COURT OF APPEAL FOR ONTARIO

CITATION: Michela v. St. Thomas of Villanova Catholic School, 2015 ONCA 801
DATE: 20151123
DOCKET: C59979

Hoy A.C.J.O., Epstein and Huscroft JJ.A.

BETWEEN

Domenica Michela, Sergio Gomes and Catherine Carnovale

Plaintiffs

(Appellants/Respondents by way of cross-appeal)

and

St. Thomas of Villanova Catholic School

Defendant

(Respondent/Appellant by way of cross-appeal)

Michael D. Wright and Stephen Moreau, for the appellants/respondents by way of cross-appeal

Ian B. St. John and Jeffrey Rochwerg, for the respondent/appellant by way of cross-appeal

Heard: July 6, 2015

On appeal from the summary judgment of Justice Thomas R. Lederer of the Superior Court of Justice, dated January 7, 2015, with reasons reported at 2015 ONSC 15, 2015 C.L.L.C. 210-020, and on cross-appeal from the costs decision dated February 20, 2015, with reasons reported at 2015 ONSC 1145.

Huscroft J.A.:

[1] Are an employer's financial circumstances a relevant consideration in determining the period of reasonable notice to which a wrongfully dismissed employee is entitled? This is the question raised by this appeal.

[2] The appellant school teachers appeal from the January 7, 2015 summary judgment in their wrongful dismissal action against the respondent private school. The motion judge found they were wrongfully dismissed and awarded pay in lieu of the six months' notice he found they should have received. He determined this notice period after taking into account the respondent's financial circumstances, which had the effect of reducing the reasonable notice period from twelve months to six. The appellants seek to vary the damage award by substituting a twelve-month notice period.

[3] The respondent accepts the motion judge's finding that the appellants were wrongfully dismissed and accepts the six-month notice period. However, the respondent seeks leave to cross-appeal the motion judge's costs award, dated February 20, 2015, on the basis that the appellants failed to accept a settlement offer greater than the damages they were awarded on summary judgment.

[4] For the reasons that follow, I would allow the appeal and deny leave to cross-appeal the costs award.

Background

[5] The respondent employed the appellants on a series of one-year contracts. Gomes was employed for thirteen years (including three leaves of absence); Michela for eleven years (including one leave of absence); and Carnovale for eight years. Each of the appellants received a letter from the respondent dated May 31, 2013 informing them that their contracts would not be renewed because enrolment for the upcoming academic year was expected to be lower. The letters stated that the appellants would be informed if the school's position changed prior to the end of the school year. Michela and Carnovale received a second termination letter dated June 27, 2013. Gomes received an e-mail from the respondent on June 30, 2013 stating that the respondent was not in a position to offer him a position at that time.

[6] The appellants commenced an action for wrongful dismissal. The parties agreed to proceed with a motion for summary judgment.

[7] The respondent argued that the appellants were not entitled to notice because they were employed pursuant to fixed-term contracts. However, the motion judge found that the appellants were employed for indefinite periods and were entitled to reasonable notice. The respondent did not cross-appeal this finding. The motion judge rejected the appellants' submission that the notice period began to run on September 1, 2013. He found that the notice period for

Gomes began to run on June 30, 2013 and that the notice periods for Michela and Carnovale began to run on June 28, 2013.

[8] The motion judge reduced the twelve-month notice period proposed by the appellants to six months after taking into account the respondent's financial position and the availability of alternative teaching positions. He reasoned as follows, at para. 100:

> …I find that the notice period proposed is too long. I point out that, if notice for 12 months is reasonable, the School will have to pay the same amount for these teachers as if they had remained on staff for the year that was upcoming. Assuming that the other two teachers who were terminated maintained the same rights, it is not difficult to see that the School would be unable to reduce its prospective deficit by terminating staff it did not need. The law does not ignore the dilemma of the employer. The teachers should be taken to understand this aspect of their employment and, in this case, were made aware of the concern. In this situation, I reduce the claim for notice by half, to six months.

[9] The motion judge rejected the respondent's argument that the appellants should be required to pay costs pursuant to r. 49.10 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 because they recovered less than the respondent had offered them to settle the matter. He found that the respondent's settlement offer was a global offer and that each of the plaintiffs had different claims. It was not possible to say that the result obtained on the motion was less

than the settlement offer because it was not clear how the offer would have been divided among the appellants.

[10] The motion judge found that the respondent lost the issues fundamental to the proceeding (the term of the contracts and whether the appellants had mitigated) and criticized the respondent for using its superior power to complicate and lengthen the proceedings in pursuit of its interests. He awarded the appellants $42,000 in costs on a partial indemnity basis.

Issues on appeal

[11] The appellants raise three issues on appeal. First, they say the motion judge erred in law in relying on the respondent's alleged financial difficulties to reduce the notice period. Second, the motion judge erred in law in presuming that there may be positions the appellants could secure six months following their termination. Third, the motion judge made a palpable and overriding error of fact in finding that enrolment issues constituted a financial problem permitting a reduction in the notice period to six months.

Analysis

Are an employer's financial circumstances a relevant consideration in determining the period of reasonable notice to which a wrongfully dismissed employee is entitled?

[12] The nature and purpose of notice are well established. Although employees may be dismissed without cause, "employment contracts for an indefinite period require the employer, absent express contractual language to the contrary, to give reasonable notice of an intention to terminate the contract if the dismissal is without cause": *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986. Reasonable notice allows employees a reasonable period of time to find replacement work. Damages for dismissal without reasonable notice are designed to compensate employees for the losses incurred during the period of reasonable notice – the amount of wages and benefits that they would have earned had they been permitted to serve out the notice period: see *Arnone v. Best Theratronics Ltd.*, 2015 ONCA 63, 329 O.A.C. 284, at para. 16, leave to appeal refused, [2015] S.C.C.A. No. 140; *Taggart v. Canada Life Assurance Co.* (2006), 50 C.C.P.B. 163 (Ont. C.A.), at para. 13; and *Sylvester v. British Columbia*, [1997] 2 S.C.R. 315, at para. 1.

[13] The calculation of the notice period is a fact-specific exercise. The relevant factors are set out in *Bardal v. The Globe & Mail Ltd.* (1960), 24 D.L.R. (2d) 140 (Ont. H.C.), at p. 145, and focus on the circumstances of the employee: the character of their employment, their length of service, their age, and the

availability of similar employment, having regard to their experience, training, and qualifications.

[14] The motion judge emphasized the "character of the employment" in determining that the twelve-month notice period sought by the appellants should be reduced to six. He reasoned as follows, at paras. 89 and 90:

> It should be self-evident that, by its nature, the School could not provide the security of employment offered by larger, more established and better-funded institutions. The teachers must be taken to have understood the circumstances of their employer. Every year, they had to wait until June before the School could be sure of its requirements for the upcoming year…
>
> The three teachers cannot be taken to have been unaware of the circumstances of the School. Whatever their rights to notice, it must be understood that they worked there understanding its circumstances. This cannot be ignored in assessing what is reasonable notice. It is an aspect of the "character of the employment" as referred to in *Bardal v. Globe & Mail Ltd*... These are facts that are particular to this case.

[15] In my view, the motion judge erred in considering an employer's financial circumstances as part of the "character of the employment".

[16] The character of the employment refers to the nature of the position that had been held by the employee – the level of responsibility, expertise, and so on. Historically, courts have drawn a distinction between management and non-management employees in determining notice, and have assumed that the former may require more time to find similar employment than the latter. This

court has questioned the validity of this assumption and suggested that the character of the employment is "a factor of declining relative importance": *Di Tomaso v. Crown Metal Packaging Canada LP*, 2011 ONCA 469, 337 D.L.R. (4th) 679, at paras. 27-28.

[17] It is not necessary to address this issue for the purposes of this case. It suffices to say that the character of the employment, like the other *Bardal* factors, is concerned with the circumstances of the wrongfully dismissed employee. It is not concerned with the circumstances of the employer. An employer's financial circumstances may well be the *reason* for terminating a contract of employment – the event that gives rise to the employee's right to reasonable notice. But an employer's financial circumstances are not relevant to the determination of reasonable notice in a particular case: they justify neither a reduction in the notice period in bad times nor an increase when times are good.

[18] The confusion in this area stems from *Bohemier v. Storwal International Inc*. (1982), 40 O.R. (2d) 264 (H.C.), cited by the motion judge, at para. 91, to support the proposition that "[u]ncertainty, especially where an employee knows that there are financial concerns, can be a factor in reducing the length of notice that might otherwise be reasonable…" The motion judge quoted the following passage found at p. 268 of *Bohemier*:

> An employee may be dismissed either on reasonable notice or by payment in lieu of notice. The latter

> alternative is almost invariably selected because, for obvious reasons, it is not helpful to a business to continue to employ a person who has received notice of dismissal. Payment in lieu of notice involves a cost to the employer for which there is no corresponding production or benefit. In my view, there is a need to preserve the ability of an employer to function in an unfavourable economic climate. He must, if he finds it necessary, be able to reduce his work force at a reasonable cost.

[19] However, the key sentence in *Bohemier* – not quoted by the motion judge – follows on from the passage quoted above, at p. 268:

> It seems to me that *when employment is unavailable due to general economic conditions*, there has to be some limit on the period of notice to be given to discharged employees even if they are unable to secure similar employment within the notice period. [Emphasis added.]

[20] *Bohemier* does not hold, and this court has never held, that an employer's financial difficulties justify a reduction in the notice period. It does no more than to hold that difficulty in securing replacement employment should not have the effect of increasing the notice period unreasonably. That is what this court should be taken to have meant when, in its brief endorsement in *Bohemier*, it said that the lower court judge was right to "tak[e] into account economic factors when considering the case for each of the parties": (1983), 44 O.R. (2d) 361, at p. 362, leave to appeal to SCC refused, [1984] S.C.C.A. No. 343.

[21] Nevertheless, it is clear that *Bohemier* has caused some confusion in wrongful dismissal litigation. Most recently, it was relied on in *Gristey v. Emke*

Schaab Climatecare Inc., 2014 ONSC 1798, 2014 C.L.L.C. 210-028, in reducing an employee's notice period by one-third as a result of the relatively poor state of the market and the financial health of the employer.

[22] It is important to emphasize, then, that an employer's poor economic circumstances do not justify a reduction of the notice period to which an employee is otherwise entitled having regard to the *Bardal* factors. See *Anderson v. Haakon Industries (Canada) Ltd*. (1987), 48 D.L.R. (4th) 235 (B.C.C.A.), at pp. 238-41 (Lambert J.A.), pp. 243-44 (Wallace J.A.); *Farquhar v. Butler Bros. Supplies Ltd*. (1988), 23 B.C.L.R. (2d) 89 (C.A.), at pp. 92-93; and *Sifton v. Wheaton Pontiac Buick GMC (Nanaimo) Ltd*., 2010 BCCA 541, 12 B.C.L.R. (5th) 90, at paras. 34-35, 47-50.

[23] Thus, even assuming that the respondent was suffering financial difficulties when it dismissed the appellants, the motion judge erred in concluding that the period of notice to which the appellants were entitled should be reduced as a result. That conclusion is neither required by the case law nor consistent with the nature and purpose of an employee's right to notice.

[24] Given this conclusion, there is no need to address the third issue raised by the appellants.

The relevance of alternative teaching positions

[25] The motion judge did not base his decision to reduce the appellants' notice periods solely on the financial position of the respondent. He stated, at para. 100:

> I do this, in part, in recognition that six months would take the teachers to the Christmas season; that is the end of the first term. It seems reasonable to presume that, if there is a moment in the course of the school year where teaching positions may become available, it would be during this holiday period.

[26] The appellants argue that the motion judge erred in law by buttressing his decision to reduce the notice period with the presumption that teaching positions may become available in the Christmas holiday period. The respondent argues that the motion judge was entitled to conclude there was evidence that similar employment was available.

[27] There is no evidentiary basis for the motion judge's presumption concerning the future availability of teaching positions. It is a matter of speculation and is inconsistent with his conclusion that the appellants took all reasonable steps to mitigate their damages. It does not support the decision to reduce the notice period.

Conclusion

[28] I would allow the appeal and increase the period of reasonable notice to twelve months – the starting point adopted by the motion judge – subject to the reductions set out by the motion judge in para. 135 of his decision.

[29] This conclusion obviates the need to address the respondent's cross-appeal, as the quantum of damages to which the appellants are entitled is significantly greater than the amount of the respondent's r. 49.10 offer, quite apart from the issue surrounding the division of the settlement offer among the three appellants.

[30] I would deny leave to cross-appeal the costs decision of the motion judge.

Costs

[31] The parties requested that this court deal with the costs on the motion rather than remit the matter to the motion judge.

[32] The motion judge awarded the appellants $42,000 in costs on the basis that they were not entirely successful. This was a reduction of the partial indemnity costs sought of $68,573.42, an amount based on rates and hours the respondent conceded to be appropriate. Given the appellants' success on the appeal, I see no reason to discount the appellants' costs on the motion. Accordingly, I would award costs of the motion to the appellants in the amount of $68,573.42, inclusive of taxes and disbursements.

[33] By agreement of the parties, costs for the appeal are set at $10,000, inclusive.

Released: November 23, 2015 “AH”

“Grant Huscroft J.A”
“I agree Alexandra Hoy A.C.J.O.”
“I agree Gloria Epstein J.A.”