
CANADA / JUDGMENT

Islip v. Coldmatic Refrigeration of Canada Ltd.

2002 BCCA 255

COURT

British Columbia Court of Appeal

DECIDED

18 April 2002

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2002BCCA0255

Citation:

Islip v. Coldmatic

Date:20020418

2002 BCCA 255

Docket:

CA028097

Registry: Vancouver

COURT OF APPEAL FOR BRITISH COLUMBIA

BETWEEN:

FRANK ISLIP

RESPONDENT

(PLAINTIFF)

AND:

COLDMATIC REFRIGERATION OF CANADA LTD.

APPELLANT

(DEFENDANT)

Before:

The Honourable Mr. Justice Esson

The Honourable Mr. Justice Hall

The Honourable Mr. Justice Smith

J. Geoffrey Howard

Counsel for the Appellant

Earl G. Phillips and

Iain K. Dixon

Counsel for the Respondent

Place and Date of Hearing:

Vancouver, British Columbia

January 22, 2002

Place and Date of Judgment:

Vancouver, British Columbia

April 18, 2002

Written Reasons by:

The Honourable Mr. Justice Smith

Concurred in by:

The Honourable Mr. Justice Esson

The Honourable Mr. Justice Hall

Reasons for Judgment of the Honourable Mr. Justice Smith:

- [1] The appellant ("Coldmatic") appeals from a judgment for damages assessed by Mr. Justice Metzger of the Supreme Court in the amount of \$109,786 in favour of the respondent ("Islip") for breach of a contract of employment. The primary question is whether Islip's pre-contractual false representation of the amount of his previous salary should serve to permit Coldmatic to avoid the contract or to justify Islip's discharge. If not, there is a question as to the proper amount of the damages award.
- [2] Coldmatic is a wholesaler of industrial refrigeration equipment and is based in the Province of Ontario. For some time it had coveted the business of Bel-Par Industries Ltd. ("Bel-Par"), a competitor based in Vancouver, British Columbia. Its attempts to purchase Bel-Par or its business were unsuccessful so, in 1998, Coldmatic approached Islip, a key employee of Bel-Par as its refrigeration-division manager, to try to hire him away.

[3] Islip was interested in the prospect of joining Coldmatic and had several discussions in that regard with George Zafir ("Zafir"), Coldmatic's president and principal shareholder. Eventually, in May 1999, he was persuaded to make a written employment proposal and he prepared and faxed to Zafir a document entitled "Employment Offer". The document included the following:

1) The current salary of the Employee is \$75,000 per annum, and the new salary to be paid by Coldmatic will be \$_ per annum.

...

4) Coldmatic will supply a pickup truck for the Employee's use, the style and model to be chosen by the Employee. At the end/termination of this Contract ... the Employee will have the option of purchasing the vehicle for the price of \$1.00. 5) The term of this Contract will be for a minimum of two years.

In his facsimile cover sheet, Islip invited Zafir to fill in the blank and to "feel free" to make any additions or deletions.

[4] On June 1, 1999, Islip travelled to Ontario at Coldmatic's expense and met with Zafir and Coldmatic's Chief Financial Officer to review the Employment Offer. The three of them executed the document, to which they had added in handwriting the following addendum:

This Agreement is subject to a minimum \$2 million sales target for 12 months or else the contractual period is null & void. They did not fill in the blank in paragraph 1, but signified their agreement to the \$75,000 salary by circling and initialling it on the document.

[5] Islip resigned his employment at Bel-Par on June 2, 1999, effective June 11, 1999. On June 7, 1999, he faxed some quotations for the truck referred to in paragraph 4 of the Employment Offer to Craig Muzylo ("Muzylo"), Coldmatic's vice-president of sales and marketing. Muzylo did not respond, as he was concerned about the cost of Islip's proposal. As Islip had to return the truck that Bel-Par had provided to him, he continued to press Muzylo for a commitment on the new truck. Finally, in a letter of June 15, 1999, Muzylo set out some less expensive proposals for a truck and said that Islip would have the option of buying the vehicle at the end of the term of his employment for the residual value of the lease, rather than for the \$1.00 stated in the signed document.

[6] When it became clear to Islip that Coldmatic would not agree to his truck proposal, he took the position that Coldmatic had repudiated and advised Muzylo of his election to terminate the contract.

[7] Islip returned to work at Bel-Par on July 5, 1999, as a commissioned salesman, since his previous managerial position had been filled after his resignation. Bel-Par provided him with a leased truck but he was required to make a monthly contribution to the lease payments.

- [8] On September 30, 1999, Islip was diagnosed with a debilitating disease and, as a result of his illness, worked only part-time from October 1, 1999, to January 31, 2000. He left his employment on leave at that time and, although he worked occasionally, received disability income benefits until October 30, 2000. He returned to full-time work on November 1, 2000.
- [9] Islip commenced this action on September 16, 1999, claiming damages for Coldmatic's alleged repudiation of the contract of employment. In its amended statement of defence, Coldmatic denied that there was a binding contract and denied the alleged repudiation. As well, it pleaded that Islip had fraudulently misrepresented the amount of his previous salary and that it was consequently entitled to avoid the contract or, alternatively, that the misrepresentation manifested dishonesty which justified dismissal for cause. Further, Coldmatic alleged that Islip suffered no loss after February 1, 2000, because his disability prevented him from working so that, had he remained in Coldmatic's employ, he would not have been paid any compensation or any disability benefits during that period.
- [10] The trial judge found that there was a binding contract of employment between the parties and that Coldmatic's intransigence in respect of the truck constituted a constructive dismissal. No appeal was taken from those findings.

Fraudulent Misrepresentation

- [11] In their facta, the parties take the elements of a fraudulent misrepresentation from Fridman, *The Law of Contract*, 3rd ed., p. 295, as follows: :
- (a) the wrongdoer must make a representation of fact to the victim;
 - (b) the representation must be false in fact;
 - (c) the party making the representation must have known the representation was false at the time it was made; and
- [4] the victim must have been induced to enter into the contract in reliance upon it.

To that summary I would add that the misrepresenter must have intended that the victim act on the representation.

- [12] There is no dispute that the first two elements were made out on the evidence. Islip's salary at Bel-Par at the time he was negotiating with Coldmatic was \$61,000 per annum, and his representation in the Employment Offer that it was \$75,000 was false.
- [13] It is Islip's position that the trial judge properly found that knowledge on his part of the falsity of the representation and reliance upon the representation by Coldmatic were not proven. Coldmatic contends that the trial judge committed palpable error in reaching those conclusions.
- [14] The trial judge's reasons on these issues of fact obscure his critical findings. He said, in this regard:

- [66] The defendant asked the court to find that there has been fraudulent misrepresentation and therefore the defendant is entitled to rescission. I find as a fact that there has been no false statement knowingly made by the plaintiff that induced the defendant to enter into the contract in reliance on that misrepresentation. [67] The employment offer, before it turned into the employment contract, was a document used to commence negotiations between the plaintiff and the defendant. The defendant asked for this document and the plaintiff supplied it. ... [69] The defendant asked the court to conclude that the plaintiff's statement about his salary induced the defendant to offer him a much higher salary than he was earning. The defendant alleges the plaintiff intentionally manipulated the defendant in a dishonest manner on a material financial term of their relationship. I find this was a negotiation process. The defendant's carelessness was not a cause for dismissal. (my emphasis)
- [15] Parenthetically, I agree with Coldmatic that the last sentence quoted is an error of law. Carelessness of the victim of fraud is no answer to an action or to a defence based on fraud: see, e.g., *United Services Funds (Trustees of) v. Richardson Greenshields of Can. Ltd./Richardson Greenshields du Can. Ltée* (1988), 22 B.C.L.R. (2d) 322 (S.C.) at 335-36. However, the error is of no moment, as the judgment on this issue is supportable on proper grounds.
- [16] It is not clear from his reasons whether the trial judge found that Islip did not know that the misrepresentation of salary was false or that, in any event, it did not induce Coldmatic to enter into the contract.
- [17] In my view, the evidence does not support a finding that Islip did not know that the misrepresentation was false. Indeed, in his cross-examination Mr. Islip testified that he knew it was false and that he made it deliberately, in effect intending Zafir to rely upon it. He said:

Q Okay. Now, if we turn back to tab. 24, the employment offer, you agree with me that the statement in paragraph 1:

"Current salary of the employee is 75,000 per annum", that was a false statement you were making Coldmatic; correct? A Yes. Q And you never told anyone at Coldmatic that this was a false figure; did you? A No.

...

Q In fact, when you put that false statement, you knew it would be pretty hard for Mr. Zafir to offer you anything less than that figure; didn't you? A Yes. Q Let me ask you, Mr. Islip: If George Zafir had only offered to match your salary of approximately \$61,000 at Bel-Par, would you have left Bel-Par to join Coldmatic? A No.

As well, the documentary evidence of Islip's compensation from Bel-Par during 1999 demonstrates that his total income, including bonuses, was \$67,632.02 and that his salary was approximately \$61,000. Thus, the evidence is clear that Islip made the false statement knowing that it was false. It is also clear that he made the representation intending that Coldmatic should rely upon it, which is another fact upon which the trial judge made no clearly-expressed finding.

- [18] Accordingly, if the judgment is to be sustained on this issue, it must be on the basis that the misrepresentation did not induce Coldmatic to enter into the contract. As the trial judge made no express finding of reliance, I have examined the evidence to ascertain whether it is capable of supporting a finding that Coldmatic did not rely upon the misrepresented fact in entering into the contract. In my view, there was evidence from which it reasonably could be concluded that Coldmatic would have agreed to pay \$75,000 annual salary even had they known that Islip's annual salary at Bel-Par was only \$61,000.
- [19] First, there was evidence that Zafir was interested in acquiring Bel-Par's business and that the hiring of Islip was an alternative means to that end when his attempts to purchase the business were unsuccessful. Thus, Zafir's interest was in hiring Islip for the custom that he could bring with him and his salary at Bel-Par would not have been a critical factor. That Coldmatic paid Islip's expenses to attend at their Ontario headquarters for the meeting of June 1, 1999, and treated him royally while he was there supports the view that this was not an ordinary hiring.
- [20] Further, when Zafir was asked on his examination for discovery why he would not make a written offer to Islip, he replied, "because it is much easier if I know what he wants, whether I can live with it or not". Moreover, Islip's uncontradicted evidence was that during the meeting of June 1, 1999, Zafir said to him, "I don't have a problem here with this \$75,000" and indicated "that this amount was may be more than he anticipated paying, but that he would pay that."
- [21] Thus, there was evidence supportive of a finding that Coldmatic would have entered into the contract even had they known that Islip's statement regarding his previous salary was false. The necessarily implicit finding of the trial judge that Coldmatic did not rely on the misrepresentation is, therefore, supportable and I am not persuaded that he made an error on this issue with which this Court could interfere.

Dishonesty as cause for dismissal

- [22] Whether dishonesty by an employee amounts to grounds for dismissal involves a weighing of the nature and degree of the dishonesty in the context in which it is manifested. This is a question of fact: see *McKinley v. B.C. Tel*, [2001] 2 S.C.R. 161, 2001 SCC 38, paras. 48-49.
- [23] Once again, the trial judge made no clear finding of fact on this issue. It appears that he concluded that, in making the misrepresentation, Islip was merely attempting to negotiate better terms of employment than those that he had with Bel-Par. He said:

- [54] The defendant submits the court should not accept the plaintiff's evidence. The defendant says, the plaintiff lied about his current salary. I accept the plaintiff's evidence that this was an employment offer to the defendant. I accept that he was going to the meeting with Mr. Zafir to negotiate. Mr. Zafir made it clear that the plaintiff had to start the process as he would not be the first to mention salary or benefits. [55] The defendant submits that there is something dishonest about the plaintiff seeking everything he had at Coldmatic [sic], plus a substantially higher salary, a new truck, and a \$1.00 buyout of that truck. [56] I find there is nothing dishonest about the plaintiff taking this position. He had a good job he was content doing. I accept his evidence that he was not going to Coldmatic unless he was improving his present position. The plaintiff was 61 years of age and this would likely be his last new job. (my emphasis)
- [24] While the statement that there was "nothing dishonest" about Islip's conduct is belied by his own testimony, it seems to me that what the trial judge intended to say was that, considered in context, the misrepresentation was not of such a serious nature as to afford grounds for dismissal. That view is supported by the evidence.
- [25] It is not disputed that both Zafir and Islip considered that they were involved in a negotiation at the material time. As well, Coldmatic's goal was to acquire Bel-Par's custom and the hiring of Islip was merely a means to that end. As I have already observed, Islip's previous salary would not have been of critical importance in those circumstances.
- [26] Accordingly, I would not accede to this ground of appeal.

Damages

- [27] The trial judge calculated the damages award as follows:

Two years' salary: \$150,000

Loss of truck value: 27,500

Lease payments to Bel-Par: 6,000

TOTAL \$183,500

Less:

Two weeks' salary received: \$ 2,700

Commissions earned from Bel-Par: 24,758

Estimated commissions,

Nov. 1, 2000 to June 14, 2001: 26,005

Disability benefits received: 20,250

Cost of truck pursuant to agreement: 1

TOTAL \$ 73,714

DAMAGES \$109,786

- [28] Coldmatic submits that the trial judge erred in awarding damages for the period of Islip's disability between October 1, 1999, and November 1, 2000, on the assumption that Coldmatic would have continued to pay him despite his disability. In this regard, the trial judge said:
- [77] Coldmatic claims there should be no damages for the period of October 1, 1999 to October 31, 2000, because of the plaintiff's disability. It says that they have no sick leave plan and any employee who gets sick does not get paid, with the possible exceptions of one or two weeks for employees with 10 or 15 years service. [78] That defence needs to be looked at in light of the following: Mr. Zafir's evidence on cross-examination was that if the plaintiff had been his employee, and came to him with a diagnosis of HIV positive, "I would ask for information. I would not get rid of him. I would have weighed the situation. What is his future? How can we work together? I would have given him a chance to see what's happening. I'm not so irrational as to fire him. I've gone through a lot of things, and I don't make quick decisions". [79] We also need to look at what he would have done at the point of February 1st when the plaintiff had to go off work. Mr. Zafir testified, "I am a people person, and I don't play with people's lives. I would only cut him off if I find out the illness is permanent, and there's no prospect for a return to work". [80] Mr. Moss' evidence on cross-examination concluded with the acknowledgement that an employee in the plaintiff's position would be accommodated. The plaintiff continued to be productive with more than \$900,000.00 in sales for Bel-Par despite his disability. [81] To cut the plaintiff off salary and benefits, and to terminate his employment following a diagnosis of being HIV positive, runs totally contrary to Mr. Zafir's repeated assurances that the plaintiff would never regret joining Coldmatic, and that he would be taken care of.
- [29] The evidence referred to by the trial judge in paras. 78-80 of his reasons supports his conclusion that Coldmatic would have continued to employ and to pay Islip despite his illness. That is a finding of fact within the purview of a trial judge and I am not persuaded that he made any reviewable error in that regard.
- [30] I agree with Coldmatic, however, that the trial judge fell into error in his assessment of damages when he gave no effect to the term of the contract that provided that the agreement would be terminated if Islip should fail to reach the minimum \$2 million sales target in twelve months. As a result of this finding, the trial judge awarded damages based on the assumption that Coldmatic would have employed Islip for the full two-year term at \$75,000 per annum.
- [31] On this point, the trial judge said:

[83] Should damages be calculated on the basis of the guaranteed two year term, from June 14, 1999 through June 13, 2001? This contract is for a fixed term. The plaintiff has been prevented from working the entire term because of the early constructive dismissal by the defendant. See *Nebin v. B.C. Hazardous Waste management Corporation*, 15 C.C.E.L. (2d), 165. [84] The concept of reasonable notice does not apply in this case as it is a contract for a fixed term. [85] Damages will be assessed for the period remaining on the term of the contract at the time of the breach, which occurred after only two weeks of employment. See *Bell Canadian Development Investment Corporation* (1990), 69 D.L.R. (4th) 178 at 190. There, the Ontario High Court justice says, and I quote:

In addition, in my opinion, in situations involving fixed-term contracts, the amount of total compensation that would have been earned over the term of the contract should be assessed on a balance of probabilities. [86] I also considered *Carr v. Fama Holdings Ltd.*, 29 B.C.L.R. at page 82. [87] I am satisfied, in the case at bar, the remuneration is \$75,000.00 per year with no commission or bonus. This two year contract had the additional term, and I quote: This agreement is subject to a minimum \$2 million sales target, for twelve months, or else the contract period is null and void. [88] There is no evidence to show that the plaintiff's performance would be less than the \$2,000,000.00 target set by the defendant. I have no evidence that this target was or was not a reasonable one. Thus, I cannot determine that if the plaintiff had failed to meet this target, could he have been terminated for incompetence. [89] I find the plaintiff is entitled to damages calculated on the basis of the guaranteed two year term of the contract, from June 14, 1999 through June 13, 2001....

[32] This reasoning demonstrates a misapprehension of the evidence, in my view. The evidence was overwhelming that Islip would not have reached the \$2 million sales target had he remained in Coldmatic's employ. After the diagnosis of his illness, which was only three and one-half months after he commenced his employment, he worked part-time for four months and, commencing February 1, 2000, he was on disability leave. The evidence was that \$2 million in sales would not have been easily achievable even had he been able to work. Accordingly, the contract would have been terminated by operation of the sales-target clause on June 14, 2000, which is twelve months after the effective date of Islip's employment.

[33] On that basis, Islip is entitled to one year's salary of \$75,000 plus the \$27,500 assessed by the trial judge as his loss from the failure to obtain the promised truck and a further \$3,000 to compensate him for the \$250 per month that he had to pay to Bel-Par to lease the truck during those twelve months. These items total \$105,500. From that amount must be deducted the wages he received of \$2,700; commissions earned from Bel-Par, which I estimate at \$20,000 during the twelve months to June 14th, 2000; and \$10,000 for the disability benefits received between February 1st and June 14th, 2000. These items total \$32,700. Accordingly, the difference of \$72,800 is the amount of Islip's loss.

[34] I would therefore allow the appeal to the extent of setting aside the award of damages of \$109,786 and substituting an award of \$72,800.

"The Honourable Mr. Justice Smith"

I AGREE:

"The Honourable Mr. Justice Esson"

I AGREE:

"The Honourable Mr. Justice Hall"

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Prepared on 29 October 2026 · Esheria