COURT OF APPEAL FOR ONTARIO

CITATION: Kotecha v. Affinia Canada ULC, 2014 ONCA 411
DATE: 20140520
DOCKET: C57512

Doherty, Cronk and Hourigan JJ.A.

BETWEEN

Niranjan Kotecha

Plaintiff/Respondent

and

Affinia Canada ULC

Defendant/Appellant

Christopher A. Chekan, for the appellant Affinia Canada ULC

Pamela Krauss, for the respondent Niranjan Kotecha

Heard and released orally: April 24, 2014

On appeal from the orders of Justice P. B. Hambly of the Superior Court of Justice, both dated July 18, 2013.

ENDORSEMENT

[1] The respondent, who worked for 20 years for the appellant, an auto manufacturer, commenced a simplified proceeding arising out of the termination of his employment.

[2] The primary issue in the proceeding was the appropriate length of notice. The motion judge granted the respondent's motion for summary judgment and awarded 22 months' pay in lieu of notice, in addition to the working notice provided.

[3] On the issue of the actual working notice, we agree with the position of the appellant that the period of working notice was 11 weeks.

[4] The appellant argues before this court that the motion judge erred in disregarding the unreported judgment of Taylor J. of the Superior Court in *Sharma v. Affinia Canada* and notes that on almost identical facts, the motion judge in *Sharma* awarded 13 months' reasonable notice. According to the appellant, the motion judge was bound by the doctrine by *stare decisis* to award a similar period of reasonable notice in this case.

[5] We reject this ground of appeal. The principle of *stare decisis* requires that courts render decisions that are consistent with the previous decisions of higher courts: *Bedford v. Canada*, 2012 ONCA 186, at para. 56. While other decisions of the Superior Court are persuasive, they are not binding as the appellant seems to suggest. Moreover, the determination of the appropriate notice period is a very fact-specific exercise and is calculated in accordance with numerous factors as set out in *Bardal v. Globe and Mail Ltd*., [1960] O.J. No. 149, being the

character of employment, the length of service, the age of the employee and the availability of other similar employment.

[6] In the case at bar, the appellant had worked at the company for 20 years, whereas, Ms. Sharma had worked there for 16 years. The appellant in this case was also eight years older than the plaintiff in the *Sharma* case.

[7] The motion judge was entitled to consider the period of reasonable notice owing to the respondent on the basis of the facts before him, rather than blindly following a case with different facts.

[8] Notwithstanding the foregoing, the court should strive to ensure that notice periods, which are inherently individual, are consistent with the case law. That was not done in this case.

[9] In our view, the notice period in this case, totalling 24 and one-half months, is excessive and there are no exceptional circumstances that would justify this award. However, we do not accept the appellant's position that a 13-month notice period is appropriate.

[10] Having regard to the fact that the respondent is older than Ms. Sharma, that he has no realistic possibility of obtaining similar employment and that he had a longer tenure of service than Ms. Sharma, but considerably less than the plaintiff in *Di Tomaso v. Crown Metal Manufacturing Packaging Canada LP*, 2010

O.J. No. 4414, we conclude that an appropriate notice period is 18 months. From this notice period, the 11 weeks working notice must be deducted.

[11] The appeal is granted in part to adjust the notice period to 18 months, less the working notice of 11 weeks. We trust that the parties can calculate the appropriate adjustments to damages where necessary based on the foregoing.

[12] With respect to the issue of costs, having regard to the history of the matter, the position taken by the employer, and given that the amount of notice determined to be appropriate in this case is far in excess of the position maintained by the appellant, we are of the view that nominal costs are appropriate in the circumstances. We award the appellant costs of the appeal in the amount of $2,500.00 inclusive of HST and disbursements.

[13] After the hearing of this appeal, the appellant made a written submission that because the parties' post–hearing calculation of damages totalled $44,720.95, the respondent did not better his offer to settle of $50,000 served prior to the motion and, therefore, the motion judge's award of costs on a substantial indemnity basis should be set aside.

[14] It is evident from a review of the motion judge's ruling on costs that, while he made reference to the offer to settle, he found that the conduct of the appellant's counsel was unreasonable and awarded substantial indemnity costs pursuant to R. 20.06, which permits, *inter alia*, a motion judge to fix costs on a

substantial indemnity basis where a party has acted unreasonably in responding to a motion for summary judgment. Accordingly, we decline to interfere with the motion judge's costs award.

"Doherty J.A."

"E.A. Cronk J.A."

"C.W. Hourigan J.A."