Court of Queen's Bench of Alberta

Citation: Oostlander v Cervus Equipment Corporation, 2022 ABQB 200

Date: 20220309
Docket: 2001 07984
Registry: Calgary

Between:

Steven Oostlander

Plaintiff

- and -

Cervus Equipment Corporation

Defendant

Reasons for Judgment
of the
Honourable Madam Justice M.H. Hollins

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[1] This is the disposition of a summary trial for wrongful dismissal.

[2] The Plaintiff, Mr. Oostlander, worked for the Defendant company, Cervus Equipment Corporation, for 36 years, from July 4, 1984 to July 3, 2020. He was a heavy-duty mechanic, servicing agricultural equipment in Cervus' location in Bassano, Alberta.

[3] Cervus made a business decision to centralize its equipment servicing in Brooks, Alberta, about 50 km away from Bassano and to convert the Bassano location into a retail branch to sell equipment parts. In May of 2018, Cervus notified Mr. Oostlander by letter that his employment would terminate about 16 months later on September 11, 2019, at the time Cervus anticipated it would be ready to close the servicing arm of its Bassano location.

[4] That did not happen, at least not on that timeline. As the September 11, 2019 date approached, Mr. Oostlander inquired about the status of that termination notice. He had apparently heard that Cervus had renewed its lease of the Bassano premises for another five years. He interpreted that as meaning the move to Brooks might not happen. Although that was a misinterpretation, Mr. Oostlander says he was told a few days before the anticipated termination date that he "was being kept on" notwithstanding the May 22, 2018 notice of termination.

[5] Indeed, that is what happened. Mr. Oostlander continued to work with no further discussion about termination until June 3, 2020. Relying on the previous working notice, Cervus then gave Mr. Oostlander 1 months' notice of termination, to be effective on July 3, 2020. When Mr. Oostlander objected to this and retained counsel who wrote to Cervus, Cervus offered Mr. Oostlander a job in Brooks, doing the same work for the same rate of pay.

[6] Mr. Oostlander rejected that offer and sued for wrongful dismissal. He seeks pay in lieu of notice of termination of 24 months' wages and benefits less the income he earned in that period. Cervus says that:

1. The May 18, 2018 notice of termination should be treated as effective notice, bringing the total working notice provided to Mr. Oostlander to 17 months, which Cervus says is adequate;
2. Even if adequate notice of termination was not provided, Mr. Oostlander could have completely mitigated any losses by taking the position in Brooks;
3. Even if it were not reasonable to expect him to do so, his effective notice period beginning July 3, 2020 should be no more than 18 months; and
4. He has otherwise failed to mitigate his losses and his damages should be reduced in any event.

[7] I find that Mr. Oostlander has proven his case on a balance of probabilities and is entitled to damages. Because I so find, I will review the Defendant's arguments in turn.

The Effect of the May 22, 2018 Working Notice

[8] Cervus argued that the May 22, 2018 working notice survived the employer's decision to keep Mr. Oostlander on beyond that date. Cervus concedes that it did not terminate Mr. Oostlander's employment on September 11, 2019 as promised.

[9] Internal emails show that, by June of 2020 when Cervus was actually ready to terminate Mr. Oostlander's employment, it was not sure whether the original termination notice could be treated as effective notice. It opted to treat the original termination notice as effective and therefore provided only one months' additional notice of termination.

[10] However, the original termination notice was of no effect once that termination date passed and Mr. Oostlander's employment was continued. Section 60 of the *Employment Standards Code*, RSA 2000, c.E-9 reads as follows:

> A termination notice is of no effect if an employee continues to be employed by the same employer after the date specified for termination of employment.

[11] Cervus says that Mr. Oostlander was told in September of 2019 that the move to Brooks was simply delayed and that Cervus would employ him for as long as there was still servicing

work available in Bassano. Mr. Oostlander disputes this. At his Questioning. Mr. Oostlander clearly and repeatedly said that he was told only that he was being kept on and was given no further information about the company's plans.

[12] If I had to choose between these versions, I would accept Mr. Oostlander's telling. The person he was said to have spoken with, Doug Jolly, provided no direct evidence by Affidavit or by cross-examination or Questioning. Therefore, any evidence from Cervus about what Mr. Jolly said to Mr. Oostlander is hearsay. While not automatically inadmissible for that reason, I see no compelling issues of necessity (i.e. no one told me why Mr. Jolly could not provide first hand evidence of this conversation), nor do I find it inherently reliable when stacked up against the only other party to that conversation, the Plaintiff.

[13] But in any event, even if I did decide that factual dispute in favour of Cervus, telling Mr. Oostlander that they would keep him on until further notice is not effective notice of termination. Notice of termination must be specific in order to be effective. In *Boutcher v Clearwater Seafoods Ltd. Partnership*, the Nova Scotia Court of Appeal said this:

> Sufficient and effective working notice terminates an employment contract: *Evans v. Teamsters, Local 31*, [2008] 1 S.C.R. 661 (S.C.C.), ¶ 28-29. England, Wood and Christie, *Employment Law in Canada* (LexisNexis Butterworths 4th ed-looseleaf), ¶ 14.75 states the requirements of effective working notice:
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> > The courts require that, in order to be effective in starting the notice period countdown, the notice itself must be "specific, unequivocal...and clearly communicate[d] to the employee that his employment will end on a certain date". The use of precise or formal language is not required provided that the employer's intention to end the relationship is objectively manifest.
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> *Boutcher v Clearwater Seafoods Ltd. Partnership*, 2010 NSCA 12 at para.31

[14] This principle was articulated even more clearly by the Ontario Court of Appeal in *Prinzo v Baycrest Centre for Geriatric Care*:

> Notice of termination need not use the words "you are hereby dismissed effective . . ." or some such equivalent. Notice of termination must, however, lead a reasonable person to conclude that his or her employment is at an end as of some date certain in the future: *Gibb v. Novacorp International Consulting Inc.* (1990), 48 B.C.L.R. (2d) 28 (B.C. C.A.), at 34. The fact that no effective date of termination is to be found in a letter indicating that employment is shortly to end is a circumstance that may support an inference that the requirement of specific notice has not been met. All of the circumstances must, however, be considered: *Gibb*, *supra*, at 34. In*MacAlpine v. Stratford General Hospital* (1998), 38 C.C.E.L. (2d) 1 (Ont. C.A.) the employee was advised by letter on January 20th, 1992 that her position as part-time coordinator at the hospital would become "redundant . . . effective 1992 06 15." That letter made it clear that MacAlpine's position would end June 15, 1992. The issue was whether the invitation to MacAlpine to apply for other jobs detracted from the clarity of the notice given, and this court held that it did not. Notice cannot be assumed to have been given if an employee is simply warned that his or her job will probably

> be eliminated "within six months to a year"; notice must be clear and unambiguous: *Ahmad v. Procter & Gamble Inc.* (1991), 1 O.R. (3d) 491 (Ont. C.A.); *Prinzo v Baycrest Centre for Geriatric Care*, 2002 CarswellOnt 2263 at para. 17.

[15] Thus, an unspecified and uncertain future date for terminating the employment contract could not bridge or save the expired notice of termination from May of 2018 nor did it function to effectively begin a new period of working notice because that would have been of completely uncertain duration.

[16] I therefore find that the May 22, 2018 notice of termination was of no effect after September 11, 2019. The one months' notice of termination Mr. Oostlander was provided in June of 2020 was, by itself, insufficient notice thereof, constituting a breach of the implied term of his employment contract that the employer would provide adequate notice of termination.

Failure to Mitigate

[17] As a plaintiff claiming damages from the breach of his employment contract, Mr. Oostlander has a legal obligation to minimize those damages by doing what he can to find similar employment – or at least similarly-remunerated employment - as soon as possible.

[18] Cervus says that, had Mr. Oostlander accepted its offer of re-employment in Brooks, he could have fully mitigated his losses. The question for this Court is whether it was reasonable for Mr. Oostlander to reject that offer and with it, the opportunity to mitigate or minimize his losses.

[19] There are many cases dealing with an employee's obligation to mitigate by accepting a different position with the same employer. While these cases are highly fact-specific, we know that what is reasonable must be assessed on the basis of what a reasonable person in Mr. Oostlander's shoes would do. This involves a careful consideration of the similarities and differences between the previous job and the newly offered job. In addition, I am to consider the less tangible impacts on Mr. Oostlander of accepting the position in Brooks.

[20] It is conceded that the job in Brooks would have been very similar if not identical to the job Mr. Oostlander had in Bassano. He would have continued as a heavy-duty mechanic servicing agricultural equipment, working with some of his former colleagues in essentially the same reporting structure. He was offered the same wages and same benefits coverage. The only thing that would have been significantly different would have been the commute to work.

[21] Mr. Oostlander had lived most of his adult life in Bassano. He had worked at the same Cervus location for 36 years, which location was 4 minutes from his home. Working in Brooks would have required a 104 kilometre commute each day. Mr. Oostlander was 60 years old in the spring of 2019 when this offer of employment in Brooks was made to him. He was vocal from the beginning about his feelings that he did not want to have to drive that much every day at his age, particularly in the winter.

[22] While that commute would have been on the TransCanada highway – obviously a major highway – I take judicial notice of the fact that even our major highways can be dangerous and difficult to navigate in bad weather, particularly in the winter.

[23] Cervus sent a second letter concerning the Brooks job to Mr. Oostlander, offering a one-time payment of $8,000 to cover the increased gas and vehicle wear and tear costs associated with the commute from Bassano to Brooks.

[24] I am not convinced this $8,000 was fresh consideration at all. His termination letter of May 22, 2018 contained an offer of an $8,000 “retention bonus”; if Mr. Oostlander worked through to his anticipated termination date of September 11, 2019, Cervus would pay him $8,000. He did work through to that date but never received that retention bonus. There is some evidence that he raised this with Cervus himself and it looks to me like Cervus agreed to pay him the money but chose to recharacterize it as a one-time prospective vehicle allowance rather than the retroactive payment they already owed him.

[25] In any event, Cervus provided calculations showing that the $8,000 would pay for Mr. Oostlander’s gas for close to 2 years of employment. First of all, as current circumstances are demonstrating, fuel prices can be extremely volatile and therefore difficult to predict. Certainly, at today’s prices, $8,000 for 520 kilometres per week would not go nearly that far. That simply illustrates the fact that, had Cervus really intended to compensate Mr. Oostlander for the costs of his increased commute for an indefinite term of employment, it would have offered a more standard vehicle allowance or reimbursement for gas and wear and tear at a negotiated rate per km.

[26] Of course, had Mr. Oostlander moved to Brooks, he could have avoided the commute. But not only has he lived in Bassano most of his life, he is married and his wife works at the school in Bassano. Given the years they have lived there and the ties they have to that community, Mr. Oostlander’s decision not to relocate to Brooks for this offer was not unreasonable.

[27] Mr. Oostlander also argued that the circumstances of his termination made it unreasonable to expect him to continue working with Cervus, regardless of the change in location.

[28] I recognize that the personality conflicts and changing dynamics that can accompany an offer of re-employment with the same employer will often mean it is not reasonable to expect the employee to stay with the same employer. However, I would not have found it reasonable for Mr. Oostlander to reject this offer based solely on his treatment by Cervus.

[29] While I understand his frustration at receiving one months’ notice of termination after 36 years of employment and his skepticism of an offer to relocate to Cervus’ Bassano plant only after he retained counsel, if the offer had not required him to relocate or undertake a daily and significant commute, absent other factors I would have thought it unreasonable to refuse.

[30] There was no evidence of any animus whatsoever between Mr. Oostlander and any of his superiors. While I do not sanction the way Cervus tried to implement its business decision to move the servicing operations to Brooks without recognizing the financial obligations it had to Mr. Oostlander as a result, the decision itself was a *bona fides* business decision; *Evans v Teamsters Local 31*, 2008 SCC 20 at para.31. There was clearly no “atmosphere of hostility, embarrassment or humiliation” as referenced in the *Evans* case.

Notice Period

[31] Having found that Mr. Oostlander was wrongfully terminated and did not fail to mitigate by accepted the Brooks position, what should be his proper notice period for the purposes of calculating damages? Cervus says 18 months' notice is reasonable and Mr. Oostlander says 24 months' notice is reasonable.

[32] As demonstrated by the parties' submissions, there are always plenty of cases supporting whatever number of months is being argued as appropriate. While the case law can narrow the appropriate range for me, the determination for any particular plaintiff is case-specific.

[33] I agree with Mr. Oostlander that 24 months' notice is appropriate for the following reasons, all known to Cervus:

(a) He was 60 years of age at the time of termination;

(b) He had lived in Bassano for many years and remaining there would mean a limited number of opportunities for new and similar employment;

(c) He had had one employer for virtually all his life; and

(d) He had had one job description and one job title for virtually all his life.

[34] While I accept that Mr. Oostlander had no managerial responsibilities, that is only relevant in terms of how it affects the job opportunities available to him. In this case, those opportunities were very few, given his age and lack of other experience or advanced education. As in *Currie v Nylene Canada*, he expected to work for Cervus until his retirement.

[35] In the *Currie* case, an employee of similar age and tenure, with no advanced education and few similar employment opportunities was awarded 26 months' notice; 2021 ONSC 1922 at para. 84. It was not suggested that Mr. Oostlander should receive more than the presumptive maximum notice and I would not have found any extraordinary circumstances in any event. However, virtually all the *Bardal* factors work in Mr. Oostlander's favour and I find 24 months' notice to be appropriate.

Calculation of Damages

[36] Having found that the notice period ought to have been 24 months from July 3, 2020 to June 30, 2022, what are Mr. Oostlander's damages? His damages are calculated as the wages and compensable benefits he would have received over the notice period less any income earned during that time period.

[37] I warned counsel that I was disinclined to do their math for them. Accordingly, I am going to address the few legal issues raised regarding damages and leave it to them to finalize. In the event that counsel cannot agree, we will make arrangements for further submissions on items of contention.

[38] The parties agreed that Mr. Oostlander's base wage plus the value of his health insurance benefits averaged $5,621 per month or $134,904 over 24 months. They disagreed on the proper treatment of vacation pay and CERB benefits received, which I deal with as follows.

Vacation Pay

[39] The parties did not agree on whether vacation pay should form part of Mr. Oostlander's damages over any notice period assessed. Generally, vacation pay is included where the employer would have paid out unused vacation time, based on the history of the employment relationship; *Bhavsar v Canadian Natural Resources Ltd*, 2016 ABQB 471 at paras.26-28:

> The plaintiffs claim vacation pay calculated on any any notice period awarded. They rely on the decision in *Tanton v. Crane Canada Inc.*, 2000 ABQB 837 (Alta. Q.B.), where the Court held that unless the employee was required to take his or her vacation on a regular basis, awarding vacation pay would not result in double recovery and vacation pay should be paid for the reasonable notice period awarded. There is other case law to the same effect: *O'Donnell v. Soldan Fence and Metals (2009) Ltd.*, 2015 ABQB 764 (Alta. Q.B.).
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> As noted in *O'Donnell*, the concern of the courts is double recovery and the question is evidentiary. Was the employee obliged to use up his vacation or could he receive pay in lieu thereof? See as well: *Turner v. Westburne Electrical Inc.*, 2004 ABQB 605 (Alta. Q.B.), par's 80-83; *Bagby v. Gustavson International Drilling Co.* (1980), 24 A.R. 181 (Alta. C.A.), para. 32.

[40] In the case at bar, we know that Cervus did pay out at least some portion of Mr. Oostlander's vacation pay, based on his 2018 income information. As that is the last full year of earnings information for Mr. Oostlander's employment with Cervus, I direct that his vacation pay for 2018 be prorated to a monthly average and added to the monthly base wage payable for the 24 months.

CERB

[41] Employment Insurance benefits are generally not deducted because of the employee's obligation to repay them to the federal government; *Crisall v Western Pontiac Buick (1999) Ltd*, 2003 ABQB 255 at para.71. While no evidence was led before me of any communications between this Plaintiff and the government concerning repayment, I am satisfied that there are sufficient cases having considered this issue to feel comfortable saying that Mr. Oostlander's EI benefits should not be treated as mitigative income to be deducted from his damages.

[42] Mr. Oostlander also received some money by way of the Canadian Emergency Response Benefit, or CERB payments. These payments have been treated differently by different Canadian courts in the context of wrongful dismissal damages. While most courts have focussed on whether or not the CERB benefit will ultimately be repayable by the plaintiff to the government, in *Irotakis v Peninsula Employment Services Ltd*, 2021 ONSC 998 at para.21, the CERB benefit was not deducted, not because of any obligation to repay but because it represented only a subsistence-level, *ad hoc* benefit. I am not convinced that is the case here, nor do I find that reasoning particularly compelling.

[43] Further, I have no evidence whatsoever before me that Mr. Oostlander will be required to repay these CERB benefits. To the extent that other courts were prepared to speculate about repayment obligations based on the general financial circumstances of their respective plaintiffs, I can only say that Mr. Oostlander's earnings during his notice period might distinguish his case from those involving well-compensated senior executives; *Hogan v 1187938 BC Ltd*, 2021 BCSC 1021 as cited in *Snider v Reotech Construction Ltd*, 2021 BCPC 238 at para.61.

[44] Frankly, I prefer not to speculate at all and so, in the absence of any such proven obligation, I am assuming that Mr. Oostlander will retain his CERB benefits and so they are properly deducted from his final damage award.

Deduction of Mitigative Income

[45] Having calculated his damages over the entire notice period, we must now turn to his actual mitigation. Did he reasonably mitigate those damages? If not, what effect does that have on his award?

[46] There were no material factual disputes in terms of what Mr. Oostlander did following his termination. He collected some employment insurance benefits and some CERB benefits. He found employment in Bassano on a casual basis with Desert Sales, beginning in September, 2019. He continues to work there to this day. In addition to this, he began work as a caretake with the Grasslands School in Bassano in September, 2020, which job he also still has. His hours in Grasslands School also vary considerably. Some days, he has no hours while other days, between his two jobs, he is working in excess of full-time hours.

[47] Cervus takes the position that Mr. Oostlander has not properly mitigated his losses. It points to a job advertisement with a Bassano tire store. Mr. Oostlander said he did not apply because he was not qualified to work with personal vehicles as opposed to heavy equipment. While that explanation sounds a bit thin to me, no evidence was provided to me about the hours or compensation associated with that job anyway. Even if I thought Mr. Oostlander ought to have applied and/or taken that job if hired, I could not effectively calculate whether it would have increased his mitigative income or not.

[48] Mr. Oostlander bears the burden of proving that he has reasonably mitigated his losses. However, whether he has done so is not analyzed in perfect hindsight. He need only behave reasonably in order to meet that obligation. I find that he has done so. It was reasonable for Mr. Oostlander to want to remain in Bassano, given that he and his wife had lived there for so long and that she was employed in Bassano. Particularly given his age and his singular employment history, that meant very few opportunities for re-employment.

[49] I think that Mr. Oostlander did a perfectly reasonable job of finding ways to support himself post-termination. While the jobs he found have not paid him the same amount of money, the fact that he was re-employed relatively quickly speaks to a reasonable level of diligence in his job search.

[50] Counsel are therefore directed to complete the calculation of Mr. Oostlander's damages as follows:

Base wage/benefits of $5,621/mo X 24 months	=	$134,904
Plus average monthly vacation pay paid in 2018 X 24 mo	+	$
Less CERB benefits received July 3, 2020 to present	-	$
Less all earnings from Grasslands and Desert Sales to Feb 28/22	-	$

Less prorated earnings from Grasslands and Desert Sales[1] (for March to June, 2022, inclusive)	-	$_____
TOTAL	=	$_____

[51] This calculation should be submitted to my office as soon as possible but no later than March 31, 2022, before inclusion in the Judgment Roll. If the parties cannot agree on costs, I ask that they notify me of that as soon as possible.

Heard on the 25th day of February, 2022.
Dated at the City of Calgary, Alberta this 9th day of March, 2022.

M.H. Hollins
J.C.Q.B.A.

Appearances:

Charles Osuji and Amanda M. Jacinto
for the Plaintiff

Allie E. Laurent
for the Defendant

[1] All earnings from Desert Sales should be divided by the number of months worked there (to and including February, 2022) to arrive at a monthly average and then used to estimate the Plaintiff's likely income from that source for the last few months of the notice period. The same calculation should be done for Grasslands School.