COURT OF APPEAL FOR ONTARIO

CITATION: Partridge v. Botony Dental Corporation, 2015 ONCA 836
DATE: 20151203
DOCKET: C59777

Laskin, Pardu and Roberts JJ.A.

BETWEEN

Lee Partridge

Plaintiff/Defendant by Counterclaim
(Respondent)

and

Botony Dental Corporation

Defendant/Plaintiff by Counterclaim
(Appellant)

Joe Conforti, for the Appellant

Michael D. Wright, for the respondent

Christopher Perri, for the respondent

Heard: November 26, 2015

On appeal from the judgment of Justice S.E. Healey of the Superior Court of Justice, dated November 28, 2014, with reasons reported at 2015 ONSC 343.

L.B. Roberts J.A.:

Overview:

[1] The appellant employer appeals from the November 28, 2014 judgment that allowed the respondent's claim for wrongful dismissal.

[2] The appellant argues that the trial judge erred as follows: in concluding that the appellant did not have just cause to dismiss the respondent; in determining that the respondent was entitled to a twelve-month notice period; in failing to make an order concerning the return of patient day sheets that the respondent had taken from the appellant's office; in concluding that the appellant had discriminated against the respondent and awarding $20,000 in damages; and in awarding costs to the respondent on a substantial indemnity scale.

[3] I would not give effect to the appellant's grounds of appeal. All of them are fact-specific and depend on this court overturning or retrying the trial judge's findings of fact. The trial judge correctly applied the law and made no palpable or overriding errors. Her findings were open to the trial judge on the evidence that was before her at trial. Her findings are therefore entitled to considerable deference.

[4] Simply put, the trial judge preferred the respondent's evidence and rejected the appellant's evidence, as she was entitled to do.

Analysis:

Wrongful Dismissal:

[5] The trial judge found that when the respondent returned from her second maternity leave on July 12, 2011, the appellant unilaterally demoted her from her

former position of office manager, which she had held for over four years, to her original position of dental hygienist, with reduced hours and pay.

[6] The trial judge also found that the appellant engaged in reprisal actions against the respondent. The respondent objected to the material changes in her employment and reminded the appellant of her obligations under s. 53(1) of the *Employment Standards Act, 2000*, S.O. 2000, c. 41 to return the respondent to her former position. Although still available, the appellant did not return the respondent to her position as office manager, deliberately increased the respondent's work hours, knowing that this change would create a conflict with her children's day care pick-up schedule, and then terminated her employment, ostensibly for cause, on July 19, 2011.

[7] The appellant does not contest the trial judge's findings of fact in relation to the respondent's wrongful dismissal claim. The appellant maintains that taking the facts as found by the trial judge, the proportionality analysis set out in *McKinley v. BC Tel*, 2001 SCC 38, [2001] 2 S.C.R. 161, and subsequently in *Dowling v. Ontario (Workplace Safety and Insurance Board)* (2004), 246 D.L.R. (4th) 65 (Ont. C.A.), leave to appeal refused, [2005] S.C.C.A. No. 25, would dictate that there was just cause for the termination of the respondent's employment.

[8] In particular, the appellant argues that the respondent's removal of two patient day sheets from the appellant's premises in breach of her employment obligations constituted just cause for the immediate dismissal of the respondent without notice or pay in lieu of notice. Further, the appellant contends that the respondent's steps to set up a competing business fill out the context in which the respondent's breach of her employment obligations should be assessed.

[9] I disagree. The trial judge undertook a contextual consideration of the respondent's actions in the light of the surrounding circumstances of her employment. The trial judge looked at the nature and extent of the respondent's actions, considered the surrounding circumstances, and decided whether dismissal was warranted as a proportional response to the respondent's actions: see *Dowling*, at para. 50.

[10] With respect to the patients' records, the trial judge correctly determined that, while the respondent's removal of the records was a breach of her employment obligations, the respondent's removal of one or two day sheets was not for the purpose of setting up a competing business. The trial judge accepted that the respondent's motivation in taking these records was to secure evidence of the respondent's reduced hours in response to the appellant's reprisals.

[11] The trial judge found that there was no evidence that any confidential information was disclosed to third parties. There was no evidence of harm to

patients or to the appellant. There was no evidence at trial that the respondent still retained these documents and they were not listed in her affidavit of documents. The appellant did not question her about them. In these circumstances, the trial judge made no error in concluding that this isolated incident did not amount to just cause, and in not ordering the return of these documents to the appellant.

[12] The trial judge's findings that the respondent did not solicit the appellants' employees, patients or suppliers, that most of her planning with another employee occurred outside of the office, and that the respondent abandoned her plans to open a competing business, were amply supported by the evidence. As the trial judge found and as appellant's counsel frankly acknowledged, planning to compete with one's employer is not by itself grounds for dismissal.

[13] Again, as the trial judge was entitled to do, she preferred the respondent's evidence about these issues. She found that they did not justify the dismissal for cause in the entire context of the employment relationship and the particular circumstances of the respondent's termination from employment. The appellant's dismissal of a senior employee with more than seven years' service and an otherwise unblemished and exemplary employment record was not warranted here: see *McKinley*; and *Dowling*, at para. 53.

[14] As a result of her findings, the trial judge was entitled to conclude that the respondent was wrongfully dismissed and that there was no just cause for her dismissal without notice or payment in lieu of notice. There is no basis for interfering with her decision on these issues.

Reasonable Notice Period and Damages:

[15] Turning next to the issue of the damages awarded, I would not interfere with the trial judge's decision.

[16] The trial judge's assessment of the applicable notice period was in accordance with the well-established criteria set out in *Bardal v. Globe and Mail Ltd.* (1960), 24 D.L.R. (2d) 140 (Ont. H.C.), and is entitled to considerable deference on appeal. As this court has repeatedly affirmed, the determination of the appropriate notice period is not the product of a mathematical formula. It requires the trial judge to carefully balance the dismissed employee's personal characteristics and prospects for becoming re-employed with reasonable efforts at mitigation.

[17] The twelve-month notice period was reasonable in the circumstances of this case. The respondent was wrongfully terminated by the appellant after over seven years of faithful service. She was the appellant's office manager; in that role, she was the most senior employee and held the position of greatest responsibility. At the time of her termination from the appellant's employment,

she was relatively young at 36 and highly skilled as a dental hygienist. However, by the time of trial, some three years post termination, while she had obtained part-time employment within about a month of termination, she was unable to find comparable full-time employment, notwithstanding her very diligent efforts as found by the trial judge.

[18] This is not surprising given the appellant's wrongful actions in this case. The appellant terminated the respondent's employment within a week of her returning after a maternity leave. The respondent was then required to look for employment with the appellant's very serious allegations of dishonesty, disloyalty and other improprieties hanging over her head. The appellant stated highly damaging allegations of misconduct on the respondent's record of employment and aggressively pursued them against the respondent at trial. It is to the respondent's credit that she was able to find relatively quickly some work in her field.

Discrimination because of Family Status:

[19] I also see no error in the trial judge's award to the respondent of $20,000 as compensatory damages under s. 46.1(1) of the Ontario *Human Rights Code*, R.S.O. 1990, c. H.19. While on the high end, this award is clearly within the range supported by the case law and by the trial judge's findings of the

appellant's wilful misconduct, which were open to her to make on the evidence at trial.

[20] Whether the framework under *Johnstone v. Canada (Border Services)*, 2014 FCA 110, 372 D.L.R. (4th) 730 or *SMS Equipment Inc. v. Communications, Energy and Paperworkers Union, Local 707*, 2015 ABQB 162, [2015] 8 W.W.R. 779 is applied, the result flowing from the trial judge's very specific, fact-driven analysis, required under both decisions, is the same.

[21] On this point, the appellant argues that there was no evidence to ground the trial judge's findings that the respondent could not adapt her childcare responsibilities to her new work schedule or that the childcare arrangements that she put into place upon her return to work were not sustainable. I disagree.

[22] The respondent testified to a very complex arrangement of relatives and others whom she had asked to pick up her children from daycare. Her unchallenged evidence that the trial judge was entitled to accept, as she did, was that this arrangement was not sustainable.

[23] The appellant contends that the respondent's work schedule in her subsequent employment demonstrates that she could and did make alternate, sustainable childcare arrangements and that her ability to do so undercuts her claim of discrimination by the appellant.

[24] I do not accept these submissions. Any comparison is invalid and unfair. First, there was no evidence as to the respondent's childcare arrangements in her new position. Further, by October 2011, the respondent was working a shorter shift than with the appellant, from 4 to 8 p.m., and only one to two days a week. Finally, the complex arrangements that the respondent was required to put into place immediately upon her return to her employment with the appellant reflected a hasty, short-term solution to the chaos created by the appellant's reprisal actions.

[25] The trial judge found that the appellant committed multiple and deliberate breaches of its obligations towards the respondent under the *Employment Standards Act, 2000*. In particular, its refusal to reinstate the respondent to the position of office manager following her maternity leave breached s. 53(1) of the Act; its commission of successively more draconian reprisals against the respondent, culminating in her dismissal without lawful cause, violated s. 74(1) of the Act.

[26] The trial judge concluded that the appellant's unlawful actions amounted to discriminatory treatment of the respondent because of her family status, including, but not limited to, her childcare obligations, contrary to the *Code*. I agree with the trial judge's findings. They are amply supported by the evidence at trial.

[27] The appellant's improper actions caused injury to the respondent's dignity, feelings and self-respect. They also materially affected her family's economic security because of her family's financial dependence on her salary. The appellant's wilful misconduct and its consequences to the respondent are well founded in the evidence that the trial judge was entitled to accept.

Trial Costs on a Substantial Indemnity Scale:

[28] Finally, there is no basis for setting aside the substantial indemnity award of costs to the respondent. The respondent's offer to settle was well below the amount of the judgment awarded to her. Moreover, the appellant's unproven allegations against the respondent of the most serious kind of employee misconduct also support an award of costs on the substantial indemnity scale.

Disposition:

[29] As a result, the appeal is dismissed.

[30] The parties agreed on the disposition of costs. The respondent is entitled to her costs of the appeal in the amount of $12,500.

Released: December 3, 2015

"L.B. Roberts J.A."

"I agree J.I. Laskin J.A."

"I agree G. Pardu J.A."