

**CITATION:** Yee v Hudson’s Bay Company, 2021 ONSC 387  
**COURT FILE NO.:** CV-19-00628429-0000  
**DATE:** 20210118

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

<b>BETWEEN:</b>	)	
	)	
MELVIN YEE	)	<i>Daniel A. Lublin and Simone Ostrowski,</i>
	)	lawyers for the Plaintiff
- and -	)	
	)	
HUDSON’S BAY COMPANY	)	<i>Elisha Jamieson-Davies and Danika L. Winkel,</i>
	)	lawyers for the Defendant
Defendant	)	
	)	
	)	<b>HEARD: DECEMBER 15, 2020</b>
	)	

**G. DOW, J.**

**REASONS FOR DECISION**

[1] The plaintiff, Melvin Yee seeks damages arising from termination of his employment on August 28, 2019. The trial proceeded virtually with the following marked as exhibits numbered:

- 1) Joint Affidavit Book;
- 2) Agreed Statement of Facts; and
- 3) Joint Document Book.

[2] The evidence of Melvin Yee was in the form of three affidavits sworn October 23, December 2 and December 9, 2020. No cross-examination on his evidence occurred. The evidence of Hudson’s Bay Company (“HBC”) was in the form of affidavits from the person to whom he reported at the time of his termination, who holds the title of Vice-President, Fashion Direction and Design, sworn November 4, 2020, a Senior Manager, H.R. Solutions Group and Associate Relations sworn November 30, 2020 and a Divisional Vice-President, Compensation, also sworn November 30, 2020. Each was cross-examined by counsel for Melvin Yee.

## Background

[3] Mindful of the four factors identified in *Bardal v. Globe & Mail*, [1960] O.W.N. 253 (Ont. H.C.), Melvin Yee is currently 62 years of age. His employment with HBC began February 11, 2008. This resulted in 11.65 years of service. His income at the time of termination consisted of:

- a) a base salary of \$162,353.00;
- b) an Annual Incentive Plan (“AIP”) or bonus based on company sales and objectives which paid out 32% of the amount due in the Spring (after year end calculations were complete) and 68% in the Fall. The additional compensation paid to Melvin Yee in 2018 was \$23,537.68. The potential payout in 2019 was \$28,411.78;
- c) group benefits including short and long term disability as well as life insurance which HBC valued at 10% of base salary or \$1,352.94 per month and Melvin Yee accepted;
- d) pension plan contributions which HBC submitted was included in the 10% for benefits and was valued at \$676.47 per month; and
- e) discounted pricing on purchases of HBC products.

[4] Melvin Yee held a variety of titles during his employment, the most second recent being as Director, Product Design and Development, Private Brands which resulted in him signing a June 19, 2015 letter or contract that included specified payments in the case of termination. However, his position at the time of his termination as Director, Product Design and Development for HBC began on April 2, 2018 which included a “Transfer Offer Letter” signed by the individual to whom he reported and was signed back by Melvin Yee on April 5, 2018.

[5] This letter confirmed it would “govern your relationship of employment with the company” and would “supersede and render void any prior verbal or written representations concerning the conditions of your employment with the company”. It confirmed Melvin Yee had the opportunity to “review the agreement and obtain independent legal advice”. It stated “this document constitutes a contract”. It did not contain any provisions for specified payments in the event of termination. Finally, the document contained “c.c. H.R. File” at its conclusion.

[6] Melvin Yee did not recall the document until it was produced as part of delivery of HBC’s Affidavit of Documents on October 13, 2020. The Trial Record indicates the Statement of Claim was issued October 2, 2019. The original Statement of Defence was dated November 4, 2019.

[7] The termination letter, dated August 28, 2019 referred to the June 19, 2015 document and attempted to abide by the specified payments contained in it. This resulted in Melvin Yee being paid 11 months of salary, benefits and he was allowed continued discounts on HBC products.

HBC also provided three months relocation – counselling. It was agreed the value of the amounts already paid by HBC to Melvin Yee was \$159,907.49.

[8] Melvin Yee began submitting applications confirming his efforts to find new work beginning in February, 2020. He had been unsuccessful as of the date of this trial. HBC conceded mitigation was not in issue.

[9] As a result of the disclosure of the April 2, 2018 Transfer Offer Letter, the pleadings were amended, principally the Statement of Claim to seek “Bad Faith, Moral, Aggravated or Punitive Damages in the sum of \$100,000.00” relying on the conduct of HBC described above. The Statement of Defence was amended, principally to withdraw its reliance on the June 19, 2015 specified payments for termination and dispute the claim for bad faith damages.

[10] As part of the affidavit evidence tendered, in cross-examination, the person to whom Melvin Yee’s reported admitted signing the letter of April 2, 2018 but having no recollection of having done so. She would not have prepared the letter. She confirmed making the offer of the position to Melvin Yee in person and discussing with him the responsibilities of his new role. She agreed the letter indicated that “c.c. H.R. File” meant it had been copied to Melvin Yee’s human resources file.

[11] This individual also clarified that while up to five individuals reported to Melvin Yee at one time, this number varied. She was the one who advised him of his termination but the details were handled by HBC’s human resources personnel. She testified the April 2, 2018 letter was located by an individual in human resources as opposed to herself.

[12] The Senior Manager, HR Solutions and Associate Relations witness from HBC testified not seeing the April 2, 2018 letter when she searched the file but admitted it was possibly there all along. She would not have reviewed it in detail. Termination letters are prepared from templates and the description of the April 2, 2018 document as a “Transfer Offer Letter” would have resulted in Melvin Yee’s termination letter being prepared on the basis of the June 19, 2015 document regardless.

[13] The evidence of the Divisional Vice-President, Compensation noted that had Melvin Yee continued his employment, the balance of his February, 2020 bonus would have been \$6,635.02. While her initial evidence that it was very unlikely that a 2020 bonus would be paid, she later testified her chance of getting a 2020 bonus was nil. However, she acknowledged the 2019 bonus was paid although some of the requisite criteria had not been met. It remained within the discretion of the company to pay a bonus.

### **Issues**

[14] The parties identified three issues to be addressed in submissions:

- a) what is the length of reasonable notice;



- b) what damages are to be included in that notice; and
- c) is the plaintiff entitled to bad faith, moral and/or punitive damages and, if so, in what amount arising from the failure by HBC to produce the April 2, 2018 Transfer Offer Letter until shortly before trial.

### Notice Period

[15] Regarding the length of reasonable and proper notice, Melvin Yee sought 18 months while HBC maintained 11 months' notice was the proper period of time. The law is clear that the reasonable notice is to provide the terminated employee with adequate time to find comparable employment.

[16] The four factors identified in *Bardal v. Globe & Mail, supra* are the cornerstones upon which the reasonable notice should be assessed. This approach should not give disproportionate weight to any one factor as indicated in *Honda Canada Inc. v. Keays*, 2008 SCC 39 (at paragraph 32).

[17] Melvin Yee is 62 years of age. While this is not "old", by more recent standards, it is within the latter stages of the usual working life career for most persons. It is a factor that favours a longer reasonable notice period.

[18] Melvin Yee's 11.65 years of service with HBC was not so long as to fall within that of "life long" employee. However, it was not brief. I find it to be neutral to somewhat favouring a longer period of reasonable notice.

[19] The character of Melvin Yee's employment brings into consideration specifics of his position such as the managerial nature of his role and the up to five individuals that reported to him during the April, 2018 until August, 2019 timeframe. At that time, he reported to the Vice-President, Fashions Direction and Design at HBC. It was acknowledged he conducted the annual performance reviews of the individuals that reported to him. In some of Melvin Yee's previous roles with HBC, he held the title of Vice-President and was described as an "executive". It should also be noted his high income level placed him amongst a very small percentage of income earning Canadians. This also favours awarding a longer period of reasonable notice.

[20] The availability of similar employment having regard to the experience, training and qualifications of the employee was the subject of submissions by both sides. Counsel for Melvin Yee submitted I should take into account the recent COVID pandemic and resulting significant increased difficulty in obtaining comparable employment. Counsel pointed to the approximate 90 applications made by his client without success as evidence of same. To be clear, counsel for Melvin Yee submitted this provided a basis for awarding a notice period at the highest possible end of the appropriate range. Counsel for HBC submitted the high volume of applications was evidence of many comparable positions and the timing of those application, being post February, 2020, was evidence such positions were available in the post COVID economy and that the contrary conclusion was the proper result.

[21] In support of Melvin Yee's position, I was directed to the statement by Justice Perell in *Paquette v. TeraGo Networks Inc.*, 2015 ONSC 4189 (at paragraph 27) that "Economic factors such as a downturn in the economy or in a particular industry or sector of the economy that indicate that an employee may have difficulty finding another position may justify a longer notice period". However, that statement needs to be considered with the statement in *Holland v. Hostopia.com Inc.*, 2015 ONCA 762 (at paragraph 61) that "Notice is to be determined by the circumstances existing at the time of termination and not by the amount of time that it takes the employee to find employment".

[22] It seems clear terminations which occurred before the COVID pandemic and its effect on employment opportunities should not attract the same consideration as termination after the beginning of the COVID pandemic and its negative effect on finding comparable employment.

[23] As often occurs in wrongful dismissal cases, each side marshalled previous decisions with similarities in the four factors to support its position and assist the court. Counsel for Melvin Yee not only prepared a list of six decisions that attempted to chart prior awards from the courts in Ontario, British Columbia and Saskatchewan of "Director – Managers" with 11.5 to 15 years of service, in the 53 to 61 year age group, earning between \$52,000.00 to \$393,000.00 per year (awarded between 16 and 24 months) but a secondary chart for a "statistical analysis".

[24] Counsel for HBC submitted a list of eight decisions from Ontario, Manitoba, Saskatchewan and Alberta of individuals holding various positions, between the ages of 58 to 61 years of age with 8 to 13.5 years of experience (who were awarded between 10 to 13 months). In addition, HBC submitted a chart distinguishing the decisions provided by counsel for Melvin Yee.

[25] I return to the *Bardal v. Globe & Mail*, *supra* decision where the four factors to be considered are prefaced with the statement "the reasonableness of the notice must be decided with reference to each particular case". To that end, based on consideration of the entire factual matrix as detailed above, I find 16 months to be the proper notice period. That is, until December 28, 2020.

### **Damages to be Included**

[26] Regarding what damages are to be included in that notice period, the parties agreed on the base salary of \$162,353.00 per year. At issue was the entitlement to the AIP bonus based on the company's sales and objectives. The evidence from HBC was had Melvin Yee continued with his employment into 2020, he would have been entitled to an additional AIP bonus of \$6,635.02 in February, 2020.

[27] In accordance with *Matthews v. Ocean Nutrition Canada*, 2020, SCC 26 (at paragraph 49) Melvin Yee is "entitled to damages representing the salary, including bonus, he would have earned". As a result, the \$6,635.02 are properly part of his damages and are so ordered.

[28] I am satisfied with the evidence from HBC, despite a possibility of a bonus from 2020 performance without meeting required criteria, that no additional amount meets the burden on the



plaintiff to prove his damages both with regard to any bonus being paid or the amount of any such bonus.

[29] The parties also disagreed about the value of the benefits available to Melvin Yee as a result of his employment with HBC. That is, counsel for HBC relied on other decisions of this court (rather than any evidence of a specific amount) to value benefits at 10% of base salary. During submissions, I calculated this to be \$1,352.94 per month.

[30] Counsel for HBC attempted to include the pension plan contributions in this amount on which there was agreement by the parties it had a specified, quantified value. During submissions, I calculated same to be \$676.47 per month.

[31] I have concluded Melvin Yee is entitled to both the \$1,352.94 per month and the \$676.47 per month. The three decisions relied on for the 10% of salary approach make no specific reference to a benefit such as a contribution to an employer pension plan. The value of the HBC contribution was agreed upon at \$8,117.65 per year. For 16 months, I calculate same to be and award \$10,823.53.

#### **Bad Faith Claim**

[32] Regarding the claim for bad faith, moral and/or punitive damages, it is based on the late disclosure of the April 2, 2018 Transfer Offer Letter. This “recklessness” as submitted by counsel for Melvin Yee prejudiced him and fell within the test described *Honda v. Keays*, 2008 SCC 39 (at paragraph 57) as “conduct during the course of dismissal that is “unfair or is in bad faith by being, for example, untruthful, misleading or unduly sensitive”. I was reminded during submissions and have considered the statement of the Court of Appeal that the way “a person’s employment is terminated” can be as important as the employment itself because it is on termination that a person is most vulnerable (see *Wood v. Fred Deeley Imports Ltd.*, 2017 ONCA 158 at paragraph 27).

[33] It is clear that HBC either initially overlooked or failed to appreciate the impact of the April 2, 2018 Transfer Offer Letter. The June 19, 2015 contract letter was used and relied on until the Transfer Offer Letter was discovered and produced. Importantly, Melvin Yee did not recall the document until it was produced on October 13, 2020. Further, the reliance on the June 19, 2015 contract letter did not deter Melvin Yee from disagreeing with the specified payments. He sought out counsel and commenced this action. His evidence on how it affected him is limited to his affidavit stating it was “extremely upsetting and troublesome” without further details (at paragraph 8 of Melvin Yee’s supplemental affidavit sworn December 2, 2020). He also testified the “careless” act of HBC was “offensive” (at paragraph 10 of that affidavit). However, it only caused “unnecessarily stress” and additional (presumably legal) costs which have yet to be determined.

[34] To the contrary, the specified payment in the June 19, 2015 contract letter provided for an additional 11 months of base salary which was paid. HBC also paid for three months of relocation

counselling. The parties have agreed Melvin Yee received \$159,907.49 which appears to equate to HBC's position on damages. This is also a credit against his award of damages.

[35] There is no evidence of any conduct leading up to the date of termination or subsequently by HBC or its employees aside from the late disclosure of the April 2, 2018 letter which would attract an award of bad faith, moral and/or punitive damages.

[36] I recognize litigation conduct can attract an award of bad faith, moral and/or punitive damages. I have reviewed the circumstances and decision in *Galea v. Walmart Canada Corp.*, 2017 ONSC 245 where such damages were awarded and the litigation conduct which contributed to that award. The Rules of Civil Procedure set out the obligation to serve an Affidavit of Documents. I was unable to find any time limit for its delivery while aware it is routinely ordered if not produced upon the request of the party seeking it. Such conduct did not occur in this matter.

[37] Counsel for HBC relied on the decision of *Groves v. UTS Consultants Inc.*, 2019 ONSC 5605 (at paragraphs 112 to 117) where the factors to consider in determining whether to award bad faith, moral and/or punitive damages were summarized to include:

- a) moral damages are not for the normal distress and hurt feelings of termination;
- b) moral damages for psychological injury go beyond hurt feelings which are intrinsic to a standard termination process;
- c) while medical evidence is not necessary, some external evidence of mental distress is typically required; and
- d) the grounds for moral damages are assessed on a case by case basis and conduct that is untruthful or misleading can qualify.

[38] I have concluded the conduct in this matter falls short of what is required to allow for such an award and that claim is dismissed. I will reserve any further comment or determination on how the timing of the delivery of HBC's Affidavit of Documents may affect the disposition of costs if that issue comes before me.

### **Conclusion**

[39] Finally, the parties raised the need to address whether a trust and accounting need to occur or a contingency discount given the length of reasonable notice sought went beyond the date of trial and potentially delivery of these reasons. As that did not occur, I shall not comment further on it save Melvin Yee shall disclose if he was successful in commencing any employment prior to December 28, 2020 and the details of same.

[40] In summary, and subject to correction by counsel, I calculate Melvin Yee's damages to be:

- a) 16 months of base salary or (\$162,353.00 per year divided by 12 months times 16 months) or **\$216,470.67**;
- b) 2019 unpaid AIP of **\$6,635.02**;
- c) Group benefits if not already paid in part of (16 months times \$1,352.94 per month) or **\$21,647.24**;
- d) Pension contributions of (\$8,117.65 per year divided by 12 months times 16 months) or **\$10,823.53**.

[41] From these amounts, there shall be deduction for the amount paid of \$159,907.49.

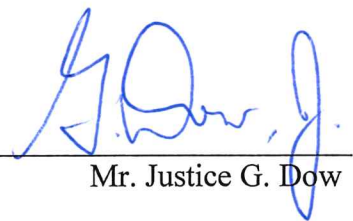
[42] I would also award pre-judgment interest on the net amount owing, from the midpoint of the time payments from HBC ceased to the release of this decision at the applicable rate which appears to be two percent per year.

#### **Costs**

[43] The parties advised there are outstanding offers to settle and requested submissions be deferred pending this decision. I agreed to do so.

[44] I urge the parties to agree on costs.

[45] If not, each party shall provide me with their position and request for the disposition of costs on or before February 12, 2021. Such submissions shall be typed, double spaced in a readable font and not to exceed five (5) pages excluding any Offers to Settle and Bill of Costs/Costs Outline being relied on.



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Mr. Justice G. Dow

**Released: January 18, 2021**



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**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

MELVIN YEE

Plaintiff

– and –

HUDSON'S BAY COMPANY

Defendant

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**REASONS FOR DECISION**

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**Mr. Justice G. Dow**

**Released: January 18, 2021**