

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

FRANKLYN PATTERSON

Plaintiff

- and -

LEE MUNRO CHEVROLET LTD.

Defendant

) Kevin Fox, for the Plaintiff

) Jonathan D. Cocker, for the Defendant

) HEARD: April 20, 21, 22, 2009

The Hon. Mr. Justice J. C. Kent

REASONS FOR JUDGMENT

INTRODUCTION:

[1] A lack of communication between the plaintiff and the defendant apparently destroyed their employment relationship. Franklyn Patterson claims that Lee Munro Chevrolet Ltd. wrongful terminated the relationship and seeks damages resulting from that termination.

PRELIMINARY:

[2] This case turns on a determination on whether the plaintiff was constructively dismissed. Counsel for the defendant points out that constructive dismissal is not specifically alleged in the statement of claim. Paragraph 20 of the Statement of Claim, however, alleges that “the actions of the defendant have in law terminated the plaintiff’s employment with the defendant...”. That pleading is sufficiently broad to encompass constructive dismissal.

[3] Counsel for the defendant also contends that by commencing this action the plaintiff acted inconsistently with any employment relationship, thereby repudiating or abandoning that relationship. While based in law, (see Hulme v. Cadillac Fairview Court [1998] O.J. No. 3237 (C.A.) that contention will only apply if this court finds that the plaintiff was not constructively dismissed.

FACTS:

[4] The evidence that was either uncontradicted or neutral established the following:

1. The plaintiff was continuously employed as the sole service manager for the defendant commencing January, 1995.
2. The final day the plaintiff worked at his position was 23 May, 2006.
3. During the afternoon of 23 May, 2006 the plaintiff attended a management meeting. He finished his day at approximately 7:00 p.m. after a training session with a service advisor.

4. The plaintiff's spouse, Tracy Patterson, telephoned Lee Munro Chevrolet Ltd. on 24 May, 2006 at approximately 8:15 a.m. and advised Debra Beaumont, a co-worker of the plaintiff, that he was not well and that he would not be in to work that day.

5. Later on 24 May, 2006 Tracy Patterson phoned and advised Debra Beaumont that the plaintiff would not be in to work on May 25 and probably not on May 26 either.

6. At a point no later than 4:00 p.m. on 25 May, 2006 Lee Munro, the dealer principal of Lee Munro Chevrolet Ltd. arranged for an advertisement to run in the *Hamilton Spectator* for the position of service manager. The advertisement may be found at Exhibit 1, Tab 12. It was published on 27 May, 2006.

7. On the 25th of May, 2006 Tracy Patterson attended at the premises of the defendant and became involved in a confrontation with Lee Munro. On 26 May, 2006 Tracy Patterson attended at the premises of the defendant and a further confrontation ensued when she attempted to leave a note from a doctor that the plaintiff had seen on May 25th. Later on May 26th Tracy Patterson sent that note dated May 25, 2006 to the defendant via fax. The note may be found at Exhibit 1, Tab 7. It provides that the plaintiff will be off work for an unknown period subject to reassessment by Dr. Strome by June 2nd. The note is signed by Mathew G. Robinson MD, CCFP.

8. There was never any written or oral resignation communicated by the plaintiff to the defendant.

9. There was never any written or oral notice of termination communicated by the defendant to the plaintiff.

ADVERTISING THE SERVICE MANAGER POSITION:

[5] The advertisement was brought to the plaintiff's attention on the day it was published, 27 May, 2006. The plaintiff describes the effect on him as: "I was shattered", "I was no longer welcome" "I felt no longer wanted" "I didn't want to speak to anyone at Lee Munro".

[6] Tracy Patterson described her spouse upon reading the advertisement as confused, upset, hurt and betrayed.

[7] Lee Munro testified. He agreed that although advertising the position of an employee off sick for just 3 days would ordinarily be disruptive to that employee's existence, he did not believe that would have been the case with the plaintiff. He explained why. He had come to believe that the absence had been pre-meditated as part of a scheme for making a claim or claims of wrongful dismissal and/or disability and that Franklyn Patterson would not be returning to work. He felt that the plaintiff's claim of illness was not credible. He was pushed toward his belief by the information that he had acquired about Tracy Patterson's situation. He had heard that Tracy Patterson received long-term disability payments. Tracy Patterson confirmed, when she testified, that she was receiving long-term disability and was also in receipt of a Canada Pension Plan Disability Pension.

[8] Lee Munro testified that he had concluded that Tracy Patterson was a “schemer” who wanted her husband out of his job and on to a disability plan that had recently been initiated by the defendant.

[9] Lee Munro was an impressive and apparently credible witness and this court is prepared to accept that his belief was genuinely held. It is, unfortunately for him, supported by nothing of evidentiary value. It is based upon speculation, gossip and water-cooler conversation.

[10] The devastation felt by the plaintiff is clear from his own evidence and to some extent corroborated by the doctor’s notes provided. The plaintiff received employment insurance sick benefits for a 17 week period. He saw a psychologist for a period of 6 to 9 months and was prescribed medication for depression, anxiety and sleep difficulties. A doctor’s note dated 2 June, 2006 and a letter elaborating on that note may be found at Exhibit 1, Tab 15 and Tab 29 respectively.

[11] Based on the foregoing evidence, this court finds that the plaintiff was genuinely ill and unable to work at the relevant period of time. The defendant replaced him on or about 21 June 2006 and on 23 June 2006 the plaintiff’s counsel wrote to the defendant setting out the plaintiff’s claim.

[12] There is no evidence of any communication between the plaintiff and the defendant, directly, or indirectly between 26 May, 2006 and 23 June, 2006 with the possible exception of a cheque sent to the plaintiff from the defendant on or about 1 June 2006.

CONSTRUCTIVE DISMISSAL:

A. Law:

[13] There are situations when an employer, although not intending to change the employment contract, creates a situation in which it is untenable for an employee to continue in the employment relationship. Such conduct on the part of an employer can properly be regarded as constructive dismissal of the employee. See Sproat, Wrongful Dismissal Handbook (3d), 5-15.

[14] An employer owes a duty to its employees to treat them fairly, with civility, decency, respect and dignity. An employer who subjects employees to treatment that renders competent performance of their work impossible, or continued employment intolerable, exposes itself to an action for constructive dismissal. Where the employer's treatment of the employee is of sufficient severity and effect it will be characterized as an unjustified repudiation of the employment contract. Whether such treatment is viewed as a breach of a specified fundamental implied term of the employment relationship or as a repudiation of the entire employment relationship the result is the same. The employee is entitled to treat the employment contract as at an end, and to recover, at least, damages in lieu of reasonable notice. (See Stamos v. Annuity Search and Marketing Service Limited, (2002) 18 C.C.E.L. (3d) 117 (Ont. S.C.J.) at paragraph 60.

[15] An employer who posted a notice that an employee had resigned was found to have constructively dismissed that employee. See: Tolman v. Gearmatic Company (1986), C.C.E.L. 195 (B.C.A.).

B. APPLICATION OF THE LAW:

[16] Lee Munro may not have anticipated that advertising Franklyn Patterson's service manager position as he did would create a situation which would be untenable for the plaintiff. After the fact correspondence concerning "an equivalent position at similar compensation" is capable of supporting that state of mind and anticipation. Viewed objectively, however, this court is driven to the inescapable conclusion that the placing of the advertisement for the position without providing any explanation or even informing the plaintiff that it would be published was conduct rendering the continuation of Franklyn Patterson's employment untenable. At that point, the plaintiff was constructively dismissed by the defendant. Franklyn Patterson, therefore, became entitled in law to assert his claim for unlawful termination of his employment.

CAUSE:

[17] Counsel for the defendant articulated a number of grounds that he submits, as an alternative, were cause for dismissal in any event. These include: a) performance issues; b) insubordination; c) not indicating a return to employment date; d) not responding to an offer of an equivalent position, and e) commencing this action for unlawful termination.

[18] In view of this court's conclusion and finding of constructive dismissal, items c, d and e above become non-issues. The performance and insubordination issues were addressed at the management meeting on Franklyn Patterson's last day of work. It is the evidence of Lee Munro that at that meeting, after reviewing the issues with Franklyn Patterson, he asked the plaintiff if he wanted to continue and the plaintiff replied that he was up to the challenge. No specific discussion of resignation or of termination took place at that meeting.

[19] The performance and insubordination issues are all arguable on the evidence and would not support a finding of cause in any event, even cumulatively.

DAMAGES:

[20] There is no evidence of any employer conduct that would support any claim for damages other than monetary.

A) **Salary:** Counsel agree that the plaintiff's salary at termination was \$2,816.66 per month plus the taxable benefit of being provided with a demonstrator vehicle. That vehicle, however, was returned before the termination and, on the evidence of the plaintiff, he does not appear to have planned to take it back later in 2006.

B) **Commission:** Counsel agree that the plaintiff would have earned a commission for May and through the required notice period. The plaintiff's counsel contends that based on 2005 earnings his commission would have been \$3,558.00 per month. The defendant's counsel argues that based on the performance of the defendant company for 2006, it would have amounted to \$2,821.97 per month; a difference of \$736.03 per month. This court fixes the probable commission at \$3,250.00 per month.

C) **Adjustments:** Counsel agree that the defendant employer continued to pay the employee portion of the plaintiff's benefits plan at a rate of \$134.06 per month and that should be deducted from the plaintiff's damages. In addition, the plaintiff appears to be indebted to the defendant for certain uniforms in the amount of \$527.22.

D) **Notice:** Counsel for the plaintiff submits that as an employee in a management position for more than 11 1/3 years the plaintiff should receive 12 months pay in lieu of notice. Counsel for the defendant counters that the correct period should be 11 months. Because, as has often been said, fixing the notice period is as much an art as it is a science, it is hard to argue with either counsel's position. The period is therefore fixed at 11 ½ months.

E) **Calculation:** The plaintiff's damages are, therefore:

a) salary, $11.5 \times \$2,816.66 = \$32,391.59$.

b) commission $11.5 \times \$3,250.00 = \$37,375.00$;

c) deduct adjustment $11.5 \times \$134.06 = \$1,541.69$;

d) deduct indebtedness - \$527.22;

Total \$67,697.68.

RESULT:

[21] The plaintiff Franklyn Patterson is entitled to recover damages from the defendant Lee Munro Chevrolet Ltd. in the amount of \$67,697.68.

[22] Judgment accordingly

COSTS:

[23] If there are written offers that bear on the issue of costs and/or if counsel are unable to agree on costs counsel may contact the trial coordinator at Brantford to arrange a date to speak to the matter of costs.

Kent, J.

Released: 8 May, 2009

COURT FILE NO.: CV-07-529
DATE: 2009/05/08

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