Court File No. CV-14-00509226-0000

SUPERIOR COURT OF JUSTICE

B E T W E E N:

K.P.

Applicant

- and -

ORACLE CANADA ULC

Respondent

R E A S O N S F O R J U D G M E N T

BEFORE THE HONOURABLE JUSTICE MYERS
On Tuesday, March 17, 2015, at TORONTO, Ontario

APPEARANCES:

D. Lublin	Counsel for Plaintiff
O. Yucel	
L. Cabel	Counsel for Defendant
S. Young	

REASONS FOR JUDGMENT

SUPERIOR COURT OF JUSTICE

MYERS, J.

MYERS, J. (Orally:

This is a motion for summary judgment in this wrongful dismissal action. The plaintiff relies on *Hyrniak v. Mauldin*, 2014 SCC 7, and argues that the Court can have confidence that it can make all necessary findings and apply well understood principles of law so as to resolve this action in a speedy, affordable, and proportionate way. I agree.

Wrongful dismissal cases with no cause alleged are an area that is particularly well suited to summary judgment. The principal facts required to assess the reasonable notice period—age, salary, position, length of tenure, seniority, job duties—are generally not an issue. The Court can look at precedents to assess the circumstances of the case, and quite readily assess the reasonable notice period.

The defendant asked for an adjournment to continue in aborted cross-examination of the plaintiff. Rule 39.02(3) requires cross-examination to be conducted expeditiously. More significant here is

that the parties entered into a consent schedule endorsed by Spence, J. on January 13, 2015. The schedule included a requirement that cross-examinations be completed by February 17, 2015. The defendant's counsel advises that due to counsels' schedules, the cross-examinations were not booked until the afternoon of February 23, 2015. The cross-examination could not be finished that day. The defendant did not come back to Civil Practice Court; rather, it arrived today and sought an adjournment.

In *2176693 Ontario Ltd., et al v. The Cora Franchise Group Inc.*, 2015 ONSC 1256, at paragraph 13 I said:

> Scheduling orders are particularly important under the new processes adopted for Civil Practice Court under the *Toronto Region Pilot Practice Advisory-Civil Practice Court (Regional-October 14, 2014, in effect until July 1, 2015)*. Dates for motions are only set when a judge has obtained an assurance that the hearing date is realistic in light of proposed interim steps. Adjournments from matters scheduled in Civil Practice Court are intended to be a rarity. As noted in the Practice Advisory:

> Motions will only be booked if the parties can confirm their availability to have them heard in the next 100 days (14 weeks). Otherwise they will not be scheduled. Absent exceptional circumstances, the Court will schedule a hearing within 100 days. In order to effectively implement this policy it will be necessary to adopt a "no adjournment within 2 days of the scheduled hearing" policy, in the absence of extenuating circumstances.

There are no exceptional or extenuating circumstances here to ignore the policy. Scheduling orders are not to be ignored without consequence. In *UHA Research Society v. Canada*, 2014 FCA134, Mr. Justice Stratas held:

> I reiterate and underscore the fact that the end result is an order of this court scheduling the appeal hearing. A scheduling order is no different from any other order of the court—it is an instrument of law, on its terms mandatory and effective.

At minimum, once the agreed and ordered schedule was at risk, the defendant should have returned to Civil Practice Court. The Practice Advisory referred to above is part of the Toronto response to *Hyrniak*. Civil Practice Court exists to provide litigants with a way to access speedier more affordable civil justice. It is not simply about the court trying to enforce orders for the order's sake. The Practice Direction is part of a culture shift mandated by the Supreme Court of Canada to fix the civil justice system in the interest of parties and the rule of law in Canada.

In the circumstances, Rule 39.02(3) was not followed by the defendant, given in particular the breach of the consent scheduling order. I therefore exercised my discretion to refuse the adjournment.

I note as well, that the issues in dispute in the defendant's factum in the main do not go to fundamental issues in the case, i.e. reasonable notice, and quantification of the plaintiff's damages. The defendant's defences of mitigation are stillborn for reasons discussed below, and cross-examination could not create a phoenix from those ashes.

The plaintiff was 47 years old when her employment was terminated on June 2, 2014. She was with the defendant for 19 years. She started as an administrator in sales, and worked her way up to General Sales Director. That is a mid-management position. She managed managers with teams of sales people under them. Approximately 25 people reported to the plaintiff. She reported up to the Vice-President.She had little formal education and training. Her salary at the time of termination was xxxxxx a year. She is also entitled to non-discretionary bonus. Her evidence is that she had accrued $xxxxx in bonus entitlement for the calendar year 2014 to the time of her dismissal. She was also entitled to participate in the employer's benefits plan, and gave uncontested evidence that the cost to the employer of those benefits was $400 per month. She was also entitled to an additional payment equal to 6% of her base pay which would go towards her RRSP. Her total compensation on an annual basis, which was approximately $xxx, which is very substantial for a person in her position.

In 2014 the defendant was restructuring its Canadian operations and moving jobs to the United States. The defendant says that the plaintiff knew, or should have known, that her job loss was

coming, and that there should be a decrease in the notice period as a result. However, paragraph six of Mr. X's affidavit has evidence to the direct contrary. There was no unequivocal or written statement to the plaintiff that her job was being terminated so that she should be out looking for employment.

In *Ahmad v. Procter & Gamble Inc.* (1991) CarswellOnt909, at paragraphs 8 and 24, the plaintiff had been clearly told that his job was coming to an end and he should be out looking. In the circumstances, the court decreased the notice period, because the purpose of notice is linked to creating a reasonable opportunity for the plaintiff to find alternative employment. In that case, as unequivocal notice had already been provided to the plaintiff in advance, not much more notice was required in order to provide him with the reasonable opportunity to which he was entitled.

That is not at all the case here. On May 12, 2014, approximately three weeks prior to the plaintiff's termination, she was told that she would be made an alternative offer or else she would be terminated. The defendant wanted her to take the offer and stay on. Shortly thereafter,

the defendant made the offer of an alternative position managing three teams, two of which were in Reston, Virginia, and reporting to a Vice-President in Boston. The plaintiff says that she was told that she would have to go to Virginia two weeks per month, at least for the foreseeable future. The job duties and scope of the job were very similar as offered to her, but even within the few days that she was given to consider her position, the reporting structure seemed to change.

The defendant's evidence is equivocal. Mr. X does not recall discussing specific travel requirements, but did discuss some travel. He says that the job does not necessarily require frequent travel; then again, on his evidence, it might. He does not deny the plaintiff's evidence. Mr. X does not deny paragraph 27 of the plaintiff's affidavit that is aimed directly at him. On cross-examination, the plaintiff says that the bulk of the information on which she relied came from a different employee. I assume for the purpose of this motion that that employee would deny having ever stated specifically that the plaintiff would be required to work and stay two weeks of each month in Reston, Virginia. Nevertheless, the defendant says that some travel

would be required, and that the travel may decrease over time. The plaintiff's evidence was it would take at least six months to get a new manager hired and up-to-speed for one of the U.S. groups which she would be managing. That is, travel would ramp up at least at the beginning, and would still be required thereafter.

The plaintiff has child care responsibilities and her husband travels for his job. Therefore, the change in job conditions were very significant for her. The defendant says the plaintiff initially was excited about and may have accepted the job, but she soured once the identity of the Vice-President to whom she was going to be reporting changed. I don't see the relevancy of this evidence. No cause is alleged as a basis for termination. On the defendant's own evidence, it told the plaintiff to take the job or she would "likely receive a severance package". Those were the circumstances the defendant created when the plaintiff was asked to decide what to do.

In *Evans v. Teamsters*, 2008 SCC20, the Supreme Court of Canada adopted *Mifsud v. MacMillan Bathurst Inc.* (1989) 70 O.R.(2nd)701(Ontario Court of Appeal). Employees are expected to take an alternative position when the salary is the same,

"working conditions are not substantially different" and it is not demeaning.

The test is a multi-factored, objective, and contextual analysis. Previously, the plaintiff travelled two to four times per year: to a trade show in Las Vegas, twice for quarterly meetings, and perhaps to see a customer on an *ad hoc* basis. Travelling two weeks per month, even for a few months, hundreds of kilometres into the United States is not remotely the same working conditions. Put in terms of *Evans*, the conditions offered were substantially different. No amount of cross-examination can surmount that objective fact. The plaintiff was entitled to reject the offer and did so, on the objective factors put forward by the defendant.

Good to its word, the defendant terminated the plaintiff's employment and made her a severance offer. It probably ought to be estoppel from now changing field to claim a lack of mitigation at all, but its claim is so weak on the facts that I don't need to deal with the estoppel.

As to the notice period, it is clear law that no one *Bardal* factor is to be given a disproportionate weight. The plaintiff's age is

relatively young, but I need bear in mind her position in middle management, her very high compensation, and her low education and formal qualifications. The length of her tenure with her employer is related to all of the foregoing factors. There is no basis in the evidence to say that comparable jobs are readily available to the plaintiff.

In *Yiu v. Canac Kitchens Ltd., a division of Kohler Ltd.* [2009] O.J. 871, D.M. Brown, J. (as he then was) said the following at paragraph 16:

> The onus an employer bears to demonstrate that the employee failed to mitigate is "by no means a light one...where a party already in breach of contract demands positive action from one who is often innocent of blame." Accordingly, an employer must establish that the employee failed to take reasonable steps and that had his job search been active, he would have been expected to have secured not just a position, but a comparable position reasonably adapted to his abilities. *Link v. Venture Steel Inc.*, 2008 O.J. 4849, 2008 Canlii 61389 (ONSC), para. 45 and 46. An employer must show that the plaintiff's conduct was unreasonable, not in one respect,

but in all respects: *Furuheim v. Bechtel Canada Ltd.* (1990) 30 C.C.E.L. 146 (Ontario Court of Appeal) para. 3.

The defendant advances no evidence on mitigation. The availability of alternative jobs in comparable positions to which the plaintiff is reasonably adapted is not an issue for cross-examination of the plaintiff. It is inappropriate for a defendant to pick away at the plaintiff's performance with a bald suggestion that she could have done better. See *Adjemian v. Brook Crompton North America*, 2008 Canlii 27469 at paragraph 21.

The defendant's cases on the notice period do not bear many factual similarities to the case at par, but would suggest a notice period in the range of 12 to 16 months. The plaintiff's cases, which are much more similar for a plaintiff of the plaintiff's age, job category, length of tenure, and closer to her salary suggest a notice period of 15 to 18 months. In my view 17 months is a reasonable period here considering the *Bardal* factors set out in the *Adjemian* case at paragraph 25.

With respect to the amount of bonus, the plaintiff's evidence is that she accrued $51,000 in the five months prior to her termination, but her tax return discloses that her bonus for calendar 2013 was $xx,000 per year. The employer says that her bonus for fiscal 2014—June to June of last fiscal year—was $xx,000. In all, it seems to me clear that results were declining over the past three years, and that it would be appropriate to treat the plaintiff's bonus at the time of her termination as $xx,000 annually, and a per month bonus should be added into the compensation throughout the notice period.

The plaintiff is not yet through the reasonable notice period. In fact, she is approximately halfway through the period that I have ordered. The defendant argued in its factum for an adjournment so that the parties can come back and assess the reasonableness of the plaintiff's performance for the rest of the notice period. Civil litigation is a "one stop shop". We do not require personal injury plaintiffs to come back and prove their future costs of care have actually been incurred. Instead, the system recognizes that there is early payment, and takes a contingency with the discount as best as the court can do. I agree with Justice L.B. Roberts

in *Hussain v. Suzuki Canada Ltd.*, [2011] O.J. 355 at paragraph 13, “A once and for all assessment is the most consistent with the goals of expeditious, affordable, and proportional civil litigation resolution.”

In this case, the plaintiff will be receiving some payments a few months early. Given that interest rates prevailing in the market place are extremely low, a discount for early payment on the amounts in issue in this case would be trivial, and I make no deduction for it.

As to claims of the plaintiff finding a comparable job, reasonably adapted to her abilities, in this market and given her age and education and salary, it seems to me that the opportunity of her finding an appropriate job comparable to the one from which she was dismissed are very low. The plaintiff asks for a contingency discount on this front of ten percent. The defendant prefers a contingency discount rather than the adjournment model argued in its factum, and submits that a discount of 20 to 25 percent would be appropriate. In light of the plaintiff’s clear evidence of cogent reasons why replacing her job is very difficult in the current market, it seems to me that a ten percent

likelihood of her doing so represents the appropriate discount.

As to benefits, it appears that the defendant has continued some of the plaintiff's benefits, but not short-term and long-term disability benefits to the time of this motion. The defendant filed no evidence of the cost of dental or health benefits. The plaintiff is entitled to $400 per month for the period of the reasonable notice period, and if the defendant decides to stop providing benefits on that basis, it is no doubt entitled to do so.

As set out by the Supreme Court of Canada in *Hyrniak*, there is a road map upon which the court can exercise various powers of fact finding and inference drawing, if necessary to do so. I have not found it necessary to exercise any of the additional powers set out in Rule 20.04 (2.1) because on the uncontested evidence of the parties to which I have adverted above, and the assumptions I have made favouring the defendant where necessary, there is clearly no serious issue requiring a trial in this matter. I am very confident that I can and have made appropriate findings on the evidence available, given the cross-examinations conducted by the

defendant as far as it went, and on the evidence that had been placed before the court by the parties in accordance with the strategic choices that they made. Similarly, I am equally confident that I can apply well established law to the facts as found. Accordingly, judgment will go in accordance with these reasons.

The fixing of costs is a discretionary decision under s.131 of the *Courts of Justice Act*. That discretion is generally to be exercised in accordance with the factors listed in Rule 57.01 of the *Rules of Civil Procedure*. These include the principle of indemnity for the successful party, the expectations of the unsuccessful party, the amount claimed and recovered, and the complexity of the issues. Overall, the court is required to consider what is fair and reasonable on fixing costs, and is to do so with a view to balance and compensation of the successful party, with the goal of fostering access to justice. See *Boucher v. Public Accountants Council for the Province of Ontario*, 2004 Canlii 14579 (ONCA).

In this case the plaintiff has been successful. The defendant did not submit an offer to settle that was more favourable to it than the outcome. Accordingly, in my view, the plaintiff is

entitled to her costs on a partial indemnity basis. The plaintiff asks for a portion of her costs on a substantial indemnity basis because the defendant waived an argument just prior to the hearing. That is not the kind of wrongdoing that, in my view, leads to a punitive costs award. Rather, parties are recommended and well advised to jettison weak arguments and should not be penalized for doing so generally.

Accordingly, I have reviewed the parties' bills of costs which are not substantially different. In my view, the fair and reasonable costs
inclusive of disbursements and HST which are payable by the defendant to the plaintiff in this matter is $20,850.

I have endorsed the record for oral reasons given. Order for summary judgement is granted.

FORM 2

Certificate of Transcript
(Subsection 5(2) *Evidence Act*)

I, Lore Ming, certify that this document is a true and accurate transcript of the recording of the Proceedings in the matter of KP v. Oracle Canada ULC heard on Tuesday, March 17, 2015, in the Ontario Superior Court of Justice, held at 393 University Avenue, Toronto, Ontario, taken from Recording 4899-802-20150317-132233-10-MYERSF which has been certified in Form 1.

March 31, 2015 — *Original signed by Lore Ming*

Date

(*Reporter's/Monitor's name)*