CITATION: Di Tomaso v. Crown Metal Packaging Canada LP, 2011 ONCA 469
DATE: 20110622
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COURT OF APPEAL FOR ONTARIO

Goudge, MacPherson and Karakatsanis JJ.A.

BETWEEN

Antonio Di Tomaso

Respondent/Plaintiff

and

Crown Metal Packaging Canada LP

Appellant/Defendant

M. Christine O'Donohue, for the appellants

Peter Cicak and Lior Samfiru, for the respondent

Heard: May 20, 2011

On appeal from the judgment of Justice Beth A. Allen of the Superior Court of Justice, dated October 19, 2010.

MacPherson J.A.:

A. INTRODUCTION

[1] The appellant, Crown Metal Packaging LP ("Crown Metal"), appeals from the judgment of Allen J. dated October 19, 2010, granting the respondent Antonio Di Tomaso's Rule 20 motion for summary judgment.

B. FACTS

[2] Crown Metal was in the business of manufacturing metal packaging. Mr. Di Tomaso was employed by Crown Metal for over 33 years as a two-piece mechanic and press maintainer, which involved setting up the line, minor repair work, and assisting the millwright with mechanical work on machines. Crown Metal closed the facility where Mr. Di Tomaso worked on February 26, 2010.

[3] On September 9, 2009, Crown Metal informed Mr. Di Tomaso that it no longer required his services. Days before his expected termination date, Crown Metal informed Mr. Di Tomaso that his employment would be extended by several weeks. Over a period of five months, Crown Metal repeatedly extended Mr. Di Tomaso's employment just before each previously stated termination date. In total, Mr. Di Tomaso received five separate written notices of termination, containing a total of four different termination dates. Specifically, Crown Metal delivered letters to Mr. Di Tomaso dated:

1. September 9, 2009, with a termination date of November 6, 2009;
2. November 4, 2009, with a termination date of December 18, 2009;

3. December 15, 2009, with a termination date of February 19, 2010;

4. February 18, 2010, with a termination date of February 26, 2010; and

5. February 24, 2010, confirming the termination date of February 26, 2010.

[4] After the September 9, 2009 notice, each subsequent letter reviewed the extensions in employment and characterized Mr. Di Tomaso's employment as being "extended" for a "temporary period".

[5] When Mr. Di Tomaso's employment was finally terminated on February 26, 2010, Crown Metal provided him with the statutory 26 weeks' severance pay pursuant to the *Employment Standards Act, 2000*, S.O. 2000, c. 41 ("*ESA*"), accrued vacation pay, and benefits to March 31, 2010. Mr. Di Tomaso was 62 years old.

(1) The Action Below

[6] Mr. Di Tomaso filed an action in the Superior Court of Justice alleging that Crown Metal failed to provide proper notice or termination pay in lieu thereof, as required by the *ESA*. He also sought common law damages for wrongful dismissal equivalent to 24 months' pay.

[7] Crown Metal claimed that its September 9, 2009 notice of termination was valid, and that Mr. Di Tomaso's entire subsequent temporary employment constituted an authorized period of "working notice". With respect to Mr. Di Tomaso's common law claim, Crown Metal took the position that he was entitled, at most, to 12 months' notice

because, emphasizing the character of his employment, he was an unskilled and low level worker.

[8] The action proceeded by way of a Rule 20 motion for summary judgment before Justice Beth Allen. On the issue of working notice, the motion judge reviewed the *ESA* regulation that authorizes an employer to count a period of temporary employment—i.e. work commenced after the termination notice but prior to the termination date—against the employee's statutory notice entitlement: *Termination and Severance of Employment*, O. Reg. 288/01, s. 6 ("the Regulation"). Specifically, the Regulation provides:

> 6. (1) An employer who has given an employee notice of termination in accordance with the Act and the regulations may provide temporary work to the employee without providing a further notice of termination in respect of the day on which the employee's employment is finally terminated if that day occurs not later than 13 weeks after the termination date specified in the original notice.
>
> (2) The provision of temporary work to an employee in the circumstances described in subsection (1) does not affect the termination date as specified in the notice or the employee's period of employment. [Emphasis added.]

[9] In Crown Metal's view, each of its extensions was less than 13 weeks in length, so its September 9, 2009 notice remained valid thus providing Mr. Di Tomaso with working notice from that date to February 26, 2010. Mr. Di Tomaso argued that the extensions should be viewed cumulatively, and that only the final letter of February 24, 2010 provided clear and unequivocal notice of termination.

[10] The motion judge agreed with Mr. Di Tomaso at para. 19:

> I find I am bound by the express language of subsection 6(1) to accept the plaintiff's position. The legislation clearly allows for notices temporarily extending termination if the final date of termination in respect of the extension is not more than 13 weeks after the date of the initial termination notice. That interpretation makes practical sense since there would be no certainty for an employee as to when his employment would finally end if the employer was not limited in the length of extensions of employment.

[11] The motion judge went on to note that the *ESA*, as remedial minimum standards legislation, should be interpreted to the benefit of the employee where ambiguities arise. Finally, at para. 21 she found that Mr. Di Tomaso's position was supported by the requirement that notice of termination be "clear and unequivocal".

[12] The motion judge also rejected Crown Metal's suggestion that Mr. Di Tomaso's entitlement to notice was capped at 12 months because he was an unskilled worker in a non-managerial position. She referred to the factors to consider in determining an employee's appropriate notice period, as set out in *Bardal v. Globe & Mail Ltd.* (1960), 24 D.L.R. (2d) 140 (Ont. H.C.J.), at p. 145 ("*Bardal*"). Those factors include: the character of the employment, the employee's length of service, the employee's age, and the availability of comparable employment in the market.

[13] According to Crown Metal, this court's ruling in *Cronk v. Canadian General Insurance Co.* (1995), 128 D.L.R. (4th) 147 ("*Cronk*") established a hard limit of 12 months on the notice to which clerical and unskilled labourers are entitled. In Crown Metal's view, the nature of Mr. Di Tomaso's employment placed him in that limited category. He was not a manager, nor was he a skilled worker.

[14] Mr. Di Tomaso countered that a more recent decision of this court dispelled the notion that there is a cap on the notice period available to unskilled employees: *Minott v. O'Shanter Development Company Ltd.* (1999), 168 D.L.R. (4th) 270 ("*Minott*"). At para. 76 of *Minott*, Laskin J.A. wrote:

> I do not regard this court's decision in *Cronk* as establishing an upper limit of 12 months notice for all non-managerial or non-supervisory employees. At most it deals with one occupational category, clerical employees. Moreover, the imposition of an arbitrary 12 months ceiling for all non-managerial employees detracts from the flexibility of the *Bardal* test and restricts the ability of courts to take account of all factors relevant to each case and of changing social and economic conditions.

[15] In that case, this court upheld the trial judge's finding that a 13-month notice period was appropriate for an unskilled, 43-year-old employee who had served for 11 years.

[16] The motion judge held that the authorities did not support the proposition that the nature of Mr. Di Tomaso's employment placed a 12-month cap on the notice to which he was entitled.

[17] After reviewing the cases presented by both parties, noting that Mr. Di Tomaso was 62 years old on the termination date and had served for 33 years, and considering his efforts to mitigate by finding other employment in the market, the motion judge found that Mr. Di Tomaso was entitled to 22 months of notice.

C. ISSUES

[18] The appellant Crown Metal raises two main arguments on appeal, namely:

1. the motion judge erred in finding that Mr. Di Tomaso did not have clear and unequivocal notice of termination until February 24, 2010; and
2. Mr. Di Tomaso received reasonable working notice of termination in light of his employment as a non-managerial employee.

[19] I would not give effect to either argument for the reasons that follow.

D. ANALYSIS

(1) The Termination Date

[20] The motion judge's interpretation of the Regulation is correct: it contemplates a single period of temporary work that is not to exceed 13 weeks. If the temporary work exceeds that duration, fresh notice is required. To find, as Crown Metal suggests, that the Regulation allows employers to give notice of termination but then extend employment for multiple, serialized periods of less than 13 months would be inconsistent with the *ESA*'s status as remedial, benefit-conferring legislation designed to protect the interests of employees: *Rizzo v. Rizzo Shoes Limited*, [1998] 1 S.C.R. 27, at para. 36.

[21] I would add only that "clear and unambiguous" notice of termination must include the final termination date. In the present case, the September 9, 2009 notice of termination included a termination date that came and went, as did several others during

the five-month period that followed. As the motion judge found, "the cumulative effect of the multiple extensions created uncertainty for [Mr. Di Tomaso] as to when he would no longer have his job." It was not until the February 24, 2010 letter that this uncertainty was cured. Mr. Di Tomaso's termination date was confirmed, and Crown Metal's notice to him was made good on that day.

(2) The *Bardal* Analysis

[22] Crown Metal argues that the character of employment factor is "often given the greatest weight in the determination of [the] appropriate notice period", and that the motion judge erred by giving it insufficient weight in this case. Crown Metal also renews its argument that this court's decision in *Cronk* and a range of other employment law cases establish 12 months as the upper limit of appropriate notice for clerical and unskilled employees.

[23] On the latter point, I agree with Mr. Di Tomaso that this court's decision in *Minott* is a full answer. Laskin J.A. rejected the notion that 12 months is the cap for every clerical and unskilled employee, regardless of the other *Bardal* factors. Crown Metal argues that Laskin J.A. allowed that it might be appropriate to "establish upper limits for particular classes of cases": *Minott* at para. 72. However, he did not do so in *Minott* and I would decline to do so here.

[24] Moreover, the cases submitted by both parties help establish a range of reasonable notice periods. The 22 months awarded by the motion judge is within the upper end of

the range, and that is understandable given that Mr. Di Tomaso would have scored so highly on the other *Bardal* factors: he was 62 years old at the time of his dismissal, he had served the company for 33 years, and he had made unsuccessful inquiries or applications with 22 companies in the area.

[25] By way of contrast, the claimant in *Minott* served in a non-supervisory role for 11 years, was 43 years old at the time of termination, and was unlikely to find similar work because of a recession. Here, as in that case, to interfere with the motion judge's determination of the appropriate notice period would amount to "unwarranted tinkering": *Minott* at para. 77.

[26] With regard to the appropriate weight to be given to the character of employment, I am also mindful of McRuer C.J.H.C.'s statement in *Bardal* at p. 145, that "[t]here can be no catalogue laid down as to what is reasonable notice in particular classes of cases." Bastarache J., writing for the majority of the Supreme Court in *Honda Canada Inc. v. Keays*, [2008] 2 S.C.R. 362, cited this statement with approval at para. 31 and went on to caution that "[n]o one *Bardal* factor should be given disproportionate weight."

[27] Crown Metal would emphasize the importance of the character of the appellant's employment to minimize the reasonable notice to which he is entitled. I do not agree with that approach. Indeed, there is recent jurisprudence suggesting that, if anything, it is today a factor of declining relative importance: see *Medis Health and Pharmaceutical*

Services Inc. v. Bramble (1999), 175 D.L.R. (4th) 385 (NBCA) ("*Bramble*") and *Vibert v. Paulin* (2008), 291 D.L.R. (4th) 302 (NBCA).

[28] This is particularly so if an employer attempts to use character of employment to say that low level unskilled employees deserve less notice because they have an easier time finding alternative employment. The empirical validity of that proposition cannot simply be taken for granted, particularly in today's world. In *Bramble*, Drapeau J.A. put it this way, at para. 64:

> The proposition that junior employees have an easier time finding suitable alternate employment is no longer, if it ever was, a matter of common knowledge. Indeed, it is an empirically challenged proposition that cannot be confirmed by resort to sources of indisputable accuracy.

[29] In my view, the motion judge conducted an appropriately holistic review of the case before her. She did not give disproportionate weight to any of the *Bardal* factors. She dedicated nine paragraphs of her reasons to the character of employment factor but it was simply not as relevant in these circumstances as the other three factors. She did not err in doing so.

E. DISPOSITION

[30] I would dismiss the appeal. The respondent is entitled to its costs of the appeal which I would fix at $14,000 inclusive of disbursements and HST.

RELEASED: JUN 22 2011 ("S.T.G.")

"J.C. MacPherson J.A."
"I agree. S.T. Goudge J.A."
"I agree. Karakatsanis J.A."