

Case Name:

MR v. Christian and Timbers, Inc.

Between
MR, plaintiff, and
Christian and Timbers, Inc., defendant

[2002] O.J. No. 1609
Court File No. 01-CV-220600CM2

**Ontario Superior Court of Justice
Swinton J.**

Heard: April 18, 2002.
Judgment: April 30, 2002.
(29 paras.)

Counsel:

J. Gardner Hodder, for the plaintiff/responding party.
Christopher Little, for the defendant/moving party.

¶ 1 **SWINTON J.**— The defendant, Christian and Timbers, Inc., has brought a motion for a stay of these proceedings under s. 7 of the Arbitration Act, 1991, S.O. 1991, c. 17 and in the alternative, under s. 106 of the Courts of Justice Act, R.S.O. 1990, c. C-43 or Rule 21.01(3) of the Rules of Civil Procedure.

¶ 2 The plaintiff is a former employee of the defendant. Although he trained as a lawyer and practised for three and a half years, he then worked as an executive search consultant for several years. He was hired in that capacity by the defendant in January, 2000. The defendant is in the business of finding and recruiting chief executive officer, board member and senior level executive management personnel for companies. It has its head office in Cleveland, Ohio, although it also has an office in Toronto.

¶ 3 Before being hired, MR was given a letter of offer dated January 14, 2000 by David Kinley, the managing director of the Canadian operations. It set out various terms of employment. Paragraph 5 is important for purposes of this motion. It stated, in part:

Employment, and the above considerations, will be contingent upon the signing of an employment agreement and the verification of compensation `left on the

table'. A copy of the employment agreement is enclosed for your review.

In fact, the employment agreement was not enclosed, but a copy was sent to MR by January 20, 2000. The next day, MR wrote to Mr. Kinley, raising various concerns about the offer letter. He also stated that he had just received the employment agreement and "given its importance to the basis of a relationship going forward, I would ask you that you provide me with the weekend to give it due consideration".

¶ 4 There is no dispute that MR obtained independent legal advice before he signed the offer letter at a meeting with Mr. Kinley on January 26, 2000. Before the offer letter was signed, one change was made, deleting the condition with respect to satisfactory references. According to Mr. Kinley, no concerns were expressed about the terms of the employment agreement. In cross-examination, he indicated that MR said that he was still reviewing the employment agreement. MR has claimed that he told Mr. Kinley that he objected to signing the employment agreement at that time.

¶ 5 MR commenced employment on February 21, 2000. He had still not signed the employment agreement. It is his evidence that he had concerns about the terms of the agreement. However, there is no evidence that he expressed those concerns to Mr. Kinley or to personnel in Cleveland in writing, and Mr. Kinley denies that oral protests were made.

¶ 6 About two weeks after MR started work, Mr. Kinley was informed by Cleveland that the employment agreement was not signed. He asked MR to do so, and MR assured him that it had been sent.

¶ 7 Cleveland then forwarded what was thought to be another copy of the draft employment agreement, but which now included MR's name and was dated February 21, 2000. In fact, it turned out to have a key difference, which was not discovered by the defendant until after these proceedings began. While the original draft had specified a term for the agreement and provisions with respect to termination, this draft provided for employment at will. Otherwise, the draft was virtually the same as the earlier draft. Both included a clause providing for arbitration of disputes, which was to be governed by Ohio law. MR claims, in his affidavit, that he noticed the change respecting employment at will and had a real concern, although he did not raise this with Cleveland, according to the defendant. He did not sign this copy.

¶ 8 Apparently, further requests were made for a signed copy. Then, in November, 2000, another copy was sent. This, too, had MR's name on it, and was dated November 20, 2000, effective February 21, 2000. It now made reference to consideration in the following terms, "in consideration of the mutual covenants contained herein and the sum of One Hundred Dollars (\$100.00) delivered to the Vice President and Consultant concurrent with his execution of this Agreement". Paragraph 1 states that both parties understand that they have rights and obligations under the Agreement and "by executing this Agreement, they have exchanged valid consideration". MR signed this, although he claims to have done this under duress because of threats of termination or non-payment of his bonus if he did not sign. He never received the \$100.00, although there is no evidence that he ever asked for it. According to the defendant, there was no protest raised about the contents of the agreement.

¶ 9 On March 19, 2001, MR's employment was terminated because of unsatisfactory performance, although cause was not asserted and an offer of payment was made. He then brought an action for wrongful dismissal in Ontario. The defendant seeks to stay this action because of the arbitration clause in the employment agreement. This clause appears in each of the drafts, and provides for arbitration by a member of the American Arbitration Association, in accordance with its Commercial Arbitration Rules, of all disputes arising out of or relating to the agreement or arising out of the employment relationship. The arbitration is to be in Ohio, with the governing law to be that of Ohio. The defendant has invoked this clause and set the arbitration proceedings in motion in Ohio with a Demand for Arbitration in January, 2002. Reference is made in the demand to the November employment agreement.

¶ 10 Section 7 of the Arbitration Act, 1991 provides:

- (1) If a party to an arbitration agreement commences a proceeding in respect of a matter to be submitted to arbitration under the agreement, the court in which the proceeding is commenced shall, on the motion of another party to the arbitration agreement, stay the proceeding.
- (2) However, the court may refuse to stay the proceeding in any of the following cases:
 1. A party entered into the arbitration agreement while under a legal incapacity.
 2. The arbitration agreement is invalid.
 3. The subject-matter of the dispute is not capable of being the subject of arbitration under Ontario law.
 4. The motion is brought with undue delay.
 5. The matter is a proper one for default or summary judgement.

An arbitration agreement is defined in s. 1 as "an agreement by which two or more persons agree to submit to arbitration a dispute that has arisen or may arise between them". Pursuant to s. 5(1), an arbitration agreement may be an independent agreement or part of another agreement, and pursuant to s. 5(3), it need not be in writing.

¶ 11 Initially, the plaintiff took the position that this matter was not governed by the Arbitration Act, 1991, but rather the International Commercial Arbitration Act, R.S.O. 1990, c. I.9. However, this was not pressed in argument, given the decision in *Carter v. McLaughlin* (1996), 27 O.R. (3d) 792 (Gen. Div.), in which the Analytical Commentary contained in the Report of the Secretary General to the eighteenth session of the United Nations Commission on International Trade Law was quoted. That document can be used in the interpretation of the Ontario Act (s. 13(b)), and it states that labour or employment disputes were not intended to be covered by the term "commercial" within that Act. A similar conclusion was reached in *Borowski v. Heinrich Fiedler Perforiertechnik GmbH* (1994), 29 C.P.C. (3d) 264 (Alta. Q.B.) at 277 with respect to the inapplicability of the counterpart Alberta legislation to employment disputes.

¶ 12 In this motion, the defendant argues that there is an arbitration agreement between the parties, set out in the initial draft copy of the employment contract, to which MR was bound when he commenced work on February 21, 2000, given that he had signed the offer letter on January 26, 2000. Essentially, the terms of the agreement were incorporated by reference in his contract, given paragraph 5 of the offer letter which he had signed.

¶ 13 The plaintiff argues that the operative agreement should be the November, 2000 agreement which he actually signed, which he argues is invalid, both because of the lack of consideration and because the contract contains an employment at will clause which is contrary to Ontario law. He also asserts that he signed under duress.

¶ 14 In order to determine this motion, I must make certain determinations of credibility. This is not easy, given that there are only affidavits and cross-examinations on which to rely. Nevertheless, when I read all the evidence, I find that MR's version of events does not seem credible. MR takes the position that he protested to Mr. Kinley about the terms of the employment agreement prior to signing the offer letter, and that he expressed his concerns both to Mr. Kinley and Cleveland after that.

¶ 15 I find it hard to believe his story that he had real concerns about the terms of the January draft, and that he expressed them. There is nothing in writing to that effect, which is in dramatic contrast to the detailed three page letter which he sent to Mr. Kinley with comments on the offer letter. Moreover, he signed the offer letter, leaving untouched the reference to employment being conditional on the signing of the employment agreement, even though an amendment was made to another part of the letter before signing. There is no evidence of any written complaint to Mr. Kinley or to Cleveland at any time after this, even though he claims to have been troubled by the change in terms from the January draft to the February draft. Finally, it is hard to accept all these assertions from MR, given that he is trained as a lawyer. Thus, he is a sophisticated party, and he had independent legal advice before signing the offer. Therefore, I prefer Mr. Kinley's version of events where there is conflict.

¶ 16 Section 7 of the Arbitration Act makes it clear that the courts are to defer to arbitration, except in the very limited circumstances in s. 7(2), where the court has a discretion whether to defer to arbitration. See *Deluce Holdings Inc. v. Air Canada* (1992), 98 D.L.R. (4th) 509 (Ont. Ct. (Gen. Div.)) at 525. My first task is to determine whether there is an agreement to arbitrate and, if so, whether it is valid pursuant to s. 7(2)2. If so, it is clear that the dispute between the parties, arising out of the plaintiff's termination, is the type of dispute which comes within the jurisdiction of the arbitrator in the agreement.

¶ 17 In my view, there is no merit to the argument that s. 7(2)3. is also operative here. That provision allows the court to refuse a stay where the subject matter of the dispute is not capable of being the subject of arbitration under Ontario law. Clearly, the dispute over wrongful dismissal and the appropriate compensation is a subject that can be arbitrated in Ontario, even in a situation where part of the employment agreement may be null and void.

¶ 18 The defendant took the position during the argument of the motion that the governing agreement is the January draft, even though it was sent to MR through an administrative error

and lacked the employment at will term that the employer wanted. The defendant indicates that it will now have to live with the consequences of having sent the wrong draft if the matter comes before an arbitrator. I accept the defendant's evidence that the January draft was sent to MR in error, and that the defendant meant to specify employment at will.

¶ 19 The plaintiff argued that the defendant could not rely on that document, since MR did not sign it and commenced working without having signed it. Thus, it was argued, the defendant waived the requirement of a signed employment contract. Given the clear wording of the offer letter, and the regular demands of the employer for a signed copy of the employment agreement, I am satisfied that MR's employment was always conditional on the signing of an employment contract. The fact that he began to work without having signed one was not, in my view, a waiver of that condition by the defendant. This is evident from the fact that the defendant continued to make efforts for many months to get MR to sign the employment contract which he had promised to sign, and which he had in possession prior to commencing work.

¶ 20 The issue is whether the January draft was incorporated by reference in his employment contract, despite the lack of a signature. There is obiter dicta in *Francis v. Canadian Imperial Bank of Commerce* (1994), 120 D.L.R. (4th) 393 (Ont. C.A.) which supports the defendant's position. There, an employee was presented with an employment contract after commencing employment, never having been alerted to its terms when he signed the offer of employment. The employment agreement was held to be unenforceable because of the absence of new consideration for the alteration of the earlier terms contained in the offer (at 400-402). However, at the end of her reasons, Weiler J.A. observed that in cases such as this,

employers are able to incorporate the terms of a standard employment agreement into the original contract of employment by saying in their offer of employment that the offer is conditional upon the prospective employee agreeing to accept the terms of the employer's standard form of agreement, a copy of which could be enclosed with the offering letter (at 402-3).

¶ 21 MR had the draft agreement before signing the offer letter. He made no change to paragraph 5 of the offer, which made his employment conditional on the signing of the employment agreement, and he made no proposals to change the draft. He knew that he was expected to sign it, and I do not accept his story that he gave notice to the defendant that he refused to do so. The defendant takes the position that the contract of employment incorporates the terms of that January draft document, and I accept that argument. Even if the agreement was not signed, acceptance of its terms was a condition of employment, and that acceptance is demonstrated by the commencement of work. By the terms of that agreement, disputes between the parties are to be submitted to arbitration.

¶ 22 Originally, as the motion was framed, the defendant relied on the November agreement, and the plaintiff argued that the employment contract was invalid because it expressly contained an employment at will clause. Given the defendant's decision to rely on the January agreement, the plaintiff now argues that the arbitration clause in this agreement is void because Ohio law is governing, and it provides for employment at will. While the plaintiff sought leave to file a late

affidavit from an Ohio lawyer describing Ohio law, there was no real contest from the defendant that there is employment at will in Ohio.

¶ 23 The Supreme Court of Canada held in *Machtinger v. HOJ Industries Ltd.* (1992), 91 D.L.R. (4th) 491 at 505 that terms in a contract of employment in Ontario were invalid because they provided less notice than that to which the employee was entitled under the Employment Standards Act. The Court then went on to determine the proper period of notice, concluding that there is an implied term of reasonable notice at common law unless the parties contract out of it by clearly specifying some other period of notice.

¶ 24 The plaintiff argued that a term specifying employment at will would contravene the Act with respect to employment in Ontario, since the employee is entitled to a minimum notice period. He then argues that to enforce an arbitration clause, with its submission to Ohio law, will allow an employer to do an end-run around the Ontario legislation. Therefore, he argues that the clause should not be enforced, in order to protect vulnerable employees and vindicate Ontario public policy.

¶ 25 Parties often specify the law that will govern their contract. There is nothing contrary to Ontario law in allowing parties to do so in an employment contract such as this, just as they do in commercial settings. See, for example, *Ruggeberg v. Bancomer, S.A.*, [1998] O.J. No. 538 (Gen. Div.), *aff'd* (1999), 122 O.A.C. 310 (C.A.). In my view, this is not a case where a vulnerable employee is being unfairly treated by the inclusion of an arbitration clause with a choice of foreign law in order to undermine his rights. MR is trained as a lawyer, and he had independent legal advice when he signed the offer letter, and he bargained over its terms. Therefore, I leave for another day whether such clauses may sometimes be unenforceable.

¶ 26 It appears to me that the plaintiff wishes to give *Machtinger* a wider application than it is meant to have. In that case, the Supreme Court of Canada held only that the termination provision of the employment contract was null and void, but not the entire contract (at 506). The reason was s. 3 of the Act, which prohibits any contracting out of the employment standards in the Act. However, the Court also held that parties can contract out of the common law rule of termination on reasonable notice if the contract clearly specifies some other period of notice, expressly or by implication (at 503). Here, the January agreement contains termination provisions that must be interpreted.

¶ 27 The plaintiff fears that the arbitrator will give effect to the Ohio law of employment at will, and will not give consideration to the illegality of such termination with respect to employment in Ontario. I have no evidence about Ohio conflicts rules with respect to public policy, so I do not know how Ontario law will be treated. However, the parties have agreed that the arbitrator shall determine their disputes in this employment relationship in accordance with Ohio law. In doing so, he or she will also have to interpret their agreement. Thus, it is for the arbitrator to determine the effect of the Ontario law under Ohio law, as well as the appropriate remedy between these parties in light of their agreement.

¶ 28 The Arbitration Act makes it clear that the courts are to defer to arbitration where the parties have chosen to arbitrate their disputes, except in very limited circumstances. In my view,

the arbitration agreement is not invalid because it chooses Ohio law to govern an employment dispute, and, therefore, a stay of this action must be ordered. However, if MR's rights under the Ontario legislation are not respected in the arbitration proceedings, he may have further remedies to pursue in Ontario in order to enforce the minimum standards to which he is entitled.

¶ 29 Therefore, I order that this action be stayed until the disposition of the arbitration in Ohio. If the parties can not agree with respect to costs, they may make written submissions within 21 days of the release of this decision.

SWINTON J.

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