CITATION: Dechene v. Dr. Khurrum Ashraf Dentistry , 2012 ONSC 4594
COURT FILE NO.: DC-16-11
DATE: 2012-08-09

SUPERIOR COURT OF JUSTICE – ONTARIO (DIVISIONAL COURT)

RE: JENNIFER DECHENE Plaintiff/Respondent

AND:

DR.KHURRUM ASHRAF DENTISTRY PROFESSIONAL CORPORATION Defendant/Appellant

BEFORE: The Honourable Mr. Justice D. A. Broad

COUNSEL: Pamela Krauss, for the Defendant/Appellant

Robert A. Konduros, for the Plaintiff/Respondent

HEARD: August 7, 2012

ENDORSEMENT

[1] The Defendant/Appellant employer appeals from the judgment, following trial, of Deputy Judge J. Sebastian Winny in the Small Claims Court at Kitchener, awarding damages to the Plaintiff/Respondent employee for wrongful dismissal from her position as a dental hygienist in the sum of $ 25,000.00 plus costs.

[2] Deputy Judge Winny found that the non-negotiable demand by the Appellant that the Respondent sign a proposed new written employment contract, which reserved to the Appellant the right to require the Respondent to work up to 48 hours per week, when the terms of the Respondent existing verbal contract provided for part-time employment of 32 hours per week, constituted constructive dismissal.

[3] The Deputy Judge further found that, in the event that the Respondent was not constructively dismissed, her employment was wrongfully terminated by the Appellant by

delivery of a termination letter delivered one day after the Respondent questioned the terms of the proposed new contract, offering only five weeks working notice after approximately six years of service by the Respondent.

[4] The Deputy Judge rejected the Appellant's position that the Respondent repudiated the employment relationship by leaving the place of employment in emotional distress after being presented with the termination letter at 9:00 a.m. immediately prior to being scheduled to treat a patient. He found the period of reasonable notice of termination to be six months, representing damages in the sum of $ 30,216, reduced to $ 25,000 in light of the limit of the Small Claims Court's jurisdiction.

Appellant's Position

[5] The Appellant argued that the Deputy Judge's Reasons contained factual errors, inappropriate commentary and unwarranted criticism of the Appellant, unsupported by the evidence, which, taken together, represented palpable and overriding errors.

[6] The Appellant also argued that its conduct and actions did not constitute constructive dismissal, as the new employment contract was not introduced to implement fundamental changes to the previous verbal contract and the Respondent's subjective perception that the proposed terms changed her hours of work did not amount to a constructive dismissal in the absence of actual implementation of such a change by the Appellant. The Appellant argued that the provision in the proposed contract reserving the right of Appellant to require the Respondent to work up to 48 hours per week was vague, and was only included to promote consistency with the contracts of its other full-time employees.

[7] The Appellant took the position that, in delivering the termination letter, the Appellant was only doing what it was entitled to do at law in furtherance of a business decision which it made, and although the proposed period of working notice was inadequate, the Respondent repudiated the employment relationship by leaving the workplace without permission, disentitling her from claiming damages for wrongful dismissal. In the alternative, the Appellant argues that the correct period of reasonable notice should be four months rather than six months, and the five weeks working notice offered by the Appellant, and not performed by the Respondent, should be deducted from that period, reducing the notice period to eleven weeks.

Disposition

[8] For the reasons set forth below I would not interfere with the decision of the Deputy Judge in the result and I would therefore dismiss the appeal.

Analysis

[9] It is common ground that the leading case on the law of constructive dismissal is *Farber v Royal Trust Co.* (1996), [1997] 1 S.C.R. 846 in which it was confirmed that, in order for there to be a constructive dismissal the employer must unilaterally make a fundamental or substantial change in an essential terms of the employment contract.

[10] The proposed new "Contract of Employment" presented by the Appellant to the Respondent stated that one its purposes was "to replace the oral and verbal agreement that exist (*sic*) between the 'employer' and the 'employee' from the first day of the commencement of the employment."

[11] The proposed contract expressly stipulated that "the employee shall recognize the absolute right given to the employee under the Employment Standards Act of Ontario to schedule the employee to work up to 48 hours in any given week."

[12] Although the parties agree that the proposed contract did not correctly characterize the right of the employer under the *Employment Standards Act*, I would not characterize the term purporting to give to the Appellant the "absolute right" to require the Respondent to work up to 48 hours as "vague" as suggested by the Appellant. It could only have meant to the Respondent what it said – that she could be required to work up to 48 hours in any given week. I agree with the Deputy Judge that it therefore represented a proposed fundamental change in an essential term of the Respondent's existing contract of employment, which provided for part-time employment of 32 hours per week. However, I do not agree that the fundamental change was unilaterally imposed by the Appellant prior to delivery of the termination letter, or was treated by the Respondent as having been implemented.

[13] Although the Deputy Judge found as a fact that the Appellant's human resources consultant Mr. Hussain had communicated to the Respondent that "she had better sign the document by the end of the day, or he would advise Dr. Ashraf to fire her" he also found that the Respondent assumed that her employer Dr. Ashraf would make his own decision and that he valued her continued employment. Hence she believed that she would not be required to execute the new contract as written and that she would not be terminated. Accordingly, although a significant increase in working hours may constitute a constructive dismissal in appropriate circumstances (see *Corey v. Dell Chemists (1975) Ltd.*[2006] O.J. No.2302 (SCJ)), in light of this finding by the Deputy Judge, the constructive dismissal had not crystallized by a unilateral

implementation by the Appellant prior to delivery of its termination letter on the next day. All that had occurred was an unsuccessful negotiation respecting the terms of a proposed new employment contract.

[14] The Appellant acknowledged in argument that the Respondent's employment was terminated upon delivery of the termination letter and that the proposed working notice of five weeks was inadequate. The Deputy Judge was therefore correct in holding that the Appellant wrongfully dismissed the Respondent. It is clear that when an employer, in the absence of just cause, terminates a contract of employment of indefinite duration, without giving reasonable notice, or pay in lieu thereof, to the employee, it commits a wrongful dismissal.

[15] The Deputy Judge held that the Respondent was too distraught, after being handed the termination letter at the beginning of the work day, to continue with her duties, and had no choice but to go home, rather than risk attempting to treat patients in her emotional state. He found further that it was unreasonable for Mrs. Ashraf, the Appellant's office manager, to consider that it was "business as usual" following delivery of the letter and to require the Respondent to request permission to leave. He specifically found that the Respondent was crying and shaking and rejected the evidence of Mrs. Ashraf to the contrary. I see no reason to interfere with these findings of fact. Although there was divergence between the evidence of the parties, the Deputy Judge was in a position to assess their demeanour and to make findings of credibility and he explained his reason for preferring the evidence of the Respondent over that of Mrs. Ashraf, namely that Mrs. Ashraf's evidence was tainted by an apparent desire to paint the Respondent in an unfavourable light. I see no palpable or overriding error in the findings of fact which the Deputy Judge made.

I therefore agree with the Deputy Judge that departure of the Respondent from the workplace following delivery of the termination letter did not exemplify an intention on her part to repudiate the employment relationship and consider herself not bound to work during the five week notice period offered to her. In the case of *Horne v. Ottawa Roman Catholic School Board* (1981) CarswellOnt 683 (HCJ) Carruthers, J. quoted Lord Selborne in *Mersey Steel & Iron Co. v. Naylor, Benzon & Co.* (1884), 9 App. Cas. 434 at pp. 438-9 as follows with respect to the law of repudiation:

> ...you must look at the actual circumstances of the case in order to see whether the one party to the contract is relieved from its future performance by the conduct of the other; you must examine what that conduct is so as to see whether it amounts to a renunciation, to an absolute refusal to perform the contract ... and whether the other party may accept it as a reason for not performing his part...

[16] The lack of any absolute refusal of the Respondent to perform was evidenced by her contacting the Appellant on the next day to advise that she would return to the workplace to complete the five week period. The Appellant acted precipitously in replacing the Respondent in the absence of a clear repudiation by her and in rejecting the Respondent's stated intention to return to the workplace.

[17] In any event, on the authority of *Giza v. Sechelt School Bus Service Ltd.* 2012 CarswellBC 22 (BCCA) at paras 26, 39 and 40, even if the Respondent did repudiate the contract by leaving the office following receipt of the termination letter, she did not thereby forfeit her right to sue for damages, as her right to do so had already accrued by the wrongful act of the Appellant in terminating her employment without reasonable notice. See also *Zaraweh v. Hermon, Bunbury & Oke* 2001 CarswellBC 2195 (BCCA) and Levitt, *The Law of Dismissal in Canada*, at para. 9.10.

[18] However, unlike *Giza*, the Appellant employer here did not keep open the Respondent employee's opportunity to work (see *Giza* at para. 38), but rather it immediately and precipitously hired a replacement, thereby foreclosing the Respondent's opportunity to work during the five week period. Having done so, it is not open to the Appellant to argue that Respondent's damages should be reduced by the five week working notice period.

[19] On the question of the appropriate notice period, I see no overriding error in the Deputy Judge's application of the factors outlined in *Bardal v Globe & Mail Ltd.*(1960), 24 D.L.R.140 (Ont. HCJ) in determining a reasonable period of notice of six months or any other reason to interfere with that finding. He made specific reference to the particular relevance of the factor respecting the availability of similar employment, finding it poor to very poor, a finding which was supported by the evidence.

[20] The appeal is therefore dismissed. The parties may make brief submissions respecting costs (three pages, not including any Bill of Costs or Costs Outline), the Respondent by September 10, and the Appellant by September 21, 2012.

D. A. Broad J.

Date: August 9, 2012