Most Negative Treatment: Check subsequent history and related treatments.

2017 ONSC 3252
Ontario Superior Court of Justice

Popescu v. Wittman Canada Inc.

2017 CarswellOnt 8108, 2017 ONSC 3252, 280 A.C.W.S. (3d) 84

PETRE POPESCU (Plaintiff) and WITTMAN CANADA INC. (Defendant)

Boswell J.

Heard: May 15, 2017
Judgment: May 26, 2017
Docket: CV-14-120773

Counsel: Vlad Popescu, for Plaintiff
David Hager, for Defendant

Subject: Public; Employment

Headnote

Labour and employment law --- Employment law — Termination and dismissal — Notice — Effect of contractual terms regarding notice
Employee was mechanical engineer who worked for employer for 12 years — Employee had employment contract providing for notice of termination set out in Employment Standards Act — Employee was laid off in 2014 with immediate effect because of alleged slow down in sales — At time of layoff, employee was earning salary of $58,000 — Employee found new job three months after layoff — Employer conceded employee was constructively dismissed but claimed no amount was owed under Act as employee had not resigned from employment within reasonable time — Employee brought action for damages for constructive dismissal — Action allowed — Employment contract was entire agreement between parties — Parties agreed on specific notice period by reference to minimum notice periods set out in Act — Requirements under employment contract were more beneficial to employee than those in Act — Contract displaced provisions of Act — Employee was entitled to notice provided for terminated employees in Act of eight weeks — Employee granted judgment for amount of $9,002.09 — This amounted to eight weeks' notice or pay in lieu of eight week's notice.

Table of Authorities

Cases considered by *Boswell J.*:

Link v. Venture Steel Inc. (2010), 2010 ONCA 144, 2010 CarswellOnt 1049, 79 C.C.E.L. (3d) 201, 2010 C.L.L.C. 210-017, 259 O.A.C. 199, 69 B.L.R. (4th) 161 (Ont. C.A.) — referred to

Machtinger v. HOJ Industries Ltd. (1992), 40 C.C.E.L. 1, *(*sub nom. *Lefebvre v. HOJ Industries Ltd.; Machtinger v. HOJ Industries Ltd.)* 53 O.A.C. 200, 91 D.L.R. (4th) 491, 7 O.R. (3d) 480n, *(*sub nom. *Lefebvre v. HOJ Industries Ltd.; Machtinger v. HOJ Industries Ltd.)* 136 N.R. 40, 92 C.L.L.C. 14,022, 1992 CarswellOnt 989, [1992] 1 S.C.R. 986, 1992 CarswellOnt 892, 7 O.R. (3d) 480, 7 O.R. (3d) 480 (note) (S.C.C.) — referred to

Rodaro v. Royal Bank (2002), 2002 CarswellOnt 1047, 22 B.L.R. (3d) 274, 157 O.A.C. 203, 49 R.P.R. (3d) 227, 59 O.R. (3d) 74, [2002] O.T.C. 442 (Ont. C.A.) — considered

Ventas Inc. v. Sunrise Senior Living Real Estate Investment Trust (2007), 2007 CarswellOnt 1705, 222 O.A.C. 102, 2007 ONCA 205, 29 B.L.R. (4th) 312, 56 R.P.R. (4th) 163, 85 O.R. (3d) 254 (Ont. C.A.) — considered

Statutes considered:

Employment Standards Act, 2000, S.O. 2000, c. 41
Generally — referred to

Pt. XV — referred to

s. 5(1) — considered

s. 5(2) — considered

s. 56(1) — considered

s. 56(1)(c) — referred to

s. 56(2) — considered

s. 56(2)(b)(ii) — considered

s. 57 — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 1.04 — considered

ACTION by employee for damages for constructive dismissal.

***Boswell J.*:**

INTRODUCTION

1 Petre Popescu is a mechanical engineer. He used to work for Wittman Canada Inc. designing continuous desiccant dryers and some of the other products they manufactured. He spent about twelve years working for them.

2 Apparently sales slowed considerably for Wittman in 2014. The slowdown must have come on pretty suddenly because one Friday they handed Mr. Popescu a letter telling him not to bother coming in for work the following Monday. He was laid off with immediate effect. He was told the lay-off was expected to last approximately 35 weeks.

3 At the time he was laid off, Mr. Popescu was earning a salary of about $58,000 per year. He immediately applied for Employment Insurance benefits. He also started looking for a new job, which he found about three months after he was laid off.

4 Mr. Popescu asserts that he was constructively dismissed and he sues for payment of 8 weeks' salary in lieu of notice in accordance the provisions of a written employment contract he had with Wittman. Wittman argues that Mr. Popescu was not terminated and is not entitled to the payment he seeks.

5 The action came on for trial before the court on May 15, 2017. It proceeded as a simplified trial. Each side filed an affidavit, with exhibits, a factum and a casebook. No cross-examinations were conducted and no further evidence called. Counsel made their submissions over the course of about ninety minutes.

6 The reasons that follow explain why I grant judgment in favour of Mr. Popescu.

THE CENTRAL ISSUE

7 Mr. Popescu had a written employment contract with Wittman. It contains a termination clause but is otherwise silent about the right of the employer to impose a lay-off and/or about

any obligations it may have in the circumstances of a lay-off. The written agreement provides that Mr. Popescu is entitled, on termination, to the notice — or payment in lieu of notice — provided for terminated employees under the *Employment Standards Act*, 2000, S.O. 2000, c. 41 (the "*ESA*").

8 The *ESA* provides that eight weeks' notice of termination are to be provided to employees, like Mr. Popescu, with more than eight years' service. But it also provides that an employee on a temporary lay-off is not a terminated employee (s. 56(1)(c)). A temporary lay-off is defined as one of no more than 35 weeks in a 52 week period, provided that one of a number of listed conditions is present. One of those conditions is where the employer continues to make contributions towards a group insurance plan. Wittman did so in this case. It further provides that an employee who is constructively dismissed is not terminated unless he or she resigns his or her employment within a reasonable period of time after the constructive dismissal. Mr. Popescu did not do so.

9 The facts are not generally in dispute. The question is whether Mr. Popescu was terminated and thereby entitled to payment equal to the notice period provided for in the *ESA*. If so, the parties are agreed that the amount owing is $9,002.09.

THE EMPLOYMENT CONTRACT

10 The employment contract is dated June 4, 2001. I infer that it was prepared by the employer.

11 The contract contains a boilerplate "entire agreement" clause at para. 8.3, which provides as follows:

> The provisions herein constitute the entire agreement between the Corporation and the Employee with respect to the subject matters hereof and supersedes all previous expectations, understandings, communications, representations and agreements, whether verbal or written, between the Corporation and the Employee with respect to the subject matters hereof and may not be modified except by subsequent agreement in writing executed by the Corporation and the Employee.

12 Article 6 of the contract deals with the issue of termination. Section 6.1 deems Mr. Popescu's employment to terminate should he die. Section 6.2 provides that Mr. Popescu can be terminated for cause at any time without notice. Section 6.3 provides that Mr. Popescu can terminate his employment by providing written notice of his intention to quit, provided he gives the same notice that he would be entitled to under the *ESA* if the employer had terminated the employment without just cause.

13 Section 6.4 is at the centre of the litigation. It provides for termination upon notice by the employer and states:

> The Corporation my (sic) terminate the employment of the Employee without just cause, by giving the Employee the period of written working notice and payment of severance pay, if any, required by the *Employment Standards Act (Ontario)* or, in the alternative to such notice and severance pay, by making such benefits contributions and by giving the Employee the termination and severance pay, if any, required by the *Employment Standards Act (Ontario*).

14 The contract does not mention anything about lay-offs.

THE EMPLOYMENT STANDARDS ACT

15 The *ESA* provides for minimum standards to be adhered to in all but certain identified classes of employment contracts in Ontario. Section 5(1) prohibits employers and employees from opting out of any of the standards set by the Act. Section 5(2), however, permits an employer and employee to include provisions in an employment contract that provide greater benefits to the employee than the *ESA* otherwise provides. In such a case, the provisions of the contract supersede the standards of the Act.

16 Standards relating to the termination of employment are found in Part XV of the *ESA* (sections 54-62).

17 Termination is defined in s. 56(1) as follows:

> 56. (1) An employer terminates the employment of an employee for purposes of section 54 if,
>
> (a) the employer dismisses the employee or otherwise refuses or is unable to continue employing him or her;
>
> (b) the employer constructively dismisses the employee and the employee resigns from his or her employment in response to that within a reasonable period; or
>
> (c) the employer lays the employee off for a period longer than the period of a temporary lay-off.

18 The term “temporary lay-off” is defined in s. 56(2) and includes:

> (b) a lay-off of more than 13 weeks in any period of 20 consecutive weeks, if the lay-off is less than 35 weeks in any period of 52 consecutive weeks and,
>
> . . .
>
> (ii) the employer continues to make payments for the benefit of the employee under a legitimate retirement or pension plan or a legitimate group or employee insurance plan . . .

THE PARTIES' POSITIONS

19 Mr. Popescu submits that the employment contract is a complete agreement between the parties as to the terms of his employment. It did not give Wittman the right to lay him off. Such a unilateral lay-off, he argues, amounts to a constructive dismissal at common law and is a breach of the employment contract.

20 Mr. Popescu says that he was terminated and interprets s. 6.4 of the contract as requiring Wittman to pay him eight weeks' salary in lieu of notice, in accordance with the provisions of the *ESA* applicable to terminated employees.

21 Wittman concedes that Mr. Popescu was constructively dismissed according to the common law. They argue, however, that s. 6.4 of the employment agreement imports, by direct reference, the statutory benefits, *if any*, provided for in the *ESA*. The question, in the result, is whether the constructive dismissal of Mr. Popescu triggers termination pay, according to the provisions of the *ESA*. In Wittman's submission, it does not.

22 Wittman interprets s. 6.4 as saying, in effect, that in the event of termination, Mr. Popescu is entitled to what the *ESA* gives him, if anything. Under the *ESA*, not every terminated employee is entitled to termination pay. For instance, an employee constructively dismissed is not entitled to termination pay unless the employee resigns from his or her employment within a reasonable period of time in response to the constructive dismissal. In this case, Mr. Popescu was advised of his lay-off on March 7, 2014. He did not notify Wittman that he was resigning. He simply failed to show up when recalled to work on September 29, 2014. Moreover, the *ESA* specifically provides that no termination pay is payable in the event of a temporary lay-off.

23 Wittman also argues that Mr. Popescu failed to plead *ESA* damages in his statement of claim. The court is urged to dismiss the claim on that basis.

DISCUSSION

The Sufficiency of the Pleadings

24 I will begin my discussion of the live issues with the matter of the sufficiency of Mr. Popescu's pleading.

25 In the amended statement of claim dated November 18, 2014, Mr. Popescu sought damages of $20,870.40 for constructive dismissal, together with $15,000 in damages for an alleged breach by Wittman of its duty to act in good faith in the course of dismissing him.

26 At paragraph 13 of the amended claim, Mr. Popescu described his claim as an entitlement to reasonable notice in accordance with common law principles. He sought pay in lieu of notice, equal to 18 months' salary and benefits.

27 Wittman is correct that Mr. Popescu did not expressly claim damages in accordance with the provisions of the *ESA*. At paragraph 18 of the amended claim, however, he stated the following:

> The Plaintiff states that the Defendant has failed to provide him with even the minimum amounts as required by the *ESA.*

28 At trial Mr. Popescu limited his damages claim to the notice provisions set out in s. 57 of the *ESA*, specifically 8 weeks' notice.

29 In its statement of defence, Wittman took the position that Mr. Popescu was validly laid off in accordance with the provisions of the *ESA* and was, accordingly, not terminated. In the alternative, if he was terminated effective March 10, 2014, his right to payment on termination was limited to 8 weeks' salary.

30 As Doherty J.A. observed in *Rodaro v. Royal Bank* (2002), 59 O.R. (3d) 74 (Ont. C.A.), at para. 60, "It is fundamental to the litigation process that lawsuits be decided within the boundaries of the pleadings." A finding of liability and consequent damages against a defendant based on a cause not pleaded by the plaintiff prejudices the defendant who may well be unprepared to address the issue in evidence at trial.

31 It is not the case, however, that pleadings are to be interpreted narrowly. A generous and liberal interpretation of pleadings is generally appropriate: see *Link v. Venture Steel Inc.* (2010), 69 B.L.R. (4th) 161 (Ont. C.A.). A liberal interpretation of pleadings is in step with Rule 1.04 of the *Rules of Civil Procedure* which requires the court to interpret the rules of the court with a view to achieving the most expeditious and cost-effective determination of a proceeding on its merits.

32 This is, ultimately, a simplified trial of a $9,000 claim. The issue of payment in accordance with the notice provisions of the *ESA* may not have been expressly pleaded by Mr. Popescu. But the issue was engaged in the statement of defence. There is no question that Wittman was alive to the issue and has addressed it from the outset of the proceedings. It would not, in the circumstances, be fair, reasonable, or in the interests of justice to dismiss the claim on the basis that the issue was not pleaded clearly enough.

The Entitlement to Damages

33 The issue of what, if anything, Mr Popescu is entitled to by way of damages turns on the court's interpretation of s. 6.4 of the employment contract.

34 The court is guided by certain principles in the interpretation of commercial contracts. In particular, a commercial contract is to be interpreted,

> (a) as a whole, in a manner that gives meaning to all of its terms and avoids an interpretation that would render one or more of its terms ineffective;
>
> (b) by determining the intention of the parties in accordance with the language they have used in the written document and based upon the "cardinal presumption" that they have intended what they have said;
>
> (c) with regard to objective evidence of the factual matrix underlying the negotiation of the contract, but without reference to the subjective intention of the parties; and (to the extent there is any ambiguity in the contract),
>
> (d) in a fashion that accords with sound commercial principles and good business sense, and that avoid a commercial absurdity.

Ventas Inc. v. Sunrise Senior Living Real Estate Investment Trust (2007), 85 O.R. (3d) 254 (Ont. C.A.), at para. 24.

35 Employers and employees are entitled to enter into contracts that define their rights and obligations in relation to the employee's employment. They may not, however, enter into provisions that attempt to contract out of the minimum standards of employment provided for in the *ESA*: see s. 5(1) of the Act and *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986 (S.C.C.), at para. 26.

36 It is well-settled that at common law, employment may be terminated without cause only on the provision of reasonable notice. A provision in an employment contract that provides for a specific notice period (or payment in lieu of notice) will displace the common law presumption

of reasonable notice, provided the provision meets the minimum standards of the *ESA*: *Machtinger*, paras. 34-35.

37 In this case the parties agreed on a specific notice period by reference to the minimum notice periods set out in the *ESA*. There is no assertion that their agreement offends the minimum standards of the Act. They have, in effect, displaced the common law presumption of reasonable notice on termination and instead have turned the statutory minimum into a contractual maximum.

38 The real question is, however, in my view, just exactly how much of the termination provisions of the *ESA* have the parties incorporated into the employment contract by reference? The answer is found in the wording of the contract.

39 First, the parties have agreed that the content of the employment agreement is the whole of the agreement between them. There is no provision in the contract that permits Wittman to lay-off Mr. Popescu. In the result — and this is not contested — the purported lay-off was a constructive dismissal of Mr. Popescu.

40 According to paragraph 6.4 of the contract, upon dismissal (termination) Mr. Popescu is entitled to "the termination and severance pay, if any, required by the *ESA*."

41 Wittman interprets this provision to mean that if there isn't any termination or severance pay required by the *ESA* in the circumstances, then Mr. Popescu gets nothing.

42 Wittman argues that there is no termination pay required by the *ESA* in the circumstances because (1) this was a constructive dismissal and Mr. Popescu failed to resign within a reasonable period of time; and/or (2) this was a temporary lay-off within the meaning of s. 56(2)(b)(ii). In other words, in accordance with the provisions of the *ESA*, Mr. Popescu was not terminated.

43 I am unable to accept Wittman's argument.

44 I agree that, in accordance with ss. 56(1) and (2) of the *ESA*, an employee is not terminated if he is only temporarily laid off, or if he fails to resign within a reasonable time after being constructively dismissed. But in my view these provisions are not operative in this case; they have been displaced by the employment contract.

45 Recall that the employment contract represents the entire agreement between the parties with respect to matters relating to Mr. Popescu's employment.

46 It is agreed that Mr. Popescu was constructively dismissed, according to the common law. While the ESA provides that a constructively dismissed employee is only a terminated employee

if s/he resigns within a reasonable period after the constructive dismissal, the employment contract does not. In this sense the requirements under the employment contract are more beneficial to Mr. Popescu than those in the *ESA*. The contract displaces the *ESA* provisions.

47 Furthermore, the *ESA* countenances temporary lay-offs of up to 35 weeks, without termination pay. But that's a minimum standard. Here, the employment agreement does not countenance temporary lay-offs without termination pay. Again, the contractual terms displace the minimum standards of the Act.

48 Section 6.4 expressly imports the notice provisions of the *ESA*. It does not expressly, nor impliedly, import the termination provisions of the *ESA*. It has its own express provisions for termination and those express provisions form the entire agreement between them.

49 I find that Mr. Popescu was terminated. I further find that the employment contract, being the entire agreement between them, displaces the termination provisions of the *ESA*, save for the notice provisions which are expressly incorporated by reference.

50 Mr. Popescu is entitled to the notice provided for terminated employees under s. 57 of the *ESA*. In his case that amounts to 8 weeks' notice, or pay in lieu of 8 weeks' notice. The parties are agreed that the amount is $9,002.09. Mr. Popescu shall have judgment in that amount.

51 The parties have alerted me to their expectation that the issue of costs may be complex. I invite them to make written submissions on the following turnaround: Mr. Popescu shall have until June 9, 2017 to serve and file his submissions on costs. Wittman shall have until June 23, 2017 to serve and file their submission. Mr. Popescu shall have until June 30, 2017 to file any reply. Submissions are not to exceed 3 pages in length and are to be submitted to me through my assistant's email: Diane.Massey@Ontario.ca.

Action allowed.