CITATION: McLeod v. 1274458 Ontario Inc., 2017 ONSC 4073
COURT FILE NO.: CV-16-550310
DATE: 20170629

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
KEITH MCLEOD	)	*Stan Fainzilberg*, for the Plaintiff
	)	
Plaintiff	)	
	)	
– and –	)	
	)	
1274458 ONTARIO INC. o/a FRONTIER SALES	)	
	)	
	)	
Defendant	)	
	)	*Dorian N. Persaud*, for the Defendant
	)	
	)	
	)	
	)	
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	)	**HEARD:** May 8, 2017
	)	

HOOD J.

REASONS FOR DECISION

Overview

Facts

[1] The plaintiff moves for summary judgment against the defendant, seeking damages of $27,036 for wrongful dismissal. The defendant agrees that summary judgment is an appropriate process but argues that the claim should be dismissed. Alternatively, the defendant argues that a mini-trial should be used due to the inconsistencies in the plaintiff's evidence and his credibility issues. For the following reasons, the plaintiff's motion is granted, although for a different amount to be calculated in accordance with these reasons.

[2] The plaintiff was a long-term employee of the defendant, having started with the company in 1998. The defendant company was in the business of the sale and delivery of residential furniture and appliances from its one store in Scarborough. The plaintiff worked as a mover for the defendant, driving a van and delivering furniture to its customers.

[3] On September 18, 2015, the plaintiff was involved in a non-work-related car accident. He was unable to immediately return to work. He was placed on an unpaid leave of absence.

[4] On or about January 29, 2016, the plaintiff's doctor, Dr. Firoz, provided him with a medical certificate indicating that he would be unable to return to work until March 15, 2016 due to knee pain and PTSD resulting from the accident. This certificate was given to the defendant.

[5] On January 31, 2016, the plaintiff, while still on his leave of absence, was sent a notice of termination. He was advised that the defendant was shutting down operations on July 31, 2016 and that his employment would be terminated effective July 31, 2016. The defendant advised that it considered the period between January 31, 2016 and July 31, 2016 to be working notice.

[6] The notice of termination, among other things, stated: "If you are physically able to return to your position as Mover before the Termination Date, you will continue to receive your regular wages." No return date for the plaintiff was referenced in the notice. The defendant confirmed his employment position as Mover.

[7] On March 15, 2016, the plaintiff was again seen by Dr. Firoz. Dr. Firoz's notes state that the plaintiff had low back pain and that his back pain had not improved.

[8] On March 31, 2016 and April 7, 2016, the plaintiff spoke to one of the defendant's principals, who requested further medical reports or documentation to support the plaintiff's continued medical leave of absence.

[9] The plaintiff provided a letter from his new doctor, Dr. Marks, addressed to the defendant, in mid-April, 2016. Dr. Marks wrote that the plaintiff was unable to work until further notice and asked the defendant to contact him if it had further questions.

[10] The defendant argues that the plaintiff shopped around to find a doctor, Dr. Marks, who would be prepared to write letters to support the plaintiff from having to return to work. There is no evidence of this. This is only the defendant's suggestion. When he was cross-examined, the plaintiff disagreed with this suggestion and said he switched doctors for convenience. There was no evidence to prove otherwise.

[11] When it received Dr. Mark's letter, the defendant, rather than contacting Dr. Marks directly, as he had suggested, asked the plaintiff for more medical information as it felt the letter was inadequate. In its letter to the plaintiff, the defendant stated that it reserved the right to terminate the plaintiff's employment immediately for just cause if the requested information was not provided by April 22, 2016.

[12] April 22, 2016 came and went. The plaintiff was not terminated. Dr. Marks provided the defendant with a brief letter of April 25, 2016 along with his medical notes. In his letter, Dr.

Marks concluded that the plaintiff was still unable to return to work. The plaintiff was not terminated as had been threatened.

[13] Instead, the defendant suggested in a number of letters, dated April 26, 2016 and May 12, 2016, that the plaintiff return to work on a part-time basis and work in customer service rather than his confirmed employment position as a Mover, as had been stated in the notice of termination. After each letter, the plaintiff advised the defendant that he was unable to work in any capacity. Again, the defendant took no steps in response, such as terminating the plaintiff.

[14] On May 30, 2016, the defendant requested that the plaintiff have Dr. Marks complete a functional abilities questionnaire about the plaintiff. Dr. Marks did so on June 28, 2016. It was provided to the defendant along with a letter from Dr. Marks dated June 20, 2016 concluding that the plaintiff was still unable to work due to back and knee pain and mental health issues. The questionnaire indicated that Dr. Marks had a follow-up appointment with the plaintiff on July 21, 2016. The defendant took no steps upon receiving the letter and questionnaire.

[15] On July 21, 2016, Dr. Marks met with the plaintiff and cleared the plaintiff for light duties on a part-time basis. The defendant was advised. The defendant accepted this recommendation and, on July 26, 2016, wrote to the plaintiff requesting that he return to work on July 27, 2016 and July 29, 2016 for a three-hour shift each day.

[16] The plaintiff returned to the defendant and worked each day for three hours.

[17] On July 31, 2016, the defendant closed down its operations.

[18] On October 31, 2016, the plaintiff started working at Purolator doing a comparable job at comparable pay.

[19] Neither party submitted any pleadings as part of their motion material but, from looking at the Case History Report, it would appear that the plaintiff issued his claim on April 5, 2016 and the defendant served its defence around May 18, 2016.

Is Working Notice Appropriate?

[20] When the plaintiff received the notice of termination, he was incapable of working. Accordingly, he was entitled to damages representing the salary he would have earned had he worked during the notice period. The fact that he could not work is irrelevant to the assessment of these damages: see *Sylvester v. British Columbia* [1997] 2 SCR 315, 146 D.L.R. (4th) 207, at para. 9.

[21] The defendant argues that, based upon *Egan v. Alcatel Canada Inc.* (2006), 206 O.A.C. 44 (Ont. C.A.), the plaintiff had no damages from January 31, 2016, when notice was given, to July 27, 2016, when he returned to work on a limited basis. *Egan* does not apply to the facts here. In *Egan*, the employee, while unable to work, was compensated by disability payments along with salary damages. The court found she was overcompensated by an award of salary on top of disability payments. Whether this is a correct decision in that it appears not to follow *Sylvester* is irrelevant because the plaintiff here, Mr. McLeod, has not received any disability payments, so any overpayment is not a consideration.

[22] The real issue is whether the plaintiff was incapable of returning to work so as to earn salary as part of the working notice period. The defendant argues that the plaintiff is seeking a windfall and that he should have returned to work on March 15, 2016 so that he could have earned 3 ½ months of working notice and that this combined with the two months paid under the *Employment Standards Act*, 2000, S.O. 2000, c. 41 (ESA) would effectively reduce the plaintiff's damage claim to a minimal amount, if for example six months, as argued by the defendant, is found to be the appropriate notice period.

[23] The defendant argues that because of Rule 20.02(1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 I should draw an adverse inference from the failure of the plaintiff to have an affidavit from Dr. Marks. The defendant further argues that, because there was no affidavit from a doctor, particularly Dr. Marks, confirming that the plaintiff was unable to work, I should find that the plaintiff has not made out his case.

[24] In my view, this argument is misguided. It ignores the fact that when the plaintiff received the notice of termination he was on an agreed medical leave of absence and at no time did this change. He remained on medical leave of absence until his return to work on July 27, 2016.

[25] When asked for more medical information, he provided it. The information must have satisfied the defendant each time it was provided because it chose not to terminate the plaintiff for cause. In all of its letters to the plaintiff, the defendant said that it might terminate the plaintiff. It reserved the right to do so. It never did. If the defendant had pulled the trigger and terminated the plaintiff for cause then perhaps on a motion for summary judgment the issue of whether the plaintiff was actually incapable of working would have been in play.

[26] The defendant cannot sit back and accept the plaintiff's position that he was unable to work and then turn around and argue that he was obliged to prove this on a summary judgment motion. The defendant cannot now argue, in effect, that it could have terminated the plaintiff for cause (when it did not) and then argue that, if it had, the plaintiff has not proven they would have been wrong to have done so.

[27] Equally, for this same reason, there is no need for a mini-trial to obtain further *viva voce* evidence.

What Notice Should Have Been Given?

[28] The parties agree that the principles for determining the appropriate notice period are to be determined by taking into account factors such as character of the employment, the length of service, the age of the employee, the availability of similar or comparable employment, and the experience, training, and qualifications of the employee: *Bardal v. Globe and Mail Ltd.* (1960), 24 D.L.R. (2d) 140, at para. 21 (Ont. H.C.J.).

[29] The plaintiff had worked as a driver and mover for the defendant for 18 years and was 43 years old when terminated. He had no special training or qualifications. The defendant argues that, because the plaintiff lacks special skills and was not a specialized employee, the notice period should be reduced.

[30] When *Bardal* was decided in 1960, it was to some extent a different work environment than today. The longer notice period for senior management employees or highly skilled and specialized employees and a shorter notice period for lower rank or unspecialized employees as suggested by the defendant may have been appropriate in 1960. If anything, in today's world and economy, that has changed. Those with skills and specialties change jobs frequently and rapidly. Those without skills and specialties, I believe, find it more difficult to find employment.

[31] Both parties provided me with their charts of cases. The plaintiff argues that, based upon his cases, 15 months is appropriate. The defendant argues that his cases support 6-8 months. In my opinion, having reviewed the *Bardal* factors and in considering the cases provided, 12 months is an appropriate notice period for the plaintiff.

Mitigation

[32] The plaintiff's decision not to return to work for the defendant until July 27, 2016 was reasonable. He relied on the medical advice that he was getting. The defendant never disagreed.

[33] The plaintiff was able to find a new job with Purolator at practically the same pay starting on October 31, 2016 or within nine months of his notice of termination and within three months of his actual termination, both being within what I have found to be a reasonable notice period.

[34] Until he was able to return to work, the plaintiff could not be expected to undertake a serious job search. What potential employer would be prepared to hire someone when the potential employee was incapable of advising when they could actually start to work and what they would be able to do?

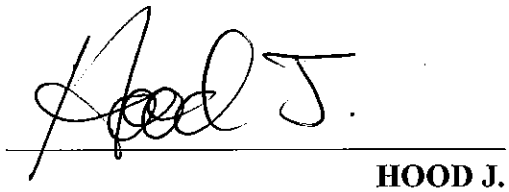
[35] The plaintiff's mitigation efforts need only be reasonable. The bar is not set too high. The onus to show that the plaintiff failed to properly mitigate lies with the defendant. The defendant argues that there were "thousands of opportunities in the GTA" for the plaintiff as disclosed on an online job search engine which apparently listed, among other things, "customer service" jobs and "courier" jobs. The defendant has not met its onus by simply referring to an online job search engine. I am not prepared to find that a website listing numerous "opportunities" is the same as there being actual jobs. There was no analysis as to the age of the "opportunities" on the website, whether there was a correlation between the "opportunities" and actual jobs, and how many of the "opportunities" were actually filled. To the contrary, the fact that he found a new job within three months of losing his other job shows that his mitigation efforts were reasonable.

Damages and Costs

[36] The plaintiff is therefore entitled to damages for nine months base salary between January, 31, 2016, when he received his notice of termination, and October 31, 2016, when he started his new employment, less the six hours pay of $102 and the $6,117.28 paid by the defendant pursuant to its obligation under the ESA. The defendant says this payment included 4% vacation pay of $256.15, which the plaintiff is claiming as part of the $27,036. I leave it to the parties to work out whether the $256.15 was paid or not. As to the claimed health benefits of $3,000, which are also part of the $27,036, this amount should be assessed at $40.25 per week, being the amount that the defendant would have contributed if the plaintiff had contributed to the

health benefits plan. This works out to approximately $1,500. I leave it to the parties to work out the exact amount owing as part of the plaintiff's damages.

[37] Being successful, the plaintiff is presumptively entitled to costs. I would expect that the parties are able to work out costs. If not, the plaintiff is to provide costs submissions to my attention through Judges' Administration, Room 170, 361 University Avenue, of no more than two double-spaced typed pages along with a bill of costs, any applicable offers, and case law on or before July 27, 2017. The defendant is to provide any responding submissions subject to the same direction by August 17, 2017. There are to be no reply submissions.



HOOD J.

Released: June 29, 2017

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ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

KEITH MCLEOD

Plaintiff

– and –

1274458 ONTARIO INC. o/a FRONTIER SALES

Defendant

REASONS FOR DECISION

HOOD J.

Released: June 29, 2017

Court File No.: CV-16-550310

KEITH MCLEOD
Plaintiff

May 8/17.

v.

1274458 ONTARIO INC. o/a FRONTIER SALES
Defendant

S. Fainzilberg for Pl.
D. Persaud for Def.

Argument on this matter was completed. Motion reserved.

Kloda J.

June 29/17.

Order to go in accordance with reasons released today.

Kloda J.

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT TORONTO

MOTION RECORD OF THE PLAINTIFF, KEITH MCLEOD
(Motion returnable on March 7, 2017 at 10:00 a.m.)

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