

**CITATION:** Brito v. Canac Kitchens, 2011 ONSC 1011  
**COURT FILE NO.:** 05-CV-294379 PD1  
**DATE:** 20110218

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:** )  
)  
FRANK BRITO, RENE FIGUEROA, ) Peter A. Grunwald, for the Plaintiff, Luis  
BRUNO LAGO, ALBINO MELO, LUIS ) Romero Olguin (all other Plaintiffs having  
ROMERO OLGUIN, EDUARDO ) discontinued their claims)  
STURLA-HORTAL, KIM LY TIEN AND )  
SOUHEIL (SAM) WAHAB )  
)  
Plaintiffs ) David J. G. McKechnie, for the Defendant  
)  
- and - )  
)  
CANAC KITCHENS A DIVISION OF )  
KOHLER CANADA CO., COMPAGNIE )  
KOHLER CANADA )  
)  
Defendant )  
)  
) **HEARD:** January 17, 18, 19 and 20, 2011  
) **DECISION RELEASED:** February 18,  
) 2011

2011 ONSC 1011 (CanLII)

**ECHLIN J.**

**REASONS FOR DECISION**

**I. INTRODUCTION:**

[1] Over the past 200 years, Canadian employment law has evolved dramatically. Workers in the 19<sup>th</sup> Century sometimes faced jail for workplace transgressions. In other instances, legalized corporal punishment was administered if servants displeased their masters. In British Columbia, legalized discrimination against Chinese workers was widespread and enshrined in legislation. The 19<sup>th</sup> Century Magistrates, who enforced the laws, tended to favour employers. Although it did not occur overnight, the 20<sup>th</sup> Century witnessed significant changes in the way in which workers were treated. It may now be fairly and generally asserted that today, in the absence of a voluntary resignation, or serious misconduct on the part of the employee, Canadian

employers must dismiss their employees with proper notice or pay in lieu thereof. If the latter, they must “make the employee whole” for the common law period of reasonable notice.

## **II. THE PARTIES:**

[2] The Defendant, Canac, has fabricated cabinetry for kitchens, bathrooms and other family rooms for many years. The Plaintiff, Mr. Luis Romero Olguin, now 63 years old, immigrated to Canada from Chile in the fall of 1979. From 1979 until July 15, 2003, he worked for Canac. In 2003, he was dismissed without cause at the age of 55. He was given the statutory minimum payment of 31.79 weeks after nearly 24 years of service, laterally as a team leader at a total annual compensation of between \$66,120.37 and \$71,691.22, plus benefits for the statutorily mandated minimum period of eight weeks.

[3] Canac has regularly chosen to litigate its many disputes with its employees in the Superior Court of Justice (Ontario) as summarized and listed by Herman J. in *Cardenas v. Kohler Canada Co.*, 2009 CanLII 17976 (Ont. S.C.); D. M. Brown J., in *Maldovanyi v. Kohler Ltd.*, 2009 CanLII 7094 (Ont. S.C.); and Strathy J. in *Munoz v. Canac Kitchens, a division of Kohler Canada Co.*, 2008 CanLII 63151 (Ont. S.C.). In this instance, Canac contests the length of Mr. Luis Romero Olguin’s admitted without cause notice period, his mitigation efforts, and his entitlement to benefit coverage claims.

## **III. THE FACTS:**

[4] The facts are straightforward and largely not in dispute. Canac led no evidence at this trial and was content to cross-examine Mr. Luis Romero Olguin and the other plaintiffs’ witnesses only. I was advised by Mr. McKechnie that the claims advanced by the other seven plaintiffs in this action were all eventually settled prior to the inception of this trial.

[5] On July 15, 2003, Canac dismissed Mr. Luis Romero Olguin without cause as a result of a restructuring and not as a result of dissatisfaction with his work. Mr. Luis Romero Olguin mitigated his damages on August 1, 2003 by securing alternate employment with Cartier Kitchens at a much lower rate of remuneration. In the 15 months following his re-employment, he earned \$53,074.14.

[6] On November 5, 2004, Mr. Luis Romero Olguin underwent surgery for laryngeal cancer, received chemoradiation treatment, and a tracheostomy tube was inserted in his throat until June 1, 2005. Further cancer surgeries were conducted on November 27, 2008, May 28, 2009, October 4, 2009, and even more surgeries are contemplated in the future. Regrettably, Canac only provided Mr. Luis Romero Olguin with eight weeks’ disability coverage upon his dismissal and Cartier never offered disability coverage as part of its compensation package for the entire period of reasonable notice at law.

## **IV. THE ISSUES:**

- a) What, if any, period of notice is Mr. Luis Romero Olguin entitled to beyond the 31.79 weeks provided by Canac and how should it be valued?
- b) What, if any, additional damage entitlements, are owed to Mr. Luis Romero Olguin?

#### **IV. THE APPLICABLE PERIOD OF REASONABLE NOTICE:**

[7] It has been observed by former Chief Justice McRuer in *Bardal v. Globe & Mail Ltd.*, [1960] O.W.N. 253 (H.C.J.) at p. 255:

There could be no catalogue laid down as to what was reasonable notice in particular classes of cases. The reasonableness of the notice must be decided with reference to each particular case, having regard to the character of the employment, the length of service of the servant, the age of the servant and the availability of similar employment, having regard to the experience, training and qualifications of the servant.

[8] The existence of any real or imagined “rule of thumb” has been ruled out by the Court of Appeal for Ontario in *Minott v. O’Shanter Development Co.*, [1999] O.J. No. 5 (C.A.).

[9] Accordingly, having regard for the relevant legal considerations and the facts outlined in paragraph 2 herein, I fix and award the Plaintiff a period of notice of 22 months. I further fix Mr. Luis Romero Olguin’s total annual cash compensation at \$71,000.00 or \$5,916.67 per month.

[10] Mr. Luis Romero Olguin is clearly entitled to “be made whole” for the period July 15, 2003 (the date of his dismissal) to November 6, 2004 (the date when he became disabled). This results in an entitlement of nearly 16 months at \$5,916.67 per month less the agreed upon statutory payments of \$36,157.95 paid by Canac and less the Plaintiff’s earnings from Cartier of \$53,074.14.

[11] It is not surprising that Mr. McKechnie conceded a notice period of less than 16 months in argument, although Canac at no time advanced any compensation to Mr. Luis Romero Olguin, beyond the statutory minimums. Later, he modified his alternate notice period submissions to 16 to 19 months.

#### **VI. THE “DISABILITY QUESTION”:**

[12] How should the law deal with the events of the period of November 6, 2004 [the disability date] to May 15, 2005 [the end of the 22 month notice period]? If it is to place Mr. Luis Romero Olguin into the position he would have been in had Canac provided him with working notice, he would have received his regular cash employment compensation, plus all benefit coverages for the entirety of his 22 month notice period at law.

[13] Canac consciously chose not to make alternative arrangements to provide its loyal, long-service employee with replacement disability coverage. Rather, it chose to go the “bare minimum” route. It provided only the statutory minimums in pay and benefits and then gambled that he would get another job and stay well. When it lost that gamble, it chose to litigate this matter for over five years. When confronted with its potential significant exposure, it raised the argument that Mr. Luis Romero Olguin failed to mitigate his potential damages by purchasing a replacement disability policy.

[14] I reject that argument. The onus is upon Canac to establish the Plaintiff’s failure to mitigate. Canac has failed to do so in this instance. Insufficient evidence was led to show that comparable coverage would have been available and would have provided Mr. Luis Romero Olguin with comparable coverage. While Mr. McKechnie conceded that in this setting, the law transforms the employee into a “notional employee”, he argued that Mr. Luis Romero Olguin failed to satisfy the “actively at work” requirement contained in the policy wording. I reject this argument and find it to be circular logic to argue that, if the Plaintiff was to be deemed a “notional employee”, then how can it be asserted that he was “not actively at work”?

[15] Canac then conceded that if those defences failed, then Mr. Luis Romero Olguin is eligible for STD coverage. The parties have agreed that these entitlements total: \$9,078.94.

[16] After the 17 weeks of STD coverage expired, the question then arises: Is Mr. Luis Romero Olguin entitled to receive damages as a result of loss of LTD coverage. Again, Canac advanced a number of policy defences, none of which succeed in this instance. The plaintiff has discharged his evidentiary burden that he is, “totally disabled” by both *viva voce* evidence and medical evidence. It then urged that the insurance policy contractually prohibited recovery. I disagree. As the costs of the Canac disability coverage were contributed to by Mr. Luis Romero Olguin, the Supreme Court of Canada has previously decided this issue in *Sylvester v. British Columbia* [1997] S.C.J. No. 58. In addition, Pattillo J. has previously ruled on this very issue *vis-à-vis* Canac in *Contreras v. Canac* [2010] O.J. No. 528 (S.C.). I agree. I therefore award Mr. Luis Romero Olguin compensation at the rate of \$5,916.67 for the period from November 6, 2004 to May 15, 2005, plus LTD benefits of an agreed-upon monthly amount of \$2,096.04 from March 4, 2005 to March 5, 2007, in addition to the STD benefits referenced previously in paragraph 15 of \$9,078.94.

[17] Finally, Canac has urged that the “any occupation” requirement should end its liability (if any) to Mr. Luis Romero Olguin for benefits from March 6, 2005 to age 65. Again, it has failed to discharge its evidentiary burden. I fix and award the sum of \$146,723.00 for damages to Mr. Luis Romero Olguin for loss of LTD benefits from March 6, 2005 to the outset of trial. The present value of the remainder of Mr. Luis Romero Olguin’s LTD entitlements to his 65<sup>th</sup> birthday is a further \$47,941.00.

**VII. ANCILLARY DAMAGES:**

[18] Having regard for Canac's cavalier, harsh, malicious, reckless, outrageous and high-handed treatment of Mr. Luis Romero Olguin, I award a further \$15,000.00 in damages relating to its "hardball approach".

[19] Pursuant to the Supreme Court of Canada's decision in *Honda Canada Inc. v. Keays* [2008] 2 S.C.R. 362, I might have considered awarding "moral damages". However, as indicated in Natalie C. MacDonald, *Extraordinary Damages In Canadian Employment Law*, Toronto: Carswell, 2010 at pp. 33-168 and 812-815, the relatively new common law head of damages, in this post-*Wallace* world, requires considerable specificity in pleading and further evidence which was not presented at this trial.

### **VIII. COSTS:**

[20] The parties were nearly in agreement with their costs submissions. Mr. McKechnie conceded that, if successful, the Plaintiff should receive \$90,000.00 inclusive of disbursements and applicable taxes. While Mr. Grunwald sought slightly more, I am of the view that \$90,000.00 is fair and reasonable, within the contemplation of the parties, and in keeping with the principles contained in *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 72 O.R. 291 (C.A.). I fix and award such amount subject to the provisions of the final paragraph of these Reasons.

[21] Should there be "other considerations" of which I am currently unaware, and, in the unlikely event that counsel are unable to resolve matters consensually, they should contact my judicial assistant by 12:00 noon February 28, 2011 and I will arrange to receive and consider further written costs submissions in a length and format to be advised.

[22] Subsequent to the release of these Reasons, counsel jointly advised that a Rule 49 offer had been made which would affect the cost disposition. After receiving submissions, I fix and award an all-inclusive cost award of \$125,000.00 inclusive of disbursements and applicable taxes in lieu of the amount referenced in paragraph 20 herein.

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ECHLIN J.

**Released:** February 18, 2011

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**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

FRANK BRITO, RENE FIGUEROA, BRUNO LAGO,  
ALBINO MELO, LUIS ROMERO OLGUIN,  
EDUARDO STURLA-HORTAL, KIM LY TIEN AND  
SOUHEIL (SAM) WAHAB

Plaintiffs

**- and -**

CANAC KITCHENS A DIVISION OF KOHLER  
CANADA CO., COMPAGNIE KOHLER CANADA

Defendant

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**REASONS FOR DECISION**

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ECHLIN J.

**Released:** February 18, 2011