SUPREME COURT OF NOVA SCOTIA

Citation: *Kavli v. A.A. Munroe Insurance Brokers Inc.*, 2019 NSSC 385

Date: 20191219
Docket: HFX482961
Registry: Halifax

Between:

Diane Kavli

Applicant

v.

A.A. Munro Insurance Brokers Inc.

Respondent

DECISION

Judge: The Honourable Justice Patrick J. Duncan

Heard: May 28, 2019, in Halifax, Nova Scotia

Counsel: Michael O'Hara, for the Applicant
Harley MacCaull, for the Respondent

By the Court:

Introduction

[1] Diane Kavli has been employed in the insurance industry since at least 1984.

[2] In 1991 she began work as a broker with Balcolm Insurance in Kingston, Nova Scotia. That company was purchased by Johnson Insurance in 2000. She stayed on with Johnson until December 2014.

[3] On January 19, 2015, she began working as a broker with the respondent, AA Munro Insurance Brokers Ltd. On August 2, 2018, Ms. Kavli was given written notice that her employment with Munro would end on August 3, but that she would continue to receive salary and benefits up to and including the pay period ending September 28, 2018.

[4] Ms. Kavli has filed an application in which she seeks an order:

(a) declaring that the termination of the Applicant's employment without reasonable notice and without pay in lieu of notice was unlawful;

(b) for general and special damages for wrongful dismissal including pay in lieu of notice;

(c) for damages for unpaid bonuses;

(d) for damages for unpaid vacation pay;

(e) for damages for loss of pension or similar benefits;

(f) for damages for loss of medical/group plan benefits; and

(g) costs.

[5] A Notice of Contest was filed by the respondent taking the position that its legal obligations to the applicant, as required by the Nova Scotia *Labour Standards Code*, have been fully met. The respondent denies any inducement or other conduct that would entitle the applicant to compensation in a greater amount than that already paid to the applicant.

The Evidence

Diane Kavli

[6] Ms. Kavli filed an affidavit in which she set out the basis of her claim.

[7] She indicates that in late 2014 she was contacted by Rhonda Freeman, a broker in the respondent's Greenwood office. She understood from Ms. Freeman that Munro was looking for a broker in the Greenwood office and that Ms. Kavli should consider applying to work with Munro. Following that conversation Ms. Freeman called to indicate that she had set up a meeting between the applicant and Mr. MacCaull, the President and owner of the respondent company.

[8] In early December, Ms. Kavli met with Mr. MacCaull at the Munro office in Greenwood. At that point the applicant was a couple of months short of her 57th birthday. She testified that he first asked her "How can we make this happen?" She said that he did not want a short-term employee but rather a commitment. He asked how long she planned to work, and she indicated seven or eight years which would take her to age 65.

[9] Mr. MacCaull offered her a salary of $50,000 per year, which was comparable to that which she was earning at Johnson Insurance. The offer included four weeks vacation per year, which was one week less than what she had at Johnson.

[10] Ms. Kavli indicated that she had not been looking to leave Johnson, but she saw this as an attractive offer because she would have fewer clients to service. After considering the offer for a few days she called and accepted it.

[11] Her evidence is that she interpreted the discussion as committing both parties to employment until she reached age 65 at which time she would retire. That would occur in February 2023. Ms. Kavli says that had she known her employment with Munro would have ended after only 3½ years, she would not have left her previous employer.

[12] In a letter dated December 23, 2014, signed by Mr. MacCaull on behalf of the respondent company, an offer was made to Ms. Kavli for the position of insurance broker in the Greenwood office. The essential terms set out therein include:

- an annual base salary of $50,000;

- 6% of base salary ($3,000) in contributions to her self-directed RRSP;

- four weeks plus a day of annual paid vacation, as well as all statutory holidays;
- up to ten days of sick leave annually and bereavement leave as appropriate;
- life and disability insurance paid for by the company;
- the option to enroll in a health and dental insurance program which would be paid for equally as between the company and her;
- all approved training courses and related expenses would be paid by the company.

[13] No term of employment or other reference to mutual expectations of the length of the employment are included in the letter. It was signed by Ms. Kavli in acceptance of that offer.

[14] Ms. Kavli indicates that she was asked by Johnson Insurance to reconsider her decision but declined.

[15] The applicant says she received only positive comments in relation to her performance while employed with the respondent company. She had no indication prior to the meeting of August 2, 2018, that her job was in jeopardy. The letter of termination dated August 2, 2019, and marked as Exhibit C, was provided to her by her immediate supervisor, Valerie Guilbault. It is signed by Mr. MacCaull and states:

> I would thank you for your services over the past 43 months with AA Munro Insurance. Unfortunately, as we continue to respond to our slow growth, we will be reducing our overall staffing complement.
>
> Effective Friday, August 3, 2018 we will be ending your employment with AA Munro Insurance. You will continue to received [sic] salary and benefits up to and including pay period September 28, 2018. An REO will be issued at that time.

[16] Ms. Kavli's evidence is that on November 30, 2018, she submitted resumes to two insurance brokerages located in the Annapolis Valley but received no response. On December 3, 2018, she filed the Notice of Application in this matter.

On January 7 and January 16, 2019, she filed resumes with two more insurance companies located in the Annapolis Valley. Again, she had no response.

[17] Income tax information provided indicates the following reported incomes from her employment with Johnson (2013-2014) and Munro (2015-2017):

2013	$47,896.59
2014	$48,290.00
2015	$49,025.37
2016	$52,412.32
2017	$51,000.00

[18] In cross-examination, Ms. Kavli agreed that in her discussions with Mr. MacCaull, prior to being hired, she understood that he expected her to "help grow the business". She also agreed that there were no verbal agreements as to the duration of her employment. She also acknowledged that she was dealt with fairly when she had some medical issues that required her to take time off from work.

Norma Pottier

[19] The affidavit of Norma Pottier was entered into evidence without opposition. She was Ms. Kavli's supervisor at the time of her resignation from Johnson Insurance.

[20] Her evidence is that Ms. Kavli was a valued employee in good standing at Johnson and that she was disappointed with the applicant's decision to leave. She confirmed that Ms. Kavli rejected an opportunity to reconsider her decision and remain with Johnson Insurance.

Harley MacCaull

[21] Mr. MacCaull confirmed the contents of an affidavit which indicated that in the fall of 2014 he had concluded that there was an opportunity to grow the company's insurance brokerage business in the Greenwood area. He instructed Ms. Guilbault to identify an insurance broker who might be prepared to work in the Greenwood office and who could assist in accomplishing this goal.

[22] His understanding is that Ms. Guilbault contacted Rhonda Freeman who in turn set up the meeting with Ms. Kavli in December 2014. He testified that in their first meeting he clearly expressed the intention that she would be hired to grow the

business in the Greenwood office, citing a goal of 15% annual growth. She assured him that she had both the capability and the intention of growing the company's general insurance business in the Greenwood area.

[23] Mr. MacCaull stated that Ms. Kavli did not seek any guarantee of a specific term of employment, nor did he or the company offer one then or at any subsequent time.

[24] Once she began work, Ms. Kavli was provided with monthly sales reports that set out the business activity of the Greenwood office. Over the period January 2015 to July 31, 2018, the revenue growth in the Greenwood office dropped from 5.8% to 0% growth. During meetings with Ms. Kavli he reinforced the company's desire to grow the business and asked what the company could do to assist her in accomplishing that goal.

[25] By July 2018 the company was in economic distress and changes had to be made in the business operations. Labour costs had to be reduced. He reviewed the *Labour Standards Act* and provided what he understood to be the required benefits plus an additional $6,548.08 over and above the minimum statutory requirement.

[26] He first received the demand for additional compensation from the applicant's legal counsel in early November. Mr. MacCaull questioned the adequacy of the applicant's attempts to find other employment. He noted that there are over 40 General Insurance Brokerages and several active Direct Writers of General Insurance operating in Nova Scotia. He noted that Ms. Kavli submitted resumes to only four companies, two just before filing the current Application and the other two shortly thereafter. There was no indication of further attempts to find employment between January and the hearing date.

[27] In cross-examination, he confirmed that he relied on Ms. Guilbault to identify someone in the Greenwood area to add to their local office. It was her decision to contact Ms. Freeman about the position. One factor that influenced his decision to hire the applicant was that he was assured she could work well with Ms. Freeman.

[28] He agreed that he could have found a more junior person for that office and for less money than he paid to Ms. Kavli. He was prepared to pay a higher salary to find someone who could assist in growing the business.

[29] Mr. MacCaull acknowledged that he asked Ms. Kavli "How do we make this work?", as well as how long she intended to work for. He recalled her response to be: "long-term".

[30] He confirmed that he told the applicant his goal was for 15% annualized growth, but acknowledged that this was not included in the letter of offer. Although there were no specific targets set, he viewed Ms. Kavli as an experienced broker who would be well aware that positive financial results were expected. Mr. MacCaull acknowledged that he did not tell the applicant her employment could be terminated if financial results were inadequate.

[31] Ms. Kavli was called in rebuttal and asked whether she was aware of Mr. MacCaull's target of 15% growth. She testified that she could not recall whether a specific number was provided to her.

Issue

[32] The respondent does not argue dismissal for just cause. The issue is whether eight weeks notice, in the circumstances of this case, is sufficient.

Reasonable Notice

[33] Chipman J. in *Reiner v. Maritime Business College (2009) Ltd*, 2016 NSSC 291, reviewed the legal principles to apply in assessing what constitutes "reasonable notice":

> Application of *Bardal* Factors
>
> [22] Although reasonable notice periods depend on the facts of each particular case, the seminal case of *Bardal v. Globe & Mail Ltd.* (1960), 1960 CanLII 294 (ON SC), 24 D.L.R. (2d) 140 (Ont. S.C. (H.C.J.)) sets out what courts consider when assessing notice: character of employment, length of service, employee's age and the availability of similar employment given the employee's experience, training and qualifications. These factors, commonly referred to as *Bardal* factors, are not exhaustive or exact but are helpful in determining a general range of reasonable notice employees are likely entitled to. The *Bardal* factors are generally recognized in Nova Scotia (see *Butcher v. Clearwater Seafoods Limited Partnership*, 2010 NSCA 12 (CanLII) per Justice Fichaud).
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> [23] Recently, Justice Leblanc considered the *Bardal* factors in *Bellini v. Ausenco Engineering Alberta Inc.*, 2016 NSSC 237 (CanLII). He noted at para. 44 that the *Bardal* analysis was endorsed by our Court of Appeal in *Silvester v. Lloyd's Register of North America Inc.*, 2004 NSCA 17 (CanLII), at para.

20. Further in the decision at para. 48, Justice Leblanc noted, "…what is required is an individualized approach to assessing the *Bardal* factors." This was in response to the alleged "rule of thumb" formula of one month of notice per year of service as a starting point.

[24] I find Justice Leblanc's thorough analysis to be of application here and, accordingly, I now reproduce paras. 47 and 48 of *Bellini* in their entirety:

> [47] There are several approaches in the caselaw to the assessment of the *Bardal* factors. One line of cases in Ontario, such as *Ryshpan v. Burns Fry Ltd.* (1995), 1995 CanLII 7278 (ON SC), 10 C.C.E.L. (2d) 235, [1995] O.J. No. 1132 (Ont. Ct. J. (Gen. Div.), adopted a "rule of thumb" using the formula of one month of notice per year of service as a starting point. This approach was rejected by the Ontario Court of Appeal in *Minott v. O'Shanter Development Co.* (1999), 1999 CanLII 3686 (ON CA), 168 D.L.R. (4th) 270, [1999] O.J. No. 5, where Laskin J.A. said, for the court:
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> > 71 Those who support the rule of thumb approach to calculating the period of reasonable notice argue that it accords with popular perception, that it is reflected in corporate severance policies, and, most important, that it provides "some predictability and certainty to the calculation ... while at the same time allowing for flexibility by adjusting for various factors."
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> > 72 Predictability, consistency and reasonable certainty are obviously desirable goals in employment law - both for employers and for those advising employees who have been or are about to be dismissed - a point emphasized by Lacourciere J.A. in his majority reasons in *Cronk*. These goals, however, are best achieved by a careful weighing and blending of the *Bardal* and other factors relevant to the calculation of reasonable notice, by establishing reasonable ranges for similar cases, recognizing that no two cases are the same, and even by establishing upper limits for particular classes of cases where appropriate.
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> > 73 The rule of thumb approach suffers from two deficiencies: it risks overemphasizing one of the *Bardal* factors, "length of service", at the expense of the others; and it risks undermining the flexibility that is the virtue of the *Bardal* test. The rule of thumb approach seeks to achieve this flexibility by using the other factors to increase or decrease the period of reasonable notice from the starting point measured by length of service. But to be meaningful at all, this approach must still give unnecessary prominence to length of service. Thus, in my opinion, the rule of thumb approach is not warranted in principle, nor is it supported by authority.

> [48] Similarly, in *Capital Pontiac Buick Cadillac GMC Ltd. v. Coppola*, 2013 SKCA 80 (CanLII), [2013] S.J. No. 454, the Saskatchewan Court of Appeal held that a "rule of thumb" approach "is not supported by the jurisprudence and is inconsistent with Bardal" (para. 22). The Nova Scotia courts have not addressed this point in detail. In *MacKinnon v. Acadia University*, 2009 NSSC 269 (CanLII), [2009] N.S.J. No. 411, Warner J. stated that the "rule of thumb" had no place in the assessment, being inconsistent with *Bardal* (para. 113). I am satisfied that the weight of the caselaw militates against employing the "rule of thumb." As *MacKinnon* suggests, what is required is an individualized approach to assessing the *Bardal* factors.
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> [emphasis added]

[34] The applicant has referred me to the decision of the Supreme Court of Canada in *Wallace v. United Grain Growers*, [1997] 3 SCR 701, as support for the application of the *Bardal* factors. The case is also provided for its identification of "inducement" as an additional factor relevant to the assessment of reasonable notice. This factor, together with Ms. Kavli's age at the time of being hired, are submitted to be the most significant factors in assessing a reasonable notice period.

[35] Justice Iacobucci, writing in *Wallace* described the role that inducement might have:

> 83 One such factor that has often been considered is whether the dismissed employee had been induced to leave previous secure employment… According to one authority, many courts have sought to compensate the reliance and expectation interests of terminated employees by increasing the period of reasonable notice where the employer has induced the employee to "quit a secure, well-paying job ... on the strength of promises of career advancement and greater responsibility, security and compensation with the new organization" (*I. Christie et al*., supra, at p. 623).
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> 84 Several cases have specifically examined the presence of a promise of job security: … In particular, I note that the British Columbia Court of Appeal recently adopted this approach in *Robertson v. Weavexx Corp*. (1997), 25 C.C.E.L. (2d) 264. The facts of this case were very similar to those currently before this Court. Writing for the court, Goldie J.A. stated at pp. 271-72:
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> > Also part of the inducement to the respondent in making the move he did was, no doubt, the discussions as to long term employment. . . . As I have concluded, those discussions lacked contractual force in terms of the respondent's assertion of a fixed term contract but nevertheless, they were and are, in my opinion, significant on the issue of reasonable notice.
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> 85 In my opinion, such inducements are properly included among the considerations which tend to lengthen the amount of notice required. I concur

> with the comments of *Christie et al., supra*, and recognize that there is a need to safeguard the employee's reliance and expectation interests in inducement situations. I note, however, that not all inducements will carry equal weight when determining the appropriate period of notice. The significance of the inducement in question will vary with the circumstances of the particular case and its effect, if any, on the notice period is a matter best left to the discretion of the trial judge.
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> [emphasis added]

Analysis

Inducement

[36] The applicant carries the burden of establishing evidence of inducement. Counsel for Ms. Kavli submits that the respondent approached her, unsolicited because she was a "highly experienced insurance broker in the market in which the respondent wished to grow its business". She had no previous plans to leave her employment with Johnson Insurance where she was a valued employee. He points to her long-standing service with Johnson Insurance and its predecessor company. Most significantly, he asserts there was an "implicit, if not express, representation that the employment would be for the long term" and therefore that she "relied, reasonably, on that representation in deciding to leave her then employment."

[37] With respect, I do not attach the same weight to this factor as counsel for the applicant would urge. While it is true that Ms. Kavli quit an apparently secure, well-paying job, she did not do so "on the strength of promises of career advancement and greater responsibility, security and compensation with the new organization". (*see*, *Wallace*) Rather, she accepted the position for approximately the same compensation, without a contractual commitment of security, and providing less vacation leave. The position was comparable to that which she held at Johnson Insurance. Taking the position did not require her to relocate or incur any expenses or disruption to her family. She acknowledges in para. 20 of her affidavit that her motivation to accept the offer was that "… there would be fewer clients to service than at Johnson's…".

[38] It has been suggested that it was reasonable for her to rely on the conversation with Mr. MacCaull in which he asked her intention with respect to her intended commitment to the position. I accept that both of them contemplated that she would be employed there for seven or eight years as she testified to.

However, I do not accept that this discussion represented a guarantee of employment for that period of time. It was not a contractual obligation.

[39] I accept Mr. MacCaull's evidence that he informed her he was looking for an experienced broker such as her to "grow the business", with an objective of an annualized growth rate of 15%. I also accept his evidence that Ms. Kavli, with extensive experience in the same position and in the same location, would understand implicitly that she was being brought in specifically for that purpose. Accepting these propositions, as I do, brings into question her stated rationale for accepting the position, that is, that she would be serving "fewer clients than at Johnson's". This dichotomy was not explained in the evidence.

[40] The inference is that she did not think she would have to work as hard which, on the face of it, would seem to be inconsistent with the object of growing the business. Therefore, it undermines the reasonableness of her asserted reliance on the same conversation as ensuring, unconditionally, a term of employment to age 65.

[41] Counsel for Ms. Kavli indicates that the financial status of the employer is not a relevant consideration in regard to the setting of reasonable notice, and in any event, there was no evidence to support the respondent's admission that it was in "economic distress".

[42] I respond to this by noting that Mr. MacCaull's testimony as to the lack of the company's economic growth over the period of Ms. Kavli's employment was uncontested, and it was not offered to suggest just cause for termination.

[43] The applicant says that she relied on Mr. MacCaull's pre-hiring representations with respect to the intended length of her employment, as if it were an unconditional guarantee. The evidence of what she knew of the respondent's reasons for hiring her is relevant to assessing the reasonableness of that expectation. Ms. Kavli knew that the company was opting to hire her because she had relevant experience and was expected to help the company grow. She was also told that the goal was to achieve 15% annualized growth. It would not be reasonable of her to conclude that she was guaranteed employment to age 65 irrespective of the finances of the company. She had sufficient information to understand that she was assuming some risk in changing jobs at age 57.

Age

[44] There is a general presumption that after a certain age it becomes progressively more difficult for an employee to obtain new employment. In this case, the applicant was 60 years of age at the time of her dismissal. She had not obtained employment at the time of the hearing. I have been asked by counsel for the applicant to accept that there is a significant likelihood that she "has effectively been forced to retire and to retire much earlier that she otherwise what have wanted".

[45] I accept the accuracy of the general proposition advanced, but the weight to attach to this factor is diminished by the lack of evidence to support the conclusion I have been asked to accept – that she has been forced to retire.

[46] Ms. Kavli provided little evidence of a sincere attempt to find work from August 3, 2018, to the date of the hearing. The number of companies that do business in the field in which she has expertise far exceeds the four companies she sent information to. Also, the resumes were only sent out immediately prior to filing this application and shortly thereafter. Long gaps after receiving notice of termination and after January 2019 leave open the inference that the applicant was not actively pursuing other employment.

[47] I have been pointed to hearsay evidence offered by the applicant that she was informally told that her last salary was greater than that of the current manager of one of the places to which she submitted her resume. Even accepting that to be accurate, a point not demonstrated in evidence, it does not say she would not be employable at some lesser salary.

[48] As a consequence, I am left with the presumption of the consequences of age on employability but without a great deal of evidence to understand the degree to which it is true for Ms. Kavli.

Length of Service

[49] The applicant was employed for three years and seven months with the respondent company. I have been urged by counsel for the applicant not to apply the so-called "rule of thumb" formula of one month of notice per year of service as a starting point. I agree with this submission.

Character of Employment

[50] The applicant was employed as an insurance broker, providing services to the firm's clientele. The position has some specialization but is not highly specialized nor of a management level.

Availability of Similar Employment having regard to Experience, Training and Qualifications of the Employee/Attempts to Secure Reasonably Comparable Alternate Employment

[51] As discussed in a different context, the applicant's age of 60 at the time of termination presumptively works against her ability to find other similar employment. I accept that premise. The respondent argued a failure by Ms. Kavli of making reasonable efforts to obtain new employment. In essence the respondent has suggested that Ms. Kavli failed to mitigate her loss.

[52] In the decision of *Boutcher v. Clearwater Seafoods Limited Partnership*, 2010 NSCA 12, the Nova Scotia Court of Appeal adopted the following statement of principle:

> [60] Under any approach, the court must enlist the first principle of mitigation stated by Chief Justice Laskin in *Red Deer College*, page 330:
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> > . . . The parameters of loss are governed by legal principle. The primary rule in breach of contract cases, that a wronged plaintiff is entitled to be put in as good a position as he would have been in if there had been proper performance by the defendant, is subject to the qualification that the defendant cannot be called upon to pay for avoidable losses which would result in an increase in the quantum of damages payable to the plaintiff. The reference in the case law to a "duty" to mitigate should be understood in this sense.

[53] Counsel for the applicant referred me to the decision of the Nova Scotia Court of Appeal in *Coleman v. Sobey's Group Inc*., 2005 NSCA 142, where Fichaud JA stated:

> 49 …The party who alleges failure to mitigate has the onus of proof. Sobeys must establish by evidence that Mr. Coleman failed to act reasonably to mitigate his losses. To satisfy the onus, it is insufficient that Sobeys merely criticizes Mr. Coleman. It is necessary that there be evidence (a) that Mr. Coleman failed to make reasonable efforts to find other work, and (b) had he done so, he likely would have found replacement work. England, Wood and Christie (4th ed.), ¶ 16.85.

[54] The evidence is that Ms. Kavli submitted resumes to four companies located in Middleton, Berwick, Aylesford, and Greenwood, Nova Scotia. She did this in close proximity to initiating the application. I am satisfied the applicant did not make reasonable efforts to find other work, however, the evidence is insufficient to conclude that she would likely have found replacement work.

Conclusion

[55] I do not agree with counsel's argument that the period of reasonable notice on these facts is a range of 12 to 24 months. I also do not accept the applicant's position that she is entitled to notice of 18 months.

[56] Having regard to the facts as I have found them, and having reviewed the relevant legal principles, including those set out in the list of Nova Scotia cases included as Exhibit A to the prehearing submission of counsel for the applicant, I conclude that the application should be granted. I set the reasonable period of notice at five months, from which must be deducted amounts already paid by the respondent.

[57] If the parties cannot agree on the quantification of damages, then I am prepared to convene a further hearing at their request to resolve the form of Order.

[58] Similarly, if the parties cannot agree as to costs of the application, then I will receive their written submissions or convene a further hearing if that is required.

[59] I direct counsel for the applicant to prepare the Order.

[60] Application granted.

Duncan, J.