CITATION: Elsegood v. Cambridge Spring Service (2001) Ltd., 2011 ONCA 831
DATE: 20111223
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COURT OF APPEAL FOR ONTARIO

Blair and Juriansz JJ.A and Pepall J. (*ad hoc*)

BETWEEN

Brian Elsegood

Plaintiff (Respondent)

and

Cambridge Spring Service (2001) Ltd.

Defendant (Appellant)

J. Sebastian Winny, for the appellant

Robert A. Konduros, for the respondent

Heard: October 24, 2011

On appeal from the order of Justice Dale Parayeski of the Divisional Court dated January 25, 2011, with reasons reported at [2011] O.J. No. 488.

Juriansz J.A.:

[1] This appeal raises the novel legal question of whether the operation of s. 56(1) of the *Employment Standards Act*, 2000, S.O. 2000, c. 41 ("ESA") can support an employee's claim for common law damages. Section 56(1)(c) of the ESA provides

that an employer terminates the employment of an employee "for purposes of section 54" if the employer lays the employee off for 35 weeks in a period of 52 consecutive weeks.

[2] The respondent employee had been in the appellant employer's employ for some seven years as a spring technician. The employment relationship was not governed by a written contract. He was 48 years old at the time of his termination. He was laid off twice. He was laid off for the first time on April 4, 2009, and then was recalled on June 9, 2009. He was laid off again on July 28, 2009. On January 22, 2010, the cumulative duration of the layoffs reached the statutory maximum of 35 weeks within a 52-week period. Until January 22, 2010, the employee considered that he remained on the employer's payroll subject to recall.

[3] Upon the length of this layoff reaching 35 weeks, the employee brought a claim for common law damages for wrongful dismissal in the Small Claims Court rather than claiming termination pay under s. 54 of the ESA. Holub Deputy J. awarded him $9,900 in damages reflecting a notice period of six months together with interest and costs of $2,060. The employer's appeal to the Divisional Court was dismissed by Parayeski J.

Issue

[4] The employer's appeal is based on a simple premise: the ESA and the common law are independent regimes; an employee's "actual" employment status is defined by the common law, and the ESA operates only to entitle the employee to the remedies under

the ESA. On this premise, common law damages for wrongful dismissal are only available for what would constitute a dismissal at common law and are not available for a "deemed termination" under the ESA. This leads to the issue in the case:

> Did the Divisional Court err by refusing to set aside the trial judge's award of common law damages based on the employee's termination by the operation of s. 56(1) of the ESA?

Analysis

[5] In my view, s. 56(1) of the ESA operates to terminate an employee's employment in law, so that the employee may claim for common law wrongful dismissal damages. I reach this conclusion in two ways. First, I do not accept the employer's premise that the ESA and common law operate as two independent regimes. I conclude that an employee's employment status simply does not survive termination by a valid enactment of the legislature. Second, accepting the employer's premise for the sake of argument, an employee laid off for more than 35 weeks in a 52-week period would be able, in every case, to claim constructive dismissal at common law. I discuss these two lines of analysis in turn.

A section 56(1) Termination is a Termination for all Purposes

[6] I do not accept the employer's premise that an employee's employment status survives a statutory termination by the ESA. Simply put, statutes enacted by the legislature displace the common law.

[7] At the outset, I note that although the employer refers to a termination under s. 56(1) as a "deemed termination", s. 56(1) does not use the word "deemed". The word "deemed" appears in s. 56(5), which provides that employment terminated under s. 56(1)(c) "shall be deemed to be terminated on the first day of the lay-off." The word "deemed" refers to the date of the termination and not the termination itself.

[8] The employer also relies on the phrase in s. 56(1) that provides that the employee is terminated "for purposes of section 54" of the ESA. The employer argues this means that the employee is not terminated for all purposes, but only for the purposes of s. 54. However, s. 54 does not bear on the character of the termination under s. 56(1); instead, s. 54 prohibits an employer from terminating an employee without notice or payment in lieu of notice. If anything, s. 54 undermines the employer's argument, because it applies generally in all cases to require the employer to give notice whenever an employee is terminated.

[9] The employer proposes the scenario where the employee would actually be on a prolonged indefinite layoff, but terminated for the purposes of the statute. I find it telling that the employer offers no date when a prolonged indefinite layoff would become a termination. It is telling because in the employer's scenario, there is no date when the employer becomes responsible for termination pay in lieu of notice. The evident purpose of s. 54 is to prevent employers from avoiding the liabilities that flow from terminating the employment of employees under the guise of placing them on indefinite layoff. The

legislature has provided that when a layoff reaches 35 weeks in 52, the employee is terminated. The legislature's action leaves no room for the continued operation of the common law respecting when an employee is terminated.

[10] I find it unnecessary to discuss the employer's reliance on a single sentence in the minority reasons in *National Automobile, Aerospace Transportation and General Workers Union of Canada (CAW – Canada), Local No. 27 v. London Machinery Inc.* (2006), 79 O.R. (3d) 444 (C.A.). The case is of limited assistance. It involved a collective agreement and the ESA has special provisions governing unionized employees. In any event, the majority held that an employee subject to a collective agreement that preserved recall rights up to two years could elect to accept the statutory termination of his employment at 35 weeks on layoff.

[11] I see no merit in the employer's further argument that the courts have already found that the common law continues to operate despite the enactment of the ESA. The employer argues that the courts have found that an employee continues to be able to claim common law damages for wrongful dismissal despite the enactment of the ESA's termination pay provisions. However, it must be remembered the statute itself provides for the continued application of the common law in that context. As Iacobucci J. pointed out, at para. 25 of *Machtinger*:

> It is also clear from ss. 4 and 6 of the Act that the minimum notice periods set out in the Act do not operate to displace the

> presumption at common law of reasonable notice. Section 6 of the Act states that the Act does not affect the right of an employee to seek a civil remedy from his or her employer. Section 4(2) states that a "right, benefit, term or condition of employment under a contract" that provides a greater benefit to an employee than the standards set out in the Act shall prevail over the standards in the Act. I have no difficulty in concluding that the common law presumption of reasonable notice is a "benefit", which, if the period of notice required by the common law is greater than that required by the Act, will, if otherwise applicable, prevail over the notice period set out in the Act. Any possible doubt on this question is dispelled by s. 4(1) of the Act, which expressly deems the employment standards set out in the Act to be minimum requirements only.

[12] My conclusion that s. 56(1) terminates an employee's employment disposes of the appeal.

[13] Nevertheless, to further demonstrate the employer's position is untenable I go on to consider what would be the result if one accepted that the employee's employment at common law survived the operation of s. 56(1).

Termination under the ESA Would Result in Termination at Common Law

[14] At common law, an employer has no right to layoff an employee. Absent an agreement to the contrary, a unilateral layoff by an employer is a substantial change in the employee's employment, and would be a constructive dismissal.

[15] In this case, the employer asserts that the employment agreement contained an implied term that allowed the employee to be placed on an indefinite layoff. The

employee had accepted a previous layoff and recall, and he testified that he considered his employment to continue during the second layoff until it reached 35 weeks. Like the courts below, I find it unnecessary to decide exactly what the term of the agreement was. The analysis that follows applies even if the employment agreement contained an implied term allowing the employer to layoff the employee for more than 35 weeks within a consecutive 52-week period. I proceed as if that were the case.

[16] The employer's argument is that since the employee agreed to be laid off for an indeterminate period of time, his status at common law continued to be an employee on layoff subject to recall. The argument is untenable because, even accepting the faulty premise that the common law continues to operate independently of the ESA, the common law would always allow an employee laid off for more than 35 weeks to claim constructive dismissal at common law. This is consistent with the provisions of s. 67(3) of the ESA, to which I will refer later and which entitle an employee to elect whether to be paid termination or severance pay or retain the right to be recalled. A term of an employment contract that provided otherwise would be null and void. This conclusion flows from the Supreme Court's reasoning in *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.J. No. 41.

[17] In *Machtinger*, two employees were dismissed in accordance with their written employment contracts. The employment contract of one of the employees allowed his termination without notice, and the contract of the other allowed termination on only two

weeks' notice. However, under the ESA they were entitled to a minimum notice period of four weeks. The trial judge, reasoning that the termination clauses in the contracts were invalid because they violated the ESA, held that the employees were entitled to reasonable notice of seven months and seven and a half months respectively.

[18] On appeal, this court agreed that the termination provisions were null and void, but held that the termination provisions in the contracts supported the inference that the employees intended to agree to very short notice periods. Therefore, the Court of Appeal limited their entitlement to notice to the statutory period of four weeks.

[19] The Supreme Court reinstated the trial decision. The Supreme Court held that "if a term [of an employment contract] is null and void, then it is null and void for all purposes, and cannot be used as evidence of the parties' intention" (at para. 28). The employment contracts had to be interpreted and applied as not containing the offending provisions. Consequently, as the employment contracts did not address the matter of notice, the employees were entitled to reasonable notice at common law.

[20] Germane to this case is *Machtinger's* conclusion that a term of an employment agreement that is inconsistent with the ESA is null and void for all purposes. The offending term is not read down and interpreted to provide for the minimum standard imposed by the ESA. Rather, the agreement is interpreted and applied as not containing the offending term.

[21] For the purposes of this discussion, I proceed on the basis that the employment agreement in this case had an implied term allowing the employer to place the employee on indefinite layoff exceeding 35 weeks in a 52 week period. The minimum standard of the ESA is that layoff amounting to 35 weeks in 52 results in the termination of employment. Since the indefinite layoff provision of the agreement fails to meet the ESA's minimum standard, it is null and void. The term is not read down to allow a layoff limited to 35 weeks in 52, but is excised from the agreement. The result is that the employment agreement is left without a term allowing any layoff at all and, if the common law applied, the employee could claim constructive dismissal as of the first day of the layoff.

[22] I note that s. 67(3) of the ESA, despite the terms of s. 56(1), allows employees to forego receiving termination pay and retain their right of recall. Neither party made any reference to s. 67(3) in this case, and so I am reluctant to comment on it. Suffice it to say, I am satisfied that it does not change the analysis. A term in an employment contract that provides for a layoff exceeding 35 weeks without providing the employee with the election available under s. 67(3) would be null and void, because it fails to provide the minimum standard set out in the ESA. In any event, by commencing this action the employee in effect made his election uner s. 67(3) to be paid his termination in severance and not to retain any right to be recalled.

[23] Thus, even if one accepts the premise that an individual's employment status continues at common law after a statutory termination under s. 56(1) of the ESA, the employee could claim constructive dismissal at common law whenever a layoff exceeds 35 weeks in 52.

Conclusion

[24] For these reasons, I would dismiss the appeal. The respondent is entitled to his costs of the appeal fixed in the amount of $15,000.00 inclusive of disbursements and all applicable taxes.

"R.G. Juriansz J.A."
"I agree R.A. Blair J.A."
"I agree S.E. Pepall J.

RELEASED: December 23, 2011