CITATION: Love v. Acuity Investment Management Inc., 2011 ONCA 130
DATE: 20110216
DOCKET: C50725

COURT OF APPEAL FOR ONTARIO

Goudge, Lang and Watt JJ.A.

BETWEEN

Paul Love

Plaintiff (Appellant)

and

Acuity Investment Management Inc. and Ian Ihnatowycz

Defendants (Respondents)

Malcolm MacKillop and Hendrik Nieuwland, for the appellant

John D. Campbell and Stephanie L. Turnham, for the respondents

Heard: December 2, 2010

On appeal from the judgment of Justice J. Patrick Moore of the Superior Court of Justice dated June 2, 2009.

Goudge J.A.:

[1] On May 3, 2005, the appellant was dismissed without cause or notice from his employment with the respondent. At the time, he was not only an employee, but a part owner of the respondent, having been permitted to buy 2% of the equity of the company. He sued the respondent on a number of grounds.

[2] At trial it was not disputed that the appellant was dismissed without cause. He was awarded damages equivalent to 5 months' pay in lieu of notice. He was also awarded damages for the loss of his shares on the basis that the proper date to be used to trigger the respondent's right to repurchase the shares, and consequently their valuation, was the end of his notice period.

[3] The appellant's other claims, including his claims for lost opportunity to acquire additional equity, for negligent misrepresentation, for aggravated or punitive damages, for oppression, and his claim against the principal of the company, Mr. Ihnatowycz, were all dismissed. The appellant has appealed none of these.

[4] The respondent made several offers prior to trial, all of which exceeded the appellant's recovery. The trial judge awarded no costs to either party up to the date of the first offer, and partial indemnity costs to the respondent thereafter.

[5] On appeal, the appellant argues that the length of the notice period used by the trial judge to calculate his entitlement to damages in lieu of notice was too short. He also appeals the order depriving him of costs prior to the respondent's first offer.

[6] The respondent cross-appeals the order that it pay the appellant for his shares using the end of the 5-month notice period as the trigger date. It argues that the proper trigger date was the date of the appellant's termination.

[7] For the reasons that follow I would allow the appeal concerning reasonable notice and substitute a period of 9 months. I would also allow the appeal of trial costs to a limited extent and order that the respondent's trial costs run only from the date of its second offer. Finally, I would allow the cross-appeal and fix the trigger date for the respondent's right to repurchase the appellant's shares and for valuing them as the date of his termination.

THE FACTS

[8] The appellant is a chartered accountant who was a partner in Price Waterhouse for a number of years until he resigned at the beginning of 2002. Thereafter, he sought employment in the investment management field because he wanted a circumstance in which he could acquire an equity interest in his employer. In seeking the right opportunity, he declined to pursue employment prospects where that was not possible, such as major banks.

[9] Through a college friend, he made contact with the respondent company, which he viewed as an appropriate vehicle through which to realize his aspirations. He began working there in October 2002.

[10] The respondent's business was investment management. The appellant became one of two senior vice-presidents in a company of 90 employees. He reported to Mr. Ihnatowycz, the founder and chief executive officer. Although he did not supervise other employees, by the time of his dismissal he had sole responsibility for managing the respondent's institutional investment clients and the business they provided to the respondent.

[11] By that date, he was also a 2% owner of the respondent, and one of 9 shareholders. He purchased his shares in August 2004 for approximately $360,000 pursuant to the Investment Agreement he signed with the respondent.

[12] The appellant was dismissed without cause on May 3, 2005. He was 50 years of age and had 2.53 years of service with the respondent. Over that time, he received total compensation including salary, commissions, profit distribution and the value of his shares which were worth an average of $633,548 per year of employment.

THE APPEAL

Issue 1 – Reasonable Notice

[13] Because the appellant was dismissed without cause and without notice, he was entitled to compensation for the reasonable notice he should have received. The trial judge began his assessment of the length of that period by citing the famous passage from *Bardal v. The Globe & Mail Ltd.* (1960), 24 D.L.R. (2d) 140 (O.H.C.) at p.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.

[14] The trial judge then moved immediately to the appellant's length of service, finding that "relatively speaking Mr. Love was a short service employee", and agreeing with the views regarding notice periods for such employees expressed in *Iliescu v. Voicegenie Technologies Inc.* (2009), 71 C.C.E.L. (3d) 123 (Ont. S.C.). He quoted from para. 57 of that decision where the court held that 4 months' notice was appropriate when the circumstances there were compared to an earlier case, *Chen v. Sigpro Wireless Inc.*, [2004] O.T.C. 466 (S.C.) in which a 45 year old software engineer with two years' service and a salary of $102,000 per year received 5 months' notice. The remainder of the trial judge's analysis of the *Bardal* factors consisted of the following:

> Mr. Love was 50 years of age at the time of termination following 2.53 years of service. He was a chartered accountant and a senior vice president but he held a senior level sales position and did not manage or supervise other people.

[15] He then noted that this was not a case where the appellant was lured away from his prior employment. Thus this aggravating factor need not be considered. He concluded simply that "in all of the circumstances of this case the reasonable notice period applicable is five months".

[16] The appellant challenges this assessment and argues that it warrants appellate intervention. I agree.

[17] The respondent quite correctly points out that because determining the appropriate period of notice requires the weighing and balancing of a variety of relevant factors, the trial judge's conclusion is entitled to deference in this court. However, as was said in *Minott v. O'Shanter Development Co.* (1999), 42 O.R. (3d) 321 (C.A.), if the trial judge erred in principle, this court may substitute its own figure, although it should do so sparingly if the trial judge's award is in an acceptable range despite the error in principle.

[18] In my opinion, the trial judge's determination of the appropriate period of reasonable notice reflects error in principle in three respects.

[19] First, it overemphasizes the appellant's short length of service. While short service is undoubtedly a factor tending to reduce the appropriate length of notice, reference to case law in a search for length of service comparables must be done with great care. The risk is that while lengths of service can readily be compared with mathematical precision that is not so easily done with other relevant factors that go into the determination of notice in each case. Dissimilar cases may be treated as requiring similar notice periods just because the lengths of the service are similar. The risk is that length of service will take on a disproportionate weight.

[20] In my view, that appears to have happened here. The two cases from which the trial judge drew guidance in awarding 5 months were cases in which the length of service

was comparable to the appellant's and the notice period was assessed at 4 and 5 months respectively. However these cases can provide very little guidance if one looks at other important factors. They were not cases involving a senior executive reporting to the chief executive officer. In neither case was the employee an owner of the business. In both cases, the employee's average annual compensation was a small fraction of the appellant's. The fact that these employees were awarded 4 and 5 months' notice is of little help in deciding what was appropriate for the appellant.

[21] The second error is the under-emphasis on the character of the appellant's employment. To describe it as a senior vice president holding a senior level sales position but not supervising others ignores a number of relevant aspects of the appellant's employment. He was one of only two senior vice presidents. He reported directly to the chief executive officer. He was responsible for an important part of the respondent's operation, namely the investments of its institutional clients. He received significant average annual compensation and was one of nine owners of the company. He was clearly a high level employee, something that this court has said favours a longer notice period: see *Cronk v. Canadian General Insurance Co.* (1995), 25 O.R. (3d) 505 (C.A.).

[22] Third, the trial judge gives no consideration at all to one of the *Bardal* factors, the availability of similar employment. Both his substantial average annual compensation and the possibility of equity participation in his employer were important aspects of the appellant's employment. Both are relevant in assessing similar employment opportunities: see *Belzberg v. Pollock* (2003), 10 B.C.L.R. (4th) 255 (C.A.) for an

example of the relevance of equity ownership in this assessment. Here both considerations suggest that obtaining similar employment would be harder rather than easier. This *Bardal* factor therefore clearly points to a longer period of reasonable notice.

[23] Taking these errors together, I conclude that the trial judge's assessment of five months is the product of error in principle. Moreover, the award is sufficiently wanting that this court is warranted in substituting its own figure. Considerably more than tinkering is required to adequately reflect the factors under-emphasized or ignored.

[24] In my view, the character of the appellant's employment, viewed fully, and the challenge of finding similar employment both require a significantly longer period of notice. Giving appropriate weight to these factors, and keeping in mind the appellant's age and short service I would set aside the 5 months awarded at trial and substitute a period of 9 months.

Issue 2: Trial Costs

[25] The respondent made three written offers to settle this action before a trial. The first, on January 24, 2008, was for $1,100,000 plus costs. The second, on April 14, 2008, was for $919,926 plus costs. The reduction from the first offer corresponded to a payment made by the respondent to the appellant in part to compensate for the failure to give notice. The third, on April 24, 2009, was for $1,250,000 plus costs. Each of these exceeded the appellant's recovery at trial. This remains so even with an increase in the period of reasonable notice.

[26] The trial judge found that the respondent's second offer did not revoke its first offer. He therefore held that it was the date of the first offer that was operative for the purposes of Rule 49.01(2). Given the result at trial the trial judge determined that the Rule entitled the respondent to its partial indemnity costs from the date of the first offer. However because of the appellant's mixed success, and his conduct in unnecessarily prolonging the trial, the trial judge exercised his discretion to deprive the appellant of costs prior to the date of the respondent's first offer.

[27] On appeal, the appellant argues that the trial judge erred in finding that the respondent's second offer did not revoke its first, and further that there was no proper basis to deprive him of costs prior to the applicable date.

[28] I agree with the appellant's first argument but not his second. There is no doubt that a second written offer can withdraw a first offer by clear implication, even if it does not do so explicitly: see *Diefenbacher v. Young* (1995), 22 O.R. (3d) 641 (C.A.) where, at pp. 646-47, the court points out that a plaintiff's second offer demanding a greater amount than its first offer had this effect. The second offer would change the offering party's position to something less attractive to the recipient of the offer than the first offer. That is exactly what happened in this case.

[29] The respondent's second offer was made on the same day as a separate *ex gratia* payment to the appellant. The second offer reads as follows:

> This letter is being delivered at the same time as another letter accompanying a payment to your client of $180,074. My

> client's Offer to Settle dated January 24, 2008 that was sent to you under cover of a letter dated January 25, 2008 is hereby reduced by $180,074.

[30] This offer clearly reduced the respondent's first offer. It was less attractive to the recipient, the appellant. Unless the second offer was intended to revoke the first, there was no point in the respondent making it. It cannot be said that the first offer of $1,100,000 plus costs remained open thereafter for acceptance by the appellant. After the second offer on April 14, 2008, the appellant could not have bound the respondent to $1,100,000 plus costs by accepting the first offer. Had he tried to do so, the respondent would have correctly said that the offer had been withdrawn on April 14, 2008.

[31] In my view, it was unreasonable for the trial judge to find that the second offer did not revoke the respondent's first offer. The effective date for Rule 49.01(2) should have been April 14, 2008 not January 24, 2008.

[32] However, I think the trial judge was entirely within his discretion to deny costs to the appellant prior to the date of the second offer for the reasons that he gave. Many of the appellant's claims failed. The trial judge was well positioned to assess the impact on trial time of the appellant's conduct. Indeed, the appellant's first position on costs at trial was that neither he nor the respondent should be awarded any costs.

[33] In the result I would alter the order for costs made at trial only to the extent of awarding partial indemnity costs to the respondent from April 14, 2008 onwards.

THE CROSS-APPEAL

[34] When he was dismissed on May 3, 2005, the appellant owned 200 shares in the respondent. Pursuant to the Investment Agreement by which the appellant acquired his shares, the respondent was entitled to buy them back from him. The respondent did so using the appellant's termination date as the trigger date. At trial the appellant argued that, properly interpreted, the Investment Agreement fixes the date that triggers the buy-back right and the share valuation process as the end of the period of reasonable notice.

[35] The trial judge agreed. He appears to have reasoned that because the Investment Agreement does not use the phrase "notice of dismissal" as a trigger date, this court's decisions, particularly *Veer v. Dover Corp. (Canada) Ltd.* (1999), 120 O.A.C. 394 (C.A.) suggest that the Investment Agreement must be interpreted to fix the trigger date at the end of the reasonable notice period. His conclusion was as follows:

> In my view, upon a fair reading of the provisions of the Investment Agreement, Mr. Love was entitled to hold his shares through to the end of his reasonable notice period (5 months) and to have the shares valued for repurchase as at the end of the quarter in which that notice period ended.

[36] The respondent says that the trial judge erred in this, and that the appropriate date was the date of the appellant's dismissal. I agree.

[37] The Investment Agreement between the appellant and the respondent was effective as of August 31, 2004. The preamble sets out the purpose of the agreement:

> **AND WHEREAS** if Love is no longer an employee of Acuity, Love must offer to sell all the Shares upon the terms and conditions contained in this Agreement.

[38] Paragraph 1 provides the parties' agreement that the appellant would acquire 200 class B shares in the respondent on August 31, 2004.

[39] Paragraph 2 sets the price to be paid by the appellant.

[40] Paragraph 3 sets out the respondent's right to repurchase these shares. It fixes the date triggering that right and as of which the share valuation process is to take place. That date is defined as the date the appellant "ceases to be an employee" of the respondent. In full, paragraph 3 reads as follows:

> **Purchase of Shares**
>
> (a) Subject of paragraph 4 hereof, if at any time:
>
> (i) Love's employment is terminated by Acuity without cause; or
>
> (ii) Love should cease to be an employee of Acuity by reason of death or disability,
>
> then subject to paragraph 3(b), Love agrees that Acuity shall have the option (but not the obligation) to purchase the Shares for a purchase price, determined at the date that Love so ceases to be an employee of Acuity, calculated as follows:
>
> The value of each Share will be an amount equal to the "Acuity Value" divided by the total number of outstanding shares in the capital of Acuity at the time such value is being calculated. The "Acuity Value" is equal to one and one-half (1½) times the revenue that Acuity estimates will be realized by Acuity during the following twelve (12) month period from the assets under administration at the end of the calendar quarter in which Love ceases to be an employee of Acuity, subject

> to an adjustment for any extraordinary or non-recurring items during such calendar quarter. For purposes of this agreement, a calendar quarter is a three (3) month period ending on either March 31, June 30, September 30 or December 31.
>
> Such option may be exercised by notice to Love from Acuity within sixty (60) days from the date that Loves ceases to be an employee of Acuity.
>
> (b) Subject to paragraph 4 hereof, if at any time:
>
> (i) Love should voluntarily terminate his employment with Acuity; or
>
> (ii) Love's employment should be terminated by Acuity for cause,
>
> then Love agrees that Acuity shall have the option (but not the obligation) to purchase the Shares for a consideration that is 10% less than the amount that would be payable has such Shares been purchased pursuant to paragraph (3)(a). [Emphasis Added.]

[41] The cross-appeal raises two issues:

a) does paragraph 3 of the Investment Agreement apply to the appellant in these circumstances; and

b) if so, when did the appellant cease to be an employee of the respondent.

[42] The first issue is easily addressed. The appellant and the respondent both argue that paragraph 3 applies to the appellant and the buy-back of his shares by the respondent.

[43] I agree. The preamble makes clear that the Agreement is to apply to every circumstance in which the appellant ceases to be an employee of the respondent.

Paragraph 3 provides for that happening because of the appellant's death or his disability or if he voluntarily terminates his employment with the respondent. It also provides for the appellant's employment being terminated by the respondent for cause (paragraph 3(a)(ii)) or without cause (paragraph 3(a)(i)). Thus, no matter how the appellant ceases to be an employee, the respondent can repurchase his shares.

[44] When an employer terminates an employee without notice, an implied term of the employee's contract of employment entitles the employer to do so by giving proper notice of termination, during which the employee will continue to work under the terms and conditions of his contract. Alternatively, as happened in this case, an employer can terminate an employee without cause, but without providing proper notice. This constitutes a wrongful dismissal, in breach of the employee's contract, and any payment by the employer in lieu of notice is an attempt at compensation for the breach. This court made that clear in *Taylor v. Brown* (2004), 73 O.R. (3d) 358 (C.A.), at para 15:

> Proper notice of termination is an implied term of the contract of employment; payment in lieu of notice is not. We agree with the opinion of Lambert J.A. in [*Dunlop v. B.C. Hydro and Power Authority* (1988) 23 C.C.E.L. 96 (B.C.C.A.)] when he states that payment in lieu of notice is seen as "an attempt to compensate for [the employer's] breach of the contract of employment, not as an attempt to comply with an implied term of the contract of employment".

[45] The Investment Agreement clearly applies to termination without cause of the appellant whether through the provision of reasonable notice or with payment in an attempt to compensate for not providing reasonable notice. The latter constitutes a

wrongful dismissal, that is, a termination in breach of the contract of employment. As such it is a termination that does not comply with the law, as that phrase is used in *Veer*. That is what happened to the appellant in this case.

[46] I agree with the appellant and the respondent that the appellant's termination is encompassed by the Investment Agreement. The clear wording of the agreement extends to a termination without cause in breach of the employee's contract of employment.

[47] The second question is when the appellant ceased to be an employee of the respondent. Paragraph 3(a)(ii) provides that the respondent must exercise its right to repurchase the appellant's shares within 60 days of that date and that the valuation of those shares is triggered by that date.

[48] The appellant argues that in a dismissal without cause in the circumstances of this case (where no proper notice was given but the employer made a payment in lieu of notice) the employment lawfully ends at the end of the reasonable notice period. The appellant says that the trial judge was correct in finding that the trigger date for the respondent's right to repurchase the shares and for valuing those shares was therefore the end of the reasonable notice period.

[49] The respondent argues that the trial judge erred and that the trigger date was the date of the appellant's termination without cause. That was the date on which he ceased to be an employee.

[50] I agree with the respondent. The date of the appellant's termination is a question of fact. Here, there is no doubt that the appellant was terminated without cause on May 3, 2005. Had he been given reasonable notice of termination instead he would have worked out his notice period and his employment would have ceased at the end of that period.

[51] However, he was given no notice. His termination without notice entitled him as a matter of law to full compensation for this breach of his contract of employment. His entitlement to this remedy arose because his employment was terminated by the employer on May 3, 2005. He would not have had this entitlement had his employment continued beyond that date. The end of his notice period represents the end point of his entitlement to compensation in lieu notice, not the end point of his employment.

[52] In short, the respondent terminated the appellant on May 3, 2005. That severed his employment relationship as of that date. It cannot be said that, nonetheless, his employment continued until the end of his notice period. He ceased to be an employee on May 3, 2005.

[53] The appellant seeks to rely on a sentence in *Kieran v. Ingram Micro Inc.* (2004), 189 O.A.C. 58 (C.A.) at para. 58. Abstracted from the context of that paragraph, the sentence might seem to support the appellant's position. However the context makes clear that the court was doing no more than describing the result in *Schumacher v. Toronto-Dominion Bank* (1997), 147 D.L.R. (4th) 128 (Ont. Gen. Div.), where, at paras. 237 to 240, that court found that the employee, who was wrongfully dismissed, ceased

being an employee on dismissal but, on the wording of the plan in that case, was entitled to damages equivalent to what he would have received had he continued to work through the period of reasonable notice. *Kieran* does not help the appellant.

[54] I therefore conclude that the appellant ceased to be an employee of the respondent on May 3, 2005, and that the trial judge erred in using the end of the notice period rather than his termination date as the trigger for the respondent's right to repurchase and for the valuation.

[55] In the result, both the appeal and the cross-appeal succeed. The judgment below must be amended in accordance with these reasons. Because success is divided, there should be no costs of the appeal or the cross-appeal.

RELEASED: FEB 16 2011 ("S.T.G.")

"S.T. Goudge J.A."
"I agree. S. Lang J.A."
"I agree. David Watt J.A."