

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:)
)
RICHARD CLARK) David Harris, for the Plaintiff
)
Plaintiff)
)
)
- and -)
)
)
BMO NESBITT BURNS) Malcolm MacKillop and Karin Bush,
) for the Defendant
)
Defendant)
)
)
)
)
)

Jarvis, J.

REASONS FOR DECISION

[1] This is a claim for damages for wrongful dismissal. The plaintiff, Mr. Richard Clark worked for BMO Nesbitt Burns (“BMO”) from September 1987 until April 23, 2004 when he was dismissed at age 52 without cause. Mr. Clark

had begun his career with BMO as a mutual fund salesman. Within a year he became an investment advisor which remained his position until his dismissal.

[2] Mr. Clark gradually developed a client base. At the end, the client assets being managed by him, his “Book of Business” (“Book”) had reached a total of approximately \$42 million. Mr. Clark had purchased the Book of James Davis, a co-worker when Mr. Davis was dismissed in September 2001. Mr. Davis had received pay in lieu of notice as well as being allowed to sell his Book. The transaction with Mr. Clark was approved and facilitated by the defendant. Mr. Clark paid Mr. Davis over time and was still paying him at the time of his dismissal at which point these payments ceased.

[3] Over the years Mr. Clark had acquired an interest in training and assisting young elite athletes. This arose from the assistance he provided to his son who achieved a hockey scholarship at an American university. From time to time Mr. Clark had considered establishing a business assisting athletes. He developed a sideline business in this area. He had long considered moving from the brokerage business to follow this dream. He had discussed the possibility of retiring and selling his Book with Ian Leith, a co-worker and with Felice Bontempo, his branch manager. Mr. Clark did not consider his financial status had reached the point where he could make the move. Both Mr. Leith and Mr. Bontempo had expressed an interest in acquiring his Book should he chose to do so. These discussions never reached the point of a final agreement.

[4] Mr. Clark’s life became more uncertain in late March 2004 when he was charged with sexually assaulting his common-law partner. Mr. Leith was a surety for Mr. Clark and thereby helped him secure his release on bail. Mr. Clark was

advised by his criminal defence counsel that there were uncertainties as to his fate at the hands of the criminal justice system. Mr. Clark took it upon himself to inform Mr. Bontempo on a confidential basis. Mr. Bontempo was unsure of his responsibility. Upon checking, Mr. Bontempo told Mr. Clark that his duty as manager required that he notify head office of the charges and he did so. Mr. Clark became anxious that there might be adverse publicity that might affect his career and in particular, was concerned that he might be incarcerated. These concerns accelerated his thoughts of establishing his own business and led to further discussions with Mr. Leith and Mr. Bontempo, both of whom remained interested in acquiring his Book. Eventually Mr. Clark and Mr. Leith decided to agree in the future to the transmission of Mr. Clark's Book to Mr. Leith. The event that might trigger such a development would have been the certainty of the charges proceeding to trial with the concomitant potential risk of conviction and incarceration or Mr. Clark's decision to leave the firm to begin his own business or if he ever left the firm for another reason.

[5] Mr. Clark had no interest in selling his Book to Mr. Bontempo but did not say this to Mr. Bontempo. The possibility of dismissal never occurred to Mr. Clark except as a possible consequence of conviction on the charges. He was reassured by Mr. Bontempo that he ought not to take any immediate steps. Because of the earlier Davis transaction Mr. Clark knew that BMO would have to approve and be a party to the transaction. It obviously did not occur to Mr. Bontempo that such approval would be problematic. It was Mr. Leith's evidence that these transactions were routinely approved. Mr. Bontempo also said that he would have foreseen no difficulty in this approval. It was Mr. Leith's evidence, which I accept, that he would have paid up to \$175,000 to Mr. Clark for his Book.

[6] Ray Lessard testified. He is the Regional Manager of the Southwest Ontario Division of BMO. The branches he oversees include the Mississauga-Burnamthorpe branch at which Mr. Bontempo was the manager, and Mr. Leith and Mr. Clark investment advisors. Mr. Lessard was also the manager of another branch in Mississauga. In 2004, Mr. Lessard was authorized by BMO to close Mr. Bontempo's branch and to decide the fate of the employees at the branch. He decided to close the branch as of the end of May, 2004. He decided to dismiss Mr. Clark and another investment advisor. He also decided that he did not wish Mr. Leith to join his branch. Mr. Leith eventually transferred to Toronto.

[7] On April 22, 2004, Mr. Lessard met with Mr. Bontempo and told him of the closing and that there would be some dismissals. He asked who might be involved but Mr. Lessard refused to tell him. When Mr. Bontempo thought about it he guessed correctly that Mr. Clark would be one of those dismissed. Mr. Bontempo was also told that he would no longer be a branch manager. Mr. Lessard outlined various options that would be available to Mr. Bontempo including a position in Mississauga as Mr. Lessard's assistant manager. He was also offered the possibility of relocating to another of several branches. Mr. Bontempo was told by Mr. Lessard that there would be some dismissals.

[8] On April 23, 2004, a meeting was called at the office and Mr. Lessard advised those present of the closing. As luck would have it, Mr. Clark was elsewhere on a business call and missed the meeting. After the meeting, Mr. Lessard met individually with each attendee to discuss how each would be affected. One other investment advisor was dismissed. Mr. Clark was told to attend the office the next day. When he arrived he knew of the closing and

suspected that he might be dismissed. He met with Mr. Bontempo and offered to sell his Book to him. By this time Mr. Bontempo had still not been advised of Mr. Clark's fate. His response to the offer was non-committal. Mr. Clark was ushered into a meeting with Mr. Lessard who advised him of his dismissal. He was told by Mr. Lessard that his position had been eliminated and that he was not suited for the business. Mr. Clark was advised by Mr. Lessard to try a new career. Mr. Clark's response was that his income was increasing dramatically. He said he had a lot of things going on in his life and asked that he be allowed to stay for some time. He said that he wanted an opportunity to sell his Book. Mr. Lessard's response was that it would only be worth \$30,000 - \$35,000 and that it had already been decided that he must go. Mr. Clark told him that he had already discussed selling his Book to Mr. Leith for of upwards of \$175,000. Mr. Lessard told him that this was not going to be allowed. He advised Mr. Clark to sign the contract which represented a fair offer or to have someone look at it for him. Mr. Clark was ushered out of the premises and was not allowed access to his office or to his client information. Mr. Clark estimated that it would have taken him 7-10 years to re-establish a similar Book at another firm.

[9] Mr. Lessard's evidence was that he would not have approved an agreement between Mr. Clark and Mr. Leith. He said that there were performance issues and that Mr. Clark was not in good standing with the firm. By this point, Mr. Leith had announced his intention to transfer to Toronto. Mr. Lessard said that he would not have countenanced Mr. Leith's acquiring Mr. Clark's Book on account of the convenience of the clients. It was palpable that Mr. Lessard had little regard for Mr. Leith or Mr. Clark.

[10] Mr. Leith's evidence regarding approval was that such transactions are customarily approved by the company. It was Mr. Lessard's evidence however that a parting employee dismissed without cause was entitled only to either severance or a transition agreement but never both. The Davis/Clark transaction stands in stark contrast to that assertion. He also said there were performance issues that would have affected Mr. Clark's ability to have such a transaction approved. In cross-examination he was unable to specify the nature of these issues except his obvious feeling that Mr. Clark was not a large producer.

[11] Mr. Lessard's evidence was that he had no previous direct experience in the transmission of Books of Business. Generally decisions regarding approval of transmissions were first made by the branch manager involved, thereafter submitted to the supervisor at his level and then to head office. He knew of no such transactions which had not been approved in the past.

[12] In cross-examination Mr. Lessard said he would not have taken a chance and hired an investment advisor facing charges such as those Mr. Clark faced. He said that he would probably have waited until the charges had been resolved.

[13] I am satisfied on the balance of probabilities that Mr. Clark would have transitioned his Book to Mr. Leith and/or Mr. Bontempo had he been given time to do so. I am also satisfied that there were no proper grounds for approval to have been denied. I am further satisfied that a reasonable price could have been reached. While Mr. Clark's dismissal might have tempered the price somewhat, this could have been avoided by keeping this circumstance confidential until transition could have been achieved.

[14] While Mr. Lessard had objections to Mr. Leith taking the Book with him to Toronto, he certainly would have had no objections to Mr. Bontempo acquiring the Book in view of his own approval of the transfer to Mr. Bontempo later. Mr. Lessard clearly had confidence in Mr. Bontempo and had stated an interest in the clients not leaving Mississauga. I need not decide whether Mr. Lessard could have directly stood in Mr. Leith's path had the transaction to him been the only option, but there was also the other possibility that others not adversely affected by the closing of the branch might have been interested in the transition of Mr. Clark's Book to them.

Finding Regarding Transition

[15] It is my finding that if Mr. Clark had been allowed to stay he could have transferred his Book to Mr. Leith and/or Mr. Bontempo or to one of the other advisors who stayed. The purchase price had not been established nor any agreement to transition by the time of Mr. Clark's dismissal.

[16] It is interesting to note that Mr. Lessard agreed to the sale of Mr. Clark's Book to Mr. Bontempo for \$50,000 by BMO notwithstanding his assertion to Mr. Clark that its value was somewhat less. There is also a "Book of Valuation" that was entered into evidence. This was prepared by an employee of the firm. That employee was not called as a witness. The evaluation was based upon the Book being valued at \$35 million. The value for a Level 3 advisor was \$95,068.97. Mr. Clark had historically been a Level 3 employee. It was Mr. Leith's evidence that he would have been prepared to pay upwards of \$175,000 for Mr. Clark's Book. There is little direct evidence which would assist me in arriving at a precise value

for the Book. Under the circumstances it is for me to assign a fair value that would have been achieved had Mr. Clark been permitted to transition his Book.

[17] Mr. Lessard might not have approved a transfer to Mr. Leith but certainly would have approved a transfer to Mr. Bontempo.

Mitigation

[18] The onus is on the defence to prove a failure to mitigate. I am not satisfied by the simple introduction of a list of brokers from the Yellow Pages. The plaintiff did contact three firms and confirmed that his criminal charges would be a factor in being accepted. Mr. Lessard admitted that he would not have accepted someone in Mr. Clark's position until the charges were disposed of. Mr. Clark did in fact plead guilty as part of the conditional sentence and would probably not have been hired by anyone at that point.

[19] The defence argued that the length of notice should be reduced by virtue of Mr. Clark's plea of guilty. There is no evidence that satisfies me that had Mr. Clark been able to find employment, he would have lost it by reason of his conditional sentence. Conversely the evidence shows that he would not have obtained employment because of the charges and would not have been in a position to retain and/or keep his employment after pleading guilty. Certainly pleading guilty would not have enhanced his chances to mitigate his losses in the brokerage industry.

[20] Mr. Clark must be presumed to be innocent at the time of his dismissal. It is clear that he would not have been able to obtain a job in the industry until the charges were resolved. There is no evidence that establishes that he would have

been employable with a criminal record or a conditional sentence. There was no suggestion that Mr. Clark would have been dismissed by BMO had he still been there when he was given the conditional sentence.

[21] I am satisfied on the balance of probabilities that he would not have been able to obtain a job in the brokerage business while the charges were pending and while he was presumed innocent. I am also satisfied that he would not have been able to obtain a job within a brokerage business after he pleaded guilty. The real issue is what he ought to have done while the charges were pending. There was no way that he could have known with any certainty of the availability of a conditional sentence. He would not have been able to obtain employment in the brokerage business during that period.

[22] In the meantime, his solution was to develop his own business in which he had some experience and interest. This was rational in my view. It was also foreseeable that initially there would be startup costs and times during which the business would develop. That period seems to have occurred during the first year and a half to two years following his dismissal.

[23] By the time the charges were resolved, there would have been no possibility of his returning to the brokerage as a person with an existing Book. His Book had been retained by Mr. Bontempo and/or his clients might have moved elsewhere in the meantime. He would have been starting anew and given his age, this was not a viable alternative. This is not a case where a leaving broker goes to another firm and can compete for his existing Book. That option was simply not available to him. His age was clearly a factor in his dismissal and the effect of his dismissal without notice would have had a more pronounced affect than with a

younger person or with an older person with a larger Book and track record of success.

[24] There was some evidence at trial regarding the activity at his new business. It was a profit-loss statement setting out startup costs and there were some signs that his business was improving. He was trying to capitalize on his contacts in a field he knew and was interested in. I find that this was the best use of his time during this period. No income was received on his part at least because of write offs from reasonable foreseeable problems in establishing a new business. There are signs the business is improving and this is indicative that he made the correct decision.

[25] The onus regarding mitigation is on the defence. This is a dismissal without cause and it created many problems for the plaintiff. There is no evidence of any realistic chance that he might have substantially mitigated his loss. The plaintiff's best chance was to develop his business. I find that his efforts in this regard have been reasonable.

[26] An issue developed during the course of the trial as to the extent as to which the plaintiff did not produce supporting documentation with respect to his revenue and expenses for his new venture. These documents were eventually produced at trial but the argument seemed to be that production was somewhat late and not organized in a fashion convenient to the defence. The rules provide in several mechanisms whereby the defence can enforce the plaintiff's duty to produce and can obtain access and/or copies of relevant documents and in some circumstances may require production in an orderly fashion. There is always the foreseeable risk that the plaintiff will make production at an inconveniently late

date. The court is in the best position to provide a procedurally fair remedy at the commencement of a trial. No such remedy was sought here. While the proof of some of the financial factors could have been more exact with greater reliance on original documents, there was some evidence regarding the plaintiff's efforts to mitigate his loss. I was not asked to draw an inference regarding the lackadaisical production.

Wallace Issue

[27] While there were some difficulties with the severance interview, the main issue in this regard is the refusal to allow Mr. Clark to sell his Book. There is nothing in the Bank's BMO policy documents to indicate that a sale is not available to someone dismissed without cause. Even if there had been, it would have been subject to the limitation that consent not be withheld unfairly or unreasonably. I find there was no justification at all to not allow Mr. Clark to proceed to attempt to sell his Book and that a sale could almost certainly have been accomplished within a reasonable period of time had he been able to stay. The circumstances lead me to conclude that the defendant must have thought that Mr. Clark's Book could have been retained and it must have been reasonably obvious that Mr. Clark would not have been able to move immediately to a competitor with the potential difficulty with the criminal charges. It was also foreseeable that it was particularly impossible for Mr. Clark to recover his business after the defendant's representatives had an opportunity to solicit his clients.

[28] There are a number of factors which lead me to the conclusion that a Wallace award is justified. I am satisfied that Mr. Lessard dealt with Mr. Clark in a cold and impersonal manner and that his comment that Mr. Clark was not suited

for the business was calculated to hurt considering Mr. Clark's 17 years of employment. Mr. Lessard's refusal to countenance Clark's transfer of his Book resulted in a windfall for Mr. Bontempo considering the advantageous price. The retention of the Book in Mr. Lessard's branch also had the affect of protecting, if not increasing Mr. Lessard's own participation in its proceeds. Mr. Clark could easily have been afforded working notice so that he could have completed the transfer of his Book and this is a factor for me to consider (see *Chan v. RBC Dominion Securities* [2004] O.J. No. 5340). I am mindful that Mr. Lessard sold the Book for \$50,000 having expressed the view to Mr. Clark that it was worth only \$30,000-35,000 at the time of the dismissal. It is my view that these factors taken together amount to a violation of the implicit covenant of fair dealing. I therefore award Wallace damages calculated at three month's notice.

Value of Book

[29] The evidence of BMO's own valuation of a Book valued at \$35 million for a Level 3 employee was \$95,000. The actual value of Mr. Clark's Book was \$41 million. Mr. Leith was compensated at a higher level than Mr. Clark and the Book would therefore have been worth more to him given his higher rate of commission than to a Level 3 employee. No firm contract was arrived at between Mr. Leith and Mr. Clark and Mr. Leith may have been generous on the high side regarding what he would have paid. Mr. Bontempo paid \$50,000 for the Book in circumstances which would indicate that he received a bargain. It is my finding the value of the Book be fixed at \$90,000 to adequately compensate Mr. Clark for his loss in this regard. It is also my finding that any reasonable agreement would have received the approval of management acting out of faith.

Appropriate Notice

[30] The defence argued that the notice period offered was within the reasonable range of what might be appropriate. They cited several cases to the effect that the court must first decide whether the offer was reasonable and only interfere if the period was unreasonable. See *Fred C. Perry v. Gulf Minerals Canada Limited and Gulf Canada Limited* [1985] No. 1041, *Rivers v. Gulf Canada Limited*, 13 C.C.E.L. 131, *Mirza v. Polysar Ltd.* 23 C.C.E.L. 316 and *McKee v. NCR Canada Limited* 10 C.C.E.L. 128.

[31] This approach was considered by Platana J. in *Wright v. Kimberly-Clark Canada Inc.* [1995] O.J. No. 1566. In reviewing the law he considered this argument and considered an unreported decision of D. Rutherford J. in *McCrea v. Conference Board of Canada* rejecting the reasonable range approach. Platana J. said at page 5,

“I agree with comments of D. Rutherford J. that while the reasonable range approach has a certain appeal, not the least of which might be to discourage litigation, I am inclined to prefer the traditional approach. I do not accept the defendant’s argument that the reasonable range position ought to prevail. A notice must be determined to be reasonable, or not, and the mere fact that it lies within a reasonable range is to me irrelevant if it cannot be said by a court that the specific notice was reasonable within all of the circumstances of the case.”

[32] I prefer this approach to that in the earlier cases.

[33] Considering Mr. Clark’s age, experience and years of service, it is my finding that he should have been given 18 months’ notice or have been permitted

to work for that period. Mr. Clark's income for the years immediately preceding his dismissal was as follows:

2001	\$81,329.60
2002	\$95,634.71
2004 (Jan-Apr)	\$47,505.45

[34] On an annualized basis, his 2004 gross earned commissions might have reached \$150,000 but that may be high considering seasonal fluctuations. Mr. Clark's payments to Mr. Davis were deducted from his gross commissions. They had begun in September 2001. These payments were personal and ought not to be deducted from his income for the purposes of calculating his entitlement. He also received benefits totaling \$9,000 which should be added to his income. His share of secretarial assistance was a personal expense of \$7,304 per annum which must be deducted. It is my finding that Mr. Clark's compensation for the purposes of calculating notice is as follows: annual commissions of \$100,000 less payment to secretary \$7,304 which nets \$92,696 plus annual benefits of \$9,000 equals an annual amount of \$101,696 which is \$8,474.67 on a monthly basis. I find the appropriate period of notice in all of the circumstances to be 18 months.

[35] Mr. Clark's new business had not reached the stage of profitability during the notice period. No deduction on account of mitigation income is warranted. No claim was advanced for expenses in connection with mitigation.

[36] Judgment should therefore issue as follows:

- (a) The sum of \$152,544.06 (18 months' pay in lieu of notice);

- (b) An additional \$25,424.01 (Wallace damages);
- (c) The sum of \$90,000 on account of Mr. Clark's loss of the sale of his Book;
- (d) The sum of \$41,027.58 which BMO paid Mr. Clark on account of Employment Standards termination and severance pay, the sum of \$41,027.58 shall be deducted from this award;
- (e) Prejudgment interest pursuant to the *Courts of Justice Act*, R.S.O. 1990, c.C. 43.

[37] I may be spoken to regarding costs and any difficulties encountered in calculating costs from this judgment.

Jarvis, J.

Released: October 12, 2007

COURT FILE NO.: 04-CV-27268CM3
DATE: 2007-10-12

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

RICHARD CLARK

- and -

BMO NESBITT BURNS

REASONS FOR DECISION

JARVIS J.

Released: October 12, 2007