# In the Court of Appeal of Alberta

**Citation: Holm v AGAT Laboratories Ltd, 2018 ABCA 23**

**Date:** 20180119
**Docket:** 1601-0347-AC
**Registry:** Calgary



**Between:**

**Michael John Holm**

Respondent
(Plaintiff)

- and -

**AGAT Laboratories Ltd.**

Appellant
(Defendant)

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**The Court:**

**The Honourable Mr. Justice Jack Watson**
**The Honourable Mr. Justice Brian O'Ferrall**
**The Honourable Madam Justice Frederica Schutz**

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**Memorandum of Judgment of the Honourable Mr. Justice Watson and the Honourable Madam Justice Schutz**

**Memorandum of Judgment of the Honourable Mr. Justice O'Ferrall Concurring in the Result**

Appeal from the Order by
The Honourable Mr. Justice R.J. Hall
Dated the 1st day of December, 2016
Filed on the 13th day of December, 2016
(Docket: 1501 01345)

## Memorandum of Judgment



**The Majority:**

### 1. Introduction

[1] The respondent employee sued the appellant employer, seeking damages for constructive dismissal.

[2] There are several issues for trial. The sole issue on appeal, however, is this: assuming that the respondent established constructive dismissal, is he entitled only to pay in lieu of notice equal to, but not exceeding the one week minimum set out in s. 2 of Alberta's *Employment Standards Code*, RSA 2000, c E-9 (the "*Act*")?

### 2. The Parties' Agreement

[3] In October 2013, the respondent accepted the appellant's offer of employment; shortly thereafter he signed the employment contract that had been prepared by the appellant (the "Agreement").

[4] The contractual termination provisions of the Agreement that bear on this appeal are set out in section 2, in particular subsections 2(2), 2(3), 2(5) and 2(6):

> 2(2) In the event we wish to terminate your employment without just cause, we agree that we will give you notice of the termination of your employment, or at our absolute discretion, we will pay you, in lieu of such notice, a severance payment equal to the wages only that you would have received during the applicable notice period. This will be in accordance with the provincial legislation for the province of employment.
>
> …
>
> 2(3) You should realize that other than the foregoing notice, or at our absolute discretion wages only in lieu of such notice, you will not be entitled to any further compensation or notice arising out of the termination of your employment by us without just cause.
>
> …
>
> 2(5) You understand and agree that other than the severance set out in paragraph 2(2) above, you shall not be entitled on the termination without just cause of your employment by AGAT to any other claim or compensation, damages, payment in

> lieu of notice, further notice of termination, or any other claim or compensation whatsoever, whether arising out of your employment by AGAT or the termination without just cause of your employment by AGAT.
>
> 2(6) In the event of the termination of your employment by AGAT for just cause, should a court of competent jurisdiction find that AGAT in fact did not have just cause, you further agree that you will not have any claim against AGAT greater than the severance payment referred to in paragraph 2(2) herein.

[5] The parties agree that in the Agreement, the referenced "provincial legislation for the province of employment" in section 2(2) is the *Act*, primarily s. 57:

> 57(1) Instead of giving a termination notice, an employer may pay an employee termination pay of an amount at least equal to the wages the employer would have earned if the employee had worked the regular hours of work for the applicable notice period.

[6] Section 57 must be read in its legislative context. First, subsection 56(a) of the *Act* states that "[t]o terminate employment an employer must give an employee written notice of at least (a) one week, if the employee has been employed by the employer for more than 3 months but less than 2 years…". Second, subsection 3(1)(a) of the *Act* provides that "[n]othing in this Act affects any civil remedy of an employee or employer." Accordingly, the respondent is free to pursue his common law rights against the appellant, absent any enforceable contractual agreement between the parties that limits or restricts those common law rights and confines the respondent's entitlement to pay in lieu only to the statutory minimum pay in lieu in notice, that is: one week.

[7] In this respect, it is appropriate to recognize the additional policy statements of the Legislature as contained in s. 3 of the *Act*:

> 3(1) Nothing in this Act affects
>
> (a) any civil remedy of an employee or an employer;
>
> (b) an agreement, a right at common law or a custom that
>
> (i) provides to an employee earnings, maternity and parental leave, reservist leave, compassionate care leave or other benefits that are at least equal to those under this Act, or
>
> (ii) imposes on an employer an obligation or duty greater than that under this Act.

> (2) If under an agreement an employee is to receive greater earnings, maternity and parental leave, reservist leave or compassionate care leave than those for which this Act provides, the employer must give those greater benefits.

[8] This statutory framework surrounds the issue for determination.

## 3. The Issue for Determination

[9] In the court below, the precise issue for determination was framed as follows:

> Whether the notice provision in the employment agreement dated October 3, 2013, between [the respondent] and [the appellant] is valid and enforceable and whether it limits [the respondent's] notice, or pay in lieu thereof, on a claim for constructive dismissal to the minimum notice requirements set out in the *Employment Standards Code*, RSA 2000, c E-9.

[10] The chambers judge answered in the negative, finding that the Agreement did not contain sufficiently restrictive language to limit the respondent's claim to the minimum notice requirements set out in the *Act*.

[11] The chambers judge determined that sections 2(3), 2(5), and 2(6) of the Agreement restricts the respondent's notice entitlement to what is set out in section 2(2) but these sections did not assist in interpreting the actual notice entitlement under section 2(2). And, although section 2(2) requires the applicable notice period to be "in accordance" with the *Act*, this did not mean that the applicable notice period is limited only to the statutory minimums in the *Act*:

> The code sets statutory minimums. Any payment by an employer below those statutory minimums would not be in accordance with the [*Act*]. Put another way, it would be a violation of the [*Act*]. But the [*Act*] does not prohibit notice or damages beyond or in addition to those statutory minimums.

[12] The chambers judge concluded, by stating:

> I find that clause 2(2) provides that the "applicable notice period" must accord with the [*Act*]. However, nothing in the agreement says the applicable notice period is limited to those legislated minimums.
>
> Unlike *Carrell*, *Thompson*, and *Roden*, supra, the clause before me does not include such limiting language. While that may have been the intention of the draftsman, it is not what he has stated. It should be noted that such a construction as that urged by the applicant employer would have the effect of significantly decreasing what are otherwise the common law rights of the employee to compensation for termination of employment without cause.

> In order to achieve such an end, the wording used by the employer in preparing the contract must be clear and unambiguous. Here, at best, the wording is not clear. It is ambiguous in that it is capable of bearing the meanings each of the party - - each of the parties ascribes to it.
>
> The rule of contractual construction of contra proferentem that the ambiguity will be -- will be resolved against the party who prepared the contract is applicable here. And in the agreed statement of facts it is acknowledged that the -- it was the employer who prepared the contract.

[13] The chambers judge's determination is appealed.

## 4. Analysis

*What is the Standard of Review?*

[14] This appeal engages the interpretation of the parties' Agreement.

[15] The parties agree that contractual interpretation is a question of mixed fact and law (*Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53 at para 50, [2014] 2 SCR 633). Unless there is an extricable question of law, questions of mixed fact and law are reviewed for palpable and overriding error (*Housen v Nikolaisen*, 2002 SCC 33 at para 36, [2002] 2 SCR 235).

[16] Standard of review is ultimately determinative in this appeal. Appellate deference is involved: see *Canada (Attorney General) v Fontaine*, 2017 SCC 47 at para 35, 414 DLR 4th 577 ; *Heritage Capital Corp v Equitable Trust Co*, 2016 SCC 19 at para 21, [2016] 1 SCR 306. This is not a case of "the interpretation of a standard form contract, where its interpretation has precedential value, and there is no meaningful factual matrix specific to the particular parties to assist the interpretation process" within the meaning of *Ledcor Construction Ltd v Northbridge Indemnity Insurance Co*, 2016 SCC 37 at para 46, [2016] 2 SCR 23; *Fontaine* at para 35.

[17] Objectivity of assessment is a crucial means by which courts can ensure the legality of the contract at the same time courts enforce the terms of the contract consistently with what those terms mean, irrespective of the aspirations of parties seen in hindsight. As this case exemplifies, Legislatures in Canada have provided for certain minimum rights in contracts of employment and such contracts therefore must at least accommodate those requirements.

[18] The core issue in this appeal is not whether this Court would read the contract the same way as the chambers judge did. The core issue is whether it was palpably and overridingingly in error for the chambers judge to have read the language of this contract, objectively as worded and construed as a whole, to conclude that while the contract recognized the entitlement of the employee to the minimum rights under the *Act*, it also left open the possibility of a remedy within

the meaning of s. 3 of the *Act* in the sense that it did not clearly exclude the possibility of an additional remedy for the employee as might exist at common law.

[19] The appellant contends that the chambers judge erred in fact and law by finding that section 2 of the Agreement does not limit the respondent's claim to the minimum notice requirements in the *Act*. The respondent replies that the chambers judge correctly determined that section 2 does not contain sufficient limiting language to bar the respondent from claiming reasonable notice at common law.

[20] Although the chambers judge referred to the concept of *contra proferentum*, his reference to that concept is neither essential to, nor does it contaminate the rest of the reasoning of the chambers judge. We merely observe that the possibility of more than one reasonable interpretation of a contract term does not, of itself, mean that the contract term is ambiguous such as to engage that concept.

*Did the Chambers Judge Commit Reversible Error?*

[21] The chambers judge accepted that employee rights can be limited through clear and unequivocal contractual language. We agree. Clearly, the common law presumption of termination only on reasonable notice can be rebutted through clear and unambiguous language in an employment contract specifying a different notice period (*Machtinger v HOJ Industries Ltd*, [1992] 1 SCR 986 at 998, 91 DLR (4th) 491). The question is whether the termination provisions in section 2 of the Agreement meet the "high level of clarity" required to extinguish the respondent's common law rights: *Ceccol v Ontario Gymnastics Federation* (2001), 55 OR (3d) 614 at para 45, 204 DLR (4th) 688.

[22] The chambers judge found that section 2(2) lacks clear limiting language. Section 2(2) provides:

> 2(2) In the event we wish to terminate your employment without just cause, we agree that we will give you notice of the termination of your employment, or at our absolute discretion, we will pay you, in lieu of such notice, a severance payment equal to the *wages only* that you would have received during the applicable notice period. *This will be in accordance with the provincial legislation for the province of employment.*
>
> [emphasis added]

[23] On its face, section 2(2) provides: (1) the appellant will give notice of the termination of the respondent's employment or (2) the appellant will, at its discretion, pay compensation in lieu of such notice, (3) if the appellant elects to pay compensation in lieu of notice, the amount will be

equal to the wages only that the respondent would have received during the applicable notice period, and that (4) this will be in accordance with the *Act*.

[24] We agree with the chambers judge that wording in the Agreement does not clearly restrict the applicable notice period to the statutory minimum set out in the *Act*.

[25] The first sentence in section 2(2) states that if the appellant elects to pay compensation in lieu of notice, the amount of compensation will be equal to the wages only that the respondent would have received during the applicable notice period. Whereas in *Roden v The Toronto Humane Society*, 2005 CanLII 33578 at para 55, 259 DLR (4th) 89 (Ont CA), the employer was entitled to terminate the employee's employment "at any other time, without cause, upon providing the Employee with the minimum amount of advance notice or payment in lieu thereof as required by the applicable employment standards legislation," here, the first sentence of section 2(2) lacks such explicit, restrictive language.

[26] The appellant submits that the word "only" serves as limiting language. The respondent suggests that the word "only" merely relates to the calculation of lost benefits. In our view, nothing in the first sentence either *prima facie* defines the applicable notice period or limits the notice period to the statutory minimum of one week. What the employee "only … would have received" would be whatever the *Act* permitted because, as noted below, the reference to the *Act*, located in a separate following sentence, does not narrow what the *Act* prescribed as a minimum. Accordingly, in our view, the first sentence of section 2 of the Agreement does not restrict the respondent's common law rights.

[27] The second sentence in section 2(2) similarly fails to restrict the respondent's notice entitlement. The chambers judge found that contractual language providing notice or pay in lieu of notice "will be in accordance" with the *Act* does not clearly limit the respondent's claim to the minimum one week notice requirement in the *Act*. We agree. Remedies allowable under s. 3 of the *Act* are also "in accordance" with the *Act*. So if the contract under consideration does not clearly exclude remedies within the meaning of s. 3 of the *Act*, then the minimum entitlement that the *Act* contemplates is not the "only" situation that would be "in accordance" with the *Act*.

[28] Sections 2(5) and 2(6) are part of the context of s. 2(2). If s. 2(2) was clear to the exclusion of any other compensation entitlement upon termination that is beyond any minima of the *Act*, those sections would seem to be largely redundant except perhaps as to one element of s. 2(6) concerning a dispute over cause. But those provisions are made subject to s. 2(2).

[29] This contractual wording establishes a floor—section 57 of the *Act* requires pay in lieu of notice to be "at least" equal to the wages the employee would have earned during the applicable notice period. Put another way, in order to be *Act*-compliant in this case, the amount of compensation paid to the respondent in lieu of notice must be at least one week, not less than this amount. The contractual requirement that notice or payment in lieu of notice be "in accordance

with the provincial legislation for the province of employment" does not, however, create a ceiling that legally limits the respondent's notice entitlement only to the statutory minimum notice requirements. Despite the appellant's contention to the contrary, in our view, section 2(2) of the Agreement does not bar the respondent from pursuing payment in lieu of reasonable notice at common law.



[30] This interpretation of section 2(2) of the Agreement is consistent with *Kosowan v Concept Electric Ltd*, 2007 ABCA 85, 404 AR 8, which turned on the interpretation of a contract provision that stated that "[s]hould you be terminated for reasons other [than] cause then you will be entitled to advance notice or severance pay thereof in accordance with the [*Act*]."

[31] In *Kosowan* at para 4, the Court of Appeal determined that, on its face, this termination provision did not render inapplicable s. 3 of the *Act* that provided that "[n]othing in this Act affects any civil remedy of an employee"; rather, the term provided only that in the event of termination without cause, the employee would be entitled to severance pay in accordance with the *Act*:

> The question to be decided is whether the termination clause in the letter agreement renders inapplicable s. 3(1) of the Code. As we read it, the term of the agreement provides only that in the event of termination without cause, the Appellant is entitled to severance pay "in accordance with the *Employment Standards Act of Alberta*." (It is conceded here that the reference is to the Code.) The clause does not, on its face, confine the Appellant to compensation pursuant to ss. 56 and 57(1) of the Code. On the contrary, the choice of language leaves open to the employee the ability to pursue an action. To do so, in our opinion, would be "in accordance with the *Employment Standards Code*." The provision is clear and unambiguous.

[32] To like effect is *Gillespie v 1200333 Alberta Ltd*, 2012 ABQB 105 at para 40, 545 AR 28:

> A contractual provision that termination notice will accord with legislated provincial standards should be interpreted as an agreement regarding minimal notice, not an agreement to exclude the implied contractual term that dismissal without cause requires reasonable notice. Although employers are free to make contracts that limit an employee's notice entitlement to the statutory minimums (see *Machtinger v. HOJ Industries Ltd*., [1992] 1 S.C.R. 986, 1992 CarswellOnt 892 at paras. 33-35), any such agreement to exclude the employee's common law protection must be clear and unambiguous.

Also see *Bellini v Ausenco Engineering Alberta Inc*, 2016 NSSC 237, [2016] NSJ No 338 (QL); *Cybulski v Adecco Employment Services Limited*, 2011 NBQB 181, 375 NBR (2nd) 307; *McLennan v Apollo Forest Products Ltd* (1993), [1993] BCJ No 2078, 49 CCEL 172 (SC), for the judicial treatment of similar contractual language in other Canadian jurisdictions.

[33] The appellant also contends that the respondent's claim is restricted by sections 2(3) and 2(5). The chambers judge rejected this argument because sections 2(3) and 2(5), and section 2(6), merely refer back to section 2(2), but do not contain language that purports to limit the notice entitlement under section 2(2). We agree. As section 2(2) does not limit the respondent to the minimum statutory notice requirements set out in the *Code*, the collective operation of section 2(2) with sections 2(3) and 2(5) does not bar the respondent from seeking remedies at common law.

[34] At best, the contractual wording of section 2 of the Agreement is ambiguous. In employment law, uncertainty ought to be resolved in favour of the employee: *Wood v Fred Deeley Imports Ltd*, 2017 ONCA 158 at para 28, 134 OR (3d) 481. Moreover, *contra preferentem* mandates that contractual ambiguities ought to be resolved against the party that drafted the contract. In this case, therefore, uncertainty and ambiguity ought to be resolved against the appellant.

[35] At its essence, an enforceable employment contract must contain clear and unequivocal language to extinguish, or limit, an employee's common law rights. Where a chambers judge concludes that an employment contract does not meet this threshold, as here, and that as a result an employee remains free to pursue common law remedies, that does not engage an area of determination for which no deference would apply.

[36] The chambers judge found that "at best, the wording is not clear". That conclusion is defensible on the facts and the law in this jurisdiction.

## 5. Disposition

[37] Accordingly, we discern no error that warrants appellate intervention. In the result, the appeal is dismissed.

Appeal heard on November 9, 2017

Memorandum filed at Calgary, Alberta
this 19th day of January, 2018

Authorized to sign for: Watson J.A.

Schutz J.A.

**O'Ferrall J.A. (concurring in the result):**

[38] I am compelled to concur in the result reached by the majority. The chambers judge properly applied judicially-approved principles governing the interpretation of employment contracts.

[39] However the contractual terms employed by the parties in this case have given me cause to question those principles. A lay person reading the entire termination provision of the contract (which is reproduced and appended to these reasons) might be forgiven for thinking that the parties did intend to "limit" termination notice or pay in lieu of such notice to the "minimums" set forth in the employment standards legislation, even though the parties failed to employ either of the quoted words of limitation. A reasonable observer might question why the parties needed a termination clause as lengthy and detailed as the one employed in this case to merely indicate their intention to be governed by the common law's reasonable notice requirement. In other words, if the termination provision of the employment contract was not intended to limit termination notice or pay in lieu, what was it there for?

[40] Perhaps the best way to explain the result in this case to the appellant employer is to say that in employment law it is sometimes not as much about ascertaining the parties' intention as it is about applying judicially-mandated principles of interpretation designed to protect employees because of perceived, and sometimes very real, inequality of bargaining power as between employees and employers. At least two of those principles were operative in this case. One was the principle that termination clauses will only rebut the presumption of reasonable notice if they are absolutely clear. The other is that faced with a clause in an employment contract which could reasonably be interpreted in more than one way, courts are required to prefer the interpretation which gives the greatest benefit to the employee.

[41] The problem, not so much with principles, but with the approach employed by the courts in interpreting employment contracts is that it may be less understandable than an approach which simply requires the court to ascertain the intention of the parties as disclosed by the words they used. Also, the rules employed in interpreting employment contracts involve presumptions against the employer which may or may not be justified in any given case. Inequality of bargaining power is not always a justifiable assumption. Small business employers and employers in the not-for-profit sector, for example, may be on a much more level playing field. Finally, prospective employers and employees who do not have access to employment lawyers may not be aware of the interpretational rules. Whether small business employers and their employees ought to be required to wade through mountains of jurisprudence in order to find the magic formula needed to achieve enforceable contract language is what is being questioned here.

[42] The courts have repeatedly asserted that there is no magic formula for limiting termination notice or pay in lieu to the minimums in employment standards legislation. However, if the analysis is not simply one of ascertaining the intention of the parties but rather one of determining

whether or not a particular clause is sufficiently clear to rebut the presumption of reasonable notice or to satisfy a judicially-mandated requirement that such clause be interpreted in favour of the employee, there will indeed be a formula of sorts. The formula will be what it takes to satisfy a court that presumptions in favour of the employee, mandated by previously-decided jurisprudence, have been rebutted. Perhaps the jurisprudence requires revisiting for situations where it is clear what the parties intended, but where the words chosen do not satisfy judicial canons of construction. This is not to suggest that the considerations articulated by courts in cases such as *Wood v Fred Deeley Imports Ltd*, 2017 ONCA 158 at para 28, 134 OR (3d) 481 are not useful. It is simply to suggest that perhaps more emphasis ought to be put on ascertaining what the parties intended.

Appeal heard on November 9, 2017

Memorandum filed at Calgary, Alberta
this 19th day of January, 2018

O'Ferrall J.A.

**Appearances:**

T.J. Boyle
for the Respondent

A. Pozzobon
for the Appellant

## Appendix A

2. TERMINATION OF EMPLOYEMENT

(1) In the future, should you wish to terminate your employment with us you agree that after your first three probationary months of your employment you will provide us with one week notice of your desire to terminate your employment. After two years of employment you will provide us with two weeks notice of your desire to terminate your employment.

(2) In the event we wish to terminate your employment without just cause, we agree that we will give you notice of the termination of your employment, or at our absolute discretion, we will pay you, in lieu of such notice, a severance payment equal to the wages only that you would have received during the applicable notice period. This will be in accordance with the provincial legislation for the province of employment.

Your effective date of service for the purpose of calculating severance as outlined above will the date of commencement in section 1.

(3) You should realize that other than the foregoing notice, or at our absolute discretion wages only in lieu of such notice, you will not be entitled to any further compensation or notice arising out of the termination of your employment by us without just cause.

(4) This is to confirm that you understand that just cause for the termination of employment means that should you commit improper acts as defined in law such as non-performance of duties, dishonesty, falsification of data, theft or breach of confidentiality, we will be able to terminate you without notice or severance in lieu of notice.

(5) You understand and agree that other than the severance set out in paragraph 2(2) above, you shall not be entitled on the termination without just cause of your employment by AGAT to any other claim or compensation, damages, payment in lieu of notice, further notice of termination, or any other claim or compensation whatsoever, whether arising out of your employment by AGAT or the termination without just cause of your employment by AGAT.

(6) In the event of the termination of your employment by AGAT for just cause, should a court of competent jurisdiction find that AGAT in fact did not have just cause, you further agree that you will not have any claim against AGAT greater than the severance payment referred to in paragraph 2(2) herein.