COURT OF APPEAL FOR ONTARIO

CITATION: Bowes v. Goss Power Products Ltd., 2012 ONCA 425
DATE: 20120621
DOCKET: C54173

Winkler C.J.O., Simmons, Cronk, Armstrong and Watt JJ.A.

BETWEEN

Peter Bowes

Applicant (Appellant)

and

Goss Power Products Ltd.

Respondent (Respondent)

Alex Van Kralingen, for the appellant

David Rosenfeld, for the respondent

Heard: May 25, 2012

On appeal from the order of Justice Kevin W. Whitaker of the Superior Court of Justice, dated July 5, 2011, with reasons reported at 2011 ONSC 4445, 95 C.C.E.L. (3d) 228.

Winkler C.J.O.:

A. INTRODUCTION

[1] The issue on this appeal is whether an employee, who is terminated without cause, is required to mitigate his or her loss when entitled to a fixed term of notice or pay *in lieu*, and the contract of employment is silent with respect to mitigation.

[2] The appellant, Peter Bowes, entered into a written contract of employment with the respondent, Goss Power Products Ltd., which provided that he would receive six months' notice or pay *in lieu* thereof if his employment was terminated without cause. The employment agreement, prepared by the respondent, is silent with respect to a duty to mitigate.

[3] The respondent terminated the appellant's employment without cause. The letter of termination stated that the appellant would be paid his salary for six months but was required to seek alternative employment during this period, keeping the respondent apprised of his efforts in this regard.

[4] Approximately two weeks after he was terminated, the appellant obtained a new position at the same salary he had been earning with the respondent. After paying the statutorily required three weeks' salary, the respondent ceased making salary payments to the appellant. The appellant brought an application under rule 14.05 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, asking for a determination of rights pursuant to his employment agreement.

[5] In his application, the appellant argued that the employment agreement set out the termination payment that was due and owing. He had no duty to mitigate and was accordingly entitled to the amount set out in the employment agreement. This amount, he stated, should be paid out in a lump sum at the time of termination. The respondent argued that the appellant's position was contrary to the settled case law on mitigation and was inconsistent with a reasonable interpretation of the agreement. The appellant had only suffered two weeks' loss of salary, which is less than the statutory minimum notice period.

[6] The application judge held that, where it contains a fixed severance entitlement, an employment agreement is subject to a duty to mitigate unless the agreement, either directly or by implication, relieves the employee of this obligation. Since the agreement at issue provided no such exemption from the duty to mitigate, the appellant was not entitled to the full amount provided for under the agreement as he had mitigated his loss by finding new employment. The application judge also held that the severance payment was not due as a lump sum.

[7] The appellant appeals from this ruling. However, he has not appealed the decision as it relates to the timing of the payment.

[8] For the reasons that follow, I would allow the appeal.

B. FACTS

[9] The appellant began his employment with Goss Industries Inc., the predecessor of the respondent, in the fall of 2007 in the capacity of Vice-President, Sales and Marketing. He signed an employment agreement on September 26, 2007 ("Employment Agreement") and commenced work for the respondent on October 9, 2007.

[10] The Employment Agreement was prepared by the respondent and presented to the appellant for signature. It was signed on behalf of the employer by the respondent's President.

[11] The Employment Agreement contained provisions setting out the appellant's salary and other aspects of his compensation package. His base salary was set at $130,000 per annum. There was provision for a bonus of up to one-half of his base salary and he was given a car allowance. The base salary had increased to $140,000 by the date of termination.

(1) The Employment Agreement

[12] The severance provision in the Employment Agreement is set out at paragraph 30(c):

> 30. The Employee's employment may be terminated in the following manner and in the following circumstances:
>
> …

> (c) By the Employer at any time without cause by providing the Employee with the following period of notice, or pay *in lieu* thereof:
>
> (i) Four (4) months if the Employee's employment is terminated prior to the completion of twenty-four (24) months of service;
> (ii) Five (5) months if the Employee's employment is terminated prior to the completion of thirty-six (36) months of service;
> (iii) Six (6) months if the Employee's employment is terminated prior to the completion of forty-eight (48) months of service; and
> (iv) Seven (7) months plus one (1) month for each additional full year of service over four years if the Employee's employment is terminated after forty-eight (48) months from commencement up to a maximum of, in total, twelve (12) months notice.

[13] Paragraph 31 of the Employment Agreement provides that the payment provided for in paragraph 30(c) is calculated on base salary only.

[14] Paragraph 33 of the Employment Agreement provides:

> 33. The Employee agrees that the notice provided [in] subsection 30(c) is in compliance with and in excess of the statutory minimum standards owed to the Employee and set out in the *Employment Standards Act* and constitutes full and complete satisfaction of any claim he/she may have to notice or compensation *in lieu* thereof, and to any other payments whatsoever (including any and all damages for wrongful dismissal) as a result of the termination of employment and the Employee agrees to release the Employer from any and all claims whatsoever which the Employee may have arising out of the termination, save and except for compliance with the terms herein set out. It is agreed that the notice provided in subsection 30(c) shall be an

> absolute, full and complete defence to any action or claim which the Employee may advance against the Employer as a consequence of any termination without cause, including, without limitation, any claim for constructive dismissal.

[15] The Employment Agreement contains a "whole agreement" clause, which stipulates that amendments must be in writing. The agreement is silent about the duty to mitigate or whether any termination payment is due as a lump sum. It also states that the appellant had "the opportunity to seek out and obtain independent legal advice … prior to the execution" of the Employment Agreement, although the appellant did not do so.

(2) Termination of Employment

[16] On April 13, 2011, the respondent terminated the appellant's employment with immediate effect, that is, without any notice. The letter of termination stated in part:

> Pursuant to your employment agreement dated September 26, 2007 (the "Employment Agreement"), GOSS Power Products Ltd. ("GOSS") will provide you with salary continuance and car allowance for the next six (6) months until October 13, 2011 (the "Notice Period"). Throughout that time you are required to seek out and locate alternate employment and advise GOSS immediately should you secure alternate employment prior to the end of the Notice Period.

[17] On April 20, 2011, the respondent issued a record of employment which stated that the appellant was entitled to six months' salary, as salary

continuation, in the amount of $2,692.31 per week (based on a base salary of $140,000). In the “comments” section of the record of employment it stated that he was “terminated without cause” and the salary continuance is expressed as “Starting Thursday, April 14/11” and “Ending Wednesday, Oct. 12/11”.

[18] The appellant commenced employment with another employer on April 25, 2011, at the same salary he had been paid by the respondent.

[19] Upon becoming aware that the appellant had secured alternative employment, the respondent took the position that he was only entitled to receive the minimum entitlement under the *Employment Standards Act, 2000,* S.O. 2000, c. 41, of three weeks’ pay *in lieu* of notice. The basis for this position was that the appellant had mitigated his loss successfully, which ended the respondent’s obligation to continue the payment of the salary continuance under the Employment Agreement.

C. THE DECISION OF THE APPLICATION JUDGE

[20] Because the appellant had only received three weeks’ pay *in lieu* of notice, he brought an application on May 11, 2011 in the Superior Court, pursuant to rule 14.05, for a determination of his rights under the Employment Agreement. He asserted that he was entitled to receive the entire termination payment as specified in the Employment Agreement and that the payment was not subject to a duty to mitigate. The application was heard on July 5, 2011 and, in an

endorsement released on July 25, 2011, the application judge held that the appellant was "obliged to mitigate" and was entitled to only the statutory minimum paid by the respondent.

[21] The application judge began the analysis section of his endorsement by stating: "It is well established that in wrongful dismissal cases where there is a claim for damages, employees are obliged to mitigate in the absence of agreement to the contrary." He noted that, although it is open to the parties to agree that the duty to mitigate does not apply, either expressly or by implication, this obligation to mitigate does not arise as an implied term of the agreement but rather as a principle of damages. The issue in the present case, he stated, is whether the same principle applies where an employment agreement contains a specified "period of reasonable notice."

[22] Applying the decision of Nordheimer J. in *Graham v. Marleau, Lemire Securities Inc.* (2000), 49 C.C.E.L. (2d) 289 (S.C.), which the application judge found "at this point to be settled law [in Ontario]", the application judge concluded that the duty to mitigate applied to the calculation of damages. He held that: "[T]he mere fact that the parties have agreed on the period of reasonable notice does not mean that the obligation to mitigate is ousted by agreement." In the result he found that the respondent's interpretation of the Employment Agreement was the correct one.

D. ANALYSIS

[23] It is well-settled law that employment agreements are subject to the ordinary principles of contract law. Peculiar to employment law, however, is the principle that, unless otherwise stated, every employment agreement contains an implied term that an employer must provide reasonable notice to an employee prior to the termination of employment. If the employer fails to provide reasonable notice of termination, the employee is entitled to damages that flow from this breach.

[24] However, the employee is bound in law to mitigate such damages as best as he or she is able. In other words, the employee must make reasonable efforts to mitigate the damages by seeking an alternative source of income: see *Bardal v. Globe & Mail Ltd.* (1960), 24 D.L.R. (2d) 140 (H.C.J.), at pp. 143-44; *Evans v. Teamsters Local Union No. 31*, 2008 SCC 20, [2008] 1 S.C.R. 661, at paras. 28-29. Laskin C.J., writing for a majority of the Supreme Court of Canada, described the duty to mitigate in *Michaels v. Red Deer College*, [1976] 2 S.C.R. 324, at p. 330:

> The primary rule in breach of contract cases, that a wronged plaintiff is entitled to be put in as good a position as he would have been in if there had been proper performance by the defendant, is subject to the qualification that the defendant cannot be called upon to pay for avoidable losses which would result in an increase in the quantum of damages payable to the

> plaintiff. The reference in the case law to a "duty" to mitigate should be understood in this sense.

[25] However, the parties to employment agreements can, and often do, substitute a fixed period of notice in the agreement, thereby displacing the common law period of “reasonable notice”. Parties are entitled to do so provided that they do not violate the minimum statutory requirement relating to notice: see *Machtinger v. HOJ Industries Ltd.,* [1992] 1 S.C.R. 986, at pp. 998-1002.

[26] Establishing a pre-determined period of notice in the contract of employment has certain distinct advantages. Most notably, it provides certainty. From the employer’s perspective, it has the advantage of “capping” the period of reasonable notice that a court might otherwise award in a suit for wrongful dismissal. Likewise, from the employee’s perspective, it ensures a guaranteed entitlement that may be greater than that which a court would award under common law. For both parties, pre-determining the period of notice avoids the need for litigation to assess notice upon termination.

[27] The question raised on appeal is this: when an employment agreement fixes the period of notice but makes no specific reference to mitigation, does this attract the obligation to mitigate in the event of a breach in the same way that the obligation attaches to the common law duty to provide reasonable notice or pay *in lieu* thereof?

[28] The appellant submits that a contractually established notice period is distinct from that which arises at common law. Specifically, he argues that when an employment agreement specifies a period of notice the parties are merely inserting a term akin to a pre-estimate of damages that would flow from non-performance of the agreement. General principles of contract law permit this as long as the condition is not so oppressive as to constitute a penalty, and is reasonable in the circumstances: see *H.F. Clarke Ltd. v. Thermidaire Corp. Ltd.,* [1976] 1 S.C.R. 319, at pp. 330-31. Courts enforce such provisions outside of the employment setting, and, significantly, such damage provisions have been held not to be subject to a duty to mitigate: see *J.G. Collins Insurance Agencies Ltd. v. Elsley Estate,* [1978] 2 S.C.R. 916, at pp. 937-38. The appellant argues that the same approach ought to be taken in the employment context where a contract specifies the amount of damages payable upon termination.

[29] The respondent argues that the idea of liquidated damages is not apposite to the field of employment law. In the respondent's words, the "underlying principles of damages for wrongful dismissal are inconsistent with the concept of liquidated damages." Thus, mitigation applies in the employment context unless the parties stipulate to the contrary in the agreement, either expressly or by implication. The respondent cites as authority the *Graham* decision relied upon by the application judge.

[30] In particular, the application judge relied upon the following passage from *Graham*, at para. 53:

> I agree with the thrust of the cases that hold that the principle of mitigation ought to apply to a contract of employment that contains a provision that stipulates what notice is to be given, or what payment to be made *in lieu* of notice, if the termination of the contract occurs. Such a stipulation is nothing more than an agreement between the parties as to the length of the reasonable notice to terminate the contract. I see no reason why there should be any distinction drawn between contracts of employment where the notice period is not stipulated and those where it is with the result that there would be a duty to mitigate in the former but not in the latter. If that were the case, it would seem to be an unfair result for the employer simply because the parties tried to agree in advance on the proper notice and thereby eliminate that as an issue in the event of a dismissal – subject of course to the court's overriding right to determine the reasonableness of such an agreement in any given case.

[31] Relying on *Graham*, the application judge concluded that parties are free to contract out of the obligation to mitigate, either expressly or by implication, but the fact that they have agreed on a period of "reasonable notice does not mean that the obligation to mitigate is ousted by agreement". A desire for certainty in setting out a specific term of notice does not mean that the parties intended to relieve the appellant of his obligation to mitigate.

[32] The application judge summarized the law as set out in *Graham* and the cases that followed it, in these words:

> [T]he core question … is - what did the parties intend? Certainly the parties could if they had so wished, provide that Bowes owed no duty to mitigate his losses. Where the law following *Graham* clearly indicates that mitigation will be assumed as a general principle of contract law, the parties must in their choice of language, indicate that the presumption is rebutted.

[33] I disagree with this line of reasoning.

(1) A fixed term of notice or payment *in lieu* is not equivalent to common law damages for reasonable notice

[34] An employment agreement that stipulates a fixed term of notice or payment *in lieu* should be treated as fixing liquidated damages or a contractual amount. It follows that, in such cases, there is no obligation on the employee to mitigate his or her damages.

[35] To reiterate, the premise of *Graham*, set out at para. 53, was as follows:

> [A contractually fixed term of notice] *is nothing more than an agreement between the parties as to the length of the reasonable notice* to terminate the contract. I see no reason why there should be any distinction drawn between contracts of employment where the notice period is not stipulated and those where it is with the result that there would be a duty to mitigate in the former but not in the latter. [Emphasis added.]

[36] In my view, Nordheimer J. in *Graham*, and the application judge in this case, erred by treating a contractually fixed term of notice as effectively indistinguishable from common law reasonable notice.

[37] When parties contract for a specified period of notice or pay *in lieu* they are choosing to opt out of the common law approach applied in *Bardal.* In doing so, the parties should not be taken as simply attempting to replicate common law reasonable notice. The Alberta Court of Appeal explained as follows in *Brown v. Pronghorn Controls Ltd.*, 2011 ABCA 328, 515 A.R. 128, at para. 47:

> If the contract entitles the employee to payment of money, howsoever calculated, on termination, that right to that money is contractual. As such, the parties were not bound to specify an entitlement that is equal or even analogous to the quantum of reasonable notice that the common law might require if the contract was silent.

Damages for contractually stipulated notice or pay *in lieu* should not be analogized directly to damages for common law reasonable notice. The parties have specifically contracted for something different; it is an error to simply equate the two.

[38] This case demonstrates this point. Here, the maximum entitlement under the agreement is twelve months, which is approximately half of the upper end of the range of damages for wrongful dismissal at common law. The agreement also limits the damages to a quantum based on the appellant's base salary. Therefore, the contractually stipulated damages exclude the bonus (valued at up to one-half the appellant's base salary), car allowance and other benefits from the calculation, which would be included in total compensation under the

common law (providing, in the case of the bonus, that the trial judge did not make a finding that it was discretionary, at the employer's option).

(2) Payment *in lieu* of a fixed term of notice, being liquidated damages or a contractual amount, is not subject to a duty to mitigate

[39] The application judge likewise fell into error when, in following *Graham,* he concluded that: "[T]he mere fact that the parties have agreed on the period of reasonable notice does not mean that the obligation to mitigate is ousted by agreement."

[40] Having concluded that the damages flowing from the breach of a contractually stipulated term of notice are indistinguishable from damages for breach of reasonable notice at common law, the application judge found that the duty to mitigate applied to the contractual term as it did at common law. In so reasoning, the application judge's initial error in conflating these two types of damages was compounded.

[41] Appellate courts have held that mitigation does not apply to liquidated damages or contractual amounts: *J.G. Collins Insurance,* at pp. 937-38. See Harvey McGregor, *McGregor on Damages*, 16th ed., (London, UK; Sweet & Maxwell Ltd., 1997), at pp. 322-23.

[42] For instance, the language of the English Court of Appeal in *Abrahams v. Performing Right Society Ltd.*, [1995] I.C.R. 1028 is instructive. Hutchison L.J.,

addressing the issue of a contractually fixed entitlement to damages in wrongful dismissal, stated at pp. 1040-41:

> [T]he concept of a duty to mitigate is entirely foreign to a liquidated damage claim, the whole object of which I take to be to fix a certain sum to be paid irrespective of the actual damage suffered by reason of the breach. How could it be right to hold a plaintiff, who can show that his actual damage is *greater,* to the stipulated sum, but permit an employer who can show that it is less to take advantage of that fact? Why should such an obviously unfair and inconsistent approach be approved when it is open to the additional criticism that to allow it exposes the parties to the risk, expense and uncertainty of litigation the avoidance of which is to be presumed to be one of the principal reasons for their stipulating for liquidated damages?
>
> ...
>
> It seems to me that, as a matter of principle, where there is a liquidated damage clause which is valid ... there is no room for arguments on mitigation of damages, a concept relevant only in cases where damages are at large. [Emphasis in the original.]

I note in passing that the respondent's assertion that *Abrahams* is in "direct conflict" with this court's decision in *Taylor v. Brown* (2004), 73 O.R. (3d) 358 (C.A.), is misplaced. Among other things, *Taylor* concerned the relationship between common law reasonable notice and pay *in lieu* of common law reasonable notice. It did not purport to address situations where notice and pay *in lieu* are contractually stipulated.

[43] In *Mills v. Alberta* (1986), 46 Alta. L.R. (2d) 157 (C.A.), the Alberta Court of Appeal dealt with a contract that provided for six months' notice or payment *in lieu* of notice upon termination. The court held that no duty to mitigate applied. Prowse J.A., writing for a unanimous court, stated at p. 160:

> Six months without notice is a period which, depending upon the circumstances, may be more or less than an employee in the private sector might be awarded as damages for wrongful dismissal. To avoid such litigation the contract provides for six months' notice or six months' salary in lieu of notice. This is a contractual right to salary and not damages that the employee relies on when he is dismissed "with or without reasons". As such, it is not in my opinion subject to any duty on the part of the respondent to mitigate his loss.

[44] The British Columbia Court of Appeal was confronted with a fixed term severance clause in *Philp v. Expo 86 Corp.* (1987), 45 D.L.R. (4th) 449. On the issue of mitigation, Lambert J.A. stated at pp. 461-62:

> If Mr. Philp had been properly dismissed, he would have had no obligation to mitigate his loss. He was absolutely entitled to the contractual payment, without any offset for the contingency of obtaining work in the future. He would have received the payment in fulfillment of his contractual entitlement and not as damages for the breach of that entitlement.

[45] The Nova Scotia Court of Appeal in *Boutcher v. Clearwater Seafoods Ltd. Partnership* rejected the notion that a stipulated amount of damages was just another formulation of *Bardal* damages at common law and went on to reject the

application of mitigation: 2010 NSCA 12, 288 N.S.R. (2d) 177, leave to appeal to S.C.C. refused, [2010] S.C.C.A. No. 144. Fichaud J.A. stated, at para. 61:

> [A]rticle 19 prescribed a fixed $25,000 to fully and finally settle Clearwater's obligations under the employment contract. Nothing in the contract varied that sum based on any factors, such as those summarized in *Bardal v. Globe & Mail Ltd* …. that affect the calculation of reasonable notice. As "reasonable notice" is irrelevant, it would be incongruous to deduct the employee's actual earnings during a period of hypothetical reasonable notice. Nothing … varied the $25,000 based on actual or potential earnings of the employee after his dismissal…. Rather article 19 shows an intent that a fixed $25,000 buys closure. Opening a dispute of the employee's actual or potential earnings for an ongoing indeterminate period is the opposite of closure.

[46] The respondent argues that *Boutcher* is distinguishable on the ground that it specifies a fixed amount of pay as opposed to a sliding scale. I disagree. There is no material difference whether the quantum is fixed or readily calculable from the terms of the agreement: see *Abrahams*, at pp. 1038-40. Both methods provide for a stipulated benefit. Moreover, in my view, neither method provides a basis for implying a term to diminish the benefit which has been agreed upon, as the Alberta Court of Appeal explained in *Mills*.

[47] The underlying rationale was expanded upon by the Alberta Court of Appeal in *Brown*, at para. 48:

> Some employees may be able to negotiate a rich golden parachute on involuntary termination without cause which enormously exceeds what the common law

> might order by way of reasonable notice. It would not have much logic to say that such a clause 'mitigates' against the common law damages as such a clause replaces the common law right in the first place. The employer could not claim mitigation or failure to mitigate against that contracted for sum of money. The employer has not waived a damages response. The employer has made a covenant.

[48] Moreover, it is irrelevant for the purpose of my analysis whether such a sum amounts to liquidated damages or a contractual amount. As *Abrahams* makes clear, at p. 1041, mitigation applies in neither case: "I consider the plaintiff's claim is for a contractual sum due and that therefore no question of mitigation arises, and that if, as the defendant contends, it is for liquidated damages, the same conclusion follows."

[49] Finally, by adopting the approach in *Graham* as the law, the application judge found there to be a presumption that mitigation was applicable, requiring an explicit contractual term to negate a duty to mitigate. As pointed out above, the legal underpinnings for this conclusion are flawed in that, because the damages are liquidated, a duty to mitigate does not automatically attach. Thus, while it is indisputable that the parties could have specifically agreed that mitigation did apply, no presumption exists in law necessitating that it must be contracted away expressly.

[50] The respondent submits that the decisions of this court in *Wronko v. Western Inventory Service Ltd.*, 2008 ONCA 327, 90 O.R. (3d) 547, addendum,

2008 ONCA 479, 91 O.R. (3d) 447, leave to appeal to S.C.C. refused, [2008] S.C.C.A. No. 294, and *Soye v. Corinthian Colleges Inc.,* 2009 ONCA 297, are binding authority on point and must be followed. I disagree. These decisions do not decide the issue before the court on this appeal.

(3) Concerns regarding an employee's "golden parachute" or any potential unfairness to the employer are without merit

[51] The respondent raises the spectre of the appellant receiving a double payment, which they refer to pejoratively as a "golden parachute". To be clear, there is no "double payment" in the sense that the respondent is paying twice. Nor is the entitlement under the Employment Agreement "golden" as it restricts damages to a maximum of 12 months of base salary, and does not include the bonus or other benefits.

[52] It is noteworthy that in the sports, entertainment and senior management fields it is commonplace for such contractual provisions to not be subject to mitigation. Where the rich, famous, and powerful are involved, there is no suggestion that such payments are unfair to the other contracting party, even where there is, in effect, total mitigation of the loss. A contract is a contract, and it is expected that it will be honoured. Nothing short of this can be countenanced where the terminated employee is less privileged.

[53] The words of the Alberta Court of Appeal in *Brown*, at para. 47, bear repeating:

> If the contract entitles the employee to payment of money, howsoever calculated, on termination, that right to that money is contractual. As such, the parties were not bound to specify an entitlement that is equal or even analogous to the quantum of reasonable notice that the common law might require if the contract was silent … Some employees may be able to negotiate a rich golden parachute on involuntary termination without cause which enormously exceeds what the common law might order by way of reasonable notice. It would not have much logic to say that such a clause 'mitigates' against the common law damages as such a clause replaces the common law right in the first place.

[54] *Graham* raises similar concerns regarding the potential for unfairness to the employer that could arise if a duty to mitigate were not imposed on the employee. *Graham* states, at para. 53, that to not require an employee to mitigate when a fixed term of notice is agreed to in the contract "would seem to be an unfair result for the employer simply because the parties tried to agree in advance on the proper notice". I do not share this concern for a number of reasons.

[55] It is worthy of emphasis that, in most cases, employment agreements are drafted primarily, if not exclusively, by the employer. In my view, there is nothing unfair about requiring employers to be explicit if they intend to require an employee to mitigate what would otherwise be fixed or liquidated damages. In fact, what is unfair is for an employer to agree upon a fixed amount of damages, and then, at the point of dismissal, inform the employee that future earnings will be deducted from the fixed amount.

[56] Notably, the concern expressed in *Graham* seems to disregard the oft-observed disparity in bargaining power between employee and employer. On this point, Iacobucci J. endorsed the following excerpt from K. Swinton, "Contract Law and the Employment Relationship: The Proper Forum for Reform" in Barry Reiter and John Swan, eds., *Studies in Contract Law* (Toronto: Butterworths, 1980) 357, at p. 363, in both his decisions in *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701, at p. 741, and *Machtinger*, at p. 1003:

> [T]he terms of the employment contract rarely result from an exercise of free bargaining power in the way that the paradigm commercial exchange between two traders does. Individual employees on the whole lack both the bargaining power and the information necessary to achieve more favourable contract provisions than those offered by the employer, particularly with regard to tenure.

(See also *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, at pp. 1051-52.) Moreover, in contrast to the concerns about fairness noted in *Graham*, the excerpt from Hutchison L.J.'s reasons in *Abrahams*, above, emphasizes the potential unfairness *to employees* inherent in the approach proposed in *Graham*.

(4) Application to the Present Case

[57] In this appeal, the clear goals of the parties in entering into the Employment Agreement, which designates a stipulated sum owed upon termination without cause, were certainty and closure. Interpreting the agreement so as to leave mitigation in play is contrary to these objectives.

[58] Indeed, the complete release contained in para. 33 of the Employment Agreement dispels any doubt that certainty and finality were the respondent's goals. The release makes clear that the respondent intended that the terms of the contract would preclude resort to the courts.

[59] Despite the care that was taken to prepare an agreement that would avoid a dispute over entitlement, the Employment Agreement is silent regarding mitigation. In my view, the parties did not intend that mitigation would come into play in the termination of the appellant.

(5) Conclusion

[60] In summary, the application judge erred in deciding that an agreement specifying a fixed notice period, in the event of dismissal without cause, was akin to damages *in lieu* of reasonable notice at common law. This mischaracterization led him to wrongly conclude that there was a presumption that the appellant had a duty to mitigate and that, since the agreement was silent in respect of mitigation, the presumption had not been rebutted. On this basis, he determined – wrongly in my view – that the parties intended, at the point of contracting, that mitigation would be applicable to the calculation of damages upon termination.

[61] Although decisions of trial courts appear to go both ways on the issue in this appeal, the preponderance of appellate jurisprudence supports the view that, where an employment agreement contains a stipulated entitlement on

termination without cause, the amount in question is either liquidated damages or a contractual sum. Either way, mitigation is irrelevant. This conclusion is based on the following reasoning:

- By contracting for a fixed sum the parties have contracted out of the *Bardal* "reasonable notice" approach or damages *in lieu* thereof. There is no material difference whether the quantum contracted for is fixed or readily calculable from the terms of the agreement.
- By specifying an amount, the stipulated quantum is characterized as either liquidated damages or a contractual sum.
- Mitigation is a live issue at law only where damages are at large, i.e. damages *in lieu* of reasonable notice. Mitigation is not applicable if the damages are either liquidated or a contractual sum.
- It would be unfair to permit an employer to opt for certainty by specifying a fixed amount of damages and then allow the employer to later seek to obtain a lower amount at the expense of the employee by raising an issue of mitigation that was not mentioned in the employment agreement.
- It is counter-intuitive and inconsistent for the parties to contract for certainty and finality, and yet leave mitigation as a live issue with the uncertainty, lack of finality, risk and litigation that would ensue as a consequence.

- Thus, where an agreement provides for a stipulated sum upon termination without cause and is silent as to the obligation to mitigate, the employee will not be required to mitigate.
- Moreover, a broad release in an employment agreement, as here, demonstrates an intention to avoid resort to the courts, confirms a desire for finality, and bolsters a finding that the parties intended that mitigation would not be required unless the agreement expressly stipulates to the contrary.

[62] I find the decisions of the appellate courts referred to in these reasons to be persuasive and I adopt their reasoning. From a practical standpoint, it is worth repeating that if parties who enter into an employment agreement specifying a fixed amount of damages intend for mitigation to apply upon termination without cause, they must express such an intention in clear and specific language in the contract.

E. DISPOSITION

[63] I would allow the appeal and set aside the decision of the application judge. A declaration will issue that the appellant is entitled to the amount of salary *in lieu* of notice specified in the Employment Agreement notwithstanding any salary earned from his new employer.

[64] The costs on the application shall be reversed in favour of the appellant and the appellant shall have his costs of the appeal fixed in the amount of $6,946.31, inclusive of taxes and disbursements.

Released: June 21, 2012 “WKW”

“W.K. Winkler CJO”
“I agree Janet Simmons J.A.”
“I agree E.A. Cronk J.A.”
“I agree Robert P. Armstrong J.A.”
“I agree David Watt J.A.”