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COURT OF APPEAL FOR ONTARIO

WEILER, LASKIN AND GOUDGE JJ.A.

B E T W E E N:	)	
	)	
YVONNE MONTAGUE, ASQUITTE MONTAGUE, ANDREA MONTAGUE, YVETTE MONTAGUE, BRUCE MONTAGUE, JARVON SCHURTON, By his Litigation Guardian ANDREA MONTAGUE and TIANA SCHURTON, By her Litigation Guardian, ANDREA MONTAGUE	)	**Yvonne Montague in person**
	)	**David E. Leonard for the respondent**
Plaintiffs (Appellants/Respondents by Cross-Appeal)	)	
- and -	)	
BANK OF NOVA SCOTIA	)	
Defendant (Respondent/Appellant by Cross-Appeal)	)	
	)	**Heard: June 13, 2003**

On appeal from the judgment and cost of Justice Sandra Chapnik of the Superior Court of Justice dated October 19, 2001.

GOUDGE J.A.:

[1] The appellant Yvonne Montague was terminated from her employment with the respondent, Bank of Nova Scotia, on July 24, 1991. She sued for wrongful dismissal. Prior to trial, the Bank admitted that it did not have cause to terminate Mrs. Montague's employment. On October 19, 2001, Chapnik J. awarded the appellant damages

equivalent to sixteen months' notice together with pre-judgment interest and costs fixed at $5,000.

[2] Mrs. Montague appeals, arguing that the trial judge erred in awarding too little notice and in dismissing her claim for aggravated and punitive damages.

[3] The Bank cross-appeals, arguing that the notice period is too long and that the trial judge erred in increasing it after she had been advised of the Bank's offer to settle pursuant to Rule 49.

[4] For the reasons that follow, I would dismiss both the appeal and the cross-appeal.

THE FACTS

[5] Mrs. Montague was employed by the Bank as a data entry operator for approximately fifteen and one-half years, from January 26, 1976 to July 24, 1991. When she was terminated, she was earning an annual salary of $24,750.00, plus a shift bonus valued at $1,254.50 per year. Her employee benefits were valued at $2,600.45 per year.

[6] On August 13, 1990, Mrs. Montague slipped and fell at work, injuring her right shoulder. As a result she was away from work until January 2, 1991, when she returned to a modified work schedule, as recommended by her doctors.

[7] On February 18, 1991, Mrs. Montague again fell at work and injured her lower back. Again she was off work, this time until April 15, 1991, again returning to a modified work schedule. However, she was unable to sustain this schedule, and on April 30, 1991 she stopped working altogether.

[8] Mrs. Montague's claim for long-term disability was denied by the administrator of the Bank's long-term disability plan because it was inadequately supported by the available medical information. On July 8, 1991, the Bank wrote to Mrs. Montague to advise that because of this decision, she was expected to return to her regular work duties on her usual shift no later than July 22, 1991, failing which she would be treated as having abandoned her employment. The letter also indicated that she could appeal the rejection of her long-term disability claim if she provided further medical documentation. At that time, the Bank had a number of medical reports about Mrs. Montague, both from her own doctors and from doctors she had seen at the Bank's request. There was clearly some medical controversy over whether she was able to do the keypunch work required by her regular job.

[9] On the day she received the Bank's letter of July 8, 1991, Mrs. Montague delivered a written reply advising that she had made appointments with two other physicians to whom she had been referred by her family doctor. One appointment was scheduled for July 12, 1991 and the other, with an internal medicine specialist, for July 23, 1991. Mrs. Montague indicated that reports from these two doctors would be submitted to the Bank.

[10] Despite this, on July 24 1991, the day after her appointment with the specialist, the Bank wrote to Mrs. Montague terminating her employment. The letter did not acknowledge the fact of the two recent medical consultations. Nor did the Bank make any inquiries of Mrs. Montague about what she had learned or when the resulting medical reports might be expected. It simply fired her.

[11] Mrs. Montague commenced an action against the Bank, seeking damages for her injuries under the *Occupiers' Liability Act*, R.S.O. 1990, c. O.2 and damages for wrongful dismissal. She succeeded in the former claim, but the latter claim was dismissed as *res judicata* because of a complaint she had lodged with the Canadian Human Rights Commission.

[12] Mrs. Montague appealed, and this court set aside the dismissal of her wrongful dismissal claim. It then proceeded to the trial from which the present appeal is taken.

[13] At the conclusion of four days of evidence, the trial judge made the following findings.

[14] First, she concluded that this case engaged the considerations set out in *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701, thus increasing the period of reasonable notice to which Mrs. Montague was entitled on termination. The trial judge put it this way:

> In all of the circumstances, I have no difficulty whatsoever in finding that the bank acted precipitously and in bad faith; it did not treat the plaintiff fairly in the manner of her dismissal. Ms. Montague at no time took any action which suggested abandonment of her employment. On the contrary, she was in continuous contact with both the nurse, Dorothy Harris, and Linda Jackson, Personnel Manager, as confirmed by Rena Benson, about her disability, which she claimed needed to be accommodated. Her summary dismissal by letter in view of the pending medical visits to the knowledge of the defendant was unreasonable, and the position taken that she had

> abandoned her job was, in the circumstances, quite preposterous.

[15] Second, the trial judge found that it would not be reasonable to place a duty on the appellant to mitigate her damages during the notice period, given her medical condition at that time.

[16] Third, the trial judge concluded that the respondent's conduct towards the appellant did not constitute an independent actionable wrong and was not so egregious as to offend the court's sense of decency. Hence she dismissed the claims for both aggravated and punitive damages.

[17] Finally, the trial judge fixed the period of reasonable notice in these words:

> In the circumstances, I award her damages at the high end of the scale, in effect raising the notice period pursuant to the *Wallace* decision by finding the period of reasonable notice to be 12 months.
>
> That's my decision.

[18] Immediately thereafter this exchange occurred between counsel for the respondent and the trial judge:

> MR. LEONARD: Perhaps I might go first, Your Honour. There was an offer to settle. I have to bring it to your attention, and I apologize for this, Your Honour, I only brought one set of that. I'm happy to hand it up. You'll see that you've awarded twelve months. By my calculation that award would be an award of $28,604.95, and you'll see that offer is for $30,500, which is more than that, plus prejudgment interest, plus party and party costs to the date of that offer. So, my submission to you simply is that we've met the requirements of Rule 49. I'm completely in Your Honour's hands, obviously, and your discretion not to apply Rule 49 in these circumstances if you are so inclined.
>
> THE COURT: Did I say twelve months including the increase because of the *Wallace* decision?
>
> MR. LEONARD: You did. Is that not what you intended?

> THE COURT: No. I meant at least another month.

[19] Counsel then advised the trial judge that even with a thirteen month notice period, his offer triggered the effect of Rule 49, and he asked for partial indemnity costs from the date of the offer in the amount of $5,000.

[20] The trial judge concluded the day with this:

> THE COURT: The law is the law; it's not always the fairest thing, but in light of the offer, I don't think I really have a choice. I think I must order the thirteen months reasonable notice and $5,000 costs to the defendant. I would hope that in the long run they are not required.

[21] Four days later, the judgment not having been entered in the court records, the trial judge summoned the parties back to court. She opened the court as follows:

> THE COURT: You will recall, Mrs. Montague and Mr. Leonard, that at the end of my judgment on Friday, I awarded damages to Mrs. Montague at the high end of the notice scale which I deemed to be eight to twelve months and fixed the period of reasonable notice, the appropriate period at twelve months. I said that would in effect increase the notice period pursuant to the *Wallace* decision. Then in the course of discussion, I increased the entire notice period to thirteen months.
>
> On further reflection, I think that I should have dealt with the period of reasonable notice separately from the *Wallace* factors. And, in my view, the thirteen months is a bit low. To properly reflect my findings regarding the *Wallace* factor, that is, the improper manner of dismissal, the knowledge of its probable effect on the plaintiff, the withholding of the letters and the whole picture from Mr. Seymour, and the actual effect of the dismissal on the plaintiff, I should have added instead of one month four months to the period of reasonable notice. The twelve month period of reasonable notice was decided according to the factors listed in the *Bardal vs. Global and Mail* case, taking into account the plaintiff's age at the time, her qualifications, her disability, and so on. So that the appropriate notice period

> should be twelve months plus four months or sixteen months in all.
>
> Now, I know this will change the cost factor, as well.

[22] The trial judge then invited submissions on costs, given the change in the period of reasonable notice. Counsel for the respondent conceded that he was no longer entitled to the benefit of Rule 49 but urged that there should be no costs against the Bank since Mrs. Montague had represented herself from shortly before the trial. The appellant asked for costs in the amount of $5,000 because that was what counsel for the Bank had sought four days earlier, and because she had in fact paid a lawyer that amount to do the work leading up to the trial.

[23] The trial judge concluded the proceedings by awarding the appellant costs on a party and party basis throughout, fixed at $5,000.

THE APPEAL

[24] The appellant's primary submission is that the trial judge erred in concluding that the period of reasonable notice required in this case was limited to sixteen months. As Laskin J.A. said in *Minott v. O'Shanter Development Co.* (1999), 42 O.R. (3d) 321 (C.A.), this submission must be judged against the standard of appellate review of wrongful dismissal awards. He described it this way at p. 343-344:

> Determining the period of reasonable notice is an art not a science. In each case trial judges must weigh and balance a catalogue of relevant factors. No two cases are identical; and, ordinarily, there is no one "right" figure for reasonable notice. Instead, most cases yield a range of reasonableness. Therefore, a trial judge's determination of the period of reasonable notice is entitled to deference from an appellate court. An appeal court is not justified in interfering unless the figure arrived at by the trial judge is outside an acceptable range or unless, in arriving at the figure, the trial judge erred in principle or made an unreasonable finding of fact. … If the trial judge erred in principle, an appellate court may substitute its own figure. But it should do so sparingly if the trial judge's award is within an acceptable range despite the error in principle.

[25] The trial judge here did not err in principle in fixing the period of reasonable notice. She was alive to and considered the relevant factors as set out in cases like *Bardal v. The Globe and Mail Ltd.* (1960), 24 D.L.R. (2d) 140 (Ont. H.C.). She also discussed and applied the principle set out in *Wallace*. Nor can it be said that the sixteen months is below an acceptable range of notice and must therefore be increased. On the contrary, if anything, this would be on the generous side in these circumstances.

[26] Thus the appellant's first argument must fail.

[27] Second, the appellant argues that the trial judge erred in dismissing her claim for aggravated and punitive damages. I do not agree. There was ample evidence to support the conclusion of the trial judge that there was no malice or vindictiveness by the Bank or its officials here. In addition, the evidence does not sustain the conclusion that the Bank's conduct constitutes a separately actionable wrong. Hence punitive damages were properly denied. Moreover, the absence of any separately actionable wrong puts an end to any entitlement to aggravated damages.

[28] In the result the appellant's second argument must also fail and the appeal must therefore be dismissed.

THE CROSS-APPEAL

[29] The respondent's first submission is that the trial judge erred in extending the period of reasonable notice using the considerations described in *Wallace*.

[30] I disagree. The trial judge focused on the timing of the termination and the characterization made by the respondent of the appellant's failure to report to work on July 22, 2001. There was ample evidence for her to conclude that the respondent fired the appellant precipitously, knowing of the pending medical visits but making no effort to find out what information they had yielded or when the resulting reports might be available. Moreover, the respondent treated the appellant as having abandoned her position, knowing that she had done nothing to suggest that. It was reasonable for the trial judge to assess this conduct as being unreasonable and in bad faith. As a result, *Wallace* was properly applied.

[31] Where mitigation or deduction for other benefits is not appropriate, it is no doubt preferable to take a holistic approach to fixing reasonable notice, and to do so on the basis of all relevant factors, including those referred to in *Wallace*, rather than to make a discrete addition to the notice period to reflect the manner of dismissal. See *Noseworthy*

v. Riverside Pontiac Buick Ltd. (1998), 168 D.L.R. (4th 629 (Ont. C.A.). Nonetheless, the end result of sixteen months does not constitute error in this case. It is within a range of reasonableness given all the circumstances. The cross-appellant's first argument must therefore fail.

[32] The Bank's second argument on its cross-appeal is that the trial judge erred in changing her judgment (namely her determination of the reasonable notice period) on two occasions after having reviewed the Bank's offer to settle pursuant to Rule 49.

[33] The Bank argues that Rule 49.06(2) and (3) prohibits the trial judge from doing this. Rule 49.06 reads as follows:

> DISCLOSURE OF OFFER TO COURT
>
> (1) No statement of the fact that an offer to settle has been made shall be contained in any pleading.
>
> (2) Where an offer to settle is not accepted, no communication respecting the offer shall be made to the court at the hearing of the proceeding until all questions of liability and the relief to be granted, other than costs, have been determined.
>
> (3) An offer to settle shall not be filed until all questions of liability and the relief to be granted in the proceeding, other than costs, have been determined.

[34] I cannot agree that the rule prohibits the trial judge from changing her order. There can be no doubt that until a judgment is formally entered in the court record, the judge has a very broad discretion to change it. In *Holmes Foundry Ltd. v. Village of Point Edward*; *Caposite Insulations Ltd. v. Village of Point Edward* (1963), 2 O.R. 404 (C.A.), Laidlaw J.A. put it this way at 407:

> It is well settled in law that an order can always be withdrawn, altered or modified by a Judge either on his own initiative or on the application of a party until such time as the order has been drawn up, passed and entered. I refer to *Re Harrison's Share under a Settlement, Harrison v. Harrison*, [1955] 1 Ch. 260 at p. 275, [1955] 1 All E.R. 185.

[35] Rule 49.06 is not a prohibition directed at the court. Rather, the rule targets those who might communicate information about an unaccepted offer to the court before liability and consequential relief are determined. It prevents communications to the judge designed to improperly affect the course of justice.

[36] The terms of the rule do not purport to limit the broad judicial power to alter a judgment beforeit is entered. Very clear language would be required to curtail a judicial discretion having such deep historical roots. Nor is there any reason to stretch the rule to achieve this result, since this judicial discretion allows a judge to change his or her judgment precisely to better serve the ends of justice. Rule 49.06 does not prohibit what the trial judge did here.

[37] The Bank also argues that the changes made by the trial judge constitute reversible error because the only reason she made the changes was to avoid the cost consequences of Rule 49 for Mrs. Montague.

[38] In my view the record does not sustain the conclusion that the changes were made to avoid the cost consequences of Rule 49. The trial judge candidly acknowledged that her first decision (twelve months) was not what she intended and that she had meant at least thirteen months. Then, when she made the second change four days later (to sixteen months), she explained why in her view the *Wallace* factors warranted an additional four months, not just an additional one month. Had the trial judge simply wished to alleviate the consequences of Rule 49 for Mrs. Montague, she could have done so by using the residual discretion given to her by the rule itself. There was no need to change her judgment. The timing of events in this case was clearly unfortunate, as the trial judge recognized. However, this is no reason not to take the trial judge's conclusions at face value.

[39] Even if I had come to the opposite conclusion, I would not have interfered with the trial judge's final judgment. I say this because even if the trial judge had erred in principle in the exercise of her discretion, her final assessment that sixteen months constitutes reasonable notice in this case is, in my view, a reasonable conclusion. Hence no appellate intervention is warranted. See *Minott, supra* at 24. Given the factors relevant to the assessment of reasonable notice, including the manner of the appellant's termination, sixteen months, although perhaps generous, is within a range of reasonableness in the circumstances and therefore it is a conclusion entitled to deference in this court.

[40] I conclude with this. While this is not such a case, I have no doubt that in some cases the very wide discretion a judge has to change his or her judgment before it is entered could be abused if it were exercised for an improper purpose. Any change to a judgment once given, no matter how soundly based, runs the risk of evoking suspicions

of abuse on the part of those adversely affected. It is at the least disquieting, and to that extent can put a cloud over the administration of justice. A judge exercising this discretion bears a significant onus to explain the change. Giving clear reasons for decision is always a profoundly important part of judging. See *R. v. Sheppard,* [2002] 1 S.C.R. 869. It is never more important than in this circumstance.

[41] The appeal and cross-appeal must both be dismissed. In the circumstances there should be no costs to either party.

Signed: **"S.T. Goudge J.A."**

"I agree K.M. Weiler J.A."

"I agree J.I. Laskin J.A."

Released: "KMW" JANUARY 7, 2004