Date: 20001120
Docket: CA 163547

NOVA SCOTIA COURT OF APPEAL

[Cite as: Blaikies Dodge Chrysler Ltd. v. Crowe, 2000 NSCA 133]

Cromwell, Hallett and Chipman, JJ.A.

BETWEEN:

BLAIKIES DODGE CHRYSLER LIMITED

Appellant

- and -

ANTHONY AARON CROWE

Respondent

REASONS FOR JUDGMENT

Counsel:	Gary A. Richard for the appellant Bradford G. Yuill for the respondent
Appeal Heard:	November 20, 2000
Judgment Delivered:	November 20, 2000
THE COURT:	Appeal dismissed per oral reasons for judgment of Cromwell, J.A.; Hallett and Chipman, JJ.A. concurring.

CROMWELL, J.A.: (Orally)

[1] The appellant employed the respondent as an auto body technician from 1982 until a purported layoff in December of 1998. The respondent sued for wrongful dismissal. The trial judge, Justice MacLellan, found that what the appellant characterized as a layoff was a dismissal, that the respondent was entitled to 12 months' pay in lieu of notice and that the appellant had not established any failure on the part of the respondent to mitigate his damages. The appellant appeals, challenging each of these conclusions reached by the trial judge.

[2] We are all of the view that the appeal fails and must be dismissed.

[3] The trial judge found that the so-called layoff was for an indefinite period and that there was no implied term of the employment contract contemplating or permitting such layoffs. We do not think he erred in all of the circumstances of this case in finding that the purported layoff was in fact and in law a dismissal.

[4] The trial judge also found that the respondent's effort to find comparable employment was reasonable and that he had not acted unreasonably in refusing the appellant's offer of one or two weeks of vacation replacement time in May of 1999. On this point, the trial judge said at p. 11:

> I find that it was reasonable for the plaintiff [the respondent] to refuse to come to work for either one or two weeks in May ... He had already arranged for his lawyer to complain about his dismissal and he should not be expected to go to work for a short period of time. He was not offered anything other than either one or two weeks, depending on whose version you accept. He was not told it might lead to more work. At that point he knew that normally work in the shop would slow up for the summer. If there was no work from December to May it was reasonable for him to conclude that there probably would not be work ahead. It is to be noted that the defendant [appellant] has not hired anyone new to work at the autobody shop.

[5] In our view, the judge did not err in finding the respondent's refusal of this short-term, temporary work constituted any failure to mitigate.

[6] As to the respondent's efforts to find comparable employment, the trial judge heard the evidence of the respondent and that called by the appellant. The judge found the respondent's efforts were reasonable in the

circumstances and that the appellant had not met its burden of showing that the respondent had failed to mitigate. The judge's findings of fact are supported by the evidence and he applied correct legal principles in reaching his conclusion on this issue.

[7] The appellant submitted in his factum that the trial judge's award of 12 months' pay in lieu of notice is inordinately high and that anything over 9 months would be excessive. We are only permitted to intervene on the assessment of damages if we are persuaded that the judge applied wrong principles of law or that his award is so inordinately high that it must be "a wholly erroneous estimate" : see **Blackburn v. Victory Credit Union** (1998), 165 N.S.R. (2d) 1 at § 61. The judge applied the correct legal principles relating to the assessment of damages and although his award is at the high end of an acceptable range, it is certainly not so inordinately high as to require appellate intervention.

[8] The appeal is dismissed. The appellant shall pay to the respondent costs of the appeal in the amount of 40% of the costs awarded at trial plus disbursements.

Cromwell, J.A.

Concurred in:

Hallett, J.A.

Chipman, J.A.