CITATION: Perretta v. Rand A Technology Corporation, 2021 ONSC 2111
COURT FILE NO.: CV-20-640708
DATE: 20210322

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
CANDICE PERRETTA aka CANDACE PERRETTA	)	*Gregory Sills*, for the Plaintiff
	)	
Plaintiff	)	
– and –	)	
	)	
RAND A TECHNOLOGY CORPORATION	)	
	)	*Andy Pushalik and Kyle Isherwood*, for the
Defendant	)	Defendant
	)	
	)	
	)	
	)	
	)	
	)	
	)	**HEARD:** March 4, 2021

A.A SANFILIPPO J.

REASONS FOR DECISION

Overview

[1] The Plaintiff, Candice Perretta aka Candace Perretta, commenced work with the defendant, Rand A Technology Corporation (herein "Rand") on September 29, 2014, initially in the role of customer advocate and later promoted to sales representative. Rand terminated Ms. Perretta's employment, without cause, on March 31, 2020. The parties could not agree on the compensation to which Ms. Perretta was entitled upon her dismissal.

[2] The Plaintiff brought this motion for summary judgment, seeking $26,907.52 in damages for wrongful dismissal, an amount that is within the jurisdiction of the Small Claims Court. The Defendant submitted that it had fulfilled all the employment obligations owed to the Plaintiff on employment termination.

[3] On the basis of the reasons that follow, I grant the Plaintiff summary judgment against the Defendant in the amount of $16,807.52, and pre-judgment and post-judgment interest in accordance with the *Courts of Justice Act*, R.S.O. 1990, c. C.43.

I. THE FACTUAL RECORD

[4] The facts pertaining to Ms. Perretta's employment and dismissal were not in dispute.

[5] Ms. Perretta started to work with Rand as a customer advocate on September 29, 2014, pursuant to a written employment agreement dated September 11, 2014. Ms. Perretta was promoted to the position of sales representative effective November 1, 2018, pursuant to a new employment contract dated October 23, 2018 (the "2018 Employment Contract"). Ms. Perretta's compensation as a sales representative was as follows: annual base salary of $46,500; eligibility to participate in Rand's commission plan for sales employees; eligibility to participate in Rand's group insurance benefits program, which included medical, dental, life insurance and disability coverage; eligibility to participate in Rand's RRSP matching program, which she did not do in 2018, 2019 or 2020; and, 15 days of paid vacation per calendar year.

[6] The 2018 Employment Contract provided that Rand could terminate Ms. Perretta's employment without cause by providing two weeks of notice or pay in lieu of notice plus the minimum notice or pay in lieu of notice, benefits and severance pay required by the *Employment Standards Act, 2000*, S.O. 2000, c. 41 (the "Termination Without Cause Provision").

[7] Ms. Perretta's employment was terminated, without cause, on March 31, 2020, by Rand's letter of termination handed to Ms. Perretta that day. Rand admitted that it made a mistake by refusing to pay Ms. Perretta the agreed-upon two weeks' pay unless Ms. Perretta first executed a Full and Final Release, which was presented to Ms. Perretta as a component of an "Enhanced Severance" offer.

[8] Ms. Perretta sent a letter to Rand on April 1, 2020 pertaining to her dismissal. Rand replied by letter on April 2, 2020 and demanded, again, that Ms. Perretta execute a Full and Final Release as a condition to her receipt of the two weeks' pay owed to her by the Termination Without Cause Provision. Ms. Perretta retained a lawyer who wrote to Rand that its treatment of its employee was in breach of the 2018 Employment Contract. Rand responded on April 24, 2020, through its legal counsel, and apologized for requiring that Ms. Perretta sign a Full and Final Release. Rand then transferred to Ms. Perretta the equivalent of two weeks' pay and the monetary value of her entitlements under the *ESA*.[1]

[1] In her factum, the Plaintiff took the position that Rand had not, at any time, paid to Ms. Perretta the full amount of her two weeks' pay, because Rand eventually paid Ms. Perretta $1,788.00 for two weeks' pay as opposed to the

[9] Ms. Perretta submitted that Rand repudiated the 2018 Employment Contract and is thereby entitled to damages for wrongful dismissal at common law without the limitation imposed by the Termination Without Cause Provision. Ms. Perretta submitted, as well, that the termination provisions in the 2018 Employment Contract are unlawful and unenforceable as they contravene the *ESA*. Rand responded that it merely made a mistake, has since apologized, and should still be allowed to limit Ms. Perretta's entitlements on dismissal to those set out in the Termination Without Cause Provision. Rand contended that the termination provisions in the 2018 Employment Contract are lawful and enforceable.

II. ISSUES

[10] This summary judgment motion raised the following issues:

A. Is the Termination Without Cause Provision Enforceable?

(a) Was the 2018 Employment Contract repudiated by the Defendant?

(b) Are the Termination Provisions in the 2018 Employment Contract unenforceable as an unlawful contracting out of the *ESA*?

B. If the Termination Without Cause Provision is unenforceable, what is the reasonable notice due and owing to the Plaintiff?

C. Should the damages claimed by the Plaintiff be reduced due to a failure to mitigate?

[11] I will address these issues in order.

III. ANALYSIS

[12] This action was brought in the Simplified Procedure, under Rule 76 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, for damages for wrongful dismissal in the amount of $32,660.00, which was throughout within the $35,000 monetary jurisdiction of the Small Claims Court.[2] The Plaintiff initially claimed, but later abandoned, $20,000 of general, punitive and aggravated damages, which, she submitted, placed this claim above the Small Claims Court monetary jurisdiction.

[13] Instead of bringing a motion for summary judgment, upon abandoning the amount of her claim in excess of the monetary jurisdiction of the Small Claims Court the Plaintiff ought to have

---

$1,788.46 owed, a shortfall of 46 cents. The Plaintiff did not rely on this position in argument: *de minimis non curat lex*.

[2] *Courts of Justice Act*, s. 23; *Small Claims Court Jurisdiction and Appeal Limit*, O. Reg. 626/00, s. 1.

transferred this action to the Small Claims Court: *Courts of Justice Act*, s. 23(2) . The failure to do so exposes the Plaintiff to the cost consequences provided by Rule 57.05.

[14] I considered whether to transfer this action to the Small Claims Court, even without the consent of the parties, in the exercise of the Court's inherent jurisdiction: *Roberts v. 603418 Ontario Inc*., 2014 ONSC 6240 (Div. Ct), at para. 25, citing *Shoppers Trust Co. v. Mann Taxi Management Ltd.* (1993), 16 O.R. (3d) 192 (Gen. Div.); *Graves v. Avis Rent a Car System Inc.* (1993), 21 C.P.C. (3d) 391 (Gen. Div.). While I do not condone the Plaintiff advancing this claim in the wrong branch of this Court, I decided not to transfer this action to the Small Claims Court at this time as the transfer would only cause delay and add to the costs that the parties have already generated disproportionately to the amounts in issue.

[15] The parties agreed that this was an appropriate case for summary judgment under Rule 20.01 in that such a process can address all issues raised by this action and because there are no genuine issues requiring a trial. It is, of course, incumbent on the motion judge to decide whether it is appropriate to grant summary judgment independent of any agreement by the parties: *Royal Bank of Canada v. 1643937 Ontario Inc*., 2021 ONCA 98, at para. 26; Rule 20.04(2)(b).

[16] I have done so and am satisfied that the summary judgment process is appropriate in this case. The factual elements of this action are not in dispute, and I am confident that the evidentiary record allows me to find all necessary facts, using the tools under Rule 20.04(2.1) if necessary, and apply the relevant law to the evidence. It is in the interests of justice to proceed with adjudication in this summary judgment motion as this process will allow for a just and fair determination of the issues on their merits.

A. Is the Termination Without Cause Provision Enforceable?

[17] The Plaintiff submitted that the Termination Without Cause Provision was unenforceable on two grounds: first, because the 2018 Employment Contract was repudiated by Rand; second, because the termination provisions in the 2018 Employment Contract are unenforceable as an unlawful contracting out of the *ESA*. I will address these positions in order.

(a) Was the 2018 Employment Contract Repudiated?

[18] Repudiation of a contract, whether an employment contract or otherwise, "occurs by the words or conduct of one party to a contract that show an intention not to be bound by the contract": *Remedy Drug Store Co. v. Farnham*, 2015 ONCA 576, 389 D.L.R. (4th) 671, at para. 42, citing *Guarantee Co. of North America v. Gordon Capital Corp*., [1999] 3 S.C.R. 423, at para. 40; *Potter v. New Brunswick (Legal Aid Services Commission)*, 2015 SCC 10, [2015] 1 S.C.R. 500, at para. 149; *Roden v. The Toronto Humane Society* (2005), 259 D.L.R. (4th) 89, at para. 50.

[19] In *Remedy Drug Store*, the employer had settled a dispute arising from the dismissal of an employee, but disagreed whether the terms of settlement included a provision that would allow the employer to conduct a forensic sweep of the employee's personal computer. The employee claimed that the employer had taken steps that amounted to a repudiation of the settlement

agreement. In affirming the motion judge's dismissal of this submission, the Court of Appeal explained the test for anticipatory repudiation, which is the same as repudiation *simpliciter* but for the difference in timing, at paras. 45-46, as follows:

> The test for anticipatory repudiation is an objective one: S.M. Waddams, *The Law of Contracts*, 6th ed. (Toronto: Canada Law Book, 2010), at para. 620. As Gillese J.A. wrote for this court in *Spirent Communications of Ottawa Ltd. v. Quake Technologies (Canada) Inc.*, 2008 ONCA 92, 88 O.R. (3d) 721, at para. 37: "To assess whether the party in breach has evinced such an intention [to repudiate the contract], the court is to ask whether a reasonable person would conclude that the breaching party no longer intends to be bound by it."
>
> In objectively construing the purported breaching party's intention, the surrounding circumstances must be considered. In *White v. E.B.F. Manufacturing Ltd.*, 2005 NSCA 167, 239 N.S.R. (2d) 270, Saunders J.A. wrote, at para. 89: "Proof of such an intention requires an investigation into the nature of the contract, the attendant circumstances, and the motives which prompted the breach." Earlier this year, Cromwell J., in his concurring opinion in *Potter*, confirmed the importance of considering the surrounding circumstances. At para. 164, Cromwell J. wrote: "As Lord Scarman put it in *Woodar Investment Development Ltd. v. Wimpey Construction UK Ltd.*, [1980] 1 All E.R. 571 (H.L.), at p. 590, the trial judge and the Court of Appeal in this case were 'concentrating too much attention on one act isolated from its surrounding circumstances and failing to pay proper regard to the impact of the party's conduct on the other party'."

[20] The test is whether, considering surrounding circumstances, including the nature of the contract, the motives which prompted the purported breach, and the impact of the party's conduct on the other party, a reasonable person would conclude that the breaching party no longer intends to be bound by the contract with the result that the innocent party would be deprived of substantially the whole benefit of the contract. A party can repudiate a contract without subjectively intending to do so, because the assessment is made objectively: *Remedy Drug Store*, at para. 47, citing *Guarantee Co.*, at para. 40.

[21] Here, the 2018 Employment Contract imposed on Rand the contractual duty to pay Ms. Perretta two weeks of pay upon termination without cause and without notice, in addition to her entitlements under the *ESA*:

> **Termination Without Cause** – We may terminate your employment in our sole discretion, without cause, by providing you with two weeks of notice or pay in lieu of notice (or some combination thereof), plus the minimum notice or pay in lieu of notice (or some combination thereof) and severance pay (if any) then required by the ESA. Rand will also continue your Benefits to the extent and for the minimum period required by the ESA.

[22] On employment termination without cause and without notice, Rand refused to pay Ms. Perretta the two weeks' salary required by the Termination Without Cause provision. Instead, in its March 31, 2020 employment termination letter, the Defendant agreed to pay Ms. Perretta her entitlements under the *ESA*, only. Instead of also paying Ms. Perretta the two weeks' salary to which she was contractually entitled, Rand presented to Ms. Perretta an "Enhanced Severance" offer whereby Ms. Perretta would receive the two weeks' salary only upon her agreement – which she was required to provide within 7 days – to the following: (i) execution of a detailed three page Full and Final Release; (ii) return of all company property without retention of copies; (iii) agreement to continue to be bound by the Confidentiality and Non-Competition and Non-Solicitation provisions of the 2018 Employment Contract; (iv) agreement to modify her LinkedIn profile; (v) agreement that in the event of breach of any of these terms, she would re-pay the two weeks' pay to Rand.

[23] Rand admitted, in my view correctly, that none of the terms contained in the Enhanced Severance offer were for the benefit of its employee, Ms. Perretta. They were only to the benefit of Rand.

[24] Rand submitted that it made a mistake. Undoubtedly it did. Rand refused to pay its employee the two weeks' salary to which she was contractually entitled on dismissal and instead demanded several substantive terms as preconditions to Ms. Perretta receiving the termination payment. The question is whether the Defendant's breach constituted a repudiation of the 2018 Employment Contract. It did, for reasons that I will now explain.

(i) Objective Assessment of the Defendant's Breach

[25] Rand did not simply specify in its employment termination letter a request for a Full and Final Release. The demand for Ms. Perretta to execute a Full and Final Release is stated four times in the employment termination letter and conveyed clearly that Rand would not pay Ms. Perretta the two weeks' pay unless she first signed the Full and Final Release.[3]

[26] Further, the Full and Final Release does not contain only a release of any cause of action that Ms. Perretta has against her former employer. The Full and Final Release also contains the following substantive terms: (i) a representation and warranty that Ms. Perretta has no other claim against Rand other than those released; (ii) an indemnity by Ms. Perretta in favour of Rand and an

---

[3] The four references are as follows: (i) "If you do not sign and return this Transition Agreement and the attached Full and Final Release within the timelines set out below, the Enhanced Severance offer will be automatically withdrawn and you will be provided only the amounts and benefits outlined above." (ii) "Fulfillment by Rand of the terms of the Enhanced Severance offer are conditional upon your execution of the enclosed Full and Final Release, the terms of which are expressly made part of this offer." (iii) "If this offer is acceptable to you, please deliver one original signed and witnessed copy of this Transition Agreement and the enclosed Full and Final Release to me by the above deadline." (iv) "Please note that the Enhanced Severance offer will not be provided until the Company receives the original signed documents stated above."

agreement to hold Rand harmless from issues arising from her employment dismissal; (iii) a "no further action clause" prohibiting Ms. Perretta from suing any other person who might, in turn, advance a claim for contribution or indemnity against Rand; (iv) a consent to the issuance of injunctive relief in the event that Ms. Perretta were to breach the Full and Final Release; (v) a non-disparagement clause; (vi) an agreement to hold as confidential the terms of her employment termination; (vii) an agreement that Rand's payment of the two weeks' pay was without any admission of liability.

[27] This shows that Rand's demand for the Full and Final Release was not a casual or accidental slip. Rand took time and purpose to prepare this detailed document. And the Full and Final Release was only one of the several terms demanded for Rand's benefit in its proposed "Enhanced Severance" offer.

[28] Rand did not make these demands of Ms. Perretta on only one occasion, but twice. This removed the possibility that Rand's initial demand for a Full and Final Release was the product of momentary inattention. In its letter of April 2, 2020, in response to Ms. Perretta's challenge to Rand's terms of employment termination, Rand reiterated its demand that she accede to Rand's terms, now within 5 days, including the execution of a Full and Final Release, in order to receive her two weeks' pay:

> In addition, as outlined in the letter to you dated March 31, 2020, our offer of an additional lump sum payment equivalent to 2 week' base pay in the amount of $1,788.46 will be withdrawn should you decide not to sign and return to us the Full and Final Release by April 7, 2020.

[29] Ms. Perretta did not accept. The Defendant's unilaterally imposed deadline of April 7, 2020 passed without an agreement on the "Enhanced Severance" offer. Rand's refusal to pay to Ms. Perretta the two weeks' pay without condition was in breach of the 2018 Employment Contract.

[30] The Defendant relies heavily on its reversal of position after receiving legal advice: not from its own lawyers but from Ms. Perretta's counsel. Mr. Bruce Markowitz, Rand's Senior Human Resources Business Partner, deposed that on April 8, 2020, he received a letter from Ms. Perretta's counsel and realized from it that he had made a mistake in demanding terms to the payment of two weeks' pay in lieu of notice. Mr. Markowitz deposed that on being alerted to his mistake – not by Rand's lawyer but by a lawyer retained and paid for by Rand's employee – he then processed Ms. Perretta's two weeks' pay in time for the April 15, 2020 company payroll.

[31] On April 24, 2020, Rand's lawyer apologized, on Rand's behalf, for demanding that Ms. Perretta execute a Full and Final Release. I see no apology for the demand that Ms. Perretta comply with the other terms set out in the company's Enhanced Severance offer.

[32] I am satisfied that a reasonable person assessing the Defendant's conduct would conclude that in demanding that its employee execute a Full and Final Release and comply with the terms of an "Enhanced Severance" offer as preconditions to receiving the two weeks' pay to which the

employee was contractually entitled, Rand no longer intended to be bound by the 2018 Employment Contract. I reach this conclusion accepting Rand's admission that it made a mistake. Even if Rand's mistake was innocent and resulted from a simple lack of understanding of the very employment contract that it had drawn, and even if I accept Rand's evidence that it did not understand its obligations at law until so advised by counsel for its employee, that does not exhaust the analysis. My assessment is whether the Defendant's conduct evidenced an intention not to be bound by the 2018 Employment Contract, assessed objectively. It does.

[33] This is not a case like those relied on by the Defendant. In *Oudin v. Le Centre Francophone de Toronto*, 2015 ONSC 6494, 27 C.C.E.L. (4th) 86, Dunphy J.'s refusal to find repudiation of the employment contract was on evidence of arithmetic errors in the computation of the values of the amounts owed, amounting to less than a weeks' pay out of 21 weeks owed. Similarly, in *Kerzner v. American Iron & Metal Company Inc*., 2017 ONSC 4352, C.C.E.L. (4th) 142, Mew J. found that repudiation of contract was not established where the parties disputed compliance with post-termination amounts owed. And in *Remedy Drugs*, the assessment of repudiation pertained to a single term: the demanded forensic sweep of a computer.

[34] Rand's breach was not "one act isolated from its surrounding circumstances", as it contends, relying on *Remedy Drug Store*, at para. 46. It is a series of acts: the March 31, 2020 termination letter; the drafting of a detailed Full and Final Release with multi-faceted terms; the imposition of several additional entitlements in the proposed Enhanced Severance offer; and doing so not once but twice, by restating its demands in its letter of April 2, 2020.

(ii) Deprivation of the Entirety of the Bargain

[35] The test for repudiation requires assessment of the impact of the breaching party's conduct on the innocent party. The breach must deprive the innocent party of "substantially the whole benefit of the contract": *Remedy Drug Store*, at para. 50.

[36] By terminating Ms. Perretta's employment, Rand was bringing the 2018 Employment Agreement to an end. The two weeks' salary in lieu of notice was the only monetary entitlement available to Ms. Perretta under the 2018 Employment Contract upon without cause termination, apart from her statutorily prescribed *ESA* entitlements. By refusing to pay the two weeks' salary, Rand deprived Ms. Perretta of the entirety of the monetary benefit available to her upon termination apart from the statutory benefits.

(iii) Surrounding Circumstances

[37] In *Wallace v. United Grain Growers Ltd*., [1997] 3 SCR 701, at para. 95, the Supreme Court stated that: "The point at which the employment relationship ruptures is the time when the employee is most vulnerable and hence, most in need of protection." It is important for employees to know, with certainty, their entitlements on the termination of their employment: *Machtinger v. HOJ Industries Ltd*., [1992] 1 SCR 986 at pp. 990-991, 1002: "I would add that not only is work fundamental to an individual's identity, but also that the manner in which employment can be

terminated is equally important." In *Rossman v. Canadian Solar Inc*., 2019 ONCA 992, 444 D.L.R. (4th) 131, at para. 39, the Court of Appeal reiterated this principle: "Employees need to know the conditions, including entitlements, of their employment with certainty. This is especially so with respect to an employee's termination – a fragile moment of stress and uncertainty."

[38] Ms. Perretta's employment was terminated at the onset of a pandemic. She was denied the monetary benefit owed to her at the time of employment termination and was put to the expense of retaining a lawyer to identify Rand's breach of contract. But for Ms. Perretta taking this step, it is likely that the unlawful demands made by the Defendant would have gone undetected and uncured, considering Mr. Markowitz' sworn evidence that Rand learned of its mistake from its employee's lawyer.

(iv) Conclusion – Rand Repudiated the 2018 Employment Contract

[39] In *Remedy Drug Store*, at para. 52, the Court of Appeal stated that a party's insistence on a new contractual term can amount to anticipatory repudiation:

> The authorities are therefore clear. The conduct in this case – insistence on a new contractual term – can amount to an anticipatory repudiation, but *only if* the term is of such importance that the party seeking to rely on the term can be said to have exhibited an intention not to be bound by the contract. [Emphasis in original]

[40] I have concluded that Rand showed an intention not to be bound by the 2018 Employment Contract in the time period between its dismissal of Ms. Perretta on March 31, 2020 to its revocation of its unilaterally imposed deadline of April 7, 2020. I find that the 2018 Employment Contract was repudiated on April 7, 2020, being the date on which Rand's unilaterally imposed demand for Ms. Perretta to comply with its new terms expired and thereby the date on which Rand refused to pay Ms. Perretta the two weeks' salary to which she was entitled on employment termination without cause and without notice. This breach could not subsequently be cured by the counsel's apology on behalf of Rand and by post-breach payment of the amounts owed, absent concurrence by Ms. Perretta, which was not forthcoming.

[41] This conclusion accords with the policy expressed by Court of Appeal in *Wood v. Fred Deeley Imports Ltd*., 2017 ONCA 158, 134 O.R. (3d) 481, at para. 28, in the context of consideration of the consequences to an employer drafting a termination provision that fails to comply with the *ESA*. In applying the principle earlier expressed by the Supreme Court in *Machtinger*, at p. 1004, Laskin J.A. wrote: "If the only consequence employers suffer for drafting a termination clause that fails to comply with the ESA is an order that they comply, then they will have little or no incentive to draft a lawful termination clause at the beginning of the employment relationship." Similarly, if the only consequence to Rand for its imposition of new demands at the time of termination that deprived its employee of the benefit of the contract is to apologize and

pay the amount that it was lawfully required to pay, there would be little or no incentive to comply with its termination provision.

(b) Are the Termination Provisions in the 2018 Employment Contract unenforceable as an unlawful contracting out of the ESA?

[42] By reason of my determination that the 2018 Employment Contract was repudiated by Rand, with the result that Ms. Perretta's entitlement to damages on termination is governed by common law principles, it is not necessary to determine whether the termination provisions in the 2018 Employment Contract are unenforceable as an unlawful contracting out of the *ESA*. However, for completeness of analysis, I will explain why I would have found that the termination provisions were unenforceable, had it been necessary to do so.

[43] The Termination With Cause Provision in the 2018 Employment Contract provides as follows:

> **Termination With Cause** – We may terminate your employment for just cause at any time without notice, pay in lieu of notice, severance pay, or other liability, subject to the ESA. For the purposes of this Agreement, "just cause" means just cause as that term is understood under the common law and includes, but is not limited to: [list of Eleven Categories of Just Cause]

[44] Three of the Eleven Categories of Just Cause are as follows: (i) "a material breach of this Agreement or our employment policies"; (ii) unacceptable performance standards"; (iii) "repeated, unwarranted lateness, absenteeism or failure to report for work". The Plaintiff submitted that these three Categories of Just Cause, and perhaps others, fall short of the statutory exemption set out in *Termination and Severance of Employment*, O. Reg. 288/01, passed under the *ESA*, which provides, in sections 2(1)3. and 9(1)6., that an employee is not entitled to notice of termination or termination pay or severance pay under the *ESA* where the employee "has been guilty of wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned by the employer."

[45] I find that the three categories of just cause emphasized by the Plaintiff, and quoted in the previous paragraph, fail to rise to the statutory threshold set out in O. Reg. 288/01 and thereby breach the *ESA*. Simply, they permit dismissal without notice of termination or termination or severance pay in circumstances where the employee is not "guilty of wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned by the employer." I will refer to these three categories as the "Offending Categories".

[46] The *ESA* sets out the minimum employment standards that employers must meet: ss. 1(1), 5(1) and 57. Parties cannot contract out of these employment standards: *ESA*, s. 5; *Rossman*, at para. 18; *Andros v. Colliers Macaulay Nicolls Inc.*, 2019 ONCA 679, 437 D.L.R. (4th) 546, at para. 19. In *Waksdale v. Swegon North America Inc.*, 2020 ONCA 391, at para. 10, the Court of

Appeal held that illegality in the "with cause" portion of the termination provisions renders all termination provisions in the employment contract unenforceable: "While courts will permit an employer to enforce a rights-restricting contract, they will not enforce termination provisions that are in whole or in part illegal. In conducting this analysis, it is irrelevant whether the termination provisions are found in one place in the agreement or separated, or whether the provisions are by their terms otherwise linked": see also *Rossman*, at para. 18.

[47] Consequently, if the Termination With Cause Provision is unlawful as contrary to the *ESA*, then all the termination provisions in the 2018 Employment Contract are unenforceable. It is irrelevant that the Defendant did not rely on the Termination With Cause Provision: *Waksdale*, at para. 11. Its illegality would render unenforceable all termination provisions in the 2018 Employment Contract, including the Termination Without Cause Provision on which Rand relies.

[48] The question then is whether the Termination With Cause Provision complies with the *ESA*.

[49] I pause to observe that it is unclear why Rand required its employee to agree to a Termination With Cause Provision that lists Eleven Categories of Just Cause, at all, much less a list that contains some categories that breach the *ESA*. If it was to set out a form of "code of conduct", it is misplaced in a Termination with Cause Provision unless the company condones all conduct except that which constitutes "wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned by the employer". If this list was meant to identify for the employee the conduct that would result in dismissal "without notice, pay in lieu of notice, severance pay, or other liability" then it would breach the *ESA* and would be unenforceable because Rand is not lawfully able to dismiss its employee without notice or pay in lieu of notice or severance pay under O. Reg. 288/01 in reliance on the Offending Categories.

[50] However, Rand submitted that the Termination With Cause Provision says more. Rand submitted that its Termination With Cause Provision, read generously and in the context of the entirety of the 2018 Employment Agreement, makes clear that Rand intended throughout to comply with the *ESA*. In support of this submission, Rand relied on the following:

(a) The Termination With Cause Provision states that it is "subject to the ESA". It provides further that the minimum entitlements under the ESA will govern: "If your minimum entitlements upon termination pursuant to the ESA exceed that which is set out above, your minimum entitlements under the ESA will govern."

(b) The 2018 Employment Contract contains a 'General' provision that states: "If any provision of this Agreement provides a right or benefit that is less than the corresponding minimum right or benefit under the ESA that provision will be deemed to provide the corresponding minimum right or benefit under the ESA."

[51] The principles that guide my interpretation of the enforceability of the Termination With Cause Provision are set out by Laskin J.A. in *Wood* at para. 28, applied in *Rossman*, at para. 23.

In application of these principles, the Termination With Cause Provision must be interpreted in a way that "encourages employers to comply with the minimum requirements of the ESA", that "encourages employers to draft agreements that comply with the ESA", and that allows employees to "know at the beginning of their employment what their entitlement will be at the end of their employment". Any ambiguity in a termination clause must be interpreted in a manner that gives the greater benefit to the employee: *Rossman,* at para. 23; *Wood,* at para. 28; *Andros*, at para. 26.

[52] Additionally, the 2018 Employment Contract "must be interpreted as a whole and not on a piecemeal basis": *Waksdale*, at para. 10; *Dumbrell v. The Regional Group of Companies Inc.*, 2007 ONCA 59, 85 O.R. (3d) 616, at para. 53: "The text of the written agreement must be read as a whole and in the context of the circumstances as they existed when the agreement was created." The Termination With Cause Provision must be determined not by its individual sentences, but as a whole: *Amberber v. IBM Canada Ltd*., 2018 ONCA 571, 424 D.L.R. (4th) 169, at para. 59: "In my view, the individual sentences of the clause cannot be interpreted on their own. Rather, the clause must be interpreted as a whole."

[53] I accept Rand's submission that, considering the entirety of the 2018 Employment Contract and the Termination With Cause Provision as a whole, there is a way that the Termination With Cause Provision can be read that is compatible with the *ESA*. The words "subject to the *ESA*" would have to be found to disqualify or neutralize the Offending Categories of Just Cause.

[54] Read generously, and by an employee well-versed in the *ESA*, the Termination With Cause Provision states in its first sentence that Ms. Perretta's employment could be terminated at any time, without notice or pay in lieu of notice or severance pay, only if her conduct rose to the level of O. Reg. 288/01 of the *ESA*. However, the next sentence of the Termination With Cause Provision says the opposite. It says that Ms. Perretta's employment can be terminated at any time, without notice or pay in lieu of notice or severance pay on the basis of the Offending Categories, which do not rise to the level of O. Reg. 288/01 of the *ESA*. Put differently, the second sentence of the Termination with Cause Provision would activate the Offending Categories as grounds for a 'with cause' termination, and the first sentence of the Termination with Cause Provision would deactivate the Offending Categories as grounds for a 'with cause' termination.

[55] The test of validity of a termination provision is not to struggle to find a way that the provision can be read consistent with the *ESA,* however convoluted. When the clause is ambiguous, as it is here, it must be read in a manner that provides the highest benefit to the employee. I adopt the statement by Sossin J. (as he then was) in *Alarashi v. Big Brothers Big Sisters of Toronto,* 2019 ONSC 4510, at para. 54-55: "While the clause can be read in a way that is compatible with the *ESA*, that is not the test for a valid termination clause, as affirmed in *Andros*. Because the clause could also be conveying to Alarashi that he may not be entitled both to termination pay and severance pay, the clause is at best ambiguous. In the face of ambiguous wording, the terminated employee is entitled to an interpretation that would lead to the highest level of benefit."

[56] Although Rand says that its provision is "subject to the *ESA*", the inclusion of the Offending Categories "flies in the face" of compliance with the *ESA*: as in *Rossman,* at para. 39.

The ambiguity must be resolved in favour of Ms. Perretta by finding that the termination provision contravenes the ESA and is thereby invalid.

[57] The Defendant submitted that the ambiguity can be saved by the later provisions that state that when Rand's employment contract results in a contravention of the *ESA*, Rand will comply with the *ESA*. These are 'saving provisions', and their proper use would be to safeguard against changes to the legislation made after the contract is concluded.

[58] An employer's attempt to contract out of the *ESA* cannot be saved by a 'saving provision': *Rossman*, at para. 35: "It cannot be the case that the saving provision here – designed to make the Termination Clause compatible with future changes to the *ESA* – could reconcile a conclusory provision that is in direct conflict with the *ESA* from the outset". Rand's contract did not comply with the *ESA* "from the outset" and cannot now be saved by a savings provision.

B. What is the Reasonable Notice Period?

[59] As I have determined that the Termination Without Cause Provision in the 2018 Employment Contract is not enforceable, because of repudiation, Ms. Perretta is entitled to pay in lieu of notice for the reasonable period under common law: *Rossman*, at para. 17, citing *Andros*, at para. 18, *Amberber*, at para. 40; *Wood* at para. 16.

[60] The parties agreed that the well-established principles set out in *Bardal v. Globe & Mail Ltd.*(1960), 24 D.L.R. (2d) 140 (Ont. H.C.), at p. 145, provide the framework for determining what constitutes reasonable notice: "The reasonableness of the notice must be decided with reference to each particular case, having regard to 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." The determination of the period of reasonable notice "is an art not a science": *Minott v. O'Shanter Development Co*. (1999), 168 D.L.R. (4th) 270 (Ont. C.A.), at para. 62.

[61] The Plaintiff submitted that an 8-month notice period was appropriate for Ms. Perretta, an employee of 5.5 years, dismissed from a sales position at 49 years old. The Plaintiff contended that an economic downturn can justify a longer notice period, relying on *Paquette v. TeraGo Networks Inc*., 2015 ONSC 4189, at para. 27, rev'd on other grounds, 2016 ONCA 618, 352 O.A.C. 1. The Plaintiff relied on three decisions that awarded a range of 7-9 months of notice to an employee: *Lanteigne c. Caisse populaire de Caraquet Ltée*, 2004 NBBR 14 (7 months' notice); *Nicholls v. Columbia Taping Tools Ltd*., 2013 BCSC 2201 (8 months' notice, reduced to 6 for failure to mitigate); and, *Murphy v. Clarica Life Insurance*, 2003 NBQB 381, 266 N.B.R. (2d) 100 (12 months' notice).

[62] The Defendant submitted that a notice period in the range of 3-6 months is more in keeping with the existing case law for a 49-year old employee dismissed from a routine sales position of 5.5 years, with no supervisory or managerial responsibilities, such as Ms. Perretta. The Defendant relied on *Thomson v. Moore Corp*., [1986] B.C.J. No. 1588 (S.C.) (3 months' notice); *Buchanan*

v. RCA Inc., [1988] B.C.J. No. 1972 (S.C.) (4 months' notice); *Di Costanza v. Jaguar Beauty Supplies Ltd*. (1995), 15 C.C.E.L. (2d) 134 (Ont. Gen. Div.)(5 months' notice), and; *Lelievre v. Commerce and Industry Insurance Co. of Canada*, 2007 BCSC 253, 57 C.C.E.L. (3d) 31 (6 months' notice).

[63] Certain of the cases relied on by the Plaintiff are in relation to employees who occupied positions of higher responsibility than Ms. Perretta, in some cases managerial, and others involved employees who had slightly longer periods of employment. The more directly applicable cases relied on by the Defendant support a notice period of up to six months.

[64] Having reviewed the relevant case law, and considered characteristics analogous to those of Ms. Perretta, and applying the principles set out in *Bardal*, in my view the appropriate notice period resulting from Ms. Perretta's employment dismissal without notice is six months.

C. Has the Plaintiff Failed to Mitigate?

[65] The Defendant had the onus of establishing that the Plaintiff has failed to act reasonably in mitigating her losses. In *Red Deer College v. Michaels*, [1976] 2 SCR 324, at p. 332, the Supreme Court explained that this is not a light burden: "[T]he burden which lies on the defendant of proving that the plaintiff has failed in [her] duty of mitigation is by no means a light one, for this is a case where a party already in breach of contract demands positive action from one who is often innocent of blame."

[66] Ms. Perretta tendered uncontradicted evidence that between the date of her termination from employment (March 31, 2020) and the date of her affidavit (November 16, 2020), she applied to 75 employment positions throughout the Greater Toronto Area. Ms. Perretta deposed that she has remained unemployed throughout and has not earned any employment income since the date of her termination from Rand.

[67] The Defendant submitted that Ms. Perretta did not engage in a constant and assiduous job search because she did not begin her search until April 27, 2020, almost a month after dismissal, and did not apply for any jobs in the period from June 12, 2020 to August 20, 2020. I do not accept Mr. Markowitz' conclusory statement that Ms. Perretta could have secured alternative employment had she broadened her job search, as it is not supported by any details or industry-specific evidence.

[68] Ms. Perretta's mitigation efforts need not be perfect but need only to be reasonable: *Adjemian v. Brook Crompton North America* (2008), 67 C.C.E.L. (3d) 118, at para. 21. The Defendant has not established that Ms. Perretta's mitigation efforts were unreasonable. I reject Rand's submission that Ms. Perretta has failed to mitigate her damages.

D. Damages

[69] The parties agreed on the amount of damages that the Plaintiff would be entitled to in the event that I should determine that the Termination Without Cause Provision was unenforceable. The parties agreed that the Plaintiff's damages for wrongful dismissal are based on: (i) base salary

of $3,875 per month; (ii) commissions of $884 per month;[4] (iii) benefits of $291 per month;[5] (iv) credit given for the amount already paid by Rand and received by the Plaintiff of $13,492.48.

[70] Applying these settled damage values to my determination that the Plaintiff is entitled to 6 months of pay in lieu of notice produces a damage award of $16,807.52. This consists of 6 months of base salary totaling $23,250 (6 x $3,875) and six months of commission income totaling $5,304 (6 x $884) and six months of benefits totaling $1,746 (6 x $291) less the amount already paid by Rand of $13,492.48.

[71] I thereby find that the Plaintiff has established an entitlement to damages in the amount of $16,807.52.

IV. CONCLUSIONS

[72] In *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, at para. 4, the Supreme Court stated that a summary judgment motion is appropriate where "it provides a process that allows the judge to make the necessary findings of fact, apply the law to those facts, and is a proportionate, more expeditious and less expensive means to achieve a just result than going to trial." For the reasons that I have explained, I am satisfied that there are no genuine issues requiring a trial and that the matters in dispute can justly and fairly be determined on summary judgment.

[73] I have concluded that Rand repudiated the 2018 Employment Contract by its conduct in the period between March 31, 2020 and April 7, 2020, resulting in its denial that day to pay Ms. Perretta the two-weeks' pay to which she was entitled. By reason of this determination, it was unnecessary to determine whether the termination provisions in the 2018 Employment Contract were also unenforceable by reason of contravening the *ESA*. Had it been necessary to make this determination, I would have found that they were unenforceable as non-compliant with the *ESA*.

[74] Ms. Perretta was thereby entitled to pay in lieu of notice for the reasonable period under common law, which I have determined to be 6 months. I find no breach of the Plaintiff's duty to mitigate. Ms. Perretta is entitled to 6 months' pay, commissions and benefits, with credit to Rand for amounts already paid. In accordance with the parties' agreement on damages, these entitlements total $16,807.52, which shall be awarded to Ms. Perretta, with pre-judgment and post-judgment interest in accordance with the *Courts of Justice Act*.

V. DISPOSITION

---

[4] Derived as monthly average from commission income of $13262 over 15 months from 2019 to termination date.
[5] Derived as estimate of 7.5% of base salary.

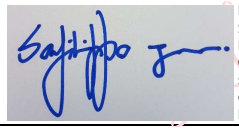
[75] I grant the Plaintiff, Candice Perretta aka Candace Perretta, summary judgment against the Defendant, Rand A Technology Corporation, in the amount of $16,807.52, plus pre-judgment interest and post-judgment interest in accordance with the *Courts of Justice Act*.

VI. COSTS

[76] I encourage the parties to confer and agree on the issue of costs.

[77] If the parties are unable to agree on the issue of costs, they may deliver written submissions on costs (Rule 57.01(7)) of no more than 4 pages with authorities hyperlinked, together with a Cost Outline (Rule 57.01(6)), according to the following schedule: (i) the Plaintiff shall deliver her costs submissions by April 8, 2021; (ii) the Defendant shall deliver its costs submissions by April 22, 2021.

[78] If no party delivers any written submissions on costs by April 22, 2021, I will deem the issue of costs to have been settled.


Digitally signed by Andrew Sanfilippo
DN: c=ca, st=on, o=Government of Ontario, ou=People, serialNumber=DSAP466376, cn=Andrew Sanfilippo
Date: 2021.03.22 16:35:54 -04'00'

A.A. Sanfilippo J.

Date: March 22, 2021

CITATION: Perretta v. Rand A Technology Corporation, 2021 ONSC 2111
COURT FILE NO.: CV-20-640708
DATE: 20210322

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

CANDICE PERRETTA aka CANDACE PERRETTA

Plaintiff

– and –

RAND A TECHNOLOGY CORPORATION

Defendant

REASONS FOR DECISION

A.A. Sanfilippo J.

Date: March 22, 2021