JOSEPH KELLY, JR., Plaintiff-Appellant,

v.

BEVERAGE WORKS NY INC., ROB FELICITO, and GERALD PONSIGLIONE, Defendants-Respondents.

No. A-3851-13T4.

Superior Court of New Jersey, Appellate Division.

Argued telephonically October 2, 2014.
Decided November 26, 2014.

Steven D. Cahn argued the cause for appellant (Cahn & Parra, L.L.C., attorneys; Mr. Cahn, on the brief).

Rebecca D. Winkelstein argued the cause for respondents (Jasinski, P.C., attorneys; David F. Jasinski, of counsel; Ms. Winkelstein, on the brief).

Before Judges Fasciale and Whipple.

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

PER CURIAM.

In this employment discrimination case, plaintiff appeals from an April 11, 2014 order dismissing his complaint and compelling arbitration pursuant to his union's collective bargaining agreement ("CBA"). We reverse and remand for further proceedings.

The record reveals the following. Plaintiff marketed and delivered Red Bull energy drink products for defendant, Beverage Works NY Inc. ("Beverage Works"), as a merchandise sales representative from 2005 through 2011. During his employment, plaintiff was a member of Local 713, I.B.O.T.U., IUJAT (the "Union"), which was the exclusive bargaining agent for all full-time Beverage Works delivery employees. Membership in the Union was a condition of employment for these workers.

On January 29, 2011, plaintiff suffered an injury to his knee while working and notified his supervisors of the accident. While out of work for a period of time, plaintiff received medical treatment and pursued worker's compensation benefits. On or about April 8, 2011, Beverage Works terminated plaintiff's employment, asserting that the termination was for cause and based upon job performance including "poor sales performance, inability to manage inventory, numerous failures to correctly invoice customers, and failure to follow direction from supervisors in daily routines."

On January 29, 2013, plaintiff filed a complaint alleging violations of New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 to-49, against Beverage Works; Rob Felicito, a Beverage Works branch sales manager who was plaintiff's supervisor during his employment; Gerald Ponsiglione, Beverage Works' chief executive officer; and certain fictitious parties. Defendants moved to dismiss the complaint for lack of subject matter jurisdiction and to compel arbitration pursuant to the CBA between the Union and Beverage Works.

The CBA contained provisions governing employee termination and arbitration. Article XVII Section 2 of the CBA provides in relevant part, "[i]n the event of any dispute as to the existence of cause for discharge, such dispute shall be determined in accordance with the Grievance and Arbitration provisions hereinafter contained." Article XVIII Section 1 of the CBA states in relevant part:

> Any disputes between the Union and the Employer arising out of or under this Agreement shall first be taken up for amicable adjustment between the disputants. Either disputant may elect to have such dispute arbitrated by a panel of arbitrators consisting of the American Arbitration Association, Mr. Wellington Davis, or Mr. J.J. Pierson.

Article XVII of the CBA provides that termination must be for cause or due to job performance. The CBA contains a "Rules of Conduct" provision which provides an illustrative list of conduct that could warrant termination. The CBA also explicitly incorporates Beverage Works' Employee Handbook, which similarly contains a "Code of Conduct" section permitting Beverage Works to terminate employment. Neither document expressly provides that, by agreeing to arbitration, employees waive their right to a jury trial.

The trial court granted defendants' motion to dismiss and compel arbitration. The court prefaced its decision with the observation that courts generally favor arbitration because it provides more efficient, affordable, and informal means by which parties can resolve disputes. The court then found that plaintiff was bound by the terms of the CBA, and that the CBA's relevant provisions required arbitration of all of plaintiff's claims relating to wrongful termination, whether contractual or statutory. The court entered an order granting defendants' motion to dismiss plaintiff's complaint with prejudice and compel arbitration.

On appeal, plaintiff argues that the arbitration provision in the CBA is not binding on him because he did not sign it. In the alternative, he argues that the relevant provisions of the agreement are too ambiguous to compel arbitration of his statutory causes of action.[1]

We review the trial court's conclusions that arbitration is required de novo, and we are required to give no deference to the trial court's decision on an issue of law. Manalapan Realty v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995). We assume for the purposes of our decision that plaintiff is bound by the CBA entered into by the Union on behalf of the covered employees. We therefore must consider whether the arbitration provision of that agreement constitutes an effective waiver by plaintiff of his right to pursue his claims in an action in the Superior Court.

Our Supreme Court recently held that the absence of any language in an arbitration provision specifying that a plaintiff is waiving a statutory right to seek relief in court renders the provision unenforceable. Atalese v. U.S. Legal Servs. Grp., L.P., 219 N.J. 430, 436 (2014). The Court emphasized that "an average member of the public may not know — without some explanatory comment — that arbitration is a substitute for the right to have one's claim adjudicated in a court of law." Id. at 442.

The Court went on to explain that "[a]n agreement to arbitrate, like any other contract, `must be the product of mutual assent, as determined under customary principles of contract law.'" Ibid. (quoting NAACP of Camden Cnty. E. v. Foulke Mgmt., 421 N.J. Super. 404, 424 (App. Div.), certif. granted, 209 N.J. 96 (2011), and appeal dismissed, 213 N.J. 47 (2013)). "Mutual assent requires that the parties have an understanding of the terms to which they have agreed," and "`[a]n effective waiver requires a party to have full knowledge of his [or her] legal rights and intent to surrender those rights.'" Ibid. (quoting Knorr v. Smeal, 178 N.J. 169, 177 (2003)).

The Court held unenforceable an arbitration clause, emphasizing that it did not explain that the plaintiff was waiving her right to relief in court, did not explain "what arbitration is," did not explain the difference between arbitration and court proceedings, and was not "written in plain language that would be clear and understandable to the average consumer that she [or he] is waiving statutory rights." Id. at 446. For those reasons, the arbitration agreement was held unclear and ambiguous, and therefore unenforceable. Id. at 448.

Here, neither the arbitration provisions nor the employee handbook put plaintiff on notice that he was waiving his right to try his claims in court. Because the provisions here do not clearly and unambiguously waive plaintiff's right to pursue his claims in court, they are unenforceable.

Defendants' argument that Atalese is distinguishable because it involved a consumer service agreement rather than a CBA is unpersuasive. We discern no reason to conclude that employees bound by a CBA should be charged with greater understanding of their rights than the average consumer.

Reversed and remanded for further proceedings in conformity with this opinion. We do not retain jurisdiction.

[1] We decline to consider defendants' arguments concerning preemption raised in their supplemental brief, as this issue was neither raised below nor raised prior to oral argument. Issues not raised below will ordinarily not be considered on appeal unless they are jurisdictional in nature or substantially implicate public interest. State v. Robinson, 200 N.J. 1, 20 (2009); Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973). These preemption arguments were not presented to the trial court and are now presented to this court without plaintiff having had an opportunity to respond.