COURT OF APPEAL FOR ONTARIO

CITATION: Morgan v. Vitran Express Canada Inc., 2015 ONCA 293
DATE: 20150430
DOCKET: C58007

Hoy A.C.J.O., Watt and Brown JJ.A.

BETWEEN

Dunstan Morgan

Plaintiff
(Respondent)

and

Vitran Express Canada Inc.

Defendant
(Appellant)

Thomas A. Stefanik, for the appellant

Christine Davies, for the respondent

Heard: April 13, 2015

On appeal from the judgment of Justice Darla A. Wilson of the Superior Court of Justice, dated November 5, 2013, with reasons reported at 2013 ONSC 6835.

By the Court:

Overview

[1] The appellant, Vitran Express Canada Inc., employed the respondent, Dunstan Morgan, as a dock supervisor for almost 25 years. In September, 2010,

Vitran changed Morgan's job from dock supervisor to "freight analyst," a position created specifically for Morgan who took the position that Vitran's action constituted constructive dismissal, and he commenced this action. By Judgment dated November 5, 2013, the trial judge ordered Vitran to pay Morgan damages in the amount of $80,911.88. The trial judge concluded that Morgan had been constructively dismissed from his position as dock supervisor at Vitran, and she held that Morgan was not obliged to continue working for Vitran in order to mitigate his damages. Vitran appeals, submitting that the trial judge erred in reaching both conclusions.

Constructive dismissal

[2] On the issue of constructive dismissal, the trial judge applied what was then the leading case on the issue, *Farber v. Royal Trust Co.*, [1997] 1 S.C.R. 846. After the trial judge granted judgment, the Supreme Court of Canada re-visited the law of constructive dismissal in *Potter v. New Brunswick Legal Aid Services Commission*, 2015 SCC 10, and identified a two-branch test for constructive dismissal. Under the first branch, the court must identify an express or implied contract term that has been breached and then determine whether that breach substantially altered an essential term of the contract. Under the second branch, the court must consider whether the conduct of the employer, when viewed in the light of all the circumstances, would lead a reasonable person to conclude that the employer no longer intended to be bound by the terms of the

contract. In *Potter* the Supreme Court of Canada stated, at paras. 36 and 42, that these two tests for constructive dismissal were not a departure from the approach adopted in *Farber*, which the trial judge applied. Accordingly, the trial judge applied the correct legal principles.

[3] In support of its position that the trial judge erred in finding that Vitran had constructively dismissed Morgan, the appellant advances two main arguments.

[4] First, Vitran submits that the evidence does not support the trial judge's finding that the terms of Morgan's employment had been altered in a substantial way. We see no merit in this submission.

[5] The evidence supported the trial judge's finding that by requiring Morgan to work as a freight analyst, Vitran had unilaterally altered the essential terms his employment contract in a substantial way. Although in para. 81 of her reasons the trial judge incorrectly stated that as dock supervisor Morgan had supervised 22 men on the dock, at para. 5 she correctly noted that Morgan had shared that responsibility with other dock supervisors. At para. 84 of her reasons, the trial judge found that the new position of freight analyst was "a job that had been created checking on 2 part-time workers, a position of less importance and prestige with very little supervisory function and little opportunity to make decisions and exercise discretion." That finding was supported by the evidence,

and it alone justified the trial judge's conclusion that Vitran had altered the essential terms of Morgan's employment in a substantial way.

[6] Second, Vitran submits that the trial judge erred in her analysis of the constructive dismissal issue by taking into account evidence about its treatment of Morgan in the period prior to his September, 2010 transfer to the position of freight analyst. To the extent that the trial judge did so, she did not err. She was entitled to consider whether Vitran's conduct, in light of the circumstances and viewed objectively, would lead a reasonable person to conclude that the employer no longer intended to be bound by the terms of the contract. See, *Potter*, at paras. 42 and 164.

[7] Further, Vitran submits that the trial judge failed to follow the decision of this court in *Mifsud v. MacMillan Bathurst Inc.* (1989), 70 O.R. (2d) 701 (C.A.). Specifically, Vitran argues that in *Mifsud* this court observed that a finding of demotion was itself not determinative of the issue of constructive dismissal, but the court would have to ascertain whether the employment contract contained an implied term that, if the employer validly considered the employee's performance to be unsatisfactory, it could demote him to a position of lesser responsibility without his consent.

[8] It must be recalled that *Mifsud* was decided over 25 years ago. Since then the Supreme Court of Canada has addressed the issue of constructive dismissal

in its decisions in *Farber* and *Potter*. In both decisions, the Supreme Court of Canada stated that a demotion is a substantial change to the essential terms of an employment contract which could warrant a finding of constructive dismissal: see, *Farber*, at paras. 36 and 46; *Potter*, at paras. 37 and 38. In any event, the trial judge's finding that Vitran had not demonstrated that Morgan was incapable of performing his job as dock supervisor directly addressed whether Vitran could rely on any such implied term of its employment contract with Morgan to demote him.

[9] In sum, we see no error in the trial judge's conclusion that Vitran had constructively dismissed Morgan.

Mitigation

[10] Vitran submits that it had established at trial that a reasonable person in Morgan's situation would have accepted the chance to continue working at the company as a freight analyst, with the result that the trial judge had erred in concluding that Morgan was not obliged to take up the freight analyst position to mitigate his damages from the constructive dismissal. Vitran argues that the trial judge erred in finding that Morgan was subject to an unfriendly work environment, reached her conclusion in the absence of evidence from other Vitran employees about how they would view Morgan's new position as a freight

analyst, and erred in finding that Morgan's personal relationships with several of his superiors, Messrs. Graham, Ferguson and Kahn, were acrimonious.

[11] In her reasons, the trial judge referred to the governing legal authorities, including *Evans v. Teamsters Local Union No. 31*, 2008 SCC 20, [2008] 1 S.C.R. 661, and to the principles enunciated in those cases regarding the circumstances in which a dismissed employee's obligation to mitigate damages must be met by returning to work for the same employer. See, in particular, *Evans,* at para. 30.

[12] The trial judge considered and applied those principles to the facts before her. She reviewed the pertinent evidence, the positions of the parties and the factors weighing in favour of and against the conclusion that Morgan's decision not to return to work was reasonable. The trial judge made the following critical findings of fact:

(i) The work environment at Vitran was unfriendly;

(ii) The work Morgan was offered as a freight analyst was of lesser importance than his job as a dock supervisor;

(iii) By accepting the freight analyst position, Morgan would have suffered a loss of dignity in the eyes of the dock workers he used to supervise. The freight analyst position had not been posted, so other employees would have known it was a position created specifically for Morgan because of his perceived ineptitude and would have been viewed as a demotion by other employees;

(iv) Morgan had been treated in an unacceptable manner by his employer in the period leading up to his constructive dismissal; and,

(v) Morgan's personal relationships with his supervisors were acrimonious in the sense that no matter what Morgan did, they continued to criticize him.

[13] These factual findings, some of which were credibility-based, were open to the trial judge to make on the record before her and they attract deference from this court. The trial judge heard from two Vitran witnesses: Robert Graham and Heidi Saccucci. She did not find Graham to be an impressive witness, and she attached little weight to Saccucci's evidence. The trial judge gave cogent reasons for reaching those conclusions. Her reasons demonstrate that she considered the factors relevant to the assessment of the reasonableness of Morgan's decision not to continue with Vitran as a freight analyst, and it was for the trial judge to determine the weight to be assigned to those factors.

[14] Finally, Vitran submits that it was not open to the trial judge to conclude that a reasonable person in Morgan's position would not have accepted the employer's offer of the freight analyst position in the absence of hearing evidence from other Vitran employees about how they would have viewed Morgan's transfer from dock supervisor to freight analyst. We see no merit in this submission. Having considered the evidence of the nature and conditions of Morgan's employment, the work atmosphere, his treatment over the years by his supervisors, and the nature of the newly-created position of freight analyst, it was open to the trial judge to conclude, in all the circumstances, that Vitran had not

met the objective test of demonstrating that a reasonable person in Morgan's position would have accepted its offer.

[15] Accordingly, we see no basis for appellate interference with the trial judge's ruling that in the circumstances, and viewed objectively, it was reasonable for Morgan to reject Vitran's offer of the new position of freight analyst in mitigation of his damages.

Disposition

[16] For these reasons, the appeal is dismissed, and Vitran shall pay Morgan costs in the amount of $7,500, inclusive of HST and disbursements.

Released: April 30, 2015 (A.H.)

"Alexandra Hoy A.C.J.O."
"David Watt J.A."
"David Brown J.A."