

CITATION: Gordon v. Altus, 2015 ONSC 5663
COURT FILE NO.: CV-14-118317
DATE: 2015-09-11

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
ALAN GORDON)
) K. MacDonald & J. M. Sanderson, for the
Plaintiff) Plaintiff
)
– and –)
)
ALTUS GROUP LIMITED) H.A. Levitt & S. Chaudhri, for the
) Defendant
Defendant)
)
)
)
)
) **HEARD:** May 29/ 2015
) June 1,2,3,4/2015
) July 6, 9/2015

JUSTICE B. GLASS

Wrongful Dismissal Action

- [1] Alan Gordon seeks damages for being wrongfully dismissed from his employment with the Defendant. The action included several other claims; however, those other issues are being arbitrated pursuant to the provisions of the asset purchase agreement between the Plaintiff's company and the Defendant.
- [2] On November 1, 2008, Alan Gordon's company sold assets of a business to the Defendant corporation and Alan Gordon was hired to continue with the Defendant in a written contract of employment. The sale transaction was valued at several million dollars. Some of the sale proceeds were linked to the performance of the business after the closing with an adjustment to be made in the purchase & sale price by February 2010.
- [3] The employment contract provided for the parties terminating the contract with payout provisions if not for cause. The term of employment was 3 years with provision for renewals.
- [4] As the parties approached the February 2010 time for a possible adjustment to the sale price, there appears to have developed some stress.

[5] By the end of March 2010, the Defendant alleged that the Plaintiff was not producing effectively and was a very unpleasant person to the point that continued working relationships could not be maintained. The Defendant claimed that the Plaintiff talked of senior personnel in the company in very derogatory terms and that he swore considerably to the point that it made working with him unbearable. Later, the Defendant claimed that the Plaintiff did not disclose lending money to a company with which the Defendant was doing business thereby making Mr. Gordon guilty of a conflict of interest to the harm of the Defendant. The Defendant took the position that Alan Gordon continued to employ Lisa Robbins even though she had been charged with fraud and that he misled the Defendant about the fraud charges. At the end of March 2010, Altus fired both Alan Gordon and Ann Gordon. They had arrived at work. Ann Gordon was escorted to a room and basically given her walking papers followed by a severance pay arrangement to which there was no complaint.

[6] On the other side of the coin though, Alan Gordon's position was that he was fired without any compensation or notice and without any justifiable cause.

[7] The Defendant claimed to dismiss the Plaintiff for cause and relied on some factors not discovered until after he was dismissed.

Issues

[8] What grounds for dismissal existed?

[9] Can the Defendant rely on alleged misconduct discovered after the fact of dismissal?

[10] Did the Plaintiff use derogatory terms and profane language?

[11] Did the Plaintiff mislead Altus about his conflict of interest?

[12] Did the Plaintiff lie about employing Lisa Robbins improperly?

[13] Should the Defendant have provided a progressive disciplinary process by reviewing conduct with Alan Gordon and providing directions for overcoming conduct that Altus did not accept?

[14] Did the Defendant act in a manner that rejected the contract so that damages for wrongful dismissal should be considered beyond the terms of the contract?

[15] If wrongful dismissal is established, is the Plaintiff entitled to punitive damages?

[16] Does Altus have a foundation for a claim for damages flowing from improper actions and behaviour of Alan Gordon?

[17] If Altus has a valid claim against Alan Gordon, what is the quantum of damages?

Background Facts

[18] The witnesses for the Defendant were current or former senior personnel for the Defendant. They claimed that the profanity used by the Plaintiff was excessive and that they would not use such language toward other people. The Plaintiff did not dispute swearing, but he noted that some swearing was common at the work site by many persons. His language was not out of line with others was the position taken by Alan Gordon.

[19] The Plaintiff disputed that he ran down senior management excessively or improperly.

[20] He was aware of the conflict of interest provisions in the employee handbook. He testified that he spoke to his manager, Michael Barker, about the alleged conflict of interest issue which was one contract with a company to which he loaned money and Altus was doing business with that company. Mr. Gordon was told he could continue so long as he did not involve himself in the transaction. That contact with the manager was the course of action to be followed in the employee handbook. The former manager denied the Plaintiff's evidence of reporting this and getting his blessing.

[21] Another cause alleged for dismissing Mr. Gordon was employing Lisa Robbins, a person involved a person charged with fraud. The Plaintiff testified that he understood that the charges against this person were within her family and that the issue had been a family dispute.

Was the Lisa Robbins Issue a Red Herring?

[22] Ms. Robbins testified at the trial. There is no doubt that she was not a truthful person when so testifying about her criminal convictions. However, I conclude that the complaint about Ms. Robbins is a red herring. She resigned within 3 weeks of commencement of work. Ms. Robbins was not dismissed; rather, when she left, she was perceived by other employees to have a health issue. The subsequent complaint was that Ms. Robbins continued to have some involvement with Altus. There is no evidence of any harm to Altus. This involvement was discovered after Alan Gordon was discharged. Representatives of Altus, including Rose Oushalkas, who was the former counsel for Altus, testified that Altus was jeopardized by being involved with a person such as Lisa Robbins with outstanding criminal fraud allegations because Altus was a public corporation. No evidence or foundation for such a claim was presented at the trial. I accept Mr. Gordon's testimony that he did not attend the fraud trial of Lisa Robbins and that he understood the allegations of fraud centred on business between Ms. Robbins and her family. There is no evidence that Alan Gordon attended the trial.

Was there a Foundation for Insubordination?

[23] The Defence witnesses had a common pattern of minimizing any swearing at Altus by anyone except Alan Gordon. Witnesses who had worked for Altus were David Gardiner, Gary Yeoman, Blair Kennedy, Barry Eisen, Paul Morassutti, Michael Barker, Karl Scharnitzky and Rose Oushalkas. Mr. Barker was the manager to whom the Plaintiff reported. They appeared to enhance the extreme use of profane language by Alan Gordon.

Mr. Yeoman distinguished himself as one who would not swear at other human beings whereas Mr. Gordon did so. Ann Gordon testified that the atmosphere at Altus was more that of an old boys' club with respect to the use of profane language. Ms. Gordon noted that the former CEO, Gary Yeoman, made the comment that the company needed more tits and ass around. That was denied by Mr. Yeoman. The Plaintiff acknowledged that he swore at times, but he disputed that he disparaged the senior personnel of the company as claimed by the Defence witnesses. At no time was any reprimand given to Alan Gordon about the use of profane language. There is no written record of the Plaintiff using profane language. No one could indicate even one date when such language was used. One would expect that at least Mr. Barker, as the Plaintiff's manager, would have addressed this issue if it was an issue. This complaint appears to have been exaggerated after the Plaintiff was dismissed as one aspect of justification for that dismissal.

[24] I conclude that the relationship deteriorated as the parties approached February 2010 when an adjustment was to be undertaken in accordance with the asset purchase agreement. Mr. Eisen noted in his testimony that Mr. Gordon thought that Altus cheated him. That potential adjustment involved assessing the performance of Altus following the asset purchase agreement so that if money were made, the Plaintiff would receive more money as part of the sale proceeds. On the other hand, if the performance was less, the Plaintiff's company would receive less money. When talking of money, I mean millions of dollars. As that adjustment time approached and Altus was indicating that its calculations demonstrated that less money would be paid to the Plaintiff's company, the Plaintiff through his company gave notice to activate the arbitration clause to resolve the dispute. The asset purchase agreement provided for the parties to go to arbitration if there were a dispute.

[25] It appears that upon the Plaintiff giving notice for arbitration, Altus wanted to end the employment contract without paying out the contracted severance funds. In other words, they decided to be cheap and then conjured up a cause for firing in order to save money. I point out that arbitration does not appear to have been anticipated to be a short-termed process here because when this trial commenced, the arbitration was still in process. It appears to me that Altus did not want to have a disgruntled employee in the person of Alan Gordon working with them for an extended period of time. So, Altus fired him allegedly for cause.

[26] As a result, they ran roughshod over the Plaintiff and put together a process to justify their actions after the fact. There had been no process of providing warnings to Alan Gordon about his performance with written directions to improve. The position taken by Altus was that the company did not provide a graduated warning to senior executive persons regarding job performance. I do not see a foundation for alleging insubordination by Alan Gordon justifying dismissal.

Was There a Basis to Dismiss Alan Gordon?

[27] My assessment is that there was no basis to fire Mr. Gordon. Rather, he did not conduct himself to the extent claimed. Further, employing Lisa Robbins lasted a short time.

[28] The conflict of interest was addressed properly. The Plaintiff spoke with the very person he ought to have, i.e. his manager Michael Barker, who cleared the loan provided Mr. Gordon did not involve himself in the transaction. There had been a point raised that the Plaintiff conducted a due diligence report for Altus when it was purchasing the company assets of the company to which Mr. Gordon was lending money. I note that there was a due diligence report by a major accounting firm, Deloitte's. I think that this is another example of Altus puffing up complaints to justify its peremptory dismissal of Mr. Gordon.

[29] He was not dismissed with cause, but rather was fired wrongfully.

Should Altus Have Engaged Progressive Discipline?

[30] Altus had an employee handbook that provided for progressive discipline. This was not exercised by Altus. The Altus witnesses stated that the company did not follow such a process with senior management personnel as if it were not expected. However, I think that is incorrect. With the guidelines of the employee handbook, Altus should have met with any employee, including Alan Gordon, if the company had a complaint about his conduct and job performance and provided written notice of dissatisfaction and a guide to change. In *Barton v. Rona Ontario Inc.*, 2012 CarswellOnt 9735 at paragraph 24 the court determined that the employer's handbook was part of the employment contract. Further, at paragraph 55, progressive discipline would have been effective. The exception to progressive discipline is conduct justifying immediate dismissal such as theft.

[31] If there were any improper behaviour by Alan Gordon, Altus should have exercised a progressive discipline approach. They did not do so. If Altus had done so, they might have avoided stumbling into the problems that arise in this trial.

Does the Employment Contract Survive?

[32] The Plaintiff argues that the conduct of the Defendant was mean-spirited enough to be a rejection of the employment contract thereby releasing Alan Gordon from the limitations contained in it. The Plaintiff submits that the Defendant tried to engage a disproportionate outcome by benefiting with a 24 month non-competition provision while reducing a damage payment pursuant to the without cause clause.

[33] The Defendant submits that the provision of the employment contract would continue to apply if the court were to find that there was no cause to dismiss Mr. Gordon. In other words, the parties would be in the same position as if there had been no attempt to dismiss for cause. Altus would then be liable to pay out funds for the time limits in the contract. The contract provided for the employer to pay a calculated sum of money to the employee simply as part of the process that they had agreed to use if the employer did not want the employee around anymore.

[34] Cases were provided supporting the Defence position so that the contract was not voided. The Ontario Court of Appeal has ruled accordingly in *Hoffman v. VRP Web Technology Inc.*, 2001 CarswellOnt 3860 and in *3869130 Canada Inc. v. I.C.B. Distribution Inc.*, 2008 CarswellOnt 2802. I am persuaded that the Defence position is the law in Ontario so that if

there was no cause to dismiss Alan Gordon, the provisions of the employment contract continue to apply when calculating how much Alan Gordon is entitled to be compensated.

What Damages Flow from the Employment Contract?

[35] The employment contracts of Alan Gordon and Ann Gordon provided that if Ann were released, \$105,000 of her income would be added to that of Alan Gordon. Interestingly, Ann Gordon was escorted to a separate room and dismissed. The Gordons had no advance warning of the dismissals of both of them. I think that the act of getting rid of Ann Gordon was a way of trying to save \$105,000 a year. This type of conduct followed by dismissing Alan Gordon without explanation and then justified by trying to find a foundation for paying him no severance was outrageous behaviour that calls for a trial court to award punitive damages. Altus takes the position that the two Gordons were dismissed simultaneously so that there was no foundation to add Ann Gordon's income to that of Alan Gordon.

[36] The employment contract contained a non-competition provision that Alan Gordon was not to work in competition with Altus Group for 2 years after termination of his employment. If he was discharged without notice in accordance with the employment contract, and paid the contracted compensation, the 2 year provision would have applied with a reduction of time matching his payout. Mr. Gordon was then locked into the employment contract not to compete with Altus.

[37] As per the employment contract, Alan Gordon is entitled to 9 months income plus 3 weeks for every year of service at the rate of \$207,000. I am not persuaded that the income of Ann Gordon in the sum of \$105,000 is to be added because there was no period of time when Alan Gordon worked beyond that of Ann Gordon. They were fired virtually simultaneously. Alan worked for Altus from November 1, 2008 to March 31, 2010 which is 1 year and 5 months. That would be 1 year plus 41.6 % of a second year. The calculation is 9 months' salary plus 3 weeks for 1 year plus 41.6% of 3 weeks in the second year. That would amount to \$155,250 for 9 months, \$11,940 for 3 weeks, and \$1,655 for 41.6% of 3 weeks in the second year. The total is \$168,845.00.

[38] The Plaintiff had sought an allowance for benefits; however, that is not part of the contract. There will not be an allowance for benefits.

Is the Plaintiff Entitled to Punitive Damages?

[39] The conduct of the Defendant corporation is outrageous because Altus got mean and cheap in trying to get rid of an employee as they approached arbitration for the determination of any adjustment in the asset purchase agreement price. They had a contracted process in place and chose to park it with an unfounded allegation to fire him. Altus paid Alan Gordon no money. Further, Altus expected Alan Gordon to act within the contract terms in not competing with Altus. In effect, he got nothing and was expected not to work within a competitive field to that of Altus. That appears to me to amount to Altus wanting to have its cake and to eat it. Now, there is no free lunch in this world and Altus cannot expect to have one.

[40] Punitive damages may be considered if there is an independent actionable wrong on the part of Altus. *Whiten v. Pilot Insurance Co.*, 2002 CarswellOnt 537 held for such consideration. At paragraph 82, the SCC noted that an actionable wrong can be established with a breach of a distinct and separate contractual provision or other duty such as a fiduciary duty.

[41] I accept the submission of the Plaintiff that in the case of Alan Gordon the independent wrong is the termination of Alan Gordon when his company, now named 3GS, gave notice to pursue arbitration under the asset purchase agreement. Altus failed to perform honestly the employment contract with Alan Gordon.

[42] Punitive damages will be set at \$100,000 because that sum of money notes the harsh treatment to Alan Gordon over an extended period of time as a means of sanctioning Altus for its terrible conduct.

Mitigation of Damages

[43] The Plaintiff could not mitigate his damages because of the conduct of Altus with the exception of doing work outside his line of work. Perhaps doing menial labour would have brought him a few dollars but nothing more. Altus chose to dump this employee and hold him to non-competition provisions of the employment contract. In other words, Altus conducted itself so as to beat down the employee. It is a bully tactic.

Defendant's Counterclaim

[44] The Defendant counterclaimed against the Plaintiff for \$1,000,000 for damages for breach of fiduciary duty, breach of duty of fidelity and breach of conflict of interest together with \$100,000 for punitive damages. The Defendant did not establish any foundation for a dollar figure for damages in the first place.

[45] My analysis above concludes that the counterclaims of Altus do not exist. No damages can be found to exist nor can there be any punitive damages in favour of Altus.

Conclusion

[46] What grounds for dismissal existed? None.

[47] Can the Defendant rely on alleged misconduct discovered after the fact of dismissal? Yes.

[48] Did the Plaintiff use derogatory terms and profane language? Not enough to justify dismissal. This was exaggerated complaining by Altus. Others used profane language too.

[49] Did the Plaintiff mislead Altus about a conflict of interest? No.

[50] Did the Plaintiff lie about employing Lisa Robbins improperly? No.

- [51] Should the Defendant have provided a progressive disciplinary process by reviewing conduct with Alan Gordon and providing directions for overcoming conduct that Altus did not accept? Yes.
- [52] Did the Defendant act in a manner that rejected the contract so that damages for wrongful dismissal should be considered beyond the terms of the contract? No.
- [53] If wrongful dismissal is established, is the Plaintiff entitled to punitive damages? Yes.
- [54] Does Altus have a foundation for a counterclaim for damages flowing from improper actions and behaviour of Alan Gordon? No.
- [55] If Altus has a valid claim against Alan Gordon, what is the quantum of damages? None established.
- [56] Judgment shall issue to the Plaintiff for \$168,845 as shown in paragraph 37 above as well as punitive damages of \$100,000 as shown in paragraph 42 above.
- [57] The counterclaim of Altus against Alan Gordon is dismissed.
- [58] The parties may address costs in writing by the Plaintiff submitting his submissions by September 21, 2015, the Defendant by October 1, 2015 and the Plaintiff in reply by October 12, 2015. The written submissions shall be filed through the court office in Newmarket, Ontario.

Justice B. Glass

Released: September 11, 2015

