COURT OF APPEAL FOR ONTARIO

CITATION: Arnone v. Best Theratronics Ltd., 2015 ONCA 63
DATE: 20150202
DOCKET: C59181

2015 ONCA 63 (CanLII)

Strathy C.J.O., Laskin and Brown JJ.A.

BETWEEN

Matthew Arnone

Plaintiff (Respondent)

and

Best Theratronics Ltd.

Defendant (Appellant)

Frank Cesario and Siobhan O'Brien, for the appellant

Christopher Rootham, for the respondent

Heard: January 9, 2015

On appeal from the order of Justice Martin S. James of the Superior Court of Justice, dated July 14, 2014, with reasons reported at 2014 ONSC 4216.

Brown J.A.:

Overview

[1] On November 26, 2012, the appellant, Best Theratronics Ltd., terminated without cause the employment of the respondent, Matthew Arnone, who had worked with the company and its predecessor for about 31 years. Arnone was 53 years old at the time.

[2] Arnone commenced a wrongful dismissal action and moved for summary judgment. By order dated July 14, 2014 (the "Order"), the motion judge granted Arnone's motion for summary judgment and ordered Best Theratronics to pay (i) damages equal to the gross amount of the salary Arnone would have earned until he qualified for an unreduced pension, less payments made to him to satisfy the statutory obligations of the employer, (ii) $65,000 representing the present value of the loss of an unreduced pension, (iii) a retirement allowance equal to 30 weeks' pay, and (iv) costs totaling $52,280.09.

[3] Best Theratronics appeals, seeking to set aside the Order and to secure, instead, an order dismissing Arnone's claim. Arnone cross-appeals, seeking to increase the damages awarded for wrongful dismissal and to increase costs to a substantial indemnity level.

[4] For the reasons which follow, I would allow the appeal, in part, set aside the motion judge's calculation of damages for wrongful dismissal and require that income earned by Arnone during the notice period be deducted from the award of damages for wrongful dismissal. I would allow the cross-appeal, increase the period of reasonable notice for calculating damages for wrongful dismissal from 16.8 months to 22 months and remit the issue of costs to the motion judge.

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Standard of review

[5] In *Hryniak v. Mauldin*,[1] the Supreme Court of Canada held that absent an error of law, the exercise of powers by a motion judge under Rule 20 of the *Rules of Civil Procedure* attracts deference. Whether a genuine issue requiring a trial exists is a question of mixed fact and law. Where there is no extricable error in principle, findings of mixed fact and law should not be overturned, absent palpable and overriding error.[2]

First Issue: Did the motion judge err in concluding that no genuine issue requiring a trial existed regarding the character of the employee's duties and responsibilities?

[6] Best Theratronics submitted that the motion judge erred in granting summary judgment because a genuine issue requiring a trial existed in respect of the character of Arnone's employment, one of the factors guiding the calculation of the common law reasonable period of notice set out in *Bardal v. The Globe & Mail Ltd*.[3] Best Theratronics contended a clear conflict of evidence existed about the role performed by Arnone prior to the termination of his employment and argued that the motion judge simply had swept aside the conflicting evidence without analysis.

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[1] 2014 SCC 7, [2014] 1 S.C.R. 87.
[2] *Hryniak*, at para. 81.
[3] (1960), 24 D.L.R. (2d) 140 (Ont. H.C.), at p. 145.

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[7] I do not accept that submission. On the issue of the character of his employment, Arnone conceded, for the purpose of the summary judgment motion, that he was a supervisor, not a manager. The motion judge made the following findings of fact:

> [23] The plaintiff has spent his entire career working in the field of Cobalt 60 industrial and medical equipment. He has a college level designation as a mechanical engineering technologist. He performed at least supervisory, if not managerial, functions. He had about eight employees reporting to him.

As well, he described the different characterizations of Arnone's responsibilities advanced by Best Theratronics as "subtle distinctions" which would not affect the employee's minimum entitlement to a 17-month period of reasonable notice.

[8] Those findings of fact find ample support in the record. Although the February 13, 2008 letter from Best Theratronics offering employment to Arnone described his position as that of a "Customer Specialist", about five months later the Employer's general manager circulated a memo to employees describing Arnone as continuing in his role of "Customer Service *Manager*" (emphasis added). The April 2009 organizational chart for Best Thereatronics described Arnone as "Manager Customer Service" and showed 11 employees reporting to him. Also, Best Theratronics provided Arnone with a business card which described his position as "Manager, Inside Sales & Customer Support". While the Director, Resources and Payroll, of Best Theratronics testified on cross-

examination that the managerial title was given to Arnone purely for customer relations purposes, the fact remained that it was Best Theratronics which had provided him with that title. The evidence also disclosed that Arnone discussed performance issues regarding his direct reports with his own manager, although it was his manager who provided the direct reports with their formal performance evaluations. Even though several months prior to his termination Best Theratronics changed Arnone's role to focus more clearly on customer support and sales, his salary remained unchanged.

[9] Best Theratronics relied heavily on the decision of the Superior Court of Justice in *Thorne v. Hudson's Bay Co.*[4] for the proposition that in appropriate cases the character of the employee's employment may give rise to a genuine issue requiring a trial. The circumstances in *Thorne* differed materially from those in the present case. First, in *Thorne*, the motion judge emphasized that the affidavit evidence placed before him had not been subjected to cross-examination, thereby preventing him from resolving in a fair and accurate way the dispute between the parties about the employee's duties. By contrast, in the present case the motion judge had before him the cross-examinations of the affiants to assist him in determining whether he could make the necessary findings of fact, which led him to conclude:

[4] 2011 ONSC 6010, 96 C.C.E.L. (3d) 35 (S.C.).

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> [17] In this case, the issues can be determined fairly and justly without a trial. The documentary record is both extensive and reliable. Several affiants have been cross-examined. While the parties may not agree on all the facts, the material facts necessary to achieve a just result are established by the available evidence and form part of the record on this motion. Cases involving the determination of a reasonable notice period are well-suited to be dealt with by way of a motion for summary judgment.

[10] Second, while in *Thorne* the employee was not prepared to accept the employer's characterization of his employment for purposes of the summary judgment motion, in the present case Arnone did so. As noted by the motion judge:

> [9] The plaintiff says that he was working as a manager prior to his dismissal but because the defendant takes issue with the characterization of his job description and duties, the plaintiff is prepared to concede for the purposes of this motion to the defendant's contention that the plaintiff's employment can best be characterized as that of a supervisor rather than a manager. The plaintiff does so in an effort to neutralize the defendant's argument that the determination of the character of the plaintiff's employment requires a trial.

[11] Also, the jurisprudence on the *Bardal* factors not only stresses that no one factor should be given disproportionate weight,[5] but more recently indicates that the character of employment is a factor of declining importance in the *Bardal* analysis.[6]

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[5] *Honda Canada Inc. v. Keays*, 2008 SCC 39, [2008] 2 S.C.R. 362, at para. 32.
[6] *Di Tomaso v. Crown Metal Packaging Canada LP*, 2011 ONCA 469, 282 O.A.C. 134, at para. 27.

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[12] Finally, while the appropriateness of bringing a summary judgment motion must be assessed in the particular circumstances of each case, a straight-forward claim for wrongful dismissal without cause, such as the present one, strikes me as the type of case usually amenable to a Rule 20 summary judgment motion.

[13] In sum, the motion judge's findings about the character of Arnone's employment provided ample support for the conclusion that no genuine issue requiring a trial existed on the issue of the character of employment.

Second Issue: Did the motion judge err in his calculation of the period of reasonable notice to which Arnone was entitled upon termination without cause?

[14] Although the motion judge correctly referred to the *Bardal* factors as the starting point for an assessment of the appropriate period of reasonable notice, he calculated the period of reasonable notice by reference to the time between the date of termination and the date Arnone would be entitled to an unreduced pension upon early retirement under the Best Theratronics defined benefit pension plan of which he was a member.

[15] Best Theratronics submits that the motion judge erred by calculating the common law period of reasonable notice so as to "bridge" Arnone's notice period to the date of his eligibility for an unreduced pension at his early retirement date, instead of assessing a reasonable notice period using the *Bardal* factors. On this

appeal, Arnone concedes that the motion judge erred in applying a “bridging” approach to the determination of the reasonable period of notice.

[16] In my view, that was an appropriate concession to make. Damages for wrongful dismissal operate to compensate an employee for the employer’s breach of the implied obligation in the employment contract to give reasonable notice of an intention to terminate the relationship in the absence of just cause. Damages are confined to the loss suffered as a result of the employer’s failure to give proper notice, measured by the loss of wages and salary, and other benefits, that would have been earned during the reasonable notice period.[7] The *Bardal* analysis remains the approach courts must apply to determine what constitutes reasonable notice of termination,[8] an approach which has not included a consideration of the time between the date of dismissal and the point at which the employee would be eligible for a full pension. In the present case, calculating the period of reasonable notice by reference to the amount of time required to “bridge” the dismissed employee to his date of eligibility for a full pension did not accord with the *Bardal* analysis. Consequently, the motion judge erred in setting the period of reasonable notice to which Arnone was entitled at 16.8 months, the period of time needed to “bridge” his entitlement to a full pension.

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[7] *Keays,* at para. 50; *Taggart v. Canada Life Assurance Co.* (2006), 50 C.C.P.B. 163 (Ont. C.A.), at para. 13.
[8] *Keays,* at paras. 28-29.

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[17] Nevertheless, the motion judge did go on to make an alternative finding that a reasonable notice period otherwise would amount to 22 months. In *Minott v. O'Shanter Development Co.*,[9] this court described the appropriate standard of appellate review for the issue of the period of reasonable notice in wrongful dismissal cases:

> This submission must be judged against the standard of appellate review of wrongful dismissal awards. Determining the period of reasonable notice is an art not a science. In each case trial judges must weigh and balance a catalogue of relevant factors. No two cases are identical; and, ordinarily, there is no one "right" figure for reasonable notice. Instead, most cases yield a range of reasonableness. Therefore, a trial judge's determination of the period of reasonable notice is entitled to deference from an appellate court. An appeal court is not justified in interfering unless the figure arrived at by the trial judge is outside an acceptable range or unless, in arriving at the figure, the trial judge erred in principle or made an unreasonable finding of fact. If the trial judge erred in principle, an appellate court may substitute its own figure. But it should do so sparingly if the trial judge's award is within an acceptable range despite the error in principle.[10]

[18] Arnone submitted that the 22-month notice period assessed by the motion judge fell within an acceptable range set by the case law for an employee in his position. Best Theratronics contended 14.4 weeks constituted a reasonable notice period in the circumstances. Arnone supported his submission by pointing to numerous cases establishing a range of 19 to 28 months as the period of

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[9] (1999), 42 O.R. (3d) 321 (C.A.).
[10] *Minott*, at pp. 343-344. [Citations omitted.]

reasonable notice for supervisors of a similar age and length of service. By contrast, Best Theratronics did not refer to any case law in support of its position.

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[19] In my view, the 22-month notice period, as found by the motion judge, fell within an acceptable range of notice periods for employees in circumstances similar to those of Arnone. Consequently, I see no basis upon which to interfere with that conclusion.

Third Issue: Did the motion judge err by failing to deduct the income earned by Arnone from his new employment from the damage award?

[20] As a result of taking a “bridging-until-retirement” approach to calculating the period of reasonable notice, the motion judge did not deduct from his award of damages for wrongful dismissal the income earned by Arnone from his new employment during the claimed notice period. The parties agreed that the motion judge erred in law by failing to deduct that income from the wrongful dismissal damages award. I would accept that agreement and vary the Order accordingly.

Fourth Issue: Did the motion judge err in awarding Arnone a retirement allowance?

[21] Arnone also claimed payment of a retirement bonus or allowance. Arnone deposed:

> It is customary for employees to receive a significant retirement bonus equivalent to one week of salary for each year of service. Had I continued employment with

> Theratronics, I would have reasonably expected receiving this retirement bonus.

Poonam Sharma, the Director, Human Resources and Payroll at Best Theratronics, deposed:

> Best Theratronics provides a retirement allowance of one week per year of service to a maximum of 30 weeks to employees who retire. The Plaintiff was not eligible for this allowance as he was terminated due to restructuring.

That was the extent of the evidence in the record about the terms of the Best Theratronics retirement allowance. Neither affiant was cross-examined on the point.

[22] From that evidence, the motion judge concluded:

> [30] Additionally, the plaintiff was entitled to a retirement allowance of one week for each year of employment to a maximum of thirty weeks. The availability of this allowance ought to have been part of an arrangement to bring the employee's employment to an end without affecting his pension.

When read as a whole, the reasons of the motion judge disclose he sought to put in place a "termination arrangement" which would provide Arnone with all the benefits available to him on retirement. This approach drove his calculation of the period of reasonable notice – in which he erred – as well as his determination that Arnone was entitled to the Best Theratronics retirement allowance.

[23] The evidence about the retirement allowance, as limited as it was, disclosed that entitlement to the retirement allowance arose not under the Best

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Theratronics pension plan but, instead, formed part of the contract of employment between Best Theratronics and its employees. The interpretation of that aspect of Arnone's contract of employment with Best Theratronics would involve an issue of mixed fact and law on which an appellate court should defer to the motion judge, except in cases of a palpable and overriding error or where it is possible to identify an extricable question of law.[11]

[24] However, the motion judge did not consider Arnone's claim to a retirement allowance as a claim under his contract of employment; instead, he approached the issue as one involving his pension benefits. At para. 30 of his reasons, the motion judge wrote: "The availability of this allowance ought to have been part of an arrangement to bring the employee's employment to an end without affecting his pension." In taking such an approach the motion judge misapprehended the evidence. Eligibility for the Best Theratronics retirement allowance was not tied to an employee's entitlement to a pension, but was a separate contractual entitlement based upon an employee's length of service, be it one year or 30 years. As a result of making that error, the conclusion of the motion judge about Arnone's entitlement to a retiring allowance is not entitled to deference.

[25] The determination of whether a contract of employment entitles an employee to the receipt of a retirement allowance where his employment has

[11] *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, 373 D.L.R. (4th) 393, at paras. 50-55; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 30-31; and *Hryniak*, at para. 81.

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been terminated without cause is an inherently-fact specific exercise. In the present case, there was no dispute that it was a term of Arnone's contract of employment with Best Theratronics that he would receive a retirement allowance of one week for each year of service up to 30 weeks. Both parties clearly benefited from that term. From the point of view of Best Theratronics, the term gave employees an incentive to remain with the company for a long time. From an employee's point of view, the term allowed him to accumulate a monetary benefit which grew as his service with Best Theratronics increased over time and which would become available to him upon retirement.

[26] In my view, from that operation of the Best Theratronics retirement allowance comes an implied term that if an employee is terminated without cause, he would be entitled to payment of the accumulated retirement allowance in consideration for his long service and fidelity to the company.

[27] In the absence of any written term to the contrary, effect should be given to this implied term of the contract of employment. If Best Theratronics wanted to limit an employee's entitlement to this benefit, it should have reduced the limitation to writing, as was done by the employer in the decision of the British Columbia Supreme Court in *Moody v. Lafarge Canada Inc.*[12] In that case, the employee was entitled to receive a retirement allowance "at your retirement (as

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[12] 2000 BCSC 1847.

defined in our pension plan)", but the contract went on to stipulate that "if your employment with Lafarge is terminated for any other reason, you will not be eligible to receive this benefit".[13] Lafarge terminated the employment of the employee, leading the court to conclude that the employee was not entitled to the retirement allowance.

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[28] No such written restriction existed in the contract of employment between Best Theratronics and Arnone. Although Sharma deposed that Arnone was not entitled to the retirement allowance upon his termination, that was simply her own view and was inconsistent with the implied term of the contract of employment.

[29] For those reasons, I would dismiss the appeal of Best Theratronics on this issue.

Fifth Issue: Did the motion judge err in awarding Arnone compensation to replace the loss of his pension benefits during the notice period?

[30] The motion judge awarded Arnone damages in the amount of $65,000 representing the present value of the loss of pension benefits to him based on the difference between a notice period ending on March 7, 2013 (the 14.4 weeks of notice paid by Best Theratronics) and one ending on July 31, 2014 (representing 20 months' notice). The amount of damages was based upon a

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[13] *Moody*, at para. 16.

calculation performed by an actuary contained in an expert opinion adduced by Arnone.

[31] Although Best Theratronics contended in its notice of appeal that the motion judge had erred in making such an award, it did not pursue the point in its Factum.

[32] The award made by the motion judge was consistent with the principle expressed by this court in *Taggart v. Canada Life Assurance Co.*: a terminated employee is entitled to claim damages for the loss of pension benefits that would have accrued had the employee worked until the end of the notice period, unless some contractual term limits that right.[14] No evidence of any such limit was before the motion judge. Accordingly, I see no basis to interfere with his award on this issue.

Sixth Issue (Cross-appeal): In assessing costs, did the motion judge err by failing to afford the parties an opportunity to disclose their respective offers to settle?

[33] Arnone cross-appeals the award of costs, arguing that the motion judge dealt with costs without affording him an opportunity to make submissions about the effect on costs of his offers to settle the motion.

[34] As noted by the motion judge, at the conclusion of oral argument on the motion the parties provided him with copies of their cost outlines. The motion

[14] *Taggart*, at paras. 13, 15.

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judge reserved his decision on the motion. In his July 14, 2014 reasons the motion judge dealt with the issue of costs. The next day Arnone's counsel wrote to the motion judge enclosing two without prejudice offers made to Best Theratronics. Counsel advised that he could not have provided the offers to the court until liability had been determined, and he requested an opportunity to make brief submissions on the scale of costs awarded. At the hearing of the appeal, counsel advised that a case conference is to be held before the motion judge to consider the effect of the offers to settle on the costs awarded, even though the Order has been issued and entered.

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[35] Since a motion judge should take into account the effect, if any, of offers to settle on the ultimate award of costs for the motion, the most appropriate way to proceed is to set aside the cost award contained in para. 5 of the Order and remit the issue of costs back to the motion judge for his determination.

DISPOSITION

[36] Accordingly, I would allow the appeal, in part, set aside para. 1 of the Order and substitute an order that Best Theratronics pay Arnone damages for wrongful dismissal calculated on the basis of a reasonable period of notice of 22 months, from which shall be deducted the statutory payments of 14.4 weeks already made by Best Theratronics and the income earned by Arnone during the notice period. I would allow the cross-appeal, set aside para. 5 of the Order

dealing with costs, and remit the issue of costs back to the motion judge for his determination.

[37] If the parties are unable to agree upon the costs of the appeal and cross-appeal, I would permit them to file brief cost submissions, to a maximum of three pages, within 10 days of the date of the release of these reasons.

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Released: February 2, 2015 (GS)

"David Brown J.A."
"I agree G.R. Strathy C.J.O."
"I agree John Laskin J.A."