COURT FILE NO.: 08-CV-361809
DATE: 2009/01/12

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
Sivathason Mahesuram	)	
	)	
Plaintiff	)	*Bram Lecker*, for the Plaintiff
	)	
	)	
- and -	)	
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	)	
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	)	
Canac Kitchens Ltd., a Division of Kohler Ltd., and Kohler Canada Co.	)	*Lyndsay Wasser*, for the Defendant
	)	
	)	
Defendant	)	
	)	
	)	
	)	**HEARD:** January 6, 2009

O'MARRA J.:

[1] This motion was brought by the plaintiff for summary judgment against the defendant, Canac Kitchens Ltd., a Division of Kohler Ltd., and Kohler Canada Co. (correctly named Canac Kitchens, a Division of Kohler Canada Co. for wrongful dismissal. The parties have agreed that all issues in this matter can be decided without cross-examination or trial and that this is a proper case for summary judgment under Rule 76 of the Rules of Civil Procedure.

Overview

[2] The plaintiff, age 59, had been employed by the defendant company for 19 years and 3 months as an accounting analyst, until he was dismissed without cause on August 29, 2008. As of the date of the hearing of this matter, approximately 4 months later, he remains unemployed.

[3] The defendant is a manufacturer, distributor and retailer of kitchen cabinetry. The plaintiff's employment was terminated as a result of a downturn in the defendant's business

which resulted in the cessation of the defendant's manufacturing operations in Canada on May 27, 2008.

[4] The plaintiff had been offered a severance package by the defendant, which he did not accept. In addition to wages received during the 12 weeks working notice period from May 27 until August 29, 2008 he received the equivalent of 19 weeks salary in accordance with the statutory severance entitlements under the Ontario Employment Standards Act, 2000, S.O. 2000 c.41.

Issues

[5] The issues to be decided in this matter are the following:

1. What is the period of reasonable notice applicable in the circumstances of this case?

2. What is the quantum of damages, if any, including the amount allowable for the value of benefits?

3. Has the plaintiff made reasonable efforts to mitigate his damages?

Facts

[6] Sivathason Mahesuran, the plaintiff, commenced employment with the defendant company on or about December 1, 1989 in the position of an accounting clerk. In March 2004, he was promoted from the position of accounting analyst I to accounting analyst II, which is also referred to in his job description as a supervisor analyst. He reported to the Manager, Planning and Analysis for Canac, who in turn reported to the Director of Finance. His accounting responsibilities required him to be able to function at the level of a certified general accountant.

[7] When the plaintiff's employment was terminated he was receiving an annual salary of $65,050. paid in bi-weekly installments. Further, he participated in the defendant's group insured benefit plan, which included long and short term disability, vision care, life insurance and accidental death and dismemberment insurance. The monthly cost of these benefits to the defendant for the plaintiff was $72.47. The plaintiff was also eligible for employee health and dental benefits which were reimbursed by the defendant company on a usage basis. All of his benefits were continued after his dismissal until December 24, 2008.

[8] As an accounting supervisor with the defendant company the plaintiff's responsibilities included the following:

1. Supervising 3 to 5 accounting staff;

2. Responsible for 16 corporate showroom monthly financial statements;

3. Reviewing monthly bank reconciliations and balance sheets, accounts for completeness and accuracy;

4. Approval for dealer commissions and other payments;

5. Statistics and external reporting;

6. Variance analysis;

7. Problem solving in accounting and process;

8. Financial reporting;

9. Co-ordination of month and year-end procedures;

10. Participate in year-end audit schedules preparations;

11. Training accounting staff, accounting manager, project leader and accounting analysts;

12. Meeting with upper management of the parent company to review and finalize consolidated corporate monthly financial statements.

[9] On May 27, 2008 the plaintiff received a letter at work from the defendant company announcing that it was ceasing manufacturing operations in Canada and that his employment would be terminated effective August 29, 2008 on a without cause basis. The letter was to be considered the commencement of "working notice". During the period that followed he was to be engaged winding down operations. During the week prior to August 29, 2008 the company would schedule a time to meet with the plaintiff to discuss his severance arrangements.

[10] On August 27, 2008 the defendant presented a letter offering the plaintiff a lump sum severance payment in the amount of $29,402.97, representing 24 weeks wages, plus the continuation of benefits, excluding short and long term disability, for 12 weeks. The plaintiff declined the offer. In addition to the 12 weeks working notice for which he was paid $15,011.54, he was paid a further $26,461.44 severance pay, 19 weeks wages in satisfaction of the statutory entitlements under the *Employment Standards Act*, 2000. On September 15, 2008 the plaintiff commenced his action claiming the sum of $50,000.00 for wrongful dismissal including compensation for loss of benefits.

Reasonable Notice:

[11] The starting point in the analysis to determine what constitutes reasonable notice period in any particular wrongful dismissal action is found in the comments of McRuer C.J. in *Bardal* v. *Globe and Mail Ltd.* (1960), 24 D.L.R. (2d) 140 (HC) at 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.

[12] The determination of reasonable notice will depend on the circumstances of each case and the facts relating to each of the relevant factors. There are a number of recent cases which provide some assistance in assessing the reasonableness of the notice and damages in like circumstances.

[13] The most recent decision in Ontario is *Munoz v. Canac Kitchens* (Ont. Sup. Ct.) October 15, 2008, Action No. CV-08347513 (unreported). Strathy J. awarded the plaintiff, a production team leader/foreman, age 52 with 12 years service earning a base salary of approximately $50,000 plus overtime, damages based on a notice period of 12 months. At the time of his dismissal he was one of two supervisors on one of the production lines supervising approximately 47 employees.

[14] In the context of the defendant company the court found that "it would be a stretch to describe him as a member of management" and referred to the position he held as "the lowest non-union position on the company ladder". Mr. Munoz had no direct authority to hire, fire or discipline employees. Further, he had no independent managerial responsibility or decision-making authority.

[15] In the course of analyzing the question of reasonable notice Strathy, J provides a most helpful review of a number of other recent cases that dealt with by this court that involved the same employer defendant and employees of relative standing in the company hierarchy as in this case.

[16] In *Yanez v. Canac Kitchens* (2004), 45 C.C.E.L. (3rd) 7 (Ont. Sup. Ct.) Mr. Justice Echlin found that Mr. Yanez a "team leader" in production, 40 years old at the time of dismissal, earning $69,566.52 in salary and benefits per annum after 15 ½ years of service was entitled to 12 months notice less statutory benefits and mitigation earnings received.

[17] In *Donoso v. Canac Kitchens* (Ont. Sup. Ct.) 2005, Action No. 03-CV-257758 (unreported) Mr. Justice Morawetz found that the plaintiff, a supervisor in the defendant's shipping department, 46 years of age at the time of dismissal who had worked for the company for 17 ½ years was entitled to 17 ½ months notice.

[18] In *Somir v. Canac Kitchens* (2007), 56 C.C.E.L. (3d) 248, Mr. Justice Siegel found that a 44 year old "team leader" in production with 20 years and 8 months of service, an annual salary of $93,796.04 was entitled to 16 months notice. As a team leader/foreman he was responsible for ensuring that personnel and materials were sufficient to meet daily production needs. He

supervised between 25 and 40 employees. The court noted that Mr. Somir had spent all his working life with Canac until his dismissal without cause.

[19] In *Navarro v. Canac Kitchen* (Ont. Sup. Ct.) 2008, Action No. 07-CV339514 (unreported) Madam Justice Klowak awarded a 47 year old supervisor with 20 and ¼ years of services damages based on a 15 months notice period. As in *Somir,* his position was characterized as being "the most junior management category" in the company.

Position of the Parties:

[20] It is the position of the plaintiff that reasonable notice period should approximate 18 months in this case. He argues that the plaintiff held a position of responsibility that entailed not only supervising and training other accounting staff but he had direct accounting functions to perform. When one compares his position and relative responsibility to the claimants referred to as "team leaders" in the other Canac cases, although short of being properly characterized as managerial they were still supervisory in nature. He suggests the nature of his responsibilities were somewhere between the "lowest non-union position on the company ladder", a team leader and management.

[21] The defendant submits that the combined working notice and statutory severance provided to the plaintiff, the equivalent of approximately 8 months salary, constitutes sufficient payment in lieu of notice. However, in the alternative, the defendant submits that the appropriate range of reasonable notice should be 12 to 14 months based on the decisions involving like positions of employment in *Taylor* v. *Bank of Nova Scotia* (1998), 37 C.C.E.L. (2d) 145 (Ont. Gen. Div.) and *Grossinger v. Olympia Business Machines Canada Ltd.* (2001), Carswell Ont. 102 (Ont. Sup. Ct.). In *Taylor*, a senior accounting clerk, age 51 with 20 years of service was awarded damages in the amount of 12 months notice. Similarly, in *Grossinger* an accounts payable supervisor, age 55 with 13 years service, was awarded damages in the amount of 12 months notice.

[22] In reply plaintiff's counsel argued, with respect to the cases cited by the defendant, *Taylor* and *Grossinger*, the plaintiff held a position requiring him to supervise employees in the same positions of the claimants, accounting clerks and accounts payable supervisors. Further, he is older than all of the claimants in the cases referred to and his more than 19 years continuous service is comparable to the years of service of the plaintiffs in *Somir and Navarro.*.

Consideration of the Bardal factors:

[23] In considering the *Bardal* factors I make the following observations:

1. *Character of the employment:* The "character of employment" factor has been applied traditionally by courts to justify longer notice periods for senior management employees and shorter periods for lower ranked or unspecialized employees. Mr. Mahesuran held a position that was supervisory in nature and specialized. He was required to perform work for the defendant that required a

knowledge base and skill level equivalent to a certified general accountant. While he was not a manager per se he reported directly to the management for his department and he had considerable responsibility in ensuring the accuracy of the financial records. As the supervisor of the accounting department he held a position in administrative operations that was above that of "team leader" on the production side. In my view, in supervising a department his position was more comparable to that of the shipping department supervisor in *Donoso.*

2. *The length of service:* Some cases have referred to the informal "rule of thumb" used to calculate reasonable notice based on one month's notice for every year of employment. It was observed by Malloy, J in *Bullen v. Proctor and Redfern Ltd.* [1996] O.J. No. 340 in considering it together with the *Bardal* factors it provided some degree of predictability and certainty in the calculation of reasonable notice while at the same time allowing for flexibility and adjustment up and down through the application of the various factors.

   In this case, Mr. Mahesuran had been with the defendant company for more than 19 years, a significant part of the remainder of his working life. His service to the defendant company was continuous and diligent.

3. *Age and the availability of similar employment:* Mr. Mahesuran at age 59 is at a point in his life where it will be increasingly more difficult for him to find similar employment and at a similar level of remuneration in the declining economic environment that currently prevails and in competition in a younger workforce.

   The plaintiff employed the services of a vocational counselor at his own expense after dismissal to assess his employability and to assist in making him more marketable in today's marketplace. His counselor made the following comment in the career/vocational assessment report dated November 16, 2008:

   > Client facing ageism factor – older workers are seen as less than competent because of their age. Employers may perceive the older workers as costing too much, having an obsolete skill set, or being a liability for employer – sponsored health insurance.

   He was of the opinion that the plaintiff would be facing a job search period of at least 12 to 18 months in today's economy and competition for jobs. Further, he concluded the plaintiff would not be able to obtain the previous level of income.

4. *Experience, training and qualifications*: The plaintiff has training in accountancy, but he does not have certification. His experience has been limited to the work he performed in house for the defendant over the past 19 years and he has not remained current with modern accounting software and accounting systems. While his employability and remuneration potential has been reduced as a result he does

however have useable skills. Upgrading will increase the potential for some form of work in his field.

5. I take into account the earlier award decisions that involved the same employer and similar circumstances in order to affect some degree of parity in the result. Like cases should have like results. While I recognize that no two cases are absolutely identical there are sufficient similarities at least with respect to relative standing in the company and length of service to assist in the determination of a reasonable notice period. I note in particular the notice periods considered reasonable in the cases of *Donoso*, and *Somir* with respect to his comparable length of service and his responsibility in supervising a department for the defendant.

[24] In my view it is appropriate considering all of the circumstances to base an award of damages on a notice period of 18 months.

Benefits:

[25] On the issue of benefits, the plaintiff has the evidentiary burden. He received benefits up to December 24, 2008. He submits by way of affidavit that to obtain the equivalent benefits privately it would cost approximately $260. per month. On the other hand, the defendant asserts that the cost of benefits actually received by the plaintiff cost $72.47 per month. That cost does not include health and dental benefits, which were paid for by the employer on an as incurred basis. The plaintiff is required to establish in evidence those costs and he has not done so.

[26] The only evidence before me with respect to the monthly cost of benefits is the amount paid by Canac based on a group benefit insurance plan, $72.47 per month. It is an amount, which no doubt is greatly reduced as a result of the sizable group rate available to a large employer as opposed to an individual. The amount as presented by the plaintiff does not specify the rate for corresponding benefits. I do not have before me evidence as the cost of the health and dental benefits. Accordingly, based on the evidence the plaintiff should be awarded the amount of $72.47 per month for the remainder of the notice period beyond December 24, 2008.

Mitigation of Damages

[27] The plaintiff has a duty to mitigate the loss of his employment by diligently searching for alterative employment. However, the defendant bears the onus of showing either that the plaintiff "found, or by exercise of proper industry in the search, could have procured other employment of an approximately similarly kind, reasonably adapted to his abilities": see *Michaels v. Red Deer College* (1975), 57 D.L.R. (3d) 386 (SCC) at p. 391. The defendant must establish that the plaintiff's search for alternative employment was unreasonable in all respects: see *Furuagim v. Bechtel Canada Ltd.*, [1990] O.J. No. 746 (Ont. C.A.). It is the position of the defendant that the plaintiff's documentation of mitigation efforts is minimal and insufficient to prove diligent mitigation efforts. I disagree. The plaintiff in his affidavit states the following:

> Since the date of my termination, I have been actively and earnestly seeking alternative employment within the area of my expertise, education and training. I have used internet search sites such as Workopolis and TorontoJobs. On a daily basis, I search the employment sections of the daily and weekly newspapers including the Toronto Star and Employment News. In addition I have consulted with the HRSDC job sites, registered with agencies and I have sent out my resumes.

The plaintiff has provided to the court a series of documents that reflects his searches in the classified ads, on-line searches via the internet and the employment centre. In addition, he has registered with a number of job agencies and at his own expense hired an agency for career guidance and employability assessment.

[28] The defendant has failed to satisfy me that the plaintiff has not taken reasonable steps to mitigate his damages.

Mitigation and Award of Damages:

[29] The defendant argues that the plaintiff has an obligation to mitigate his damages by securing alternative employment throughout the entire notice period. Consequently, if the notice period extends beyond the date of judgment the plaintiff should remain accountable to the defendant for any income earned during the post-judgment period. The defendant seeks an order directing that damages awarded should be paid to the defendant's solicitor in trust in a similar manner prescribed in *Brouillard v. Rostrust Investments Inc.*, [1997] O.J. No. 4136 (Ont. Gen. Div.). Counsel for the plaintiff would be required to deliver a statement of the plaintiff's earnings during the remaining notice period to the defendant's counsel, which would be deducted from award amounts held in trust. In short, the monies would be paid out to the plaintiff in equal monthly installments subject to deduction of any mitigation earnings received by the plaintiff during the notice period.

[30] In these circumstances I am not inclined to make such an order. Rather, I am of the view that a lump sum award of damages is appropriate. The defendant in this matter has been involved in no less than five actions in as many years where this court has concluded that the defendant in each instance paid inadequate severance packages forcing employees to sue to recover their reasonable entitlements. In *Somir, supra* at para. 5 Mr. Justice Siegel in addressing the issue of costs observed the following:

> Another important consideration is the fact that the action resulted from a decision by the Canac Human Resources Department to arbitrarily impose a severance package that was clearly inadequate in view of the decision in *Yanez v. Canac Kitchens*, [2004] O.J. No. 5238 (SCJ) which was released approximately one month before the termination of the plaintiff's employment.

> As set out in my reasons for judgment, Canac had alternative courses of action available to it, which its representatives chose not to pursue. Having decided to terminate the plaintiff's employment without cause, however, it was obligated under the laws of Ontario to pay him damages in lieu of notice for the reasonable notice period. The evidence before the court does not permit the court to conclude whether Canac's expectation that the plaintiff would accept whatever was given to him was simply incompetent or was intentionally heavy-handed. In either case, I think the action was abusive to the plaintiff. The defendant paid the plaintiff an inadequate severance package and forced him to sue to recover his reasonable entitlement. At the trial, which lasted one and a half days, the defendant had no meritorious argument for disregarding the principles applied in *Yanez*.

[31] This is not a case for "Wallace damages" where the "employer engaged in bad faith conduct or unfair dealings in the course of dismissal: see Wallace v. United Grain Growers Ltd., [1997] 3 S.C.R. 701 (S.C.C.). Indeed, in this case the combined 12 weeks working notice and the offered severance of 24 weeks would have approximated 9 months notice. However, it is significantly less than the notice periods considered reasonable in the cases discussed above - even those cases relied on by the defendant suggesting an appropriate range in the alternative. It is difficult to reconcile the severance package offered by the defendant to the plaintiff in this case, an employee who had a considerable length of service in a position that required some specialization with responsibilities as great as, if not greater than the plaintiffs in those cases. The defendant would have been aware of all of the cases, save *Munoz*, at the time the plaintiff was dismissed. The severance package offered was inadequate in comparison. The plaintiff was required to sue to recover his reasonable entitlement.

[32] Moreover, in my view, the plaintiff, in the award of damages should be placed in the same position as if he had been provided a fair and adequate severance package in lieu of notice at the time his employment was terminated. In the letter of August 27, 2008 the defendant chose to offer the plaintiff a lump sum severance payment at that time. If the defendant had offered an adequate severance package, accepted by the plaintiff, it would have been provided to him on a lump sum basis without the requirement to report subsequent earnings. To subject the plaintiff to the pay out process suggested by the defendant would require him to incur at a minimum the additional expense of counsel, an expense he would not have incurred on acceptance of an adequate severance package.

Award of Damages:

[33] Eighteen months of salary or one and a half times the plaintiff's annual salary of $65,050 would amount to $97,575. In calculating the award it is necessary to deduct the amounts already received as a result of dismissal. When the total amount paid to the plaintiff for 12 weeks working notice and the statutory entitlements under the *Employment Standards Act*, 2000, $41,472.90 is deducted from the damages award, the remainder, $56,101.96, even exclusive of

the amount awarded for benefits, is greater than the maximum amount allowable to a party utilizing the Simplified Rules of Procedure. Rule 76, permits a party to claim $50,000 or less, exclusive of interest and costs.

[34] In the result, the plaintiff shall have judgment in the amount of $50,000., as claimed and pre-judgment interest in accordance with the *Courts of Justice Act*, RSO 1990, c.C.43, as amended, from August 29, 2008.

[35] Costs are awarded to the plaintiff. I advised counsel at the conclusion of the hearing that if they were unable to agree between themselves as to costs I would receive written submissions of no more than two pages in length from each together with a draft bill of costs. Such materials should be submitted within two weeks of the date of this judgment.

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O'Marra J.

Released: January 12, 2009

COURT FILE NO.: 08-CV-361809
DATE: 2009/01/12

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

Sivathason Mahesuran

Plaintiff

- and -

Canac Kitchens Ltd., a Division of Kohler Ltd., and Kohler Canada Co.

Defendant

REASONS FOR JUDGMENT

O'Marra J.

Released: January 12, 2009