

COURT OF APPEAL FOR ONTARIO

CITATION: Covenoho v. Pendylum Ltd., 2017 ONCA 284

DATE: 20170405

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Rouleau, Pepall and Roberts JJ.A.

BETWEEN

Joss Covenoho

Appellant (Plaintiff)

and

Pendylum Ltd.

Respondent (Defendant)

Joss Covenoho, acting in person

Harj Mann, for the respondent

Heard: March 21, 2017

On appeal from the order of Justice Mario D. Faieta of the Superior Court of Justice, dated September 29, 2016, with reasons reported at 2016 ONSC 4969.

ENDORSEMENT

[1] The appellant appeals from the dismissal of her motion for summary judgment in her wrongful dismissal action against the respondent, her former employer, as a result of which the motion judge dismissed the appellant's action. She also seeks leave to appeal the motion judge's costs award against her in the amount of \$28,000.

[2] The appellant was employed by the respondent under a one-year fixed term contract. On July 10, 2013, the appellant signed a standard form agreement with the respondent. She commenced her employment on July 15, 2013. Article 2 of the contract between the parties provides as follows:

2.1 The term of this Agreement will commence on the date of this Agreement and will continue in full force and effect unless the Agreement is terminated as follows:

(a) immediately by PENDYLUM providing written notice to you if you violate or fail to honor any of these provisions of this Agreement or fail to perform your duties as set out in Appendix A in a satisfactory manner as determined by PENDYLUM (known as Cause); or if the PENDYLUM Client to which you have been contracted terminate[s] its contract with PENDYLUM for your services; OR

(b) by either party providing written notice of **at least two (2) weeks** to the other.

2.2 In the event of termination, we will have no liability to you, save and except to pay any accrued and earned compensation up to and including the date of termination.

2.3 Upon termination or expiration of the agreement, you agree to return and/or destroy all confidential information and copies and sign an undertaking that all Confidential Information has been returned and/or destroyed.

[3] By letter dated October 11, 2013, the respondent terminated the appellant's employment without notice or payment in lieu of notice, as follows:

Pursuant to paragraph 2.1a) of your Contract Agreement with Pendylum Inc., dated July 10, 2013, and specifically by reason of Pendylum Client Ceridian's decision to terminate its contract with Pendylum Inc. for your services, we hereby advise you that your contract with Pendylum Inc. is hereby terminated with immediate effect.

[4] The motion judge concluded that as the appellant had been employed for less than three months, she was not entitled to notice under the *Employment Standards Act*, 2000, S.O. 2000, Ch. 41 ("ESA"), and reasonable common law notice was not required under s. 2.1 of the contract. He also dismissed her claim for damages arising from bad faith in the manner of termination.

[5] The appellant's main ground of appeal is that the motion judge erred in dismissing her summary judgment motion and action on the basis that the respondent was entitled to terminate the appellant's employment under Article 2 of her employment contract. She submits that Article 2 is void because it is contrary to the provisions of the *ESA*, in that it purports to allow the respondent to terminate her employment without cause and without notice or payment in lieu of notice, regardless of the length of her employment.

[6] We agree.

[7] The termination provisions contained in Articles 2.1(a) and 2.2 of the contract are contrary to ss. 54, 57 and 58 of the *ESA* in that they purport to allow the respondent to terminate, without cause, the employment of the appellant, in the event that she had been continuously employed for more than three months,

by providing less than the statutory minimum notice period. In determining whether the contract is in compliance with the *ESA*, the terms must be construed as if the appellant had continued to be employed beyond three months; if a provision's application potentially violates the *ESA* at any date after hiring, it is void: *Wright v. Young & Rubicam Group of Cos.*, 2011 ONSC 4720, [2011] O.J. No. 4960, at paras. 27-37; *Shore v. Ladner Downs*, [1998] B.C.J. No. 1045 (B.C.C.A.), at para. 16. As such, the termination provisions are void and common law standards apply: *Machtiger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986; *Wood v. Fred Deeley Imports Ltd.*, 2017 ONCA 158, [2017] O.J. No. 899; s. 5(1) of the *ESA*.

[8] The appellant claims damages in the amount of \$56,000, representing her salary for the 40 weeks that remained on her fixed term contract at the time of her employment termination. The motion judge determined that had the appellant's employment not been validly terminated under the contract, he would have found that she was entitled to damages equivalent to her salary for the remainder of the unexpired term of the contract, without deduction for mitigation.

[9] Having concluded that her employment was not validly terminated, we agree with the motion judge's alternative finding in this regard. As this court recently stated in *Howard v. Benson Group Inc.*, 2016 ONCA 256, 129 O.R. (3d) 677, at para. 44: "In the absence of an enforceable contractual provision stipulating a fixed term of notice, or any other provision to the contrary, a fixed

term employment contract obligates an employer to pay an employee to the end of the term and that obligation will not be subject to mitigation”. The termination provisions being void and of no force or effect, the appellant is entitled to receive the salary that she would have earned for the remaining weeks of her fixed-term contract.

[10] For these reasons, we allow the appeal. We set aside the order and cost award of the motion judge and substitute a judgment awarding the appellant damages from the respondent in the amount of \$56,000, together with pre and post judgment interest.

[11] The respondent is to pay the appellant the amount of \$1,664 on account of her disbursements.

“Paul Rouleau J.A.”

“S.E. Pepall J.A.”

“L.B. Roberts J.A.”