COURT OF APPEAL FOR ONTARIO

CITATION: Design Filtration Microzone Inc. v. Cunningham, 2018 ONCA 468
DATE: 20180518
DOCKET: C64414

Hoy A.C.J.O., Brown and Trotter JJ.A.

BETWEEN

Design Filtration Microzone Inc.

Appellant (Defendant)

and

Craig Cunningham

Respondent (Plaintiff)

Nigel McCready, for the appellant

D. Bruce Sevigny, for the respondent

Heard and released orally: May 16, 2018

On appeal from the order of Justice Calum MacLeod of the Superior Court of Justice, dated September 7, 2017.

REASONS FOR DECISION

[1] The appellant dismissed the respondent, without cause, on December 16, 2016. At the time, the respondent was 55 years of age.

[2] The motion judge granted summary judgment in favour of the respondent, among other things, ordering the appellant to pay the respondent 12 months'

salary, benefits and pension contributions in lieu of notice, and a $12,000 bonus for the year of termination. The appellant takes issue with both of these aspects of the judgment.

[3] The appellant submits that in awarding the respondent a notice period of 12 months, the motion judge placed too little emphasis on the fact that the respondent is a professional engineer with approximately two decades of management experience, and therefore should be attractive to potential employers; and too much emphasis on the respondent's age, the character of his employment, and the specialized nature of his industry. The appellant renews its argument that a notice period of 8 to 10 months is appropriate.

[4] We are not persuaded that there is any basis to interfere with the motion judge's conclusion that a 12-month notice period is justified on the facts of this case. The motion judge's determination of the period of reasonable notice is entitled to deference from this court. The motion judge made no error in principle. He considered the relevant factors and 12 months' notice is reasonable in the circumstances. The appellant's submission that the motion judge accorded too little weight to some relevant factors, and not enough to others, is an attempt to re-argue the motion.

[5] Nor are we persuaded that there is any basis to interfere with the motion judge's finding of fact that the appellant would have paid the respondent a

discretionary bonus for 2016 if the decision to terminate him had not been taken. His finding is supported by the record, including the discovery evidence of the appellant's President that he intended to pay the respondent a performance bonus for 2016 right up until the point that the appellant's parent company advised him that the respondent was to be terminated.

[6] As to the quantum of the bonus, we reject the appellant's argument that this court's decision in *Paquette v. TeraGo Networks Inc.*, 2016 ONCA 618, 269 A.C.W.S. (3d) 495 required the motion judge to average the bonuses the respondent received in the three years prior to dismissal. In *Paquette*, the court simply endorsed a calculation that the terminated employee in that case proposed and that had been utilized in another case. The court noted that the employer did not offer any evidence to suggest an alternative amount that the employee would have received by way of bonus. The quantum fixed by the motion judge in this case was reasonable, having regard to the amount of the discretionary bonuses paid to the respondent in the years that he received them and the appellant's profit for 2016, before a reserve for this litigation was taken.

[7] Accordingly, the appeal is dismissed. The respondent shall be entitled to his costs of the appeal fixed in the amount of $10,000, including disbursements and HST.

"Alexandra Hoy A.C.J.O."
"D.M. Brown J.A."

"G.T. Trotter J.A."