CITATION: Gazier v. Ciena Canada, ULC, 2024 ONSC 865
COURT FILE NO.: CV-22-88906 (Ottawa)
DATE: 20240208

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Michaël Gazier, Plaintiff

-and-

Ciena Canada, ULC, and Ciena Canada, Inc., Defendants

BEFORE: Mr. Justice Graeme Mew

COUNSEL: *Daria A. Strachan*, for the Plaintiff (Moving Party)

Greg McGinnis, for the Defendants (Responding Parties)

HEARD: 17 January 2024, at Ottawa by video conference

ENDORSEMENT

[1] The plaintiff seeks summary judgment in his wrongful dismissal action against the companies that employed him for 22 years. He was 58 years old when he was provided with notice of termination on a without cause basis.

[2] There is no dispute between the parties as to the plaintiff's position, length of service, base salary, quantum of bonuses paid, entitlement to a comprehensive benefits package, or Defined Contribution Pension Plan (DCPP) (4% of salary).

[3] Straightforward claims by a plaintiff for wrongful dismissal without cause are often amenable to summary judgment: *Arnone v. Best Theratonics Ltd.*, 2015 ONCA 63, 329 O.A.C. 284, at para. 12. This is particularly so where there is no dispute regarding the plaintiff's length of employment, age, position and compensation as of the date of termination: *O'Reilly v. Imax Corporation*, 2019 ONSC 342, at para. 18. Indeed, in many wrongful dismissal actions, the parties agree that summary judgment is the appropriate procedure, as was the case in *O'Reilly*.

[4] The original motion record consisted of a relatively modest 198 pages, comprised of a notice of motion, the pleadings, and a fourteen page affidavit of the plaintiff sworn on 27 January 2023 to which were appended fourteen exhibits. Since then, however, responding materials, cross-examinations and voluminous productions arising from undertakings given and requests made, have resulted in the record swelling to over 4,000 pages.

[5] Not surprisingly, the defendants were initially of the view that summary judgment was not appropriate. Certainly at first blush, this summary judgment motion had all of the appearance of a "trial in a box" requiring the motions judge to hear a few hours of submissions at a high level of abstraction and then be "left to wade through the banker's box(es) of material to make detailed findings on contested evidence": *RNC Corp. v. Johnstone*, 2020 ONSC 7751, at para. 4.

[6] However, by the time that the motion was heard, the defendants conceded that there were only two issues which they maintained would require some sort of oral hearing, namely (a) the effect of certain inconsistent statements made by the plaintiff in his affidavit and on cross-examination; and (b) the plaintiff's efforts to mitigate. Counsel for the defendants conceded that if the court concluded that the current evidentiary record was not sufficient for the necessary findings of fact to be made, the use of the court's powers under Rule 20 of the *Rules of Civil Procedure* (for example mini-trial, or a limited oral examination of the plaintiff) would likely be sufficient to make the record complete.

[7] Furthermore, as is so often the case, upon making a cursory examination of the record, it seemed to me likely that, notwithstanding the voluminous record, there would be very few documents or transcript extracts that it would actually be necessary to consider in order to decide this matter.

[8] I therefore elected to hear the summary judgment motion, reserving the right to deny the motion altogether and send the case to trial, or to order that some oral testimony be adduced. My decision to proceed was influenced by a concern that the grossly inflated size of the record possibly reflected an attempt, for tactical reasons, to make a relatively straightforward dispute, well-suited to summary judgment, into a more complex case, with evidentiary issues in dispute, that would be unsuitable for summary determination.

[9] Following a hearing that lasted nearly four hours, I reserved judgment. I had already concluded that I could decide the main issues on the record before me. However, I anticipated that a number of the issues would, once determined in principle, require further calculations and possibly further submissions would need to be made. I also indicated to counsel that, as can befit a summary process, I would provide my decision by way of endorsement, rather than a more fully reasoned decision.

[10] In this endorsement, I address the following issues:

(a) What is the reasonable length of notice of termination of employment that the plaintiff should have received?

(b) What, if any, damages should the plaintiff receive for the bonus that he would have received or earned during the notice period?

(c) What is the appropriate value of the comprehensive benefits package which the plaintiff would have received?

(d) What allowance should be made for lost employer pension contributions?

(e) What, if any, vacation entitlement should be compensated for?

(f) Has the plaintiff failed to mitigate his loss?

Background

[11] Mr. Glazier was 58 years old when he was terminated, having worked for the defendants for more than 22 years. Although his background is in engineering, he had shifted from a technical engineering Principal Architect position to a non-managerial Senior Director role within the Chief Strategy Office of the employer. As a result, he asserts (and it is not seriously disputed) that his engineering and engineering management skills had become outdated.

[12] Mr. Gazier did not have an up-to-date written employment contract. The defendants produced an employment contract entered into in 1999. However, it did not accurately reflect either Mr. Gazier's position with the defendants at the time of his termination, his current remuneration package, or his bonus entitlement.

[13] The notice of termination given to the plaintiff on 10 November 2021 informed him that his employment would be terminated effective 4 February 2022. He continued to work until his termination date. In addition to the twelve weeks of working notice that he received, he was paid 26 statutory severance weeks, calculated using his base salary. He was also paid fifteen days of vacation pay (or "Paid Time Off"), calculated using his base salary. His employee benefits (extended health care, disability insurance, life insurance and accidental death and disability insurance) were also terminated effective 4 February 2022.

Reasonable Notice

[14] The plaintiff argues that a reasonable notice period in his case would be 27 to 30 months. The defendants argue that the appropriate range is 18 to 22 months.

[15] The plaintiff was well paid. At the time of his termination he was making $229,163.26 per annum. It is now over two years since he was terminated. He has not yet found another suitable job.

[16] Both parties provided me with comparable cases which consider application of the factors listed in *Bardal v. The Globe and Mail Ltd.* (1960), 24 D.L.R. (2d) 140 (Ont. H.C.).

[17] It is well established that only exceptional circumstances will support a base notice period in excess of 24 months (*Lowndes v. Summit Ford Sales Ltd.* (2006), 206 O.A.C. 55 (C.A.); *Dawe v. The Equitable Life Insurance Company of Canada*, 2019 ONCA 512 (CanLII)).

[18] The plaintiff argues that his circumstances are, indeed, exceptional. He compares his circumstances to those of the plaintiffs in *Currie v. Nylene Canada Inc.*, 2022 ONCA 209 (26 months), *Milwid v. IBM Canada Ltd.*, 2023 ONSC 490 (26 months) and *Keenan v. Canac Kitchens Ltd.* (2016), 29 C.C.E.L. (4th) 33, 2016 ONCA 79 (26 months).

[19] The defendants referred me to *Peterson v. Electro Sonic Inc.*, [2000] O.J. No. 1418 (S.C.J.) (20 months), *Brake v. PJ-M2R Restaurant Inc.*, 2016 ONSC 1795 (20 months) and *Devlin v. High Liner Foods Incorporated*, 2019 ONSC 6897 (22 months).

[20] Having regard to Mr. Gazier's 22 years of unbroken employment, his age, the specialized nature of the position which he held, as well as the fact that he was terminated during the pandemic, I am satisfied that he is entitled to a longer period of notice than provided for in the cases which the defendants referred me to.

[21] However, I do not find his circumstances to be "exceptional".

[22] Accordingly, in my view, the appropriate notice period is 24 months.

[23] The plaintiff argues that had he not been dismissed, he would have been entitled to annual pay increases. Based on information obtained by the plaintiff, he says that he would have received increases of 3% and 3.9% in the two years subsequent to his termination.

[24] The defendants point out that the plaintiff did not receive an increase in January 2021 and that such increases were, in any event, discretionary. As someone who was already relatively highly placed within his salary range, annual pay increases were by no means automatic. Furthermore, the plaintiff's claim for pre-judgment interest would effectively duplicate much of his claim for salary increases.

[25] I agree with the defendants that the record indicates that an annual increase was by no means guaranteed. Furthermore, even if, as claimed by the plaintiff, he would have been entitled to increases in the range of 3% to 3.9%, an award of pre-judgment interest on the 2021-22 base figure will substantially, if not completely, match the increase which he might have received. I would therefore not make any adjustment to the base annual loss of income figure to take into account possible pay increases.

[26] The defendants agree that damages in lieu of notice should include the defendants' matching pension contributions of up to 4% of his salary, namely $9,167.00 per year.

Bonus Entitlement

[27] The plaintiff claims that the annual bonus which he received from the defendants, Ciena Canada, ULC, and Ciena Canada, Inc. ("Ciena") formed an integral part of his compensation.

[28] The plaintiff claims that his bonus was based on a formula which incorporated his personal performance, a predetermined level value of 35% of his base pay, and the performance of the company. He was regularly rated at 100% for his personal performance, with the business performance of the company varying from year to year.

[29] In the three years immediately prior to his termination, Mr. Gazier received bonuses for the financial year ending 31 October each year as follows:

(a) 2019: $128,487.00

(b) 2020: $72,186.00

(c) 2021: $118,706.66

[30] The defendants acknowledge that in the four years prior to his termination, Mr. Gazier's "performance factor" had been 100%. But the defendants maintain that Ciena's "Corporate Bonus Plan", the most recent version of which was posted on the company's intranet in 2020, states that bonuses are discretionary and did not constitute part of the plaintiff's usual compensation package and "will not be subject to a damages award in relation to without cause termination, except as otherwise required by law".

[31] Although the defendants were able to point to the "Corporate Bonus Plan" information posted on the intranet, as well as an earlier employee handbook, the only document that could properly be considered as evidence of the plaintiff's contract of employment was the 1999 employment contract, which related to an entirely different position to that held by the plaintiff at the time of his termination. Simply pointing to a handbook or a document posted on the intranet, without more (for example, some sort of communication to the plaintiff drawing his attention to the "Corporate Bonus Plan" information, or an express or implied agreement on the plaintiff's part that these documents formed part of his contract of employment) is of no assistance to a determination of what the actual terms of the plaintiff's employment were.

[32] What the record does indicate is that the plaintiff was consistently paid a bonus and that the formula for that bonus remained the same for a number of years, including the four years immediately prior to his termination in which his personal performance was assessed at 100%.

[33] I therefore conclude that for the two-year period following his notice of termination, Mr. Gazier is entitled to be compensated for the loss of bonus payments which, I find, formed an integral part of his compensation.

[34] The plaintiff argues that the bonus payments element of his damages should be based on an average of the bonuses he received in the previous three years. This would result in him being allocated $118,283.00 for the fiscal year end 2022, and $115,623.00 for fiscal year end 2023.

[35] The defendants argue that if a bonus is payable, it should be based on what actually happened during the 2022 and 2023 fiscal years. For the fiscal year ended 31 October 2022, the corporate performance percentage was 50% (no doubt a reflection of the pandemic). For the 2023 fiscal year, it was 100%. Applying the formula used to calculate the plaintiff's bonus payments, this would have resulted in him receiving $40,103.40 for fiscal 2022 and $80,206.80 for fiscal 2023.

[36] I agree with the defendants that it would represent a windfall if the plaintiff were to receive more by way of bonus allocation during the 24 months which I have found would constitute the

reasonable notice period, than he would have received if he had remained employed. Accordingly, while I find that he is entitled to his bonus, it should be in the amounts of $40,103.40 and $80,206.80, as submitted by the defendants.

Benefits

[37] The plaintiff claims that the value of the benefit package which he received was $45,832.65 per year, equivalent to 20% of his base salary.

[38] The plaintiff canvassed the cost of health and dental benefits, life insurance, and long term disability benefits. He was not able to get coverage that would provide life insurance for his spouse, and the terms of the medical and dental packages were less favourable than those which he had through his employment. The total cost of this replacement coverage (without long term disability, spousal life insurance and accidental death and disability) amounted to $20,270.95.

[39] Relying on this court's decision in *Geluch v. Rosedale Golf Association* (2004), 32 C.C.E.L. (3d) 177, 2004 CanLII 14566 (ON SC), the plaintiff argues that the value of his benefits should be fixed at 15% - 20% of salary. He asserts that the cost of coverage that would replicate that loss, if available, would likely exceed 15% of Mr. Gazier's base salary, given the estimates he was able to obtain for inferior and incomplete coverage.

[40] Furthermore, the plaintiff and his partner actually incurred just $3,820.00 paying for dental expenses and contact lenses that would otherwise have been covered by the defendants' benefit plan. The plaintiff does point out, however, that he and his spouse have received estimates for additional dental work in the total amount of $14,790.00.

[41] The defendants observe that periodontic work was capped under Ciena's plan at $2,000.00 per person per year, in combination with other services. They also point to quotes obtained from Sun Life and MercerMarsh Benefits suggesting that the appropriate monthly allowance for the loss of the value of benefits would be $500.00 - $600.00.

[42] It is not possible to make an "apples to apples" comparison between what could now be privately purchased by the plaintiff, and what was available through the employer-provided benefit plan. The evidentiary record does not permit predetermination of how much of the dental work that the plaintiff and his spouse received estimates for would have been covered (nor does it seem likely that additional information in this regard would have been obtained if this matter proceeded to trial).

[43] I accept that Mr. Gazier should be compensated for the value of the benefits which he no longer received as a result of his employment being terminated. However, the suggestion that the value of these benefits was 20% of base salary, or even the 15% recognised in the *Geluch* case, strikes me as excessive. This is particularly so having regard to the quotes which the plaintiff obtained for, albeit, inferior coverage, as well as the actual expenses incurred which would otherwise have been covered by insurance.

[44] Having regard to the inferior coverage which Mr. Gazier was able to get quotations for (namely $20,270.95 a year), an amount of $25,000.00 per year would seem to me to fairly and

adequately compensate the plaintiff (this amount takes into account the $20,270.95 quotation and makes additional allowances for the exclusion of LTD, spousal life insurance and accidental death and disability coverage).

Accrued Vacation

[45] The plaintiff claims that the employer was contracted to provide employees with fifteen or more years of service with six weeks, or thirty days of vacation per annum. And, he argues, the vacation pay should be calculated on the full earnings, including bonus.

[46] The defendants acknowledge that the plaintiff was entitled under section 35.2 of the *Employment Standards Act, 2000,* S.O. 2000, C. 41, to a minimum of 6% of his non-vacation pay ("wages") as vacation pay.

[47] While not conceding that bonus pay should form part of the vacation pay calculation, the defendants assert that the statement of claim, as presently pleaded, does not adequately assert a claim for unpaid vacation pay.

[48] In that regard, the plaintiff's claim for accrued vacation pay has been well known to the defendants since the summary judgment motion was first brought nearly a year ago. Any infelicities in the pleading (which do not, in any event, strike me as patent), could easily be overcome by amendment. I would not, therefore, give any effect to the defendants' technical arguments about the quality of the pleadings.

[49] There does not appear to be any serious dispute that employees with fifteen-plus years of service were entitled to thirty days of vacation per year. Mr. Gazier is not able to say, based on reviewing his own records, whether he took his full entitlement and, accordingly, what the measure of approved vacation pay might be. He was also unable to obtain accrued vacation pay records from the defendants.

[50] As previously indicated, Mr. Gazier did receive three weeks of vacation pay calculated on his base salary.

[51] A bonus which is not dependent on the discretion of the employer qualifies as wages under the definition of "wages" in section 1(1) of the *Employment Standards Act*, and, hence, as part of the earnings on which vacation pay entitlement would be based: *Ashenhurst Nouwens & Associates Inc. v Charles McFarland,* 2016 CanLII 44014 (ON LRB).

[52] While Mr. Gazier had a reasonable expectation of receiving a bonus each year, unlike in the *Ashenhurst Nouwens* case, where the offer of employment to the employee stated that the company would pay a $1,000.00 bonus provided that the employee started with the company on or before a certain specified date, Mr. Gazier's bonus entitlement was both discretionary (as to whether he received a bonus at all) and (as to the amount payable) dependent on both his performance and that of the company. While I have held that the plaintiff's bonuses should be taken into account when determining his damages, his vacation pay entitlement is governed by statute. A discretionary bonus is not part of "wages" as that term is used in the statute. Accordingly, the plaintiff's bonus payments do not factor in to his vacation pay entitlement.

[53] My finding, therefore, is that Mr. Gazier should have received a vacation pay entitlement based on six weeks (rather than the three which he received) calculated on his base salary at the time of his termination. With respect to the defendants' refusal to provide evidence from their records as to how much of his vacation entitlement the plaintiff had used, I neither draw a negative inference, nor make any other finding. If the plaintiff had wished to move on the refusal, he could have done so.

Other Benefits

[54] The plaintiff seeks damages for the loss of additional expenses which were covered by his employer, including cell phone expenses and home office expenses including internet. He also raises the fact that Ciena matched his charitable donations every year, and covered the cost of his attendance for courses and conferences.

[55] The amounts claimed are relatively modest. As Mr. Gazier spent a good deal of his time working from home, it is understandable why these expenses were covered while he was employed. I am not, however, satisfied that it would be reasonable to include the loss of these reimbursements as part of his damages claim. He is no longer using his phone, home internet and other home office expenses for the benefit of his employer. While it may be that he now is incurring such expenses for his own benefit, including for the purposes of mitigating his losses, I am not satisfied that these expenses, in the circumstances in which they were incurred (and for which reimbursement was provided) should form part of his damages claim.

Mitigation

[56] The defendants say that Mr. Gazier has not mitigated. Furthermore, they assert that there is potentially a triable issue in this regard. They point to inconsistencies between his evidence when examined for discovery and correspondence that was exhibited concerning his mitigation efforts. The evidence concerned involved the extent to which he has used executive recruitment services, and whether he had made appropriate efforts in his dealings with those services.

[57] To the extent that there were some inconsistencies between Mr. Gazier's evidence when examined for discovery and the documentary evidence, I do not find those discrepancies to be significant (and, indeed, corrections were made prior to the hearing of the summary judgment motion).

[58] What is abundantly clear is that Mr. Gazier has diligently sought new employment. In total, he has applied for over 120 jobs, including work physically located in the Ottawa area, remote work and hybrid employment.

[59] It is notable that Mr. Gazier was not initially offered outplacement services by the defendants. They did, eventually, provide him with an offer of three months of outplacement services, which he took them up on.

[60] The plaintiff does not have business or information technology qualifications. He has, however, taken numerous courses online to try and upgrade his marketability.

[61] The 24 months, which I have found would constitute the reasonable notice period, is already over and yet Mr. Gazier remains unemployed.

[62] The defendants assert that Mr. Gazier took too long before he started looking for other employment (he made no documented job applications before July/August 2022), that he took too long to sign up with an executive recruiter, and that he has undersold his financial and business skills which, by the plaintiff's own description, he says are "weak".

[63] The onus is on the defendants to prove, on a balance of probabilities, that Mr. Gazier has failed to take reasonable steps to mitigate his damages; and, that if he had done so, he would have been expected to secure a comparable position reasonably adapted to his abilities.

[64] Mr. Gazier's affidavit sets out in great detail the efforts he has made. He describes how the specialised nature of his recent employment has become a limiting factor, as has his age, when seeking new employment.

[65] There is, in my view, no substance to the defendants' complaint that Mr. Gazier has failed to mitigate. To the contrary, he has made, and continues to make, reasonable efforts to find suitable employment.

Next Steps

[66] I would invite counsel to confer on the issue of recalculating damages based on these reasons. If either (a) it is not possible to reach agreement; or (b) counsel are of the view that there are matters that should have been dealt with by these reasons, but which have not been, I will, upon request, convene a further hearing to settle any outstanding issues and/or particulars of the amounts awarded. Otherwise, a draft judgment can be submitted to me *via* my judicial assistant, Aimee McCurdy: aimee.mccurdy@ontario.ca.

Costs

[67] The plaintiff is presumptively entitled to costs on a partial indemnity basis, subject to any adjustments warranted by offers to settle. If the parties are unable to agree on costs, I will, upon request, provide further directions for the making of submissions on costs.

Graeme Mew J.

Released: 08 February 2024

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