CITATION: Markoulakis v. SNC-Lavalin Inc., 2015 ONSC 1081
COURT FILE NO.: CV-14-504720
DATE: 20150416

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Eftihios (Ed) Markoulakis, Plaintiff,

AND:

SNC-Lavalin Inc., Defendant,

BEFORE: Pollak J.

COUNSEL: *Daniel A. Lublin,* for the Plaintiff

Jeffrey P. Mitchell, for the Defendant

HEARD: November 14, 2014, December 17, 2014, February 6, 2015

ENDORSEMENT

[1] The Plaintiff, Eftihios Markoulakis ("Mr. Markoulakis"), requests summary judgment of his claim for wrongful dismissal. He had been employed for 40.66 years by the Defendant, SNC-Lavalin Inc., at the time of his termination of employment which was the result of a shortage of work. He was earning $129,272 annually as a Senior Civil Engineer and was 65 years old. The parties are agreed on his monthly compensation for the purposes of this action. In lieu of reasonable notice, the Defendant paid an amount approximately equivalent to 34 weeks compensation. He has been paid approximately up to the time of this hearing of his motion.

[2] The Plaintiff submits that he should have been paid 30 months' compensation. The Defendant replies that the amount paid (equivalent to 34 weeks of compensation) is within the "reasonable range" of payment in lieu of reasonable notice of termination of employment. The Plaintiff's termination occurred 34-weeks before the trial.

[3] The parties agree that the payment received should be deducted from any amount awarded by the Court as pay in lieu of reasonable notice. The parties also agree that the Plaintiff is obliged to mitigate his damages and that any income earned during the reasonable notice period must be deducted from any award of damages.

[4] The Plaintiff claims that 30 months' is the appropriate period of reasonable notice, but only 34 weeks have elapsed since his termination of employment at the time this motion for summary judgment was heard. The Defendant submits that an award to compensate the Plaintiff

for more than 34 weeks would have the practical effect of removing the Plaintiff's obligation to mitigate his damages.

[5] Although the Defendant agrees a summary judgment motion is appropriate to resolve the determination of the period of reasonable notice, it submits that this motion should not have been brought until the end of the notice period being claimed by Mr. Markoulakis. It therefore argues that the motion should be adjourned until the end of the notice period to avoid an unfair resolution of this dispute.

[6] This "unfairness" arises because the Plaintiff has an obligation to make all reasonable attempts to mitigate his damages. Should he be successful, the Defendant's liability for the award of pay in lieu of notice at common law is reduced.

[7] How does the Defendant, who has the burden of proving a failure to mitigate damages, ensure that the Plaintiff does so during the unexpired period of reasonable notice?

[8] In *Cronk v. Canadian General Insurance Co.* (1995), 25 O.R. (3d) 505, [1995] O.J. No. 2751 (C.A.) the Court of Appeal upheld a 20 month notice award granted on a summary judgment motion only 9-months after termination. The appellant in that case had argued that it was inappropriate to render judgment before the expiry of the notice period. The Court rejected this argument at p. 10 (O.J.):

> "I reject the appellant's submission that the judgment unfairly releases the respondent from her obligation to mitigate her damages by seeking other employment. That obligation continues during the period of notice set by the court, even if it extends beyond the date of the judgment. The respondent remains accountable to the appellant for any income earned during that post-judgment period."

[9] In *Bullen v. Protor & Redern Ltd.*, 1996 CanLII 8135, 47 C.P.C. (3d) 280 (Ont. S.C.) nthe Court held that summary judgment was appropriate in wrongful dismissal cases where just cause is not alleged. Regarding the authority to grant judgment prior to the expiration of the reasonable notice period, the Court concluded at para. 38 that:

> "The damages for wrongful dismissal are assessable at the date of termination subject only to the duty to mitigate. There is ample authority for granting judgment prior to the expiration the reasonable notice period. In the *Cronk* case, the Plaintiff was dismissed in September 1993. The employer had offered 9 months notice which would have expired in June 1994. Ms Cronk's motion for summary judgment was heard in April 1994 and the motions court judge awarded 20 months notice. The employer alleged failure to mitigate but this was found to be unsubstantiated: *Cronk v. Canadian General Insurance Co.* (1994), 19 O.R. (3d) 515, 6 C.C.E.L. (2d) 15 (Gen. Div.). Although the Court of Appeal reversed the motions court judge's decision on other grounds, the portion of the judgment dealing with mitigation and the appropriateness of the summary judgment procedure was not criticized. Rather, the majority of the Court of Appeal awarded 12 months notice to the Plaintiff. This award was made without requiring the Plaintiff to submit to further cross examination on her mitigation efforts between April 1994 and September 1994.

> Indeed the Court of Appeal specifically found that a trial was not required to dispose of the action."

[10] The Plaintiff's evidence is that he is now 66 years old, with more than 40 years of service with the Defendant. He has made extensive efforts to find another, comparable position. The Defendant does not challenge this evidence. The Plaintiff submits that his evidence is sufficient for the Court to make a finding of fact he will not be able to find alternative employment.

[11] While the evidence shows that the chances of re-employment for the Plaintiff are low, it does not establish that re-employment during the notice period is not possible. I do not find there is a proper evidentiary base on which to make the finding that the Plaintiff will not be able to find a job during the balance of the notice period.

[12] The jurisprudence relied on by the parties demonstrates that when considering how to award damages before the expiry of the period of reasonable notice, courts in Ontario have applied the following three strategies:

(i) The Trust Approach: the Plaintiff must account for any mitigation earnings and a procedure is designed for potential for a return to Court in the event of disputes;

(ii) The Partial Summary Judgment Approach: the parties return at the end of the notice period to determine the adequacy and success of the Plaintiff's mitigation efforts;

(iii) The Contingency Approach: the Plaintiff's damages are reduced by a contingency for re-employment. (Neither party supports this approach and there was no evidence upon which to find the appropriate contingency rate.)

[13] The Plaintiff submits that the trust approach, used in *Correa v. Dow Jones Markets Canada Inc*. (1997), 35 O.R. (3d) 126, [1997] O.J. No. 3356, is the appropriate procedure for resolving the issue in this case. In *Correa*, the Court awarded a lump sum payment for the maximum notice period, which included damages for the unexpired period of reasonable notice. A trust was imposed, and the Plaintiff was ordered to account to the Defendant for any earnings during the notice period.

[14] In its factum, the Defendant had agreed with the use of the trust approach. However, in response to a request from the Court for further submissions, the Defendant changed its position, submitting that the trust approach was *not* appropriate. The Plaintiff objected to this change in position.

[15] The Plaintiff has, however, not altered his position in reliance on these references made by the Defendant in its factum and the Plaintiff has had ample opportunity to make full submissions on the issue. I do not therefore agree that the Defendant is now precluded from arguing against adopting the trust approach.

[16] The Defendant submits that the trust approach is inconsistent with the principles of judicial economy and fairness. If the Court awards the maximum amount of damages that the Plaintiff could receive, the Defendant may be forced to return to court to recover any overpayment. Requiring the Defendant to recover any overpayment through subsequent negotiations or further litigation is not fair to the Defendant. Further, the Defendant argues that the trust approach may negatively affect the Plaintiff's motivation to mitigate his damages. The Defendant states that this "motivational problem" is of particular concern in the instant case, as the Plaintiff has the belief that he will not succeed.

[17] In support of its position, the Defendant directs the Court's attention to the case of *Russo v. Kerr*, 2010 ONSC 6053, 326 D.L.R. (4th) 341. In that case, Gray J. held that that if a plaintiff is awarded full damages on the motion for summary judgment; s/he will have no real incentive to mitigate, as anything earned would have to be paid to the defendant. Any duty to mitigate would be merely theoretical, particularly given the difficulty the defendant would face in assessing the reasonableness of the mitigation efforts for the remainder of the notice period. As Gray J. observed at para. 61 that by adopting the trust approach:

> "the Court will have no real ability to assess the reasonableness of the Plaintiff's conduct. Once the money is paid, the ability to get the matter back before the Court is practically non-existent. Unlike at a trial, after the notice period has expired, where the Plaintiff can be cross-examined as to his or her efforts that cannot realistically be done after the money has been paid."

As a result, Gray J. concluded that "[t]he imposition of a trust… provides no real solution" (*Russo*, at para. 61).

[18] The Defendant notes that two recent cases of this Court, both heard after *Cronk*, refused to adopt the trust approach as a result of the problems identified above. One of those cases applied the partial summary judgment approach, while the other used the contingency approach. However, the Defendant also objects to the application of these approaches on the basis that they do not allow for a real assessment of damages. They do not therefore result in a "fair and just result [that] will serve the goals of timeliness, affordability and proportionality in light of the litigation as a whole" (*Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87 at para. 66).

[19] The Defendant submits that the only fair manner of proceeding is to wait until damages have crystallized at the end of the notice period claimed. This allows for an accurate assessment of the Plaintiff's damages and allows the Defendant to test reasonableness of the Plaintiff's mitigation efforts if necessary. This is particularly true, according to the Defendant, in light of the lengthy notice period claimed by the Plaintiff, and because the Plaintiff has not yet suffered *any* loss as a result of the Defendant's failure to provide reasonable notice. The Plaintiff has received all of his *Employment Standards Act*, 2000, S.O. 2000, c. 41 ("*ESA*") termination and severance pay entitlements of 34 weeks during the period preceding the hearing of the motion for summary judgment.

[20] Using the approach urged by the Defendant would require the Plaintiff to wait until the claimed notice period expires before obtaining a damage award. The Defendant argues that it is neither unusual nor unfair to require a party to wait until his or her damages have fully crystallized before obtaining an award for those damages. What *is* unfair, is requiring the Defendant to pay an amount, representing the maximum damages it may be responsible for, when the Defendant's liability may in fact be substantially less in a case where the Plaintiff has been paid his *ESA* entitlements, fully compensating him to the date of the hearing. In any other type of action, a trial to quantify the Plaintiff's damages would not proceed until damages were fully crystallized or were calculable through expert evidence. For example, in a personal injury action, a Court would not proceed to order the maximum damages possible, and then direct the return of the action when expert/actual evidence of damages was available to order the return of monies to the Defendant. The quantum of damages would be adjudicated at one time.

[21] The Plaintiff responds that the Defendant does not challenge the Plaintiff's mitigation efforts to date. The Plaintiff is prepared to submit income statements and T4 statements to the Defendant and to put any money earned from possible re-employment during the notice period in a trust held for the Defendant. If the parties are not able to address a possible dispute regarding future income earned the Defendant could return to court to address the terms of this court order and challenge the mitigation efforts of the Plaintiff.

[22] The Plaintiff submits that the possibility of returning to court in the future to adjudicate a potential dispute over the Order is more practical than adjourning the motion for the remainder of the notice period.

[23] In *Hryniak*, the Supreme Court of Canada provided a roadmap of the approach to follow on a Motion for Summary Judgment. At para. 66, Karakatsanis J., writing for the Court, stated:

> "On a motion for summary judgment under Rule 20.04, the judge should first determine if there is a genuine issue requiring trial based only on the evidence before her, without using the new fact-finding powers. There will be no genuine issue requiring a trial if the summary judgment process provides her with the evidence required to fairly and justly adjudicate the dispute and is a timely, affordable and proportionate procedure, under Rule 20.04(2)(a).
>
> If there appears to be a genuine issue requiring a trial, she should then determine if the need for a trial can be avoided by using the new powers under Rules 20.04(2.1) and (2.2). She may, at her discretion, use those powers, provided that their use is not against the interest of justice. Their use will not be against the interest of justice if they will lead to a fair and just result and will serve the goals of timeliness…"

[24] Applying the *Hryniak* roadmap, I must therefore consider:

(i) whether, on the basis of the evidentiary record alone, there genuine issues that require a trial; and

(ii) whether the evidentiary record is sufficient to "fairly and justly adjudicate the dispute."

[25] In this action, the evidence is largely uncontradictory and there are not many issues in dispute. In my view, the answer to both these questions is yes, with the exception of the issue regarding the Defendant's right to test the Plaintiff's fulfillment of his obligation to mitigate his damages throughout the period over which he should have been given reasonable notice of termination of employment. The exercise of my fact-finding powers will not resolve this issue.

[26] Before considering the best way to resolve that issue, I must determine the amount of reasonable notice to which the Plaintiff is entitled, subject to his obligation to mitigate his damages. The parties agree that determining this amount requires the Court to take a "holistic approach" in considering the factors set out in *Bardal v. Globe & Mail Ltd*., [1960] O.J. No. 149, 24 D.L.R. (2d) 140 (H.C.J.) and *Di Tomaso v. Crown Metal Packaging Canada LP*, 2011 ONCA 469, 282 O.A.C. 134. The parties also agree on a total annual compensation of $145,244.

[27] The Plaintiff argues that because of his 40.66 years of service and his age of 66 years, he is entitled to an extraordinary notice period of 30 months' pay in lieu of reasonable notice. He relies on the following table of jurisprudence regarding awards to professionals, all of whom were younger and had less service than the Plaintiff:

Case Name	Position	Tenure	Salary	Age	Notice [Mths.]
Stolze v. Delcan Corp. (1998), 40 C.C.E.L. (2d) 70 (Ont. Ct. (Gen. Div.))	Survey Engineer	32	$67,000	56	24
Ben David v. Congregation B'nai Israel, [1999] O.J. No. 1238 (Ont. Gen. Div.)	Congregation Rabbi	26	$65,000	59	30
Weselan v. Totten Sims Hubicki Associates, 2003 CanLII 49300 (ON SC)	Professional Engineer	29	$75,000	58	24
Walsh v. UPM-Kymmene Miramichi Inc., [2003] N.B.J. No. 166 (NBCA)	Papermill Shift Supervisor	30	$100,680	52	28
Johnston v. Canada Cement Lafarge (1984), 12 C.C.E.L. 108 (ACA)	Engineer	26	$88,000	55	24
Donovan v. New Brunswick Publishing, [1996] 184 NBR (2d) 40 (NBCA)	Executive Sports Editor	36	$46,000	57	28
Jervis v. Raytheon Canada Ltd., (1990) 35 C.C.E.L. 73 (Ont. S.C. – H.C.J.)	Senior Engineer	21	--	--	24

Lee v. Bank of Nova Scotia, [2004] O.J. No. 3505 (Ont SC)	Auditor	29	$41,100	57	26
Ashman v. Orphans' Home and Widows' Friend Society, [1993] O.J. No. 104	Psychologist	24	--	--	24
Silvester v. Lloyd's Register of North America Inc. (2004), 30 C.C.E.L. (3d) 200 (NSCA)	Marine Surveyor	19	--	--	24
AVERAGE		**27.2**	**$68,969**	**56.29**	**25.6**

[28] The parties agree that notice beyond 24-months is within the Court's discretion in exceptional cases. They further agree that the amount of notice must be decided on the facts of each case. The Court should consider: (i) the character of employment; (ii) the length of service; (iii) the age of the employee; (iv) the availability of similar employment having regard to the experience, training, and qualifications of the employee, and any other relevant circumstances: *Bardal*, at para. 21; *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, [1992] S.C.J. No. 41 at para. 22.

[29] The Plaintiff submits that the chart demonstrates that on average, our courts have awarded a professional who is 56 years of age, with 27 years' service, 25.60 months' notice. As the Plaintiff was 10 years older, and had 13.5 years more of service when he was terminated, he argues that he should have been provided with 30-months' notice. He submits that his situation is clearly exceptional, as it is without comparable precedent.

[30] The Plaintiff further argues that finding another comparable senior level professional position will be very difficult because:

(a) the Plaintiff's work experience is only with the Defendant;

(b) as a result of his age, employers will infer that he will retire shortly;

(c) the job market for senior engineers at the Plaintiff's level in this industry are rare;

(d) there are few available opportunities with a similar level of status, responsibility and compensation; and,

(e) the Defendant did not offer outplacement or career counselling.

[31] In *Kerr v. Canada Alloy Castings Ltd.*, [2000] O.J. No. 5169, 102 A.C.W.S. (3d) 739 (S.C.), 24 months' pay in lieu of notice was awarded to a president who was demoted to a lesser technical position. He was 62-years of age, and had been employed by the defendant for approximately 33 years. In the case of *Hussain v. Suzuki Canada Ltd.*, [2011] O.J. No. 6355, 100 C.C.E.L. (3d) 295 (S.C.), the Court found that a 26 month notice period was appropriate for a 65

year old warehouse supervisor with 36 years' service who had only worked for the Defendant. The court found that these factors made the case exceptional.

[32] The Defendant submits that the plaintiffs in *Kerr* and *Hussain* had similar service and age to the Plaintiff, but held more senior roles. The Defendant argues that the Plaintiff was a professional, but was non-managerial with no significant decision-making authority. It is submitted that there are no exceptional circumstances used to justify a notice period beyond 24 months.

[33] The Defendant further submits that because of his training and qualifications, the Plaintiff will be able to find employment. The Defendant submits that the job search summary of the Plaintiff shows that there are opportunities for senior engineers in this case. He has applied for 33 positions.

[34] As well, the Defendant notes that the Plaintiff refused what it suggests was a reasonable offer of continued employment with the Defendant in Saskatchewan. The Plaintiff had accepted other such moves while he was employed and the Defendant argues that he therefore should have accepted this offer: his failure to do so was a failure to mitigate his damages.

[35] Notwithstanding the submissions made by the Defendant, I accept the evidence of Plaintiff that for personal reasons, he was unable to accept the geographic relocation. I find that this refusal does not constitute a failure to mitigate his damages.

[36] Finally, the Defendant argues that, since the Plaintiff was told one month before his termination of employment that he would be terminated, the Plaintiff's entitlement to pay in lieu of notice should be correspondingly reduced by one month.

[37] On the basis of the evidence, I agree with the Plaintiff that there are exceptional circumstances in this case justifying an award of notice beyond 24 months. The fact that the Plaintiff is over 65, has more than 40 years of service with the Defendant, his only employer, is in my view, exceptional. Having regard to the guidance set out in the jurisprudence referred to by the parties, I do not agree with the Defendant that the minimum statutory payments, equivalent to 34 weeks of pay, are sufficient. On the other hand, I do not agree that the Plaintiff is entitled to a notice period of 30 months. I find that, having regard to all of the *Bardal* factors, the average period referred to by the Plaintiff in his chart of the jurisprudence of 27 months is appropriate in this case. I do not reduce this notice period because of the verbal notice given by the Defendant.

[38] With respect to the issue of the Plaintiff's continuing duty to mitigate, I have found that the evidentiary record does not allow this Court to make a finding on whether the Plaintiff will have any employment income loss during the balance of the notice period or whether he will successfully mitigate. Even though the Plaintiff has shown that he has not been able to find employment for thirty-four weeks, he moved for summary judgment knowing that it would be heard only 34 weeks after his termination of employment. The Plaintiff chose to deal with this issue by submitting that the Court should make a finding that he would not be able to mitigate his damages during the balance of the notice period. For the reasons set out above, the Court has declined to make this finding.

[39] In the circumstances of this case, the Plaintiff has not yet lost any employment income.

[40] The Court has determined that the reasonable notice period for Mr. Markoulakis is 27 months. It follows that the Defendant has the obligation to the Plaintiff to pay the agreed upon compensation monthly for the balance of such notice period. This obligation of the Defendant to pay is subject to the Plaintiff's obligation to mitigate his damages and to a deduction in the monthly payments by the Defendant for any earnings from employment or a business. If during the balance of the notice period, the Defendant challenges the mitigation efforts or earnings of the Plaintiff and does not make such payments to the Plaintiff, the parties may deal with this dispute either on a motion for summary judgment, or by way of a trial of an issue.

[41] I am of the opinion that in this case, this determination with respect to the amount of notice period is the best way to ensure a fair and expeditious resolution of the dispute between the parties. The employee's right to a determination of the appropriate period of reasonable notice has been satisfied and the employer's right to challenge the employee's mitigation efforts has been preserved. As the parties know what their obligations are, the likelihood of the need for further court proceedings is minimized.

[42] The Supreme Court directed in *Hryniak* that: "Where a motion judge dismisses a motion for summary judgment, in the absence of compelling reasons to the contrary, she should also seize herself of the matter as the trial judge." In my view, if further proceedings are required, this is an appropriate case for me to do so, but only if it is possible to do without delaying the hearing of the proceeding. I will therefore, subject to the practical requirements of motion and trial scheduling, hear any further motion for summary judgment or a trial of an issue with respect to the employer's obligation to make payments to the Plaintiff during the balance of the period of reasonable notice.

Costs

Subject to any agreement between the parties, brief written submissions on costs are to be made as follows: the Plaintiff must deliver his costs submissions by 12:00 p.m. on April 24, 2015; with the Defendant's to be delivered by 12:00 p.m. on May 5, 2015. In accordance with what the Rules provide, the submissions should not exceed three pages in length and they should include a bill of costs, together with information on each lawyer's year of call and actual billing rate. If there are any offers of settlement that bear on the issue of costs, these should be included as well.

Pollak J.

Date: April 16, 2015