COURT FILE NO.: 68/04
DATE: 20050214

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

LANE, MATLOW and GROUND JJ.

B E T W E E N:	
Patrick Boland Appellant (Plaintiff)	*Bram A. Lecker*, for the Appellant
- and -	
APV Canada Inc. Respondent (Defendant)	*Christopher Diana*, for the Respondent
-and-	
Director of Employment Standards, Ministry of Labour Intervenor	*Eric Del Junco*, for the Director
	HEARD: December 2, 2004

LANE J:

[1] This is an appeal by leave from the judgment of Cameron J. dated January 30, 2004, dismissing the plaintiff's motion for summary judgment for damages for wrongful dismissal and directing that the action proceed to trial on the issue of mitigation of his damages.

[2] The plaintiff had been employed by the defendant for over twelve years when, in 2003, the defendant sold part of its business to Cimco Refrigeration. Cimco made an offer of employment to the plaintiff but he declined it when he learned that Cimco would not recognize his seniority. As a result, his employment was terminated by the defendant. Within three weeks he obtained alternative employment at an increased salary, albeit with no benefits for an additional nine weeks.

[3] On termination by the defendant, the plaintiff received some, but not all, of the entitlements due to him under the *Employment Standards Act*[1] (ESA). He launched this action in May 2003, claiming both damages for wrongful dismissal and the balance of his entitlement under the ESA. He did not file any complaint under the ESA administrative scheme.

[4] The motion judge refused summary judgment on the basis that the standards in the ESA were not enforceable by action but only through the administrative procedures of the ESA and, further, that the ESA remedies of termination pay and severance pay are alternatives to damages for wrongful dismissal. He found that the ESA claims in this action were contrary to law and he sent the action to a trial to be confined to the mitigation issues.

[5] The appellant submits that the motion judge erred in his conclusions as to the ESA claim. He contends that the minimum standards are recoverable by action as an alternative to the administrative route, and without mitigation.

[1] *Employment Standards Act 2000*, S.O. 2000 C. 41

[6] The Director, intervening, submits that the statutory entitlements under the ESA are recoverable in the context of a civil action. In principle, statutory entitlements are recoverable by action unless the Act which confers them creates an exclusive mode of enforcement by administrative action only. He submits that the ESA did not do so. Rather, it created an administrative avenue to obtain the entitlements, without eliminating access to the courts. What it did prohibit was bringing an action in the courts and also pursuing a complaint for the same entitlements administratively. Employees have a choice of whether to pursue their statutory entitlements administratively or in the courts. If they choose the administrative route, there is a cap of $10,000 on the award.

[7] The respondent submits that the pleadings establish that the claim by the plaintiff was for damages for wrongful dismissal and not for the statutory entitlements at all. The pleaded reference to reliance on the ESA is dismissed as ‘boilerplate’ and it is submitted that the appellant opted to seek damages instead of enforcing compliance with the ESA by administrative complaint.

[8] In my view, the pleadings do engage the ESA benefits. There is no relevance to a reference to the ESA in the context of a wrongful dismissal action for common law damages. However, the present pleading is not clear and it is desirable that the ESA entitlements be claimed in specific language. If there is any doubt on the adequacy of the pleadings, leave ought to be given to the appellant to amend to make specific reference to the amounts of the ESA entitlements which he claims. Certainly the motion judge thought that the appellant was seeking to enforce his ESA entitlements; he stated clearly in paragraph 7 of the reasons that the plaintiff

claimed such entitlements and he spent most of the balance of the reasons on the point. It is disingenuous of the respondent to submit that the appeal is not maintainable on the ESA points because there is no appeal from reasons. The appeal is from the refusal of summary judgment and it is clear that the motion judge's views on the issue of seeking ESA entitlements in the action were a central feature of the decision.

[9] The issues before us are ones of statutory interpretation. Elmer Driedger first formulated the modern rule of statutory interpretation in the first edition of his book *The Construction of Statutes*[2], and it now appears on the first page of Professor Sullivan's fourth edition of this work[3]:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[10] This approach to statutory interpretation has been declared to be the preferred approach by the Supreme Court of Canada in *Re Rizzo & Rizzo Shoes Ltd.*[4] and other cases. Such an approach acknowledges the multifaceted nature of the task of interpreting an Act which includes, as required, textual analysis, the discovery of legislative intent from the scheme and object of the Act and the consideration of the context, including those existing legal norms that form the background against which the Act has been enacted.

Can an employee claim ESA benefits in an action?

[11] The relevant statutory provisions are sections 8 (1), 8(2), 97(2), 97(3) and 98(2):

> 8 (1) Subject to section 97, no civil remedy of an employee against his or her employer is affected by this Act.
>
> 8 (2) Where an employee commences a civil proceeding against his or her employer under this Act, notice of the proceeding shall be served on the Director on a form approved by the Director on or before the date the civil proceeding is set down for trial.
>
> 97(2) An employee who files a complaint under this Act alleging an entitlement to termination pay or severance pay may not commence a civil proceeding for wrongful dismissal if the complaint and the proceeding would relate to the same termination or severance of employment.
>
> 97(3) Subsections (1) and (2) apply even if,
>
> (a) the amount alleged to be owing to the employee is greater than the amount for which an order can be issued under this Act; or
>
> (b) in the civil proceeding, the employee is claiming only that part of the amount alleged to be owing that is in excess of the amount for which an order can be issued under this Act.
>
> 98(2) An employee who commences a civil proceeding for wrongful dismissal may not file a complaint alleging an entitlement to termination pay or severance pay or have such a complaint investigated if the proceeding and the complaint relate to the same termination or severance of employment.

[12] The ESA is remedial legislation, intended to provide a minimum set of standards applicable to employment practices in Ontario for the protection of employees. It should be given a large and liberal construction so as to achieve the ends the Legislature had in mind. As it provides minimum standards, the possibility always exists that in some instances other entitlements are actually better for the employee than the ESA minimum standards. It is not always easy to know whether the one is better than the other because common law damages are not predictable except within a fairly wide range. There appears to be no principled reason why

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[2] (Toronto: Butterworths, 1974) at 67.
[3] R. Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Toronto: Butterworths, 2002) at 1.

an employee should not be able to seek both the statutory minimums and the possibly more advantageous common law remedies in the same action, always subject to double recovery considerations.

[13] In *Poletek*[5], Herold J. reviewed the ESA as it then stood, (only slightly different in language from the text of the ESA in force in 2000), and concluded that the equivalent sections to those quoted above indicated that the Legislature contemplated civil proceedings as an alternative to the administrative remedies created by the ESA

[14] The Director, intervening, urges that the sections quoted above have the effect of permitting such an action. In my view, the Director is right. Section 8(1) indicates that nothing in the ESA affects a civil remedy of an employee against the employer, but section 8(2) is more explicit. It requires an employee bringing a civil proceeding against the employer "under this Act" to give notice to the Director. Clearly the ESA contemplates actions to enforce the standards it establishes.

[15] The Director points out that the $10,000 cap on awards under the administrative route provides an incentive to the higher paid employee to avoid that route in favour of an action. Were it the case that no such action was possible, the objective of providing a universal minimum standard would be affected: the higher paid employee would have to gamble on showing his dismissal was wrongful without the safety net intended to protect him or her, or accept a highly inadequate administrative award.

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[4] [1998] 1 S.C.R. 27 at para. 21.
[5] *Poletek v Thomas Cook Group (Canada) Limited,* (1997) 27 C.C.E.L. (2nd) 57 (O.C.G.D.)

[16] Section 97(2) does not prohibit actions except where the plaintiff has already made an administrative complaint; nor does section 98(2) deprive the employee who sues of his ESA rights, it only prevents enforcement of them through the administrative route as well as the action route.

[17] In my view, the answer to the question posed in the heading for this section is clearly yes.

If an Action is Brought, are the ESA and Common Law awards to be offset?

[18] In 1995, in *Kwasnycia*[6], Ferrier J. reviewed the cases on this topic:

> The plaintiff argues that the Employment Standards Act, R.S.O. 1990 c. E.14, s. 40a gives the plaintiff entitlement to 26 weeks severance pay in addition to the amounts payable at common law. Put another way, the plaintiff argues that the defendant is not entitled to deduct from the common law damage award, the amounts paid pursuant to the Employment Standards Act. This issue has been dealt with in several cases in Ontario. The argument for the plaintiff in this regard has not been accepted by this Court, except in two decisions of Gibson J. referred to below: Brown v. Black Classon-Kennedy Limited (1989), 29 C.C.E.L. 92; Mattocks v. Smith & Stone (1982) Inc. (1990), 34 C.C.E.L. 273; Plitt v. P.P.G. Canada Inc. (1992), C.L.L.C. 14,041; Lefebvre v. Beaver Road Builders Limited, [1993] O.J. No. 2371; Kolcun v. Carsten Electronics Limited, [1993] O.J. No. 2371; Justice Gibson in Stevens v. The Globe & Mail, [1993] O.J. No. 185 and in Morris v. Rockwell International Canada Limited (1993), C.L.L.C. 14,046 held otherwise. I agree with the analysis of Justice Corbett in Mattocks and refer as well to the judgment of Justice Iacobucci in Machtinger and HOJ quoted by Justice Lane in Kolcun v. Carsten Electronics, where Justice Iacobucci in the Machtinger case said this:
>
> > "It is also clear from ss. 4 and 6 of the Act that the minimum notice periods set out in the Act did not operate to displace the presumption at common of reasonable notice. Section 6 of the Act states that the Act does not affect the right of an employee to seek civil remedy from his or her employer. Section 4(2) states that a 'right, benefit, term or condition of employment' under a contract that provides a greater benefit to an employee than the

[6] *Kwasnycia v Goldcorp Inc.* (1995) 10 C.C.E.L. (2nd) 65 (O.C.G.D.) at paragraphs 22 and 23.

> standards set out in the Act shall prevail over the standards in the Act. I have no difficulty in concluding that the common law presumption of reasonable notice is a 'benefit', which, if the period of notice required by the common law is greater than that required by the Act, will, if otherwise applicable, prevail over the notice period set out in the Act. Any possible doubt on this question is dispelled by s. 4(1) of the Act, which expressly deems the employment standards set out in the Act to be minimum requirements only."

Justice Lane in the Kolcun decision went on to say:

> "This passage makes it clear that where, as here, the reasonable notice is a period in excess of the period required by the Act, the common law prevails. Therefore, I do not allow the statutory benefits in addition to the 20 months."

[19] Subsequently, in 1996, the Court of Appeal in *Stevens*[7] addressed the issue. Catzman J.A. observed that the universal practice of trial judges in the reported cases was to order the deduction of termination payments under the ESA from common law awards of damages. Such a practice was, he said at paragraph 22, consistent with *Machtinger v HOJ Industries*[8] where the Supreme Court decided that, where the common law notice period is more generous than the ESA, the common law amount is awarded, but not both. However, there was not the same unanimity as to severance awards under ESA. While many judges had ordered the deduction of ESA severance awards from common law damages, others had not. Catzman J.A. agreed with the approach of the majority of the cases as exemplified by the decision of Corbett J. in

[7] *Stevens v Globe & Mail* 135 D.L.R. (4th) 240
[8] [1992] 1 S.C.R. 986

Mattocks[9] and found no policy reason for a different treatment of severance payments and termination payments: both should be deducted from common law awards of damages for wrongful dismissal.

[20] These authorities permit a definitive answer to the question posed. ESA standards are minimum and if a larger amount is assessed as damages, those damages are awarded, but any ESA payments actually paid are deducted.

If an Action is Brought are the ESA amounts subject to mitigation?

[21] The parties agree that when ESA amounts are obtained through the administrative route, they are "not subject to mitigation".[10] However, the respondent submits that when the same statutory benefit is claimed in an action, it can only be regarded as establishing the measure of the damages of the plaintiff and therefore must be subject to mitigation.

[22] The intervenor argues to the contrary. The ESA benefits are minimum entitlements and may not be reduced whether sought in an action or by the administrative route.[11] The ESA entitlements are not damages. They are not linked to any actual loss suffered by the employee, but are payable in any event. They are to be paid "promptly", a legislative indication that the employer is not entitled to wait and see if the employee becomes re-employed. There can be no contracting out of the ESA (section 5(1)), but if an employment contract or another Act provides a greater benefit, the other Act or the contract applies (section 5(2)).

[9] (1990), 34 C.C.E.L. 273
[10] Respondent's Factum para. 16
[11] *Machtinger v HOJ Industries Ltd.* [1992] 1 S.C.R. 986, esp. paras. 31, 32.

[23] I agree with the position of the intervenor. ESA entitlements are not linked, as damages are, to the criteria established in Bardal[12] such as the age of the employee, the likely length of time to find another position, the actual finding of another position etc. They are payable in any event. In my view, it is illogical to suppose that the Legislature intended that such payments would become 'damages' if sought in an action, but not when sought administratively. They are minimum sums to be paid by the employer and subjecting them to reduction by reason of sums received from others removes their character as minimum. Their character as minimums was clearly recognized in *Machtinger*[13] and in *Re Rizzo*[14]. In the latter case, Farley J. said at pages 454-5:

> The statutory obligation appears to be absolute; it is not based upon any actual loss. It must be paid in two weekly instalments following termination. There is no statutory provision for repayment if new employment is found after [termination], but within the calculation period. It should also be noted that severance pay is in addition to termination pay. It would not appear to me that the concept of mitigating damages, which might be awarded in a civil action for wrongful dismissal, has any legal relevance to an employer's minimum statutory obligations with respect to termination pay and severance pay.

[24] Therefore, there is no point in sending this case to trial to ascertain if the plaintiff has or reasonably ought to have mitigated his damages and so ought to receive only part, or perhaps none, of the ESA amounts. They simply cannot be reduced in that way.

Summary

[12] *Bardal v Globe & Mail* (1960) 24 D.L.R. (2d) 140 (H.C.J.)
[13] *Supra*, note 11.
[14] *Re Rizzo and Rizzo Shoes Ltd.* (1991) 6 O.R. (3rd) 441 (O.C.G.D.), affirmed [1998] 1 S.C.R. 27, para. 36.

[25] In summary, the motion judge erred in holding that ESA entitlements cannot be claimed in an action, but only administratively. They can be claimed through either route. Such entitlements, however claimed, are not subject to reduction on the basis of the principle of mitigation because ESA entitlements are not damages. The $10,000 cap is applicable to administrative enforcement of the ESA only and has no application to a claim made in an action. The plaintiff's claim for ESA entitlements is to be determined by the statutory formulae and paid without regard to mitigation or the $10,000 cap. Any claim for failure to provide notice in excess of the ESA entitlements is a claim for damages and is subject to the mitigation principle.

Disposition

[26] I would allow the appeal, set aside the order of the motion judge and substitute an order granting summary judgment for the outstanding balance of the plaintiff's ESA entitlements in accordance with these reasons. The appellant may proceed with the wrongful dismissal claims as he may be advised.

[27] The appellant should have costs here and of the motion below. If the parties cannot agree on the amount of such costs, they may make brief written submissions to be delivered to the Registrar of the Court within 30 days of the release of these reasons.

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Lane, J.

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Matlow, J.

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Ground, J.

Released: February ,2005

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LANE, MATLOW AND GROUND JJ.

B E T W E E N:

PATRICK BOLAND
Appellant (Plaintiff)

- and -

APV CANADA INC.
Respondent (Defendant)

- and -

DIRECTOR OF EMPLOYMENT STANDARDS, MINISTRY OF LABOUR
Intervenor

REASONS FOR JUDGMENT

Lane J.

Released: February 14, 2005