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COURT OF APPEAL FOR ONTARIO

GOUDGE, SIMMONS and JURIANSZ JJ.A.

B E T W E E N:

LANCE BELTON, MICHAEL BONITO, JOE CIARAVELLA, JOE CITRIGNO, BLAKE COLE, BRIAN LEACH, DANIEL LEMIRE, DONALD MacDONALD and DONALD ROBBINS	)	Thomas J. Gorsky for the appellants
Plaintiffs (Appellants)	)	
- and -	)	
LIBERTY INSURANCE COMPANY OF CANADA	)	D. Barry Prentice for the respondent
Defendants (Respondent)	)	
	)	Heard: April 29, 2004

On appeal from the judgment of Justice Tamarin M. Dunnet of the Superior Court of Justice dated September 24, 2002.

JURIANSZ J.A.:

[1] The appellants appeal from the judgment of Dunnet J. dated September 24, 2002 dismissing their action against the respondent ("LICC") for wrongful dismissal. They seek to set aside the trial judge's findings that their refusal to acknowledge LICC's right to amend their commission schedule was a repudiation of an essential term of their employment contract justifying termination, and that they failed to mitigate their damages.

[2] LICC cross-appeals from the trial judge's finding that the appellants were its employees and not independent contractors.

[3] For the reasons that follow, I would allow the appeal and dismiss the cross-appeal. After first reviewing the facts giving rise to this litigation, I will address LICC's cross-appeal and then the issues raised by the appellants on the appeal.

THE FACTS

[4] Until May 30, 1996 the agents were commissioned sales representatives selling life insurance for the Prudential Insurance Company of America ("Prudential") and property and casualty insurance for the Prudential of America General Insurance Co. ("PAGIC"). In the spring of 1996, London Life acquired Prudential's Canadian life insurance business. The appellants continued to sell life insurance for London Life and property and casualty insurance for PAGIC. Each appellant also signed a PAGIC Agent Agreement ("the PAGIC agreement"), which included the following terms:

> Status and Authority For all purposes the Agent is an independent contractor and the Contract shall not create any employer/employee relationship between the Company and the Agent. ...
>
> Commissions ... Changes to the schedule of commissions may be made by the Company upon written notice at least 90 days in advance of the effective date of any such change to the commission schedule.
>
> Termination Either party may suspend or terminate the Contract by written notice to the other party. ...

[5] The Liberty Mutual Insurance Company purchased PAGIC in January of 1997. It assumed the PAGIC agreements, and renamed PAGIC the Liberty Insurance Company of Canada (LICC). London Life entered into an exclusive inter-corporate distribution agreement with LICC, whereby London Life agents would continue to have the ability to distribute property and casualty products for LICC. Accordingly, the appellants again continued to sell life insurance for London Life, and began selling property and casualty insurance for LICC under the terms of their PAGIC agreement.

[6] On January 4, 1999, LICC wrote to its agents, and announced that the distribution agreement between LICC and London Life had been renewed. With the letter, LICC enclosed a new LICC agency agreement ("the LICC agreement") regarding the sale of LICC's property and casualty insurance that it asked the agents to sign and return. The letter stated the LICC agreement would take effect on April 7, 1999, and would change the commission structure under the PAGIC agreement, placing greater emphasis on new sales rather than renewals, and, as well, would establish "minimum production levels" for London Life and LICC sales. Under the LICC agreement, an agent's agreement would be terminated if he failed to meet the new minimum production levels. The covering

letter invited the agents to contact LICC with questions or concerns and asked them to return the LICC agreement with their signature no later than February 28, 1999.

[7] In February 1999, LICC and London Life sent the agents separate letters advising that London Life had agreed to remove from the LICC agreement the minimum production levels relating to London Life products. The letter from LICC enclosed a revised Schedule B to the LICC agreement, in which the reference to London Life minimum production levels was deleted, and asked the agents to initial this revised schedule and return it to LICC. The letter from London Life advised the agents to contact a LICC or London Life representative if they wished to discuss the contract changes.

[8] LICC wrote to the appellants again on March 30, 1999, reminding them to sign and return the LICC agreement. The March 30, 1999 letter stated as follows:

> As you are aware, a revised LICC Agency Agreement was mailed to you in early January.
>
> We requested you sign and return the Agreement by February 28, 1999. To date we have not received your signed agreement.
>
> Your current Agreement with LICC will terminate April 7, 1999, 12: 01 a.m., and therefore your attention to this matter is essential. Please return your signed agreement immediately... .

[9] None of the appellants provided LICC with a signed LICC agreement. Finally, LICC wrote to the appellants on April 15, 1999, indicating that it had not received a signed copy of the LICC agreement and notifying each of them that "[e]ffective April 7, 1999 your Agreement with Liberty Insurance Company of Canada is terminated".

[10] The trial judge found that each of the appellants was aware that if he did not sign the agreement, his right to sell LICC products and his relationship with LICC would terminate on April 7, 1999.

ANALYSIS

WERE THE APPELLANTS EMPLOYEES OF LICC OR INDEPENDENT CONTRACTORS?

[11] As noted by the trial judge, the fact that the PAGIC agreement stated it did not create an employer-employee relationship is not determinative. Relying on *Doyle v. London Life Insurance Co.* (1985), 23 D.L.R. (4th) 443 (B.C.C.A.), leave to appeal to

S.C.C. refused (1986) 64 N.R. 318n, the trial judge identified the following principles to distinguish independent contractors from employees when considering the status of a commissioned agent:

1. Whether or not the agent was limited exclusively to the service of the principal;
2. Whether or not the agent is subject to the control of the principal, not only as to the product sold, but also as to when, where and how it is sold;
3. Whether or not the agent has an investment or interest in what are characterized as the "tools" relating to his service;
4. Whether or not the agent has undertaken any risk in the business sense or, alternatively, has any expectation of profit associated with the delivery of his service as distinct from a fixed commission;
5. Whether or not the activity of the agent is part of the business organization of the principal for which he works. In other words, whose business is it?

[12] After considering all the evidence in light of these factors, the trial judge concluded that there was an employer-employee relationship between LICC and the agents. The trial judge observed that "the issue of control is an important aspect in the relationship between the plaintiffs and LICC", noting that LICC introduced a centralized call centre that effectively eliminated direct contact between the agents and their customers regarding policy changes and renewals, and that all of the agents had LICC managers, although many of the agents did not call upon their managers for assistance. The trial judge also noted that the agents were not permitted to advertise using the Liberty Mutual name; that the agents were not permitted to sell any property and casualty insurance other than LICC's; that LICC owned the agents' books of business; and that the agents had no ownership or legal entitlement to their customers.

[13] The trial judge also referred to the fact that the agents "were required to devote their full time to the interests of London Life and its customers and act exclusively for London Life". This factor, in isolation, could be seen as militating against the trial judge's finding of an employment relationship between the appellants and LICC. However, the agreement between London Life and LICC appears to have permitted LICC to employ the appellants directly, on terms and conditions separate from London Life, without the appellants being in breach of their obligations to London Life. In this context, the appellants' employment relationship with London Life does not preclude a finding that they also had an employee-employer relationship with LICC.

[14] The following passage from *Jaremko v. A. E. LePage Real Estate Ltd.* (1989), 69 O.R. (2d) 323 (C.A.) at 324 is apt:

> The determination whether a particular individual is a servant or employee, as contrasted with an independent contractor,

> must in every case be made on the evidence adduced before, and accepted by, the trier of fact. In the present case, the trial judge, upon review and consideration of the competing factors set out in her reasons for judgment, concluded that a master-and-servant relationship existed between the plaintiff and the defendant. In our view, there was evidence on the basis of which she could reach that conclusion, and we are not persuaded that she misapprehended any of the evidence in so doing.

[15] I would not disturb the trial judge's finding that the appellants were in an employer-employee relationship with LICC as she applied the appropriate factors in considering this issue and there was sufficient evidence to support her conclusion.

IS LICC LIABLE TO THE APPELLANTS FOR WAGES IN LIEU OF REASONABLE NOTICE?

[16] The appellants took the position at trial that LICC's action in requiring them to sign the LICC agreement, which they claimed reduced their commissions and introduced new minimum production levels, was a fundamental breach of contract amounting to constructive dismissal. The trial judge dismissed the appellants' action on the basis that LICC was entitled to introduce changes to the commission plan and that the appellants were in breach of their contract by refusing to acknowledge LICC's managerial authority to make such changes. For the reasons that follow, I disagree with the trial judge's conclusions, and would find that the appellants were entitled to reasonable notice of termination.

[17] It seems that the trial judge took the view that the LICC agreement was a new agency agreement and also went on to consider, in the alternative, whether LICC amended the compensation plan of the PAGIC agreement. In this regard, the trial judge wrote at paragraphs 73 and 74:

> [73] In my opinion, LICC had the contractual right to implement the new Agreement. It gave notice of the changes in accordance with the Agreement, which I find to be reasonable. I find that the plaintiffs repudiated an essential term of the Agreement by refusing to acknowledge LICC's right to amend the compensation plan as part of its managerial authority. The plaintiffs knew that if they did not sign the new Agreement, the right to sell LICC products and their relationship with LICC would come to an end. In my view, such conduct on the part of the plaintiffs justified dismissal.

> [74] In the alternative, LICC had the right to terminate the plaintiffs when they refused to acknowledge the right of the company to amend the compensation plan. The evidence is undisputed that LICC made the decision to change the commission structure in good faith and for valid and legitimate business reasons.

[18] At the hearing of the appeal, counsel for LICC declined to take a position on whether LICC terminated the PAGIC agreement and replaced it with the LICC agreement, or simply amended the compensation schedule of the PAGIC agreement.

[19] In my view, three aspects of the record lead to the conclusion that the LICC agreement was a new agreement. First, the language LICC used in its letters to the appellants is consistent only with LICC terminating the PAGIC agreement and implementing a new agreement. In its letter dated January 4, 1999, LICC advised the appellants that a "new agency agreement" was enclosed for their review and signature, that the "existing agreement" would remain in effect until April 7, 1999, at which time "the new agreement will supersede all previous agreements". Similarly, LICC's letter dated April 15, 1999, advised the appellants that the "current Agency Agreement" had "expired", and noted that LICC had not received a "signed copy of the new Agreement". Second, the PAGIC agreement only gave the company the right to change the compensation schedule; however the LICC agreement changed more than just the compensation schedule in the PAGIC agreement. Notably, the LICC agreement added minimum performance requirements for LICC as well as London Life products (although London Life later softened these requirements). Third, at no time did LICC simply provide the appellants with an amended compensation schedule under the PAGIC agreement. I conclude, therefore, that the LICC agreement terminated the PAGIC agreement and imposed a new agreement on the appellants.

[20] LICC had the undoubted right to terminate the PAGIC agreement. However, it was obliged to provide the appellants with reasonable notice for doing so, even though the termination of the PAGIC agreement was based on sound business reasons. Upon receiving LICC's letter dated January 4, 1999, giving them notice of the termination of the PAGIC agreement on April 7, the appellants would clearly be aware that their right to sell LICC products and their relationship with LICC would end if they did not sign the LICC agreement. However, the appellants' right to reasonable notice of the termination of the PAGIC agreement remained unaffected by their refusal to sign the LICC agreement. The appellants were under no obligation to accept the LICC agreement, and their refusal to do so cannot be considered just cause for LICC terminating the PAGIC agreement under which they were employed.

[21] Even if LICC's action in introducing the LICC agreement is characterized as simply amending the compensation plan of the PAGIC agreement, I would still find that the appellants' refusal to acknowledge LICC's right to make these changes did not justify their dismissal and that the appellants remained entitled to reasonable notice of termination of their employment under the PAGIC agreement. The PAGIC agreement gave LICC the right to change the commission schedule on ninety days notice; it did not require the appellants to acknowledge LICC's right to change the commission schedule.

[22] Whether the courts should develop the common law to place a duty on employees to affirmatively acknowledge an employer's right to make unilateral changes to the terms and conditions of their employment, even where such right is granted by contract, must be determined according to the policy considerations that animate employment law. MacPherson J.A. in *Ceccol v. Ontario Gymnastic Federation* (2001), 55 O.R. (3d) 614 (C.A.) recapitulated that the common law should be interpreted to protect vulnerable employees. He said (at para. 47):

> In an important line of cases in recent years, the Supreme Court of Canada has discussed often, with genuine eloquence, the role work plays in a person's life, the imbalance in many employer-employee relationships and the desirability of interpreting legislation and the common law to provide a measure of protection to vulnerable employees:[references omitted].

[23] The line of cases to which MacPherson J. A. referred includes *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701, *Machtinger v. HOJ Industries,* [1992] 1 S.C.R. 986, and *Reference Re Public Service Employee Relations Act (Alta.),* [1987] 1 S.C.R. 313. Dickson C.J., in *Reference Re Public Service Employee Relations Act (Alta.)*) wrote (at para. 91): "Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being." Iacobucci J., writing for the majority of the Supreme Court of Canada in *Machtinger,* noted (at para. 30) that the manner in which employment can be terminated is of fundamental importance to the individual. He quoted with approval the following passage:

> ... the terms of the employment contract rarely result from an exercise of free bargaining power in the way that the paradigm commercial exchange between two traders does. Individual employees on the whole lack both the bargaining power and the information necessary to achieve more

> favourable contract provisions than those offered by the employer, particularly with regard to tenure.
>
> [From K. Swinton, "Contract Law and the Employment Relationship: The Proper Forum for Reform" in B. J. Reiter and J. Swan, eds., *Studies in Contract Law* (Toronto:Butterworths, 1980), 357 at 363.]

[24] Iacobucci J., writing the majority decision in *Wallace*, quoted this passage again, emphasizing his view of the accuracy of its observation regarding the power imbalance in employment relationships. Iacobucci J. went on to point out that this unequal balance of power in an employment relationship led the Supreme Court of Canada, in *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, to recognize employees as a vulnerable group in society. Iacobucci J. noted that for most people, work is one of the defining features of their lives and that any change in their employment status is bound to have far-reaching repercussions. He said (at para. 95):

> The point at which the employment relationship ruptures is the time when the employee is most vulnerable and hence, most in need of protection. In recognition of this need, the law ought to encourage conduct that minimizes the damage and dislocation (both economic and personal) that result from dismissal.

[25] In my view, the trial judge's view that the appellants' failure to acknowledge LICC's right to change the compensation schedule constituted a repudiation of the PAGIC agreement did not pay heed to these principles. As occurred in this case, it is not unusual for an employer and employees to disagree over whether the employer's unilateral changes to the terms and conditions of the employment constitute constructive dismissal. The employees' predicament in such a situation is unenviable. If they leave their employment claiming constructive dismissal, they will face the immediate loss of job and income. They will not know when, or even if, they will find replacement employment. They will have to finance an action in an expensive legal system. Should the matter proceed to trial, they will bear the burden of proving they have been constructively dismissed. Years may pass before the dispute reaches trial, and when it does, the court may not agree with the position they have taken. From the beginning they face the prospect of paying the employer's legal costs. On the other hand, if the employees acknowledge an employer's changes and continue to work, they will be taken to have condoned the changes and will no longer be able to claim constructive dismissal if they are dissatisfied with the new terms and conditions of employment.

[26] The vulnerability of employees who believe they may have been constructively dismissed and the difficulty of making the life-altering decisions they face must be

recognized. In this context, it is understandable that such employees may wish to try to adjust to the new terms and conditions without affirming the employer's right to make these changes and before taking the radical step of advancing a constructive dismissal claim. Allowing employees reasonable time to assess the new terms before they are forced to take an irrevocable legal position not only addresses their vulnerability, but also promotes stability and harmonious relations in the workplace. For these reasons, I am of the view that the appellants had no obligation to acknowledge LICC's right to change the compensation schedule, and that their failure to do so did not constitute a repudiation of their agreement with LICC.

[27] It is important to note that while the appellants in this case refused to acknowledge LICC's right to amend the compensation plan, they continued to fulfill all of their duties. Had LICC not terminated their employment on April 7, 1999, but simply started compensating them according to the new compensation schedule as it considered it was entitled to, the appellants would have had the opportunity to assess their changed situation for a reasonable time, and decide whether they could accept it or whether they would claim wrongful dismissal. The conclusion that "the agents repudiated an essential term of the Agreement by refusing to acknowledge LICC's right to amend the compensation plan as part of its managerial authority" denies the appellants the opportunity to try out the new terms and precludes the possibility that the situation might have resolved without resort to the legal process.

[28] Therefore, even if LICC's action is characterized as simply amending the compensation plan of the PAGIC agreement, I would find that the appellants' refusal to acknowledge LICC's right to make these changes to the compensation plan did not justify their dismissal and that they are entitled to reasonable notice.

DAMAGES AND MITIGATION

[29] The trial judge included in her reasons for judgment her views regarding what would constitute reasonable notice for each appellant. Although LICC raised this as a ground of cross-appeal, it did not pursue the issue in oral argument. In any event, I would not disturb the trial judge's assessment of what would have been reasonable notice for each appellant.

[30] In my view, the notice period for the appellants began to run as of January 4, 1999, the date when LICC first advised the appellants that the PAGIC agreement would end on April 7, 1999, and would be replaced by the LICC agreement. The trial judge concluded that the notice period began to run on April 7, 1999, and not January 4, because LICC changed its position regarding the London Life minimum performance requirements after it sent the agents the January 4, 1999 letter. However, this change did

not alter the unequivocal nature of the notice given by LICC to the appellants on January 4, 1999 that the PAGIC agreement would terminate on April 7, 1999.

[31] I should note that under the analysis that the LICC agreement simply amended the compensation schedule of the PAGIC agreement, the notice period would run from April 7, 1999, the date when LICC actually terminated its relationship with the appellants.

[32] The trial judge concluded that even if LICC constructively dismissed the appellants, no damages flowed from their dismissal. In her view, the appellants had failed to prove their damages because, although they could no longer sell property and casualty insurance for LICC after April 7, 1999, they continued to be employed by London Life selling life insurance. She reasoned that the appellants "had the opportunity to sell more life [insurance] business since they were no longer occupying time selling [property and casualty] business." Furthermore, the trial judge rejected the appellants' position that damages should be awarded on the basis of the average of their property and casualty earnings from 1996 to 1998 because "it fails to take into account mitigation". She also was of the view that the appellants failed to prove their damages on a balance of probabilities because they did not undertake an analysis to demonstrate whether the loss of LICC property and casualty earnings had any financial impact on them.

[33] Since I found that the LICC breached its obligation to provide reasonable notice of such termination to the appellants, the appellants, as the successful innocent parties, are entitled to all reasonable presumptions in calculating their losses. As Laskin C.J. indicated in *Michaels v. Red Deer College*, [1976] 2 S.C.R. 324, in the ordinary course, a plaintiff in a wrongful dismissal case would lead evidence respecting the loss claimed to be suffered, and the burden is then on the defendant to show the plaintiff could reasonably have avoided some part of the loss claimed. Laskin C.J. referred to leading textbooks on this issue and quoted with approval the following extract from C.G. Cheshire, C.H.S. Fifoot & M.P. Furmston, *Law of Contract*, 8th ed. (London: Butterworths, 1972) at 599:

> But the burden which lies on the defendant of proving that the plaintiff has failed in his duty of mitigation is by no means a light one, for this is a case where a party already in breach of contract demands positive action from one who is often innocent of blame.

[34] The trial judge erred in her views regarding damages because, in effect, she placed the burden on the appellants to prove that they had mitigated any losses they suffered by not receiving reasonable notice, when in fact the burden was on LICC to prove the appellants had failed to mitigate their damages. In any wrongful dismissal case, not only those where the plaintiff holds two jobs, it may be said the loss of employment leaves the

appellants with additional free time to earn other income. However, the burden always remains on the employer to show a failure to mitigate.

[35] At trial, the appellants placed into evidence their income from all sources and established they lost LICC income following April 7. I agree with the appellants' submission that their property and casualty earnings during the period from 1996 to 1998 is an appropriate basis upon which to assess their lost income. If an analysis could show that an augmentation in the appellants' London Life income offset the loss of their LICC income, it was up to LICC to offer it. Since LICC did not offer such evidence, it is liable for their full amount of the appellants' lost property and casualty earnings.

[36] The appellants also disputed the trial judge's finding that they are not entitled to statutory severance pay under the *Employment Standards Act*, R.S.O. 1990, c. E. 14. The trial judge concluded that the appellants were disentitled to severance pay by virtue of s. 58 (6) (a), which excludes severance pay entitlement to employees who refuse an employer's offer of reasonable alternative employment. In this regard, the trial judge relied on the LICC agreement as an offer of reasonable alternative employment. It is unnecessary to deal with this issue as the damages that the appellants will receive for wages in lieu of notice exceed each appellant's entitlements under the *Employment Standards Act.*

CONCLUSION

[37] I would dismiss LICC's cross-appeal, allow the appellants' appeal, set aside the order of the trial judge, and order that the appellants are entitled to judgment according to the notice periods assessed by the trial judge running from January 4, 1999. The amount of each appellant's judgment shall be calculated using the average of his property and casualty earnings during the years 1996-1998.

[38] Costs on a partial indemnity scale payable by LICC to the appellants are fixed in the amount of $10,000.00 inclusive of disbursements and G.S.T.

"R.G. Juriansz J.A."
"I agree S.T. Goudge J.A."
"I agree J.M. Simmons J.A."

Released: August 17, 2004