

CITATION: Gannon v. Kinsdale Carriers, 2024 ONSC1060
COURT FILE NO.: CV-21-64
DATE: 2024/02/20

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:)	
)	
SHARON GANNON)	
)	Fiona Martyn, for the Plaintiff
Plaintiff)	
)	
– and –)	
)	
KINSDALE CARRIERS LIMITED)	Nicholas Preston, for the Defendant
)	
Defendant)	
)	
)	
)	HEARD: December 4, 5, 6, 2023

K.A. GORMAN

OVERVIEW

- [1] This Simplified Rules action arises out of an alleged wrongful termination, owing to the closure of the defendant’s trucking and transport business, which was expedited by the economic impact of the Covid 19 pandemic.
- [2] The Plaintiff seeks 22 months of reasonable notice under the common law, less *Canada Labour Code* entitlement and mitigation income earned, for the sum of \$31,347.65.
- [3] The issues before the court are:
1. Did the Plaintiff have advanced notice of the Defendant’s Closure, and if so, should damages (if any) be reduced?;
 2. Did the Plaintiff fail to mitigate her damages by refusing to accept an offer of comparable employment?
 3. What is the reasonable notice period to which she is entitled?

THE PLAINTIFF'S CASE

Sharon Gannon

- [4] Sharon Gannon ("Sharon") was continuously employed with the defendant's trucking company for over 22 years from in or around July 1998 until December 31, 2020.
- [5] At the time her employment was terminated, Sharon was 57 years old and employed with Kinsdale Carriers Limited ("Kinsdale") in the role of accounts receivable/dispatcher/office clerk.
- [6] Sharon had an annual base salary of approximately \$43,680 (\$21.00/hr.). The defendant provided group benefits and Sharon was entitled to three weeks of paid vacation annually.
- [7] Sharon was originally hired in the position of office personnel/accounts receivable. Her duties at the time included:
- a) Creating invoices and posting deposits;
 - b) Filing;
 - c) Making collection calls;
 - d) Ordering licenses for company equipment;
 - e) Overseeing the driver check program at the company;
 - f) Fuel tax reporting and creating various monthly reports;
 - g) Packaging and mailing orders;
 - h) Inventory counts;
 - i) Completing work orders; and
 - j) Completing weekly driver pay settlements.
- [8] In or around June 2015 the defendant's dispatch employee resigned. The defendant's owner, Sherry Lowes ("Sherry"), took on some of the dispatch duties and assigned some to Sharon. Sharon denied that she offered to take on some dispatch duties.
- [9] On November 9, 2015, Sharon received a pay increase from \$19.09 to \$21 an hour. The accompanying documentation reads, "rate change, reflects the new position Sharon has accepted. Dispatch." As a result of the additional dispatch duties Sharon's hours of work increased from 37.5 hours a week to 40 hours a week.

- [10] Sharon continued her usual accounts receivable and other office duties in addition to the dispatch function. Her regular working hours were Monday-Friday, 8 AM-5 PM; she was not required to work any “on-call” hours, nor did she request to do so.
- [11] In her affidavit Sharon attested that “any dispatch duties I did accounted for at most 50% of my total daily tasks on a given day. However, at times it could be less, and it varied based on how busy the defendant was.”
- [12] In her reply affidavit dated November 13, 2023, Sharon attested that between 2015 and 2020 dispatch work accounted for approximately 2 to 2.5 hours of work each day, and approximately 10 to 12.5 hours of work per week. In cross-examination Sharon stated that for the last year of her employment dispatch would take up approximately four hours per day.
- [13] Sharon attested that on December 16, 2020, the defendant delivered to all staff, including herself, a notice of closure letter indicating that the company would close, permanently, as of December 31, 2020. Sharon states that at no time prior to December 16, 2020, was she advised that the business would be closing.
- [14] In cross-examination Sharon testified that in 2015 there were approximately 10 transport drivers. She said that in 2020 she noticed that the drivers had reduced to between 4 and 6 drivers.
- [15] While Sharon was not privy to the company’s financial statements, she said that on a few occasions in 2020 Sherry made some casual comments to her about the financial status of the business.
- [16] Sharon stated while she had had some concerns about the financial state of the company this was largely due to the uncertainty presented by Covid-19.
- [17] In cross-examination she agreed she had concerns about the state of the business for about one year prior to its closure.
- [18] On December 16, 2020, the defendant delivered to all staff, Sharon included a notice of closure letter that indicated that the company would be permanently closing as of December 31, 2020.
- [19] Sharon attested that at no time prior to receipt of the letter was she advised that the business would be closing or that her employment would end on a specific date. She said that when she received the notice, she was shocked that the defendant had made the “drastic decision to permanently shut its doors and terminate everyone’s employment”.
- [20] In the days following December 16th, Sherry provided Sharon with some contact information for Zehr Transport Limited, a local trucking company. Shortly thereafter Sharon contacted Zehr to inquire about a job opportunity. She told the court that she needed to look for another job as soon as possible because she was not in a position to retire.

- [21] In lieu of a resume Sharon emailed Jenn Zehr (“Jenn”) a list of her current employment duties. She attended an in person meeting at Zehr on December 29, 2020, with the owner, Jack Zehr (“Jack”) and his daughter, Jenn. Of the twenty listed job functions Sharon said that only four were related to dispatch work.
- [22] Sharon attests that she was given a job description and was surprised to learn that it was for a full-time dispatcher. Sharon states that at the defendant company she was not a full-time dispatcher, and that the dispatch function was not her primary duty.
- [23] Sharon attests that all that was discussed during the meeting at Zehr was that the position was for a full-time dispatcher and that there would be on-call hours including evenings/after hours and possibly some weekend work.
- [24] Further, Sharon stated that the pay associated to the dispatch position was not confirmed and there was no indication that Zehr would match her current salary. Sharon stated that a start date was never discussed, nor did she receive an offer of employment from Zehr for any position. She felt the meeting was “exploratory in nature” and that no offer was actually extended to her.
- [25] At the conclusion of the meeting, she advised the Zehr’s that she needed to think about what had been discussed as she had not planned on considering a full-time dispatch position.
- [26] Sharon attests that she never enjoyed dispatch duties and was even required to take a medical leave in May 2018 on account of the workplace stress she experienced as a result of the additional dispatch duties.
- [27] On December 30th Sharon sent a text message to Zehr that she was not interested in a full-time dispatch position but rather was interested in an accounts receivable role. Her text read:
- Good morning Jenn...I appreciate all of you seeing me last night. What a great group of people you are. I’ve given this a lot of thought and have decided at this point I don’t want to get back into dispatching. If there was a position for payables, or receivables I would be interested. I want to take this opportunity to explore what is out there and maybe take some on line courses. So once again thank you all for speaking with me last night.
- [28] During the last two weeks of her employment with the defendant, Sherry provided contact information for Seaboard, another transport company. Sharon made contact and was told that there were no job vacancies at the time. Further, she was told that if anything became available it would be out of their Sarnia terminal which would involve a four-hour daily commute.
- [29] Sharon maintains that Zehr never presented her with a job offer.

- [30] Sharon maintains that she took every reasonable step to mitigate her damages. Following her termination, she completed an online course in bookkeeping. She secured new employment with Trafalgar supply company on July 29, 2021, approximately seven months following her termination. While at Trafalgar she continued her job search and was ultimately able to do so.
- [31] Sharon secured a full-time position with Clark Insurance Inc. commencing December 13, 2021.

THE DEFENDANT'S CASE

Sherry Lowes

- [32] Since its inception, Kinsdale has been a family owned and operated business. When Sherry's husband died in September 2019 Sherry assumed ownership and control and became President of the corporation.
- [33] As a family run business the defendant has never insisted that employees enter employment contracts. Sharon was employed on this basis from July 7, 1997, until the defendant's closure on December 31, 2020.
- [34] Sherry attested that Sharon's ordinary hours of work were from 8 am to 5 pm. She said that Sharon offered to work after hours by fielding dispatch calls, but the company could not afford to pay so she kept to office hours.
- [35] Sherry attested that the plaintiff was initially hired in an administrative role and assisted with office administration and accounts receivable, her position changed over the years.
- [36] For the five or so previous years to the defendant's closure, the plaintiff occupied the role of "dispatcher/accounts receivable". Sherry attested that since 2015 until the company's closure the majority of the plaintiff's work involved dispatching and all associated tasks directly and indirectly related thereto. Sharon would record orders from customers, make entries into the dispatch system, match loads with drivers, schedule loads and maintain contact with drivers through the defendant's communication system. Sharon was responsible for fleet maintenance. Sharon would assist Sherry in calculating rates, mileage, material to be transported and delivery estimates, and calculate drivers' weekly settlements and pay.
- [37] Sherry attested that although the plaintiff would assist with some office administration, her primary responsibility was as a dispatcher.
- [38] Sherry attested that despite her best efforts to ensure that the defendant's business remained sustainable, the COVID-19 pandemic introduced new and unforeseen financial challenges. By December 2020 the defendant could no longer trade sustainably, and Sherry was forced to close the business.

- [39] Leading up to the closure Sherry would often confide in Sharon. She attested that she would discuss the company's precarious financial position and her concern about cash flow and the ability to meet payroll obligations.
- [40] Prior to 2020, the defendant used between 10-12 drivers. After COVID-19 the drivers were reduced to between 4-6 at any given time.
- [41] Sherry attested that she and Sharon discussed their collective concerns about a looming closure of the business. She said that the ultimate closure was anything but a shock to the plaintiff. She said the plaintiff was well aware that her employment was at risk and that absent a significant turn around the defendant was facing closure.
- [42] Sherry attested that one of the most difficult decisions that she ever had to make was to issue the written notice to all employees. On December 16, 2020, she provided her employees with two weeks of working notice under the *Canadian Labour Code*, benefit continuation for the same period of time (two weeks), accrued vacation pay (if any) and statutory severance pay. The notice indicated that the business would close permanently on December 31, 2020.
- [43] Sherry said that after the plaintiff received her notice of termination, Sharon remarked to her that she was surprised that I had held out as long as I had.
- [44] Following the notice of termination Sherry made every effort to assist her employees to obtain comparable work as soon as possible.
- [45] Sherry attested that as December 2020 grew to a close she called on various industry contacts in attempt to secure employment for as many of her employees as possible. To that end, in relation to the plaintiff and two other employees, she reached out to John "Jack" Zehr ("Jack") on or about December 21, 2020 and to another transporter that operated under the name of "Seaboard".
- [46] Sherry attested that insofar as the plaintiff was concerned she confirmed to Jack that her core function had been dispatching. She said that she insisted that Jack match the plaintiff's wage of \$21.00 per hour, as well as her weekly schedule of 8 am to 5 pm.

John "Jack" Zehr

- [47] Jack Zehr is the owner-operator of Zehr Transport.
- [48] He attested that on December 21, 2020, he received a telephone call from Sherry, who followed up with an e-mail. Sherry suggested that he contact Sharon for an interview as she thought Sharon would be a good fit as a dispatcher.
- [49] Jack attested that Sherry made it clear to him that Sharon's wages would have to remain the same. Jack forwarded Sharon's contact information to his stepdaughter, Jenn and asked her to set up an interview.

- [50] On December 29, 2020 Jack and Jenn met with Sharon. Jack attested that before the end of the interview he and Jenn verbally offered Sharon the position of dispatcher, and confirmed her hours and wages, and told her of a benefit package.
- [51] In cross-examination Jack told the court that his company does not require an overnight dispatcher. If anything were to happen between 5-8 am, he would take the call. He also told the court that dispatchers at Zehr do not work on weekends.
- [52] In cross-examination, Jack told the court that he was offering Sharon the same position that she had at Kinsdale. It would not have been full-time dispatch.
- [53] He said that Sharon wanted to discuss it with her husband.
- [54] Jack attested that Sharon was enthusiastic throughout the interview, and that given her level of interest he had no doubt that she would accept the offer and start early in 2021. He said that he was surprised to hear that Sharon had sent Jenn a text declining the position.

Jennifer Zehr

- [55] Jenn works as the Director of Operations at Zehr Transport. Her responsibilities encompass Human Resources and Finance. She is Jack's stepdaughter.
- [56] On December 23, 2020, Jack forwarded her the email he had received from Sherry about Sharon. Jennifer called Sharon on December 28th and set up an interview for 4 pm the following day.
- [57] The interview was conducted with Jack also present. Jenn felt that Sharon had a lot of experience in the trucking industry, including in the role of dispatcher.
- [58] In cross-examination Jenn testified that the discussion during the interview was not framed as a full-time dispatcher. Jenn said that Sharon would not have been a good fit as a full-time dispatcher.
- [59] At the end of the interview Jack and Jenn offered Sharon the dispatcher position and told her that it would also include administrative and other office duties. It was made clear that Sharon's salary and hours of work would remain the same. Jenn said that Zehr Transport has never had an administrative officer work evenings or weekends.
- [60] Jennifer attested that at the end of the interview, the Office Administrator, Kim Noseworthy came in and that she spoke with Sharon about some administrative duties.
- [61] In cross-examination, Jennifer said Kim would not have spoken with Sharon had the job offer been for the position of a full-time dispatcher.
- [62] Jennifer said that Sharon seemed excited to join Zehr, but asked to talk the offer over with her husband.

- [63] Jenn said that when Sharon accepted the verbal offer it was her intention to reduce the offer to writing. In cross-examination Jenn denied that the interview was merely “exploratory” in nature. She said that a verbal job offer was made to Sharon.
- [64] Jenn said that she was surprised to receive Sharon’s December 30th text declining the offer.

LAW AND ANALYSIS

Did the Plaintiff have Advanced Notice of the Defendant’s Closure?

- [65] Sharon was continuously employed with the defendant’s trucking company for over 22 years from in or around July 1998 until December 31, 2020.
- [66] Sharon testified that in 2015 there were approximately 10 transport drivers. She knew that by 2020 there were only 4-6 drivers.
- [67] Even after accepting the position of Dispatcher in November 21, 2015 Sharon continued her usual accounts receivable and other office duties in addition to the dispatch function.
- [68] As Dispatcher Sharon would: record orders from customers, make entries into the dispatch system, match loads with drivers, schedule loads and maintain contact with drivers through the defendant’s communication system. Sharon would assist Sherry in calculating rates, mileage, material to be transported and delivery estimates, and calculate drivers’ weekly settlements and pay.
- [69] Sherry testified that she and Sharon would speak extensively about the financial state of the company.
- [70] Kinsdale was not a large, multi-national company. Sharon, on her own evidence, was aware that the operation had “down-sized” – almost halving the number of drivers. She was responsible for monitoring the material transported and calculating settlements and pay. She continued in the roll of Accounts Receivable/Payable. It would have been readily apparent to her that Kinsdale was in dire financial straits.
- [71] Further, Sharon admitted that the closure of the business was always in the back of her mind. I find that Sharon was clearly aware and on constructive notice of the impending and real risk of the business’ closure.
- [72] While Sharon did not have an “end date” for the closure of the company, I find as a matter of fact that Sharon had advance notice of the Defendant’s closure.

Did the Plaintiff fail to mitigate her damages by refusing to accept an offer of comparable employment?

[73] It is the obligation of a terminated employee to mitigate his or her damages by seeking comparable employment, which is defined as employment comparable in status, hours and remuneration to the position held at the time of dismissal: *Carter v. 1657593 Ontario Inc.* 2015 ONCA 823. In *Humphrey v. Mene Inc.*, 2022 ONCA 531 at paragraph 57, the court held:

Comparable employment does not mean identical employment. It means "a comparable position reasonably adapted to [the plaintiffs] abilities": *Link v. Venture Steel Inc.*, 2010 ONCA 144, 259 O.A.C. 199, at para. 73, leave to appeal to S.C.C. requested but appeal discontinued, 33690 (April 30, 2010); *Dussault v. Imperial Oil Limited*, 2019 ONCA 448, 2019 C.L.L.C. 210–053, at para. 5.

[74] The leading case on failure to mitigate is the Supreme Court of Canada’s decision in *Michaels v. Red Deer College*, 1975 CanLII 15:

1. An employee is required to mitigate damages arising from wrongful dismissal;
2. The onus will be on the employer to establish a failure to mitigate; and
3. The onus requires the employer to establish that:
 - a) The employee did not take reasonable steps to see comparable employment and;
 - b) Had the employee done so, he or she could have procured comparable employment.

[75] The burden of proof rests squarely on the defendant to show that the plaintiff has failed to mitigate. The employer must establish that the employee failed to take reasonable steps to secure comparable employment: *Link v. Venture Steel Inc.* (*supra*); *Yiu v. Canada Kitchens Ltd.*, 2009 CanLII 9412 (ONSC).

[76] Throughout the trial the plaintiff made every effort to distance herself from her role as dispatcher. At paragraph 41 of the plaintiff’s factum, it states:

The Plaintiff acknowledges that she completed *some* dispatch work for the Defendant, but she was never a full-time dispatcher nor did dispatching comprise most of her work. The Plaintiff unequivocally states that most of her work at the time of her termination consisted of accounts receivable and/or office administration work.

[77] This is simply wrong on the evidence before the court. The plaintiff performed more than “some” dispatch duties by her own evidence.

[78] The plaintiff occupied the role of dispatcher from November 2015 to the end of December 2020. Her job description was changed to “dispatcher” on November 9, 2015. A salary increase accompanied the change as did an increase in the hours of work.

- [79] Much was made of the list of duties Sharon provided, and that only four or five were associated to dispatching, and the rest were administrative in nature. In my view that is a red herring. By her own testimony, Sharon admits that half (50%) of her working hours were dedicated to dispatch. She further admitted that when Kinsdale was busy, dispatch took priority over her administrative duties.
- [80] Further, many of the administration duties that Sharon performed were closely associated with her role as dispatcher, e.g., calculating driver settlement. Indeed, the email she sent to Jenn Zehr on December 21, 2020 is illuminating. She attached a list of her duties which clearly focused on dispatch and related functions.
- [81] Frankly, it is somewhat of an academic exercise to try to determine exactly how much dispatch work *vis a vis* administrative work Sharon was doing in December 2020. By that time, there were only 4-6 drivers working for Kinsdale. The business was no longer viable.
- [82] Sherry was proactive in her efforts to assist her employees in obtaining new employment in a seamless fashion.
- [83] Sherry reached out to Jack at Zehr Transport. She provided Sharon with contact information in an effort to secure her comparable employment.
- [84] Jenn and Jack met with Sharon on December 29, 2020.
- [85] The plaintiff puts forth a two-pronged argument:
1. No offer was ever made to Sharon; and
 2. If an offer was made, it did not constitute comparable employment.
- [86] The plaintiff submits that the December 29th meeting was simply “exploratory” in nature and did not result in an offer of employment.
- [87] I cannot accede to this submission, nor do I accept that Sharon was not offered comparable employment.
- [88] Jenn attested that Sherry had called her, suggesting that Sharon would be a good fit for the position of dispatcher at Zehr. Jenn said that Sherry made it clear that Sharon’s salary and hours of work would have to remain the same. Jenn attested that that would not be a problem.
- [89] At the end of the interview Jack and Jenn offered Sharon the dispatcher position and told her that it would also include administrative and other office duties. It was made clear that Sharon’s salary and hours of work would remain the same.

- [90] Both Jack and Jenn testified that the job being offered was “dispatcher” with ancillary office administration duties. Jenn told the court that Sharon would not have been a “good fit” as a full-time dispatcher.
- [91] Sharon met with Office Administrator, Kim Noseworthy. Jenn testified that there would have been no need for Sharon to meet with Kim if the job being offered was strictly “dispatch”.
- [92] As the court stated in *Aubrey v. Teck Highland Valley Copper Partnership*, 2017 BCCA 144 at para. 47 quoting Madam Justice D. Smith in *Frolick v. Frolick* 2007 BCSC 84 at para. 30:

An effective agreement requires a meeting of the minds of the parties. An enforceable contract requires a consensus between the parties on all of the essential terms of their agreement.

- [93] While the job offer was not reduced to writing, a verbal offer was made.¹ That is the only logical explanation for the text message that Sharon sent Jenn: [...] I’ve given this a lot of thought [...] (emphasis mine). “This” clearly relates to the offer of employment.
- [94] Clearly there had been an offer. Had the interview been merely “exploratory” in nature, Sharon could have chosen not to send a text, or simply send one that read “thank you for meeting me”. This was not an equivocal offer.
- [95] Both Jack and Jenn attested to being surprised that Sharon declined the offer of employment given her apparent enthusiasm during the interview.
- [96] I agree with counsel for the Plaintiff. Sharon was under no obligation to accept a full-time dispatch position. However, that is not what was offered.
- [97] Counsel for Sharon submits that while accepting the role at Zehr would have minimized the amount of wrongful dismissal damages owed to her, she was under no obligation to prioritize the defendant’s pecuniary interests above her own long-term career interests. However, she predicates this statement on the basis that the role offered to her by Zehr was a full-time dispatcher, which I found not to be the case.
- [98] In any event, as the court stated in *Benjamin v. Cascades Canada ULC*, 2017 ONSC 2583 at para. 13:

Cascades provided Benjamin with at least three directly comparable positions which Benjamin chose to ignore. Cascades ought not to be responsible in law for a decision by a terminated employee to change his career when he chose not to

¹ It is noteworthy to add that when hired at Kinsdale, Sharon did not receive a written offer of employment.

pursue comparable work opportunities provided by the employer and could have obtained a comparable position had he applied.

- [99] The dispatch position offered Sharon constituted comparable employment. Sharon could have started at the early part of January, 2021.
- [100] Sharon spent the entirety of the trial attempting to distance herself from her role as dispatcher at Kinsdale. This was an apparent effort to cast doubt on Zehr's offer of comparable employment. Further she strenuously rejected the notion that she had even been offered employment, in the face of her own text message. She complained that Zehr did not reduce an offer to writing, yet she had never received a written offer from Kinsdale. I found her entirely incredible.
- [101] Sherry went out of her way to find suitable employment for her employees. What comes to mind is the adage, "no good deed goes unpunished".
- [102] While Sharon wanted to "see what's out there" and pursue on-line courses, it should not fall to the defendant to fund her educational pursuits.
- [103] As the court stated in *Cimpan v. Kolumbia Inn Daycare Society, 2006 BCSC 1828* at para. 107:
- It cannot be the law that a dismissed employee can elect to take further training for self-employment and charge that to the employer, unless the employee cannot obtain alternate suitable employment.
- [104] An offer of comparable employment was extended by Zehr on December 29, 2020. Sharon chose to reject it, to her detriment. Failure to mitigate has been proven. Sharon is not entitled to reasonable notice damages.
- [105] The Defendant is entitled to her costs. If the parties are unable to come to an agreement as to quantum, I will receive brief (no more than five pages) written submissions within 30 days.



Justice K.A. Gorman

Released: February 20, 2024

CITATION: Gannon v. Kinsdale Carriers, 2024 ONSC1060

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

Sharon Gannon

– and –

Kinsdale Carriers Limited

REASONS FOR JUDGMENT

Justice K.A. Gorman

Released: February 20, 2024