STATE OF MICHIGAN

COURT OF APPEALS

MSX INTERNATIONAL PLATFORM SERVICES, LLC d/b/a MSX INTERNATIONAL, Plaintiff/Counter-Defendant-Appellant,	UNPUBLISHED May 22, 2012
v	No. 300569 Wayne Circuit Court
BRIAN HURLEY, Defendant/Counter-Plaintiff-Appellee.	LC No. 10-006007-CL

Before: OWENS, P.J., and JANSEN and MARKEY, JJ.

PER CURIAM.

In this case involving an employment contract dispute over the vesting of paid time off (PTO), plaintiff, MSX International, appeals the trial court's denial of its motions for summary disposition and to vacate the arbitration award. We reverse and remand.

The trial court concluded that the arbitrator had acted within his authority and entered a judgment against plaintiff for $11,697. Plaintiff now appeals, arguing that the arbitrator erred in concluding that defendant Brian Hurley's PTO had accrued where Hurley had signed an agreement acknowledging that MSX could terminate his compensation at-will, without cause or notice. We agree.

A trial court's decision on whether to enforce or vacate an arbitration award is reviewed *de novo*, applying the requirements of MCR 3.602(J)(2). *Miller v Miller,* 474 Mich 27, 30; 707 NW2d 341, 344 (2005). Under that rule an arbitration award is properly set aside only "where it clearly appears on the face of the award or the reasons for the decision as stated, being substantially a part of the award, that the arbitrators through an error of law have been led to a wrong conclusion, and that but for such error, a substantially different award must have been made." *Detroit Auto Inter-Insurance Exchange v Gavin,* 416 Mich 407, 416; 331 NW2d 418, 432 (1982), quoting *Howe v Patrons' Mutual Fire Ins Co of Michigan,* 216 Mich 560, 570; 185 NW 867-68 (1921).

At the crux of this case is the issue of whether MSX's written PTO policy granted Hurley a vested contract right to PTO. We conclude that it did not. In *Toussaint v Blue Cross & Blue Shield,* 408 Mich 579, 292 NW2d 880 (1980), the plaintiff was handed a manual of Blue Cross

personnel policies which reinforced his belief that he would be with the company "as long as I did my job." The handbook stated that the disciplinary procedures applied to all Blue Cross employees who had completed their probationary period and that it was the "policy" of the company to release employees "for just cause only." *Toussaint,* 408 Mich at 597-568. The Michigan Supreme Court held that a provision of an employment contract providing that an employee shall not be discharged except for cause is legally enforceable, even though the contract is not for a definite term of years. *Id.* at 598. The Court then articulated two subcategories of this general proposition. The first subcategory was that of an express contract or agreement, either oral or written. The second subcategory was the situation in which an employer creates a situation "instinct with an obligation;" the Court termed this: "legitimate expectations." *Id.* at 613, 619.

With respect to the first category, the Court emphasized that there must be an express agreement to terminate only for cause, or statements of company policy or procedure to that effect. *Id.* at 610; *Bracco v Michigan Technological University,* 231 Mich App 578, 590, 588 NW2d 467 (1998). Here, the claim does not concern just cause employment but, rather, an asserted entitlement to compensation for PTO. Hurley asserts that this entitlement derives from the written PTO policy and is therefore "contractual in nature." Basically, Hurley argues that he had a vested right to compensation based the written policy that he asserts is contractual.

Using the analytical approach contained in *Toussaint,* we find nothing in the record that supports the notion of an express contract or agreement, either oral or written, concerning compensation for PTO. First, there is no evidence whatever that Hurley, or anyone else, actually "negotiated" any aspect of the PTO policy. Second, there is no evidence that MSX actually agreed in its handbook to extend the PTO policy to the Hurley or to anyone else; indeed, MSX specifically stated in its reservation of rights: "MSX International further reserves the right to modify, revoke, suspend, terminate or change any or all policies and procedures and employee benefits, in whole or in part, at any time, with or without prior notice."

Hurley argues that the written PTO policy served to grant him compensation independently of the prior acknowledgment of the "at-will" status of his employment. Hurley, however, has not established that any consideration was given for this supposed contract. Under the PTO policy, MSX granted all employees five days of PTO as soon as they started working. This negates Hurley's argument that the PTO was granted in exchange for a promise to continue working for a year. Thus, as a matter of law, there is no basis for a finding that there was an express contract or agreement, either oral or written, that entitled Hurley to PTO.

In *Toussaint,* the Court articulated a principle of "sweeping generality." *Bracco*, 231 at 591. The Court said that:

> While an employer need not establish personnel policies or practices, where an employer chooses to establish such policies and practices and makes them known to its employees, the employment relationship is presumably enhanced. The employer secures an orderly, cooperative and loyal work force, and the employee the peace of mind associated with job security and the conviction that he will be treated fairly. No pre-employment negotiations need take place and the parties' minds need not meet on the subject; nor does it matter that the employee knows

> nothing of the particulars of the employer's policies and practices or that the employer may change them unilaterally. It is enough that the employer chooses, presumably in its own interest, to create an environment in which the employee believes that, whatever the personnel policies and practices, they are established and official at any given time, purport to be fair, and are applied consistently and uniformly to each employee. The employer has then created a situation "instinct with an obligation." [*Toussaint*, 408 Mich at 613].

This "legitimate expectations" subcategory is not based upon traditional contract analysis, and the Court rather quickly began to define its limits. In *Rowe v Montgomery Ward,* 437 MICH 627, 632; 473 NW2D 268 (1991) Justice Riley stated:

> But unless the theory has some relation to the reality, calling something a contract that is in no sense a contract cannot advance respect for the law. Thus, we seek a resolution which is consistent with contract law relative to the employment setting while minimizing the possibility of abuse by either party to the employment relationship.
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> The Court then held that it should use an objective test, "looking to the expressed words of the parties and their visible acts." [*Id.* at 640].

The Court took a similar approach in *Rood v General Dynamics Corporation,* 444 Mich 107, 507 NW2d 591 (1993). There, in dealing with the legitimate expectations subcategory, the Court used a two-step analysis derived from *Toussaint,* examining first what, if anything, the employer has promised, and second whether the promise, if made, was capable of instilling a legitimate expectation of just-cause employment. *Id.* at 138-139.

Although the legitimate expectations subcategory created in *Toussaint* deals explicitly with situations involving wrongful discharge claims, the analytical approach contained in *Toussaint* and refined in *Rowe* and *Rood* remains helpful. Here, looking at the expressed words of MSX, in both the at-will employment statement signed by Hurley and in the MSX General Employee Manual, the clear expectation appears to be that MSX was entitled "to modify, revoke, suspend, terminate or change any or all policies and procedures and employee benefits, in whole or in part, at any time, with or without prior notice."

Additionally, *Dumas v Auto Club Ins Ass'n*, 437 Mich 521, 473 NW2d 652 (1991), is instructive. There, as the Supreme Court described them, the plaintiffs' claims revolved around a deferred compensation plan that the Auto Club labeled the "Accrued Commission Plan." Under this plan, members of the Auto Club's insurance sales force would receive seven percent commissions on insurance policies sold and upon policy renewals. After a substantial drop in its cash reserves in 1997, the Auto Club implemented a change in its compensation plan so that salespersons would be paid a flat rate for each policy sold. The plaintiffs sued, alleging among other things a breach of contract. *Id.* at 525-526.

The trial court, after various motions for summary disposition and partial summary disposition, divided the various plaintiffs into three groups. The group most analogous to Hurley in this matter is the trial court's Group A: those plaintiffs who were informed of the seven

percent commission system upon being hired but were not promised that the payment system would be in place for any particular duration. *Id.* at 526-527. Similarly, here, Hurley was aware of the PTO policy, but MSX did not promise anything independently of the handbook provisions. With respect to Group A, the trial court in *Dumas* granted summary disposition, having determined that no claim for breach of contract existed. *Id.* at 527. However, this Court reversed the trial court's grant of summary disposition regarding the breach of contract and unjust enrichment claims.

Our Supreme Court opened its discussion by stating the first question to be addressed was whether plaintiffs can maintain claims for breach of contract where defendant unilaterally altered the terms upon which the plaintiffs were compensated. The Court stated that, since no express promises of permanency were made to plaintiffs, any contractual rights to that effect had to spring from the legitimate expectations leg of *Toussaint. Id.* at 528. Similarly, here, Hurley's claims must be analyzed within the legitimate expectations framework. The Court in *Dumas* went on to state as to the Group A plaintiffs:

> While the deferred compensation cases are subject to contract law, the "legitimate expectations" doctrine of *Toussaint* does not follow traditional contract analysis. Therefore, it does not logically follow that *Toussaint* should be extended to the area of compensation. Also, since employees' accrued benefits are protected by the presence of traditional contract remedies, there is no need to extend the expectations rationale to compensation.
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> In addition to the lack of precedent extending *Toussaint* to facts similar to those presented here, policy considerations weigh in favor of containing *Toussaint* to the wrongful-discharge scenario. Were we to extend the legitimate-expectations claim to every area governed by company policy, every time a policy change took place contract rights would be called into question. The fear of courting litigation would result in substantial impairment of a company's operations and its ability to formulate policy. Justice GRIFFIN'S majority opinion in *In re Certified Question, supra,* p. 456, 443 NW2d 112, discussed the nature of a business policy:
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>> "In other words, a 'policy' is commonly understood to be a flexible framework for operational guidance, not a perpetually binding contractual obligation. In the modern economic climate, the operating policies of a business enterprise must be adjustable and responsive to change."
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> Our opinion in *In re Certified Question* was in furtherance of this Court's traditional reluctance to limit or second guess the decision-making ability of business management. As stated in *In re Butterfield Estate,* 418 Mich 241, 255, 341 NW2d 453 (1983), "[a] court should be most reluctant to interfere with the business judgment and discretion of directors in the conduct of corporate affairs."
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> * * *

> Given the traditional reluctance of courts to interfere with management decisions and the needed flexibility of businesses to change their policies to respond to changing economic circumstances, we conclude that *Toussaint* should not be extended to create legitimate expectations of a permanent compensation plan. Previous cases have not extended the legitimate-expectations theory to facts similar to these, and we decline the opportunity to extend the theory to compensation terms. [*Id.* at 531-532].

Here, MSX clearly stated that they retained the right to modify, revoke, suspend, terminate or change any . . .employee benefits. This is a right similar in effect to the management right to unilaterally alter the provisions of a compensation plan with which the Court in *Dumas* refused to interfere. We decline to extend the legitimate expectations subcategory of *Toussaint* to cover the PTO provision. See also *Heurtebise v Reliable Business Computers,* 452 Mich 405, 413-414, 550 NW2d 243 (1996), in which the Court held that when a defendant did not intend to be bound to any provision contained in a handbook, it is not a binding contract. The handbook in question in *Heurtebise* contained language that stated that the defendant had the right to modify any policy at its sole discretion and as future conditions might warrant.

Hurley, however, argues that PTO involves a "vested right" and asserts, in the language of the *Dumas* opinion, that "a change in a compensation policy which affects vested rights already accrued may give rise to a cause of action in contract." *Dumas,* 437 Mich at 513 citing *In re Certified Question, Bankey v Storer Broadcasting Co,* 432 Mich 438, 457, n 17; 443 NW2d 112 (1989).

The seminal case in the area of vested rights is *Cain v Allen Electric & Equipment Co,* 346 Mich 568; 78 NW2d 296 (1956). *Cain* involved a former employee's claim to severance pay after the defendant company discharged him. The defendant Allen Electric had a written set of policies applicable to employees that included a reference to severance pay, evidently in lieu of notice of discharge, "'[w]hen it becomes necessary to terminate the services of an office employee on a permanent basis ....'" *Id.* at 569. Nevertheless, another section of the policies indicated that they were not "complete and [were] subject to change or amendments either through necessity created by laws or for other reasons that may come to our [Allen Electric's] attention." Further, Allen later sent out a communication to all its office employees informing them that, "[r]ecently, management approved a permanent personnel policy for termination pay and vacation pay." As the Court described it, this communication stated a "termination pay policy." The Court stated that:

> The pertinent part thereof (insofar as this litigation is concerned) provided that an "executive" having 5 to 10 years employment should be entitled to 2 months termination. It is stipulated [by the parties] that [Cain] was classified as an "executive" employee and that he had knowledge of the personnel policies of [Allen Electric] at the time they were "adopted and exhibited" to all its supervisory and office employees, including [Cain]. [*Id.* at 571].

The plaintiff Robert Cain decided to leave his employment with Allen Electric and gave two months' notice in writing. *Id.* However, two days later, Allen Electric terminated his employment. Shortly thereafter, Allen Electric's board of directors passed a resolution declaring

that Cain would not receive any severance pay, ostensibly, as Allen Electric argued in the subsequent lawsuit, because Cain had voluntarily terminated his own employment. *Id.* at 572.

When the trial court awarded Cain his severance pay, Allen Electric appealed to the Michigan Supreme Court. One of the issues our Supreme Court addressed was whether Allen Electric's policies gave Cain a contractual right to severance pay. Allen Electric argued that the severance policy was "'a mere gratuitous statement of policy or intent,' "and was not enforceable." *Id.* at 573. Our Supreme Court, however, disagreed that the severance policy was effectively the prospect of a gift at separation from employment that could be given or withheld at the company's discretion. Quoting a variety of sources for the proposition that severance policies and other employee benefits serve the interests of employers by creating goodwill from the public's perspective, content and loyal employees, and are an easy way to clear employment rolls of individuals no longer useful, our Supreme Court held that the severance pay was enforceable under contract law. *Id* at 574-580. In particular, our Supreme Court concluded that the policy made an offer to employees, like Cain. Employees who accepted this promise, as Cain did, were allowed to rely reasonably on the company's promise. Our Supreme Court observed:

> The offer having thus been accepted it was not within defendant's power to withdraw it when called upon to perform. The 'change or amendment' to which the company policy was said, in its preamble, to be subject, could not encompass denial of a contract right gained through acceptance of an offer. To assert otherwise is simply to re-assert that there was no contract. [Id. at 580].

Thus, the Court held that if there is a definitive offer of a severance policy which can be considered to have been accepted by an employee through that employee's continuation of his employment with the offering company, such an offer and acceptance cannot be defeated by reference to disclaimers in more generalized personnel policies and handbooks.

The present case is distinguishable from *Cain*. Although the measure of the number of days of PTO was based on total years of service, employees were simply granted five days of PTO as soon as they were hired. If the employee failed to remain in service, he or she would receive no paid time off. *Cain* stressed that rendering the term of service stated in the offer is what results in vesting: "[T]he consideration to be rendered by the employee was his continued satisfactory service with the company for the period or periods mentioned in the offer." *Id* at 577. PTO was granted to Hurley as soon as he began work, as a gratuity, not as compensation for time spent working for MSX. Therefore, this was not a case where Hurley's rights were vested.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ Jane E. Markey