CITATION: Buaron v. AcuityAds Inc., 2015 ONSC 5774
COURT FILE NO.: 15-CV-522578
DATE: 20150924

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
JOSEPH BUARON	)	Daniel A. Lublin, for the Plaintiff
Plaintiff	)	
	)	
	)	
- and -	)	
	)	
	)	
ACUITYADS INC.	)	Ellen V. Swan, for the Defendant
Defendant	)	
	)	
	)	**HEARD:** September 1, 2015

K. HOOD J.

REASONS FOR DECISION

[1] This is a wrongful dismissal matter under the simplified procedure. The parties agree and ask that the issues be decided on a motion for summary judgment without cross-examination upon any of the affidavits filed.

[2] The plaintiff commenced employment with the defendant on April 7, 2014. On January 7, 2015, nine months later, he was terminated, without cause, as a cost-cutting measure. He found another job starting on June 16, 2015, almost 22 weeks after being let go.

[3] Prior to starting work with the defendant, the plaintiff executed an employment agreement which contained a provision that if he was terminated without cause, as here, his payment in lieu of notice would be severely limited.

[4] When terminated, the plaintiff was paid what was due to him under the employment agreement. The plaintiff seeks to set aside the employment agreement as being unenforceable. If successful, he asks for damages in lieu of reasonable notice. He also seeks

punitive damages due to the destruction by the defendant of his personal information on his mobile phone following termination.

[5] For the following reasons, I set aside the employment agreement, fix the notice period at four months and dismiss the claim for punitive damages.

The Employment Agreement

[6] The plaintiff was employed by EQ, Inc. ("EQ"), one of the defendant's competitors, as Senior System Administrator in an information technology role. He had been with EQ for seven and a half years.

[7] In March 2014, the defendant determined that it required a Senior System Administrator for the operations area of its technology department. Ms. Kapcan ("Kapcan"), the defendant's Chief Operating Officer and Vice President Technologies was responsible for this department. She asked other employees of the defendant whether they knew of anyone looking for a job. She says she was told by Mr. Bochis ("Bochis"), a former colleague of the plaintiff at EQ now with the defendant, on March 20, 2014, that the plaintiff was looking for a new job.

[8] The plaintiff denies he was looking to leave EQ and asserts that he was approached by the defendant. This is one example of the contradictions in the evidence between the parties. While not overly relevant to the question of whether the employment agreement is binding, the parties wish to proceed by way of summary judgment. In the circumstances of this case, considering the amount at issue and that proportionality is to be the guiding principle (see Rule 1.04(1.1)) in applying the Rules, including Rule 20.04, I believe summary judgment to be the appropriate process.

[9] On March 20, 2014, the plaintiff received a message on his LinkedIn account from Kapcan advising that the defendant was looking for a senior system administrator and if he was interested, to call her at the number provided. Kapcan does not dispute that she may have sent this message. She cannot recall. The plaintiff did not respond.

[10] The next contact was an e-mail from Bochis to the plaintiff on Friday, March 21, 2014 at 9:45 a.m. advising the plaintiff that the defendant had an opening for a system administrator and if he was not interested, asking whether he could he recommend someone.

[11] Twenty-two minutes later, at 10:07 a.m., the plaintiff e-mailed Bochis advising that he was interested, attached his résumé and asked if the defendant would like to meet.

[12] Twenty-five minutes later, at 10:32 a.m., Bochis advised the plaintiff that Kapcan would phone him. She called him on March 21 within the hour. The plaintiff states Kapcan wanted to meet that afternoon. Kapcan states, following the conversation, she suggested that day or the following Monday or Tuesday for a meeting. They agreed to meet that same day after work at the defendant's office. Kapcan states the plaintiff was the one who wanted to meet that same day and was enthusiastic about doing so. The plaintiff does not deny this.

[13] The plaintiff and Kapcan met at approximately 6:00 p.m. Both the plaintiff and Kapcan agree the meeting was an interview of the plaintiff for the purpose of the job. There is a wide disparity between the plaintiff and Kapcan as to what was discussed at the meeting and what was agreed to. Much of the disagreement is irrelevant in considering the enforceability of the employment agreement, but I find, based upon the affidavit evidence, that the plaintiff insisted upon receiving a salary of $110,000, which the defendant was prepared to pay. As well, it was agreed there was to be a three-month probation period, following which the plaintiff would receive health benefits. He would also be entitled to four weeks' vacation per year.

[14] The plaintiff states Kapcan offered him a job at the meeting. He says he was prepared to accept the offer, provided he received a letter from the defendant confirming the terms they had just agreed to verbally. Kapcan does not address this head-on in her affidavit. She seems to suggest that this may have happened following the meeting of March 21. The plaintiff does state he had follow-up conversations on either March 21 or 22 with Kapcan when he again advised he was prepared to accept the offer once he received the confirming letter.

[15] The parties agree that on March 23, 2014 the defendant e-mailed the plaintiff with an "offer letter". The e-mail reads:

> Joseph, attached is the offer letter.
>
> Crystal will schedule a time with you to come in and go through the contracts and get some orientation tour ☺
>
> Looking forward to having you on board.
>
> Best,
> Rachel Kapcan

The attached offer letter reads:

> Dear Mr. Buaron,
>
> I am delighted to extend this offer to you for full time employment as a Senior System Administrator starting on April 7th, 2014. Your salary will be $110,000 a year. You will be receiving benefits after the 3 month probation. The vacation time allotted will be 4 weeks a year.
>
> The IT and Dev Department is here to support your successful integration. We are looking forward to you joining our team and your success at AcuityAds.

> If you have questions, please call or email me. I look forward to having you come on board.
>
> Sincerely,
> Rachel Kapcan

[16] The plaintiff takes the position that at this point he had a contract with the defendant, having received written confirmation of his verbal agreement. His contract was as a Senior System Administrator at $110,000 per year, with four weeks vacation and three months probation. The defendant takes the position that this offer letter was something else although the defendant never really says what. Although termed an "offer letter", the defendant argues that it really was not an "offer" which the plaintiff could accept. The defendant argues there was more, which was part of this offer, being the employment agreement that the plaintiff had to sign. It relies on the e-mail and the reference to the plaintiff having to "go through the contracts".

[17] I find that once the plaintiff received the "offer letter," he had an employment contract with the defendant. The letter was confirmation of the verbal agreement the plaintiff and Kapcan had reached on March 21, 2014. Kapcan had already made the offer to the plaintiff at the meeting, which he had accepted, conditional on the receipt of written confirmation of the agreed essential terms of salary, title, vacation, probation period and benefits.

[18] The reference to "contracts" in the e-mail could mean anything. These could be the health benefit contracts or insurance contracts for the plaintiff to sign. It does not lie in the mouth of the defendant to say there was more to sign to create an agreement. It could easily have included the employment agreement with the e-mail and letter of March 23. It chose not to do so. Kapcan, in her affidavit, states that usually the defendant tells a prospective employee that a comprehensive employment agreement will have to be signed before commencing employment with the defendant. Here, she did not mention such a comprehensive agreement to the plaintiff during their discussions, nor did they even refer to it in the letter or e-mail, let alone attach it. Rather, the plaintiff was now "on board" and "joining our team".

[19] Having received the offer letter, the plaintiff resigned from his position with EQ. Who knows what would have happened if the defendant had provided the plaintiff with the comprehensive agreement prior to his resignation. He may have stayed at EQ, he may have negotiated with the defendant and removed some of the clauses or, he may simply have signed it as is.

[20] Having resigned from EQ, the plaintiff when presented with the comprehensive agreement on March 24, 2014 felt, quite reasonably, that he had no choice but to sign it when he attended the defendant's offices on March 28, 2014. He now had no leverage to negotiate with the defendant; nor could he return to EQ.

Is the Comprehensive Agreement Enforceable?

[21] I find that the Comprehensive Agreement is not enforceable. The parties already had a contract when the offer letter of March 23, 2014, was received. No new or additional consideration was provided to the plaintiff along with the comprehensive agreement in order to vary the existing agreement.

[22] The plaintiff relies upon *Francis v. Canadian Imperial Bank of Commerce*, (1994) 21 O.R. (3d) 75 (C.A.), O.J. No. 2657 and *Hobbs v. TDI Canada Ltd.*, 2004 CanLII 44783 (Ont. C.A.) in support of his argument that the comprehensive agreement is not enforceable. I find that these cases are applicable to the situation herein.

[23] In *Francis*, Weiler J.A. stated at para. 22:

> This principle of contract law, namely, that new or additional consideration is required to support a variation of an existing agreement, was implicitly recognized by this court in the context of an employment relationship in *Stott v. Merit Investment Corp.* (1988), 1988 CanLII 192 (ON CA), 63 O.R. (2d) 545, 48 D.L.R. (4th) 288 (C.A.).

Further, she stated at para. 30:

> ... I would add that, in cases such as this, employers are able to incorporate the terms of a standard employment agreement into the original contract of employment by saying in their offer of employment that the offer is conditional upon the prospective employee agreeing to accept the terms of the employer's standard form of agreement, a copy of which could be enclosed with the offering letter.

[24] In *Hobbs*, Juriansz J.A. stated at paras. 42 and 49:

> The requirement of consideration to support an amended agreement is especially important in the employment context where, generally, there is inequality of bargaining power between employees and employers. Some employees may enjoy a measure of bargaining power when negotiating the terms of prospective employment, but once they have been hired and are dependent on the remuneration of the new job, they become more vulnerable. The law recognizes this vulnerability, and the courts should be careful to apply Maguire and Techform Products only when, on the facts of the case, the employee gains increased security of employment, or other consideration, for agreeing to the new terms of employment.
>
> ...

> In this case, TDI's standard Solicitor's Agreement contained onerous terms that it must have known would be important to a prospective employee's decision whether to accept employment with the company. Instead of following the procedure suggested by Weiler J.A., TDI failed to advise Hobbs that it would require him to sign a standard form of agreement and did not advise him of its terms until after he had resigned from his previous employment. This prevented Hobbs from making a fully informed decision whether to resign from Cieslok Outdoor and accept TDI's offer.

Here, the defendant either chose deliberately or forgot to attach the comprehensive agreement to its e-mail and letter.

Notice Period

[25] With the comprehensive agreement being unenforceable, the plaintiff is entitled to reasonable notice or payment in lieu thereof. He did not receive notice, so he is entitled to damages in lieu thereof.

[26] The parties are in agreement that in determining the length of notice, the Court should consider the factors as set out in *Bardal* v. *Globe & Mail Ltd.*, [1960] O.J. No. 149, 24 D.L.R. (2d) 140: (1) the character of employment; (2) the length of service; (3) the employee's age; and (4) the availability of similar employment having regard to the experience, training and qualifications of the employee.

Inducement

[27] The list is non-exhaustive and each case will depend upon its own particular circumstances. Here, the plaintiff argues that the inducement factor should also be considered and by doing so, the notice period should be increased, relying upon *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701, 152 D.L.R. (4th) 1, 1997 CanLII 332 (SCC): see paras. 83 and 85.

[28] In the circumstances herein, I find there was no inducement. There is no evidence that the plaintiff was courted by the defendant to leave EQ on the strength of promises of career advancement and greater responsibility and security. There was increased compensation of $10,000 per annum, but this was something demanded by the plaintiff and agreed to, rather than offered by the defendant to entice him away from EQ. Based upon the evidence, I find that all that was agreed to, as hereinbefore set out, was the three-month probation period, four weeks' vacation per annum and health benefits following probation. The plaintiff has not met his onus of satisfying me that he was offered all of the items of responsibility and advancement set out in his affidavit. There is no documentation to back up his allegations.

[29] Moreover, I find the speed at which all of this happened is contrary to there being any inducement. Twenty-two minutes after being asked by his friend whether he was interested in a position with the defendant he sent his résumé out. That same day he and the defendant had reached an agreement. This was not a situation where someone had to be coerced to leave their job or where there was negotiation, numerous meetings and a lot of back-and-forth between the parties. It happened almost immediately. The plaintiff's conduct was characterized by alacrity as opposed to caution or a reluctance to leave his current employer.

[30] Further, the plaintiff agreed that there was a three-month probation period with the defendant. This too is inconsistent with an inducement to leave secure employment.

[31] Accordingly, I will determine the length of notice without considering inducement as a factor. As has been pointed out in the case law, the determination of a reasonable notice period is an art not a science. As a result, most cases yield a range of reasonableness.

[32] The plaintiff, when terminated by the defendant, found another job commencing on June 16, 2015. I should not, however, conclude that this is the appropriate notice, based on hindsight. I still have to consider the *Bardal* factors in determining what is reasonable.

[33] The plaintiff was 34 years of age when terminated, which should make him more marketable. He only was with the defendant for nine months, which generally speaking leads to a shorter reasonable notice period. There is very limited evidence as to the character of his employment other than that it was highly technical and in the computer and information technology area. The plaintiff argues that this made his job search more difficult. If anything, I would have thought this made the plaintiff more marketable, having a marketable skill set.

[34] As to the fourth factor, the plaintiff sent out numerous applications directly and through LinkedIn and networked with friends and contacts. He had numerous interviews and follow-ups which suggest that there was an active market for this area of work. As of June 2, 2015, when he swore his first affidavit, he did not have a new job. The defendant takes no issue with his mitigation efforts.

[35] He obtained a new job starting June 16, 2015. This is just over 22 weeks from his date of termination. There is no evidence as to when he actually was hired for his new job between June 2 and June 16. Nor is there any evidence as to what sort of job it is or the job particulars.

[36] The plaintiff argues for a notice period of five and a half months. The defendant argues for a range of two to three months. They each provided cases in support of their positions with employees that they respectively argued were of a similar age, job and tenure. I am certain that with enough searching through the electronic legal databases, counsel could find a case to match nearly any scenario presented.

[37] Having considered the plaintiff's age, skills, the length of his employment with the defendant, the character of his employment, his mitigation efforts and the availability of

similar employment and the cases provided, I find that the appropriate reasonable notice period is four months.

[38] I assume that the parties are able to work out the actual amount of damages based upon this number. If they cannot do so, they may make brief written submissions on this. I trust this will not be necessary.

Punitive Damages

[39] Following the plaintiff's termination, and without notice, the defendant remotely wiped the plaintiff's mobile phone, deleting not only the defendant's information from the plaintiff's phone, but also the plaintiff's personal information, including personal contact information and photos which had great sentimental value to the plaintiff.

[40] The plaintiff alleges this was deliberate in that it is common knowledge within the information technology industry that a remote wipe will destroy all of the contents of a mobile phone.

[41] As a result of losing his personal information, the plaintiff alleges he has suffered distress and anxiety and seeks damages in relation thereto under the tort of intrusion upon seclusion or alternatively, through an award of punitive, aggravated or moral damages.

[42] The defendant acknowledges that it destroyed the plaintiff's personal information contained on his phone upon termination. It argues that the plaintiff agreed to this through his acceptance of the Microsoft Exchange user agreement when the defendant's server was made accessible on the plaintiff's phone. In the alternative, it argues that the removal of personal information by the remote wipe was unintentional.

[43] The defendant filed an affidavit from its Senior Network Administrator who stated, "I was under the impression that such a remote wipe would only remove data in the company e-mail account on an employee's personal phone."

[44] The alleged Microsoft Exchange user agreement was not produced by the defendant and I am not prepared to find that through it the plaintiff authorized the destruction of his personal information upon departure. Even if it did state that "the employee's phone could be wiped remotely through the exchange server" as deposed, this doesn't mean the plaintiff agreed to the destruction of his personal information. The defendant's own witness thought this only meant the company's e-mail account would be destroyed.

[45] How an information technology company like the defendant could make this sort of mistake is surprising. I also find it surprising that the plaintiff, who works in the information technology field, would not have backed up or saved his personal information in some manner.

[46] On the limited evidence before me, I am not prepared to find that the destruction by the defendant was planned, but I find it was reckless.

[47] The plaintiff argues that the destruction amounts to an intrusion upon seclusion: see *Jones v. Tsige*, 2012 ONCA 32. *Jones* does not apply to the case herein. In *Jones*, the defendant accessed the plaintiff's personal bank accounts at least 174 times. While the defendant did not publish, distribute or record this financial and personal information, she did view it. In this case there is no evidence that the plaintiff's information was viewed prior to its destruction.

[48] In *Jones* limitations were placed upon liability for intrusion upon seclusion. Only certain intrusions can be viewed as highly offensive which can lead to a finding of intrusion upon seclusion. At para. 72 Sharpe J.A. states:

> ...it is only intrusions into matters such as one's financial or health records, sexual practices and orientation, employment, diary or private correspondence that, viewed objectively on the reasonable person standard, can be described as highly offensive.

[49] I do not find that there was an intrusion or invasion of the plaintiff's personal information nor, viewed objectively, were the defendant's actions highly offensive as defined.

[50] The plaintiff's alternative argument is that the defendant's conduct should result in an award of punitive or aggravated damages or moral damages. The plaintiff seems to argue that they are synonymous, but they are not.

[51] Punitive damages are awarded to punish or deter the defendant for conduct that is wrongful and so malicious and outrageous that the conduct or acts are deserving of punishment on their own. Aggravated damages are compensatory and are mental distress damages awarded to the plaintiff for his or her mental distress relating to the manner of dismissal. While conduct may cause mental distress that substantiates an award of mental distress or aggravated damages, the same conduct could also be deserving of punishment and thus justify an award of punitive damages. On the other hand, the conduct might be worthy of punishment even though it might not have caused mental distress.

[52] The plaintiff's statement of claim seeks punitive damages only. I do not find that the defendant's conduct in destroying the plaintiff's personal information to be so malicious and outrageous to be deserving of punishment and punitive damages.

[53] The facts in the cases relied upon by the plaintiff are far different from the within action. Respectively:

i) the employer lied to and deceived the employee over the employee's valuable property which was eventually stolen while in the employer's care (*Bouma* v. *Flex-N-Gate Canada Co.*, 2004 CanLII 66311 ONSC);

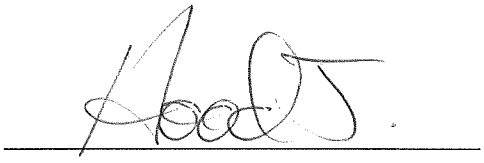
ii) the employer treated a longstanding employee as a common criminal, made unfounded accusations of impropriety and seized her personal files and scientific manuscripts (*Rock* v. *Canadian Red Cross*, 1994 CanLII 7412 ONSC); and lastly,

iii) the employer insensitively terminated a longstanding employee, withheld ongoing client files which were the employee's and were needed for his new business, and failed to return the employee's personal effects which the employee was unable to carry from his office due to his medical condition which prevented him from doing so. (*Simmons v. Webb*, 2008 CanLII 67908 ONSC.)

[54] In this case, punitive damages are not appropriate.

Costs

[55] I have been provided with cost outlines from both parties. I am, of course, unaware of any offers made between the parties following the commencement of the claim. I would also hope that the parties would be able to resolve the issue of costs, but if they cannot the plaintiff shall provide his costs submissions within two weeks of today's date, with the defendant submissions to be provided two weeks thereafter. Each party's submissions shall not exceed three pages in length. If offers were made that bear on the issue of costs, these should be included within the submissions.



Hood J.

Released: September 24, 2015

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