IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Murphy v. Optipress Inc., 2008 NSSC 75

Date: 20080328
Docket: SH-231511
Registry: Halifax

Between:

Daniel P. Murphy

Plaintiff

and

Optipress Inc.

Defendant

Judge: Justice John M. Davison

Heard: February 25, 26, 27, 2008, in Halifax, Nova Scotia

Written Decision: March 28, 2008

Counsel: David A. Mombourquette, for the plaintiff

Lisa M. Gallivan, for the defendant

Davison, J.:

[1] The plaintiff in this action claims damages for wrongful dismissal of employment without cause and damages for breach of contract by failing to pay bonuses which accrued before the dismissal of the plaintiff.

[2] The plaintiff was originally employed by Atlantic Nova Print Company Incorporated hereinafter referred to as A.N.P. He started employment with that company in 1980 and on January 1st, 1986 he became President of A.N.P. On October 31st, 1985 he became president of Atlantic Nova Group hereinafter referred to as A.N.G., the holding company of A.N.P.

[3] Three or four years after he commenced employment with A.N.P. the plaintiff became Production Manager. The company was owned by his father, Thomas Murphy and Kenneth Banfield as equal shareholders. Around 1990 the plaintiff was appointed Chief Executive Officer of A.N.P. and Calvin Ripley was named President. The plaintiff remained President and Chief Executive Officer of A.N.G. The owners of A.N.G., about this time, were Thomas Murphy, the plaintiff, Kenneth Banfield and his children, Peter, Mark and Michael. Thomas

Murphy and Kenneth Banfield held the “controlling votes”. The plaintiff’s father died in January 1998 and the plaintiff inherited his father’s voting control.

[4] The plaintiff is 50 years of age. In 1978 he obtained a Bachelor of Commerce degree. He was terminated in his position with the defendant by letter dated January 30th , 2004 and on that date he had been employed with the defendant and its legal predecessors for a period of about twenty-four years. He described his duties starting with sales and clerking at the time of employment at A.N.P. and developing an operational roll of banking, accounting, production, sales quota and all aspects of the company’s requirements and services.

[5] By a Share Purchase Agreement dated October 29, 1999 the plaintiff, Michael Banfield and Mark Banfield sold all of their shares in A.N.G. to Newcap Inc. which was a wholly owned subsidiary of Newfoundland Capital Corporation Limited. By a separate Share Purchase Agreement dated October 29th, 1999, Calvin Ripley and Maurice Geddis, two minority shareholders of A.N.P., sold their shares to A.N.G. The resolution of directors dated October 29, 1999 indicates the plaintiff transferred 40 shares to Newcap Inc. and Michael Banfield and Mark Banfield each transferred 20 shares to Newcap Inc.

[6] Counsel advances the submission the plaintiff was required to resign as a director of A.N.G. and A.N.P. but remained employed as president of Newcap Inc.'s printing operations. The evidence supports this submission. The plaintiff's responsibilities covered all of the printing operations of Newcap Inc. in addition to the A.N.P. operations which were conducted under the trade name "Print Atlantic". The plaintiff was a printer, a role he filled with the defendant and all companies and organizations which preceeded the defendant.

[7] By a purchase agreement dated June 30th, 2002, Newcap Inc. transferred all its assets to the defendant.

ISSUES

1) What is the period of reasonable notice which the plaintiff should have received on termination?

2) What damages is the plaintiff entitled for the failure of the defendant to provide reasonable notice?

3) Did the plaintiff take reasonable efforts to mitigate his damages?

4) Did the defendant breach the plaintiff's employment contract by failure to pay bonuses?

[8] The plaintiff's position is that he worked "in the specialized field of printing" for a period of 24 years and should be awarded damages based on a notice period of 24 months less the 25 weeks paid to him by the defendant following termination. The parties agree the plaintiff's salary at termination date was $160,000.00 per year and counsel for the plaintiff submits the plaintiff should receive $320,000.00 less $76,923.07 which was received on termination for a balance of $243,076.93.

[9] It is also the position of the plaintiff that he should receive $96,0000.00 which is a 30% bonus following the termination date and receive $12,153.85 representing pension contributions at 5% of base and a $12,600.00 car allowance for 18 months.

[10] It is the first submission of the defendant that the plaintiff is not entitled to damages based upon his entire association with the various printing companies. It is argued he received approximately 1.5 million dollars for the sale of his shares which took place in October 1999 and, therefore, was fairly compensated for the shares as a result of the sale. It is submitted the calculation of notice must be based on the 4 ½ years between October 1999 and termination on January 30, 2004. The defendant says the appropriate notice period is 6 months which is the amount paid by the defendant to the plaintiff on termination and that the plaintiff has been provided with appropriate compensation for the loss of his employment.

[11] It is my understanding that if the court does not accept the argument that the appropriate length of notice is four and a half years, the defendant's alternative argument is that the plaintiff's proposal of a notice period of 24 months is too long and consideration should be given to a period between 14 months to 18 months.

ANALYSIS

[12] Counsel for the plaintiff starts his argument on the issue of length of service by referring to the often cited case **Bardal v. The Globe and Mail Ltd.** (1960), 24 D.L.R. (2d) 140 with respect to the aspect of reasonable notice. McRuer C.J.H.C. stated:

> There can be no catalogue laid down as to what is reasonable notice in particular classes of cases. The reasonableness of the notice must be decided with reference to each particular case, having regard to the character of the employment, the length of service of the servant, the age of the servant and the availability of similar employment, having regard to the experience, training and qualifications of the servant.

[13] Counsel for the plaintiff points out the plaintiff had an executive position with a number of companies starting with A.N.P. and continuing to Newcap Ltd. He was a part time owner of A.N.P. but at no time did he have full control of the company. The best position he had was a fifty percent (50 %) ownership but he had to consult with the board with respect to capital expenditures and was required to consult with partners.

[14] Some of the authorities referred by counsel for the defendant involve the sale of assets of a company which employed the terminated party. In this proceeding that which took place in October, 1999 was the sale of the plaintiff's shares in a company. As stated in The Law of Dismissal in Canada, Howard A. Levitt (2nd) edition at p.9:

> The fact that a terminated employee is also the company's major shareholder does not affect the rights that he or she would otherwise have as an employee.

[15] A similar statement was made in Wrongful Dismissal by David Harris at p. 2-18.20:

> The fact that the dismissed employee is also a major shareholder of the defendant will be of no consequence. In *Guildford v. Anglo-French Steamship Co.* (1884), 9 S.C.R. 303, 18 CarswellNS 12, the plaintiff was the largest shareholder of the defendant, a fact that had no bearing on his action for damages. In the Supreme Court of Canada, Ritchie J. stated:
>
> > This question as to the ownership of the vessel, the captain being a shareholder, had, as I have said, in my opinion, nothing whatever to do with the case, as everything must turn on the contract entered into with the company, with which the plaintiff's interest in the ship as a shareholder had nothing whatever to do. (p. 308 [S.C.R.]
>
> English case law confirms this conclusion. In *Lee v. Lee's Air Farming Ltd.* (1960), [1961] A.C. 12, [1960] 3 All E.R. 420, [1960] 3 W.L.R. 758 (N.Z.P.C.), as the citation suggests, the plaintiff was the major shareholder and controlling force of the defendant, on whose behalf he negotiated his own contract of

employment. Upon its termination, and the plaintiff's action for damages, the House of Lords upheld the plaintiff's right to bring such an action:

> Always assuming that the company was not a sham then the capacity of the company to make a contract with the deceased could not be impugned merely because the deceased was an agent of the company in its negotiation. The deceased might have made a firm contract to serve the company for a fixed period of years. If within such period he had retired from the office of governing director and other directors had been appointed, his contract would not have been affected. The circumstance that in his capacity as shareholder he could control the course of events would not in itself affect the validity of his contractual relationship with the company . . . . In their Lordships' view, it is a logical consequence of the decision in *Solomon's* case ([1897] A.C. 22, 53) that one person may function in dual capacities. (p. 766 [W.L.R.])

...

A dismissed shareholder/employee may maintain an action for wrongful dismissal while simultaneously pursuing an "oppression remedy" in his or her capacity as a shareholder...

[16] In **Lynch v. J.D. Mack Ltd.** (1984), 65 N.S.R. (2d) 417 Mr. Justice MacIntosh stated in para. 17:

> Because Lynch was both an employee and a shareholder the termination of his employment raises two questions. First, the amount of compensation to which he is entitled on termination of his employment and secondly, the amount of compensation to which he is entitled for his ownership interest if and when he relinquishes his share. The second question is not before the court. His position as a shareholder is to be kept separate from that as an employee.

> "It is abundantly clear that neither the fact of the plaintiff being a shareholder nor what he may have done with a view to redeeming the concern and saving it from ruin ... should have, in my opinion, any bearing whatever on this case (at p. 307) ... this question as to the ownership of the vessel, the captain being a shareholder, had, as I have said, in my opinion, nothing whatever to do with the case, as everything must turn on the contract entered into with the company, with which plaintiff's interest in the ship as a shareholder had nothing whatever to do."
>
> Per, Ritchie, C.J. in Gilford v. Anglo French Steamship Co. 9 S.C.R. 303. See also Strickland v. Tricom Associates (1979), Ltd., (1982) 38 Nfld. and P.E.I. Reports 451.

[17] Counsel for the defendant made reference to **Edwards v. Morden & Helwig Ltd.** 1987 WL 728972 (Ont. H.C.) and **Baker v. British Columbia Insurance Co.**, (1992), 41 C.C.E.L. 107 (BCSC). These were decisions of single judges in Ontario and British Columbia. She also referred to **Lingelbach v. James Tire Centres Ltd.** 120 D.L.R. (4th) 456, a decision of the Saskatchewan Court of appeal with one of the three judges dissenting.

[18] In a written memorandum to the court, counsel for the defendant stated she advances the three cases to support the following principle:

> ...Courts make a distinction in situations where there has been either a share transfer only without a change in beneficial ownership and/or where employees remain "employed" on terms and conditions of employment that are substantially the same prior to and after a change of ownership has occurred. both (sic) the *Baker* and *Lingelbach* cases are distinctly different than the present case.

[19] In the **Edwards** case there was no specific reference to legal authority supporting the position taken by the court. There was a general comment of the court in para. 18 which reads:

> The reported cases do include a number of situations showing similarity to the present on where a period of previous employment was taken into consideration; and the present situation is not at all free from difficulty. However, my conclusion is that the situation here is significantly different from the cases in which the previous employment has been considered. Here the plaintiff was the owner of a company; he sold the assets, keeping only the name of the incorporated company through which he had operated, and became an employee of a significantly larger organization. He had been the sole, controlling figure in his own business, and I think the move that he made in 1979 to the employ of the defendant is a substantially different situation from others in which one company takes over another company as a going concern, and he, in a sense, inherits the employees of the company taken over. I think this situation is significantly different from that.

[20] There were factual distinctions between this proceeding and the **Edward's** case. Mr. Edwards was the sole owner of a small business which was having financial problems and he sold the assets of the business, not the shares. He did not follow his company into the operation of the larger company in the same manner as the plaintiff did in this proceeding but he became a district supervisor responsible for several offices of the large company's operation.

[21] Mr. Edwards became an employee of a larger organization at a time when he had the sole controlling interest in his company. In this proceeding, the plaintiff had not the sole controlling interest but, at best, he had a 50% interest and was required to consult with the Board of Directors and the other 50% owners.

[22] Newcap took over A.N.P. as a going concern and could be said to have taken control "lock, stock and barrel". The key is they were different sales. As expressed by counsel for the plaintiff, after Newcap took over A.N.P. as a going concern, the plaintiff was in the same chair, in the same office, doing the same job. The only difference was the plaintiff had to report to the President of Newcap approximately once a month to handle budget issues and capital expenditures.

[23] Mr. Justice Eberle in the **Edward's** case concluded in para. 24:

> In doing my best to consider all of the conflicting factors, some of them indicating a longer period; some of them indicating a shorter period, the best conclusion I can come to on the facts of this case is that the appropriate period of notice is nine months.

[24] I do not consider that which occurred in the **Baker** case supports the submissions of the defendant that the length of employment to be considered

reasonable notice should be confined to four and one-half years - from 1999 to 2004. The position of counsel for the defendant is set out in her written brief as follows:

> ...in *Baker v. British Columbia Insurance Co.* (1992), 41 C.C.E.L. 107 (BCSC), where an employee had worked in his own insurance company for four years and continued to work for the company for seven years in middle to upper management after it was purchased by a new corporate owner. In this case, the Court found that the entire length of employment, including the time during which the employee was an owner of the company should be considered in calculating notice. This conclusion was based largely on the fact that the terms and conditions of employment remained virtually identical following the ownership change as they had before the change in ownership. This case is distinctly different than the present case. Unlike in the *Baker* case, Murphy's employment changed dramatically after he sold his ownership interest. At this point, he no longer ran the business as his own with autonomy to make all strategic decisions. He was now an employee and treated as such.

[25] The plaintiff held a senior management position with the specialty of a printer and was not just an employee. This specialty continued from his early days with ANP to the time of dismissal in 2004. With various companies he had positions as President, Chief Executive Office and Vice President. Also, his speciality made obtaining similar positions very remote. He made strenuous efforts to seek new employment without success.

[26] In **Lingelbach v. James Tire Centres Ltd.**, [1994] S.J. No. 640 (Sask.C.A.) the plaintiff was a senior executive and director of a company with sixteen percent (16 %) ownership. The court found the trial judge erred in law by overlooking the company law principle of separate corporate personality. The court said at para. 9:

> ...And because of the doctrine of separate legal personality, it was open to him to act in the two separate capacities, that is as a director of the corporation which owned, in part, the business in question, and as an employee of the business. Being the former did not disqualify him from being the latter as well, whether for purpose of s.2(d) of the Act or for the purpose of the common law. All of this is well established by high legal authority.

[27] Again at para. 26 the court stated:

> ...The only change of ownership was in respect of shares in the companies that owned the business, not in respect of ownership of the business itself which remained the property of the same companies as before, except that the two companies were apparently merged. By reason of the doctrine of separate corporate personality, outlined above, a change of ownership of the shares did not change the company which has a separate existence from its shareholders, and did not change the ownership of the business, which remained with the same companies which then merged. If there was no change in ownership of the business, there was no break in the length of service of the appellant with the company which owned the business, and the appellant was entitled to be treated as if he had unbroken service with the same employer since at least 1982, when the present owner first began operation of the business....

[28] The Saskatchewan Court of Appeal agreed with the position of the Ontario Court of Appeal in **Addison v. M. Loeb Ltd.** (1986), 53 O.R. (2d) 602 which stated at p. 607:

> In these circumstances and in the absence of an express understanding to the contrary, it would, I think, be unfair to assess the appellant's damages for wrongful dismissal in the same manner as if he had walked into the store for the first time after the respondent purchased the business and became a new employee of the respondent, even at the rank of assistant manager. An examination of the authorities in cases where an employee has been employed by a purchaser of a business after having been employed for some time by the vendor and has subsequently been wrongfully dismissed discloses no clear principle other than that in the majority of the cases some recognition is given to the period of employment with the predecessor employer.
>
> Although length of service is a factor in determining the proper award for damages, it is not the only factor. The conduct of the parties is relevant. Furthermore, when the appellant assumed employment with the respondent, the respondent automatically received the benefit of the services of a very experienced assistant manager and one fully familiar with the operation of the store.

[29] The Saskatchewan Court of Appeal also commented that the sale of shares did not constitute a sale of business with these words:

> The only change of ownership was in respect of shares in the companies that owned the business, not in respect of ownership of the business itself which remained the property of the same companies as before, except that the two companies were apparently merged. By reason of the doctrine of separate corporate personality...a change of ownership of the shares did not change the company which has separate existence from its shareholders, and did not change the ownership of the business, which remained with the same companies which

> then merged. If there was no change in ownership of the business, there was no break in the length of service of the appellant with the company which owned the business, and the appellant was entitled to be treated as if he had unbroken service with the same employer since at least 1982, when the present owner first began operation of the business.

[30] There was representations from counsel for the plaintiff in his submissions with respect to some agreements and comments in documents effected by the parties. The purchase agreement dated June 30th, 2002 between Newcap Inc. and the defendant contains a list of people in management and the reference to the plaintiff describes him as President and C.E.O. with 22 years of service. There is also a document which seems to be a cheque stub dated December 19th, 2003 which was delivered to the plaintiff and set out the starting date of May 2nd, 1980.

[31] In the purchase agreement under Article 9 entitled Employees there is a paragraph in these terms:

> 9.1 Employees
>
> The Purchaser shall offer to employ (each an Employment offer) on the closing date but effective from the effective time all employees on terms and conditions which, in the aggregate for each such employee, are substantially the same as the terms and conditions of their employment with the Vendors immediately prior to the Closing Date.

[32] There is also a paragraph 9.3 which reads:

> 9.3 Severance Obligations
>
> The purchaser shall be responsible for - - - notice of termination of employment or pay in lieu of notice or damages for wrongful dismissal incurred with respect to any employees terminated or deemed terminated for any reason on or after Closing Date. The purchase shall recognize accumulated service with both the Vendors and the Purchaser for all purposes including for the purposes of determining any such severance, termination pay, notice of termination of employment or pay in lieu of notice - - -.

[33] I find there has been no break in the plaintiff's employment and he is entitled to credit for employment with the defendant and its predecessor companies dating from February, 1980.

[34] I must now consider the extent of the period of reasonable notice. The plaintiff seeks a twenty-four month period and the defendant, in an alternative argument suggests between a fourteen and an eighteen month period.

[35] I refer again to the reasons of Chief Justice McRuer in **Bardal v. The Globe & Mail Ltd.** (*supra)* directing no catalogue be laid down as to reasonable notice and the facts of each case must be considered. I consider the use of a scale to

match the number of months contradicts the directions of the Chief Justice and cause one to ignore the factors set out in that case.

[36] The British Columbia Court of Appeal in **Sorel v. Tomenson Saunders Whitehead Ltd. et al.** (1987)**,** 39 D.L.R. (4th) 460 had interesting comments on the length of notice period. The plaintiff had 37 years of service with an insurance company and with the defendant which purchased the insurance company. The plaintiff had worked his way up to General Manager, a position he retained after the purchase of the insurance company. The trial judge found the plaintiff was entitled to two and one-half years notice. The court of appeal reduced this to two years notice and stated at p. 463:

> ...This court did not in *Suttie v. Metro Transit Operating Co.* (1985), 28 D.L.R. (4th) 36, [1986] 3 W.W.R. 289, 2 B.C.L.R. (2d) 145, set maximum upper limits for a period of notice. It may be that in certain exceptional cases a notice period of more than two years may be appropriate. However, the circumstances in *Suttie* and those in the present case are so similar that the period of notice in this case must be treated in the same fashion, namely, two years. In *Suttie* and the present case, both plaintiffs were senior employees in highly specialized fields; both were nearing retirement age (58 and 61 respectively); and both had devoted substantially all of their working careers to their employers (39 and 37 years respectively).
>
> Counsel for the respondent frankly conceded that he was unable to cite any appellate case in Canada at the present time in which more than two years' notice was required. Accordingly, we would reduce this period to two years.

[37] I have considered several cases including **Mosher v. Twin Cities Co-Operative Dairy Limited** (1984), 63 N.S.R. (2d) 252, **Holland v. Midland Walwyn Capital Inc.** (1992), 124 N.S.R. (2d) 204, **Domery v. Matchless Inc.** (1996), 15 N.S.R. (2d) 321 and **Rogers v. Canadian Acceptance Corporation** (1982), 50 N.S.R. (2d) 537. I am of the view that sixteen months is the appropriate notice period.

MITIGATION

[38] The third issue to consider is the question of mitigation. The authorities point to two aspects which are important in considering the issue of mitigation in a wrongful dismissal case. The dismissed employee has a duty to take reasonable steps to mitigate his damages but the majority of cases state there is an onus on the employer to prove the employee did not take reasonable steps to mitigate. There is reference to this issue in Wrongful Dismissal Practice Manuel (2nd Edition). Ellen E. Mole at p. 10-2:

> 10.3 ...While a few cases say the plaintiff employee may have the initial burden of proving he or she has made reasonable efforts to mitigate, others have disagreed

> with this position, although an employer may be able to rely on the employee's own evidence to prove a failure to mitigate. The majority of cases have said that the employer defendant has the onus to prove the employee could have avoided all or part of the loss through sufficient mitigation efforts....

[39] The defendant did not advance any evidence to indicate the plaintiff could have avoided the loss through mitigation efforts. It was further set out in Wrongful Dismissal Practice Manuel (*supra)* at para. 10.4 as follows:

> 10.4 Most cases have said that this onus will not be met unless the employer proves both that the employee's efforts were unreasonable *and* that similar employment was available if a proper effort had been made. A total lack of effort may lead to a finding of failure to mitigate, but even a total lack of effort may be explainable by other circumstances, particularly if the employee reasonably believed that there was no use in seeking work, as none would be available. However, if an employee has clearly removed himself or herself from the work force, for example by deciding to retire, this will generally cut off damages. Some cases have reduced damages due to a lack of effort, but this has usually been done without analysis, and in most cases lack of effort alone has not been deemed sufficient to reduce damages. It is not usually enough that the employee's conduct was unreasonable in one respect; the employer must show it was unreasonable as a whole.

[40] The author Mole sets out the standard of reasonableness in para. 10-15 as folllows:

> 10.15 Only reasonable efforts are required, not a job search that aggressively pursues every possible means of mitigation. Even efforts that were not assiduous as they might have been will not be a failure to mitigate unless they were unreasonable. The standard of reasonableness may not be exacting, given that the employer is the wrongdoer in a wrongful dismissal case, and the employee's perspective on reasonableness usually takes precedence over the employer's view

> of reasonableness; the employee is not required to act in the employer's best interests to the detriment of his or her own interests. The employee is certainly not required to take risky or unsavoury steps, or even be held to the standard of making the best possible decisions...

[41] It was my impressions from the uncontradicted evidence of the plaintiff that he took reasonable efforts to mitigate his damages. He sent extensive documents with a view to finding a job and made numerous contacts for that purpose. He hired a consultant and made applications without success. Even after he purchased a business, he still made efforts to find a job.

DAMAGES

[42] Counsel have reached substantial agreement on the issue of damages. They have agreed to use a base salary of $160,000.00 per year, a pension contribution of $8,000.00 per year and a car allowance of $8,400.00 per year. These amounts total $176,400.00 a year or $14,700.00 a month. For a period of sixteen months there would be a gross amount of $235,200.00 less $76,923.07, the amount paid to the plaintiff by the defendant at the time of termination. The balance is $158,276.93.

[43] It is agreed the plaintiff is entitled to $2,875.00 for special damages and that the total claim of the plaintiff be reduced by $4,206.32 which were expenses owed by the plaintiff to the defendant.

[44] The parties agree to a 3.5% pre-judgment interest rate.

[45] There has been agreement with respect to the bonuses to which the plaintiff is entitled but the substance of the agreement is not clear to me from the document I received from counsel.

[46] Costs must be assessed.

J.