FILED
APR 24 1984
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

213

RONALD L. GILBRIDE,

Plaintiff-Appellant,

vs.

STUART, TINLEY, PETERS, THORN, SMITS & SENS, an Iowa Partnership,

Defendant/Cross-Appellant.

Filed April 17, 1984

4-56
83-684

Appeal from the Iowa District Court for Pottawattamie County - J. C. Irvin, Judge.

Plaintiff appeals and defendant cross-appeals from a judgment in an action for breach of an employment contract. AFFIRMED.

Ronald L. Gilbride, pro se.

Michael J. Mooney of McCormack, Cooney, Mooney & Hillman, P.C., Omaha, Nebraska, and Troyce A. Wheeler of Anderson & Wheeler, Council Bluffs, Iowa, for defendant/cross-appellant.

Considered by Oxberger, C.J., and Hayden and Sackett, JJ.

HAYDEN, J.

Plaintiff appeals and defendant cross-appeals from a judgment in an action for breach of an employment contract.

Plaintiff, Ronald Gilbride, an attorney working for the Internal Revenue Service office in Wisconsin, contacted defendant law firm in 1979 about securing employment in the Council Bluffs area. After a series of communications, defendant offered and plaintiff accepted a position as an associate with the firm at a salary of $20,000 per year. Plaintiff sold his house in Wisconsin and moved his family to Council Bluffs where he purchased a home. He began work on August 27, 1979, and his employment was terminated on September 8, 1979. Although plaintiff only worked for defendant for eleven days, he was paid $3,461.54, the equivalent of nine weeks' salary. Plaintiff obtained another position with a law firm in Harlan, Iowa, and began work there on November 5, 1979.

Plaintiff filed the present action for breach of contract alleging the following damages: $4,798.97 in lost wages, $8,487.55 for moving expenses, $3,651.90 additional travel expense incurred in commuting from Council Bluffs to Harlan, and $131.56 for expenses incurred in seeking new employment. At trial plaintiff obtained leave to amend his petition by deleting his request for moving expenses. The total amount of damages claimed by plaintiff, therefore, was $8,582.43. The jury returned the following verdict: "We, the Jury, find in favor of the Plaintiff, Ronald L. Gilbride, and fix the amount of his recovery against the Defendant at $ 0 (zero) ."

Plaintiff has appealed asserting that he proved his entitlement to damages as a matter of law and that the trial court erred in not granting his motions for either a directed verdict, judgment notwithstanding the verdict, a new trial, or an additur. Defendant's cross-appeal asserts that the trial court erred in assessing costs against defendant.

Our review of this action at law is on assigned error. Iowa R. App. P. 4.

The assessment of damages has traditionally been a jury function. Olsen v. Drahos, 229 N.W.2d 741, 742 (Iowa 1975). Its decision should only be set aside for the most compelling reasons. Id. The appellate court should not interfere unless it clearly appears the verdict is unconscionable, the result of passion or prejudice, or not warranted by the evidence. Stauter v. Walnut Grove Products, 188 N.W.2d 305, 313 (Iowa 1971). A verdict should not be set aside as either too large or too small simply because the appellate court would have reached a different conclusion. Kautman v. Mar-Mac Community School District, 255 N.W.2d 146, 147 (Iowa 1977). In reviewing a jury award, we accord weight to the fact that the trial court, having observed the witnesses and the jury, did not deem it appropriate to interfere with the verdict. Id. at 147-48.

The essence of plaintiff's argument is that the jury did not award him damages because it concluded that plaintiff's employment was of indefinite duration. Plaintiff asserts that under Kitchen v. Stockman National Life Insurance Co., 192 N.W.2d 796 (Iowa 1971), the jury was required to find that plaintiff was employed for a minimum term of one year. Although we agree with plaintiff that the Kitchen case is applicable, we do not agree that the failure to award damages resulted from a misunderstanding of the law.

In Kitchen, the plaintiff was hired to be a branch manager of defendant's insurance office in Cedar Rapids at a salary of $12,000 per year. After leaving his prior job and moving his family from Michigan to Iowa, plaintiff was informed that the defendant had decided to close its Cedar Rapids office and that his employment was being terminated. At issue in the case was whether plaintiff's employment was at will or for an initial period of one year. The supreme court, quoting The Restatement, Second, of Agency, section 442, said:

> Unless otherwise agreed, mutual promises by principal and agent to employ and to serve create obligations to employ and to serve which are terminable upon notice by either party; if neither party terminates the employment, it may terminate by lapse of time or by supervening events.

Id. at 801-02. Quoting Comment b of that section, the court continued:

> The fact that a servant or other agent is employed under a contract which merely specifies a salary proportionate to units of time which are commonly used for the purposes of accounting or payment, such as a month or a year, does not, of itself, indicate that the parties have agreed that the employment is to continue for the stated unit of time. Such a specification merely indicates the rate at which the salary is earned or is to be paid, and either party is privileged to terminate the relationship at any time unless further facts exist. However, the fact that payment is to be made in accordance with a time unit is evidence, in connection with other relevant facts, indicating that the agreement is for such unit.

Id. at 802. Such "other relevant facts" which may indicate that the agreement is for a specific period of time include: the type of agency (as where a temporary appointment would not likely be made); an important change made by the employee in his general relations in order to accept the position (i.e., moving to a new location); or a sacrifice on the part of the employee of a position of some value in order to enter the employment. Id. The Kitchen court concluded that the plaintiff had been hired for an initial period of one year and that the appropriate measure of his damages was "all wages past due and future promised earnings, less what was or could be reasonably earned by him in similar employment for the remainder of the initial one year . . . ." Id.

In this case, plaintiff Gilbride received the following offer of employment:

> We would like to offer you a position with our firm as associate. We propose that you would commence work on the basis of a salary rate of $20,000 per year. That salary would be reviewed at the end of the calendar year and periodically thereafter.

Under the Kitchen rationale, the fact that a salary measured in terms of yearly units was contemplated along with the fact that plaintiff gave up a good job and moved his family from Wisconsin to Council Bluffs, plus the fact that a position as an associate with a law firm is not normally a temporary position, would support the conclusion that plaintiff was initially employed for one year.

In assessing damages, however, the jury could have considered the fact that the $20,000 yearly rate by the express terms of the offer only applied from the time plaintifff began work until the end of the 1979 calendar year. Compensation for the remainder of plaintiff's initial one year period was to be determined at a salary review based on plaintiff's performance. At this review his salary could have been raised, lowered, or left at the same level. The jury could have concluded that the terms of the contract regarding plaintiff's promised future earnings were too vague to allow plaintiff to recover based on a salary rate which expressly was to apply for only the first four months of plaintiff's employment.

Furthermore, the amount of earnings plaintiff received for the initial one-year period was disputed at trial. Plaintiff claimed that he earned $16,148.53 for that entire period. However, plaintiff's answer to an interrogatory was admitted into evidence which stated that he had earned $16,148.53 at the second law firm from November 5, 1979 to August 26, 1980. Accepting this latter statement, the jury would then have added the amount paid to plaintiff by defendant. The jury could have concluded that plaintiff had received substantially all of what he was promised even assuming that he had been promised $20,000 for the entire year.

Plaintiff claims that he is entitled to his commuting and job-hunting expenses even if he received his full salary. The jury could have decided that the expenses for commuting were incurred because of plaintiff's refusal to move to Harlan. There was evidence presented that plaintiff wanted to stay in Council Bluffs because his wife was attending law school in Omaha. Furthermore, we cannot say as a matter of law that the jury should have awarded plaintiff $130 for expenses incurred in seeking new employment.

Considering the evidence in the light most favorable to the verdict, we cannot say as a matter of law that the verdict was inadequate or based on a misunderstanding of the law. Therefore, we find no compelling reason to disturb the jury's decision.

Defendant's cross-appeal challenges the trial court's assessment of costs. Defendant claims that since the jury found no damages, plaintiff was not entitled to costs as the successful party. See Iowa Code section 625.1 (1981). Plaintiff maintains that he was the successful party since the jury found in his favor on the issue of liability. We do not disturb the trial court's order on this issue. A plaintiff who recovers less than the amount prayed for is ordinarily still entitled to recover costs. Rand & Carson v. Wiley, 70 Iowa 110, 117-18, 29 N.W. 814, 817-18 (1886).

AFFIRMED.