

ONTARIO

SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

BETWEEN:)
)
ALEXANDER)
NAGRIBIANKO) *CONNELL*) *Howard Markowitz, for the Respondent*
)
)
Plaintiff/Respondent)
) *Gavin MacKenzie, for the Appellant*
– and –)
)
SELECT WINE MERCHANTS LTD.)
)
Defendant/Appellant)
)
)
) **HEARD at Toronto:** November 16, 2015

M.A. SANDERSON J.

Introduction

[1] Select Wine Merchants appeals from the judgment of Deputy Judge Richardson in the Small Claims Court dated May 20, 2015 awarding the Plaintiff Alexander Nagribianko (“Nagribianko”) damages in lieu of 4 months’ notice on the termination of his employment.

The Parties

[2] The Appellant, Select Wine Merchants Ltd. (“Select”), is a wine and spirit import agency.

[3] The Respondent is a former probationary employee of the Appellant.

The Facts

[4] The terms of the Respondent's employment were set out in a written employment contract signed on May 10, 2013 on behalf of the Appellant by its President, Mr. Pierre Doise (“Doise”), and by the Respondent on May 14, 2013.

[5] The employment contract not only provided for an annual salary of \$65,000; the right to participate in certain benefit plans and programs; a monthly car allowance of \$750; paid vacation days, accrued at a rate of 6% of total earnings; use of a company laptop; and reimbursement of up to \$150 per month for the business use of the Respondent's personal mobile communication device. It also provided for a probationary period of 6 months.

[6] It was not disputed at trial that at the commencement of his employment, the Respondent faced a six month probation period. The Respondent conceded this point.

[7] The Respondent commenced employment with the Appellant on May 27, 2013.

[8] On November 21, 2013, Select terminated Nagribianko's employment [within the six month probation period] because "after careful consideration", Select had concluded that Nagribianko was "unsuitable for regular employment."

[9] On June 3, 2014, Nagribianko commenced an action against Select in the Small Claims Court seeking remedies including damages for wrongful dismissal.

Reasons of the Trial Judge

[10] At the conclusion of the trial, the Deputy Judge gave oral reasons for judgment.

[11] He held that the employment contract provided for a six month probationary period.

[12] He accepted the evidence of the Respondent that at the time the employment contract was signed, he did not receive a copy of the Appellant's employee handbook- which was incorporated by reference into the employment contract, and which expressly mentioned that Select could terminate an employee's employment during the probationary period upon providing written notice or payment in lieu of notice under the *Employment Standards Act*.

[13] The Deputy Judge wrote: "there's no way I am going to determine what probationary period means just by the contract ...". He said: "It does mean that there is probation and it does mean that it was for six months." He said: "the issue relating to the contract and the employee handbook cannot be relied on by [Select]."

[14] He therefore awarded common law damages to the Plaintiff/Respondent equivalent to four months' salary and benefits in lieu of reasonable notice.

[15] At trial, the Respondent gave evidence that his understanding of the term "probation" was that if he performed well, his employment would continue after the probationary period ended. He understood that "in some circumstances" probation is a trial period where an employer and an employee assess each other and determine if it is going to be an appropriate relationship.

[16] He acknowledged during cross-examination that he had been subject to probation periods in previous jobs and that he generally understood what a probation period meant. He agreed that a probation period meant that the relationship was not stable. He agreed that the language in the

employment contract was straightforward. He said that he was willing to take a risk and bet on himself.

[17] The Deputy Judge accepted the Respondent's evidence on this point, and found that the Respondent "was prepared to bet on himself, that he had the self-confidence that he would do the job properly and would pass the probationary period. That was the gamble he was prepared to take."

[18] In determining reasonable damages in lieu of notice, he found that Select had had "induced" the Respondent [to come to work at Select] and he awarded the Plaintiff damages in lieu of notice equivalent to four months' salary and benefits.

The Standard of Review

[19] The standard of review on an appeal is as outlined by the Supreme Court of Canada in *Hausen v Nikolaisen* 2002 SCC 33. On pure questions of law, the standard of review is correctness.

[20] The standard of review of findings of fact is palpable and overriding error.

[21] Counsel for the Appellant submitted that this appeal involves questions of law to which a correctness standard applies. In the present case, the written employment contract negotiated and signed by the parties expressly provided that the Plaintiff's/Respondent's employment was subject to a six month probationary period. *Mison v Bank of Nova Scotia*, [1994] OJ No 2068 ((Gen Div)) at para 38. He erred in law / failed to apply the correct standard for dismissal of a probationary employee.

[22] Counsel for the Respondent submitted that this appeal involves questions of fact. He submitted that "probation" does not have a single meaning. It is subject to judicial interpretation having regard to the parties' understanding about what had been agreed.

Issues

Meaning of Probation

[23] In his Reasons, the Deputy Judge held that the meaning of "probation" was not clear on the face of the contract. He considered the Plaintiff's/Respondent's subjective understanding of probation.

[24] Counsel for the Respondent submitted that the trial judge correctly held that whether an employee was subject to a probation period is fact driven.

[25] Counsel for the Respondent relied on *Easton v. Wilmslow Properties Corp.*, [2001] O.J. No. 447 (ONSC) where the court held:

The existence of a probation period is a question of fact in each case. Since it takes away an employee's usual rights, a probationary period must be expressly agreed to by the employee. It cannot be implied into the relationship...I find that the use of the phrase "Probationary Period" in the letter offer is ambiguous. It does not spell out that it is meant to be a period when the employee must demonstrate that she is suitable for regular employment as a permanent employee, and that she is to go through a period of assessment to determine whether she is suitable for the job.

[26] Counsel for the Appellant submitted that in adopting the Respondent's subjective understanding of "probation", the Deputy Judge erred in law. The term "probation" has a recognized meaning in employment law.

[27] Having held that the employment contract provided for a probationary period of six months, the Deputy Judge erred in law in failing to recognize that the employment of a probationary employee is different in nature from that of a non-probationary employee.

[28] In interpreting a contract, the question the Court should ask is what reasonable persons in the same circumstances as the parties would have understood the contract to mean. The subjective intentions of the parties are irrelevant. The goal is to ascertain the objective intent of the parties through the application of legal principles of interpretation. *Salah v Timothy's Coffees of the World Inc.*, 2010 ONCA 673 at para 16.

[29] Counsel for the Appellant also submitted that the Deputy Judge also erred in failing to consider that the Respondent, on his own evidence, understood that probationary employment is different in nature from non-probationary employment and that his employment was at risk during that period.

[30] He also erred in law in concluding that the Respondent was entitled to reasonable notice at common law.

What is the Test to Be Applied for Dismissal of a Probationary Employee?

[31] The standard for dismissal from non-probationary employment is just cause.

[32] The standard for dismissal from probationary employment is different. It is suitability.

[33] Probation is a testing period for the employer to assess a probationary employee's suitability. It offers the employer an opportunity to determine if the employee will work in harmony with the organization, if hired permanently. Suitability includes considerations of the probationary employee's character, ability to work with others, and ability to meet the employer's present and future standards. *Jadot v Concert Industries Ltd*, [1997] BCJ No 2403 (BC CA) at para 30, *Markey v Port Weller Dry Docks Ltd*, 47 DLR (3d) 7, 4 OR (2d) 12 at para 50.

[34] The nature of the employment relationship during probation is tentative. In *Pathak v. Royal Bank*, [1996] BCWLD 891 (BC CA) at para 8, the British Columbia Court of Appeal described the difference between probationary and regular employment:

... it is not appropriate to analogize from the legal and practical considerations pertaining to a regular employee in order to answer a question relating to a probationer's terms of employment. Probation is intended to ascertain whether a settled and ongoing relationship would work out. Its tentative nature is the controlling feature ...

[35] A probationary employer must extend to the probationary employee a fair opportunity to demonstrate suitability for permanent employment. However, in the absence of bad faith, an employer is entitled to dismiss a probationary employee without notice and without giving reasons. *Jadot v Concert Industries Ltd*, [1997] BCJ No 2403 (BC CA) at para 29, *Markey v Port Weller Dry Docks Ltd*, 47 DLR(3d) 7, 4 OR (2d) 12 at para 63.

[36] Where the employment of a probationary employee has been terminated for unsuitability, the employer's judgment and discretion in the matter cannot be questioned. All that is required is that the employer show that it acted fairly in determining whether the probationary employee was suitable and that he/she was given a fair opportunity to demonstrate his/her ability.

[37] In *Markey v. Port Weller Dry Docks*, 47 DLR (3d) 7, 4 O.R. (2d) 12 the Court commented at para 50: "implicit in the term 'probationary' is the right of the company to decide whether to permit the employee to become a permanent employee or not, as that is the basic reason for setting up a period of probation[T]he process of determining whether or not a probationary employee is to be retained is in the hands of the company." *Mison v Bank of Nova Scotia*, [1994] OJ No 2068 (Ont CJ (Gen Div)) at para 41 to 43, *Markey v Port Weller Dry Docks Ltd*, 47 DLR (3d) 7, 4 OR (2d) 12 at para 50.

Conclusion

[38] In my view, the Deputy Judge erred in law in failing to enforce the clear terms of the employment contract that the Plaintiff had signed that made reference to a probationary period of 6 months. It was not necessary for the Plaintiff to refer to the employee handbook to know that his employment was subject to a 6 month probationary period.

[39] The Deputy Judge erred in law in failing to recognize that contractual interpretation is an objective exercise.

[40] A reasonable person in the same circumstances as the Respondent/Plaintiff would have understood the term "probation" to mean a period of tentative employment during which Select would determine whether the Respondent/Plaintiff would be a suitable employee and would decide whether or not to make him a regular/non probationary employee.

[41] On his own evidence, the Plaintiff /Respondent understood that during the 6 month probationary period he would be at risk. He may have believed that the employer would find him

to be a suitable employee, but a reasonable person in those circumstances would also have understood that that might not happen.

[42] A reasonable person would have understood, and on his own evidence, the Plaintiff/Respondent did understand that probationary is inherently unstable and tentative.

[43] Probationary employment, on its face and by its nature, is inconsistent with any inducement or promise of long-term employment.

[44] In this case the employer properly and in good faith applied the suitability test.

[45] Since the employer was entitled to terminate the probationary employment in good faith during the probation period, it is not necessary for this Court to determine the period of reasonable notice.

Disposition

[46] The appeal is allowed.

[47] The action is dismissed.

[48] The parties may make short written submissions on costs on or before February 8, 2016.

M.A. SANDERSON J.

Released: January , 2016

CITATION: Nagribianko v. Select Wine Merchants Ltd., 2016 ONSC 490
DIVISIONAL COURT FILE NO.: 324/15
DATE: 20160125

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

BETWEEN:

ALEXANDER CONNELL NAGRIBIANKO

Plaintiff/Respondent

– and –

SELECT WINE MERCHANTS LTD.

Defendant/Appellant

REASONS FOR JUDGMENT

M.A. Sanderson J.

Released: January 25, 2016