CITATION: ANDERSON v. CARDINAL HEALTH, 2013 ONSC 5226
COURT FILE NO.: CV-13-471868-0000
DATE: 20130815

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: LILLIAN ANDERSON, Plaintiff

AND

CARDINAL HEALTH CANADA INC., Defendant

BEFORE: CHIAPPETTA J.

COUNSEL: *Matthew Fisher*, for the Plaintiff

Richelle Pollard, for the Defendant

HEARD: August 8, 2013

ENDORSEMENT

[1] The plaintiff has brought a motion for summary judgment. In determining whether or not to grant the motion, I considered whether the summary judgment process in this case would "provide an appropriate means for effecting a fair and just resolution of the dispute before the court": *Combined Air Mechanical Services Inc. v. Flesch*, 2011 ONCA 764, 108 O.R. (3d) 1, at para. 38. In my view, it would not. The motion record is inadequate. The interests of justice require a trial.

[2] The plaintiff's motion for summary judgment is dismissed.

Background

[3] The defendant, Cardinal Health Canada Inc., employed the plaintiff, Lillian Anderson, for 22 years and five months until she was dismissed without cause on October 1, 2012. At the time of her dismissal, she was 55 years old and earning $79,573.72 annually including benefits. As of January 2013, the defendant had paid her approximately $45,690 representing eight weeks statutory pay in lieu of notice and the minimum severance pay required under the *Employment Standards Act*, S.O. 2000, c. 41.

[4] The plaintiff commenced an action for wrongful dismissal and moved for summary judgment under the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, s. 20, seeking an award for damages. The plaintiff submits that there is no genuine issue requiring a trial as all of the

evidence has been adduced by affidavit, tested under cross-examination, and bolstered by completed undertakings. On the merits, the plaintiff seeks a damage award equal to 24 months of reasonable notice.

[5] On the merits, the defendant states that the appropriate notice period is between 12 and 14 months and should not exceed 16 months. Further, the defendant states that the notice period should be reduced for the plaintiff's failure to take reasonable steps to mitigate her damages. In defence of this motion, the defendant submits that there is a triable issue based on the plaintiff's failure to mitigate and failure to provide supporting documentation; therefore, a motion for summary judgment is inappropriate.

Analysis

[6] I have two concerns about deciding this matter summarily.

[7] First, I am not able on the record before me to render a finding as to whether or not the plaintiff's conduct in seeking alternative employment was unreasonable in all respects. The court can deduct from the plaintiff's damage award if her mitigation efforts were not reasonable: *Kent v. Stop N' Cash 1000 Inc*., 51 C.C.E.L (3d) 199 (Ont. C.A.). The onus rests with the defendant to establish that the plaintiff's conduct in seeking alternative employment was unreasonable in all respects: *Furuheim v. Bechtel Canada Ltd*. (1990), 30 C.C.E.L. 146 (Ont. C.A.). A full appreciation of the evidence and issues required to make this dispositive finding is not attainable on the record before me: *Combined Air*, at para. 50. The plaintiff has therefore not satisfied her onus to demonstrate that mitigation is not a genuine issue in this case requiring a trial.

[8] The plaintiff submits that she took reasonable steps to mitigate her damages. She applied for jobs within two months of being terminated and took courses in resume writing, cover letter writing, and other job search skills in January and February 2013. She applied for jobs in March, April, May, June, and July 2013. She states in her affidavit and under cross-examination that she used newspapers such as the Toronto Sun job ads, an agency, a Seneca College employment counselor, and online resources such as Monsters.ca, HRSDC Job Bank, and Workopolis.ca. Her evidence is that she continued searching for work despite her brother's brain cancer diagnosis and unfortunate death during the period between April and June 2013.

[9] The defendant submits that the plaintiff's attempts to find alternative employment have been unreasonable in all respects. In the eight months following her termination, she applied for only 13 positions, which amounts to less than two positions per month; this is minimal compared to other plaintiffs who applied for 60 positions during similar time periods: See e.g. *Nasager v. Northern Reflections Ltd*., 2010 ONSC 5840, 85 C.C.E.L. (3d) 314, at para. 17. The defendant searched the same sources as the plaintiff and found 27 other positions that it submits the plaintiff should have applied for but did not. Following the swearing of her affidavit to support this motion and up to the date of this motion (totaling almost a two month period), the plaintiff applied for only three positions.

[10] I am unable on the record before me to resolve the conflicting evidence and determine if the plaintiff's failure to apply for the other 27 positions is unreasonable in all respects.

[11] The plaintiff submits that she addressed the defendant's questions on her mitigation efforts under cross-examination. I disagree. When asked why she only applied for four positions in March 2013, the plaintiff stated that she needed to update her skills because she does not have the skills that employers are looking for. The plaintiff's statement is unsupported by documentary evidence. It is also cause for pause when compared to the other 27 available jobs located by the defendant based on the plaintiff's existing skills. The supporting record lacks reliable documentary evidence for the court to draw a reasonable inference and evaluate the credibility of the plaintiff's statement.

[12] When asked why she did not or could not apply for the 27 positions, the plaintiff maintained that the jobs offered lower wages and were not comparable to her duties with the defendant. The defendant's affiant admitted that some of the 27 positions paid less than the plaintiff's income at termination. However, the plaintiff's explanation is difficult to accept as fact because she did not limit her search to accounting manager roles. Rather, the plaintiff's search and her 13 job applications included positions that, based on title, would seem to pay less and not compare to her duties with the defendant (e.g., accounting clerk and front office administration). The record does not show details about the 13 positions, such as hourly wage, benefits package, work hours, number of direct reports, managerial duties, or required qualifications. The court is therefore left without the supporting documentation necessary to evaluate the credibility of the plaintiff's statements as to why she did not apply for the 27 positions. The court does not have the evidence required to make a dispositive finding of the unreasonableness of her conduct.

[13] Second, and for the same reasons noted above, particulars of the 13 positions are required to determine the availability of comparable employment opportunities for the plaintiff; and the availability of comparable employment is important to determine reasonable notice. *Bardal v. Globe & Mail Ltd*. (1960), 24 D.L.R. (2d) 140 (Ont. H.C.), at p. 145 established that courts must consider four main factors to determine the applicable notice period for an employee dismissed without cause: (1) character of employment, (2) length of service, (3) age of the employee, and (4) availability of similar employment having regard to the employee's experience, training, and qualifications (the "*Bardal* factors").

[14] It is agreed that, at the time of termination, the plaintiff was employed in an accounting capacity as an Accounting Manager, was 55 years old, and had 22 years of service. There is no dispute about the plaintiff's employment duties. There is a dispute however, as outlined above, about the last *Bardal* factor: availability of comparable employment opportunities. Determining the appropriate notice period is not a mathematical exercise but involves weighing numerous factors: *Laszczewski v. Aluminart Products Ltd*. (2007), 62 C.C.E.L. (3d) 305, at para. 61. The availability of comparable employment opportunities is a controversial issue between the parties, unresolved by affidavit evidence or by cross-examination. It is a factor that warrants due weight in assessing reasonable notice. Therefore, it remains a genuine issue requiring a trial with respect to the plaintiff's claim for damages for wrongful dismissal.

[15] The facts and issues of this motion are similar to those in *Thorne v. Hudson's Bay Co.*, 2011 ONSC 6010, 96 C.C.E.L. (3d) 35. In *Thorne*, the plaintiff submitted a chart outlining her

mitigation efforts, such as searching newspapers, searching websites, networking, and consulting a recruiter. In response, the defendant outlined a number of positions it found through its own search efforts to which the plaintiff did not apply. In dismissing the motion for summary judgment, Justice Campbell held that the parties' conflicting evidence gave rise to triable issues concerning the availability of comparable employment (a *Bardal* factor) and the reasonableness of the plaintiff's mitigation efforts. Justice Campbell states the following at para. 29:

> The plaintiff may be able to provide compelling explanations as to why the other job opportunities noted by the defendant are not comparable, or were overlooked by the plaintiff. These different perspectives as to the potential significance of the plaintiff's "mitigation charts" serve to illustrate the unsatisfactory nature of trying to fairly resolve the genuine issues between the parties on these important points simply by reference to documentary evidence, unaided by *viva voce* explanations and untested by cross-examinations.

Conclusion

[16] In this case, cross-examination tested the plaintiff's affidavit evidence. The motion record however remains inadequate as the Court cannot test the credibility of the plaintiff's statements on cross-examination without the particulars of the 13 positions to which the plaintiff applied.

[17] As outlined above, conflicting evidence on this motion generates two issues: (1) the reasonableness of the plaintiff's efforts to mitigate her damages and (2) the availability of comparable employment opportunities to determine reasonable notice. The record does not permit a proper and fair resolution of the conflict. The plaintiff's motion for summary judgment is therefore dismissed.

[18] The plaintiff requested an expedited trial date to avoid further financial hardship. I find this request appropriate in the circumstances. November 2013 trial dates were offered to counsel at the hearing of this motion. Unfortunately, counsel's schedule could not accommodate the November dates. This matter is therefore scheduled for a two day non-jury civil trial starting January 13, 2014. Counsel should confirm these dates with the Trial Coordinator's Office.

Costs Reserved to the Trial Judge

[19] Although the defendant successfully defended the plaintiff's motion for summary judgment, I reserve the issue of costs in relation to this motion to the trial judge.

[20] On the merits, the defendant concedes that the plaintiff is entitled to minimum 12 months' notice but submits that 16 months is the maximum appropriate damage award. Even if the defendant is successful in its mitigated position at trial, the plaintiff will receive a substantial lump sum of money from the defendant. The trial is to take place in less than five months. In my view, it is appropriate to reserve the costs of this motion to the trial judge as opposed to ordering an unemployed plaintiff to forthwith pay the defendant's costs, only to receive a damage award

from the defendant a few months later. As Justice Campbell ordered in *Thorne* at para. 35, I reserve the costs in connection with this summary judgment motion to the trial judge.

CHIAPPETTA J.

Date: August 15, 2013