

Court File No. SC-18-000119-0000
(Guelph)

**ONTARIO
SUPERIOR COURT OF JUSTICE
(SMALL CLAIMS COURT)**

BETWEEN:

Gary Muise)	Melanie Henriques
)	Paralegal for the Plaintiff
Plaintiff)	
-and		
Mark Wilson's Better)	
Used Cars Limited)	
Defendant)	Robert Dowhan
)	Counsel for the Defendant

Heard: April 30, 2019

Reasons for Judgment

1. This matter proceeded by way of a trial, decision reserved. For the following reasons, judgment is granted against the defendant for \$19,448.00 plus interest.

Nature of the Dispute

2. The plaintiff is an individual who was employed by the defendant from 2008 to 2016. The plaintiff brings this claim seeking damages in the amount of \$25,000 plus interest and costs alleging wrongful dismissal of his employment.

Plaintiff's Evidence

3. The plaintiff was the sole witness on his behalf. The plaintiff is 67 years of age, lives in Guelph and outlined his background including leaving school early after Grade 8 then returning to complete grade 12, serving 10 years in the military and holding a number of jobs prior to joining the defendant including driving a cab.

4. The plaintiff started working with the defendant in March 2008 working a minimum of 40 hours per week. The plaintiff was not advised of any performance issues during his tenure. While the plaintiff undertook a number of roles during his tenure, in November 2016 he was working as a driver earning \$16 per hour plus group benefits plan with no supervisory responsibilities. The plaintiff testified that he had previously been in a parts role but was moved to the driver role several months prior to November 2016. The plaintiff testified that 48 hours prior to this termination he asked Samantha Robinson of human resources to speak to management regarding his request for a raise which she agreed to do.

5. The plaintiff was called into a meeting on November 17, 2016. Joseph Barber led him to a meeting room where the plaintiff testified he met with Mr. Barber and Samantha Robinson and Karl Schultz and was presented with a letter misdated November 11, 2016 Exhibit 1 as filed. The plaintiff asked for clarification on the use of the term "without cause" in the letter presented to him and was advised by Ms. Robinson that this meant that they do not need a reason. The meeting was described as being up to 10 minutes in length.

6. The plaintiff denied advising the defendant he wanted to retire, indicating that he would like to retire but was not in a financial position to retire. The plaintiff denied that he was hoping to be terminated to collect severance and maintained that he was happy working for the defendant. The plaintiff testified that he had a gut feeling he was going to be fired.

7. The plaintiff confirmed receiving eight weeks pay in lieu of notice and that he had understood that this was all he was entitled to. The plaintiff outlined his efforts to find new employment which was comprised of attending locations in person to submit his resume, online searches and sending emails. The plaintiff did not produce copies of the emails, covers letters or applications submitted. The plaintiff found new employment September 4, 2017 earning \$12.50 without group benefits. The plaintiff testified that he felt his age was a barrier to re-employment and he was told during his job search on one occasion that he should not be seeking work at his age.

8. On cross examination the plaintiff denied the suggestion that he was moved through various positions due to his dissatisfaction with each role. On cross examination the plaintiff denied that he advised Joseph Barber or Samantha Robinson that he wished to be "let go" to receive a severance. The plaintiff further denied speaking to Mr. Barber during the November 17th meeting about receiving what he wanted.

Evidence of the defendant:**Joseph Barber**

9. Joseph Barber is currently the internal operations manager of the defendant. In November 2016 he held the role of internal service manager. Mr. Barber testified that the plaintiff hired him, and that as of November 2016 Mr. Barber was the direct supervisor of the plaintiff.

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10. Joseph Barber testified that the plaintiff told him and he also overheard from other employees that the plaintiff was seeking a severance payment as did not want to lose his severance. Mr. Barber brought the issue to the attention of Samantha Robinson in Human Resources advising that the plaintiff wanted his severance pay for his 8 years of service. Ms. Robinson addressed the matter with owner and general manager of the defendant company and advised Mr. Barber that she had instructions that they were "letting him go" and proceeded to prepare the paperwork.

11. Mr. Barber testified that he brought the plaintiff into the meeting advising him and as they walked together he advised the plaintiff that he would get his request of a severance. Mr. Barber confirmed his attendance at the November 17, 2016 meeting with Samantha Robinson. Mr. Barber also testified that he spoke to the plaintiff at the termination meeting advising the plaintiff that he was receiving what he wanted and asking if the plaintiff was happy which was responded to affirmatively by the plaintiff.

12. On cross examination Mr. Barber indicated that the plaintiff was disruptive in the workplace a bit at the end of his employment only when speaking about not giving up his severance and confirmed there were no disciplinary or performance issues with the plaintiff. Mr. Barber denied that the plaintiff inquired about what the term "without cause" meant at the November 17th meeting. On cross examination Mr. Barber was asked why the defendant did not put the request from the plaintiff in writing he testified that it was a strange request, that they did not know how to handle it and used the standard termination letter.

Samantha Robinson

13. Samantha Robinson is an employee of the defendant having commenced employment in June 2015. In November 2016 she was assistant to the then Controller and Human Resources Manager Karl Schultz whom she identified as having health problems in the fall of 2016 and missing work, ultimately passing away in June 2017. Mr. Schultz was not involved in the events of November 2016 due to his ill health. During his absence Ms. Robinson was Acting Human Resources Manager.

14. Ms. Robinson did not speak directly to the plaintiff regarding his plans. On November 17, 2016 Ms. Robinson was advised by Mr. Barber of there being gossip of the plaintiff saying he desired to be fired and obtain a severance and that he was unhappy with his job. Ms. Robinson confirmed being consulted by Mr. Barber and addressing the calculation of termination pay pursuant to the *Employment Standards Act* with the owner and the general manager of the defendant company who authorized her to make the payment of 8 weeks termination pay plus vacation pay. Ms. Robinson then prepared the letter and presented same to the plaintiff in a meeting with Mr. Barber also present. Ms. Robinson testified that Mr. Barber said to the plaintiff that he had received what he wanted and he would receive severance. Ms. Robinson described the plaintiff as happy and excited during the meeting saying he would spend time with his daughter and grandchildren. Ms. Robinson submitted the Record of Employment indicating Code "M" dismissal. No release of liability document was presented to the plaintiff.

15. On cross examination Ms. Robinson confirmed that the plaintiff asked her during their meeting what was meant by reference to "without cause" termination in the letter presented to him and she explained how the 8 weeks of termination pay was calculated. Ms. Robinson confirmed that termination with cause was never discussed by the defendant. On cross examination Ms. Robinson was asked about putting the fact situation alleged by the defendant in writing and addressing a release of the employer from future liability. Ms. Robinson candidly agreed that this could have occurred but did not. In relation to using the letter template Ms. Robinson candidly stated that she did not know why an alternate letter addressing the events

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leading up to the meeting was not discussed nor addressed. On cross examination Ms. Robinson confirmed that the defendant viewed that they were terminating the employment of the plaintiff even though he wanted to leave.

Mark McMullen

16. Mark McMullen has worked for the defendant for 15 years, holds the position of general manager and has known the plaintiff throughout his tenure. Mr. McMullen confirmed that the employer has over 100 employees. Mr. McMullen testified that there were ongoing issues with the plaintiff which necessitated him to be moved from position to position. Mr. McMullen was advised by Ms. Robinson of the request for severance as described by Ms. Robinson in her testimony.

17. Mr. McMullen described a pattern of the plaintiff who he moved repeatedly through lateral moves and in October 2016 he was moved to shuttle bus driver position with some limited parts delivery which had a \$2 lower rate than his prior position. In November 2016 Mr. McMullen was advised by Mr. Barber and Ms. Robinson that the plaintiff was unhappy. Mr. McMullen testified that he had a concern that the plaintiff was disgruntled and interacting with customers in the shuttle and could express his disgruntlement to customers. Mr. McMullen described that the plaintiff wanted to construct his own dismissal and they were prepared to provide him with minimum *Employment Standards Act* termination pay calculated at approximately \$5,500. Mr. McMullen testified that the plaintiff was seeking a return to his prior pay rate and the driver position did not warrant the additional \$2 per hour. Mr. McMullen did not speak to the plaintiff directly about his dismissal, departure or the concern about the plaintiff being disgruntled.

Position of the Parties:

18. Ms. Henriques argued that her client was terminated and is entitled to reasonable notice which she submits is 10 to 12 months for a 65 year old 8 year employee. The plaintiff submits there is no evidence of any agreement by the plaintiff and that he did not have an understanding or appreciation of the situation nor an understanding of entitlements beyond 8 weeks termination notice. The plaintiff submits that the onus is on the employer to prove resignation and they have not satisfied their onus. The plaintiff characterized the situation as a "broken telephone" and highlighted that neither human resources nor the general manager met with the plaintiff to address his alleged request and the letter of November 17, 2016 of the employer does not align with their position.

19. Counsel for the defendant argued that there is a settlement agreement between the parties to be bound by its terms namely the cessation of the employment of the plaintiff on his request and consent, payment of the 8 weeks and no further action. Alternatively the defendant submits that the mitigation efforts of the plaintiff are very poor and very little evidence was provided regarding same and the notice period sought by the plaintiff is excessive in any event.

Analysis:

20. The defendant submits that there was a consensual agreement. I disagree. The letter misdated November 11, 2016 but which all agree was presented to the plaintiff on November 17, 2016 was the opportunity for the defendant to confirm a consensual arrangement as they allege was the case. The letter does not document a settlement agreement of any kind between the parties but is a standard termination letter which is supported by the Record of Employment filed citing dismissal. Despite having an opportunity to do so the defendant failed to meet with the plaintiff to address his alleged statements about a severance to clarify his position

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and reach and document any such agreement regarding a mutual end to the relationship. Evidence was led that the plaintiff was a problematic employee and there were concerns regarding his conduct but there is no discipline or performance record presented and no evidence that these alleged concerns were addressed with the plaintiff although he was moved to a lesser paying position. The level of communication with the plaintiff throughout appears minimal.

21. The letter presented to him states, inter alia:

"We regret to inform you that your services as an employee of [the defendant] are being terminated without cause effective today....

Based on your service with [the defendant] you are entitled to eight (8) weeks of pay in lieu of notice."

22. The plaintiff testified and Ms. Robinson confirmed that he inquired about the meaning of "without cause" and I find clearly that the plaintiff was not aware of his legal rights, did not sign a release.

23. The onus is on the defendant to prove a resignation occurred and they have clearly on the evidence before me not met this onus. I accept the evidence of the plaintiff that he was seeking a return to his prior wage rate and I accept there was an element of him being unhappy with the position and rate change. Even if the plaintiff made comments as alleged by the defendant about wanting a severance package with or without reference to retirement, this would not on the facts before me amount to conduct constituting a clear statement of resignation upon which an employer could rely.

24. I agree with the submission of the plaintiff that this was a case of broken telephone and management took the opportunity to end the relationship without human resource or upper management speaking to the plaintiff and document their position on the arrangement. I appreciate that the situation was compounded by the absence of the Controller/H.R. Manager due to serious illness.

25. I therefore find that the plaintiff was wrongfully dismissed on November 17, 2016.

26. The Bardal factors are: 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.

27. The plaintiff was an employee of approximately 8.5 years tenure and was age 65 in November 2016. While the defendant raised the lack of mitigation efforts of the plaintiff, given his personal background and the context I find his efforts while modest to be satisfactory. There was some reference to the plaintiff alleged working immediately after his termination but I received no evidence of any income earned until September 2017.

28. The plaintiff held a non-skilled non-management position. I find that in addition to the 8 weeks paid the plaintiff is entitled to an additional notice period of 6 months for a total notice period of 8 months. There is no disagreement that the plaintiff received 8 weeks' termination pay, vacation pay totalling \$5656.69 and benefit continuation for the 8 week period.

29. I calculate the following:

a. 6 month's pay in lieu of notice \$17,680 (\$16 hour x 42.5 hours);

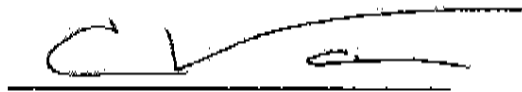
b. 10% of the above in lieu of benefits continuation \$1,768.

Judgment:

30. Judgment is granted to the plaintiff against the defendant in the amount of \$19,448.00, prejudgement interest from November 17, 2016 to date and post-judgement interest both at the *Courts of Justice Act* rate.

31. If the parties are unable to agree on costs they may provide submissions in writing within 20 days. Such submissions should be served and filed with the Guelph Small Claims Court office.

Dated July 25, 2019



Carol VandenHoek

Deputy Judge