CITATION: Fillmore v. Hercules SLR Inc., 2016 ONSC 4686
COURT FILE NO.: CV-15-537985
DATE: 20160720

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:		
ROY FILLMORE	Plaintiff	*Lia Moody* for the Plaintiff
– and –		
HERCULES SLR INC.	Defendant	*Craig R. Lawrence* for the Defendant
		HEARD: July 18, 2016

ENDORSEMENT

DIAMOND J.:

[1] On August 24, 2015, the plaintiff was terminated from his employment with the defendant after being employed for 19 years and 3 months. Shortly thereafter, he commenced this action seeking damages for wrongful dismissal.

[2] Both parties agree that this action ought to proceed by way of the plaintiff bringing a motion for summary judgment pursuant to Rule 20.04(2)(b) of the *Rules of Civil Procedure*.

[3] I commend the parties for their prudent and conscientious approach to this litigation. The parties submit that as there are only two outstanding issues, the most efficient course of action is to have these issues determined by way of motion for summary judgment. I agree.

[4] While the affiants tendered by the parties have yet to be cross-examined on their respective affidavits, 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 enhanced powers set out in Rule 20.04(2.2). It is therefore in the interest of affordable and proportionate justice to proceed by way of motion for summary judgment.

[5] The following are the two outstanding issues to be determined:

Issue #1: What is the amount of common law reasonable notice due and owing to the plaintiff?

Issue #2: Should the plaintiff's damages be reduced by reason of his alleged failure to mitigate?

[6] I will now address each issue in turn.

Issue #1: What is the amount of common law reasonable notice due and owing to the plaintiff?

[7] There is no signed employment agreement between the parties. As such, the Court must determine the appropriate length of reasonable notice. I am, once again, guided by the traditional criteria set forth in *Bardal v. Globe & Mail* [1990] O.J. No. 149 (H.C.J.), which include the plaintiff's age, length of service, character of his employment and the availability of similar employment with regard to his experience, training and qualification.

[8] The Court is to approach its task of assessing reasonable notice in a holistic manner, as no one *Bardal* factor is to be given disproportionate weight over another.

[9] As at the date of his termination, the plaintiff was 51 years of age and employed as the defendant's Director (Purchasing). He has been employed by the defendant (and a predecessor of the defendant) for the majority of his adult life.

[10] As Director (Purchasing), the plaintiff received an annual salary of $81,962.49, a matching 5% contribution to a registered pension plan and participation in the defendant's standard extended health benefits plan.

[11] The defendant submits that the plaintiff (a) never managed or supervised any other employees, (b was not responsible for directing corporate strategy, (c) did not play any role in the hiring or firing of other employees, and (d) did not set budgets or direct department operations.

[12] The plaintiff did not tender any evidence to counter the above submissions as to his lack of management responsibilities. During argument, counsel for the plaintiff effectively conceded that her client did not hold a "classic managerial position". That said, I do find that the

plaintiff's position was senior and specialized as he was the defendant's only Director (Purchasing) in Ontario.

[13] As held by the Court of Appeal for Ontario in *Di Tomaso v. Crown Metal Packaging Canada LP* 2011 ONCA 469 (CanLII):

> "Crown Metal would emphasize the importance of the character of the appellant's employment to minimize the reasonable notice to which he is entitled. I do not agree with that approach. Indeed, there is recent jurisprudence suggesting that, if anything, it is today a factor of declining relative importance: see *Medis Health and Pharmaceutical Services Inc. v. Bramble* (1999), 1999 CanLII 13124 (NB CA), 175 D.L.R. (4th) 385 (NBCA) ("*Bramble*") and *Vibert v. Paulin* (2008), 2008 NBCA 23 (CanLII), 291 D.L.R. (4th) 302 (NBCA).
>
> This is particularly so if an employer attempts to use character of employment to say that low level unskilled employees deserve less notice because they have an easier time finding alternative employment. The empirical validity of that proposition cannot simply be taken for granted, particularly in today's world. In Bramble, Drapeau J.A. put it this way, at para. 64:
>
> > 'The proposition that junior employees have an easier time finding suitable alternate employment is no longer, if it ever was, a matter of common knowledge. Indeed, it is an empirically challenged proposition that cannot be confirmed by resort to sources of indisputable accuracy.'
>
> In my view, the motion judge conducted an appropriately holistic review of the case before her. She did not give disproportionate weight to any of the Bardal factors. She dedicated nine paragraphs of her reasons to the character of employment factor but it was simply not as relevant in these circumstances as the other three factors. She did not err in doing so."

[14] It has been consistently held that the assessment of reasonable notice is an art and not a science. As stated, the plaintiff's age, length of service and position all warrant consideration. The case law provided by both parties demonstrate a range of reasonable notice periods. The plaintiff submits that reasonable notice ought to be 20 months, while the defendant submits that the appropriate notice period is 14 months.

[15] I find the case of *Mahesuram v. Canac Kitchens Ltd*. 2009 ONSC 1369 (CanLII) to be demonstrative and helpful. In *Mahesuram*, the plaintiff was 59 years old as of the date of his termination after being employed as a Supervisor Analyst for 19 years, and earning a salary at

termination of $65,050.00 per annum plus benefits. Justice A. J. O'Marra awarded 18 months' payment in lieu of reasonable notice.

[16] Having reviewed the relevant jurisprudence, and having considered the traditional *Bardal* criteria, I find the appropriate reasonable notice period to be 17 months.

Issue #2: Should the plaintiff's damages be reduced by reason of his alleged failure to mitigate?

[17] On Thursday, August 20, 2015, the plaintiff was asked to meet with the defendant's general manager, Randy Tollefson ("Tollefson"). The plaintiff sat down with Tollefson, who presented the plaintiff with two separate letters, both dated August 20, 2015.

[18] The first letter, marked "Without Prejudice", advised the plaintiff, *inter alia*, as follows:

> "Further to our conversation today, this letter confirms that upon review of our business operations, it has been determined that your services with the Company are no longer required. Your employment with Hercules SLR Inc. is being terminated on Monday, August 24, 2015 without cause."

[19] Accordingly, the plaintiff's employment as Director (Purchasing) would be terminated the following Monday. The first letter further advised that the defendant would provide him eight weeks' written notice in accordance with the requirements of the *Employment Standards Act, 2000*, S.O. 2000, C. 41, and offered the plaintiff an additional payment of 12 weeks' severance in exchange for the plaintiff executing and returning a Full and Final Release no later than Friday, August 28, 2015 (the "Severance Offer").

[20] The plaintiff also received a second letter dated August 20, 2015. In that second letter, the plaintiff was offered the "permanent, full time role of Supervisor Service", with an expected start date of Monday, August 24, 2015. The salary for this new position would be $60,000.00 per annum (i.e. more than 20% less than his former salary). The defendant's offer further provided the plaintiff with a six month income guarantee at his old salary to "assist him in the transition from current role to new role". In other words, the defendant was prepared to maintain the plaintiff's old salary for six months before the new salary would commence (the "New Employment Offer").

[21] Both the Severance Offer and the New Employment Offer were open for acceptance until Monday, August 24, 2015. The plaintiff did not accept either offer by the defendant's deadline.

[22] On Tuesday, August 25, 2015, the plaintiff sent an email to Laura Hubley ("Hubley"), the defendant's Human Resources Generalist. The plaintiff asked for confirmation that the "termination letter is now in effect" and that "as of Monday, August 24 he was no longer employed with the defendant".

[23] In response, Hubley delivered the following email to the plaintiff:

> "This is to confirm our conversation this morning that as a result of a review of business operations and a restructuring initiative, your current role as Procurement Director has been eliminated as of August 24, 2015. On Thursday, August 20, you were presented with 2 options to consider.
>
> The first option in the letter dated Thursday August 20, we have offered you a termination letter which outlined a severance package. This package includes a Full and Final Release Agreement with an expiry date of Friday, August 28, 2015. If you agree to the terms of the severance package and return the signed release agreement, we agree to pay you a severance package equal to 20 weeks of pay in a lump sum on the next regular pay date of September 3, 2015. If we do not receive the signed release agreement, we will pay you a lump sum of 8 weeks in accordance with Ontario Employment Standards.
>
> The second option is to consider a job offer also dated August 20, 2015. If you accept the new job offer, your employment will continue with Hercules SLR Inc. To assist you in transitioning to the new role, we are offering you a 6 month income guarantee ending February 26, 2016.
>
> If you decide not to accept the job offer, your employment with Hercules SLR Inc. ended on Monday. August 24, 2015. We have not had specific direction from you stating which option you prefer. Therefore, unless otherwise directed, we will proceed with termination."

[24] The defendant submits that Hubley's email renewed the expired New Offer of Employment to the plaintiff, and as such the plaintiff was offered a reasonable opportunity to mitigate his damages by returning to work for the defendant. The defendant thus submits that by not accepting the New Offer of Employment, the plaintiff failed to discharge his duty to mitigate his damages. For clarity, I note that the defendant is not challenging any of the plaintiff's other mitigation efforts (or lack thereof) on this motion. The defendant's position is that the plaintiff failed to mitigate his damages solely by reason of his refusal to accept the New Offer of Employment.

[25] As held by the Supreme Court of Canada in *Evans v. Teamsters Local Union No. 31* (2008) S.C.J. No. 20, in some circumstances it may be necessary for a dismissed employee to mitigate his/her damages by returning to work for the same employer. As wrongful dismissal damages are intended to compensate for the lack of reasonable notice, in the absence of the employee facing a potential hostile atmosphere, embarrassment or humiliation, the Court may require the employee to mitigate his/her damages by "taking **temporary** work with the dismissing employer" (my emphasis in **bold**).

[26] The plaintiff relies upon the decision of the Court of Appeal for Ontario in *Farwell v. Citair, Inc.* 2014 ONCA 177 (CanLII), and specifically the following extract:

> "To paraphrase *Evans*, the appellant's mitigation argument presupposes that the employer has offered the employee a chance to mitigate damages by returning to work. To trigger this form of mitigation duty, the appellant was therefore obliged to offer Mr. Farwell the clear opportunity to work out the notice period *after* he refused to accept the position of Purchasing Manager and told the appellant that he was treating the reorganization as constructive and wrongful dismissal."

[27] Both of the offers presented to the plaintiff were set to expire on Monday, August 24, 2015, being the date the plaintiff's position with the defendant was being terminated. The New Offer of Employment is not an offer to work through the notice period (which the defendant originally suggested was 20 weeks). The nature of the New Offer of Employment was not time restricted or limited. It was a new, full time position with the defendant.

[28] The *Farwell* decision obliges the defendant to offer the plaintiff the "clear opportunity to work out the notice period" after the plaintiff refuses to accept the new, lesser position. I do not view Hubley's email as being consistent with *Farwell*. Hubley's email seems to keep both the Severance Offer and the New Offer of Employment on the table even though the plaintiff's employment as Director (Purchasing) was "eliminated" the previous day. The New Offer of Employment does not trigger the duty to mitigate as discussed in *Evans* and particularized in *Farwell*; rather, it was an offer to accept a demotion.

[29] The defendant further submits that even if the New Offer of Employment failed to comply with *Evans* or *Farwell*, it was nevertheless a reasonable offer of employment which the plaintiff ought not to have refused in the circumstances. I disagree. Had the exact same offer been presented to the plaintiff by a third party employer during the notice period, and even assuming the terms of that third party employer's offer were reasonable enough for the plaintiff to accept, as the offer included a lesser salary than the plaintiff should have received from the defendant during the notice period, the plaintiff could still look to the defendant for compensation for that missing amount. In other words, had the plaintiff accepted such an offer from a third party employer, he could still seek compensation from the defendant for the difference between his new salary and his old salary during the notice period.

[30] The defendant's New Offer of Employment invites the plaintiff to become the "permanent, full time Supervisor Service" at a lesser salary going forward with no end date. Unlike traditional offers from dismissing employers that the employee work through the notice period, the New Offer of Employment required the plaintiff to accept the terms of the new position "as is". There is nothing in the second letter which confirms that the potential acceptance of the New Offer of Employment would be without prejudice to the plaintiff's rights arising from his dismissal from his former position.

[31] Had he accepted the New Offer of Employment, the defendant would likely have argued that the plaintiff condoned his right to seek additional compensation. The proposed transitional six month salary guarantee could arguably amount to consideration in exchange for a waiver of

the plaintiff's rights arising from his dismissal. There is no obligation on the plaintiff to effectively risk handing the defendant a Full and Final Release through the back door and under the guise of mitigation efforts.

[32] Accordingly, I do not find that the plaintiff failed to discharge his duty to mitigate. The plaintiff is therefore entitled to payment of reasonable notice in the amount of 17 months of his total compensation set out above.

[33] Finally, as the notice period extends past the date of this decision, the parties have agreed to implement the Trust and Accounting approach (as that term was summarized by Justice Perell in *Paquette v. TeraGo Net Works Inc.,* 2015, ONSC 4189 (CanLII). As such, a trust in favour of the defendant is impressed upon the funds awarded to the plaintiff for the balance of the notice period, and the plaintiff is required to account for any future mitigation income.

Costs

[34] 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 such efforts prove unsuccessful, the plaintiff may serve and file written costs submissions (totaling no more than four pages including a Costs Outline) within ten business days of the release of this decision.

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

Diamond J.

Released: July 20, 2016

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