COURT OF APPEAL FOR ONTARIO

CITATION: Nason v. Thunder Bay Orthopaedic Inc., 2017 ONCA 641

DATE: 20170803

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Strathy C.J.O., Gillese and Pardu JJ.A.

BETWEEN

Darren Nason

Plaintiff (Appellant)

and

Thunder Bay Orthopaedic Inc.

Defendant (Respondent)

Daniel Matson, for the Plaintiff (appellant)

Donald B. Shanks and Jordan Lester, for the Defendant (respondent)

Heard: April 20, 2017

On appeal from the judgment of Justice J.S. Fregeau of the Superior Court of Justice, dated December 30, 2015.

REASONS FOR DECISION

[1] The appellant, Darren Nason, was an orthotic technician working for the respondent, Thunder Bay Orthopaedic Inc. He developed problems with his arms and hands as a result of the physical demands of his work. The respondent placed him on a medical leave of absence on August 18, 2010, and terminated his employment on January 22, 2013. The appellant sued for wrongful dismissal and for damages under the *Human Rights Code* for his employer's failure to accommodate his disability and for disability related discrimination. The trial judge awarded damages for wrongful dismissal equal to 15 months' pay in lieu of notice, net of WSIB benefits the appellant received during that period, plus

$10,000 in damages for breach of the *Human Rights Code*, finding that the disability was a factor in the respondent's decision to terminate the appellant's employment.

[2] The appellant submits that the trial judge erred by refusing to award him additional damages for loss of income between August 18, 2010, and January 22, 2013. He says the trial judge erred in concluding that the respondent had accommodated his disability to the point of undue hardship on August 18, 2010, and that the employer was justified in placing him on medical leave on that date.

[3] The respondent cross-appeals. It submits that the trial judge erred by failing to find that the employment contract was frustrated by the appellant's disability. The respondent submits that at the time of termination, there was no reasonable likelihood of the employee being able to return to work within a reasonable time.

[4] For the reasons that follow, both the appeal and the cross-appeal are dismissed. Neither party has demonstrated palpable and overriding error on the part of the trial judge.

A. THE TRIAL JUDGE'S REASONS

[5] Both parties agree that the trial judge correctly articulated the applicable legal tests. Both disagree with his application of those tests to the facts as he found them.

B. ACCOMMODATION TO POINT OF UNDUE HARDSHIP

[6] The trial judge found that the respondent had made significant changes to the appellant's work duties to accommodate his disabilities, but that it had reached the point of undue hardship in making those accommodations:

> [159] Pursuant to TBO's knowledge of Mr. Nason's condition and their knowledge of the physical requirements of a technician's job, modifications were put in place for Mr. Nason. It was agreed that he would be allowed to work at a pace compatible with his condition. Mr. Nason was allowed rest breaks at his discretion and breaks to perform stretching exercises. He was told not to use the computer at lunch and to rest his hands and wrists instead. He was allowed extensive paid time off as requested to attend physiotherapy and medical appointments. Most significantly, he was no longer required to do cast modifications, a job that Mr. McWhirter knew was physically demanding. Mr. Nason's evidence

that he was not consulted and that all changes were made unilaterally is not credible.

[160] In my opinion, the steps taken by TBO satisfy the substantive component of their duty to accommodate Mr. Nason's disability. Mr. McWhirter testified that despite these accommodations, the overall situation got worse. He testified that Mr. Nason's condition continued to deteriorate and his productivity declined to the point where it was 50% or less of what it should have been. I accept this evidence.

[161] Mr. McWhirter testified that TBO employed only two technicians at this time, one of whom was Mr. Nason. As Mr. Nason's productivity decreased, Mr. McWhirter and Mr. Berezowski were required to work evenings and weekends, each working an additional 12 to 13 hours per week, to maintain productivity and to keep pace with others. This represents approximately 2/3 of a full time position. Mr. McWhirter testified that he and his co-owner came to realize that this was simply not sustainable. He testified that it made no sense to keep Mr. Nason on the payroll. TBO felt it was in the best interests of TBO and of Mr. Nason that he be put on leave, allowed to draw the WSIB benefits for which he was qualified and given time away from the workplace to recover from his injuries. I find this to be logical and reasonable.

[162] A determination of whether an employer has accommodated a disabled employee to the point of undue hardship must take account of the specific fact situation and apply common sense. An employer is not required to create a new position for the employee. An employer is not required to make fundamental changes to the employee's job scope or working conditions. Hardship becomes undue when an employee is no longer able to fulfill the basic obligations of his employment position, despite accommodations.

[163] I am persuaded that TBO fulfilled the procedural and substantive components of their duty to accommodate Mr. Nason. TBO is a small business in which all aspects of the operation are familiar to the owners. To a large extent, they work in close proximity to or alongside their employees. They know what is going on in their shop on a day to day basis. TBO understood Mr. Nason's disability and they acted proactively to accommodate that

> disability by significantly altering his employment duties over the summer of 2010. Despite such accommodations, his condition worsened and his ability to fulfill his employment obligations decreased beyond the point of viability. Keep him on as an active employee beyond this point would have required further fundamental changes to his job duties as well as hiring another technician to do what Mr. Nason could no longer do.
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> [164] I find that as of early August 2010, TBO had fulfilled their duty to accommodate Mr. Nason to the point of undue hardship. Having done so, their decision to put him on unpaid leave on August 18, 2010 was not an infringement of Mr. Nason's rights to equal treatment with respect to employment. This aspect of the plaintiff's claim is dismissed.

[7] The appellant argues that the respondent could have asked other employees to work through their lunches, or to work more hours. He submits that there was no evidence of financial hardship.

[8] The trial judge had the benefit of hearing the evidence of the appellant and the respondent. There is no basis to interfere with his finding that each of the two proprietors of this specialized small business could no longer sustain 12-15 extra working hours each week.

C. FRUSTRATION OF THE EMPLOYMENT CONTRACT

[9] The trial judge rejected the respondent's argument that the employment contract had been frustrated by the appellant's disability:

> [180] The issue of whether the termination of the employment contract of a disabled employee is a wrongful dismissal or the frustration of the employment contract depends on the facts. Where an employee is permanently unable to work because of a disabling condition, the doctrine of frustration of the employment contract depends on the fact of the case. Where an employee is permanently unable to work because of a disabling condition, the doctrine of frustration of contract applies because the permanent disability renders performance of the employment contract impossible, such that the obligations of the parties are discharged without penalty. Frustration of contract is established if at the time of termination there is no reasonable likelihood of the employee being able to work with a reasonable time. (Fraser v. UBS, 2011

> ONSC 5448, paragraphs 15 and 32). The onus is on the employer to prove that the contract was frustrated.
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> [181] TBO has failed to establish that there was no reasonable likelihood of Mr. Nason being able to return to work within a reasonable time of January 22, 2013. The evidence does establish that Mr. Belcamino was of the opinion that Mr. Nason had permanent restrictions. The evidence also establishes that WSIB felt that Mr. Nason's recovery had plateaued and that he had reached his maximum medical recovery. WSIB also concluded that Mr. Nason was partially permanently impaired as of the end of 2012. However, whether Mr. Nason could have returned to work, with accommodations, had not been sufficiently explored as of January 2013 such that one could conclude that there was no reasonable likelihood of it happening in the future.
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> [182] TBO's statement in their January 14, 2013 letter to Mr. Nason undermine their position on this issue. In this letter they advised Mr. Nason that nothing is currently available but they will "re-evaluate" his desire to return to work if and when medically cleared.

[10] The respondent, however, terminated the appellant's employment on January 22, 2013, about a week after sending a letter dated January 14, 2013 in which it stated that it would "re-evaluate his desire to return to work if and when medically cleared". The termination was made, on the findings of the trial judge, before the appellant could produce evidence establishing that there was a reasonable likelihood of an ability to return to work within a reasonable time. The trial judge correctly noted that the employer had the onus of establishing frustration of the employment contract. There is no basis for this court to interfere with his determination that the issue of whether the appellant could have returned to work within a reasonable time had not been adequately explored as at the date of termination.

[11] Since success was divided on the appeal and cross-appeal, this is not a case for costs.

[12] In the result both the appeal and the cross-appeal are dismissed without costs.

"G.R. Strathy C.J.O."

"E.E. Gillese J.A."

“G. Pardu J.A.”