COURT OF APPEAL FOR ONTARIO

CITATION: Ali v. O-Two Medical Technologies Inc., 2013 ONCA 733
DATE: 20131205
DOCKET: C56718

Gillese, Juriansz and Strathy JJ.A.

BETWEEN

Samir Ali

Plaintiff (Appellant)

and

O-Two Medical Technologies Inc.

Defendant (Respondent)

Tim Gleason and Megan Reid, for the appellant

David A.S. Mills and Jennifer A.N. Corak, for the respondent

Heard: September 26, 2013

On appeal from the order of Justice Meredith Donohue of the Superior Court of Justice, dated February 7, 2013, with reasons reported at 2013 ONSC 880.

Juriansz J.A.:

A. OVERVIEW

[1] This appeal raises the question of when time begins to run under the *Limitations Act, 2002*, S.O. 2002, c. 24, Schedule B ("*Limitations Act*"), for an employee's claim for unpaid commissions in a situation in which the employer has unilaterally changed the basis for the calculation of commissions earned.

[2] The appellant, Samir Ali ("Ali"), brought a claim against the respondent, O-Two Medical Technologies Inc. ("O-Two"), to enforce a commission agreement in connection with a sale he arranged to Iraq's Ministry of Health. O-Two brought a motion for summary judgment on the ground that the *Limitations Act* barred Ali's claim. O-Two's motion was granted, and Ali appeals.

[3] For the reasons that follow, I would allow the appeal.

B. FACTS

[4] Ali worked as a mechanical engineer for O-Two from March 22, 2002 to September 10, 2007, when his notice of resignation given August 29, 2007 became effective. He also had a side agreement with O-Two to sell its products in Iraq on a commission basis. According to his statement of claim, Ali negotiated a large sale to the Iraqi Ministry of Health on December 5, 2006. Once the buyer accepted delivery and paid for the products, he would be entitled to the commission calculated as set out in the agreement.

[5] Ali claims that one week after he negotiated the Iraqi sale, O-Two purported to unilaterally change the commission agreement and informed him on December 12, 2006 that it would pay him a lower rate of commission.

[6] The parties met and exchanged letters, in which Ali claimed he was entitled to commission at the higher rate and O-Two relied on the lower rate set out in its December 12 formula. Ali retained counsel who wrote to O-Two on

August 28, 2007 demanding that commission be paid at the higher rate. O-Two replied by letter, dated September 7, 2007, reiterating its previous position.

[7] O-Two and the Iraqi Ministry of Health went on to complete their transaction. The Iraqi Ministry provided its first payment to O-Two under the contract in October 2007 and Ali became entitled to receive his commission in November 2007. On November 23, 2007, O-Two tendered payment of Ali's commission at the lower rate.

[8] Ali issued a statement of claim for breach of contract and *quantum meruit* on September 16, 2009. O-Two took the position that Ali's claim, if he had one, arose when it changed the commission structure on December 12, 2006 and that he had not filed his action until more than two years later. O-Two applied for and was granted summary judgment on the basis that Ali's alleged claims arose outside the two-year limitation period under s. 4 of the *Limitations Act*.

C. DECISION BELOW

[9] After reviewing the factual background, the motion judge stated that the outcome of the motion turned on when the damage to Ali occurred. She cited *Caglar v. Moore*, [2005] O.J. No. 4606 (S.C.), at para. 24, for the proposition that a breach of contract action "commences when the plaintiff has sufficient facts to recognize that the contract has been breached." She further noted that Ali did not need to know the precise extent of the alleged losses; it was sufficient that there

be some damage: *Hamilton (City) v. Metcalfe & Mansfield Capital Corp.*, 2012 ONCA 156, 347 D.L.R. (4th) 657, at para. 61.

[10] The motion judge concluded that there was no doubt damage had occurred when O-Two gave Ali the revised commission formula on December 12, 2006, and, at the latest, the damage was clear when it delivered two letters confirming its position on August 1, 2007 and September 7, 2007.

[11] She rejected Ali's argument that the doctrine of anticipatory breach applied because "[Ali] was handed the commission formula by [O-Two] on December 12, 2006 and [O-Two] honoured it." Similarly, the facts of the *quantum meruit* claim were clear to Ali by at least September 7, 2007, more than two years before he filed his claim.

[12] Accordingly, the motion judge held that Ali failed to initiate his claim within the two-year period under s. 4 of the *Limitations Act*, and dismissed the claim.

D. ANALYSIS

[13] Section 4 of the *Limitations Act* provides that "a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered." Section 5(1)(a) sets out factors for determining when a party "discovers" a claim:

> (1) A claim is discovered on the earlier of,
>
> (a) the day on which the person with the claim first knew,

> (i) that the injury, loss or damage had occurred,
>
> (ii) that the injury, loss or damage was caused by or contributed to by an act or omission,
>
> (iii) that the act or omission was that of the person against whom the claim is made, and
>
> (iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it.

[14] Ali accepts the motion judge's conclusion that the limitation clock began to run at the time the contract was breached. However, he submits that the motion judge erred in concluding that a breach of contract occurred before the commissions were due in November 2007. Instead, he argues, O-Two gave notice of its intention to breach the commission contract in the future when it changed the commission rate, which was an anticipatory breach. As the innocent party to an anticipatory breach, Ali refused to accept the repudiation, affirmed the contract and continued to press for performance: *Brown v. Belleville (City)*, 2013 ONCA 148, 114 O.R. (3d) 561, at paras. 42-45. By choosing this option, he submits that the breach did not occur until O-Two tendered a deficient payment on November 23, 2007.

[15] In response, O-Two raised two principal arguments for why Ali suffered "damage" within the meaning of s. 5(1)(a)(i) more than two years prior to initiating his claim.

[16] First, O-Two relies on this court's endorsement in *Wadsworth v. RBC Dominion Securities Inc.*, 2007 ONCA 340, [2007] O.J. No. 1739, for the proposition that Ali had to sue immediately upon the change in terms of the contract.

[17] *Wadsworth* does not assist O-Two. *Wadsworth*, which was decided under the former *Limitations Act*, R.S.O. 1990, c. L.15, arose out of similar circumstances. Wadsworth's employer had unilaterally changed his compensation structure governing the calculation of trailer fees. The motion judge granted summary judgment to his employer because he had brought a claim more than six years after the change in compensation structure. This court, as O-Two points out, dismissed the major part of his appeal in a short endorsement. However, O-Two fails to recognize that the court allowed a part of Wadsworth's appeal.

[18] The portion of Wadsworth's claim that this court allowed to proceed related to the "trailer fees" that were paid to him within the six-year limitation period that applied under the former legislation. Clearly, the court reasoned in *Wadsworth* that time did not begin to run until the employer actually paid Wadsworth the trailer fees at the lower rate.

[19] As I see it, this court's decision in *Wadsworth* supports Ali's position that he did not suffer damage until payment of his commissions came due and O-Two tendered payment at the lower rate.

[20] Second, O-Two submits that this court cannot segregate the commission agreement from Ali's employment relationship with O-Two. As a consequence, it argues, a unilateral change in compensation itself would constitute a breach of the employment relationship, and the limitation clock would begin to run at the time of the change.

[21] In my view, this argument relies upon a mischaracterization of Ali's claim. Ali's statement of claim does not claim constructive dismissal. It challenges the commission agreement in particular rather than his employment relationship with O-Two in general. Ali is seeking damages "for commissions due and owing" pursuant to his commission agreement with respect to sales to Iraq. The time at which Ali suffered damage was therefore when O-Two breached the commission agreement. I agree with Ali that the doctrine of anticipatory breach is relevant to the timing of the breach.

[22] An anticipatory breach of contract occurs when one party to the contract, "by express language or conduct, or as a matter of implication from what he has said or done, repudiates his contractual obligations before they fall due": G.H.L.

Fridman, *The Law of Contract in Canada*, 6th ed. (Toronto: Carswell, 2011), at p. 585.

[23] O-Two's change in Ali's commission structure on December 12, 2006 was a repudiation of its contractual obligations before it became obligated to pay his commissions in November 2007. By purporting to apply a new agreement, O-Two could hardly have made its intention to repudiate the prior commission agreement clearer.

[24] Once the counterparty shows its intention not to be bound by the contract, the innocent party has a choice. The innocent party may accept the breach and elect to sue immediately for damages—in which case, the innocent party must "clearly and unequivocally" accept the repudiation to terminate the contract: *Brown*, at para. 45. Alternatively, the innocent party may choose to treat the contract as subsisting, "continue to press for performance and bring the action only when the promised performance fails to materialize"; by choosing this option, however, the innocent party is also bound to accept performance if the repudiating party decides to carry out its obligations: S.M. Waddams, *The Law of Contracts*, 6th ed. (Toronto: Canada Law Book, 2010), at para. 621.

[25] This court recently applied this principle in *Brown*, where Cronk J.A. confirmed, at para. 42, that an anticipatory breach "does not, in itself, terminate or discharge a contract." Rather, Cronk J.A. noted that the innocent party may

elect to treat the contract as continuing, as the Supreme Court stated in *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423, at para. 40:

> Contrary to rescission, which allows the rescinding party to treat the contract as if it were void *ab initio*, the effect of a repudiation depends on the election made by the non-repudiating party. If that party treats the contract as still being in full force and effect, the contract "remains in being for the future on both sides. Each (party) has a right to sue for damages for *past or future breaches*" (emphasis in original): *Cheshire, Fifoot and Furmston's Law of Contract* (12th ed. 1991), by M. P. Furmston, at p. 541.

See also *Macnaughton v. Stone*, [1949] O.R. 853 (H.C.), at pp. 858-59.

[26] In this case, Ali, although he could have elected to do so, did not accept O-Two's repudiation of the contract and immediately sue for damages. Rather, he continued to press for payment in full. Because he did not accept the repudiation, he did not know he would suffer "damage" within the meaning of s. 5(1)(a)(i) until the payment of his commissions fell due on November 23, 2007 and O-Two did not make full payment.

[27] In conclusion, I would reject both of O-Two's arguments for why Ali suffered "damage" within the meaning of s. 5(1)(a)(i) more than two years prior to initiating his claim. Ali did not "discover" his claim for purposes of s. 5(1)(a) until November 23, 2007, because that is the day on which he first knew damage had occurred. Accordingly, the two-year limitation period under s. 4 of the *Limitations*

Act for Ali's claim would not expire until November 23, 2009. His claim issued on September 16, 2009 was in time.

E. DISPOSITION

[28] For these reasons, I would allow the appeal, set aside the motion judge's order and dismiss the motion for summary judgment.

[29] As agreed, Ali is entitled to the costs of this proceeding fixed at $12,000 inclusive of disbursements and taxes, and costs for the proceeding below of $5,763.

Released: December 5, 2013 ("E.E.G.")

"R.G. Juriansz J.A."
"I agree E.E. Gillese J.A."
"I agree G.R. Strathy J.A."