CITATION: Holmes v. Hatch Ltd., 2017 ONSC 379
COURT FILE NO.: CV-16-553456
DATE: 20170202

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Paul Holmes, Plaintiff

AND:

Hatch Ltd., Defendant

BEFORE: Pollak J.

COUNSEL: *Andrew Monkhouse*, for the Plaintiff

William D. Anderson, for the Defendant

HEARD: November 10, 2016

ENDORSEMENT

[1] The Plaintiff, Paul Holmes, was employed by the Defendant, Hatch Ltd. ("Hatch"), for approximately 17 years before he was terminated without cause. He brings this motion for summary judgment of his action for wrongful dismissal and breach of contract. He seeks:

(a) 18-20 months' compensation in lieu of notice;

(b) damages equal to the value of his employment benefits; and

(c) a ruling on whether the termination provision in his employment contract is enforceable.

[2] The Defendant submits that pursuant to his Employment Agreement, Mr. Holmes was entitled to either:

(a) combined notice and severance pay of 21 weeks; or,

(b) the combined notice and severance pay, if greater, as required by the *Employment Standards Act, 2000*, S.O. 2000, c. 41 [*"ESA*"].

Hatch argues that Mr. Holmes received the greater period of combined notice and severance pay. He was paid his salary for a period equivalent to approximately 25.5 weeks from May 5, 2016 to

the end of October 2016 and his employment benefits continued for eight (8) weeks after termination.

[3] In the alternative, the Defendant submits that as of the hearing of this motion, Holmes had been unemployed for approximately twenty five (25) weeks while being paid his salary. He has therefore suffered no damages and has the obligation to mitigate any damages he may suffer. The Defendant submits that Holmes has limited his serious job search to approximately ten (10) employers in the GTA which is an unreasonable breach of his obligations to mitigate his damages.

[4] Mr. Holmes' argument on this motion is that:

(1) the termination provision in the Employment Agreement incorporates the common law right to reasonable notice;

(2) the termination provision does not clearly contract out of the common law or is ambiguous regarding same; and

(3) the termination provision violates the *ESA* if it does create a minimum.

In the alternative, he also submits that the Defendant fundamentally breached the Employment Agreement by failing to consider the common law factors of service, position and age, as set out in the termination clause. The consequences of this breach are that he is entitled to reasonable notice as required by common law, as Hatch cannot rely on the termination clause in the Employment Agreement.

[5] As well, Mr. Holmes submits that there was no consideration for the employment contract, and that he is consequently entitled to reasonable notice at common law.

[6] The termination provision relied on by Hatch in the employment agreement is as follows:

> "In the event that we must terminate your employment for reasons other than cause, you will receive a termination package which takes into account your years of service, position and age. As a minimum the amount of combined notice and severance you will receive will equal 4 weeks plus one week for each completed year of service, or such greater amount as may be required by statute at the time of termination." [Emphasis added.]

Mr. Holmes argues that the termination provision explicitly reads in and incorporates the common law *Bardal* factors of years of service, position and age: *Bardal v. Globe & Mail Ltd*., 24 D.L.R. (2d) 140 (Ont. H.C.J.) ("*Bardal*") at p. 145. The provision explicitly states that his termination package must be based on these specific factors. Hatch must consider these factors when it makes its decision on the content of the termination package. It does not provide what he is entitled to, but promises that certain factors that will be considered.

[7] I agree with the submission of Mr. Holmes that a proper interpretation of the clause requires that the words be given meaning. The provision creates an obligation for Hatch to consider the listed factors.

[8] The Defendant argues that the evidence on this motion establishes that the factors referred to in the termination clause were considered in deciding on the "package" for Mr. Holmes. Mr. Holmes disagrees.

[9] The Defendant did not provide direct evidence about how the decision regarding the content of Mr. Holmes' termination package was made or what factors were considered when arriving at this decision. Rather, Hatch relies on the "answers to undertakings" given at the examination for discovery of Nancy Kohler, the human resources manager for Central North America of the Defendant, as evidence about the company's decision.

[10] Ms. Kohler was asked the following questions at her examination for discovery with respect to the package offered to Mr. Holmes:

> 185. Q. Yes. Did Hatch take this part of the contract into consideration when preparing the severance package for Mr. Holmes?
>
> A. I don't understand the question.
>
> 186. Q. So, this contract states that "the termination package will take into account your years of service." When preparing the termination package for Mr. Holmes, did Hatch take into account his years of service with the company?
>
> 189. Q. … How did or did Hatch take into consideration his position when determining his severance package?
>
> A. I don't know.
>
> 190. Q. **Who drafted or determined what Mr. Holmes' severance package would be?**
>
> A. **The advisor at the time.**
>
> 191. Q. **Who was that?**
>
> A. **That would have been Leanne Li…**
>
> 195. Q. **She was the one who determined the severance package for Mr. Holmes?**
>
> A. **She prepares the paperwork and the letters, yes. She was the business partner for them.**

196. Q. **Who made the decision regarding the actual amounts for the severance package?**

A. **We follow the contract in his offer letter.**

MR. ANDERSON: Who were the people that were actually involved in that discussion?

THE DEPONENT: It would have been Leanne Li and I don't know if I would have signed off or Melody Archer would have signed off. I don't know.

MS. MCLENNAN: Counsel, I'd like an undertaking to advise if Ms. Li considered Mr. Holmes' position when determining the severance package to offer him.

[Emphasis added.]

[11] The undertakings and responses are as follows:

UNDERTAKINGS		
17	Advise whether Ms. Leanne Li considered Mr. Holmes' position when determining the severance package to offer Mr. Holmes.	A number of factors were considered including Mr. Holmes' position when determining the severance package to offer Mr. Holmes. **The decision made in these circumstances was to not provide any more than our contractual obligations. [Emphasis added.]**
18	Advise whether Ms. Leanne Li considered Mr. Holmes' age when determining the severance package to offer Mr. Holmes	**A number of factors were considered including Mr. Holmes' age when determining the severance package to offer Mr. Holmes. The decision made in these circumstances was to not provide any more than our contractual obligations. [Emphasis added.]**

[12] From these answers, it is apparent that the employer based the termination package on its own interpretation of its "contractual obligations" and that such interpretation was that only the *ESA* minimums had to be provided.

[13] Both parties agree that a motion for summary judgment of Mr. Holmes' claim is appropriate in this case.

[14] In *Hryniak v. Mauldin, et al* 2014 SCC 7, [2014] S.C.R. 87, the Supreme Court of Canada created a roadmap to follow on a motion for summary judgment. At paragraph 66, the Court states:

> "On a motion for summary judgment under Rule 20.04, the judge should first determine if there is a genuine issue requiring trial based only on the evidence before her, without using the new fact-finding powers. There will be no genuine issue requiring a trial if the summary judgment process provides her with the evidence required to fairly and justly adjudicate the dispute and is a timely, affordable and proportionate procedure, under Rule 20.04(2)(a). If there appears to be a genuine issue requiring a trial, she should then determine if the need for a trial can be avoided by using the new powers under Rules 20.04(2.1) and (2.2). She may, at her discretion, use those powers, provided that their use is not against the interest of justice. Their use will not be against the interest of justice if they will lead to a fair and just result and will serve the goals of timeliness, affordability and proportionality in light of the litigation as a whole."

[15] In applying this roadmap, I must ask myself the following: 1) Based on the evidentiary record alone, are there genuine issues that require a trial? 2) Does the evidentiary record before me provide the evidence I need to "fairly and justly adjudicate the dispute"?

[16] On the basis of the evidentiary record, are there genuine issues that require a trial? On the issue of whether Hatch complied with the termination clause, the evidence of Hatch is:

> **"The decision made in these circumstances was to not provide any more than our contractual obligations.**
>
> **A number of factors were considered including Mr. Holmes' age when determining the severance package to offer Mr. Holmes. The decision made in these circumstances was to not provide any more than our contractual obligations."**

On this motion for summary judgment Hatch has not, in my view, provided the court with sufficient credible evidence to support its submission that it did consider the factors of age, service, and position when deciding the content of the package to be offered to Mr. Holmes. Hatch has the obligation to put its "best foot forward". Hatch did not adduce evidence from the decision maker Ms. Leanne Li, but rather provided self-serving indirect evidence through answers to undertakings in the cross-examination of Ms. Nancy Kohler, the representative of the Defendant at examination for discovery. The evidence, reproduced above, is a statement that the

factors were considered, and that Hatch decided “not to provide any more than its contractual obligations”, but there is no evidence as to how the factors were considered.

[17] Both at the hearing, and after the hearing, the Court requested submissions on the consequences, if any, of the Defendant’s failure to consider the factors in deciding what Mr. Holmes' termination package would be. In particular, after the hearing, the Court asked the parties to consider the following cases:

(a) *Ebert v. Atoma International Inc*., 28 C.C.E.L. (2d) 158 ("*Ebert*");

(b) *Hamilton v. Open Window Bakery Ltd*., 2004 SCC 9, [2004] 1 S.C.R. 303 ("*Hamilton*");

(c) *Orr v. Magna Entertainment Corp*., 63 C.C.E.L (3d) 132 ("*Orr* "); and

(d) *Goldsmith v. Sears Canada Inc*., 2013 ONSC 3214, 257 A.C.W.S. (3d) 102 ("*Goldsmith*").

[18] Hatch argues that in *Hamilton,* the Supreme Court of Canada held that when a contract has been repudiated, the breaching party is required to perform no more than the minimum performance guaranteed under the contract. At para. 11, the Court quoted *Cockburn v. Alexander* (1848), 6 C.B. 791 for stating that "where there are several ways in which the contract might be performed, that mode is adopted which is the least profitable to the plaintiff, and the least burthensome to the defendant.”

[19] Mr. Holmes argues that the contract, if valid, does not limit his notice but at most, provides Hatch with some discretion to decide on the amount of notice to be given. He further argues that Hatch has not met its burden of proving that there is a genuine issue requiring a trial on whether Hatch did consider the factors set out in the termination clause when it made its decision about the termination “package” to be given to Mr. Holmes.

[20] Mr. Holmes submits that the principles in *Hamilton* are not applicable to this case. The termination provision provides that "…you will receive a termination package which takes into account your years of service, position and age." It does not provide that the consideration of the factors are an alternative to *ESA* minimums. **Rather, it treats consideration of the factors to arrive at a suitable termination package as an additional requirement, subject to the *ESA* minimums.**

[21] I agree with these submissions. The principles set out in the *Hamilton* case are not applicable as the termination clause provides for one mode of performance, namely, that Hatch will provide Mr. Holmes with an **appropriate** termination package that complies with the *ESA* minimums and is based on a consideration of the listed factors.

[22] I agree with both parties that there is no genuine issue requiring a trial and that the evidentiary record provides me with the necessary evidence to fairly and justly adjudicate the issue of whether Hatch has breached the Employment Agreement. I have found that the

evidence supports my finding that Hatch has breached the Agreement by not considering the factors. What are the consequences of this breach?

[23] As the Plaintiff submits that Hatch fundamentally breached the Employment Agreement by failing to consider the factors set out in the Agreement, specifically years of service, position and age, Hatch has repudiated the Agreement. The Agreement therefore becomes invalid and the damage award must be based on the common law.

[24] Mr. Holmes relies on *Ebert* to support his argument that Hatch cannot breach the contract "and then rely on the termination clause which it breached, to limit its liability." I agree with these submissions. Mr. Holmes is therefore entitled to damages for failure to provide reasonable notice in accordance with the common law. It is therefore not necessary for this Court to consider the issue of whether the employment contract is not enforceable because there was no consideration for it.

[25] The Plaintiff's Claim for damages for failure to give reasonable notice is greater than the amount of time that has elapsed since his termination of employment to the time of the hearing of this motion. An award in favour of the Plaintiff would have the practical effect of removing the Plaintiff's obligation to mitigate his damages.

[26] With respect to the obligation to mitigate damages, Hatch submits that Mr. Holmes has limited his job search to approximately ten (10) employers in the GTA which has similar employment in his field of expertise. As well, Mr. Holmes does not include a cover letter, sending only his resume electronically.

[27] Before considering the best way to deal with the "mitigation" issues, I must determine the amount of reasonable notice to which the Plaintiff is entitled, subject to his obligation to mitigate his damages. I must consider the factors set out in *Bardal*.

[28] Mr. Holmes submits that his notice period should be eighteen (18) to twenty (20) months, plus the value of benefits, and that there should be no deduction for his failure to mitigate.

[29] In his factum, Mr. Holmes argues the *Bardal* factors apply as follows:

> "87. **Nature of Employment**: The Plaintiff was employed as a Project Manager and Senior Water Resources Engineer. This is a professional job which is specialized.
>
> 88. **Length of Service**: The Plaintiff was employed for just over 17 years from January 25, 1999 until he was terminated without cause or advanced notice on May 5, 2016.
>
> 89. **Age**: At the date of his termination, the Plaintiff was 54 years old. His date of birth is December 30, 1961.

> 90. **Availability of Similar Employment, Having Regard to Experience, Training, and Qualifications**: The Plaintiff submits that this factor ought to be considered in the context provided in *Bardal*, cited supra: it involves not only a "listing" of all the comparable positions available, but a consideration of the Plaintiff's level of qualifications for those positions."

[30] Hatch argues, in the alternative to its position that the Termination Clause is valid and enforceable, that the common law reasonable notice period is between nine (9) and fifteen (15) months, based on the following *Bardal* factors:

> **"Age**: The Plaintiff was fifty-four (54) years of age at the time of termination and was therefore not near the end of his working career.
>
> **Length of service**: Holmes' approximately seventeen (17) years of recognized service is not short-term, but not particularly long service.
>
> **Character of employment**: The character of employment factor tends to justify a longer notice period for senior management employees and a shorter period for middle or lower rank or unspecialized employees. The Plaintiff's position was not that of a manager or executive at Hatch.
>
> **Availability of similar employment**: Hatch confirms that comparable employment for the Plaintiff is available. "Water Resources Engineer" and "Environmental Engineer" job searches of the Indeed job search engine in September, 2016 generate lists of 88 and 354 job opportunities, respectively, within the Greater Toronto Area. The Plaintiff has been unemployed for six (6) months and has been paid his salary for the entire period.
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> *Slater v. Sandwell Inc*., 1994 CanLII 7414 (ON SC) at para 53 - 55 citing *Zeggil v. Foundation Co. of Canada* (1980), 2 C.C.E.L. 164 (Ont. H.C.)"

[31] Hatch also relies upon the following authorities in support of its alternative position that the appropriate reasonable notice period is between nine (9) and fifteen (15) months:

Case	**Age**	**Service**	**Position**	**Notice**
Vist v. Best Theratronics Ltd., 2014 ONSC 2867, 241 A.C.W.S. (3d) 144	54	16 years	Senior Radiation Physicist	6 months
McLean v. Raywal Limited Partnership, 2013 ONCA 312, 228 A.C.W.S. (3d) 130.	45	12 years	Kitchen Designer	8 months

Briant v. Gerber (Canada) Inc.(1989), 17 A.C.W.S. (3d) 186 (Ont. H.C)	49	15 years	Engineer	9 months
Morris v. Rockwell International of Canada Ltd. (1993), 47 C.C.E.L. 183 (Ont. Gen. Div.)	50	10.5 years	Engineering assistant technician	10 months
Jadubir v. Martinrea International Inc. 2012 ONSC 1367, 213 A.C.W.S. (3d) 920	-	15 years	Lead Hand Toolmaker	12 months
Russell v. Molson Breweries (Ontario) Ltd. (1995), 9 C.C.E.L. (2d) 277 (Ont. Gen. Div.)	43	17 years	Quality control analyst	13 months
Bullen v. Protor & Redfern Ltd. (1996), 20 C.C.E.L. (2d) 36 (Ont. Gen. Div.)	41	21 years	Site representative surveyor	16 months
Beatty v. Best Theratronics Ltd., 2014 ONSC 3376, 241 A.C.W.S. (3d) 374	58	16 years	Radiation Safety Officer	16 months

[32] After considering the *Bardal* factors and the parties' submissions, I find that the reasonable notice period is 18 months. A deduction must be made from any damages award for the notice and payments that have already been paid to or received by Mr. Holmes.

[33] With respect to the issue of the Plaintiff's continuing duty to mitigate, I find that the evidentiary record does not allow this Court to make a finding on whether the Plaintiff will have any employment income loss during the balance of the notice period or whether he will successfully mitigate. Even though the Plaintiff has argued that he has not been able to find employment to the date of this motion, he moved for summary judgment knowing that it would be heard before he suffered any loss of employment income. To remedy this difficulty, the parties have advised the Court that they agree to follow the approach the Court has taken in the case of *Markoulakis v. SNC-Lavalin Inc.*, 2015 ONSC 1081, 253 A.C.W.S. (3d) 362.

[34] The Court has determined that the total reasonable notice period for Mr. Holmes is 18 months. It follows that the Defendant has the obligation to pay Mr. Holmes the appropriate monthly compensation for the balance of the 18 month notice period subject to the deductions I have referred to above. The Defendant's obligation to pay is also subject to the Plaintiff's

obligation to mitigate his damages and to a deduction in the monthly payments by the Defendant for any earnings from employment or a business. If during the balance of the notice period, the Defendant challenges the mitigation efforts or earnings of the Plaintiff and does not make such payments to the Plaintiff, the parties should determine the appropriate procedure for resolving this dispute.

[35] The parties have not agreed to, or provided the Court with, evidence on the amount of compensation Mr. Holmes is entitled to on a monthly basis for damages during the notice period. The Court has therefore only provided the parties with the above-noted legal determination of the duration of the reasonable period.

[36] Partial summary judgment is therefore granted by way of a declaration with respect to Mr. Holmes' entitlement to 18 months' damages for wrongful dismissal. The parties did not make any submissions on the procedure to be used if they require adjudication on the remaining potential issues and the calculation of "mitigation and damages". I therefore make no ruling in this regard.

[37] At para. 78 in *Hryniak*, the Supreme Court of Canada held that:

> Where a motion judge dismisses a motion for summary judgment, in the absence of compelling reasons to the contrary, she should also seize herself of the matter as the trial judge.

[38] In my view, this is an appropriate case for me to follow the Supreme Court's direction and remain seized of any necessary future proceedings in this matter, such as a trial of the remaining issues. I must, however, qualify this to be subject to the practical reality of our court's ability to schedule trials in a timely and expeditious manner. I will not be seized of this trial if the effect of my unavailability would be to delay the hearing of the trial between the parties. If it is possible to do so without adverse delay or consequences to the parties, I seize myself of the trial of this matter as directed in *Hryniak*.

Costs

[39] If the parties are unable to agree on costs, they may make brief written submissions to me no longer than three pages in length. The Plaintiff's submissions are to be delivered by 12:00 p.m. on February 13, 2017, and the Defendant's submissions are to be delivered by 12:00 p.m. on February 21, 2017. Any reply submissions are to be delivered by 12:00 p.m. on February 28, 2017.

Pollak J.

Date: February 2, 2017