Court File No. CV-15-531020

ONTARIO
SUPERIOR COURT OF JUSTICE

ROY SINGH

Plaintiff

V.

QUALIFIED METAL FABRICATORS LTD.

Defendant

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R E A S O N S F O R J U D G M E N T

BEFORE THE HONOURABLE MR. JUSTICE STINSON

On May 10, 2016 at TORONTO, Ontario

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APPEARANCES:

A. Monkhouse	Counsel for the Plaintiff
L. McLennan	Counsel for the Plaintiff
J. Piccin	Counsel for the Defendant
G. Piccin	Counsel for the Defendant

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ONTARIO

SUPERIOR COURT OF JUSTICE

T A B L E O F C O N T E N T S

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Transcript Ordered: May 16, 2016

Transcript Completed: May 17, 2016

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TUESDAY, 10TH, MAY, 2016:

R E A S O N S F O R J U D G M E N T

STINSON, J.: (Orally)

This is an action for wrongful dismissal, breach of contract, human rights damages and punitive, aggravated and/or moral damages.

As its name suggests, the defendant Qualified Metal Fabricators Ltd. is in the business of sheet metal fabrication and custom metal fabrication, among other work. It does not produce its own products, but instead is a so-called "job shop" that carries out fabrication work on behalf of customers on a contract by contract basis. It employs approximately 130 people in its fabrication plant, which occupies over 100,000 square feet in Etobicoke.

In March 2011, Qualified needed additional workers to carry on its business. The plaintiff, Roy Singh, applied for one of the positions. He was hired as an assembler. His duties and responsibilities included the assembly of products and component parts to meet production and quality standards. The position of assembler is a relatively low skilled, labour-intensive job. He was initially paid $15.00 per hour for his services.

A little over four years later, on May 15, 2015, Qualified terminated Mr. Singh's employment. It did not and does not now say that it had cause to dismiss him. Rather, Qualified says that it had a shortage of work and it decided that Mr. Singh should be one of the employees who it would let go. In purported compliance with his written employment contract and with the Employment Standards Act 2000, S.O. 2000, c. 41 s. 57(d) and s. 61(l)(a), Qualified provided Mr. Singh with four weeks pay in lieu of notice, amounting to $2,733.94, plus his other entitlements required under the ESA.

Mr. Singh was unemployed for a period of time and collected employment insurance. He has subsequently worked intermittently through employment agencies. He has not regained full-time employment since his job at Qualified ended.

Mr. Singh commenced this action against Qualified on June 24, 2015. He asserts that he was entitled to reasonable notice of termination, and not merely the four weeks required under the ESA. He also claims damages of $25,000 for violations of the Ontario *Human Rights Code* R.S.O. 1990 c.H19. He asserts that Qualified chose to terminate his employment in order to avoid potential accommodations for future time off work due to Mr. Singh's disabilities, which include diabetes and severe headaches. Mr. Singh asserts

that terminating an employee because of his disability is discriminatory and in violation of s. 5 of the *Code*. Mr. Singh claims damages under section 46.1 of the *Code*.

Qualified asserts that Mr. Singh was paid his complete entitlement under his contract and the ESA and has no further right to payment on account of the termination of his employment. It relies on the employment agreement signed by Mr. Singh at the time of his hiring which expressly references termination rights. For his part, Mr. Singh asserts that those terms contravene the requirements of the ESA and therefore are unenforceable.

This case raises the following issues:

(1) Are the plaintiff's rights to notice of te1mination limited to the termination rights provided in the written contract of employment or was he entitled to common law notice of termination?

(2) If the common law applies, what notice period is applicable?

(3) What are the plaintiff’s monetary losses?

(4) Did the plaintiff fail to mitigate his damages?

(5) Did the defendant contravene s. 5 of the *Code* and, if so, what remedy is appropriate?

(6) Is this a suitable case for an award of moral, aggravated or punitive damages and, if so, in what amount?

Issues and Analysis

Issue 1 - Are the plaintiff's rights to notice of termination limited to the termination rights provided in the written contract of employment or was he entitled to common law notice of termination?

At the time he was hired, Mr. Singh signed a document entitled "Employee Work Agreement". It covered the topics of Benefits (such as vacation, uniforms and health coverage), Termination and Work Ethics. In relation to termination, the Employment Agreement stated as follows:

> "Termination:
> Start date to three months: this length of service is a probationary period and the employee is not entitled to any notice or salary in lieu of notice, if the company decides, in its discretion, that your performance or suitability are unsatisfactory, or that you are unwilling or unable to properly carry out your duties.

> Three months to one year - one-week notice.
>
> One year to three years - two weeks' notice.
>
> Three years and over - one week notice for each year of employment to a maximum of eight weeks.
>
> This policy shall be maintained in accordance with the Employment Standards Act."

The position of the defendant is that this clause in the Agreement sets out the full entitlement of an employee to payment in the event of termination. The defendant argues that it displaces any potential claim for reasonable notice of termination, based on common law principles. The plaintiff asserts that the clause does not eliminate the right to common law notice, since it is silent on the point. At best, the clause is ambiguous. Additionally, the plaintiff submits that the clause is unenforceable since on its face it violates the ESA.

I do not need to cite any authority for the proposition that, as a general rule, the law will imply into an employer/employee relationship a term that the employer must give reasonable

notice of its intention to terminate the employment, or must compensate the employee for the income she or he might have earned during the notice period. This concept is sometimes described as the "presumption that the contract is terminable without cause only on reasonable notice." See *Machtinger v HOJ Industries Ltd.*, [1992] 1 SCR 986 at 1005.

The first question to ask, therefore, is whether the termination clause in this case rebuts the presumption that the common law notice period continues to apply. In many of the cases in which the effect of such clauses has been considered, they have contained an express proviso that the clause displaces any rights to reasonable notice or common law notice. See, for example, *Carpenter v. Brains II Canada Inc.* [2015] O.J. No. 5235; *Wright v. Young and Rubicam Group of Companies*, 2011 ONSC 4720; *Garreton v. Complete Innovations Inc.* 2016 ONSC 1178. In the present case, the clause makes no reference to its impact on the common law entitlement to reasonable notice.

In *Wood v. Industrial Accident Prevention Association*, 2000 O.J. No. 2711, Leitch J considered a clause in an employment letter that stated as follows: "While we do not anticipate the situation arising, we feel you would wish to know that should it be necessary to terminate

your employment without cause it will be in accordance with the Employment Standards Act of Ontario." She concluded that this contractual term was clear and set out the applicable notice period with sufficient particularity to rebut the presumption of reasonable notice. She therefore found that the applicant was entitled only to termination pay calculated in accordance with the ESA and that the letter of employment was worded with sufficient clarity to remove the common law right to seek damages for wrongful dismissal. The defendant relies on this authority.

With great respect to Leitch J, I reach a different conclusion. Over the last 16 years since *Wood* was decided, numerous cases have addressed the manner in which the presumption of common law notice can be displaced. As was stated by Low J, in *Wright v. Young and Rubicam*, above, (at paragraph 36):

> "There is, in my view, no particular difficulty in fashioning a termination clause that does not violate either the minimum standards imposed by the Employment Standards Act or the prohibition against waiving statutory minimum requirements and there is no compelling reason to uphold a termination clause which the draftsman may reasonably be understood to have known was not enforceable either at all or under

certain circumstances."

In our case, it was open to the employer to draft a contract that excluded common law notice. It instead proffered an Employment Agreement that was silent on the subject. At best it is an open question whether it was or was not intended to override common law notice entitlement. I would, therefore, construe it as ambiguous. That ambiguity must be construed against the defendant, having regard to the power imbalance that exists between an employer and employee as a matter of course. I am not prepared to find that the Employment Agreement operated to nullify or detract from the implied common law requirement of reasonable notice of termination. The same conclusion was reached by Aston J in *Dwyer v. Advantis Inc.* 2009 O.J. 1956 and by MacKenzie J. in *Howard v. Benson Group Inc.* 2015 ONSC 2638.

[16] I therefore conclude that on this basis, despite the Employment Agreement, the plaintiff was entitled to reasonable notice of termination consistent with common law principles.

If I am in error with respect to the foregoing point, the question then becomes whether, as drafted, the clause deprives the plaintiff of any ESA rights. Breach of the ESA minimum guarantees has been found to render such clauses unenforceable in a range of cases. The question

comes down to whether the contractual language does or does not offend the statutory prohibition contained in section 5(1) of the ESA against contracting out of that statute. If s.5(1) is contravened, the employer cannot rely on the clause.

As drafted, the termination clause provides as follows:

> Three months to one year - one-week notice.
> One year to three years - two weeks' notice.
> Three years and over - one week notice for each year of employment to a maximum of eight weeks.

On one interpretation, where an employee had served precisely one year she or he would receive only one week notice under the category "Three months to one year." With respect to an employee who had served three years, the agreement is unclear whether that employee would receive two weeks notice or one week notice for each year of employment to a maximum of eight weeks. In other words, the language is ambiguous. By contrast, the ESA expressly addresses these situations in s.57(a), (b) and (c) as follows:

> (a) At least one week before the termination, if the employee's period of employment is less than one year;
> (b) At least two weeks before the termination, if the employee's period of

> employment is one year or more and fewer than three years;
>
> (c) At least three weeks before the termination, if the employee's period of employment is three years or more and fewer than four years.

Thus, in the legislation clarity is brought by including the words "less than one year" and "one year or more and fewer than three years" and so on. Applying the principle of contra proferentem, and construing the Employment Agreement against the employer, it breaches the statute since a one-year employee would be entitled to one week notice only whereas the statute requires an employee who has one year or more to at least two weeks notice.

I would thus hold that the agreement does not comply with the requirements of the ESA and on this basis I would hold it is unenforceable.

In the result, I hold that the plaintiff was entitled to reasonable notice of termination. I now turn to that issue.

Issue 2: If the common law applies, what notice period is applicable?

The factors relevant to assessing reasonable notice of termination in an employment contract are well-established. They involve the nature of

the employment, the length of service, the plaintiff's age and the availability of similar employment, having regard to experience, training and qualifications.

In the present case, the plaintiff was employed as an assembler and spot welder. He was a relatively junior level employee and had no supervisory responsibilities. He was employed for just over four years. He was 56 years old at the date of his dismissal.

In relation to the availability of similar employment, the plaintiff s position was, essentially, a labourer's position in a manufacturing process. The manufacturing sector in Ontario has not been terribly robust in the recent past, which may have made it difficult for the plaintiff to find re-employment. His age, as well, is likely a factor that may make it difficult for him to obtain re-employment.

In none of the cases cited by plaintiff's counsel was an employee of less than five years' seniority given an award of five months. Indeed, workers in comparable positions receive notice measured in months that were equal to or less than their number of years of service.

In my view the appropriate notice period in the present case is four months.

Issue 3: What are the plaintiff's monetary losses?

In his memorandum of fact and law, plaintiff's counsel included a helpful summary of the month by month income loss suffered by Mr. Singh. That chart reveals a cumulative loss for four months of $8,728.08. That sum must be reduced, because the actual income shown on the chart as having been received by Mr. Singh through mitigation efforts and otherwise is in some cases net after-tax. I would deduct $300.00, reducing the plaintiff s recoverable loss to $8,428.08.

Issue 4: Did the plaintiff fail to mitigate his damages?

Mr. Singh's evidence as to his mitigation efforts was not entirely consistent and it is, therefore, of questionable reliability. It is beyond argument, however, but that he was beginning to earn replacement income in July 2015, approximately two months after the termination of his employment by the defendant. Given that his dismissal was unexpected, and in light of the challenges associated with finding work in the manufacturing sector, I am not persuaded that he failed to mitigate. I would thus not reduce his income loss damages from the above number.

Issue 5: Did the defendant contravene s.5 of the Code and, if so, what remedy is appropriate?

The plaintiff submits that the defendant terminated his employment at least in part due to his disability or his perceived disability. It is not disputed that the defendant employer knew that Mr. Singh had a disability that required accommodation through time off of work to see specialists and receive treatment. The former general manager of the defendant, Mr. Ring, acknowledged he was aware of Mr. Singh's condition.

Mr. Singh's argument that his dismissal was related to his disability is based on an alleged linkage between a request made by him on May 8, 2015, for time off to see his doctor in July, and the decision to terminate his employment which was conveyed to him one week later, on May 15, 2015. Plaintiff submits that I should conclude the dismissal was related and caused in part at least by a reluctance on the part of the defendant to accommodate the plaintiff s disability. I reject that submission and expressly find there was no such linkage.

The decision to terminate Mr. Singh's employment was made by Mr. Ring. He testified. He is now retired and has no ongoing loyalty to the defendant. In this sense he is neutral and independent. I found him to be a most impressive witness, who answered questions in a logical and responsive fashion. Mr. Ring was responsible for

the operation of a plant employing over 100 people in various manufacturing positions. He was the one who gauged the performance of each employee. He was the one who decided, when a reduction in workforce was necessary, which employees should be let go. His testimony had a ring of truth.

Mr. Ring described a series of dealings with Mr. Singh in which he found Mr. Singh's job performance to be substandard. He described two particular instances in which complaints were received from customers about the quality of the product produced by Mr. Singh. One of these came shortly before the decision was made to let Mr. Singh go. On a rating scale of one to ten, Mr. Ring gave Mr. Singh a rating of just five out of ten on employee performance.

The president and CEO of the defendant testified. He described the business of the company as a fluctuating one, in which contracts come and go and the workforce is either increased or decreased as a result. Business was down in the spring of 2015 and he therefore instructed his general manager, Mr. Ring, to reduce staff. This testimony is uncontradicted.

Mr. Ring's evidence was that, upon receiving these instructions from the owner, he had to decide which employees to let go. Mr. Singh was

among the ones he selected for dismissal. He testified that he based his decision exclusively on employment factors, including Mr. Singh's performance. He denied that there was any connection with Mr. Singh's disability.

In relation to the Mr. Singh's request for time off to see his doctor, that request was submitted on May 8, 2015. It sought five consecutive Fridays off work in the month of July for Mr. Singh to see his doctor. Mr. Ring explained that he received and considered Mr. Singh's request. In light of his need to keep the production floor properly staffed, Mr. Ring asked Mr. Singh to supply a doctor's note confirming those were the only dates Mr. Singh could be seen. Mr. Singh refused, but subsequently submitted a request for those days as vacation, a request that was then superseded by a request for other dates as vacation dates, a request that Mr. Ring approved.

Mr. Ring testified that there was no connection whatsoever between the requests by Mr. Singh for time off to see his doctor and the decision to terminate his employment, which was conveyed on May 15, 2015, one week later. He said that he was prepared to accommodate provided Mr. Singh provided he supplied a doctor's note to support his request for his Friday absences. I have no reason to doubt the truth of Mr. Ring's evidence and I accept it in its entirety.

It follows that I conclude there is no basis for a finding that the dismissal of Mr. Singh had any connection with his disability. To the contrary, I find that it had none. I therefore find the claim for breach of the *Code* to be unsupported.

Issue 6: Is this a suitable case for an award of moral, aggravated or punitive damages and, if so, in what amount?

In my view this is not a case in which an award of punitive, aggravated or moral damages is warranted. The decision to terminate Mr. Singh's employment was made for proper business reasons. Although I have found that the employer was not entitled to rely on the express terms of the Employment Agreement, there is no basis for a suggestion that the employer acted in bad faith. To the contrary, it paid Mr. Singh his full ESA entitlement and it resisted this claim on the basis that it had properly discharged its legal obligations to him. Although I have reached a different conclusion, that alone cannot warrant an award of punitive damages nor one for aggravated or moral damages which are reserved for clear and exceptional cases. This is plainly not one of those.

Conclusion and disposition

For these reasons, I award Mr. Singh damages for wrongful dismissal in the amount of $8,428.08.

The balance of his claims are dismissed.

STINSON, J.

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Form 2

CERTIFICATE OF TRANSCRIPT
(SUBSECTION 5(2))

Evidence Act

I, LORI JELEN, certify that this document is a true and accurate transcript of the recording of the Reasons for Judgment, in the matter of Singh v. Qualified Metal Fabricators, in the Ontario Superior Court of Justice, held at Toronto, Ontario, taken from Recording No. 4899-703-20160510, as certified in Form 1.

Date: May 17, 2016

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L. Jelen
Certified Court Transcriptionist
ACT #2900548874

Court File No. CV-15-531020

ONTARIO
SUPERIOR COURT OF JUSTICE

ROY SINGH

Plaintiff

V.

QUALIFIED METAL FABRICATORS LTD.

Defendant

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R E A S O N S F O R J U D G M E N T

O N C O S T S

BEFORE THE HONOURABLE MR. JUSTICE STINSON

On May 10, 2016 at TORONTO, Ontario

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APPEARANCES:

A. Monkhouse	Counsel for the Plaintiff
L. McLennan	Counsel for the Plaintiff
J. Piccin	Counsel for the Defendant
G. Piccin	Counsel for the Defendant

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ONTARIO

SUPERIOR COURT OF JUSTICE

T A B L E O F C O N T E N T S

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Transcript Ordered: May 20, 2016

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Ordering Party Notified: May 26, 2016

TUESDAY, 10TH MAY, 2016:

R E A S O N S F O R J U D G M E N T
O N C O S T S

STINSON, J.: (Orally)

The plaintiff was successful in the action and, therefore, absent other considerations is, on the face of it, entitled to an award of costs.

The first question to be addressed, however, is whether Rule 57.05(1) should be applied. And, that is the rule that provides that, if a plaintiff recovers an amount within the monetary jurisdiction of Small Claims Court, the court may order that the plaintiff shall not recover any costs. The defendant submits that that provision should apply. But, I note that it is a discretion and not an automatic rule and, indeed, it requires the exercise of the discretion in favour of the defendant to deprive the plaintiff of costs. In other words, ordinarily the plaintiff would continue to be entitled to recover costs unless the court orders otherwise.

In this case, I have concluded that I should not apply Rule 57.05(1). It is, as I have noted, discretionary. In this case the plaintiff sought amounts that were over the Small Claims Court minimum and thus, the case could not have proceeded in Small Claims Court. Admittedly, I

found that a claim in excess of the Small Claims Court limit was not warranted, but it was adjudicated based on a record that was adduced in the fashion that the Superior Court practice permits and would not have been permitted in Small Claims Court, including examinations for discovery. I note that defence counsel took advantage of the examination for discovery when cross-examining the plaintiff, something that he would not have been able to do had the matter proceeded in Small Claims Court.

I also note that reasonable efforts were made to settle by the plaintiff, as well as by the defendant. The offers made by the defendant were less than the plaintiff's recovery and indeed the plaintiff's offer were far closer to the amount awarded.

I, in the circumstances, am not prepared to deprive the plaintiff of the award of costs to which he otherwise would be entitled. I, therefore, am going to award the plaintiff costs as per the standard measures in Rule 57.

Turning to the quantum of costs, first of all there is no suggestion that costs should be awarded on a substantial indemnity basis. That, of course, is reserved for rare and exceptional cases where there is a case involving impropriety on the part of a party in relation to the

underlying cause of action or the conduct of the litigation, and that is not applicable here. Or, it could be applicable where a Rule 49 offer has been served but, again, the offers here do not trigger Rule 49 so that is not a factor.

I do observe, however, that both sides expended considerable resources and thus, on a partial indemnity basis, I see that the plaintiff's Bill of Costs is $18,679.21, whereas the defendant's Bill of Costs is, I think, $16,667.92; not dramatically different sums. So, the parties came equipped to litigate and expended comparable resources in doing so.

The real question is having regard to the amount recovered, only $8,500.00, what is a reasonable sum to award? I would classify this as a matter of moderate complexity. I note that the plaintiff prevailed on legal issues, although the plaintiff lost on the factual issues. It was, however, successful in the outcome. The amount recovered is modest by some measures, but to this plaintiff I would classify it as an important sum. In terms of ability to pay, I note the defendant has a payroll in excess of $2.5 million dollars and employs more than 130 employees. There is no question that the amount claimed is within the defendant's ability to pay.

Any award of costs comes down to a question of

what is fair and reasonable in the circumstances and, in my view, taking into account the factors I have described, a fair and reasonable sum in accordance with the parties' expectations would be $12,000.00 all inclusive, and I fix the plaintiff's costs at $12,000.00.

So, counsel, I have endorsed the Record as follows: For oral reasons delivered in court today the plaintiff shall recover judgment from the defendant for the sum of $8,500.00 inclusive of pre-judgment interest, plus costs in the all inclusive sum of $12,000.00.

STINSON, J.

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Form 2

CERTIFICATE OF TRANSCRIPT
(SUBSECTION 5(2))

Evidence Act

I, LORI JELEN, certify that this document is a true and accurate transcript of the recording of the Reasons for Judgment on Costs, in the matter of Singh v. Qualified Metal Fabricators, in the Ontario Superior Court of Justice, held at Toronto, Ontario, taken from Recording No. 4899-703-20160510, as certified in Form 1.

Date: May 26, 2016

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L. Jelen
Certified Court Transcriptionist
ACT #2900548874