IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Cite as: LeBlanc v. Comeau's Sea Foods Ltd., 2016 NSSM 25

Claim: SCD No. 448688
Registry: DIGBY

Between:

ROBERT JOSEPH LEBLANC

Claimant

– and –

COMEAU'S SEA FOODS LIMITED

Defendants

Adjudicator: Andrew S. Nickerson, QC

Heard: May 4, 2016

Decision: May 12, 2016

Appearances: Ali Raja, for the Claimant,
Michelle McCann, for the Defendant

[1] Robert LeBlanc was born September 4, 1948 and is now 67 years of age. He has lived in Mavilette, Digby County for 42 years. He is a welder by trade and has a grade 8 education. He says that he worked for the defendant for 42 years fixing scallop boats and scallop fishing equipment and that he never worked anywhere else and did no side work. He said that he worked every year but would be laid off during the winter to return in the spring when the scallop season began. He says that the employer would call him. He did say in one part of his evidence that he had phoned the employer "once". He acknowledged in cross-examination that he called the defendant to go back to work five times from 2007 to 2013 (with the exception of 2011 when he worked the entire year). He stated that he never asked for a layoff for the winter and always wanted to work.

[2] In the spring of 2014 he returned to work as usual. He says sometime around July he was told by Earl Dugas, his shop foreman, that he was finished and that he had been replaced. Mr. Amirault who was in charge of all of the welding work was not there at the time. Mr. LeBlanc says he called Mr. Amirault and expressed his concern that he had insufficient weeks to draw employment insurance. He was offered reemployment and he came in and worked until October 2014. Exhibit 2 shows that he worked until October 31, 2014.

[3] He did not contact Mr. Amirault again and was never recalled. He did not look for work in the spring of 2015 as he thought that he would be recalled. He noted that his wife was very sick throughout 2014 and she eventually passed away in November 2015. He said he was busy all through the winter of 2014 caring for her but was expecting to go back to work in the spring. He testified that neither Mr. Amirault nor Mr. Dugas gave any indication of any severance package and gave him no notice of termination other than the comments made by Mr. Dugas noted earlier.

[4] Mr. LeBlanc said he was now 67 and plans to retire but he had planned on working until October 2015. He understood that he had to pay for some medical benefits while he was not working. He said no one explained to him that he could convert the company plan to a private plan at the end of 2015. He says that no one notified him personally that he needed to pay additional premiums and understood that he was staying on the benefits. He said that his wife was advised that he needed to make contributions for health benefits to the employer and his son Jonathan went to the defendant's offices and made payments.

[5] Jonathan LeBlanc, the claimant's son, testified that in the fall of 2014 he attended the offices of the defendant on three occasions and personally made three payments to the secretary at the head office. The receipts for this are included in Exhibit 3. The payments are acknowledged by the defendant. He says that no one advised him of any arrears but that his mother had said they needed to make payments "to catch up". He says that he never saw letters from anyone concerning the benefits.

[6] Evan Amirault is the manager of the welding department for the defendant and has held that position for 23 years. He testified that the defendant is a family owned and family oriented business and takes the time to know their employees and tries to keep the good workers. He says Mr. LeBlanc worked as a welder and he felt that he knew Mr. LeBlanc quite well and was on good terms with him. He says that he never told Mr. LeBlanc that he could not come back to work in 2015 and that had Mr. LeBlanc called him he would have had work for him. His evidence was that Mr. LeBlanc was not dismissed from his employment. He says that he recalls for the past seven or eight years Mr. LeBlanc would call him at the beginning of the scallop season when he knew that work was likely available and he would work from approximately May to October and then collect employment insurance over the winter. His recollection was that 2007 was the first year that Mr. LeBlanc took the winter off. He says this was at Mr. LeBlanc's request and that they did the same several years thereafter. In Mr. Amirault's testimony it was Mr. LeBlanc who called and indicated when he wanted to come back to work in the spring.

[7] Mr. Amirault says that in 2013 and 2014 Mr. LeBlanc had gotten his hours for employment insurance and attended Christmas parties in 2013 and 2014. He says that he did not expect Mr. LeBlanc to return to work because he made a note in his annual salary review done at a Christmas party. He testified

that he made a note which is at TAB 6 of the defendant's book of exhibits which reads "last year of work". His view was that this indicated that Mr. LeBlanc had intended to retire. When the exhibit is examined it is clear that this note was made in 2012.

[8] He says that Mr. LeBlanc called in April 2014 and wanted to work the summer months. He says in July Mr. LeBlanc said he had worked enough and he took this as an intention to retire. It is not clear to me if this was alleged to be said to Mr. Dugas or to Mr. Amriault. Mr. Amirault says that Mr. LeBlanc called in September 2014 and stated that he needed 40 hours to complete sufficient work for an employment insurance claim. He returned to work to the end of October.

[9] Mr. Amirault says that in the spring of 2015 he did not call Mr. LeBlanc as he thought that Mr. LeBlanc was now retired and Mr. LeBlanc had not called to return to work. He says that at no time did he ever indicate to Mr. LeBlanc that he had been replaced. He simply took it that he was retired because he had not called. He says that he saw Mr. LeBlanc in a casual meeting in November 2015 and paid his respects to Mr. LeBlanc with respect to the loss of his wife. He says this conversation was friendly and there was no mention of Mr. LeBlanc's employment, dismissal or retirement.

[10] In cross-examination Mr. Amirault confirmed that he had no complaints about Mr. LeBlanc's work and that he was a good employee. He always found Mr. LeBlanc to be a truthful individual. He also admitted that Mr. LeBlanc never made a clear statement that he was retiring. He said that Mr. LeBlanc knew when work is needed and he is in the best position to call. He said that in the fall of the year Mr. LeBlanc would often say "I am done" but that he did not ever hear him say that he would retire. He gave Mr. LeBlanc no advice about the group insurance policy. Mr. Amirault maintained that "We always went by what he wanted". Mr. Amirault stated that Earl Dugas told him a couple of weeks before Mr. LeBlanc was laid off in the middle of the summer of 2014 that Mr. LeBlanc wanted to quit but he does not recall Mr. Dugas saying that Mr. LeBlanc wanted to retire.

[11] Mr. Amirault testified that there would have been work for Mr. LeBlanc in the spring of 2015 if Mr. LeBlanc had called and asked for it.

[12] Danny Webber is the CFO of the defendant. He says that the only time that the defendant had paid any kind of severance or pay in lieu of notice was a layoff of employees at a related company that was closed down. He says that he does not know Robert LeBlanc. He testified that the company is operated in a very informal manner and is very much a family company.

[13] His department manages the employee benefit program but he does not have intimate knowledge of it. He admitted that there was a duty to advise Mr. LeBlanc about the status of his benefit package but that there was no letter ever sent to Mr. LeBlanc. He says that Monique Stewart, one of his staff

contacted Mrs. LeBlanc (now deceased) to indicate that if Mr. LeBlanc wished to stay on the benefit package he would need to make some payments for the premiums. He believes that Ms. Stewart would have advised Mrs. LeBlanc of the amounts required. No payments were made after December 2015.

ISSUES

[14] Was there an employment relationship between the parties during 2015?

[15] Was the claimant dismissed without notice or pay in lieu thereof?

[16] If so, has the claimant fulfilled his duty to mitigate his losses?

LAW AND ANALYSIS

[17] There is a certain sadness to this case. It highlights the problems that can arise when parties fail to communicate clearly and take no steps to confirm their understanding of a situation.

[18] I want to thank counsel for their assistance in this matter. I found this a difficult matter to adjudicate. Their conduct of the case and the submissions that they made were very helpful in my struggle to achieve what I hope is a legally supportable and fair result.

[19] The facts of this case are not entirely typical of dismissal cases. Here we have a company which according to all parties was operated in a rather informal manner which for the most part was beneficial to both the employees and the employer. They regarded each other with respect and spoke casually and on good terms. While this is admirable and to be encouraged in general, it has unfortunately led to what I consider to be miscommunication and misunderstanding.

[20] The note relied on by Mr. Amirault as suggesting in his mind that Mr. LeBlanc intended to retire, and in fact had retired, was made in 2012. I cannot see how this could possibly imply anything about Mr. LeBlanc's intentions the spring of 2015, since he had worked in 2013 and 2014.

[21] I found all of the witnesses to be credible people attempting to tell the truth as they understood it. Mr. LeBlanc certainly is poorly educated and not very well spoken, and may not be totally reliable about the finer details of the facts, but there is nothing in the evidence to suggest that he is dishonest. I think it is a strong inference from the evidence that he honestly believed in July 2014, likely based on something that Earl Dugas had said to him, that the employer wish to terminate him. He then called Mr. Amirault and was rehired to work until October 2014. I conclude from this sequence of events that Mr. LeBlanc quite reasonably understood that any termination had been removed and that he was back to

the normal working status. I am satisfied that Mr. LeBlanc believed that he would be going back to work in the spring of 2015.

[22] I do not have the benefit of Mr. Dugas's evidence. It is the responsibility and duty of counsel to put forward such evidence as they consider of benefit to their case and I draw no inference negative or positive for the failure of either party calling this witness. However this leaves me with no ability to determine what occurred between Mr. LeBlanc and Mr. Dugas that led Mr. LeBlanc to think he was dismissed with any degree of comfort. I do believe that Mr. LeBlanc honestly believed that he was to be let go. No one clarified the effect of the recall for the fall of 2014. Again poor communication is a factor.

[23] Both parties acknowledge that Mr. LeBlanc did not call his employer in the spring of 2015. The defendant acknowledges that it was well aware that Mr. LeBlanc had lost his wife, and was or should have been aware, that Mr. LeBlanc was under substantial stress. I do believe that this is a company that values and cares for its employees and their families and has a very human interaction with them. It does seem somewhat inconsistent with the nature of the way this company was managed that they would not reach out to a long-standing employee who they knew had recently suffered such a loss.

[24] The defendant's counsel acknowledges that the test to determine whether or not an employment relationship has been terminated is that, when objectively viewed, an intention to leave employment was communicated. She argues that this can be by an act as well as communication. I accept this as a correct statement of the law.

[25] The defendant argues that there is a seven year past practice which obligates Mr. LeBlanc to make the call to the employer if he wants work. With respect, I do not think it is that simple. In my view an objective observer would take into account the entire relationship between the parties including its informal nature. I have accepted as true that this company operated on an informal basis and had friendly relations with their employees. I am satisfied that there were occasions when the employer called the employee back to work and perhaps more occasions when this employee called, especially in recent years. I do not think this takes away from the fact that this is a long-standing employee of value to this company. It seems inconsistent with the nature of the way this company was operated that they would not take some interest in this employee and take some steps to determine whether in fact he did wish to return to work. In fact the nature of the way in which they interacted with employees may well have induced Mr. LeBlanc to expect this of them.

[26] I am satisfied that the claimant made no unequivocal indication of his intention to retire or not return to work. I do not think the fact that he failed to call in the spring of 2015, objectively assessed, is

a sufficiently clear act that would constitute a clear communication of his intent not to return. Given other circumstances and a different corporate environment the defendant's argument may well have prevailed. However, given the evidence that I have heard about the relations between this employer and its employees I do not think that an objective observer would come to a conclusion that Mr. LeBlanc's failure to call would constitute an act which unequivocally communicates an intent not to return.

[27] Nor do I think the employer really turned its mind to whether Mr. LeBlanc had retired. I am strengthened in my view by the fact that the administration of the defendant continued to accept payments on account of the group plan and made no efforts to inform Mr. LeBlanc about the options that he may have had to convert to private plan. This suggests to me that there was no expectation on the part of the employer that the relationship had terminated. I note as well that the administration staff did not advise Mr. LeBlanc himself about the amount due to maintain his status on the plan. It appears to me that at the end of 2015 the defendant simply made an assumption that Mr. LeBlanc would not be returning.

[28] I am satisfied that Mr. LeBlanc was in fact dismissed without notice or pay in lieu thereof.

[29] However that is not the end of the matter. Mr. LeBlanc clearly had a duty to mitigate. He sought no employment elsewhere. He did not call the employer to ask for work as he did in other springs and in the middle of 2014. If work had been offered in 2015 he would have been obligated to take it.

[30] This now leaves the court with a very difficult task. On the one hand I have found that Mr. LeBlanc was wrongfully dismissed. On the other hand he did nothing in the way of seeking work to mitigate his loss.

[31] The defendant's exhibit book shows that the amount he worked in each year was slowly going down. I note that in 2014 Mr. LeBlanc had earnings of $15,026.24. I believe it is the logical inference that Mr. LeBlanc would have had earnings in a similar range in 2015.

[32] It is well-known that the length of service and the level of responsibility are major factors in the determination of the length of notice. Mr. LeBlanc was a long-standing employee and he exercised a skilled trade but was clearly not at a management level. Given his length of service and the nature of his employment, I think it is reasonable and in accordance with the established principles for determining the length of notice that he should have been given one year's notice.

[33] I must take into account that that Mr. LeBlanc has only ever worked for one employer, and considering his age and education, he may have had difficulty finding replacement work even with the best efforts. I also consider the fact that he had recently lost his wife to be a relevant factor.

[34] The task of trying to assess whether Mr. LeBlanc would have been able to obtain other employment is a daunting one. I also am aware that he would have had an obligation to accept employment from the defendant. I don't think his failure to mitigate can reduce his claim to zero. That would simply negate my finding that the employer had a duty to contact him and get an unequivocal answer as to whether he wished to return to work. He clearly has skills and it seems reasonable that with effort he could have found some reasonable amount of work in his field.

[35] In situations such as this any court is always left making a decision that has a substantial degree of arbitrariness to it. I think there is a range that a judge or adjudicator trying this case might reasonably arrive at. However, I am required to make the decision and I have no other choice but to make a judgment call which accords with my sense of fairness.

[36] There is no clear way to quantify an appropriate award. I therefore have concluded that the fairest result I can achieve is to say that the amount Mr. LeBlanc would have been entitled to for the lack of notice would be $15,000 and that his lack of mitigation should reduce that by half. This is by no means a result based on entirely satisfying logic and compelling analysis of the evidence, but it is the best that I can do given the evidence and the legal principles that I have to work with. I have done my best to apply the law and be fair.

[37] I therefore award the sum of $7,500 to the claimant.

[38] I award no costs to either party.

Andrew S, Nickerson Q.C., Adjudicator