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COURT OF APPEAL FOR ONTARIO

AUSTIN, LASKIN and GOUDGE JJ.A.

B E T W E E N :)	
)	
VAINO VEER also known as)	Martin Sclisizzi and
VICTOR VEER)	Matthew L. O. Certosimo,
)	for the appellant
)	
Plaintiff)	
(Respondent))	
)	
- and -)	Gordon A. Meiklejohn and
)	Sylvia Tint,
)	for the respondent
)	
DOVER CORPORATION (CANADA))	
LIMITED SOCIETE DOVER (CANADA))	
LIMITEE)	
)	
)	
Defendant)	Heard: April 22, 1999
(Appellant))	
)	

On appeal from the judgment of Madam Justice Joan Lax dated September 26, 1997

GOUDGE J.A.:

[1] Dover Corporation (Canada) Limited appeals from the judgment of Lax J. issued September 26, 1997. She determined that the plaintiff Victor Veer had been dismissed by Dover without cause and awarded him damages equivalent to twenty-four months' notice together with damages for the loss of his stock options.

[2] The appellant raises three issues on this appeal. First, it says that the trial judge erred in not finding cause for dismissal. Second, it says that given the wording of his stock option agreements with Dover, Mr. Veer had no entitlement following his dismissal. Third, it argues that if Mr. Veer had such a contractual entitlement, the trial judge erred in her assessment of the damages suffered for its breach. By way of cross-appeal the respondent seeks an increase in the twenty-four month notice period.

[3] For the reasons that follow I would dismiss both the appeal and the cross-appeal.

[4] Mr. Veer was suspended by Dover on March 21, 1993 and dismissed on April 27, 1993. At that point he was sixty-one years of age and a very senior executive with Dover, having worked there for more than forty years.

[5] In early 1993 Dover was seeking to bring about a joint venture that would bring it significant business opportunities in China. Both Mr. Veer and Dover's president, Mr. Wilkinson, were involved in this endeavour. It was Mr. Veer's activities in connection with this joint venture that Dover primarily relied on in asserting that it had cause to terminate him. Secondarily, Dover relied on what it described as persistent disobedience by Mr. Veer during the last three years of his employment.

[6] The trial judge, after carefully reviewing the evidence,

concluded that Dover had not demonstrated a pattern of disobedience in Mr. Veer's general conduct or in his participation in the development of the joint venture prior to March 18, 1993. Thereafter, until his suspension from work on March 21, he sought to continue his own participation in the joint venture contrary to Mr. Wilkinson's wishes. The trial judge concluded that this single episode of defiance and insubordination by Mr. Veer did not justify his termination in light of his subsequent apology, his long record of faithful service, his position of seniority and responsibility and the absence of any injury to Dover or to the joint venture.

[7] The appellant's primary challenge to this conclusion is that the trial judge erred in failing to find a pattern of misconduct and in determining that only in the single episode after March 18, 1993 was there insubordination. In my view this conclusion is one of fact that the trial judge was entitled to make. The record provides an ample evidentiary basis for it. Unless such a finding demonstrates palpable and overriding error, this court will not interfere. In my view this finding clearly does not do so.

[8] The appellant also argues that the episode of insubordination that did occur revealed a fundamental defect in Mr. Veer's character and justified Mr. Wilkinson's loss of confidence in him, either of which warranted termination.

[9] Again the trial judge's findings of fact are a conclusive answer. She expressly rejected the assertion that Mr. Veer's conduct demonstrated a defect in his character. Moreover, she concluded that it was an error in judgment for Mr. Wilkinson to conclude that if Mr. Veer continued in his employment, it would threaten Mr. Wilkinson's leadership at Dover. These findings follow a full review of the evidence and were, in my view, entirely open to the trial judge to make.

[10] The appellant also challenges the determination of the trial judge that Mr. Veer's unexercised stock options remained available to be exercised during his notice period, after his actual dismissal on April 27, 1993. She concluded that this was permitted because of the wording of the stock option agreements between Mr. Veer and Dover and further, that this wording was distinguishable from that in *Brock v. Matheson Group Limited et al.* (1991), 34 C.C.E.L. 50 (Ont. C.A.).

[11] The relevant provision in each of Mr. Veer's stock option agreements reads as follows:

If the option holder's employment with the corporation and/or a subsidiary, as the case may be, is terminated for any reason other than set forth in paragraphs 6, 7 or 8 above, whether such termination be voluntary or involuntary, without his having fully exercised his option, the option shall be cancelled and he shall have no further rights to exercise his option or any part thereof and all of his rights hereunder shall terminate as of the effective date of such termination. [Emphasis added]

[12] Paragraphs 6, 7 and 8 respectively deal with the death, retirement or incapacity of the option holder and have no application here.

[13] The appellant argues that the language of this clause ended Mr. Veer's option rights as of his dismissal on April 27, 1993, even if that dismissal was unlawful. In this regard, it points to the inclusion of both voluntary and involuntary termination as triggering events under the agreements for the cancellation of his stock options.

[14] I disagree. In my view "voluntary" termination refers to a termination that is consensual or initiated by the employee, whereas "involuntary" termination is that initiated by the employer. In either case, the termination contemplated must, I think, mean termination according to law. Absent express language providing for it, I cannot conclude that the parties intended that an unlawful termination would trigger the end of the employee's option rights. The agreement should not be presumed to have provided for unlawful triggering events. Rather, the parties must be taken to have intended that the triggering actions would comply with the law in the absence of clear language to the contrary. There is no such language in these stock option agreements. Hence, following his unlawful dismissal on April 27, 1993, Mr. Veer had the twenty-four months of reasonable notice required for his termination to exercise the rights under the stock option agreements.

[15] In *McDonald v. Lac Minerals Ltd.*, [1987] O.J. No. 1216 (H.C.) (Q.L.) Griffiths J. followed a similar line of reasoning and reached a similar conclusion.

[16] In *Ryan v. Laidlaw Transportation et al.* (1995), 26 O.R. (3d) 97 (Ont. C.A.) this court came to the same result. The termination language in the stock option plan in that case read as follows:

Each of the 10 options are conditional upon the executive completing continuous service with the Company (which includes any of the subsidiaries), ... to the last day of the year immediately following the granting date of the particular option, failing which the option becomes null and void.

[17] This court concluded that this language preserved the stock options for the employee to the end of his notice period. It did not extinguish them as of the date of his wrongful dismissal.

[18] The language of the option agreements in this case is clearly different from that in *Brock*, supra. The relevant paragraph from one option agreement in that case is representative:

4. Upon the occurrence of any event specified in clause 10 hereof [which commenced 'In the event of the Employee ceasing to be an employee or servant of the Corporation'] (except the death of the Employee) prior to October 31, 1985, the option hereby

no granted shall forthwith cease and terminate and shall be of
further force or effect whatsoever as to such of the Optioned
Shares in respect of which such option has not previously
been exercised; provided that where the Employee is dismissed by
the Corporation, the Employee shall have 15 days from the date
notice of dismissal is given in which to exercise the option hereby
granted in respect of the Optioned Shares available as of
October 31 of the Year preceding such dismissal. [Emphasis
added]

[19] That case also involved an employee terminated without cause and without reasonable notice. This court read the language quoted above to provide that the date of the actual dismissal of the employee was the reference point for the ending of the employee's option rights. In doing so, it focused on the special language in that provision of "ceasing to be an employee ... from the date of the notice of dismissal" and "such dismissal" to conclude that it was the day on which the employee was in fact dismissed that mattered, irrespective of whether that dismissal was lawful or unlawful. Absent language such as this, it seems to me that parties must be presumed to contemplate triggering action that complies with the law. There being nothing in the provision in this case that resembles the language in Brock, I would conclude that the respondent's rights under these option agreements were alive until the end of the reasonable notice period required for his lawful termination.

[20] Finally, the appellant argues that the trial judge erred in calculating the damages for the lost stock options as of the date of judgment. It says that damages should have been assessed as of April 27, 1995, the end of the notice period, when Mr. Veer could have mitigated his loss by using his own funds to purchase in the market the shares to which he would have been entitled under the option agreements. This would have cost him between \$261,000 and \$303,000 U.S. dollars.

[21] This argument must fail. It appears not to have been raised at trial. Moreover, there is no evidence to permit the appellant to show, as it must, that such action by Mr. Veer would be reasonable in his circumstances as a way of minimizing his losses. Indeed, given the amounts involved, I would think quite the opposite is the case.

[22] As to the cross-appeal, I would not interfere with the length of notice determined by the trial judge to be reasonable. In the circumstances of this case it is clearly within an acceptable range of notice. Nor do the reasons for judgment reflect any error in principle in reaching this conclusion.

[23] In summary, I would dismiss the appeal and the cross-appeal, each with costs.

(signed) "S T Goudge JA

(signed) "I agree. Austin J.A.

(signed) "I agree John Laskin JA"

RELEASED: May 19, 1999