Case Name:

Cao v. SBLR LLP

Between
Suyi Cao, Plaintiff, and
SBLR LLP, Defendant

[2012] O.J. No. 3328

Court File No. SC-11-116203-00

Ontario Superior Court of Justice
Small Claims Court - Toronto, Ontario

Z.J.C. Prattas Deputy J.

Heard: February 7 2012; written submissions,
April 5, 2012.
Judgment: June 28, 2012.

(152 paras.)

Counsel:

Kyle Magee, Duty Counsel Pro Bono Law Ontario, Counsel for the plaintiff.

Matthew Wise, Counsel for the defendant.

REASONS FOR JUDGMENT

1 Z.J.C. PRATTAS DEPUTY J.:-- The plaintiff claims $25,000.00 for damages for wrongful dismissal.

2 The defendant contends that the plaintiff was dismissed for just cause during the probation period and is therefore not entitled to any damages.

Background

3 While being employed as a Tax Accountant at the accounting firm of Soberman LLP, in the spring of 2008 the plaintiff responded to an advertisement from a job recruiter for an advertised Financial Analyst position. When she went for the interview she was informed by the recruiter Bruce Simon that he was close friends with a partner at the defendant and that he may have a tax position available for her there.

The job posting

4 The defendant's online job posting (Exhibit 1, Tab 8) indicated that the firm's business was growing and they were looking for a Tax Accountant to join them. It set out the various attributes for a successful candidate which included post secondary education; working towards completion of a professional designation; a minimum of two years experience in a tax role; prepare and review corporate, personal, and trust tax returns.

5 After checking the posting the plaintiff submitted her resume (Exhibit 2) to the recruiter who passed it on to the defendant and an interview was arranged.

The resume

6 The plaintiff's submitted resume contained the following relevant points:

(a) Ensuring timely and accurate preparation of detailed tax returns (personal, trust, corporate, GST), voluntary disclosures and clearance certificate applications using Taxrep and FormulaTrix
(b) Preparing financial statements
(c) **CGA - Currently Enrolled in CGA Level 4 and PACE Level Course** - in progress (bold in the original)

The interview process

7 . At all relevant times in 2008 Frank Bilotta ("Bilotta") was the Tax Manager of the defendant.

8 Bilotta testified that he was involved in both the preparation of the job posting and in the two-stage interview process.

9 After a preliminary interview the plaintiff subsequently met with Bilota, who was responsible to assess her technical skills. She also met with several other individuals including the managing partner, Cary Selby, and a senior partner, Shawn Rosenzweig ("Rosenzweig") who were to determine the overall fit of the plaintiff within the company.

The contract of employment

10 Following the successful completion of the interview process the plaintiff was offered a job as a Team Accountant, Tax by the defendant by letter dated June 27, 2008 (the "Offer"). The Offer was also copied to Bilota and Rosenzweig.

11 There followed some negotiations on the start date and vacation time, which were amended by hand on the said Offer. The Offer was signed by the plaintiff on July 13, 2008, and by Susan Hamade ("Hamade") on behalf of the defendant with both parties having initialled all changes by July 16, 2008, thus forming a final and binding agreement (the "Contract"). (Exhibit 1, Tab 6)

12 The Contract was for an indefinite term and set out a base salary of $60,000.00 per year. It also set out a probation period of 90 days, and provided for three weeks vacation, participation in an incentive program and after three months an entitlement to benefits.

13 Though the SBLR Team Handbook ("Handbook") was to have been attached to the Offer, none was attached, but the plaintiff testified that she requested and received and reviewed the Handbook prior to her signing the Offer.

14 The Contract included a clause making it conditional on satisfactory references and confirmation of plaintiff's professional designations:

> This offer is expressly conditional upon receipt of references that satisfactorily support our understanding of your skills, abilities as well as confirmation of your professional designations.

15 The fully initialled copy of the Contract includes a handwritten note next to the above clause that says: "satisfied as per S. Hamade". (the "Blackline Contract").

16 It is also to be noted that no obligation was imposed on the plaintiff that she had to obtain her CGA designation or complete the Canadian Institute of Chartered Accountant's in-depth tax course (the "Tax Course"), within any specified times or at all.

17 The terms of the Contract included a warm welcome of the plaintiff and an expression of the defendant's collective confidence in her technical knowledge, interpersonal skills and overall fit within the defendant team. These positive sentiments were more particularly expressed in the second and last paragraphs of the Contract as follows:

> Our offer is affirmation in our collective vote of confidence in your technical knowledge, interpersonal skills and fit within the [the defendant] team and culture.
>
> [Suyi], we have every confidence in your professional skills and abilities and your fit with the great team of people at [the defendant]. It would be our great

pleasure to welcome you as a permanent member of the SBLR team.

The plaintiff's employment and termination

18 The plaintiff started work with the defendant on August 18, 2008. She reported to Bilotta who assigned her various tasks each week.

19 During her brief employment the plaintiff was given five tasks. These included a CRA assessment, a review of an alter ego trust issue and a corporate reorganization.

20 Both Bilotta and the plaintiff testified that at no time was she asked to conduct any corporate tax ("T2") review. The plaintiff further testified that she did not receive any negative feedback on her work while working at the defendant's.

21 On September 25, 2008, the plaintiff was called into a meeting with Bilotta and Rosenzweig where she was informed that her employment was terminated ("Termination Meeting").

22 According to the plaintiff the reasons given to her by Bilotta at that meeting were the following:

(a) That she was not performing at the required "intermediate level".
(b) That she would not be able to obtain her CGA (Certified General Accountant) designation by the summer of 2009.

23 The plaintiff testified that this was the first time that she had heard that she was an "intermediate" level Tax Accountant. It was also the first time that she had heard that the defendant had any concerns about her work.

24 Bilotta admitted that, contrary to the policies in the defendant's Handbook for periodic meetings to review the performance of an employee and offer suggestions for improvements, this was the first meeting he had had with the plaintiff on her performance and it was for the purpose of terminating her and no suggestions were given for improvement.

25 By letter dated September 25, 2008, the plaintiff's termination was confirmed, but curiously it contained no cause, despite the alleged reasons given by Bilotta at the meeting ("Termination Letter").

26 The Record of Employment ("ROE") submitted by the defendant to Service Canada contains a handwritten note that reads: "involuntary termination without cause."

The issues

27 The following issues emerge in this case:

(a) What transpired during the interview process?

(i) Did plaintiff inform Bilotta that she would complete her CGA by the summer of 2009?
(ii) Did the plaintiff inform Bilotta that she had conducted T2 reviews?
(iii) Could plaintiff enroll in the Tax Course without her designation?
(iv) Can defendant introduce new evidence in final submissions?

(b) Was the plaintiff wrongfully dismissed?
(c) If wrongfully dismissed, how much reasonable notice to plaintiff?
(d) Was there mitigation?
(e) Are EI benefits deductable from reasonable notice damages?
(f) Was the plaintiff induced by the defendant to leave her previous employment?
(g) Did defendant reveal "offer to settle" in final arguments?
(h) Can costs be awarded to a party represented by pro bono counsel?

Analysis

(a) What transpired during the interview process?

28 The parties presented conflicting recollections of the interview process relating to three crucial questions regarding the CGA designation, the T2 reviews and the Tax Course.

(i) Did plaintiff inform Bilotta that she would complete her CGA by the summer of 2009?

29 The plaintiff testified that during the interview she informed Bilotta that she was in the process of obtaining her CGA designation having completed levels 1 to 3 and part of level 4. In confirmation of this she submitted a letter dated April 11, 2010 from the CGA Association which confirmed that as of May 2008 she had indeed completed these programs. (Exhibit 1, Tab 1)[Editor's note: Exhibit 1 was not attached to the copy received by LexisNexis Canada and therefore is not included in the judgment.]

30 Her submitted resume also stated that she was "currently enrolled in CGA Level 4 and PACE Level Courses - in progress".

31 She further testified that she explained to Bilotta that "while she hoped to obtain her designation by the summer of 2009, the courses she required were offered by York University which had not yet released its course calendar." (Paragraph 17, plaintiff's written submissions, hereafter "plaintiff's submissions")

32 She therefore argued that since her ability to complete the designation depended on the

availability of the qualifying courses, she could not have guaranteed to Bilotta her completion date.

33 In his testimony, Bilotta insisted that the plaintiff had assured him that she would complete her CGA requirements by the summer of 2009.

34 Defendant counsel submitted that this representation was critical both in the defendant hiring the plaintiff and in her enrolling in the Tax Course in a timely manner to meet the defendant's business needs.

35 Bilotta testified that he knew both during the interview process, and when the job Offer was ultimately made, that the plaintiff was in the process of completing her CGA designation. He further insisted that the plaintiff had confirmed both during the interview process and in an e-mail that she would have her CGA designation by the summer of 2009.

36 He did not produce any such email at trial. However, the defendant attempted to introduce three emails in the defendant's written submissions following the completion of the evidence.

37 For the reasons set out below (subsection iv), I have rejected these three emails.

38 Bilota's memory as to what happened during the interview was tested during cross examination. He appeared rather vague in many of the details. While he testified that he interviewed a number of candidates for the Tax Accountant position at that time, he could not remember how many.

39 More significantly however, he failed to produce any notes that he may have taken during the interview with the plaintiff and he admitted that he had not reviewed any notes that he may have taken during that interview prior to trial. He proved to be rather tentative whether he had in fact kept any notes at all at that time.

40 I further note that there is no obligation imposed on the plaintiff in the employment Contract to obtain her CGA designation within a specified time or any time at all. Had this been as critical as the defendant now submitted, surely this should have been covered and spelled out in some detail in the Contract.

41 In her testimony the plaintiff stated that Bilotta informed her during the interview that having an accounting designation was not critical as long as the employee could do the job. (paragraph 17, plaintiff's reply submissions)

42 Contrary to what the defendant may have submitted as to the plaintiff misleading the defendant on her qualifications, the evidence clearly indicates that the defendant did not rely solely on the plaintiff's resume and statements to satisfy itself as to her professional qualifications. As indicated by the notation on the Blackline Contract, Hamade obtained references on behalf of the defendant that confirmed the plaintiff's professional designations. In short, the defendant satisfied

itself fully in this regard.

43 On a balance of probabilities I accept the evidence of the plaintiff over that of Bilotta on this point and find that the plaintiff did not guarantee her completion by the summer of 2009, as alleged by Bilotta, since her ability to complete the requirements depended on the availability of qualifying courses which were out of her control.

(ii) Did the plaintiff inform Bilotta that she had conducted T2 reviews?

44 Just like the question of the CGA designation there were differences in the testimony relating to the T2 reviews.

45 The plaintiff testified that she informed Bilotta during the interview that she only had experience in the preparation of T2 tax returns. And this was consistent with her resume which provided that she had experience in "Ensuring timely and accurate preparation of detailed tax returns." (my emphasis)

46 The plaintiff further explained in her testimony that while the preparation of T2 tax returns was performed by a junior level accountant, their review was performed by a senior accountant. This was not refuted by the defendant.

47 The defendant on the other hand submitted that the plaintiff informed Bilotta that she had experience in both preparing and reviewing T2 tax returns. In fact, this was a necessary skill and duty for any new hire and would therefore be reasonable to have been discussed and, as the senior accountant who was aware of these duties, Bilotta surely would have satisfied himself on this point.

48 However, the plaintiff's resume is very clear and contains no experience for T2 reviews. Yet despite such lack of experience the defendant agreed to not only interview the plaintiff even without that experience, but also to subsequently hire her.

49 Had the plaintiff informed Bilotta at the interview that she indeed had T2 review experience, he certainly must have confronted her with this inconsistency in her resume and should have alerted him to potential difficulties before he satisfied himself on her technical skills and before any offer of employment was made.

50 Bilotta did not mention any discussion on such discrepancy in her resume in his testimony. Nor did he produce any notes in this regard.

51 Further, why would the plaintiff exclude such skill, if she had it, from her resume? Would not such skill have made her candidacy more appealing? Why would she risk not getting the job by omitting it?

52 Once again, Bilotta admitted that he did not review any notes prior to trial. The plaintiff on the other hand had specific recollections of the interview. And this is logical and reasonable since she

met with only a few representatives of the defendant, whereas Bilotta had no notes and could not even remember how many candidates he had interviewed.

53 On a balance of probabilities I accept the evidence of the plaintiff over that of Bilotta on this point and find that the plaintiff did not hold herself out as having experience in reviewing T2 tax returns.

(iii) Could the plaintiff enroll in the Tax Course without her CGA designation?

54 The defendant submitted that any candidate for the position in question should have been sufficiently advanced in their CGA courses so that they would be eligible to enrol in the Tax Course in a timely manner. Because the plaintiff would not be able to complete her designation requirements by the summer of 2009, this would further hold back her technical skills to the detriment of the defendant and its clients.

55 Firstly, there is no mention at all in the Contract, let alone an imposed obligation, on the plaintiff to enroll in the Tax Course with or without her designation.

56 Secondly, I am satisfied from the evidence that the plaintiff was eligible and could have enrolled in this Tax Course with her then existing level or progress in her CGA courses.

(iv) Can defendant introduce new evidence in final submissions?

57 As I said above, even though no such email referring to the CGA designation was produced at trial, the defendant tried to introduce three emails on this point in the defendant's written submissions following the completion of the evidence.

58 The plaintiff objected in her reply that those three emails had not been presented, authenticated or admitted as exhibits at trial. They were untested evidence that the defendant attempted to introduce without notice and the plaintiff had no opportunity to cross-examine on or respond to them and should therefore not be admitted.

59 In support of her position to reject this new evidence, the plaintiff submitted the case of *Shafei v. Vossoughi,* [2009] O.J. No. 5051, 2009 CanLII 66151, and particularly paragraph 4 which reads in part as follows:

> [... I] emphasize that my decision must be based on the evidence at trial. In her submissions [the applicant] attempted to introduce evidence that was not before me at the trial nor was the subject of any testimony. I cannot consider or rely on any evidence that was not called during the trial and I reject the submissions of the applicant that rely on such evidence. (emphasis added)

60 I agree with and adopt this passage. Therefore, my decision must be based on the evidence at

the trial. The new evidence purported to be introduced by the defendant at the submissions stage was not subject to cross-examination or to an opportunity to be refuted and responded to by the plaintiff. I would therefore reject such new evidence.

(b) Was the plaintiff wrongfully dismissed?

61 There is no dispute that the plaintiff was on probation when she was terminated. There is also no dispute that a lower standard of what constitutes just cause for termination applies to probationary employees. (see *Mison v. Bank of Nova Scotia*, [1994] O.J. No. 2068 at paragraph 41)

62 However, as the plaintiff submits, "an employer is not entirely relieved of its obligations to act fairly simply because the employee is on probation." (paragraph 56 plaintiff's submissions)

63 In her further submission the case of *Mison* at paragraph 41, has clearly established that the onus is upon the employer to show that it has just cause to discharge even a probationary employee.

64 At the same time the plaintiff conceded that an employer may conclude that a probationary employee is unsuitable for the position hired, but such conclusion must be reasonable and must be reached "after the employee has been given a fair opportunity to demonstrate his ability." (paragraph 43 of *Mison*)

65 In further support of this submission the plaintiff cited the case of *Ritchie v. Intercontinental Packers Ltd.* [1982] SJ No 78, where Justice Noble had this to say about the status of probationary employees at paragraph 14:

> Thus where [a probationary] employee is fired, it seems to me that the only onus that rests on an employer to justify the dismissal, is that he show the court that he acted fairly and with reasonable diligence in determining whether or not the proposed employee is suitable in the job for which he was being tested. So long as the probationary employee is given a reasonable opportunity to demonstrate his ability to meet the standards the employer sets out when he is hired, including not only a testing of his skills, but also his ability to work in harmony with others, his potential usefulness to the employer in the future, and such other factors as the employer deems essential to the viable performance of the position, then he has no complaint. (emphasis added)

(This passage was also cited with approval by Justice Epstein at paragraph 42 in *Mison*)

66 In addition to the issues discussed in some detail above, the plaintiff submitted that the defendant breached its duty to act reasonably or fairly towards the plaintiff for the following additional reasons:

(a) She did not receive any negative feedback prior to the Termination Meeting on

the five tasks that she was given;

(b) Contrary to the express policy for periodic performance reviews in the Handbook, (incorporated into the Contract), there was no such review prior to the Termination Meeting;

(c) Even though Bilotta expressed concern about the plaintiff's ability to conduct T2 reviews, she was never given any such opportunity and could therefore not have been evaluated on this task;

(d) In assessing her technical skills, proficiency in completing T2 reviews was not a minimum qualification for the position. The plaintiff expected that she would be given an opportunity to develop her skills during her employment;

67 She further pointed out to the notation in the ROE that she was terminated "involuntarily ... without cause", which is clearly contrary to what the defendant advanced at trial.

68 As all statements on that ROE are deemed to be true, the plaintiff submits that it should be accepted over any other positions that may have been advanced by the defendant that it had cause to terminate her.

69 In her view therefore the defendant did not have just cause to terminate her. Further, though the defendant may have concluded that she was unsuitable for the position, that conclusion was reached in breach of the defendant's obligations as it was neither reasonable nor based on a fair assessment of the plaintiff's abilities. Consequently she felt that she was wrongfully dismissed.

70 The defendant on the other hand submitted that the plaintiff clearly understood that she was on probation and could therefore be terminated without notice or compensation during the first ninety day of her employment.

71 The defendant further pointed out that the Handbook, which the plaintiff acknowledged as having read, did not "guarantee" the plaintiff a job.

72 Getting her CGA designation by the summer of 2009 was "a primary consideration in hiring her", according to the defendant. It therefore became "concerned" upon becoming a ware during the probationary period that the plaintiff could not "meet [the defendant's] in-depth tax course requirements, as she would not be able to complete her CGA designation by summer of 2009." (paragraphs 41 and 42 defendant's submissions)

73 However, as I have found above, the defendant knew at the interview stage, and not during the probationary period as it now asserted, that the plaintiff might not have been able to obtain her designation by the summer of 2009.

74 On the Tax Course, the plaintiff submitted that if the defendant had its own requirements in this regard, it submitted no evidence that it communicated any such requirements to the plaintiff. It is abundantly clear that any such requirements did not form part of the Contract. Therefore, it would

be unreasonable for the defendant to have based its decision to terminate the plaintiff on her inability to satisfy this undisclosed requirement.

75 As remarked in paragraph 51 in the case of *Longshaw v. Monarch Beauty Supply Co. Ltd.*, [1995] BCJ No. 2362 (BCSC), where an employee is misled as to the basis upon which they will be judged, the dismissal cannot be said to be in good faith.

76 The defendant further submitted that "it quickly became abundantly clear that [the plaintiff] was simply unable to perform the job for which she was hired." (paragraph 44 defendant's submissions)

77 Consequently, "an objective determination was made by [the defendant] to terminate her employment" during the probationary period, which was within the defendant's right to do so. (paragraph 45, defendant's submissions)

78 There was no evidence presented by the defendant as to exactly when it became "abundantly clear" that the plaintiff was unable to perform her job.

79 Similarly there was no evidence produced by the defendant as to the criteria used to determine such inability. After all, the plaintiff had been given only five tasks during her period on the job and she had performed those tasks without any negative feedback. Given such limited number of tasks, on what exact grounds was the plaintiff therefore evaluated and found wanting?

80 If anything, it would appear that it was the defendant - not the plaintiff -- that had been found deficient by failing to follow its very own policies, when it failed to inform the plaintiff of her progress - or lack thereof - and in failing to make any suggestions for improvement. As admitted by Bilotta, there was no such opportunity given to the plaintiff to improve.

81 The inevitable conclusion is that regardless of whether just cause exists or not the employer is nevertheless obligated to act in good faith, including at the time of termination.

82 The defendant is asserting the existence of just cause for the termination, even though the Letter of Termination and the ROE contain no such cause.

83 I have carefully reviewed the alleged causes of termination. None of these reasons appear to have been unknown or to have been incapable of being discovered at the time of termination. In fact the evidence strongly suggests that any alleged causes for termination were or ought to have been known by the defendant at the time of termination. Yet, the defendant deliberately chose not to disclose any just cause for terminating the plaintiff in the Termination Letter.

84 The defendant did not argue that any of the causes raised subsequent to the termination document were ascertained subsequent to the issuance of the Termination Letter or the ROE, which would permit it to assert in the pleadings.

85 The defendant cited no authority that it could raise any just cause that was readily known or discoverable at the time of termination after it had already issued the Termination Letter citing no such cause.

86 The defendant also cited no authority that it could add or expand just cause after the Termination Letter was delivered, based on the fact that some cause may have been verbally mentioned during the Termination Meeting.

87 If verbally raised why was the alleged verbal cause different from the written record? Why was the Termination Letter silent on any cause? And why would the ROE - an official document submitted to the government - omit any cause and instead insert "involuntary termination without cause"? The defendant provided no explanation for these differences.

88 If the employer is relying on a verbal notice, then, any such verbal notice must be clear and unambiguous so that the employee knows exactly the ground upon which he or she is being terminated. Such clarity is also vital so that a court can evaluate the propriety and adequacy of any such cause in any subsequent proceedings.

89 But what happens when the verbal cause turns out not to be just cause? Can the employer then turn around and plead "other just cause"?

90 In my view once the termination document is issued to the employee without citing any just cause, no such cause can be subsequently asserted by the employer, unless,

(a) such cause is an after-acquired just cause (and usually alleging some kind of misconduct), and
(b) it was not known or it could not have been reasonably known or discovered at the time of termination even if the employer had exercised all reasonable due diligence in this regard.

91 If just cause is known or discoverable at the time of termination and the employer intends at any time to rely on it as a reason for termination, then, the employer is obligated to disclose it to the employee at termination, otherwise the employer may be estopped from asserting it afterwards.

92 In any case, the onus is on the employer to prove that there was just cause at the time of termination and to disclose it accordingly. If it is after-acquired just cause, the onus remains on the employer to prove why it was not known or not discovered at termination and how it was discovered subsequently, so that the court can evaluate the reasonableness and due diligence efforts of the employer in this regard and whether it may even constitute just cause.

93 On the whole, there was a certain degree of incoherence pervading both the sundry reasons subsequently put forward by the defendant as to the alleged termination of the plaintiff and to the defendant's evidence to support and prove such allegations.

94 The plaintiff thought that she was performing well and meeting expectations since no one had informed her otherwise. Under similar circumstances in the case of *Longshaw v. Monarch Beauty Supply Co. Ltd.*, [1995] BCJ No. 2362 (BCSC) (paragraphs 29 and 49), the court held that the employee there was wrongfully dismissed because the employer did not meet the established standard that the dismissal even of a probationary employee must be made in good faith.

95 On a balance of probabilities I find that the plaintiff was not given a reasonable or fair opportunity to demonstrate her fitness for the position for which she was hired. Had the defendant had any reservations, it should have related these to the plaintiff and had given her an opportunity to improve, as was provided in the appropriate documents of the employer such as the Handbook and the Contract. The employer failed to do this. Calling her into a meeting for the first time only to inform her that she would be terminated and not offering her an opportunity to improve was tantamount to her termination not to have been in good faith.

96 As described in paragraph 49 of the *Longshaw* case, the plaintiff "was misled as to the basis on which [she] would be judged, both by the [Contract] and by [her superior]. In the circumstances, the dismissal cannot be said to have been made in good faith".

97 Finally, I find on a balance of probabilities that the alleged reasons put forward by the defendant do not amount to and do not constitute just cause to terminate the Contract. I further find that even if they did amount to just cause, the ensuing dismissal was not done in good faith. Consequently the plaintiff was wrongfully dismissed.

(c) If wrongfully dismissed, how much reasonable notice to plaintiff?

98 Ever since the 1936 case of *Carter v. Bell & Sons (Canada) Ltd.*, [1936] OR 290 (OCA), the jurisprudence has established that "employment contracts for an indefinite period require the employer, absent express contractual language to the contrary, to give reasonable notice of an intention to terminate the contract if the dismissal is without cause". (see paragraph 19, *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986).

99 Though this common law notice requirement may be presumed in employment contracts, it can only be rebutted by clear and unambiguous language in the contract. (paragraphs 20 and 21 in *Machtinger*)

100 The plaintiff therefore submitted that the Contract in the case at bar does not refer to the minimum notice provisions of the *Employment Standards Act, 2000,* S.O. 2000, c. 41. ("ESA") and does not specify any other period of notice upon termination.

101 Therefore, since she was dismissed without cause and there is no contractual limitation on the amount of notice, the plaintiff was entitled to reasonable notice in accordance with the common law principles as enunciated in such cases as *Machtinger* above and *Christensen v. Family Counselling Centre of Sault Ste. Marie and District,* [2001] OJ No 4418 (ONCA) at paragraph 8,

citing the trial judge's decision with approval.

102 She further submitted that she is entitled to damages based on the factors set out in the case of *Bardal v. Globe and Mail Ltd*. [1960] OJ No 149.

103 In this case, the plaintiff was 30 years old at the time she was terminated. Her position as a Tax Accountant was technical and specialized. She had spent three years with Soberman LLP in a similar position researching tax matters, preparing a variety of tax returns and working with tax authorities. In addition, the plaintiff had considerable other experience as a bookkeeper and accountant. She was well educated, with an Honours Bachelor of Science and was on her way to obtaining her CGA designation. Moreover, it is clear from the plaintiff's considerable efforts to find a new job that there was not an abundance of similar employment for tax specialists available in late 2008.

104 She then submitted the following cases to establish that she is entitled to five months notice.

(a) *Alishah v. J. D. Collins Fire Protection Co*., [2006] O.J. No. 4634 (OHCJ) - five months
(b) *Dang v. North America Tea, Coffee & Herbs Trading Co.,* [2002] B.C.J. No. 1593 (BCPC) - three months
(c) In *Humbert v. Leduc Gold & Country Club*, [1999] A.J. No. 476 (ABQB) - three months
(d) *Lipp v. First Nations Education Steering Committee*, [2005] B.C.J. No. 1854 (BCPC) - three months
(e) In *Longshaw v. Monarch Beauty Supply Co. Ltd.,* [1995] B.C.J. No. 2362 (BCSC) - six months

105 On the other hand, the defendant submitted that the amount claimed by the plaintiff for reasonable notice is excessive and the cases submitted in support are easily distinguishable from the case at bar.

106 For example, in *Alishah* the defendant submitted that the employee was not on probation. Rather the case was based on just cause which was not accepted by the court. But just cause has been rejected in the case at bar as well.

107 In *Dang*, the defendant argued that unlike the case at bar, the probationary clause there was vague and not acknowledged. Further, the employee had received a performance bonus after three months denoting long-term employment, which did not occur in the case at bar.

108 In *Humbert*, the contract did not include a probationary clause as such, only a performance review after six months. Additionally, the employment was seasonal and thus more difficult to find employment in the middle of the season.

109 The *Lipp* and *Longshaw* cases dealt with dismissal not in good faith. But good faith is engaged and is a live issue in the case at bar.

110 The defendant further argued that even if the court were to find that cause did not exist for the probationary employee's discharge, the employee is then to receive some notice of termination, but that notice must be less than would be the case if the employee were not probationary. In support of this submission the defendant cited the case of *Kirby Motor Coach Industries Ltd.* (1980), 6 Man. R. (2d) 395 at paragraph 27 (Co.Ct.)

111 The defendant further submitted that the case of *Stephens v. Morris Rod Weeder Co.* (1989), 27 C.C.E.L. 92 (Sask. Q.B.) at pg. 8, held that the amount of termination pay to which a probationary employee is entitled to has been held to be less than if the employee had not been on probation.

112 In *Segreti v. Orion Communications Inc.*, [2003] O.J. No. 1169, at paragraph 24, the defendant submitted that a dismissed probationary employee was not entitled to any notice or pay in lieu of notice other than what is set out in section 57 of the ESA. This section provides for such notice only when the employee has been so employed for more than 3 months. And since the plaintiff was employed for less than three months, no notice under ESA is required.

113 I am not persuaded that *Segreti* stands for the proposition that a probationary employee is not entitled to any notice other than that under the ESA. Does this mean that when the ESA is not incorporated into the employment contract that an employee is not entitled to any notice whatsoever? I am not convinced that the jurisprudence deprives an employee of reasonable notice in the absence of such reference. (See the *Kirby Motor* case above, for example) Besides, the ESA notices are minimum notices.

114 In the case at bar I find that the employee would be entitled to reasonable notice under common law.

115 The defendant further argued that probation carries with it less job security. It therefore results in an expanded definition of cause and a reduced notice period. In support of this submission the defendant submitted the case of *Mison v. Bank of Nova Scotia,* [1994] OJ No. 2068, at paragraph 65

116 Finally, the defendant submitted the case of *Benson v. Co-op Atlantic,* [1987] N.J. No. 15 to support its submission that the court awarded only two weeks reasonable notice even where it found no just cause.

117 It further submitted that *Benson* supports the proposition that an employer could dismiss a probationer before the full period expired if it became obvious at an earlier date that he or she was unsuitable for the position. The employee there was fired for alleged unsatisfactory performance three and a half days into her three month probationary period.

118 However, in my view the *Benson* court clearly upheld the principle that a probationary employee is entitled to reasonable notice where, as here, there is no just cause. Though the employer had submitted just cause for dismissal, the court went on to find that the there was no just cause where the employee was dismissed (wrongfully) because the employer had given her perfunctory training and, in the court's estimation, she would probably have succeeded in meeting the requisite standards after three months of reasonable training.

119 In assessing the length of reasonable notice one must keep in mind that a probationary employee has taken a risk and given up a previous job or other job finding opportunities to accept the new position. (paragraph 53, *Longshaw* case)

120 Such is the case here where the plaintiff was gainfully employed at another accounting firm and took a risk in accepting the position with the defendant after it was recommended by her recruiter who effectively steered her to the defendant.

121 In the result therefore I find on a balance of probabilities that the plaintiff is entitled to four months reasonable notice.

(d) Was there mitigation?

122 It is well established that at common law the plaintiff has a duty to mitigate her damages.

123 In this case, the plaintiff testified that she applied to over 200 jobs, beginning on the day she was terminated. Despite her efforts and perseverance, it took fourteen months to find a comparable position in a difficult economic time.

124 To support that by her actions she had indeed mitigated, she referred me to the case of *Pollock v. Patrick Cotter Architect Inc.*, 2005 BCSC 1799, where at paragraphs 22-24, the court held that the employee had met her obligation to mitigate when she sent letters to 13 prospective employers and applied for a number of positions.

125 The plaintiff further submitted the case of *Lim v. Delrina (Canada) Corp.*, [1995] O.J. No. 171 (ONSC) at paragraphs 26-27, that Ontario Courts have held that general economic conditions at the time of termination have a bearing on the ease of finding alternative employment and also on the length of notice to which an employee is entitled.

126 There is no doubt that late 2008 was the beginning of a period of significant economic uncertainty in Ontario.

127 From the evidence adduced I am satisfied that the plaintiff did mitigate.

128 It is equally established by the jurisprudence that the burden is on the defendant to show that the plaintiff failed to mitigate her damages. (See *Michaels v. Red Deer College,* [1976] 2 S.C.R. 324, (SCC) and especially paragraph 11)

129 As it failed to present any evidence that the plaintiff could have obtained comparable employment during the reasonable notice period, I find on a balance of probabilities that the defendant failed to discharge this onus.

(e) Are EI benefits deductable from reasonable notice damages?

130 The evidence showed that the plaintiff received $3,763.00 in Employment Insurance ("EI") payments in 2008 and $14,569.00 in 2009.

131 The defendant therefore submitted that these EI amounts went significantly or completely towards mitigating her damages. Further, pursuant to Sections 45 and 46 of the *Employment Insurance Act,* (S.C. 1996, c. 23) ("EIA"), the defendant submitted that some or the entire amount of any judgment obtained in her favour by this Court, would need to be repaid to the Employment Insurance office.

132 During her cross-examination the plaintiff acknowledged that she may have an obligation to repay some of the EI benefits that she received should she be awarded damages by the Court as a result of her wrongful dismissal.

133 However, the fact that the plaintiff may have received EI benefits does not reduce the defendant's liability or the amount of damages that ought to be awarded by this Court. Nor should this fact impede or interfere with or affect the calculation of any damages that the Court deems appropriate to award.

134 I further agree with the submission of the plaintiff and so hold that the application of the EIA is an issue to be resolved by the parties after the Court has determined the questions of liability and the appropriate quantum of damages. Such determination must be made without reference to the EIA.

(f) Was the plaintiff induced by the defendant to leave her previous employment?

135 The plaintiff submitted that because she was encouraged to apply to the defendant for a job by a friend of the defendant's partner, that she was therefore induced to leave her previous secure employment. She therefore requested that I exercise my discretion to increase the notice period in accordance with the principles for inducement set out in the case of *Wallace v United Grain Growers Ltd.,* [1997] 3 S.C.R. 701 at paragraphs 83-85.

136 The evidence clearly showed that while being employed as a Tax Accountant at the accounting firm of Soberman LLP, in the spring of 2008 it was the plaintiff herself who responded to an advertisement from a job recruiter for an advertised Financial Analyst position. She arranged and went to an interview for that position. It was only while being interviewed for that advertised position that the job with the defendant was mentioned to her. Once again, she decided on her own to provide her resume to the recruiter for the defendant's position. The defendant did not seek out

the plaintiff at any time.

137 I am therefore not persuaded that she was induced to leave her previous employment to join the defendant.

(g) Did defendant reveal "offer to settle" in final arguments?

138 The defendant stated in paragraph 74 of its written submissions the following:

> At the time of termination, [the plaintiff] was offered one weeks' payment in lieu of notice. On or about May 12, 2011, [the defendant] made a written offer to pay [the plaintiff] two weeks' pay in lieu of notice. This offer was rejected by [the plaintiff] and the matter proceeded to trial.

139 The plaintiff in her reply submissions stated that this reference to a settlement offer is " directly contrary to Rule 14.04 which provides that no communication about an offer to settle or any related negotiations shall be made to the trial judge until all questions of liability and the relief to be granted, other than costs, have been determined".

140 The plaintiff further submitted that it was "unclear from the [defendant's] submission" to determine whether the paragraph was being tendered by the defendant "as evidence related to liability, for the purpose of attempting to contrast [the plaintiff's] 'excessive' claim with its own position, or for the purposes of addressing costs in the event [the defendant] is successful **o**n the merits of its defence."

141 Regardless of the reason, the plaintiff submitted that it has been established since at least 1866 that any reference to settlement negotiations is improper and should not be disclosed to the Court. Such prohibition from disclosure is based on solid policy reasons, including those set out in the case of *Pirie v. Wyld*, [1886] OJ No 188, at paragraph 18, "as having a tendency to promote litigation and to prevent amicable settlements" if there is a risk of publicly disclosing settlement negotiations.

142 The plaintiff further submitted in paragraph 11 of her reply:

> Even if the contents of a settlement communication are seemingly trite, the communication is still inadmissible. This is because, as noted in [paragraph 26 of] *Pirie* it is impossible to determine whether improper disclosure has influenced the decision maker and prejudiced the opposing party.

143 The plaintiff therefore urged me not to consider or rely upon the statements made in paragraph 74 of the defendant's written submissions

144 While the revelation of the "offer" at dismissal may be excused since it was not made during or in contemplation of litigation, the same cannot be said about the May 2011 offer. The latter was

clearly made during litigation as the Claim had been commenced on September 22, 2010.

145 Consequently, I hereby reject the said submission by the defendant, who should have known better and not have made such disclosure. Such submission is therefore inadmissible.

146 I further state that I have not considered nor have I relied in any way on this submission in reaching my conclusions on liability, the length of reasonable notice or the quantum of damages.

(h) Can costs be awarded to a party represented by pro bono counsel?

147 I would like to address the issue of whether costs can be awarded to a successful party who may have been represented by pro bono counsel.

148 It is trite to state that costs are subject to the discretion of the court. It is equally trite that a successful party is presumptively entitled to his costs in a court proceeding, subject to that discretion being properly exercised by the court.

149 In this case, the plaintiff was represented by pro bono counsel. I can find no reason that would disentitle her to costs just because she was represented by pro bono counsel.

150 I am supported in this view by the decision of the Ontario Court of Appeal in the case of *Brockie v. Ontario (Human Rights Commission)*, [2004] OJ No 1285, where it said the following on this point in paragraph 6:

> Although Brillinger was represented by pro bono counsel, that should not disentitle him to costs. The Divisional Court's reasons for denying costs ("the funding for the pro bono work must come from somewhere, possibly from charity") is not only pure speculation; it is also wrong - Brillinger's counsel informed the court that he had taken the appeal on a pro bono basis, and without any outside funding. The Divisional Court's concern about an uneven playing field overlooks the problems created by refusing pro bono counsel the opportunity of recovering some of their outlay. Such a policy would act as a severe penalty to lawyers acting in the public interest by making it possible for litigants of modest means to access the courts. (emphasis added)

Disposition

151 In the result therefore there will be judgment for the plaintiff against the defendant as follows:

(a) The amount of $20,000.00, for the Plaintiff's Claim, using the undisputed figures as submitted by the plaintiff ($5,000 per month times 4 months).
(b) An amount for the assessable court disbursements.
(c) Prejudgment interest at the court rate on and from September 25, 2008.

(d) Postjudgment interest at the current court rate.
(e) Costs which I fix at $3,500.00.

152 If an offer to settle was served by either party pursuant to Rule 14 of the Rules of this Court then I expect that the parties can resolve the costs amount. If they cannot, they can write to me with their brief submissions within fifteen days from the release of these reasons.

Z.J.C. PRATTAS DEPUTY J.

cp/e/qlmdl/qljxr/qlced/qljxh