2011 CarswellOnt 12251
209 A.C.W.S. (3d) 101

Hussain v. Suzuki Canada Ltd.

Ontario Superior Court of Justice

Roberts J.

Judgment: November 4, 2011
Docket: CV-11-421472

Counsel: Daniel Lublin, for Plaintiff
Laurie Jessome, Jessica Zagar, for Defence

Subject: Labour and Employment; Public

Labour and employment law.

***Roberts J.*:**

1 The parties agree that there are no genuine issues requiring a trial. They have submitted an Agreed Statement of Facts. I therefore dispose of the plaintiff's action as follows:

I Reasonable Notice Period:

2 The plaintiff submits that he was entitled to 30 months' notice of the termination of his employment; the defendant submits a range of 12 to 18 months as the appropriate period of reasonable notice.

3 The plaintiff is entitled to 26 months' notice of the termination of his employment, or payment in lieu of, based on the case law provided by the parties and, in particular, applying all the well known factors taken from *Bardal v. Globe & Mail Ltd.* (1960), 24 D.L.R. (2d) 140 (Ont.S.C.J.):

i. At the time of his termination for employment without cause on February 15, 2011, the plaintiff was almost 65 years old.

ii. He had worked continuously for the defendant since April 7, 1975. With almost 36 years' service, he was the defendant's most tenured employee in Canada. He had no notice or inkling that his employment would be terminated.

iii. His last position held with the defendant was Assistant Warehouse Supervisor, a supervisory position, of which the duties are set out in paragraph 6 of the Agreed Statement of Fact. He was responsible for supervising 11 people. Defendant's counsel submitted that the plaintiff's job was a very important and valuable job.

iv. The plaintiff immigrated to Canada from India in September 1974. His job with the defendant has been his only full time job in Canada. He has worked for the defendant for the majority of his working life. While there is no evidence that he is to retire imminently, it is a reasonable inference that the plaintiff is now closer to the end of his working years.

v. While some of his skills may be transferable, their entire application has been in the

automotive industry. Although he has had many years of warehouse and supervisory experience, they are general skills obtained on the job and are not the product of a definable trade, and are therefore less marketable.

vi. The plaintiff lost his job as a result of the defendant's restructuring due to its economic issues.

4 While there is no cap on the amount of reasonable notice of employment termination to which an employee may be entitled, and each case must be considered on its own particular circumstances, 24 months is usually the higher end of the range unless generally there are exceptional circumstances: *Lowndes v. Summit Ford Sales Limited*, 2011 ONCA 469, at para. 11.

5 In my view, while each factor on its own may not be exceptional, the combination of all of the above factors amount to the kind of exceptional circumstances that warrant a 26-month notice period.

II Mitigation:

6 The plaintiff has a duty to mitigate his damages for wrongful dismissal by taking all reasonable steps to obtain alternate employment that is suitable to his employment experience and abilities. The plaintiff's efforts need not be perfect but they must be reasonable. The defendant has the onus of proving that the plaintiff has failed to mitigate his damages. (See: *Thorne v. Hudson's Bay Co.*, 2011 ONSC 6010 (Sup.Ct.J.), at para. 26)

7 The plaintiff's evidence of his efforts until July 2011 satisfy his duty to mitigate: he began his applications for employment within 3 weeks of his termination; as of July 2011, he had made 27 applications for positions that appear to be suitable to his employment experience and abilities; and, in addition to searching and registering on appropriate work sites, he has made inquiries of co-workers, community resources, and friends. Except for 1 telephone interview, his efforts have proven fruitless.

8 The defendant has not met its burden to prove that the plaintiff failed to mitigate his damages. The defendant has not submitted any evidence to demonstrate that there were other appropriate work opportunities for which the plaintiff should have applied or which he ought to have pursued. The cross-examination of the plaintiff did not serve to discredit the plaintiff's mitigation efforts. The defendant's criticism that the evidence of the plaintiff's mitigation efforts stops at July is unfounded: all affidavit evidence had to be filed before the cross-examinations which were held in July; and the plaintiff could not file further affidavit evidence without leave of the court. The plaintiff was prepared to file additional evidence of his efforts if required. I shall return to this point later in these Reasons.

9 The defendant complains that following his employment termination, the plaintiff should have immediately started to apply for work. This assertion ignores the effect of the plaintiff's shock in having been terminated from employment after so many years of service and at his age without notice, cause, nor a penny in termination and severance pay (in breach of the defendant's statutory obligations).

10 The plaintiff is allowed a reasonable period of time to get over this shock, to organize his thoughts about obtaining new employment, and to undertake the necessary research and preparation of his resumes so that he is in a position to apply and compete for available positions: *Systad v. Ray-Mont Logistics Canada Inc.*, 2011 CarswellBC 2370 (BCSC), at para. 31. It is frankly remarkable that, in his circumstances, the plaintiff was able to organize himself so quickly.

11 In consequence, I make no reduction of the 26-month notice period that I have determined is reasonable in the specific and exceptional circumstances of this case.

12 The plaintiff's motion for judgment has reached the court before the end of the period of reasonable notice, so that the plaintiff still has the duty to mitigate his damages by seeking alternate, comparable employment. This situation gives rise to the issue of whether the plaintiff's damages should be reduced by any contingency for re-employment, whether partial summary judgment should be awarded and the plaintiff's motion returned some months hence, and whether the damages should be held in trust or other vehicle to be paid out to the plaintiff upon further proof of his reasonable and/or successful mitigation efforts.

13 I agree with the plaintiff's position that it is preferable to apply a contingency so that this matter may be determined at this time rather than bringing the parties back in the future or requiring the plaintiff to submit proof of mitigation efforts for payment out of a trust. The latter routes may simply set the stage for further disagreement and protracted litigation and expense.

14 What is the appropriate contingency factor? Based on the uncontroverted evidence before me, I draw the reasonable inference that it is highly unlikely that the plaintiff will become re-employed in a position comparable to that held with the defendant. The plaintiff is now 65 years old and, while not at all denigrating the importance of his position with the defendant and his experience and skills, he is undoubtedly facing extremely stiff competition with much younger applicants for the same kind of employment.

15 The facts are that his 27 applications have resulted in only 1 unsuccessful telephone interview and that the plaintiff remains unemployed almost 9 months after his dismissal; this is clear evidence of the difficulties that the plaintiff is facing and will continue to encounter over the length of his notice period. The plaintiff is significantly disadvantaged because of his age when competing with younger employees: *Benayon v. Total Credit Recovery Ltd.*, [1996] O.J. No. 739, at para. 44, aff'd [1998] O.J. No. 4414 (C.A.).

16 Finally, at 65 years of age, it cannot be seriously debated that the plaintiff is in the twilight if not at the end of his working years and that, because of his age, his chances of employment in a similar or even a related industry are remote: *Suttie v. Metro Transit Operating Co.*, [1983] B.C.J. No. 1657 (B.C.S.C.), at para. 22, and [1985] B.C.J. No. 1749 (B.C.C.A.), at para. 21.

17 Taking all of these circumstances into account, I see about a 1% chance of re-employment for the plaintiff and reduce the 26-month notice period by 2 weeks to 25.5 months.

III Damages:

18 The parties agree that at the time of his employment termination, the plaintiff's compensation was: a base salary of $48,790; annual RRSP/Pension contributions by the defendant of 3.5% of the plaintiff's base salary which equals $1,708; and health, dental, life insurance, disability and other benefits. The plaintiff also was eligible to receive a discretionary bonus to which I return below.

19 The defendant does not dispute that the plaintiff's base salary and pension benefit should be included in the calculation of the plaintiff's damages during the period of reasonable notice but argues that no amount should be allowed for the following:

i. Disability benefits: The plaintiff paid for them and there was no cost to the defendant during the plaintiff's employment. After termination of the plaintiff's employment, the defendant paid the premiums and continued the coverage until the benefits carrier terminated them in August 2011 after the plaintiff's 65th birthday.

ii. Health, dental and other benefits: The defendant has continued to pay the premiums for health, dental and other benefits and the benefits carrier will continue these benefits until

February 15, 2012.

iii. Discretionary bonus: The bonus was entirely discretionary, the plaintiff did not receive it each and every year of his employment, and, based on the plaintiff's last performance review, the defendant argues that it is doubtful that he would have received it during the fiscal year ending March 31, 2011.

20 The defendant's position regarding the benefits is untenable. It is a well established principle that a wrongfully dismissed employee is entitled to the value of the lost salary and benefits flowing from the dismissal (see, for example: *Davidson v. Allelix Inc.*, [1991] O.J. No. 2230 (Ont. C.A.), at para. 21).

21 The cost to the plaintiff of replacing the benefits provided under a group insurance policy is far more than the plaintiff's contribution while he was employed. If the benefits cannot be continued by the defendant's group carrier(s), then the value of the benefits must be assessed for the remainder of the period of reasonable notice and paid to the plaintiff, either at the employer's cost or the cost to the plaintiff of replacing them in the marketplace, less any amounts the plaintiff would have contributed to them during his employment, and less any amounts which were paid by the defendant for the disability benefits.

22 If the parties cannot agree on this amount, or if there is evidence that no carrier will provide the benefits in issue, they may submit to me through Judges' Administration further affidavit evidence and submissions concerning these matters within 10 days of the date of these Reasons.

23 There are two aspects to the question of the discretionary bonus: the payment of the bonus for the defendant's fiscal year ending on March 31, 2011; and the inclusion of an amount for the discretionary bonus in the calculation of the plaintiff's damages for the period of reasonable notice.

24 The evidence establishes the following:

i. While bonuses were discretionary, Piero Caleca, the affiant for and the Vice-President, Finance Operations, of the defendant, also explained that the results of the defendant determined whether bonuses were paid and each employee is assessed based on a rating system.

ii. On his cross-examination, the plaintiff estimated that he received bonuses 30 out of the 36 years of his employment. Out of the 7 years of data provided by the plaintiff, the plaintiff received a bonus in the last 5 of them including the fiscal year ending March 2010. The defendant did not rebut the plaintiff's evidence.

iii. Employees in comparable positions to the plaintiff, such as the defendant's Warehouse Supervisor who took over the plaintiff's duties after his employment dismissal, received bonuses for the defendant's fiscal year ending on March 31, 2011. On his cross-examination, Mr. Caleca testified that the bonus amounts paid were less than in previous years. He also confirmed that the defendant's results were such that bonuses were paid.

25 While not an enormous part of his compensation, given the regularity with which bonuses were paid, I find that they formed an integral part of the plaintiff's compensation.

26 The defendant's assertion that the plaintiff would not have been paid a bonus because of his poor performance is belied by the results of the plaintiff's 2010 performance review in which the plaintiff received acceptable and competent ratings.

27 As a result, the plaintiff is entitled to be paid the bonus that he would have received if he had been employed on March 31, 2011, as well as during the period of reasonable notice.

28 The defendant has not provided the amount of the bonuses paid to comparable employees or the percentage by which the bonus amounts dropped because of the defendant's economic issues. The data for the plaintiff's bonuses confirm that the bonuses were dropping over the last few years.

29 As such, rather than averaging the bonuses, which would produce an artificially high amount, I fix the amount of the plaintiff's bonus for the year ending March 31, 2011 in the amount of $2,248 (the same as for the previous fiscal year end) and hold that the amount of $2,248 should be used as the bonus component in the calculation of the plaintiff's damages during the period of reasonable notice.

IV Interest:

30 As already noted, in breach of its statutory obligations, the defendant failed to pay to the plaintiff his termination and severance pay entitlements until the end of June 2011, and only after the action had been commenced and this motion for summary judgment instigated. The plaintiff is therefore entitled to be paid prejudgment interest under the *Courts of Justice Act* of 1.3% from February 22, 2011 (the date by which the statutory amounts should have been paid to the plaintiff) to June 30, 2011 (or whatever earlier specific date on which the payment was made).

31 The plaintiff's statutory termination and severance pay amounts to 34 weeks' pay, which amount the defendant is entitled to deduct from the damages payable to the plaintiff under this Judgment. The 34-week period ended on October 11, 2011. The plaintiff is entitled to prejudgment interest at 1.3% from October 11, 2011 to the date of this Judgment on the few weeks of damages that should have been paid to him from October 11th onwards for the balance of the 25.5 months of the notice period.

32 The plaintiff is entitled to prejudgment interest of 1.3% on all amounts payable to the plaintiff for pension, health and other benefits that were not continued or paid from the date that they ceased.

33 The plaintiff is entitled to postjudgment interest of 3% on all net amounts payable under this Judgment, including costs, from the date of this Judgment.

V Costs:

34 The parties have agreed that in the event that the plaintiff is successful on all issues, the plaintiff should have his partial indemnity costs of $19,287.37. The plaintiff was materially successful on all issues and is entitled to his costs.

35 For these reasons, I order that the plaintiff's costs be fixed in the amount of $19,287.37 and payable by the defendant within 30 days.

END OF DOCUMENT