CITATION: Betts v. IBM Canada Ltd., 2015 ONSC 5298
COURT FILE NO.: CV-14-511727
DATE: 20150825

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
ANTHONY BETTS	)	*Lumi Pungea*, for the Plaintiff
	)	
Plaintiff	)	
	)	
– and –	)	
	)	
IBM CANADA LTD.	)	*Jennifer Dolman*, for the Defendant
	)	
Defendant	)	
	)	
	)	
	)	
	)	**HEARD: August 18, 2015**

REASONS FOR DECISION

DIAMOND J.:

Overview

[1] The plaintiff brought this proceeding under the Simplified Procedure for damages arising from what he claims to be a wrongful dismissal from his employment with the defendant. He seeks damages for wrongful dismissal (including a loss of group benefits during the applicable notice period), damages for mental distress, and punitive damages. An additional claim for general and special damages in accordance with the Ontario *Human Rights Code* was previously withdrawn.

[2] The primary defence raised by the defendant is that the plaintiff abandoned or voluntarily resigned from his employment effective June 30, 2014, and as such is not entitled to any of the damages sought in the Statement of Claim. In the alternative, if the plaintiff did not abandon or resign from his employment, then the defendant takes issue with the amount of reasonable notice sought by the plaintiff, and denies any liability for damages for mental distress or punitive damages.

[3] Both parties brought motions for summary judgment. The defendant served its motion first seeking an order dismissing the plaintiff's claim, or, in the alternative, an order quantifying

reasonable notice to be six months' salary less mitigation income and other outstanding expenses. The plaintiff's motion seeks damages in an amount equivalent to fifteen months' notice less mitigation income.

[4] Both parties submit that all issues raised in this proceeding can be determined by way of summary judgment motion. I agree. Most, if not all, of the documentary evidence is not in dispute, and any potential credibility issues can be resolved without invoking the enhanced powers of Rule 20.04(2.2).

[5] For the reasons which follow I grant the defendant's motion for summary judgment and dismiss the plaintiff's action.

The plaintiff's employment history

[6] The plaintiff commenced his employment with the defendant on or about March 8, 1999 in the province of Nova Scotia. His employment contract was signed in Nova Scotia. He worked in Nova Scotia until 2002 when he was transferred to the province of New Brunswick.

[7] Up to 2012 the plaintiff was employed by the defendant as a Learning Specialist, travelling on occasion to Markham, Ontario to teach others in the IBM office. Subsequently, his position changed to a Band 4 I/TAP SSR, which is known as a System Service Representative. The plaintiff was never employed by IBM in Ontario, and remained employed by IBM in New Brunswick.

[8] As at the date when his employment ceased, the plaintiff was 35 years old and had worked for the defendant for fifteen years. Inclusive of the 2014 annual value of the defendant's Contribution Pension Plan and Benefits Plan, the plaintiff estimates that the total value of his employment remuneration was $59,790.42 per year.

[9] While he was employed as a Learning Specialist, the plaintiff became engaged to his fiancée whom he met while he was in Ontario. When he travelled to teach at IBM's office in Markham, the plaintiff would stay with this fiancée in Mississauga.

[10] In his factum, the plaintiff seems to argue that his transfer to the position of System Service Representative was temporary and carried out for the sole purpose of caring for his father who was suffering from terminal cancer. Even if I were to accept this position, there is no evidence that the plaintiff ever worked out of any other province but New Brunswick, which is where he permanently resided and owned property.

The disability plan

[11] As a regular, full-time employee of the defendant, the plaintiff was eligible to apply for benefits under the defendant's short term disability plan (the "Plan"). The defendant retained the services of Manulife Financial Corporation ("Manulife") to assist with the Plan's administration

by adjudicating disability claims and managing employees' absences and return to work processes.

[12] Under the Plan, the term "disability" is defined as a "restriction or lack of ability due to illness or injury which prevents you from performing the essential duties of your own occupation". While Manulife's case management team would guide and advise the defendant with decisions under the Plan, the defendant retained the sole discretion to decide whether an employee is properly entitled to disability benefits.

[13] When an employee meets the definition of "disability" under the Plan, he/she will be entitled to a medical leave of absence and receive short term disability benefits.

[14] When an employee's application for short term disability is denied, he/she can either return to work or appeal the decision. During the lifespan of an appeal, the employee is placed on an administrative, unpaid leave of absence and remains on such leave until the appeal is adjudicated.

The plaintiff's medical issues and prior leave of absence

[15] The plaintiff testified that since approximately 2008, he has suffered from major recurring depressive disorder, and anxiety disorder, for which he takes prescribed medication and receives therapy. He further testified that he has suffered two major depression episodes, one during September 2008 - January 2009, and another one during October 2013 – July 2014 (the latter episode giving rise to the current dispute between the parties).

[16] On the record before me, I make two observations. First, at no point during these motions did the defendant take specific issue with the plaintiff's evidence that on occasion, he has suffered from depressive and anxiety disorders since 2008. As such, I was not asked to assess the veracity of the plaintiff's evidence in this regard. The defendant's argument focused upon the actions, and lack of actions, taken by the plaintiff when he applied for short term disability benefits in 2013-2014.

[17] Second, the plaintiff's uncontroverted evidence was that he applied and qualified for a short term disability leave of absence during his 2008 major depression episode in order to seek and obtain treatment, and ultimately recover from his symptoms. In my view, this evidence is significant as it confirms that by the time of his second major depression episode, the plaintiff was already familiar with the terms of the Plan, the application for short term disability benefits, and the process through which his application was processed to obtain a leave of absence.

The 2013-2014 short term disability application

[18] The plaintiff's father passed away in 2013. The plaintiff's depression symptoms worsened and became similar to his previous major depression episode in 2008. The plaintiff testified that while he tried to work through his condition, his symptoms became unbearable and on October 16, 2013, he ceased reporting to work in New Brunswick for health reasons.

[19] The plaintiff contacted his manager on October 21, 2013 to report that he had missed five days of work due to health reasons, and that he anticipated his absence to extend beyond 10 working days.

[20] Manulife was informed of the plaintiff's absence. The defendant sent the plaintiff a letter dated October 22, 2013 which advised him that the Plan required a Manulife case manager to approve the plaintiff's absence from work.

[21] On October 30, 2013, Manulife sent the plaintiff a letter requesting that he contact Manulife by November 5, 2013 to submit the necessary forms (which were enclosed) including an "employee declaration" and "attending physician's statement". That letter specifically stated that Manulife "respects and recognizes the role of [his] physician and the return to work process as outlined by the Canadian Medical Association ("CMA") Policy Statement".

[22] This policy states that [his] physician's role was to "diagnose and treat [his] illness or injury rather than to approve absences from work". The defendant required a medical physician to assess and diagnose the plaintiff, and provide a plan of treatment. This policy is clear and understandable, as the goal for all parties is to hopefully ensure that the plaintiff receives proper treatment for any illness so that a return to work is possible. This is, of course, exactly what happened in 2008.

The plaintiff relocates

[23] In November 2013 the plaintiff moved from New Brunswick to Ontario, and began residing full-time with his fiancée. This move was carried out without informing the defendant or Manulife. Further, this move was in contravention of the defendant's policy (as articulated in the October 22, 2013 letter) that convalescing away from the plaintiff's usual place of residence must be first approved by a Manulife case manager in order to ensure it would not affect potential treatment or prevent the plaintiff from participating in return to work planning.

[24] For his part, the plaintiff testified that he was in dire financial straits in New Brunswick, facing foreclosure proceedings with respect to his New Brunswick property. While that may in fact have been the case, it is not difficult to conclude from the record that given the plaintiff's situation at that time it was his desire to relocate to Mississauga and reside with his fiancée.

[25] In any event, the plaintiff met with his New Brunswick family doctor in Moncton on November 13, 2013. His family doctor increased the dosage of the plaintiff's medication, and advised him that the potential beneficial effects would not likely occur for another 1-2 months.

[26] By that time, the plaintiff had missed his deadline to submit his employee declaration. The attending physician statement was due by November 15, 2013.

[27] During this period, the plaintiff was still being paid his salary. No medical information was provided by the plaintiff or his family doctor. On November 28, 2013, the plaintiff delivered an e-mail to Manulife advising that his family doctor was unwilling to complete the

attending physician statement because she was not involved in his decision to initiate a short term disability leave request in the first place.

[28] The plaintiff testified that he was searching for and ultimately found a new psychotherapist (psychologist) in Mississauga. Her name was Dr. Debra Nixon ("Dr. Nixon") and the plaintiff was able to book an initial appointment with her on January 3, 2014.

[29] With all due respect to Dr. Nixon, she is not a psychiatrist or medical physician with the CMA. While Dr. Nixon no doubt assisted the plaintiff with his recovery, her qualifications do not satisfy the requirements under the Plan.

[30] I pause to note that in 2013 the plaintiff had requested that the defendant inform him of "availability dates" for a possible job in Ontario. Presumably, he was interested in relocating to Ontario so that he could permanently reside with his fiancée in Mississauga. However, no such Ontario positions were available, and he was needed in New Brunswick.

[31] As the plaintiff had committed to being treated regularly by Dr. Nixon in Mississauga, I find it unlikely that he ever intended to return to New Brunswick and resume working for the defendant there.

The absence option letters

[32] It is important to highlight a series of five letters delivered by the defendant to the plaintiff between December 2013 – June 2014, all of which outline the plaintiff's options in the face of his refusal and/or inability to comply with the Plan's requirements. In several of these letters, the defendant advised the plaintiff that in the absence of pursuing one of the available options, he would be held to have voluntarily resigned from his employment.

[33] Proceeding chronologically, the first letter was sent on December 2, 2013 after Manulife decided that the plaintiff did not qualify for short term disability benefits (based upon a lack of medical evidence). The defendant gave the plaintiff three options.

> (a) return to work by December 10, 2013 or submit the necessary medical documentation;
>
> (b) if the medical documentation was submitted, the plaintiff would be placed on unpaid leave of absence effective December 10, 2013; and
>
> (c) if the medical documentation was not submitted by January 6, 2014, the defendant would consider the plaintiff to have abandoned his claim for short term disability benefits.

[34] When this letter was sent by courier to the plaintiff's address in New Brunswick, the courier was unable to deliver the letter to the plaintiff's attention. As stated above, the plaintiff

had already moved from New Brunswick to Ontario without informing the defendant or Manulife.

[35] The first attending physician statement was submitted to Manulife on January 6, 2014. It was completed by Dr. Nixon, who is not a physician. Dr. Nixon had just met the plaintiff a few days earlier. She indicated her diagnosis to be a "major depressive disorder, recurrent, moderate with full inter-episode recovery". She described the plaintiff's symptoms and indicated that the plaintiff's prognosis was "good" based upon his recovery from the 2008 major depression disorder.

[36] Interestingly, Dr. Nixon noted that the plaintiff "has requested a job transfer to Ontario due to existing problems with current manager…this would be very beneficial to his recovery. Also, he is in a serious relationship with a partner who lives in Mississauga". There does not appear to be any prior evidence, be it from the plaintiff or any document, which raises any alleged dissatisfaction with his manager as a potential impairment to his return to work.

[37] Dr. Nixon's statements essentially reiterated the plaintiff's self-reports of his symptoms. In response, Manulife advised the plaintiff that the attending physician statement must be completed by the plaintiff's medical physician as the Plan required a confirmed diagnosis from a medical doctor. Manulife offered to assist with this request by delivering the attending physician statement form to the plaintiff's family doctor in New Brunswick.

[38] By letter dated January 16, 2014, Manulife communicated the defendant's decision to deny the plaintiff's application for short term disability benefits as Dr. Nixon's form did not substantiate that the plaintiff was functionally impaired from performing the essential duties of his job (as required by the "disability" definition and presumably known to the plaintiff from his 2008 successful application for short term disability benefits). Manulife's decision was clearly based upon the medical documentation submitted by the plaintiff to date, as Manulife was expecting to hear back from the plaintiff's family doctor.

[39] By letter dated January 17, 2014, the defendant formally advised the plaintiff that his claim for short term disability benefits was denied, and provided the plaintiff with two options: appeal the decision, or return to work by January 27, 2014. The defendant further advised the plaintiff that if he failed to submit the necessary medical documentation to support the appeal by February 17, 2014, the defendant would consider him to have abandoned his appeal at which point he would be required to return to work or be considered to have voluntarily resigned.

The first appeal

[40] Manulife received the plaintiff's intent to appeal form on February 21, 2014. No further medical documentation was submitted by the plaintiff by the required deadline.

[41] As there was no medical information supporting restrictions or limitations upon the plaintiff's ability to perform the essential duties of his occupation with the assistance of work accommodation and a medical treatment plan, Manulife denied the plaintiff's appeal. By letter

dated February 26, 2014, Manulife advised the plaintiff of this decision and also noted the following:

> (a) the plaintiff had been managing a diagnosis of depression for five years, treating it with medication with a dosage which had recently been increased to further improve his ability to manage his symptoms;
>
> (b) the plaintiff had only been seen by his family doctor on one occasion since November 13, 2013, with no further medical information on file from any physician; and
>
> (c) the documentation received from Dr. Nixon did not reflect the entire period of time when he was absent from work and primarily included the plaintiff's self-report of symptoms.

[42] The defendant confirmed the denial of the appeal in a letter dated February 26, 2014. That letter followed the same format as the previous option letters, and informed the plaintiff that his options were to return to work or appeal the decision for a second and final time. Once again, the defendant advised him that if he failed to submit the appropriate documentation by the required deadline, the defendant would consider him to have abandoned his appeal and in the absence of returning to work would be considered to have voluntarily resigned.

[43] While the plaintiff did advise Manulife of intent to appeal a second time, he missed the deadline for filing the documentation.

The workplace facilitation meeting

[44] The plaintiff then requested a workplace facilitation meeting. The purpose of the meeting, which is part of the disability accommodation process, is to discuss and address the employee's perceived non-medical barriers to return to work. In other words, the meeting would not cover any of the medical information advanced by the plaintiff, but rather non-medical concerns such as Dr. Nixon's note that the plaintiff had requested to report to a new manager.

[45] The meeting took place by teleconference on April 4, 2014. In response to the plaintiff's concerns as relayed by Dr. Nixon, the defendant decided to assign him a new manager in New Brunswick.

Further option letters

[46] The plaintiff continued to refuse to provide any further appeal information despite his stated intention to do so. By letter dated April 24, 2014, the defendant gave him a further extension to May 2, 2014 to submit the required appeal documentation failing which he would be required to return to work on May 5, 2014. This was the fourth absence option letter delivered to the plaintiff since early December 2013.

[47] On May 2, 2014, the plaintiff delivered an e-mail to the defendant advising that he would not be providing any further medical information to support his second and final appeal. The plaintiff further advised that he would not be returning to work by the defendant's imposed deadline of May 5, 2014, and would be providing a "doctor's note" to this effect.

[48] On May 8, 2014, Dr. Nixon wrote a letter "To Whom It May Concern" which stated the following:

> "I have seen Anthony Betts for individual psychotherapy from January 2, 2014 through to the present time. He came to me because he was feeling anxious and depressed. It would appear that he has had two major depressive disorders, one in 2008 and another one starting in the autumn of 2013. During both of these episodes he was seen by his family doctor in New Brunswick who diagnosed him with clinical depression and gave him anti-depression medication.
>
> Since he has been working with me, I would concur that he has been experiencing major depressive disorder and also has had symptoms of anxiety. I understand that he is currently on sick leave and in my professional opinion he is still clinically depressed and not ready to return to work.
>
> He is currently residing in the Mississauga, Ontario area and I have referred him to a new family physician who he will be seeing in the near future in order to review his case, and continue to treat him medically for this condition. I am also suggesting that he possibly be referred to the Mood Disorders Clinic at CAMH which is staffed by psychiatrists who specialize in the assessment and treatment of anxiety and depression."

[49] I have several observations about Dr. Nixon's letter. First, the defendant never received it. Rather than continuing his communications with the defendant/Manulife by e-mail, for some reason the plaintiff forwarded the letter by regular mail. Manulife had previously requested that any further appeal or medical documentation be sent to the attention of its integrated health services representative. Apparently, the plaintiff did not follow this request.

[50] In any event, the contents of Dr. Nixon's letter confirm that she had referred the plaintiff to a new family physician for an appointment in the "near future in order to review his case". This was, presumably, what the defendant and Manulife were looking for: a diagnosis and a plan of treatment from a medical physician. Regrettably, the plaintiff did not meet with any new family physician in Ontario. No further medical evidence or documentation from any family physician was delivered to the defendant/Manulife or produced on these motions.

<u>The final option letter</u>

[51] On May 15, 2014, the defendant wrote a fifth option letter to the plaintiff advising that he had until June 9, 2014 to submit additional medical information for his second and final appeal. There was no legal obligation upon the defendant to further unilaterally extend the deadline for the receipt of such documentation. While the letter also offered the plaintiff a personal leave of absence until the end of June 2014, he was advised, once again, that in the absence of submitting the necessary medical information by June 9, 2014, or returning to work by June 30, 2014, he would be held to have voluntarily resigned.

[52] The plaintiff did not comply with the extended deadline. On June 20, 2014, the plaintiff delivered an e-mail to the defendant advising that he would not be returning to work by June 30, 2014 because "his doctor's note still applied".

[53] The plaintiff had been absent from work for over 8 months. As he failed to submit the documentation required to support the second appeal, and failed to return to work by June 30, 2014, the defendant chose to process the plaintiff's separation as a voluntary resignation effective June 30, 2014, a result which the plaintiff had been warned about in the five absence option letters.

Summary Judgment

[54] Rule 20.04(2)(a) of the *Rules of Civil Procedure* provides that the Court shall grant summary judgment if the Court is satisfied that "there is no genuine issue requiring a trial with respect to a claim or defence". As a result of the amendments to Rule 20 introduced in 2010, the powers of the Court to grant summary judgment have been enhanced to include, *inter alia*, weighing the evidence, evaluating the credibility of a deponent and drawing any reasonable inference from the evidence.

[55] In *Hryniak v. Mauldin* 2014 SCC 7, the Supreme Court of Canada established a road map in terms of how a motions judge should approach a motion for summary judgment. The Court must first determine whether there is a genuine issue requiring a trial based only upon the evidence filed with the Court and without using the new fact finding powers set out in the 2010 amendments. Summary judgment will thus be available if there is sufficient evidence to justly and fairly adjudicate the dispute, with the motion being an affordable, timely and proportionate procedure.

[56] As previously stated, any disputes on these motions relate to the legal implications of the facts and documents referenced above. I agree with the parties that this case is ideally suited for disposition by way of summary judgment.

Did the plaintiff abandon or resign from his employment?

[57] While an actual resignation must be clear and unequivocal, the test for abandonment is similar to the test for resignation: do the statements or actions of the employee, viewed

objectively by a reasonable person, clearly and unequivocally indicate an intention to no longer be bound by the employment contract (See: *Pereira v. Business Depot Ltd. (c.o.b. Staples Business Depot)*, [2009] B.C.J. No. 1731 varied on other grounds 2011 BCCA 361).

[58] The plaintiff seeks to import a subjective element into this test, and relies upon his affidavit wherein he testified that it was never his intention to resign from his employment. In my view, such evidence given in response to the defendant's motion for summary judgment is arguably self-serving, but certainly not persuasive in the face of the objective facts and the documentary record.

[59] The defendant relies on three objective factors, which the defendants submits taken singularly or collectively, confirm that the plaintiff indeed abandoned or resigned from his employment:

> (a) a failure to report to work and fulfill his employment obligations for over 8 months (including a failure to heed the various warnings in the five option letters);
>
> (b) a failure to follow the policies and procedures set forth in the Plan regarding applications for short term disability benefits and appeals therefrom; and
>
> (c) a voluntary and undisclosed relocation from New Brunswick coupled with his lack of intention to return to New Brunswick and resume his employment with the defendant.

[60] I agree with the defendant. All of the above objective factors are indicia that the plaintiff abandoned his employment. While no one, including this Court, doubts that the plaintiff suffered from depression and anxiety disorders, having successfully obtained and concluded a previous leave of absence while on short term disability, the plaintiff was well aware of what was required of him, and the reasons why the defendant maintained its short term disability policy (a policy of which the plaintiff successfully availed himself in 2008). The absence option letters could not have been clearer, and simple and consequential language was used on each occasion. Deadlines were extended when the defendant was under no obligation to do so.

[61] It is difficult to imagine what more the defendant could have done during the plaintiff's 8 month absence from his job in New Brunswick. Many warnings were given, but very few were heeded. The defendant needed the plaintiff to return to work when he was fit to do so, much like in 2008. The plaintiff simply had to comply with his obligations under the Plan, which the plaintiff confirmed on cross-examination applied to his situation.

[62] Even an employee suffering from medical issues is not immune from being found to have abandoned his/her employment. A failure to follow the directives and requirements under the

Plan can be akin to disobedience, which would normally justify dismissal. To the extent that the plaintiff argues that his medical condition itself precluded him from complying with the Plan's requirements, there is no medical evidence before me upon which I could make such a finding.

[63] During argument, counsel for the plaintiff submitted that the defendant was under an independent duty to accommodate the plaintiff over and above the Plan. In other words, regardless of whether the plaintiff's medical condition met the definition of "disability" under the Plan, Dr. Nixon's notes were sufficient to trigger an independent duty on the part of the defendant to accommodate the plaintiff.

[64] To begin, the plaintiff could not produce any jurisprudence to support such a position. More importantly, when asked how the defendant could discharge such an alleged duty, counsel for the plaintiff responded that the defendant ought to have offered the plaintiff a "leave of absence due to health reasons" and independently assessed the veracity of the plaintiff's claims by, *inter alia*, retaining its own health physician to assess him.

[65] With respect, such a suggestion makes little sense and is effectively moot. The purpose of the Plan itself is to allow full-time employees the opportunity to meet their obligations in order to qualify for leaves of absence and short term disability payments. If an employee presents his/her employer with a "doctor's note" from a psychologist stating that the employee is unfit to work, why would the onus then shift upon the employer to disprove the merits of the plaintiff's position, while at the same time continue to pay the employee, presumably hire a temporary replacement, and keep the employee's position open for an eventual return to work?

[66] Further, a unilateral relocation away from an employee's province of employment, without the approval of the employer, is another factor which confirms an employee's intention to abandon his/her employment. (See: *Staley v. Squirrel Systems of Canada Ltd.* 2013 B.C.C.A. 201.) During argument, counsel for the plaintiff submitted that once the plaintiff was fit to return to work, it was his intention to return to New Brunswick. I find such a statement to be lacking in credibility. All of the plaintiff's actions were consistent with someone who had no intention of returning to New Brunswick. The plaintiff sold his property in New Brunswick and had taken up residence with his fiancé in Mississauga.

[67] Further, had the defendant unilaterally altered the terms of the plaintiff's employment, and forced the plaintiff to relocate to another province as a condition of continued employment, such a change to a fundamental term would very likely be grounds for a finding of constructive dismissal. Why would the reverse situation, as in this case, not produce similar consequences?

[68] I grant the defendant's motion for summary judgment. The plaintiff's claim is dismissed.

Damages

[69] In the event I am incorrect in my decision to grant the defendant's motion for summary judgment, I will briefly assess the plaintiff's damages as sought in the Statement of Claim.

[70] To begin, I do not find the presence of any grounds to support the plaintiff's claim for aggravated damages for mental distress. Such aggravated damages are compensatory, and I do not find anything in the "manner of dismissal" which would have caused the plaintiff mental distress on the record before me. There is no medical evidence to suggest that he suffered any mental distress as a result of the manner of his dismissal.

[71] In my view, the defendant treated the plaintiff fairly throughout 2013-2014. The defendant was accommodating, extending deadlines on many occasions, repeating the various options open to the plaintiff, and attempting to steer the plaintiff with a view to ensuring he complete his application for short term disability payments. As stated by the Supreme Court of Canada in *Keays v. Honda Canada Inc.*, [2008] 2 S.C.R. 362, a failure to accommodate an employee is not grounds to award aggravated damages in the absence of egregious conduct on the part of the employer which is unfair, untruthful, misleading or unduly sensitive. None of those factors are present in the case before me.

[72] Similarly, the plaintiff's claim for punitive damages must also be dismissed. The defendant did nothing "so malicious or outrageous" that it would be deserving of punishment on its own. Further, there is no independent actionable wrong which, according to *Keays*, must be present as a precondition to awarding punitive damages.

[73] This leaves the plaintiff's claim for damages for wrongful dismissal, and the assessment of reasonable notice. The plaintiff claims 15 months. The defendant suggests 6 months.

[74] The determination of a reasonable notice period is a principled art and not a mathematical science as each case turns on its own particular facts.

[75] The plaintiff was able to obtain new employment on August 26, 2014 (although for a lesser salary), which was less than two months after he claimed to have been terminated. In assessing the traditional criteria set forth in *Bardal v. Globe and Mail*, [1990] O.J. No. 149 (H.C.J.), there is no doubt that the plaintiff's length of service (15 years) is a factor in favour of a lengthy notice period. However, the plaintiff's relatively young age, the nature of his position and the relative ease with which he was able to locate comparable work all favour a shorter notice period.

[76] The plaintiff did not hold a management position, and was able to secure a new job as a computer expert and instructor within two months. Having reviewed the law described above and relied upon by the parties, and having considered the *Bardal* factors, I find the appropriate reasonable notice period to be 10 months less the plaintiff's mitigation income, and the defendant having the right to set off the sum of $1,823.74 for a balance owing on the plaintiff's corporate credit card and an overpayment made erroneously by the defendant.

Costs

[77] I would urge the parties to try and resolve the costs of this action, including these motions. If such efforts prove unsuccessful, the defendant may serve and file its written costs submissions totaling no more than four pages (including a Costs Outline) within ten business days of the release of this decision.

[78] The plaintiff shall thereafter serve and file his responding costs submissions, also totaling no more than four pages including a Costs Outline, within ten business days of the receipt of the defendant's costs submissions.

Diamond J.

Released: August 25, 2015

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SUPERIOR COURT OF JUSTICE

BETWEEN:

ANTHONY BETTS

Plaintiff

– and –

IBM CANADA LTD.

Defendant

REASONS FOR DECISION

Diamond J.

Released: August 25, 2015