

COURT OF APPEAL FOR ONTARIO

CITATION: Hann v. GXS Canada Inc., 2015 ONCA 211

DATE: 20150331

DOCKET: C59506

Lauwers, Hourigan and Pardu JJ.A.

BETWEEN

Mark Hann

Plaintiff (Appellant)

and

GXS Canada Inc. and Open Text Corporation

Defendants (Respondents)

Daniel A. Lublin and Ozlem Yucel, for the appellant

Evert van Woudenberg, for the respondents

Heard: March 6, 2015

On appeal from the order of Justice Edward P. Belobaba of the Superior Court of Justice, dated October 2, 2014.

ENDORSEMENT

[1] Mark Hann appeals from an order awarding him summary judgment against his former employer, GXS Canada Inc. and its parent company, Open Text Corporation.

[2] The appellant was 58 years old when he was terminated after 34 years of employment with GXS. He assumed positions of greater and greater

responsibility over his term of employment. When the appellant was terminated without cause, he was Manager of software engineering and Vice-president of Canadian operations. At the time of termination, GXS had a Layoff Policy requiring it to give the appellant a lump sum of 81 weeks' pay in lieu of notice, a job retraining allowance and other benefits. GXS did not comply with the Layoff Policy, and initially did not acknowledge that it existed. Instead, GXS provided the appellant with 52 weeks' pay in lieu of notice, payable on a continuing basis over the following year rather than as a lump sum.

[3] The appellant sued, initially seeking damages for failure to comply with the Layoff Policy, and in the alternative, damages for wrongful dismissal based on failure to give reasonable notice of termination.

[4] The appellant brought a motion for leave to amend his statement of claim to claim full common law damages for wrongful dismissal without reasonable notice, with damages claimed in the alternative for failure to comply with the Layoff Policy. He also moved for summary judgment on the statement of claim as amended. The respondents did not file any material on the motion.

[5] The parties have arrived at an agreed statement of facts, which describes what transpired on the motion:

1. The matter was called in open court and Justice Belobaba advised he was inclined to rule that the Layoff Policy would remain applicable as the basis for the plaintiff's relief, notwithstanding it had not been complied with to date by

the defendant, and that the plaintiff should also receive an award of substantial costs.

2. Justice Belobaba invited counsel to consider the matter further outside the courtroom with these thoughts in mind. The parties agreed to re-attend on Justice Belobaba in chambers. With Justice Belobaba's earlier statements in mind, the parties requested an endorsement that the Layoff Policy would be fully applicable to the plaintiff, and the defendant agreed not to oppose an award of complete indemnity costs to date in favour of the plaintiff. That is the judgment signed by Justice Belobaba.
3. The parties each understood that an appeal from the endorsement of Justice Belobaba was available as this was not an Order on consent.

[6] The order ultimately issued by the motion judge provided that:

- The defendant is to comply in full with the terms of the Layoff Policy;
and
- The defendant is to pay legal fees in the sum of \$45,840.44, all-inclusive, to the plaintiff's solicitor within 30 days.

[7] The appellant now argues that the motion judge erred in failing to grant leave to amend his statement of claim and in failing to consider his primary claim for damages based on common law notice of termination. He submits that, having repudiated the Layoff Policy, GSX was not entitled to rely on that policy to pay him a lower amount than he would have received based on his common law notice entitlement.

[8] The agreed statement states: “the parties requested an endorsement that the Layoff Policy would be fully applicable to the plaintiff, and the defendant agreed not to oppose an award of complete indemnity costs to date in favour of the plaintiff.” We see no error in the motion judge making the order requested by both parties. If the appellant wanted to pursue damages based on the common law reasonable notice period, he should have asserted that claim before the motion judge, rather than requesting the order that was made.

[9] There is no basis for this court to intervene.

[10] Accordingly, the appeal is dismissed with costs to the respondents, fixed at \$4000 all-inclusive.

“P. Lauwers J.A.”

“C.W. Hourigan J.A.”

“G. Pardu J.A.”