SUPREME COURT OF NOVA SCOTIA
Citation: *Hallett v. R.A. Murray International Limited*
2019 NSSC 288

Date: 20191001
Docket: 473547
Registry: Halifax

Between:

Dawn Hallett

Applicant

v.

R.A. Murray International Limited

Respondent

Decision

Judge: The Honourable Justice Gerald R.P. Moir

Heard: May 7 and 8, 2019 in Halifax

Counsel: Blair Mitchell, for the Applicant
Matthew McEwen and William Russell, for the Respondent

Moir, J.:

Introduction

[1] Ms. Hallett worked for R.A. Murray International Limited for thirty-two years. She started in the late eighties as a typist, and became office manager after ten years. Her salary in the end was $64,000 a year.

[2] The company terminated the employment in May, 2017. There is no suggestion of cause. Ms. Hallett was notified of the termination seven months before it came into effect. She was given a lump some of ten months additional salary on termination. So she got seventeen months in notice or pay in lieu of notice. She says the notice period should have been thirty months. Also, she claims for loss of bonuses and she claims *Wallace* damages. Murray International says there was a failure to mitigate damages.

[3] Ms. Hallett also says she is owed compensation for money that the company should have set aside for her to have in retirement.

[4] I will deal separately with damages for dismissal, liability for *Wallace* damages, and liability for retirement money.

Damages for Dismissal

[5] ***Facts.*** Mr. Richard Murray founded Ramsen Engineering with his partner, Mr. Harold Hennricksen, in 1980. Both men were professional engineers.

[6] Mr. Murray graduated from the Nova Scotia Technical College in 1966. He worked as a professional engineer in Jamaica for over a decade. He kept up many professional relationships on the island after moving back to Nova Scotia and founding Ramsen.

[7] Mr. Hennricksen left Ramsen in 1998, and Mr. Murray incorporated Murray International to continue the business of Ramsen. That business included engineering services, general contracting, material procurement, and logistical services for projects. However, Murray International began to specialize in highway bridges and sale of aggregates.

[8] Ms. Hallett was hired by Ramsen Engineering as a typist in 1985. Before that she had worked for about ten years as secretary to the late Arthur (“Art”) Meagher, Q.C. at the Public Utilities Board. She had learned secretarial arts at

Miss Murphy's Business College for a year. Her employment at Ramsen continued at Murray International when it was incorporated.

[9] After Mr. Hennricksen moved on and Murray International was incorporated, Mr. Murray gave Ms. Hallett the title "Office Manager". She took on many of the administrative functions previously exercised by Mr. Hennricksen.

[10] From 2007 until 2011, Murray International was very busy. It designed, obtained financing for, and built seventeen bridges and connector roads across Jamaica. Mr. Murray says that four-year period "was the most lucrative period of my career, and of R.A. Murray International Limited". Ms. Hallett says, "the company had some nine employees or consultants in Jamaica and perhaps six employees and consultants out of Halifax".

[11] Business slowed down for Murray International after the completion of the Jamaica bridges project. Staff were laid off. In the end, the only employees were Mr. Murray, Ms. Hallett and Mr. Ken Pettipas. Mr. Pettipas did handyman work part time for Mr. Murray and as a contractor with Murray International. His full-time job was with the Halifax School Board.

[12] At that time, Ms. Hallett's salary was $65,000 a year. In many years she also received a bonus. The last bonus was $2000 in 2018. Mr. Murray swore that he approved bonuses for all employees, and:

> In years where the company did well, bonuses were paid. In years where the company did not do as well, smaller bonuses were paid. In years when the company did badly, no bonuses were paid at all.

[13] In 2000, 2009, and 2010 Ms. Hallett was paid bonuses in the tens of thousands of dollars. In 2001 to 2004, 2007, 2008, 2011, and 2013 her bonuses were between $2,000 and $8,500. There were no bonuses in 2005, 2006, 2012, or 2014 to 2016.

[14] In 2016 when Mr. Murray was seventy-seven and Ms. Hallett was sixty-two, Mr. Murray decided to wind down most of his business and work as a consultant only. At that time, Ms. Hallett's duties only involved bank reconciliations for Murray International and accounts for related parties, for Murray International in Jamaica, and a trust, GST filings, and income tax remittances.

[15] In September and October 2016, Ms. Hallett, Mr. Murphy, and others met twice to discuss the wind-down and the end of Ms. Hallett's employment. On November 3, 2016, Mr. Murray sent an e-mail to Ms. Hallett that read:

> As you know, we have been considering a number of changes here. The purpose of this letter is to let you know that some of these changes will affect your employment.
>
> We have made the decision that we will be eliminating the position you currently hold. As a result, your employment with us will end on May 31, 2017. We have met with you on several occasions during the last few months to discuss your employment situation. You indicated during these meetings that you are looking to wind down your employment with us.
>
> Therefore, in order to satisfy any and all obligations to you, we offer the following:
>
> Full time work until May 31, 2017; and
>
> A lump sum payment on June 14, 2017 of $50,000.00 less statutory deductions. This amount is equal to ten months pay of your full-time salary.
>
> Your eligibility for benefits ends on your last day of actual work with us (May 31, 2017).
>
> Further, the property containing the current office 1358 Queen Street, Halifax, Nova Scotia may be sold. In the event that the property is sold before May 31st 2017, you will be required to work from your home until your last day of work.
>
> This working notice and salary continuance will satisfy our obligation to provide you with notice or salary in lieu of notice.
>
> If you need time off work for outside appointments, please let us know. Also, if you need a reference letter, just let us know and we will provide one for you.
>
> We hope that the above arrangements work with your expressed desire to transition to other interests. We thank you for your years of service and truly wish you the very best for the future.

[16] Ms. Hallett drew full time salary until the May 31, 2017 termination date. Then she was given a cheque for $31,925, $50,000 less withholdings.

[17] Ms. Hallett and Mr. Murphy gave conflicting evidence on Ms. Hallett's authority and role in Murphy International. She swears she "preformed all administrative functions". This included "purchase orders, accounts receivable, payables, invoices", but also "liaising with the firms accountants, liaising with the firm's clients and suppliers, and bank managers and bank staff". When required she even "oversaw the employees, all their vacation schedules, the running of the office and the building". She swears:

> Alone or with an engineer, I interviewed potential employment candidates for positions including an engineer, an engineer in training, drafts person-technical employee including Brian Josee, a project manager, and Ashley Gillis, then an engineer in training.
>
> At busy times or particularly critical times, I was often involved in matters involving the loading or unloading of vessels to transport material to the overseas project sites. Ships work 24/7 and to arrange for the transport and delivery; this often involved overtime which I worked on, according to my own discretion.
>
> Through the course of international projects, further, I liaised with overseas government officials, contractors, quantity surveyors, customers brokers, and Canadian government officials.

[18] Documents used to promote the Jamaica bridges project included reviews of roles played by various Murray International employees. Ms. Hallett exhibited hers, although it is not so grandiose as she claims in her affidavit:

> Mrs. Dawn Hallett's responsibilities include all aspects of administrative and secretarial work, including handling of tenders and shipping documents, receiving supplier's documents, and combining other documentary requirements and distributing to government agencies, clients, etc., as well as coordinating inter-office communications. Mrs. Hallett's duties also included accounting, accounts payable/receivables, invoicing, etc.

[19] Ms. Hallett was cross-examined. She said that as office manager she assisted with preparing quotes, but when provided with documentary examples she agreed that Mr. Murray provided the details and she typed the documents. She agreed that was typical. She also agreed that an organizational chart showed no one reporting to her.

[20] Mr. Murray swears that Ms. Hallett's primary role was as bookkeeper. Rather than liaise with accountants, their role was to "direct Dawn on proper booking practices". She also answered the phone, completed paperwork, did day to day banking and provided office management.

[21] Three times during the Jamaica bridges project, Ms. Hallett travelled to the island to help with the Jamaica office, which was bigger than Halifax's.

[22] Mr. Murray swore that Ms. Hallett's role with staffing was to set up interviews for him to conduct. He produced documents illustrating her scheduling role. He also swore, "Dawn was not qualified to assess the abilities or qualifications of engineers who may apply to work for R.A. Murray International Limited". I think that obvious.

[23] Sometimes Ms. Hallett signed bids. She had no authority to make independent decisions and only signed bids approved by Mr. Murray and at his direction.

[24] Mr. Brian Josee testified. He had been a project manager with Murray International for six years. He said Ms. Hallett appeared to be the administrator of the Halifax office. She did payroll, accounts receivable, payments to contractors, and secretarial staff supervision for the Jamaica office. Ms. Hallett also appeared to be closely involved in shipping aggregates.

[25] In my assessment, Ms. Hallett's affidavit exaggerates her authority and responsibilities at Murray International after she moved from typist to office manager. She managed a relatively small business, including the expansion during the Jamaica bridges project. However, she did not "liaise" in any meaningful way with the accountants, clients, suppliers, government officials, contractors, quantity surveyors, or bankers. She did not "oversee" the project managers and other engineers.

[26] Mr. Murray and engineers under him made the decisions. Ms. Hallett provided clerical services on bids, banking and bookkeeping services under direction of the accountants, clerical services for payroll, accounts payable, accounts receivable and the like, and scheduling services. I find Ms. Hallett was a middle manager in a small professional services and construction firm.

[27] ***Determination.*** Chief Justice McRuer's four factors for quantification of reasonable notice in *Bardal v. Glove & Mail Ltd*, [1960] O.J. 149 (O.S.C.) have been applied by courts across Canada for sixty years. In Nova Scotia, see for example *Silvester v. Lloyd's Register North America Inc.*, 2004 NSCA 17 at para. 20. At para. 21 of *Bardal*, the Chief Justice wrote:

> 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.

[28] We cannot say that McRuer's factors have always been without controversy, or that they are immutable to changes in the worlds of employment and litigation, or that they are exclusive. As well be seen, there is a serious

challenge to the first factor and the fourth needs adaptation to the state of modern litigation.

[29] On the first factor, Ms. Hallett relies on *Di Tomaso v. Crown Metal Packaging Canada LP*, 2011 ONCA 469. That decision has a curious background.

[30] In 1994, Justice MacPherson, then of the Ontario Court of Justice, rejected the notion that the highest ranges of notice periods (twenty to twenty-one months) were reserved for senior managers and professionals, and not clerical employees: *Cronk v. Canadian General Insurance Company* [1994] O.J. 1564 (O.C.J.). He awarded twenty months to a clerical worker who had been fired in her fifties after twenty-nine years of service and with low prospects of timely reemployment.

[31] The Ontario Court of Appeal reversed Justice MacPherson and reduced the award to twelve months: *Cronk v. Canadian General Insurance Company*, [1995] O.J. 2751. The language used by the Ontario Court of Appeal so emphasised the clerical/management distinction that some thought it established a twelve-month upper limit for clerical employees: see *Di Tomaso*, paras. 13 and 14.

[32] The decision of the Ontario Court of Appeal in *Di Tomaso* was written by MacPherson, JA. He followed Laskin, JA in *Minott v. O'Shanter Development Company Ltd.*, [1999] O.J. 5 (C.A), a decision rejecting the notion of a diminished upper limit for certain kinds of workers. Mr. Minott was awarded thirteen months.

[33] In *Di Tomaso*, the Ontario Court of Appeal upheld an award of twenty-two months for notice for an unskilled, non-managerial worker who was sixty-two and had served the employer for thirty-three years. He had been unable to mitigate his losses by finding timely reemployment.

[34] Referring to decisions of the New Brunswick Court of Appeal, Justice MacPherson wrote:

> Crown Metal would emphasize the importance of the character of the appellant's employment to minimize the reasonable notice to which he is entitled. I do not agree with that approach. Indeed, there is recent jurisprudence suggesting that, if anything, it is today a factor of declining relative importance…

[35] A decision of Drapeau, JA, later the Chief Justice of New Brunswick, lead the way for the decline of the first McRuer factor. In *Medis Health and*

Pharmaceutical Services Inc. v. Bramble, [1999] N.B.J. 307 (C.A.), Medis had closed its Fredericton dispensary. Six people "who were employed either as labourers or non-management and non-supervisory clerical positions" (para. 1) lost their jobs.

[36] The trial judge, Justice Lalee, set notice periods as low as thirteen months and as high as twenty-four months. She "placed particular emphasis on the age and length of service of each employee as well as the availability of alternate employment" (also, para. 1 of the appeal decision).

[37] The appeal was about the first of the McRuer factor. "Medis Health contends that the notice periods do not reflect the menial status of the respondents' jobs" (para. 2).

[38] After reviewing scholarly criticism of the appeal decision in *Cronk* (paras. 52 to 54), Justice Drapeau wrote:

> 56 In my view, the answer to the conundrum raised by MacPherson J. in *Cronk* is to be found in elementary principles of employment and evidence law.
>
> 57 The relevance of any factor is a function of the objectives that the law seeks to attain through notice of termination of employment. The primary objective of notice is to provide the terminated employee with a reasonable opportunity to seek alternate suitable employment.

[39] He diminished the function of the first factor by requiring evidence to support its relevance. At para. 65 Justice Drapeau wrote:

> Bearing in mind that reasonableness of notice is a conclusion that is largely fact-driven, I find it impossible to accept as a matter of law that character of employment simpliciter is relevant in all cases, no matter what the factual record might be. Judicial notice cannot be taken of its relevance in all cases. Absent evidence showing that the character of the terminated employee's job has some relevance to the pursuit of one or more of the objectives of notice, it is irrelevant.

He concluded at para. 70:

> In summary, judicial notice cannot be taken of the impact of the character of the terminated employee's job on his or her quest for suitable alternate employment. Moreover, the traditional approach, to the extent that it includes a consideration of character of employment simpliciter, is antithetical to the law's ultimate goal, namely egalitarian justice, and its application is not compelled by any authority binding on this Court. In my view, it behoves this Court to discard character of employment simpliciter as a relevant factor.

[40] Justice Warner discussed, and followed, the new line of cases in *Welch v. Ricoh Canada Inc.*, [2017] N.S.J. 258 at paras. 36 to 40. I respectfully adopt his commentary. The first McRuer factors needs evidence to make it relevant to length of reasonable notice. What appears to have been supported as judicial notice before, needs a new basis in evidence or a basis consistent with the principles for taking notice of a fact.

[41] In Ms. Hallett's case, the nature of her employment was somewhere between the purely clerical and higher management. This should be given no weight for the length of notice to which she was entitled.

[42] Ms. Hallett had served Murray International for over three decades when she received notice her employment was being terminated. She was in her sixties. The second and third factors indicate a lengthy notice period.

[43] The defence of mitigation has not been proven. No evidence suggests that a woman in Ms. Hallett's circumstances could have obtained a new job after her initial seven months notice.

[44] On the contrary, Ms. Hallett gave evidence that she regularly checked an online site advertising jobs and never found any position comparable to what had been hers. She may have been too restrictive, but I cannot make a finding that comparable work was available for her. The fourth factor is not against a lengthy notice period.

[45] The authorities do not support an award based on thirty months, except for the inclusion of *Wallace* damages. *Wallace* itself said that twenty-four months may be "at the high end of the scale": *Wallace v. United Grain Growers Ltd.*, [1997] S.C.J. 94 at para. 109. And that was with a period extended for bad faith.

[46] In *Medis Health* at para. 83, Justice Drapeau referred to twenty-four months as "a period commonly referred as the upper limit". At para. 24 of *Di Tomaso*, Justice MacPherson said, "cases submitted by both parties help establish a range of reasonable notice periods" and "the 22 months awarded by the motion judge is within the upper end of the range…".

[47] In *Welch* at para. 56, Justice Warner wrote:

> The present case law suggests that, save exceptional circumstances, application of the *Bardal* factors leads to reasonable notice periods in the range of about 6 months to 24 months.

That range does not include extension for *Wallace* damages, which would be among "exceptional circumstances".

[48] In *Silvester v. Lloyd's Register of North America*, the Court of Appeal substituted twenty-four months for thirty. And, that was with an extension for *Wallace* damages in accordance with the way *Wallace* damages were calculated at that time. Seventeen months was too short a notice period for a worker or manager who was over sixty years of age and had served the employer for over three decades, half her lifetime.

[49] In my assessment, twenty-two months was the appropriate period of notice.

[50] Ms. Hallett claims an amount for bonuses over her notice period. The employer was in decline when her employment was terminated. Its business was solely tied to the professional expertise, business abilities, and connections of one person. That person was a man about to turn eighty. The business had not paid Ms. Hallett a bonus in four years and, at that, the last bonus was only $2,000. Ms. Hallett had no reasonable prospect of being paid a bonus during her notice period.

[51] I will grant judgment for an extra five months notice, $27,000.

Wallace **Damages**

[52] Ms. Melda Murray, late wife of Mr. Murray, held office in Murray International, as corporate secretary and treasurer. Ms. Hallett had little to do with her until events in 2016, which Ms. Hallett thinks are proof of the true cause of her dismissal.

[53] In 2015, Ms. Hallett misappropriated $14,500 US in company funds. Mr. Murray noticed an unusual transaction and confronted Ms. Hallett. She explained why she had done it, and quickly replaced the money.

[54] Ms. Hallett swore that a year later, "Mrs. Murray began significantly to give me instructions in aspects of the office in which she had not been previously involved." In Ms. Hallett's mind, the misappropriation in 2015 and the involvement of Ms. Murray in 2016 are connected.

[55] According to Ms. Hallett, friction developed over housing Jamaican engineering students sponsored by Murray International. That, a previous criticism about cleaning the office bathrooms, and "her tone of voice" caused Ms.

Hallett "to believe that I was being forced out of office". There was more friction about shredding documents and, again, cleaning bathrooms.

[56] Ms. Hallett swears that the "unpleasant" events sprung from "an intention to cause me to leave employment". She complains that "Mr. Murray did not intervene in respect of these events". She also claims that she was being mislead into believing the company was winding down. Mr. Murray had "the intention to continue to operate the business while at the same time, terminating me".

[57] Ms. Hallett's conjectures run up against three hard facts. The business depended entirely on the professional expertise, business abilities, and connections of a man entering his eighties. Murray International hired no one to replace Ms. Hallett. She was its last full-time employee. And, no one suggests that Ms. Hallett complained to Mr. Murray.

[58] We do not have Ms. Murray's side of the story. She died in 2017.

[59] Even if I accepted the evidence given by Ms. Hallett about her interactions with Ms. Murray, I would not make findings in line with the opinions she says she formed, and puts forward as if they were evidence.

[60] Mr. Murray's account of the termination of Ms. Hallett's employment employs no conjecture on his part. It is also more consistent with the written record than is Ms. Hallett's.

[61] In light of the foregoing and having heard cross-examination, I prefer Mr. Murray's evidence on the manner of termination over that of Ms. Hallett.

[62] *Wallace* established liability of an employer to a dismissed employee for bad faith conduct "in the course of dismissal" para. 98. The content of the obligation of good faith and fair dealing in the course of dismissal was said to include "… employers ought to be candid, reasonable, honest and forthright…", and the content of bad faith would include "conduct that is unfair or is in bad faith, by being, for example, untruthful, misleading or unduly insensitive". (Also, para. 98).

[63] *Wallace* required that damages for breach of the duty of good faith and fair dealing in employment terminations were to be way of an increased notice period (para. 109). The award was, therefore, subject to the duty to mitigate and it was to be reduced by successful mitigation.

[64] *Honda Canada Inc. v. Keays*, 2008 SCC 39 untied these damages from the notice period. See, para. 59. Proof of mental distress that is, in the contractual measure, proximate leads to compensation for that damage.

[65] Bad faith in the manner of dismissal has not been proved. On the contrary, a business tied to the professional services and business abilities of one person was to decline as he approached his eighties. The employer gave seventeen months. The employee continued at her post full time for seven of those months.

[66] This is not a case for *Wallace* damages.

Money for Retirement

[67] In September of 2006 Mr. Murray set up "The R.A. Murray Family Trust". Mr. Josee was the nominal settlor. The trustees were Mr. Murray, Ms. Murray, and their son, Cameron Murray. Ms. Hallett signed as witness to execution by Mr. Josee, Mr. Murray, and Ms. Murray. She was not a party, nor was the respondent.

[68] The nominal settlement was five dollars. Anyone could add contributions of any amount.

[69] Ms. Hallett swore, "In approximately 2006 or 2007, Mr. Murray told me that he was setting aside money for my retirement and he talked in the range of a sum of $800,000". She assumed the family trust was the vehicle into which her retirement money would be paid. As I said, Murray International was not a party to the trust.

[70] That is the extent of the evidence for a promise of retirement money. No certainty as to the amount. Nothing about tax treatment. Nothing about when payments might be made. Nothing about when retirement might happen. Uncertainty about who was making the alleged promise.

[71] There were eight named beneficiaries in the family trust plus all of the Murray grandchildren as a group of beneficiaries. Dawn Hallett and Kim Pettipas were named beneficiaries.

[72] Being a named beneficiary did not guarantee a benefit. Aside from the need for contributions, interim distributions could be paid to "anyone or more of the Beneficiaries" as the trustees consider appropriate and, after Mr. Murray died, as his will provides. The same was provided for final distributions.

[73] Mr. Murray denies there was ever a discussion about setting aside money for Ms. Hallett. He says she worked for Murray International knowing it did not offer pension benefits. She "was paid a fair salary throughout her career".

[74] Ms. Hallett bases her claim for retirement money on the incorporation of a term for such into her employment contract, breach of the implied duty of good faith performance, or *quantum meruit*. In each of these, a finding of liability depends on acceptance of Ms. Hallett's evidence on this subject. I reject that evidence.

[75] Murray International was a sophisticated business operation in 2006. Its successes were not accomplished by sloppy bidding, oral building contracts, or poor accounting. I do not believe that either Mr. Murray or Ms. Hallett would have tolerated an imprecise, unwritten promise involving large sums of money and no tax accounting.

[76] For that reason, and by reasons of my overall assessment of credibility, I prefer Mr. Murray's evidence on this subject over that of Ms. Hallett.

[77] The case put forward for Ms. Hallett raised issues about the *Statute of Fraud*s, the essential requirement for contractual intent, and who is the contracting party. However, the evidence does not justify an examination of those subjects. Simply put on behalf of Murray International, the company "never promised to 'set aside' any amount for Ms. Hallett, in trust or otherwise".

Conclusion

[78] I will grant judgement for an additional five months in the notice period. The rest of the claims are dismissed. If necessary, the parties may make submissions on costs in writing.

J.