IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Clelland v. eCRM Networks Inc., 2006 NSSC 337

Date: 20061115
Docket: S.H. No. 262120(A)
Registry: Halifax, NS

Between:

Kelly Clelland

Appellant

v.

eCRM Networks Inc.

Respondent

Judge: Associate Chief Justice Deborah K. Smith

Heard: May 16th, 2006 in Halifax, Nova Scotia

Counsel: Richard (Rick) M. Dunlop for the Appellant, Kelly Clelland

Jason McQuaid/James Rossiter for the Respondent, eCRM Networks Inc.

[1] This is an appeal by Kelly Clelland ("the Appellant") from a Small Claims Court decision dated January 10th, 2006 (as subsequently amended).

[2] In the spring of 2005, the Appellant applied for and obtained a job with eCRM Networks Inc. ("the Respondent"). Prior to the commencement of this employment, the Respondent drafted a written employment contract for the Appellant to sign. The contract had a maximum term of one year which commenced on April 11th, 2005. According to the terms of the contract, the Appellant was to be employed as an Administrative Services Manager. The contract included, *inter alia*, the following terms:

> .....
>
> **2. <u>Compensation and Benefits</u>**
>
> A. The Employer agrees to pay the Employee, as basic compensation for the services provided by the Employee hereunder, $28,000 per this agreement payable in bi-weekly installments.
>
> .....
>
> C. The Employee may also subscribe the Employers Health Plan (Blue Cross). Details of this plan can be provided at the Employee's request. The employee may enter this plan immediately if is so desired.
>
> .....

> **5. Term**
> Except as otherwise provided in this Agreement, this Agreement shall be for a maximum period of 12 months from the effective date written above. The employee agrees to a 3 month probation period in which employment can be terminate [sic] at any time without cause. Employee will undergo review prior to the end of the probation period to determine future employment.
>
> **6. Termination**
> A. The Employer may not terminate this Agreement except for the reasons noted below:
> (a) any act or omission of the Employee which constitutes grounds for dismissal of an employee for just cause as that term is interpreted by the applicable employment and labour law of the province; or
> (b) death of the employee
> B. Upon termination of the Agreement:
>
> (a) the Employer's obligations to the Employee under this Agreement shall terminate except for the Employer's obligation to pay the Employee's full compensation and expenses in accordance with the terms as set out in this Agreement.
>
> .....
> **8. Amendments**
> Any amendment to this Agreement must be in writing and signed by both parties hereto.
> **9. Entire Agreement**
> This is the entire Agreement between the Employer and the Employee with respect to the employment of the Employee by the Employer and supersedes any prior agreements with respect to such employment whether written or oral.
> .....

[3] There is no evidence that this contract was ever signed on behalf of the Respondent. Nevertheless, Mr. McQuaid has acknowledged that the Agreement is binding upon the Respondent.

[4] Prior to going to work for the Respondent, the Appellant was employed at a dental clinic. She gave up this job to commence employment with the Respondent.

[5] On October 14th, 2005 the Respondent terminated the Appellant's employment with two weeks pay in lieu of notice. According to the Adjudicator's findings, by November 4th, 2005 the Appellant had returned to work at her former job at the dental clinic earning $18.00 per week less than she was earning with the Respondent. She has no medical benefits with her present employment.

[6] On November 9th, 2005 the Appellant filed a Notice of Claim against the Respondent in the Small Claims Court of Nova Scotia. The relief claimed in that proceeding is set out at paragraph 10 of the said Notice which states:

> 10. Ms. Clelland says that because [sic] the Employment Contract was for a 12-month term and could only be terminated for cause or upon her death. Therefore, she is entitled to the following:
>
> (a) the basic compensation Ms. Clelland would have received from October 29, 2005 to April 11, 2006 had the Defendant not breached the Employment Contract. This totals $12,384.62;
>
> (b) payment of 4% vacation pay on the $12,384.62, totaling $495.38;
>
> (c) payment of the replacement cost of Ms. Clelland's health benefits from October 29, 2005 to April 11, 2006, totaling $571.38;
>
> (d) Such further and other relief that this Honourable Court deems just.

[7] A defence was filed by the Respondent on November 29th, 2005. In this document the Respondent referred to and relied upon the written employment contract signed by the Appellant. Further, the Respondent claimed that the Appellant was dismissed for just cause.

[8] The matter was heard in Small Claims Court on January 5th, 2006. In the Adjudicator's decision dated January 10th, 2006 he rejected the Respondent's just cause defence and found that the Appellant had been dismissed for reasons of economy. He further found that the employment contract in question was for a term of one year beginning April 11th, 2005. The Respondent does not dispute these findings.

[9] The Adjudicator then dealt with the issue of whether the Appellant's claim should be offset by the income that she received after returning to the dental office. The Appellant took the position that the employment contract in question was a fixed term contract and that she should be awarded the full amount that she would have earned under the contract had she remained employed for one year without consideration of the income that she received after becoming re-employed.

[10] The representative that gave evidence on behalf of the Respondent testified that the contract in question had simply been taken from a standard form and that he had no understanding of the implications of the language used in clause 6 dealing with termination. The Respondent took the position that any money owing to the Appellant under the contract had to be reduced by the amount of income that the Appellant received when she became re-employed at the dental clinic.

[11] In deciding this issue the Adjudicator stated:

> My dilemma is whether the claim should be reduced by Ms. Clelland's current income in the face of the provisions of the written contract. One is supposed to apply the clear language and any ambiguity is to be interpreted against the person who provides the form, but I am satisfied that eCRM was entirely naive in constructing the contract, that a fixed term was not sought by Ms. Clelland, nor was there a negotiation of the clause that Ms. Clelland be paid regardless. The clause was not, I am satisfied, ever anything that the parties brought their minds to and cannot properly be said to have been a part of the agreement under which Ms. Clelland began to work. eCRM is a small and struggling business. I see no justice in enriching Ms. Clelland at the expense of eCRM. To force

> eCRM to pay her from the first of November, 2005 through to the middle of April 2006 would simply be to provide her with a windfall....."

[12] The Adjudicator awarded the Appellant one additional weeks' lost pay ($538.00) as well as the difference between her current salary and her salary with the Respondent for a period of five and a half months ($450.00). Finally, the Adjudicator awarded the Appellant the sum of $476.00 to replace her lost medical benefits. In total, the Respondent was ordered to pay the Appellant the sum of $1,464.00.

[13] On February 7th, 2006 the Appellant filed a Notice of Appeal appealing the Adjudicator's decision.

[14] Pursuant to s. 32(1) of the *Small Claims Court Act*, appeals to the Supreme Court of Nova Scotia from the Small Claims Court can only be made on grounds of jurisdictional error, errors of law or a failure to follow the requirements of natural justice. In this case, the Appellant submits that the learned Adjudicator committed the following errors of law:

1. The Learned Adjudicator erred in law in determining that the Appellant's claim should be reduced and that she was not entitled to the full amount due under her Written Employment Agreement ("Agreement"). The Learned Adjudicator failed to interpret the Agreement in accordance with the laws of contractual interpretation, namely:
   (a) The Agreement should not have been interpreted in a manner that contradicted the clear terms of the Agreement and the intention of the parties as clearly expressed by the terms of the Agreement. The Learned Adjudicator erred by ignoring the Agreement's clear wording and reducing the Appellant's entitlement under the Agreement on the basis of irrelevant factors of which there was no evidence.
   (b) If there was an ambiguity, which the Appellant denies, the effect of the ambiguity should have been construed against the Respondent because the Respondent drafted the Agreement.

[15] Additional grounds of appeal were contained in the Notice of Appeal but were not pursued by the Appellant at the time of the appeal and need not be considered here.

[16] It is well recognized that the jurisdiction of the Supreme Court is limited when sitting in appeal of a Small Claims Court decision. In *MacIntyre v. Nichols*, [2004] NSSC 36 the Honourable Justice LeBlanc dealt with this issue and stated:

> [23] I do not have jurisdiction to rehear the case and to make my own findings of fact. If the findings of fact of the adjudicator are reasonable on their face there is no basis on appeal to substitute for the decision of the adjudicator one I would prefer to make. It is evident that I did not have the opportunity to hear the evidence and make findings of reliability and credibility as did the adjudicator.
>
> [24] I refer to the decision of Saunders, J. (as he then was), in ***Brett Motors Leasing Ltd. v. Welsford*, [1999] N.S.J. No. 466 (S.C.)**. He stated at para. 14:
>
> > One should bear in mind that the jurisdiction of this Court is confined to questions of law which must rest upon

> findings of fact as found by the adjudicator. I do not have the authority to go outside the facts as found by the adjudicator and determine from the evidence my own findings of fact. "Error of law" is not defined but precedent offers useful guidance as to where a superior court will intervene to redress reversible error. Examples would include where a statute has been misinterpreted; or when a party has been denied the benefit of statutory provisions under legislation pertaining to the case; or where there has been a clear error on the part of the adjudicator in the interpretation of documents or other evidence; or where the adjudicator has failed to appreciate a valid legal defence; or where there is no evidence to support the conclusions reached; or where the adjudicator has clearly misapplied the evidence in material respects thereby producing an unjust result; or where the adjudicator has failed to apply the appropriate legal principles to the proven facts. In such instances, this Court has intervened either to overturn the decision or to impose some other remedy, such as remitting the case for further consideration.
>
> [25] I adopt the analysis of Saunders, J. in ***Brett***, *supra* and find that before I can overturn the adjudicator's decision, there has to be a clear error on her part. In other words, the appellant must show that the adjudicator misinterpreted documents or other evidence, that there was no evidence to support the conclusions reached, that she clearly misapplied the evidence in a material respect thereby producing an unjust result or that she failed to apply appropriate legal principles to proven facts. Only in such an instance, could I overturn the decision of the adjudicator.

[17] While in this case, I do not agree with the reasons given by the Adjudicator for his decision, in my view, his ultimate conclusion is correct and accordingly, the appeal should be dismissed.

[18] I should begin by dealing with those portions of the Adjudicator's decision that, with respect, I do not agree with.

[19] During the course of his decision, the Adjudicator found that clause 6 of the contract in question was not part of the agreement under which the Appellant began to work. It appears that the Adjudicator relied upon parole evidence in coming to this conclusion.

[20] In general, when a transaction has been reduced to writing, extrinsic evidence is inadmissible to contradict, vary, add to or subtract from the terms of the document (see: *Schofield v. Ward* (1988), 84 N.S.R. (2d) 404 (C.A.) at ¶25). This is particularly so when the parties have agreed as a term of the contract that the written document is to constitute evidence of their entire agreement. One exception to this rule is when the contract itself is unclear or ambiguous. In those circumstances Courts have the discretion to permit parol evidence to clarify an otherwise ambiguous or unclear contract.

[21] In the case at Bar, it is difficult to determine from the Adjudicator's decision whether he found the contract in question to be unclear or ambiguous. However, he referred to and relied upon parol evidence in coming to his decision. In my view, the Adjudicator used this parol evidence – not to clarify

a term of the contract – but to avoid clause 6 of the contract altogether. I refer to ¶5 of the Adjudicator's decision

where he states:

> .....I am satisfied that eCRM was entirely naive in constructing the contract, that a fixed term was not sought by Ms. Clelland, nor was there a negotiation of the clause that Ms. Clelland be paid regardless. The clause was not, I am satisfied, ever anything that the parties brought their minds to *and cannot properly be said to have been a part of the agreement under which Ms. Clelland began to work.....*
>
> [Emphasis added]

[22] With respect, clause 6 of the contract clearly was part of the agreement under which the Appellant went to work for the Respondent. The parties may not have had previous discussions about whether there would be a fixed term contract or what would happen in the event of termination – but once the contract was drafted by the Respondent and was accepted by the Appellant, it clearly was part of the agreement under which the Appellant began her employment.

[23] In my view, the parol evidence referred to by the Adjudicator did not help to clarify the meaning of clause 6 of the parties' Agreement and was improperly used by the Adjudicator to avoid a term of the contract that he felt would unjustly enrich the Appellant. It must be remembered that it was the employer that drafted the contract in question including clause 6 dealing with termination. In my view, it was an error for the Adjudicator to have found that clause 6 was not part of the agreement under which the Appellant began to work.

[24] Further, in my view, it is irrelevant whether the Respondent is a small struggling business or whether the Appellant would receive a windfall by being paid the full amount that she would have earned under the contract had she remained employed for one year without taking into account the income that she received after returning to her previous employment. If the contract in question provides for such a payment, then the Respondent must make the said payment regardless of how small a business it is or whether such payment could be viewed as a windfall to the Appellant. The Respondent drafted the contract in question. It must be prepared to live by its terms.

[25] What then is the effect of clause 6 of the Agreement?

[26] As indicated previously, the Appellant takes the position that this was a fixed term contract and pursuant to clause 6 she should have been awarded the full amount that she would have earned under the contact had she remained employed for one year without consideration of the income that she received after becoming re-employed at the dental clinic.

[27] The Respondent does not dispute the Adjudicator's finding that this was a fixed term contract but submits that the Appellant had a duty to mitigate her losses regardless of whether her employment was for an indefinite period or for a fixed term.

[28] Subject to certain exceptions referred to below, the duty to mitigate does apply to a fixed term contract. Counsel have referred the Court to the decision in *Graham v. Marleau, Lemire Securities Inc.*, [2000] O.J. No. 383 (Ont. S.C.J.) where the Court thoroughly reviewed the jurisprudence on an employee's duty to mitigate their damages resulting from the breach of a fixed term contract. Nordheimer, J. summarized his findings at ¶ 50 as follows:

> 50 I confess that I do not find it easy to reconcile all of these cases. However, I believe that the following general conclusions can be drawn from them:
>
> (a) whether a contract is a fixed term contract or a contract of indefinite duration, the principle of mitigation applies to a claim arising from any breach of that contract, and;
>
> (b) in cases where there is an agreed upon severance provision, the principle of mitigation also applies to that provision, but;
>
> (c) there is an exception to that second conclusion in cases where the contract of employment can be interpreted as having exempted, either expressly or by implication, the employee from the duty to mitigate. Examples of such exemptions are:
>
> (I) an express wavier of the duty to mitigate as in *Neilson;*
>
> (ii) an express obligation to continue to make the payments under the employment contract as in *Paquin;*
>
> (iii) where the contractual provision provides that the severance amount is payable immediately at, or very shortly after, the time of the termination as in *Borkovitch* and *Rossi.* In such cases, the fact that the payment is to be made prior to the time when either the employer or the employee could know whether mitigation could occur implicitly suggests a waiver of that obligation.

[29] Counsel for the Appellant acknowledges that normally a terminated employee has a duty to mitigate her losses but submits that in this case, the Appellant had no such duty in light of the language of the employment contract in question. The Appellant relies heavily on the Alberta Court of Appeal decision in *Paquin v. Gainer's Inc.* (1991), 117 A.R. 61 (C.A.) in support of her position. That case involved an employment contract that contained the following clause:

> "D. Early Termination
>
> This agreement may be terminated at anytime during the term hereof without notice or pay in lieu thereof in any of the following events or circumstances:
>
> 1) if Paquin is guilty of any criminal act involving breach of trust;
> 2) upon the death of Paquin;
> 3) if Paquin shall be incapacitated by reason of illness or mental or physical disability for more than one hundred twenty (120) consecutive days;
> 4) Gainers provides to Paquin thirty (30) days written notice of its intention to terminate this agreement or such lessor period of notice as Paquin may agree to accept
>
> Except for termination for cause as set out in paragraph D 1) herein, notwithstanding the termination of this agreement, Gainers shall be responsible to Paquin and/or his

estate for the balance of the term of this agreement as though such agreement had not been terminated."

[30] In upholding the trial judge's decision in *Paquin, supra*, that the income that the Plaintiff received from alternate employment did not have to be deducted from the loss that was caused by the Plaintiff's early dismissal, the Court of Appeal stated at ¶5 and 6:

> Normally summary discharge of an employee without cause breaches the contract of employment and entitles the employee to damages. In such a case the employee must take reasonable steps to mitigate his damages by obtaining other employment if available.
>
> However, the bargain here made by the parties clearly contemplated early termination and provided that such early termination (unless for cause as defined) would entitle the respondent to the contractual benefits for the balance of the minimum term as though termination had not occurred. Accordingly the respondent was under no duty to mitigate his loss nor to credit Gainer's with any earnings that he obtained from other employment after termination. Paquin's primary claim was for enforcement of his contractual benefits and not for damages for breach of the contract.

[31] The Appellant in the case at Bar submits that her employment contract entitles her to full compensation upon termination and therefore, as in *Paquin*, *supra*, she had no duty to mitigate her losses nor was the Respondent entitled to credit for the salary that she earned after finding alternate employment.

[32] The Appellant makes note of the fact that clause 6 of the employment contract states that *upon termination of the agreement* the employer is obliged to pay the employee's full compensation and expenses in accordance with the terms as set out in the Agreement. She submits that the word "upon" is the more formal meaning of the word "on" which, according to *The Canadian Oxford Dictionary* (Oxford: Oxford University Press 2004) means "(of time) exactly at; during; contemporaneously with....." The Appellant takes the position that since full compensation is said to be owing "upon" termination of the Agreement, it could not have been contemplated that mitigation would be relevant as full compensation would be owing before the parties could know whether mitigation could occur (see ¶ 50 (c) (iii) in *Graham v. Marleau Lemire Securities Inc.*, *supra*.)

[33] The Respondent acknowledges that if the parties clearly agreed to contract out of the general duty to mitigate, Courts will generally uphold those intentions. However, the Respondent submits that in this case the parties did not expressly or impliedly agree that the Respondent would pay the Appellant the remainder of her salary in the event that her employment was terminated early. The Respondent suggests that clause 6 (B)(a) of the Agreement should be interpreted to mean that upon termination of the Agreement the Appellant is to receive full compensation and expenses but only up to the date of termination.

[34] Further, the Respondent notes that the wording of clause 6(B)(a) does not specify upon whose decision to terminate the obligation to pay becomes due. The Respondent suggests that if the Court accepts the Appellant's proposed interpretation of this clause, the Appellant could unilaterally terminate the contract herself and the Respondent would have to pay her full compensation and expenses until the end of the fixed term - even though it was the Appellant who chose to terminate the Agreement.

[35] Finally, the Respondent submits that clause 6(B)(a) of the Agreement is ambiguous and, therefore, the adjudicator properly used parol evidence to assist him in interpreting the contract.

[36] Clause 6 of the Agreement in question deals with the issue of termination of the Appellant's employment after the probationary period referred to in clause 5. Clause 6 is made up of two parts - 6(A) and (B). In my view, these two parts are intended to be read together. Clause 6(A) provides that the employer may not terminate the Agreement except for just cause or the death of the employee. In my view, clause 6(B) stipulates what will occur in the event the Agreement is terminated as per 6(A). In this regard, I accept the Respondent's submission that 6(B) is intended to mean that an employee is entitled to full compensation

and expenses to the date of termination and not thereafter. That, in my view, is the most reasonable interpretation of this clause.

[37] In my opinion, clause 6(B) does not deal with the issue of what will occur if an employee is improperly terminated (contrary to clause 6(A)) nor does it deal with the issue of what occurs if the employee terminates the Agreement. Clause 6(B) relates to clause 6(A) and deals with termination with just cause or upon death.

[38] There are a number of reasons for the conclusion that I have reached. First, clause 6(B) begins by relieving the employer of any its obligations to the employee under the Agreement except for the employer's obligation to pay full compensation and expenses in accordance with the terms as set out in the Agreement. It would, in my view, be most unusual for a clause that was intended to deal with what would occur if the employer *improperly* terminated an employee (contrary to clause 6(A)) to begin by relieving the *employer* of its obligations to the *employee* under the Agreement (subject to the obligation to pay full compensation and expenses). This is particularly so in light of the wording of clause 6(A) which specifically states that the employer *may not* terminate the Agreement except for just cause or the death of the employee.

[39] Further, if the Appellant's position is correct - she would receive the same compensation whether she was justly terminated (for cause) as per clause 6(A) [since 6(B) says what will happen in the event the Agreement is terminated as per 6(A)] or whether she was unjustly terminated (as in this case). In my view, this position is untenable and the entitlement to compensation would not be the same in both circumstances.

[40] The Agreement as drafted does not deal with what will occur if the employer improperly breaches clause 6(A). In that case, the employee would have an action against the employer arising from the breach. In the case at Bar, the Adjudicator accepted that the Respondent improperly breached the Agreement and found that the Appellant was entitled to succeed with her action against the Respondent. The issue was one of mitigation.

[41] In my further view, the Agreement as drafted does not relieve the Appellant from a duty to mitigate either explicitly or impliedly. As stated above, the clause under consideration (6 (B)) deals with proper termination pursuant to clause 6(A). It does not deal with improper termination (contrary to 6(A)). As the Agreement is silent on what will occur if the employer breaches clause 6(A) and since there is a general duty to mitigate (even with a fixed term contract), the Adjudicator properly reduced the Appellant's claim by the amount of income that she received when she became re-employed at the dental clinic.

[42] The wording of the Agreement before me is, in my view, clearly distinguishable from the wording of the Agreement in *Paquin v. Gainer's Inc., supra*. In that case, as found by the Alberta Court of Appeal, the Agreement in question allowed for early termination and indicated what would happen in the event this occurred. In the case at Bar, the contract provides that the employer *may not* terminate the agreement early except in certain clearly defined circumstances (just cause or death) which are not applicable here. Further, in my view, the Agreement does not provide what will occur in the event of improper early termination.

[43] In conclusion, while I disagree with the reasons provided by the Learned Adjudicator, I am satisfied that he reached the appropriate conclusion and accordingly, the appeal is dismissed with costs to the Respondent as per s. 23 of the Small Claims Court regulations. I hereby reserve the right to deal further with costs in the event that the parties are unable to reach agreement on the appropriate amount of costs.

[44] An Order will issue accordingly.

Associate Chief Justice Deborah K. Smith