CITATION: Poole v. Whirlpool Corporation, 2011 ONCA 808
DATE: 20111119
DOCKET: C54087

COURT OF APPEAL FOR ONTARIO

O'Connor A.C.J.O., Laskin and Cronk JJ.A.

BETWEEN

Mark Poole

Respondent/Plaintiff

and

Whirlpool Corporation and
Whirlpool Canada LP

Appellants/Defendants

Michael W. Kerr and M. Christine O'Donohue, for the appellants

David G. Boghosian and Laura Day, for the respondent

Heard and released orally: December 14, 2011

On appeal from the judgment of Justice A. Hoy of the Superior Court of Justice, dated August 4, 2011.

ENDORSEMENT

[1] This litigation arose from the appellants' termination of the respondent's employment, without cause, in early March 2010. On motion by the respondent, the motion judge granted summary judgment for wrongful dismissal and, as pertinent to this

appeal, ruled that the respondent was entitled to a bonus in the amount of $5,598.38 per month during the 19-month notice period that the motion judge concluded was appropriate.

[2] The appellants challenge the motion judge's decision that the respondent is entitled to a bonus, her calculation of the bonus and her conclusion that no genuine issue requiring a trial arises in respect of the respondent's bonus claim.

[3] We conclude that the appeal must be dismissed.

[4] The appellants contend that to be eligible for a bonus under the applicable Bonus Plan, the respondent was required to be actively employed on December 31st of the year for which the bonus was claimed. As the respondent was fired in March 2010, he did not qualify for a bonus in 2010 or 2011.

[5] The motion judge was correct to reject this contention. The bonus eligibility precondition relied on by the appellants was not incorporated in the respondent's 2007 letter of employment; nor was there any evidence that the precondition was otherwise drawn to the respondent's attention at any time, whether orally, in writing, or by means of the appellants' internal intranet communications system, or that he ever agreed to it. The appellants elected not to cross-examine the respondent on his affidavit materials, in which he swore that he never agreed to the precondition and was unaware of any reference to it on the appellants' intranet system.

[6] The appellants' failure to lead evidence or otherwise establish through cross-examination of the respondent that they had communicated the bonus eligibility precondition to the respondent or obtained his assent or agreement to it precludes any reliance by the appellants on the precondition to defeat the respondent's bonus claim.

[7] We reach a similar conclusion concerning the motion judge's calculation of the bonus. There was a paucity of evidence before the motion judge on some of the key components of the formula said by the appellants to govern the calculation of the bonus. In these circumstances, it was open to the motion judge to accept the respondent's position as to the appropriate method for the bonus calculation.

[8] Nor do we see any error in the motion judge's ruling that no genuine issue requiring a trial arises in respect of the respondent's entitlement to a bonus or the appropriate method for calculating that bonus.

[9] Based on the record before her, the motion judge was positioned to have a full appreciation of the evidence and the issues concerning the respondent's bonus claim. The fact that the motion judge assessed the sufficiency of the evidence concerning certain of the respondent's other entitlements in a different fashion, in particular, the evidence of his health and medical benefits and pension contributions, does not undermine this conclusion. Once it was determined that the termination of the respondent's employment was wrongful, the determination of his bonus was straightforward based on evidence that was largely uncontroverted.

[10] Accordingly, the appeal is dismissed. The respondent is entitled to his costs of the appeal, fixed in the agreed amount of $10,000, inclusive of disbursements and all applicable taxes.

"D. O'Connor A.C.J.O."
"John Laskin J.A."
"E.A. Cronk J.A."