Valdivia v. Lony G Inc., [2007] O.J. No. 5207

Ontario Judgments

Ontario Superior Court of Justice

Small Claims Court - Toronto, Ontario

M.O. Mungovan Deputy J.

Heard: June 28 and October 4, 2007; October 4, October 10 and October 23, 2007.

Judgment: November 14, 2007.

No. SC-05-00029581-0000

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Between Doris Valdivia (Plaintiff), and Lony G Inc. (Defendant)

(53 paras.)

Counsel

Tracy Brown, law student, agent for plaintiff.

Albert S. Frank, counsel for Defendant.

M.O. MUNGOVAN DEPUTY J.

I. Cause of Action

1 The plaintiff, Doris Valdivia, brings this action against her former employer, the defendant, Lony G Inc. ("Lony G"), for damages for wrongful dismissal. In the alternative, she sues the defendant for severance pay pursuant to the Employment Standards Act, 2000.

II. Issues

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1. Was Ms. Valdivia a permanent seasonal employee?
2. If so, on what date did her employer, Lony G, terminate her contract of employment?
3. What period of reasonable notice is Ms. Valdivia entitled to?
4. Did Ms. Valdivia mitigate her damages?
5. Was this contract of employment frustrated?

III. Facts

3 The plaintiff, Ms. Valdivia, commenced employment with the defendant, Lony G, on May 10th, 1996. Lony G

manufactured leather garments for men and women. Their main customers were the Japanese tourists visiting Toronto. Ms. Valdivia occupied the position of "garment finisher/buttons/press". In other words, she was responsible for sewing buttons and pressing the lining.

4 As stated, she started working for Lony G on May 10th, 1996, and ceased to work for them on November 14th, 1996 after having been given two to three weeks' verbal notice of lay-off. However, she was told by Frank Kibe, the owner of Lony G, that she would be recalled for work some time in the spring of 1997.

5 Lony G, through a telephone call, probably from Mr. Kibe, did recall Ms. Valdivia on April 28, 1997. She stopped working that year on November 7, 1997, once again after having received a two to three weeks' notice of lay-off. This pattern of resuming work in the spring and ending it in the late fall upon receipt of advance notice of lay-off continued year after year until November 21st, 2002.[1]

6 However, in the spring of 2003 Ms. Valdivia received no telephone call from Mr. Kibe on behalf of his Company. Accordingly, she telephoned him in April or May of 2003, only to be told that he had no work for her at that time but that she should call him again in two weeks' time, because maybe there might be work for her. She did telephone him in May of 2003. However, he once again told her that he had no work for her but that she should return to Lony G's factory to collect her vacation pay. She followed that instruction, and picked up her cheque for vacation time.

7 In the witness box Ms. Valdivia described how devastating it was to hear the news that she had no job, for she had three children to support, and was a relatively recent immigrant to Canada.

8 The plaintiff claims at common law for damages for wrongful dismissal in the amount of $9,009.00. Based on a weekly salary of $429.00, that figure represents termination pay in lieu of notice for twenty-one weeks. She also claims vacation pay of $120.12, representing 4% of seven weeks' wages.

IV. Analysis

Issue #1: Was Ms. Valdivia a seasonal employee who was rehired each year or a permanent employee, hired to do seasonal work?

9 Mr. Frank, counsel for Lony G, argued that the Company hired Ms. Valdivia each year for seven years between 1996 and 2002, so that there were seven separate contracts of employment. Moreover, the annual notice of lay-off, which his client gave to her two or three weeks in advance of her termination of work, was really a notice of termination of her contract of employment which clearly exceeded the minimum period of notice under the Employment Standards Act, 2000. Furthermore, the so-called date of recall was basically the date of rehiring.

10 Plaintiff's advocate, Ms. Brown, contended that the notice of termination of work, which Ms. Valdivia would receive in the late fall of each year, was a "notice of lay-off", and that the period between the date of lay-off in the fall and the date of recall in the spring of the following year when Ms. Valdivia would resume work, was simply the period of "lay-off". Accordingly, this was a contract of employment of indefinite duration, subject to annual lay-offs. To put it another way, Ms. Valdivia was a permanent employee whom Lony G hired to do seasonal work.

The Case in support of a finding that Ms. Valdivia was a permanent employee who was hired to do seasonal work

11 The following factors, supported by the evidence, point in the direction of finding that Ms. Valdivia was a permanent employee who was hired to do seasonal work. First, during her 7 years of employment from 1996 to 2003, the evidence showed a definite pattern of lay-off in the late fall of one year, followed by recall in the early spring of the next year. That pattern of behaviour on the part of the Company led Ms. Valdivia to expect that she probably would be recalled that coming spring. In fact, she testified that Nerry Para, her supervisor, did tell her, when she began her employment, that she was not to worry about the winter months when she was away from the Company, because she would be recalled the next spring.

12 Secondly, Ms. Valdivia's relationship with her employer never ended when she received her oral notice of lay-off in the late fall of each of the 7 consecutive years of employment. For, before she even left Lony G's factory, Lony G would assist her and the other employees who received their notice, with their application for EI (Employment Insurance) by providing them with a completed ROE (Record of Employment). It was suggested by the plaintiff's representative, Ms. Brown, that the rationale for this cooperative behaviour on the part of Lony G was that they thereby were assured of an available pool of trained and loyal workers the following year when the recall took place. I find that this was probably the reason for Mr. Kibe's interest in seeing that his employees would get their ROEs before leaving for the break.

13 Thirdly, Ms. Valdivia testified that she never sought after a job during the "offseason" (beginning with the late fall of one year and ending with the early spring of the ensuing year). That period of time could be as little as 12 weeks but as great as 35 weeks.[2] Instead, she took advantage of the time away from Lony G to study the English language as a second language. If Ms. Valdivia really thought that the end had come in her relationship with her employer when she received her notice of lay-off, surely she would have looked for a job elsewhere during those periods of lay-off. The fact that she did not do so, indicates to me that she felt the relationship with her employer was a continuing one, and that only the work itself was brought to an end once a year.

14 Fourthly, Lony G would send her Christmas cards over her 7-year association with the Company. That would foster the feeling that she would be recalled the next spring.

15 Fifthly, most of the employees would return to Lony G in the springtime year after year following the period of absence (fall of one year to the spring of the next).

16 Sixthly, in the ROEs supplied to Ms. Valdivia, Section 14, entitled "Expected Date of Recall", displays 2 boxes: one titled "Unknown", and the other, "Not Returning". With one exception, Lony G placed an x in the "Unknown" box, and left the "Not Returning" box blank. That exception was the ROE for 1999, wherein Mr. Kibe failed to insert an x in either box. However, that appears to be a typographical error. So, while the employer did not know the exact date of recall for Ms. Valdivia, he did know that he did not want to sever permanently his connection with her.

17 Seventhly, when Mr. Kibe wanted a particular individual to return to her job which she held the previous year, he simply telephoned her to arrange for that to happen. That was the extent of the formality. The returning individual did not need to reapply for the position or satisfy any other conditions. Mr. Kibe did not feel the need to advertise the position. He had a pool of committed, loyal and trained individuals. All of this is indicative of a contract with an indefinite term.

18 Eighthly, the notice of lay-off was not in writing but by word of mouth. Two or three weeks before lay-off, the owner, Mr. Kibe, would tell his employees that he would no longer be needing their services at that time. Once again, the lack of formality gave rise to the notion that the relationship of employer and employee was one of long-standing.

19 Ninthly, in the evidence there is a memorandum[3] using Lony G's letterhead, and dated October 5, 1998, which Mr. Kibe signed in his capacity as President. He addressed it to "To whom it may concern". In that note he certified "that Ms. Doris Valdivia has been employed by (sic.) the Lony G Inc. since May in 1996". [Italics are added.] By stating that Lony G had employed Ms. Valdivia since May of 1996, Mr. Kibe demonstrates in his representative, corporate capacity that he understood the extent of his Company's relationship with Ms. Valdivia, viz. it was an ongoing relationship between employer and employee irrespective of two intervening lay-offs.

The Case against finding that Ms. Valdivia was a permanent employee but rather was a seasonal employee

20 The argument against concluding on the evidence that Ms. Valdivia was a permanent employee doing seasonal work as opposed to being a seasonal employee is as follows:

21 First, Ms. Valdivia admitted during her testimony that Lony G was under no obligation to recall her, if that Company had no work for her to perform. She complained bitterly though that, when Mr. Kibe finally refused to call her back in May of 2003, he had already returned to their work many of her colleagues. She was singled out, and she could not understand why.

22 Secondly, with respect to her 7 years of employment, the lay-off dates in the fall were all irregular, and the recall dates in the spring suffered the same fate. Hence, this irregularity from year to year of "stop" and "start" shows the lack of a pattern, and therefore, there was no pattern to support an expectation in the mind of Ms. Valdivia that her relationship with the Company as an employee was a continuing one.

Conclusion

23 The 9 factors tending to show that Ms. Valdivia was a permanent employee of Lony G, hired to do seasonal work, are all well supported by the evidence and make good sense. On the other hand, the 2 arguments against this conclusion need some attention.

24 With respect to the first argument, it is true that Ms. Valdivia understood that there would be no recall in the event Lony G had no work for her to do. However, to say then that she had no right to a notice of termination, reasonable or otherwise, is a non sequitur, particularly when one is addressing an employee who has served her employer for a period of 7 consecutive years even with annual layoffs. The employee's right to reasonable notice of termination is a cardinal, fundamental principle of the common law. The courts of common law implied that right as a term of every contract of indefinite duration. For an employer legally to deny this right to one of his employees, it must be established beyond peradventure that the employee understood and agreed that she or he was hired on that basis. Simply to explain to the employee that the employer will not recall her if there is no work, falls very short of the mark. The employer, in my opinion, must explain to the employee that, when she finds out that there will be no recall, she will also not be entitled to any notice of termination, which would include termination pay or severance pay. The evidence does not show that Lony G explained this to Ms. Valdivia.

25 In Ceecol v. Ontario Gymnastic Federation,[4] there is a passage that sums up the point I am trying to make. MacPherson J.A., writing for the Court of Appeal for Ontario, explains:

> [26] It seems to me that a court should be particularly vigilant when an employee works for several years under a series of allegedly fixed term contracts. Employers should not be able to evade the traditional protections of the ESA and the common law by resorting to the label of 'fixed term contract' when the underlying reality of the employment relationship is something quite different, namely, continuous service by the employee for many years coupled with verbal representations and conduct on the part of the employer that clearly signal an indefinite term relationship.

26 Ms. Valdivia did work continuously for 7 years, subject to recurring annual layoffs. I have found that there was this expectation of a return to work each spring. That expectation, which she had, stemmed from the unbroken pattern of work, layoff, and recall. In the eighth year that pattern ended; Ms. Valdivia did not receive her recall that spring nor did she receive any notice of termination of her contract of employment.

27 MacPherson J.A. also stated in Ceecol that it is well for the trial judge to bear in mind the consequences flowing from the parties' conflicting interpretations. The justice explains his concern in this passage:

> [46] Moreover, I think it is important to acknowledge what is at stake in the conflicting interpretations put forward by the parties. Ceecol worked loyally and professionally for the Federation for almost 16 years. Her final salary was $50,000. If she is entitled to only the eight week payment established by the ESA, she will receive approximately $7,700. If she is entitled to reasonable notice, which the Federation is content to accept is 16 months, she will receive approximately $66,700.

28 In our case, Ms. Valdivia, who worked diligently and without any complaint about her workmanship throughout her 7 years with Lony G, will receive absolutely no money, if the defendant's argument succeeds. For she will have already received her notice of termination 3 weeks prior to her termination on November 21st, 2002, bearing in mind she would be working under a series of fixed-term contracts starting with the 1996 contract of employment. On the other hand, if the plaintiff has her way, she would be entitled to pay in lieu of notice of 21 weeks plus vacation pay, totalling $9,129.12.

29 As regards the second argument, viz. the irregularity in "stop" and "start" dates, I find that they do not detract from the existence of a pattern of behaviour on the part of both parties, from which Ms. Valdivia's expectation of continuous employment is derived, and which leads to the conclusion of one contract of indefinite term.

30 Accordingly, Ms. Valdivia was a permanent employee of Lony G, who hired her to do seasonal work.

Issue #2: On what date did Lony G terminate Ms. Valdivia's contract of employment?

31 In April or May of 2003, not having received a "call-back" from Mr. Kibe, Ms. Valdivia telephoned him only to be told that there was not enough work for her to be recalled. However, he advised her to contact him again in 2 weeks' time, because there might be a job for her then. She telephoned Mr. Kibe at the time he suggested. He told her that there was no work for her but to come into the factory and collect her vacation pay relating to 2002's work period.

32 In her Plaintiff's Claim Ms. Valdivia pleads in paragraph 10 that "Ms. Valdivia was laid off for the winter". In contracts of employment where the parties agree explicitly or implicitly that the employee may be laid-off, a "lay-off" is not considered to be a termination of the contract of employment, that is to say, a termination of the status of employee. In other words, the relationship between an employer and an employee continues on after the lay-off [although the Employment Standards Act, 2000 tells you when a long-term lay-off turns into a termination of the contract of employment.]

33 However, in paragraph 12 the pleader states: "Upon her termination on November 21st 2002, Ms. Valdivia received no reasonable notice of her termination or pay in lieu of notice". It would appear at first sight that the draughtsman is equating the date of lay-off to be the date of termination of Ms. Valdivia's employment contract. However, at trial, during submissions, Ms. Brown representing Ms. Valdivia explained that the lay-off, that occurred on November 21st, 2002, became a termination of the employment contract retroactively by virtue of the Employment Standards legislation.

34 Based on the evidence of what had transpired over the telephone between Mr. Kibe and Ms. Valdivia in May of 2003, I find that Lony G, at common law, in effect, terminated Ms. Valdivia's contract of employment some time in May of 2003. Mr. Kibe's communication of lay-off on November 21st, 2002 did not amount to a termination of employment. Ms. Valdivia took what was conveyed to her in May of 2003 as meaning that her employment contract was at an end. I agree with her conclusion. While neither Ms. Valdivia nor Mr. Kibe seems to be able to identify with any precision the exact date of this telephone conversation, common sense would allow me to choose May 15th, 2003 as being a likely effective date of termination.

Issue #3: What period of reasonable notice is Ms. Valdivia entitled to?

35 In all contracts of indefinite duration the courts imply a term of reasonable notice in favour of the dismissed employee. As I have determined that Ms. Valdivia's contract of employment fell into that class of contracts, the question now is, What should the period of reasonable notice be?

36 To arrive at the duration of the reasonable notice period courts take into account various factors. For the starting point for determining these factors, one turns to McRuer C.J.'s decision in Bardal v. The Globe & Mail (1960), [See 5 Note below] wherein he sets forth the following factors: "the character of the employment, the length of service of the servant, the age of the servant and the availability of similar employment, having regard to the experience,

training and qualifications of the servant".[6] The Chief Justice explains that there is no catalogue of factors. "The reasonableness of the notice must be decided with reference to each particular case".[7]

37 Paragraph 15 of the Plaintiff's Claim sets the period of reasonable notice at 21 weeks. The pleading justifies the length of the notice period on the bases of "her seven years of service, her age, and the responsibilities of her job". She was 47 years old at the time of her dismissal. As explained earlier, she was a finisher of leather garments made for women and men. Throughout those 7 years of employment, she was a very good worker, diligent and loyal.

38 Added to the above list of factors is the economic circumstances of the employer. Yet, as Then J. remarked in Szwez v. Allied Van Lines Ltd.,[8] "I intend to attempt to strike a balance between the impact of this factor both on the plaintiff and the defendant and further to consider this factor with the many other relevant factors in determining the appropriate period of notice".[9]

39 The unaudited[10] statements of income and retained earnings for Lony G[11] do show a serious downturn during the years, 2001 to 2003, with the net income for each of these three years being on the negative side: 2001 (-$118,637), 2002 (-$105,459) and 2003 (-$81,766). However, in 2004 the Company experienced a recovery with the net income for that year being on the plus side, $47,397.

40 These financial statements reflect what happened to the Toronto economy. In the first place, there was "9/11", which affected negatively the tourist industry in Toronto in the year 2001. Secondly, there were the two outbreaks of SARS occurring in the first half of 2002. The number of tourists to Toronto seriously decreased. Then, the World Health Organization and the Japanese Government cautioned against travelling to Toronto. With respect to all of these events I can take judicial notice. As seen from the financial statements, these events did indeed take their toll on Lony G's business, particularly when you consider that the bulk of their business stemmed from Japanese tourists.

41 However, it must be borne in mind that dismissed employees without the benefit of a reasonable notice period are really creditors of their employer. Ms. Valdivia is no different. She occupies the same position as Lony G's creditors. Yet, it would be quite unheard of if Lony G were entitled to say to a supplier of leather that his bill will be discounted because the Company is undergoing hard times. Accordingly, this factor of economic circumstances cannot take prominence. It is just one of many as Then J. explained.

42 The evidence establishes that Ms. Valdivia was unemployed until 2005. However, it was not for want of trying that she remained unemployed for such a length of time, because the record shows that she did attempt to return to the workforce. But English was her problem, her first language being Spanish. The record again shows that she was diligent about learning English.

43 Taking the factors that I have mentioned into consideration, I find that a notice period of 21 weeks (or about 5 months) is not out of the ordinary.

Issue #4: Did Ms. Valdivia mitigate her damages?

44 In wrongful dismissal cases the courts are interested in knowing whether or not the dismissed employee mitigated her damages. Yet, the onus is on the employer to establish on the balance of probabilities that the employee failed to honour the mitigation rule.

45 The period of notice in this case commenced on May 15th, 2003 and ended on October 9th, 2003, equating to 21 weeks. That is the relevant period of time in the context of mitigation. I find on the evidence that Ms. Valdivia did honestly try to return to the workforce but it was in the child care industry.

46 English, as I stated earlier, was a serious problem for her. Consequently, she attended English language classes on a regular basis. She cannot be faulted for not being able to earn money from employment during this period of time.

Issue #4: Was this contract of employment frustrated?

47 In the first part of 2002 SARS struck twice in Toronto. With the warnings of WHO and the Japanese Government about traveling to Toronto, the business of Lony G was hurt financially. After all, most of their custom derived from Japanese tourists. The Company argues that they are discharged from their contractual obligation owed to the plaintiff because the contract of employment was "frustrated".

48 For this doctrine of frustration to operate the court is "to ask whether the promisor's obligation has radically changed as a result of intervening events".[12] The obligation that we are talking about is the implied contractual obligation to give Ms. Valdivia a reasonable period of notice of termination. I do not see how SARS and the consequent warnings from WHO and the Japanese Government actually brought about a radical change in Lony G's obligation vis-a-vis Ms. Valdivia.

49 I grant you that the Company finds this obligation onerous because of SARS and the pronouncements of WHO and the Japanese Government, as they are dependant to a large extent on Japanese tourists. However, the present state of the law in Canada does not allow parties to be relived of their legal obligations because performance has become more expensive due to outside events. As Ms. Brown argued, Lony G never closed its doors or went into bankruptcy. Accordingly, the doctrine of frustration provides no excuse to Lony G for failing to perform its notice obligation owed to Ms. Valdivia.

V. Employment Standards Act, 2000

50 Paragraph 18 of the Plaintiff's Claim bases a claim under the above statute in the event I find pay in lieu of reasonable notice to be less than the plaintiff's entitlement under the Employment Standards Act, 2000. My finding that the plaintiff is entitled to 21 weeks' notice makes any inquiry under this statute redundant.

VI. Disposition

51 As damages for breach of contract, the plaintiff shall be entitled to termination pay of $9,009, derived from multiplying $429 (Ms. Valdivia's weekly salary) by 21 weeks. She is also entitled to vacation pay of 4% of $9,009, equalling $360.36. In aggregate her damages are $9,369.36.

52 Parties may make written submissions as regards pre-judgment interest, postjudgment interest and costs. The plaintiff's submissions are to be filed with the Court and served on the defendant's counsel no later than 4:30 p.m. on November 28th, 2007. The defendant's submissions are to be filed and served on the plaintiff's representative, Community and Legal Aid Services Programme, York University, within 14 days after receipt of plaintiff's submissions. Plaintiff is to be allowed 10 days after receipt of defendant's submissions to file and serve any response.

53 Submissions to be filed with the Court are to be delivered to the Trial Scheduling Office (47 Sheppard Avenue East, 3rd Floor) addressed to the attention of Michael O. Mungovan, Deputy Judge. Delivery must be in person or by a recorded service: registered or recorded mail, or courier.

M.O. MUNGOVAN DEPUTY J.

1 See exhibit 2, Table of Contents. The Records of Employment at Tabs 3, 4, 9, 14, 21, 26, 29 and 34 show the dates of commencement of work and termination of work in respect of 1996 through to 2002.

2 On average the "offseason" was 22.3 weeks.

3 Exhibit 2, Tab 16.

4 *(2001), 55 O.R. (3d) 614*, para. 26.

5 *[1960] O.W.N. 253*.

6 Ibid, p. 255.

7 Ibid.

8 *(1993), 45 C.C.E.L. 39* (Ont. Gen. Div.).

9 Ibid. p. 47.

10 I would very much have preferred the statements to have been audited.

11 Exhibit 1.

12 The Law of Contracts (2005), John D. McCamus, p. 572.

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