CITATION: Kotecha v. Affinia, 2013 ONSC 4817
COURT FILE NO.: 4015-13SR
DATE: 2013-07-18

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:		
Niranjan Kotecha	Applicant	Pamela Krauss, for the Applicant
- and -		
Affinia Canada ULC	Respondent	Christopher A. Chekan, for the Respondent
		HEARD: June 25, 2013

THE HONOURABLE MR. JUSTICE P.B. HAMBLY

REASONS FOR JUDGMENT

[1] The plaintiff, Niranjan Kotecha (Kotecha), has brought a motion for summary judgment in an action for wrongful dismissal under Simplified Procedure. The defendant, Affinia Canada ULC (Affinia) admits that the plaintiff was dismissed without cause. The issues are the length of the notice requirement and the plaintiff's damages. There have been no discoveries. The defendant has brought a motion for leave to appeal the order of the Assignment Court Judge setting the date for the plaintiff's summary judgment motion to be heard prior to examination for discoveries or in the alternative for an order staying the plaintiff's summary judgment motion

until the examination for discovery of the plaintiff has been completed. After hearing argument on both motions I reserved judgment. In my view, the plaintiff's motion should proceed and the defendant's motion should be dismissed. My reasons follow.

Background

[2] Kotecha issued and served his statement of claim in January 2013. Affinia filed its statement of defence in February 2013. Kotecha brought a motion for summary judgment initially returnable at the Assignment Court for long motions on May 23rd. Mr. C. Chekan, who represents Affinia, appeared at the Assignment Court. He stated that Affinia wished to examine Kotecha for discovery before the summary judgment motion was heard. He stated that he was not available until October. He would not provide dates when he was available to argue a summary judgment motion. He took the position that he should be able to examine Kotecha for discovery before the summary judgment motion was heard. The Assignment Court Judge set Kotecha's summary judgment motion to be heard as a long motion in accordance with the local procedure on days in the weeks of June 10, June 24 and July 8 when Ms. P. Krauss, counsel for Kotecha, was available. The case was called before me to be argued on Tuesday, June 25th. Affinia brought its motion returnable on June 26th. I had that motion brought forward. I heard argument on this motion first. I then heard argument on the summary judgment motion.

[3] Kotecha delivered an affidavit of documents on June 6th. Kotecha's motion for summary judgment was supported by his affidavit, sworn April 30th, to which he attached a number of documents. Ms. Krauss advised that all the documents in the affidavit of documents were attached to Kotecha's affidavit. Kotecha also filed a factum and a case book in support of his motion. In support of its motion, Affinia filed an affidavit sworn June 6, 2013 of Rita

Simoes, a law clerk in the office of Mr. Chekan. Attached to her affidavit were the pleadings, the Assignment Court Judge's endorsement, a draft order incorporating the endorsement, Kotecha's confirmation of the motion returnable at the long motions Assignment Court on May 23rd and eight letters exchanged between Ms. Krauss and Mr. Chekan. Affinia filed no material on Kotecha's summary judgment motion.

[4] Affinia is a manufacturer of auto parts. Kotecha commenced employment with Affinia on June 24, 1991. He was a machine operator. He installed rivets on brake pads. He received a letter dated May 16, 2011 from Affinia advising him that his employment would be terminated on July 8, 2011. The letter stated that his employment would be terminated without cause. Affinia sent him an amended letter dated June 6, 2011. The date of termination remained the same. He in fact worked to July 29, 2011. He worked for Affinia for 20 years. Affinia made a severance payment to him in the amount of $14,656.92.

[5] At the time of his dismissal, Affinia was paying him $18.23 per hour. On a 40 hour work week this equates to an annual salary of $37,918.40. In 2008, his gross income from Affinia was $44,738, in 2009 was $42,558 and in 2010 was $44,032. The difference in his annual salary at his base pay and his gross income is accounted for by overtime.

[6] Kotecha attached his resume to his affidavit. It consists of statements that he worked as a machine operator at Greb Shoes between 1980 and 1990 and as a machine operator at Affinia between 1991 and 2011. He has attached to his affidavit a chart which shows that he has attended at 225 companies to apply for work as a machine operator or for any position, called nine others and consulted with Northern Lights Employment Agency on four occasions. He has

not been successful in obtaining a single interview. Almost all have indicated that they are not hiring. None have invited him to an interview. Kotecha is 70 years of age.

[7] In his factum Kotecha sets out his claim for payment in lieu of notice as follows:

	Annual	**Monthly**	**22 Months (24 minus 2 months working notice)**
Annual Average Earnings	$44,000.00	$3,666.66	$80,670.00
Pension Value Loss	Matched 3% of salary	$110.00	$2,420.00
Cost of Loss of Benefits (out of pocket expenses)			$705.95
Mitigation Expenses			$0.00
		subtotal	$83,795.95
Less Pay in Lieu and Severance paid			$14,656.92
Total			$69,139.03

[8] He claims a loss of pension benefits based on a percentage of his wages which he supports with recent pay stubs showing payments by Affinia towards a RRSP. He claims loss of benefits based on what he has spent on health benefits which he states would have been covered by his health plan with Affinia. The amount for severance pay is shown in his Record of Employment.

Analysis

Test for Summary Judgment

[9] The test for when summary judgment should be granted is set out in revised rule 20.04 (2) as follows:

> 20.04(2) The court shall grant summary judgment if,
>
> (a) the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence; or
>
> (2.1) In determining under clause (2) (a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:
>
> 1. Weighing the evidence.
>
> 2. Evaluating the credibility of a deponent.
>
> 3. Drawing any reasonable inference from the evidence.

[10] The Court of Appeal in *Combined Air v. Flesch*, 2011 ONCA 764 explained when a judge should grant summary judgment in accordance with Rule 20.04 as follows:

> **74** The amended rule also now permits the summary disposition of a third type of case, namely, those where the motion judge is satisfied that the issues can be fairly and justly resolved by exercising the powers in rule 20.04(2.1). In deciding whether to exercise these powers, the judge is to assess whether he or she can achieve the full appreciation of the evidence and issues that is required to make dispositive findings on the basis of the motion record - as may be supplemented by oral evidence under rule 20.04(2.2) - or if the attributes and advantages of the trial process require that these powers only be exercised at a trial.

[11] The *Rules of Civil Procedure* that set out materials that the parties on a motion for summary judgement should file are as follows:

> 20.02 (1) An affidavit for use on a motion for summary judgment may be made on information and belief as provided in subrule 39.01 (4), but, on the hearing of the motion, the court may, if appropriate, draw an adverse inference from the failure of a party to provide the evidence of any person having personal knowledge of contested facts.
>
> (2) In response to affidavit material or other evidence supporting a motion for summary judgment, a responding party may not rest solely on the allegations or denials in the party's pleadings, but must set out, in affidavit material or other evidence, specific facts showing that there is a genuine issue requiring a trial.

> 20.03 (1) On a motion for summary judgment, each party shall serve on every other party to the motion a factum consisting of a concise argument stating the facts and law relied on by the party.
>
> (2) The moving party's factum shall be served and filed with proof of service in the court office where the motion is to be heard at least seven days before the hearing.
>
> (3) The responding party's factum shall be served and filed with proof of service in the court office where the motion is to be heard at least four days before the hearing.

[12] The Court of Appeal emphasized in *Combined Air* that the evidentiary obligations on the parties have not changed with the new rule. The court stated the following:

> **56** By adopting the full appreciation test, we continue to recognize the established principles regarding the evidentiary obligations on a summary judgment motion. The Supreme Court of Canada addressed this point in *Lameman*, at para. 11, where the court cited Sharpe J.'s reasons in *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1996), 28 O.R. (3d) 423 (Gen. Div.), at p. 434, in support of the proposition that "[e]ach side must 'put its best foot forward' with respect to the existence or non-existence of material issues to be tried." This obligation continues to apply under the amended Rule 20. On a motion for summary judgment, a party is not "entitled to sit back and rely on the possibility that more favourable facts may develop at trial": *Transamerica*, at p. 434.

[13] I would think that the often cited statement of principle by the Court of Appeal in *10615900 Ltd. v. Ontario Jockey Club* [1995] O.J. No. 132 in the judgment of Justice Osborne would continue to apply as follows:

> **35** The purpose of Rule 20 is clear. The rule is intended to remove from the trial system, through the vehicle of summary judgment proceedings, those matters in which there is no genuine issue for trial: see Pizza Pizza Ltd v. Gillespie (1990), 75 O.R. (2d) 225, 45 C.P.C. (2d) 168 (Gen. Div.), Irving Ungerman Ltd v. Galanis (1991), 4 O.R. (3d) 545, 83 D.L.R. (4th) 734 (C.A.). The motions judge hearing a motion for summary judgment is required to take a hard look at the evidence in determining whether there is, or is not, a genuine issue for trial. The onus of establishing that there is no triable issue is on the moving party, in this

> case the purchaser. However, a respondent on a motion for summary judgment must lead trump or risk losing: see rule 20.04(1). Generally, if there is an issue of credibility which is material, a trial will be required: see Irving Ungerman, supra.

[14] Cases where the court decided that it could grant summary judgement in a wrongful dismissal case under the revised rule against an employer because it was capable of having a "full appreciation" of the evidence are the following: *Nassager v. Northern Reflections Ltd.* (2010), ONSC 5840 (decision of Allen J.); confirmed [2010] O.J. No. 4652 (Div. Court, decision of Pardu J.); *Russo v. Kerr Bros. Ltd.* (decision of Gray J.); *Sharma v. Affinia Canada Ltd.* (unreported decision of Taylor J. – same defendant and same counsel as in the case at bar); see also the decision of Perell J. in *Adjemian v. Brook Cromption North American*, [2008] O.J. No. 2238, confirmed [2008] O.J. No. 5230 under the prior summary judgment rule; to the contrary under the revised rule see the decision of Broad J. in *Bonhof v. Eunoia* [2012] O.J. No. 2455 where there was a live mitigation issue.

[15] I find that I can have a full appreciation of the evidence and issues in this case based on the material filed by Kotecha. I am strengthened in this conclusion by the fact that Affinia has filed no material on the merits of Kotecha's claim.

The Bardal Factors

[16] In *Bardal v. Globe and Mail Ltd.* (1960), 24 D.L.R. (2d) 140 Chief Justice McRuer set out the factors that a court should take into account in determining what constitutes reasonable notice that an employer should give to an employee of his/her dismissal. He stated the following:

> **21** 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.

Length of Service

[17] Kotecha was employed by Affinia for 20 years. Cases cited by Kotecha have determined a reasonable notice period for long term non-professional employment of senior employees as follows:

> *McGroaty v. Linita Design and Manufacturing Ltd.* [2007] O.J. No. 4414 - age 62, 17 years of employment, 17 months notice;
>
> In *Di Tomas v. Crown Metal Packaging Canada LP* [2010] O.J. No. 4679; confirmed [2011] O.J. No. 2900 – age 62, 33 years employment, 22 months notice;
>
> *Movileanu v. Valcom Manufacturing Group Inc.* [2007] O.J. No. 441- age 56, 17 years of employment, 12 months notice;
> *Guiterrez v. Canac Kitchens Ltd.*, 2009 CarswellOnt 99 – age 50, 13 years employment, 12 months notice;
>
> *Munoz v. Canac Kitchens*, 2008 CarswellOnt 7059 - age 52, 12 years employment, 12 months notice.

Character of Employment

[18] In *Di Tomas*, the plaintiff was employed as a mechanic and press maintainer. Justice Allen rejected the proposition that the character of the employment of Di Tomas should result in a reduced notice period. Her decision was upheld by the Court of Appeal in the judgment of Justice MacPherson. On this issue he stated the following:

> **27** Crown Metal would emphasize the importance of the character of the appellant's employment to minimize the reasonable notice to which he is entitled. I do not agree with that approach. Indeed, there is recent jurisprudence suggesting that, if anything, it is today a factor of declining relative importance: see *Medis Health and Pharmaceutical Services Inc. v. Bramble* (1999), 175 D.L.R. (4th) 385 (N.B.C.A.) ("*Bramble*") and *Vibert v. Paulin* (2008), 291 D.L.R. (4th) 302 (N.B.C.A.).
>
> **28** This is particularly so if an employer attempts to use character of employment to say that low level unskilled employees deserve less notice because they have an easier time finding alternative employment. The empirical validity of that proposition cannot simply be taken for granted, particularly in today's world. In *Bramble*, Drapeau J.A. put it this way, at para. 64:
>
> > The proposition that junior employees have an easier time finding suitable alternate employment is no longer, if it ever was, a matter of common knowledge. Indeed, it is an empirically challenged proposition that cannot be confirmed by resort to sources of indisputable accuracy.

Age

[19] In *McKinney v. University of Guelph et al*, [1990] 3 S.C.R. 229, eight professors and a librarian at different universities, applied for declarations that the universities' policies of the mandatory retirement at age 65 violate s. 15 of the *Charter*. Their claim was dismissed. In the majority judgment of Justice LaForest, the Supreme Court of Canada held with respect to persons between the age of 45 and 65 the following;

> **92** … They do not have the flexibility of the young, a disadvantage often accentuated by the fact that the latter are frequently more recently trained in the more modern skills. Their difficulty is also influenced by the fact that many in that age range are paid more and will generally serve a shorter period of employment than the young, a factor that is affected not only by the desire of many older people to retire but by retirement policies both in the private and public sectors…

[20] Justice Matheson in *Movilwanu* cited this passage in support of the proposition that "It is apparent that people in that age bracket will have more difficulty in finding similar employment with another company at the same wage rate." (para. 66).

[21] Kotecha is 70, looking for a labouring job which is all that he knows.

Availability of Similar Employment

[22] Kotecha, since his dismissal two years ago, has applied to a great number of companies for a position as a machine operator or any position. He has not even been offered a single interview. Given his age and the state of the economy I do not find this surprising.

Is Affinia entitled to an Examination of Discovery of Kotecha Before His Summary Judgment Motion is Decided?

[23] *Rules of Civil Procedure* that have application to this issue are as follows:

> 1.04 (1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.
>
> (1.1) In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding.
>
> (2) Where matters are not provided for in these rules, the practice shall be determined by analogy to them.
>
> 2.01 (1) A failure to comply with these rules is an irregularity and does not render a proceeding or a step, document or order in a proceeding a nullity, and the court,
>
> (a) may grant all necessary amendments or other relief, on such terms as are just, to secure the just determination of the real matters in dispute; or
>
> (b) only where and as necessary in the interest of justice, may set aside the proceeding or a step, document or order in the proceeding in whole or in part.

[24] The only reported case on this issue would seem to be the decision of Master Short in *Homebrook v. Seprotech System Inc.*, [2011] O.J. No. 2404. In that case the plaintiff commenced an action under Simplified Procedure, in which he alleged that he had been constructively dismissed. The defendant employer denied that he had been dismissed. The plaintiff brought a motion for summary judgment. Master Short held that the defendant was entitled to examine the plaintiff for discovery before his motion was decided. He relied on the

decision of Justice Rouleau (as he then was, now Rouleau J.A.) in *Trans-Canada Medical Management Inc. v. Varenbut*, (2003), 5 C.P.C. (6th) 344. He held that in a non-simplified case, a discovery could proceed before a motion for summary judgment. Master Short stated the following:

> **7** Here, in my view, the "equality of arms" consideration of the concept of proportionality directs me to apply Rule 1.04(2) to establish, by analogy in this particular situation, a procedure whereby both parties are entitled to conduct an examination in the form of a discovery of up to two hours each, pursuant to Rule 76.04(2). Such examinations shall be held in accord with the Rules applicable to discoveries rather than cross-examinations (should they conflict) with the transcripts being available on the return of the judgment motion.

[25] I asked Mr. Chekan to state the issues on which he wished to examine Kotecha for discovery. His response and my comment on each of his reasons is as follows:

1. Whether or not he was entitled to be paid overtime in the notice period?

Kotecha has filed his T4 slips from Affinia for 2008, 2009 and 2010 which show his gross income which, when compared to his basic pay, show that he worked substantial overtime in each of these years. He also filed pay stubs from 2011, which show payments for overtime. In *Guiterrez* Justice Lederer stated the following:

> **14** It has been held that where overtime has become an integral part of the anticipated income of the terminated employee, it may be considered as a compensable damage. Each case will depend on its own circumstances (see: *Munoz v. Canac Kitchens, supra*, paras. 40-43). ...

Affinia has presented no facts to contradict the facts alleged by Kotecha nor could they since the facts presented by Kotecha come from documents which Affinia

issued. It has presented no case law to contradict the statement of Justice Lederer in Guiterrez or that of Justice Strathy in *Munoz*.

2. Whether or not Kotecha would have been entitled to be paid medical benefits which he is claiming in the notice period?

Kotecha states in his affidavit in para. 8(b) that "comprehensive medical and dental insurance benefits" were part of his compensation package and in para. 15 that he has incurred medical expenses in the notice period which he is claiming of $705.95 that would have been covered by his health benefits plan with Affinia. Affinia has presented no evidence to the contrary. Particulars of the medical benefits which Affinia provided to Kotecha while Affinia employed him would be in its knowledge.

3. Whether or not Kotecha had a defined contribution benefit pension plan?

Kotecha's pay stubs show pension contributions to a RRSP equal to 3% of his salary. Again this is Affinia's document.

4. Whether or not Kotecha had properly mitigated his loss?

Kotecha has presented detailed evidence of his attempt to find employment. In *Michaels v. Red Deer College*, [1976] 2 S.D.R. 324 the Supreme Court of Canada in the judgment of Chief Justice Laskin held that the burden is on the defendant to prove that the plaintiff has not properly mitigated his loss. (paras. 11-12)

[26] This is a simple case of wrongful dismissal where liability is not in issue, rather than constructive dismissal as in *Homebrook* where liability was in issue. The case is an assessment of damages. It is a much different case than *Homebrook*. The defendant has presented no evidence and has not filed a factum. Not only has it not put its best foot forward it has done nothing. The requirement for filing a factum is mandatory. It may be that Affinia does not have standing before the court. In *York University v. Michael Markicevic*, 2013 ONSC4311 Justice D.M. Brown stated the following;

> [5] Achieving access to the civil justice system requires taking concrete steps. The most concrete and most readily available step to improving access to justice involves judges consistently making greater use of their inherent powers to control the civil justice process to ensure that those who seek justice actually end up in a court room where justice is dispensed, without encountering financial exhaustion before reaching the threshold of the court room.

Although this statement may be a little stronger than the facts of this case warrant it does make the point well that what should concern judges is making a fair process available to litigants as quickly as possible with as little cost as possible.

Result

[27] Affinia's motion is dismissed.

[28] Of the cases cited *Di Tomaso* is the closest on the facts to the case at bar. I find that the notice period is 22 months as Kotecha claims. Kotecha shall have judgment against Affinia in the amount that he claims of $69,139.03.

[29] Kotecha may make submissions on costs in writing within 10 days of the receipt of this judgment and Affinia may have 10 days to reply.

Justice P.B. Hambly

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