CITATION: Marques v. Delmar International, 2016 ONSC 3448
COURT FILE NO.: CV-15-528398
DATE: 20160526

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
ANTONIO MARQUES Plaintiff	*Alex C. Lucifero* for the Plaintiff
– and –	
DELMAR INTERNATIONAL INC. Defendant	*Morris Cooper* for the Defendant
	HEARD: May 24, 2016

ENDORSEMENT

DIAMOND J.:

Overview

[1] On August 11, 2014, the plaintiff commenced employment with the defendant as its Director of Warehousing and Distribution.

[2] On April 7, 2015, the defendant terminated the plaintiff's employment without cause.

[3] On termination, and in exchange for an executed Release, the defendant offered the plaintiff a lump sum payment in lieu of reasonable notice equivalent to four weeks' base salary plus 8% of earnings for any accrued but unpaid vacation pay. While the plaintiff did not execute any Release, there is no dispute that he did receive the sum of $14,230.97 from the defendant,

which sum represents one month's base salary (exclusive of car allowance to be discussed hereinafter).

[4] In this proceeding, there are three outstanding issues. Both parties submit that the most efficient course of action is to have these issues determined by way of motion for summary judgment. I agree. The relevant documentary evidence does not appear to be in dispute. On the record before me, I am confident that I can find the necessary facts and apply the relevant law to the evidence, and that any potential credibility issues can be resolved without invoking the additional powers set out in Rule 20.04(2.2) of the *Rules of Civil Procedure*. Thus it is in the interest of affordable and proportionate justice to proceed by way of motion for summary judgment.

[5] The following three issues are to be determined:

Issue #1: Was the plaintiff's car allowance of $800.00 per month part of his total remuneration package as of the date of the termination of his employment?

Issue #2: Is the plaintiff entitled to a bonus plan payment as part and parcel of any damages for wrongful dismissal?

Issue #3: What is the amount of common law reasonable notice due and owing to the plaintiff?

[6] I will address each issue in turn.

Issue #1: Was the plaintiff's car allowance of $800.00 per month part of his total remuneration package as of the date of the termination of his employment?

[7] On or about July 14, 2014, the plaintiff signed an Employment Agreement ("the Agreement") with the defendant. The Agreement was drafted by the defendant in an attempt to codify the terms of employment discussed between the parties during negotiations over the previous several weeks.

[8] Under the heading "Compensation", the Agreement provided as follows:

> "1. Your base salary will be $185,000 Canadian, per annum, payable every two weeks as per Company policy.
>
> 2. A mobile phone allowance of $75 per month will be given, provided a personal mobile phone is used for off-hours communications as per our current mobile allowance policy.
>
> 3. A car allowance of $800 per month will be given as per Company policy.

4. You will be entitled to participate in the incentive bonus plan associated with your position. The details of this plan will be finalized with you. Until such plan is finalized, we will guarantee a minimum bonus of $25,000 after your first year of employment."

[9] On its face, the Agreement lists the plaintiff's car allowance as part of his annual compensation. The defendant did not withhold any taxes on the $800.00 monthly payment, and did not include that monthly payment as part of the $14,230.97 paid to the plaintiff shortly after termination.

[10] It is the defendant's position that the car allowance was in fact reimbursement for expenses incurred by the plaintiff, and not a component of the plaintiff's income.

[11] The plaintiff testified on cross examination that travelling by vehicle was expected of him as part of his position. Rather than providing the plaintiff with a "company car", the defendant submits that the $800.00 monthly payment was allocated as repayment of expenses, and therefore no such reimbursement payments were due and owing to the plaintiff post-termination (as he ceased to incur any such expenses).

[12] The defendant points to its car allowance policy which is maintained electronically in its intranet server database. A copy of that policy (last revised in March 2013) states that the monthly car allowance is intended to be used by employees "to fund the acquisition, running costs and insurance for a private car used for business travel within their designated region".

[13] The car allowance policy was not attached to the Agreement, nor was it provided to the plaintiff to review at any time prior to his execution of the Agreement. The defendant submits that plaintiff was aware (or ought to have been aware) of the car allowance policy. The defendant also submits that the words "as per Company policy" contained in term #3 of the Agreement are sufficient to incorporate the car allowance policy by reference.

[14] As held by the Court of Appeal for Ontario in *Poole v. Whirlpool Corporation* 2011 ONCA 808 (CanLII), a defendant cannot rely upon external documents which are not explicitly incorporated into employment agreements, especially documents which were not otherwise drawn to an employee's attention at any time "whether orally, in writing or by means of internal internet communication system".

[15] If the defendant wanted to treat the monthly car allowance as a reimbursement payment, it could have easily done so by specifying such a term in the Agreement, or appending the car allowance policy to the Agreement. In my view, the words "as per Company policy" are insufficient to consider the monthly car allowance as anything other than what the Agreement provides on its face - a component of the plaintiff's total remuneration.

[16] Accordingly, I find the answer to Issue #1 is "Yes". As the plaintiff's car allowance formed part of his total remuneration, it is to be included in the payment of any reasonable notice due and owing to him.

Issue #2: Is the plaintiff entitled to a bonus plan payment as part and parcel of any damages for wrongful dismissal?

[17] The Agreement provided that the plaintiff would be entitled to participate in the defendant's incentive bonus plan with the details of this plan "to be finalized". Until such time as the bonus plan was finalized, the Agreement also provided that the defendant would "guarantee a minimum bonus of $25,000.00 after the plaintiff's first year of employment."

[18] The plaintiff submits that if he was to receive a notice period which extended his employment until or after August 11, 2015 (i.e. the 12 month anniversary of his commencement date), he is therefore entitled to receive the guaranteed $25,000.00 minimum bonus payment set out in the Agreement.

[19] The defendant submits that the bonus plan was merely an incentive, and as the plaintiff was not "actively employed" on the one year anniversary of his commencement date, he is not eligible for payment of the bonus in any event.

[20] The jurisprudence is replete with cases dealing with bonus plans requiring employees to be "actively employed" as at the date the bonus payment is either earned or paid. Once again, the defendant chose the words to be used in its Agreement, and the term "active employment" is not set out therein.

[21] I agree with the comments of my colleague Justice Faieta in *Wolfman v. Rocktenn-Container Canada, L.P.* 2015 ONSC 1432 (CanLII) and come to the identical conclusion. A review of the negotiations between the plaintiff and the defendant leading up to the Agreement discloses that the guaranteed $25,000.00 minimum bonus played an integral part of the plaintiff's total compensation, thereby rendering it "inappropriate and unfair to the employee to be deprived of the bonus by reason of the unilateral action of the employer".

[22] The defendant argued that the plaintiff was asking the Court to rewrite the terms of the Agreement by permitting the plaintiff to claim his bonus "even after his employment ended after 7.5 months of employment". I do not agree, and find that it is the defendant that is seeking to imply terms into the Agreement, a document which it drafted.

[23] The defendant further submits that as a result of the plaintiff securing alternative employment (to be discussed further in addressing Issue #3 below), the plaintiff's new remuneration terms (which include a very similar bonus plan) amount to a mitigation of the plaintiff's alleged loss of bonus payment. In my view, the terms of the plaintiff's new employment position are not a relevant consideration in the construction and interpretation of the Agreement.

[24] Accordingly, in answering Issue #2 I find that in the event the plaintiff's notice period (discussed below) extends to August 11, 2015 or later, the plaintiff is entitled to the guaranteed $25,000.00 minimum bonus payment.

Issue #3: What is the amount of common law reasonable notice due and owing to the plaintiff?

[25] As of the date of his termination, the plaintiff was 48 years old. There is no dispute that the plaintiff fulfilled his duty to mitigate, and found a job as the Vice-President of Operations and Administration with Northern International Inc. ("Northern").

[26] The Northern employment agreement is dated July 3, 2015 with a start date of July 27, 2015. The plaintiff is receiving an identical salary ($185,000.00) with, as stated above, similar bonus incentive opportunities.

[27] Accordingly, it took the plaintiff approximately 3.5 months to locate alternative, similar employment. For this, the plaintiff is to be commended.

[28] The defendant submits that in considering the traditional criteria as set out in *Bardal v. Globe & Mail*, [1990] O.J. No. 149 (H.C.J.), and given the fact that the plaintiff was able to secure alternative, similar employment within 3.5 months, reasonable notice ought to be no more than 2-3 months. In other words, there is no better yardstick to use in determining reasonable notice than the time it took the plaintiff to actually locate alternative, similar employment.

[29] While I understand the nature of that argument, I am bound to follow the relevant common law as confirmed by the Court of Appeal for Ontario in *Holland v. Hostopia.Com Inc.* 2015 ONCA 762 (CanLII):

> "There is, however, merit to the appellant's submission that the trial judge should not have considered the speed with which he found new employment in determining the period of reasonable notice. Notice is to be determined by the circumstances existing at the time of termination and not by the amount of time that it takes the employee to find employment: see *Panimondo v. Shorewood Packaging Corp.* (2009), 73 C.C.E.L. (3d) 99 (Ont. S.C.J), citing *Harper v. Bank of Montreal* (1989), 27 C.C.E.L. 54 (Ont. Div. Ct.). If two employees in identical circumstances are terminated at the same time, they are entitled to the same notice, regardless how long it takes each of them to find a new job. One may mitigate her damages by finding a comparable job shortly after being dismissed. The other may be unable to find work for years. They are entitled to the same notice, regardless of the outcome. The time it takes to find a new job goes to mitigation of damages, not to the length of notice."

[30] The Agreement is silent with respect to the parties' respective rights upon termination. As such, I must resort to the common law in determining reasonable notice due and owing to the plaintiff. I have reviewed the case law tendered by the plaintiff in support of his position that, in his view, 7 months' reasonable notice is appropriate. The defendant did not tender any case law.

[31] The assessment of reasonable notice is certainly an art and not a science. The plaintiff's age, management position and length of service all warrant consideration. The cases provided by the plaintiff demonstrate a range of reasonable notice periods.

[32] I find the case of *Laszczewski v. Aluminart Products Limited*, 2007 CanLII 56493 (CanLII) to be demonstrative and helpful. In *Laszczewski*, the plaintiff was 47 years old as of the date of his termination after working as a Director of Production for approximately 6.5 months and earning a salary of $106,000.00 per annum. The late Justice Echlin awarded 4 months' payment in lieu of reasonable notice.

[33] Having considered the traditional *Bardal* criteria, inclusive of the plaintiff's mitigation efforts and the availability of similar employment, I find that the appropriate reasonable notice period to be 4 months.

[34] Accordingly, for the purpose of Issue #2, the plaintiff's employment would be extended by a period of 4 additional months (i.e. 16 weeks). This is short of the 12 month anniversary of the plaintiff's commencement dates, and as such the guaranteed $25,000.00 minimum bonus payment is not due and payable by the defendant.

[35] With respect to the actual amount of damages owing to the plaintiff (inclusive of car allowance and applying the $14,230.97 credit), I assume that counsel for the parties will be able to calculate that figure. If they are unable to do so, they may file brief written submissions with my assistant totaling no more than two pages. I trust such an exercise will prove unnecessary.

Costs

[36] I would strongly recommend that the parties exert the necessary efforts to try and resolve the costs of this motion and the action itself. If they are unable to do so, the plaintiff may serve and file written costs submissions (totaling no more than four pages including a Costs Outline) within 10 business days of the release of this endorsement.

[37] The defendant shall thereafter serve and file its responding costs submissions (also totaling no more than four pages including a Costs Outline) within 10 business days of the receipt of the plaintiff's costs submissions.

Diamond J.

Released: May 26, 2016

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