CITATION: Carpenter v. Brains II Canada, Inc., 2016, ONSC 3614
DIVISIONAL COURT FILE NO.: 577/15
DATE: 20160531

ONTARIO

SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

DAMBROT, STEWART and PARAYESKI JJ.

BETWEEN:	)	
	)	
Patricia Carpenter	)	David Vaughan, for the Plaintiff (Respondent)
	)	
Plaintiff (Respondent)	)	
	)	
– and –	)	
	)	
Brains II Canada, Inc.	)	Michael Kleinman, for the Defendant (Appellant)
	)	
Defendant (Appellant)	)	
	)	
	)	**HEARD at Toronto:** May 31, 2016

M. DAMBROT J. (ORALLY)

[1] Brains II Canada, Inc., the defendant in a wrongful dismissal action, appeals from a summary judgment of Stinson J. dated October 8, 2015. The motion judge awarded the plaintiff, Patricia Carpenter, eight months of pay in lieu of notice, less the amount received for benefits during the notice period, and $9,000.00 for costs.

[2] On appeal, the defendant seeks an order setting aside the judgment and reducing the costs award. On cross-appeal, Ms. Carpenter asks the decision be upheld, but asks the Court to increase the damage award.

BACKGROUND

[3] The plaintiff was employed in the Service Division of NexInnovations ("Nex") from September 1996 to October 2007. Nex encountered financial difficulties in 2007 and was the subject of creditor protection proceedings. On October 2, 2007, the employment of all Nex employees was terminated, with court approval.

[4] On October 17, 2007, a further court order was made authorizing the sale of certain assets of Nex relating to its Services Division to the defendant. Following the purchase of these assets, the defendant hired some of the former employees of Nex, including the plaintiff. On October 26, 2007, the plaintiff accepted a written offer of employment made to her by the defendant. The plaintiff was employed by the defendant in a capacity similar to her employment by Nex, in the same location and earning the same salary.

[5] On May 28, 2014, Ms. Carpenter's employment was terminated with 8 weeks' working notice (making the termination effective July 23, 2014), after which she was paid 17.9 weeks' pay as statutory severance. At the time of her termination, Ms. Carpenter was 54 years old and her base salary was $45,000.00. Ms. Carpenter was unemployed between July 2014 and January 2015, at which point she began a retraining program. The motion judge found that during this period of unemployment, she applied for more than 50 positions, and attended three job workshops and three networking events, without any success.

[6] The plaintiff's employment contract describes the plaintiff's employment, her remuneration and benefits, her position, her duties, the relevant office regulations, the term of her employment and the rules governing the termination of her employment and other obligations. Under the heading "Term of Employment & Termination of Employment" the agreement provides as follows:

> In the event the [sic] termination of employment, except where such termination is for just cause, the company will provide you with notice (or salary in lieu thereof), and severance pay [if applicable] pursuant to its obligations as an employer and successor employer to NexInnovations Inc. under Employment Standards legislation, as amended. You will also be paid all salary amounts that may have accrued to you to the date of termination. This includes all your entitlements to both termination pay and severance pay under the applicable *Employment legislation* [sic] as well as any outstanding vacation or statutory holiday pay.
>
> You agree and acknowledge that you will not be entitled to any other compensation, under common law or equity, by reason of the termination of your employment by the Company. At all times, should the requirements under statutory law, or successor legislation be amended, the Company will provide you with your entitlements under such legislation in lieu of your entitlements under this Agreement.

[7] The plaintiff argued at trial that the termination provision of her employment contract was invalid, that she was entitled to pursue a common law remedy for wrongful dismissal, and that she was entitled to significantly more notice than she had been given.

The Reasons of the Trial Judge

[8] Stinson J. found that the termination provision of the plaintiff's employment contract was invalid as a result of the statutory prohibition in s. 5(1) of the *Employment Standards Act, 2000,* S.O. 2000, c. 41 ("the ESA"). Section 5(1) provides:

> Subject to subsection (2), no employer or agent of an employer and no employee or agent of an employee shall contract out of or waive an employment standard and any such contracting out or waiver is void.

[9] The motion judge reasoned that, on its face, the termination provision of the employment contract in this case purports to contract out of the common law notice provisions that otherwise might be applicable, and provides that the ESA entitlement is the only recourse available to the plaintiff. He said that the validity of such a clause turns on the language used and whether or not the contractual language offends the prohibition in s. 5(1) of the ESA against contracting out of that statute.

[10] He noted that in *Miller v. A.B.M. Canada Inc.*, 2014 ONSC 4062, aff'd 2015 ONSC 1566 (Div. Ct.), where an employment contract provided for payment of "salary" in lieu of notice in the event of termination without cause, but made no mention of benefits, those items were not included in the amounts to be paid during the period of notice, contrary to the ESA, and the termination provision of the contract was invalid. In dismissing an appeal from this judgment, Marrocco A.C.J.S.C. distinguished between contracts where the employee is entitled to be provided with the minimum amount of notice "or payment in lieu thereof as required by the applicable employment standards legislation", and contracts where the employee is merely entitled to be "paid salary in lieu of such notice."

[11] He said that the word "payment" is different than the word "salary", and that the difference in wording was significant in that case because the employment agreement in question distinguished salary, pension contributions and a car allowance. As a result, the contract

provided, in effect, that benefits were not to be paid during the notice period and the clause was therefore contrary to the ESA and was unenforceable.

[12] Stinson J. concluded that in the present case, as in *Miller*, remuneration and benefits are discussed separately in the agreement. In the termination clause, reference is made to salary in lieu of notice, without any mention of benefits being paid should notice not be provided. In fact, he said, the employment agreement in the present case goes farther than the one in *Miller* because it expressly provides that the employee is not entitled to any other compensation by reason of the termination of her employment. In other words, not only does the clause provide the employer with the right to pay salary, without mentioning or obliging it to pay benefits during the notice period, it also expressly exempts the employer from any other obligations.

[13] As a result, he concluded that the termination provision of the employment contract was unenforceable and that the plaintiff was entitled to pursue a common law remedy for wrongful dismissal, and turned to a consideration of the appropriate notice period.

[14] On this issue, he considered only the period of employment beginning in October 2007, and did not consider the period of employment for Nex as the plaintiff urged. He acknowledged that where there is a mere change in ownership it is open to a judge to consider the period of continuous ownership as a whole. Where a business is acquired as a going concern there is an implied term in an employment contract that employees who continue in service will be given credit for past service. However, such an implied term may be negated by notice. (See *Sorel v. Tomenson Saunders Whitehead Ltd.*, [1987] 15 B.C.L.R. (2d) 38 (C.A.).)

[15] Here, however, this was not a simple asset sale and a mere change of ownership. There was a bankruptcy, a termination of employment, a purchase of some of the assets of the former employer and a new employment where the employee was told that the new employer would not be honouring her prior severance entitlements.

[16] As a result, he determined the notice period on the basis of 6½ years of employment, took into account the plaintiff's age, her seniority, her salary, her efforts to mitigate her damages and the availability of comparable employment, and concluded that she was entitled to eight months' notice.

[17] With respect to mitigation, the motion judge stated that he was satisfied that the plaintiff made reasonable efforts to mitigate her damages until she decided to go back to school. Despite these efforts, he said that a replacement position was difficult for the plaintiff to locate. Having regard to that factor as well as the her age, seniority, income level, length of service and the availability of comparable employment having regard to her experience, training and qualifications, he held that a proper period of notice in the present case would be eight months or 34.4 weeks.

[18] He noted that eight months' notice would take the plaintiff from May 2014 until January 2015, when she chose to return to school instead of continuing her job search. He therefore concluded that she had satisfactorily mitigated and should not lose any credit for the sums due to her by reason of her decision to leave the workforce in late January 2015.

[19] The motion judge then said that he presumed that the plaintiff's benefits continued during her eight weeks of working notice, but that she received nothing on account of benefits in relation to the 17.9 weeks of severance she was paid. He left it to the parties to calculate the precise sum due in light of his conclusion that she was entitled to receive a total of eight months' notice.

[20] Finally, the motion judge noted that by his rough calculation the quantum of the judgment that he awarded to the plaintiff was within the monetary jurisdiction of the Small Claims Court, and as a result it was open to him pursuant to rule 57.05(1) to order that the plaintiff should not recover any costs. Where a case is complex and involves difficult questions of law, however, he said, it does not automatically follow that a successful plaintiff should be deprived of costs. Here, he considered that principle applicable and declined to make an order that the plaintiff not recover any costs.

[21] He then noted that in closing submissions counsel agreed that the successful party should recover costs of $9,000, subject to his determination of the rule 57.05 issue. Having decided that point in favor of the plaintiff and having found her entitled to succeed in the action, he ordered the defendant to pay costs of $9,000 for the action, including the motion which, in his view, represented a fair and reasonable amount for partial indemnity costs.

The Grounds of Appeal

[22] The defendant raised the following three issues on this appeal:

1. Did the motion judge err in finding that the termination provision found in the employment contract signed by Ms. Carpenter was invalid?

2. Did the motion judge err in finding that Ms. Carpenter made reasonable efforts to mitigate her damages?

3. Was the costs award appropriate?

[23] The plaintiff raised the following two issues on cross-appeal:

1. Did the motion judge err in finding that Ms. Carpenter was only entitled to termination pay under the common law based on 6.5 years of service, as opposed to 18 years of service?

2. Did the motion judge err in finding that Ms. Carpenter failed to mitigate her damages once she commenced full-time courses?

The Standard of Review

[24] The standard of review on an appeal from the decision of a trial judge on a question of law is correctness. The standard of review for findings of fact is that such findings are not to be reversed unless it can be established that the trial judge made a palpable and overriding error.

[25] Questions of mixed fact and law are subject to the palpable and overriding error standard unless it is clear that the trial judge made some error of law or principle that can be identified independent of the judge's application of the law to the facts of the case. In these circumstances, the error of law is extricable from the questions of mixed fact and law in issue and must be separated out and reviewed on a standard of correctness.

[26] In our view, all of the issues on this appeal are either issues of fact or issues of mixed fact and law and, accordingly, the palpable and overriding error standard applies. In particular, as will be seen shortly, the question of the validity of the termination clause in the agreement turned on the proper interpretation of the contract.

[27] The law concerning the interpretation of contracts has evolved. It is now clear that contractual interpretation involves issues of mixed fact and law because it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix. In some circumstances, it may be possible to identify an extricable question of law from within what was initially characterized as a question of mixed fact and law. However, courts are obliged to be cautious in identifying extricable questions of law in disputes over contractual interpretation. (See *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, 2 S.C.R. 633.) This is not such a case.

Analysis

The Appeal

1. **Did the motion judge err in finding that the termination provision found in the employment contract was invalid?**

[28] The defendant argues that the motion judge did not give appropriate weight to the contractual provision as a whole, and instead submits that the language of the contract indicates the intent to comply with the legislated minimum standards.

[29] On the first point, I content myself with saying that the motion judge made no extricable error of law in interpreting the contract, and that his interpretation of the contract is free of palpable or overriding error. A palpable error is one that is obvious, plain to see or clear. On the contrary, the motion judge's interpretation of the contract was an entirely reasonable one that was consistent with other cases. In particular, it was not a palpable error for the motion judge to conclude that the reference to salary in the termination clause of the agreement excluded other benefits.

[30] On the second point, the defendant argues that the words "At all times, should the requirements under statutory law, or successor legislation be amended, the Company will provide you with your entitlements under such legislation in lieu of your entitlement under this Agreement" somehow obliges the defendant to comply with present legislation despite other language in the contract. I will simply say that the entitlement to the benefit of the law in the words in question is only triggered by an amendment to the law and says nothing about the defendant's entitlement to the benefit of the law as it read at the time of the contract.

2. Did the motion judge err in finding that Ms. Carpenter made reasonable efforts to mitigate her damages?

[31] The onus is on an employer to show that a dismissed employee failed to take reasonable steps to mitigate damages. This is a pure question of fact. The motion judge concluded that the onus was not met. There was an ample evidentiary foundation for this determination. It reflects no palpable error.

3. Was the cost award appropriate?

[32] The defendant submits that the motion judge erred by awarding the full agreed upon $9,000.00 cost award to the plaintiff on the ground that the plaintiff was only partly successful. The motion judge agreed with the defendant on the matter of the length of the plaintiff's employment. The defendant also argues that the motion judge should have exercised his discretion under Rule 57.05(1) to make an order that the plaintiff should not recover any costs.

[33] Both the application of Rule 57.05(1) and the quantum of costs were matters within the discretion of the motion judge. He made no palpable or overriding error in his exercise of his discretion. There is no basis for us to interfere with his costs order.

The Cross-Appeal

1. **Did the motion judge err in finding that Ms. Carpenter was only entitled to termination pay under the common law based on 6.5 years of service, as opposed to 18 years of service?**

2. **Did the motion judge err in finding that Ms. Carpenter failed to mitigate her damages once she commenced full-time courses?**

[34] The motion judge made no palpable or overriding error in the conclusions he reached on these issues, and his conclusions were amply supported by the evidence.

[35] Indeed, with respect to the second issue, even if the motion judge made a palpable error in concluding that the plaintiff's efforts at mitigation ended when she left the workforce, a determination that I need not make, it was not an overriding error. It had no effect on the motion judge's determination of the notice owed to the plaintiff. He stated:

> I note that eight months' notice would take the plaintiff from May 2014 until January 2015, when she chose to return to school instead of continuing her job search. I therefore conclude that she has satisfactorily mitigated and should not lose any credit for the sums due to her by reason of her decision to leave the workforce in late January 2015.

COSTS

[36] I have endorsed the Appeal Book, "Appeal and cross-appeal dismissed for oral reasons delivered today. On agreement, no costs are ordered."

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DAMBROT J.

_____
STEWART J.

_____
PARAYESKI J.

Date of Reasons for Judgment May 31, 2016

Date of Release: June 6, 2016

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BETWEEN:

Patricia Carpenter

Plaintiff (Respondent)

– and –

Brains II Canada, Inc.

Defendant (Appellant)

ORAL REASONS FOR JUDGMENT

M. DAMBROT J.

Date of Reasons for Judgment: May 31, 2016

Date of Release: June 6, 2016