CITATION: Zoldowski v. Strongco Corporation, 2015 ONSC 5485
COURT FILE NO.: CV-15-524081
DATE: 20150915

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
JENNIFER ZOLDOWSKI	)	Stan Fainzilberg, for the Plaintiff
	)	
Plaintiff	)	
	)	
– and –	)	
	)	Geoff Breen, for the Defendant
STRONGCO CORPORATION/ CORPORATION STRONGCO	)	
	)	
	)	
Defendant	)	
	)	
	)	**HEARD:** August 26, 2015

K. HOOD J.

REASONS FOR DECISION

[1] The plaintiff was dismissed without cause by the defendant. She brings a motion for summary judgment seeking to fix the appropriate notice period. That is the first issue. The other issue before me is how to deal with the duty to mitigate as this motion is being heard prior to the expiration of any reasonable notice period I might award.

[2] The claim falls within the simplified procedure and the parties agree that I can decide this on a summary judgment motion. The parties also agree that once I decide what is the appropriate notice period, they can work out the actual amount of damages, including the plaintiff's benefits, pension plan and vacation pay. There were no cross-examinations. Nor has there been discovery.

[3] For the reasons that follow, I fix the notice period at 14 months. The mitigation approach I have chosen is the trust and accounting approach.

Facts

[4] The plaintiff was employed by the defendant on January 27, 1998. She was 22 years old. Over the years she worked for the defendant in a variety of positions. Her last position with the defendant was Parts Administrator. She had an annual base salary of $47,998.17. She was dismissed on February 12, 2015 without cause due to an upgrade to the defendant's "electronic inventory management system". As defendant's counsel advised, she was replaced by a computer. She was 39 years old when let go. She had worked 17 years for the defendant.

[5] She received the minimum termination entitlements required under the *Employment Standards Act, 2000*, S.O. 2000, c. 41, from the defendant.

[6] Since being let go, she has applied for numerous jobs throughout the GTA, primarily as an office administrator or in the area of purchasing or inventory control, which is the sort of work she was doing for the defendant when terminated. From the many applications, she has had one job interview which did not result in an offer. She has sought job counselling, created profiles on a variety of online job search sites looking for work and has applied to an employment agency. To date she has had no success in finding a new job.

[7] She has done this while helping her stepmother who is ill, and being a mother for her three children. She is married and her husband works full time with a second job. She lives in Pickering, Ontario.

Reasonable Notice

[8] The plaintiff argues the appropriate notice period is 15 months. The defendant argues for 10 months.

[9] The purpose of the notice period is to give the dismissed employee an opportunity to seek alternative employment and to cushion the employee from the effects of economic dislocation caused by the dismissal. It also acts to compensate long-serving employees for their years of service and investment in the employer's business: see *Rizzo* v. *Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27, 1998 CanLII 837 (SCC) at paras. 25 and 26.

[10] The parties are in agreement that in determining the length of notice, the court should consider, among other things: (1) the character of employment; (2) the length of service; (3) the employee's age; and (4) the availability of similar employment having regard to the experience, training and qualifications of the employee: see *Bardal* v. *Globe & Mail Ltd*. [1960] O.J. No. 149, 24 D.L.R. (2d) 140.

[11] This list is non-exhaustive, and each case will depend upon its own particular circumstances. As part of this determination the court may consider the economic climate the employee is put into when terminated. If there is an economic downturn, then that may make it more difficult to find a job and may justify a longer notice period: see *Paquette* v. *TeraGo Networks*, 2015 ONSC 4189, 2015 ONSC 4189 (CanLII), at para. 27. I believe I can take judicial notice of the general economic downturn in the GTA and Southern Ontario for the first half of 2015.

[12] As pointed out in *Paquette* at para. 25, the determination of a reasonable notice period is an art not a science. As a result most cases yield a range of reasonableness.

[13] This is apparent from the cases relied upon by both the plaintiff and defendant and the charts put together by each party in their respective factums. The plaintiff refers to 10 cases with what she argues are employees with similar positions, length of employment, age and salary as her where a range of 13 to 18 months was awarded. She submits therefore that 15 months is appropriate. The defendant refers to 4 cases, with what it argues are similar factors as the plaintiff's situation, where 10 months was awarded. It submits therefore that 10 months is appropriate. I expect the defendant could have found an equal number of cases as the plaintiff if pressed. I do not consider the number of cases presented as relevant to the determination.

[14] Of the *Bardal* factors, the plaintiff argues the character of employment is of declining importance particularly, so if the employer attempts to use it to say, as the defendant has done here, that low-level unskilled employees deserve less notice because they have an easier time finding alternative employment: see *DiTomaso* v. *Crown Metal Packaging*, 2011 ONCA 469, 337 D.L.R. (4th) 679, at paras. 27-28. I agree with the plaintiff's argument. If anything, employees with a particular marketable skill are more valuable to employers and should have an easier time finding employment. The plaintiff herself is a case in point. Her skills were vulnerable to automation and she was replaced by a computer.

[15] Considering the other factors, the plaintiff is only 39 years old, which should make her more marketable. She was a long serving employee which, generally speaking, leads to longer reasonable notice. From numerous applications and internet job searches, the plaintiff has obtained one interview, which suggests there is limited availability of similar employment.

[16] Having considered the case law provided by the parties, the plaintiff's age, skills, the length of her employment with the defendant, the character of her employment, the availability of similar employment and the economic climate in Southern Ontario and particularly the GTA I find that the appropriate reasonable period is 14 months.

[17] The parties have, as I have indicated earlier, advised that they can work out the actual amount of damages based upon this number. I hope that will remain the case. If they cannot do so, they may make brief written submissions on this.

Mitigation

[18] The other issue is mitigation. If an employment matter proceeds to trial, normally the trial decision is long after the notice period awarded, so that the plaintiff's mitigation efforts can be tested at trial. Here, the notice period extends beyond today's date. This is apparently becoming a more common issue due to the increase in summary judgment motions for cases such as this, arising from the culture shift brought on by *Hryniak* v. *Mauldin*, 2014 SCC 7, 1 S.C.R. 87.

[19] The plaintiff's mitigation efforts need only be reasonable. The onus is on the defendant to establish a failure to mitigate by the plaintiff: see *Somir* v. *Canac Kitchens*, 2006 CanLII 42369 (ON SC), 2006 CarswellOnt. 8108, at para. 58. There is no evidence from the defendant to suggest that the plaintiff has not acted reasonably to date. I find that her mitigation efforts, as set out above, have been reasonable. The defendant's concern is with the future. The defendant argues – how can it challenge the plaintiff's mitigation efforts in the future when there is no evidence of this now?

[20] As reviewed in *Paquette*, and in *Markoulakis* v. *SNC-Lavalin Inc*., 2015 ONSC 1081, 2015 ONSC 1081 (CanLII), where judgment is granted, as here, before the expiry of the period of reasonable notice, courts in Ontario have applied three different approaches to the duty to mitigate:

1. the contingency approach – the employee's damages are reduced by a contingency for re-employment during the balance of the notice period following judgment.

2. the trust and accounting approach – the employee must account for any mitigation earnings obtained during the notice period following judgment.

3. the partial summary judgment approach – the employee is granted a partial judgment and the parties return to the court to determine the adequacy and success of the employee's mitigation efforts.

[21] The parties both reject the contingency approach. The plaintiff argues for the trust approach and the defendant argues for the partial summary judgment approach.

[22] In *Paquette*, Justice Perell favoured the trust approach at paras. 68-70:

> Mr. Paquette may utilize the funds as he sees fit, but he must account for any mitigatory earnings for the balance of the reasonable notice period. It is the mitigatory earnings not the damages award upon which there is a court imposed constructive trust in favour of TeraGo.
>
> I reject the Partial Summary Judgment Approach as cynical, patronizing, unfair, impractical, and expensive.
>
> Mr. Paquette has had no employment income since November 2014. He has made diligent, albeit unsuccessful, efforts to mitigate, and it is cynical to assume that with many years of future employment both possible and needed, that he will sit on his hands and wait out the reasonable notice period rather than getting on with his career. If he earns mitigatory income, he will have to simply account for it or be liable for breach of trust.

[23] In *Markoulakis*, Justice Pollak favoured the partial summary judgment approach. She did so, it would appear, on the basis of *Hryniak*, in that the partial summary judgment approach allows the possible creation of an evidentiary record sufficient to "fairly and justly adjudicate the dispute" (see para. 24). Justice Gray in *Russo* v. *Kerr Bros. Ltd*., 2010 ONSC 6053, 326 D.L.R. (4th) 341, preferred the partial summary judgment approach, in order to avoid turning the duty to mitigate into a theoretical duty only. In both of these cases the notice period was substantial – 27 months and 22 months, respectively.

[24] As argued by the defendant, the partial summary judgment approach will allow the defendant to challenge the plaintiff's future mitigation efforts. The defendant argues that if the plaintiff receives her full award now it is likely she will make no attempt to obtain other employment during the balance of her notice period, having lost the incentive to do so. It argues the plaintiff has a sick stepmother and three children and will be disinclined to seek employment. The defendant argues it should not be forced to bring a breach of trust action to argue her anticipated failure to mitigate. The defendant argues this is a needless expense and any ability to get the money back is practically non-existent.

[25] The plaintiff has to date taken diligent steps to mitigate. She is young and has many years of employment ahead of her. It is to her benefit to find future employment as soon as she can. The award of 14 months is now 50% complete and there is not a substantial notice period left. She was not making a large salary. The expense of a partial summary judgment process outweighs the amount at issue. In the circumstances of this case, I prefer the decision of Justice Perell in *Paquette* and adopt his reasoning therein. The trust approach also aligns with the Supreme Court's recognition in *Rizzo* v. *Rizzo*, at para. 24 of "the importance that our society accords to employment and the fundamental role that it has assumed in the life of the individual."

[26] The plaintiff must account to the defendant for any mitigatory earnings for the balance of the notice period ordered. She is to do so at the end of the 14 month notice period and will reimburse the defendant any such amount received. There is a court imposed constructive trust upon those earnings in favour of the defendant.

[27] I have been provided with a costs outline from the plaintiff and a bill of costs from the defendant. The amounts being sought on a partial indemnity scale are similar. I am of course unaware of any offers between the parties following the commencement of the plaintiff's claim. I would hope that the parties can resolve the issue of costs but if they cannot the plaintiff shall provide her cost submissions within 15 days of today's date and the defendant's submissions within 15 days thereafter. Each party's submission should not exceed three pages in length. If offers were made that bear on the issue of costs, these should be included.

K. HOOD J.

Released: September 15, 2015

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