CITATION: McLean v. The Raywal Limited Partnership, 2011 ONSC 7330
COURT FILE NO.: CV-11-00419831
DATE: 2011/12/09

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
NATALIE MCLEAN	)	Kevin Fox, for the Plaintiff
	)	
Plaintiff	)	
	)	
– and –	)	
	)	
THE RAYWAL LIMITED PARTNERSHIP and 2037629 ONTARIO INC.	)	John E. Tyrrell, for the Defendants
	)	
Defendants	)	
	)	
	)	
	)	
	)	**HEARD:** December 5 and 6, 2011

WHITAKER J.

What is This Case About?

[1] This is the trial in an action for wrongful dismissal. The critical issue is whether the plaintiff was laid off or dismissed.

[2] The plaintiff Natalie McLean ("Natalie") claims that she was dismissed without cause on October 22, 2010 after being employed by the defendants The Raywal Limited Partnership ("Raywal") for over 12 years.

[3] Raywal takes the position that Natalie was not dismissed, but was laid off with the intention of recall.

[4] Natalie was recalled but did not accept the recall. Raywal considered Natalie to have abandoned her job.

[5] For reasons which follow, the claim is allowed.

What Happened?

[6] Natalie testified on her own behalf. The defendants called as a witness, Brian Magee ("Brian"), president and CEO of Raywal.

[7] Natalie was 45 years old at the time of her lay off or dismissal. She was employed as a kitchen designer and was certified by her professional association. At the time, Natalie was divorced with a 23 year old son.

[8] Raywal builds custom kitchens. Its business is intertwined with the residential construction industry.

[9] Raywal's volume of business fluctuates with the construction industry cycle. For this reason, it is important that Raywal has some "elasticity" in their workforce.

[10] When Natalie was initially hired in 1998, Raywal had an employee handbook that included provisions for layoff. At the time, Natalie was not advised of this in her written offer of employment, nor was she provided with a copy of the handbook. Natalie was not obliged to confirm in writing that she acknowledged the existence of the handbook or that it was part of her contract of employment.

[11] In June of 2008 while still employed by Raywal, Natalie was offered and accepted a new position that she described as a "lateral move". At the time, she was obliged to accept in writing a new offer of employment which indicated that she agreed that she had read and would follow the policies of the employee handbook. The handbook contained provisions which govern layoff.

[12] Aside from the ability to continue her employment, Natalie was not provided with any consideration in return for her agreement to the terms of the written offer of employment in June of 2008.

[13] On October 22, 2010, Natalie was purportedly laid off with a recall date of Monday, June 27, 2011.

[14] Natalie's benefit package was continued during the period of layoff. Both Natalie and Raywal contributed to the benefits premiums during this period.

[15] By letter of May 27, 2011, Natalie was recalled.

[16] Natalie did not return to work.

[17] One day before the mediation in this matter at a golf tournament, Brian told Natalie that she could have her job back. Natalie did not accept the offer and indicated that she would wait until the mediation.

Analysis

[18] There is no issue that Raywal has a legitimate and appropriate business interest in being able to layoff employees and then to recall them in response to the cyclical demand for skilled labour in their industry.

[19] The parties agree that a layoff will be lawful and of effect where it is based on an employment contract. In the absence of a contractual basis for layoff, the device of layoff does not exist at common law and any purported layoff will be in fact, a dismissal.

[20] There was clearly no contractual basis for layoff in Natalie's contract of employment which began on July 15, 1998 as there was no reference to layoff in the signed and returned letter of employment, nor were there other references or acknowledgements to indicate that the layoff provisions of the employee handbook applied to Natalie.

[21] The only issue is whether the employee handbook layoff provisions in Natalie's contract of employment amended on June 27, 2008, are enforceable.

[22] This issue has been dealt with by the Ontario Court of Appeal in *Hobbs v. TDI Canada Ltd.* 2004 CanLII 44783 (ON CA), where the court had before it the same question. At paragraphs 32 and 33, the Court noted that the leading authority on the point was *Francis v. Canadian Imperial Bank of Commerce (*1994), 21 O.R. (3d) 75 (C.A.) and that this case stood for the proposition that continuing employment cannot amount to consideration in exchange for a change in the terms of employment.

[23] The Court in *Hobbs v TDI Canada Ltd.*, above, noted at paragraph 35 that this point was accepted in *Techform Products v. Wolda* (2001), 56 O.R. (3d) 1 (C.A.) where Rosenberg J.A. stated at paragraph 24:

> It is also consistent with the principle fundamental to consideration in the context of an employment contract amendment – that in turn for the new promise received by the employer something must pass to the employee, beyond that to which the employee is entitled under the original contract. Continued employment represents nothing more of value flowing to the employee than under the original contact.

[24] The Court in *Hobbs v TDI Canada Ltd.*, then explained further at paragraph 42 that consideration was required, particularly as a result of the vulnerability of employees when negotiating changes in terms of employment:

> [42] The requirement of consideration to support an amended agreement is especially important in the employment context where, generally, there is inequality of bargaining power between employees and employers. Some employees may enjoy a measure of bargaining power when negotiating the terms of prospective employment, but once they have been hired and are dependent on the remuneration of the new job, they become more vulnerable. The law

> recognizes this vulnerability, and the courts should be careful to apply *Maguire* and *Techform Products* only when, on the facts of the case, the employee gains increased security of employment, or other consideration, for agreeing to the new terms of employment.

[25] In the present case, other than the continuation of employment under new terms with an arguable change in job function, there was no obvious or certain improvement in compensation or other terms of employment. I do not consider the continuation of the benefits plan as consideration or an acceptance of the layoff. Employers may continue benefits after dismissal for a variety of reasons.

[26] I conclude that Natalie was given no consideration. For this reason, the change in terms of employment so as to include the layoff provisions of the employee handbook are unenforceable against Natalie.

[27] With respect to mitigation, I am satisfied based on Natalie's evidence and her mitigation log, that Raywal has not satisfied its onus of demonstrating that the mitigation efforts were inadequate (see *Link v Venture Steel Inc* 2008 CanLII 63189 (ON SC)).

[28] I also find that it was not reasonable in the circumstances for Natalie to accept the job offer made by Brian at the golf tournament on the eve of mediation. This non-acceptance does not indicate a failure to mitigate.

[29] With respect to Natalie's claim for her bonus to be included in the calculation of her damages, I am not persuaded that she would have been entitled to a bonus in the year following her dismissal. Based on previous years and what was happening within Raywal, it is unlikely that Natalie would have received the bonus now claimed.

[30] The factors which assist in calculating the period of reasonable notice are set out in *Bardal v. the Globe and Mail*: *Bardal v. Globe & Mail Ltd.* (1960), [1960] O.W.N. 253, 24 D.L.R. (2d) 140, 1960 CarswellOnt 144 (Ont. H.C.) at paragraph 21:

> **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.

[31] Applying this analysis, I find that ten months is the appropriate reasonable notice period.

[32] I remit to the parties the calculation of damages. If they are unable to agree, I will decide the issue following written submissions.

Outcome

[33] Judgment accordingly.

Whitaker J.

Released: December 09, 2011

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BETWEEN:

NATALIE MCLEAN

Plaintiff

– and –

THE RAYWAL LIMITED PARTNERSHIP and 2037629 ONTARIO INC.

Defendants

REASONS FOR JUDGMENT

Whitaker J.

Released: December 09, 2011