COURT OF APPEAL FOR ONTARIO

CITATION: De Jesus v. Linamar Holdings Inc. (Camcor Manufacturing), 2017 ONCA 384
DATE: 20170515
DOCKET: C62551

Rouleau, Pardu and Roberts JJ.A.

BETWEEN

Ronald De Jesus

Appellant (Plaintiff)

and

Linamar ~~Corporation~~ Holdings Inc. aka Camcor Manufacturing

Respondent (Defendant)

Robert A. Konduros, for the appellant

Malcolm MacKillop and Todd Weisberg, for the respondent

Heard: May 2, 2017

On appeal from the judgment of Justice Nancy Mossip of the Superior Court of Justice, dated July 18, 2016, with reasons reported at 2016 ONSC 4383.

REASONS FOR DECISION

A. OVERVIEW

[1] The appellant appeals the dismissal of his wrongful dismissal action.

[2] The appellant was employed as a production supervisor with the respondent. On October 8, 2013, his employment was terminated for cause after approximately 19.5 years of continuous employment, without notice or

compensation in lieu of notice. The respondent terminated the appellant's employment because of a series of incidents that culminated in his having allowed 1,500 defective camshafts to be processed with "roping" marks during his shift and then in his having lied to the respondent about what had happened.

[3] The trial judge did not accept the appellant's evidence that he had carried out regular checks of the line and had instructed members of his team to do the same, nor his denial that 1,500 defective camshafts had been produced during his shift. The trial judge accepted the respondent's evidence that 1,500 defective camshafts had been produced during the appellant's shift and that, if the appellant and his team had in fact been carrying out the mandated checks as often as they said they had, it would have been impossible for the appellant or his team members not to have discovered the defective camshafts. Indeed, the trial judge accepted the evidence of one of the packers that she and other packers had brought the roping issue to the appellant's attention on three occasions during their shift. The trial judge concluded that the appellant had lied about the roping issues that had occurred during his shift.

[4] The trial judge held that the appellant's failure to supervise and to take any remedial steps once the roping problem was brought to his attention, combined with his dishonesty about what had happened, went to the heart of the employment relationship. Accordingly, the trial judge concluded that these facts, when taken together with the appellant's earlier disciplinary incidents, established

on a balance of probabilities that the respondent had just cause to terminate the appellant's employment.

B. ISSUES ON APPEAL

[5] The appellant submits that the trial judge made the following errors:

i. The trial judge reversed the onus that the respondent had to meet, erroneously requiring the appellant to prove that his employment had not been terminated for cause.

ii. The trial judge was biased against the appellant.

[6] We would not give effect to these submissions.

(1) Did the trial judge reverse the onus on the employer to prove just cause?

[7] The appellant submits that an improper reversal of the employer's onus resulted in the trial judge erroneously accepting the respondent's "impossibly exaggerated" evidence that 1,500 defective camshafts were produced during the appellant's shift and the respondent's hearsay evidence that 604 of those defective camshafts had to be scrapped. In support of his allegation of the trial judge's error, the appellant points to the following sentence near the end of the trial judge's conclusion, at para. 163: "On all of the evidence, the plaintiff has not met his onus that he was wrongfully terminated from his employment with the defendant."

[8] We agree with the respondent's submission that this concluding sentence referring to "onus" must be read in the context of the entirety of the trial judge's reasons. From the respondent's written and oral submissions at trial, it is apparent that the respondent accepted that it had the onus to demonstrate, on a balance of probabilities, that it had just cause to terminate the appellant's employment without notice or compensation in lieu of notice. In their submissions at trial, both counsel advised the trial judge that the respondent had this onus.

[9] Moreover, the trial judge applied the correct analysis for determining whether just cause has been established, as set out by the Supreme Court of Canada in *McKinley v. BC Tel*, 2001 SCC 38, [2001] 2 S.C.R. 161, and as later referenced by this court in *Dowling v. Ontario (Workplace Safety & Insurance Board)* (2004), 246 D.L.R. (4th) 65 (Ont. C.A.) and *Fernandes v. Peel Educational & Tutorial Services Limited (Mississauga Private School),* 2016 ONCA 468, [2016] O.J. No. 3140. Following this analysis, the trial judge concluded at para. 150 of her reasons that "Mr. De Jesus' action for wrongful dismissal cannot succeed because Linamar had just cause to terminate his employment".

[10] Taken in this context, the trial judge's above-noted sentence at para. 163 of her reasons merely alludes to the fact that the appellant was unsuccessful at trial. Her analysis itself does not reflect a reversal of the employer's onus.

[11] With respect to the trial judge's acceptance of the hearsay evidence about the 604 scrapped defective camshafts, we agree that this was an error. However, this was not a palpable and overriding error because it did not affect the trial judge's assessment of the evidence or her ultimate determination of the issues. As the trial judge stated several times in her reasons, the key factual issue that she had to decide was whether 1,500 defective camshafts had been produced during the appellant's shift. Whether or not 604 of those camshafts were ultimately scrapped was immaterial to the trial judge's determination of the total number of defective camshafts. The trial judge found that the magnitude of the total number of defective camshafts, which the appellant allowed to pass uncorrected during his shift, taken together with his subsequent dishonesty about them, was the culminating event that formed the primary basis for his dismissal for cause.

[12] The trial judge gave thorough and detailed reasons as to why she preferred the respondent's evidence to that of the appellant on the issue of whether 1,500 defective camshafts were produced during the appellant's shift. In particular, she was alert to and dealt with the differences among the various estimates of the actual number of defective camshafts given by the respondent's witnesses. She accepted the evidence of the production supervisor who discovered and counted the actual number of defective camshafts produced during the appellant's shift. This evidence was consistent with and supported by the evidence of the packer

and the other supervisors who testified about the unusually large amount of defective camshafts that they saw had been produced during the appellant's shift. It was open to the trial judge to accept this evidence and to conclude that 1,500 defective camshafts had been produced during the appellant's shift. There is no basis to interfere with her finding on that point.

(2) Was there a reasonable apprehension of bias?

[13] We turn finally to the appellant's allegation of bias against the trial judge.

[14] In *Lloyd v. Bush*, 2017 ONCA 252, [2017] O.J. No. 1559, at para. 112, this court very recently reiterated the classic, undisputed test for reasonable apprehension of bias, as summarized by the Supreme Court of Canada in *Yukon Francophone School Board, Education Area No. 23 v. Yukon Territory (Attorney General)*, 2015 SCC 25, [2015] 2 S.C.R. 282, at para. 20 of that decision:

> what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude? Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly?

[15] This court went on to state, at para. 113 of *Bush*, the equally well-established principle that judges are afforded a strong presumption of impartiality that is not easily displaced, although that presumption can be rebutted by the trial judge's conduct.

[16] In support of his allegation of bias, the appellant places particular emphasis on the trial judge's negative reaction to counsel's failure to bring to the court's

attention a decision of this court that questioned a procedural ruling that the trial judge had made earlier. The trial judge initially chastised appellant's counsel, describing his failure to bring the case to the court's attention as "bad advocacy". However, once counsel for both parties apologized and explained that the failure was unintentional, the trial judge's initial annoyance immediately disappeared and she offered and granted appellant's counsel a recess to determine best how to continue his questions in light of the new case.

[17] This exchange and the other concerns raised by the appellant do not demonstrate bias on the part of the trial judge. There is no evidence of inappropriate treatment by the trial judge of the appellant and his counsel. Criticism of counsel by the trial judge, as occurred here, or disagreement with the findings urged upon her by counsel, does not amount to bias or give rise to a reasonable apprehension of bias. The trial judge's reasons for her findings are detailed and comprehensive, and amply supported by the record.

C. DISPOSITION

[18] Accordingly, the appeal is dismissed.

[19] Costs are to the respondent in the agreed amount of $20,000, inclusive of disbursements and applicable taxes.

"Paul Roleau J.A."
"G. Pardu J.A."
"L.B. Roberts J.A."