Citation: Testori Americas Corporation v. Simon Barnard
2001 PESCAD 4

Date: 20010326
Docket: AD-0879
Registry: Charlottetown

PROVINCE OF PRINCE EDWARD ISLAND
IN THE SUPREME COURT - APPEAL DIVISION

BETWEEN:

TESTORI AMERICAS CORPORATION

APPELLANT

AND:

SIMON BARNARD

RESPONDENT

Before: The Honorable Chief Justice G.E. Mitchell
The Honorable Mr. Justice J.A. McQuaid
The Honorable Mr. Justice N.H. Carruthers

John J. Maynard — Counsel for the Appellant

Gregory J. Howard — Counsel for the Respondent

Place and Date of Hearing — Charlottetown, Prince Edward Island
March 12, 2001

Place and Date of Judgment — Charlottetown, Prince Edward Island
March 26, 2001

Written Reasons by:
The Honorable Chief Justice G.E. Mitchell

Concurred in by:
The Honorable Mr. Justice J.A. McQuaid
The Honorable Mr. Justice N.H. Carruthers

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APPELLANT

AND
SIMON BARNARD

RESPONDENT

(3 pages)

Before: Mitchell, C.J.P.E.I.; McQuaid,
and Carruthers JJ.A.

Heard: March 3, 2001
Judgment: March 26, 2001

EMPLOYMENT - Wrongful dismissal - Damages - Employer's obligation of good faith in manner of termination not constituting implied contractual term

Employment contract expressly providing employer at its sole option could dismiss the employee for any reason upon payment of a stipulated sum. The Court of Appeal held the trial judge erred in law in holding the appellant employer liable for damages for breach of an implied term of good faith in the manner of dismissing the respondent, its employee.

CASES CONSIDERED: ***Wallace v. United Grain Growers Ltd.*** (1997), 152 D.L.R. (4th) 1 (SCC); ***Malik v. Bank of Credit and Commercial International SA***, [1997] 3 All E.R. 1 (H.L.); ***Alexander v. Padinox Inc.***, [1999] 2 P.E.I.R. 96 (P.E.I.S.C.-A.D.)

John W. Maynard, for the appellant
Gregory J. Howard, for the respondent

MITCHELL C.J.:

[2] This appeal is from the decision of a judge of the Trial Division reported at [2000] 1 P.E.I.R. 277. The main issue is whether employment contracts contain an implied term requiring good faith in the manner of dismissal.

[3] The respondent, a person quite experienced at negotiating employment contracts for himself, agreed to become the appellant's design and engineering manager by a written employment contract dated June 16, 1996. The contract was signed after discussion and negotiations between the parties. It contained the following provision:

> Termination
>
> If the Company [the appellant] decides, at its sole option, to terminate your [the respondent] employment for any reason other than negligence in the performance of your duties, the Company will pay you 8 weeks salary in case your termination happen [sic] in the first 12 months of your employment and 4 weeks salary afterwards.

Obviously there was little job security under this contract from the beginning and, oddly enough, even less after the first year of employment. However, prior to signing the agreement, the respondent did negotiate an increase in salary over that first offered which also had the effect of somewhat increasing the sum due him upon severance. It does not appear the respondent ever took any issue with the termination clause itself. The respondent began working for the appellant in September 1996 but only lasted about 7 months. The appellant dismissed him on May 12, 1997 and subsequently paid the 8 weeks salary due according to the termination clause.

[4] The Respondent sued claiming general and special damages for wrongful dismissal. The trial judge found the actions of the appellant constituted bad faith and unfair dealings breaching an implied term of the employment contract requiring good faith and fair dealing. The trial judge assessed the respondent's damages at $59,317.62 and ordered the appellant to pay him that sum together with costs.

[5] The appellant takes some issue with the trial judge's conclusions of fact but I can find no manifest error and therefore would not interfere with those findings. Nevertheless, I would allow the appeal. Contrary to the trial judge's ruling, as Canadian law presently stands, there is no implied contractual term that an employee will not be dismissed in a bad faith manner. The trial judge's ruling in this case appears to have resulted from a misunderstanding of the decision of the Supreme Court of Canada in ***Wallace v. United Grain Growers Ltd.*** (1997), 152 D.L.R. (4th) 1.

[6] The ***Wallace*** case, unlike this one, involved a situation where the contract did not contain

any express provision regarding termination. However, the trial judge at para. 84 of her decision intimates ***Wallace*** holds that employment contracts carry an implied term of good faith and fair dealing. However, Iacobucci J., writing for the majority of the Supreme Court in ***Wallace***, specifically ruled out reading in such an implied term. See: paras 75-78. The correct interpretation of the Supreme Court's decision is as stated by McQuaid J.A. for this court in ***Alexander v. Padinox Inc.***, [1999] 2 P.E.I.R. 96 at para. 35 where he said:

> In ***Wallace*** Iacobucci J. for the majority, specifically rejected a claim in contract for an act of bad faith in dealing with an employee. He did go on to find, however, that any bad faith on the part of the employer in dealing with the employee in the course of dismissal could be taken into account in determining the length of the notice.

The "notice" being referred to by McQuaid J.A. is the reasonable notice of termination required by law in cases of indeterminate employment contracts. At para 40 of his reasons McQuaid J.A., citing ***Wallace*** as authority, rejected claims for damages beyond the sum awarded in lieu of reasonable notice.

[7] The majority in ***Wallace*** held that an employee could not maintain an action in contract or in tort for bad faith dismissal, but that a trial judge had the discretion to take bad faith in the manner of dismissal into account as a factor bearing on the damages payable in lieu of reasonable notice of termination. In other words, bad faith was accepted as a factor a trial judge could properly consider in determining the amount payable in lieu of reasonable notice of termination, but it would not constitute a separate source for a damage award on its own. The majority in ***Wallace*** was careful not to put bad faith dismissal on a contractual footing because to do so, it said, would contravene the general principles applicable to contracts of employment. See: paras. 75-76. The majority expressed the view that if such a change to the law was to be made, it would be better if it were left for the legislatures to do.

[8] Needless to say, the law does not imply a term providing for reasonable notice in cases where the employment contract already contains an express term regarding notice or payment in lieu thereof in case of termination. In the case at bar, the employment contract contained an express provision according to which the appellant could choose to dismiss the respondent, whenever and for any reason other than negligence in the performance of his duties, it wanted to, so long as it paid him the equivalent of 8 weeks salary if the dismissal occurred during the first year of employment and 4 weeks if afterwards. Accordingly, in this case there is no implied reasonable notice period to be extended for bad faith considerations. The contract did not require the reason for dismissal had to be a good one or a fair one. Dismissal for any reason was, according to the written contract, at the sole option of the appellant provided it paid the respondent the stipulated sum.

[9] The minority decision of the Supreme Court in ***Wallace*** would mandate a good faith duty in the manner of terminating all indeterminate employment unless there was express provision to the contrary, and the House of Lords in ***Malik v. Bank of Credit and Commercial International SA***, [1997] 3 All E.R. 1, held that, absent a term to the contrary, all employment contracts are deemed to provide that the employer shall not without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. However, the law in Canada, at the moment, is as stated by the majority in ***Wallace***. Furthermore, even if the law in Canada accorded with the minority view in ***Wallace*** or the House of Lords in ***Malik***, it might not assist the respondent because he agreed to a clause which expressly gave the appellant the right to dismiss him at its sole option whenever it wanted and for whatever reason it wanted, provided it paid him the stipulated sum.

[10] For the reasons given above I would set aside the order of the court below, dismiss the respondent's action, and award the appellant costs throughout.

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The Honorable Chief Justice G.E. Mitchell

I AGREE: _____

The Honorable Mr. Justice J.A. McQuaid

I AGREE: _____

The Honorable Mr. Justice N.H. Carruthers