COURT OF APPEAL FOR ONTARIO

CITATION: Nagribianko v. Select Wine Merchants Ltd., 2017 ONCA 540
DATE: 20170627
DOCKET: C62592

LaForme, Hourigan and Paciocco JJ.A.

BETWEEN

Alexander Connell Nagribianko

Plaintiff (Appellant)

and

Select Wine Merchants Ltd.

Defendant (Respondent)

Howard Markowitz, for the appellant

Gavin MacKenzie and Brooke MacKenzie, for the respondent

Heard: June 26, 2017

On appeal from the judgment of Justice Mary A. Sanderson of the Superior Court of Justice (Division Court), dated January 25, 2016, with reasons reported at 2016 ONSC 490, allowing an appeal from a decision of Deputy Judge Richardson, dated May 20, 2015.

REASONS FOR DECISION

[1] The appellant, Alexander Connell Nagribianko (the "appellant"), appeals the decision of the Divisional Court, reversing the Small Claims Court decision that had held that Select Wine Merchants Ltd. (the "respondent"), had wrongfully terminated the appellant shortly before he had completed six months of work with them.

[2] The respondent agreed that it did not have just cause to terminate the appellant. The respondent's position is that it terminated the appellant as a probationary employee, having judged in good faith that he was unsuitable for the job, primarily because a key customer of the respondent refused to deal with appellant.

[3] In finding that the termination was wrongful in the absence of just cause, the trial judge held that the respondent was not entitled to rely on the clause in the employment contract stating, "Probation..... Six months". The trial judge found that the probationary terms had not been spelled out as a result of the failure of the respondent to deliver a copy of the Employee Handbook that contained the terms the respondent intended to include.

[4] The trial judge found that the appellant understood the term "probation" to mean no more than that he would be kept on as an employee if he performed well, and that he would not have taken the job had he known that he could be terminated without just cause and with only one week's pay in lieu of notice.

[5] The trial judge awarded the appellant damages equivalent to four months of salary and benefits in lieu of notice, based largely on his finding that the respondent had induced the appellant to leave a stable job, to pursue an opportunity for advancement and a greater degree of responsibility.

[6] The trial judge's decision to treat the term "Probation..... Six months" as having no meaning was wrong. The parties agreed to a probationary contract of employment, and the term "probation" was not ambiguous. The status of a probationary employee has acquired a clear meaning at common law. Unless the employment contract specifies otherwise, probationary status enables an employee to be terminated without notice during the probationary period if the employer makes a good faith determination that the employee is unsuitable for permanent employment, and provided the probationary employee was given a fair and reasonable opportunity to demonstrate their suitability: *Mison v. Bank of Nova Scotia* (1994), 6 C.C.E.L. (2d) 146 (Ont. Ct. (Gen. Div.)), at para. 43.

[7] It is true that there is a presumption that an indefinite employment contract is terminable only on reasonable notice, however that presumption is overcome if the parties agree to a probationary period of employment: *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, at p. 999; *Jadot v. Concert Industries Ltd.* (1997), 44 B.C.L.R. (3d) 327 (C.A.), at para. 29; *Ly v. British Columbia (Interior Health Authority)*, 2017 BCSC 42, [2017] B.C.J. No. 43, at para. 42.

[8] Since it is not possible to contract out of the minimum notice standards provided for in the *Employment Standards Act, 2000*, S.O. 2000, c. 41 (the "*ESA*"), probationary employees are entitled to receive statutory notice, or pay in lieu of that notice. In this case, the required period of notice is one week, which the appellant received: *ESA*, ss. 54, 61.

[9] This is not a case such as *Machtinger*, or *Garreton v. Complete Innovations Inc.*, 2016 ONSC 1178, [2016] O.J. No. 869, where the termination clauses in employment contracts were rendered null and void because they expressly provide for notice periods shorter than the statutory minimum, contrary to employment standards legislation. There is nothing in the appellant's employment contract purporting to oust the statutory notice requirements under the *ESA*.

[10] The Divisional Court was therefore correct in holding that the trial judge erred in failing to give effect to the probationary term of the contract, and in treating the appellant, for dismissal purposes, as though he was a permanent employee.

[11] The Divisional Court was also correct in finding the trial judge erred by interpreting the term "Probation..... Six months" according to the subjective understanding of the appellant, when contractual terms are to be interpreted based on an objective assessment of the intention of the parties: *Salah v Timothy's Coffees of the World Inc.*, 2010 ONCA 673, 2010 O.A.C. 279, at para. 16.

[12] Since there are no specific terms in the appellant's employment contract to the contrary, the contractual term "Probation..... Six months" carries the

common law meaning described in para. 6 of this decision. The Divisional Court was correct to so find.

[13] The appeal is dismissed. The respondent is awarded costs of the appeal in the amount of $5,000 inclusive of disbursements and HST.