CITATION: Bernier v. Nygard International Partnership., 2013 ONSC 4578
COURT FILE NO.: CV-12470810
DATE: 20130704

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
Diane Bernier Plaintiff	*Chris Foulon and Andrea Stoddart*, for the Plaintiff
– and –	
Nygard International Partnership Defendant	*Shane Rayman*, for the Defendant
	HEARD: June 6, 2013

MORGAN J.

[1] Upon being terminated from her employment, the Plaintiff received the minimum statutory salary and benefits required under the *Employment Standards Act, 2000*, SO 2000, C 41 (the "*Act*"). She claims that this fell far below the amounts to which she has a right at common law.

[2] The Plaintiff here moves for summary judgment under Rule 20 of the *Rules of Civil Procedure*. She seeks the monetary difference between the statutory entitlements and her common law rights.

[3] The Defendant seeks to resist the motion. It contends that the Plaintiff has been paid all that she is entitled to receive, or that, in any case, the test for summary judgment under Rule 20.04 has not been met as there are issues raised by the action that require a full trial.

[4] For the reasons that follow, the Plaintiff is entitled to the amounts that she claims. There is no genuine issue requiring a trial.

I. The Plaintiff's employment and termination

[5] The Plaintiff was a management level employee who worked for the Defendant for 13 years. On December 4, 2012, at the age of 54, the Plaintiff was terminated without cause by the Defendant.

[6] During her employment with the Defendant, the Plaintiff's compensation was comprised of a base salary, an annual bonus, a car allowance, health and dental benefits, and employer contributions to disability and life insurance coverage. For the final four years of her employment prior to termination (2008 through 2011), the Plaintiff's compensation package was worth a total of $190,307.15 per annum.

[7] On termination, the Plaintiff received her base pay and benefits for 21.3 weeks until April 30, 2013. This calculation by the Defendant was based on the minimum statutory notice requirements under sections 60 to 65 of the *Act*. After some delay, the Defendant also paid the Plaintiff her 2012 bonus in the amount of $45,840 in May 2013.

[8] The Plaintiff submits that this is substantially less than required as reasonable notice or pay in lieu of reasonable notice at common law, and claims the difference between what she received and 18 months of full salary (including bonus) and benefits. She also claims interest on the 2012 bonus payment for the approximately 5 months that the Defendant delayed in paying it. The Plaintiff has to date not found new employment which would mitigate her losses.

[9] In the present motion, the Plaintiff seeks summary judgment of her entire claim. Her counsel has suggested that whatever amount she is awarded should properly be impressed with a trust in the event that she succeeds in mitigating her losses before the end of what would be her common law notice period.

[10] The Defendant concedes that the Plaintiff was terminated without cause, which entitled her to notice and severance pay. The Defendant likewise concedes that the Plaintiff was entitled to her 2012 bonus, and has no objection to the interest claimed by the Plaintiff from her termination date until the date it was actually paid.

[11] In its defence to the claim and in its response to the present motion, the Defendant submits that the payment the Plaintiff received was all that is required under the *Act* and is all that she was entitled to receive. The Defendant argues that, at the very least, there are enough questions raised about the Plaintiff's claim that a trial of the issues is necessary and that judgment should not be granted at this early stage.

[12] More specifically, the Defendant raises four questions in countering the Plaintiff's request for summary judgment: (a) were the Plaintiff's severance and notice entitlements were modified by contract? (b) even if not enforceable, did the employment contract reflecting the employer's general policy limiting the notice period provide guidance for assessing reasonable

notice at common law? (c) should the Plaintiff's salary during the notice period be limited to base pay and benefits only, and not include any bonus? and (d) has the Plaintiff made reasonable mitigation efforts?

[13] Each of the Defendants objections will be analyzed in turn. For the reasons that follow, I would reject all of them. Although they were presented ably by Defendant's counsel, none of the questions raised by the Defendant overcome the well settled case law on an employee's rights upon dismissal without cause; there is, accordingly, no issue that requires a trial of for which I cannot achieve a full appreciation.

II. The Defendant's objections

a) Is there an employment agreement that limits notice of termination?

[14] Just prior to her commencement of employment, on August 17, 1999, the Plaintiff signed a written employment agreement with the Defendant that set out the terms of her employment. This agreement provided, *inter alia*, that the Plaintiff's employment may be terminated with 30 days' notice by either party.

[15] The employment agreement also addressed the process by which the terms of the Plaintiff's employment could be amended. The agreement specifically states that, "[n]o waiver, amendment, revision or alteration to this contract will be valid or enforceable unless in writing signed by both parties and unless amended in writing, the terms and conditions contained in this letter will continue to apply."

[16] The Plaintiff contends, and the Defendant concedes, that the 30 days' notice provision was contrary to the minimum notice requirements contained in the *Act*, and that the minimum notice requirements under the *Act* cannot be waived by contract. As a result, both parties agree that the notice provision contained in the August 17, 1999 employment agreement is void and unenforceable.

[17] The most contentious factual issue between the parties revolves around whether the void termination provision in the August 17, 100 employment agreement was replaced by another valid provision at a subsequent date. Defendant's counsel submits in his factum that since the 30 day notice period in her 1999 employment agreement was void as a matter of law, there was "a lack of clarity and understanding between the parties in relation to the contractual notice period in the event of termination of Ms. Bernier's employment without cause."

[18] The Defendant further contends that this "lack of clarity" was clarified in February 2007, when the contract of employment was amended in a meeting between the Plaintiff and the Defendant's corporate president, Jim Bennett. In this meeting, the Defendant alleges, the Plaintiff received an increase in salary and bonus and in return agreed to a modification of the notice provision of her employment agreement under which upon termination without cause she was owed the minimum statutory entitlements required under the *Act*.

[19] In an affidavit sworn by its Vice President and General Counsel, Abraham Rubinfeld, the Defendant states that the Plaintiff consented to these amendments to her employment agreement. Mr. Rubinfeld further deposed that the amendments were incorporated into a letter, signed by Jim Bennett, that was delivered to the Plaintiff on or shortly after February 12, 2007.

[20] The copy of the February 12, 2007 letter produced by Mr. Rubinfeld is not counter-signed by the Plaintiff, as one might expect from a document that purports to amend a signed employment agreement. The Plaintiff herself has sworn in her own affidavit that no such meeting or agreement with Mr. Bennett ever took place. She has also sworn that she never received the letter that supposedly confirms the amended version of her employment agreement.

[21] For his part, Mr. Rubinfeld indicated in his affidavit and his cross-examination that he was not present at the alleged meeting between the Plaintiff and Mr. Bennett. He has also deposed that he has only second-hand "information and belief" that the February 12, 2007 letter was ever delivered to the Plaintiff, but has never said where that information and belief comes from. He has confirmed, however, that Mr. Bennett is still alive and well and is currently the Vice Chair of the Defendant corporation.

[22] Defendant's counsel submits that the factual controversy over whether or not the employment agreement was amended in February 2007 requires a full trial. Plaintiff's counsel counters that an adverse inference may be drawn under Rule 20.02 from the fact that there is no affidavit from Mr. Bennett as to the alleged amending agreement and letter, and that Mr. Rubinfeld's second-hand information does not count as evidence on this point. Plaintiff's counsel submits that the direct evidence of the Plaintiff that no such agreement was ever reached, and that no amending letter ever delivered, is, in effect, uncontested.

[23] It is now well accepted that in a summary judgment motion a party must lead trump or risk losing. As Sharpe J. put it in *Transamerica Life Insurance Co. of Canada v Canada Life Assurance Co.*, 1996 CanLII 7979, para. 29 (SCJ), "a party is no longer entitled to sit back and rely on the possibility that more favourable facts may develop at trial."

[24] That appears to me to be an apt description of the Defendant's approach here. There has been no explanation as to why Mr. Bennett did not submit an affidavit in response to the Plaintiff's motion for summary judgment. Defendant's counsel merely states that we need a trial at which Mr. Bennett will presumably testify, and that only at that point will the court fully appreciate the situation.

[25] Plaintiff's counsel is correct that an adverse inference could be drawn from Mr. Bennett's failure to provide any evidence on the central factual controversy in the action. The Defendant's problem is, however, even more severe than that, since drawing an adverse inference might suggest that there is even a credibility issue to be resolved. There is, however, no real issue here at all.

[26] There is absolutely no evidence from the Defendant that the February 2007 letter embodied an agreement or was ever delivered to the Plaintiff. In his first affidavit, Mr. Rubinfeld simply says that, "[i]t is my understanding and belief that the Amendment Agreement was delivered to the plaintiff's attention on or shortly after February 12, 2007." He provides no source for this crucial piece of information. Then, as if in recognition of this weakness, Mr. Rubinfeld provided a second affidavit in which he tries to clarify the situation by speculating that the Plaintiff must have been given the letter because it was the Defendant's standard practice to give employees this type of letter.

[27] In other words, not only does Mr. Rubinfeld have no direct knowledge of the facts to which he deposes, but he does not even testify that Mr. Bennett, the one person other than the Plaintiff who could have direct knowledge, informed him of the facts. There is nothing but uninformed speculation on Mr. Rubinfeld's part.

[28] What the court is presented with in this motion is not a credibility contest. There is no actual evidence – either direct or indirect – on the Defendant's side which I would have to weigh against the direct evidence on the Plaintiff's side.

[29] The Plaintiff has provided sworn evidence that there was no agreement with Mr. Bennett and that she was never given an amending letter by him in February 2007. Mr. Bennett has provided nothing. Under these circumstances, I have no trouble achieving the type of "full appreciation of the evidence and issues that is required to make dispositive findings", as stipulated by the Court of Appeal in *Combined Air Mechanical Services Inc. v Flesch*, [2011] OJ No 5431, at para. 50.

[30] The Plaintiff's evidence certainly trumps the Defendant's lack of evidence. I find as a fact that there was no agreement amending the notice provision of the Plaintiff's employment agreement. The common law notice requirement therefore prevails.

(b) Does the Defendant's general policy on notice influence the definition of 'reasonable notice'?

[31] The Defendant contends that it had a general policy of limiting the amount of notice to which its employees were entitled. It submits that the August 1999 employment agreement and the February 2007 letter, even if neither is enforceable in its own right, are both indicative of this policy. The Defendant also argues that the Plaintiff herself had presented similar letter agreements restricting the notice entitlements to the Defendant's employees under her supervision, and so she was fully aware of this policy.

[32] In making these points, the Defendant's argument is that its overall policy of providing only the statutory minimum in terms of notice of termination was well known to the Plaintiff. The Defendant further argues that this understanding limited the amount of notice that the Plaintiff was by law entitled to receive. In effect, the Defendant submits that the understanding reached by the parties defined for them the contours of the common law notice requirement.

[33] The Plaintiff's reply to this is that she did not pay attention to this aspect of any letters she gave to the employees under her supervision. She also points out that those employees all counter-signed their employment letters, thereby indicating their consent to the terms; by contrast, the Plaintiff never signed any version of the February 12, 2007 letter that Mr. Bennett supposedly presented to her.

[34] The Plaintiff also states that the employees under her supervision were by definition at a lower level of the employment hierarchy than her. Indeed, their salaries appear to have been a small fraction of the Plaintiff's own salary. Plaintiff's counsel goes on to submit that there is no reason to think that a term of employment that applied to employees under the Plaintiff's supervision also applied equally to her as their supervisor.

[35] Most importantly, counsel for the Plaintiff points out that the Supreme Court of Canada has already addressed, and rejected, the Defendant's argument.

[36] In *Machtinger v HOJ Industries*, [1992] 1 SCR 986, at para 26, the court stated that, "[i]n argument the respondent accepted that the attempt to contract out of the provisions of the Act was 'null and void,' but argued that the documents should be considered as evidence 'that contracts were entered into which expressed clearly the intention of the parties with respect to notice of termination.' I cannot accept this argument." Citing the English decision in *James v Thomas H. Kent & Co.*, [1951] 1 KB 551 (CA), the Supreme Court went on to hold, at para 28, that, "in the absence of a valid contract, [it] had no choice but to imply a term that the employee was entitled to reasonable notice."

[37] In the case before me, there is no evidence that the employment agreement was actually amended in February 2007, and no evidence that an employment policy to which the lower level employees under the Plaintiff's supervision had agreed was ever meant to apply to the Plaintiff herself. All I have to go on in the record is the Plaintiff's original 1999 employment agreement with its void notice clause.

[38] In addressing precisely this situation, the British Columbia Supreme Court in *Suleman v British Columbia Research Council* (1989), 38 BCLR (2d) 208, rejected the notion that a void contract provides any evidence of the parties' enforceable intentions. The court stated, at p. 214: "I find nothing in the evidence in the present case to warrant the conclusion that the parties, had they turned their minds to the subject, would have agreed to substitute for the void contractual term the minimum period of notice required by statute instead of looking to the common law standard of reasonable notice."

[39] I could not have said it better myself. There is simply nothing in the record that suggests that I should apply anything but the common law standard of reasonable notice in this situation.

(c) Should the Plaintiff's salary during the notice period include any bonus?

[40] The August 17, 1999 employment agreement provided that the Plaintiff is eligible for an annual bonus provided that she is employed by the Defendant on November 30th of each year. Since she was terminated in early December 2012, the Defendant has paid her the bonus for 2012.

[41] The Plaintiff states that the calculation of the period of notice to which she was entitled at common law is more than 13 months, which would therefore take her beyond November 30, 2013. Her counsel argues, therefore, that any calculation of pay in lieu of notice must take into account not just her monthly base pay but the annual bonus she would have received in 2013.

[42] The Defendant responds that the August 17, 1999 employment agreement is only void in terms of the notice provision, but remains intact and in force for all of its other provisions. Its counsel argues, therefore, that any calculation of pay in lieu of notice must take into account her 2013 base pay only as she was not actively employed by the Defendant on November 30, 2013.

[43] Defendant's counsel is correct when he submits that the 1999 employment agreement remains in force except for the void notice provision. That, however, does not answer the bonus question. Even if the employment-on-November-30th requirement remains applicable, the Plaintiff might be eligible for a 2013 bonus if she ought to have been employed on that date.

[44] The Alberta Court of Queen's Bench held in *Olson v Sprung Instant Greenhouses Ltd.* (1985), 41 Alta LR (2d) 325 that the question of whether a terminated employee is entitled to a bonus turns on whether the bonus has become an integral part of the employee's annual salary. The evidence before me is that the bonus, while calculated in accordance with the Defendant's corporate performance each year, was a regular feature of the Plaintiff's compensation that she had come to expect. There is nothing to counter her submission that it had, since the inception of her position with the Defendant, become an integral component of her annual pay.

[45] As to whether the Plaintiff was "employed" on November 30, 2013 for the purposes of her right to the bonus, the relevant question is whether she would have been employed had she been given reasonable notice as required at common law. The Manitoba Court of Queen's Bench addressed this question in *Wiebe v Central Transport Refrigeration (Man.) Ltd.* (1993), 84 Man R (2d) 273, 277, where it reasoned that:

> The damage award should place [the plaintiff] in the same financial position he would have been at the end of the period of notice had he actually been given the appropriate notice of the pending termination. He is entitled to the salary and benefits he would have received during the period of reasonable notice.

[46] While an agreement that no bonus is payable on termination of the employee would be valid and enforceable, see *Poole v Whirlpool Corp.*, [2011] OJ No 5778 (Ont CA), that is not the case here. The Defendant submits that the common law notice period is 13 months, while the Plaintiff submits that the period of reasonable notice at common law is more in the range of 18

months. Either way, the Plaintiff should have been given a period of notice that would have seen her actively employed on November 30, 2013.

[47] The Defendant cannot avoid the obligation to include the bonus that the Plaintiff would have been entitled to receive in 2013 had she been given proper notice of termination. The Plaintiff's pay in lieu of notice must contain, for the first 12 months (taking her to the end of December 2013), the monthly equivalent of her average annual bonus over the past several years along with her average monthly base salary for each month of notice to which she was entitled.

[48] For any amount of pay in lieu of notice over 12 months, she is entitled to base pay and benefits only. While reasonable notice of termination would have taken her beyond the bonus eligibility date in 2013, it would not have made her eligible for a bonus the following year. That is, even at the outer limits of reasonable notice, which Plaintiff's counsel identifies as 18 months from December 4, 2012, she would not have been actively employed on November 30, 2014.

(d) Has the Plaintiff failed to mitigate?

[49] The Defendant suggests that the Plaintiff has not pursued sufficient efforts to find new employment and has therefore failed in her duty to mitigate her losses. Specifically, the Defendant seems to say that the Plaintiff has been searching for jobs with too high a salary and should be willing to settle for something lower.

[50] There is no evidence, however, that any such jobs have been available to her or that she has declined to pursue any appropriate opportunity. Rather, counsel for Defendant has offered the suggestion that the reason she has not yet found a job might be that she is looking at positions that are at too high a level. He then submits that the question of mitigation is another reason that summary judgment should be declined in favour of a trial of this entire dispute.

[51] The Plaintiff has tendered a large mitigation brief demonstrating her very substantial job search. She is in her 50's and has for many years been employed at a managerial level and has earned in the range of $200,000 per annum. It is entirely understandable that, despite her best efforts, she has not located a new job to date.

[52] I find that the Plaintiff's efforts to mitigate have been reasonable and appropriate to her employment experience. There is no reason to conduct a trial with *viva voce* evidence in the face of the voluminous written record of her job search.

[53] Far from preventing the court from achieving a full appreciation of the evidence, a voluminous evidentiary record in the right circumstances ensures that the court can safely dispense with the need for a trial. See *Fairview Donut Inc. v The TDL Group Corp.*, 2012 ONSC 1252 (Ont Sup Ct). That is especially the case where, as here, the argument about failure to mitigate looks like an attempt to make something out of nothing.

III. Conclusion

[54] This is a proper case for summary judgment under Rule 20.04. I find there to be no genuine issue requiring a trial.

[55] The Plaintiff was entitled to reasonable notice of termination, as defined by the common law.

[56] Generally speaking, the reasonable notice period is determined by considering the nature of the employment, the length of the employment, the employee's age, and the realistic possibility of finding similar employment appropriate to the experience, responsibility and qualifications of the employee. *Bardal v Globe & Mail Ltd.* (1960), 24 DLR (2d) 140 (Ont HC). Here, counsel for both parties accept these general principles, but disagree on the specific application of them. The debate between counsel ranges from 13 months' notice to 18 months' notice.

[57] The Plaintiff was an employee who had a managerial position with a high salary denoting the considerable experience and responsibility entailed in her job. The courts have taken found that an employee who is "highly skilled and moderately specialized", which would be an apt description of the Plaintiff in the within action, deserves notice at the higher end of the scale. See *Teitelbaum v Global Travel Computer Holdings Ltd*. (1999), 41 CCEL (2d) 275, at para 16 (SCJ).

[58] Likewise, the courts have found that notice periods should lean toward the higher side where the employee's position was "one of considerable responsibility in a comparatively specialized industry." *Tull v Norske Skog Canada Ltd.* (2004), 34 CCEL (3d) 225, at para 12 (BC SC). This, too, is a description that closely resembles the position held by the Plaintiff for 13 years with the Defendant.

[59] I find that the Plaintiff's age, experience, and level of responsibility put her on the higher side of the range of notice periods for an employee terminated without cause after 13 years with the Defendant. She was entitled to 18 months' notice.

[60] The Defendant shall pay the Plaintiff an amount equal to 12 months' worth of her total compensation (including base salary, bonus and benefits), plus another 6 months' worth of her salary and benefits (including base salary and benefits, but excluding bonus), plus 5.5 months' worth of interest on the late paid 2012 bonus at the *Courts of Justice Act* rate, minus the amounts that she has already been paid under the *Act*. I leave it to the parties to calculate the relevant amounts.

[61] As of today, there are still 11 months to go before the 18 month notice period will have expired. Although the situation raises a contingency with respect to mitigation, "it is well established that a plaintiff is entitled to have her/his wrongful dismissal claim heard prior to the expiry of the period of reasonable notice." *Bullen v Proctor & Redfern Ltd.* (1996), 20 CCEL (2d) 36, at para 45 (Ont Gen Div).

[62] As Osborne J. put it in *Thomson v Bechtel Canada Ltd.* (1983), 3 CCEL 16, 23 (Ont HC):

> The contingency of new employment within the notice period could be somewhat speculatively assessed and imposed upon the notice period to reduce it. In the circumstances of this case, I think it is preferable to impose upon the plaintiff a trust, whereby any earnings of the plaintiff until the expiry of the 11-month notice period will be impressed with a trust in favour of the defendant. I am satisfied that the plaintiff has endeavoured to obtain employment throughout and that he will continue with his sincere endeavours to obtain employment.
>
> Under the terms of the general trust to which I have referred, the plaintiff will account to the defendant so as to reduce the defendant's obligation to pay the plaintiff to the extent that the plaintiff receives earnings from new employment within the notice period.

[63] The entire award is therefore impressed with a trust. At the end of the 18 month notice period, the Plaintiff will account to the Defendant for any new employment income she receives during the notice period and will reimburse the Defendant any such amounts received.

[64] The Plaintiff shall have her costs on a partial indemnity basis. Plaintiff's counsel has submitted a Costs Outline which proposes fees in the range of $23,000 and disbursements in the range of $2,000. These represent the costs for the entire action, which is appropriate since summary judgment is being granted which will put an end to the action.

[65] The Defendant shall pay the Plaintiff costs in the total amount of $25,000, inclusive of disbursements and HST.

Morgan J.

Released: July 4, 2013

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REASONS FOR JUDGMENT

E.M. Morgan J.

Released: July 4, 2013