CITATION: Hilton v. K & S Services Inc., 2009 ONCA 603
DATE: 20090804
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COURT OF APPEAL FOR ONTARIO

Gillese, Lang and LaForme JJ.A.

BETWEEN

Craig MacKenzie Hilton

Plaintiff (Respondent)

and

K & S Services Inc.

Defendant (Appellant)

Myron W. Shulgan, for the appellant

Paul C. Nesseth, for the respondent

Heard and released orally: July 29, 2009

On appeal from the Order of Justice J. Quinn of the Superior Court of Justice dated January 19, 2009.

ENDORSEMENT

[1] Craig Hilton lives in Tecumseh, Ontario. He worked in Windsor, Ontario, for 12 years for the Ford Motor Company as a "Lean Manager".

[2] K & S Services Inc. is a Michigan corporation. It is a supplier specializing in the repair of industrial automation components. Its head office is located in Michigan. It has three plant facilities in Michigan and a number in other states. It also operates a plant in Oakville, Ontario through a wholly owned subsidiary, MCS Facility Support Ltd.

[3] While Mr. Hilton was working for Ford, K & S approached him about working for it. Mr. Hilton told K & S that he had responsibilities as a joint custodial parent of his daughter and that he needed to be in the Windsor-Detroit area on alternating weeks. After being assured that his childcare responsibilities could be accommodated, Mr. Hilton agreed to accept a position and left his job with the Ford Motor Company.

[4] In a brief, one-page letter dated April 6, 2006, Mr. Hilton was offered the position of Vice-President in Charge of Operations. The letter set out his base salary, car allowance, vacation entitlement and bonus. It stated that the offer would serve as a 2 and a half year contract and, thereafter, employment would be the "same" as all other K & S employees. It then stated that K & S is an "at will" employer and, therefore, either party could sever the employment relationship at any time, with or without cause.

[5] On April 11, 2006, Mr. Hilton signed the letter and FAXed it back to K & S. He became a commuter employee, travelling from his home in Tecumseh. He often worked from home or from the K & S office in Oakville. He was treated as a Canadian employee working in Michigan. He was placed on K & S's Canadian payroll and treated similarly

to other Canadian commuter employees who were on the Canadian payroll. His pay cheque was issued from the Bank of Montreal in Toronto. He was paid in Canadian dollars through K & S's subsidiary in Oakville. Canada Pension Plan and Employment Insurance deductions were taken from his pay and remitted to the Canadian government on his behalf. He was given a Canadian blackberry with a Canadian phone number. All health and insurance benefits were from Canadian providers.

[6] After his dismissal, K & S provided Mr. Hilton with a Canadian record of employment. Since dismissal, he has received Canadian employment insurance.

[7] Mr. Hilton brought the within action for damages for constructive dismissal in Ontario. He states that he will lose the rights he has for wrongful dismissal under Ontario law and under the Ontario human rights legislation if he is forced to have his claim heard in an American court.

[8] K & S moved to have the action stayed on the basis that the matters in dispute between the parties have no real and substantial connection to Ontario.

[9] The motion judge dismissed the motion, finding that not only did Ontario have jurisdiction over the action, it was also the more appropriate forum in which to have the action tried.

[10] K & S appeals. The foundation of its appeal is its contention that the employment relationship is governed by Michigan law, a matter which the motion judge failed to

recognize and properly consider. Based on its assertion that Michigan law governs, it argues that the Ontario Superior Court of Justice lacks jurisdiction over the action and, in any event, Michigan is the more convenient forum.

[11] In our view, this argument must fail. The motion judge was alive to the question of what law governed this relationship. But, as he noted, the one page letter which K & S relies on as the "contract" does not stipulate the governing law. We note also that it does not contain a "whole contract" provision or anything akin to that. The question of what law governs Mr. Hilton's employment relationship is a live one that must be decided at trial. In light of this, it cannot be said that Michigan law applies and the motion judge did not err in failing to treat it as the governing law.

[12] The facts, as set out by the motion judge in paras. 5 and 7 of his reasons, make it clear that there is a real and substantial connection between the present action and Ontario. Those facts, in conjunction with the motion judge's unassailable determination that the plaintiff would lose a juridical advantage if the action were tried in Michigan, also demonstrate that Ontario is the more convenient forum. Paragraphs 5 and 7 read as follows:

> [5] The defendant owned a subsidiary in the City of Oakville in the Province of Ontario and the plaintiff's monthly salary was paid to him by the defendant's Oakville subsidiary in Canadian currency. The Oakville subsidiary, in processing the plaintiff's wages, deducted amounts for Canadian income tax which included Provincial income tax,

Employment Insurance and Canadian Pension Plan. The plaintiff's wages were processed through the Bank of Montreal in Toronto. The plaintiff is presently receiving Employment Insurance payments from the Ontario government as a result of his termination of employment in Michigan. The plaintiff's health benefits with the defendant were provided by Great West life, a Canadian corporation, as was his prescription plan. Plaintiff was given a Canadian Blackberry by the defendant with a Canadian phone number. The plaintiff worked at and communicated with the defendant's Oakville office on occasion.

[7] The facts of this case indicate that the plaintiff was not employed as a typical Michigan resident. …

> 1) The employment contract (…) does not stipulate whether [the] plaintiff is an employee of the defendant or of its Oakville subsidiary.
>
> 2) The employment contract does not stipulate whether Michigan or Ontario law is to apply.
>
> 3) Plaintiff's salary is paid in Canada in Canadian dollars by [the] defendant's Oakville subsidiary.
>
> 4) [The] defendant's Oakville subsidiary has deducted Canadian tax, C.P.P. and Ontario E.I. contributions from the plaintiff's wages.
>
> 5) [The] defendant has provided the plaintiff with Ontario prescription and health benefits.
>
> 6) [The] plaintiff is presently receiving Ontario E.I. benefits as a result of his termination from the defendant's employment.
>
> 7) [The] plaintiff receives no U.S.A. or Michigan benefits, i.e. Social Security or 401K.
>
> 8) [The] plaintiff's damages were incurred in Ontario.

[13] Accordingly, the appeal is dismissed with costs to the respondent in the agreed upon amount of $5,000, inclusive of disbursements and GST.

"E.E. Gillese J.A."

"S.E. Lang J.A."

"H.S. LaForme J.A."