Claim No: SCCH - 478816

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Citation: *Tomie v. May*, 2018 NSSM 70

BETWEEN:

GEORGE LEO TOMIE

Claimant

- and -

BENJAMIN MAY and 3301244 NOVA SCOTIA LIMITED

Defendants

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Halifax, Nova Scotia on September 18, 2018

Decision rendered on September 27, 2018

APPEARANCES

For the Claimant	Donna Tomie, Agent
For the Defendants	Gary Keigan Operations Manager

BY THE COURT:

[1] George Leo Tomie is a 67-year old gentleman who is suing his former Employer, 3301244 Nova Scotia Limited ("3301244"), for wrongful dismissal. Benjamin May is the owner of that company, who was not personally in court and whose name did not even come up during the evidence except to say that he is based in Ontario and owns the company. There is no reason shown why he should have been personally named, and the claim against him will be dismissed. The only claim, to the extent it has merit, is against the company that employed the Claimant.

[2] 3301244 is a broker that subcontracts work on behalf of FedEx Ground, the well-known package delivery company. The Claimant worked as a driver delivering parcels and packages to and from a depot in Dartmouth to points between there and Antigonish, Nova Scotia. He was first employed by a predecessor company in January 2016. 3301244 took over the contract sometime in late 2017, and in early 2018 presented the Claimant with an employment contract, which was signed on February 12, 2018. Under well-known principles, the Claimant's years of service are considered to be the total length of his employment, which add up to about 2.2 years.

[3] Several terms of that contract are relevant to this Claim:

a. Para 10: Hours of work were 10 hours per day, five days per week.

b. Para 11: Compensation was $150 per full day; $75 per half day (i.e. $15 per hour)

c. Para 23 (b): the Employer is entitled to terminate at any time (without cause) providing the minimum entitlements under the

Labour Standards Code, which the employee agrees are “fair and reasonable.”

d. Para 23 (a): the Employer may terminate for “cause” which includes “insubordination ... or ... serious misconduct ...”

[4] On March 5, 2018, the Claimant was terminated with cause after an incident on March 2, 2018. The letter of dismissal stated:

> On March 2, 2018 at approximately 6:30 a.m., and in the presence of FedEx Management, you were witnessed intentionally mishandling packages in a manner that could cause damage. You continued to throw packages even after you were warned to stop. In all, you threw three packages and when instructed to stop, you threw another and replied “write me up.”

[5] The Defendant produced two witnesses who were present on that day, only one of whom closely witnessed the incident in question. The Claimant gave a slightly different version of the event.

[6] According to the Defendant’s version, as testified to by Operations Manager Gary Keigan, the Claimant was loading his vehicle at the Dartmouth facility and was instructed to remove some of his packages from the conveyor line, as they were holding up other packages coming down the line. The Claimant was said to have reacted inappropriately by picking up the packages and throwing them into his truck, in defiance of the well-known directive to handle all packages carefully to avoid breakage of contents. When he was instructed to stop doing so, he continued and dared the Employer to “write me up.” Mr. Keigan regarded this as major misconduct (throwing packages) and insubordination (refusing to stop). To compound the situation, there was an employee of FedEx Ground present at the time, who observed the incident. Mr.

Keigan expressed a concern that the company's status as a subcontractor could be in jeopardy if it was not seen to be meeting standards of careful handling. Mr. Keigan felt that dismissal for cause was the necessary response.

[7] The Claimant did not deny throwing packages, but explained that the packages were lightweight and did not appear to contain anything breakable. He also said that two of the four items he threw were just empty bags. He felt that he was being unfairly pressured and that he did not have time to move the packages with great care. He denied being belligerent but admitted to being frustrated.

[8] On the question of whether or not this was serious misconduct meriting summary dismissal, I am not satisfied that it meets that threshold. The onus would be on the Defendant to prove that the conduct met the test of being worthy of the ultimate disciplinary response, and I do not believe the onus has been met. However, I do believe the conduct was worthy of some discipline.

[9] The concept of progressive discipline, with ever-increasing severity of punishment, is less suited to non-union situations, because employers have no right to issue suspensions without inviting a claim of constructive dismissal. The only lesser discipline that can typically be used is a warning, which some people would criticize as being almost consequence-free and no real punishment. Still, many employers start with verbal warnings and then progress to written warnings, before advancing to termination.

[10] In this situation, I believe the Defendant's response was overly harsh, and that a strong written warning would have been the correct response. Had that

been done and such a warning not been heeded, on the next occasion dismissal might have been justified on the basis not only of the culminating act but also on the fact that there was a prior disciplinary record. Here there was no record of prior discipline that the Claimant was aware of, although there had apparently been some occasions where the Claimant had been verbally warned about some of his behaviour and the Defendant had documented them. It is not clear that the Claimant regarded these occasions as disciplinary.

Damages

[11] The Claim as originally filed sought $25,000.00, reduced from a much larger figure to remain within the court's jurisdiction. The Claim somewhat hyperbolically claimed that the dismissal was done in bad faith, and sought punitive damages. At trial, the Claimant reduced his demand further to $6,000.00, representing eight weeks of salary. That is the approximate number of weeks he spent on the sidelines until obtaining another job, at a lesser rate of pay.

[12] There are a number of reasons why even this amount is greater than the Claimant should recover.

[13] The first issue is the employment contract, which limits his recovery to the amount payable under the *Labour Standards Code*. The clause in the employment contract reads:

> 23 (b) The Employee's employment may be terminated by the Employer at any time, without cause, upon providing to the Employee all accrued and unpaid wages, benefits and vacation pay and accrued entitlements in

> law, along with the minimum entitlements under the *Labour Standards Code*, Nova Scotia. The Employee agrees that the minimum entitlements are fair and reasonable.

[14] The applicable amount of "minimum entitlement" for an employee with the length of service of the Claimant would be two weeks under s.72 (1) of the *Code*:

> 72 (1) Subject to subsection (3) and Section 71, an employer shall not discharge, suspend or lay off an employee, unless the employee has been guilty of wilful misconduct or disobedience or neglect of duty that has not been condoned by the employer, without having given at least
>
> > (b) two weeks' notice in writing to the person if his period of employment is two years or more but less than five years;

[15] Although the parties did not argue the point, I am aware of authorities such as *Bellini v Ausenco Engineering Alberta Inc*., 2016 NSSC 237 (CanLII) that have discussed at great length whether or not a limiting clause, such as that found here, is enforceable. Suffice it to say that courts have bent over backwards to avoid relying on such clauses, in order to provide the employee with common law reasonable notice. If the clause is at all ambiguous, it will be read in favour of the employee. And in most cases, where it has been drafted by the employer, it will also be read against the interest of that employer. In *Bellini* Justice LeBlanc stated:

> [8] It is well-established that "employment contracts for an indefinite period require the employer, absent express contractual language to the contrary, to give reasonable notice of an intention to terminate the contract if the dismissal is without cause": *Machtinger v. HOJ Industries Ltd.*, 1992 CanLII 102 (SCC), [1992] 1 S.C.R. 986, [1992] S.C.J. No. 41, at para. 19. The intention to contract out of the obligation to give reasonable notice requires "clear, express language": Howard A. Levitt, *The Law of Dismissal in Canada*, 3d edn. (Toronto: Thomson Reuters, looseleaf) at §11:40:30. As the court said in *Cybulski v. Adecco*

Employment Services Ltd., 2011 NBQB 181 (CanLII), 2011 CarswellNB 401:

> 12 In order to displace the presumption of reasonable notice, the language of a limiting clause must be clear and unequivocal. There must be a high level of clarity... It should be noted in this case that the Contract was prepared by [the employer]. There is a presumption that unless there is an agreement with express language to the contrary, an employee is entitled to reasonable notice of termination.

[16] In my view, the language used by the Defendant in the contract is clear and unambiguous. While the language used may not be the clearest or most elegant possible, I believe it is unambiguous in its intended meaning - that the minimum entitlements under the *Code* are a fair and reasonable measure of the employee's entitlement. To interpret this to mean that the employee can sue for more would be, in my opinion, a linguistic stretch. I believe that the Claimant knew, or ought to have known, what he was agreeing to.

[17] Another limiting factor would be mitigation. There was evidence put forth by the Defendant, which was not disputed by the Claimant, that he was offered another similar job by another contractor working out of the same facility. The Defendant's Operations Manager even recommended him. While it might seem strange that he would fire him one day and recommend him the next, I think it is quite clear that a large part of the Defendant's motivation for terminating the Claimant was to be <u>seen</u> to be taking that type of conduct seriously in the eyes of FedEx.

[18] I believe that had the Claimant been acting reasonably, he would have explored this other job opportunity and potentially been out of work for a shorter period of time.

[19] In the result, I believe that the Defendant is obligated to pay the Claimant two weeks pay, which adds up to $1,500.00.

[20] None of the claims for aggravated or punitive damages, set out in the Claim, have the slightest bit of merit.

[21] There will be an order against 3301244 for damages of $1,500.00. The Claimant shall also receive his filing fee of $199.35.

[22] If I am wrong about the enforceability of the contract, I believe the Claimant would still have a mitigation problem. If I am wrong about that, the length of notice proposed by the Defendant, namely eight weeks, would be in the ballpark as a measure of common law damages, but as I have already stated, he is limited to two weeks.

[23] I note that the Defendant made a counterclaim for the administrative cost of responding to the Claim. This is not recoverable. Forgetting for a moment that the Defendant was not entirely successful in defending the claim, there are good policy reasons not to entertain such claims. It is understood that every party brought into a lawsuit against their will must spend time and resources to defend themself. Such costs have never been recoverable in lawsuits. Some out of pocket expenses (i.e. money paid to third parties) can be recoverable, assuming the party claiming them has been successful. This is not the case here. The costs sought are for the time spent by the company's own personnel, as well as the cost of filing the counterclaim. Such counterclaim having been entirely misconceived, I would not reward the Defendant for filing same.

[24] In the end, the Claimant succeeds to the limited extent already discussed, against the Defendant 3301244, namely $1,500.00 in damages plus costs of $199.35, for a total of $1,699.35.

Eric K. Slone, Adjudicator