CITATION: Kraft v. Firepower Financial Corp., 2021 ONSC 4962
COURT FILE NO.: CV-20-00651064-0000
DATE: 20210715

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Steven Kraft, Plaintiff

– AND –

Firepower Financial Corporation, Defendant

BEFORE: E.M. Morgan J.

COUNSEL: *Daniel Lublin*, for the Plaintiffs

Rich Appiah and Dominica Moran, for the Defendant

HEARD: July 14, 2021

SUMMARY JUDGMENT

[1] The Plaintiff was terminated from his employment by the Defendant without cause. He sues for pay in lieu of notice, commissions and bonuses which he says are owing to him, and holiday and vacation pay.

[2] He brings this motion for summary judgment under Rule 20.01 of the *Rules of Civil Procedure*. Both sides agree that a fair, just and expeditious adjudication can be done here in summary form, and that the necessary findings can be made without resorting to a full trial: *Hryniak v. Mauldin*, [2014] 1 SCR 87, at para 4.

[3] Although he started work as a research analyst in October 2014, by the time his job with the Defendant ended in March 2020 he was a specialized commissioned salesperson working in the investment banking field and focused on mergers and acquisitions. His responsibilities included seeking out and presenting new business opportunities to the Defendant. He received a base annual salary of $70,000 at the time of his termination. In addition, he received commissions, incentive payments, vacation and health benefits.

[4] His entitlement to commissions was based on his sourcing and presenting to the Defendant any opportunities that resulted in fees payable to the Defendant, which were internally known as "success fees". He also earned incentive income from participation in what was known as the Bonus Pool, in which he participated with other members of the Defendant's sales team and which were paid to him on a quarterly basis based on his percentage of the pool's fee-generating activities.

[5] In 2017, the Plaintiff identified a potential M&A deal for the Defendant with a company called Arzon Limited ("Arzon"). The Defendant and Arzon entered into a contract in late 2018, at which point no further work was required by the Plaintiff or any other salesperson. At the time of the Plaintiff's termination, the Arzon deal was nearing completion and payment was expected to be forthcoming imminently. It was by an order of magnitude the largest transaction in which the Plaintiff was involved for the Defendant, and would have translated into his largest commission.
.

[6] Upon terminating him, the Defendant proposed paying any commissions that arose on the Plaintiff's pending deals, including the Arzon deal, provided those deals closed within 5 months of his termination. Plaintiff's counsel characterizes the 5-month timeline as having been arbitrarily selected by the Defendant, and was unrelated to anything in the Defendant's otherwise applicable sales compensation plan. As it happened, the Arzon deal closed on September 9, 2020 – i.e. 6 months following the Plaintiff's termination. The Defendant was paid $1,374,277.75 in fees from Arzon. The Plaintiff would have earned $77,559 in commission from this transaction, but it is the Defendant's position that no commission need be paid to the Plaintiff in respect of the Arzon deal.

[7] There is one other commission-related matter – the Schure Sports deal – that the Plaintiff worked on which was pending at his termination. The Plaintiff submits that the commission payable to him if and when the deal closes will likely be in the range of $10,000 to $30,000. As with Arzon, all of the Plaintiff's work on this matter was concluded before he was terminated in March 2020. The Schure Sports deal has not yet closed and it is not certain when that will take place.

[8] The Plaintiff seeks base salary in lieu of notice equal to 10 months' salary. He also seeks the value of his benefits during this period and, as indicated, commissions on the Arzon and Schure Sports deals.

[9] There is no doubt that the Plaintiff made efforts to mitigate his losses: see *Yiu v. Canac Kitchens Ltd.,* 2009 CanLII 9412 (SCJ). His job search lasted 13 months, during which time he applied to over 70 jobs. As will be explained further below, his search coincided with the closing of the economy generally during the COVID-19 pandemic.

[10] In *Rowles v. Al-Wood Manufacturing Ltd*., 1979 CanLII1057, the Alberta Court of Queens Bench held that in the absence of an express contractual term to the contrary, there is an implied term of the employment relationship requiring an employer to pay a terminated employee his or her commission for sales effected but not yet concluded prior to termination, regardless of when the transaction closes. The Court reasoned that an employee is entitled to a commission on sales contracted before termination but in respect of which deliveries were made and paid for afterwards. It further held that commissions are earned when a salesperson has substantially performed his or her duties in connection with the sale, despite the fact that the time for actually paying the commission has not yet arrived by the date of termination.

[11] Along similar lines, in *Andros v. Colliers Macaulay Nicolls Inc*., 2019 ONCA 679, at paras 55-56, the Court of Appeal noted the essential unfairness of denying an employee compensation for efforts with respect to a bonus that was earned prior to termination:

> [55] Absent a contracting out, allowing for common law damages that include compensation in lieu of a *pro rata* share of a bonus in circumstances where the bonus is an integral part of the compensation package is the only sensible approach. Although the notice period in this case ended a few months before the bonus would have come due, one can well imagine a scenario in which the notice period could expire on the very eve of the bonus payment date. In those circumstances, the appellant's position would lead to the untenable result that the dismissed employee would get no part of the bonus he or she had earned through a combination of his or her labour during that calendar year and over the course of the notice period that followed.
>
> [56] The greater the bonus in relation to the employee's overall compensation and the shorter the notice period, the greater the unfairness of the situation. By way of example, if the appellant is right, then an employee who is terminated in early December, but only eligible to a couple of weeks of notice, would not be eligible to seek damages for a *pro rata* share of his or her bonus for the eleven months of work he or she completed and the short notice period that followed. Absent clear language in the contract, I do not accept the inherent unfairness that would arise in precluding those employees terminated without cause from seeking a *pro rata* share of their bonuses only by virtue of the fact that the notice period ended before the bonus payment date, particularly where the bonus payment date is entirely in the discretion of the employer.

[12] In addition, Plaintiff's counsel submits that any commission that would have come due during the reasonable notice period is payable to the terminated employee. The Supreme Court of Canada confirmed this entitlement in *Matthews v. Ocean Nutrition Canada Ltd.*, 2020 SCC 26, at paras 51-55, stating that the remedy for breach of the implied term to provide reasonable notice of termination is to award the employee damages based on what the employee would have earned had he or she been permitted to remain employed during the notice period. The Defendant, through its counsel, has acknowledged this right. There is no language in the employment agreement between the Plaintiff and the Defendant that would alter or eliminate this common law right:

> Q404: Counsel, if it is determined that the plaintiff's notice period extends beyond the day when the defendant received the fee on Arzon, is there any dispute from the defendant that the plaintiff would be entitled to commission on Arzon?
>
> A [by Defendant's counsel]: There is no dispute.

[13] Further, commissions are generally considered to be "wages" within the definition of section 1(1) of the *Employment Standards Act*, 2000, SO 2000, c. 41 ("*ESA*"), and are thus required to be paid during the statutory notice period. To the extent that a clause in an employment

agreement purports to exclude those wages during the statutory notice period, it is void and unenforceable: *Kerner v. Information Builders (Canada) Inc.*, 2020 ONSC 2975. The Defendant's representative, in cross-examination, confirmed that the Arzon deal would have generated commission payable to the Plaintiff had his employment lasted until the deal's closing date:

> Q211. Mr. Douville, if the plaintiff was employed when the Arzon fees were paid to the defendant, he would have received a commission; right?
>
> A: Yes.

[14] The Plaintiff makes the same arguments in respect of his entitlement to a commission on the Schure Sports deal as he makes in respect of the Arzon deal. All of his work on the transaction was performed prior to his termination, and the Defendant is merely awaiting payment.

[15] It is noteworthy that the Plaintiff was dismissed right at the onset of the COVID-19 pandemic. He contends, and the length of his job search demonstrates, that this situation seriously impacted on his ability to find new employment.

[16] The Defendant's position is that I should take no account of the economic shutdown occasioned by the pandemic. Relying on *Yee v Hudson's Bay Company*, 2021 ONSC 387, counsel for the Defendant submits that the Plaintiff was in fact dismissed before the Ontario government enacted its initial pandemic emergency orders and so the COVID-19 pandemic does not count. I view this as a misreading of the *Yee* case and as a focus on what is really a red herring.

[17] At issue here is the job market and the impact of COVID on that market. The reason that the pandemic was not taken into account in determining the reasonable notice period in *Yee* is that the employee in that case was terminated in August 2019 – i.e. more than a half year prior to the COVID pandemic – and there was no evidence that the pandemic impacted his job search.

[18] Here, by contrast, the Plaintiff was terminated during the second week of March 2020, the very same week and just days before the Ontario government declared an emergency. Whatever policy considerations drove the provincial government to implement its emergency orders on one particular day that week and not another are not relevant to the analysis; the point is that the economy was already shutting down and remained closed during the Plaintiff's inevitably prolonged job search. A global pandemic does not just emerge on the day of the government's emergency decree.

[19] Especially during the first half-year of the shutdown in response to the pandemic, there was uncertainty in the economy and the job market and fewer employers were looking to fill positions. I agree with cases that warn against the danger of applying hindsight to the reasonable notice analysis: *Iriotakis v. Peninsula Employment Services Limited*, 2021 ONSC 998, at para 19. But as a number of my colleagues have commented, "[t]his degree of uncertainty, which existed on February 19, 2020, is one of the many factors that I consider in assessing the reasonable period of notice applicable to the circumstances of this case": *Lamontagne v. J.L. Richards & Associates Limited*, 2021 ONSC 2133, at para 64.

[20] In general, the reasonable notice period is based on an employee's age, tenure, character of employment and the ability to find similar employment, having regard to the employee's experience, training and qualifications: *Paquette v. TeraGo Networks Inc*., 2015 ONSC 4189, at paras 21-31, aff'd 2016 ONCA 618. This should take account of the fact that the Plaintiff worked for the Defendant for 5.5 years, was mid-career, and was a well-qualified salesperson whose job required some specialized knowledge of the investment banking industry: see *Bardal v. The Globe & Mail Ltd.*, 1960 CanLII 294 (Ont SC). Plaintiff's counsel has provided a survey of cases dealing with employees with similar attributes and length of service.

[21] For employees of his age, experience, and time on the job, the case law varies between 4 and 12 and months as a reasonable notice period. Scanning the relevant case law, the average notice period in the reported cases is in the range of 9 months: see *Serrao v. National Bank of Financial Inc.*, [2004] O.J. No. 2821; *Summerfield v. Staples Canada Inc*., 2016 ONSC 3656; *Lau v. Royal Bank of Canada*, 2015 BCSC 1639; *Pollock v. First Heritage Financial Planning Ltd*., 2003 BCSC 179.

[22] As indicated, there is evidence that the pandemic impacted on the Plaintiff's ability to secure new employment. In light of that evidence, he deserves to receive at least somewhat above the average notice period. I would peg the figure at 10 months, or one month more than the average for his circumstances during non-pandemic times. It is also clear that vacation and holiday pay is included as "wages" within the meaning of the *ESA* and must be paid as part of his compensation on severance.

[23] As for commissions, I find that, in addition to salary, vacation, and holiday pay as set out above, the Plaintiff deserves payment of commission in respect of the Arzon deal. That transaction closed during what should have been his notice period, and so the commission earned on the deal are included as part of his "wages".

[24] The same is true with his percentage share of the Bonus Pool. That amount would have been paid to him as a matter of course had he continued working during the notice period, and so must be included in his pay in lieu of notice. Plaintiff's counsel submits, correctly in my view, that this can be calculated using the Plaintiff's 2018 and 2019 average compensation from the Bonus Pool.

[25] Defendant's counsel's view is that if one relies on average yearly bonus compensation then a longer period – say, five years – should be used. I understand that position and do see some logic to it. But the evidence is that the Plaintiff has grown with experience in the job. I am of the view that the last two years of the Plaintiff's employment are more reflective of his experience at the time of termination and are thus more reflective of what his final year's compensation would have been.

[26] On the other hand, I am not prepared to award the Plaintiff commission on the Schure Sports deal if and when it ever closes. The Plaintiff's notice period has come and gone, and his entitlement to wages – whether salary, bonus, commission, or other incentive payment – does not go on forever.

[27] The notice period defines the time frame after which both the employee and the employer must put the employee's wages flowing from his termination behind them. Otherwise, an employer and employee would be tied to each other indefinitely. I am of the view that a judgment in a case like this should bring finality to the issues between the parties.

Disposition

[28] The Defendant shall pay the Plaintiff 10 months of his final base salary as pay in lieu of notice. To this must be added the Plaintiff's share of the Bonus Pool (using his last two years average amounts) as well as the value of his foregone vacation and holiday pay that would apply had he worked for the 10-month notice period. I leave it to counsel to work out the precise dollar amounts.

[29] In addition, the Defendant shall pay the Plaintiff $77,559 in commissions from the Arzon transaction.

[30] The parties may make written submissions on costs. I would ask Plaintiffs' counsel to send to my assistant by email short submissions (2 pages maximum) within two weeks of today, and for Defendants' counsel to send to my assistant equally short submissions within two weeks thereafter. There is no need to deliver copies of authorities cited in these submissions, provided that any cases are cited with full citations so that they can be found online.

Date: July 15, 2021 Morgan J.