# COURT OF APPEAL FOR ONTARIO

CITATION: Richards v. Media Experts M.H.S. Inc., 2012 ONCA 769
DATE: 20121113
DOCKET: C55742



Simmons, Armstrong and Watt JJ.A.

BETWEEN

Lauren Richards

Plaintiff (Appellant)

and

Media Experts M.H.S. Inc. and Mark Sherman

Defendants (Respondents)

Robert C. Taylor, for the appellant

Andrew C. Lewis, for the respondents

Heard: October 30, 2012

On appeal from the order of Justice Suzanne M. Stevenson of the Superior Court of Justice, dated June 15, 2012.

## ENDORSEMENT

[1] The appellant sued her employer, the corporate respondent, for damages for wrongful dismissal. She also sued the executive chairman of the corporation ("the personal respondent") for damages for the torts of intentional and negligent infliction of nervous shock.

[2] On a rule 21 motion, the motion judge struck out the amended statement of claim against the personal respondent as disclosing no reasonable cause of action and as having no reasonable prospect of success.

[3] The material facts in the statement of claim are set out in the motion judge's reasons.

[4] The appellant raises a number of issues in this appeal. However, the main argument put before us is that the motion judge erred in her conclusion that to permit a claim to proceed against the personal respondent would allow the appellant to circumvent a limitation of liability clause in the contract of employment between the appellant and the corporate respondent. The clause in question limited a claim for wrongful dismissal to 12 months compensation.

[5] The personal respondent was not a party to the employment contract. However, the motion judge concluded that the personal respondent took the benefit of the clause in question on the basis articulated by the Supreme Court in *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299.

[6] In *London Drugs*, Iacobucci J., writing for the majority, stated at para. 257:

> "... I am of the view that employees may obtain such a benefit if the following requirements are satisfied:
>
> 1. The limitation of liability clause must, either expressly or *impliedly*, extend its benefit to the employees (or employee) seeking to rely on it;

> 2. The employees (or employee) seeking a benefit of the limitation of liability clause must have been acting in the course of their employment and *must have been performing the very services provided for in the contract between their employer and the Plaintiff (customer) when the loss occurred*." (emphasis added)



[7] In our view, both of the above requirements in *London Drugs* are met in this case.

[8] In respect of the first requirement, the appellant negotiated her employment agreement with the personal respondent who became her boss. We agree with the submission of counsel for the respondents that the relationship was such that the parties could not have contemplated that the appellant could make claims against the personal respondent arising from her dismissal that she could not make against the corporate respondent. The limitation clause does not make sense otherwise.

[9] In respect of the second requirement, the material facts pleaded in the statement of claim against the personal respondent indicate that he was acting on behalf of the corporate respondent when he terminated the appellant's employment. The allegation in the statement of claim that the personal respondent acted "on a frolic of his own" is a conclusory statement that does not accord with the material facts pleaded and does not convert the actions of the personal respondent (as inappropriate as they may have been) into an independent tort.

[10] The appellant also argued that the limitation clause should not apply in this case because it did not expressly name employees and officers of the corporation and was therefore ambiguous and subject to the application of the principle of *contra proferentem*. We do not accept this argument. For the reasons we have explained above, we are satisfied that the parties intended the limitation clause to apply to the personal respondent.

[11] In the result, the appeal is dismissed.

[12] The personal respondent shall have his costs on a partial indemnity scale fixed in the amount of $15,000, inclusive of disbursements and applicable taxes.

"Janet Simmons J.A."

"Robert P. Armstrong J.A."

"David Watt J.A."