

STATE OF MICHIGAN
COURT OF APPEALS

MARIE SKLADANOWSKI,

Plaintiff-Appellee,

v

CLEAR CHANNEL RADIO,

Defendant-Appellant.

UNPUBLISHED

December 14, 2006

No. 261004

Wayne Circuit Court

LC No. 04-411807-CZ

Before: Cavanagh, P.J., and Markey and Meter, JJ.

PER CURIAM.

Defendant appeals as of right from the trial court's order vacating an arbitration award for defendant and directing the arbitrator to enter an award in favor of plaintiff in this case involving the Family and Medical Leave Act ("FMLA"), 29 USC 2601 *et seq.* We affirm in part, reverse in part, and remand this case for further proceedings.

"We review de novo a trial court's decision regarding an order to enforce, vacate, or modify an . . . arbitration award." *Tokar v Albery*, 258 Mich App 350, 352; 671 NW2d 139 (2003). According to MCR 3.602(J)(1)(C), a reviewing court should vacate an arbitration award if it finds that the arbitrator exceeded his or her powers. Arbitrators exceed their powers when they act in contravention of controlling principles of law. *Saveski v Tiseo Architects, Inc.*, 261 Mich App 553, 554; 682 NW2d 542 (2004). If it clearly appears from the face of the award that the arbitrator was led to the wrong conclusion through an error of law and that, but for the error, a substantially different award would have been made, the award and decision should be vacated. *Saveski, supra* at 555.

Plaintiff, a former saleswomen for defendant, resigned from her employment with defendant because defendant concluded that she would not be paid commissions for accounts she had previously procured¹ if she took a leave of absence under the FMLA to complete an adoption

¹ Defendant's practice is to pay commissions to its salespeople not immediately after a sale is procured, but after it is "aired and billed." Therefore, weeks or months can pass between the time a salesperson procures work and the time a salesperson is fully compensated for the procurement.

of a child. Plaintiff thereafter sought payment for the sales she procured before her resignation and made a demand for arbitration.² The arbitrator ruled in favor of defendant, concluding, in part, that defendant breached no contract and therefore was not obligated to make any payments to plaintiff.

In our opinion, it is clearly apparent from the face of the arbitration award that the arbitrator was led to a wrong conclusion through an error of law and that, but for the error, a substantially different award would have been made. *Id.* Indeed, the parties do not dispute that a valid agreement was in place whereby plaintiff would be paid commissions for procured work after the work was “aired and billed.” Defendant indicated, however, that if plaintiff took a leave of absence under the FMLA, she would forfeit earned commissions during that period. Defendant relied on a provision of the FMLA stating that leave granted to an employee “may consist of unpaid leave.” See 29 USC 2612(c).

The language of the FMLA relied on by defendant simply does not discuss employees who are paid based on commissions. While the FMLA indicates that an employer should not have to pay an employee for the work the employee misses while on leave, it certainly does not provide a basis for refusing to pay commissions for sales that an employee has *already earned* and is entitled to under a valid agreement with the employer.³ Defendant incorrectly concluded that it could legitimately refuse to pay plaintiff her commissions while she was on FMLA leave.

The arbitrator erred in concluding that defendant did not owe plaintiffs commission payments for work she procured that was aired and billed during the time designated for her FMLA leave. Moreover, because plaintiff resigned her position only because of defendant’s unequivocal assertion that it would not make commission payments to plaintiff during her

² We note that, “[u]nder the doctrine of repudiation or anticipatory breach, if, before the time of performance, a party to a contract unequivocally declares the intent not to perform, the innocent party has the option to either sue immediately for the breach of contract or wait until the time of performance.” *Stoddard v Manufacturers National Bank of Grand Rapids*, 234 Mich App 140, 163; 593 NW2d 630 (1999). Because defendant unequivocally declared the intent not to pay plaintiff her legitimately earned commissions, plaintiff was not required to actually take the FMLA leave and await the time for performance before seeking remedial action.

³ We note that this interpretation is supported by the purpose of the FMLA. “Enacted in 1993, the FMLA represents an attempt to reconcile the demands of the workplace with the needs of families.” *Woodman v Miesel Sysco Food Service Company*, 254 Mich App 159, 166; 657 NW2d 122 (2002) (citation and quotation marks omitted). “Thus, while Congress sought to provide employees the right to take reasonable leave . . . , it also sought to do so in a manner that accommodates the legitimate interests of employers.” *Woodman, supra* at 166 (citation and quotation marks omitted). In this case, our interpretation of the FMLA properly balances the interests of the employee and the employer. Plaintiff is paid for the work she did and is allowed to take a leave of absence, while defendant is not required to pay her for the work she missed. Under defendant’s interpretation, plaintiff would not be paid for the work she had already done, and defendant would essentially receive a windfall.

FMLA leave, plaintiff was also entitled to recover commission payments for work she procured that was aired and billed *after* the time designated for her FMLA leave. Accordingly, we affirm the trial court's ruling with regard to defendant's liability for the commission payments. The arbitrator exceeded her authority by committing a clear error of law. *Saveski, supra* at 554-555.

However, we disagree with the court's decision to simply accept, without inquiry, a monetary figure in the schedule plaintiff provided to the court concerning the amount owed. Therefore, a hearing on damages is appropriate. See MCR 3.602(J)(3).⁴ However, no damages shall be awarded for periods beyond December 31, 2002, because plaintiff does not argue for such damages on appeal.

Affirmed in part, reversed in part, and remanded for further proceedings in accordance with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh

/s/ Jane E. Markey

/s/ Patrick M. Meter

⁴ This court rule states that if an arbitration award is vacated because the arbitrator exceeded her authority, "the court may order a rehearing before the arbitrator who made the award." We disagree with defendant that plaintiff's apparent failure to provide authenticated documentation of damages before the arbitrator is fatal to her current claim for damages. As noted by defendant on appeal, "no transcript exists of the arbitration," so this Court does not know, with certainty, what occurred during the arbitration. However, it is clear to us that, given the arbitrator's ruling, the arbitrator ultimately did not even reach the issue of damages. Now that we have reversed the arbitrator's initial ruling, a hearing on damages has become pertinent and necessary.