satisfied that the wage loss damages I have ordered compensates for a loss that is not addressed by *ESA* group termination pay</u>. Section 64 of the *ESA* serves a purpose that is distinct from that of Section 54 of the Code [citations omitted].
>
> [Added emphasis.]

[36] Simply put, payments made under s. 63 are intended to, and do, replace the wages that the common law notice requirements are intended to protect. The group termination provisions, including the notice and/or pay contemplated by s. 64, do not.

[37] Equally instructive is the purpose s. 64 is intended to serve, an issue addressed by the Court of Appeal in *Weyerhaeuser Co. Ltd. v. IWA-Canada, Local 2171*, 2004 BCCA 6. In that case, the Court referred to s. 71 of the *ESA* which provides that if an employer is required to give notice under s. 64, the Minister may require the employer to establish an “adjustment committee”. Pursuant to s. 71(3):

> 71(3) The purpose of the adjustment committee is to develop, by cooperation, an adjustment program
>
> (a) to eliminate the need for terminating the employment of the affected employees, or
>
> (b) to minimize the impact of termination their employment and to help them obtain other employment.

[38] Referring to s. 71, the Court concluded at para. 19 that

> … it appears that one of the underlying purposes of the mass termination notice provisions enacted by the legislature was to engage all involved in a process to determine if there could be any salvage of employment at affected plants.

[39] Notably, especially when viewed in light of s. 71, neither s. 64 nor s. 71 purport to replace a common law right. Indeed, no common law right analogous to the statutory rights created by ss. 64 and 71 exists. In other words, there is no common law right to oust. By contrast, as I have concluded above, the benefit conferred on a dismissed employee under s. 63 compensates for lost earnings during the notice period and directly correlates to the purpose for the common law entitlement to reasonable notice.

[40] The only statutory requirements that serve the same purpose as the common law entitlement to reasonable notice are the minimum notice or payment provisions contained in s. 63. In my view, in order to oust the common law entitlement to reasonable notice, a contractual term must meet the minimum statutory requirements set out in s. 63. The s. 64 notice requirements, being additional statutory rights not found in the common law, do not establish the minimum standard that is required to oust an employee’s common law entitlement to reasonable notice.

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b. Does the Termination Clause waive or circumvent s. 64?

[41] The conclusion that s. 63 establishes the minimum statutory requirement required to oust the common law presumption of reasonable notice does not end the analysis. Mr. Forbes argues that by imposing an eight week maximum for notice in the Termination Clause, Glenmore purports to circumvent the minimum notice requirements on group terminations imposed by s. 64. Relying on s. 4 of the *ESA*, he argues that this waiver or circumvention voids the Termination Clause.

[42] For the reasons that follow, I do not accept that argument.

[43] First, British Columbia case law establishes that the common law will not imply a contractual term that is contrary to the *ESA*. Second, even if the Employment Agreement is silent on the issue of notice in a group termination situation, case law from other provinces supports the position that Glenmore is still bound by the *ESA* in such situations.

[44] In *Ly v. British Columbia (Interior Health Authority)*, 2017 BCSC 42 [*Ly*], the Employment Agreement referred to an "initial probationary period of six (6) months". However, no further details were included with respect to the meaning of the term "probationary period" or the employer's obligation to provide notice or pay on the employee's dismissal during that period.

[45] The Court concluded that the reference to a six-month "probationary" period <u>implied</u> that the employer had the right to dismiss the employee without notice and without reasons during that six-month period: *Ly* at para. 52. However, as s. 63 of the *ESA* requires an employer to provide notice after three months of employment, the Court declined to imply that that term, noting that the probationary period clause did not <u>expressly</u> circumvent s. 63(1) of the *ESA*. Since "there can be no implied contractual right of the employer to circumvent" the *ESA*, probationary employees would be therefore entitled to the benefits under s. 63(1) of the *ESA* during the six-month probationary period: *Ly* at para. 53.

[46] The Court went on to distinguish the decision in *Shore* regarding a potential but expressly stated future violation of employment standards from the circumstances of *Ly*, where such a violation would only occur through implying terms to the agreement:

> [55] Since I have decided that, as a matter of fact, IHA's 2008 and 2014 Terms and Conditions of Employment were never actually incorporated into Mr. Ly's Employment Contract, *Shore* does not apply in this case. *Shore* is distinguishable and inapplicable because there are no express terms in Mr. Ly's Employment Contract which potentially circumvent [s.] 63(1) of the *ESA* and, further, as I concluded above, the common law will not import an implied term into a probationary term of employment that is contrary to the legislative requirements under the *ESA*.
>
> [Added emphasis.]

[47] In the present case, Mr. Forbes relies on the portion of the Termination Clause that provides, in part, that

> [a]fter three consecutive years of employment" Mr. Forbes would be entitled to "three weeks' notice or wages, plus one additional week's notice or wages for each additional year of employment to a maximum of eight weeks' notice or wages.
>
> [Added emphasis.]

[48] He argues that the express reference to a "maximum" entitlement caps his entitlement to eight weeks for all purposes, including for a group termination.

[49] On its face, the Termination Clause, including the provision capping notice to eight weeks, mirrors the entitlement under s. 63. On that basis, I conclude that the clause is Glenmore's attempt to expressly incorporate s. 63 into the Employment Agreement in respect of Mr. Forbes' maximum entitlement on an individual termination. I do not accept Mr. Forbes' argument that the Termination Clause does any more than that.

[50] Like the situation in *Ly*, in this case, there is no express provision waiving the employer's obligation to comply with s. 64 requirements on a group termination. Any intention to cap Mr. Forbes' notice entitlement on a group termination is implied. However, as confirmed in *Ly*, a court will not imply a contractual right to circumvent the minimum notice requirements of the *ESA* or to render terms of the contract in

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any other way that is contrary to the legislative requirements of the *ESA*. The result is that, notwithstanding the eight week maximum contemplated by the Termination Clause, Glenmore remained bound by the notice and other requirements afforded by s. 64 on a group termination.

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[51] Having concluded that there can be no implied term to circumvent the minimum requirements of s. 64, the Employment Agreement can only be described as silent with respect to the entitlement to be afforded to Mr. Forbes on a group termination. The Ontario Court of Appeal has considered the implication of such silence in a few cases.

[52] In the first case, *Roden v. Toronto Humane Society*, 2005 CanLII 33578 (ON CA), [2005] O.J. No. 3995, [*Roden*], the termination provision included the following:

> Otherwise, the Employer may terminate the Employee's employment at any other time, without cause, upon providing the Employee <u>with the minimum amount of advance notice of payment in lieu thereof</u> as required by the applicable employment standards legislation.
>
> [Added emphasis.]

Roden at para. 55.

[53] At the time, the Ontario employment standards legislation required the employer to provide minimum notice or pay in lieu of notice. It also required the continuation of benefits coverage over the statutory notice period.

[54] In *Roden*, the employee argued that the contract's silence on the obligation to provide benefits during the notice period meant that employer had no obligation to do so, and had thus contracted out of the minimum requirements of Ontario's employment standards legislation. On that basis, the employee argued that the whole "without cause" termination clause was void for failing to meet the minimum standards contained in Ontario's legislation.

[55] The Ontario Court of Appeal did not accept that argument. It found that even if the agreement was silent on the treatment of benefits during the notice period, the

employer was still bound by Ontario's employment legislation and had in fact complied with the statutory requirements regarding benefits:

> [62] The without cause provisions in question are of precisely the type that Iacobucci J. says are valid [in *Machtinger*]: they referentially incorporate the minimum notice period set out in the *Act*. The without cause provisions do not attempt to provide something less than the legislated minimum standards; rather, they expressly require the Society to comply with those standards. As I have said, in my view, the provisions do not purport to limit the Society's obligations to payment of such amounts. That is, they do not attempt to contract out of the requirement to make benefit plan contributions. Because the contracts are silent about the Society's obligations in respect of benefit plan contributions, the Society was obliged to – and did – comply with the requirements of the *Act* in that regard.
>
> [Added emphasis.]

[56] The Ontario Court of Appeal came to the same conclusion in *Nemeth v. Hatch Ltd.*, 2018 ONCA 7 [*Nemeth*]. In addition to the obligation to provide minimum notice or pay in lieu (akin to s. 63 of the *ESA*), Ontario's employment standard legislation includes the obligation to provide additional "severance pay" to five-year plus employees if they are part of group terminations of 50 or more employees within a six-month period in certain circumstances (akin to s. 64 of the *ESA*): *Employment Standards Act, 2000*, S.O. 2000, c. 41, s. 64. The termination clause in *Nemeth* did not reference "severance pay," and only referenced notice or pay in lieu of notice.

[57] Relying on the decision in *Roden*, the Ontario Court of Appeal concluded that the silence on severance pay did not denote an intention to contract out of Ontario's employment standards regarding additional severance pay, and thus the termination clause was not void: *Nemeth* at paras. 15–17.

[58] As set out above, I have concluded that the Termination Clause expressly limits Mr. Forbes' entitlement on an individual termination to the statutory minimum established by s. 63 of the *ESA*. It does not purport to impose any limits on his entitlement on a group termination as required by s. 64 of the *ESA*. It is silent on that issue. In accordance with the reasoning in *Roden* and *Nemeth*, it follows that Glenmore is bound to the minimum statutory requirements established by s. 64 regarding group terminations.

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[59] In reaching that conclusion, I acknowledge that the termination clauses in *Roden* and *Nemeth* expressly reference the employment standards legislation and acknowledge the application of its provisions generally. The Termination Clause in this case does not.

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[60] However, the Termination Clause is similar to the clauses in *Roden* and *Nemeth* in an important way: like the termination clauses in those decisions, the Termination Clause does not purport to expressly exclude any statutory notice requirements. In my view, the similarity is most instructive and distinguishes this case, as *Roden* and *Nemeth* were distinguishable, from the decisions in *Machtinger*, *Shore*, and *Rutledge v. Canaan Construction Inc.*, 2020 ONSC 4246 [*Rutledge*], a third decision relied on by Mr. Forbes.

[61] *Rutledge* involved the dismissal of a "prescribed" employee in the construction industry who, in accordance with the applicable legislation, was not entitled to notice or pay in lieu of notice on termination. His without cause termination clause nonetheless expressly stated that he would be provided minimum notice based on the "Employment Standards Act … or as may otherwise be required by applicable legislation": *Rutledge* at para. 3. However, given his status as a "prescribed" employee, he acknowledged that pursuant to the legislation and as stated in the agreement, he was otherwise entitled to "absolutely no notice or pay and benefits in lieu thereof upon termination": *Rutledge* at para. 3.

[62] The termination clause went on to provide:

> The termination provisions set force above, represent all severance pay entitlement, notice of termination or termination in lieu thereof, salary, bonuses, vacation pay and other remuneration and benefits payable or otherwise provided to the Employee in relation to the termination of the Employee regardless of cause or circumstances.

[63] At the time of the employee's hiring, employment, and dismissal, the broad language of the termination clause did not contravene the applicable legislation. However, the Court noted that circumstances could change in the future if, for example, the employee was no longer a "prescribed" employee or if a group

termination was required. In either case, the termination clause would then not meet the statutory minimums for notice, rendering the provision unenforceable: *Rutledge* at paras. 15–17.

[64] While seemingly on point with the case at bar, Mr. Forbes' reliance on *Rutledge* ignores that the termination provision in that case went beyond addressing the minimum individual notice by expressly purporting to restrict statutory entitlements in all cases, "regardless of cause or circumstances". No such overarching general limits are expressed in the language of Mr. Forbes' Employment Agreement. Again, the Termination Clause limits only the notice required on an individual termination. It is silent with respect to any other entitlement that may accrue to Mr. Forbes on the termination of his employment.

[65] On the basis of the above, I am satisfied that nothing in the Termination Clause waives Glenmore's obligation to Mr. Forbes in a way that would contravene the *ESA.* To the contrary, I find that Glenmore remained bound to comply with its obligations under s. 64.

4. Summary and Conclusion

[66] To summarize the above, I conclude as follows:

a) Section 63, not s. 64, of the *ESA* establishes the minimum statutory requirements that are needed to oust the common law entitlement to reasonable notice; and,

b) Nothing in the Termination Clause waives Glenmore's obligation to provide the s. 64 notice to Mr. Forbes in the appropriate circumstances.

[67] I am of the view that that Termination Clause, which provides for the same notice as provided for in s. 63 of the *ESA*, is enforceable and provides the maximum notice or pay to which Mr. Forbes is entitled.

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[68] Having paid Mr. Forbes six weeks' pay for his six year and four-month employment in accordance with the Termination Clause, I conclude that Glenmore has met its obligation to Mr. Forbes on the termination of his employment.

B. Did Mr. Forbes Mitigate His Damages?

[69] Having concluded that Mr. Forbes' entitlement to notice, or pay in lieu, is validly governed by the Termination Clause and it is not necessary to look to the common law notice requirements, there is no need to consider whether he took steps to mitigate his damages. Mitigation would only arise as a concern in a common law reasonable notice analysis.

IV. Conclusions and Costs

[70] Having concluded that Glenmore has discharged its obligation to Mr. Forbes, the action against it is dismissed.

[71] Glenmore is entitled to its costs in this action, at Scale B.

"Ahmad, J"

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