CITATION: *Ramos v. Hewlett-Packard (Canada) Co.*, 2017 ONSC 4413
COURT FILE NO.: 16-70917
DATE: 2017/07/19

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Maria Thereza Ramos, Plaintiff

AND

Hewlett-Packard (Canada) Co., Defendant

BEFORE: Madam Justice Robyn M. Ryan Bell

COUNSEL: David Cutler, for the Plaintiff

Jeffrey P. Mitchell, for the Defendant

HEARD: July 11, 2017

ENDORSEMENT

Overview

[1] Maria Thereza Ramos has commenced a claim against Hewlett-Packard (Canada) Co. for damages for wrongful dismissal, breach of contract, and loss of employee benefits and out-of-pocket losses. She does not claim for damages resulting from the manner in which Hewlett-Packard terminated her employment, bad faith conduct or for punitive damages. Hewlett-Packard does not allege that Ms. Ramos' employment was terminated for cause.

[2] By letter dated July 25, 2016, Hewlett-Packard notified Ms. Ramos that as of August 1, 2016, she would be transitioned into the company's workforce reduction program and that her employment would be terminated on a without cause basis as of September 23, 2016. In the same letter, Hewlett-Packard offered Ms. Ramos a separation package. In its statement of defence, Hewlett-Packard refers to the separation package it offered to Ms. Ramos, the dollar amount of the separation package (para. 21) and Ms. Ramos' rejection of the separation package

(first sentence of para. 22). Hewlett-Packard states that the separation package offered to Ms. Ramos constitutes appropriate notice of termination under the common law (first sentence of para. 23). The heading between paras. 22 and 23 of the statement of defence reads "ESIT Offered the Plaintiff a Reasonable Separation Package." (Hewlett-Packard changed its name to ESIT Canada Enterprise Services in 2017.)

[3] Ms. Ramos moves to strike out these references on the basis that in wrongful dismissal cases, where an offer is made without prejudice and to "buy peace," the fact of the offer should not generally be pleaded. (*Williamson v. Grant Brown National Leasing Inc.*, [1986] O.J. No. 2378 (H.C.J.)) Hewlett-Packard says that its July 25, 2016 letter was the primary written communication that Ms. Ramos' employment was being terminated and that no litigation was contemplated at that time. Hewlett-Packard says that it did not intend its letter to be without prejudice, and points out that the letter was not labelled "Without Prejudice." Hewlett-Packard takes the position that its July 25, 2016 letter was a communication to Ms. Ramos that her employment was being terminated and was a with prejudice offer to her as to her legal entitlements.

[4] There are two issues on this motion:

(i) whether the separation package offer in Hewlett-Packard's July 25, 2016 letter was made without prejudice; and

(ii) whether the particulars of the separation package offer are relevant to the issues in the action.

[5] The motion was argued under Rule 25.11 of the *Rules of Civil Procedure*. The parties agree that Rule 49.06(1), which prohibits references to an offer to settle in any pleading, does not apply to this motion. Rule 49.06(1) is limited in its application by Rule 49.02(1) which requires that an offer to settle under Rule 49 be made by "a party to a proceeding." (*Canadian Imperial Bank of Commerce v. Val-Dal Construction Ltd.* (1988), 63 O.R. (2d) 283 at para. 10.) The separation package offer made by Hewlett-Packard was made prior to the commencement of the action.

[6] For the following reasons, I find that the offer made to Ms. Ramos in the July 25, 2016 letter was made without prejudice. I also find that the offer is irrelevant to the matters at issue in the action.

Issue 1: Offer was made without prejudice

[7] In wrongful dismissal cases, where an offer of settlement is made without prejudice, to "buy peace," the fact of the offer should not generally be pleaded. (*Bonneville v. Hyundai Auto Canada Inc.*, [1988] O.J. No. 26 (H.C.J.) at para. 10, citing *Williamson*.) The exceptions to the general rule are limited. The first exception is where the defendant has pleaded that the plaintiff was dismissed for cause. This was the case in *Williamson*, where the plaintiff was permitted to plead in reply that the defendant had offered the plaintiff before litigation, an additional payment in lieu of notice, thereby waiving the cause upon which the defendant relied to justify the dismissal. The second exception arises in the context of a claim for mental distress. Whether an offer of settlement will be relevant because it might be evidence tending towards the exacerbation of the plaintiff's mental distress will depend on the facts of the case. (*Bonneville* at para. 16.) The third exception identified in the case law arises where the plaintiff advances a

claim for punitive damages. In *Ariganello v. Dun & Bradstreet Canada*, [1993] O.J. No. 411 (Gen. Div.), Master Donkin dismissed the plaintiff's motion to strike paragraphs of the statement of defence pleading settlement offers. Master Donkin concluded that the paragraphs answered the plaintiff's allegations that the defendant had shown high-handed and callous disregard for the plaintiff's rights and feelings in terminating his employment and in discussing his entitlement to compensation.

[8] The pleadings in this action do not raise any of the exceptions to the general rule prohibiting reference to without prejudice settlement offers in wrongful dismissal pleadings. The issue is whether the offer to settle was made without prejudice, to buy peace and to compromise a potential action. On the basis of the evidence before me, I find that the severance package offer in Hewlett-Packard's July 25, 2016 letter was made on a without prejudice basis.

[9] Although Hewlett-Packard points to the absence of the words, "without prejudice" on its July 25, 2016 letter, and contrasts that letter with other correspondence in the record which bears the without prejudice label, the absence of the without prejudice banner is not, by itself, determinative of the issue. (*Bonneville* at para. 9.)

[10] There is limited direct evidence in the record as to whether the separation package offer was intended to be without prejudice. Ms. Ramos' evidence is that she understood that the offer was intended to "buy peace" in terms of her accepting the enhanced severance amount offered in exchange for her promise not to sue Hewlett-Packard for wrongful dismissal. Mr. Telfer, Legal Counsel for Hewlett-Packard, swore an affidavit in support of the company's position on this motion. The July 25, 2016 letter is not signed. Mr. Telfer does not state that he wrote the letter or that he was involved in the drafting of the letter. He does not state that he spoke with the

drafter of the letter in order to prepare his affidavit. I am left with the statement, "…nor did ESIT consider [the letter] to be a without prejudice communication, as it was advising the Plaintiff of the termination of her employment and her severance offer." Mr. Telford does not identify the source of his information for this statement, and I give it minimal weight.

[11] Based on the content of the offer to settle and the context in which it was written, I conclude that the offer to settle contained in the July 25, 2016 letter was intended to be a without prejudice offer, to buy peace between the parties. In arriving at this conclusion, I have considered the following:

(i) The offer is for an "enhanced severance package" in the amount of $39,645.34, contingent on execution of the Final Release & Indemnity Agreement; otherwise, "[Ms. Ramos] will only receive, within the week after the signoff deadline has passed, the minimum amounts that are required by law, less applicable statutory deductions."

(ii) There is an element of compromise in the separation package offer: an increased amount of severance in exchange for Ms. Ramos' signing the Final Release & Indemnity Agreement.

(iii) The offer was written and made in an effort to avoid litigation. The letter states: "Please note that in the event this offer is not accepted, HPE reserves the right to rely on the strict terms of your employment agreement, if applicable."

(iv) The Final Release & Indemnity Agreement, attached to the July 25, 2016 letter, is integral to the offer. While Griffiths J. in *Williamson* did not regard the

requirement of a release as significant, the wording of the Final Release & Indemnity Agreement supports my conclusion that the offer was made without prejudice and in an effort to avoid litigation. It provides for the release and discharge of Hewlett-Packard from all actions and causes of action which Ms. Ramos has or "may hereinafter have;" it contains covenants by Ms. Ramos not to file a complaint for termination or severance pay, overtime or vacation pay; and it contains a no admission of liability clause.

(v) Both the letter and the Final Release & Indemnity Agreement provide that they are to be kept confidential. In the Final Release & Indemnity Agreement, the employee agrees that she will "not disclose the terms or the nature of the settlement evidenced by the within Final Release & Indemnity Agreement, save and except for the Employee's spouse, legal and financial advisors, and as may be required by law." I find that the offer was made with the implied intention that it would not be disclosed to a court. Hewlett-Packard ought not to be entitled to refer to the offer in its statement of defence simply because Ms. Ramos did not accept the offer.

Issue 2: Offer is irrelevant to the matters in issue in the action

[12] Hewlett-Packard says that its offer to settle was made with prejudice and is relevant to the issue of the company's compliance with Ms. Ramos' contract of employment. I have found that the offer to settle was made without prejudice and to buy peace. In its statement of defence, Hewlett-Packard alleges that it offered Ms. Ramos a "reasonable severance package." This

position is repeated in Mr. Telfer's affidavit. What constitutes reasonable notice will be an issue for the trial judge to determine; what Hewlett-Packard offered to Ms. Ramos is irrelevant.

[13] The exclusion of without prejudice offers of settlement made to "buy peace" in wrongful dismissal cases (subject to the limited exceptions previously discussed) is based on the sound policy rationale of encouraging the parties to settle without litigation. I agree with the following observation of McRae J. in *Hartley v. J.B. Food Industries Inc.*, [1986] O.J. No. 608 (H.C.J.) at para. 3:

> …I am of the view that the letter is privileged, that it ought not to have been pleaded and that the Courts would be derelict in their duty if they failed to require that privileged documents written in pursuit of early settlements not become an issue at the trial.

Disposition

[14] For these reasons, I find that the separation package offer set out in Hewlett-Packard's July 25, 2016 letter to Ms. Ramos was made without prejudice and is irrelevant to the matters at issue in the litigation. The following references to the offer are to be struck out from the statement of defence under Rule 25.11(a) on the basis that they are irrelevant and may prejudice the fair trial of the action: the entirety of paragraph 21; the first sentence of paragraph 22; the first sentence of paragraph 23; and the heading between paragraphs 22 and 23.

[15] If the parties are unable to agree on costs of the motion, they may make brief written submissions on costs within 10 days of the release of this endorsement.

Madam Justice Robyn M. Ryan Bell

Date: July 19, 2017

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Released: July 19, 2017