**COURT FILE NO.:** CV-21-00662176-0000
**DATE:** 20230621

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

| | | |
|---|---|---|
| **BETWEEN:** | ) | |
| | ) | |
| SRINIVASAN GIDUTURI | ) | |
| | ) | Andrew Monkhouse and Reshida Darrell, for the Plaintiff |
| Plaintiff | ) | |
| | ) | |
| **– and –** | ) | |
| | ) | |
| LG ELECTRONICS CANADA INC. | ) | Matthew Dewar and Katherine Golobic, for the Defendant |
| | ) | |
| Defendant | ) | |
| | ) | |
| | ) | |
| | ) | **HEARD:** May 2, 2023 |

**DINEEN J.**

[1] The plaintiff sues for wrongful dismissal following his termination from the defendant after 13 years and five months of employment in its warehouse. The defendant outsourced its warehouse operations to a company named Pantos. It sought to ensure that its warehouse employees were all offered comparable employment with Pantos while maintaining their seniority. The plaintiff turned down the job offer from Pantos and was subsequently terminated.

[2] The first issue on this trial is whether the plaintiff's decision to turn down the Pantos position represents a failure to mitigate. The second issue is what period of reasonable notice is otherwise appropriate.

[3] This case proceeded as a one-day summary trial by zoom. Three witnesses were called: the plaintiff, a HR representative of the defendant named Alison Marconicchio, and a former employee of Pantos named Jason Bang.

[4] During the cross-examination of the final witness Mr. Bang, the registrar pointed out that the court reporter's office had failed to assign a reporter through an administrative error and so no record had been preserved of the earlier portion of the trial. I had regrettably failed to notice earlier that no reporter was on the zoom call. I apologize to the parties for this failure. Following a break to permit the parties to consider their positions, both parties agreed that they did not wish to seek a mistrial or to recall the witnesses to examine them

again on the record. This is fortunately not a trial that turns primarily on contested factual issues.

**The evidence**

[5] The plaintiff began working in the defendant's warehouse as a packer in 2006. He originally worked through a temp agency but was hired full time on September 28, 2007. Eventually the plaintiff was promoted to be team lead for parts return. At the time of his termination, the plaintiff was 49 years old and earning $44,250.48.

[6] The plaintiff was born in India and acquired a number of degrees including a Master's degree in Commerce and an MBA from universities in that country. He moved to Canada in 2006 and his job with the defendant was his first here.

[7] The benefits included in the plaintiff's compensation included group medical benefits paid for by the defendant, six days a year of paid sick leave, and a 5% bonus based on the company's performance and his own assessed performance. The plaintiff's performance reviews were positive and no performance issues arose while he worked for the defendant.

[8] The defendant announced its intention to outsource the warehouse to Pantos in a meeting with employees on January 4, 2021. Both Ms. Marconicchio and Mr. Bang testified that their understanding of the agreement between the defendant and Pantos was that the affected employees were to be offered equivalent terms of employment at Pantos and to carry over their seniority. I accept their evidence that the intention of both companies and a term of their agreement was that the employees should not be adversely affected by the transition. Employees who agreed to continue their work for Pantos were to begin there on March 15. The plaintiff testified that he was told at the January 4 meeting that his job and compensation would remain the same.

[9] On January 11, Pantos sent the plaintiff a written job offer for the role of warehouse team lead. The offer stated that it was "not a contract for any specific time of employment" but rather proposed an "at-will employment relationship." It asked the plaintiff to reply indicating whether he accepted or declined the offer by February 5.

[10] The plaintiff was troubled by these developments. He contacted Ms. Marconicchio and they ultimately spoke on three or four occasions about his concerns. She also put him in touch with Mr. Bang as a Pantos representative.

[11] Some of the plaintiff's concerns involved the particulars of the job offer. For instance, while LG paid for the plaintiff's benefits, he would be required to pay $169.98 a month for the family plan at Pantos. The plaintiff also received six paid sick days at LG and at Pantos any sick days were unpaid. After the plaintiff made this point, Pantos adjusted their offer to increase the base salary to account for the lost paid sick days and for a delay in the merit increase the plaintiff would have been due at LG.

[12] In his evidence, the plaintiff also expressed more general concerns about the outsourcing, saying that he felt that Pantos was a much small and less established and professional

company than LG and that he did not like the company's communication style. He was also worried that he might lose his job at any time because Pantos was an outsourcing company.

[13] The plaintiff declined Pantos's offer around February 10. He testified that he had wanted assurances from LG that Pantos was a good company that would give him the same situation and security he had enjoyed with them, and that he was not satisfied of this. He also hoped that he might be able to continue at LG in another job if the defendant did not attempt to persuade him to reconsider. After the plaintiff communicated his decision, Pantos moved quickly to hire a replacement.

[14] On March 12, the plaintiff received a formal termination letter from LG, terminating his benefits coverage immediately and saying that he would be paid severance in the amount of $11,420.03. Pantos had already filled the plaintiff's position by this time.

[15] The plaintiff struggled to find comparable employment. He eventually found a similar job as an inventory specialist in a warehouse and started work on May 10, 2022 on a six-month contract. The job had no benefits and was inferior to his old job, but he had been unable after extensive efforts to find a better job. The plaintiff testified that his Indian educational credentials are of little value in his job search without relevant Canadian experience.

## Issues and analysis

### *The credibility of the witnesses*

[16] While the primary issues on this trial are not dependent on credibility findings and the basic facts are not in dispute, all three witnesses were challenged in cross-examination. I found each of the witnesses credible. My impression was that both Ms. Marconicchio and Mr. Bang (who no longer works for Pantos and who had no continuing personal interest in the litigation) did their best to assuage the plaintiff's concerns and treated him respectfully.

[17] The defendant is very critical of the plaintiff's evidence, calling him evasive and self-serving and arguing that his objections to the Pantos offer were "specious and trifling." This was not my impression of the plaintiff and his motivations.

[18] I accept that the plaintiff was concerned about his job security with Pantos even if he did not clearly articulate this at the time. I also accept that he believed the defendant might offer him another job or make greater efforts to persuade him to reconsider, though this belief might seem unreasonable in view of the communications he had received from the defendant.

[19] The pride the plaintiff felt in working for the defendant, and the loyalty he felt to it as his only Canadian employer, was obvious in his evidence and was palpably sincere. It was clear to me that the plaintiff's primary problem with the outsourcing was an emotional one rather than an economic one, best captured by his evidence that he felt himself to be part of the LG "family." It was also clear that the defendant fundamentally did not understand this, either at the time or at trial. This disconnect is the reason the plaintiff never received

the reassurances that might have persuaded him to accept the Pantos offer, a course of action that with hindsight was clearly in his best interests. He, perhaps naively, expected the defendant to have a similar loyalty to him that he felt for it, but he was unable to express this in a way that its representatives understood and they addressed his objections as purely financial ones.

***Mitigation***

[20] The main point of contention between the parties is whether the plaintiff's rejection of the Pantos offer constitutes a failure to mitigate his damages by refusing an offer of comparable employment.

[21] The plaintiff observes that the Pantos offer was not wholly identical in that the benefits were not included and required a large additional payment, and the initial offer letter purported to offer "at will" employment implying that the plaintiff could be terminated without any severance payment[1].

[22] In any case, I accept the position of the plaintiff that the duty to mitigate was not engaged by this offer because it was made and withdrawn before the plaintiff's actual termination.

[23] A very similar issue arose in *Dussault v. Imperial Oil Limited* 2018 ONSC 1168. The plaintiffs in that case worked for Imperial Oil's retail sites associated with its gas stations. Imperial sold its retail division to Mac's Convenience Stores. As part of the sale, Imperial employees including the plaintiffs were offered positions with Mac's. The plaintiffs declined the offers before the sale was completed and their employment terminated.

[24] Favreau J. (as she then was) rejected the position of Imperial that the plaintiffs had accordingly failed to mitigate their damages:

> In this case, I agree with the plaintiffs that it was not reasonable for them to be required to mitigate their damages by accepting the Mac's offer. I have made this finding for a number of reasons.
>
> First the offer from Mac's was made before the plaintiffs' employment was terminated. In *Farwell v. Citair, Inc. (General Coach Canada)*, 2014 ONCA 177 (C.A.), at paras. 20-21, relying on *Evans, supra*[2], the Court of Appeal confirmed that it is fatal to an employer's argument that an employee failed to mitigate his damages by working for his old employer where the offer of alternative employment was made before the termination:

[1] The evidence at trial was that this language was later removed when Pantos was alerted to the fact that it would be unenforceable under Ontario law.

[2] *Evans v. Teamsters, Local 31* 2008 SCC 20

> But the appellant faces another obstacle, which, in my view, is insurmountable. To paraphrase Evans, the appellant's mitigation argument presupposes that the employer has offered the employee a chance to mitigate damages by returning to work. To trigger this form of mitigation duty, the appellant was therefore obliged to offer Mr. Farwell the clear opportunity to work out the notice period after he refused to accept the position of Purchasing Manager and told the Appellant that he was treating the reorganization as constructive and wrongful dismissal.
>
> There is no evidence that the appellant extended such an offer to Mr. Farwell. Accordingly, Mr. Farwell did not breach his mitigation obligation by not returning to work.
>
> In this case, the Mac's offer was presented to the plaintiffs before their employment with Imperial was terminated. Neither Mac's nor Imperial approached the plaintiffs after they rejected the offers and after Imperial sent out the notices of termination offering the plaintiffs an opportunity to work for Mac's while they searched for new employment.

[25] Similarly, in this case the plaintiff received and rejected the offer to continue his employment on materially different terms before his termination. By the time his termination was effected the position was filled and he was not able to mitigate his damages by reconsidering and accepting it.

[26] The defendant relies on *Hickey v. Christie & Walther Communications Limited* 2020 ONSC 7214, in which Muszynski J. distinguished *Dussault*. In that case, the defendant was sold to a company called Turris. The plaintiff rejected three successive job offers from Turris, the third of which Muszynski J. found was comparable to his previous employment with the defendant. She found that the fact that the timing of the offer came before termination was not determinative, saying in part:

> In this case, the evidence confirms that Turris offered employment to all interested CWC employees immediately at the time of the asset purchase. Due to ongoing negotiations between Mr. Hickey and Turris, CWC extended Mr. Hickey's employment to allow Turris and Mr. Hickey to reach an agreement and for Mr. Hickey to obtain legal advice. Mr. Hickey remained on the CWC payroll during this period even though CWC's business was effectively not operational. I find that the extension of Mr. Hickey's employment beyond closing was done in good faith by CWC.

[27] In *Hickey* the reason the comparable offer was made before termination was that the employer had extended the plaintiff's employment to allow for continuing negotiations

after two prior offers were rejected. It would be unjust in those circumstances to use this benefit extended by the employer to hold that the duty to mitigate was not triggered. That is not what happened in this case and I find that the reasoning in *Dussault* is applicable.

[28] Having rejected the defendant's reliance on Pantos's offer, I have no difficulty in concluding that the plaintiff made reasonable efforts to mitigate his damages. He provided a job log showing that he applied for a great many comparable positions and had four job interviews where he advanced to the second round of a job competition. I accept his evidence that he ultimately accepted a less desirable contract position as the best he could reasonably obtain.

***Reasonable notice***

[29] The governing authorities recognize that fixing a period of reasonable notice is not a mathematical exercise that can be reduced to a particular formula. In *Paquette v. TeraGo Networks Inc* 2015 ONSC 4189, Perrell J. outlined the relevant considerations as follows:

> In determining the length of notice, the court should consider, among other possible factors: (1) the character of employment; (2) the length of service; (3) the age of the employee; and (4) the availability of similar employment having regard to the experience, training, and qualifications of the employee: *Machinter v. HOJ Industries Ltd*., 1992 CanLII 102 (SCC), [1992] 1 S.C.R. 986; *Cronk v. Canadian General Insurance Co.* (1995), 1995 CanLII 814 (ON CA), 25 O.R. (3d) 505 (C.A.); *Bardal v. Globe & Mail, supra*. The factors are not exhaustive, and what is a reasonable notice period will depend on the circumstances of the particular case: *Honda Canada Inc. v. Keays*, 2008 SCC 39 (CanLII), [2008] 2 S.C.R. 362; *Wallace v. United Grain Growers Ltd*., 1997 CanLII 332 (SCC), [1997] 3 S.C.R. 701 at para. 83; *Minott v. O'Shanter Development Co.* (1999), 1999 CanLII 3686 (ON CA), 42 O.R. (3d) 321 (C.A.) at para. 66; *Duynstee v. Sobeys Inc.*, 2013 ONSC 2050 at para. 17.
>
> The determination of a reasonable notice period is a principled art and not a mathematical science. In *Minott v. O'Shanter Development Co., supra*, Justice Laskin wrote at para. 62:
>
> > Determining the period of reasonable notice is an art not a science. In each case trial judges must weigh and balance a catalogue of relevant factors. No two cases are identical; and ordinarily, there is no "right" figure for reasonable notice. Instead, most cases yield a range of reasonableness.
>
> In *Cronk v. Canadian General Insurance Company, supra*, Associate Chief Justice Morden stated at para. 85:

> The governing rule is that a dismissed employee, in the position of Ms. Cronk, is entitled to reasonable notice or payment in lieu of it. The legal precept of reasonable notice, which is the essence of this rule, is a standard and not, itself, a rule. Unlike a rule, it does not specify any detailed definite state of facts which, if present, will inevitably entail a particular legal consequence. Rather, its application enables a court to take all of the circumstances of the case into account. It allows for individualization of application and, obviously, involves the exercise of judgment.
>
> 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: *Bullen v. Proctor & Redfern Ltd.*, 1996 CanLII 8135 (ON SC), [1996] O.J. No. 340 (Gen. Div.) at paras. 24-29; *Thomson v. Bechtel Canada*, [1983] O.J. No. 2397 (H.C.J.); *Corbin v. Standard Life Assurance*, 1995 CanLII 3852 (NB CA), [1995] N.B.J. No. 461 (C.A.); *Leduc v. Canadian Erectors Ltd*., [1966] O.J. No. 897 (Gen. Div.) at para. 34-36.

[30] The plaintiff argues that 14 months is an appropriate period of notice, while the defendant counters that no more than 9 months should be awarded. The defendant also argues that the period between January 4 and March 12 should be deducted as working notice.

[31] As outlined above, the plaintiff was 49 years old and had worked for the defendant for nearly 13 ½ years with a final salary of $44,250.48. I agree with the defendant that while the plaintiff was characterized as a "team lead" and under some circumstances would direct the work of temporary employees, this was not truly a supervisory position given that the plaintiff had no other employees directly report to him. The description of his day-to-day activities suggests to me that his position would be more accurately characterized as a warehouse employee.

[32] The cases relied on by the plaintiff involve positions of greater responsibility. In *O'Sullivan v. Cavalier Tool* 2010 ONSC 3937, the plaintiff (who received 18 months of notice) was directly responsible for supervising 50 employees. In *Whiting v. Boys & Girls Club Services of Greater Victoria* 2011 BCSC 68 (also 18 months), the plaintiff was significantly older than Mr. Giduturi and had more of a managerial position.

[33] On the other hand, I find that a greater period of notice is warranted than was awarded in the cases relied on by the defendant. The plaintiff in *Hayward v. 331265 Ontario Ltd.* 2005 CanLII 12852 (ONSC) (8 months) was an employee with fewer responsibilities who quickly found new employment as a labourer and the court found no evidence of a shortage of comparable positions. *Oudin v Le Centre Francophone de Toronto* (8.8 months) 2015 ONSC 6494 involved unusual circumstances where the plaintiff had years of notice that

his position was under threat and where he began a job search ahead of time, factors that the court found pointed to a period of notice at the low end of the range. *Aucoin v. Litugical Publications of Canada Ltd.* 2009 CanLII 10667 (ONSC) (10 months) was the most comparable case cited to me though it involved a lower income and job with fewer responsibilities.

[34] I also note that, as Dunphy J. observed in *Oudin*, courts should not assume that higher-ranking managerial employees will always struggle more to find comparable employment. I accept that the plaintiff in this case made extensive efforts to find comparable work with limited success, and also accept his evidence that the economic changes arising from COVID-19 pandemic hindered his efforts. I take this into account in fixing the period of notice.

[35] I find that an appropriate period of notice is 12 months. I also accept the position of the plaintiff that this period should begin from the agreed date of termination of March 12, 2021.

***Punitive damages***

[36] I reject the plaintiff's claim for punitive damages. I see nothing in the behaviour of the defendant that would justify such an award in this case and find that its employees attempted to deal with the plaintiff and his concerns about the outsourcing process in good faith.

**Disposition**

[37] The plaintiff is awarded 12 months of notice less the amount paid to him upon termination. If the parties cannot agree on costs, the plaintiff may submit brief cost submissions within two weeks of the date of this judgment and the defendant will have two further weeks to respond.

Dineen J.

**Released:** June 21, 2023

**COURT FILE NO.:** CV-21-00662176-0000
**DATE:** 20230621

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

SRINIVASAN GIDUTURI

Plaintiff

**– and –**

LG ELECTRONICS CANADA INC.

Defendant

**REASONS FOR JUDGMENT**

Dineen J.

**Released:** June 21, 2023