COURT OF APPEAL FOR ONTARIO

CITATION: Milwid v. IBM Canada Ltd., 2023 ONCA 702
DATE: 20231023
DOCKET: COA-23-CV-0237

van Rensburg, Hourigan and Favreau JJ.A.

BETWEEN

Gregory Milwid

Plaintiff (Respondent)

and

IBM Canada Ltd.

Defendant (Appellant)

John A. MacDonald and Aislinn E. Reid, for the appellant

Chris Foulon and Behzad Hassibi, for the respondent

Heard: October 17, 2023

On appeal from the judgment of Justice Audrey P. Ramsay of the Superior Court of Justice, dated January 26, 2023, with reasons reported at 2023 ONSC 490.

REASONS FOR DECISION

A. INTRODUCTION

[1] IBM Canada Inc. appeals the summary judgment order granted against it in the respondent's wrongful dismissal claim. It asserts two grounds of appeal: (i) the motion judge erred in finding that there were exceptional circumstances that would

justify fixing the reasonable notice period at more than 24 months; and (ii) the motion judge erred in finding that the respondent was entitled to damages for the value of Restricted Stock Units ("RSUs") that would have vested within the reasonable notice period.

[2] After hearing the appellant's oral submissions, we dismissed the appeal with reasons to follow. These are our reasons.

B. NOTICE PERIOD

[3] The motion judge found that the respondent was entitled to 26 months' reasonable notice, considering his "age, lengthy service, the exclusivity of his employment with the defendant, the character of his employment and specialized nature of his work." An award over 24 months was found to be warranted because there were exceptional circumstances. It appears that, in finding exceptional circumstances, the motion judge relied on the respondent's age, length of service with the same employer, managerial position, his compensation in an uncertain economy, and "the technical/skilled nature of his skills geared towards the defendant's business."

[4] The appellant submits, relying on *Dawe v. The Equitable Life Insurance Company of Canada*, 2019 ONCA 512, that the motion judge erred in basing her finding that there were exceptional circumstances that warrant a notice period in excess of 24 months on the factors set out in *Bardal v. The Globe & Mail Ltd.*

(1960), 24 D.L.R. (2d) 140 (Ont. H.C.). We do not accede to this submission. There is nothing impermissible in relying on the constellation of *Bardal* factors, along with other exceptional circumstances, to find that a notice period exceeds 24 months: *Currie v. Nylene Canada Inc*., 2022 ONCA 209.

[5] In this case – similar to the situation in *Currie* – the evidence established that the respondent's skills were not transferrable because they related, almost exclusively, to the appellant's products. This is an exceptional circumstance not covered by the *Bardal* factors, which could warrant a notice period exceeding 24 months. Therefore, we see no error in the motion judge's decision to fix reasonable notice at 26 months.

[6] The appellant also submits that the motion judge erred in finding that an additional month of notice, bringing the total to 27 months' notice, was appropriate to reflect the circumstances of the COVID-19 pandemic. This finding is entitled to deference by this court and was well supported by the evidence in this case. The pandemic was a truly exceptional circumstance, and the respondent lost his position right at the time the global economy was shutting down. There is no basis to interfere with the motion judge's decision in this regard.

C. RESTRICTED STOCK UNITS

[7] The respondent was granted RSUs by the appellant pursuant to his Equity Award Agreement, which sets out the terms, conditions, performance

requirements, limitations, and restrictions applicable to an award, including country-specific terms (the “Equity Award”). He was to receive 888 RSUs, half of which were to vest on November 14, 2020, and the other half of which were to vest on November 14, 2022. On August 14, 2020, the RSUs were cancelled. The motion judge found that the respondent was entitled to damages for the value of the RSUs that would have vested within the reasonable notice period, which was fixed at US$55,619.88.

[8] The appellant submits that the motion judge erred in awarding these damages because, pursuant to the terms of the Equity Award, the respondent was ineligible to receive the RSUs as his employment had been terminated. In support of this argument, the appellant relies on a country-specific definition of “Termination of Employment” applicable to the respondent’s Equity Award, which states:

> Termination of Employment
>
> For the purposes of the Plan and this Agreement, you shall be considered to be terminated from your employment with IBM or its affiliate on the later of the following dates:
>
> a. The date you cease to provide services to the employer or any affiliated company, regardless of whether such date is the last date upon which the employer is required by common law, agreement, policy, or otherwise to pay you termination pay in lieu of notice of termination of employment; or

> b. The date upon which the employer is required by statute (i.e. applicable provincial employment/labour standards legislation) to pay you termination pay in lieu of notice of termination of your employment.

[9] There is no dispute that in order for the appellant to rely on this term to exclude the respondent from participating in the Equity Award, the exclusionary language must be clear and unambiguous in limiting or eliminating the respondent's common law rights: *Matthews v. Ocean Nutrition Canada Ltd*., 2020 SCC 26, [2020] 3 S.C.R. 64, at para. 64.

[10] The motion judge held that the Termination of Employment provision is ambiguous:

> Under clause (a), an employee is considered terminated on the "date (the employee) cease to provide services to the employer". With the introduction of the word "regardless", after this phrase to explain the date that the employee ceases to provide services, in my view, the clause suggests that an employee may be considered to be terminated, when the employee ceases to provide services to the employer, which may be the last date of the common law notice period. There is no other interpretation from the provision which state that an employee can be considered to be "terminated" on the date the employee "cease to provide services to the employer" "regardless of whether such date is the last date upon which the employer is required by common law, …to pay termination pay…" The reference to "such date" refers back to the date the employee "cease to provide services", and contained, as it is, in the same sentence, and the sequence of the words, "such date" is also tied to the "last date" that the employer is required to pay "termination pay". What the clause does not clearly do, is exclude the common law notice period from consideration in establishing the employee's date of

> termination. Accordingly, the date the employee "cease to provide services" extends to the "last date" of the common law notice period. [Emphasis in the original.]

[11] The appellant submits that the motion judge erred in law in straining to create an ambiguity where none existed, contrary to the dicta from this court in *Amberber v. IBM Canada Ltd.,* 2018 ONCA 571, 424 D.L.R. (4th) 169, at para. 63. We disagree. In our view, the wording of the provision is ambiguous. The inclusion of the phrase "regardless of whether such date" in subsection (a) created uncertainty about when an employee becomes ineligible to participate in the Equity Award and leaves available a reasonable interpretation that eligibility is not extinguished until the end of the notice period at common law. Counsel for the appellant fairly conceded that if there is an ambiguity in the provision, it is not operative to extinguish the respondent's right to participate in the Equity Award. Therefore, we dismiss this ground of appeal.

D. DISPOSITION

[12] The appeal is dismissed. In accordance with the parties' agreement, costs of the appeal are payable by the appellant to the respondent in the all-inclusive sum of $20,000.

"K. van Rensburg J.A."
"C.W. Hourigan J.A."
"L. Favreau J.A."