No. 602/87

SUPREME COURT OF ONTARIO
COURT OF APPEAL
HOWLAND C.J.O., CATZMAN and CARTHY JJ.A.

B E T W E E N :	
PHILIP DOUGLAS JOHNSTON Plaintiff (Respondent)	Thomas A. Stefanik for the appellant
- and -	Marc J. Somerville, Q.C. and Karen Scherl
DRESSER INDUSTRIES CANADA, LTD. Defendant (Appellant)	for the respondents
A N D B E T W E E N :	
IAN PAUL WINNARD Plaintiff (Respondent)	
- and -	
DRESSER INDUSTRIES CANADA, LTD. Defendant (Appellant)	Heard: November 29, 1989

CATZMAN J.A.:

The background and the appeals

The appellant Dresser Industries Canada, Ltd. ("Dresser") is a manufacturer and supplier of high technology products and services to energy, natural resource and industrial markets. In 1981, as a result of a major expansion in oil rig

production at its plant in Cambridge, Ontario, Dresser commenced a recruitment drive for workers trained and experienced in the sheet metal, plating and welding trades. It advertised in newspapers in the United Kingdom and sent representatives there who interviewed one hundred applicants, including the six respondents. During the interviews, all of the respondents expressed concern and sought assurances regarding the security of their employment if they agreed to move to Canada. Dresser offered employment to the respondents, who accepted and who moved with their families to the Cambridge area that year. The trial judge, whose findings appear later in these reasons, found that it was a term of the agreement between Dresser and the respondents that they would be employed by Dresser for a period of at least two years.

The six respondents commenced employment with Dresser on different dates between July and December, 1981. Upon completion of a 45-day probationary period of employment, each signed a union membership card and, for the first time, received a copy of a collective agreement, in force at the Cambridge plant, between Dresser and the local union of the United Steelworkers of America. In April, 1982, by reason of a surplus of oil on world markets, Dresser experienced a sudden

cancellation of orders for oil rigs. It laid off a number of employees. Among them were the six respondents, who were laid off in April and May, 1982, in accordance with the seniority provisions of the collective agreement.

In the result, the six respondents worked for Dresser for periods ranging from just over four months to just over nine months. Some returned to England with their families; others remained in Canada. Each of the six brought an action against Dresser for damages for breach of contract or, alternatively, for negligent misrepresentation. The trial judge dismissed their claim on the latter basis but found in their favour on the former basis. He awarded damages calculated on the basis of the difference between the wages each respondent would have earned over the two year period from the commencement of his employment less the moneys actually earned by him during that period, and reimbursement for particular expenses incurred by each of them.

Dresser appealed the judgments in all six actions. Because of the amounts involved, only two of the six appeals lay to this court. Counsel agreed that those two appeals would be argued and that the parties to the other four appeals would be bound by the outcome. The appeals were limited to the question

of Dresser's liability in law to the respondents. No issue was taken with the amounts of the damages awarded by the trial judge.

The trial judge's findings and conclusions

The trial judge made findings, all of which are supported by the evidence, that:

i) during the interviews in England , Dresser's representatives made representations to the respondents of security of employment for a reasonable period of time, not less than two years;

ii) the respondents relied upon such representations in deciding to accept the jobs offered to them and to emigrate to Canada;

iii) none of the respondents was advised by Dresser's representatives that there was a collective agreement in existence between Dresser and the union that set out certain terms of employment and was binding upon all members of the union;

iv) no copy of the collective agreement was made available to any of the respondents until they had completed their probationary period; and

v) the representations regarding security of employment for at least two years were intended by the parties, and constituted, a term of the contract between them,

and he reached the following conclusions:

vi) that individual contracts of employment cannot co-exist with a collective agreement where the individual contracts address, expressly or by clear implication, the same matters dealt with in the collective agreement;

vii) that a claim for damages arising out of rights created by a collective agreement must be pursued in accordance with the remedy contemplated in the collective agreement rather than by court action;

viii) that recourse may be had to court action in the present case, where the respondents became subject to the terms

of the collective agreement well after the formation of the individual contracts between them and Dresser; and

ix) that Dresser had in each instance breached those contracts by terminating the employment of the respondents prior to two years from the date of commencement of their employment.

The jurisdiction of the court

On the appeals, counsel for Dresser argued that, as a matter of law, individual employees in the position of the respondents could not bring court action to assert rights under individual contracts of employment once they became subject to the provisions of a collective agreement. In his submission, this proposition was established in three cases in the Supreme Court of Canada: Canadian Pacific Railway Company v. Zambri, [1962] S.C.R. 609, 34 D.L.R. (2d) 654; McGavin Toastmaster Limited v. Ainscouah et al., [1976] 1 S.C.R. 718, 54 D.L.R. (3d) 1; and St. Anne-Nackawic Pulp & Paper Co. Ltd. v. Canadian Paper Workers Union, Local 219, [1986] 1 S.C.R. 704, 28 D.L.R. (4th) 1.

Zambri concerned the disposition of charges laid against an employer for alleged violations of aprovincial labour relations statute by the termination of employment of a number of employees following a lawful strike. McGavin concerned the entitlement of employees to severance pay, pursuant to the terms of a collective agreement, after an employer closed its plant following an illegal strike. St. Anne-Nackawic concerned the right of an employer to sue a union for damages by reason of a strike which was illegal under a provincial labour relations statute and was a breach of the collective agreement between the employer and the union.

With respect to Zambri, the trial judge in the present case found support for his disposition of the claims of the six respondents in the observation of Judson J. (at p.624 S.C.R., p.666 D.L.R.) that

> ... when there is a collective agreement in effect, it is difficult to see how there can be anything left outside, except possibly the act of hiring. [trial judge's emphasis.]

The McGavin and St. Anne-Nackawic cases were considered in a decision of the British Columbia Court of Appeal in Wainwright et al. v. Vancouver Shipyards Co. Ltd.; Marine &

Shipbuilders Local 506. U.B.C.J.A., Third Party (1987), 38 D.L.R. (4th) 760, 14 B.C.L.R. (2d) 247; leave to appeal refused by the Supreme Court of Canada, Oct. 22, 1987. That decision, which was reported after the present case was argued at trial, dealt with a remarkably similar fact situation. In Wainwright, the defendant had a contract to build an ice-breaker and required skilled employees for that purpose. It advertised for prospective employees in New Brunswick. At their interviews, the plaintiffs expressed reservations about travelling from New Brunswick to Vancouver, and were assured of "several years" (found by the trial judge to be not less than three years)full employment without lay-off if they made the move. They did but, after a year and a half, were laid off due to a work shortage. The plaintiffs were required to become members of a union which had a closed shop agreement with the defendant and, pursuant to the collective agreement, were the first to be laid off. Their action for damages succeeded at trial, and the employer appealed.

On the appeal, the employer contended that the employees' contracts of employment were governed by the terms of the collective agreement and that the court had no jurisdiction to entertain a claim for damages for breach of such contracts. In support, its counsel relied, among other cases, upon McGavin

and St. Anne-Nackawic. The employees contended that the discussions which brought them from New Brunswick to Vancouver resulted in "pre-employment contracts" for breach of which they could properly bring action.

The appeal was dismissed. Hinkson J.A., who delivered the judgment of the court, adverted to McGavin and St. Anne-Nackawic and concluded as follows (at pp.762-763 D.L.R., p.250 B.C.L.R.):

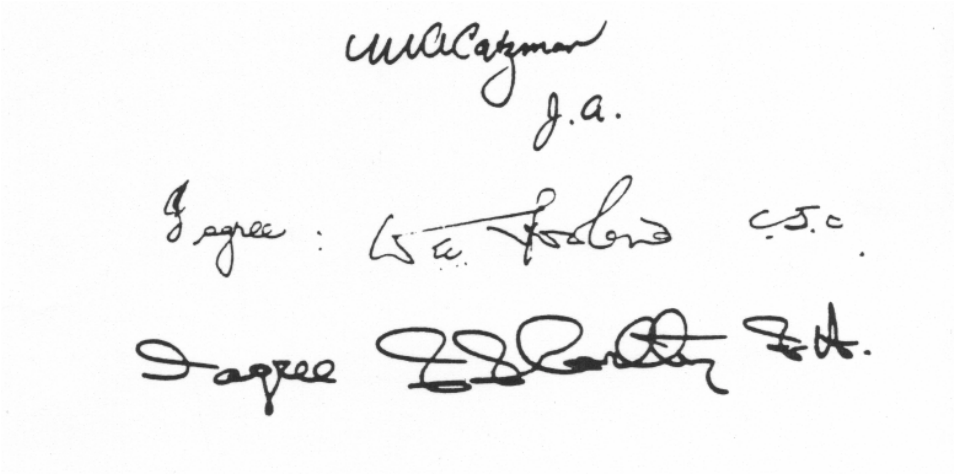
> In the McGavin case, Chief Justice Laskin said at p.6 D.L.R., p.725 S.C.R., in dealing with the question of the relationship between parties who become master and servant or employer and employee, the following:
>
> > The reality is, and has been for many years now throughout Canada, that individual relationships as between employer and employee have meaning only at the hiring stage and even then there are qualifications which arise by reason of union security clauses in collective agreements.
>
> That passage was cited with approval by Mr. Justice Estey in the St. Anne case. At p.12 D.L.R., p.718 S.C.R., in the St. Anne case Mr. Justice Estey said:
>
> > The collective agreement establishes the broad parameters of the relationship between the employer and his employees. This relationship is properly regulated through arbitration and it would, in general, subvert both the relationship and the statutory scheme under which it arises to hold

> that matters addressed and governed by the collective agreement may nevertheless be the subject of actions in the courts at common law.
>
> It is upon the basis of that reasoning that the appellant contends that the court here had no jurisdiction.
>
> In my opinion, if the claims of the Plaintiffs in these proceedings were that because of the pre-employment contracts, they could not be laid off pursuant to the terms of the collective agreement, clearly that would be a matter for arbitration, but those are not the c aims advanced here. The trial judge found upon the basis of the evidence of the plaintiffs that they were given to understand that they would not be laid off for three years. That finding supports a conclusion that there were pre-employment contracts. These claims do not arise out of the collective agreement. They are claims arising out of a contract governed by common law principles. In my opinion, the court did have jurisdiction. I think that this is clear from what was said by Chief Justice Laskin in the McGavin case and approved by Mr. Justice Estey in the St. Anne case. [emphasis added.]

I respectfully agree with the view expressed by Hinkson J.A. which is, in essence, the basis upon which the trial judge in the present case found in favour of the respondents and is, in my opinion, fatal to the position advanced by Dresser in support of these appeals.

Disposition

Accordingly, I would dismiss the appeals with costs, including the costs of interlocutory motions which were reserved for disposition by the panel hearing the appeals.



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JUDGMENT

Released: D. A. Howland C.J.O.
:mel January 10, 1990