Ontario Supreme Court
Martellacci v. CFC/INX Ltd.,
Date: 1997-02-06

Gladys Martellacci, Plaintiff

and

CFC/INX Ltd., Defendant

Ontario Court of Justice, General Division Molloy J.

Judgment: February 6, 1997

Docket: Toronto 96-CU-107579

B.A. Lecker, for the plaintiff.

T.A. White, for the defendant.

Molloy J. **(orally):**

1 This is a motion for summary judgment by plaintiff in a wrongful dismissal action.

A. Summary Judgment in Wrongful Dismissal Actions

2 It is now well settled that a judgment may be given on a summary motion in a wrongful dismissal action in appropriate cases: see *Luz v. Moore Business Communication Services* (1995), 9 C.C.E.L. (2d) 169 (Ont. Gen. Div.); *Cronk v. Canadian General Insurance Co.* (1995), 25 O.R. (3d) 505 (Ont. C.A.). This is particularly the case where there is no real issue as to whether there was cause for the dismissal. Where all of the essential factual elements are undisputed, summary judgment is an available and an appropriate method of proceeding.

3 The usual standard of proof rules apply with respect to summary judgment motions in wrongful dismissal cases. Judgment should only be granted if the defendant fails to raise a genuine issue for trial. The onus remains on the plaintiff. However, the defendant is required to put its best foot forward and set out the evidence upon which its defence rests.

B. The Facts

4 The plaintiff, in the case before me, was employed for a period of 16 years. At the time of the termination of her employment, she was approximately 43 years old. She started with the

defendant company as an order desk/customer service representative in 1980. She was promoted to the position of purchasing agent in 1989, a position which she held until April 12, 1996. In that position, she had one assistant who reported to her, but no other supervisory responsibilities.

5 The position of purchasing agent was not a senior managerial position. I would classify it as an administrative position or perhaps junior managerial. It was a position of responsibility with a requirement to exercise independent judgment, but it had very little supervisory responsibilities.

6 The defendant is a large company employing three hundred people. It produces ink products for the printing industry. Ms. Martellacci did the purchasing for the company. There is no written job description. However, there is no real dispute about the plaintiff's employment duties. She was responsible for negotiating prices for raw materials, payment terms, and ensuring the availability of products from suppliers for the production of printing inks and supplies for the graphic trade industry in branches across Canada. She negotiated on-hand raw material, consignment inventory, maintained on-hand and just-in-time inventories, ordered products, verified deliveries, and worked with customs and brokers for timely clearance of materials via transport. She also processed all necessary paper work on computer systems and sent those to accounts payable for payment to suppliers.

7 There was no written contract of employment. Her salary was approximately $32,800 per year. She had a full benefit package including major medical, drugs, dental, long-term disability, short-term disability, life insurance and pension. The value of her benefit package is approximately 10 to 12 percent of her annual salary.

8 There is no issue with respect to termination for cause or misconduct. Ms. Martellacci was an employee with excellent references from her employer and the only reason she was let go was an economic downturn of the employer.

9 On April 12th, 1996, the employer gave Ms. Martellacci a notice of temporary lay-off. This was stated to be due entirely to economic downturn and the need for the company to reduce its staff. The notice was stated to be for twelve weeks. Ms. Martellacci was to receive some benefits during this period of lay-off, but would not receive long-term disability, short-term disability, pension benefits or life insurance. She received no salary during the period of

lay-off. There was no prior agreement with the employee with respect to lay-offs. The lay-off was imposed unilaterally by the employer.

10 After the April 12, 1996 lay-off, Ms. Martellacci did nothing at first. However, shortly thereafter, she did retain counsel. On June 11th, 1996, her counsel, Mr. Lecker, wrote to the employer asking for confirmation that she would, in fact, be returned to employment at the end of the lay-off period. Her counsel took the position that whatever the situation might be with respect to lay-offs under the *Employment Standards Act,* at common law, the lay-off constituted wrongful dismissal. However, no demands were made at this time other than a request for confirmation that she would be returning to employment.

11 Thereafter, there was a series of letters between counsel for the employer and counsel for the employee. Counsel for the employer took the position that the lay-off of Ms. Martellacci was in accordance with the *Employment Standards Act* and that an employee in this situation had no further rights against the employer.

12 In a June 21st, 1996 letter to the employer's counsel, Mr. Lecker disagreed with the employer's position with respect to the *Employment Standards Act.* Mr. Lecker also raised in that letter the fact that Ms. Martellacci had become aware that the employer had given her previous position to her former assistant (who incidentally was paid at a substantially lower rate), and further, that this employee had been issued business cards stating that she was the purchasing agent.

13 Mr. Lecker asked for confirmation from the employer that Ms. Martellacci would, in fact, be recalled and that she would be returned to a comparable position. This point is of significance and it is worth quoting the specific letter sent by Mr. Lecker. It states:

> In order to ensure that my client's election to treat this contract as being terminated is made based on accurate facts. I demand your client's response as to whether or not Ms. Martellacci is to be definitely recalled and if so, when. Be advised that we are already aware that your client has offered Ms. Martellacci's position to an existing employee and in that regard, business cards have already been printed. Of course, if there is a recall, we will regard any action to place my client in a non-comparable position to be a breach of her employment contract.

14 Therefore, it is clear that as of June 21, 1996, the employer was fully aware that Ms. Martellacci was concerned about her position and was actively seeking confirmation, both that she would be returned as an employee and that the position to which she would be returned would be comparable to her previous position as purchasing agent.

15 On July 2nd, 1996, the employer wrote to Ms. Martellacci advising her that her lay-off status was being extended to September 27th, 1996, but this time the lay-off would include full benefits. The Statement of Claim in this action was issued on July 12, 1996. There had, in the meantime, been further attempts by the plaintiff's counsel to get confirmation that Ms. Martellacci would definitely be recalled and that she would be placed into a comparable position. These were unsuccessful. Counsel for the employer, Mr. White, was asked to accept service of the Statement of Claim which he agreed to do.

16 On July 16th, Mr. Lecker wrote to Mr. White confirming these events. This letter states *inter alia*:

> I am in receipt of your letter dated July 12th, 1996. I confirm that your client has consistently failed to answer the question put to them on two (2) occasions as to whether or not my client will be definitively recalled, and, if so, to what comparable position. As I had previously noted, we are already aware that my client's previous position has been assumed by another employee… We will be taking the position that my client's employment was terminated on July 12, 1996, which is the date of your last letter and the date which your client confirmed, by inference what we had suggested, (i.e.) that Ms. Martellacci's position had been assumed by another individual.

17 On September 20th, the employer wrote to Ms. Martellacci as follows:

> Dear Gladys: I am pleased to inform you that you are being recalled to work on September 30th, 1996. You will be working in various clerical functions in inventory and accounts payable. You will be reporting to Murray Scott. Please report to Murray on Monday, September 30th at 8:30 a.m. Yours truly-

18 The employer confirms that this was the full extent of the information provided to the plaintiff about the job to which she was instructed to return, i.e. "various clerical functions in inventory and accounts payable." The plaintiff refused to report to work taking the position that this was not a comparable position and that her employment had, therefore, been terminated.

19 All of the foregoing facts are uncontroverted on the evidence.

C. Position of the Employer

20 The employer takes the position that its lay-offs of the plaintiff in April and in July were in full compliance with the *Employment Standards Act* lay-off provisions and therefore cannot constitute termination of her employment. The employer further argues that the employee had an obligation to return to work on September 30th and that her failure to do so was an act of insubordination constituting a resignation from her position or, alternatively, grounds for dismissal. Although the employer did not give Ms. Martellacci full particulars of the job to which she would be returning, it took the position that she should have returned in any event and determined for herself precisely what the job entailed.

D. Analysis

1. Employment Standards Act

21 The employer relies on the *Employment Standards Act.* It is abundantly clear in the *Act* and in the case law interpreting the *Act* that it is a minimum standard only and does not remove or reduce any rights which an employee has at common law.

22 The principal case relied on by the employer is *Stolze v. Ontario (Adjudicator appointed under Employment Standards Act)* (1995), (sub nom. *Stolze v. Delcan Corp.)* 96 C.L.L.C. 210017 (Ont. Div. Ct.), unreported. The Divisional Court in that case upheld a ruling by an adjudicator under the *Employment Standards Act* that an employer could lay off an employee without pay for the period specified in the *Act* without this constituting termination of the employment within the meaning of the *Act.* The arbitrator held that this was permissible since the contract of employment did not prohibit temporary lay-offs without pay. The lay-offs were found to be in compliance with the *Act.*

23 I make no determination as to whether or not Ms. Martellacci was “laid off” within the meaning of the *Employment Standards Act* or whether her employment was terminated within the meaning of the *Act.* Such a determination is irrelevant to the proceeding before me. Compliance by the employer with the *Employment Standards Act* does not mean that there can be no common law cause of action by an employee. This is clear even in the *Stolze v. Delcan* decision itself. The Divisional Court states therein at page 6:

> The statement by the adjudicator that the Act was a complete code of statutory entitlement does not suggest that it abrogates any entitlement arising outside the statute, or that ss. 4 or 6 of the Employment Standards Act were overlooked. Section 4 provides that the requirements in the Act in favour of employees are a minimum. Section 6 provides that no civil remedy of an employee against his or her employer is suspended or affected by the Act.

24 This principle is also clearly stated by the Supreme Court of Canada in *Machtinger v. HOJ Industries Ltd.* (1992), 40 C.C.E.L. 1 (S.C.C.). The Court held at page 14 to 15 of the C.C.E.L.:

> "It is also clear from ss. 4 and 6 of the Act," (the *Ontario Employment Standards Act*) "that the minimum notice periods set out in the Act do not operate to displace the presumption at common law of reasonable notice. Section 6 of the Act states that the Act does not affect the right of an employee to seek a civil remedy from his or her employer. Section 4(2) states that a 'right, benefit, term or condition of employment under a contract' that provides a greater benefit to an employee than the standards set out in the Act shall prevail over the standards in the Act. I have no difficulty in concluding that the common law presumption of reasonable notice is a 'benefit,' which, if the period of notice required by the common law is greater than that required by the Act, will, if otherwise applicable, prevail over the notice period set out in the Act. Any possible doubt on this question is dispelled by s. 4(1) of the Act, which expressly deems the employment standards set out in the Act to be minimum requirements only."

25 It is, therefore, well settled law that compliance by the employer with the minimum provisions of the *Employment Standards Act* does not operate to circumscribe the employee's common law rights. Compliance with the *Employment Standards Act* is not in and of itself a defence to a common law action for wrongful dismissal. This applies to the notice provisions as well as to the lay-off provisions.

26 The specific issue of *Employment Standards Act* lay-off provisions in this context was dealt with by the Ontario Divisional Court in *Style v. Carlingview Airport Inn* (1996), 18 C.C.E.L. (2d) 163 (Ont. Div. Ct.). Madam Justice Feldman ruled in that case as follows, at page 167:

> The employer relies also on the Employment Standards Act as authorizing temporary thirteen week layoffs. However, that Act sets up a separate statutory code for the

payment of termination pay based on length of service. It does not affect common law rights and obligations regarding dismissal and constructive dismissal.

27 Madam Justice Feldman then referred to the *Stolze v. Delcan* decision relied on by the defendant in this case and stated as follows:

> Because the issues in *Stolze* involved only the scheme of benefits under the Employment Standards Act, it is not determinative of the issues in this case. The statutory scheme only provides a code of benefits payable on termination. It does not alter contractual rights and obligations between employers and employees.

28 Accordingly, I conclude that the defence raised by the employer in this case based on compliance with the *Employment Standards Act* does not raise a triable issue.

2. Did The Lay-off Constitute Wrongful Dismissal?

29 It is trite law that if an employer changes a fundamental term of employment, this may constitute constructive dismissal. It is difficult to imagine a more fundamental term of employment than that the employee be paid his or her salary.

30 In this case, there was no agreement that the employer was entitled to lay off the employee for any period of time. In the absence of such an agreement, the employer cannot simply place an employee's employment status on hold without pay and without substantial benefits and expect that this will not constitute constructive dismissal. If the demotion of an employee or a reduction in pay and responsibilities of an employee constitute constructive dismissal, then surely indefinite suspension with no guarantee of recall, no salary and virtually no benefits must also qualify for the same treatment at law.

31 This issue was dealt with by the Divisional Court in *Style v. Carlingview Airport Inn.* The Divisional Court found that a lay-off amounted to wrongful dismissal and held at page 166 to 167:

> In the case at bar, the plaintiff had a contract of indefinite hiring. There was no express term contemplating layoff as in a collective agreement. There had been no lay-offs before, nor was any warning of possible layoff given. Nor were any benefits paid during the layoff. The hours of employment were adapted on an ongoing basis to the work available based on the occupancy of the hotel, but there had never been a layoff. Also,

the plaintiff was often called upon when there was extra work to do, indicating that the employer was satisfied with her work.

In my view there was no express or implied term of the contract of employment that the employee could be temporarily laid off with out pay.

32 In the case before me, there was no agreement with respect to lay-offs and there were no warnings. The lay-off was imposed unilaterally. With respect to the April lay-off, however, there was at least a triable issue as to whether the employee acquiesced and accepted that particular lay-off as part of her employment agreement. I do not say that this is necessarily the case, but merely that on a summary judgment motion, I am not prepared to say that there is no triable issue on this point. Also, although the plaintiff's material suggests that the employer was not acting *bona fide* when issuing the lay-off and that the employer, in fact, had no real intention of returning her to her position, again, in my view, the defendant has raised a triable issue on this point. I am not prepared to conclude, applying the test for a summary judgment motion, that the lay-off on April 12th was termination of employment.

33 However, with respect to the July lay-off, there can be no doubt. The employee by then had retained counsel. Clear letters were sent requesting clarification and assurances. Those were not provided. The July lay-off most clearly was not accepted by the employee. On the contrary, the employee, as a consequence, sued for wrongful dismissal.

34 When an employer without prior agreement lays off an employee, the employee may elect to wait and see. The employee may acquiesce in the lay-off to see if later he will be able to return to his previous job. However, an employee is not obligated to do that. An employee may treat the lay-off as a wrongful dismissal. Ms. Martellacci clearly treated the July lay-off as a wrongful dismissal of her employment.

35 I agree with counsel for the plaintiff. There had been a fundamental change in the employment relationship. Ms. Martellacci was not working and she was not being paid. This constitutes wrongful dismissal.

3. The September Job Offer

36 The employee had been the purchasing agent for a large company. When she was laid off, a member of the senior management gave her a letter of reference to be used by her in the

event that she elected to look for other employment rather than accept the lay-off. That letter stated in part as follows:

> Ms. Martellacci has been the purchaser for our Company for the past seven years. During that time, she has distinguished herself as one of the best negotiators the Company has ever had and she has bargained countless cost reductions. Prior to myself being promoted to Technical Manager, it was the role of the Technical Department to negotiate prices for raw materials. Based on her proven track record, I gladly yielded that responsibility to Gladys because I knew that I could not match her bargaining skills. When it comes to negotiating, Ms. Martellacci behaves as though she is spending her own money instead of the Company's funds.
>
> She has a rapport with suppliers, transportation companies, customs agents/brokers and accounts receivable personnel which is unsurpassed by anyone else in the printing ink industry. She has a very special skill in cutting through red tape and getting materials when they are needed so that our clients receive their goods on time. She always places the needs of our customers first.

37 I recognize, of course, that this was a letter of reference and that its author may well have stressed the positive features and ignored any negatives. However, even taking that into account, the picture of the employee's responsibilities in this letter is reasonably clear and is fully consistent with Ms. Martellacci's own description of her job responsibilities as purchasing agent, which are not contradicted by the defendant.

38 After the lay-off, the employer admits that Ms. Martellacci's assistant was made purchasing agent. However, the employer says that most of the purchasing responsibilities were taken away from that individual and given to members of senior management, and whatever was then left of the job responsibilities was given to the junior employee.

39 The description of the job to which the plaintiff was requested to report was merely "various clerical functions in inventory and accounts payable." This is vague to say the least, but whatever it is, it certainly is not a purchasing agent job. It does not appear to me to suggest that it is managerial or administrative. It seems to refer to a clerical position which would be lower in status than the one previously held by Ms. Martellacci. This may or may not have been a demotion. For purposes of this motion, that is not the issue. The only issue is whether the plaintiff should have accepted this position in mitigation of her damages. It was

open to the employer if this job was, in fact, comparable to purchasing agent, to explain this fully to the employee. The employer had been on notice since June that the comparability of alternate work was an important factor for the plaintiff. Notwithstanding this, the employer neglected or refused to amplify or clarify. The description given of the position was vague in the extreme. The employer's position was that Ms. Martellacci should report for work and try it out before deciding that it was not comparable. I consider this to be an unreasonable position by the employer. The employer fails to consider that it would have been degrading and humiliating for an employee to return to the workplace in these circumstances in order to determine what the nature of the job was. Her former assistant now held her previous position, and she was being given an indeterminate clerical and accounts payable function. There was no attempt by the employer to allay her concerns in any way. There was no attempt to provide particulars or details of the new position.

40 In my view, it was perfectly reasonable for this employee to insist that she know what the job was before she reported for work. These parties were already involved in litigation. Requests for information were repeatedly made. The plaintiff's obligation to mitigate is only to act reasonably. In my view, it was not unreasonable to refuse to return to the job position in question which would involve acrimony and humiliation: see *Style v. Carlingview Airport Inn.* More particularly, it was not unreasonable to require full information before being required to make such a decision: see *Furuheim v. Bechtel Canada Ltd.* (1990), 30 C.C.E.L. 146 (Ont. C.A.).

41 The defendant filed no evidence in this proceeding that the proposed job was, in fact, comparable. The defendant has no sworn evidence deposing to that fact. There is an obligation on the defendant to put its best foot forward.

42 On the day that the motion proceeded before me, the defendant sought to file an affidavit attaching submissions which had been made to the Employment Standards Officer in this matter, apparently describing the two jobs and showing them to be comparable. The job descriptions themselves were not sworn to by the defendant. This did not constitute, therefore, evidence of the defendant as to the comparability of the positions. Plaintiff's counsel objected to the filing of this material. However, I let the affidavit in as evidence of the issues that were, in fact, before the Employment Standards branch, but not as evidence of the job duties themselves.

43 In any event, as I have said, even if the jobs were comparable, the plaintiff didn't know that, and it was unreasonable of the employer not to communicate the necessary information to her so that she could make an informed decision. It was unreasonable for the employer to require her to report for work before she could find out what the job was. Accordingly, I find as a fact that the employee acted reasonably and that there was no failure to mitigate by the employee in failing to take this particular job.

4. Length of Notice

44 The period of notice to be given to any employee in a wrongful dismissal is determined according to the particular facts of the case. There are, however, general guidelines to be considered. The factors to be considered are set out in the often quoted decision of *Bardal v. Globe & Mail (The)*, [1960] O.W.N. 253, 24 D.L.R. (2d) 140 (Ont. H.C.). In that case, Chief Justice McRuer held at page 255 of the *Ontario Weekly Notes*:

> There could be no catalogue laid down as to what was 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.

45 Ms. Martellacci was 43 years old and she had been employed for 16 years. In terms of the character of her employment, the Court of Appeal in *Cronk* has confirmed that this is referrable to the status of the employee within the organization. Ms. Martellacci was not a member of management but she was not a lowly clerical worker either. She was somewhere in the middle, an administrative staff person with substantial independence and responsibilities. There was no evidence with respect to the availability of other work, given her work experience and education and qualifications, and, therefore, I do not consider this to be a factor in determining the period of notice one way or the other. The 16 years of service is a substantial factor entitling the plaintiff to significant notice.

46 All other things being equal, she would get notice of about 16 months. Her age, in this case, is not a particularly significant factor. She is on the young side, but essentially this would be, in my view, a neutral factor. The status within the company is a factor which would

reduce the period of notice somewhat. This was not a significant managerial position, but also not a low-level clerical position.

47 The plaintiff's counsel, in oral submissions, suggested that the appropriate range is from 12 to 16 months. The defendant's evaluation was, in my view, a little closer to the mark, giving a range of 10 to 12 months.

48 Balancing all of the factors referred to in *Bardal,* in my view, the appropriate notice period is 12 months. This is in line, in my opinion, with the applicable and relevant case law. The closest case to which I was referred to is *Luz v. Moore Business Communication Services.* In that case, the plaintiff was a purchasing agent. He was 39 years old and supervised four other individuals. He had been employed for five years and he was given six months notice. The job responsibilities in that case were similar, although the plaintiff in *Luz* had more supervisory responsibilities. However, this is balanced out with the younger age of the plaintiff in *Luz,* so that the two cases are really quite similar. The five-year employment resulted in a 6-month notice period.

49 The other case which I thought was quite similar to which I was referred is *Jeffrey v. Purolator Courier Ltd.* (1995), 8 C.C.E.L. (2d) 205 (Ont. Gen. Div.). In that case, the plaintiff had been employed for 14 years as a supervisor of an office. She was 41 years old at the time of her dismissal and she received 12 months notice plus aggravated damages. The plaintiff in that case had a more senior position in terms of status with the company.

50 Therefore, in my view, the 12-months notice period that I arrived at, in looking at the various factors to be considered under *Bardal,* is in line with other case law.

5. Mitigation

51 The plaintiff has stated that she tried hard to find other work without success and she has produced substantial documentation to support this. The defendant did not cross-examine the plaintiff and has put forward no evidence to rebut the plaintiff's evidence. There is an onus on the defendant to show failure to mitigate. There was no evidence whatsoever of any failure to mitigate. On the contrary, there was substantial evidence from the plaintiff of her attempts to mitigate.

52 Accordingly, in my view, there is no triable issue with respect to failure to mitigate: see *Michaels v. Red Deer College,* [1976] 2 S.C.R. 324, 57 D.L.R. (3d) 386 (S.C.C.).

53 The defendant submits that since the period of notice had not expired at the time of the summary judgment motion, the defendant would be prejudiced if summary judgment is given at this time, particularly since there has not been examination for discovery on the issue of mitigation at this point. In my view, there is no merit to that argument. The defendant had full opportunity to cross-examine the plaintiff on her affidavit if it wished, and chose not to do so. Summary judgment may be awarded even though the notice period has not elapsed at the time of judgment. There is no requirement that an employee wait out the notice period without any income before the employee is entitled to compensation. However, the duty to mitigate is an ongoing one: *Thomson v. Bechtel Canada Ltd.* (1983), 3 C.C.E.L. 16 (Ont. H.C.). The plaintiff strikes me as highly motivated to return to work. Certainly all of the material before me supports that conclusion and nothing filed by the defendant contradicts that. The plaintiff has made extensive attempts to mitigate already. There is no reason to believe that these attempts will stop.

54 The defendant submits in the alternative that if judgment is granted, it should be subject to some limiting terms or the imposition of a trust. In *Thomson v. Bechtel Canada Ltd.* to which I've referred above, Mr. Justice Osborne dealt with this issue at page 23 as follows:

> This action has come to trial well before the 11-month notice period to which I have referred earlier has gone by. To say the least, this is unusual. This gives rise to the necessary consideration of how, if at all, I should take into account the possibility (I regard it as nothing more than that) of the plaintiffs obtaining other employment within the 11-month notice period. I do not accept the defence submission that the plaintiff, having the onus of proof imposed upon him, has not demonstrated an entitlement of damages over the 11-month period. Merely because damages are difficult to prove is no reason to deny them. It is obvious that the plaintiff is not in a position to establish whether he will or will not obtain employment in the next five or six months. I am sure the plaintiff wishes he could approach that issue with some certainty. The plaintiff may obtain employment in the next five or six months. I hope he does. The contingency of new employment within the notice period could be somewhat speculatively assessed and imposed upon the notice period to reduce it. In the circumstances of this case, I

> think it is preferable to impose upon the plaintiff a trust, whereby any earnings of the plaintiff until the expiry of the 11-month notice period will be impressed with a trust in favour of the defendant. I am satisfied that the plaintiff has endeavoured to obtain employment throughout and that he will continue with his sincere endeavours to obtain employment.

55 I am in complete agreement with the observations made by Justice Osborne in that case and I believe the same reasoning applies to the case before me.

E. Conclusion

56 The plaintiff was wrongfully dismissed from her employment on July 2nd, 1996. The plaintiff shall have judgment for damages for wrongful dismissal based on an appropriate notice period of 12 months. The damages shall include her salary plus 10 percent for the value of her employment benefits.

57 Any monies received by the plaintiff as a result of employment during the notice of termination period shall be impressed with a trust in favour of the defendant, the amount not to exceed the total amount of the plaintiff's judgment against the defendant. The plaintiff shall provide an accounting to the defendant on a monthly basis with respect to any earnings she receives during the notice period.

F. Costs

58 In considering the scale of costs, I'm entitled to take into account offers to settle made by either party. In this particular case, I'm being asked not only to determine the scale of costs but to fix costs. In fixing costs, the function of the trial judge - in this case a motions judge - is not to perform a detailed assessment of costs, as would be done by an Assessment Master, but rather to come to some reasonable determination, approximating what that result might be.

59 Rule 49.10(1) provides that where a plaintiff has made an offer to settle at least seven days before the commencement of the hearing and the plaintiff then obtains a judgment which is as favourable or more favourable than the offer, the plaintiff is entitled to party and party costs from the date of the offer, and solicitor and client costs, thereafter. The defendant quite correctly points out that the formal offer to settle made by the plaintiff was delivered on

February 1st and the hearing was on February 5th. Although the offer to settle was not as favorable to the plaintiff as judgment is, and was, in fact, a compromise offer by the plaintiff, the offer is not in compliance with the technical requirements of Rule 49.10. Even if it were, it would trigger solicitor and client costs only from that date forward which would exclude the cross-examinations and much of the preparation for the motion for judgment itself, although the hearing of the motion would, if the rule applied, be on the solicitor and client basis. Therefore, I do not believe that the automatic consequences of Rule 49.10 are triggered.

60 However, I have further discretion under Rule 57.01 in making a cost award -- and, I may, in the exercise of that discretion, consider any and all offers to settle by either party. Also, under Rule 57.01, which is quite broad, there is a specific reference to the appropriateness of the Court taking into account the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding, and a party's denial of or refusal to admit anything that should have been admitted.

61 In determining the appropriate cost award in this case, I am not taking into account any of the skirmishes between counsel with respect to the various adjournments of this motion; nor am I taking into account the skirmishes with respect to the scheduling of the cross-examination of Mr. Scott. None of these matters gave rise to any significant costs in any event, but there was considerable fingerpointing and positioning going on which I am just going to disregard completely with respect to both parties.

62 Of greater concern to me is the fact that plaintiff's counsel from the outset has taken a consistent position in requesting the employer to behave reasonably towards this employee, requesting normal and reasonable information with respect to the employee's rights, and about important matters that the employee needed to decide. The employer's position taken throughout, I must assume, was a considered one. The employer was represented by counsel. The employer steadfastly refused to provide reasonable information to the plaintiff. The employer steadfastly insisted that compliance with the *Employment Standards Act* with respect to lay-offs was an absolute answer to this employee's concerns. Counsel for the plaintiff wrote to counsel for the defendant not only making demands and requests, but making detailed reference to applicable and binding case law, including page references to case law which clearly established that the employer's position was wrong in law from the outset. Notwithstanding this, the employer persisted in that position right up to and through

the hearing. This has resulted in far greater cost to the plaintiff than otherwise would have been the case. This is a factor that I am taking into account in fixing the costs in this matter. However, I do not think this is an appropriate case to award solicitor and client costs throughout.

63 Mr. Lecker has stated that his time is somewhere between 40 and 45 hours in preparation and for the hearing. If anything, that is probably an underestimate of the time involved. There was substantial time spent on correspondence with the employer and on legal research, even from the outset. There was the preparation of the Statement of Claim, the motion materials, and the cross-examination of Mr. Scott. And, there were, unfortunately, two attendances before me as this motion was not reached the first day; and, now, a third attendance for the judgment. So there was substantial court time just for the argument of the motion. The argument took a better part of half a day. So, if anything, 40 hours is an underestimate.

64 If I calculate 40 hours at the billing rate of $225, the solicitor and client bill just for fees would be $9000. And Mr. Lecker has asked for solicitor and client cost in the amount of $7,500. The disbursements alone are $600. And, as I said, even an underestimate of the hours on a solicitor and client basis would be $9,000. Therefore, the solicitor and client bill is more likely $10,000 or more for this matter which, mind you, is not unreasonable given the issues that were involved and the time that was taken to do it. I do not believe, however, that all of this should be borne by the employer.

65 I do take into account, as well, that the conduct of the plaintiff is to be commended in that a consistent approach was taken throughout in attempting to settle the matter. A reasonable position was taken. Excessive demands were not made. The settlement offer that was made, although not technically within the rules, was a very reasonable compromise offer. Even more exemplary is the fact that throughout the initial stages, instead of making outrageous demands or anything of that nature, a conciliatory position was taken and information simply requested with respect to the return to work.

66 Also, the plaintiff has kept costs down substantially by bringing the summary judgment motion rather than going through the oral examinations for discovery and taking the matter through to trial. If the plaintiff had done that, substantially more costs would have resulted for the defendant.

67 In all of the circumstances, therefore, I think that the plaintiff's request for $7,500 in costs is a reasonable one. Costs are fixed at $7,500 plus G.S.T. Interest on the judgment shall run from the date of the issuance of the Statement of Claim at the rate prescribed in the Courts of Justice Act.

G. The Employment Standards Proceedings

68 I neglected in my reasons to deal with the *Employment Standards Act* proceedings. The plaintiff also commenced a proceeding before the Employment Standards Branch and there was an issue raised by the defendant as to whether or not this was in any way an impediment or obstacle to the plaintiff going forward with the case before me.

69 In my view, the *Employment Standards Act* proceedings do not in any way prevent the plaintiff from exercising her common law rights through this civil action. The Employment Standards proceedings have not proceeded to a decision. They are still before the Officer, and no determination has been made. Therefore, the decision of the Court of Appeal in *Rasanen v. Rosemount Instruments Ltd.* (1994), 17 O.R. (3d) 267 (Ont. C.A.), with respect to issue of estoppel, has no application. There has been no final determination which comes into play.

H. Aggravated Damages

70 The plaintiff abandoned her claim with respect to punitive damages and damages for mental distress for purposes of this motion for judgment. The plaintiff, however, did request aggravated damages. In my view, that is not an appropriate matter for me to consider on a summary judgment motion. Whether or not there is an entitlement to aggravated damages could be proceeded with at trial, but on a motion for summary judgment, it is certainly not a matter about which I could say there was no triable issue.

Motion granted.