

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Jessen v. CHC Helicopters International Inc., 2005 NSSC 241

Date: 20050812

Docket: SH 174983

Registry: Halifax

Between:

Wendy Jessen,
of Halifax, Nova Scotia

Plaintiff

v.

CHC Helicopters International Inc.,
a body corporate

Defendant

REASONS FOR JUDGMENT

Judge: The Honourable Justice Glen G. McDougall

Heard: August 12, 2005, in Halifax, Nova Scotia

Written Decision: September 08, 2005

Counsel: Brian Hebert, Esq., for the plaintiff
Tom W. Groves, Esq., for the defendant

McDougall, J.:

[1] The trial of this matter was heard by me with a jury on June 6, 7, 8, 9, 10, 13 and 14, 2005. The plaintiff sought damages for wrongful dismissal. It included a claim for general damages along with aggravated and punitive damages. At the close of the plaintiff's case the Court granted a defence motion to dismiss the plaintiff's claim for aggravated and punitive damages leaving the issue of reasonable notice to the jury.

[2] After deliberating, the jury rendered its decision. The plaintiff was awarded four months in lieu of notice. She was also given an additional 48 months extended notice due to the manner of dismissal based on the **Wallace** factors (so-called). The jury awarded certain other amounts for vacation pay entitlement, overtime pay, et cetera.

[3] The decision of the jury has been appealed by the defendant on the ground that the award of 48 months' extended notice is so inordinately high that it is a wholly erroneous estimate of the damages suffered by the plaintiff.

[4] Pending this appeal the parties attempted to reach agreement on the wording of an order that would properly reflect the jury's decision. Unfortunately they could not agree on whether mitigation by the plaintiff should apply not only to the reasonable notice period but to the extended notice period as well. In addition they could not agree on the issue of costs.

[5] Counsel for the parties filed written briefs followed by oral submissions on Friday, August 12, 2005. An oral decision on the issue of mitigation was rendered immediately after hearing the arguments of counsel. The Court decided to reserve its decision on costs pending the results of the appeal.

[6] Regarding the matter of mitigation during the extended notice period, counsel for the plaintiff very ably argued that mitigation should only apply to the reasonable notice period and not to the extended notice period. With respect, I do not agree. According to the Supreme Court of Canada decision in **Wallace v. United Grain Growers Ltd.**, [1997] 3 S.C.R. 701, it is clear that in the absence of a separate actionable cause, such that would justify an award of aggravated or punitive damages, an employee who has been subjected to callous and insensitive treatment in the course of his or her dismissal is entitled to claim additional compensation in the form of an

addition to the notice period. At paragraph 95 of the majority decision, the Honourable Justice Iacobucci wrote:

¶ 95 The point at which the employment relationship ruptures is the time when the employee is most vulnerable and hence, most in need of protection. In recognition of this need, the law ought to encourage conduct that minimizes the damage and dislocation (both economic and personal) that result from dismissal. In *Machtiger*, supra, it was noted that the manner in which employment can be terminated is equally important to an individual's identity as the work itself (at p. 1002). By way of expanding upon this statement, I note that the loss of one's job is always a traumatic event. However, when termination is accompanied by acts of bad faith in the manner of discharge, the results can be especially devastating. In my opinion, to ensure that employees receive adequate protection, employers ought to be held to an obligation of good faith and fair dealing in the manner of dismissal, the breach of which will be compensated for by adding to the length of the notice period.

[7] It is clear from this, that a breach of the employer's obligation of good faith and fair dealing in the manner of dismissal will be compensated for by adding to the length of the notice period.

[8] Counsel for the defendant quoted from the case of **Y.S. v. H & R Property Management Ltd.**, [1999] O.J. No. 5588. At paragraphs 20 - 21, the Honourable Justice Sutherland, of the Ontario Supreme Court stated:

¶ 20 I digress somewhat at this point to record my opinion that under the Supreme Court of Canada decision in *Wallace and United Grain Growers Ltd.* (1997), 152 D.L.R. (4th) 1 (S.C.C.), a breach by the employer of his obligations of good faith when terminating an employment is compensable by increasing the notice period but is not compensable by way of aggravated damages except where an independent, freestanding actionable wrong has been established.

¶ 21 In my opinion that means that any additional amount in lieu of notice that might be mandated in those circumstances under the doctrine of *Wallace* would itself be subjected to capping by way of mitigation when a terminated employee obtains a new job at higher pay. The decision in *Wallace* would thus be of no assistance to the plaintiff in avoiding the mitigation effect of her subsequent long term employment.

[9] In a somewhat more tangential way the matter was dealt with by the Nova Scotia Court of Appeal in the case of **Barakett v. Levesque Beaubien Geoffrion**

Inc., [2001] N.S.J. No. 426. At paragraph 51, the Honourable Justice Gerald Freeman wrote:

¶ 51 Wallace does not mandate a two-step assessment of reasonable notice, that is, an evaluation of reasonable notice without regard to the manner of dismissal followed by an adjustment to the notice period to reflect the manner of dismissal. ...

And at paragraph 57, the Honourable Justice Thomas Cromwell wrote:

¶ 57 Gruchy, J. the trial judge, did not specify the extent to which his finding of unfair dealings by the employer in the manner of dismissal increased the notice period. I agree with Freeman, J.A. that, on this record, the judge was entitled to consider this matter as one aspect of fixing a reasonable period of notice and that it was not necessary (nor in my view desirable) for the judge to set out, in isolation, the effect this consideration had on the length of reasonable notice.

[10] Any extension to the period of reasonable notice arising out of the bad faith conduct of the employer at the time of dismissal is not a separate head of damages that would be subject to new or different rules regarding mitigation. As such, the plaintiff is required to mitigate her damages throughout the period of reasonable notice which should include the additional notice period awarded by the jury.

[11] I would request counsel to draft an order reflecting this decision.

J.