COURT OF APPEAL FOR ONTARIO

CITATION: Antchipalovskaia v. Guestlogix Inc., 2022 ONCA 454

DATE: 20220609

DOCKET: C69598

Trotter, Coroza and Favreau JJ.A.

BETWEEN

Marina Antchipalovskaia

Plaintiff (Respondent)

and

Guestlogix Inc.

Defendant (Appellant)

Lindsay Scott, for the appellant

Aaron Rosenberg, for the respondent

Heard: February 17, 2022 by video conference

On appeal from the judgment of Justice Andra Pollak of the Superior Court of Justice, dated May 31, 2021.

Favreau J.A.:

A. OVERVIEW

[1] The appellant, Guestlogix Inc., appeals from a judgment finding that the respondent, Marina Antchipalovskaia, is entitled to twelve months notice for dismissal without cause.

[2] The twelve month notice period was partially based on the motion judge's finding that the respondent was continuously employed by the appellant for eight years, from 2011 to 2019.

[3] However, the appellant terminated the respondent's employment in 2016 in the context of creditor protection proceedings under the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36 (the "CCAA"). As part of those proceedings, the Superior Court made an order providing for the payment of creditors, including the respondent given her status as a former employee at the time the order was made, and explicitly releasing any claims by creditors. The appellant subsequently re-hired the respondent on the same terms as her previous

employment. The appellant then terminated the respondent's employment without cause in 2019.

[4] The issue on this appeal is whether the motion judge erred in treating the respondent's employment with the appellant from 2011 to 2019 as one continuous period of employment and, if so, the notice period the respondent is entitled to at common law.

[5] For the reasons that follow, I would allow the appeal. The motion judge erred in failing to give any effect to the respondent's termination in 2016 and the court ordered release when assessing the reasonable notice at common law. Nevertheless, the respondent's earlier period of employment with the appellant is relevant to determining the notice period. On this basis, I would substitute the twelve month notice period for a seven month notice period.

B. BACKGROUND FACTS

(1) The respondent's initial employment with the appellant

[6] The appellant is a technology company that helps airlines provide "digital concierge services" to their passengers.

[7] The respondent first started her employment with the appellant in July 2011 as a Senior Business Analyst. The parties had a written agreement setting out the terms of her employment.

(2) The CCAA proceedings

[8] On February 9, 2016, the appellant obtained a protection order from its creditors under the CCAA.

[9] On April 29, 2016, the Superior Court made an order approving a procedure for the submission of claims against the appellant. The procedure was to provide for the submission of claims by all creditors.

[10] In June 2016, a group of investors agreed to purchase the appellant's shares (the "Transaction Agreement"). The Transaction Agreement included a condition that the eventual CCAA plan of arrangement would include a term releasing the appellant from any liability for claims by the appellant's employees arising before the implementation date.

[11] On July 29, 2016, the appellant filed a plan of compromise and arrangement in the Superior Court (the "Plan").

[12] One of the stated purposes of the Plan was to settle and release what the Plan described as "Affected Claims" and "Released Claims". The Plan specified that both Affected Claims and Released Claims were to include claims by former employees that arose on or prior to the Plan Implementation Date.

[13] The Plan provided for a broad release of Affected Claims and Released Claims, specifying that they "shall be fully, finally, irrevocably and forever released, discharged,

cancelled and barred, and the Company and the Released Parties shall thereupon have no further obligation whatsoever in respect of the Affected claims or the Released Claims".

[14] A majority of creditors voted in favour of the Plan. The Superior Court made an order approving the Plan on September 12, 2016. The order specified that the Plan Implementation Date was to be September 21, 2016. The order also included a declaration that:

> On the Plan Implementation Date, the Plan and all associated steps, compromises, transactions, arrangements, releases and reorganizations effected thereby shall be deemed to be implemented, binding and effective in accordance with the provisions of the Plan, and the steps required to implement the Plan, including, without limitation, the release of all Affected Claims, Released Director/Officer Claims and Released Claims in accordance with the terms of the Plan, shall be deemed to occur and to take effect in the sequential order and at the times contemplated in the Plan, without any further act or formality, beginning at the Effective Time on the Plan Implementation Date.

(3) The respondent's termination and rehiring in 2016

[15] As part of the Plan implementation, the appellant terminated the respondent's employment and immediately rehired her in the same position. The steps in this process were as set out below.

[16] On August 4, 2016, the appellant sent a letter to the respondent notifying her that it intended to terminate her employment and to make her an offer to rehire her on the same terms as her current employment. The letter also advised the respondent that she could submit a proof of claim in the CCAA proceedings for payment of severance and termination.

[17] On August 30, 2016, the appellant sent another letter further notifying the respondent that, given the termination of her employment, she was entitled to make a claim in the CCAA proceedings.

[18] In response, the respondent submitted a Proof of Claim for her termination and severance pay entitlements under the *Employment Standards Act, 2000*, S.O. 2000, c. 41 (the "*ESA*"). She sought $19,321.15.

[19] As a creditor in the CCAA proceedings, the respondent was entitled to vote on the Plan. On August 31, 2016, the respondent submitted a proxy vote in favour of the Plan. On appeal, the respondent takes the position that she did not have sufficient time to consider her rights and options when she voted in favour of the Plan, an issue which is addressed below.

[20] The CCAA monitor accepted the respondent's claim. The respondent was paid $13,367.83, which was approximately 72% of her claim and which represented her pro rata entitlement to payment as an unsecured creditor.

[21] On September 13, 2016, the appellant sent the respondent an offer of employment. The letter stated that the respondent's start date would be "the first day following the implementation of the CCAA plan of arrangement and compromise".

[22] In a further letter to the respondent, the appellant described the respondent's "reset" start date as follows:

> Further to your new employment agreement dated September 13, 2016 and the implementation of the CCAA plan of arrangement and compromise (the "CCAA Plan") effective September 21, 2016, this letter will confirm that your start date (the "Starting Date") with the Company has been reset to today's date, September 22, 2016. From today forward this will be your effective Starting Date for all employment related matters including but not limited to seniority, benefits, vacation, etc. For certainty, there will be no interruption in your benefit coverage or other program participation as a result of the transition from your past employment agreement to the new one herein.

[23] At the time the appellant rehired the respondent, the respondent signed a new employment contract, which purported to preclude entitlement to common law notice in the event of her termination.

(4) The respondent's second period of employment and termination

[24] Following the CCAA proceedings, the respondent continued in her employment with the appellant. There is no dispute that she continued to have the same responsibilities she had before the CCAA proceedings.

[25] The appellant terminated the respondent's employment on June 13, 2019, which is approximately 2.75 years following her September 22, 2016 "reset" start date with the appellant.

[26] At the time of her 2019 termination, the respondent was 55 years old. She earned $101,500 per year. The appellant also provided benefits to the respondent, matched her RRSP contributions and paid her a yearly discretionary bonus.

[27] Upon termination, the appellant paid the respondent $16,867.43. This calculation was based on the respondent's entitlement under the *ESA* from July 5, 2011 (which was the respondent's original start date) to June 13, 2019, minus the amount the respondent had been paid in the CCAA proceedings. This sum represented approximately 9.5 weeks of pay. The appellant relied on the without cause provision in the employment agreement signed by the respondent to limit payments to the minimum amounts that would be due under the *ESA*.

[28] It took the respondent twelve months to find a new position following her termination.

(5) The motion judge's decision

[29] The respondent brought an action for wrongful dismissal, claiming that she was entitled to common law notice. After starting the action, the respondent brought a motion for summary judgment. The parties agreed that there were no facts in dispute and that the matter could be decided summarily. The motion judge agreed.

[30] There were two issues on the motion: 1) the validity of the with cause and without cause termination provisions in the employment contract, and 2) the appellant's entitlement to

common law notice.

[31] On the first issue, the motion judge found that the termination provisions in the employment contract were invalid because they did not comply with the minimum requirements in the *ESA*.

[32] Having found that the termination provisions were invalid, the motion judge went on to consider the respondent's entitlement to common law notice. In that context, the motion judge held that the respondent's employment with the appellant should be treated as continuous from 2011 to 2019. In doing so, she noted that the appellant issued a Record of Employment that identified the respondent's first day of work as July 5, 2011, and that the appellant calculated the respondent's entitlements under the *ESA* on the basis of 7 years and 11 months of employment. When assessing the respondent's entitlement at common law, the motion judge noted that the respondent did not sign a release in the CCAA proceedings but she did not consider the significance of the court ordered release.

[33] Ultimately, the motion judge held that twelve months notice was appropriate in the circumstances of this case. She awarded damages to the respondent "reflecting a twelve (12) month notice period, less the amount of the [respondent]'s Claim in the CCAA proceedings and the amounts the [respondent] has been paid as a result of her termination of employment".

C. PARTIES' POSITIONS ON APPEAL

[34] The appellant does not challenge the motion judge's finding that the termination clause was invalid and that the appellant was therefore entitled to reasonable notice at common law. However, the appellant argues that the motion judge erred by failing to find that the respondent's entitlement to any common law notice for her employment between 2011 and 2016 was released in the CCAA proceedings. Accordingly, the appellant argues that the respondent's entitlement to common law notice should have been based on 2.75 years of employment and that 4 months notice would be reasonable in the circumstances of this case. Alternatively, the appellant seeks clarification regarding the motion judge's order in respect of the amount of the deduction attributable to the payment made to the respondent in the CCAA proceedings.

[35] The respondent argues that the motion judge did not make any errors in principle that would justify appellate intervention. The motion judge was required to look at the totality of the circumstances, and it was open to her to take the years of employment between 2011 and 2016 into account when making this determination. The motion judge's determination that the respondent was entitled to a twelve month notice period was reasonable in the circumstances of this case.

D. ISSUES AND DISCUSSION

[36] The issues to be decided on this appeal are whether the motion judge erred in treating the respondent's employment from 2011 to 2019 as continuous for the purpose of determining her entitlement to common law notice and, if so, the appropriate common law notice period.

[37] As discussed below, I agree with the appellant that the motion judge erred in failing to give effect to the termination of the respondent's employment in 2016 and the release granted in the CCAA proceedings. In determining the respondent's entitlement to common law notice, the motion judge should have treated the respondent's period of employment as running from 2016 to 2019. However, I disagree with the appellant's argument that the respondent's period of employment from 2011 to 2016 should play no role in determining the notice period. Rather, the respondent's years of employment prior to 2016 should be taken into account in determining her notice period as her prior years of service provided a benefit to the appellant.

(1) Legal principles applicable to calculating the notice period

[38] It is well established that a common law notice period is to be based on the guidance in *Bardal v. Globe & Mail Ltd.*, (1960), 24 D.L.R. (2d) 140 (Ont. H.C.). In *Bardal*, the court provided a non-exhaustive list of factors to be considered in deciding the appropriate notice period. These factors include, but are not limited to, the length of employment:

> There can be no catalogue laid down as to what is 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 the 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. [Emphasis added.]

[39] Accordingly, while an employee's length of employment is not determinative of the common law notice period, it is one of the relevant *Bardal* factors. Therefore, in cases where there has been an interruption in an employee's employment due to the sale of the business, the court must decide whether and to what extent the interruption in employment affects the determination of the notice period.

[40] Under s. 9(1) of the *ESA*, if an employer sells a business and the purchaser continues to employ an employee of the seller "the employee shall be deemed not to have been terminated or severed for the purpose of this Act and his or her employment with the seller shall be deemed to have been employed with the purchaser for the purpose of any subsequent calculation of the employee's length or period of employment" [emphasis added].

[41] However, as recently held by this court in *Manthadi v. ASCO Manufacturing*, 2020 ONCA 485, at para. 48, there is a "sharp distinction" between the rights of employees under the *ESA* and under the common law when the ownership of a business changes. In *Manthadi*, at para. 48, Juriansz J.A. described the nature and extent of this distinction. He wrote:

> [A] sharp distinction must be drawn between termination of employment by a successor employer under the ESA and under the common law. While the ESA is clear that the employment of employees of the vendor of a business who are employed by the purchaser is deemed not to be terminated for the purposes of the ESA, the common law is equally clear that such employees are terminated (by constructive dismissal) when their employer sells the business and there is a change in the identity of the employer. Dubin J.A. stated the common law in *Addison v. M. Loeb Ltd.* (1986), 1986 CanLII 2474 (ON CA), 25 D.L.R. (4th) 151 (Ont. C.A.), at pp. 152-53, as follows:

> At common law, since a contract of personal services cannot be assigned to a new employer without the consent of the parties, the sale of the business, if it results in the change of the legal identity of the employer, constitutes a constructive termination of the employment.
>
> …
>
> If the employee is offered and accepts employment by his new employer, a new contract of employment is entered into. [Emphasis added.]

[42] In *Manthadi*, at paras. 51-53, this court discussed the challenges for long service employees who are terminated upon the sale of a business and offered employment by the new owner. As Juriansz J.A. explained, at para. 53, often the only meaningful option that these employees are left with is accepting the offer from the new owner. He wrote:

> … Employees terminated by the sale of a business often have no realistic option other than to accept the offer of a new contract of employment with the purchaser if such is offered. If they are subsequently terminated by the purchaser, the new start date of their term of service weighs in favour of a shorter notice period than had the business not been sold.

[43] Relying on an earlier decision from this court, *Addison v. M. Loeb Ltd.*, (1986), 25 D.L.R. (4th) 151 (Ont. C.A.), Juriansz J.A. went on to state that, even where an employee starts a new period of employment with a successor employer, that employee's prior years of employment can be taken into account in determining the appropriate notice period upon a subsequent termination. This is because the experience a long serving employee brings to a new owner is relevant when applying the *Bardal* factors. Specifically, at para. 58, Juriansz J.A. explained that a "purchaser of an ongoing business who takes on the vendor's employees avoids the burden, cost, and time of having to recruit a new employment force that is unfamiliar with the work, the working environment, and one another".

[44] In *Manthadi*, this court explained that the application of the *Bardal* factors in a successor employer situation gives courts the necessary flexibility to deal with the unique circumstances of each case. Juriansz J.A. wrote, at paras. 66-67:

> A trial judge applying the *Bardal* factors is able to craft an appropriate award in a successor employer case without stitching together the employee's two terms of service. The *Addison* approach does not use a notional length of service as the yardstick of appropriate notice. The *Addison* approach has the advantage of flexibility. Its flexibility enables the court to deal fairly with the endless variety of circumstances in which an employee's claim may be presented. The court is able to recognize, under the rubric of experience, the equivalent of all or some of an employee's service with the vendor employer in order to arrive at a fair result.
>
> The fair result need not devalue the employee's past service. The notice periods awarded in both *Addison* and *Bardal* were no less than had length of service been used as the yardstick. The appropriate notice period is assessed taking into consideration all of the circumstances. [Emphasis added]

[45] In *Manthadi*, at paras. 73-76, this court also held that a settlement reached with the prior employer, including the effect of a release and the receipt of a payment, is another relevant, but not determinative, factor in deciding on the appropriate notice period.

[46] Accordingly, where an employee is dismissed and rehired in the context of a change in ownership, the length of employment at common law is not deemed to be continuous as it is under the *ESA.* Nevertheless, the employee's years of employment with the previous owner may still be relevant to determining the appropriate notice period given that the employee's past experience brings value to the new employer.

(2) The motion judge erred in failing to consider the effects of the termination and release

[47] The motion judge erred in treating the respondent's years of employment as continuous from 2011 to 2019. While the motion judge was aware that the respondent's employment had been terminated in the context of the CCAA proceedings and that there was a court ordered release, she did not address whether and to what extent these circumstances should impact the length of common law notice. This was an error in principle.

[48] The motion judge recognized that, under the *ESA*, the respondent's employment with the appellant was to be treated as one continuous period. She wrote:

> I agree that for the purposes of her ESA entitlements, the 2016 share purchase did not affect the [respondent]'s continuity of service – her employment continued unchanged, maintaining the same salary, vacation entitlement, and RRSP matching. Her work location did not change, and she kept the same role and title. She was not provided with a termination notice, issued a Record of Employment, nor did she execute a release. She was "offered continued employment" as a "retained employee" under a new employment agreement.

[49] However, contrary to this court's decision in *Manthadi*, at para. 48, the motion judge failed to address the "sharp distinction" between the calculation of the respondent's length of employment under s. 9(1) of the *ESA* and at common law. In determining the respondent's length of employment for the purpose of deciding the common law notice period, the motion judge should not have relied on the deemed continuity of employment under s. 9(1) of the *ESA*.

[50] The circumstances in this case are somewhat different than those in *Manthadi*. In *Manthadi*, this court stated that, at common law, "employees are terminated (by constructive dismissal) when their employer sells the business and there is a change in the identity of the employer": para. 48. Here, the identity of the respondent's employer did not change given that the sale of the business was achieved through a share purchase agreement. However, the appellant explicitly terminated the respondent's employment and rehired her in 2016, at which point, the parties signed a new employment agreement.

[51] Most significantly, in the context of the CCAA proceedings, the Superior Court made an order that released all claims and potential claims against the appellant up to the Plan Implementation Date. The intent of the release was to release claims by employees such as

the respondent. While the respondent argues that she did not have a chance to meaningfully consider the terms of the release before submitting her vote in favour of the CCAA plan of arrangement, this is irrelevant. The release was made by court order approving the Plan and not based on the approval of individual creditors.

[52] The circumstances in this case are somewhat similar to those in *Carpenter v. Brains II Canada Inc.*, 2015 ONSC 6224, aff'd 2016 ONSC 3614 (Div. Ct.). In that case, the employer had also gone through CCAA proceedings that led to an asset sale -- rather than a share purchase. The plaintiff was an employee who had worked for the company prior to and after the sale until she was terminated a few years after the CCAA proceedings. In the context of her claim for wrongful dismissal, she argued that she was entitled to a common law notice period that reflected her period of employment before and after the CCAA proceedings. In rejecting this position, Stinson J. wrote, at para. 15:

> This was not a simple asset sale and a mere change of ownership. There was a bankruptcy, a termination of employment, a purchase of some of the assets of the former employer and a new employment where the employee was told that the new employer would not be honouring her prior severance entitlements.

[53] This line of reasoning about the status of the respondent's employment as a result of the CCAA proceedings applies here too.

[54] While the circumstances giving rise to the termination and resumption of the respondent's employment in this case are different than in *Manthadi*, the termination and CCAA release are nevertheless relevant to determining the respondent's length of employment and the appropriate notice period. By failing to consider the effect of the termination and CCAA release, the motion judge erred in treating the respondent's employment with the appellant as continuous.

[55] The respondent acknowledges that her employment was terminated in the context of the CCAA proceedings in 2016. However, she argues that this court owes significant deference to the motion judge's application of the *Bardal* factors in determining the length of common law notice. She relies on this court's statement in *Manthadi*, at para. 67, that in cases of successor employers, it may sometimes be appropriate for the length of notice to be as long as it would have been if the business had not been sold. On this basis, the respondent argues that the motion judge had the discretion to grant a notice period that was as long as the notice period would have been if the respondent's employment had not been terminated in 2016. Accordingly, she argues that this court should not interfere with the motion judge's exercise of discretion.

[56] I agree with the respondent that, as a general principle, this court should not interfere lightly with a court's determination of a common law notice period. Such a determination requires the court below to weigh multiple factors and assess the circumstances of each case on the basis of its unique circumstances. This court owes significant deference to that weighing exercise: see *Minott v. O'Shanter Development Co.* (1999), 42 O.R. (3d) 321 (C.A.), at pp. 343-44; and *McNevan v. AmeriCredit Corp.*, 2008 ONCA 846, 94 O.R. (3d) 458, at paras. 34-35. Even where the judge below made an error in principle, this court will not

ordinarily alter the notice period if it falls within an acceptable range in the circumstances of the case: *Wood v. Fred Deeley Imports Ltd.*, 2017 ONCA 158, 134 O.R. (3d) 481, at para. 75.

[57] In this case, the motion judge gave no consideration to the interruption of the respondent's employment and the CCAA release when weighing the *Bardal* factors. While *Manthadi* provides that a court can give "some recognition" to an employee's prior experience when dealing with successor employer cases, this is different than treating the two separate periods of employment as continuous. When dealing with a successor employer, the court must look at all the circumstances, including the intentions of the parties, in deciding what effect the employee's earlier period of employment should have on the notice period. By failing to do so, the motion judge made an error in principle that tainted her analysis of the *Bardal* factors.

[58] In addition, a twelve month notice period was already at the high end of the range for someone with the respondent's responsibilities and qualifications who worked for a period of approximately eight years. It certainly does not fall within the acceptable range for someone who worked for a period of 2.75 years in circumstances where the CCAA court ordered release clearly contemplated that the appellant would be released from any liabilities predating the implementation of the Plan. Accordingly, the motion judge's determination that twelve months was an appropriate notice period should be set aside.

(3) The appropriate notice period

[59] Rather than sending the matter back to the motion judge or another judge of the Superior Court, in accordance with s. 134(1)(a) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, it is preferable and appropriate for this court to determine the proper notice period. Unlike in *Manthadi*, where this court held that a trial was necessary to resolve credibility and other evidentiary issues, there are no material facts in dispute in this appeal.

[60] The appellant argues that the notice period should be four months because it is consistent with what the motion judge ordered, considering that twelve months for eight years of employment is equivalent to four months for 2.75 years of employment. The appellant also argues that a four month notice period is consistent with cases that have considered and applied the *Bardal* factors in similar circumstances. In my view, this approach is not satisfactory because it does not accord with this court's direction in *Manthadi*; specifically, it does not take account of the benefit the appellant received from the respondent's prior experience. The respondent continued in her position without the need for any additional training. She had five years of experience doing exactly the same work. Notwithstanding that the court ordered release in the CCAA proceedings released any claim she may have for common law notice prior to her 2016 date of termination, the contribution she made to the appellant during her 2.75 years of employment was significantly different from the contribution of an employee at her level who did not have five years of prior employment with the appellant.

[61] In my view, a notice period of seven months is appropriate in the circumstances of this case. This notice period is longer than the notice period the respondent would have been entitled to if she had first started her employment with the appellant in 2016, thereby

accounting for the benefit the appellant received from her previous period of employment. At the same time, however, this notice period recognizes and gives effect to the intent of the court ordered release in the CCAA proceedings, which was to release the appellant from liabilities arising prior to the implementation of the Plan.

E. DEDUCTION

[62] Based on the foregoing, it is not necessary to clarify the quantum that should have been deducted from the twelve month notice period. The respondent's proof of claim in the CCAA proceedings only related to her initial period of employment with the appellant. Given that the respondent's entitlement to common law notice is based of her second period of employment, there is no basis for making any deduction attributable to the payment she received in the context of the CCAA proceedings.

F. DISPOSITION

[63] I would allow the appeal. The motion judge's finding that the appellant is entitled to common law notice of twelve months is substituted for a finding that she is entitled to common law notice of seven months. The parties are to make the necessary adjustments to the calculation of damages in the motion judge's decision.

[64] As agreed between the parties, the appellant is entitled to costs in the amount of $10,000, all inclusive. The costs of the motion below remain as ordered by the motion judge because, despite the change to the common law notice period on appeal, the respondent was nevertheless substantially successful on the motion below.

Released: June 9, 2022 "G.T.T."

"L. Favreau J.A."

"I agree. Gary Trotter J.A."

"I agree. Coroza J.A."