CITATION: Fulmer v Nordstrong Equipment Limited, 2017 ONSC 5529
COURT FILE NO.: CV-17-568293
DATE: 20170925

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
GLEN FULMER	)	*Kristen Pennington*, for the Plaintiff
	)	
Plaintiff	)	
	)	
– and –	)	
	)	
NORDSTRONG EQUIPMENT LIMITED	)	
	)	
Defendant	)	*Gerald Griffiths*, for the Defendants
	)	
	)	
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	)	
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	)	
	)	**HEARD: September 15, 2017**

ENDORSEMENT

DIAMOND J.:

Overview

[1] The defendant carries on business as a designer and manufacturer of conveyer and bulk material handling equipment.

[2] The plaintiff was hired in or around August 2010 as the controller of Nordstrong East, a division of the defendant operating in the province of Ontario.

[3] The plaintiff was terminated from his position on December 12, 2016, and subsequently commenced this proceeding seeking damages for wrongful dismissal.

[4] Both parties agree that this action ought to be determined by way of summary judgment pursuant to Rule 20.04(2b) of the *Rules of Civil Procedure*. I agree, and commend counsel for their conscientious and efficient approach to this litigation. Most, if not all, of the material facts are not in dispute and the parties are in agreement as to the issues that need to be decided.

Accordingly, and on the record before me, I am confident that I can find the necessary facts and apply the relevant law to the evidence, and that any potential credibility issues can be resolved without invoking the enhanced powers set out in Rule 20.04(2.2).

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

[5] The plaintiff submits that in addition to his duties, obligations and responsibilities as the controller of Nordstrong East, he also took on a number of human resources functions (drafting workplace procedures/policies, drafting employment offers/agreements for newly hired employees, and acting as a liaison for employees to senior management with respect to employment benefit or pension plan issues), and as such the character of his employment was "enhanced". While the defendant does not significantly dispute that the plaintiff did perform additional functions, the defendant maintains that those functions were simply ancillary to his core duties, obligations and responsibilities as controller, and were only needed on an intermittent basis.

[6] As controller, the plaintiff reported directly to Nordstrong East's president. According to the plaintiff, from 2009-2016 Nordstrong East doubled the size of its manufacturing facility and purchased an administrative warehouse facility in Mississauga. The plaintiff testified that he played a key role in these events including budgeting and maintaining control of the expenses for both the purchase and renovation of the new Mississauga warehouse facility.

[7] There is no signed employment agreement between the parties. As such, in determining the appropriate length of reasonable notice, I am guided by the traditional criteria set forth in *Bardal v. Globe and Mail.* 1990 CanLII 6677 (ONSC). These criteria include the plaintiff's age, length of service, character of employment and the availability of similar employment with regard to his experience, training and qualification. No one *Bardal* factor is to be given disproportionate weight over another factor, and as such I approach my task of assessing reasonable notice in a holistic manner.

[8] At the date of his termination, the plaintiff was 59 years of age. He had received an annual base salary of $87,500.00, a matching 4% contribution to a Registered Pension Plan and participation in the defendant's benefit plan. The plaintiff was also eligible to receive a discretionary bonus, although this issue will be dealt with separately in my Endorsement.

[9] The assessment of reasonable notice is certainly an art and not a science. The plaintiff's age, length of service and position all warrant consideration. The plaintiff points to the character of his employment being equivalent to that of a manager, and argues that managers are entitled to lengthier notice period by virtue of the difficulty they face in finding alternative, similar employment at a commensurate level of responsibility and remuneration. In my view, the plaintiff did not hold a "classic managerial position", but in any event I rely upon the comments of the Court of Appeal for Ontario in *Di Tomaso v. Crown Metal Packaging Canada LP* 2011 ONCA 469 (CanLII):

> "Crown Metal would emphasize the importance of the character of the appellant's employment to minimize the reasonable notice to which he is entitled. I do not agree with that approach. Indeed, there is recent jurisprudence suggesting that, if anything, it is today a factor of declining relative importance: see *Medis Health and Pharmaceutical Services Inc. v. Bramble* (1999), 1999 CanLII 13124 (NB CA), 175 D.L.R. (4th) 385 (NBCA) ("*Bramble*") and *Vibert v. Paulin* (2008), 2008 NBCA 23 (CanLII), 291 D.L.R. (4th) 302 (NBCA)."

[10] The case law provided by both parties point to a range of reasonable notice periods. The plaintiff submits that reasonable notice ought to be assessed at 12 months, while the defendant argues that the appropriate notice period is 6-8 months. I find the decision of *Ellerbeck v. KVI Reconnect Ventures Inc.* 2013 BCSC 1253 (CanLII) to be demonstrative and helpful. In *Ellerbeck,* the plaintiff was 59 years old as of the date of her termination after being employed as a corporate controller for 3.5 years, and earning (as at termination) a total remuneration of $109,840.00. The Court awarded 10 months' payment in lieu of reasonable notice.

[11] Having reviewed the relevant jurisprudence and having considered the traditional *Bardal* criteria, I find the plaintiff's reasonable notice period to be 10 months.

Issue #2 **Is the plaintiff entitled to payment of a 2016 bonus?**

[12] To the extent that the defendant is advancing a position that the plaintiff was required to be "actively employed" as at the date the bonus payment was earned or paid, there is no dispute that inclusive of his 6 weeks' statutory notice *Employment Standards Act, 2000* S.O. 2000 C.41, the plaintiff was employed as of the end of the defendant's fiscal year (which aligns with the calendar year).

[13] While the plaintiff's bonus was always discretionary in nature, the evidence is that the plaintiff was paid a bonus in each year of his employment. Those amounts were as follows:

Year	Bonus
2010	$5,000.00 (pro-rated for his 5 month period of employment)
2011	$12,000.00
2012	$20,000.00
2013	$15,000.00
2014	$12,500.00

2015	$20,000.00

[14] The plaintiff's annual bonus was determined at the sole discretion of Nordstrong East's president. On cross-examination, the defendant's representative testified that the defendant had and continues to effectively maintain an "unofficial policy" that a terminated employee would not be provided with any bonus, *pro rata* or otherwise.

[15] While the discretion to pay a bonus was not usually exercised until the February following the end of the fiscal/calendar year, the plaintiff's termination letter made no reference whatsoever to either his eligibility for a 2016 bonus, or the "unofficial policy" that no bonus would be payable. I note that the plaintiff's termination letter also made no reference to any concerns with his job performance.

[16] The plaintiff relies upon the decision of my colleague D. Wilson J in *Bain v UBS Securities Canada Inc.*, and in particular the following passage:

> "Simply because a bonus is awarded in the sole discretion of an employer does not mean that it can be done in an arbitrary or unfair fashion or that the employer can decide that an employee should not get a bonus without following a fair, identifiable process. The employer may adjust the weight given to various factors, given the market conditions and other changeable criteria, but that does not obviate the requirement that the exercise must be done in a fair manner. The court must analyze the evidence in a particular case and decide whether the process that was followed was fair and reasonable."

[17] The defendant takes the position that post-termination, it discovered various issues related to the plaintiff's performance which would have (and in fact have) caused the defendant to exercise its discretion to deny the plaintiff a bonus in any event. Those issues were discovered by the defendant's new controller upon his review of Nordstrong East's financial statements. In particular, the new controller gave evidence that:

(a) engineering costs had been overstated by $160,000.00;

(b) profits had been overstated by approximately $90,000.00 in previous years due to inventory not being properly accounted for; and

(c) the plaintiff had been using Canadian dollar figures and not US dollar figures, in the calculation of Nordstrong East's U.S. income tax returns for the 2013-2015 years, resulting in Nordstrong East paying excessive taxes.

[18] Notably, the defendant is not alleging after-acquired cause. Rather, the defendant submits that since the bonus was discretionary, and issues have since been discovered relating to the plaintiff's alleged poor performance, no bonus would have been payable.

[19] A review of the evidence from the cross-examination of the defendant's representative discloses, *inter alia*:

(a) senior management, including corporate controllers for Nordstrong East's parent company, reviewed Nordstrong East's financial statements on a regular basis and never questioned any of the alleged errors made by the plaintiff until after his termination; and

(b) the plaintiff did not complete the U.S. income tax returns himself. Those documents were completed by an external U.S. contractor and reviewed by tax accountants employed by Nordstrong East's parent company.

[20] I agree with the plaintiff that the defendant seems to be seeking reasons to justify its "unofficial policy" of not paying out a bonus to any terminated employee. I see no reason why the plaintiff would not be entitled to payment of his 2016 bonus. The issue then becomes one of quantum, bearing in mind that the objective exercise of discretion must be carried out in a fair and reasonable manner.

[21] As of the date of the plaintiff's termination, Nordstrong East appeared on track to achieve record profitability. Company profit was one of the factors used to historically determine the amount of the plaintiff's bonus. Nordstrong East's 2016 profits were expected to equal or surpass its 2015 profits.

[22] In the circumstances of this case, I find that the plaintiff is entitled to payment of a 2016 bonus, and that using the historical data, the amount of that bonus is to remain consistent with his 2015 bonus. The plaintiff is therefore awarded payment of his 2016 bonus in the amount of $20,000.00.

Issue #3 **Is the plaintiff entitled to payment of a 2017 bonus?**

[23] The plaintiff further claims entitlement to a bonus that he would have received over his notice period, calculated on the same basis as his annual bonuses earned during his employment (including his 2016 bonus). The plaintiff surmises that since Nordstrong East's profits were trending upwards, it is reasonable to forecast that his bonus over the notice period would have been at least equal to his 2015 and 2016 bonuses.

[24] In my view, the plaintiff's argument reaches too far. The purpose of reasonable notice is to provide a terminated employee with sufficient time to locate comparable employment. Historically, bonuses were earned and calculated at the conclusion of the defendant's fiscal/calendar year, and no doubt granted on the basis of an employee's positive efforts and contributions to Nordstrong East's business.

[25] As I have awarded the plaintiff 10 months' reasonable notice, his employment with the defendant would have ended in or around October 2017, subject to successful mitigation efforts. I do not find it to be within the reasonable expectation of the plaintiff (charged with a duty to mitigate his losses) to be able to earn a bonus for the 2017 calendar year while he searched for alternative, comparable employment.

[26] I therefore decline to award any 2017 bonus to the plaintiff.

Issue #4 **Is the plaintiff entitled to compensation for loss of benefits during the 10 months' notice period, and if so, what amount?**

[27] Damages for wrongful dismissal are designed to place the terminated employee in the same position he/she would have been in but for a breach by the employer of the implied term of an employment contract to provide reasonable notice.

[28] On the record before me, the plaintiff was and remains covered by his spouse's medical benefits, and in fact availed himself of those benefits when claiming dental expenses (although he was not fully compensated for same) after he was terminated. If the purpose of damages for reasonable notice is to "make the plaintiff whole", and it is the plaintiff's onus to prove his losses, apart from the shortfall in his claim for dental expenses (which the parties can calculate themselves), I find no evidence of the plaintiff's loss of benefits during the notice period. There is no evidence that the plaintiff replaced the benefits he would have enjoyed during his notice period. While the plaintiff argues that the plaintiff lost the benefit of having the "peace of mind of coverage", I do not find his evidence to support that contention.

[29] Accordingly, subject to payment of the shortfall in his claimed dental expenses, I do not award any damages for the loss of benefits during his notice period.

Issue #5 **Did the plaintiff discharge his duty to mitigate his losses?**

[30] As a terminated employee, the plaintiff had a duty to make reasonable efforts to mitigate his loss of income. A failure to discharge that duty can lead to the Court reducing the reasonable notice period. The onus of proving that a terminated employee failed to discharge his/her duty to mitigate rests squarely upon the employer, and that onus is typically a high one.

[31] The defendant argues that the plaintiff waited until March 2017 to send out job searches, and when he did so he limited his searches to the cities of Mississauga and Brampton thus failing to apply for jobs in Etobicoke or the remainder of the Toronto area (which he in fact did do commencing in June 2017).

[32] The defendant must show that the plaintiff failed to pursue alternative employment opportunities that were of a comparable nature, and that such opportunities were not only available, but if pursued, the plaintiff could have minimized his damages. On the record before me, there is little to no evidence surrounding comparable employment opportunities which the

plaintiff could have achieved, let alone pursued. The plaintiff did apply to more than 25 positions, and participated in networking efforts on a consistent basis.

[33] In my view, the plaintiff has discharged his duty to mitigate. The plaintiff is to be held to a standard of reasonableness, not a standard of perfection. While it is unfortunate that the plaintiff has not located alternative employment to date, and his duty to mitigate will continue until the end of the notice period, I find that he has made reasonable efforts to locate and secure alternative employment. As such, I decline to reduce the plaintiff's award of 10 months' reasonable notice.

[34] With respect to payment of the balance of the notice period, even though the plaintiff's notice period will expire in just over a month, I am content to have the parties' implement the Trust and Accounting approach (as that term was summarized by Justice Perell in *Paquette v. TeraGo Networks Inc.* 2015 ONSC 4189, appeal allowed on other grounds 2016 ONCA 618). As such, a trust in favour of the defendant is impressed upon the funds award to the plaintiff for the balance of the notice period, and the plaintiff is required to account for any future mitigation income.

Costs

[35] In my view, success has arguably been divided. If the parties take a different view, I would first strongly urge them to exert the necessary efforts to try and resolve the costs of this motion, and the action itself.

[36] If such efforts prove unsuccessful, the parties may exchange written costs submissions (totaling no more than four pages including a Costs Outline) in accordance with the following schedule:

(a) the plaintiff may serve and file his costs submissions within 10 business days of the release of this Endorsement.

(b) the defendant shall thereafter have an additional 10 business days from the receipt of the plaintiff's costs submissions to deliver its responding costs submissions.

Diamond J.

Released: September 25, 2017

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SUPERIOR COURT OF JUSTICE

BETWEEN:

GLEN FULMER

Plaintiff

– and –

NORDSTRONG EQUIPMENT LIMITED

Defendant

ENDORSEMENT

Diamond J.

Released: September 25, 2017