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COURT OF APPEAL FOR ONTARIO

MCMURTRY C.J.O., MACPHERSON and ARMSTRONG JJ.A.

B E T W E E N :)	
)	
KAREN TAYLOR)	Daniel J. Fife
)	for the appellant
)	
Plaintiff (Appellant))	
)	
- and -)	
)	
DYER BROWN)	Ross R. Nicholson
)	for the respondent
)	
Defendant (Respondent))	
)	
)	Heard: October 5, 2004

On appeal from the judgment of Justice Terrence L. J. Patterson of the Superior Court of Justice dated November 19, 2003.

BY THE COURT:

[1] The appellant appeals from the judgment of Justice Terrence L. J. Patterson, dated November 19, 2003, in which he awarded her damages for wrongful dismissal equivalent to 12 months pay, based on her rate of remuneration at the time of her dismissal, less any agreed-upon deductions for monies received by her during the notice period.

[2] The principal issue at trial was whether the respondent employer law firm, Dyer Brown, could offer the appellant 18 months working notice (the “first notice”), and then unilaterally withdraw that notice some three weeks later, by offering her six months pay in lieu of notice (“second notice”).

Facts

[3] The appellant was employed by the respondent for 21 years as a clerk, working primarily in the real estate department. She commenced working for the respondent employer, a full-service law firm in London, Ontario in May of 1978. The appellant

worked primarily for one partner, Wayne Holmes, who in September 1999 first alerted her that her job was in jeopardy.

[4] On October 19, 1999, the appellant was advised by two partners of the firm that her employment would be ending in 18 months time. Four days later, on October 23, 1999, Mr. Holmes died unexpectedly.

[5] On November 17, 1999, the appellant was given a formal notice of termination providing her with 18 months working notice. She was 52 years old at the time. The appellant was very distraught both by reason of the death of Holmes, whom she regarded as a close friend, and by her notice of termination. She consulted her doctor who advised her to take time off work to deal with her stress and also referred her to a psychologist for counselling. That same day, the appellant provided a letter from her doctor to a partner in the respondent law firm in which it was stated that the appellant qualified for sick leave.

[6] At the time the appellant received the first notice in October 1999, the respondent law firm was in financial difficulty. Several law partners had retired or left the firm. These departures, together with a slump in the real estate market, adversely affected the firm's revenues. In an attempt to save the firm, the respondent decided to reduce overhead, which included ending the appellant's employment.

[7] On December 2, 1999, Taylor was advised by her physician to take another two weeks off work in order to allow her to cope with her stress. On December 6, 1999, the appellant received a letter that contained terms which provided for her immediate dismissal with six months pay in lieu of notice, and an immediate termination of her group benefits. The loss of the benefits meant that she could not continue with her psychological counselling.

[8] At the time of her termination, the appellant's annual remuneration, inclusive of benefits, amounted to \$41,832.86. By September 2000 she had found part-time work with another lawyer, essentially doing secretarial work. She did not secure a second part-time position until February 2002.

Reasons for Judgment

[9] The trial judge found that the only valid notice was the first notice of 18 months and, accordingly, that the respondent was estopped from giving a second notice since the appellant had relied upon the terms of the first notice. However, without giving reasons, the trial judge awarded the appellant 12 months payment in lieu of notice commencing on her last day of work which was December 3, 1999.

[10] On the issue of mitigation of damages, the trial judge found that there was no failure on the part of the appellant to mitigate.

[11] The trial judge also found that the respondent had acted in good faith in terminating the appellant's employment and therefore she was not entitled to aggravated damages. He held that the respondent law firm was in financial difficulties and while estopped from giving the appellant a second notice, it had done so in an attempt to be fair to all its employees.

[12] The appellant seeks relief on the following issues:

- (a) the trial judge erred in awarding a notice period of 12 months pay in lieu of notice, after having determined that 18 months working notice was a reasonable period of notice;
- (b) the respondent acted in bad faith in dismissing the appellant which should lead to an increase in the length of the notice period;
- (c) the appellant submits that she should have been awarded pre-judgment interest.

[13] As stated above, the decision of the trial judge does not indicate why, after having determined that 18 months working notice was appropriate in the circumstances, he awarded 12 months pay in lieu of notice. Therefore, the first issue that must be resolved on this appeal is whether there is a functional difference in law between these two forms of notice warranting the provision of a shorter notice period when providing a payment in lieu of notice as opposed to working notice of termination.

[14] While the purpose of the notice period is to provide time for employees to find alternate employment, a task made more difficult while the employee undertakes to fulfill the terms of working notice, we are of the view that there is no functional difference at law between working notice and payment in lieu of notice.

[15] Proper notice of termination is an implied term of the contract of employment; payment in lieu of notice is not. We agree with the opinion of Lambert J.A in *Dunlop v. British Columbia Hydro and Power Authority* (1988), 32 B.C.L.R. (2d) 334 (C.A.), when he states at pp. 338-39 that payment in lieu of notice is seen as "an attempt to compensate for [the employer's] breach of the contract of employment, not as an attempt to comply with an implied term of the contract of employment". The quantum of a payment in lieu of notice, therefore, is not calculated in accordance with the terms of the contract, but rather is a means by which an employer may terminate an employee contrary to its common law duty to give reasonable notice of termination, without incurring any liability.

[16] This position is supported by the wording of the *Employment Standards Act*, R.S.O. 1990, c.E.14 (the "Act"), as it stood at the time of Taylor's dismissal. Subsection

57(14) of the Act authorizes the provision of pay in lieu of notice in the amount that would have been earned if proper working notice had been provided.

Unilateral Amendment of the Notice Period

[17] Having found that there is no functional difference at law between working notice and pay in lieu thereof, the next issue is whether the respondent was entitled to unilaterally amend the notice period after the first notice.

[18] The trial judge held that the respondent was estopped from amending the notice period. Relying on G.H.L. Fridman's *The Law of Contract*, 4th ed. (Toronto: Carswell 1999), he wrote the following at para. 11 of his reasons for judgment: "There was an existing legal relationship, a clear promise, reliance, action by Karen Taylor to her detriment and she came to court with 'clean hands'."

[19] With respect, we cannot agree. There was no evidence before the trial judge of any reliance or action by the appellant to her detriment. These factual elements are necessary pre-conditions to a finding that the respondent was estopped from attempting to alter the nature or extent of the notice. Given that the facts of this case do not support a finding of estoppel, the question remains as to whether there is some other legal principle that would have precluded the respondent from unilaterally amending the notice period.

[20] In our view, it is unnecessary to answer this question to dispose of this appeal. The trial judge found, and we agree, that the first offer of 18 months working notice was reasonable. It is clear, therefore, that regardless of whether it was open to the respondent to unilaterally amend the first notice in favour of some other reasonable notice period, the second notice of six months pay in lieu of notice was not reasonable. There was no objective change in any of the relevant factors for determining reasonable notice in the short three week period between the first and second notices that would justify the amendment.

[21] It is on the basis of a consideration of what would constitute reasonable notice in the circumstances, and not the law of estoppel, that the first notice is the only valid one and the employer ought to be bound by it.

Extension of the Notice Period

[22] In determining what constitutes reasonable notice, it is open to the court to consider employer bad faith as a factor warranting an extension of a reasonable period of notice. Taylor submits that Dyer Brown acted in bad faith in the manner of dismissal, and that consequently the trial judge erred in failing to recognize this as a factor justifying an extension of the notice period pursuant to the principles established in *Wallace v. United Grain Growers Ltd.*, [1997] S.C.R. 701.

[23] We do not agree. Although Dyer Brown acted with what can be characterized as a lack of sensitivity towards Taylor's circumstances, it cannot be said that its conduct was motivated by bad faith sufficient to justify an extension to the notice period. While Dyer Brown could have been more forthright when presenting Taylor with the second notice, we are not prepared to disturb the finding of the trial judge that the respondent did not act in bad faith.

Pre-Judgment Interest

[24] Finally, the appellant submits that the trial judge erred in failing to award pre-judgment interest, in accordance with the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 and the *Courts of Justice Act*, R.S.O. 1990, c. C.43. While Taylor did specifically plead pre-judgment interest in her statement of claim, the issue was not considered by the trial judge. The parties had agreed that the question of what constituted a reasonable notice period would be decided by the trial judge but that counsel would determine the actual monetary amount generated by that notice period in view of the requisite deductions. For this reason, the issue of entitlement to and quantum of pre-judgment interest was not addressed by the trial judge.

[25] Although Dyer Brown took a different position in its written submissions, Mr. Nicholson, counsel for the respondent, graciously consented on behalf of his client to overlook what may be described as a procedural irregularity in seeking pre-judgment interest on appeal rather than at trial. As a result, the issue was resolved by counsel and we commend Mr. Nicholson for his professionalism in that regard.

DISPOSITION

[26] The appeal is allowed. The appellant is entitled to 18 months pay in lieu of notice and to pre-judgment interest at 4.8 per cent. The appellant is also entitled to her costs of the trial and the appeal, fixed at \$44,000, inclusive of disbursements and GST.

RELEASED: November 16, 2004 ("RRM")

"R. Roy McMurtry C.J.O."

"J. C. MacPherson J.A."

"Robert P. Armstrong J.A."