

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

MARY EGAN

Plaintiff

- and -

ALCATEL CANADA INC.

Defendant

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) Janice B. Payne and Ted J. Murphy, for the
) Plaintiff
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) K. Scott McLean and David Elliott, for the
) Defendant
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) **HEARD:** January 26-28, February 16-19,
) 2004 written submissions were completed
) on March 26, 2004.

G.R. MORIN J.

REASONS FOR JUDGMENT

[1] The plaintiff, after close to twenty years of continuous employment with the Bell Canada family of companies, left her employment and hired on with the defendant. Less than twenty-one months later, her employment was terminated by the defendant, without cause, as part of a mass termination. The plaintiff now brings this action for damages for wrongful dismissal and for damages for lost short and long-term disability benefits.

[2] The plaintiff began her employment with Bell Canada on a part-time basis in 1980 and became a full-time employee in 1983. She remained with the Bell Canada organization until she

resigned on September 29, 2000, having worked over the years for a number of the individual companies in the Bell Canada family. It is clear on the evidence of the plaintiff, her former supervisor at Bell, May Scallie, and the plaintiff's friend and co-worker at Bell, Janice Johnston, that all service within the various Bell companies was treated as common service within the Bell organization and that this common service concept was applicable in the context of seniority, pension entitlements, vacation entitlements and severance packages. In fact, Bell Canada's Human Resources Department had assigned to the plaintiff a net credited service date of October 28, 1981.

[3] Accordingly, for the purpose of this lawsuit, it must be taken that when the plaintiff started her employment with the defendant on October 16, 2000, she had left approximately twenty years of continuous employment with a common employer to do so.

[4] At the time of her resignation, the plaintiff's job title was Senior Leader-Marketing Offer Development/Sales Channel Management. In this position she directed and managed a team of peers and subordinates involved in marketing Bell Nexxia products. Her salary when she left Bell Canada was \$85,000.00 per annum together with the usual benefits and pension entitlements.

[5] On all of the evidence I find that when the plaintiff chose to resign from Bell Canada, her future there was relatively secure. She was a highly thought of and highly skilled employee in the marketing field. May Scallie, who herself had a twenty-three year career with the Bell family and to whom the plaintiff reported prior to going to the defendant company, testified that the plaintiff's future prospects with Bell Canada were very good prior to her resignation. Her friend and co-worker, Janice Johnston, gave evidence that she was "flabbergasted" when the plaintiff chose to leave Bell Canada.

[6] On all of the evidence, it is clear that the plaintiff was encouraged to give serious consideration to seeking employment with the defendant by two of the defendants' employees, Linda Stott and Maria Espinosa.

[7] Linda Stott had been employed by the Bell family of companies for some fifteen years before she hired on with the defendant in April of 1998. She and the plaintiff had been friends for years and that friendship carried on after Ms. Stott left Bell to go to Alcatel. During the course of her evidence at this trial, Ms. Stott was asked whether at any time she intended to encourage the plaintiff to come to Alcatel. She responded to the effect that she and the plaintiff did have discussions about how marketable they were with respect to the skills learned at Bell and how valued those skills are outside of the Bell organization. Ms. Stott told the plaintiff how things were going for her in her employment with the defendant. To the question whether she saw herself involved in bringing the plaintiff over or encouraging her to come over to Alcatel, Ms. Stott responded that she had never made it sound better than it was. In any event, it was Ms. Stott's evidence that in or about the month of June 2000, she told the plaintiff of a position that had become available at Alcatel and that the plaintiff expressed some interest. With the plaintiff's consent, Ms. Stott submitted the plaintiff's CV to the Alcatel Talent Network on or about June 28, 2000. There is filed as an Exhibit (Exhibit 1, Tab 5) a letter from the Alcatel Talent Network to Ms. Stott which reads in part as follows:

The Recruiting Team relies on employees like you to spot talented prospects who might enhance the Alcatel team. We appreciate your taking time to discuss a potential career at Alcatel with Mary.

[8] The Talent Network program was set up such that there were certain benefits available to the Alcatel employee for submitting a prospect's CV and in the event that the prospect was in fact hired by Alcatel, then the company paid a very substantial bonus to the employee submitting the prospect's CV. The aforesaid letter comments that in the previous year one employee had earned \$18,000.00 through the program. With the submission of the plaintiff's CV to the company, Ms. Stott also recommended the plaintiff to James Guillet, the defendant's Assistant Vice-President-Product Marketing.

[9] Maria Espinosa had been an employee of Bell Canada for some fourteen years before hiring on with the defendant in August of 2000 as Director-Marketing, Planning and Implementation. She had known the plaintiff at Bell and had a friendly relationship with her.

On the day that she started work with Alcatel, on August 21, 2000, Ms. Espinosa called the plaintiff to tell her that there was an opening in marketing with the company. Ms. Espinosa told the plaintiff that she thought the plaintiff would fit in quite well with this position and that it would be great to work together again. She asked the plaintiff for a copy of her CV which the plaintiff sent by e-mail on August 23, 2000. Ms. Espinosa passed the CV on to Mr. Guillet.

[10] According to the evidence of the plaintiff, which I accept, the plaintiff initially declined to send her CV to Ms. Espinosa as requested. However, after telling Ms. Stott of the call and being encouraged by her as well and after speaking to her husband, she reconsidered and sent her CV on to Ms. Espinosa.

[11] I find on all of the evidence that at this point in time the plaintiff had no particular interest in leaving Bell Canada however by her own admission she was keeping her eyes and ears open to opportunities within the Bell family and to a lesser extent to opportunities in the general market place. As Mr. Guillet explained in his evidence, these were exciting times for people in the hi-tech industry. Business was booming and hiring was very difficult because of the competition. As he further explained it; “It was urgent to hire good people fast.”

[12] Mr. Guillet explained that he first heard of the plaintiff through Ms. Stott and Ms. Espinosa both of whom had submitted her CV to him and had recommended her to him. He called the plaintiff to hopefully arrange an interview. She agreed to meet with him within a few days. The interview went extremely well and Mr. Guillet arranged to have the plaintiff meet with three of his colleagues. After those interviews, the four agreed that the plaintiff would be an exciting addition to the marketing group. Mr. Guillet called the plaintiff and asked what she was looking for in terms of salary and she indicated between \$125,000.00 and \$130,000.00. He advised her that her expectations were within the range of what he could likely offer and that he would get back to her. He confirmed then with his Human Resources Department that he would offer the plaintiff an annual salary of \$125,000.00 with a \$5,000.00 signing bonus. He called the plaintiff back and offered that together with stock options. She said she wanted to discuss the matter with her financial advisor to make sure that she would be on parity with what she was receiving by way of salary and benefits at Bell Canada. Within a day the plaintiff called back

leaving a message that she accepted the offer. Eventually, a formal written offer of employment dated September 11, 2000 was forwarded to the plaintiff. It was signed by Mr. Guillet and it was signed on the same day by the plaintiff indicating her acceptance.

[13] Mr. Guillet confirmed in his evidence that throughout the negotiation he knew that the plaintiff had worked some nineteen years with Bell Canada. He conceded that during the negotiations with the plaintiff he, as one would expect, spoke in positive terms of Alcatel. He realized that the plaintiff's package at Bell included salary, benefits and pension.

[14] The plaintiff explained in her evidence how, after her interview with Mr. Guillet, she had consulted her financial advisor to determine what salary she would need to receive from Alcatel in order to make up for her pension loss at Bell Canada. Their calculation was that it would be necessary for her to save \$23,000.00 per annum over and above allowable RRSP contributions for fifteen years in order to match what she was leaving behind at Bell Canada. At a fifty percent tax rate she needed an additional \$46,000.00 per annum over and above her Bell salary of \$85,000.00 and thus required \$125,000.00 to \$130,000.00 from Alcatel.

[15] By the letter agreement of September 11, 2000, the plaintiff was hired by the defendant as a Director, Product Marketing, in the Marketing & Business Development Department, reporting to Mr. Guillet. Her start date was October 16, 2000 and her starting salary was \$125,000.00 per annum with a signing bonus of \$5,000.00 payable at the time of her first pay cheque. As well, she was given a comprehensive benefits package and stock options along with the option of enrolling in the company's group retirement savings plan wherein for every dollar she contributed, the defendant contributed fifty cents. She was given four weeks of vacation per year.

[16] There was no fixed term of employment set out in the Employment Agreement nor were any assurances with respect to length of employment either sought by the plaintiff or given by the defendant during the course of negotiations. However, on all of the evidence, one can reasonably infer that both sides anticipated and expected a lengthy term of employment. The high tech industry was still in its boom period. As Mr. Guillet testified, it was a very robust time

for people in the industry and the hiring process was very difficult because of the competition. It was urgent to hire good people fast and Alcatel was getting an experienced marketing person with a proven track record. The plaintiff was leaving Bell Canada where she had worked for close to twenty years to go to a new employer with an excellent reputation in the high tech community and at a very significant increase in pay. At the time of hiring then, each side would have contemplated a long and mutually satisfactory employer/employee relationship. Unfortunately, for everybody concerned, less than two years later the bubble had burst and large-scale layoffs ensued.

[17] Subsequent to her hiring on October 16, 2000, the plaintiff remained in the marketing field with the defendant. In or about April of 2001 there was a change in her job description, which is of no real consequence in this litigation. Throughout her employment with the defendant the plaintiff remained in a director level position. Her periodic reviews were always more than satisfactory. Effective February 19, 2001 she received an increase in her base salary from \$125,000.00 to \$135,000.00 per annum.

[18] On July 3, 2002, without any prior notice, the plaintiff's employment was terminated as of that date and she was escorted from the building. The termination letter (see Tab 28, Exhibit 1) offered a separation payment of a total of sixteen weeks salary equivalent to \$41,538.46 payable by way of an initial lump sum payment of \$31,153.85 for statutory notice and severance in accordance with the requirements of the *Employment Standards Act* and a second payment of the remaining \$10,384.62 upon receipt by Alcatel of a signed copy of the enclosed form of release.

[19] By way of the termination letter, the plaintiff was also advised that she would remain covered for group health care, dental care, life insurance, accidental death insurance, short-term disability and long-term disability until September 25, 2002, which was the expiry date of the statutory notice period.

[20] The plaintiff declined to sign the release proffered by the defendant and has been paid only the \$31,153.85 for statutory notice of severance as required by the *Employment Standards Act*.

[21] At the time of her dismissal, the plaintiff was just one month short of forty-two years of age. She was married with a young child. She had been released by the defendant from a director's position where she was earning a base salary of \$135,000.00 per annum into a market place that was vastly different from that which existed at the time of hiring. As previously noted, the bubble had burst, there were massive layoffs in the high tech industry, and jobs were hard to come by.

[22] Immediately upon termination, the plaintiff began seeking alternate employment. On the evidence, I am satisfied that she made reasonable efforts to mitigate her damages up until the time that she was told by her family physician and her psychotherapist to discontinue her job search. She made those reasonable efforts notwithstanding that unbeknownst to her, at the time of her termination, she was slowly making her way toward a state of major depression and disability. She had been faced with a number of stressors during the year before her termination. Her mother had died after a lengthy illness and she had suffered two miscarriages. As she entered the year 2002 she thought she was coping at work although she constantly felt very tired and was starting to disassociate herself from her fellow employees by doing her work behind closed doors. A few days after her termination on July 3, 2002, she discovered that she was again pregnant. An ultrasound on August 15, 2002 advised her that she would again miscarry which she eventually did on October 1, 2002. She was, by October of 2002, although continuing her job search, constantly extremely exhausted and very sad. She was facing a possible divorce by her husband because of her situation which he did not fully understand and she was, as she put it in her evidence, "Hanging on by her nails". In all of the circumstances, I am more than satisfied that she made reasonable efforts to mitigate her damages while she was in a position to do so.

[23] The plaintiff was entitled to reasonable notice of her termination or payment in lieu thereof. As was said by McRuer C.J.H.C. in *Bardal v. The Globe & Mail Ltd.* (1960) 24 D.L.R. (2d) 140 at p.145:

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.

[24] In *Wallace v. United Grain Growers Ltd.* (1997) 1 52 D.L.R. (4th) 1 (S.C.C.), Iacobucci J., speaking for the court, commented that Canadian courts have added several additional factors to the Bardal list and that the application of these factors to the assessment of a dismissed employee's notice period, will depend upon the particular circumstances of the case. At paragraph 83 of *Wallace* Iacobucci J. said the following:

One such factor that has often been considered is whether the dismissed employee had been induced to leave previous secure employment: see *E.G. Jackson v. Makeup Lab Inc.* (1989) 27 C.C.E.L. 317 (Ontario H.C.J.); *Murphy v. Roland Inc.* (1991) 39 C.C.E.L. 86 (Ontario Court General Division); *Craig v. Interland Window Mfg. Ltd.* (1993) 47 C.C.E.L. 57 (B.C.S.C.). According to one authority, many courts have sought to compensate the reliance and expectation interests of terminated employees by increasing the period of reasonable notice where the employer has induced the employee to "quit a secure, well paying job... on the strength of promises of career advancement and greater responsibility, security and compensation with the new organization" (*I. Christie et al; supra*, at p.623)

And at paragraph 85 of *Wallace*, Iacobucci J. said the following:

In my opinion, such inducements are properly included among the considerations which tend to lengthen the amount of notice required. I concur with the comments of *Christie et al; supra*, and recognize that there is a need to safeguard the employee's reliance and expectation interests in inducement situations. I know, however, that not all inducements carry equal weight when determining the appropriate period of notice period. The significance of the inducement in question will vary with the circumstances of the particular case and its effect, if any, on the notice period is a matter best left to the discretion of the trial judge.

[25] The compensation required to be paid by the defendant to the plaintiff must be calculated in terms of what the plaintiff would have received if she had been provided with reasonable notice of the termination of her employment.

[26] In determining what would be reasonable notice of termination in this case, the factors that I must consider include the following. At the time of her termination the plaintiff was close to forty-two years of age, married, and the mother of a young child. She held a director level position with the title of Director of Global Marketing Programs, Broadband Networking Division and reported to a Vice-President in the organization. She was a member of the defendant's senior management and was earning an annual salary of \$135,000.00. She enjoyed family medical, dental and vision care benefits along with life, accidental death and both short term and long term disability insurance. She enjoyed four weeks paid vacation per annum as well as participation in the defendant's stock option plan and participation in the defendant's deferred profit sharing plan. She had been encouraged by the defendant and its employees to leave longstanding secure employment of some twenty years to hire on with the defendant at a very significant increase in salary. Indeed, unbeknownst to the plaintiff at the time of hiring, Ms. Stott and Ms. Espinosa shared an \$8,000.00 case bonus paid by the defendant upon the hiring of the plaintiff.

[27] That is not to say that there was anything untoward about the conduct of the defendant company, Mr. Guillet, or either Ms. Stott or Ms. Espinosa in the hiring of the plaintiff. There were no assurances, either in writing or verbally given to the plaintiff as to the length of employment that she would enjoy with the defendant. She hired on with the defendant of her own free will with the encouragement of her friends and former co-workers, Ms. Stott and Ms. Espinosa. The Talent Network Program in place at Alcatel at the time whereby an employee was rewarded with cash for bringing to the company's attention a good prospective employee that was in fact eventually hired on, was the kind of program that was very prevalent in the high tech industry at the time. It is of interest to note that the program has since been discontinued.

[28] In any event, while the defendant and its employees cannot be criticized for encouraging the plaintiff to leave her twenty year secure employment with Bell and to sign on with Alcatel, it is a factor that should be considered, along with all of the others, in determining what would have been reasonable notice of termination in this case. I am mindful of the caution of Iacobucci J. in *Wallace* that not all inducements will carry equal weight when determining the appropriate period of notice and that the significance of the inducement in question will vary with the circumstances of the particular case. This is certainly not a case where the plaintiff was somehow enticed away, in the pejorative sense, from secure employment with Bell Canada. It is a case, however, where she was encouraged by the defendant's employees to seriously consider a change to Alcatel and a case where she could and did reasonably expect that if she did come over, she would enjoy a long relationship with the defendant absent any cause for her dismissal.

[29] In all of the circumstances of this case, I have concluded that notwithstanding the relatively short period of employment with the defendant of less than two years, a reasonable notice period would have been one of nine months and damages will accordingly be calculated on that basis.

[30] I may say that I find, on the evidence, nothing in the manner in which the plaintiff's employment was terminated by the defendant, that would justify my increasing the reasonable notice period that I have determined at nine months in accordance with the other "*Wallace*" factors. In *Wallace* the court found in the context of the facts of that case that bad faith conduct on the part of the employer in the manner of dismissal is a factor that is properly compensated by an addition to the notice period. I am not satisfied that the defendant and in particular Mr. Guillet, in conducting itself and himself in the fashion in which they did on the day of dismissal, acted out of bad faith within the meaning of *Wallace*.

[31] Based on a reasonable nine month notice period, I calculate the plaintiff's termination entitlements to be as follows:

- (1) Compensation for lost salary

Annual salary of \$135,000.00
Weekly salary of \$2,596.15.
39 x \$2,596.15 = \$101,250.00

(2) Compensation for lost benefits

In addition to recovery of lost income, the plaintiff is also entitled to damages on account of loss of benefits. In *English v. Alcatel Networks Corp.* [2002] O.J. No. 2398 (Sup.Court) Kealey J. took the simple approach of valuing the loss of employee benefits at ten percent of the lost salary. I propose to do the same and calculate the compensation for lost benefits at ten percent of \$101,250.00 or \$10,125.00.

(3) Compensation for lost group RSP/DPSP employer contributions.

As previously noted, this program permitted the plaintiff to contribute to her group RSP account up to a maximum of two-thirds of her maximum permissible annual RSP contribution amount (in this case \$13,500.00) and the remaining one-third of the plaintiff's maximum annual RSP contribution would be contributed by the defendant. It was the plaintiff's evidence that throughout her employment she directed that appropriate payroll deductions be processed so as to transfer \$9,000.00 per annum into her group RSP account and that the defendant made the required matching contributions resulting in an annual employer contribution of \$4,500.00. For the nine month reasonable notice period this would represent a loss to the plaintiff of \$3,375.00. This payment would have been made into a tax sheltered vehicle and accordingly, the loss must be grossed up to account for the fact that as an item of damage, it will be subject to tax. I agree with the submissions of plaintiff's counsel that those damages will be taxable at the top marginal rate for Ontario, currently 46.41% necessitating a tax "gross up" of 86.6% or \$2,922.00 for a total damage award of \$6,297.00 as compensation for lost DPSP employer contributions.

(4) Expenses incurred while seeking new employment.

It was the plaintiff's evidence that she expended the sum of \$564.68 on account of costs incurred in her attempts to obtain alternate employment and there is no reason why she should not recover these expenses.

[32] Accordingly, I calculate the total termination entitlement damages to be as follows:

Salary:	\$101,250.00
Benefits:	\$ 10,125.00
DPSP:	\$ 6,297.00
Job Search Expense:	\$ <u>564.68</u>
TOTAL:	\$118,236.68

[33] From that total must be deducted two items:

1. The sum of \$31,153.85 already paid by the defendant to the plaintiff as her statutory minimum salary entitlement; and
2. The value of her benefit continuation during the twelve-week statutory period calculated at ten percent of \$31,153.85 or \$3,115.38.

[34] Accordingly, the total termination entitlement damages payable by the defendant to the plaintiff are: \$118,236.68 minus \$31,153.85 minus \$3,115.38 for a total of \$83,967.45.

[35] If per chance my calculations are incorrect based on a nine-month reasonable notice period, then counsel may make short written submissions.

[36] In this action the plaintiff also claims damages for lost disability insurance entitlements. The plaintiff enjoyed short and long-term disability benefit coverage (STD and LTD) as part of her compensation package. In the dismissal letter from the defendant dated July 3, 2002, the defendant advised the plaintiff that all of her benefits including STD and LTD would be

cancelled effective September 25, 2002, the date of the expiry of the statutory notice period. The coverage was provided by the Great West Life Assurance Company.

[37] The STD insurance provisions provided as follows:

Short term disability income benefits under this plan are for disability periods that start while a person is covered.

Disability is assessed on the basis of the duties the person regularly performed for the employer before disability started. A person is considered disabled if, because of disease or injury there is no combination of duties he can perform that regularly took up at least sixty percent of his time at work to complete.

[38] The LTD insurance provisions provides as follows:

The benefits under this policy are for disability periods that start while a person is insured.

During the initial assessment period, disability is assessed on the basis of the duties a person regularly performed for the employer before disability started. The initial assessment period is the waiting period plus the next twenty-four months of disability. During this time the person is considered disabled if, because of disease or injury, there is no combinations of duties he can perform that regularly took at least sixty percent of his time at work to complete.

[39] Each of the policies sets out a formula for the purpose of calculating the benefit payable to the insured under each policy.

[40] Dr. Anne Boland gave evidence on behalf of the plaintiff. She received her MSC in psychology in 1976 at Memorial University in St. Johns and her PhD in Clinical Psychology in 1995 from the University of Ottawa. She is presently in private practice providing assessment and psychotherapy to primarily adult clients. At least a third of her practice is devoted to the treatment of depression and she has dealt with hundreds of depression cases.

[41] Dr. Boland first met the plaintiff in 1997 with the plaintiff's then partner for ten sessions of couple therapy. The couple were planning to get married which they eventually did and had

some concerns about the partner's health and the plaintiff's ability to bear children which concerns were resolved at the time.

[42] The plaintiff and her husband were seen again by Dr. Boland during the Summer of 2001 for some four sessions relating to family planning.

[43] Dr. Boland next heard from the plaintiff when she telephoned the doctor about two to three weeks prior to the appointment that was scheduled for November 4, 2002. During the course of the telephone call, it was obvious to Dr. Boland that the plaintiff was highly distressed. From her previous dealings with the plaintiff the doctor remembered her as being a strong and self-confident woman. However, during the course of the telephone call, the plaintiff was presenting herself as a person who was highly stressed and highly deflated. During the course of the telephone call, the plaintiff spoke of her mother's death, her layoff and several miscarriages.

[44] At the appointment of November 4, 2002, Dr. Boland did not recognize the plaintiff having regard to the way she was behaving. Again, she was not the woman that Dr. Boland remembered. She was crying through most of the session, appeared to be exhausted and in a great deal of distress. She was obviously overwhelmed.

[45] Dr. Boland, on November 4, 2002, had no difficulty at all arriving at a diagnosis of major depressive disorder. The plaintiff met all of the criteria of major depressive disorder set out in the Diagnostic Statistical Manual #4 of the American Psychiatric Society (DSM4). It was Dr. Boland's evidence that it was highly likely that the plaintiff was suffering from major depression when she telephoned for an appointment some two to three weeks before November 4th. Dr. Boland expressed the opinion that by the time she saw the plaintiff on November 4th, the plaintiff had been suffering from major depression for at least one month.

[46] Dr. Boland told the plaintiff of her diagnosis on November 4th and told her to immediately discontinue her job search. Dr. Boland was well aware of the nature the plaintiff's work as a marketing executive who was required to function quickly, make decisions, connect and interface with people, plan ahead and lead and the doctor was clear in her evidence that

when seen on November 4, 2002, the plaintiff was unable to function in that position or indeed in any position of employment. It was the doctor's evidence that had the plaintiff been working at that time, she would have recommended that she go on sick leave.

[47] Dr. Boland recommended to the plaintiff that she follow a course of psychotherapy and that she immediately contact her family physician for medication. It was the doctor's prognosis that the plaintiff would be ready to continue her search for work in nine to twelve months and the fact is that the psychotherapy lasted well into the Fall of 2003 with psychotherapy sessions of one and a half hours each, one per week until the end of 2002, then every two weeks until the Summer of 2003 and one per month into the Fall of 2003.

[48] Dr. Boland strongly disagreed with the defendant's witness, psychiatrist Dr. Brian Hoffman, that the plaintiff was suffering from an adjustment disorder as opposed to a major depressive disorder.

[49] The plaintiff's family physician, Dr. Barbara Boyd, testified on her behalf. In her general practice, she sees roughly one hundred different cases of depression every year. She has been the plaintiff's family physician for the last nine years and had occasion to examine her on November 27, 2002 following Dr. Boland's diagnosis. She noted at the time of her examination that the plaintiff in the prior twelve month period had experienced the illness and ultimate death of her mother, three miscarriages, the loss of her employment and was totally exhausted. Dr. Boyd was satisfied on that date that the plaintiff met all the criteria for a diagnosis of major depressive episode and she expressed the view that it would have taken several months for the plaintiff to ultimately get to that position. Dr. Boyd was of the view that it was likely that the plaintiff's medical condition did not prevent the plaintiff from working until approximately October 1, 2002. She based this opinion on her knowledge of how long it takes for symptoms to develop.

[50] Dr. Boyd prescribed the anti-depressive drug Paxil for the plaintiff and recommended that she continue her psychotherapy with Dr. Boland.

[51] Dr. Boyd continued to see the plaintiff on a regular basis and noted improvement through to the Fall of 2003 by which time Dr. Boyd was of the view that the plaintiff could likely have started work again. In this respect, Dr. Boyd noted that by the Fall of 2003 the plaintiff was doing some volunteer work on the doctor's recommendation but the doctor expressed in her evidence the caution that it would be difficult to say whether or not by the Fall of 2003 the plaintiff could have begun performing sixty percent of her former job description.

[52] Dr. Brian Hoffman is the Chief Psychiatrist at North York General Hospital and has practiced in the field of psychiatry since 1974. He had not interviewed either the plaintiff or Dr. Boland or Dr. Boyd. He had reviewed the various documents listed in his report dated November 19, 2003 filed as an Exhibit together with the notes of Drs. Boland and Boyd. Upon a review of the documentation, he saw "only scant documentation of symptoms and dysfunction to justify a psychiatric diagnosis of major depressive disorder and that the more likely diagnosis should have been adjustment disorder." He further expressed the opinion that on the basis of the materials that he reviewed, he could find no evidence of a significant mood disorder that would have interfered with the plaintiff's ability to work prior to November 4, 2002. In his supplementary report dated January 20, 2004 also filed as an Exhibit, he criticized both Dr. Boyd and Dr. Boland as advocating on behalf of the plaintiff.

[53] Dr. Hoffman readily conceded that psychiatry is an inexact science particularly in the field of depression and that there is no instrument available to determine unequivocally its existence. He explained that an adjustment disorder as defined by DSM4 is a milder depression where the person is having difficulty adjusting to life's circumstances. On the other hand, a major depressive disorder is often not related to personal events (but may be) and results in moderate to severe symptoms that have quality beyond sadness. Functioning is more severely affected by a major depressive disorder.

[54] The doctor explained that major depression may be mild and the plaintiff may be able to deal with it whereas adjustment disorder may be severe to the point where the plaintiff is incapacitated.

[55] Dr. Hoffman explained that he has not assessed the plaintiff and is not in a position to diagnose or assess the extent of her disability other than from the documentation. He stressed that he is unable to make a diagnosis in this case and can only look at the notes and tell the court what he takes from them. He readily conceded that he would have been much more comfortable in his opinion if he had had a chance to see and talk to the plaintiff and to Drs. Boland and Boyd. He advised the court that there was nothing unusual about a psychologist treating a person for major depression along with the family doctor providing medication. He agreed on cross-examination that it appeared that the plaintiff had been exposed to an incredible sequence of stressors including her mother's death, three miscarriages, dismissal from her job and the uncertainty of whether or not she could or should have a second child.

[56] On all of the evidence, I have no doubt that the plaintiff sometime subsequent to her dismissal on July 3, 2002, began to suffer from a major depressive disorder. I much prefer the evidence of her treating psychologist Dr. Anne Boland and her treating family physician, Dr. Barbara Boyd to the evidence of Dr. Hoffman who did not have an opportunity to speak to either the plaintiff or her doctors.

[57] As one would expect, it is difficult to determine with any exactitude when the plaintiff became disabled, within the meaning of the disability policies, but on all of the evidence, it is most likely that the plaintiff was disabled on October 1, 2002 and she remained so disabled for a period of approximately one year by which time, as of October 2003, she was in a position to continue her search for permanent employment. She was involved in three volunteer jobs by that time and on the evidence I am of the view that she could have made the transition to permanent employment by then.

[58] The nine month common law notice period takes the plaintiff to April 3, 2003. She became disabled within the meaning of STD and LTD coverages within that notice period on October 1, 2002. The plaintiff eventually made application for STD and LTD benefits in February of 2003. The application was denied by Great West on the basis that the plaintiff was not insured for benefits at the time that the insurer considered the disability to have started. In that respect, the insurer considered the disability to have started on November 27, 2002 when the

plaintiff was seen by Dr. Boyd. The disability coverage had been cancelled as of September 25, 2002. The insurer took the position that it was incumbent upon the plaintiff to satisfy the definition of disability while coverage was still in effect. Had the defendant given the plaintiff working notice of nine months, the disability coverage would still have been in effect when she became disabled on October 1, 2002 and would have continued to be available to her until October 1, 2003.

[59] The law is clear that dismissed employees are to be kept whole throughout the entire reasonable notice period during which period employees are entitled not only to the continuation of salary but the continuation of all forms of employee benefits. Compensation is calculated in terms of what the employee would have received if she had been provided with reasonable notice of the termination of her employment. See *Bardal supra, Davidson v. Allelix Inc.* [1991] 7 O.R. (3d) 581 (C.A.) and *Leduc v. Canadian Erectors Ltd.* [1996] O.J. No. 897 (Gen.Div.). Here, by reason of my finding with respect to reasonable notice, the plaintiff is being compensated at full salary for the period July 3, 2002 to April 3, 2003 but is receiving nothing for the approximate six month period from April 3rd to October 1, 2003, during which period her disability continued.

[60] It would appear from the calculations made by plaintiff's counsel that assuming disability as of October 1, 2002, if the disability benefits had still been in place as of that date, the plaintiff would have been entitled to STD benefits for seventeen weeks, totaling some \$29,427.00 before gross up. That would have taken the plaintiff into February of 2003 at which time she would be entitled to LTD benefits of \$5,787.50 per month for a total of approximately eight months, for a total of approximately \$46,000.00. The total disability benefits payable then for the one-year period from October 1, 2002 would be approximately \$76,000.00 before gross up.

[61] It must be remembered, however, that the evidence clearly shows that upon going on either STD or LTD benefits, the employee in accordance with the contracts, is immediately taken off the defendant's payroll.

[62] Here, the plaintiff is being fully compensated for her lost salary and value of benefit package for the nine-month period from July 3, 2002 to April 3, 2003 in the amount of

\$118,236.68. To completely ignore the fact that had she gone on disability on October 1, 2002, she would have been without salary for the remainder of the common law notice period (approximately six months) at the rate of \$11,250.00 per month (a total of some \$67,500.00) would, in my view, be unjust and inequitable and would amount to double recovery on the part of the plaintiff.

[63] On the evidence, it cannot be inferred in this case that the parties agreed that the plaintiff in the circumstances would be entitled to receive both disability benefits (or the value of their loss) and damages for wrongful dismissal. As was said by Major J. in *Sylvester v. British Columbia*, 146 D.L.R. (4th) 207 S.C.C:

If disability benefits are paid in addition to damages for wrongful dismissal, the employee collecting disability benefits receives more compensation than the employee who is dismissed while working. Deducting disability benefits ensures that all affected employees receive equal damages, i.e. the salary the employee would have earned had the employee worked during the notice period. If disability benefits are not deductible employers who set up disability benefits plans will be required to pay more to employees upon termination than employers who do not set up plans. This deterrent to establishing disability benefit plans is not desirable.

[64] In my view, by an award of damages which sees the plaintiff paid her full salary for the common law notice period of nine months, six months of which she would not have been able to work, leaves the plaintiff “whole” in the face of her dismissal on July 3, 2002. In the circumstances, I do not propose to assess any damages with respect to the claims for disability benefits.

[65] There will be judgment, then, in favour of the plaintiff in the amount of \$83,967.45 together with appropriate pre-judgment interest. If the parties cannot agree on pre-judgment interest and costs, I will receive written submissions.

The Honourable Mr. Justice G.R. Morin

Released: July 13, 2004

COURT FILE NO.: 02-CV-021821

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

MARY EGAN

Plaintiff

- and -

ALCATEL CANADA INC.

Defendant

REASONS FOR JUDGMENT

G.R. MORIN J.

Released: July 13, 2004-