Indexed as:
Messer v. Barrett Co.

Messer v.
Barrett Co. Ltd.

[1926] O.J. No. 70

59 O.L.R. 566

[1927] 1 D.L.R. 284

Ontario Supreme Court - Appellate Division

Middleton, Masten, Orde, and Smith JJ.A.

November 18, 1926

Master and Servant -- Contract of Hiring -- Definite Hiring for a Term -- Continuance of Relationship -- Reasonable Notice Required to Terminate Contract -- Justification of Dismissal -- Pleading.

Where there has been a definite hiring for a year and the relationship of master and servant has continued by mutual agreement beyond that term, the implied agreement is that it will continue as long as the parties mutually agree, and can be terminated only by reasonable notice. The reasonable notice to be given is not required to terminate at the end of a year from the hiring.

Pollard v. Gibson (1924), 55 O.L.R. 424, applied.

Beeston v. Collyer (1827), 4 Bing. 309, considered.

Where it to intended to justify the dismissal of a servant for cause, the defendant's pleading should specifically state the ground of the dismissal.

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1 APPEAL by the defendants from the judgment of his Honour Judge O'Connell, pronounced at

the trial of the action in the County Court of the County of York, on the 9th June, 1926.

2 The plaintiff was on the 12th March, 1923, employed by the defendants as sales-manager, and served in that capacity until the 14th January, 1925, when he was dismissed. His employment was at an annual salary of $5,000, payable monthly.

3 Upon the plaintiff's dismissal he was paid his salary until the 28th February, 1925, and with their defence to this action, which was brought to recover damages for wrongful dismissal, the defendants brought into court $175, being the proportionate salary until the 12th March, 1925, the anniversary of the plaintiff's employment.

4 The trial Judge held that reasonable notice in all the circumstances would be five months' notice, and upon that basis assessed the plaintiff's damages at $708.30.

5 There was upon the record a plea that the summary dismissal was justified. Upon the facts the trial Judge found that this defence had not been proved.

6 November 18. The appeal was heard by MIDDLETON, MASTEN, ORDE, and SMITH, JJ.A.

Everett Bristol, for the appellants.

Norman Sommerville, K.C., and F. A. Campbell, for the plaintiff, respondent.

7 Everett Bristol, for the appellants, contended that upon the plaintiff's own evidence there was an express contract for a yearly hiring. In any case a general hiring without limitation of time raises a presumption of a yearly hiring which must be rebutted: Taylor on Evidence, 11th ed., vol. 1, p. 171; Halsbury's Laws of England, vol. 20, p. 92; Smith on Master and Servant, 7th ed., p. 34; Cayme v. Allan Jones and Co. (1919), 35 Times L.R. 453; Beeston v. Collyer (1827), 4 Bing. 309; and a yearly hiring can be terminated only with the current year unless there is a stipulation or a custom to the contrary: Halsbury, vol. 20, p. 96; Buckingham v. Surrey and Hants Canal Co. (1882), 46 L.T.R. 885. Harnwell v. Parry Sound Lumber Co. (1897), 24 A.R. 110, does not establish, nor has any Ontario court yet decided, that in the case of a yearly contract the employer may terminate only upon reasonable notice and may not terminate at the end of the year without notice. In Bain v. Anderson (1898), 28 Can. S.C.R. 481, the Supreme Court of Canada decided on the facts that there was no yearly hiring. At the trial the late Sir William Meredith, then Chief Justice of the Common Pleas, took a different view of the facts and held that in the case of an indefinite hiring, in the absence of anything to qualify it, a jury may properly find, as an inference of fact, that the hiring is a yearly one: Bain v. Anderson (1896), 27 O.R. 369, 371. This statement of law was approved by the Judges of the Ontario Court of Appeal (Cases in Supreme Court of Canada, vol. 164, p. 26). The English rule is that in such case the Judge must direct himself that it is a yearly hiring: Cayme v. Allan Jones and Co., supra. This rule has been recognised in Ontario cases: Gould v. McCrae

(1907), 14 O.L.R. 194; Baker v. Canadian Tygard Engine Co. Ltd. (1922), 23 O.W.N. 81; Pollard v. Gibson (1923), 54 O.L.R 419. On appeal the decision in the last mentioned case was reversed (1924, 55 O.L.R. 424), upon the ground that the contract was one of agency and not one of hiring, and the dictum of Ferguson, J.A., at p. 428, that, in the absence of a stipulation or usage to the contrary, a contract of indefinite or, yearly hiring may be terminated on yearly notice, was not necessary to the decision. In any event it does not go the length of saying, and no reported case has yet gone that length, that a yearly hiring must be terminated on reasonable notice and may not be terminated at the end of the year without notice. The parties undoubtedly contemplated that performance of the contract would extend over a greater period than one year, and the case was therefore within the Statute of Frauds: Cayme v. Allan Jones and Co., supra; McGregor v. McGregor (1888), 21 Q.B.D. 424; Britain v. Rossiter (1879), 11 Q.B.D. 123; Connell v. Bay of Quinte Country Club (1923), 24 O.W.N. 264. Even if the agreement was subject to termination upon reasonable notice, this would not take it out of the statute: Hanau v. Ehrlich, [1911] 2 K.B. 1056. This is not such a case as Beeston v. Collyer, 4 Bing. 309, in which it was held that the statute does not apply where an agreement for a year is merely implied from circumstances which had arisen within that year. Here the plaintiff's own evidence is that there was an express agreement in the first place for more than one year. The secondary evidence given of the writing was insufficient, because it was not proved that the writing contained the names of the parties or that it was signed by the defendant or a duly authorised agent.

8 Norman Sommerville, K.C., and F. A. Campbell, for the plaintiff, respondent, were not called upon.

9 At the conclusion of the argument for the appellants, the judgment of the Court was delivered by MIDDLETON J.A.:-- We do not think it necessary to call upon counsel for the plaintiff to answer the argument that has been so elaborately presented by Mr. Bristol. We have had an opportunity during the course of the argument to consult the cases to which he referred and to read the relevant evidence.

10 The question, as in many cases that arise between master and servant, is largely a question of fact. Here the learned trial Judge has come to the conclusion that the contract was not a monthly hiring but was a general or indefinite hiring, and in the view of the learned trial Judge this involved, rightly enough, the result that the hiring would be subject to termination upon reasonable notice.

11 I would rather conclude that the contract was for a definite term of a year and afterwards for an indefinite period. This raises the question: Where there has been a definite hiring for a year and the relationship has continued by mutual agreement beyond that term, what is to be taken as the implied agreement as to the mode of termination of the contract of hiring? Mr. Bristol contends that it was automatically terminated at the end of the second year and each succeeding year, on the anniversary of the hiring, without any notice. The opposite contention is that it would continue so long as the parties mutually agreed and could only be terminated by reasonable notice. We think the latter view is to be preferred.

12 If the case determined by the First Divisional Court -- Pollard v. Gibson, 54 O.L.R. 419, 55 O.L.R. 424 -- is not conclusive upon this point, then we are prepared to go as far as necessary to fill up what is lacking. In that case Mr. Justice Masten held (54 O.L.R. 419) that the contract was terminable upon the anniversary and that reasonable notice of termination should have been given, so that, applying the decision to the situation here, it would have been n necessary to have given 14 months' notice. The Appellate Division (55 O.L.R. 424) took a different view of the law. The earlier cases are said to establish "that, in the absence of an express provision to the contrary, or evidence of some usage that every one must be considered to know and to contract with reference to, a contract of general, indefinite, or yearly hiring and service may be terminated on reasonable notice, and that there is no law requiring the notice to end with a year."

13 I would add, if it be necessary to add anything, that where the indefinite hiring arises, as here, after the termination of a definite period, then it is clear that the reasonable notice to be given is not required to terminate at the end of the year from the hiring, and that the only method of terminating the hiring is by reasonable notice.

14 I do not think there is any foundation for the idea that after the period of definite hiring has come to an end and the relationship of master and servant has continued, this becomes a yearly hiring in the sense that the contract ends upon the anniversary of the original service without notice. The proper conclusion in such a case is that the hiring is indefinite and is to be terminated only by reasonable notice. Beeston v. Collyer, 4 Bing. 309, expressly leaves open the question of the notice required to terminate the hiring. That case shews that the statute has no application to an implied contract arising from continued services after the termination of an earlier relationship.

15 On the question whether misconduct justified the discharge, the learned trial Judge has found against the defendants on the facts. Upon the pleadings I should be inclined to hold that the matter was not open. Where it is intended to justify a discharge for cause, the pleadings should specifically state the ground upon which the discharge was made; here, however, there is nothing suggested to indicate that the learned Judge was wrong.

16 The appeal upon all grounds fails and should be dismissed with costs.

17 Appeal dismissed.

qp/s/qlkam/qlrpv