COURT OF APPEAL FOR ONTARIO

CITATION: Krishnamoorthy v. Olympus Canada Inc., 2017 ONCA 873
DATE: 20171116
DOCKET: C62948

Strathy C.J.O., Cronk and Pepall JJ.A.

BETWEEN

Nadesan Krishnamoorthy

Plaintiff (Respondent)

and

Olympus Canada Inc.

Defendant (Appellant)

George Avraam and Jeremy Hann, for the appellant

Matthew Fisher and Ian Hurley, for the respondent

Heard: May 11, 2017

On appeal from the judgment of Justice Grant R. Dow of the Superior Court of Justice, dated September 28, 2016.

Pepall J.A.:

[1] The appellant employer, Olympus Canada Inc. ("Olympus Canada"), appeals from a summary judgment award of damages in favour of its former employee, the respondent Nadesan Krishnamoorthy, in the amount of $310,040.88. This sum represents 19 months' pay in lieu of notice, plus prejudgment interest and costs.

[2] The issue on appeal is a narrow one: did the motion judge err in concluding that the termination clause in the parties' employment agreement was unenforceable due to a lack of consideration? Mr. Krishnamoorthy did not cross-appeal but raises other issues that the motion judge declined to address given his finding that Olympus Canada had failed to provide Mr. Krishnamoorthy with valid consideration. Mr. Krishnamoorthy also asks this court to admit fresh evidence.

[3] For the following reasons, I would allow the appeal, dismiss the motion for admission of fresh evidence, and remit the action to trial.

(1) Background

[4] The relevant facts may be briefly summarized.

[5] Olympus America Inc. ("Olympus America") carries on an optical sciences business in the United States. Carsen Group Inc. ("Carsen"), an unrelated company, carried on business as an exclusive distributor for Olympus America's products in Canada.

[6] In May 2000, Mr. Krishnamoorthy commenced employment with Carsen as a senior financial analyst. By 2005, he had been promoted to Director of Finance.

[7] In 2005, Olympus America decided to terminate its distribution agreement with Carsen. Olympus America announced that a new, related company,

Olympus Canada, would be established to distribute its products in Canada. Olympus America terminated its distribution agreement with Carsen effective July 31, 2006. Olympus Canada purchased some, but not all, of Carsen's assets.

[8] Carsen advised its employees, including Mr. Krishnamoorthy, that Olympus Canada had indicated their intent to offer employment to certain employees. It also advised them that Carsen would provide "an appropriate financial package" for those employees not offered employment with Olympus Canada.

[9] Carsen had 125 employees. Olympus Canada offered employment to 122 of them, one of whom was Mr. Krishnamoorthy.

[10] In November 2005, Olympus Canada provided an offer of employment to Mr. Krishnamoorthy under the terms of a written employment agreement. The terms of the agreement were substantially similar to those he had with Carsen with certain exceptions. First, a termination clause limited the compensation Mr. Krishnamoorthy would receive in the event of termination without cause to the greater of (1) notice or pay in lieu of notice and severance pay under the *Employment Standards Act, 2000*, S.O. 2000, c. 41 (the "ESA"), or (2) four weeks' pay per year of service with Olympus Canada or Carsen, up to a maximum of 10 months, if Mr. Krishnamoorthy signed a release.

[11] In addition, the agreement provided that Mr. Krishnamoorthy would be treated as a new employee and, except as otherwise provided in the agreement

or as required by applicable legislation, his service with any other employer would not be recognized.

[12] The agreement also included a clause that released Olympus Canada and its affiliates from any claims that Mr. Krishnamoorthy might have in respect of his employment with and/or termination from Carsen or any other employer that had employed him.

[13] Mr. Krishnamoorthy signed the employment agreement on December 16, 2005. He did not receive a signing bonus or any other additional compensation for entering into an employment agreement with Olympus Canada. Nor did he receive any pay in lieu of notice or severance pay from Carsen. His employment was to start on August 1, 2006.

[14] On April 10, 2006, Carsen wrote to Mr. Krishnamoorthy confirming that his employment with Carsen would terminate on July 31, 2006 and that Mr. Krishnamoorthy had accepted an offer of employment with Olympus Canada. Mr. Krishnamoorthy subsequently commenced his employment with Olympus Canada.

[15] On May 19, 2015, Olympus Canada dismissed Mr. Krishnamoorthy without cause. Olympus Canada offered him compensation in accordance with the 2005 employment agreement. Mr. Krishnamoorthy refused the offer, commenced an

action against Olympus Canada for damages for wrongful dismissal, and subsequently moved for summary judgment.

[16] Before the motion judge, Mr. Krishnamoorthy took the position that, pursuant to s. 9(1) of the ESA, his employment with Carsen and Olympus Canada was continuous. He argued that the termination clause in his 2005 employment agreement was unenforceable because Olympus Canada had failed to provide him with consideration for amending his employment agreement to include that clause.

[17] In response, Olympus Canada argued that its offer of employment constituted sufficient consideration and, as such, the termination clause was binding.

[18] The motion judge accepted Mr. Krishnamoorthy's position. He implicitly concluded that Olympus Canada's offer of employment did not amount to sufficient consideration and so the termination clause was invalid. He awarded Mr. Krishnamoorthy damages equivalent to 19 months' pay in lieu of notice.

[19] In reaching that conclusion, the motion judge found that, upon the sale, Mr. Krishnamoorthy's remuneration and duties, and the substance and nature of the business, all remained the same. Insofar as s. 9(1) of the ESA was concerned, he noted that Olympus Canada "did recognize this issue in the employment agreement but limited it to (10 years or 10 months' notice)."

(2) Analysis

[20] Olympus Canada submits that the motion judge's decision ignores that Olympus Canada had no pre-existing employment agreement with Mr. Krishnamoorthy and had no legal obligation to make him an offer of employment. In its submission, the ESA does not deem employment to be continuous for all purposes. In these circumstances, Olympus Canada's offer of employment amounted to consideration for the termination clause.

[21] Mr. Krishnamoorthy submits that there is no reason to interfere with the motion judge's decision that there was a lack of consideration such that the termination clause is invalid.

[22] I agree that the motion judge erred in concluding that there was no consideration for the termination clause and that therefore the clause was invalid.

[23] In *Addison v. M. Loeb Ltd.* (1986), 53 O.R. (2d) 602 (Ont. C.A.), Dubin J.A. (as he then was) explained the position of an employee at common law when there is a sale of a business, at pp. 603-604:

> At common law, since a contract of personal services cannot be assigned to a new employer without the consent of the parties, the sale of a business, if it results in the change of the legal identity of the employer, constitutes a constructive termination of the employment.
>
> …

> If the employee is offered and accepts employment by his new employer, a new contract of employment is entered into.

[24] Applying those principles in this case, Mr. Krishnamoorthy's employment with Carsen was terminated and he entered into a new contract with Olympus Canada upon the sale of the business. At issue is whether there was consideration for that new contract.

[25] It is well established that a promise to perform an existing contract is not consideration: *Holland v. Hostopia.com Inc*., 2015 ONCA 762, 392 D.L.R. (4th) 650, at para. 52. In other words, new or additional consideration is required to support a variation of an existing contract: *Hobbs v. TDI Canada Ltd.* (2004), 246 D.L.R. (4th) 43 (Ont. C.A.); see also *Francis v. Canadian Imperial Bank of Commerce* (1994), 21 O.R. (3d) 75 (Ont. C.A.) In this case, the motion judge, relying on *Hobbs* and *Francis,* found that Olympus Canada's offer of employment did not constitute consideration and further concluded that *Hobbs* was indistinguishable.

[26] However, that is not this case. *Hobbs* and *Francis* both involved employment with a single employer and not two different employers as is the case here. The motion judge erred in disregarding the new contract of employment with Olympus Canada, who was a new employer upon its purchase of some of Carsen's assets. That Mr. Krishnamoorthy's day-to-day job did not materially change after the sale does not change that fact.

[27] Although s. 9 of the ESA deems there to be continuity of employment if certain requirements are met, it does not deem there to be continuity for all purposes. Section 9(1) of the ESA states:

> If an employer sells a business or a part of a business and the purchaser employs an employee of the seller, the employment of the employee shall be deemed not to have been terminated or severed for the purposes of this Act and his or her employment with the seller shall be deemed to have been employment with the purchaser for the purpose of any subsequent calculation of the employee's length or period of employment.

[28] In *Addison*, this court interpreted the substantially similar language of s. 13(2) of the predecessor Act:

> Where an employer sells his business to a purchaser who employs an employee of the employer, the employment of the employee shall not be terminated by the sale, and the period of employment of the employee with the employer shall be deemed to have been employment with the purchaser for the purposes of Parts VII, VIII, XI and XII.

[29] Dubin J.A. acknowledged in *Addison*, at p. 604, that this predecessor provision "was enacted to avoid, to some extent, … unfairness" to employees when the employer sells the business. However, he rejected the argument that s. 13(2) deemed there to be continuity of employment for all purposes.

[30] Similarly in this case, if the purpose of s. 9(1) of the ESA had been to deem there to be continuity of employment for all purposes, there would have been no reason to include the words "for the purposes of this Act" in the section. These

words make clear that s. 9(1) cannot be used to claim rights or entitlements on which the ESA is silent.

[31] Section 9(1) of the ESA does not deem the employment contract between an employee and an employer to bind a subsequent purchaser of some of that employer's assets as was the case here. Nor does s. 9(1) of the ESA require the purchaser of a business' assets to offer employment to employees of that business on the same terms as their original contracts as claimed by Mr. Krishnamoorthy. He cannot rely on s. 9(1) to achieve either of these effects. He can only rely on s. 9(1) to claim those entitlements that are set out in the ESA itself.

[32] This interpretation is consistent with this court's comments in *Abbott v. Bombardier Inc.*, 2007 ONCA 233, 85 O.R. (3d) 21, at para. 18:

> Viewed in the context of the entire statute, in our view, the purpose of s. 9 of the ESA is to protect minimum statutory entitlements that are related to length of employment where the purchaser of a business, or part of a business, continues to employ the employees of the vendor following the sale. Such entitlements include: vacation entitlements, entitlements to pregnancy and parental leaves, as well as entitlement to notice of termination or pay in lieu of notice and severance pay. [Emphasis added.]

[33] Thus, on my reading, Mr. Krishnamoorthy cannot rely on s. 9(1) of the ESA to support his argument that Olympus Canada's offer of employment did not amount to consideration.

[34] In short, Olympus Canada's offer of employment amounted to consideration for the termination clause. The motion judge erred in concluding otherwise.

[35] There are two further issues to be addressed.

[36] The first is Mr. Krishnamoorthy's motion to introduce fresh evidence. He seeks to introduce fresh evidence in the form of the record of employment issued by Olympus Canada upon Mr. Krishnamoorthy's termination of employment in 2015, which lists his start date of employment with Olympus Canada as being May 30, 2000.

[37] The test for the admission of fresh evidence on appeal, described in *Sengmueller v. Sengmueller* (1994), 17 O.R. (3d) 208 (Ont. C.A.), at pp. 210-11, encompasses three components: is the evidence credible; could the evidence not have been obtained, by the exercise of reasonable diligence, prior to trial; and will the evidence, if admitted, likely be conclusive of an issue in the appeal?

[38] The test for the admission of fresh evidence is not met. The record of employment was available to Mr. Krishnamoorthy, through the reasonable exercise of due diligence, before the summary judgment motion was heard. Furthermore, the record of employment would not have been conclusive of the issue of consideration engaged by this appeal.

[39] The second issue is whether it is appropriate to address the alternative arguments Mr. Krishnamoorthy made before the motion judge and raises again

on appeal. Although he did not bring a cross-appeal, he argued in his factum and in oral submissions that, if Olympus Canada were successful on the consideration point, this court could consider whether the termination clause is invalid because it violates ESA requirements and whether the "substratum of the contract was lost" over the years.

[40] As this court has stated on more than one occasion, termination clauses should be interpreted in a way that encourages employers to draft agreements that comply with the ESA: see, for e.g., *Wood v. Fred Deeley Imports Ltd.*, 2017 ONCA 158, 134 O.R. (3d) 481, at para. 28; *North v. Metaswitch Corp.*, 2017 ONCA 790, at para. 19. In other words, courts will scrutinize termination clauses closely for compliance with the ESA.

[41] However, this court does not have the benefit of any factual findings beyond those relating to the narrow issue addressed by the motion judge. I would therefore order that the action proceed to a trial of the remaining issues in dispute between the parties.

(3) Disposition

[42] For these reasons, I would allow the appeal, set aside the summary judgment, dismiss the motion to introduce fresh evidence, and order that the action proceed to trial. As agreed between the parties, Olympus Canada, as the successful party, is entitled to costs of the appeal in the amount of $15,000

inclusive of disbursements and applicable taxes. The costs of the summary judgment motion are reserved to the trial judge.

Released:

"GS" "S.E. Pepall J.A."
"NOV 16 2017" "I agree G.R. Strathy C.J.O."
"I agree E.A. Cronk J.A."