IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *McMahon v. Maximizer Services Inc.,* 2023 BCSC 4

Date: 20230103
Docket: S241519
Registry: New Westminster

Between:

Mary McMahon

Plaintiff

And

Maximizer Services Inc.

Defendant

Before: The Honourable Justice Mayer

Reasons for Judgment

Counsel for the Plaintiff:	N. Chhina K. Fountain, Articled Student
Counsel for the Defendant:	N.C. Toye M. Lusk
Place and Date of Hearing:	New Westminster, B.C. December 7, 2022
Place and Date of Judgment:	New Westminster, B.C. January 3, 2023

INTRODUCTION

[1] The plaintiff, Mary McMahon, brings this summary trial application seeking damages for her alleged wrongful dismissal from employment with the defendant, Maximizer Services Inc. ("Maximizer"), in November 2021.

[2] Ms. McMahon has worked in sales for many years. She alleges that in late 2020 or early 2021, she was actively recruited to work with Maximizer by a former colleague, Christopher Barry. She had had worked with Mr. Barry for several years at the Greater Vancouver Board of Trade ("GVBT") until he left to join Maximizer in mid-2020. Maximizer is in the business of developing and selling customer relationship management software (the "CRM software").

[3] Ms. McMahon became employed as an account manager with Maximizer effective March 14, 2021, selling CRM software systems to customers. The terms of her employment with Maximizer were set out in a written agreement dated February 22, 2021 (the "Employment Agreement"). Her annual base salary was set at $75,000, before commissions and bonusses.

[4] Although during submissions, Ms. McMahon initially contended that she was induced by Mr. Barry to enter into the Employment Agreement to support her argument regarding the length of reasonable notice she alleges she was entitled to, she abandoned this position during the summary trial.

[5] Although not plead in her notice of civil claim, in her notice of application and at the hearing before this Court, Ms. McMahon alleged that, in or about September 2021, the Employment Agreement was varied, requiring Maximizer to provide her with six months' notice or pay in lieu if her employment was terminated without cause.

[6] On November 16, 2021, Maximizer terminated Ms. McMahon's employment on a without-cause basis and paid her two weeks base salary as pay in lieu of notice, which Maximizer contends was done in accordance with the termination clause included in the Employment Agreement (the "Termination Clause").

Ms. McMahon contends that the Termination Clause is unenforceable because it is vague and unclear and because it offered less in severance pay than is mandated by the *Employment Standards Act*, R.S.B.C. 1996, c. 113 [*ESA*]. As a result, Ms. McMahon contends that she was wrongfully terminated and seeks damages equivalent to six months' pay in lieu of notice.

[7] In addition to damages for wrongful dismissal, Ms. McMahon seeks aggravated damages, alleging that Maximizer was unduly harsh and insensitive in the manner of her dismissal.

ISSUES

[8] One of the issues this Court must decide is whether this matter is suitable for determination by way of a summary trial, and such suitability depends on the issues which must be decided in this application.

[9] The principle issue is whether the Termination Clause is enforceable. If this Court finds that the Termination Clause is enforceable, the Court must then determine whether Maximizer complied with its terms when Ms. McMahon was dismissed.

[10] If the Termination Clause is found to be unenforceable, Ms. McMahon would have been wrongfully dismissed and this Court must then determine the reasonable notice or pay in lieu of notice that should have been provided to her under the common law. Further, if the Termination Clause is found to be unenforceable, this Court will have to determine whether the manner of Maximizer's termination of Ms. McMahon warrants an award for aggravated damages.

SUITABILITY FOR SUMMARY TRIAL

[11] Pursuant to Rule 9-7(15) of the *Supreme Court Civil Rules*, this Court may grant summary judgement on an issue on a summary trial unless the Court is unable, on the whole of the evidence, to find the facts necessary to decide the issues of fact, or the Court is of the opinion that it would be unjust to decide the issues on the application.

[12] In this case, both parties consider that this matter is suitable for determination by way of summary trial—although Maximizer acknowledges that if this Court finds that the Termination Clause is not enforceable, issues of credibility may arise, in particular on the facts underlying the length of notice given to Ms. McMahon, making the matter unsuitable for summary disposition.

[13] In my view, this matter can be decided on the parties' evidence with respect to the enforceability of the Termination Clause. I find that this raises a discrete question of contractual interpretation, which, if decided in favour of Maximizer, will resolve the whole of this action.

ENFORCEABILITY OF THE TERMINATION CLAUSE

[14] There is no dispute that when Ms. McMahon was hired, the terms of her employment with Maximizer were as set out in the Employment Agreement. As stated earlier in these reasons, Ms. McMahon contends that the Termination Clause is unenforceable because it is vague and unclear and because it does not provide the minimum amount of severance payable in accordance with the *ESA*. Maximizer contends that the Termination Clause is enforceable. In addition, Ms. McMahon also contends that after the Employment Agreement was made, the parties agreed to extend the notice period on termination to six months.

Relevant Legal Principles

[15] As was stated by the Supreme Court of Canada in *Machtinger v. HOJ Industries Ltd.,* [1992] 1 S.C.R. 986, 1992 CanLII 102, when an employee is terminated without cause, the presumption is that the employee is entitled to "reasonable notice", but this presumption is rebuttable if the contract of employment clearly specifies, expressly or impliedly, some other period of notice: *Machtinger* at 998.

[16] Absent considerations of unconscionability, an employer is able to rely on a contract of employment which referentially incorporates the minimum notice periods in the applicable employment standards' legislation. Where an employment contract

fails to comply with the minimum statutory notice period, an employee can only be dismissed without cause if he or she is given reasonable notice of termination: *Machtinger* at 1004–1005.

[17] The validity of a termination clause is a question of contractual interpretation. In interpreting a termination clause, or any term of a contract, the court must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. A court should not disaggregate the words of a contract looking for any ambiguity that can be used to set aside the agreement and, on that basis, apply notice as provided for by the common law": *Asgari Sereshk v. Peter Kiewit Sons ULC,* 2021 BCSC 2570 at paras. 71–72, referring to the decisions in *Composite Technologies Inc. v. Shawcor Ltd.,* 2017 ABCA 160 at paras. 104–105 and *Cook v. Hatch Ltd.*, 2017 ONSC 47 at paras. 24–25.

Is the Termination Clause Vague and Unclear?

[18] The Termination Clause states the following:

> **Termination**
>
> While we hope for a long-term relationship, we feel it is best to address now what will happen if we must part ways.
>
> Maximizer may terminate your employment without notice, and without severance being paid, at any time: i) *with cause*; or ii) during a probationary period.
>
> In the event Maximizer initiates termination, and that termination is *without cause*, Maximizer will provide the greater of:
>
> a) the notice (or payment in lieu) prescribed by the Employment Standards Act of BC as amended or replaced from time to time; and
>
> b) **Two (2) weeks'** written notice of termination (or payment in lieu), PLUS an additional **one (1) week** for every completed year of service to a maximum of **four (4) months** ("severance").
>
> In the event Maximizer initiates termination and that termination involves the payment of severance, severance will be calculated using base salary only. (Note: Any unused vacation is payable by law, and would be in addition to severance). Other compensation elements (specifically including, but not limited to: incentives, commissions and bonuses directly tied to future performance; benefits documented in this Agreement; undocumented

> benefits or perks; monthly expenses typically incurred while employed; etc.) will not be considered in severance calculations.
>
> You may terminate your employment with Maximizer at any time by providing four (4) weeks written notice.

[19] Ms. McMahon contends that the Termination Clause is invalid because its terms are uncertain due to vagueness and a failure to clearly set out her entitlements upon termination. In particular, Ms. McMahon raises the following:

a) in reading subparagraphs (a) and (b) of the Termination Clause it is unclear whether Ms. McMahon would receive, at a minimum, notice or payment in lieu of notice in accordance with the *ESA*, or, two weeks notice plus one additional week of notice for each year of service or payment in lieu of such notice based on her base salary alone;

b) use of the word “notice” in subparagraph (a) and “written notice” in subparagraph (b) creates confusion;

c) it is not clear whether the defined term “severance” in subparagraph (b) applies to the whole Termination Clause, in part because the use of the word “and” rather than “or” in between clauses (a) and (b) suggests that the subclauses should be read together; and

d) interpreting the Termination Clause requires her to perform complex calculations to determine what she is entitled to on termination.

[20] Ms. McMahon contends that these uncertainties allow for a multiple interpretation of the Termination Clause, some of which contravene the *ESA.* First, if severance applies to (a), since severance is defined to be calculated on base salary alone, the clause could disentitle her to payment in lieu of notice which includes commissions and bonuses. Second, if Ms. McMahon were to receive written notice under clause (b) and continue to work until her termination, rather than receive payment in lieu, the clause could disentitle her to commissions and bonuses for that period.

[21] In my view, Ms. McMahon asks this Court to do precisely what the authorities say should not be done—which is to disaggregate the words in the Termination Clause, looking for any ambiguity that can be used to set aside the agreement.

[22] I find the Termination Clause to be clear. It states that upon termination without cause, Ms. McMahon would receive the greater of, under subparagraph (a), notice or pay in lieu of notice prescribed in the *ESA* and, under subparagraph (b), two weeks or more notice or payment in lieu of notice based on base pay only. The use of the word "and" in between clauses (a) and (b) does not detract from the ordinary meaning of the words "greater of" which precedes these paragraphs, being that Ms. McMahon would be entitled to the greater of the notice or pay in lieu of notice provided for in each of those options.

[23] With respect to the word severance, the Termination Clause is clear in that severance is used to define the notice Ms. McMahon would be entitled to under subclause (b) only. The defined term severance follows immediately at the end of subclause (b). As a result, the fact that severance under subclause (b) only includes payment of base salary for a minimum of two weeks does not offend the *ESA*. Simply put, Ms. McMahon is entitled to notice under whichever of the two options is better for her. I do not find that to determine her entitlement to notice or pay in lieu of notice requires that Ms. McMahon would be required to perform complex calculations, as she alleges.

Does the Termination Clause Offend the *ESA*?

[24] Given my reasons above, I do not find that the Termination Clause offends the *ESA*. At a minimum, Ms. McMahon is entitled to notice or payment in lieu of notice as set out in the act.

[25] Ms. McMahon relies on the decision of the Ontario Court of Appeal in *Waksdale v. Swegon North America Inc.,* 2020 ONCA 391 for the proposition that an employer should not have the option to rely on unenforceable terms and should not draft termination clauses that give it the option to contravene statutory requirements. Those facts do not arise in this case. In this case, Maximizer did not seek to contravene the statutory requirements for notice set out in the *ESA* in the Termination Clause, but rather set compliance with the *ESA* as a minimum requirement in case Ms. McMahon was terminated without cause.

Did Maximizer Pay the Required Severance?

[26] In this case, Maximizer did not provide notice of termination to Ms. McMahon but paid her severance in lieu of notice, as they were entitled to do.

[27] Section 63 of the *ESA* provides the minimum statutory entitlements of an employee upon termination. Section 63(1) of the *ESA* provides that an employer becomes liable to pay an employee an amount equal to one week's wages as compensation for length of service. Under s. 63(2), this amount increases to two weeks pay after 12 consecutive months employment. Under s. 63(3), this liability is deemed to be discharge if written notice of termination is provided. Under s. 63(4), the amount an employer is liable to pay becomes payable on termination of employment and is calculated by totalling all the employee's weekly wages, at their regular wage, during the last eight weeks of employment, dividing that total by eight, and then multiplying the result by the number of weeks' wages the employer is liable to pay. Regular wage is defined in s. 1 of the *ESA* to include commissions.

[28] The evidence establishes that Maximizer terminated Ms. McMahon on November 16, 2021 and paid her $2,884.61 for two weeks in lieu of notice, calculated using her base weekly salary ($75,000 annual base salary ÷ 52 weeks x 2 weeks). If Ms. McMahon had been paid pursuant to the *ESA*, she would have been entitled to be paid one week's regular wages in lieu of notice. Maximizer provided evidence from its CEO, Iain Black, which is not challenged, that Maximizer paid Ms. McMahon more in severance than she would have been paid pursuant to the *ESA*.

[29] I find that when Maximizer terminated Ms. McMahon, they provided pay in lieu of notice in compliance with the Termination Clause.

Did the Parties Agree to Amend the Employment Agreement to Require a Minimum Six Months' Notice?

[30] Ms. McMahon alleges in her notice of application that before she was hired by Maximizer, Mr. Barry advised her that she would receive six months' notice of termination and would be secure in her role.

[31] In her affidavit filed September 7, 2022, Ms. McMahon did not mention that Mr. Barry told her she would receive six-months' notice of termination before she was hired. In notes which Ms. McMahon deposes she took during a conversation with Mr. Barry prior to being hired by Maximizer, she made the note "6 month Probationary".

[32] I do not find that it was a term of the Employment Agreement that Ms. McMahon would receive six months' notice of termination at the time it was entered into by the parties.

[33] Ms. McMahon also alleges in her notice of application that, shortly before she was terminated by Maximizer, Mr. Barry reiterated that she would receive six months' notice of termination. Ms. McMahon did not allege or plead any facts in her notice of civil claim that the Employment Agreement had been amended in this manner. As well during her examination for discovery on June 28, 2022, Ms. McMahon testified that she signed the Employment Agreement and agreed to be bound by its terms, but it was her position that the Termination Clause was not binding on her.

[34] In her affidavit, Ms. McMahon swore that during a conversation with Mr. Barry around the summer of 2021 when she expressed concern about the recent liquidation of Maximizer's UK office and her job security, he assured her that she did not have anything to worry about and if he "let her go", he would give her six months' severance. Mr. Barry denies that he made this assurance. There is no documentary evidence that this assurance was made and there is no evidence that any consideration flowed for the alleged assurance.

[35] The evidence does not establish, on a balance of probabilities, that the parties agreed to amend the Employment Agreement to include a six months' notice of termination provision.

Conclusion on Wrongful Dismissal

[36] In conclusion, I find that the Termination Clause is enforceable and that Ms. McMahon received severance pay in lieu of notice in accordance with its terms. As a result, I find that Ms. McMahon was not wrongfully dismissed.

AGGRAVATED DAMAGES

[37] Given my findings above, there can be no award of aggravated damages awarded for the manner of Ms. McMahon's dismissal.

[38] As stated in *Damani v. Stuart Olson construction Ltd.,* 2015 BCSC 2322:

> [22] Aggravated and punitive damages arising out of a dismissal flow from the cause of action for wrongful dismissal which is abased on a failure to give the required notice or pay in lieu of notice. See, *Honda Canada Inc. v. Keays,* 2008 SCC 39 at paras. 50-52.
>
> [23] Where, as in this case, the plaintiff has not been wrongfully dismissed, there can be no aggravated or punitive damages awarded for the manner of dismissal. Absent a proven breach of contract, there can be no aggravated damages awarded for breach of the duty to act in good faith in respect of the alleged breach of contract.

CONCLUSION

[39] Ms. McMahon's claim for damages for wrongful dismissal and for aggravated damages are dismissed.

"Mayer J."