COURT OF APPEAL FOR ONTARIO

CITATION: Farwell v. Citair, Inc. (General Coach Canada), 2014 ONCA 177
DATE: 20140307
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Doherty, Lauwers and Strathy JJ.A.

BETWEEN

Kenneth Farwell

Plaintiff (Respondent)

and

Citair, Inc. c.o.b. as General Coach Canada

Defendant (Appellant)

Robert J. Atkinson, for the appellant

Lianne Armstrong, for the respondent

Heard: February 5, 2014

On appeal from the judgment of Justice Johanne N. Morissette of the Superior Court of Justice, dated October 23, 2012, with reasons reported at 2012 ONSC 6013.

Lauwers J.A.:

[1] The trial judge found that the appellant, Citair, Inc., carrying on business as General Coach Canada, had wrongfully dismissed the respondent, Kenneth Farwell. She fixed the damages in lieu of notice at 24 months, and dismissed the appellant's argument that Mr. Farwell had not mitigated his damages because he

did not stay in the position offered to him of Purchasing Manager for the notice period. For the reasons set out below, I would dismiss the appeal.

Constructive Dismissal

[2] The appellant argues that the trial judge made an error of mixed fact and law, and misapplied the principles of the law of constructive dismissal, when she found that the appellant's transfer of the respondent from Operations Manager/Vice President of Operations to the position of Purchasing Manager was a fundamental change to the employment contract.

[3] The trial judge applied the decision of the Supreme Court of Canada in *Farber v. Royal Trust Co.*, [1997] 1 S.C.R. 846. Gonthier J. approved, at para. 34, the following statement of the law taken from an article by Justice N. W. Sherstobitoff of the Saskatchewan Court of Appeal:

> A constructive dismissal occurs when an employer makes a unilateral and fundamental change to a term or condition of an employment contract without providing reasonable notice of that change to the employee. Such action amounts to a repudiation of the contract of employment by the employer whether or not he intended to continue the employment relationship. Therefore, the employee can treat the contract as wrongfully terminated and resign which, in turn, gives rise to an obligation on the employer's part to provide damages in lieu of reasonable notice.

[4] The trial judge's key findings on the evidence were the following:

> In reorganizing, Ken's role as VP Operations to Purchasing Manager involved a significant change in

> responsibilities and duties. It entailed a change in title to reflect his diminished role in the company resulting in a significant loss of status and prestige. In that regard, the evidence of all witnesses, including that of Roger, acknowledged that Ken's proposed new role would be of lesser status, even though Roger attempted to convince this Court that all his managers are of importance, it remains a fact that from an objective point of view, the Purchasing Manager does not have the same status or prestige as the Operations Manager to whom the Purchasing Manager reports to.

[5] I would find that the trial judge did not err in concluding that Mr. Farwell was constructively dismissed. The decision is amply supported by the evidence and fits comfortably within the law as stated by the Supreme Court of Canada in *Farber*.

The Notice Period

[6] The trial judge set the period of notice at 24 months. The appellant submits that a notice period two to four months shorter would have been more appropriate.

[7] The trial judge applied the well-known principles for assessing the reasonableness of notice set out in *Bardal v. Globe & Mail Ltd*. (1960), 24 D.L.R. (2d) 140 (Ont. H.C.J.), at p. 145. She stated:

> As indicated in *Bardal v. The Globe & Mail Ltd*., the reasonableness of the notice must be decided with reference to each particular case, having regard to the character of the employment, the length of service of the employee, the age of the employee and the

> availability of similar employment, having regard to the experience, training and qualifications of the employee.

[8] The trial judge found the following facts:

> Ken was 58 years of age in May 2009 and had been employed for 38 years. He had a high level managerial employment and had been very dedicated to the company.

[9] I would find that the trial judge did not err in her determination of the length of notice in these circumstances.

Mitigation

[10] Mr. Farwell made efforts in a poor economy to find other employment but was not successful for many months.

[11] The appellant argues that Mr. Farwell had a legal duty to mitigate his damages, and that he was obliged to accept the job of Purchasing Manager during the period of working notice; the salary and working conditions would have been almost the same as for his previous position, the only difference being a likely reduction in bonus. Giving effect to this argument would eliminate Mr. Farwell's damages.

[12] Bastarache J. set out the relevant law in *Evans v. Teamsters Local Union No. 31*, 2008 SCC 20, [2008] 1 S.C.R. 661, at para. 30:

> This Court has held that the employer bears the onus of demonstrating both that an employee has failed to make reasonable efforts to find work and that work could have been found (*Red Deer College v. Michaels*, [1976] 2

> S.C.R. 324). Where the employer offers the employee a chance to mitigate damages by returning to work for him or her, the central issue is whether a reasonable person would accept such an opportunity. In 1989, the Ontario Court of Appeal held that a reasonable person should be expected to do so "[w]here the salary offered is the same, where the working conditions are not substantially different or the work demeaning, and where the personal relationships involved are not acrimonious" (*Mifsud v. MacMillan Bathurst Inc.* (1989), 70 O.R. (2d) 701, at p. 710). [Emphasis added.]

[13] The trial judge correctly noted that an employee cannot be obliged to mitigate by working in an atmosphere of hostility, embarrassment or humiliation. She noted, again correctly, that she was obliged to assess, objectively, the "work atmosphere, stigma and loss of dignity" to be faced by Mr. Farwell in considering whether to continue his employment in an effort to mitigate his damages.

[14] The trial judge found that obliging Mr. Farwell to accept the new position, which he had held years earlier, would be humiliating and embarrassing for him:

> Further in this case, the fact that an employee previously subordinate to Ken, would be elevated to his position, and in Ken's mind, having to now report to Wayne, even though Roger testified otherwise, would be humiliating and embarrassing given the prior roles and responsibilities within the company. For these reasons, I find that requiring Ken to return to the company in order to mitigate his losses would be unreasonable.

[15] The appellant argues that the trial judge's use of the words, "in Ken's mind," shows that, despite her correct self-instruction on the test, she actually took a subjective approach in her assessment. The appellant submits that the

trial judge did not properly assess the circumstances under which Mr. Farwell's employment would have continued. In assessing "work atmosphere, stigma and loss of dignity" for the purposes of mitigation, the trial judge made no mention of the positive elements in his relationship with his employer.

[16] The appellant points to the consensus view of the witnesses that Mr. Farwell was an "exemplary employee," and to the evidence that Mr. Farwell had previously excelled as Purchasing Manager. The employer's view was that he was simply mismatched as Operations Manager. The appellant also relies on the evidence that Mr. Farwell's superior repeatedly pressed him to remain with the company, and that Mr. Farwell enjoyed a good working relationship with his colleagues and commanded respect in the Purchasing Manager role.

[17] The appellant adds that the evidence showed that the dismissal was motivated by economic considerations and not by any animus against Mr. Farwell. The appellant had recently adopted a new product focus in which Mr. Farwell's immediate subordinate was the expert, and he was not; the restructuring of its management personnel was a consequence of its evolving business model in tough economic times and was not meant to stigmatize him.

[18] The appellant argues that in circumstances such as these, where the employer's restructuring serves a legitimate business interest and is not merely a pretext for terminating an employee, an employee like Mr. Farwell should be

obliged, as part of his duty to mitigate, to return to work for the same employer, at least for the notice period, despite the constructive dismissal: *Evans*, at para. 31; and *Davies v. Fraser Collection Services Ltd.*, 2008 BCSC 942, 67 C.C.E.L. (3d) 191, at para. 43.

[19] In my view, an employee's obligation to mitigate by remaining with his or her employer for the period of working notice is an aspect of what the law recognizes as "efficient breach." Courts ought not to discourage efficient breach: see e.g. *Bank of America Canada v. Mutual Trust Co.*, 2002 SCC 43, [2002] 2 S.C.R. 601, at para. 31. In proper circumstances, the principle of efficient breach can apply to employment contracts: *IBM Canada Limited v. Waterman*, 2013 SCC 70, [2013] S.C.J. No. 70, at para. 153, Rothstein J., dissenting.

[20] There may well be merit in the appellant's argument that the trial judge took a subjective approach in assessing "work atmosphere, stigma and loss of dignity" for the purposes of mitigation, rather than the required objective approach. There may also be merit in the argument that the circumstances here would support the imposition of an obligation on Mr. Farwell to mitigate by working through the notice period. But the appellant faces another obstacle, which, in my view, is insurmountable. To paraphrase *Evans*, the appellant's mitigation argument presupposes that the employer has offered the employee a chance to mitigate damages by returning to work. To trigger this form of mitigation duty, the appellant was therefore obliged to offer Mr. Farwell the clear

opportunity to work out the notice period after he refused to accept the position of Purchasing Manager and told the Appellant that he was treating the reorganization as constructive and wrongful dismissal.

[21] There is no evidence that the appellant extended such an offer to Mr. Farwell. Accordingly, Mr. Farwell did not breach his mitigation obligation by not returning to work.

[22] I would dismiss the appeal with costs fixed by agreement on a partial indemnity basis at $15,000.00 all inclusive.

Released: March 7, 2014 "D.D."

"P. Lauwers J.A."

"I agree Doherty J.A."

"I agree G. Strathy J.A."