COURT OF APPEAL FOR ONTARIO

CITATION: Chapman v. GPM Investment Management, 2017 ONCA 227
DATE: 20170321
DOCKET: C61512

van Rensburg, Hourigan and Miller JJ.A.

BETWEEN

Brent Chapman

Plaintiff (Appellant)

and

GPM Investment Management and Integrated Asset Management Corp.

Defendants (Respondents)

Paul J. Pape and Jerome R. Morse, for the appellant

Christopher J. Cosgriffe and Ryan Watkins, for the respondents

Heard: October 25, 2016

On appeal from the judgment of Justice Drew S. Gunsolus of the Superior Court of Justice, dated November 27, 2015, with reasons reported at 2015 ONSC 6591.

B.W. Miller J.A.:

Overview

[1] The sole issue on this appeal is whether an employer's refusal to pay a bonus merely breached the appellant's employment contract, which the employer no longer contests, or whether it also constituted constructive dismissal. For the

reasons that follow, in my view the trial judge made no error in finding, on the facts before him, it did not. I would dismiss the appeal.

Background

[2] GPM is in the business of providing real estate management services. The appellant was employed by GPM for nine years, as its chief executive officer and president, and was also a director of IAM, which holds an ownership interest in GPM.

[3] Over the course of his employment, the appellant entered into three successive memoranda of understanding, setting out the terms of employment. The most recent of these, dated November 17, 2008, was for a term of three years and was in force at the time the appellant's employment ended on October 26, 2011.

[4] This memorandum of understanding provided that the appellant was entitled, in addition to his base salary and various benefits and stock options, to an annual bonus that was to be calculated as follows:

> Annual pro rata bonus available shall be 10% of pretax profit of GPMA and Darton less interest income and depreciation. Profit shall not include present level, if crystalized, of performance fees to GPMA on GPM/Endow (8) of $0.60MM.

[5] On October 19, 2011, the appellant met with Steven Johnson, the Chief Financial Officer of the respondent IAM, to discuss the quantum of his 2011

bonus. The appellant was surprised to learn that GPM planned to exclude from the calculation of its pretax income (which was used to calculate the appellant's bonus) profit from the sale of lands that it had purchased several years earlier as an investment (the "Ellerslie lands"). The exclusion of profits from the sale of the Ellerslie lands reduced the appellant's bonus by $329,687.

[6] Johnson and the appellant met again on October 24, 2011, and Johnson confirmed this decision. He left open the possibility, however, that GPM might reconsider if the other investors in the Ellerslie lands would be willing to contribute. The appellant did not follow up on this suggestion, on the basis that the other investors had no legal obligation to contribute to his bonus.

[7] On October 26, 2011, the appellant left his employment, after taking the position that GPM's refusal to include the profit from the sale of the Ellerslie lands in the calculation of his bonus constituted constructive dismissal. GPM took the position that he had voluntarily resigned.

[8] The appellant sued for damages for breach of his employment contract and for constructive dismissal. The respondents defended the action, asserting that no bonus was payable on the Ellerslie lands and that the appellant had not been constructively dismissed.

[9] Although the trial judge found that GPM had breached the appellant's contract by not including the profit from the Ellerslie lands transaction in the

calculation of the appellant's bonus, he did not find that the appellant had been constructively dismissed. The trial judge found that the breach did not alter an essential term of the appellant's contract. He characterized the dispute between the parties as more a matter of "disagreement over the interpretation of the application of Mr. Chapman's bonus scheme". This was not, therefore, a unilateral change in the bonus structure by the employer, but a disagreement over the interpretation of the contract, and a "disagreement regarding the calculation of a bonus is not necessarily constructive dismissal".

[10] The trial judge concluded that "(a)ny reasonable person would conclude that the essential terms of the employment contract had not been changed, but in fact remained intact."

Issues

[11] The appellant raises two issues on this appeal:

1. Did the trial judge misapply the test for constructive dismissal? and
2. If so, should the damages for constructive dismissal be assessed on the basis of a four year average of pre-dismissal remuneration?

[12] As I would find that the trial judge did not err in his application of the law of constructive dismissal, it will not be necessary to address the second issue.

Analysis

A. PRINCIPLES

Constructive dismissal

[13] As the trial judge noted, there are two routes that a plaintiff can follow to establish constructive dismissal, as set out in *Potter v. New Brunswick Legal Aid Services Commission*, 2015 SCC 10, [2015] 1 S.C.R. 500.

[14] The first branch is apt where an employer has, by a single unilateral act, breached an essential term of the contract of employment. The second branch allows for constructive dismissal to be made out where there has been "a series of acts that, taken together, show that the employer no longer intended to be bound by the contract". On both branches, it is "the employer's perceived intention no longer to be bound by the contract" that gives rise to the constructive dismissal: *Potter*, at para. 43.

[15] The first branch – for a single unilateral act – has two steps: (1) the employer's conduct must be found to constitute a breach of the employment contract, and (2) the conduct "must be found to substantially alter an essential term of the contract": *Potter*, at para. 34.

[16] In contrast, the focus of enquiry on the second branch is not on a single act of the employer, but on the "cumulative effect of past acts by the employer"

that establish that the employer no longer intends to be bound by the contract: *Potter*, at para. 33.

[17] The perspective shifts during the analysis. In ascertaining whether an employer's conduct has amounted to a breach of contract (the first step of the first branch), the test is objective: *Potter*, at para. 62. Thereafter, on both the second step of the first branch and on the second branch, the perspective shifts to "that of a reasonable person *in the same circumstances as the employee* …The question is whether, given the totality of the circumstances, a reasonable person in the employee's situation would have concluded that the employer's conduct evinced an intention to no longer be bound by [the contract]" (emphasis in original): *Potter*, at para. 63. In these parts of the analysis, the trial judge must conduct the enquiry from the perspective of the reasonable employee. This perspective excludes, for example, reliance on information that "the employee did not know about or could not be expected to have foreseen." *Potter,* at paras. 62 and 66. Furthermore, the employee is not required to establish that the employer actually intended to no longer be bound by the contract, but only that a reasonable person in the employee's situation would have concluded that this was the employer's intention: *Potter*, at para. 63.

B. THE PRINCIPLES APPLIED

[18] The appellant runs arguments under each branch of *Potter*. First, he argues that the trial judge muddled the two branches of *Potter* and imported elements of the second branch into the first. Additionally, he says that the trial judge relied impermissibly on the employer's perspective rather than the employee's.

[19] With respect to the second branch, the appellant argues that the trial judge erred in not considering the second branch of the *Potter* test at all, and ought to have found constructive dismissal based on GPM's course of conduct.

[20] Each of these arguments is explored below.

The first branch – a single breach

[21] The appellant's argument is that the trial judge wrongly used a criterion exclusive to the second branch (whether a reasonable person in the employee's position would conclude that the employer no longer considered itself to be bound by the contract) to resolve the question on the first branch of whether the breach was a substantial alteration of an essential term of the contract. He argues that the trial judge then committed a further error by answering this question from the employer's perspective, using evidence of the employer's intentions that could not have been known by the appellant.

[22] The trial judge, however, did not conflate the two branches of *Potter* and the appellant is simply mistaken. In reading the trial judge's reasons, it must be borne in mind that both the first and second branches of *Potter* are in service of the same ultimate enquiry: the determination of whether the employer has, by its conduct, evinced an intention not to be bound by the contract: *Potter*, at para. 63. The question of whether there has been a substantial alteration of an essential term of the contract is not an end in itself, but a step towards answering this ultimate question. The trial judge had this ultimate question in mind, and did not conflate the two branches of the *Potter* test.

[23] As I explain below, the trial judge did not err in concluding that the breach of contract did not constitute a substantial alteration to an essential term of the contract, nor did it evince an intention not to be bound by the contract.

The breach: denial of bonus from sale of the Ellerslie lands

[24] Of critical importance to this appeal is the trial judge's analysis of the breach of contract, and whether that breach constituted a substantial alteration to the contract.

[25] GPM is in the business of providing real estate management services. As noted by the trial judge, its income, for the most part, is generated through operating fees. As part of his remuneration, the appellant was entitled to a bonus calculated on GPM's profits. There were two exceptional asset sales, outside of

GPM's ordinary operations, that generated substantial capital gains for GPM. One of these was the disposition of a property management company, Darton Property Advisors & Managers Inc. Income generated by Darton was included in the calculation of the appellant's annual bonus. The trial judge found that when Darton was sold, the appellant was paid a discretionary bonus. Although the appellant disputes the nature of the Darton bonus, the trial judge found that IAM, in its statements to its shareholders, characterized the bonus as discretionary.

[26] The second asset sale was the Ellerslie lands. The trial judge found that this investment was unusual, in that it was acquired prior to the commencement of the appellant's employment with GPM, and was the only real estate investment held by GPM during the entirety of the appellant's tenure. The trial judge accepted GPM's evidence as to why this was the case: subsequent to purchasing the Ellerslie lands, GPM concluded that the acquisition of real estate investments put it in a conflict of interest with its investors. GPM made no further real estate investments. It did engage in other real estate transactions, but these were different in kind. The trial judge found that in these transactions, GPM earned a fee by securing agreements to purchase and then assigning its rights to third parties. On these deals, GPM had no intention and no ability to complete the purchases, let alone hold them as investments.

[27] Although the non-investment policy was not communicated to the appellant, and the appellant did not agree that the acquisition of the Ellerslie

lands constituted a conflict of interest, the fact remains that during the entire course of the appellant's employment, GPM did not acquire a single real estate investment. Thus the appellant had no expectation of further bonuses from capital gains in the future.

[28] The trial judge found that the appellant's employment contract with GPM required that he be paid a bonus based on all of GPM's income, including capital gains on real estate investments such as the sale of the Ellerslie lands, and not just operating income. GPM was therefore found to have breached its contract with the appellant. Did the trial judge nevertheless err by concluding that this breach was not a substantial alteration of an essential term of the contract?

A substantial alteration of an essential term

[29] The appellant argues that the trial judge erred in not finding that GPM had converted the appellant's overall bonus scheme from a non-discretionary bonus to a discretionary bonus, and that this constituted a substantial alteration of an essential term of the contract.

[30] The trial judge rejected this argument, and found that there had been no alteration to any term: the appellant's duties and his compensation, including the bonus calculation, remained unchanged. The dispute between the appellant and GPM "amounted to a dispute over the interpretation of the application of one transaction to Mr. Chapman's bonus scheme and nothing more."

[31] The appellant argues that the trial judge erred in this conclusion because he considered the breach from the employer's perspective rather than that of a reasonable employee: the trial judge made note of Johnson's evidence that GPM thought it would be business as usual going forward, and that GPM intended all along to continue to be bound by the terms of the memorandum of understanding. The appellant argues that as these intentions were not communicated to him, they were unknowable by him, and a reasonable employee in his position, confronted with a denial of $329,000 in bonus income would have concluded that GPM had no intention to continue to be bound by the contract.

[32] The trial judge, however, made no such error. Although he noted Johnson's evidence that GPM intended to continue to be bound by the contract, this was secondary in the trial judge's reasoning. What was primary was the appellant's statements in cross-examination that he believed that none of the terms of his employment had changed. As the trial judge summarized the appellant's evidence, at paras. 69-70:

> During cross-examination, Mr. Chapman admitted the following:
>
> i. No one told him that his duties as president/CEO of GPM had or would change;
>
> ii. No one said that his duties as a director of IAM had or would change;

> iii. No one told him that his base salary had or would change;
>
> iv. No one told him that the way in which his bonuses would be calculated in the future would or had been changed.
>
> Mr. Chapman further acknowledged that he expected that his bonuses would be paid as they had been in the past. To quote Mr. Chapman, when asked whether he expected his bonuses would continue, he said, "Oh, yes; most certainly."

[33] Although the appellant distanced himself from this statement on re-examination, the trial judge was entitled to prefer the evidence elicited on cross-examination.

[34] Furthermore, the trial judge considered all of the relevant surrounding circumstances in concluding that there were no other factors that could lead a reasonable person in the appellant's position to conclude that GPM's breach indicated an intention not to be bound by the memorandum of understanding.

[35] Against this, the appellant argues that the trial judge erred in not finding that he had been placed in the untenable position of having to either forego the $329,000 in bonus income and keep his job, or sue to recover the $329,000 and lose his job.

[36] The trial judge, however, found on the evidence that the appellant had options other than suing GPM on the one hand and foregoing the bonus on the other, including proposing arbitration and/or following up on Johnson's

suggestion that GPM might reconsider paying something towards a bonus if the other investors in the Ellerslie lands agreed.

[37] In my view, it was open to the trial judge to find that there were, on the facts of this case, dispute resolution alternatives that the appellant, a commercially sophisticated party, could have been expected to explore, and that a reasonable person in the appellant's position would not have considered himself to have been constructively dismissed when the bonus on the sale of the Ellerslie lands was refused.

[38] In summary, the trial judge made no error in characterizing the dispute as solely about whether a particular transaction – one that he accepted could not be repeated during the remainder of the contractual term – fit within the unaltered bonus structure. The trial judge's rejection of the appellant's argument that the respondents had converted the appellant's bonus structure from non-discretionary to discretionary, and his finding that the disagreement over what constituted income for the calculation of the appellant's bonus was not an alteration to the contract, let alone a substantial alteration, were supported by the evidence. Finally, the conclusion that the failure to pay the bonus in question did not constitute constructive dismissal, notwithstanding that non-payment was in breach of the appellant's employment contract, was reasonably open to the trial judge after a proper analysis and application of the first branch of the *Potter* test.

The second branch – a course of conduct

[39] A further argument on appeal is that the trial judge failed to address the second branch of *Potter*, specifically the argument that the respondents unequivocally told the appellant that they would not be bound by the contract, and that this was a continuing course of conduct that evidenced an intention not to be bound by the contract in the future.

[40] The respondents objected that this theory of liability was neither pleaded nor advanced at trial, and so it is unsurprising that it does not feature more prominently in the trial judge's reasons.

[41] In any event, the argument fails on the facts, as found by the trial judge, that "no evidence was presented upon which one could conclude that GPM did not intend to be bound by the terms of the 2008 employment Memorandum of Understanding." None of the evidence that the appellant marshalled in support of the argument that the respondents resented the appellant's level of remuneration and intended to curtail it when his contract was next up for renegotiation, is relevant to the question of whether a reasonable employee in the circumstances of the appellant would believe that the respondents did not intend to be bound to the existing agreement. And against this is, again, the appellant's own evidence that he believed at the relevant time that despite GPM refusing to pay a portion of

his bonus, nothing had changed going forward. In such circumstances, constructive dismissal is not made out on the second branch either.

Disposition

[42] I would dismiss the appeal. I would award the respondents costs in the amount of $17,000 inclusive of disbursements and HST.

Released: “BWM” MAR 21 2017

“B.W. Miller J.A.”
“I agree. K. van Rensburg J.A.”
“I agree. C.W. Hourigan J.A.”