CITATION: Titus v. William F. Cooke Enterprises Inc., 2007 ONCA 573
DATE: 20070822
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# COURT OF APPEAL FOR ONTARIO

DOHERTY, MACPHERSON and CRONK JJ.A.

BETWEEN:

DOUGLAS L. TITUS

(Plaintiff/Respondent)

and

WILLIAM F. COOKE ENTERPRISES INC., WM. F. COOKE HOLDINGS INC., WFC HOLDINGS INC., WILLIAM F. COOKE TELEVISION PRODUCTIONS INC., DESIGNERS PATIO INC., WILLIAM F. COOKE TELEVISION PROGRAMS and WILLIAM F. COOKE

(Defendants/Appellants)

Brian P. Bellmore for the appellants

R. Brent Raby for the respondent

Heard: June 13, 2007

On appeal from the judgment of Justice Victor Paisley of the Superior Court of Justice dated February 22, 2006.

MACPHERSON J.A.:

## A. INTRODUCTION

[1] The respondent, Douglas Titus, was employed as in-house corporate counsel by the appellant William Cooke and his group of companies (collectively, the "appellants"). The respondent worked for the appellants for eighteen months, from March 28, 2000 to September 28, 2001.

[2] On September 28, 2001, the appellants fired the respondent. They offered the respondent a settlement package, provided he signed a release. The respondent accepted the offer and signed the release on the spot.

[3] The respondent sought and obtained new, albeit less remunerative, employment within two weeks. He received the settlement funds within a month. Shortly thereafter, he sued the appellants, claiming that the settlement and release were unconscionable.

[4] Following a short trial, the trial judge, Paisley J., found in favour of the respondent. The appellants appeal, but on only one issue – did the trial judge err by setting aside the release that the respondent had signed?

## B. FACTS

### (1) The parties and the events

[5] The respondent graduated from Queen's Law School in 1975 and was called to the Ontario Bar in 1977.

[6] From 1978 to 1987, the respondent served as an in-house counsel for Proctor & Gamble. His employment was terminated in 1987 and he accepted a severance package from the company.

[7] In May 1988, the respondent went to work for the appellants, a group of Ontario companies controlled by William Cooke that carry on the business of distributing American television programs to television networks and independent television stations in Canada. The respondent was employed by the appellants to replace their in-house corporate counsel who was on leave. When this counsel returned, the respondent's employment was terminated. He received a severance package, which he accepted, in March 1989.

[8] From May 1989 to April 1991, the respondent was employed as an in-house counsel at Boeing de Havilland. His employment with that company was terminated in 1991 and he accepted a severance package.

[9] From 1991 to 1994, the respondent served a second stint as in-house counsel with the appellants. When his employment was terminated in 1994, he accepted a severance

package that included permission to use an office in the appellants' premises while he searched for new employment.

[10] From 1994 to 1997, the respondent was largely unemployed except for a six-month period when he worked for the Practice Advisory Service of the Law Society of Upper Canada.

[11] From 1997 to 1998, the respondent was employed as an in-house counsel for Fantasia, an adult entertainment company, at a salary of $65,000 per year. He resigned his position because of concerns about his employer's business activities.

[12] In 1999, the respondent made a major career change. He abandoned his search for a corporate counsel position and became a full-time duty counsel with Legal Aid Ontario. His salary was $45,000 per year.

[13] In early 2000, the appellants approached the respondent again regarding the possibility of employment as in-house counsel. The parties engaged in sporadic negotiations for three months and ultimately reached an agreement. The respondent would work as in-house counsel at a salary of $115,000 per year. He would also receive a car allowance of $450 per month, payment of his law society fees and practice insurance, and parking and medical benefits.

[14] The respondent commenced employment on March 28, 2000. He performed effectively. However, eighteen months later, on Friday, September 28, 2001, William Cooke called the respondent into his office and told him that he was being terminated due to business downsizing.

[15] David Fraser, the appellants' chief financial officer, joined the meeting and presented the respondent with a written termination letter and severance offer, signed by Mr. Cooke, the crucial terms of which were:

> We write to inform you that as a result of a change in our business requirements and our long-term personnel plans, it is necessary to make certain personnel decisions.
>
> Your employment with the Company will be terminated effective today.
>
> In an effort to assist you herein, the Company is prepared to provide you with the following separation package:
>
> 1. The Company will forthwith pay you 2 weeks of base salary (less applicable deductions) as termination

> pay in accordance with Section 57(1)(a) of the *Employment Standards Act*, S.O. 1990, as amended (the "Act");
>
> 2. The Company is prepared to pay you a gratuitous additional lump sum payment equal to 2 ½ months of your annual salary (less applicable deductions). These payments exceed your statutory entitlement pursuant to the Act. You are no longer required to report to work.
>
> 3. Your benefits, will be maintained until the earlier of the 31st day of October, 2001 or the date on which you obtain alternate employment.
>
> . . .
>
> 8. The Company is prepared to provide you with a letter of reference.
>
> 9. In exchange for all of the above, we require you to execute the attached Release, confirming your acceptance of this arrangement on or before Friday October 5, 2001.
>
> 10. If you choose not to accept this separation package and sign the attached Release, the Company will pay you your 2 weeks of termination pay under the Act.

[16] The release referred to in paragraphs 9 and 10 provided that the respondent released and forever discharged the appellants from all actions, causes of action, suits and complaints arising from his "hiring by, employment with and cessation of employment with the Employer." The release concluded with these words, in highlighted capital letters directly above the space for the respondent's signature:

> I HAVE READ THIS DOCUMENT AND I UNDERSTAND THAT IT CONTAINS A FULL AND FINAL RELEASE OF ALL CLAIMS THAT I HAVE OR MAY HAVE AGAINST THE RELEASEES. I AM SIGNING THIS DOCUMENT VOLUNTARILY.

[17] The respondent read the documents at the meeting. Mr. Cooke and Mr. Fraser suggested that he take them home and consider them over the weekend. The respondent declined. He signed the release and requested immediate payment of the settlement

funds. The appellants prepared a cheque for $16,087.65, being the amount of the severance funds ($28,750), less statutory deductions for withholding taxes. The respondent left the premises with the cheque.

[18] Due to a drafting error, the cheque could not be cashed. The respondent contacted Mr. Fraser the following week to advise of the problem with the cheque and requested that the appellants pay him the two weeks statutory severance and pay the balance of the settlement funds into his Registered Retirement Savings Plan ("RRSP") without deduction for withholding taxes. The appellants agreed to do this. On October 31, 2001, the respondent delivered to the appellants the documents they required to directly deposit the funds to his RRSP and, on November 1, 2001, the appellants issued a cheque to the respondent for $4,423.08 (for the statutory two-week notice period) and deposited $24,326.92 (the balance of the remaining two and one-half months agreed notice period) directly into the respondent's RRSP account.

[19] On October 12, 2001, two weeks after his termination, the respondent obtained employment as duty counsel with Legal Aid Ontario. His income from October 12 to December 31, 2001 was $12, 312.21.

**(2) The litigation**

[20] On April 9, 2002, the respondent commenced an action against the appellants seeking damages for wrongful dismissal. Central to the success of the action was the respondent's request that the release he had signed be set aside as unconscionable, or as having been procured by undue influence or duress.

[21] For reasons unknown, the trial did not take place for almost four years. The trial commenced on February 20, 2006. The trial judge heard testimony from Mr. Titus, Mr. Cooke and Mr. Fraser on February 20 and 21. Counsel made their closing submissions on February 22 and the trial judge rendered an oral judgment the same day.

[22] The essential terms of the employment contract were not in dispute – base salary of $115,000, car allowance of $450 per month, payment by the appellants of law society fees and practice insurance, and parking and medical benefits.

[23] On two disputed issues – whether the employment contract was for an indefinite term and whether the base salary was subject to a $5,000 increase after one year of service – the trial judge found in favour of the respondent. On a third disputed issue, the trial judge held that the appropriate period of common law notice for the termination of the respondent was ten months. The appellants do not appeal these dispositions.

[24] However, in order to reach the issue of common law damages for wrongful dismissal, the trial judge first had to consider whether the release was binding on the

respondent. If it was binding, then the respondent could have no cause of action against the appellants because the release specifically precluded this.

[25] The trial judge held that the release did not bind the respondent. He concluded: "In my view, it would be wrong for me to apply the release as written, to deny the employee the compensation that he was entitled to by the Common Law." The appellants appeal this component of the judgment.

## C. ISSUE

[26] The only issue on the appeal is whether the trial judge erred in concluding that the release signed by the respondent should be set aside.

## D. ANALYSIS

[27] In his Statement of Claim, the respondent pleaded unconscionability, undue influence and duress. In the short trial, the respondent advanced only a claim based on unconscionability.

[28] At the start of his oral reasons, the trial judge defined the issues in this fashion:

> The plaintiff, Douglas Titus, is a member of the Bar of Ontario and was employed by the defendant when he was terminated without cause. The plaintiff signed a release on termination. The principal issues which I have to decide are: What was the agreement that the plaintiff and defendants entered into. Was it for a limited time period, or was it an indefinite contract of employment. *Was the release signed and accepted, signed in circumstances that are unconscionable or unfair, so as to render the release unenforceable,* and, if so, the proper notice or salary in lieu of notice in the event that the contract was for an indefinite term.
>
> (Emphasis added.)

[29] The trial judge then provided a comprehensive and careful review of the facts. Next, he analyzed the first issue and concluded that the employment contract was for an indefinite term. The appellants do not challenge this conclusion on this appeal.

[30] At this point in his oral reasons (represented by twenty-three pages of typed transcript), the trial judge turned to the second issue, the release issue: "What to make of the release."

[31] Unfortunately, in his consideration of this issue, the trial judge did not apply the law of unconscionability; indeed, he never referred to the concept. Instead, he anchored his analysis of the release issue in the decision of the Supreme Court of Canada in

*Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701. Applying *Wallace* to the circumstances relating to the release, the trial judge concluded:

> This is a breach of good faith as the law, which I have reviewed, would define it. This was an exercise of power in the circumstances where the employer, in a relatively secure position, was aware that the employee was in a very insecure position. And that was unfair and a breach of good faith.

[32] The appellants contend that the trial judge's finding of "breach of good faith" was misconceived (because it was unresponsive to the pleaded and argued central issue – unconscionability) and, in any event, was grounded in a misreading of *Wallace*. I agree with these submissions.

[33] In *Wallace*, the court held that there is no actionable tort of breach of duty of good faith and fair dealing in the employment law context. However, bad faith conduct *in the manner of dismissal* may be compensated for by an addition to the applicable common law notice period awarded to the employee. As explained by Iacobucci J. at para. 88:

> The appellant urged this Court to recognize the ability of a dismissed employee to sue in contract or alternatively in tort for "bad faith discharge". Although I have rejected both as avenues for recovery, by no means do I condone the behaviour of employers who subject employees to callous and insensitive treatment in their dismissal, showing no regard for their welfare. Rather, I believe that such bad faith conduct in the manner of dismissal is another factor that is properly compensated for by an addition to the notice period.

See also: *Cain v. Clarica Life Insurance Co.* (2005), 263 D.L.R. (4th) 368 at paras. 74-76 (Alta. C.A.).

[34] With respect, the trial judge failed to recognize the distinction drawn in *Wallace* between, on the one hand, a substantive tort of bad faith discharge (rejected) and, on the other hand, enhanced damages for bad faith conduct by the employer in the manner of discharge (accepted).

[35] I observe that the respondent did not attempt, either in his factum or in oral argument, to uphold the release component of the trial judgment on the basis of the trial judge's 'good faith' analysis. Rather, the respondent's position is that on the basis of the record before the trial judge (now before this court) the release should have been set aside as unconscionable. In oral argument before this court, this is where the argument was joined. I turn, therefore, to this issue.

[36] A party relying on the doctrine of unconscionability to set aside a transaction faces a high hurdle. A transaction may, in the eyes of one party, turn out to be foolhardy, burdensome, undesirable or improvident; however, this is not enough to cast the mantle of unconscionability over the shoulders of the other party: see Fridman, *The Law of Contract in Canada* (Fifth Edition), p. 320.

[37] In *Black v. Wilcox* (1976), 12 O.R. (2d) 759 at 762 (C.A.), Evans J.A. discussed the foundations of unconscionability in a similar fashion:

> In order to set aside the transaction between the parties, the Court must find that the inadequacy of the consideration is so gross or that the relative positions of the parties are so out of balance in the sense of gross inequality of bargaining power or that the age or disability of one of the controlling parties places him at such a decided disadvantage that equity must intervene to protect the party of whom undue advantage has been taken.

[38] In a recent case dealing with the doctrine of unconscionability in a wrongful dismissal context, *Cain v. Clarica Life Insurance Co.*, *supra*, Côté J.A. reviewed the leading cases and academic commentary and concluded, at para. 32:

> Those authorities discuss four elements which appear to be necessary for unconscionability…
>
> 1. a grossly unfair and improvident transaction; and
>
> 2. victim's lack of independent legal advice or other suitable advice; and
>
> 3. overwhelming imbalance in bargaining power caused by victim's ignorance of business, illiteracy, ignorance of the language of the bargain, blindness, deafness, illness, senility, or similar disability; and
>
> 4. other party's knowingly taking advantage of this vulnerability.

[39] In my view, the respondent could not bring himself within any of these four elements.

**(1) Grossly unfair transaction**

[40] The appellants' offer of three month's salary in lieu of notice was not grossly unfair. The appellants sought legal advice about the contents of their settlement offer. The respondent had worked for the appellants for only eighteen months. It should be noted that he had worked for the appellants on two previous occasions, for ten months and three years respectively. However, when he was terminated on these prior occasions the respondent accepted severance packages. Accordingly, his previous periods of employment can do no more than provide context for fixing an appropriate notice period.

[41] It is true that the trial judge, after considering the factors in *Bardal v. Globe and Mail Ltd.* (1960), 24 D.L.R. (2d) 140 (Ont. H.C.J.), determined that the appropriate notice period was ten months, and that the appellants do not challenge this conclusion. However, the fact that ten months is a reasonable notice period does not mean that the appellants' offer of three months was grossly unfair. If the respondent accepted the offer, he would receive the money immediately, he would have an opportunity to mitigate his damages by seeking new employment (in fact, the respondent obtained a new position within two weeks of his termination) and, importantly, he would avoid the delay, costs and uncertainty of litigation.

[42] The linking of the letter of reference to acceptance of the settlement offer is potentially problematic. There is no legal obligation on an employer to provide a letter of reference. However, a threat to withhold a letter of reference by the employer as part of a negotiation/litigation strategy may, in some situations, provide valuable support for an employee's subsequent claim that a release was unconscionable and should not be enforced.

[43] Whatever may be said about the threat to withhold a letter of reference in some other factual context, it played a very small part in the process that produced this release. Moreover, the respondent did not seek to negotiate on this issue and it appears that he did not request a reference letter as he sought new employment.

[44] Finally, linking the settlement offer to the release was not grossly unfair. The respondent, with long experience in both contract and employment law, described it in his testimony as "look[ing] like a standard release taken out of the text books." In short, it was fair for the appellants, in the context of a reasonable settlement offer, to propose a release. It was then up to the respondent to accept, reject or negotiate any component of the offer, including the release. The respondent accepted the offer.

**(2) Absence of legal advice**

[45] Obviously, this factor is inapplicable in this case. The respondent is a senior lawyer with extensive experience in contract and employment law. In his *curriculum*

*vitae*, the respondent described himself as "Senior Counsel for two multinationals: Boeing Canada Ltd. And Proctor & Gamble Inc." Under the heading *Significant Activities and Accomplishments*, he recorded: "Employment Law: Counsel for senior management in all areas of employment including Wrongful Dismissals…." In short, the respondent did not want or need legal or other advice.

**(3) Overwhelming imbalance in bargaining power**

[46] There is an inherent imbalance in bargaining power between an employer and an employee when the former terminates the employment of the latter. The employer's business will continue, the employer will be there, and the employee will be gone. Thus, as Iacobucci J. said in *Wallace*, *supra*, at para. 95: "The point at which the employment relationship ruptures is the time when the employee is most vulnerable and hence, most in need of protection."

[47] In this case, the respondent asserts that the starting point of vulnerability at the moment of termination was magnified by two important personal circumstances – the recent death of his father (three weeks before termination) and his desperate financial situation (high debt load).

[48] Acknowledging these aspects of general and specific vulnerability, they do not, in my view, rise to the level of creating an overwhelming imbalance in bargaining power in this case.

[49] The generalized vulnerability of all terminated employees is diminished in this case by the fact that the respondent was a senior, knowledgeable lawyer particularly well-versed in contract and employment law, including the law relating to wrongful dismissal. In short, the respondent knew well his position and his options (accept, reject, negotiate).

[50] The death of his father was, of course, a difficult and sad event for the respondent. However, the appellants put no pressure on the respondent and told him to take the time he needed to deal with this unfortunate event. As for the respondent's high debt load, it is not clear from the record how the respondent got in this predicament. After all, for the eighteen months before his termination he was receiving a salary of almost $10,000 per month plus generous benefits and he was living at his parents' home. Additionally, the picture of financial desperation is clouded somewhat by the fact that the respondent chose to place most of the severance money he accepted and received in his RRSP account rather than pay down his debt.

**(4) Employer taking advantage of employee's vulnerability**

[51] The appellants sought legal advice about an appropriate severance package to present to the respondent. The contents of the package were not unreasonable. The

termination was announced, and the severance package presented, in private in a company office and in a polite, professional manner. The appellants strongly advised the respondent to take time to consider their offer. When the respondent rejected their advice and asked for immediate payment, the appellants wrote a cheque the same day. After the cheque could not be cashed due to an inadvertent drafting error and the respondent requested a combination of payments directly to himself and into his RRSP account, the appellants complied with this request one day after receiving the relevant documents.

[52] It is true that the appellants fired the respondent and that the termination was without cause. However, the law permits this and structures both how termination is achieved (manner) and its consequences for the employee (compensation). In this case, the appellants' conduct was professional and lawful throughout.

**Conclusion**

[53] In his factum, the appellants' counsel writes:

> 60. It is submitted that as an experienced lawyer, the Respondent knew of his legal entitlement to severance, the amount which would be reasonable and the options available to him when he was presented with the offer:
>
> (a) accept the Severance Offer and Release and locate immediate re-employment; or
>
> (b) refuse to accept the Severance Offer and Release and negotiate for a higher severance package; and/or
>
> (c) refuse to accept the Severance Offer and Release, and commence litigation in hope of recovering greater severance pay in lieu of notice after mitigation.

[54] I agree with this analysis, although I would add the words "try to" in front of "locate immediate re-employment" in option (a). The respondent, with legal knowledge and experience – in short, with eyes wide open – chose option (a). There was nothing unconscionable in the appellants' conduct towards the respondent and, therefore, the respondent cannot resile from the choice he made, including the money he accepted before commencing litigation.

## E. DISPOSITION

[55] I would allow the appeal, set aside the judgment, and make an order dismissing the action.

[56] The parties are agreed that the question of costs should be addressed after the release of these reasons. The appellants should deliver their costs submissions (not longer than three pages plus supporting documents) within two weeks of the release of these reasons. The respondent should deliver his submissions in a similar format within two weeks of receipt of the appellants' submissions.

RELEASED: August 22, 2007 ("DD")

"J. C. MacPherson J.A."
"I agree Doherty J.A."
"I agree E. A. Cronk J.A."