CITATION: Wilson v. Solis Mexican Foods Inc., 2013 ONSC 5799
COURT FILE NO.: 5762-11SR
DATE: 2013-09-12

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
Patricia Wilson	)	Jonathan B. Pitblado, for the Plaintiff
Plaintiff	)	
– and –	)	
Solis Mexican Foods Inc.	)	Megan Vandersleen, for the Defendant
Defendant	)	
	)	**HEARD:** September 10, 2013

GRACE J.

Introduction

[1] After more than 16 months of employment, the plaintiff was advised of her immediate termination by letter dated May 19, 2011.

[2] Cause was not and is not alleged. The plaintiff received two weeks' pay in lieu of notice. She maintains that she should have received pay in lieu of notice until she obtained alternate employment with the TSC Stores on November 25, 2011. (the "wrongful dismissal claim").

[3] The plaintiff also alleges that she was terminated, at least in part, because of an ongoing back ailment. She maintains that her rights under part I of the *Human Rights Code*, R.S.O. 1990, C.H.19, (the "*Code*"), were infringed and that she can and should be awarded damages pursuant to s. 46.1 (the 'human rights claim').

Background

[4] The plaintiff is a certified general accountant (C.G.A.). She accepted the defendant's December 15, 2009 letter of employment the following day. She commenced employment as Assistant Controller January 4, 2010.

[5] The plaintiff's tenure in that role was short-lived. In May, 2010, she was moved to a different position: Business Analyst.

[6] It seems to be accepted that the move was a lateral one. Her annual salary ($65,000) and benefits (for which the defendant paid $257.91 per month, exclusive of the RRSP contribution program) were unchanged. I will address responsibilities later in these reasons.

[7] The plaintiff's attendance and performance were formally assessed in November, 2010. Aside from a time management issue, the plaintiff received a grade of satisfactory or better.

[8] Soon afterward concerns emerged. Five days after the plaintiff met with Mr. Roberts, the Human Resource Manager, the plaintiff's performance was discussed by more senior management. Alongside the heading "Outcomes" three items appeared. The attendees (Mr. Roberts, Mr. Vivian (the C.O.O.) and Ms. Seabourne (controller) decided that it was "time to consider that [the plaintiff] may not be suited to" the defendant.

[9] During the months of March and April, 2011 there were frequent communications about a topic mentioned in the December 16, 2010 meeting the plaintiff had with Mr. Roberts: the plaintiff's back.

[10] It appears that in early March, 2011, the plaintiff stopped coming to work.

[11] A March 7, 2011 note from the plaintiff's family physician, Dr. Melita Belyea read as follows:

> This certifies that [the plaintiff] requires to be off work until further notice due to medical reasons.

[12] The defendant understandably found the note to be less than illuminating and requested updated and more comprehensive medical documentation by March 22, 2011.

[13] While the plaintiff provided e-mail updates dated March 11, 13 and 22, 2011, nothing further bearing Dr. Belyea's name or signature arrived within that time frame.

[14] That caused Mr. Roberts to correspond further with the plaintiff by letter dated March 24, 2011. He asked for a doctor's note by noon on March 29, 2011. As he had before and did later, Mr. Roberts advised the plaintiff that she was "a valued member of our company".

[15] On March 28, 2011, the plaintiff updated the defendant on her status. She said her back had "gotten a little better each day" since a set back the earlier week. She spoke of upcoming physiotherapy appointments and paraphrased a note from Dr. Belyea she attached. Dr. Belyea advised that the plaintiff was "medically fit to start a graduated return to work". Dr. Belyea proposed four hours per day during the week of April 4, six hours per day the following week and eight hours per day starting April 18, 2011.

[16] That proposal was unacceptable to the defendant. The defendant required that the plaintiff be "capable of returning to full-time hours and full duties before making the transition back to the workplace".

[17] The defendant required completion of an enclosed Functional Abilities Form by April 18, 2011. Dr. Belyea's completed and signed form dated April 12, 2011 was delivered in a timely fashion. It seemed to suggest that the plaintiff could return on a full-time basis but would need some accommodation – a combination of sitting, standing and walking.

[18] By letter dated April 14, 2011, the defendant expressed concern. In part, Mr. Roberts wrote:

> We are troubled…that the restrictions mentioned by your doctor (especially sitting) concern critical abilities vital to your being able to perform your job function here at Solis.

[19] Mr. Roberts reiterated the same requirement mentioned in paragraph 16 of these reasons and also required the plaintiff to have another Functional Abilities Form completed and returned by May 10, 2011.

[20] The plaintiff deposed that she "was shocked, dismayed and angered" by the letter.

[21] The plaintiff's recitation of the chronology jumped forward to the May 19, 2011 termination letter, to which I will soon return.

[22] However, the plaintiff missed at least three significant events. First, on April 28, 2011, Mr. Roberts e-mailed the plaintiff. He indicated that he "wanted to check in" and find out her current status. Second, it does not appear that Dr. Belyea completed a further Functional Abilities Form. That brings me to the third event. A further note from Dr. Belyea was obtained. Dated April 28, 2011, it said simply – and unexpectedly given her March 28, 2011 note:

> [The plaintiff] requires to be off work until June 15, 2011 due to medical reasons.

[23] If there was further communication between the parties before May 19, 2011, I haven't seen it.

[24] A May 19, 2011, letter advised the plaintiff that the defendant's New Orleans Pizza "organization" had been sold. The letter continued:

> As a result of these organizational changes, many of your job functions have become redundant. Regretfully, we must terminate your employment effective May 20, 2011.

[25] Before addressing the claims let me say something about the trial.

The Trial

[26] This claim was commenced under Rule 76 – the *Simplified Procedure*. The parties appropriately decided that there should be a summary trial under rule 76.12.

[27] After reading the trial record assembled as required by rule 76.11 (4), I had anticipated that the time limited oral examinations contemplated by rule 76.12 would be conducted. In fact, no oral evidence was called by either party.

[28] Consequently, I am left with an evidentiary record that both parties conceded was thin. By way of example, the plaintiff never addressed Dr. Belyea's April 28, 2011 note. As mentioned, its existence was first disclosed by the defendant when Mr. Vivian swore a responding affidavit on its behalf. The plaintiff's subsequent reply affidavit repeated the earlier omission. Did the plaintiff suffer a reversal attributable to her back or was Dr. Belyea's final note in relation to a new problem? I simply don't know.

[29] More than once during submissions, Ms. Vandersleen made mention of a fact I had no recollection seeing in any affidavit or exhibit. For example, she said that the defendant was a "lean operator" who only employed one business analyst. When asked for the reference in the evidence, Ms. Vandersleen fairly conceded there wasn't one. Needless to say, counsel cannot give evidence.

[30] Since the state of the plaintiff's health and the sincerity of the defendant's professed reason for dismissal are live issues, it should come as no surprise to the parties that their decision not to call oral evidence leaves me feeling less than fully assisted from an evidentiary perspective. I have done the best I can.

Analysis and Decision – the Wrongful Dismissal Claims

[31] As noted, the defendant does not allege cause. In fact, the defendant conceded that the plaintiff did not receive sufficient pay in lieu of notice.

[32] Ms. Vandersleen submitted a period of three (3) months was appropriate relying on cases such as *Bulmer v. Teleglobe Inc.* (1995), 9 C.C.E.L. (2d) 290 (Ont. Gen. Div.); *Daniel v. Survival Systems Ltd.* (2001), 188 N.S.R. (2d) 259 (N.S.S.C.) and *Warnes v. Army & Navy Dept. Store Ltd.* (1996), 8 W.W.R. 120 (Sask. Q.B.).

[33] Mr. Pitblado submits a period of six (6) months was appropriate and relies on excerpts from Stanley Ball, Canadian Employment Law (Canada Law Book, Toronto, March 2013) 9-15 to 9-16 and Howard Levitt, The Law of Dismissal in Canada, 3rd ed. (Carswell, Toronto) 8-5 to 8-6.1; 8-22 and 8-38 and the cases cited there.

[34] Both counsel referred to the ever cited and seemingly timeless decision of McRuer C.J.O. in *Bardal v. Globe & Mail Ltd*, [1960] O.W.N. 253 (H.C.J.) and the non-exhaustive list of factors set forth at para. 21: character of the employment, the length of service, the age of the employee and the availability of similar employment, having regard to the employee's experience, training and qualifications.

[35] I turn briefly to these factors and note the following. First, I accept the defendant's submission that the plaintiff occupied a middle management position. Mr. Pitblado submitted that the business analyst position involved "great responsibility" – because that was the phrase used in paragraph 5 of the statement of claim, a paragraph admitted in the statement of defence.

[36] I disagree. That phrase was used in the context of the plaintiff's initial role as assistant controller. A few months later she accepted a move to the business analyst position. In paragraph 9 of the Statement of Claim, the plaintiff, alleged that "The business analyst position was an important position". That paragraph was denied by the defendant. The position description introduced into evidence supports the defendant's characterization. The plaintiff occupied a middle management position involving modest responsibility.

[37] As noted, the plaintiff's tenure was quite short (approximately 16.5 months). In Ball's publication, *supra*, the author commented as follows at 9-15:

> Short service will not necessarily preclude a significant notice period, even in the absence of inducement, for many types of employees. High remuneration, important levels of responsibility, inducement, poor re-employment prospects or specialized skills may engender significant notice periods for relatively short-term employees.

[38] I will deal with re-employment shortly since that is a factor specifically set forth in *Bardal, supra*. None of the other elements mentioned by Ball are present here. As is clear from the evidence, the plaintiff's designation as a C.G.A. made her well qualified for the business analyst position. However, it was <u>not</u> a prerequisite.

[39] I turn to age. At the time of her termination the plaintiff was 54 years old. As noted by Linden, *supra*, at 8-38:

> It is assumed that the older the employee, the more difficult it is to obtain suitable, alternative employment. As a result, the notice period should be greater.

[40] Mr. Pitblado submits that age was a factor here because despite the efforts taken to obtain alternate employment summarized in her initial affidavit, the plaintiff was unable to obtain another job until November 25, 2011 when she accepted employment with TSC Stores.

[41] With respect, I once again disagree. As noted, the plaintiff did not acknowledge the existence of Dr. Belyea's April 28, 2011 note. She chose to ignore it. I am of the view that I can and should draw this inference: the plaintiff was not capable of working until June 15, 2011 as Dr. Belyea represented.

[42] I also wonder whether the estimate provided by Dr. Belyea was a realistic date for the plaintiff's return given the fact that the plaintiff appears to have had a medical reversal of some kind.

[43] Was the plaintiff's inability to obtain alternate employment a product of age and/or a lack of availability of similar employment or a product of lingering medical issues? Based on the evidence I conclude it was a combination of the two.

[44] After considering the evidence, the so called *Bardal* factors and all of the authorities cited, I conclude that the appropriate or reasonable notice period was (3) months as Ms. Vandersleen conceded.

[45] Mr. Pitblado expressed optimism that the parties could quantify the amount payable on account of wages (as noted, the plaintiff's salary was $65,000 annually) and benefits ($257.91 per month exclusive of the RRSP contribution) after giving credit to the defendant for the amount(s) voluntarily paid to date. If they cannot do so I may be spoken to.

Analysis and Decision – the Human Rights Claim

[46] Section 5(1) of the *Code* provides in part:

> Every person has a right to equal treatment with respect to employment without discrimination because of …disability.

[47] 'Disability' is defined in s. 10 (1). The definition includes "any degree of disability…that is caused by …illness…" (s. 10 (1) (a)).

[48] Mr. Pitblado referred me to two cases where a person experiencing back pain was found to have a disability: *Chen v. Ingeniere Electro – Optique Exfo Inc.*, 2009 HRTO 1641 and *Llano v. Fairweather Inc.*, 2011 HRTO 556.

[49] The defendant does not take issue with that proposition or its applicability to this fact situation.

[50] The defendant maintains that its decision to terminate the plaintiff was unrelated to the plaintiff's disability. Rather, the decision was a product of the sale of the New Orleans Pizza division. The defendant notes that the plaintiff conceded in paragraph 33 of her June 12, 2013 that "with the loss of that division my work load would have been cut in half".

[51] In *Dwyer v. Advanis Inc.*, [2009] O.J. No. 1956 (S.C.J.), Aston J. commented at para. 49:

> It is insufficient to find termination while physically disabled. One must find termination because of physical disability for there to be discrimination or bad faith.

[52] In that case, Aston J. concluded that the employer terminated the employee because of a substantial financial reversal and not because the employee had suffered a heart attack.

[53] In *Chen*, supra, at para. 47, Ontario Human Rights Tribunal member Judith Hinchman wrote:

> It is well-established in human rights law that the protected ground need only be one factor in the decision made that adversely affected the [employee]; it does not have to be the only or primary reason…

[54] *Janzen v. Platy Enterprises Ltd.*, [1989] S.C.R. 1252 was cited in support of that proposition. Counsel did not provide me with a copy and the Tribunal member did not identify the portion of the Supreme Court of Canada's decision relied upon. I have read the S.C.C.'s decision and did not see a clear statement of the kind mentioned in *Chen*.

[55] I note, however, that the Tribunal member Michelle Flaharty, reached the same conclusion in *Llano*, supra, at para. 39. However, no authority was cited.

[56] Nevertheless, I accept the proposition that a decision to terminate an employee based in whole or in part – on the fact that employee has a disability is discriminatory and contrary to the *Code*. If an employer regards disability as a factor justifying termination (or other negative treatment), the employee in question is not receiving "equal treatment…without discrimination" as s. 5 (1) of the *Code* requires.

[57] In my view, the evidence leads to the conclusion that the plaintiff's ongoing back issue was a significant factor in the decision to terminate. I reach that conclusion based on the totality of the evidence. The evidence I rely upon is as follows.

[58] First, the defendant's regard for the plaintiff changed in December, 2010. I will repeat some of the evidence here. A formal attendance and performance review had been conducted in November, 2010. The plaintiff was performing at an acceptable level.

[59] A few weeks later (December 16, 2010), the plaintiff met with Allan Roberts, the defendant's Human Resources Manager. She raised a number of issues including a sore back and feeling physically unwell.

[60] Five days later Mr. Roberts met with Mr.Vivian (the defendant's C.O.O). and Ms. Seabourne (the defendant's Controller). They concluded "time to consider that [the plaintiff] may not be suited to Solis".

[61] The matter drifted but clearly the plaintiff's back issues were ongoing. By early March, 2011, the plaintiff was off work.

[62] On March 7, 2011, Dr. Belyea wrote her first cryptic and unsatisfying note simply saying that the plaintiff was to be "off work until further notice due to medical reasons".

[63] The defendant understandably wanted information concerning the plaintiff's "recovery status, a return to work date and/or a date when you have been scheduled to be medically reassessed."

[64] After several e-mails from the plaintiff, the defendant wrote again by letter dated March 24, 2011. As noted previously, it asked for a progress note from Dr. Belyea by mid-day on March 29, 2011.

[65] The plaintiff did exactly as she was asked. Both her March 28, 2011 e-mail and Dr. Belyea's note bearing that same date indicated that the plaintiff could return within days and gradually increase her daily hours. By week three it was proposed that she would begin working eight (8) hours per day.

[66] Did the defendant allow the "valued member of our company"? No.

[67] The defendant insisted that there be a "complete recovery" before the plaintiff's return. On March 31, 2011, the defendant asked that Dr. Belyea complete and return the Functional Abilities Form by April 18, 2011 "in order to review and discuss any limitations you may still have at that time."

[68] The plaintiff did so. On its face, the plaintiff could return to work full time though she would have to alternate between sitting, standing and walking on some basis. Did the defendant "discuss any limitations" with the plaintiff? No. It wrote again, on April 14, 2011 and insisted for a second time on a "complete recovery to a safe and healthy state" as a pre-condition to the plaintiff's return. No accommodation was offered or seemingly, even considered.

[69] The same form had to be completed again and submitted by May 10, 2011 "or sooner if a complete recovery is imminent prior to this date".

[70] To say that an impression emerges that the defendant was disingenuous is an understatement. Ms. Wilson was given the run around. The defendant does not want her to return. How, with respect, does one know there has been a "complete recovery" from a bad back?

[71] Although not mentioned in a single letter, the impending divestiture is hovering in the background. While I was not shown a single transaction document or agreement of purchase and sale, it is inconceivable that the sale of the New Orleans Pizza decision occurred overnight.

[72] Indeed, at paragraph 33 of his affidavit, Mr. Vivian deposed:

> While the plaintiff was out leave (sic) Solis Mexican Foods Inc. was in the process of corporate restructuring.

That "restructuring" was the sale of a division.

[73] As noted, on May 19, 2011, the plaintiff was terminated. The divestiture or "corporate restructuring" had been completed. That letter was dated eight (8) days after the deadline for delivery of the Second Functional Abilities Form.

[74] With respect, from my chair it is clear that the employer no longer felt the need to prolong things. It had the excuse it needed to rid itself of the plaintiff once and for all. If things were otherwise why did silence reign after the defendant received Dr. Belyea's April 28, 2011 note advising that the plaintiff would be off work until June 15, 2011?

[75] If the divestiture was the real reason for the plaintiff's termination, why did that transaction not feature, at all, in a single communication with the plaintiff before May 19, 2011? Did it truly only realize the plaintiff was not needed post-closing? Was the author of the letters – the Human Resources Manager – caught so unprepared? No. The defendant's position is contrary to the evidence and defies common sense.

[76] Without hesitation, I conclude that the decision to terminate the plaintiff started with her complaints on December 16, 2010. Those were largely based on the condition of her back and the long hours.

[77] The manner of implementation of the December 21, 2010 decision evolved during March and April, 2011. The defendant was able to manage without the plaintiff. Her disability resulted in an extended absence at very little, if any, economic cost to the defendant.

[78] The plaintiff's condition enabled the defendant to nudge the problem across the divestiture finishing line and provided the defendant with an excuse to terminate her.

[79] The limited evidence I have supports the conclusion there would have been less work for the plaintiff to do – at least for a time. However, it cannot be forgotten that she had been working significant overtime. With respect, Mr. Vivian's statement that the plaintiff's position was "redundant" and that there "were no comparable positions" are conclusory and given the history I have recited - hollow.

[80] Ms. Wilson was terminated in whole or significant part because of her disability. Her right to equal treatment was violated and the defendant breached Part I, s. 5 (1) of the *Code*.

[81] Section 46.1 of the *Code* provides in part:

> If, in a civil proceeding in a court, the court finds that a party…has infringed a right under Part I of another party…, the court may make…:
>
> > 1. An order directing the party who infringed…to pay monetary compensation to the party whose right was infringed for loss arising out of the infringement,

> including compensation for injury to dignity, feelings and self-respect…

[82] In this case, the plaintiff deposed that she "was shocked, dismayed and angered" by the defendant's pre-termination letter of April 14, 2011. She also referred vaguely to "loss of dignity and loss of feelings of self-worth" in relation to the same letter.

[83] That is the only evidence I have with respect to a "loss" relating to feelings, dignity and self-respect. However, compensation is not restricted to those items.

[84] Mr. Pitblado relies on *ADGA Group Consultants Inc. v. Lane*, (2008), 91 O.R. (3d) 649 (Div. Ct.). In that case, the Tribunal had concluded that an employer had terminated an employee because he was bi-polar. The Tribunal found that the employer breached the *Code* and awarded the employee $35,000 in general damages "to compensate for the intrinsic value of the infringement of rights under the *Code*". (See para. 149 of the decision) and a further $10,000 for mental anguish.

[85] In reviewing the decision, the Divisional Court identified the basis for the Tribunal's award of general damages. Former section 41 (1) (b) of the *Code* authorized the Tribunal to direct the party who infringed the rights of another "to make restitution, including monetary compensation, for loss arising out of the infringement."

[86] At para. 149 the Divisional Court concluded that the wording was sufficiently broad to permit the Tribunal to award "compensation for the loss of the right to be free from discrimination and the experience of victimization".

[87] Instructively Ferrier J. wrote on behalf of the Court at paragraphs 153 and 154.

> This court has recognized that there is no ceiling on awards of general damages under the *Code*. Furthermore, Human Rights Tribunals must ensure that the quantum of general damages is not set too low, since doing so would trivialize the social importance of the *Code* by effectively creating a "licence fee" to discriminate.
>
> Among the factors that Tribunals should consider when awarding general damages are humiliation; hurt feelings; the loss of self-respect; dignity and confidence by the complainant; the experience of victimization; the vulnerability of the complainant; and the seriousness of the offensive treatment. [Authorities omitted].

[88] The section of the *Code* there in issue has been reworded and renumbered. What is now s. 45.2 (1) of the *Code* gives the Tribunal the same power as is conferred on the Court in s. 46.1 (1).

[89] While the evidence in this case with respect to "injury to dignity, feelings and self-respect" consists of conclusory statements only that pre-dated termination (although they reflect a

time when the defendant could have accommodated the plaintiff's gradual increase in hours), two elements from *ADGA Group*, *supra*, resonate.

[90] First in this case, the plaintiff lost "the right to be free from discrimination" and experienced "victimization". Second, the defendant's breach of the statute is serious. The defendant orchestrated the dismissal and was disingenuous at various times both before and during termination.

[91] As Aston J. wrote in *Dwyer*, *supra*, at para. 50:

> When dismissing employees, employers are under a duty to act fairly. They are required to be candid, reasonable, honest and forthright.

Telling an employee they are valued while making them overcome various obstacles so that they do not return temporarily and then terminating them permanently when the time is ripe, does not meet that standard.

[92] In my view, an appropriate award under s. 46.1 (1)1 is $20,000. I am of the view the award takes into account the factors I have mentioned. It recognizes the importance of the right that was infringed, the impact of the defendant's conduct on the plaintiff and the particular circumstances of the case.

Conclusion and Costs

[93] For the reasons given, damages are awarded to the plaintiff in accordance with paragraphs 44, 45 and 93 of these reasons.

[94] Interest should accrue on both awards. If the parties cannot agree on the rate or commencement date, I may be spoken to.

[95] Given the result, the plaintiff is presumptively entitled to costs. If the parties are unable to agree on quantum, brief written submissions not exceeding four typed pages exclusive of supporting dockets and any offer(s) to settle may be sent to me through Judge's administration as follows:

1) by the plaintiff within fifteen (15) days of the release of these reasons; and

2) by the defendant within a further fifteen (15) days thereafter.

"Justice Grace"

Justice A.D. Grace

Released: September 12, 2013

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– and –

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Defendant

REASONS FOR JUDGMENT

Grace, J.

Released: September 12, 2013