CITATION: Paul Amaral v. Verona Floors Inc., 2016 ONSC 5763
DIVISIONAL COURT FILE NO.: DC-15-902-00
DATE: 20161012

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

BETWEEN:	)	
PAUL AMARAL	)	William Doodnauth, for the Respondent
Respondent	)	
– and –	)	
VERONA FLOORS INC., operating as EUROPEAN FLOORING GROUP	)	Ryan Wozniak, for the Appellant
Appellant	)	
	)	**HEARD:** August 16, 2016

REASONS FOR DECISION

EDWARDS J.:

Introduction

[1] This is an appeal by Verona Floors Inc. (Verona) from the order of Deputy Judge Di Gregorio, which awarded the Respondent Paul Amaral (Amaral) damages for wrongful dismissal in the amount of $13,333.33, plus prejudgment interest and costs.

[2] Amaral was employed by Verona from January 2012 until August 2013, when he was dismissed without cause. From October 2008 until December 2011, Amaral had worked for a company called Legnotech Group Limited (Legnotech). Amaral asserts that he was employed by Verona from October 2008 until his dismissal in August 2013, on the basis of an argument that the obligations of Legnotech "flowed" to Verona and that there never was a termination of his employment when those obligations were transferred.

[3] It is Verona's position that the trial judge erred both in fact and in law, in awarding Amaral common law damages for wrongful dismissal in respect of his service with Legnotech. This argument is asserted on the basis of evidence at trial which, it is argued, demonstrated that Legnotech and Verona always operated completely independently of one another, and that Amaral resigned from Legnotech in 2011 in order to commence his employment with Verona.

The Facts

[4] There is no dispute that Amaral was an employee of Verona from at least January 2012 through August 2013. Amaral's employment was terminated on August 21, 2013.

[5] Amaral commenced his employment with Legnotech in October 2008. Legnotech was originally a family run company. Mehran Kheyrai (Mehran) was the Vice-President of Legnotech and a 20 percent shareholder. Mehran's father was the majority shareholder of Legnotech. In 2011, difficulties arose between the shareholders of Legnotech, which essentially amounted to a family dispute. Mehran left Legnotech and set up his own company, Verona. The business of Verona and Legnotech continued in the same premises. Many of the employees of Legnotech left and began to work for Verona.

[6] At trial, Amaral took the position that his employment was a continuous one from October 2008 through to the date of his termination in August of 2013. Verona took the position that Amaral was employed by an entirely separate corporation and, as such, his employment commenced with Verona in January 2012 and terminated in August 2013.

Position of Verona on the Appeal

[7] Verona argues that the trial judge erred both in fact and in law in awarding Amaral common law damages for wrongful dismissal in respect of his service with Legnotech. In that regard, Verona argues that the evidence at trial demonstrated that Legnotech and Verona always operated completely independently of one another, and that Amaral effectively resigned from Legnotech in 2011 in order to begin his employment with Verona.

Position of Amaral

[8] Counsel for Amaral argues that there was no palpable or overriding error in the determinations made by the trial judge, and that the issues of "flow through" from Legnotech to Verona was appropriately determined. In that regard, it was argued both at trial and on appeal, that Amaral had no intention to give up any accrued or earned employment entitlements when he left Legnotech to begin his employment with Verona.

Analysis

[9] Both counsel agree that the standard of review of a decision of a trial judge on a question of law is one of correctness, and that the standard of review for questions of mixed fact and law is "palpable and overriding error". Palpable and overriding error is defined as

one that is "clear to the mind and plain to see", such as a misapprehension of the evidence or an obvious failure to correctly apply the facts to the law. See *Prolink Broker Network Inc. v. Jaitley*, [2015] O.J. No. 6108 at para. 12.

[10] Verona argues that the trial judge erred in fact and in law when he ruled that Legnotech's liabilities - liabilities which he did not specify, "flowed through" to Verona because Amaral's employment contract did not include a term barring the "flow through" of the unidentified "liabilities".

[11] Counsel for Verona argues that the trial judge failed to take into account the clear and uncontroverted evidence of Mehran and Joe Boragina (Boragina). Boragina had been an employee of Legnotech and had also been an employee of Verona. He had worked with Legnotech from December 2003 and began working with Verona in 2012, leaving his position in June 2015.

[12] There was an issue at trial as to whether or not Amaral had executed a contract with Verona, and in that regard the trial judge accepted the evidence of Boragina over the evidence of Amaral. In his Reasons, the trial judge stated:

> Mr. Boragina gave his evidence in a frank, forthright, and credible manner. Mr. Boragina no longer works for the defendant corporation and was truthful in all respects…

[13] In Boragina's evidence, he acknowledged that there had been no severance paid when there was a so-called transfer of new companies from Legnotech to Verona Floors.

[14] In his evidence with respect to the circumstances surrounding the change of employment, Boragina stated:

> Q. Would it be correct to say that at the end of 2011 when new employment contract were offered to yourself and to Mr. Amaral, that at that point basically you resigned from your post with Legnotech Group to join the new company, Verona Floors Inc.?
>
> A. I didn't see it specifically that way, no.
>
> Q. How did you see that?
>
> A. More of a continuation of my time with the company.
>
> Q. Okay, but you understood that there was two different companies in place? One was owned by my father had the instability that we had spoken about.
>
> A. Yes.
>
> Q. And the other one was a new company that was under my control, and therefore, you know, we said that you cannot ---

A. You cannot work for both. I understood that part, yes.

Q. Right, so therefore you left one ---

A. Left one to join the other, yes.

Q. So did you resign or did you basically, you know, give up your old position to join the other company?

A. Yes.

Q. Would you say that Mr. Amaral did the same?

A. Yes.

[15] Mehran, in his evidence, explained to the court the corporate status of Legnotech and Verona in response to a question from the trial judge as follows:

> THE COURT: Was there any agreement between Verona or yourself and Legnotech regarding the transfer of assets or the change in business or anything of that nature?
>
> MR. KHAYERI: So, Your Honour, the only agreements that were in place was the actual lease of the premises that Verona Floors took over the actual lease off that premises, and Legnotech Group continued to pay rent to Verona Floors for having its assets there and for its employees to be at that premises. There was no transfer of actual assets. Both companies continued to operate, including sales and administration and both companies still have revenues independent from each other, as it was confirmed by Mr. Boragina, who was in earlier on.
>
> THE COURT: Was any of this explained to the employees? Was there a meeting of employees?
>
> MR. KHAYERI: Yes, absolutely, and that's why I said to you I've mentioned several times that in late 2011 when all this bit of a turmoil was happening in 2011, that basically the employees, certain key employees were asked which side ---
>
> THE COURT: No, no, I didn't ask about choosing sides.
>
> MR. KHAYERI: Sure.
>
> THE COURT: I'm asking about the structure, the set-up of the two different companies; was all that explained?
>
> MR. KHAYERI: Yes, it was fully explained that the new company was a new corporation that was controlled by myself.

[16] Counsel for Verona argues that the trial judge failed to take into account the clear and uncontroverted evidence of Mehran and Boragina, both of whom it is suggested confirmed that Legnotech and Verona were never one and the same corporation, and that Amaral never worked for both companies at the same time. In that regard, it is argued that there was no reasonable basis upon which the trial judge could conclude that Verona and Legnotech were common employers of Amaral, given the following uncontroverted evidence at trial:

1) that Verona and Legnotech were at all times separately controlled entities operating independently of one another;

2) Amaral signed an employment contract with Verona in December 2011, which makes no reference whatsoever to Legnotech; and

3) that there are no facts to indicate or suggest that Amaral took instructions from or performed work for Legnotech while he was employed by Verona.

[17] In his Reasons, the trial judge correctly formulated the issue before him as follows:

> The real issue here is the notice period and whether or not the two companies were truly separate independent entities having nothing to do with one another, or whether the obligations of one flowed to the other. I find, and it is my opinion, that the obligations of Legnotech Group Limited to the plaintiff flowed to Verona Floors Inc. and the reason for that is there was never a termination of the employment of Amaral, the plaintiff. He continued doing the exact same duties he did with Legnotech Group Limited out of the same premises at the same salary, using the same phone number, and having a company that shared shareholders and officers with the prior company.
>
> In law, that is sufficient to put the employee liabilities of the prior company to the secondary company, absent any specific agreement that stated that there would be no flow through. The employment agreement that was signed December 19, 2011, makes no such statement.

[18] In my view, the trial judge - having accepted Boragina as a credible witness, fails to have given any weight to Boragina's evidence where he asserted that both he and Amaral had resigned their old positions with Legnotech to join Verona. He also appears to have given no weight to Boragina's evidence, where he acknowledges that Verona and Legnotech were entirely two distinct companies.

[19] While Verona and Legnotech might have occupied the same premises, and while Amaral may very well have executed duties of employment that were similar if not identical to those he did at Legnotech, there was no evidence before the trial judge that established that the liabilities of Legnotech were in any way assumed by Verona. What occurred was a disagreement amongst family members that resulted in an entirely new company being set up by Mehran.

[20] If the evidence had come out at trial that Legnotech and Verona were essentially one and the same company and Amaral had been asked to execute an employment contract, the result of which would have shortened the notice period that he would otherwise be entitled to, such an employment contract would have no force and effect as no consideration would have passed between the new employee and the new company that would allow for the shortening of the notice period. Those were not the facts before the trial judge. Amaral chose to change employers when he left Legnotech, and whether or not he formally resigned was of no consequence as he chose to leave Legnotech to assume a new position of employment with Verona.

[21] In my view, the learned trial judge erred in law in coming to the conclusion that the obligations of Legnotech flowed through to Verona and there was never any termination of the employment by Amaral. In fact, Amaral did terminate his employment when he chose to leave Legnotech, as had Boragina. The fact that the two companies shared shareholders and officers was of no consequence. As the Court of Appeal in *Downtown Eatery (1993) Ltd. v. Her Majesty the Queen in the Right of Ontario et al.*, [2001] O.J. No. 1879, stated at para. 31:

> In Ontario, the common employer doctrine has been considered in several cases. In Gray v. Standard Trustco Ltd. (1994), 8 C.C.E.L. (2d) 46, 29 C.B.R. (3d) 22 (Ont. Gen. Div.), Ground J. said, at p. 47 C.C.E.L.:
>
> > …it seems clear that, for purposes of a wrongful dismissal claim, an individual may be held to be an employee of more than one corporation in a related group of corporations. One must find evidence of an intention to create an employer/employee relationship between the individual and the respective corporations within the group.
>
> In Jones v. CAE Industries Ltd. (1991), 40 C.C.E.L. 236 (Ont. Gen. Div.) ("Jones"), Adams J. reviewed many of the leading authorities and observed, at p. 294:
>
> > The true employer must be ascertained on the basis of where effective control over the employee resides…I stress again that an employment relationship is not simply a matter of form and technical corporate structure.

[22] The evidence at trial was clear that Mehran was the majority owner and directing mind of Verona. There is no evidence to suggest that any of the shareholders of Legnotech exercised the control that Mehran exercised. In fact, there was no evidence of corporate control as between Legnotech and Verona.

[23] Legnotech and Verona were entirely separate corporate entities. The learned trial judge erred in law in his conclusion that the obligations of Legnotech flowed through to Verona. As such, in determining the appropriate notice period on the basis of Amaral's

employment with Legnotech, the trial judge fell into error. The common law notice period must therefore be adjusted. As such, that portion of the trial judge's order requiring Verona to pay general damages equal to three months' pay is set aside. The net result is that Verona shall pay Amaral $3,076.92 in full satisfaction of his entitlements under his employment contract.

[24] As to the question of costs, both counsel agreed that in the event either side was successful in the appeal that the appropriate level of costs was $1,500.00 all-in inclusive. There was a minor dispute as to an appropriate level of costs in the event either party was unsuccessful. The range of costs in that regard was between $750.00 and $1,000.00. Taking into account what the losing party might reasonably expect to pay in costs, I am ordering Amaral to pay the costs of the appeal, fixed in the amount of $1,000.00 all-in.

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Justice M.L. Edwards

Released: October 12, 2016

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