CITATION: Hettrick v. Triple F Paving Co. Ltd., 2021 ONSC 208
COURT FILE NO.: 3784/17
MOTION HEARD: 20201110

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Beverley Hettrick, Plaintiff

AND:

Triple F Paving Co. Ltd., Defendant

BEFORE: MILLER J.

COUNSEL: G. Ko, for the Plaintiff

K. Ketsetzis, for the Defendant

HEARD: November 10, 2020

REASONS FOR DECISION

[1] The Plaintiff Beverley Hettrick brings a motion for summary judgment in an action for wrongful dismissal. In conjunction with this, she seeks to amend her Statement of Claim to narrow the issues in the action. She seeks that summary judgment be granted in her favour for breach of contract and wrongful dismissal and that damages be assessed at 24 months' notice.

[2] The Defendant Triple F Paving Co. Ltd. (Triple F) consents to the amended Statement of Claim, which reduces the claim to only damages in the amount of $100,000 for breach of contract and wrongful dismissal. Triple F however takes the position that it would be inappropriate to grant summary judgment even on the narrowed issues as there are multiple genuine issues in dispute related to the cessation of Ms Hettrick's employment with Triple F, which would ultimately require a trial of this action.

[3] In the alternative, Triple F submits that if there are no issues requiring a trial, Ms Hettrick abandoned her employment with Triple F, and therefore has not proven wrongful dismissal.

[4] In the further alternative, Triple F takes the position that if Ms Hettrick was wrongfully dismissed, she is not entitled to 24 months notice, but rather 18 months notice.

[5] The motion to amend the Statement of Claim is granted, on consent. The motion for summary judgment proceeded on the sole claim by Beverley Hettrick for damages in the amount of $100,000 for breach of contract and wrongful dismissal.

Background

[6] There are several facts that are not disputed.

[7] Triple F is a paving company located in Oakville, Ontario.

[8] On September 24, 1996, Triple F hired Beverley Hettrick as a receptionist, bookkeeper and office administrator. Hettrick was responsible for general administrative duties related to customer service and financial reporting. Throughout her employment Ms Hettrick earned approximately $44,200 per year with an annual bonus of $2,600.

[9] Ms Hettrick describes her position as “Accounting Manager” and her duties as a) managing the company’s accounting, (b) processing the company’s payroll, (c) providing quotes to clients, and (d) general office administration.

[10] Triple F takes the position that Ms Hettrick gave herself this title but does not dispute that her duties included those of receptionist, bookkeeper and office administrator.

[11] Beverley Hettrick was continuously employed by Triple F from September 24, 1996. On September 29, 2015, Ms Hettrick wrote to Marco Faiazza, director and Operations Manager of Triple F, to request a stress-related medical leave of absence.

[12] Ms Hettrick advised in this letter that she would be unable to work for "4 weeks or longer", depending on her “response to treatment and recovery progress”. She advised in the letter that it was her “sincere expectation” that upon her recovery and return to work that “all duties and responsibilities associated with her job “will be fully reinstated”. In the letter Ms Hettrick offered to produce a medical certification form from her doctor verifying her need for the requested leave. In the letter Ms Hettrick asked to be advised in writing – at her email address – “what additional information is needed to process this request.”

[13] On October 6, 2015 Triple F delivered to Ms Hettrick her paycheque for work performed to September 25, 2015 and a Record of Employment. A Post-It note was “attached” to the Record of Employment, on which was handwritten, “ Bev Don’t forget to send/email the Doctor’s Note”.

[14] On October 15, 2015 Mr. Faiazza wrote to Ms Hettrick to tell her that Triple F had not received the requested Doctor’s note. If she did not provide it by October 31, 2015, Mr. Faiazza stated that Triple F would have to advise Canada Revenue Agency that the Record of Employment issued to Ms Hettrick was “to be cancelled for lack of verification”.

[15] In her affidavit of July 30, 2019, Ms Hettrick deposed that she did not receive any further communication from Triple F subsequent to the package with the paycheque and Post-It note. In response to the Post-It note, however, she requested a letter from her doctor. A letter dated November 27, 2015 from Ms Hettrick’s doctor indicates Ms Hettrick “is not presently well enough to return to work” and that the date of return to work is “indefinite”. Ms Hettrick’s affidavit indicates that her mental state at that time was such that she did not forward the letter to Triple F.

[16] A further letter from Ms Hettrick's doctor dated July 5, 2018 describes Ms Hettrick's medical condition and treatment; refers to the letter of November 27, 2015 and confirms that Ms Hettrick was not at that time well enough to send it in; and, provides a prognosis and recommendation, conveyed to Ms Hettrick in September 2017, that she pursue a "graduated return to work although under modified conditions".

[17] On September 15, 2017, Ms Hettrick wrote to Triple F's President, Americo Sergio, indicating her willingness to return to work at that time and proposing a graduated return to work. Triple F did not respond to this request.

[18] On September 25, 2017, Ms Hettrick wrote another letter, addressed to both Mr. Sergio and to Mr Faiazza, requesting a response to her letter of September 15, 2017.

[19] Ms Hettrick did not hear from Triple F for over a month. By letter dated November 6, 2017, Mr Faiazza advised Ms Hettrick that because she did not provide a doctor's note regarding her medical leave request in October 2015, "Triple F concluded that you abandoned your position with us." The letter further advised that, "Currently, Triple F has no vacant positions."

Genuine Issue Requiring a Trial

[20] It is agreed between the parties that the first issue to be determined is whether there is a genuine issue requiring a trial.

[21] Ms Hettrick submits that there is no dispute as to the material facts. She submits that This Court is equipped to make all necessary findings of fact, to apply the law to the facts, and to resolve this dispute in a more proportionate, expeditious and cost-effective manner than through a trial.

[22] The Defendant submits that the issues requiring a trial are: 1) the nature of Ms Hettrick's employment; 2) whether Triple F gave appropriate notice as to their position that Ms Hettrick's leave was predicated on provision of medical documentation; and, 3) the amount of notice necessary if notice is required.

[23] In respect of the nature of Ms Hettrick's employment, Triple F submits that their position that Ms Hettrick's employment was akin to an entry-level administrator, with duties similar to a receptionist, bookkeeper, and general administrator is contradicted by Ms Hettrick's evidence that her position was that of an Accounting Manager, whose responsibilities included managing the company's accounts, processing the company's payroll, providing quotes to clients as well as general office administration.

[24] Triple F further submits that there is conflicting evidence between the parties as to whether or not Triple F made numerous attempts after Ms Hettrick's leave of absence to seek confirmation of Ms Hettrick's health and employment status with Triple F. The existing evidence is in the affidavits of Beverley Hettrick and Marco Faiazza and the written interrogatories of Ms Hettrick and Mr. Faiazza.

[25] Triple F submits that in order for the court to get a full appreciation of the evidence and issues, the court must have access to fuller documentary productions and *viva voce* evidence by witnesses, which can only achieved by way of trial.

[26] As noted in *Hryniak v. Mauldin*, 2014 SCC 7, in assessing whether the court has sufficient evidence to resolve the dispute fairly, it may rely on the documentary record, as well as the additional fact-finding powers set out in r. 20.04. including the ability to weigh the evidence, evaluate the credibility of any deponents, and draw reasonable inferences from the evidence.

[27] As noted at paragraph 49 of *Hryniak*, there is no genuine issue requiring a trial where the summary judgment motion: (i) allows the judge to make the necessary findings of fact, (ii) allows the judge to apply the law to the facts, and (iii) is a proportionate, more expeditious and less expensive means to achieve a just result.

[28] As noted in *Edmond v. Algonquin College*, 2018 ONSC 1898 at paras. 85-87 and in *Asgari v. 975866 Ontario Ltd.*, 2015 ONSC 7508 at para. 4, wrongful dismissal cases are well-suited to summary judgment motions, and they assist parties in obtaining affordable access to the civil justice system.

[29] In *Nagpal v. IBM Canada Ltd.*, 2019 ONSC 4547 the court granted summary judgment, even where the employer alleged abandonment.

[30] The Ontario Court of Appeal in *Sweda Farms Ltd. v. Egg Farmers of Ontario*, 2014 ONCA 878 at paragraph 4 confirmed that parties to a summary judgment motion have an obligation to put their best foot forward on the motion. They therefore cannot withhold argument or evidence and then submit that a trial is needed to really understand or weigh it.

[31] Regarding Triple F's assertion that it made numerous attempts after Ms Hettrick started her leave of absence to confirm her health and employment status, the evidence filed includes Triple F's admission at discovery that other than written correspondence exchanged between the parties, and referenced earlier in this endorsement, there was no contact between the plaintiff and the company during her medical leave. Specifically Triple F represented that "All documentation in relation to this action have already been produced". I find there is sufficient evidence before the Court to determine fairly, whether Triple F's defence of abandonment can be made out.

[32] If Ms Hettrick did not abandon her employment, I find that there is sufficient evidence before the Court to fairly determine an appropriate notice period. While there is some dispute as to the termination date, I find this is capable of being determined on the evidence before the Court. Also, there is no dispute as to Ms Hettrick's age, start date, or annual compensation. Determination of the appropriate notice period is largely an exercise of examining similar fact situations in other wrongful dismissal cases and their legal results to determine what would be fair in these circumstances.

[33] For these reasons, I conclude that there is no genuine issue requiring a trial.

Abandonment

[34] It is Ms Hettrick's position that at no point did she abandon her position, When she requested leave she clearly communicated her intention to resume her position when able. Apart from requesting she furnish a doctor's note, her employer made no effort to contact her to enquire about when she might be able to return to work and did not respond to her request for accommodation when she was ready to resume work. At no time prior to November 6, 2017, did Triple F warn Ms Hettrick that they might consider her post abandoned.

[35] It is Triple F's position that when Ms Hettrick failed to provide the requested doctor's note they reasonably concluded that she had abandoned her position.

[36] Triple F submits that the test for abandonment of employment is an objective test. They rely on *Betts v. IBM Canada Ltd.* 2015 ONSC 5298, which indicates at paragraph 57:

> …do the statements or actions of the employee, viewed objectively by a reasonable person, clearly and unequivocally indicate an intention to no longer be bound by the employment contract

[37] Triple F also relies on *Nagpal* at paragraph 31 in support of their position that "Context is important. The totality of the circumstances must be considered."

[38] It is Triple F's position that it reasonably concluded that Ms Hettrick had abandoned her employment given the following circumstances:

(a) Triple F is a small, family-run business;

(b) Ms Hettrick failed to provide a copy of her medical certificate, which she was required to do before Triple F could approve her medical leave; Ms Hettrick was aware of the requirement for a medical certificate;

(c) Triple F made continuous attempts to communicate with Ms Hettrick regarding the status of the medical certificate and the status of her medical leave; all their attempts were "wholly ignored" by Ms. Hettrick;

(d) Ms Hettrick failed to communicate with Triple F for two years; and

(e) As a result, Triple F was forced to fill Ms. Hettrick's vacant position.

[39] It is not disputed that Triple F is a small, family-run business.

[40] Triple F submits that it is undisputed that Ms Hettrick was advised that they required a copy of her medical certificate in order to authorize her request for medical leave. I find that the evidence does not go that far.

[41] Nowhere in the correspondence to Ms Hettrick did Triple F specifically tell her that a medical certificate was required in order to authorize her request for medical leave. The only email reply to Ms Hettrick's request for medical leave, in which specifically asked to be

advised in writing – at her email address – "what additional information is needed to process this request." was the response "Sounds great to me, Bev."

[42] While Triple F did request a doctor's note by way of a Post-it note, that communication did not indicate that a medical certificate was required for the medical leave to be approved. Neither did the letter of October 15, 2015. In that letter, Triple F simply indicated that if the requested doctor's note was not received by October 31, 2015 they would have to advise the Canada Revenue Agency that the Record of Employment is "to be cancelled for lack of verification".

[43] Aside from these communications, there is no evidence to support Triple F's assertion that they "made continuous attempts to communicate with Hettrick regarding the status of the medical certificate and the status of her medical leave, which went wholly ignored".

[44] It is not disputed that Ms Hettrick did not take any steps to have the medical certificate delivered to Triple F, nor did she request that her physician deliver the medical certificate on her behalf. Triple F questions Ms Hettrick's evidence that she was not well enough to send in the doctor's letter of November 27, 2015.

[45] Triple F points out that the letter from the physician dated July 5, 2018, is not contemporaneous with Ms Hettrick's purported inability to send in the November 27, 2015 letter. Triple F submits that the contents of the letter of July 5, 2018 is not in affidavit form nor has the doctor been qualified as an expert. Triple F relies on *Betts* at paragraph 62 which indicates:

> Employees on medical leave will not be immune to abandonment where they have failed to follow employee policies and where there is no medical evidence available to support that the employee could not comply with these policies.

[46] Ms Hettrick relies on *Lemesani v. Lowerys Inc.*, 2017 ONSC 1808 at para. 134 in support of her position that an employer must demonstrate that an employee's words or conduct clearly and unequivocally indicated an intention to abandon their employment.

[47] Ms Hettrick relies on Nagpal at paragraph 39 in support of her position that an employee's failure to communicate during a medical absence is not an unequivocal indication of an intention to abandon one's position. Further, the Ontario Divisional Court held, in Sutherland v. Messengers International, 2018 ONSC 2703 at para. 25 that where there is confusion or uncertainty over whether an employee abandoned his engagement, the onus is on the employer to clarify with the employee whether he or she quit.

[48] Ms Hettrick relies on evidence that at no point prior to November 6, 2017 did Triple F: attempt to clarify the status of her medical leave; inquire whether her intention to return to work had changed; suggest that she had "abandoned" her position; or warn that her position would be considered "abandoned" by the company.

[49] Further, Ms Hettrick's request for leave, made September 29, 2015 clearly communicated her desire to return to work when able and her expectation that that "all duties and

responsibilities" associated with her job "will be fully reinstated". At no time did Ms Hettrick resile from this position, nor did Triple F at any point, before November 7, 2016 warn Ms Hettrick that her expectation that she would be able to return to her former position would or could not be met.

[50] I find on the evidence, that Ms Hettrick never abandoned her position. To the contrary, at the time she requested leave, she specifically communicated to Triple F her desire to return to her position once well. I find that Triple F has not established that Ms Hettricks's words or conduct clearly and unequivocally indicated an intention to abandon her employment.

[51] Having found that she did not abandon her position, I must determine what period of notice is appropriate in the circumstances of this case.

Notice

[52] It is Ms Hettrick's position that she is entitled to 24 months' pay in lieu of notice.

[53] Ms Hettrick submits that she is entitled to notice as follows: $88,400 (24 months' base salary); $5,200 bonus (24 months); and, $8,840 (benefits for 24 months, at 10% of base salary) for a total of $102,440.69

[54] Triple F submits that if Ms Hettrick is entitled to damages they should be limited to 18 months' notice, and should not include any bonus.

[55] Triple F submits that any damages should be limited to: Base Salary (18 months) of $66,299.94; and, Lost Benefits (18 months at 10% base salary) of $6,629.99 for a total of $72,929.93.

[56] In determining the length of reasonable notice, courts consider (a) the age of the employee at termination; (b) the length of employment; (c) the character of employment; and, (d) the availability of similar employment. *Bardal v. The Globe & Mail Ltd.* [1960] O.J. No. 149

[57] Ms Hettrick relies on *Paquette v. TeraGo Networks Inc*., 2015 ONSC 4189 at paragraphs 30-31 in support of her position that older long-term employees are generally entitled to longer notice periods:

> Generally speaking, a longer notice period will be justified for older long-term employees, who may be at a competitive disadvantage in securing new employment because of their age. In *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229 (S.C.C.) at para. 92, Justice La Forest stated:
>
> Barring specific skills, it is generally known that persons over 45 have more difficulty finding work than others. They do not have the flexibility of the young, a disadvantage often accentuated by the fact that the latter are frequently more recently trained in the more modern skills. Their difficulty is also influenced by the fact that many in that age range are paid more and will generally serve a shorter period of employment than the young, a factor that is affected not only by the desire of many older people to retire but by retirement policies both in the private and public sectors.

[58] Ms Hettrick relies on evidence that began her employment with Triple F in September 1996 and was not terminated until she was advised by Triple F, in the letter dated November 7, 2017, that there was no position of work available to her.

[59] Ms Hettrick emphasizes evidence showing that during her 21-year tenure, she was Triple F's Accounting Manager, responsible for: (a) managing the company's accounting, (b) processing the company's payroll, (c) providing quotes to clients, and (d) general office administration.

[60] Ms Hettrick relies on evidence that her annual compensation consisted of (a) a base salary of $44,200; (b) an annual bonus of $2,600; and (c) medical and dental benefits of 10% of her base salary.

[61] Ms Hettrick relies on the following cases in support of her 24 month notice position:

Brake v. PJ-M2R Restaurant Inc., 2016 ONSC 1795, aff'd by 2017 ONCA 402, (20 months notice for 20 years of service); *Graceffo v. Alitalia*, 1994 CarswellMan 179 (Q.B.), (24 months notice for 30 years of service); *Brien v. Niagara Motors Ltd.*, 2008 CarswellOnt 4936 (S.C.), aff'd by 2009 ONCA 887 (24 months notice for 23 years of service); and, *Stroppa v. Globe Foundry Ltd.*, 2005 BCSC 312 (24 months notice for 27 years of service).

[62] Triple F submits that Ms Hettrick's tenure was only 19 years, from September 1996 to September 2015; that she was 71 not 73 at the time of her termination; and that she was not an Accounting Manager but a general administrator with Triple F and performed duties including those of a general receptionist, bookkeeper and administrator.

[63] Triple F submits that there is no evidence Ms Hettrick exercised any supervisory role in her employment. The title of "Accounting Manager" was not Ms Hettrick's formal position nor was this title ascribed to Ms Hettrick during her employment.

[64] Triple F takes the position that in assessing her reasonable notice period, Ms Hettrick has mischaracterized the nature of her employment. Specifically, Ms Hettrick attempts to rely on case law dealing in matters involving *prima facie* managers. Triple F submits that in these cases, all of the employee plaintiffs had supervisory duties over employees and management over the function of the business in some capacity.

[65] Triple F relies on the following cases, which they submit demonstrate that if Ms Hettrick is entitled to reasonable notice, that the notice period would not be 24 months, but at the most would result in 18 months reasonable notice:

Turner v. Indirect Enterprises Inc. 2009 CarswellOnt 9666, aff'd 2011 CarswellOnt 770, 2011 ONCA 97 (Ont. C.A.) (18 months notice for 19 years service); *Cohen v. Edwards* 2000 CarswellOnt 2202 (18 months service for 20 years service); *Patterson v. IBM Canada Ltd.* 2017 ONSC 1264 (18 months notice for 22 years service); and, *Donath v. Hughes Containers* 2014 Carswell Ont 17310 (10 months notice for 14 years service).

[66] I find that Ms Hettrick was 73 when her position was terminated in that it was first communicated to her November 6, 2017.

[67] I accept that in the cases relied on by Ms Hettrick, each of the plaintiffs had supervisory duties over other employees and management over the function of the business in some capacity. While the evidence supports a finding that Ms Hettrick managed, in the sense of oversaw the transactions relating to, the company's accounts, she did not hold a "management" position as that term is used in the case law. I therefore find the cases relied on by the plaintiff to be distinguishable. I accept that the appropriate notice period for Ms Hettrick, in all of the circumstances, is 18 months' notice.

[68] Triple F does not include in their calculation of damages, any bonus for Ms Hettrick. Triple F submits that Ms Hettrick's bonus was discretionary and not a regular part of her compensation.

[69] Ms Hettrick's evidence is that she received a bonus every year of her employment amounting to approximately $2,600. Mr. Faiazza's evidence, in his August 13, 2018 Answers on Written Examination for Discovery indicated that while Ms Hettrick was not "entitled" to any bonus, she did receive a bonus every year of her employment at Triple F which amounted to approximately $2,600 per year.

[70] In *Bernier v. Nygard International Partnership*., 2013 ONSC 4578 at paragraph 44 the court held that

> …the question of whether a terminated employee is entitled to a bonus turns on whether the bonus has become an integral part of the employee's annual salary. The evidence before me is that the bonus, while calculated in accordance with the Defendant's corporate performance each year, was a regular feature of the Plaintiff's compensation that she had come to expect. There is nothing to counter her submission that it had, since the inception of her position with the Defendant, become an integral component of her annual pay.

[71] The Ontario Court of Appeal in *Paquette v. TeraGo Networks Inc*., 2016 ONCA 618 relied on *Bernier* in its summary of the law in this respect at paragraph 17:

> Damages for wrongful dismissal may include an amount for a bonus the employee would have received had he continued in his employment during the notice period, or damages for the lost opportunity to earn a bonus. This is generally the case where the bonus is an integral part of the employee's compensation package: see *Brock v. Matthews Group Limited* (1988), 20 C.C.E.L. 110, at para. 44 (Ont. H.C.J.), aff'd (1991), 34 C.C.E.L. 50, at paras. 6-7 (Ont. C.A.) (appeal allowed in part on other grounds); *Bernier*, at para. 44 (Ont. S.C.), aff'd, at para. 5 (Ont. C.A.). This can be the case even where a bonus is described as "discretionary": see *Brock v. Matthews Group*, at para. 44 (Ont. H.C.J.), aff'd, at paras. 6-7 (Ont. C.A.).

[72] I am satisfied on the evidence here that Ms Hettrick's annual bonus of $2,600 was an integral part of her annual salary, and should be included in the calculation of damages.

[73] I find that Ms Hettrick is entitled to damages of: Base Salary (18 months) of $66,299.94; Bonus (18 months) $3,900 and, Lost Benefits (18 months at 10% base salary) of $6,629.99 for a total of $76,829.93.

Mitigation

[74] While the comments of LaForest J. in *McKinney v. University of Guelph* are somewhat dated they nonetheless are applicable to the facts of this case.

[75] This principle was enunciated more recently in *Potter v. New Brunswick (Legal Aid Services Commission)*, 2011 NBBR 296 at para. 71, aff'd by 2015 SCC 10 at para. 22.

[76] At age 73 when her employment was terminated, I find that Ms Hettrick had no duty to mitigate.

Conclusion

[77] There is no genuine issue requiring a trial. Ms Hettrick did not abandon her employment and is therefore entitled to damages for wrongful dismissal. Damages are assessed at $76,829.93, plus prejudgment interest pursuant to the Courts of Justice Act from November 6, 2017.

Costs

[78] The parties agreed before me that if Ms Hettrick was successful that $15,000 + HST would represent partial indemnity costs for the motion but that they would additionally like to be able to make cost submissions including offers to settle.

[79] I find that Beverley Hettrick is entitled to her costs.

[80] The parties are encouraged to agree on costs, but if they cannot, they may exchange and file written cost submissions, not to exceed three pages exclusive of any cost outline or any offer(s) to settle, as follows: Plaintiff by January 25, 2021; Defendant by February 1, 2011 and Reply, if any, by February 8, 2021.

MILLER J

Date: January 11, 2021