CITATION: Miller v. A.B.M. Canada Inc., 2014 ONSC 4062
COURT FILE NO.: 11-4228-SR
DATE: 2014-07-07

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
Paul Miller	)	J.A. Byrne and M. Sidky,
	)	Counsel for the Plaintiff
	)	
Plaintiff	)	
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	)	
- and -	)	
	)	
	)	
A.B.M. Canada Inc.	)	R.B. Bissell and M. Sopik,
Defendant	)	Counsel for the Defendant
	)	
	)	
	)	**HEARD:** June 20, 23 and 24, 2014
	)	

GLITHERO J.

REASONS FOR JUDGMENT

[1] The plaintiff's employment with the defendant was terminated without notice and he brings this action for damages. The issues are:

(1) whether the provisions of the employment contract, and particularly the termination clause, are sufficient to limit the plaintiff's recovery to the minimum notice provisions available under the *Employment Standards Act 2000,* S.O. 2000,c. 41 (ESA);

(2) if not, what is the reasonable period of notice upon which to calculate damages;

(3) if damages are to be determined in accordance with common law principles, is the principle of inducement operative here so as to enhance the damages otherwise payable?

Background

[2] Mr. Miller is currently 41 years of age and was 39 at the time of termination of his employment with the defendant. He is married with two children.

[3] He has a B.A. in accounting from Laurentian University and is designated as a management accountant by the Society of Management Accountants. After his B.A. he also started a Master's program, but did not finish it.

[4] Prior to his beginning work with the defendant in September of 2009, Mr. Miller had four previous positions. He was a staff accountant at KPMG for almost three years but left because of long hours of work. He then did a three month contract job with a local accountant. Then he did a 12 month contract job for a real estate investment company. He then joined Dieter's Metal Fabricating Ltd. and was there for six years. When he left that company, his position was that of V.P. (Finance). His responsibilities included finance, human resources, sales, marketing, purchasing and strategic direction. Though he claims to not remember precisely, he believes his income was approximately $120,000 per annum when he left. He testified that he had been led to believe that if the president of that company retired, the president's son was to take over as president and the plaintiff would become vice-president of the company.

[5] In 2005, the plaintiff had registered to become a "member" of a hiring consulting service agency and that membership signified his interest in receiving from that agency advertisements of positions available in his field. While employed at Dieter's, this agency sent to the plaintiff, and many others, an advertisement for a position as "Director, Finance and Business Process Improvement". This posting listed three pages of description of the position and the requirements of a successful candidate. Amongst the responsibilities of the successful candidate

would be to "oversee the management of all leases, contracts and other financial commitments". The successful person was also to monitor all legislation relevant to employment standards.

[6] The plaintiff applied for the position by responding to the agency's e-mail. This led to communication between the plaintiff and the president of the agency. That in turn led to a meeting between the plaintiff and the defendant's president, Christopher Koehler, a few weeks later. Their first meeting was at a restaurant and they discussed the job requirements. The plaintiff testified that he was told that he would become Chief Financial Officer within two years during this initial meeting. The plaintiff then met with three of the defendant's managers and discussed work environment and company philosophy with them. The plaintiff testified that he didn't like the impression of the defendant company that he got from these managers so he indicated he was not interested in the advertised position. According to the plaintiff, a week later someone from Mr. Koehler's office contacted him and set up a further meeting. The plaintiff's evidence is that at that further meeting, Mr. Koehler wanted to know "what it would take" to get the plaintiff to join the defendant company and the plaintiff outlined his requirements. The plaintiff was interested in the work-life balance and teamwork issues. His evidence is that he was told by Mr. Koehler that he would be the number two person and that this was to grow into the position of Chief Operating Officer. The meeting ended with an agreement that Mr. Koehler would send the plaintiff a contract specifying the terms and conditions of employment.

[7] Mr. Koehler did so and that contract is found at Tab 3 of Exhibit 1. The plaintiff received it on July 13, 2009 and returned it signed on July 15, 2009. The evidence is that there was no deadline for him to sign it and that he was free to take as much time as he wished to consider it or to seek any advice concerning the contract.

[8] The plaintiff's evidence is that he read those portions of the contract relating to those items that he was most interested in, but did not read other portions, including the termination provisions.

[9] This contract is set up with a series of appropriate headings and a plain language description of the terms appropriate to the particular heading. It is only 5 pages long plus a signature page. As to the heading "Termination", the plaintiff's evidence is that he saw the heading, knew what it meant, but did not read the terms set out thereunder.

[10] The employment contract provided for a salary of $135,000 per year and called for salary reviews at the discretion of the defendant. The defendant also agreed to equal the plaintiff's personal pension contributions up to a maximum of 6% of base salary, and the defendant agreed to provide the plaintiff with a $680 per month car allowance. The contract also contained an addendum, as part of the original contract, which called upon the defendant to pay a bonus for 2009, which was paid. It also called for bonuses for 2010 and that was based on performance objectives of the company which were not met and hence no bonus was paid for 2010.

[11] The relevant portions of the employment contract, the effect of which have been in dispute in this case, are as follows:

> - In the introductory paragraph it provides that "the terms and conditions of this offer of employment are outlined below. Your signature in the space provided indicates your acceptance of our offer on these terms and conditions."
>
> - Under the title "Remuneration", after dealing with salary and the provision providing the defendant would equal the plaintiff's personal pension contribution up to a maximum of 6% of base salary, the contract provides "It is expressly understood and agreed that you have no contractual entitlement to receive such additional compensation except in strict compliance with the terms of the plan and you have no contractual right to the continuance of a particular plan or any plan.

A.B.M. retains an unfettered discretion to amend or discontinue any plan at any time".

- Under the title "Fringe Benefits", after providing for the $680 per month car allowance the contract indicates "A.B.M. Canada reserves the right to amend or discontinue the fringe benefits provided. In the event of any such amendment or discontinuance you shall have no right to compensation as a consequence of such amendment or discontinuance."

- Under the title "Termination", the contract provides:

> "You are not entitled to any notice of the termination of your employment or salary in lieu of notice where your employment is terminated for any breach of this Agreement or any other cause deemed sufficient in law or in any other circumstances in which no notice or salary in lieu thereof is required by law.
>
> Subject to the provisions of applicable legislation, probationary employees may be terminated at any time without notice or cause.
>
> Regular employees may be terminated at any time without cause upon being given the minimum period of notice prescribed by applicable legislation, or by being paid salary in lieu of such notice or as may otherwise be required by applicable legislation.
>
> Should you resign your employment you are not entitled to any payment and shall give A.B.M. Canada at least 30 days' notice of such resignation."

[12] At the end of the contract, following the signature on behalf of A.B.M. Canada, the contract provides *"I have been given a copy of this contract of employment as well as the bonus plan and I have read and understood their respective terms. I hereby accept the terms and conditions of employment outlined above."* and the plaintiff then signed the contract and the bonus addendum.

[13] The plaintiff started work on September 1, 2009. The plant manager, production manager, warehouse manager and comptroller and financial clerks reported to him. The plaintiff testified that he did well in the job and was told he was doing so in November 2010 by the

defendant's president and by the chairman of A.B.M. in Italy, the parent corporation. However, in January of 2011 the plaintiff was in the comptroller's office and found an invoice from the same hiring consultant service agency which related to a posting by that agency on behalf of the defendant for the position of VP Finance, a position that the plaintiff testifies he had expected to get for himself. As a result of seeing this, his evidence is that he approached the president to discuss it and he was terminated and a letter of termination followed, dated January 26, 2011. The letter reiterated that he was entitled to two weeks of salary in lieu of notice in the amount of $5,532.21, inclusive of a car allowance and a factual reference letter and indicated that his record of employment would be forwarded separately. The letter went on to say that "as a sign of good faith and in order to assist you while you seek alternative employment, the company was offering four weeks of base salary, plus car allowance representing $11,067.62" and that the offer was open to February 1, 2011. If not accepted then the plaintiff was to receive only the two weeks contracted for. The plaintiff did not accept the letter or the offer contained therein. This letter did not say whether the termination was for cause or without cause, but given that the letter extends an offer of compensation at the contractual amount, and if accepted at a higher amount, in fact the letter was not one of termination for cause.

[14] The plaintiff received the pay cheque for two weeks, plus vacation pay on May 25, 2011. The cheque did not include anything for his car allowance component or pension contributions.

[15] The plaintiff had to make several contacts with the comptroller before finally receiving his record of employment. In the meantime, he supported himself on a line of credit. He made efforts to obtain replacement employment by applying for jobs, researching companies' websites

and contacting job banks. His evidence is what one recruiter told him that his lack of a reference letter was a problem.

[16] In Exhibit 1, there are approximately 55 communications by the plaintiff in respect of efforts to obtain replacement employment in the financial management field. He got two interviews, as I appreciate his evidence, but was not successful on either. He started another company called Chief Financial Consultants in March of 2011. It is a financial management consulting business. The company did not get its first contract until August of 2011. He still operates that business.

[17] No evidence was led and no argument was advanced in support of a contention that the plaintiff had failed to mitigate his loss.

[18] The plaintiff's evidence is that the work-life balance was very important to him. His evidence is that in November of 2010, the defendant's president and the chairman of the defendant's Italian parent company told him that he had good prospects for advancement with the defendant company. In cross-examination, an e-mail of November 6, 2010 was shown to him and he agreed that in that e-mail, Exhibit 2, Mr. Koehler expressed concern about the plaintiff's level of commitment in terms of work hours and his failure to address priorities and e-mails in a timely fashion. The e-mail ended by expressing the hope that the plaintiff's performance during the upcoming visit by the chairman would not result in the need for more serious performance discussions.

[19] The plaintiff agreed on cross-examination that while at Dieter's, part of his responsibility was to sometimes review contracts. He also agreed that in connection with a credit he claims in his *curriculum vitae* for negotiating a $10 million dollar contract, that reviewing the terms of the

contract was part of his effort. He agreed that he had taken a business course as part of his B.A. program. He also agreed that while at Dieter's, problems with hirings and firings and other employment issues would often come to him through the HR manager. The plaintiff agreed he could not argue that he didn't understand the termination provisions, because he had never read them. He also agreed that he would never recommend to a client of his new business that the client sign a contract without reading it, and in fact he would advise him to seek legal advice before signing it.

[20] The plaintiff called Peter Hohendorn, the Vice-President at Dieter's, who confirmed the plaintiff's employment there for a period of six years and described him as being a good employee whom they were sorry to see leave. He testified that the plaintiff would have been given more responsibility if he had remained on with the company. He also testified that the plaintiff never approached him about the possibility of returning to work at Dieter's after he had been dismissed by the defendant. He had added however, but that by the time of the plaintiff's dismissal his former position had been filled and they would not have been able to take him back.

[21] Steven Smyth is the owner of the Chief Financial Interviewer Inc. agency and demonstrates in his evidence great pride in his expertise and his ability to draft proper job descriptions for prospective employers, and the care he takes in interviewing prospective employees and vetting their qualifications. His evidence is clear that it was he that forwarded the defendant's job description to the plaintiff, along with many other people, as the plaintiff and others had registered as "members" of his organization. He was not asked specifically by the defendant to forward the advertisement or to otherwise contact the plaintiff. He confirmed that

the job description did include wording indicating advancement prospects in the employment depending on time and success with the company.

[22] The final witness was Christopher Koehler, who was the president of the defendant corporation, between July 2007 and July of 2012. His employment with the defendant had been terminated. He appeared at trial under summons rather than voluntarily. I mention this as I did not sense that Mr. Koehler had any tendency to either give evidence detrimental to the defendant company as a result of his termination, or to favour or disfavour the plaintiff. In my assessment, he gave his evidence in a factual, direct, responsive, helpful and straightforward fashion.

[23] He indicates that he was never advised as a result of the plaintiff's early dealings with he or the managers of the defendant that there was any reluctance on the plaintiff's part to accept employment with the defendant. He agreed that the job description was accurate indicating "further financial professional career advancement opportunities are planned for the incumbent" but pointed out that the job description specifically noted that such advancement was "with time and success". The defendant at the time was a three year old company and growing quickly and wanted someone with leadership skills that could ultimately grow into a Chief Financial Officer position as the company grew. He denies that there was any discussion of time lines for such advancements in relation to the plaintiff. He denies that there was any discussion of a position of Chief Operating Officer as that terminology has never been part of any discussion within the defendant or its parent company in relation to the defendant's operation.

[24] The employment contract is one that Mr. Koehler drafted, using precedents that he had obtained from a former employer and its legal department. He confirmed that he caused the employment contract to be forwarded to the plaintiff after its terms had been modified somewhat

to reflect some changes desired by the plaintiff. He confirmed that there was no deadline on the plaintiff to return the employment contract or on the time available for the plaintiff to review it. After the plaintiff commenced work on September 1, 2009, there was thereafter no discussion by the plaintiff about any concerns or uncertainties about the terms of the contract.

[25] Mr. Koehler confirmed that by the fall of 2010, the plaintiff's performance was such that possibilities of advancement were slim to none as there were concerns about the accuracy of his financials and the adequacy of his hours of work. He confirmed that the plaintiff had made inquiries about the fact that he did not receive a salary increase and Mr. Koehler identified Exhibit 2 as his e-mail response to those inquiries. He explained that at the time of the defendant's hiring and commencement of work, the company was still in Brampton but moved shortly thereafter to Milton in a new facility. While in Brampton, the defendant and the plaintiff had agreed that the plaintiff could start work early and leave work early so as to avoid the traffic problems in the Brampton area. Mr. Koehler's evidence is that the plaintiff, after the move to Milton, continued to leave work early which Mr. Koehler objected to on the basis that part of the plaintiff's responsibilities was to set a good example and to be available when Mr. Koehler was not present. He cited as one example a situation where the load of product for a large customer was not assembled properly for shipping, and that when it was detected, everyone including management pitched in to manually reshape the shipment so as to be up to the customer's expectations. They wanted it out late the same afternoon. Despite the pressure upon all of them to correct this problem, Mr. Koehler's evidence is that the plaintiff left to go home after 10 minutes and without assisting all the others in the completion of the correcting measures. The plaintiff's departure time was before the close of business.

[26] Mr. Koehler testified the plaintiff had also been spoken to about the sufficiency of his financial information. Mr. Koehler confirmed that shortly after his e-mail, in fact the following Monday, he and the plaintiff met with the chairman of the Italian parent company, who was visiting the defendant. He testified that at such meeting there was no discussion about advancement. In fact, there was discussion about the plaintiff's shortcomings and that the meeting ended on the understanding that there was a gap in the plaintiff's performance level but that the Italian head of the parent company wanted to give the plaintiff a chance to improve. Mr. Koehler's evidence continued that in the ensuing few days, while the chief executive from Italy was present and reviewing the Canadian company's performance, several problems were detected within the financial information produced by the plaintiff, and that the discovery of these shortcomings led to the decision that the plaintiff would be terminated.

[27] Mr. Koehler had no excuse for the time it took to make the payment of two weeks' salary, or to provide the record of employment, indicating simply, but believably, that those matters were not his personal responsibility and he just assumed they had been done. He agreed that if the car allowance entitlement was not paid as part of the severance pay, it should have been.

[28] This evidence as to shortcomings in the plaintiff's performance were not admitted on the basis of being relevant to dismissal for cause as that was not the position advanced at trial. The evidence was admitted to counter the plaintiff's assertion that he had been promised advancement from the beginning, that his work was going well and was of good quality, and that he was promised good prospects of advancement as late as November of 2010 only to then be terminated in January. Where the evidence of the plaintiff and that of Mr. Koehler differ, I

accept the evidence of Mr. Koehler. In my assessment, the plaintiff hedged on many of his answers, did not provide admissions directly, but only upon further questioning. In my assessment, he was imprecise in his answers in areas where a precise answer would have been easy but detrimental, and he embellished his attributes and work performance. For example, he claimed to be unable to remember whether he had accepted the new position before resigning from Dieter's, and only on being questioned did he acknowledge that it only made sense that he would secure the new employment before terminating the old. The evidence of Mr. Koehler, on the other hand, was precise, direct, responsive and made more sense in the circumstances of the company and when compared to the e-mail marked as Exhibit 2.

The Plaintiff's Position

[29] The plaintiff contends that the termination provision in the contract of employment is null and void or otherwise unenforceable and accordingly that the plaintiff's entitlement should be determined on common law principles. It is further contended on his behalf that there should be a modest enhancement on the basis of inducement to accept the employment with the defendant.

The Defendant's Position

[30] The defendant's position is that the employment contract sets out the terms of employment in well-organized provisions stated in plain language. In particular, the "Termination" section is clear that on termination without cause the plaintiff was entitled to be paid for the minimum period of notice as provided for in the legislation, in this case two weeks. The defence position is that this has been paid out, and all that the plaintiff is entitled to is the pension contribution of 6% of base salary for two weeks plus the car allowance for two weeks.

Discussion

[29] The Supreme Court of Canada in *Machtinger v. Hoj Industries Ltd.*, [1992] S.C.J. No. 41 at para. 20 established that a contract of employment for an indefinite period requires that the employee be given reasonable notice of an intention to terminate the contract if dismissed without cause and that this principle is characterized as a presumption, rebutted only if the contract clearly specifies some other period of notice, either expressly or impliedly, and such other period is not inconsistent with legislated minimums.

[30] Section 57(b) of the *ESA* provides for a minimum period of notice of two weeks if the employee's employment has been between one and three years, as is the case here.

[31] Section 5(1) of the *Act* prevents either side from contracting out of an employment standard and provides that any such contracting out is void. Subsection (2) provides that any greater benefit to an employee provided for in an employment contract prevails if the employment standard provided under the *Act* is less advantageous.

[32] While s.60 of the *Act* was argued as being applicable in this case in the submissions on behalf of the plaintiff, in my opinion that section prevents a reduction in an employee's wages and benefits when an employee is working during a notice period. This section does not apply in a case like this where the employee was not required to work the notice period, but rather terminated and the issue is the appropriate compensation in lieu of notice.

[33] Section 61(1) permits termination without notice if the employer pays the amount the employee would have been entitled to receive during the notice period, together with benefits to which the employee is entitled to receive during the notice period.

[34] While counsel for the plaintiff submits that a termination clause simply stating that an employee is entitled to compensation in accordance with the legislation does not restrict the employee to the minimum notice period provided, that submission is based on *Kosowan v. Concept Electric Ltd.* 2007 ABCA 85 (CanLII) Alberta. The factual difference in that case is that the termination clause did not provide that the employee was to receive the "minimum" notice period as was provided for in the contract in this case. In this case the termination clause did specify that the minimum legislated notice was contemplated. I reject that argument.

[35] In my opinion, in terms of the portion of the termination provision which deals with the length of the notice period, the clause was effective to rebut the presumption of reasonable notice according to common law. As authority for the proposition that a termination clause specifying a

minimum period of notice, provided the period is not contrary to the minimum provided under the ESA, is effective to rebut the presumption of common law application: see *Stevens v. Sifton Properties Ltd.*, [2012] O.J. No. 6244 (S.C.J.); *MacDonald v. ADGA Systems International Ltd.*, [1999] O.J. No. 146 (C.A.), leave to appeal refused, [1999] S.C.C.A. No. 147.

[36] However, the length of the notice period is only part of the termination equation. It determines the length of time during which the employee is to be paid in lieu of notice. The other part relates to the amount to be paid to the employee during that period.

[37] Both *Machtinger* at para. 26 and s.5(1) of the *ESA* make any provisions that attempt to contract out of minimum employment standards, by providing for lesser benefits than those legislated as minimums, "null and void".

[38] In this case, the third paragraph of the termination section of the contract provides "regular employees may be terminated at any time without cause upon being given the minimum period of notice prescribed by applicable legislation, or by being paid *salary* in lieu of such notice or as may otherwise be required by applicable legislation" (emphasis added). Under the title "Remuneration", the contract stipulates what the salary will be, $135,000 per annum. While still under the heading of "Remuneration", but in a paragraph separate from the salary paragraph, the contract provides that the defendant will pay pension contributions up to 6% of base salary. The contract is drafted in such a way as to make the pension contribution part of remuneration, but not part of salary.

[39] The car allowance of $680 per month is provided for in the contract under the title "Fringe Benefits". Accordingly, it is not defined under the contract as being part of salary.

[40] Both in respect of the pension benefits and the car allowance, the contract provides that the defendant has the right to amend or discontinue such payments. In the circumstances of this case, I do not accept the plaintiff's submission that such terminology breaches the *Employment Standards Act*.

[41] There was no cancellation or discontinuance of such payments prior to the notice of termination.

[42] The plaintiff submits that in this case the termination provision of the employment contract specifically excludes the payment of the pension and car allowance benefits and hence is contrary to s.61(1)(a) in respect of the car allowance and (b) in respect of the pension contribution.

[43] This same situation occurred in *Stevens v. Sifton Properties Ltd.*, (supra). There, an employment contract specified a minimum notice period in terms found to be sufficiently clear to displace the common law notice provision, in terms of the length of time called for. But the termination clause called for payment of salary in lieu of notice but provided for no payment of benefits for the same notice period. The court found that as a result the termination clause was null and void, in respect of the entitlement to benefits for the notice period, and relied on para. 28 of *Machtinger*, supra, to find that where one clause in the termination provisions is null and void by operation of the ESA, then it is null and void for all purposes. If a term makes the contract unlawful, then no lawful contractual term can be extracted such as to preserve or save the length of the notice period where the entitlement to benefits during the notice period is contrary to the statute. As alternative interpretations of the impugned termination provision were proffered, the court there also held that even so at best it gave rise to an ambiguity which by application of the

principle of *contra proferentem* requires that the ambiguity be resolved in the plaintiff's favour. In that case, the court held that the language in the contract, which specified a minimum notice period that was not contrary to the *Act*, was sufficient to displace the common law presumption and accordingly it was only the portion of the termination clause providing for the non-payment of benefits which ran afoul of the ESA and rendered the entire termination clause null and void.

[44] Also relevant is the decision in *Wright v. Young and Rubicam Group of Companies (Wunderman),* [2011] O.J. No. 4960 (S.C.J.). There, the contract of employment termination clause provided for payment of salary but not benefits. It was there held, even though in fact the employer paid the benefits during the notice period, that the contract term violated the ESA requirements and hence that the entire termination provision was null and void, or in the alternative was at best ambiguous and attracted application of the *contra proferentem* principle.

[45] In the case at bar, a reading of the termination clause in my opinion leads to the result that the 6% pension contribution and the car allowance are not included in the amounts to be paid during the period of notice, contrary to the ESA. In the letter of termination here, the employer indicates initially that the defendant's position is that base salary and car allowance are to be paid, without any reference to the 6% pension contribution. On page 2, as part of the "sign of good faith" enhanced offer, if accepted, to pay four weeks, again it is for base salary, plus car allowance and no mention of pension contribution. In evidence, Mr. Koehler testified that he was of the view that both the car allowance and the pension contribution were payable. It seems from the prevailing case law that it is the wording of the contract in respect of termination that governs, rather than the actions of the parties. In any event, the car allowance and the pension contribution have not been paid in this case.

[46] Other examples of application of the principle of *contra proferentem* in situations involving ambiguous terminology can be found in *Christensen v. Family Counselling Centre of Sault Ste. Marie*, [2001] CanLII 4698 (ON CA), *Ceccol v. Ontario Gymnastics Federation* (2001), 55 O.R. (3d) 614, where it was held that what is required is a "high degree of clarity".

[47] For these reasons, in my opinion, the termination clause in the within contract fails to comply with the provisions of the ESA and for that reason is null and void and incapable of refuting the common law presumption established by the majority in *Machtinger* that the employee is entitled to a reasonable period of notice as calculated under common law principles. In saying this, I am satisfied that the termination provision is adequate in terms of how it purported to stipulate the length of the notice period. Where I think it breaches the statute is that it does not provide for the payment of benefits during the period of notice, or in the alternative, is ambiguous in this respect, hence attracting resolution of that ambiguity against the defendant pursuant to the principle of *contra proferentem*.

Period of Reasonable Notice

[48] Given the foregoing finding, it is necessary to consider what at common law would be a reasonable period of notice in the circumstances of this case. Pursuant to the principles of *Bardal v. Globe & Mail Ltd.*, [1960] O.J. No. 149 at para. 21, reasonable notice must be determined on the facts of each case, having regard to "a character of the employment, the length of service of the employee, the age of the employee, and the availability of similar employment, having regard to the experience, training and qualifications of the employee". Those factors are not exhaustive, and for example, pursuant to *Wallace v. United Grain Growers Limited*, [1997] 3 S.C.R. 701 at 737 inducements to accept employment or representations as to security of

employment can be additional factors to consider, as can the conduct of the employer in terminating the plaintiff.

[49] Here, Mr. Miller was, in my opinion, in a position properly characterized as middle management. He had others within the company reporting to him, but he also was very much subject to and required to report to the president of the company, who in turn reported to the chairman of the parent company.

[50] The length of employment was from September 1, 2009 to January 26, 2011, a period of 17 months. The employee was 39 at the time of termination and hence relatively young. I do not have much evidence on the availability of similar employment. The plaintiff testified as to numerous efforts he made but without much detail in terms of the types of employment he tried to obtain, how well his qualifications matched the requirements of prospective employers, or as to details of location and remuneration of other like positions that were available. The majority of the replacement job enquiries made by the plaintiff appear to fall within two months of his being terminated. Accordingly, those efforts may not accurately reflect the true availability of replacement employment if a longer period of search had been undertaken. As it is, Mr. Miller set up his own company in March 2011, although he did not get his first contract until August.

[51] I also take into account Mr. Miller's evidence that he did not read the termination provisions in the contract. He was aware of the "Termination" heading, knew what it was intended to deal with, but swears he did not read the provisions. Had he done so, he could have voiced objection to whatever provisions he found unsatisfactory, either as to length of the notice period, or the fact that it did not call for payment of benefits during that period. The contract terms make it clear what the employer intended. Mr. Miller in his *curriculum vitae* indicated that

he had experience in and had been responsible for human relations at Dieter's. Part of his job description with the defendant made him responsible for monitoring all legislation relevant to the organization, and specifically listed employment standards. By signing the contract, Mr. Miller signified to the employer that he had read, and understood, and accepted the terms of the contract. Had he in fact read what he acknowledged having read, the parties could have either negotiated their differences, or parted ways and avoided a period of employment that has been unhappy and no doubt costly for both. In the circumstances of this case, the employee cannot escape bearing some responsibility for the fact that both parties entered into a contract which fell below ESA standards.

Inducements / Promise of Job Security

[52] In submissions as to what would constitute a reasonable notice period, counsel for the plaintiff submits that the evidence in this case supports the notion that the plaintiff was induced to leave his prior employment with Dieter's, and that it also supports the notion that he was promised job security at his employment with the defendant, both of which are factors tending to lengthen the appropriate notice period. Reliance is placed on *Wallace v. United Grain Growers Limited*, [1997] 3 S.C.R. 701, at pp. 737-739. In fairness, plaintiff's counsel characterizes the evidence in this case as amounting to only a slight factor in this case, or a "modest inducement": *Bishop v. Beefeater (Niagara) Ltd.*, [2002] O.J. No. 4147.

[53] Counsel for the defendant points out that case law establishes that in order to constitute an inducement, the efforts must "go beyond the ordinary degree of persuasion, and an employee who willingly leaves a secure job in order to pursue a new opportunity has not necessarily been induced": CED Employment Law III. 7.(b).(viii)(Ontario). He also refers to *Firatli v. Kohler*,

[2008] O.J. No. 2763 where an employee was approached by a recruiter and it was held that the discussions entailed only normal persuasive efforts and only resulted in a moderate enhancement to the terms of employment.

[54] In this case, I am satisfied that there were no efforts amounting to inducement or promises of job security beyond the normal types of persuasive comments expected by employers towards employees in the job market. From the plaintiff's perspective, reliance is placed on his evidence that he had decided to turn down the prospect of employment at the defendant and it was only after he was asked by the defendant's president "what will it take to get you here" that he decided to go. I reject the plaintiff's evidence and accept that of Mr. Koehler to the effect that he was never advised of any interim decision by the plaintiff to refuse employment and that his meetings and conversations with the plaintiff involved a discussion of terms and conditions, but nothing beyond the ordinary. I accept his denial of the plaintiff's suggestion that he was asked "what will it take" to have the plaintiff accept employment.

[55] Similarly, in my opinion there is no evidence of promises of job security such as to justify an enhancement of the normal notice of the otherwise appropriate notice period. The sentence in the job advertisement at page 2 that "with time and success, further financial professional career advancement opportunities are planned for the incumbent" is subject to the qualifier at the outset of the statement and must be considered in the circumstances of a three year old company that was growing quickly. The company had to prove successful before further positions would open up, and it was only to occur after time had been spent in the position offered, and after sufficient time had elapsed for the company to progress to that point. As to the plaintiff's evidence that he was promised a brighter future with the company in the fall

of 2009 and again in January of 2010, I reject his evidence. I accept the defence evidence that he received no raises, but when the plaintiff made inquiry about why he had not received a raise, he received the e-mail marked as Exhibit 2 which is inconsistent with promises of advancement. I further accept the defence evidence that when at the plaintiff's insistence he met with Mr. Koehler and the chairman from Italy, the tenor of the conversation, far from promising enhancement, instead revolved around shortcomings on the part of the plaintiff and a short-lived agreement to wait awhile to see if things improved. Mr. Kohler referred to the plaintiff's shortcomings in the financial materials then under review as being a "disaster" and precipitated his dismissal.

Conclusion

[56] Having regard to these factors, in my opinion, a reasonable period of notice in all the facts of this case would be one of three months. The base salary has been paid for half a month, leaving the base salary owing for 2.5 months, which I calculate to be $28,125. In addition, he is entitled to car allowance at $680 per month for three months in the amount of $2,040 and the 6% contribution to pension for three months in the amount of $2,025.

[57] In terms of special damages, the plaintiff claims four expenses incurred in setting up his new company totaling $235.39. He should recover that amount. He also claims $630 as the mileage claim for seven trips to Toronto or Mississauga. I would not allow those claims as he is already recovering car allowance for the period of notice.

[58] For these reasons, the plaintiff shall have judgment for the following:

- $28,125.00 for 2.5 months of base salary (two weeks already paid);

- $ 2,040.00 for car allowance for 3 months;
- $ 2,025.00 for pension contribution for 3 months;
- $ 235.39 for special damages

Total -- $32,425.39

Costs

[59] In the event that the parties are unable to agree on the issue of costs, written submissions may be forwarded to my chambers at the Courthouse, 85 Frederick Street, 7th Floor, Kitchener, Ontario N2H 0A7. Those submissions should not exceed five pages, exclusive of bills of costs and any relevant authorities. The submissions of the plaintiff are to be forwarded within 30 days of the release of these reasons, and those of the respondent are to be submitted within 21 days thereafter. If submissions are not received within these time periods, or any extension that may be sought and granted, I will assume that costs have been agreed upon and no costs order will be made.

C.S. Glithero J.

Released: July 7, 2014

CITATION: Miller v. A.B.M. Canada Inc., 2014 ONSC 4062
COURT FILE NO.: 11-4228-SR
DATE: 2014-07-07

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Paul Miller

Plaintiff

– and –

A.B.M. Canada Inc.

Defendant

REASONS FOR JUDGMENT

C.S. Glithero J.

Released: July 7, 2014

/lr