ONTARIO SUPERIOR COURT OF JUSTICE
Welland Small Claims Court file 3967/18

Robert Pressey, Plaintiff
v.
Kwik-Mix Materials Limited, Defendant

For the Plaintiff: M. Henriques, paralegal
For the Defendant: B. Simpson, lawyer

Before: Marshall Deputy Judge
Heard: November 7, 2018

Released: November 12, 2018

J U D G M E N T

[**1**] In this wrongful dismissal claim, the Defendant ["KMM"] concedes the Plaintiff ["Pressey'] was not terminated for just cause. Two issues remain. First, what is reasonable notice? Second, should there be a deduction for Pressey failing to mitigate his damages? Pressey gave evidence on his own behalf; Suzanne Del Castro ["Del Castro"], on behalf of KMM. For the reasons that follow, Pressey is awarded reasonable notice of 14 weeks with no deduction for failure to mitigate his damages.

1. Robert Pressey

[**2**] Pressey is a 56 year old resident of Welland, Ontario. He has a Grade 10 education. His work history includes construction labourer, truck driving, other labour intensive jobs and retail sales. Pressey had been unemployed for about a year prior to commencing work with KMM in January, 2014 as a dryer technician. When terminated, he was making $20.00 an hour.

[**3**] Pressey was given severance pay of four weeks. There was no letter of reference. He was not provided with any employment outreach-type services. He was provided with a Record of Employment. He refused a further four weeks as it was conditional on signing a release.

[**4**] Pressey began looking for work a week after his termination. He applied to more than twenty-five positions. A partial list, compiled by the John Howard Society ["JHS"] in Welland, is at Exhibit 1/7. Pressey went to about five interviews. He had three offers, all of which were rejected due to out of town work or low starting wages in the area of $11.00 an hour. He very recently started a job with Vancor Supply in St Catharines, Ontario. He is now earning $18.00 an

hour in sales and delivery. That company is involved with sewer and water systems.

[**5**] Throughout the period from his KMM termination to securing the Vancor Supply position Pressey testified he was ready, willing and able to work. JHS staff helped him prepare a resume. Same was not produced at trial. He had been receiving Employment Insurance benefits of $900.00 every two weeks.

[**6**] Pressey had Facebook and LinkedIn accounts. He did not use the latter to assist with his job search.

[**7**] Pressey conceded KMM was not concerned about his then age of 52 years when it hired him. His position did not involve supervision of others. He has an A-Z driver's license, allowing him to drive a tractor trailer rig. He also has training re working at heights. He knows first aid from his former days as a volunteer fireman.

[**8**] JHS acted in effect as Pressey's job search coordinator. It sent out resumes to potential employers, also sending him to sundry interviews. He thought he attended at JHS every other week. The Vancor Supply position was found through a friend.

[**9**] Mr Simpson canvassed most of the applications listed in Exhibit 1/7 re the mitigation issue. Over the first month post-employment there were four or five applications sent out. Pressey testified he did not know he had to 'hit a certain number'. For the period of April 16 to May 15, 2018, he stated he was looking for work even if no applications were sent out. Having household duties and responsibilities for children, he suggested 'you do the best you can'. He looked for work every day, using his phone and a computer to check for jobs not only outside of the area but also across Canada. Pressey estimated he spent an hour a day on line though maybe not every day. Most of his own attempt to find another job was on line.

[**10**] The five offers of employment were discussed. The position at Snider was truck driving and yard work. Part of the job would have involved climbing atop the tractor [of a tractor trailer unit], something he did not want to do. Another job offer at Pannels involved driving a truck to/from Paris, Ontario. After a discussion with his wife, that position was declined as he did not want to drive an over-sized load, feeling it was too much responsibility. Positions that were too physical were also declined. Another possibility with Jeffery's Greenhouse would have required him to use his own motor vehicle with an unspecified mileage rate. At 56 years old, he felt he was too old for any actual construction job. Pressey conceded he might not have been qualified for some of the job positions JHS sent out applications on his behalf. Some positions to which he applied had been filled in the interim. He was not sent to any job fairs by JHS nor did he go to any on his own initiative.

[**11**] Pressey testified the JHS list was incomplete. There was no supplementary list provided at

trial. The last application listed in the JHS 'Job Search Record' is dated July 18, 2018, roughly seventeen weeks after his termination.

[**12**] In the later summer, Pressey tried to get his Grade 12 equivalent degree. While the details were vague, apparently the necessary requirements had changed, foreclosing that effort. Some job positions required Grade 12 math which he did not have.

[**13**] Pressey confirmed he had a mortgage to pay off so it was beneficial to get a job. He also noted he had 'done the best I could'.

2. Suzanne Del Castro

[**14**] Del Castro dealt with human resource issues at KMM. Its office is in Port Colborne, Ontario. The company manufactures ready made concrete products.

[**15**] Pressey was terminated on March 15, 2018. Del Castro was not present but she had prepared the termination letter. The offer of eight weeks' notice in return for a release was based on Pressey's experience, age and skill set. It is company policy not to provide a letter of reference. KMM was not contacted by any prospective employers of Pressey.

[**16**] As I understood her evidence, another employee at KMM took over Pressey's job as a dryer technician so that employee's position had to be filled. KMM went through several recruiting outlets. She acknowledged it took a bit of time to get back up to normal staffing numbers.

[**17**] Del Castro was not aware Pressey did not have a Grade 12 education level. She noted for the position he had held at KMM experience was more important than education level.

[**18**] Del Castro conceded the Regional Municipality of Niagara had one of the highest unemployment rates in the province in 2018. She accepted most job hunting is done on line these days but emphasized the importance of calling in, attending and persistence. In another instance of give and take, Del Castro conceded a terminated employee may not have to take the first low paying job on offer but it was relevant consideration for a prospective employer that a candidate had a job while looking for something better. Further, if a candidate had additional skills, that person may get promoted from general labourer to supervisor.

3. Submissions

On behalf of Pressey

[**19**] He was 56 years old when terminated. He worked for KMM for four years. He had a Grade 10 education and no additional credentials. As his work history was most labour intensive and retail, he had some 'hurdles' with a job search. That JHS sent out most of the job applications on three dates did not mean that was the extent of his job search.

[**20**] He sought other jobs, some thirty in all. He looked at other positions on line. He had sought help from two job agencies. Friends were on the lookout for him as well. Mitigation is not set against a standard of perfection but one of reasonableness. KMM could have done more by providing a letter of reference or directing Pressey to job fairs. It was not reasonable for Pressey to have to accept a position paying him around $550.00 a week when he had been earning $800.00 a week, an appreciably higher income. It took Pressey seven months to find alternate employment.

[**21**] The range of reasonable notice was two to six months. There should be no discount for failure to mitigate.

On behalf of KMM

[**22**] Determining reasonable notice is more an art than a science. The JHS job applications listed in Exhibit 1/7 end in July, 2018. Pressey should not accordingly be allowed more than four months in the circumstances. There is a good argument it should be lower due to Pressey's skill set, including as a truck driver, past jobs in manufacturing and retail sectors, volunteer firefighter experience and the mobility that went with having a motor vehicle. He was terminated at a better time of the year. If he had three offers, age was not that important a consideration.

[**23**] A job at the provincial minimum wage of $14.00 an hour was 70% of his prior income. His job search was not consistent.

[**24**] The range of reasonable notice was two to four months with a discount of 50% for failure to mitigate.

4. Reasonable notice

[**25**] *Bardal v The Globe & Mail Ltd.*, (1960) 24 D.L.R. (2d) 140 (Ont. H.C.) is the starting point [at p 145]:

"There can be no catalogue laid down as to what is reasonable notice in particular classes of cases. The reasonableness of the notice must be decided with reference to each particular case, having regard to the character of the employment, the length of service of the servant, the age of the servant and the availability of similar employment, having regard to the experience, training and qualifications of the servant."

The 'rule of thumb' of one month per year of service is not warranted in principle, putting too much stress on the length of service factor: *Minott v O'Shanter Development Company Ltd.*, (1999) 42 O.R. (3d) 321.

[**26**] Pressey was 56 years old when terminated. As a dryer technician, he had worked in a labourer position for four years. Same had no supervisory dimension.

[**27**] His experience was in labour intensive jobs and retail sales. He had a Grade 10 education and was employed in a variety of positions for most of his adult life. His qualifications included a skill set beyond the scope of his last position. He also had a family and a mortgage.

[**28**] Both Ms Henriques and Mr Simpson provided cases on reasonable notice. It is refreshing to see some overlap in the number of months, namely, the representatives did not each take extreme positions. As each case is unique, the case law is but a guide. As reasonable notice is a very fluid concept, I have not given much weight to cases from last century or those from outside Ontario. I would agree with Mr Simpson the 2016 decision of Stinson J in *Singh v Qualified Metal Fabricators Ltd.*, [2016] O.J. No. 4219 (S.C.J.) is the closest similar set of facts. It is referenced it both briefs.

[**29**] In *Singh*, the plaintiff worked for a bit over four years as an assembler in a manufacturing company in Etobicoke, Ontario. The job appears to have been a labour intensive position. It had no supervisory aspect. Singh was a year older at termination than Pressey. Stinson J had found manufacturing had not been 'terribly robust' recently [para 25]. Reasonable notice was assessed at four months.

[**30**] There was not much evidence on the strength of the local economy as it impacted Pressey's job search. Del Castro acknowledged it took a bit more time to fill out KMM's staffing needs and the local unemployment rate was higher than in most of the province. Ms Henriques in submissions began to refer to three tabs in the Statement of Fact and Law of the Plaintiff dealing with local economic conditions. I advised her same were not part of the evidence so I would not consider the import of the tabs relative the issue of reasonable notice. I also note I have ignored paragraphs 45 and 46 of the document for similar reasons. I would nevertheless be remiss if I did not acknowledge the quality of the document in general, even if most of it dealt with an issue conceded by KMM shortly after the trial began.

[**31**] While Pressey may only have had a Grade 10 education, he has been rather successful finding work in a variety of fields. The extent of his skill set seemed to overcome concerns as to his age as he did several offers of employment. He was content to lead a quiet, uneventful life and there is nothing wrong with that.

[**32**] Having reviewed the *Bardal* factors, the respective briefs and in particular *Singh*, I would award Pressey reasonable notice based on 14 weeks.

5. The issue of mitigation

[**33**] The onus is on the defendant employer: *Red Deer College v Michaels*, [1976] 2 S.C.R. 324 at 331. As noted by Chief Justice Laskin, that onus is not 'light': p 332.

[**34**] In *Benjamin v Cascades Canada ULC*, 2017 ONSC 2583 (CanLII), Glustein J considered what an employer must demonstrate for a successful mitigation argument:

"[96] Laskin C.J. then considered the requirements on an employer to meet the onus. He held that the employer needs to establish that the employee either found employment or (*Michaels*, at para. 11):

(i) the employee did not take reasonable steps to seek comparable employment "by the exercise of proper industry in the search", and

(ii) if the employee had done so, the employee "could have procured" such comparable employment.

Laskin C.J. adopted the following passage from *Williston on Contracts, supra*, at p. 312 (*Michaels*, at para. 11):

It seems to be the generally accepted rule that **the burden of proof is upon the defendant to show that** the plaintiff either found, or, **by the exercise of proper industry in the search, could have procured other employment of an approximately similar kind reasonably adapted to his abilities**, and that in absence of such proof the plaintiff is entitled to recover the salary fixed by the contract. [Emphasis added]

[97] Laskin C.J. held that if the employer establishes the above elements, the "ordinary measure of damages" is determined by deducting from the notice period the amount that "the employee earned, or what he might reasonably have earned in other employment of like nature, from what he would have received had there been no breach" (*Michaels*, at para. 11)."

Like reasonable notice, mitigation is very much a facts-driven exercise. I will first review some of the case law provided by Ms Henriques and Mr Simpson.

[**35**] *Singh* has been alluded to earlier in these reasons. Stinson J [at para 29] did not find Singh's evidence thereon 'entirely consistent' and of 'questionable reliability'. In light of the difficulty of finding work in the manufacturing sector, however, no deduction was made. It is fair to conclude the totality of Pressey's evidence was at least beyond any 'questionable reliability' standard even if it had some holes ie incomplete.

[**36**] In *Somir v Kohler Canada Co.*, 2006 CanLII 42369 (ONSC), no deduction was made for a lack of mitigation by Siegel J for the following reasons:

"[59] First, there is ample evidence that the plaintiff actively sought comparable employment with other kitchen cabinet companies without success. There is no evidence that this effort diminished after February 2006 even if the paper evidence is reduced. Nor is there any evidence that the evening courses taken by the plaintiff prevented him from conducting his job search during the day.

[60] Second, there is no evidence that any comparable positions were available to the plaintiff in the kitchen cabinet industry and that the manner of the plaintiff's job search precluded identification of these opportunities. The only suggestion of the defendant was that the plaintiff should have consulted other foremen who had been terminated in prior years. This is, however, highly speculative and hardly constitutes evidence that comparable positions were available to the plaintiff.

[61] Third, the plaintiff also registered with two employment agencies during 2005, without success in locating a suitable position.

[62] Lastly, there was no requirement on the plaintiff to accept the positions offered by two kitchen cabinet companies. Both positions were at substantially lower wage rates, neither was a supervisory position similar to that of foreman at Canac, and each was temporary. A terminated employee is not required to accept lower paying alternative employment with doubtful prospects: *Allen* v. *Bosley Real Estate Ltd.*, [2003] O.J. No. 3971 (S.C.J.) at para. 17."

For the moment I only comment about Pressey's effort to get his Grade 12 equivalency post-termination and its possible impact on the mitigation issue. The evidence on the matter was not well developed by the Plaintiff nor pressed by the Defendant. As it in any event took place toward the tail end of Pressy's period of unemployment, I do not find it relevant to any mitigation argument advanced by KMM.

[37] In *Benjamin*, Glustein J described post-employment job search assistance provided by the former employer [at para 36]. Benjamin decided to retrain and not accept other possible positions at his former employer [paras 70-77], factors far removed from Pressey's situation. What an employer has to establish for a successful mitigation argument was also considered:

"[112]…In *Yiu*, D. Brown J. follows the analysis of Echlin J. in *Link v. Venture Steel Inc.*, 2008 CanLII 61389 (QC SAT), [2008] OJ 4849 (SCJ) ("*Link*"), in which Echlin J. held (*Link*, at para. 49):

Nevertheless, it remains incumbent upon Venture to lead evidence that Link failed to pursue alternate employment opportunities that were of a comparable nature **and that such opportunities were not only available, but that if pursued, Link could have minimized the damages sustained**. [Emphasis added][9]

[113] On appeal (cited as *Link v. Venture Steel Inc.*, 2010 ONCA 144 (CanLII)), the court upheld the decision of Echlin J. on the mitigation issue (and allowed the appeal in part on another issue). The court held that the mitigation defence of the employer could not succeed because the employer had not led any evidence about the availability of comparable employment, a factor consistent with the "could have" onus under *Michaels*. O'Connor A.C.J.O. held (*Link* (CA), at para. 73):

Because Venture did not lead any evidence about the availability of suitable employment, the trial judge concluded that Venture had not met the second prong of the test set out above."

The basis for the successful mitigation argument in *Benjamin* [retraining and not considering other jobs at his employer] make the case readily distinguishable from Pressey's circumstances. I do not mean to imply an employer has an obligation to assist a former employer but that it might ultimately be financially beneficial for an employer to do so is self-evident.

[**38**] The decision of Reilly J in *Plotogea v Heartland Appliances Inc.*, 2007 CanLII 26615 (ON SC) is a high water mark for defence counsel in wrongful dismissal cases. A nine month determination of reasonable notice was cut to two months [para 76], the effort to find other job found to be 'woefully inadequate' [para 63]. The decision offers a few further insights re the mitigation issue. A terminated employee need only search locally for alternate employment. The search for work can be limited to his or her field or a related area [para 62]. These propositions would be applicable to Pressey. Just dropping off resumes [para 64], one found to be 'amateurish and non-revealing' at that [para 66], did not show initiative.

[**39**] The typical situation where mitigation arises is where a terminated employee advances a wrongful dismissal claim and does not find any available work during the course of the notice period. Pressey did, however, have job offers that he turned down, another factor to consider as to whether KMM has met the burden of proof that Pressey failed to mitigate his damages. Under *Red Deer* College, KMM could have advanced a successful mitigation argument if it had proved either a job Pressey should have taken or the general lack of effort of his job search. I will now review factors particular to this claim.

[**40**] Pressey's resume was not in evidence. It should have been. What is at Exhibit 1/7 is an incomplete list of job applications. It should have been complete. Such deficiencies raise the spectre of information not helpful to Pressey. That paperwork may not be as complete as it should be is not necessarily held against a plaintiff but it could be, a risk any plaintiff could readily cure. Pressey testified he got two job offers on his resume alone, suggesting at least a decent one but it still should have been before the Court in light of the mitigation argument advanced. The use of JHS as an outside source with its own resources was a positive indication. KMM did not offer any support to Pressey as far as other options, a consideration discussed

above. I put little emphasis on Pressey's assertion he looked across Canada for jobs when a position involving daily trips to/from Paris, Ontario as a truck driver was turned down, that distance being just 139 kilometers or 86 miles. While Pressey testified he incorporated his Facebook account into his job search, he ignored his LinkedIn account. He did not attend any job fairs. He did seek out jobs via the computer and his phone, using technology. It is reasonable to note what is at our fingertips these days on line has minimized the need to 'pound the pavement' all day with a job hunt. It is ironic all the resources at JHS proved fruitless, a tip from a friend leading to his present job.

[**41**] An unusual, unexplained factor is Pressey's evidence that one or more positions involved a pay level of $11.00 an hour, amounting to $440.00/week. The minimum wage in the province of Ontario is $14.00 an hour, amounting to $560.00/week for a forty hour week. Pressey's EI paid him $450.00/week. Suffice to say there would be little financial incentive for a job offer at $11.00 an hour although Del Castro did point out employers would look favourably on an applicant seeking a job who already had a job. It goes without saying working for comparable monies rather than collecting same via EI would be viewed positively by an employer. What the courts have not clarified is how much of a discount should a terminated employee have to accept or fear a successful mitigation argument? That is not an issue I need address.

[**42**] What takes Pressey's case out of the run of the mill mitigation cases is the fact he had several job offers.

[**43**] Of the job offers, Pressey's evidence in chief was brief, namely, most were out of town and paid just $11.00 an hour or so. That with Alfieri Flooring in retail was contingent on a plant opening, the key event never happening. Same cannot be held against Pressey. A position to drive a tractor trailer unit at Snider Trucking was turned down without clarification of the prospective wage rate as Pressey did not want to climb atop vehicles. The 'why' he did not want to do so was not explored. A refusal based on medical issues might be looked at differently than possible laziness. The Snider Trucking position was not on the JHS job application list. The truck driving position with Pannels [to/from Paris, Ontario] was on said list. The reasons offered for not taking the position was Pressey did not want to drive over-sized loads and it was a big responsibility. I took his comment to mean he did not want to drive a tractor trailer unit. The position at U-Cart Concrete as a general labourer was too physical, coupled with a low wage rate. I accept these positions for varying reasons may not have been 'suitable' [per *Link*, para 37 above] on the basis the burden of proof to conclude otherwise was on KMM.

[**44**] The skill set Pressey put down in his 2018 resume was evidently overstated. He had an A-Z driver's license but did not want to driver a big rig. He had some work history in labourer positions but the scope of that work seemingly looked less appealing to him at 56 years of age. There was no evidence of, for instance, a bad back. There was an evident disconnect between

the resume drafted for Pressey by JHS—which he would have agreed to--and his turning down several positions scant months later, positions of greater financial benefit to him and his family than his EI monies. Why apply to such places in the first place?

[**45**] It was a close call but I find KMM has not satisfied the burden on a balance of probabilities that Pressey failed to mitigate his damages.

[**46**] While I would not hold there cannot be a successful mitigation argument when the damages awarded for wrongful dismissal are modest, claims at the lower end of the spectrum of awards will bear less scrutiny. In *Singh*, Stinson J rather summarily dismissed the defence argument in a paragraph [at para 29]. The four reasons outlined in *Somir* to dismiss the mitigation claim are outlined above [para 36]. Each case is of course rooted in its own facts. Pressey's approach to finding another job may not have been the 'fine job' submitted by Ms Henriques but he did enough in using the services of JHS, sending out sufficient applications and utilizing other options on his own. His turning down of several offers might be viewed as questionable in some instances and was frankly only borderline reasonable on the basis of the onus being on KMM.

[**47**] I would cite one additional decision, that of D.M. Brown J in *Zaman v Canac Kitchens Ltd. (Kohler Ltd.)*, 2009 CanLII 9413 (ON SC), with respect to the burden:

"[13] The onus an employer bears to demonstrate that the employee failed to mitigate is "by no means a light one…where a party already in breach of contract demands positive action from one who is often innocent of blame." Accordingly, an employer must establish that the employee failed to attempt to take reasonable steps and that had his job search been active, he would have been expected to have secured not just a position, but a comparable position reasonably adapted to his abilities : *Link v. Venture Steel Inc.*, 2008 CanLII 63189 (ON SC), 2008 CanLII 63189 (ON S.C.), paras. 45 and 46. An employer must show that the plaintiff's conduct was unreasonable, not in one respect, but in all respects: *Furuheim v. Bechtel Canada Ltd*. (1990), 30 C.C.E.L. 146 (Ont. C.A.), para. 3."

KMM certainly had some bows in its quiver on both branches of the *Red Deer College* analysis in advancing the mitigation issue. It hit the outer portions of the target but needed to hit the bullseye.

[**48**] Had I found a failure to mitigate, there was the final issue of the degree the reasonable notice award would be reduced. Some courts have reduced by months or weeks while others have used a percentage discount. A complicating factor is Pressey was offered several jobs. Had I found he should have taken one [or more] of them, it would have been reasonable to base any deduction on the timing of the offers plus the wage differential if the new job had a lower hourly rate. Two at least related to mid-June, 2018 [Pannels and U-Cart Concrete]. Particulars of

the potential employment opportunities were not fully developed. In all the circumstances, I would have found it reasonable to consider a discount of four weeks for failure to mitigate had it been established.

Summary

[**49**] Pressey is awarded damages for reasonable notice of 14 weeks. At para 52 of the Statement of Fact and Law of the Plaintiff, a six month salary figure of $18,506.54 is listed. Same works out to exactly $711.79 a week. For 14 weeks, reasonable notice would be $9,965.06 with no deduction for failure to mitigate. Pressey has been paid $3,360.00 already so the net amount awarded to him is $6,605.06.

[**50**] I urge the representatives to try to resolve costs directly, thereby saving the parties further expenses. Costs in Small Claims Court are rather limited. I offer the following observations as guidance. As the successful party, costs should be awarded to Pressey. It is fair to observe Pressey got less than half of what was sought and KMM lost the most contested issue. The trial lasted about three-quarters of a judicial day. The representation fee at trial would be in the $750.00 plus HST range. I would pick a rough mid-point of May 15, 2018 for pre-judgment interest at 1%. Courts disbursements [likely $240.00] would be awarded to Pressey. Post-judgment interest would commence on December 1, 2018 at 3%, allowing KMM some modest time to pay the judgment.

[**51**] If costs cannot be resolved, I propose the following timetable:

a) submissions for Pressey on or before November 20th next;

b) submissions for KMM on or before November 27th next; and

c) any reply submissions for Pressey on or before December 2nd next.

Items a) and b) may be three separate pages in length; item c), one page. Bullet point format is fine. Any relevant Offer to Settle should be attached re its possible impact on the R. 19.04 representation fee. The representatives can treat the suggested dispositions on costs outlined in the prior paragraph as starting points. Bills of costs are not required. Everything should be emailed to me with a hard copy sent to the Clerk. The representatives can tinker with the first two dates to suit any short term scheduling issues but I would like everything wrapped up by December 2nd next. Should costs be resolved, I would ask Mr Simpson to email me in that regard, copying Ms Henriques, so I can advise the Clerk.

[**52**] I commend Ms Henriques and Mr Simpson for the clear and concise manner in which their respective cases were presented. The trial was shortened [whether a post-employment company manual applied], productions went in on consent, case law was provided on the legal

issues and there were no surprise developments.

November 12, 2018

”Marshall Deputy Judge”