4

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Jakubcak v. Dr. R.A. Melnyk Inc.*, 2011 BCCA 31

Date: 20110121
Docket: CA037129

Between:

David Jakubcak

Appellant
(Plaintiff)

And

Dr. R.A. Melnyk Inc.
doing business as Coast Dental Centre

Respondent
(Defendant)

Before: The Honourable Mr. Justice Hall
The Honourable Madam Justice Levine
The Honourable Mr. Justice Tysoe

On appeal from: Supreme Court of British Columbia, April 15, 2009
(*Jakubcak v. Dr. R.A. Melnyk Inc.*, Vancouver Registry S090729)

Oral Reasons for Judgment

Counsel for the Appellant:	B.J. Lotzkar
Counsel for the Respondent:	C.D. Martin
Place and Date of Hearing:	Vancouver, British Columbia January 19, 2011
Place and Date of Judgment:	Vancouver, British Columbia January 21, 2011

[1] **TYSOE J.A.**: The plaintiff appeals from the order of the summary trial judge in awarding only $1,426 in damages with respect to the defendant's wrongful dismissal of the plaintiff from his employment with the defendant, and awarding costs of the entire action to the defendant.

[2] The defendant operates a dental office, which normally uses the services of two dental hygienists. The plaintiff is a dental hygienist who had worked for the defendant on four occasions for one day each prior to the events giving rise to this litigation.

[3] In the summer of 2008, one of the defendant's full-time dental hygienists went on maternity leave. She was expected to return to work following the maternity leave on August 1, 2009. A replacement hygienist was hired but she also became pregnant, and she terminated her employment in November 2008.

[4] The defendant's office manager contacted an agency, which was in the business of supplying temporary dental workers, in search of another replacement hygienist. It was the same agency which had previously referred the plaintiff to the defendant in respect of his one-day assignments.

[5] The defendant's office manager was advised by the agency that the plaintiff had accepted the position. There was a subsequent telephone conversation between the office manager and the plaintiff, in which they discussed certain aspects of the employment, including free dental work, payment of a conference fee and a bonus if the plaintiff continued to work for the defendant until July 30, 2009 and generated billings in excess of $100,000. At the plaintiff's request, the office manager sent him a confirmatory e-mail, which began with the sentence "Thank you for taking the maternity leave position from December 1/08 to July 30/09".

[6] The plaintiff began working for the defendant on December 1, 2008 but his employment was terminated with one day's notice on December 22, 2008 after the defendant learned that the full-time hygienist wanted to return from her maternity leave.

[7] The plaintiff sued the defendant, asserting that he had a fixed-term contract of employment and that he was entitled to be paid his remuneration until July 30, 2009 as well being entitled to damages in respect of the bonus, the conference fee and the dental work the plaintiff had intended to obtain for free during the period of his employment with the defendant.

[8] The matter came on for trial under what was then Rule 18A of the *Rules of Court*. The summary trial judge had before her affidavits with respect to the conversation between the plaintiff and the defendant's office manager, the confirmatory e-mail sent to the plaintiff and partial transcripts of the examination for discovery of the plaintiff.

[9] The judge concluded that the defendant was entitled to terminate the plaintiff's employment upon giving him reasonable notice. Her reasoning in this regard was as follows:

> [28] I do accept that a temporary employment contract may create a contract for a definite term pursuant to which an employer will be liable for the entire period of the employment offered. However, in the absence of a written contract, the court must determine the nature of the bargain reached between the parties from the discussions that took place between them. On the basis of the plaintiff's discovery evidence and the affidavit evidence of both parties, I conclude that the offer of employment in this case contemplated that work was available on a temporary basis until August 1, 2009, when the maternity leave of Ms. Tse was expected to end, but not that the plaintiff was guaranteed employment for that period of time. In my view, the overriding aspect of the defendant's offer of employment was its temporary nature rather and not its definite term. Although the work was to end at a specified time, there was no suggestion that the employer could not terminate on reasonable notice.
>
> [29] I am satisfied that had the plaintiff communicated to the defendant his assumption or understanding that the offer was for a fixed-term employment contract, the defendant would have insisted on a mechanism for termination of the contract on reasonable notice within that period of time.
>
> [30] I conclude that the defendant was entitled to terminate the plaintiff on reasonable notice.

[10] The judge held that the reasonable notice period for termination in the circumstances was one week and awarded the plaintiff damages in the amount of $1,426. After judgment was given, the judge was advised that on April 3, 2009, five

days before the hearing of the summary trial, the defendant had delivered to the plaintiff an offer to settle in the amount of $5,000. After considering submissions as to whether the defendant was entitled to an award of double costs from the date of the offer, the judge declined to award double costs but awarded the defendant its costs of the entire proceeding.

[11] On appeal, the plaintiff says it is unclear whether the judge found that there was a contract of definite duration containing a term that the contract could be terminated by giving reasonable notice, or a contract of indefinite duration. The plaintiff says that no provision for early termination can be properly implied in a definite term contract and that a finding of a contract of indefinite duration did not accord with the evidence.

[12] In my opinion, there is no uncertainty with respect to the conclusion of the trial judge. On my reading of the reasons for judgement as a whole, the judge found that the contract of employment was for an indefinite period and that it was not an express term of the contract that the defendant could not terminate on reasonable notice. As with all employment contracts of indefinite duration that do not contain an express term to the contrary, the result was that there was an implied term in the plaintiff's employment contract that it could be terminated by either party upon the giving of reasonable notice of termination.

[13] The issue, then, is whether this Court should interfere with the judge's finding that the contract was one of indefinite duration. This was largely a factual finding, although it could possibly be categorized as a finding on a question of mixed fact and law.

[14] In *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, the Supreme Court of Canada thoroughly canvassed the standards of review applicable to appellate courts reviewing decisions of trial judges. The Court held that deference should be given to trial judges in respect of findings of fact and findings of mixed fact and law unless there was a palpable and overriding error or, in the case of a finding of mixed fact and law, unless the judge made an extricable error in principle.

[15] It has not been demonstrated, in my view, that the judge in this case made a palpable error in a finding of fact. Although the opening sentence of the confirmatory e-mail was some evidence in support of a finding of a contract with definite duration, it was not conclusive, and it was open to the judge on the whole of the evidence to find that the contract was for an indefinite duration but was not to extend past July 30, 2009.

[16] The evidence before the judge included the affidavit of the defendant's office manager that she did not intend to employ the plaintiff for a fixed term and that she would have refused to hire the plaintiff if his employment was required to continue until July 30, 2009. The judge also had before her the evidence of the plaintiff on his examination for discovery that he was never told that his employment would be guaranteed to July 30, 2009 and that he did not remember whether he was told that his employment would end on July 30, 2009. It is my view that the judge's finding was reasonably supported by the evidence before her.

[17] Nor, in my opinion, did the trial judge make an extricable error in principle. There is no principle of law that a person hired as a replacement for an employee on temporary leave has entered into an employment contract of definite duration. Each case turns on its facts. The judge did not err, in my view, when she held that the plaintiff bore the onus of establishing that the employment contract was for a definite term: see *Herold v. Marathon Developments Inc.*, [1999] B.C.J. No. 878 at para. 6 (S.C. Chambers).

[18] In the alternative, if the employment contract was for an indefinite term, the plaintiff says that one week's notice of termination of his employment contract was inadequate. I am not persuaded that the judge erred in this regard.

[19] The plaintiff had been working for the defendant for approximately three weeks at the time of his termination. The employment was of a temporary nature that was arranged by a temp agency. I agree with the view of Mr. Justice Ewaschuk, expressed in *Hedeluis v. Ian Martin Associates Ltd.*, [1984] O.J. No. 861, 4 C.C.E.L. 9 (Ont. High Ct. Jus.), that notice periods in respect of temporary assignment

employees will be less than the notice periods to which permanent employees are entitled. Although the notice period of one week was relatively short, it is my view that it was adequate in the circumstances of this case.

[20] Finally, the plaintiff says the judge erred by awarding the defendant the costs of the entire proceeding as a result of the settlement offer. In my view, the plaintiff has a valid point on this issue. While Rule 37B(4) of the *Rules of Court* in effect at the time stated that the court may consider an offer to settle when exercising its discretion in relation to costs, that discretion was constrained by the options contained in Rule 37B(5), which read as follows at the relevant time:

> (5) In a proceeding in which an offer to settle has been made, the court may do one or both of the following:
>
> > (a) deprive a party, in whole or in part, of any or all of the costs, including any or all of the disbursements, to which the party would otherwise be entitled in respect of the steps taken in the proceeding after the date of delivery of the offer to settle;
> >
> > (b) award double costs of all or some of the steps taken in the proceeding after the date of delivery of the offer to settle.

[21] These options did not include the deprivation of costs to which a plaintiff, who has obtained a judgment in more than a nominal amount (albeit less than the amount of the settlement offer), is entitled in respect of steps taken in the proceeding prior to the delivery of the settlement offer. Under Rule 57(9) of the *Rules of Court*, costs were to follow the event unless the court otherwise ordered, and there must have been a principled basis for a contrary order. The judge did not exercise a discretion under Rule 57(15) to award costs in relation to a particular issue, and there was no other principled basis for depriving the plaintiff of party and party costs in respect of steps taken prior to the delivery of the settlement offer. In my opinion, the judge erred in depriving the plaintiff of those costs, and in awarding the defendant its costs in respect of steps taken prior to the delivery of the settlement offer.

[22] In the result, I would allow the appeal to the limited extent of setting aside the judge's order of costs and replacing it with an order awarding costs of the steps

taken in the action up to April 3, 2009 to the plaintiff and awarding costs of the steps taken thereafter to the defendant. I would otherwise dismiss the appeal. In view of the plaintiff's limited success on this appeal, I would order that each party bear their own costs of the appeal.

[23] **HALL J.A.**: I agree.

[24] **LEVINE J.A.**: I agree.

[25] **HALL J.A.**: This appeal is allowed in part as provided for in the reasons of Mr. Justice Tysoe.

D. Tysoe J.A.

The Honourable Mr. Justice Tysoe