CITATION: Tagg Industries v. Rieder, 2018 ONSC 5727
COURT FILE NO.: CV-17-572484
DATE: 20180927

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: 975866 Ontario Ltd. o/a Tagg Industries, Plaintiff (Defendant by Counterclaim)/Moving Party

AND:

Otto Rieder, Defendant (Plaintiff by Counterclaim)/Responding Party

BEFORE: H. McArthur J.

COUNSEL: Jonathan Frustaglio, appearing as counsel, for the Plaintiff (Defendant by Counterclaim)/Moving Party

Christopher Perri, appearing as counsel, for the Defendant (Plaintiff by Counterclaim)/Responding Party

HEARD: June 20, 2018

ENDORSEMENT

H. MCARTHUR J.:

Introduction

[1] Tagg Industries brings a motion for summary judgment against its former employee, Otto Rieder. Tagg asserts that the issues are simple. Tagg lent $40,000 to Mr. Rieder and he signed a promissory note. The loan was to be forgiven on January 5, 2016, the day Mr. Rieder would be deemed to have earned a $40,000 bonus. Mr. Rieder was fired on December 4, 2015. Thus, Mr. Rieder is not entitled to the bonus, and he is required to repay the loan pursuant to the promissory note; there is no genuine issue requiring a trial.

[2] Mr. Rieder counters that he was fired without just cause, and was therefore entitled to notice. The notice period would extend to January 5, 2016. Thus, he would be entitled to a bonus of $40,000, and, in lieu of receiving the money, to have the loan forgiven. Mr. Rieder relied on his claim that he was fired without just cause in his statement of defence to the action brought by Tagg. He also brought a counterclaim, pleading that he was fired without just cause, and is entitled to have the loan forgiven (as well as one months' salary and vacation pay). Although Mr. Rieder did not bring a cross-motion for summary judgment, he argues that I should grant him such relief on his counterclaim.

[3] The action by Tagg against Mr. Rieder was brought pursuant to the simplified procedure set out in r. 76 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. The counterclaim by Mr. Rieder was also brought under the simplified procedure.

[4] Paragraph 2 of r. 76.04(1) provides that when an action is brought under the simplified procedure, cross-examination of a deponent on an affidavit under r. 39.02 is "not permitted". This rule may make it more difficult for the court hearing the summary judgment motion to fairly resolve factual conflicts: *Combined Air Mechanical Services Inc. v. Flesch*, 2011 ONCA 764, at para. 256; *Singh v. Concept Plastics Limited*, 2016 ONCA 815, at paras. 22-24. In such cases, a summary trial may be the more expeditious and less expensive means to achieve a just result.

[5] In the present case, despite r. 76.04(1), both sides conducted cross-examinations on the affidavits filed in support of the motion. They candidly admit that they made a mistake and failed to advert to this rule. Tagg and Mr. Rieder both took the position that I could rely on the cross-examinations. Neither side was able to point to any authority as to my jurisdiction to rely on evidence elicited in cross-examinations that were prohibited by the Rules. That said, for the purposes of this motion, based on the consent of the parties, I was prepared to consider the cross-examinations and hear the argument of counsel flowing from that evidence. It struck me that if a consideration of the cross-examinations allowed me reach a fair and just determination on the merits that would be the just, proportionate and most expeditious approach.

[6] For reasons that are set out below, I find that Tagg's motion for summary judgment must be dismissed. I have also determined that it is appropriate to grant summary judgment in favour of Mr. Rieder. There is no genuine issue requiring a trial.

[7] I do not intend to detail the facts, but will refer to them as necessary in my analysis. I propose to start by setting out the legal framework for summary judgment motions. Next, I will consider Tagg's motion for summary judgment and explain why it is dismissed. Finally, I will explain why I have concluded that Mr. Rieder should be granted summary judgment on his counterclaim.

Legal Framework for Summary Judgment Motions

[8] Rule 20.04(2)(a) provides that the court shall grant summary judgment if satisfied that there is no genuine issue requiring a trial with respect to a claim or defence. In *Hryniak v. Mauldin*, 2014 SCC 7, at para. 49, Karakatsanis J. explained that there will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.

[9] In considering a motion for summary judgment, the court should first determine if there is a genuine issue requiring a trial based only on the evidence in the motion record, without using the fact-finding powers set out in rr. 20.04(2.1) and (2.2). The analysis of whether there is a genuine issue requiring a trial should be done by reviewing the factual record and granting

summary judgment if there is sufficient evidence to fairly and justly adjudicate the dispute and summary judgment would be a timely, affordable and proportionate procedure.

[10] If there appears to be a genuine issue requiring a trial, then the court should determine if the need for a trial can be avoided by using the fact-finding powers under r. 20.04. Their use will not be against the interests of justice if it will lead to a fair and just result and will serve the goals of timeliness, affordability and proportionality in light of the litigation as a whole.

[11] Pursuant to Rule 20.0(2), a responding party may not rest solely on the allegations or denials in the party's pleadings, but must set out, in affidavit material or other evidence, specific facts showing that there is a genuine issue requiring a trial. Each side must put its best foot forward with respect to the existence or non-existence of material issues to be tried. A court is entitled to assume that the record contains all the evidence that the parties would present if the matter proceeded to trial: *Sweda Farms Ltd. v. Egg Farmers of Ontario,* 2014 ONSC 1200, at paras. 26-27, aff'd 2014 ONCA 878.

Analysis

(1) Tagg's Motion for Summary Judgment

Issue One: Was Mr. Rieder fired for just cause?

[12] The question of whether Mr. Rieder is required to repay the loan is intricately linked to the question of whether he was fired with or without just cause. If fired without just cause, Mr. Rieder would be entitled to notice. If the notice to which he was entitled extended to January 5, 2016, then he would be entitled to have the $40,000 loan forgiven, as his entitlement to a bonus of the same amount would crystalize on that date. On the other hand, if fired with just cause, he would have no entitlement to his bonus and would be required to repay the loan. Thus, the issue of whether Mr. Rieder was fired without just cause is a key consideration in deciding the summary judgment motion brought by Tagg.

[13] Mr. Rieder argues that he was fired without just cause. Indeed, he deposed that on the day he was fired, Stephen Dulong, the President of Tagg, specifically told him he was being fired without just cause. Mr. Dulong took the position that Mr. Rieder was fired for just cause. Clearly, their positions are contrary. The question is whether on the evidence before me, I can fairly determine whether Mr. Rieder was or was not fired for just cause. In my view, I can.

[14] Mr. Dulong advanced four reasons justifying Tagg's actions in firing Mr. Rieder: (i) Mr. Rieder deleted proprietary information from a company laptop; (ii) Mr. Rieder stored pornography on a company laptop; (iii) Mr. Rieder misrepresented his previous work title, responsibilities and salary; and (iv) Mr. Rieder's work performance was substandard.

[15] The purported reasons justifying Mr. Rieder's summary dismissal, however, were not communicated to him at the time he was fired. Instead, the reasons for termination were set out for the first time by Tagg when it filed its defence to Mr. Rieder's counterclaim. If Mr. Rieder had truly been fired for performance issues, it seems reasonable to expect that he would have been advised of such. An employee must not be left to guess as to the reason for summary

dismissal: *Laszczewski* v. *Aluminart Products Limited*, [2007] O.J. No. 4991, at para. 41. Yet nowhere in the termination letter did it outline why Mr. Rieder was being fired. The fact that Tagg did not address just cause in its termination letter is a factor that supports Mr. Rieder's position that was being fired without just cause.

[16] Moreover, the termination letter noted that Mr. Rieder was entitled to one weeks' notice under the *Employment Standards Act, 2000*, S.O. 2000, c.41 (the *ESA*). But if he were being fired for cause, he would not be entitled to any notice. This further supports Mr. Rieder's position that he was fired without just cause.

[17] I find further support for Mr. Rieder's position that he was dismissed without cause when I consider the four reasons proffered in support of his termination. In my view, none of the reasons relied on by Tagg amount to just cause to fire Mr. Rieder. I will address each in turn.

(i) Deletion of proprietary information from the company laptop.

[18] Mr. Dulong claimed that after he was fired, Mr. Rieder deleted propriety information from the company laptop before returning the computer. Mr. Dulong relies on this fact in support of his position that he had just cause to fire Mr. Rieder.

[19] As noted in *Dowling* v. *Ontario* (*Workplace Safety and Insurance Board)*, [2004] O.J. No. 4812 (C.A.), at para. 51, an employer is entitled to rely on wrongdoing discovered after termination, so long as the later discovered acts occurred pre-termination: see also *Lake Ontario Portland Cement Co. Ltd*. v. *Groner*, [1961] S.C.R. 553. In the present case, the alleged deletion of proprietary information occurred after Mr. Rieder was fired. Thus, this alleged misconduct cannot amount to just cause for terminating Mr. Rieder's employment.

(ii) Pornography on the company laptop

[20] Mr. Dulong also alleged that after Mr. Rieder was fired, an IT worker discovered that Mr. Rieder had a large amount of pornography on his company laptop. Mr. Dulong had no first-hand information about this and relied on hearsay information. Tagg did not tender any evidence from the IT worker. Thus, there is no admissible evidence before me to support that Mr. Rieder did have pornography on his computer.

[21] Even if there was admissible evidence that Mr. Rieder had pornography on his laptop, however, in my view it would not amount to just cause. Mr. Dulong testified that at times he saw that Mr. Rieder was engaged in non-work related activity on his laptop. Yet there is no suggestion that Mr. Rieder ever looked at or downloaded pornography while at the workplace. There is no suggestion that he created a hostile workplace for other employees. There is no suggestion that the material was illegal, such as child pornography.

[22] The law is clear that since dismissal without reasonable notice is such a severe punishment, it must be a proportionate response and can only be justified by misconduct of the most serious kind. Further, the onus of establishing that just cause exists rests squarely with the employer. In order to justify dismissal for cause, the "core question for determination" is not whether the employee has committed an act of misconduct, but whether the employee has

engaged in a degree of misconduct that is incompatible with the fundamental terms of the employment relationship. Summary dismissal is only warranted where the misconduct is sufficiently serious that it strikes at the very heart of the employment relationship: *Dowling*, at para. 49; *McKinley* v. *BC Tel*, 2001 SCC 38, at paras. 53-54. Here, finding pornography on the company laptop would not be sufficiently serious to warrant Mr. Rieder's termination.

(iii) Misrepresentation of previous work title, responsibilities and salary

[23] Mr. Dulong took the position that Mr. Rieder misrepresented his previous work title, responsibilities and salary. Once again, he relied on hearsay in making these claims. Mr. Dulong testified that he found this information out when he started "making calls" when it became apparent that Mr. Rieder was going to fight this matter in court. Tagg did not provide affidavit evidence from anyone who provided such information to Mr. Dulong. No admissible evidence was adduced to establish that Mr. Rieder had misrepresented the facts as alleged. That said, even if such evidence had been tendered, in my view this misconduct would not be sufficiently serious to warrant Mr. Rieder's summary dismissal.

(iv) Substandard Work

[24] Mr. Dulong took the position that he was justified in firing Mr. Rieder because his work was substandard. For example, he testified that Mr. Rieder did not take charge in meetings when he should have been leading the meetings. Mr. Rieder did not bring in enough new business. He said that Mr. Rieder came in late and left early. In my view, however, given the high standard required for summary dismissal, the performance complaints raised by Mr. Dulong do not amount to just cause.

[25] If I am wrong, and the complaints were sufficient to warrant dismissal, I find that Tagg condoned any workplace performance concerns. Issues relating to the quality of Mr. Rieder's work were all addressed with him verbally before October 2015. Then, on October 14, 2015, Mr. Rieder entered into a new work agreement entitled "Compensation and Job Description Update" (the "Update"). The Update canvassed Mr. Rieder's work performance to date. While raising some concerns about Mr. Rieder's performance, the Update also provided that Mr. Rieder would receive an increase in salary along with increased work responsibilities. The Update further provided that the parties would evaluate Mr. Rieder's performance again in March 2016.

[26] Mr. Dulong testified that any complaints he received about Mr. Rieder happened before October 2015. Mr. Dulongs's concerns with Mr. Rieder's performance were first raised with him verbally and then put into the Update in October 2015. There were no additional performance issues that arose after the Update was signed.

[27] When an employer is aware of misconduct, it can do one of two things. The employer may dismiss the employee, or the employer may choose to overlook the conduct. As explained in *Nossal* v. *Better Business Bureau of Metropolitan Toronto Inc.*, [1985] O.J. No. 2574 (C.A.), at para. 13, if the employer "retains the servant in his employment for any considerable time after discovering his fault, that is condonation, and he cannot afterwards dismiss for that fault without anything new": see also *Armstrong* v. *Lendon*, 2015 ONSC 3004, at paras. 13-14.

[28] In the present case, to the extent that there were performance issues, in my view Tagg clearly condoned those issues by entering into the Update in October 2015. Mr. Dulong did not point to "anything new" that arose after that date. This justification for summarily dismissing Mr. Rieder does not survive scrutiny.

(v) Conclusion on whether Mr. Rieder was fired for just cause

[29] Mr. Rieder deposed that on December 4, 2015, the day he was fired, Mr. Dulong told him that he was being fired without just cause. The fact that none of the four reasons put forward by Tagg were raised until after Mr. Rieder filed his statement of defence and counterclaim provides some support for Mr. Rieder's position that he was fired without just cause. The termination letter which provided for notice also provides support for Mr. Rieder's position. Further support for his position flows from the fact that that the reasons advanced by Tagg for firing Mr. Rieder do not amount to just cause for dismissal.

[30] The evidence on the motion allows me to make the necessary findings of fact and to apply the law to the facts. Having done so, I conclude that Mr. Rieder was fired without just cause.

Issue Two: What notice period was should Mr. Rieder have received?

(a) Was Mr. Rieder entitled to one months' notice pursuant to the first employment agreement signed on October 1, 2014?

[31] On October 1, 2014, Mr. Rieder signed an employment agreement with Tagg. This agreement specified that if Mr. Rieder were fired without just cause, he would be entitled "within the first year [to] receive 1 month of notice or pay in lieu thereof based on base salary."

[32] In his pleadings Mr. Rieder relied on this provision to support his position that he would be entitled to one months' notice, which would mean that he would be owed his bonus. The bonus would then offset the loan.

[33] In light of *North* v. *Metaswitch Networks Corporation*, 2017 ONCA 790, however, this position cannot prevail. There, the court considered a term in an employment contract that provided that in the event of termination of employment, any payment owed to the employee would be based on his base salary alone. The court found that this provision, which excluded commissions, violated the ss. 60 and 61 of the *ESA*. The court explained that s. 5(1) of the *ESA* prohibits employers and employees from waiving or contracting out of any of the employment standards prescribed by in the *ESA*. Since the termination clause contracted out of a provision of the *ESA*, the entire termination clause was held to be void.

[34] Similarly, in the present case, the October 2014 employment agreement provided that pay in lieu of notice was to be based on salary alone, not the bonus outlined in the agreement. Because the termination clause is inconsistent with the *ESA*, it is void.

(b) Was Mr. Rieder entitled to only two weeks' notice because of the termination clause in the promissory note?

[35] As noted above, on October 14, 2015, Tagg and Mr. Rieder entered into new employment agreement (the Update). On October 15, Mr. Rieder signed the promissory note with respect to the $40,000 loan at issue in this motion. Within the promissory note, there is a clause that provides that the "Debtor agrees that any severance or termination pay is limited to the amount outlined by the Ontario Ministry of Labour." Tagg argues that this clause governs and as a result, Mr. Rieder was only entitled to notice under the *ESA*, which would end before his bonus was due.

[36] There is a presumption under the common law that employees are entitled to reasonable notice. This presumption may be rebutted by a contractual termination clause. That said, a termination clause will rebut the presumption only if the wording is clear. Here, Mr. Rieder argues that the purported termination clause does not rebut the presumption because it was unclear: *Wood* v. *Fred Deeley Imports Ltd*., 2017 ONCA 158, at para. 28. I agree that the clause relied on by Tagg does not rebut the common law presumption of reasonable notice for three reasons.

[37] First, the clause is contained in the promissory note, rather than in the Update. If Tagg has wanted to clearly impose a termination clause, in my view it should have been included in the Update (the document dealing with employment issues) rather than the promissory note. Moreover, the clause is included under the heading Additional Security and Rights of Set-off. I agree with Mr. Rieder that the purported termination clause was unclear, as it was buried within the promissory note, under an imprecise heading. Second, the purported termination clause refers to Mr. Rieder as the Debtor, rather than the employee. The use of this language had the effect of further obscuring the purported termination clause. Third, the language used in the termination clause was unclear and confusing. The clause does not refer to the *ESA*; rather, it refers to the "amount outlined by the Ontario Ministry of Labour."

[38] In my view, the poorly drafted clause, which was buried within the promissory note rather than the Update, does not rebut the presumption that Mr. Rieder would be entitled to reasonable notice at common law.

(c) Was Mr. Rieder entitled to notice of at least one month pursuant to the common law?

[39] Mr. Rieder argues that since there was no termination clause rebutting the presumption that he is entitled to reasonable notice upon termination, he is entitled to reasonable notice at common law. Considering his age, length of service, the character of employment and the availability of similar work, Mr. Rieder asserts that he would be owed notice in the range of four months: *Bardahl* v. *Globe & Mail Ltd.* (1960), 24 D.L.R. (2d) 140 (Ont.H.C.); *Marques* v. *Delmar International Inc.*, 2016 ONSC 3448, at paras. 32-33; *Laszczewski*, at para. 64; and *Wellman* v. *Herjavec Group Inc.*, 2014 ONSC 2039, at para. 26. Despite the authorities supporting that he would be entitled to four months' notice, Mr. Rieder is content to cap his notice at one month, which would take him to January 5, 2016 the day his bonus was due.

[40] Tagg agrees that if common law notice applied, Mr. Rieder would be entitled to at least one month. Tagg argues, however, that Mr. Rieder cannot advance this position, as he failed to plead common law notice in his statement of defence or counterclaim. Rather, in the pleadings, Mr. Rieder relied on the October 2014 employment agreement which provided for one months' notice. Thus, Tagg argues that Mr. Rieder cannot rely on common law notice in this motion. As noted recently by Copeland J., however, although a pleading will normally state any statutory basis for a claim, it is not necessary for a pleading to expressly state a common law basis for a claim. Rather, a party is simply required to plead material facts that as a matter of law can be the basis for the claim: *Toronto Hydro* v. *Gonte and City of Toronto*, 2018 ONSC 4315. In the present case, Mr. Rieder's pleadings set out the material facts that would support his position for common law notice; he was not required to raise common law notice in the pleadings.

[41] If I am wrong in so concluding, however, I keep in mind that r. 26.01 provides that the court "shall" grant leave to amend a pleading on such terms are as just, "unless prejudice would result that could not be compensated for by costs or an adjournment."

[42] While no formal motion to amend was brought before me, in essence Mr. Rieder sought to amend his pleadings to rely on common law notice. In my view, in the circumstances, it is appropriate to consider common law notice for the following four reasons.

[43] First, by the time the motion started, Tagg was clearly aware that Mr. Rieder would be relying on common law notice. Tagg did not claim it was prejudiced by this, nor did it seek an adjournment based on Mr. Rieder's new reliance on the common law. Instead, Tagg presented full argument as to why the presumption of reasonable notice had been rebutted by the clause in the promissory note.

[44] Second, while at common law he would be entitled to four months, Mr. Rieder has agreed to limit any claim stemming from the common law to one months' notice. This was the period of notice he claimed in his pleadings. In light of this position, it is difficult to see how Tagg would be prejudiced by allowing Mr. Rieder to advance common law notice.

[45] Third, if I were to hold that Mr. Rieder could not advance his argument with respect to common law notice at this stage, there is nothing preventing him from seeking an amendment thereafter. If successful, he would then argue his counterclaim on that basis. But, the action brought by Tagg would have been dealt with on the basis that Mr. Rieder could not rely on the common law. Similar to granting partial summary judgment, this would create the risk of duplicative or inconsistent findings, and in my view would not be advisable in the context of the litigation as whole: *Butera v. Chown, Cairns LLP*, 2017 ONCA 783. This is especially so since these matters have proceeded under the simplified procedure.

[46] Fourth, courts should not take an overly technical view of the pleadings on a simplified procedure action. Here, there are relatively small amounts of money at issue. Tagg is seeking $40,000 plus interest. Mr. Rieder claims he is entitled to a bonus which would offset the loan, as well as $27,371.66 (one month's salary and 19 vacation days). Rule 1.04(1), provides that the Rules shall be liberally construed to secure the most just, most expeditious and least expensive determination of every civil proceeding on its merits. Rule 1.04(1.1) provides that in applying

the Rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues and to the amount involved in the proceedings. In my view, proportionality militates in favour of allowing Mr. Rieder to move forward with his claim based on the common law even in the absence of a formal motion to amend. This is particularly so as Tagg did not assert that it would be prejudiced.

[47] As a result, I find that Mr. Rieder should be permitted to argue common law notice. I also find that at common law, he would be entitled to at least one months' notice.

Issue Three: Does one months' notice extend to January 5?

[48] Tagg argues that one months' notice would not extend to January 5, 2016. Tagg agrees that December 4, 2015 was the last day Mr. Rieder worked. That is borne out in the Record of Employment which lists December 4 as Mr. Rieder's last day of work. Tagg also agrees that Mr. Rieder's notice would thus flow from December 5, 2015. Tagg argues, however, that according to a date duration calculator, it is 32 days from December 5 to January 5. Tagg asserts that 32 days is more than one month, and thus Mr. Rieder's notice period would end before his bonus became due.

[49] Mr. Rieder counters by arguing that a month should be calculated as a calendar month (date to date). Thus, if the notice started on December 5, 2015, one calendar month later would be January 5, 2016. In support of this position, he refers to the *Legislation Act, 2006* S.O. 2006, c.21, Sched. F. There, s. 89(6) says that a month includes the day in the last month counted that has the same calendar number as the specified day. Mr. Rieder argues that this provides some support of his position as to how to define a month.

[50] I agree that a month should be calculated as a calendar month for two reasons. First, in addition to the *Legislation Act*, the *Interpretation Act*, R.S.C. 1985, c.l-21, s. 35(1) defines a month as a calendar month: see also s. 28(c). While not dispositive, these statutes provide useful guidance in how to define a month.

[51] Second, there are a number of cases which support that a month should be calculated as a calendar month. For example, *Fernandez* v. *Direct Energy Marketing Ltd*., [2012] O.J. No. 5275 (S.C.) was a small claims matter in the employment context. There, at para. 43, the court calculated a six-months' notice period going date to date. In *Funk* v. *Blue Cross Life Insurance Co*., 2015 MBQB 184, at paras. 51-57, the court found that a month should be calculated as a calendar month.

[52] In *R.* v. *Ashraf*, 2016 ONCJ 584, Band J. determined that a month should be calculated date to date, noting at para. 58 that this approach was "clear, simple and accords with common sense and everyday experience." *Ashraf* was adopted with respect to this point by Paciocco J. (as he then was) in *R.* v. *J.M.*, 2017 ONCJ 4, at para. 45. More recently, *Ashraf* was approved of on this point in *R.* v. *Frail*, [2017] ONSC 5886, at para. 23. In *Frail*, Schreck J. also noted at para. 23, that calculating months in this manner appears to be the approach used by the Supreme Court in *R.* v. *Cody*, 2017 SCC 31.

[53] I agree that calculating a month as a calendar month is clear, simple and accords with common sense and everyday experience. Thus, I find that the proper way to calculate a month is not to count days, as advocated by Tagg, but rather to calculate date to date. Thus, if Mr. Rieder was entitled to one months' notice, his notice would extend from December 5, 2015 to January 5, 2016. And on January 5, he would be entitled to his bonus, which would offset the loan.

Conclusion on Tagg's Motion for Summary Judgment

[54] Tagg cannot prevail on its motion for summary judgment. The evidence on the motion allows me to make the following findings: 1) Mr. Rieder was fired without cause; 2) Mr. Rieder was entitled to one months' notice; 3) one months' notice would extend to January 5; and 4) on January 5, Mr. Rieder would be entitled to his bonus, and to have the loan offset as a result.

[55] Mr. Rieder was not obligated to pay back the loan. The summary judgment motion brought by Tagg against Mr. Rieder is thus dismissed. Further, Mr. Rieder is granted summary judgment, dismissing Tagg's action.

(2) Mr. Rieder's Request for Summary Judgment on his Counterclaim

[56] A number of authorities support that a motion judge may grant summary judgment in a respondent's favour: *Kassburg* v. *Sun Life Assurance Company of Canada*, 2014 ONCA 922, at paras. 50-52; *Kings Lofts Toronto Ltd*. v. *Emmons*, 2014 ONCA 215, at paras. 14-15; *Landrie* v. *Congregation of the Most Holy Redeemer*, 2014 ONSC 4008, at paras. 50-51; *Hunter-Rutland Inc.* v. *Huntsville (Town)*, 2015 ONCA 353, at para. 5.

[57] Tagg argues, however, that none of the above authorities dealt with a situation where the respondent was seeking summary judgment on a counterclaim. Tagg submits that courts cannot grant summary judgment on a counterclaim in the absence of a cross-motion.

[58] I cannot agree. Each case must be decided based on the particular facts involved, keeping in mind rr. 1.04(1) and 1.04(1.1). In the present case, the evidence and argument relied upon by Mr. Rieder in response to the summary judgment motion brought by Tagg are identical to that relied upon in advancing his counterclaim. Mr. Rieder argues in both that 1) he was fired without cause; 2) he was thus entitled one months' notice; and 3) the notice extended to January 5, 2016 the date his bonus would become due.

[59] On Tagg's motion for summary judgment, I have concluded that the evidence allows me to determine that Mr. Rieder was fired without just cause, that he was entitled to one months' notice and that the notice extended to January 5, 2016 the date his bonus became due. Those findings also warrant granting Mr. Rieder summary judgment on his counterclaim. To hold that in these circumstances Mr. Rieder cannot argue for his own summary judgment would be inconsistent with the culture shift advocated in *Hryniak*. Mr. Rieder is entitled to summary judgment on his counterclaim as there is no genuine issue requiring a trial.

[60] While I have found that on the record before me summary judgment on the counterclaim is warranted, there is one other issue that should be addressed. In *Kings Loft*, at para. 14, the court found that the motions judge had not erred in granting summary judgment to the

respondent, in part because the applicant had failed to seek an adjournment when the respondent's position that it was seeking summary judgment became clear.

[61] In the present case, when it became apparent during the hearing that I was inclined to accept that Mr. Rieder could seek his own summary judgment, Tagg sought an adjournment so that it could adduce more evidence on the issue of whether Mr. Rieder was fired for just cause. I denied the request. In my view, however, the fact that Tagg unsuccessfully sought an adjournment does not militate against granting summary judgment on the counterclaim. I say this for three reasons.

[62] First, it was clear to Tagg that Mr. Rieder's defence to its summary judgment motion was that he had not been fired for just cause. Indeed, Tagg filed the reply affidavit of Mr. Dulong specifically to address this issue and much of the cross-examination of Mr. Rieder focused on the issue of whether he was fired for just cause. If there was any uncertainty on the part of Tagg as to Mr. Rieder's position, that should have been put to rest by the comments of counsel for Mr. Rieder during the cross-examination of Mr. Dulong. At that time, counsel made clear that his defence to Tagg's motion for summary judgment revolved around the issue of just cause. Tagg knew that the issue of just cause was central to Mr. Rieder's defence and that it had to put its best foot forward to counter that defence. If Tagg had additional information touching on this key issue, it should have been tendered.

[63] Second, when pressed in oral argument, Tagg could not articulate what additional evidence it would seek to tender if an adjournment were granted. While Tagg said that Mr. Dulong would provide another affidavit, it could not specify what would be in the affidavit. Nor was it made clear why, if Mr. Dulong had more information on this issue, it was not put into his reply affidavit which specifically dealt with the issue of just cause.

[64] Third, the case was brought under the simplified procedures. In my view, it would have been contrary to principles of proportionality to grant an adjournment to Tagg to allow it to try to find additional evidence to address an issue that had been clearly flagged as being the key to Mr. Rieder's defence.

Conclusion on Mr. Rieder's request for summary judgment on his counterclaim

[65] Mr. Rieder is entitled to summary judgment on his counterclaim. There is no genuine issue requiring a trial; the evidence filed on Tagg's motion for summary judgment allows me to make the necessary findings of fact and to apply the law to the facts. Summary judgment is a proportionate, more expeditious and less expensive means to achieve a just result.

[66] Mr. Rieder was fired without just cause. He is thus entitled to his bonus, which offsets the amount due under the promissory note. Mr. Rieder is also entitled to $14,583.33, which represents his base salary from December 5, 2015 to January 5, 2016. Again, while he would be entitled to more, he is only seeking one months' notice. Mr. Rieder is also entitled to 19 accrued and unused vacation days, totaling $12.788.33. Thus, Mr. Rieder is entitled to total damages for wrongful dismissal in the amount of $27,371.66, plus prejudgment interest.

Costs

[67] I encourage the parties to see if they can agree on costs. If the parties are unable to agree on costs, Mr. Rieder shall serve and file with my office written costs submissions within 15 days. Tagg shall serve and file with my office any responding costs submissions within 15 days thereafter. The written submissions shall not exceed three pages in length, excluding the Costs Outline.

Justice Heather McArthur