COURT OF APPEAL FOR ONTARIO

CITATION: Ruston v. Keddco MFG. (2011) Ltd., 2019 ONCA 125
DATE: 20190219
DOCKET: C65505 (M49619)

Pepall, Trotter and Harvison Young JJ.A.

BETWEEN

J.P. Ruston

Plaintiff (Respondent)

and

Keddco MFG. (2011) Ltd.

Defendant (Appellant)

Gerald Griffiths and Adam James, for the appellant

Andrew Monkhouse and Samantha Lucifora, for the respondent

Heard and released orally: February 7, 2019

On appeal from the judgment of Justice Victoria R. Chiappetta of the Superior Court of Justice, dated May 16, 2018, with reasons reported at 2018 ONSC 2919.

REASONS FOR DECISION

Introduction

[1] The respondent Scott Ruston was terminated from his employment with the appellant Keddco MFG in June 2015. At the time of his termination, he was told that he was being terminated for cause and that he had committed fraud. No

specifics were given. When he indicated that he would be hiring a lawyer, the appellant advised him that if he did, it would counter-claim and that it would be very expensive. Roughly one month later, he filed a statement of claim seeking damages for wrongful dismissal. The defendant responded with a statement of defence and counter-claim in which it alleged cause and claimed damages of $1,700,000 million for unjust enrichment, breach of fiduciary duty and fraud, as well as $50,000 in punitive damages.

[2] Mr. Ruston was 54 at the time of his termination. He had been hired as a sales representative in 2004 and had quickly moved up through the ranks. In 2011, Keddco was acquired by Canerector Inc., a private company that buys and holds business interests focused in metal fabrication and industrial manufacturing. At that time, Mr. Ruston was promoted to president of Keddco and referred to as the division manager of Canerector. Apart from one brief period of employment, Mr. Ruston, who has a grade 12 education, has been unable to find re-employment.

The Trial Judge's Decision

[3] The trial judge presided over an 11 day trial. She found that the appellant had failed to prove cause against Mr. Ruston and found that the appellant had failed to prove any of its allegations against him. She also found that its counter-claim for damages in the amount of $1,700,000 had been a tactic to intimidate

Mr. Ruston and that it had breached its obligation of good faith and fair dealing in the manner of Mr. Ruston's dismissal. She dismissed the appellant's counterclaim in its entirety and awarded Mr. Ruston significant damages, including: damages in lieu of reasonable notice based on a 19 month notice period, including bonus and benefits; punitive damages in the amount of $100,000; and moral damages in the amount of $25,000.

[4] The appellant submits that the trial judge made reversible errors of law in awarding:

1. Damages representing a 19 month notice period, which it asserts exceeds the applicable range;
2. A bonus for the 2015 year;
3. Aggravated/moral damages; and
4. Punitive damages.

[5] We do not find any merit to any of the appellant's grounds of appeal. For the reasons that follow, we dismiss the appeal.

Analysis

[6] As a general observation, we note that although the appellant states that it is not appealing any findings of fact or appealing the finding that there was no cause, it repeatedly relies on assertions of fact that are contrary to those found by the trial judge. For example, in arguing that the trial judge erred in awarding a bonus for the 2015 year, the appellant submits that Mr. Ruston would not have

received a bonus had he stayed because no one did. However, for compelling reasons, the trial judge specifically rejected that evidence: see Reasons for Judgment, at paras. 125-126.

The 19 Month Notice Period

[7] First, the appellant argues that the trial judge erred in principle by taking inappropriate factors into account and by awarding a notice period beyond the 15 to 17 month range.

[8] We disagree. The trial judge gave careful and cogent reasons for her decision that a 19 month period was appropriate. While she found that the facts were similar to those in *Singer v. Nordstrong Equipment Limited*, 2018 ONCA 364, 47 C.C.E.L. (4th) 218 (in which the defendant employer was also owned by Canerector), she found that there were a few distinguishing factors that justified a notice period of 19 months rather than 17 months. These included the fact that the appellant here was 54 rather than 51 (as was Mr. Singer), her finding that he had family ties to a smaller area for the purposes of finding similar employment, that he was terminated for serious allegations of cause and that he was not provided with a letter of reference: Reasons for Judgment, at paras. 104-105.

[9] All of these factors affected the notice period because they made it less likely that Mr. Ruston would find employment which (with the exception of one short period) he has been unable to do. The trial judge applied the well-known

considerations from *Bardal v. Globe & Mail* (1960), 24 D.L.R. (2d) 140 (Ont. H.C.J.), at p. 145 to the facts of this case. The conclusion that the appropriate period in this case should be 19 months was open to her in the circumstances of this case as she found them. Moreover, there is nothing in *Singer* that supports the appellant's submission that a 17 month notice period is an upper limit. We disagree with the appellant's submission that the trial judge's reasons for concluding that a 19 month notice period was appropriate were not supported by the evidence. Rather, the trial judge's thorough reasons were well grounded in the evidence before her.

The 2015 Bonus

[10] Second, the appellant argues that the trial judge erred in awarding a bonus for the 2015 year because "the only evidence was that Mr. Ruston would not have been awarded a bonus [had he remained in the employ of the defendant] because there was no profit".

[11] We disagree. The trial judge specifically found that she was "left without any credible evidence on the treatment of Keddco's bonuses post termination": Reasons for Judgment, at para. 126. She also found that Mr. Ruston had received a bonus in every year of his employment that constituted a significant amount of his overall compensation: Reasons for Judgment, at para. 123. The trial judge gave detailed reasons for her conclusion on this basis, which was amply grounded in the record before her.

Aggravated/Moral Damages

[12] Third, the appellant submits that the trial judge erred in awarding aggravated or moral damages “as the evidence did not support that Mr. Ruston suffered a loss other than is to be expected in the case of a termination”. We find no merit in this submission.

[13] The trial judge reviewed the applicable case law: see Reasons for Judgment, at paras. 143-147, citing *Wallace v. United Corn Growers Ltd*., [1997] 3 S.C.R. 701, at para. 95; *Honda v Keays*, 2008 SCC 39, 2 S.C.R. 39, at para. 60; *Doyle v Zochem*, 2017 ONCA 130, at para. 13. She noted correctly that employers have an obligation of good faith and fair dealing in the manner of dismissal and also that an employers’ pre and post termination conduct may be relevant to the moral damage analysis if such conduct is a component of the manner of dismissal: see Reasons for Judgment at para. 145. She was alive to the essentially compensatory nature of aggravated damages. She itemized in detail the conduct that she found to warrant the award.

[14] The evidentiary record provides ample support for the trial judge’s finding that the manner of dismissal warranted an award of aggravated damages. She found that the appellant’s conduct in threatening Mr. Ruston not to make a claim and in instituting the counter-claim was calculated to, and did, cause Mr. Ruston stress. She accepted Mr. Ruston’s evidence that the manner of dismissal was devastating and had caused him stress. In short, we see no error of law or

principle, or palpable or overriding error of fact that would justify interfering with the trial judge's award of $25,000 for aggravated damages.

Punitive Damages

[15] Finally, the appellant submits that the trial judge erred in making a punitive damages award against it in the amount of $100,000. Relying on *Pate Estate v Galway-Cavendish and Harvey (Township)*, 2013 ONCA 669, 368 D.L.R. (4th) 193, the appellant argues that the trial judge erred in failing to consider the punitive aspects of a substantial costs award and compensatory damages, and by awarding an amount that exceeds what is rationally required to punish the misconduct and achieve the accepted purposes of a punitive damages award.

[16] We do not agree. The trial judge carefully reviewed all of the appropriate factors. She specifically referred to the emphasis in *Pate*, at para. 228, that the court "must consider the overall damages award when selecting an appropriate punitive quantum" and that it must be careful to avoid double compensation or double punishment: Reasons for Judgment, at para. 139.

[17] In reaching her conclusion, the trial judge referred to the threat by the appellant during the termination meeting that if Mr. Ruston sued, the appellant would counter-claim – a threat which it carried out with its counter-claim alleging fraud. The trial judge also referred to the fact that the appellant had, on the seventh day of trial, reduced its damages claim from $1,700,000 to $1. The trial

judge concluded that “it did not appear as though the [appellant] had any intention of proving damages but rather was using the claim of $1,700,000 strategically to intimidate [Mr. Ruston]”: Reasons for Judgment, at para. 142. These facts supported her finding of misconduct justifying a punitive damages award.

[18] It does not follow from the fact that this is the same conduct which the trial judge referred to in making the aggravated damages award that an award of punitive damages amounted to either double recovery or double punishment. That is because aggravated damages aim to compensate a plaintiff for heightened damages caused by the breach of the employer’s duty of good faith and fair dealing in the manner of dismissal, while punitive damages seek to punish and denunciate inappropriate or unfair conduct. There can be no question that the appellant’s conduct, and particularly that of Ms. Hawkins, rose to the level of conduct deserving of denunciation for all the reasons cited by the trial judge. The trial judge was alive to the concerns about double compensation, and to the need to consider the entire compensatory package as a whole.

[19] In short, the appellant has not shown any basis for this court to interfere with the punitive damages award. The trial judge applied the correct legal considerations to the evidence as she found it. She thoroughly reviewed and considered the evidence, and the record before her amply supports her conclusions.

Appeal from the Cost Award at Trial

[20] The appellant seeks leave to appeal the costs award at trial, and submits that the award of $546,684.73 was unfair and unreasonable. It takes no issue with the fact that costs were awarded on a substantial indemnity basis given Mr. Ruston's Rule 49 offer, but argue that a fair and reasonable award would not have exceeded the $200,000 to $230,000 range. While we recognize that this costs award was unusually high, the appellant has not satisfied us that the costs award was not fair and reasonable in the circumstances of this case.

Disposition

[21] For the foregoing reasons the appeal is dismissed. The motion for leave to appeal from the costs award is dismissed. Costs of the appeal in the amount of $35,000, inclusive of HST and disbursements, are awarded to Mr. Ruston.

"S.E. Pepall J.A."
"G.T. Trotter J.A."
"A. Harvison Young J.A."