CITATION: 542491 Ontario Limited v. 8240631 Canada Inc., 2024 ONSC 2769
COURT FILE NO.:CV-15-522765
DATE: 20240514

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: 542491 ONTARIO LIMITED and DONALD FOSTER, Plaintiffs

AND:

8240631 CANADA INC. carrying on business as INNOVATION CLIC, Defendants

Defendants

BEFORE: Justice Papageorgiou

COUNSEL: Matthew Dewar, for the Plaintiffs

HEARD: May 6, 2024

ENDORSEMENT

Overview

[1] This is a wrongful dismissal claim brought by the plaintiffs commenced in 2015. The defendant participated. Ultimately, the defendant's Statement of Defence was struck out and the matter proceeded by way of written default judgment followed by an uncontested trial due to deficiencies in the written materials.

[2] It is important to understand the background, and the way that this matter has proceeded to fully appreciate and understand the matters in dispute.

Background

[3] The plaintiff Donald Foster is currently 75 years old. He was the exclusive sales agent of Presentoirs CLIC Inc., beginning 2002, earning commission. Mr. Foster was paid through the plaintiff numbered company 542491 ONTARIO LIMITED ("542").

[4] Presentoirs was in the business of point of purchase solutions and in store marketing materials. Mr. Foster had a great deal of experience in the area and was recruited by Richard Boucher who is the principal and incorporator of Presentoirs. Mr. Boucher was based in Montreal and was looking for someone to build the business for him in Ontario. Mr. Foster was to be the new face and voice of Presentoirs because of his expertise and position in the marketplace.

[5] Although the parties drafted a written contract, it was always a work in progress because the business was changing from day to day and the relationship evolved organically. They were small, started in Mr. Foster's living room and grew from there.

[6] Mr. Foster worked hard to successfully build the business by targeting a group of companies to go after, analyzing the marketplace, and presenting what was a revolutionary and patented point of sale system.

[7] The business was extremely successful, and Mr. Foster earned greater and greater commissions. It was his impression that Presentoirs became dissatisfied with the commissions it was paying him which continued to increase because the business was so successful.

[8] In particular, in or around January 2014, Mr. Foster introduced and closed a deal with a significant and large new client, Labatt Brewing Company Ltd. This introduction played a large part in assuring the continued existence of Presentoirs.

[9] On February 4, 2014, Presentoirs made an assignment in bankruptcy and Innovation CLIC, another company incorporated by Mr. Boucher, took over its business. Mr. Foster continued to provide the exact same services to Innovation, including significant sales to Labatts, the client he brought in.

[10] Then, on April 29, 2014, Innovation wrote to Mr. Foster advising that "any sales agent contract between Innovation" and Mr. Foster would be terminated effective December 31, 2014. It purported to significantly change his commission structure in the interim.

[11] Although there had been some variation in Mr. Foster's commission structure over the years, for some time, he had been earning 10 % commission on all sales. The April 29, 2014 letter purported to limit the 10 % that he had been earning on all sales to the first $300,000 in sales. There was a declining percentage applied to various other limits, with 1.5 % commission to be paid on sales of $1,000,000 or more.

[12] The April 29, 2014 letter concluded by setting out that the notice of termination would remain in effect unless a new agreement was entered into in writing prior to the termination and that unless a mutual agreement was reached.

[13] Mr. Foster advised Mr. Boucher that the changes were unacceptable particularly in light of his recent contributions which included the Labatts contract. He refused to accept the revised commission structure.

[14] Mr. Foster continued to keep his nose to the grindstone and make sales.

[15] In August 2014, Mr. Boucher instructed Mr. Foster to immediately cease all contact with Innovation's clients which frustrated his ability to perform his duties. He considered his employment terminated. Between February 2014 and August 2014, Innovation failed to pay Mr. Foster commissions owed to him, even though he worked throughout that period.

Delays caused by the defendants.

[16] Over the last many years, the plaintiffs have attempted to move this matter along, but Innovation has obstructed the prosecution of this matter. There are 250 pages of written communications in the record documenting the significant efforts made by the plaintiffs and the obstruction by Innovation. There were also verbal communications. Some salient points are:

- The plaintiffs served their affidavit of documents immediately but had to pursue Innovation for years to obtain a complete affidavit of documents, in particular relevant information and documentation pertaining to sales records which formed the basis for the wrongful dismissal damages during the notice period.

- From 2016 until 2019, the plaintiffs sought to schedule examinations for discovery without success. The file at the initial defence law firm was passed from lawyer to lawyer, defence counsel initially took the position that mediation should proceed first and then changed its mind. There were ongoing excuses for why relevant materials were not produced and/or why examinations could not proceed.

- On April 3, 2019, Innovation's lawyers eventually brought a successful motion to remove themselves because of their inability to secure instructions and cooperation.

- Innovation appointed new counsel, but this did not improve matters.

- On November 3, 2020, Innovation's new counsel advised that he was unable to obtain instructions and proceed to discoveries which had been scheduled for November 10, 2020. Innovation's new counsel ultimately brought a motion to be removed from the record on May 11, 2021.

- Eventually, because of Innovation's refusal to appoint new counsel and attend at discoveries, on March 29, 2022, Associate Judge Robinson struck out Innovation's Statement of Defence. Innovation has not appealed this order or sought to set it aside.

- On December 22, 2022, Mr. Foster noted Innovation in default.

Written motion for default judgment

[17] I first considered this motion for default judgment in writing on July 8, 2023, and granted partial default judgment only in respect of past commission amounts due while Mr. Foster was still employed. I declined to grant judgement on all issues because there were deficiencies in the materials including:

- The plaintiffs claimed judgment for wrongful dismissal, and there was insufficient evidence before me to determine whether Mr. Foster was an employee, dependent

contractor, or independent contractor. There were some statements in the affidavit evidence that conflicted: *Fisher v. Hirtz*, 2016 ONSC 4768 at para 1.

- The plaintiff 542's role was unclear.

- Although there was some evidence that Innovation continued Presentoirs' business, the plaintiffs had not provided sufficient evidence that this was the identical business and/or any case law on whether the notice period should include the duration of any employment relationship with Presentoirs, or the criteria from the case law which may be applicable to this issue.

- It was unclear what the commission structure was.

- There was a claim for future vested commissions in the amount of $207,006.88 claimed in the factum for which there was no evidence or explanation.

Uncontested trial

[18] This matter then proceeded by way of uncontested trial. The only witness was Mr. Foster who filed additional documents.

The Issues

[19] The issues before me are:

- Issue 1: Was Mr. Foster an employee, an independent contractor, or a dependent contractor, and is 542's role relevant to this determination?

- Issue 2: Should the period upon which the reasonable notice period is based include the time period that Mr. Foster was employed with Presentoirs?

- Issue 3: What was the commission structure?

- Issue 4: What is the notice period taking into account all relevant factors?

- Issue 5: Is there any basis for awarding a claim for commissions in respect of all sales to customers found by Mr. Foster, after the notice period?

- Issue 6: Can the pleading be amended to correct a misnomer?

Analysis

The test on a motion for default judgment

[20] As noted in *Elekta Ltd. v. Rodkin*, 2012 CarswellOnt 2928 (ONSC), in determining liability, the test on a motion for default judgment is as follows: A. What deemed admissions of fact flow from the facts pleaded in the Statement of Claim? B. Do those deemed admissions of fact entitle the plaintiff, as a matter of law, to judgement on the claim? C. If they do not, has the plaintiff adduced admissible evidence which, when combined with the deemed admissions, entitle it to judgement on the pleaded claim?

Issue 1: Was Mr. Foster an employee, an independent contractor, or a dependent contractor, and is 542's role relevant to this determination?

[21] As set out in *McKee v. Reid's Heritage Home's Ltd*, 2009 ONCA 916, the first step in analyzing this issue is to consider whether the individual is an employee or contractor. If they are a contractor then the court considers whether they are independent or dependent.

[22] There is no "litmus" or universal test for determining whether a party is an employee or a contractor: *Fisher* at para 28. As set out in the *671122 Ontario Ltd. v. Sagaz Industries Inc*, 2001 SCC 59 (CANLII), the main consideration is whether a worker provides services on his or her own account. Looked at a different way, it involves the consideration of whose business it is: *Bradien v. La-Z-BoyCanada Ltd*., 2008 ONCA 464 at para-34.

[23] In *Fisch*er from paras 29 to 37, Perell J. analyzed the case law and set out a number of factors applied by courts to determine the true nature of the relationship including: a) the parties' intentions; b) what the parties thought; c) the parties' behaviour and how they conducted their business; d) whether the individual controlled the work, owned tools, had a chance of profit or risk of loss; e) whether the worker hired others to assist; f) whether the worker assumed financial risk; g) whether the worker had invested money in the business; and h) whether the worker had management responsibilities.

[24] If a worker is found to be a contractor, then the next step is to consider whether that worker is an independent or dependent contractor. This involves consideration of: a) whether the worker was economically dependent; b) whether the working arrangement was permanent; c) whether the working relationship was exclusive--the greater the exclusivity, the greater the permanence, the more the relationship looks like an employment relationship; d) the fact that a worker performs the work through a sole proprietorship or through a business is relevant but not determinative; and e) it does not matter what the parties call themselves, what matters is the substance of the relationship. *Fisher* at paras 29 to 37.

[25] Based upon the deemed admissions, affidavit evidence, and Mr. Foster's oral testimony, I am satisfied that Mr. Foster was a either an employee or a dependent contractor of Presentoirs and then Innovation:

- Presentoirs and then Innovation controlled the clients with whom Mr. Foster could work exclusively.
- Presentoirs and then Innovation established prices.
- There were minimum performance requirements.
- Presentoirs and then Innovation furnished all tools including point of sale samples.
- Mr. Foster was told to use the company website.
- Mr. Foster was given an email address and business card under Presentoirs' and then Innovation's banner.
- Mr. Foster was given an office, and it was mandatory that he was there each day.
- Mr. Foster's title was Vice President of Marketing.
- Mr. Foster worked fulltime for Presentoirs and then Innovation.
- Mr. Foster did not have any other clients or work apart from what he did for Presentoirs and then Innovation.
- Mr. Foster did not invest any money or take any risk.
- Mr. Foster's relationship with Presentoirs and then Innovation was exclusive and permanent.
- Mr. Foster was permitted to develop sales materials, but they were subject to approval by Presentoirs and then Innovation.
- Mr. Foster was subject to a probationary period.
- Mr. Foster was directed to use the company computer, telephone, telecopier, intranet, and confidential intellectual material.
- Mr. Foster was told to comply with company policy, and he did.
- Mr. Foster had no opportunity to earn profit other than through commissions. He had no other source of income.
- Mr. Foster was economically dependent on the working relationship.
- Mr. Foster considered Mr. Boucher to be his boss and he reported to him on an ongoing basis.

- There is an unsigned employment agreement dated 2003. Mr. Foster's uncontradicted evidence is that although it was never signed, some parts of the unsigned agreement applied to him. It identified Mr. Foster as an employee and included a non-competition covenant which applied for one year after he left the company. He considered himself bound by this.

- Presentoirs, Innovation and Mr. Boucher held Mr. Foster out as an employee, and he was treated like one.

[26] In summary, Mr. Foster did not provide services on his own account. The business was not his. It was Presentoirs' and then Innovation's and he was subject to control over most aspects of his work. The fact that Mr. Foster was paid through 542 does not change the analysis of the true substance of the relationship which was either one of employment or dependent contractor. On the record before me, 542's only role was to receive payment. There is no evidence it did anything else.

Issue 2: Should the period upon which the reasonable notice period is based include the time period that Mr. Foster was employed with Presentoirs?

[27] In *Nokes v Doncaster Amalgamated Colliers Ltd*. (1940) A.C. 1014 (H.L.), the Court held that when a business is sold, there is an automatic termination of an employee's contract of employment unless the parties agree to assign it to the new owner, in which case it can be said that the new owner is assuming the employee's contract including the obligations in respect of dismissal and notice. This includes implied assignments or novations where the matter is not expressly addressed. In all cases, a court must consider the particular facts to determine whether there is an implied assignment or novation.

[28] The decision *Manthadi v. ASCO Manufacturing*, 2020 ONCA 485, at para 48, built upon this principle and considered whether or not the period of employment with the previous employer should be stitched together with the duration of the employment with the new employer for the purpose of calculating the reasonable notice period. The Court concluded that there is no automatic stitching together of the two employment periods. Rather, the prior employment period is a factor that can be taken into account as part of the *Bardal* factors in determining reasonable notice and "appropriately weighing the experience a long-time employee brings to the purchaser."

[29] In that way, a court may craft an award flexibly and "deal fairly with the endless variety of circumstances in which an employee's claim may be presented.": at para 66. The court can take into account all of the circumstances including the service with the vendor and the benefit of that service to the purchaser to arrive at a just result.

[30] I conclude that in this case, as part of the *Bardal* factors, Mr. Foster's period of service to Presentoirs should be stitched together entirely to his employment with Innovation for the following reasons:

- The uncontradicted evidence is that Mr. Foster was an indefinite employee of Presentoirs and that this continued with Innovation.

- After Presentoirs made an assignment in bankruptcy on February 4, 2014, Innovation took over the business.

- Mr. Foster was not offered any reasonable notice or compensation from Presentoirs and was not even told about Presentoirs' assignment into bankruptcy immediately.

- There is no evidence that at the time it took over the business, Innovation sought to terminate Mr. Foster or that it sought to renegotiate his employment agreement. It did not write to Mr. Foster advising that it did not intend to give him credit for past service to Presentoirs. Instead, until the April 29, 2014 letter, it simply continued to accept his services without any additional terms. Thus, at the time Innovation took over the business, there was an implied novation of Mr. Foster's original agreement with Presentoirs on exactly the same terms with the implied consent of both parties. As such, I find that there was also an implicit understanding that Innovation had contracted with Mr. Foster on the basis that he would be given credit for his prior years of service.

- By the time of the April 29, 2014 letter, it was already too late for Innovation to seek to change the employment terms or resile from the implicit understanding, agreement, and novation.

- Mr. Boucher was the incorporator of Presentoirs and then also incorporated Innovation.

- The corporate profile report for Innovation shows Mr. Boucher as the sole Director, President, Secretary and Treasurer. Indeed, he is the only individual noted on the corporate profile report. The corporate profile report for Presentoir shows Mr. Boucher as the Chief Officer or Manager and sole Director. There is also no other individual noted on the corporate profile report.

- Although Innovation was only incorporated in August 2013, its website stated that it had been servicing companies for twenty years; since the timing of its incorporation makes this impossible, this implicitly must include Presentoirs' former business and is an acknowledgement that these were actually the same company operating under a different name.

- At the time of the assignment into bankruptcy, Presentoirs was a successful company who had just landed a major client, Labatts, as a result of Mr. Foster's efforts. There has been significant production of sales records that show that Presentoirs' sales immediately prior to the assignment in bankruptcy were strong. In all the circumstances, I infer that the assignment was made by Mr. Boucher so that he could establish the exact same company using a different name, so as to alter Mr. Boucher's employment agreement, with the intention of reducing the significant commissions Mr. Foster had been earning and which he then proceeded to do in the April 29, 2014 letter, which was signed by Mr. Boucher.

Issue 3: What was the commission structure?

[31] Mr. Foster indicated that initially the parties discussed him being paid 15 % commission, although it is unclear on this record whether this ever transpired. Then the parties discussed him receiving 10 % on sales to new clients and 8 % on sales to existing clients and this is reflected in his affidavit.

[32] However, Mr. Foster testified that for the last few years of his employment with Presentoirs, he earned 10 % commission on all but a few sales, even to existing clients, and the records produced corroborate this.

[33] Therefore, I find that the contractual commission structure with Presentoirs which was then implicitly agreed to by Innovation when it continued his employment without seeking to impose new terms or renegotiate his agreement, was 10 % on all sales similar to his previous employment with Presentoirs.

Issue 4: What is the notice period taking into account all relevant factors?

[34] At its foundation, reasonable notice is the period of time it should reasonably take the terminated employee to find comparable employment: *Schamborzki v. BC North Shore Health Region*, 2000 BCSC 1573 ("*Schamborzki*"), at para. 29, citing *Ahmad v. Procter & Gamble Inc.* (1991), 1991 CanLII 7225 (ON CA), 1 O.R. (3d) 491 (Ont. C.A.), at p. 496. See also *Lin v. Ontario Teachers' Pension Plan*, 2016 ONCA 619, 402 D.L.R. (4th) 325, at para. 54.

[35] The *Bardal* factors include age, length of service, character of employment, and availability of similar employment having regard to the experience, training, and qualifications of the employee: *Bardal v. The Globe & Mail Ltd*. (1960), 1960 CanLII 294 (ON SC), 24 D.L.R. (2d) 140, at para. 21; *Bain v. UBS Securities Canada Inc*., 2016 ONSC 5362 ("*Bain*"), aff'd 2018 ONCA 19.

[36] Age: At the time of termination, Mr. Foster was 67 years old and the uncontradicted evidence is that he was going to continue working. Even though it is the defendant's duty to show that he failed to mitigate, Mr. Foster has provided significant evidence of his attempts to find new employment which further supports his evidence that he had no intention of retiring. Because of his age, I accept that he would have a difficult time finding alternate employment.

[37] Length of Service: With the employment periods stitched together, Mr. Foster had worked 12 years. He has significantly assisted in building the business and in securing a large client Labatts just prior to his termination.

[38] Character of Employment: His title was Vice President of Sales and he had been instrumental in building this business. As noted, the business was so speculative that they initially began working out of his home. It was through his efforts that this business took off.

[39] Availability of Similar Employment: He worked in a niche field and gave uncontradicted evidence that he could not find any similar employment. And so, he attempted to find alternate employment, still without success.

[40] In all the circumstances, I agree that the reasonable notice period is 18 months. See the following cases which provide comparable notice periods in comparable circumstances: *O-Sullivan v. Cavalier Tool & Manufacturing Ltd*., 2010 ONSC 3937; aff'd 2010 ONCA 480; *Spalti v. MDA Systems Ltd*., 2018 BCSC 2296; *McCarthy v. Motion Industries (Canada) Inc*., 2014 ONSC 7556 aff'd 2015 ONCA 224; *Mullaly v. Global Television Network*, 2006 NBQB 99.

[41] This would mean that the notice would run from April 29, 2014 (when he received the April 29, 2014 letter, which purported to give him some working notice) until the end of October 2015.

[42] Mr. Foster has provided evidence of sales to customers that he procured in the amount of $977,365.22 during the notice period. Ten percent of this amount is $97,736.52.

[43] I have already awarded Mr. Foster damages in the amount of $79,745.15, for the period of February 2014 until July 31, 2014, for which he was not paid, even though he was still employed and working. This included $16,289.43 in respect of the working notice from April 29, 2014, until July 31, 2014, when he was advised to stop contacting clients.

[44] Thus, he is entitled to the additional amount of $81,447.15 for the period from August 1, 2014, to the end of October 2015: ($97,736.52 - $16,289.43 = $81,447.15)

Issue 5: Is there any basis for awarding a claim for commissions in respect of all sales to customers found by Mr. Foster, after the notice period.

[45] Mr. Foster also claims $207,006.88 in respect of the present value of Mr. Foster's future commission entitlements under the remaining terms and renewal terms of each such existing contract negotiated by him.

[46] Mr. Foster relies upon *Bokhari v. Ottawa Customs Consulting Ltd*., 1998 CarswellOnt 3914 (Ont Ct. Gen Div). In that case the defendant company was in the business of recovering customs duties overpayments by clients. The plaintiff entered into a working arrangement with the defendant for salary, consulting, and commission in respect of customs duties that he recovered. There was a written agreement and a specific finding that the agreement in question entitled the plaintiff to share income on a 50 50 basis with the defendant in respect of clients brought in by him no matter when the work was done, whether it was during the life of the agreement or after its expiry.

[47] In this case, Mr. Foster only gave evidence in respect of an agreement whereby he would earn 10 % commission on sales. Although he did state that there was no specific provision that restricted his commissions in the event his employment ended, he gave no evidence that is comparable to the evidence given in the *Bokhari* case. That is, he gave no evidence as to any

contractual term that would specifically entitle him to future commissions in respect of clients brought in by him, after his employment ceased, taking into account a reasonable notice period.

[48] Therefore, he has not proven any contractual entitlement to the present value of future commission entitlements. As well, he did not provide any sufficient basis for the calculation of $207,006.88, being the present value of all of remaining and renewal terms of contracts negotiated by him.

Issue 6: Can the pleading be amended to correct a misnomer?

[49] The short answer is yes.

[50] The Statement of Claim issued February 25, 2015, noted the defendant to be 8240631 Canada Inc. carrying on business as Innovation CLIC.

[51] Mr. Foster recently discovered that there was a transposition of numbers in the name of the defendant in the title of proceeding. The corporate profile report for the defendant notes the corporate name to be 8240361 Canada Inc., carrying on business as Innovation CLIC. Thus, the title of proceeding has the numbers "3" and "6" switched in location. Notably, paragraph 3 of the Statement of Claim sets out the corporate name correctly.

[52] As set out in *Omerod v. Strathroy Middlesex General Hospital*, 2009 ONCA 697 at para 21, where "there is a coincidence between the plaintiff's intention to name a party and the intended party's knowledge that it was the intended defendant, an amendment may be made despite the passage of the limitation period to correct the misdescription or misnomer."

[53] To state the matter a different way, if a reasonable person who receives a pleading would look at the document and realize that it referred to him, then that is a case of misnomer such that an amendment can be made despite the passage of the limitation period: *Spirito Estate v. Trillium Health Care*, 2008 ONCA 762 at para 12.

[54] Innovation responded to this case with a Statement of Defence dated March 27, 2015, and litigated it for many years without raising any issue as to the corporate name reflected in the title of proceeding.

[55] Innovation was on notice, was never confused as to any aspect of this matter and there is no prejudice to making an order amending the style of cause to reflect the correct name of the defendant given that this was simply a misnomer.

[56] As such I grant the amendment.

Costs

[57] The plaintiffs request costs in the amount of $27,120.72 on a partial indemnity basis. I have reviewed the Bill of Costs, the hours charged and the rates. I find that the amount claimed is fair and reasonable and within the reasonable contemplation of Innovation and award these.

Conclusion

[58] I award the plaintiffs $81,447.15 in addition to $79,745.15 already awarded for the period August 1, 2014, to October 31, 2015, as reasonable notice based upon an 18-month reasonable notice period together with costs in the amount of $27,120.72 with prejudgment and post judgment interest at the Courts of Justice Act rate from the date of the Statement of Claim.

[59] I also give the plaintiffs leave to amend the misnomer.

[60] The plaintiffs may submit a Judgement to me in respect of both the partial judgment awarded in writing, as well as the matters reflected in this decision.

Justice Papageorgiou

Date: May 14, 2024