**IN THE SMALL CLAIMS COURT OF NOVA SCOTIA**
Cite as: Moores v. Samuel & Co. Apparel Ltd., 2011 NSSM 39

2011 Claim No. 341855

**BETWEEN:**

Name: **Kim Moores**

**Claimant**

- and -

Name: **Samuel & Co. Apparel Limited**

**Defendant**

Name: **Envy Apparel**

**Defendant**

**Hearing Dates** -March 1 and 28, 2011
**Appearances:** Claimant - Jonathan Langlois-Sadubin, Barrister and Solicitor
Defendant - Nancy Holmes, President and Secretary of Defendant

## DECISION and ORDER

[1] This is a wrongful dismissal case. There is no allegation of just cause.

[2] There was no written employment agreement. The issues therefore are what is reasonable notice and whether or not there has been a failure to mitigate.

**Reasonable Notice**

[3] The classic Canadian formulation of what is to be considered in setting reasonable notice is from the case of *Bardhal v. The Globe & Mail Ltd*(1960), 24 D.L.R.(2d) 140 (Ont. H.C.) as follows (at p. 145):

> *There could be no catalogue laid down as to what was 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 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 (p. 145).*

[4] In this case the Claimant was the manager of a womens' clothing store. She worked for the Defendant from July or August of 2005 until her termination in March, 2010. She was a store manager for four of those years. And while she was off for a number of months in 2008-2009 for medical reasons, I consider the length of employment for present purposes to be five years.

[5] She is presently 54 years of age. The availability of similar employment seems, on the evidence, to be limited.

[6] In consideration of all the factors, I accept the submission on behalf of the Claimant that five(5) months is an appropriate and reasonable amount of notice. In making this finding I am mindful of the fact that she was in a management position in a retail environment which may be considered to militate against a lengthy notice period. On the other hand, her age would be a factor increasing what would otherwise be a reasonable notice period. On balance, I consider that five months is an appropriate reasonable notice period.

**Mitigation**

[7] The Defendant argues that the Claimant has failed to mitigate her damages.

[8] There was evidence given by the Defence about the number of womens clothing stores in the Halifax Regional Municipality and it was shown that the Claimant did not make application to all of these or even a high percentage. The Claimant's response was that in a number of these instances, the stores in question would not realistically look at a manager with her type of experience or of her age. Her evidence in this regard was cogent and convincing.

[9] Further, the Claimant testified that she made 32 applications in the March - July, 2010, period, which is the relevant time period, given my finding on reasonable notice. From this she received one job offer which was for part time work as a sales clerk in jewelry store.

[10] As to what are "reasonable efforts" to mitigate, I refer to the following comments from the *The Wrongful Dismissal Handbook (3d)*, E. Mole, et al., at H-2.1:

> *An employee seeking damage for wrongful dismissal is only required to make reasonable efforts to mitigate his or her damages.* ***The standard of reasonableness may not be exacting. Even efforts that were not as assiduous as they might have been will not be a failure to mitigate unless they were unreasonable****.*
>
> [Emphasis added]

[11] As to the burden of proof, the law is clear that the defendant employer bears the burden of proof on the mitigation issue in a wrongful dismissal case. This has been the law of Canada since the Supreme Court of Canada case of *Red Deer College v. Michaels*, [1976] 2 SCR 324. I

refer to the following comments of the then Chief Justice of Canada, Bora Laskin, in the *Red Deer* case(pp. 331-332):

> In the *ordinary course of litigation respecting wrongful dismissal, a plaintiff, in offering proof of damages, would lead evidence respecting the loss he claims to have suffered by reason of the dismissal. He may have obtained other employment at a lesser or greater remuneration than before and this fact would have a bearing on his damages. He may not have obtained other employment, and the question whether he has stood idly or unreasonably by, or has tried without success to obtain other employment would be part of the case on damages. If it is the defendant's position that the plaintiff could reasonably have avoided some part of the loss claimed,* ***it is for the defendant to carry the burden of that issue, subject to the defendant being content to allow the matter to be disposed of on the trial judge's assessment of the plaintiff's evidence on avoidable consequences****. This is the way I read what is said on the matter in such leading textbooks on the subject as Cheshire and Fifoot's, Law of Contract, 8th ed. (1972), at p. 599, and Corbin, Contracts, vol. 5 (1964), at p. 248. The matter is put as follows in two passages from Williston on Contracts, vol. 11, 3rd ed. (1968), at pp. 302 and 312:*
>
> > *The rule of avoidable consequences here finds frequent application. The consequence of this injury is the failure of the employee to receive the pay which he was promised but, on the other hand, his time is left at his own disposal. If the employee unavoidably remains idle, the loss of his pay is actually suffered without deduction. If, however, the employee can obtain other employment,*
>
> *[Page 332]*
>
> > *he can avoid part at least of these damages. Therefore, in an action by the employee against the employer for a wrongful discharge, a deduction of the net amount of what the employee earned, or what he might reasonably have earned in other employment of like nature, from what he would have received had there been no breach, furnishes the ordinary measure of damages.*
> >
> > ***It seems to be the generally accepted rule that the burden of proof is upon the defendant to show that the plaintiff either found, or, by the exercise of proper industry in the search, could have procured other employment of an approximately similar kind reasonably adapted to his abilities, and that in absence***

> ***of such proof the plaintiff is entitled to recover the salary fixed by the contract**.*
>
> *Cheshire and Fifoot, supra, expressed the position more tersely as follows:*
>
> > *But the burden which lies on the defendant of proving that the plaintiff has failed in his duty of mitigation is by no means a light one, for this is a case where a party already in breach of contract demands positive action from one who is often innocent of blame.*
> >
> > [Emphasis added]

[12] In *Coleman v. Sobeys Group Inc.*, 2005 NSCA 142 (CanLII), Fichaud, J.A., puts it this way:

> *[49] On the merits of this avoidable loss issue, in my view, Sobeys' appeal should be dismissed. 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.*

[13] Applying the law and on the basis of the evidence here, I find that the Claimant has made reasonable efforts in the circumstances to mitigate her loss. The Defendant has not met its burden to show otherwise.

**Damages**

[14] In a wrongful dismissal case, the measure of damages is the loss of income and other remuneration proven by the Claimant for the relevant notice period.

[15] The proven loss here is limited to the salary figure of $40,000. The reasonable notice period is five months. From that however is to be deducted the two weeks which the Claimant has already been paid by

the Defendant. The calculation here therefore is 4.5/12 x $40,000 = $15,000.00.

[16] I will allow costs for the filing fee of $179.35

***Order***

[17] It is hereby ordered that the Defendant pay to the Claimant as follows:

| | |
|---|---|
| Debt | $ 15,000.00 |
| Costs | 179.35 |
| **Total** | **$ 15,179.35** |

[18] This award is be subject to any statutory withholdings or repayment amounts pursuant to Federal Income Tax Act and/or Employment Insurance Act.

**DATED** at Halifax, Nova Scotia, this 3rd day of June, 2011.

**Michael J. O'Hara**
**Adjudicator**