

COURT OF APPEAL FOR ONTARIO

CITATION: Chevalier v. Active Tire & Auto Centre Inc., 2013 ONCA 548

DATE: 20130911

DOCKET: C55919

Cronk, Blair and Strathy JJ.A.

BETWEEN

Earl Chevalier

Plaintiff (Appellant)

and

Active Tire & Auto Centre Inc.

Defendant (Respondent)

Bradley J. Troup and Gillian Fahy, for the appellant

Orlando M. Rosa, for the respondent

Heard and released orally: September 5, 2013

On appeal from the judgment of Justice R.A. Lococo of the Superior Court of Justice, dated October 10, 2012.

By the Court:

**I. Introduction**

[1] In late October 2008, the appellant, Earl Chevalier, was constructively dismissed from his employment with the respondent, Active Tire & Auto Centre Inc., as the manger of an automotive and tire centre in Niagara Falls. Active Tire purported to lay-off Mr. Chevalier in the erroneous belief that it was entitled to do

so due to the poor financial performance of the Niagara Falls facility. Within two weeks of his lay-off, Mr. Chevalier sued Active Tire, seeking damages for wrongful dismissal, including moral damages for the manner of his dismissal. Five days after the commencement of his action, Active Tire recalled Mr. Chevalier to work, at the same location, with the same responsibilities and duties, at the same salary and with the same benefits.

[2] Mr. Chevalier declined to return to work and proceeded to trial. He alleged, among other matters, that Active Tire personnel had embarked on a deliberate campaign of harassment and intimidation against him, designed to provoke his voluntary resignation. Mr. Chevalier maintained that, as a result, his work environment had become poisoned and he was not obliged to return to work under circumstances in which he would be subjected to hostility, embarrassment and humiliation.

[3] At trial, Active Tire did not dispute that Mr. Chevalier had been constructively dismissed. As relevant to this appeal, the central issue was whether Mr. Chevalier was obliged to mitigate his damages by accepting Active Tire's offer that he return to work.

[4] The trial judge concluded that, viewed objectively, a reasonable person in Mr. Chevalier's circumstances would have accepted the opportunity to return to work at the Niagara Falls centre. By declining this opportunity, Mr. Chevalier

failed to mitigate his damages, as he was obliged to do, with the result that his damages in lieu of notice were nil. The trial judge, therefore, dismissed Mr. Chevalier's action for damages.

[5] Mr. Chevalier appeals.

## **II Discussion**

[6] He raises two grounds of appeal. First, he argues that the trial judge erred in his application of the relevant legal test in determining the reasonableness of Mr. Chevalier's refusal to return to work.

[7] We reject this argument.

[8] In his fulsome reasons, the trial judge referred to the governing legal authorities, including the leading decisions of the Supreme Court of Canada in *Evans v. Teamsters Local Union No. 31*, 2008 SCC 20, [2008] 1 S.C.R. 661 and *Michaels v. Red Deer College*, [1976] 2 S.C.R. 324, and to the principles enunciated in those cases regarding the circumstances in which a dismissed employee's mitigation of damages obligation must be met by returning to work for the same employer. See in particular, *Evans* at para. 30.

[9] The trial judge considered and applied those principles to the evidence before him. He reviewed the pertinent evidence in some detail, the positions of the parties, and the factors weighing in favour and against the conclusion that Mr.

Chevalier's decision not to return to work was reasonable. He made the following critical findings:

(1) the impugned conduct of Active Tire personnel was directed towards making Mr. Chevalier a more effective, contributing employee and assisting him in meeting the terms of his employment agreement, rather than driving him from the company;

(2) in particular, the conduct of Active Tire's General Manager, Mr. Steele, was intended to help Mr. Chevalier improve his performance and was not part of a campaign to cause him to leave the company;

(3) contrary to his contention, Mr. Chevalier was not subjected to demeaning, objectionable or retributory conduct by Active Tire representatives. Indeed, some of the incidents complained of by Mr. Chevalier were either misinterpreted by him or did not occur;

(4) the decision to lay-off Mr. Chevalier was made by Active Tire for economic reasons in the mistaken belief that lay-off options were available to it in the circumstances;

(5) although Mr. Chevalier was an honest witness, many of the incidents of which he complained had become magnified and distorted in his mind over time; and

(6) the fact that Mr. Chevalier had already left the employ of Active Tire, and the fact that he had already sued the company, when the offer of re-employment was made, while relevant, were not determinative of the reasonableness of his rejection of Active Tire's offer of re-employment.

[10] These factual findings, many of which were credibility-based, were open to the trial judge on the record before him. They attract deference from this court.

They are also fatal to Mr. Chevalier's claim that the trial judge erred in his

assessment of the reasonableness of Mr. Chevalier's decision not to return to work. To the contrary, they confirm that the trial judge considered the factors relevant to the assessment of the reasonableness of that decision. It was for the trial judge to determine the weight to be assigned to those factors.

[11] Mr. Chevalier next argues that the trial judge erred by concluding that there was no acrimony and/or animosity between the parties. He argues, essentially, that because Mr. Chevalier had left the employ of the company when he was laid-off and had sued the company for wrongful dismissal, it is self-evident that the relationship between the parties was acrimonious and infused with animosity.

[12] On this record, we also reject this argument.

[13] The trial judge heard the testimony of at least five defence witnesses, including the President, General Manager and other managers of Active Tire who worked with Mr. Chevalier. He accepted their evidence on the critical issues in contention. He found their evidence to be credible and contrary to the assertion that Mr. Chevalier would be exposed to an atmosphere of hostility, embarrassment and humiliation if he returned to work. This was the trial judge's call to make.

[14] We therefore see no basis for appellate interference with the trial judge's ruling that in the circumstances, and viewed objectively, Mr. Chevalier's rejection of Active Tire's re-employment offer was unreasonable.

[15] We recognize that this result is unfortunate for Mr. Chevalier. However, absent palpable and overriding error, it is not open to this court to interfere with a trial judge's factual findings or assessment of the evidence. In this case, the trial judge's key factual findings, which flowed from his evaluation of the trial evidence, are adverse to Mr. Chevalier. We are not satisfied that the case for palpable and overriding error has been made out.

[16] Accordingly, the appeal is dismissed. The respondent is entitled to its costs of the appeal, fixed in the amount of \$7,500, inclusive of disbursements, plus all applicable taxes.

Released: "EAC" September 11, 2013

"E.A. Cronk J.A."  
"R.A. Blair J.A."  
"G.R. Strathy J.A."