

COURT OF APPEAL FOR ONTARIO

CITATION: Howard v. Benson Group Inc. (The Benson Group Inc.), 2016 ONCA
256

DATE: 20160408
DOCKET: C60404

Cronk, Pepall and Miller J.J.A.

BETWEEN

John Howard

Plaintiff (Appellant)

and

Benson Group Inc., carrying on business as The Benson Group Inc.

Defendant (Respondent)

Kevin Sherkin and Ryan Wozniak, for the appellant

Albert Campea and Rachel Goldenberg, for the respondent

Heard: October 16, 2015

On appeal from the order of Justice Donald MacKenzie of the Superior Court of Justice, dated April 22, 2015, with reasons reported at 2015 ONSC 2638.

Miller J.A.:

Overview

[1] The appellant, John Howard, was employed at an automotive service centre in Bowmanville, Ontario as Truck Shop Manager and then as Sales Development Manager. His written employment contract was for a five-year term, commencing September 2012 (the “Employment Contract”). His

employer, the respondent Benson Group Inc., terminated the appellant's employment, without alleging cause, 23 months later.

[2] The appellant brought an action for breach of contract, seeking payment of his compensation for the unexpired portion of the contract: more than three years' salary. His subsequent motion for summary judgment was granted by the motion judge, but he was not awarded the remedy that he sought. Instead of payment of salary to the end of the term of the contract, the appellant was awarded common law damages for wrongful dismissal. The quantum of damages, subject to mitigation, was to be assessed at a mini trial.

[3] The primary question raised on appeal is whether an employee who is employed under a fixed term employment contract that does not provide for early termination without cause, is entitled to payment of the unexpired portion of the contract on early termination of the contract?

[4] For the reasons that follow, I conclude that the motion judge erred in holding that the appellant is entitled to common law damages and that a duty to mitigate applies in the circumstances of this case. In my view, the appellant is entitled to a contractual sum for the termination of his employment in an amount equal to his salary and benefits for the unexpired term of the Employment Contract.

Background

[5] The respondent terminated the appellant's employment on July 28, 2014 – 23 months into the Employment Contract. The appellant was then 57 years old and earned a base salary of \$60,000 per year, plus benefits.

[6] The Employment Contract expressly provided for early termination. Clause 1.3 set out the general framework: “(t)he Employee and the Employer may terminate the Employee's employment at any time in accordance with the terms and conditions of this Agreement.” Various early termination scenarios were governed by Article 8. These included early termination by the employee (Clause 8.2), and by the employer for cause (Clause 8.3). Most significantly for this appeal, the employer's right to early termination without cause was governed by Clause 8.1:

Employment may be terminated at any time by the Employer and any amounts paid to the Employee shall be in accordance with the *Employment Standards Act of Ontario*.

[7] The respondent took the position that it terminated the Employment Contract according to Clause 8.1, and that Clause 8.1 governed its liability to the appellant. The respondent argued that its liability was limited to two weeks' salary in lieu of notice. The motion judge, however, found Clause 8.1 to be unenforceable due to ambiguity. Significantly, that finding is not appealed.

[8] After excising Clause 8.1 due to vagueness, the motion judge examined the remaining provisions of the Employment Contract to determine whether it demonstrated an intention by the parties to displace the common law presumption of reasonable notice (or pay in lieu) in the event of termination without cause. He concluded that it did not. Accordingly, he rejected the appellant's argument that he was entitled to contractual damages (or liquidated damages) for the unexpired term of the Employment Contract.

[9] The motion judge ordered a mini-trial to address the question of "what is the reasonable notice period attributable to the defendant's termination of the plaintiff's employment according to common law", including any obligation on the appellant to mitigate his damages by seeking other employment.

Issues

[10] The appellant raises two issues on appeal. Did the motions judge err in finding that:

- (1) the respondent is liable for damages according to the common law of reasonable notice, rather than damages for termination of a fixed term contract? and
- (2) an award of damages for early termination of the Employment Contract is subject to a duty to mitigate?

Issue 1: Common law reasonable notice or damages for termination of a fixed term contract?

[11] The motion judge made two critical findings: (1) that the early termination clause is sufficiently ambiguous as to be unenforceable; and (2) that in the absence of an enforceable early termination clause, the respondent's obligations are governed by "an implied term under the common law requiring 'reasonable notice' for the termination of the employment of the [appellant]." Only the latter finding is appealed.

The Appellant's Argument

[12] The appellant argues that the motion judge erred in finding that he is entitled only to common law damages for reasonable notice, rather than contractual damages for the unexpired part of the contract. He submits that although Clause 8.1 was found to be unenforceable, the remainder of the contractual provisions with respect to term and termination remained in effect, and the Employment Contract remained a fixed term contract.

[13] As the right to early termination, per Clause 1.3, could only be exercised "in accordance with the terms and conditions of this Agreement", the appellant argues that without Clause 8.1, the respondent had no contractual right to terminate the Employment Contract without cause. The only contractual rights the respondent had to terminate the Employment Contract were: (1) termination

for cause under Clause 8.3, and (2) early termination without cause during a long-expired probationary period under Clause 1.

[14] The appellant argues that the motion judge erred in concluding that a consequence of the failure of Clause 8.1 was that the Employment Contract did not evidence an intention to oust the common law presumption of reasonable notice. The appellant maintains that the Employment Contract remained a fixed term contract, and should be interpreted in the same manner as any fixed term employment contract without a provision allowing for early termination without cause.

The Respondent's Argument

[15] The respondent submits that the Employment Contract must be interpreted in accordance with the parties' intentions, particularly the intention, manifest in Clause 1.3, that the Employment Contract could be terminated "at any time".

[16] If the Employment Contract expressly permits early termination, the respondent says, then the appellant, on early termination, cannot be entitled to compensation that he would have earned to the end of the Employment Contract. To hold otherwise, the respondent says, would mean that the appellant's right to compensation would be the same regardless of whether the Employment Contract permitted early termination or not. Clause 1.3 permitting termination "at any time" would have no practical effect and the employer would

derive no benefit from contracting for early termination. Accordingly, the respondent contends, the motion judge made no error in finding that the Employment Agreement did not displace the common law presumption of reasonable notice.

The Applicable Standard of Review

[17] The applicable standard of review was not addressed by the parties. In my view, it is correctness. Generally, a motion judge's interpretation of a contract will be entitled to deference and is reviewable for palpable and overriding error on the reasonableness standard. This is because contractual interpretation most often raises questions of mixed fact and law. However, where the decision below contains an extricable question of law, it is reviewable on the correctness standard. Extrinsic errors include: (1) the application of an incorrect legal principle; (2) the failure to consider a required element of a legal test; and (3) the failure to consider a relevant factor: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, at para. 53.

[18] In *Sattva*, Rothstein J. warned that courts must be "cautious in identifying questions of law in disputes over contractual interpretation", and ensure that the proposed ground of appeal has been properly characterized. "The close relationship between the selection and application of principles of contractual interpretation and the construction ultimately given to the instrument means that

the circumstances in which a question of law can be extracted from the interpretation process will be rare”: *Sattva*, at paras. 54-55.

[19] The first question raised by the appellant is properly characterized as an extricable question of law. The question is whether an employer who: (1) terminates without cause (2) a fixed term employment contract that (3) does not include an enforceable provision for early termination without cause is (4) liable for damages according to the common law of reasonable notice, or for wages for the unexpired term of the contract? Accordingly, in light of this extricable question of law, the correctness standard of review applies.

Common law damages or wages for the unexpired term

[20] There is a common law presumption that every employment contract includes an implied term that an employer must provide reasonable notice to an employee prior to the termination of employment. Absent an agreement to the contrary, an employee is entitled to common law damages as a result of the breach of that implied term: *Bowes v. Goss Power Products Ltd.*, 2012 ONCA 425, 351 D.L.R. (4th) 219, at para. 23. This presumption can only be rebutted if the employment contract “clearly specifies some other period of notice, whether expressly or impliedly”: *Machtiger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, at p. 998; *Ceccol v. Ontario Gymnastic Federation* (2001), 55 O.R. (3d) 614 (C.A.), at para. 45. The question, then, is whether the motion judge erred in

holding that the Employment Contract, without Clause 8.1, failed to rebut that presumption by clearly specifying some other period of notice, expressly or impliedly.

[21] In my view, the motion judge erred in so holding. Where an employment agreement states unambiguously that the employment is for a fixed term, the employment relationship automatically terminates at the end of the term without any obligation on the employer to provide notice or payment in lieu of notice. Such a provision, if stated unambiguously, will oust the implied term that reasonable notice must be given for termination without cause: *Lovely v. Prestige Travel Ltd.*, 2013 ABQB 467, 568 A.R. 215, at para. 135; *Ceccol*, at para. 25.

[22] Of course, parties to a fixed term employment contract can specifically provide for early termination and, as in *Bowes*, specify a fixed term of notice or payment in lieu. However, and on this point the appellant and the respondent agree, if the parties to a fixed term employment contract do not specify a pre-determined notice period, an employee is entitled on early termination to the wages the employee would have received to the end of the term: *Lovely*, at para. 136; *Bowes*, at para. 26; *Canadian Ice Machine Co. v. Sinclair*, [1955] S.C.R. 777, at p. 786.

[23] The respondent argues, however, that because the Employment Contract does not (in the absence of Clause 8.1) contain a provision that expressly specifies a notice period for early termination without cause, the common law presumption of reasonable notice must govern. To conclude otherwise, the respondent argues, would be to ignore the effect of Clause 1.3, expressly authorizing the early termination of the Employment Agreement. What would be the point of authorizing early termination, the respondent asks, if the consequences of early termination would be the same regardless of whether the contract permitted early termination?

[24] I reject the respondent's interpretation of the Employment Contract. Clause 1.3 does not establish an undifferentiated right to early termination with or without cause. By providing that "(t)he Employee and the Employer may terminate the Employee's employment at any time in accordance with the terms and conditions of this Agreement", the clause merely creates a framework for termination "in accordance with the terms and conditions" of the Employment Contract. With the removal of Clause 8.1, the only rights of termination which remained were those established by Clauses 8.2 and 8.3.

[25] Accordingly, the excision of Clause 8.1 had no effect on the fixed term nature of the Employment Contract. As noted above, the respondent does not contest that had the Employment Contract run its course, the respondent would

have had no obligation to provide notice to the appellant or payment in lieu of notice upon termination.

[26] The Employment Contract, without Clause 8.1, unambiguously remains a fixed term contract. Without Clause 8.1, it contains no provision for early termination without cause. In keeping with *Machtinger* and *Ceccol*, the Employment Contract is sufficiently clear to oust the common law presumption of reasonable notice on termination. It follows that the appellant is entitled to the compensation that he would have earned to the end of the Employment Contract.

[27] The respondent objects that such an outcome produces a windfall for the appellant and is unfair. I disagree for the following reasons.

[28] The motion judge found that the respondent drafted the Employment Agreement. The respondent is not an unsophisticated party. Its position before the motion judge was that the Employment Agreement required the appellant to forego the implied term of reasonable notice of termination for (on the respondent's interpretation of the unenforceable Clause 8.1) pay in lieu of two weeks' notice.

[29] The respondent sought to use a fixed term contract either to eliminate its severance obligation entirely or to limit it to two weeks' notice on an early termination. It was, of course, free to do this. But the courts have consistently

held that the consequences to an employee of such a bargain are so significant that the employer must communicate clearly in the contract that this is what it is intending to do: *Ceccol*, at para. 27. If an employer does not use unequivocal, clear language and instead drafts an ambiguous or vague termination clause that is later found to be unenforceable, it cannot complain when it is held to the remaining terms of the contract.

[30] I conclude that the motion judge erred in not finding that the Employment Contract, without Clause 8.1, clearly established a notice period equal to the unexpired portion of the fixed term contract. The motion judge further erred in not finding that this notice period ousted the common law presumption of reasonable notice.

Issue 2: Was the appellant under an obligation to mitigate his damages arising from the termination of the fixed term contract?

The Applicable Standard of Review

[31] The motion judge held that there was a duty to mitigate, and directed a mini-trial on both quantification of reasonable notice and mitigation. The motion judge, of course, made no error in holding that damages in lieu of reasonable notice are subject to mitigation. However, having found that the appellant is entitled to compensation on another basis, it is necessary for this court to make a fresh determination about whether he is bound by a duty to mitigate.

The Duty to Mitigate

[32] The leading case from this court on the duty to mitigate in the context of an employment contract is *Bowes*. The question in *Bowes* was whether an employment agreement that fixes the period of notice, but makes no specific reference to mitigation, attracts the obligation to mitigate in the event of breach in the same way as the obligation to mitigate attaches to the common law duty to provide reasonable notice or pay in lieu.

[33] *Bowes* held that a contractually fixed term of notice is distinguishable from common law reasonable notice. At para. 34, the *Bowes* court stated: “[a]n employment agreement that stipulates a fixed term of notice or payment in lieu should be treated as fixing liquidated damages or a contractual amount. It follows that, in such cases, there is no obligation on the employee to mitigate his or her damages.” Thus, the duty to mitigate does not apply to liquidated damages or contractual amounts: *Bowes*, at para. 41.

[34] The rationale for this conclusion is that: (1) it would be unfair to permit an employer to opt for certainty by specifying a fixed amount of damages for termination, and then permit it to reduce that amount by compelling the employee to mitigate his or her damages when mitigation was not addressed in the employment agreement; and (2) it would be inconsistent for parties to

contract for certainty, and yet leave mitigation as a live issue with its uncertainty and risk of future litigation: *Bowes*, at para. 61.

[35] The employment agreement in *Bowes* differed from the Employment Contract in this case in two respects: (1) it was not a fixed term contract; and (2), more significantly, it contained an express clause stipulating a fixed quantum of damages for early termination of the contract.

[36] The appellant argues that the *Bowes* principle ought to be extended to fixed term contracts that, in effect, do not contain a provision for early termination without cause. He argues that the same interests of fairness and certainty apply. He relies on Wakeling J.'s commentary on *Bowes* in *Lovely*, at para. 140:

Certainty is just as much a feature of a fixed-term contract with no early termination provision as a contract term requiring an employer to pay an employee a stipulated sum if it wishes to invoke an early termination provision in a fixed-term contract or a termination provision in an indefinite-duration agreement. An employer who ends the employment relationship in a fixed-term contract before its term expires must pay the employee the value of the salary and benefits the employee would have received had he or she worked throughout the remaining term of the contract. If the parties wish to modify that obligation they should unambiguously say so.

[37] The respondent's objection to this reasoning is that, far from the circumstances of *Bowes*, the parties here had not bargained for certainty. The motion judge found that there was no evidence as to what the parties agreed

should happen if Clause 8.1 was found to be unenforceable. It would be odd, on the respondent's view, to characterize the result in this case as the consequence of parties bargaining for certainty as the absence of a specified termination payment was accidental.

[38] I would reject this argument. In my view, the parties did bargain for certainty when they entered a fixed term contract.

[39] There is no reason to depart from the rule in *Bowes* that there is no duty to mitigate where the contract specifies the penalty for early termination. It does not matter whether the penalty is specified expressly, as in *Bowes*, or is by default the wages and benefits for the unexpired term of the contract, as in the case of fixed term contracts generally.

[40] The respondent resists this conclusion, relying on *Loyst v. Chatten's Better Hearing Service*, 2012 ONSC 1653, 98 C.C.E.L. (3d) 243, aff'd 2013 ONCA 781, 14 C.C.E.L. (4th) 151, and *Graham v. Marleau, Lemire Securities Inc.* (2000), 49 C.C.E.L. (2d) 289 (Ont. S.C.). In my opinion, neither of these cases help the respondent.

[41] In *Loyst*, the question was whether a refusal by an employee to accept unilaterally imposed changes to her employment contract constituted a failure to mitigate. The trial judge found that the employer had terminated the employment, and had not satisfied its onus of proving that the employee's

mitigation efforts were inadequate. On appeal, this court held, in a brief endorsement, that based on the trial judge's finding that the employment had been terminated, the employer could not argue that the employee had failed to mitigate by not remaining with the employer. The termination of employment precluded the option of remaining with the employer.

[42] The trial decision in *Loyst* is easily explained on the basis that it predates *Bowes*. On appeal to this court in *Loyst*, neither *Bowes* nor the question of whether the duty to mitigate applied, were put in issue. On that basis, *Loyst* is of no assistance to the respondent.

[43] In *Graham*, Nordheimer J. exhaustively canvassed the case law on the question of whether a contractual sum payable on termination of employment is subject to the duty to mitigate. After observing that there were competing lines of authority, he concluded at para. 50 that the duty to mitigate applied to both fixed term contracts and contracts of indefinite duration. *Graham*, however, has been overtaken on this point by *Bowes*. At paras. 34-37, the *Bowes* court wrote:

An employment agreement that stipulates a fixed term of notice or payment *in lieu* should be treated as fixing liquidated damages or a contractual amount. It follows that, in such cases, there is no obligation on the employee to mitigate his or her damages.

To reiterate, the premise of *Graham*, set out at para. 53, was as follows:

[A contractually fixed term of notice] *is nothing more than an agreement between the parties as*

to the length of the reasonable notice to terminate the contract. I see no reason why there should be any distinction drawn between contracts of employment where the notice period is not stipulated and those where it is with the result that there would be a duty to mitigate in the former but not in the latter. [Emphasis added.]

In my view, Nordheimer J. in *Graham*, and the application judge in this case, erred by treating a contractually fixed term of notice as effectively indistinguishable from common law reasonable notice.

When parties contract for a specified period of notice or pay *in lieu* they are choosing to opt out of the common law approach applied in *Bardal*. In doing so, the parties should not be taken as simply attempting to replicate common law reasonable notice. The Alberta Court of Appeal explained as follows in *Brown v. Pronghorn Controls Ltd.*, 2011 ABCA 328 (CanLII), 515 A.R. 128, at para. 47:

If the contract entitles the employee to payment of money, howsoever calculated, on termination, that right to that money is contractual. As such, the parties were not bound to specify an entitlement that is equal or even analogous to the quantum of reasonable notice that the common law might require if the contract was silent.

Damages for contractually stipulated notice or pay *in lieu* should not be analogized directly to damages for common law reasonable notice. The parties have specifically contracted for something different; it is an error to simply equate the two.

[44] In the absence of an enforceable contractual provision stipulating a fixed term of notice, or any other provision to the contrary, a fixed term employment contract obligates an employer to pay an employee to the end of the term, and that obligation will not be subject to mitigation. Just as parties who contract for a

specified period of notice (or pay in lieu) are contracting out of the common law approach in *Bardal v. Globe & Mail Ltd.* (1960), 24 D.L.R. (3d) 140 (Ont. H.C.), so, too, are parties who contract for a fixed term without providing in an enforceable manner for any other specified period of notice (or pay in lieu).

Disposition

[45] For the reasons given, I would allow the appeal. A declaration shall issue that the appellant is entitled to a contractual sum for the termination of his employment in an amount equal to his salary and benefits for the unexpired term of the Employment Contract. I would remit the matter to the motion judge for a determination of the quantum of that sum, unless the parties are able to agree. Finally, I would award costs to the appellant in the amount of \$9,000, inclusive of disbursements and HST.

Released: "BWM" APR 8, 2016

"B.W. Miller J.A."
"I agree. E.A. Cronk J.A."
"I agree. S.E. Pepall J.A."