COURT OF APPEAL FOR ONTARIO

CITATION: Fillmore v. Hercules SLR Inc., 2017 ONCA 280
DATE: 20170404
DOCKET: C62566

Juriansz, Lauwers and Hourigan JJ.A.

BETWEEN

Roy Fillmore

Plaintiff (Respondent)

and

Hercules SLR Inc.

Defendant (Appellant)

Craig R. Lawrence, for the appellant

David Vaughan, for the respondent

Heard: March 31, 2017

On appeal from the judgment of Justice James Diamond of the Superior Court of Justice, dated July 20, 2016 with reasons reported at 2016 ONSC 4686.

ENDORSEMENT

By the Court:

[1] The summary motion judge granted the plaintiff damages for wrongful dismissal based on a 17 month notice period. Although the appellant does not challenge the length of the notice period, it argues that the respondent failed to

mitigate. In particular, the appellant argues that the respondent's obligation to mitigate obliged him to accept the appellant's offer of employment at a salary roughly 20% less than his former salary.

[2] The appellant challenges the motion judge's finding that the respondent was not obliged to accept the offer and therefore had not failed to discharge his duty to mitigate. For the reasons that follow, we dismiss the appeal.

[3] The respondent was 51 years old and was employed as the defendant's director of purchasing. He had been employed by the appellant for about 19 years and received a salary of about $82,000 with some additional benefits.

[4] The appellant sought to restructure and decided to terminate the respondent without cause. The appellant provided the respondent with a "severance offer" and a "new employment offer". The severance offer required him to sign and return a full and final release in exchange for which he would be provided with eight weeks written notice in accordance with the requirements of the *Employment Standards Act*, *2000*, S.O. 2000, c. 41, and providing him with an additional payment of 12 weeks' severance.

[5] In the new employment offer he received on the same day, the respondent was offered a permanent full time position as the supervisor of service at a salary of more than 20% less than his current salary for doing the same work. The offer also provided him with a six month income guarantee at his old salary to assist him in his transition.

[6] Both the offers were open for acceptance until August 24, 2015. The respondent did not accept either.

[7] The following day, on August 25, 2015, the respondent sent an e-mail to the applicant's representative asking whether the termination letter was now in effect. The representative sent an e-mail restating the terms of the severance offer and the new employment offer.

[8] The trial judge puts the applicant's position squarely in paragraph 24:

> The defendant submits that Hubley's email renewed the expired New Offer of Employment to the plaintiff, and as such the plaintiff was offered a reasonable opportunity to mitigate his damages by returning to work for the defendant. The defendant thus submits that by not accepting the New Offer of Employment, the plaintiff failed to discharge his duty to mitigate his damages.

[9] The appellant relies on the decision of this court and *Farwell v. Citair Inc*, 2014 ONCA 177, in particular para. 20:

> There may also be merit in the argument that the circumstances here would support the imposition of an obligation on Mr. Farwell to mitigate by working through the notice period. But the appellant faces another obstacle, which, in my view, is insurmountable. To paraphrase *Evans* [*Evans v. Teamsters Local Union No. 31*, 2008 SCC 20, [2008] 1 S.C.R. 661], the appellant's mitigation argument presupposes that the employer has offered the employee a chance to mitigate damages by returning to work. To trigger this form of mitigation duty, the appellant was therefore obliged to offer Mr. Farwell the clear opportunity to work out the notice period *after* he refused to accept the position of Purchasing Manager and told the Appellant that he was treating the reorganization as constructive and wrongful dismissal.

[10] The motion judge concluded that the new offer of employment was not consistent with this court's decision in *Farwell* because it was not an offer to work through the notice period. Instead, it was simply an offer for a new full time position at much less compensation. As the motion judge observed at para. 30:

> There is nothing in the second letter which confirms that the potential acceptance of the New Offer of Employment would be without prejudice to the plaintiff's rights arising from his dismissal from his former position.

The motion judge concluded, at paragraph 31:

> There is no obligation on the plaintiff to effectively risk handing the defendant a Full and Final Release through the back door and under the guise of mitigation efforts.

[11] We agree.

[12] The relevant test from *Evans* was set by Bastarache J. at para. 30:

> This Court has held that the employer bears the onus of demonstrating both that an employee has failed to make reasonable efforts to find work and that work could have been found (*Red Deer College v. Michaels*, [1976] 2 S.C.R. 324). Where the employer offers the employee a chance to mitigate damages by returning to work for him or her, the central issue is whether a reasonable person would accept such an opportunity.

[13] The motion judge found that on the facts of this case a reasonable person in the respondent's position is not obliged to accept a term risking waiver of the wrongful dismissal claim. We see no error in this finding.

[14] The appeal is dismissed with costs in the agreed amount of $7,000 for the appeal inclusive of disbursements and taxes.

"R.G. Juriansz J.A."
"P. Lauwers J.A."
"C.W. Hourigan J.A."