CITATION: Fisher v. Hirtz, 2016 ONSC 4768
COURT FILE NO.: CV-15-537554
DATE: 20160725

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
DEBORAH FISHER	)	*Andrew H. Monkhouse* and *Laura McLennan* for the Plaintiff
Plaintiff	)	
– and –	)	
	)	
THOM HIRTZ and GROUP FIVE INC.	)	*Neil S. Abbott* for the Defendants
Defendants	)	
	)	**HEARD**: July 7, 2016

PERELL, J.

REASONS FOR DECISION

A. INTRODUCTION

[1] By way of a summary trial pursuant to Rule 76 of the *Rules of Civil Procedure*, Deborah Fisher sues Group Five Inc. for wrongful dismissal. Ms. Fisher worked as a painter for Group Five Inc., which is a construction project manager.

[2] Ms. Fisher and Thom Hirtz of Group Five testified and were cross-examined at the hearing.

[3] There are two branches to Ms. Fisher's claim, one of which was not contested at the summary trial. The uncontested claim was for $2,196.72 for work done and not paid for. There shall be judgment to Ms. Fisher for this claim.

[4] Ms. Fisher's contested claim was for $38,517.60 as damages for breach of her worker contract based on six months' compensation in lieu of reasonable notice plus $25,000 for punitive damages plus pre-judgment and post-judgment interest.

[5] Group Five's defences to the contested claim are fivefold: (1) Ms. Fisher was neither an employee nor a dependent contractor; rather, she was an independent contractor not entitled to damages for wrongful dismissal; (2) in any event, she was not wrongfully dismissed; rather, she quit; (3) if she was an employee who was wrongfully dismissed, she was entitled to no more than one month's pay in lieu of reasonable notice; (4) if she was an employee who was wrongfully dismissed, then she failed to mitigate her damages; and (5) this is not an appropriate case for punitive damages.

[6] With respect to the contested claim, for the reasons that follow, I conclude that: (a) Ms. Fisher`s claim should be dismissed because she was an independent contractor. Had I found that she was an employee or dependent contractor, I would have concluded that: (a) she did not quit but was dismissed without cause and without reasonable notice; (b) she was entitled to two-month`s pay in lieu of reasonable notice; (c) she did not fail to mitigate; and (d) this was not a case for punitive damages.

B. FACTUAL BACKGROUND

[7] Group Five is a construction project manager that, among other things, arranges the construction and renovation of residences. Group Five is owned by Mr. Hirtz, who oversees its operations. Group Five facilitates the connection between a client's project and various trades including electricians, plumbers, drywall contractors, millworkers, painters, and general labourers who provide construction services. Mr. Hirtz testified that Group Five's relationship with the contractors is transient and seasonal and project specific. He said that Group Five does not guarantee work for the trades it uses and rather it engages the tradespeople on a project by project basis.

[8] Ms. Fisher was born on July 2, 1960. She is a high-school graduate and is a painter by trade.

[9] In April 2014, on behalf of Group Five, Mr. Hirtz engaged Ms. Fisher as a painter. Whether Ms. Fisher was engaged as (1) an employee; (2) a dependent contractor; or (3) an independent contractor, is the prime legal question that I must resolve.

[10] Whatever the engagement between Ms. Fisher and Group Five, it began around April 2015 and lasted until the end of August 2016; i.e., 16 months.

[11] The engagement between Ms. Fisher and Group Five, whatever it was, was pursuant to an oral contract. No written contract was ever signed.

[12] I believe Ms. Fisher when she says that she subjectively believed that she was engaged as an employee, but as the discussion in the analysis and discussion section below will reveal, her subjective view, while relevant, is not determinative of the nature of the relationship between her and Group Five.

[13] Some terms of the arrangement between Ms. Fisher and Group Five are objectively ascertainable. She and Group Five agreed that she would be paid $35 per hour for work as a painter and $25 per hour for general labour. The parties agreed that Ms. Fisher would submit invoices detailing the hours worked and that she would be paid on a bi-weekly basis. She did not receive any employee benefits and she was not issued a T4 slip. There were no deductions at source, and she paid her own taxes, insurance, and pension fees. She filed her own incomes taxes as an independent contractor. She obtained WSIB Clearance Certificates for the jobs she worked on.

[14] Ms. Fisher invoiced Group Five for her work, and she received cheques from Group Five for her work. The amount claimed in the invoices would vary from invoice to invoice. The invoices ranged between $1,500.00 and $4,378.16. During the time of her engagement, Ms. Fisher's average bi-weekly pay was $2,962.89.

[15] Ms. Fisher was assigned work by Mr. Hirtz, and occasionally she was provided with tools by Group Five, but Ms. Fisher also had her own painting equipment and tools that were adequate for most assignments. She was supplied the paint for the assignments. Once Ms. Fisher accepted an assignment, she took instructions from Mr. Hirtz, which she described as being supervised by him and which he described as hiring her for a job for which she set her own hours and schedule.

[16] With one or two exceptions during the 16 months that she was with Group Five, Ms. Fisher worked exclusively for Group Five. She believed that under her employment arrangement as an employee she was obliged to work exclusively for Group Five; however, her belief was a mistaken one. Since Group Five was of the impression that she was an independent contractor, it would not have objected to her working for others. In any event, it appears that she was kept busy by Group Five, and save for those few exceptions, she worked exclusively for Group Five.

[17] On August 28, 2015, there was an incident that ended the relationship between Ms. Fisher and Group Five.

[18] Ms. Fisher's version of the incident was that she was working at a job site when Mr. Hirtz arrived after visiting another job site where Ms. Fisher's brother Walter had been working as a labourer. Mr. Hirtz informed Ms. Fisher that her brother had been assigned a clean-up task and had used corrosive cleaning chemicals that caused several thousands of dollars of property damage. Ms. Fisher says that Mr. Hirtz angrily demanded that she pay for the damage caused by her brother. When she refused to do so, she says he dismissed her and told her not to come back. Ms. Fisher left only to be telephoned by Mr. Hirtz later in the day. Ms. Fisher says that in this call, Mr. Hirtz threated her and said that he "would take her and Walter out." Several days then passed, but on September 2, 2015, Mr. Hirtz sent her an email message and asked her to return just to finish the job. Ms. Fisher declined the offer, and she advised Mr. Hirtz that she felt too unsafe to return after what had happened on August 28th.

[19] Mr. Hirtz's version is different. He agrees that there was an incident on August 28, 2015, and he agrees that he was very upset about what Walter had done. He admits that he did make a demand for compensation, but he says that the demand was reasonable and that it was directed at making Walter, not Ms. Fisher, pay for a small portion of the property damage. He denies ever threatening to harm Ms. Fisher, and he denies dismissing her either expressly or constructively. He agrees that she was asked to leave the job site, but he says it was only so that everybody could cool down. He denies terminating the arrangement between Ms. Fisher and Group Five, and says she quit and refused his invitation to continue to work for Group Five.

[20] After the termination of her arrangement with Group Five, Ms. Fisher attempted for several months to obtain a comparable arrangement with another contractor, but despite her efforts to find alternative employment, she was only able to secure a comparable arrangement in January 2016, five months after her termination.

C. DISCUSSION AND ANALYSIS

[21] Under employment law, the significance of a finding that a worker is an "employee" or a "dependent contractor," as distinguished from an "independent contractor," is that if the worker is dismissed without cause, then he or she is entitled to reasonable notice of termination or compensation in lieu of reasonable notice. As foreshadowed in the introduction to these Reasons for Decision, my conclusion is that Ms. Fisher was an independent contractor, and from that

conclusion it follows that her relationship with Group Five could be terminated without reasonable notice. It further follows that she had no claim for damages and thus there are also no issues about the reasonable notice period or about mitigation. The reasoning for my conclusion follows.

[22] The determinative issue in this case is: what was the legal classification of the relationship between Ms. Fisher and Group Five at the end of that relationship. Because the law recognizes that employment relationships are dynamic and can and do change, the classification of a particular relationship requires a contextual examination over its entire course, but the relationship's classification at the end is what ultimately matters.

[23] At one time, historically, in the context of work relationships, the law recognized just two types or classes of workplace relationships; namely (1) employer-employee (master-servant); and (2) contractor-independent contractor, and, as I shall explain below, the law developed criteria or factors for the courts to consider to differentiate the employee from the independent contractor. However, in 1936, the Ontario Court of Appeal recognized the existence of an "intermediate" position "where the relationship of master and servant does not exist but where an agreement to terminate the arrangement upon reasonable notice may be implied": *Carter v. Bell & Sons (Canada) Ltd.*, [1936] O.R. 290 (C.A.).

[24] The relationship intermediate between the employee and the independent contractor is the "dependent contractor," and thus courts across the country recognize three classes of work relationships. See: *Marbry Distributors Ltd. v. Avrecan International Inc.* (1999), 171 D.L.R. (4th) 436 (B.C.C.A.); *JKC Enterprises Ltd. v. Woolworth Canada Inc.* (1986), 300 A.R. 1 (Q.B.); *Erb v. Expert Delivery Ltd.* (1995), 167 N.B.R. (2d) 113 (Q.B.), at paras. 6-14. The leading cases in Ontario are: *Braiden v. La-Z-Boy Canada Ltd.*, 2008 ONCA 464; *McKee v. Reid's Heritage Homes Ltd.*, 2009 ONCA 916; *Keenan (c.o.b. Keenan Cabinetry) v. Canac Kitchens, a Division of Kohler Ltd.*, 2016 ONCA 79, affg. 2015 ONSC 1055.

[25] See also: *Ross v. 413554 Ontario Ltd. (c.o.b. Chouinard Bros. Roofing)*, [2008] O.J. No. 3381 (S.C.J.); *Slepenkova v. Ivanov*, [2007] O.J. No. 4708 (S.C.J), affd. 2009 ONCA 526; *Moseley-Williams v. Hansler Industries Ltd.*, [2008] O.J. No. 4457 (S.C.J.); *Sarnelli (c.o.b. East End Lock and Key) v. Effort Trust Co.*, 2011 ONSC 1080; *Conde v. National Sign Manufacturers Ltd.*, 2013 ONSC 229 (Div. Ct.); *Duynstee v. Sobeys Inc.*, 2013 ONSC 2050; *Filiatyrault v. Tri-County Welding Supplies Ltd.*, 2013 ONSC 3091; *Huber v. Way*, 2014 ONSC 4426; *Wyman v. Kadlec*, 2014 ONSC 4710; *John A. Ford & Associates Inc. (c.o.b. Training Services) v. Keegan*, 2014 ONSC 4989.

[26] In *McKee v. Reid's Heritage Homes Ltd., supra*, the Court of Appeal described the methodology or analytical approach to the determination of the worker relationship. The first step is to determine whether or not the worker is an employee or a contractor in accordance with the established methodology and criteria for differentiating an employee from an independent contractor. The analysis of the classification of the relationship ends if the worker is determined to be an employee. However, if the worker is determined to be a contractor, the second step of the analysis is to determine whether he or she is a dependent or an independent contractor.

[27] The leading cases for the first step of differentiating employees from contractors, be they independent or dependent contractors (which is the focus of the second step of the analysis) are: *Montreal v. Montreal Locomotive Works Ltd. et al.*, [1947] 1 D.L.R. 161 (P.C.); *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983; *Belton v. Liberty Insurance Co. of*

Canada (2004), 72 O.R. (3d) 81 (C.A.); *Braiden v. La-Z-Boy Canada Ltd., supra*.

[28] The employee versus contractor cases establish that there is no litmus test or formula for making the classification of the worker and rather there is a non-comprehensive list of relevant criteria or factors which should be analyzed on a case-by-case basis to determine the true legal nature of the relationship. The court must consider: (a) the intentions of the parties; (b) how the parties themselves regarded the relationships; (c) the behaviour of the parties toward each other; and (d) the manner of conducting their business with one another: *Charbonneau v. A.O. Shingler & Co.*, [2000] O.J. No. 4282 (S.C.J.) at para. 12; *Wyman v. Kadlec*, *supra*, at para. 28.

[29] In *Montreal v. Montreal Locomotive Works Ltd. et al.*, *supra*, Lord Wright indicated a fourfold test would be appropriate to differentiate an employee from an independent contractor; namely: (1) control of the work; (2) ownership of tools; (3) chance of profit; and (4) risk of loss. He stated that posing the question "Whose business is it?" would also serve, in some cases, to answer the question of the nature of the parties' relationship.

[30] In *671122 Ontario Ltd. v. Sagaz Industries Canada Inc., supra*, at para. 47, the Supreme Court of Canada said that the central question for determining whether a worker is a contractor is whether he or she is providing services in business on his or her own account. The Court stated:

> Although there is no universal test to determine whether a person is an employee or an independent contractor, I agree with MacGuigan J.A. that a persuasive approach to the issue is that taken by Cooke J. in *Market Investigations*, [1968] 3 All E.R. 732, *supra*. The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks.

[31] In *Braiden v. La-Z-Boy Canada Ltd., supra*, at para. 34, Justice Gillese suggested that the question of whose business was it was at the heart of the matter; was the worker carrying on business for himself or herself or was he or she paid to make a contribution to somebody else's business enterprise. In determining that question, the following non-comprehensive factors were relevant but not necessarily determinative: (1) the extent to which the activities of the worker were controlled by the other contracting party; (2) whether the worker provided his or her own tools or equipment; (3) whether the worker hired his or her own helpers; (4) the extent to which the worker assumed financial risk; (5) the extent to which the worker had invested capital in the enterprise; (6) the extent to which the worker had management responsibilities; and (7) whether the worker had an opportunity for profit in the performance of his or her tasks.

[32] In *John A. Ford & Associates Inc. (c.o.b. Training Services) v. Keegan*, *supra*, at paras. 74-75, Justice D.G. Price provided a helpful description of the control factor, as follows:

> 74. The control test is the most traditional and frequently used method of determining whether an individual is an employee. If the employer has substantial control over the worker's operations, an employment relationship will be found,

> even if the worker has substantial freedom to operate, such as a professional employee normally has.
>
> 75. Control over the employee need not be complete in order to establish an employment relationship. Indicia of control include: the ability to decide when, where, and by what method the employee will perform his/her work; the ability to determine which customers can be served or sold goods, and which cannot; the requirement that the employee submit activity reports; the employee's ability or inability to attend meetings; assistance and guidance that the employer gives to the employee in connection to the work being performed; the employer's ability to set dress and conduct codes for the employee, and the discipline the employer exercises over the employee for breaches of company policy. The employer's ability to select and dismiss the employee, and the general power to control the employee, are also important factors in determining the existence of an employment relationship.

[33] As noted above, if the first step of the analysis determines that the worker is a contractor, then it is necessary to go further and determine whether the worker is a dependent or independent contractor. In *McKee v. Reid's Heritage Homes Ltd., supra*, Justice MacPherson identified a variety of factors to differentiate dependent and independent contractors including: (1) the extent to which the worker was economically dependent on the particular working relationship; (2) the permanency of the working relationship; (3) the exclusivity or high level of exclusivity of the worker's relationship with the enterprise.

[34] It follows from the factors identified by Justice MacPherson that the more permanent and exclusive the contractor relationship then the less it resembles an independent contractor status and the more it resembles an employee relationship and, therefore, the relationship should be classified as a dependent contractor relationship.

[35] The extent to which, over the history of the relationship, the worker worked exclusively or near-exclusively or was required to devote his or her time and attention to the other contracting party's business is an important factor in determining whether the worker is a dependent or independent contractor: the greater the level of exclusivity over the course of the relationship, the greater the likelihood that the worker will be classified as a dependent contractor: *Keenan (c.o.b. Keenan Cabinetry) v. Canac Kitchens, a Division of Kohler Ltd., supra.*

[36] In *McKee v. Reid's Heritage Homes Ltd., supra*, Justice MacPherson said that recognizing the intermediate category between employee and independent contractor accorded with the statutorily provided category of dependent contractor found in the *Labour Relations Act*, S.O. 1995. At para. 29 of his judgment in *McKee v. Reid's Heritage Homes Ltd.*, he stated:

> 29. Finally, recognizing an intermediate category based on economic dependency accords with the statutorily provided category of "dependent contractor" in Ontario, which the *Labour Relations Act*, S.O. 1995, c. 1, Sch. A, s. 1(1), defines as:
>
> > [A] person, whether or not employed under a contract of employment, and whether or not furnishing tools, vehicles, equipment, machinery, material, or any other thing owned by the dependent contractor, who performs work

> or services for another person for compensation or reward on such terms and conditions that the dependent contractor is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor.

[37] It should be noted that if the analysis of the worker relationship reaches the second stage, there will inevitably be indicia that the worker was a contractor; for example, that he or she was paid in exchange for invoices and not issued salary cheques, but the analysis, nevertheless, continues to examine the true substance of the relationship. Thus, the case law reveals that the fact that the worker operated as a sole proprietor or through a business is relevant but not determinative of the worker's status: *McKee v. Reid's Heritage Homes Ltd., supra*, at para. 54; *Braiden v. La-Z-Boy Canada Ltd., supra*, at para. 30; *Kordish v. Innotech Multimedia Corp*. [1998], 46 C.C.E.L. (2d) 318, (Ont. Gen. Div.), aff'd [2000] O.J. No. 2557 (C.A.).

[38] What the parties may choose to call their relationship is relevant but not determinative, and the court will determine the nature of the relationship based on the conduct of the parties: *John A. Ford & Associates Inc. (c.o.b. Training Services) v. Keegan, supra*, at paras. 72, 77.

[39] Applying the above legal principles to the facts of the immediate case, the first step is to determine whether Ms. Fisher is an employee or a contractor. In my opinion, she was a contractor.

[40] There was no written contract that might have helped classify the relationship between Ms. Fisher and Group Five, and not surprisingly, after-the-fact, the parties characterized the relationship in the way that was most favourable to them; however, the parties' conduct, not the label they put on it, reveals that Ms. Fisher was a contractor.

[41] Put another way, the evidence shows that Ms. Fisher was self-employed and carried on a sole proprietorship in which she provided painting services to Group Five. I appreciate that how she carried on her affairs is not necessarily determinative but in my opinion, in the immediate case, it was the intention of the parties that she not be an employee and that she be a contractor.

[42] Group Five assigned the work, as it did to other tradespersons, but Ms. Fisher controlled whether she would accept the assignment; there was no obligation on her to do so, and she was neither expressly nor implicitly required to exclusively devote her services to Group Five. As it happened, with a few exceptions, she did not work for others, but her exclusivity of services was a coincidence not a matter of contractual obligation.

[43] Ms. Fisher had her own tools and equipment but given the nature of the painting trade, the control of the tools provides little information about the nature of the relationship with Group Five which supplied her with the paint. The painting trade as a business is not capital intensive but as a sole proprietor Ms. Fisher took on the risk of utilizing her human capital of having been trained to be a painter.

[44] Group Five was in the business of a construction project manager, and its own business organization was not to hire an employee workforce but to retain independent contractors of which the painting tradespersons were one of many trades. I find that Group Five had a contractor-to-contractor relationship with Ms. Fisher.

[45] Having decided that Ms. Fisher was a contractor, I move on to the second stage of the

analysis of her worker relationship with Group Five and the determination of whether she was an independent or dependent contractor.

[46] In my opinion, she was an independent contractor. Having reviewed the cases cited above where courts have examined whether a worker is a dependent contractor, comparatively speaking Ms. Fisher has a very weak case for this classification of her contractual relationship with Group Five.

[47] It is true that Ms. Fisher was economically dependent on Group Five as the exclusive source of her income, but that dependency had a short history, and was a self-induced dependency because she was not precluded from contracting with others and there was no express or implicit understanding that Group Five would provide her with a minimum or any level of work. Throughout the relative short history of their relationship, the duration of the assignments varied and her invoices to Group Five reflected that they were paying for her services on an as needed basis. In comparison to the other cases, where an independent contractor relationship had morphed into a dependency because of a long history of exclusive dependency, there was little to suggest an enduring dependency. Ms. Fisher had only provided varying amounts of services over a sixteen-month period during which she carried on business as a sole proprietor. I conclude that when the relationship ended she was an independent contractor.

[48] During the course of argument, Group Five made the *in terrorem* argument that a determination that Ms. Fisher's relationship with Group Five was other than that of an independent contractor would establish a dangerous precedent that would disrupt the construction industry, which industry, it submitted, inherently involves independent contractor relationships. However, in coming to my conclusion that Ms. Fisher was an independent contractor and not an employee or dependent contractor, I did not rely on this argument. There is nothing in the nature of the construction industry that would preclude the existence of any of the three worker relationships. In any event, there are no industry binding precedents in this area of the law and each case must be decided on its own facts. In the immediate case, those facts lead me to the conclusion that Ms. Fisher was an independent contractor.

[49] It follows that but for her uncontested claim for $2,196.72 for work done and not paid for, Ms. Fisher's action should be dismissed.

[50] Had I found that she was an employee or dependent contractor, I would have concluded that: (a) she did not quit but was dismissed without cause and without reasonable notice; (b) she was entitled to two months' pay in lieu of reasonable notice; (c) she did not fail to mitigate; and (d) this was not a case for punitive damages.

[51] In *Rajput v. Menu Foods Ltd.*, [1984] O.J. No. 2290 (H.C.J.) at para. 18*, Justice Galligan described a test for determining whether an employee was terminated or whether he or she resigned is as follows:

> It seems to me that in deciding whether or not a person was entitled to think that he had been fired, or whether in fact the person had resigned, a Court ought to ask itself: What would a reasonable man understand from the words used in the context in which they were used in the particular industry, in the particular working place, and in all of the surrounding circumstances?

[52] In the immediate case, it is not necessary for me to determine which version of the events

between August 28, 2015 and September 2, 2015 is true. Apart from the intensity of the confrontation in August and Mr. Hirtz's denial of threatening bodily harm, the versions are consistent, and what emerges from them is that Ms. Fisher was correct in her contention that she was fired and Mr. Hirtz is wrong in asserting that she quit. If I had concluded that Ms. Fisher was an employee or dependent contractor, I would have found that she was wrongfully dismissed.

[53] An employee who is dismissed without reasonable advance notice of termination is entitled to damages for breach of contract based on the employment income they would have earned during the reasonable notice period, less any amounts received in mitigation of the loss: *Sylvester v. British Columbia*, [1997] 2 S.C.R. 315. The purpose of requiring reasonable notice is to give the dismissed employee an opportunity to find other employment: *McKay v. Camco, Inc.*, [1986] O.J. No. 2329 (C.A.) at para. 40; *Morrison v. Abernathy School Board* (1875-76), 3 S.C. (4th) 945 at p. 950.

[54] There is no catalogue as to what is reasonable notice in particular classes of cases, and the reasonableness of notice must be determined by reference to the facts of each particular case: *Bardal v. Globe & Mail*, [1960] O.J. No. 149 (H.C.J.). In determining the length of notice, the court should consider, among other possible factors: (1) the character of employment; (2) the length of service; (3) the age of the employee; and (4) the availability of similar employment having regard to the experience, training, and qualifications of the employee: *Machinter v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986; *Cronk v. Canadian General Insurance Co.* (1995), 25 O.R. (3d) 505 (C.A.); *Bardal v. Globe & Mail*, *supra.*

[55] The factors are not exhaustive, and what is a reasonable notice period will depend on the circumstances of the particular case: *Honda Canada Inc. v. Keays*, [2008] 2 S.C.R. 362; *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701 at para. 83; *Minott v. O'Shanter Development Co.* (1999), 42 O.R. (3d) 321 (C.A.) at para. 66; *Duynstee v. Sobeys Inc.*, 2013 ONSC 2050 at para. 17.

[56] The approach to determining a reasonable notice period is flexible, and each case will turn on its own particular facts. The weight to be given each factor will vary according to the circumstances of each case, and the judge in a wrongful dismissal case is required to exercise judgment in determining what factors are of particular importance. In determining the reasonable notice period, the court should not apply as a starting point any rule of thumb attribution so many weeks or months of notice per year of service, because such an approach privileges length of service above all relevant factors in determining notice, and each case must be considered having regard to its particular facts: *Minott v. O'Shanter Development Co.*, *supra*; *Beatty v. Best Theratronics Ltd.*, 2015 ONCA 247; *Love v. Acuity Investment Management Inc.*, 2011 ONCA 130; *Cowper v. Atomic Energy of Canada Ltd.*, [1999] O.J. No. 2021 (S.C.J.); *Dey v. Valley Forest Products* (1995), 162 N.B.R. (2d) 207 (C.A.) at p. 215.

[57] The character of employment factor tends to justify a longer notice period for senior management employees or highly skilled and specialized employees and a shorter period for lower rank or unspecialized employees: *Cronk v. Canadian General Insurance Co.*, *supra*; *Bullen v. Proctor & Redfern Ltd.*, *supra*, at paras. 7-10; *Teitelbaum v. Global Travel Computer Holdings Ltd.* (1999), 41 C.C.E.L. (2d) 275 (Ont. S.C.J.); *Bernier v. Nygard International Partnership*, 2013 ONSC 4578 at para. 57; *Tull v. Norske Skog Canada Ltd*., 2004 BCSC 1098.

[58] Generally speaking, the longer the duration of employment, the longer the reasonable notice period: *Bullen v. Proctor & Redfern Ltd.*, *supra*, at para. 21.

[59] Generally speaking, a longer notice period will be justified for older long-term employees, who may be at a competitive disadvantage in securing new employment because of their age: *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229 at para. 92.

[60] Wrongful dismissal is a breach of contract claim, and the normal principles of damages assessment apply to the determination of the quantum of damages, including the principle that a plaintiff cannot recover for avoidable loss; i.e., the mitigation principle. See: *Zaman v. Canac Kitchens Ltd., a division of Kohler Ltd.*, [2009] O.J. No. 872 (S.C.J.); *British Westinghouse Electric & Mfg. Co. Ltd. v. Underground Electric R. Co. of London, Ltd*., [1912] A.C 673 (H.L.); *Karas v. Rowlett*, [1944] S.C.R. 1; *Apeco of Canada Ltd. v. Windmill Place*, [1978] 2 S.C.R. 385.

[61] The onus is on the defendant to establish a failure to mitigate: *Michaels v. Red Deer College I,* [1976] 2 S.C.R. 324; *Dobson v. Winton & Robbins Ltd.*, [1959] S.C.R. 775. More particularly, the onus is on the employer to prove that the employee would likely have found a comparable position reasonably adapted to his or her abilities and that the employee failed to take reasonable steps to find that comparable position: *Di Tomaso v. Crown Metal Packaging Canada LP*, 2010 ONSC 5761 at paras. 36-37; *Palmer v. Clemco Industries Inc.*, 2010 BCSC 230; *Link v. Venture Steel Inc.*, 2010 ONCA 144 at para. 73; H.A. Levitt, *The Law of Dismissal in Canada*, (3rd ed. loose-leaf) (Aurora: Canada Law Book, 2003) at p. 10-3; England, Wood, Christie, *Employment Law in Canada*, (4th ed., loose-leaf) (Markham: LexisNexis Canada Inc., 2005) at p. 16-89.

[62] In assessing the innocent party's efforts at mitigation, the courts are tolerant, and the innocent party need only be reasonable, not perfect: *Banco de Portugal v. Waterlow & Sons Ltd*., [1932] A.C. 452 (H.L.); *Leduc v. Canadian Erectors Ltd.*, [1996] O.J. No. 897 (Gen. Div.) at paras. 52-60.

[63] In *Yiu v. Canac Kitchens Ltd., a division of Kohler Ltd.*, [2009] O.J. No. 871 (S.C.J.), Justice D.M. Brown stated at para. 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. No. 4849, 2008 CanLII 61389 (ONSC), paras. 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 (Ont. C.A.) para. 3.

[64] In the particular circumstances of the immediate case, having regard to the above principles, my assessment is that two months was the reasonable notice period and that Ms. Fisher did not fail to mitigate her damages arising from a wrongful dismissal. The circumstances of her dismissal do not warrant any punitive damages.

D. CONCLUSION

[65] For the above reasons, I grant Ms. Fisher judgment for $2,196.72 plus pre- and post-judgment interest.

[66] If the parties cannot agree about the matter of costs, they may make submissions in writing beginning with Group Five's submissions within 20 days of the release of these Reasons for Decision followed by Ms. Fisher's submissions within a further 20 days.

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Perell, J.

Released: July 25, 2016

CITATION: Fisher v. Hirtz, 2016 ONSC 4768
COURT FILE NO.: CV-15-537554
DATE: 20160725

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

DEBORAH FISHER

Plaintiff

– and –

THOM HIRTZ and GROUP FIVE INC.

Defendants

REASONS FOR DECISION

PERELL J.

Released: July 25, 2016