

SUPERIOR COURT OF JUSTICE  
DIVISIONAL COURT

BETWEEN:

THUAN DUONG

PLAINTIFF

-and-

TAALMAN ENGINEERED PRODUCTS LTD.

DEFENDANT

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R U L I N G

BEFORE THE HONOURABLE MR. JUSTICE J. KENT  
on September 23 2005 at HAMILTON, Ontario

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APPEARANCES:

C. Thiesenhausen

Counsel for the Plaintiff

M. Taal

In-Person

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R E A S O N S F O R J U D G M E N T

KENT, J. (Orally):

Thuan Duong, the plaintiff appellant, and Taalman Engineered Products, defendant respondent.

The plaintiff appellant has appealed to this Court sitting as a divisional court, from the judgment of a deputy judge, delivered 12 December 2003 in the Small Claims Court at Hamilton.

The claim of the appellant at trial and before this Court is that he was wrongfully dismissed and not provided with reasonable notice. The deputy judge at trial appears, upon reviewing the transcript and her reasons for judgment, to have found that the appellant was terminated for cause, having reversed the onus of proof prior to that finding.

It is not necessary for this Court to consider whether or not that in fact occurred and whether the appeal should succeed on that ground, there being a more clear ground of appeal available to the appellant and a ground such that some comment from this Appellate Court is required.

I refer to the appellant's submission that at trial he did not receive natural justice. The allegation is that there was a failure of natural

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justice in that no Vietnamese interpreter was available to assist the appellant at trial in understanding just what was taking place in the course of the administration of justice.

The issue of the degree to which the appellant understood what was taking place at trial was only raised by him after judgment had been pronounced and the issue of costs was being addressed in the Small Claims Court. The issue therefore was never one that was identified or flagged for the trial judge from the outset or from an earlier point in the trial, which would have enabled her to ensure that either the appellant understood what was happening, or to adjourn in order to obtain the services of an interpreter.

In the transcript of the proceedings the appellant put it this way, and I read from Page 20 of the transcript, commencing at Line 1, the words of the appellant,

"Today I suppose to bring my interpreter with me. I got no money to get him with me, so I'm trying to get it myself."

It is a fact that he had an interpreter at the pre-trial in the Small Claims Court. We know that from the affidavit filed as fresh evidence on this appeal, which this Court permitted on motion on behalf of the appellant.

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At Paragraph 6 of the affidavit the appellant states,

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"When I made my claim in the Small Claims Court, my claim was written out for me by the real estate lawyer we used for our house. I inquired about Vietnamese/English translation at the court office and was informed I could schedule a translator, but I learned that I would have to pay for the translator. I did hire a translator for the pre-trial of my case, but that cost \$120 which I could not afford."

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Paragraph 7 I call it, although it has a number eight in front of it in the affidavit,

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"I had only been to court on a *Highway Traffic* matter, which had a Vietnamese language translator. I did not understand the proper procedure for the Small Claims trial or in fact what was happening at the trial, as the proceedings were not translated."

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It is worthy of note that in order to provide the affidavit from which this Court has just quoted, it was necessary for the appellant to utilize the services of an interpreter.

The plight of the appellant on this trial appears to have attracted the attention of a number of organizations which intervened on this issue in general terms. I refer in particular to the

intervention on behalf of the Metro Toronto Chinese and South East Asian Legal Clinic, The Advocates Society, The South Asian Legal Clinic for Ontario, and the Attorney General of Ontario.

It is noteworthy that since this trial took place on the 12<sup>th</sup> of December 2003, the policy of the Ministry of the Attorney General has been under review and has in fact changed effective as recently as the 15<sup>th</sup> of September of this year. The policy is particularized in the record of the intervener, the Attorney General of Ontario, at Tab 1(A), (B) and (C).

In summary, it would be appropriate to say that if the trial in this case were to take place today, a person in the position of this appellant would be able to apply to have an interpreter provided without fee. Therefore if a new trial were to be ordered, that policy would enable this appellant to be able to apply to have a Vietnamese interpreter available without fee.

It would appear that this is a situation where the Ministry of the Attorney General has concluded that, not specifically this appellant, but appellants in similar circumstances deserved better treatment than they had been receiving. The appeal of course cannot turn on a change in the policy of the Ministry of the Attorney General. However, it is appropriate that that improved policy is now in place.

The position of the respondent is that if one reads the transcript, it will be evident that the appellant understood what was going on until the point where he was told he had been unsuccessful in his claim at trial.

The representative of the respondent, Taalman Engineered Products Limited, is Mr. Martin Taal and he was present at the pre-trial, at the trial, and has represented the respondent on this appeal. It was his view that the appellant stated his case clearly at the pre-trial when he had an interpreter available to him and clearly at the trial when he did not have an interpreter available to him.

The trial judge reached a similar conclusion, and I am satisfied having listened to what Mr. Taal has said and having read what the Deputy Small Claims Court judge said, that both the judge and Mr. Taal believed at the time, and still probably do, that the appellant's understanding was adequate, but given the fresh evidence and given a more careful reading of the transcript it is evident that the respondent and the trial judge are in error as to the degree of the appellant's understanding of what was taking place, and that degree of understanding was not such that would enable this Court to say that the appellant received natural justice in the Small Claims Court. Had an interpreter been available, no doubt the conclusion would have been otherwise.

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For these reasons then, I would have allowed the appeal and ordered a new trial.

Both parties have agreed, however, that in the interests of judicial economy and because all of the evidence necessary to arrive at a decision is before this Court, and essentially before it in an uncontradicted fashion, this Court, if it is of the view that the appeal should be allowed, instead of ordering a new trial, merely assess the quantum of the appropriate notice period. I propose to do so.

In order to do that I am required to find that the implied contract of employment was breached and reasonable notice was not provided to the employee by the employer and then proceed to assess the quantum. What then is the proper period of notice for this employee who was terminated and paid six weeks notice?

It is common ground that what was paid to the dismissed employee was the minimum provided by law in this province. Counsel for the appellant argues that there should be an additional payment over and above the six weeks given all of the circumstances. I agree that in these circumstances six weeks was somewhat less than was reasonable and adequate.

This is an employee of six years, 36 years of age at the time of trial, married with three children,



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and he came to Canada in 1985. He, at the commencement of his employment with the respondent had no particular trade or skill that would assist the respondent, however, in the course of his six years there he learned on the job. He was not in any supervisory position. He was not however at the very bottom of the scale and was being paid an hourly wage well above the minimum wage. Even though his employment probably could have been classified as a labouring position, it was in the quality control end of the respondent's business.

He was terminated on the 18<sup>th</sup> of June 2003 and therefore when the matter came on in December and he was still out of work, he would have been out of work for six months at the time.

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KENT, J. (Orally):

In all of the circumstances a more appropriate period of notice, and I acknowledge that I am now looking at it with a degree of hindsight, a more appropriate period of notice would have been three to four months, and I therefore fix the appropriate notice period at three and one half months.

What the actual calculation will work out to, I leave to the parties. It will be three and one half month's pay, less the six weeks already paid,

and that would be the finding as to the notice period and the quantum to be paid.

The appellant has been successful on this appeal, however the issue upon which the appeal has been determined is not one that either the appellant or the respondent are entirely responsible for or aggrieved by. It is the view of this Court that what occurred here was really an inadequacy in the system that has in fact since been recognized and remedied.

It is therefore the view of this Court that there should be no costs ordered on the appeal. The appellant however should have his costs of trial on a Small Claims Court scale.

The appeal is allowed.

The finding that I have made is made for the reasons that I have indicated, and the order of costs is as I have indicated as well.

Fresh evidence admitted on appeal, fee waiver granted.

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Certification

Form 2

Certificate of Transcript  
Evidence Act, Subsection 5(2)

I, Kathie Bremner, certify that this document is a true and accurate transcript of the recording of Duong and Taalman Engineered Products Ltd., in the Superior Court of Justice, Divisional Court, held at 45 Main Street East, Hamilton, taken from Recording No. 608-145/05, which has been certified in Form 1.

Nov. 02/05

Date

K. Bremner

Kathie Bremner - Court Reporter