Date: 20250625
Docket: CI 24-01-46118
(Winnipeg Centre)
Indexed as: Hebert v. Colin's Mechanical Service Ltd.
Cited as: 2025 MBKB 87

COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

GERALD HEBERT,	)	Grant M. Driedger, K.C.
	)	for the plaintiff
plaintiff,	)	
	)	
- and -	)	
	)	
COLIN'S MECHANICAL SERVICE LTD.,	)	Amanda Verhaeghe
	)	for the defendant
defendant.	)	
	)	
	)	Judgment Delivered:
	)	June 25, 2025

BOCK J.

[1] The plaintiff, Gerald Hebert, moves for summary judgment against his former employer, Colin's Mechanical Service Ltd. ("Colin's Mechanical"). Colin's Mechanical terminated Mr. Hebert's employment without cause. The central issue on this motion is the amount of pay in lieu of notice to which he was entitled. That issue turns on the proper interpretation of paragraph 5.2 of his employment agreement with

Colin's Mechanical. For that reason, both parties agree this an appropriate case for determination by summary judgment, no matter the outcome.

[2] For the reasons that follow, Mr. Hebert's claim is dismissed.

BACKGROUND

[3] In 2021, Mr. Hebert and his wife sold their electrical contracting business, Lineside Electric Ltd. ("Lineside"), to Colin's Mechanical pursuant to a share purchase agreement dated July 1, 2021. The share purchase agreement provided for a purchase price of $450,000 payable in accordance with the provisions of paragraph 2.2. Of that sum, $250,000 was payable in four consecutive, equal, annual instalments beginning on the first anniversary of the closing date of the transaction. That debt was evidenced by way of a promissory note from Colin's Mechanical in favour of Mr. Hebert and his wife.

[4] Paragraph 7.1(i) of the share purchase agreement made it a condition of that agreement that Mr. Hebert enter into a four-year employment agreement with Colin's Mechanical by no later than July 1, 2021. To that end, on July 1, 2021 the parties entered into a written employment agreement for a period of four years commencing August 1, 2021 and continuing until July 31, 2025.

[5] Section 5 of the employment agreement governed the subject of termination: paragraph 5.1 covered termination with cause; paragraph 5.2, termination without cause by Colin's Mechanical; paragraph 5.3, termination by Mr. Hebert; and paragraph 5.4, termination due to Mr. Hebert's death or disability.

[6] As noted earlier, this case turns on paragraph 5.2. It provides:

> **5.2 Termination Without Cause by Colin's**. Colin's may terminate the Employee's [i.e., Mr. Hebert's] employment at any time during the Term [defined

> in paragraph 1.1 as "a period of four (4) years commencing August 1st 2021 (the "***Term***")] without cause subject to notice or payment in lieu of notice or some combination of notice and pay in lieu, in accordance with the *Employment Standards Code* of Manitoba, but termination by Colin's without cause shall not prejudice the Employee's right to the outstanding balance of the Note issued by Colin's under the SPA [i.e., the promissory note for $250,000 and share purchase agreement referred to earlier].
>
> [emphasis in the original]

[7] On April 1, 2024, Mr. Hebert was given notice of the termination of his employment contract effective May 1, 2024, 15 months before it was due to expire. Mr. Hebert was successful in obtaining alternate employment effective August 26, 2024, but at a lower income. He now sues Colin's Mechanical to recover the difference.

THE POSITIONS OF THE PARTIES

[8] Mr. Hebert contends his employment agreement with Colin's Mechanical is a four-year, fixed-term contract. As such, Colin's Mechanical is obliged to pay him an amount equal to the wages and benefits he would have earned to July 31, 2025. If the meaning of paragraph 5.2 is in any way ambiguous, the ambiguity should be resolved in his favour. He has quantified his claim to be $44,928.62 after deducting the amount he earned elsewhere during the balance of the unexpired term of the employment agreement.

[9] Alternatively, Mr. Hebert submits that paragraph 5.2 is unenforceable, either because it is unreasonable or because paragraph 5.1 does not comply with ***The Employment Standards Code***, C.C.S.M. c. E110 (the "***Code***"), so rendering all of section 5 invalid.

[10] Colin's Mechanical submits that paragraph 5.2 of the employment agreement, properly interpreted, gives it the right to terminate Mr. Hebert's employment at any time during its term without cause subject to notice or payment in lieu of notice in accordance

with the ***Code***. According to Colin's Mechanical, it has more than satisfied the requirements of the ***Code***, because it gave him four weeks' notice of termination of his employment (instead of the two weeks' notice the ***Code*** requires in this case) and paid him accordingly.

DISCUSSION AND DISPOSITION

[11] My interpretation of paragraph 5.2 leads me to conclude that Colin's Mechanical was entitled to terminate Mr. Hebert's employment as it did, and is therefore not liable to make any further payment to him in lieu of notice.

[12] The parties agreed in paragraph 1.1 of the employment agreement that Colin's Mechanical would employ Mr. Hebert for a four-year fixed term commencing August 1, 2021. As a matter of law, a fixed-term employment contract with no early-termination provision would leave an employee like Mr. Hebert entitled to payment of wages and benefits for the unexpired term of the contract (***Howard v. Benson Group Inc.***, 2016 ONCA 256, at para. 21).

[13] In this case, however, paragraph 5.2 introduces an early-termination provision which allows Colin's Mechanical to terminate the employment agreement at any time during its four-year term, "subject to notice or payment in lieu of notice or some combination of notice and pay in lieu, in accordance with the *Employment Standards Code* of Manitoba".

[14] In my view, paragraph 5.2 clearly and unambiguously incorporates by reference the statutory notice and wage in lieu of notice provisions contained in the ***Code***. I arrive at that view by the application of the usual principles of contractual interpretation,

summarized in ***Sattva Capital Corp. v. Creston Moly Corp.***, 2014 SCC 53, [2014] 2 S.C.R. 633 ("***Sattva***") at para. 47:

> [47] . . . the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine "the intent of the parties and the scope of their understanding" … To do so, a decision-maker 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.
>
> [citations omitted]

[15] The ordinary and grammatical meaning of the words contained in paragraph 5.2 is obvious: they confer on Colin's Mechanical the right to terminate Mr. Hebert's employment at any time during the four-year term of the agreement and the corresponding obligation to give notice or payment in lieu of notice "in accordance with the *Employment Standards Code*". In my opinion, they plainly communicate the parties' intention to limit Mr. Hebert's rights on termination of the employment agreement by Colin's Mechanical to those provided by the ***Code***.

[16] Support for this interpretation of paragraph 5.2 is found in ***Egan v. Harbour Air Seaplanes LLP***, 2024 BCCA 222, where a similar termination clause allowing the employer to terminate the employee's employment "at any time without cause so long as it provides appropriate notice and severance in accordance with the requirements of the Canada Labour Code" (at para. 6) was found to be "sufficiently clear to rebut the presumption of common law reasonable notice" (at para. 63). The words used in paragraph 5.2 of the employment agreement just as clearly replace the employer's usual obligations on termination of a fixed-term contract with those contained in the ***Code***.

[17] Had the parties intended to preserve Mr. Hebert's right to be paid wages and benefits for the unexpired term of the employment agreement on termination without cause, they could easily have done so, either by not referring to the statutory notice requirements contained in the ***Code***, or by including an explicit proviso that termination without cause would not prejudice Mr. Hebert's right to be paid for the balance of the term. On this latter point, I find it significant that the parties did include a specific proviso in paragraph 5.2 that termination without cause would not prejudice Mr. Hebert's right to the outstanding balance payable under the promissory note issued under the share purchase agreement. This indicates the parties directed their minds to the financial consequences to each party that would follow termination by Colin's Mechanical without cause.

[18] This interpretation is also consistent with the surrounding circumstances at the time the parties entered into the employment agreement, the most relevant of which is the share purchase agreement. Paragraph 2.4(e) of the share purchase agreement specifically provides that the "Purchase Price and repayments under the Note are subject to Gerald Hebert's continued employment with the Purchaser as described in more detail in paragraph 7.1(i)." It further provides that if Mr. Hebert terminates his employment prior to the expiration of the four-year term the purchase price will be reduced by the balance then outstanding under the promissory note. By contrast, the corresponding provision in the event of early termination by Colin's Mechanical only guarantees payment to Mr. Hebert of the purchase price and promissory note, but not to payment of wages

and benefits for any unexpired term of employment. That result is consistent with the apparent intention of paragraph 5.2 of the employment agreement.

[19] What all of this suggests to me is that the parties considered the financial consequences to each side in the event of the early termination of Mr. Hebert's employment and made a deliberate choice to incorporate the statutory notice requirements contained in the ***Code*** in the "without cause" termination provision in paragraph 5.2 of the employment agreement.

[20] Mr. Hebert's arguments to the contrary, which I will address briefly, are unpersuasive.

[21] First, Mr. Hebert argues paragraph 5.2 is ambiguous and that any ambiguity should be resolved in his favour as the more vulnerable party to this employment agreement. For reasons set out earlier, I do not find paragraph 5.2 to be at all ambiguous. Therefore, there is no need to invoke the principle *contra proferentem* in these circumstances.

[22] Second, Mr. Hebert argues the interpretation of paragraph 5.2 put forward by Colin's Mechanical should be rejected because it leads to an unreasonable result by leaving Mr. Hebert at risk of having his four-year term of employment terminated on two weeks' notice from his very first day of work. I disagree. There is nothing inherently unreasonable in two parties, both represented by counsel, negotiating a four-year employment agreement which incorporates the notice provisions in the ***Code***.

[23] Third, Mr. Hebert argues that the "with cause" termination provisions contained in paragraph 5.1 are illegal because they impose a stricter standard on him than the

standard contained in the ***Code***. Mr. Hebert submits that the invalidity of paragraph 5.1 operates to render all the termination provisions in the employment agreement invalid, including paragraph 5.2. In support of that proposition Mr. Hebert relies on a trio of cases from the Ontario Court of Appeal: ***Waksdale v. Swegon North America Inc.***, 2020 ONCA 391, ***Kopyl v. Losani Homes (1998) Ltd.***, 2024 ONCA 199 and ***De Castro v. Arista Homes Limited***, 2025 ONCA 260.

[24] I cannot accede to Mr. Hebert's view of the matter. Section 62(1)(h) of the ***Code*** simply provides that s. 61, the section which imposes notice and payment obligations on employers, does not apply "when the employment of the employee is terminated for just cause". "Just cause" is not defined in the ***Code***. By comparison, paragraph 5.1 defines "cause" as follows:

> **Termination With Cause**. Colin's may terminate this Agreement and the Employee's employment hereunder at any time without prior notice or payment in lieu of notice for cause. In this context "***cause***" means, without limitation:
>
> (a) Employee's theft or attempted theft, fraud or attempted fraud, unauthorized appropriation or attempted appropriation of any tangible or intangible property of Colin's, or other willful and material misconduct respecting money, property, or affairs of Colin's;
>
> (b) Employee's material dishonesty with respect to any matter concerning Colin's;
>
> (c) Employee substantial or repeated neglect of or other failure to perform the Employee's assigned duties or the responsibilities of his position in accordance with the President's reasonable discretion;
>
> (d) Employee's use of any manner of intoxication on Colin's property or while conducting Colin's business or which results in a significant impairment of Employee's job performance;
>
> (e) Employee's repeated and unexplained absenteeism, insubordination, conflict, or any other conduct, act or

omission, whether willful, negligent or otherwise, inconsistent with the goals, objectives or business of Colin's;

(f) any material or persistent breach of this Agreement by the Employee including, without limitation, any breach of the confidentiality, non-disclosure and non-competition covenants attached as Schedule "A"; and

(g) "***just cause***" as construed at common law [Dele per SGS].

If Colin's terminates the Employee's employment for cause, then the Employee shall be entitled only to the amount of his Base Salary, all other benefits, and accrued but unpaid vacation pay earned up to the date of termination. Notwithstanding the foregoing, in the event of termination for cause, Colin's retains the right to pursue any and all other remedies against the Employee (including, but not limited to, monetary damages) in connection with the events giving rise to termination.

(I assume the phrase "[Dele per SGS]" in subparagraph 5.1(g) was a note to draft by Mr. Hebert's counsel, whose initials were SGS, which was inadvertently left in the executed employment agreement. In my view, nothing turns on this.)

[25] Mr. Hebert argues that in theory, very trivial conduct by him could constitute a breach of paragraph 5.1 and therefore "cause" for his termination without notice, even though the same conduct would never meet the common law criteria for "just cause". I disagree. A "practical, common-sense" interpretation of paragraph 5.1 in keeping with ***Sattva*** (at para. 47) suggests that whether a breach of any of its provisions constitutes "cause" would require an assessment of the context of the alleged misconduct giving rise to the breach and whether it was sufficiently serious to justify termination without notice or pay in lieu. This is the same assessment that would be required in the case of an employer who asserts "just cause" under s. 62(1)(h) of the ***Code***. In short, I find the termination provisions in paragraph 5.1 are no more strict than the "just cause" provision in s. 62(1)(h) of the ***Code***.

[26] Having found nothing in these circumstances to render paragraph 5.1 invalid, I need not consider whether its invalidity would render paragraph 5.2 invalid. The trio of decisions from the Ontario Court of Appeal cited by Mr. Hebert therefore do not come into play.

[27] Mr. Hebert also argued that he was actually entitled to eight weeks' notice or pay in lieu by operation of s. 5 of the ***Code***. Section 5 deems the employment of certain employees to be continuous upon the sale of the business which employs them:

> **Continuity of employment**
>
> **5** For the purpose of Divisions 2 to 5, 9 and 10 of Part 2 (minimum standards) of this Code, when the business of an employer or a part of the business is sold, leased, transferred, merged or otherwise disposed of whereby the control, direction or management of the business is given to another person, or the business continues to operate under a receiver, the employment of an employee is deemed to be continuous and uninterrupted.

[28] Mr. Hebert submits that for the purpose of calculating the notice to which he was entitled under the ***Code*** his length of employment should include his years of service with Lineside, which commenced in 2006. On that basis, he would be entitled to eight weeks' notice, which is four more than he actually received.

[29] The answer to Mr. Hebert's argument lies in paragraph 6.3 of the share purchase agreement, which provides in part that Lineside would "terminate all existing employees effective as of July 31, 2021, ensuring in respect of all employees that all wages, salaries, vacation pay, benefits, bonuses, commissions, <u>termination entitlements</u>, and other returns or compensation have been paid…" (underlining added). Thus, the parties agreed that any termination entitlements of Lineside employees, which I would interpret to include Mr. Hebert's entitlement to notice and pay in lieu, would be paid by Lineside.

Mr. Hebert has not led any evidence to permit me to determine whether or not Lineside did so. If it did, Mr. Hebert should not be entitled to the benefit of s. 5 of the ***Code***, inasmuch as that would result in a double recovery. If it did not, then Mr. Hebert may have a remedy against Lineside or Colin's Mechanical. But, in the absence of any evidence on the point, I am unable to come to any conclusion.

[30] Finally, a comment on certain evidence led by both parties under the guise of "surrounding circumstances". In my view, both parties relied on evidence of their subjective intentions and conduct in support of their respective interpretations of the employment agreement, in violation of the parol evidence rule. By way of example, Mr. Hebert relied on the following evidence contained in paragraph 22 of his affidavit affirmed February 26, 2025: "When the sale of the shares in Lineside was made I fully expected that I would be employed by the Defendant until the end of July of 2025. That was my understanding of the contract. I arranged many of my financial affairs around that, including leasing a vehicle that would be used for work related purposes." Colin's Mechanical made similar use of evidence contained in the affidavit of Stuart McKelvie, its chief financial officer, affirmed March 25, 2025, as reflected in the assertion in paragraph 13 of its brief that the "purpose and intent behind these early termination provisions was discussed directly with Hebert's lawyer and tacitly accepted by both Hebert and his counsel".

[31] I have not relied on such evidence in arriving at my decision. As ***Sattva*** makes clear, evidence of the surrounding circumstances to interpret a written contract is admissible and does not run afoul of the parol evidence rule (at paras. 56–61).

However, evidence of the subjective intention of the parties, their negotiations and their conduct after the execution of the contract will generally not fall within the ambit of "surrounding circumstances", and I find it does not in this case (***King v. Operating Engineers Training Institute of Manitoba Inc.***, 2011 MBCA 80, at para. 72).

[32] Mr. Hebert's claim is therefore dismissed. The parties may arrange to make further submissions before me with respect to the issue of costs if they are unable to come to agreement.

_____ J.