CITATION: Cowie v. Great Blue Heron Charity Casino, 2011 ONSC 6357
DIVISIONAL COURT FILE NO.: 142/11
DATE: 2011/11/07

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

AITKEN, SWINTON AND HOY JJ.

B E T W E E N:	
GEORGE COWIE	Howard Markowitz, for the Plaintiff/Respondent
Plaintiff/ Respondent	
- and -	
GREAT BLUE HERON CHARITY CASINO	Sarah Crossley, for the Defendant/Appellant
Defendant/Appellant	
	HEARD: October 19, 2011

REASONS FOR JUDGMENT

Aitken J.

Nature of Proceedings

[1] The Great Blue Heron Charity Casino ("GBH") appeals from a judgment of Madam Justice Sanderson dated February 18, 2011 requiring it to pay George Cowie ("Cowie"), a former employee, damages for wrongful dismissal.

Grounds of Appeal

[2] GBH submits that the Trial Judge made three errors, any one of which would justify the appeal being granted:

- In considering the issue of whether Cowie's employment contract had been frustrated, the Trial Judge misconstrued the law on the frustration of contracts and used hindsight inappropriately in assessing the facts.
- The Trial Judge failed to consider GBH's alternative argument that Cowie had been dismissed for just cause.
- The Trial Judge made a palpable and overriding error in concluding that the Plaintiff had mitigated his damages.

[3] In that the first ground of appeal has validity, there is no need to consider the alternate grounds.

Regulatory Context for Casino Security Guards

[4] GBH operates a casino in Port Perry. GBH, like other casinos in Ontario, operates in a highly regulated industry and is governed by the *Gaming Control Act, 1992*, S.O. 1992, c. 24 ("*GCA*"). Pursuant to that legislation and accompanying regulations, all but 50 of GBH's 1,100 employees require some sort of licence through the Alcohol and Gaming Commission of Ontario ("AGCO"). More particularly, all individuals employed in the operation of a casino, whose regular duties require access to any areas of the premises used for gaming-related purposes, have to be licensed with the AGCO. Security personnel are covered by this provision.

[5] In August 2007, the *Private Security and Investigative Services Act, 2005*, S.O. 2005, c. 34 ("*PSISA*") came into effect adding additional licensing requirements for security guards, including those working for casinos. Under s. 2(4) of the *PSISA*, a security guard is "a person who performs work, for remuneration, that consists primarily of guarding or patrolling for the purpose of protecting persons or property". Section 6 of the *PSISA* provides that no person shall act as a security guard unless the person holds the appropriate licence under the *PSISA*. Section 10 of the *PSISA* reads:

> Mandatory requirements
> 10(1) No person is eligible to hold a licence under this Act unless,
> (a) *the person possesses a clean criminal record*; and
> (b) in the case of an individual,
> (i) the person is 18 years old or older,
> (ii) the person is entitled to work in Canada, and
> (iii) the person has successfully completed all prescribed training and testing. [Emphasis added.]

[6] Under s. 10(5) of the *PSISA*, a person possesses a "clean criminal record" if the person has not been convicted of a prescribed offence under the *Criminal Code*[1], the *Controlled Drugs and Substances Act*[2] or any other Act of Canada or, if convicted of such an offence, the person has been granted a pardon under the *Criminal Records Act*[3].

[7] When applying for a licence under the *PSISA*, the person must pay the required fee and, amongst other things, provide a list of his convictions for offences under federal and/or provincial legislation unless a pardon has been received. As well, the person must provide proof that he has successfully completed all prescribed training and testing.

[8] Under s. 13(1), an applicant who meets the requirements in the *PSISA* and accompanying regulations is entitled to the issuance of the required licence; however, under s. 13(2), the Registrar retains the discretion to decline to issue the licence if the Registrar is of the opinion that one of seven enumerated reasons applies and is relevant to the applicant's fitness to hold a licence. A number of such reasons relate to prior criminal behaviour on the part of the applicant. The final reason is a catch-all factor: "[i]t is in the public interest to refuse to issue or renew the licence".

[9] Section 31 of the *PSISA* provides that no business shall employ a security guard unless he has an appropriate licence. To do so is an offence under ss. 43(1) and 44 rendering the company liable to a fine of up to $250,000 (s. 45(2)), and individual directors or officers of the company liable to a fine of up to $25,000 and imprisonment for a term of not more than a year, or both (s. 45(1)).

[10] Individuals who were already employed as security guards when the *PSISA* came into effect were given a grace period of one year in which they had to obtain the requisite *PSISA* licence. The grace period expired on August 23, 2008.

Evidence Pertaining to Cowie

[11] Cowie was hired by GBH in January 2000 as a security officer. One of the terms of his employment was that he be licensed as a casino operations employee by the Ontario Gaming Control Commission under the *GCA*. On June 9, 2005, Cowie was promoted to the position of Security Training Officer, a position which required him to be licensed as a casino "gaming key employee" under the *GCA*. On April 4, 2007, Cowie's position was reclassified to Team Leader. The Security Training Officer and Team Leader positions were non-unionized and both required what is known as a "key licence" under the *GCA*. Cowie had a key licence when required to do so for the positions he occupied at GBH.

[12] There is no dispute that Cowie's duties as Security Training Officer and Team Leader meant that he was a "security guard" for the purpose of the *PSISA*. Therefore, as of August 23, 2008, Cowie was required to have a licence under the *PSISA*. The problem for Cowie was that

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[1] R.S.C. 1985, c. C-46.
[2] S.C. 1996, c. 19.
[3] R.S.C. 1985, c. C-47.

on March 31, 1983 he had been convicted of break and enter – a listed prescribed offence under the *PSISA*. Cowie had never applied for a pardon in regard to this offence. As a result, as of August 23, 2008, Cowie did not have a clean criminal record and could not be licensed as a security guard under the *PSISA* until such time as he received a pardon.

[13] By letter dated August 21, 2008, GBH notified Cowie his employment would be terminated because a licence under the *PSISA* was a *bona fide* occupational requirement and the contract of employment between GBH and Cowie had been frustrated. A termination meeting occurred on August 25, 2008. Cowie was not provided with any notice or any pay in lieu of notice, and his benefits were terminated within the week. No wrongdoing on Cowie's part was alleged in the termination letter.

[14] On May 15, 2009, Cowie commenced an action against GBH for damages for wrongful dismissal.

Trial Judgment

[15] The Trial Judge found that Cowie's contract of employment had not been frustrated as a result of his not having a *PSISA* licence by August 23, 2008. Instead, she found that Cowie had been wrongfully dismissed. She awarded him damages calculated on the basis of eight months notice plus the value of benefits.

[16] The Trial Judge made several findings as to what occurred prior to August 23, 2008. She found that Cowie had not learned until June 2008 that he would need a *PSISA* licence. At that time, pursuant to the direction of his supervisor, he and other security guards at the casino submitted their applications for a licence. At the same time, GBH continued to seek clarification from the Privacy Security and Investigative Services Branch as to whether security guards with key licences from the AGCO also required licences under the *PSISA*. On August 5, 2008, GBH received confirmation that they did. Cowie received a letter dated August 13, 2008 advising that he was ineligible to hold a *PSISA* licence because of his criminal record, for which he had not received a pardon. Cowie immediately brought the letter to the attention of his supervisor. It was on the basis of the letter denying Cowie a *PSISA* licence that GBH concluded that Cowie's employment contract had been frustrated.

[17] The Trial Judge made the following specific findings of fact:

- as of August 23, 2008, if acting as a Security Team Leader or a security guard, Cowie was clearly required to have a licence under the *PSISA*;
- as of August 23, 2008, Cowie was not entitled to a security licence because he did not have a pardon; and
- Cowie only applied for a pardon after he received the letter advising that his application for a *PSISA* licence had been refused.

[18] Cowie's evidence was that he had received the letter notifying him that his application for a licence had been refused on approximately August 21, 2008 and had immediately provided it to his supervisor. His letter of dismissal was dated August 21, 2008. The evidence before the Trial Judge was that, as of that date, both Cowie and GBH understood that it could take up to two years to get a pardon, though when discussing options Cowie advised his supervisor that the period might be shorter if Members of Parliament assisted. The Government of Canada website at the time advised that it could take from 12 to 24 months to receive a pardon. The evidence also was that there were no other non-unionized positions at GBH that Cowie could fill that would not require a *PSISA* licence, and Cowie could not fill a unionized position.

Law of Frustration

[19] In *Naylor Group Inc. v. Ellis-Don Construction Ltd.*, [2001] 2 S.C.R. 943 at paras. 53 and 55 ("*Naylor Group*"), the Supreme Court of Canada reviewed general principles regarding the circumstances in which a contract will be frustrated.

> Frustration occurs when a situation has arisen for which the parties made no provision in the contract and performance of the contract becomes "a thing radically different from that which was undertaken by the contract": *Peter Kiewit Sons' Co. v. Eakins Construction Ltd.*, [1960] S.C.R. 361, *per* Judson J., at p. 368, quoting *Davis Contractors Ltd. v. Fareham Urban District Council*, [1956] A.C. 696 (H.L.), at p. 729.
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> ...
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> The court is asked to intervene ... to relieve the parties of their bargain because a supervening event ... has occurred without the fault of either party. For instance, in the present case, the supervening event would have had to alter the nature of the appellant's obligation to contract with the respondent to such an extent that to compel performance despite the new and changed circumstances would be to order the appellant to do something radically different from what the parties agreed to under the tendering contract ...

[20] In providing this summary, the Supreme Court relied in part on the following explanation of "radical change of obligation" provided in G.H.L. Fridman, *The Law of Contract in Canada*, 4th ed. (Scarborough: Carswell, 1999) at 677:

> The key to both the understanding and the application of the doctrine of frustration in modern times is the idea of a radical change in the contractual obligation, arising from unforeseen circumstances in respect of which no prior agreement has been reached, those circumstances having come about without default by either party. What would appear essential is that the party claiming that a contract has been frustrated should establish that performance of the contract, as originally agreed, would be impossible.

[21] Further at 679, Fridman elaborated:

> From the decided cases to which reference has been made it is deducible that the basis of frustration is impossibility. By this is meant physical impossibility and *impossibility resulting from a legal development that has rendered the contract no longer a lawful one*. [Emphasis added.]

[22] In *Petrogas Processing Ltd. v. Westcoast Transmission Co.* (1988), 59 Alta. L.R. (2d) 118 (Q.B.), aff'd (1989), 66 Alta L.R. (2d) 254 (C.A.), O'Leary J. at 136 explained how changes in the law can lead to the frustration of existing contracts:

> Supervening illegality occurs when, after the making of a contract, a change in the law renders it illegal to perform the contract in accordance with its terms. The change in the law, to qualify as a frustrating event, must be one which was not foreseen by the parties and for which no express or implied provision is made in the contract. In addition, the illegality must not be temporary or trifling in nature when viewed in the context of the contract as a whole. If these conditions are met, the contract is automatically discharged by frustration the moment performance in accordance with its terms becomes illegal.

[23] The concept of frustration can also apply to "situations where the contract may be both physically and legally capable of being performed but would be totally different from what the parties intended were it performed after the change that has occurred". It was in regard to these types of situations – and not the case of legal impossibility that is involved here – that Fridman commented at 679-680:

> The distinction is made and drawn between complete fruitlessness and mere inconvenience, hardship, loss of advantage, or the like. It is also necessary to differentiate a disruption that is permanent, *vis-à-vis* the contract (albeit that it may not be permanent in other respects) and one that is temporary or transient. The latter might add to the difficulties of performance. It might make performance less desirable, economically valuable, or more expensive to undertake. But it will not constitute frustration.

I note this reference to a permanent disruption, even though it referred to circumstances where the performance of the contract was legally possible, because it was a factor emphasized by the Trial Judge in this case.

[24] It is not in dispute that the doctrine of frustration can apply to employment contracts: see *Dartmouth Ferry Commission v. Marks* (1904), 34 S.C.R. 366; *Wightman Estate v. 2774046 Canada Inc.*, 2006 BCCA 424, 231 B.C.C.A. 75 [*Wightman Estate*]; S.M. Waddams, *The Law of Contracts*, 5th ed. (Toronto: Canada Law Book, 2005) at 259. In cases where employees are unable to work due to a disabling illness, it has been held that the question is "whether the disability prevents the performance of the essential functions of the employee's job for a period of time sufficient to say that, in a practical or business sense, the object of the employment has

been frustrated": see *Wightman Estate*, at para. 21; *Marshall v. Harland & Wolff Ltd.*, [1972] 2 All E.R. 715, [1972] 1 W.L.R. 899 (N.I.R.C.); *Yeager v. R.J. Hastings Agencies Ltd.* (1984), [1985] 1 W.W.R. 218 at 240, 5 C.C.E.L. 266 (B.C.S.C.).

[25] In cases where the performance of personal services became illegal due to a change in the law, the focus is not on the period of time during which a disability may exist but instead is on the impossibility of the services contemplated under the contract continuing to be performed due to a change in the law. One example is *Reilly v. The King*, [1934] 1 D.L.R. 434 (P.C.) where legislation abolished the Federal Appeal Board, before Reilly's term on the Board had expired, and created the Pension Tribunal and the Pension Appeal Court to replace the Board. Reilly was not appointed to either the Tribunal or the Court. Reilly's contract was deemed discharged (not broken) because further performance of the contract became impossible due to the new legislation. Reilly's claim for salary for the unexpired portion of his term on the Board was denied. Another example is *Thomas v. Lafleche Union Hospital* (1989), 82 Sask. R. 70; 27 C.C.E.L. 156 (Q.B.), aff'd (1991), 93 Sask. R. 150, 36 C.C.E.L. 251 (C.A.) where a nurse's employment contract with a hospital was found to be frustrated after the Saskatchewan Registered Nurses Association found the nurse guilty of professional misconduct and incompetence, and his registration as a nurse was revoked. The hospital could no longer legally or practically employ the person in his position as Director of Nursing when he was no longer registered as a nurse.[4]

Analysis

[26] On an appeal from a judge's decision, the standard of review on a question of law is that of correctness (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 at para. 8).

[27] The Trial Judge had three issues to consider: whether the employment contract between GBH and Cowie had been frustrated; if not, whether Cowie had been wrongfully dismissed; and if so, whether he had acted reasonably in mitigating his damages. The Trial Judge made an error in law in conflating these issues. She misconstrued the law regarding frustration applicable to the circumstances of this case and applied hindsight inappropriately in regard to the facts.

[28] First, the Trial Judge looked to what actually happened after August 23, 2008 in deciding whether the employment contract had been frustrated on that date. Although such evidence may have been relevant to the issue of mitigation, it was not relevant to the issue of frustration. She noted that Cowie immediately applied for a pardon and sought the help of his Member of Parliament and provincial Member of Parliament. He was granted a pardon on December 17, 2008. The Trial Judge found as a fact that Cowie would have been able to obtain his *PSISA* licence probably by the end of December 2008 or certainly in early January 2009. On January 15, 2009, Cowie notified his former supervisor at GBH that he had received his pardon (though he did not apply for any position at the casino). GBH did not contact Cowie to offer him a

[4] The Saskatechewan Court of Appeal grappled with the question of whether the contract could be considered frustrated if the frustration had been induced by the nurse himself, but put off until another day a full analysis of the issue. The Court upheld the Trial Judge's decision that the employment contract had been frustrated and also noted that there were other ratios that meant that the nurse's appeal must be dismissed.

position. Cowie's old position in fact remained unfilled until March 2009. There was evidence that, had Mr. Cowie applied for his old job before March 9, 2009, he would have been rehired.

[29] In finding that the employment contract had not been frustrated, the Trial Judge reasoned:

> I find ... that Cowie's team leader position was available to March 4th, 2009 [*sic*]. Had he been suspended, but not terminated, he would have been able to qualify for the position well before March 4th [*sic*] when it was filled and would likely still be working at that position today. In all the circumstances here, including the Casino's failure, until June 2008, to make it clear to Mr. Cowie that his job was in jeopardy, the evidence that he held a key licence and there were discussions as late as July 2008 about exemptions, his eight and a half years of trouble-free employment, I am of the view that Cowie's employment should have been suspended for at least six months to one year, not terminated. To be frustrated, a contract must be totally different from what the parties had intended. The disruption must be permanent, not temporary or transient. The performance of the contract must be permanently rendered impossible. Here, those conditions were not met. There was a reasonable alternative to termination, suspension of at least six months to one year. If the employer did not want to hold the job open, it could have provided reasonable notice. The employer did neither.

[30] In essence, the Trial Judge looked to events that occurred after August 23, 2008 to conclude that the circumstance that disrupted the contract – Cowie not having the *PSISA* licence as required as of August 23, 2008 – was a *temporary* inconvenience. There was no evidence relevant to the period up to August 23, 2008 that would support this conclusion.

[31] The *PSISA* clearly made it illegal for Cowie to continue to be employed in security at GBH from August 23, 2008 forward. Before it would be legal for him to be employed in this capacity, he needed both a criminal pardon and then a licence under the *PSISA*. Neither GBH nor Cowie knew as of August 23, 2008 whether Cowie would qualify for either the pardon or the licence. In regard to the pardon, the National Parole Board website referred to wait times of from 12 to 24 months, and it was the understanding of both Cowie and GBH as of August 23, 2008 that it could take up to two years for a pardon to be granted. Additionally, it was known on August 23, 2008 that both the pardon and the licence were discretionary items. The granting of a pardon was within the discretion of the National Parole Board and the granting of a *PSISA* licence was within the discretion of the Registrar under that Act. It would have been a matter of pure speculation in August 2008 to predict if and when either the pardon or the licence would be granted. What eventually happened in regard to the pardon cannot be used to conclude that the problem created by the *PSISA* would have been short-lived. As well, there was no evidence relevant to the period up to August 23, 2008 to support the Trial Judge's finding that Cowie would have received his *PSISA* licence by early January 2009 at the latest.

[32] Second, the Trial Judge treated the situation as one more akin to those involving the illness or disability of someone providing personal services, rather than a situation where the provision of those services – for an indefinite period of time – can no longer be done legally. In the latter circumstance, the weight of authority, as discussed above, is to the effect that the contract is immediately frustrated. The focus is not on when, if ever, the provision of those services will once again be legal.

[33] Third, even if an analysis is done on the basis of "whether the disability prevents the performance of the essential functions of the employee's job for a period of time sufficient to say that, in a practical or business sense, the object of the employment has been frustrated", the only evidence before the Trial Judge was that GBH could not keep the position of Team Leader in security unfilled indefinitely. Based on the information available to GBH up to August 23, 2008, it could have taken Cowie up to two years to receive his pardon. The Trial Judge did not suggest that suspending Cowie or giving him leave for an indefinite period up to two years, while keeping his position open, would have been reasonable. She only went so far as to suggest that suspension of the contract for at least six months to a year would have been a reasonable option.

[34] Fourth, in considering the doctrine of frustration, the Trial Judge erred in placing too much emphasis on the notion that the disruption of the contract must be permanent in the sense of never being possible to resume in the future. The real question is whether the performance of the contract becomes a thing radically different from that which was undertaken by the contract. There is no dispute that implicit in the employment contract between GBH and Cowie was the understanding that Cowie would have all necessary government licences to act as a security guard and that both parties would comply with the law relating to casinos and their employees. The passage of the *PSISA* was not something foreseen or contemplated by the parties when they entered the employment contract. They made no provision for it in their contract. It was something beyond their control. It involved no fault on the part of either of them. It was a supervening event that as of August 23, 2008 made illegal GBH's continuing employment of Cowie in its security department. The evidence was that there was no other work that Cowie could do for GBH due to union and other issues. To continue to bind GBH to an employment contract, when the employee by law is prohibited from performing any services under the contract for what appears to be a lengthy and open-ended period of time, is imposing something radically different from what the parties originally agreed to.

Disposition

[35] The appeal is allowed, the decision of the Trial Judge is set aside, and the action against GBH is dismissed. GBH's counsel advised the Court that it would seek costs at trial and on the appeal only in the amount of $1,500 all in – a sum far below the costs incurred. Costs are awarded on this basis.

Aitken J.

Swinton J.

Hoy J.

Released: November 7, 2011