COURT OF APPEAL FOR ONTARIO

CITATION: Bois v. MD Physician Services Inc., 2017 ONCA 857
DATE: 20171108
DOCKET: C63311

Simmons, Rouleau and Brown JJ.A.

BETWEEN

Mark Bois

Plaintiff (Appellant)

and

MD Physician Services Inc., MD Private Investment Management Inc. and MD Management Limited

Defendants (Respondents)

Morgan Rowe, for the appellant

Ashlee L. Barber, for the respondents

Heard: October 20, 2017

On appeal from the judgment of Justice Sylvia Corthorn of the Superior Court of Justice, dated December 28, 2016.

REASONS FOR DECISION

OVERVIEW

[1] This appeal raises a single issue: Did the motion judge err in concluding the "active employment" requirement in the respondents' Variable Incentive Plan ("VIP") under which the appellant, Mark Bois, was awarded a bonus did not

conflict with ss. 11(5) and 13(1) of the *Employment Standards Act, 2000*, S.O. 2000, c. 41 ("*ESA*")?

FACTS

[2] The material facts are not in dispute. The appellant worked for the respondents from August, 1997 until his resignation in October 2011.

[3] In 2009 and 2010 the appellant was awarded bonuses under the respondents' VIP. Under the plan, a bonus awarded for a year was payable in equal installments over the three years following the calendar year for which the bonus was awarded. Installment payouts would be made in February or March of each year.

[4] The 2007 VIP stated:

> In the event a Participant's continuous Active Employment terminates, either voluntarily or involuntarily and whether for cause or not for cause, the Participant will immediately forfeit any entitlement to any payments under this plan whether attributable to prior years or to the current year.

[5] The 2011 VIP that replaced the 2007 VIP effective January 3, 2011 contained a similar provision: "Any employee who has left the organization or has given notice to leave the organization on or before the incentive payment date will not be eligible to receive a payment."

[6] A March 16, 2010 letter from the respondents signed and agreed to by the appellant stated:

> In any given year, you must be a permanent employee of the CMAH Group of Companies on December 31 of the year for which the incentive is paid and continue to be so employed on the payment date(s) to receive a payment. Any employee who is no longer employed with the organization or has given notice of termination prior to the payout date will not be eligible to receive a payment.

[7] The appellant resigned before the pay-out dates for the final installment of his 2009 bonus and two installments of his 2010 bonus. The future installments totaled $114,916.79.

[8] The appellant commenced this action seeking those installments. The motion judge granted the respondents summary judgment dismissing his action.

ISSUE

[9] The appellant submits the motion judge erred in her interpretation of ss. 11(5) and 13 of the *ESA*, which state:

> 11(5) If an employee's employment ends, the employer shall pay any wages to which the employee is entitled to the employee not later than the later of,
>
> (a) seven days after the employment ends; and
>
> (b) the day that would have been the employee's next pay day.
>
> 13(1) An employer shall not withhold wages payable to an employee, make a deduction from an employee's wages or cause

> the employee to return his or her wages to the employer unless authorized to do so under this section.

[10] The appellant contends that where a bonus has been awarded for a year, but at the time of the employee's resignation future bonus installments remain to be paid-out, s. 11(5) of the *ESA* effectively operates to accelerate the employer's obligation to pay-out future installments, notwithstanding language in an incentive plan requiring the employee to be actively employed at the date of any future pay-outs. To the extent that the terms of the VIPs sought to disentitle the appellant to the future installments, they were void as they contravened s. 13(1) of the *ESA*.

ANALYSIS

[11] We are not persuaded by the appellant's submission.

[12] The motion judge interpreted the VIPs as requiring an employee to be actively employed with the respondents on the date of a bonus installment pay-out in order to receive the installment. If the employee resigned before an incentive payment date, he would not be eligible to receive a payment: at para. 61. She also held the appellant had notice of the active employment eligibility requirement and he knew or ought to have known when he resigned that he would be forfeiting entitlement to the bonus: at para. 66. Those findings are not challenged on appeal.

[13] The motion judge construed s. 11(5) of the *ESA* as requiring the respondents to determine whether, at the time the appellant's employment ended, he was entitled to the payment of any bonus installments based on the wording of the VIPs and the length of his notice period: at para. 101. She concluded the respondents "rightfully and correctly determined that by reason of his resignation the plaintiff's entitlement to the Bonus was extinguished": at para. 102.

[14] We see no error in the motion judge's approach or conclusion.

[15] It was open to the parties to agree how and when any bonus was declared, earned, accrued and would be payable: *Kielb v. National Money Mart Company*, 2017 ONCA 356, at para. 12.

[16] By the terms of the VIPs, the appellant was not entitled to the three bonus installments whose pay-out dates fell well after the date of his resignation. While those three installments would constitute wages payable upon each of the future pay-out dates, they were not "wages to which the appellant [was] entitled" when he resigned and his employment ended. Accordingly, we see no basis to interfere with the motion judge's conclusion that where, as in circumstances such as those of the present case, the entitlement to an incentive plan payment does not arise until after an employee's resignation or the expiration of the reasonable period of notice of termination, a plan's requirement that the employee be

actively employed at the time of a future pay-out does not contravene s. 11(5) of the *ESA*.

[17] Nor does such an active employment provision contravene s. 13(1) of the *ESA*, as the future pay-outs do not constitute “wages payable to an employee” at the time of his resignation.

DISPOSITION

[18] For the reasons set out above, we dismiss the appeal.

[19] The respondents are entitled to their costs of appeal on a partial indemnity basis fixed at $5,000, inclusive of disbursements and all applicable taxes.

“Janet Simmons J.A.”
“Paul Rouleau J.A.”
“David Brown J.A.”