COURT OF APPEAL FOR ONTARIO

CITATION: Lynch v. Avaya Canada Corporation, 2023 ONCA 696
DATE: 20231023
DOCKET: COA-23-CV-0064

Doherty, Brown and George JJ.A.

BETWEEN

John Lynch

Plaintiff (Respondent)

and

Avaya Canada Corporation

Defendant (Appellant)

Sébastian Lorquet and Boris Subara, for the appellant

Kate Kahn, for the respondent

Heard: October 6, 2023

On appeal from the judgment of Justice Nathalie Champagne of the Superior Court of Justice, dated December 19, 2022.

REASONS FOR DECISION

OVERVIEW

[1] The appellant, Avaya Canada Corporation ("Avaya"), terminated the employment of the respondent, John Lynch, a professional engineer, effective March 31, 2021, due to a company restructuring. Mr. Lynch had worked for Avaya and the predecessor owner of the business since May 1982. The parties unsuccessfully attempted to reach a termination settlement. Mr. Lynch sued for wrongful dismissal.

[2] Mr. Lynch moved for summary judgment on his wrongful dismissal claim; both parties agreed that summary judgment was appropriate to determine the action.

[3] The motion judge found that a 30-month notice period was appropriate in all the circumstances; as well, she was not persuaded Mr. Lynch failed to mitigate his damages.

[4] Avaya appeals. It contends that in granting judgment the motion judge erred: (i) by awarding a notice period in excess of the relief sought by Mr. Lynch in his Statement of Claim; (ii) by misapplying the factors set out in *Bardal v. The Globe & Mail Ltd.* (1960), 24 D.L.R. (2d) 140 (Ont. H.C.) in determining the period of reasonable notice; and (iii) by concluding Mr. Lynch took reasonable steps to mitigate his damages.

Awarding a period of notice in excess of that claimed

[5] In his Statement of Claim, Mr. Lynch claimed damages for wrongful dismissal representing 26 months' notice; the motion judge awarded 30 months' reasonable notice. Avaya submits the motion judge erred by awarding Mr. Lynch a notice period that exceeded the relief sought in the Statement of Claim.

[6] We see no merit in this argument. As Avaya acknowledges in its factum, at the hearing of the summary judgment motion Mr. Lynch sought an award of damages based on 36 months' notice. The motion was argued on that basis. Avaya conceded at the hearing of the appeal that it suffered no litigation prejudice by the motion proceeding on that basis. As well, Avaya acknowledged that had Mr. Lynch sought an amendment of his claim before the motion judge, she probably would have granted one. Accordingly, we give no effect to this ground of appeal.

Period of reasonable notice

[7] Avaya alleges that the motion judge erred in fixing a notice period of 30 months because she wrongly held that the circumstances of this case placed it within the "exceptional circumstances" category of cases that this court has held justify a notice period in excess of 24 months: see *Lowndes v. Summit Ford Sales Ltd.* (2006), 206 O.A.C. 55 (C.A.), at para. 11. Avaya placed particular emphasis on the fact that Mr. Lynch did not hold a management position in the company.

[8] We are not persuaded the motion judge made such an error.

[9] The common law principle that an employee dismissed without cause is entitled to reasonable notice is designed to afford an employee a reasonable period of time to search for and secure alternate employment: Stacey Ball, *Canadian Employment Law* (Toronto: Thomson Reuters, 2023), at §9.6; Howard Levitt, *Law of Dismissal in Canada*, 3d ed., (Toronto: Thomson Reuters, 2023), at §8.5. The *Bardal* approach to determining the reasonable period of notice to which a dismissed employee is entitled – an approach approved by the Supreme Court of Canada in *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701, at para. 81 – is premised on the principle that "there can be no catalogue laid down as to what is reasonable notice in particular classes of cases": *Bardal*, at p. 145. Instead, the *Bardal* approach determines the applicable period of reasonable notice by employing a case-by-case consideration of a group of factors that has regard to the character of the employment, the length of service of the employee, the age of the employee, and the availability of similar employment "having regard to the experience, training and qualifications" of the employee: *Bardal*, at p. 145.

[10] In *Lowndes*, this court recognized that there is no absolute upper limit or "cap" on what constitutes reasonable notice, but it went on to state that "generally only exceptional circumstances will support a base notice period in excess of 24 months" for long-term employees in positions comparable to that held by the employee in that case, which appeared to be below the position of a senior

executive: *Lowndes*, at paras. 11-15. See also *Dawe v. The Equitable Life Insurance Company of Canada*, 2019 ONCA 512, 435 D.L.R. (4th) 573, at paras. 31-33; *Currie v. Nylene Canada Inc.*, 2022 ONCA 209, at paras. 11-13.

[11] In the present case, the motion judge acknowledged this jurisprudence and concluded that "the plaintiff's circumstances were exceptional". In her reasons, the motion judge identified, as a group, all of the factors that led her to fix the notice period at 30 months. Her holistic description of the relevant factors is understandable given the approach set out in *Bardal*, but Avaya contends her failure to identify separately the *Bardal* factors amounting to "exceptional circumstances" taints her analysis and requires a reduction of the period of notice awarded.

[12] Certainly, when drafting reasons in wrongful dismissal cases in which they propose to award damages for a period of reasonable notice in excess of 24 months, judges should specifically identify those factors that they think demonstrate the presence of "exceptional circumstances" for the purpose of calculating the period of reasonable notice. Appellate courts should not be left to guess which factors, taken alone or in combination, move a case into one that displays "exceptional circumstances".

[13] Although the motion judge in the present case did not craft her reasons in that fashion, it is possible to discern the "exceptional circumstances" factors she

relied on by comparing her listed factors with those this court in *Currie* held justified an award in excess of 24 months. Those factors were: (i) Mr. Lynch specialised in the design of software to control unique hardware manufactured by Avaya at its Belleville facility; (ii) it was uncontested that Mr. Lynch's job was unique and specialized, and that his skills were tailored to and limited by his very specific workplace experience at Avaya; (iii) during his lengthy employment of 38.5 years, Mr. Lynch developed one or two patents each year for his employer; (iv) Avaya identified Mr. Lynch as a "key performer" in one of his last performance reviews; and (v) although similar and comparable employment would be available in cities such as Ottawa or Toronto, such jobs would be scarce in Belleville where Mr. Lynch – who was approaching his 64th birthday – had lived throughout his employment.

[14] Those factors provided the requisite support for the trial judge's determination that Mr. Lynch's circumstances were "exceptional" and justified an award of damages in lieu of reasonable notice based on a notice period in excess of 24 months. Given that the question of reasonable notice is one of mixed fact and law, in the circumstances of this case we do not consider the motion judge's determination of the notice period as resting on palpable and overriding error. Accordingly, we are not persuaded by this ground of appeal.

Failure to mitigate damages

[15] As its last ground of appeal, Avaya submits the motion judge erred in failing to find that Mr. Lynch had not taken reasonable steps to mitigate his damages by seeking alternative employment. Avaya contends his failure to mitigate should result in a significant reduction of the notice period to 16 months.

[16] The motion judge accurately summarized the law relevant to mitigation of damages in wrongful dismissal cases: Mr. Lynch had a duty to mitigate by taking reasonable steps to look for work; Avaya, as the employer, had the ultimate onus of showing on a balance of probabilities that Mr. Lynch did not take reasonable steps to find employment and, had he done so, he would likely have found comparable employment. As with any factual dispute, Avaya could meet its onus via direct evidence or by inferences drawn from circumstantial evidence.

[17] As we understand Avaya's submissions on this issue, its real quarrel is with the motion judge's fact-finding on matters relating to the mitigation issue. The motion judge accepted the employee's evidence about his efforts to find employment and his reasons for not expanding the search. Those factual findings are entitled to deference and Avaya has not convinced us that we can, or should, interfere with those findings. We see no error in the motion judge's treatment of the mitigation issue.

DISPOSITION

[18] The appeal is dismissed.

[19] We have reviewed the cost submissions of the parties. Mr. Lynch is entitled to his costs of the appeal fixed on a partial indemnity basis in the amount of $20,000, inclusive of disbursements and applicable taxes.

"Doherty J.A."
"David Brown J.A."
"J. George J.A."