

COURT OF APPEAL FOR ONTARIO

LABROSSE, ROSENBERG AND GILLESE J.J.A.

B E T W E E N :)
)
ALCATEL CANADA INC.) **K. Scott McLean and Tracy Darling**
) **for the appellant**
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 Appellant)
)
- and -)
)
MARY EGAN) **Janice Payne and Ted Murphy**
) **for the respondent**
)
 Respondent)
)
) **Heard: November 17, 2005**

On appeal from the judgment of Justice Gerald R. Morin of the Superior Court of Justice dated July 13, 2004.

LABROSSE J.A.:

[1] This case involves an appeal and a cross-appeal from the judgment of Morin J. arising out of the termination of Mary Egan’s employment by Alcatel Canada Inc. (“Alcatel”).

[2] Alcatel appeals the trial judge’s award of a nine-month notice period and damages of \$83,967.45 for wrongful dismissal, based on twenty months of employment. Alcatel also appeals the award of the costs of the action fixed by the trial judge at \$116,848.37 for fees, disbursements and GST. Ms. Egan cross-appeals the dismissal of her claim for lost disability benefits in addition to the damages awarded for wrongful dismissal.

The facts

[3] On October 16, 2000, Ms Egan commenced her employment with Alcatel after almost twenty years of continuous employment with the Bell Canada family of companies. She was forty years of age and married, with a young child. When she left

Bell Canada, she was earning \$85,000 annually plus benefits. She asked for and received a base annual salary of \$125,000 from Alcatel, which she felt she needed to make up for her pension loss at Bell Canada. She also received a \$5,000 signing bonus. Ms Egan left a senior marketing position at Bell Canada to take a director-level and senior management position at Alcatel.

[4] In February 2001, some four months after commencing her new employment, her base salary was increased to \$135,000.

[5] On July 3, 2002, after a period of employment of less than twenty-one months, without prior notice and without cause, Ms. Egan was terminated by Alcatel as part of a mass termination. She was paid approximately twelve weeks' salary for statutory notice and severance in accordance with the requirements of the *Employment Standards Act, 2000*, S.O. 2000, c. 41.

The appeal

i) The notice period

[6] In detailed reasons, the trial judge addressed the length of Ms. Egan's period of reasonable notice. Of importance on this issue is the fact that two former colleagues and friends of Ms. Egan at Bell Canada, Ms. Stott and Ms. Espinosa, had transferred to Alcatel prior to Ms. Egan. In determining the notice period the trial judge examined their role in the decision of Ms. Egan to transfer to Alcatel.

[7] The trial judge made the following findings:

- When Ms. Egan decided to resign from Bell Canada, her future prospects with Bell Canada were very good and her future was relatively secure;
- She had no particular interest in leaving Bell Canada;
- She was encouraged to give serious consideration to seeking employment with Alcatel by Alcatel's employees, Ms. Stott and Ms. Espinosa;
- Both Ms. Stott and Ms. Espinosa submitted Ms. Egan's C.V. (although she had originally declined to give it to Ms. Espinosa) and recommended her to James Guillet, Assistant Vice-President-Product Marketing of Alcatel;
- Mr. Guillet spoke in positive terms of Alcatel during the negotiations;
- On all the evidence, it could reasonably be inferred that both sides anticipated and expected a lengthy term of employment;
- Ms Egan had been encouraged by Alcatel and its employees to leave longstanding secure employment of some twenty years to hire on with Alcatel at a very significant increase in salary, plus a bonus and stock options;

- Unbeknownst to Ms. Egan at the time of hiring, Ms. Stott and Ms. Espinosa shared an \$8,000 bonus paid by Alcatel for their efforts upon the hiring of Ms. Egan.

[8] As to the applicable law, the trial judge instructed himself as follows, at paras. 23-
24:

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.

In *Wallace v. United Grain Growers Ltd.* (1997), 152 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 para. 83 of *Wallace*, Iacobucci J. said the following:

One such factor that has often been considered is whether the dismissed employee has 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., *Employment Law in Canada* (2nd ed. 1993) at p. 623]

And at para. 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 note, however, that not all inducements carry equal weight when determining the appropriate period of notice. 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.

[9] The trial judge went on to conclude that Ms. Egan had been “encouraged” by Alcatel and its employees to leave Bell Canada and hire on with Alcatel. He then went on to state, at para. 28:

In any event, while the defendant and its employees cannot be criticized for encouraging the plaintiff to leave her twenty year secure employment 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.

[10] In this last paragraph, the trial judge used three different words - "encouraging", "inducements" and "enticed" - in relation to the actions of Alcatel. The use of these different words can only lead and did lead to confusion. Counsel for Ms. Egan used all three words in one paragraph of her factum as if they were interchangeable. On the other hand, counsel for Alcatel submitted that by failing "to draw the necessary distinction" between encouragement and inducement, the trial judge's reasons invite a finding of inducement in virtually any new hire, thereby suggesting that encouragement is somewhat less than inducement. I cannot agree with either position.

[11] Clearly, the trial judge's use of "somehow enticed away, in the pejorative sense" was intended to represent some negative or sinister connotation that did not apply to this case. However, it is equally clear that he used encouragement as a synonym for inducement. He used "encouraging" in the first sentence and he properly directed himself in the second by specifying that he is mindful of the caution of Iacobucci J. in *Wallace* that not all "inducements" will carry equal weight. And later, he wrote that nothing in the manner in which Ms. Egan's employment was terminated would justify increasing the reasonable notice period in accordance with the *other* "*Wallace*" factors. In my view, the use of the different words referred to is not helpful and should be avoided. The question is still whether Alcatel induced Ms. Egan to leave her employment with Bell.

[12] As reviewed earlier, the trial judge found that Ms. Egan left twenty years of secure employment with Bell Canada; she was encouraged to join Alcatel by Ms. Stott and Ms. Espinosa; both sides anticipated a lengthy term of employment; and she hired on at a substantial increase in salary. Caution must be exercised to avoid a conclusion of inducement in virtually any new hire and while this case may be close to the line, it reaches a level beyond that inherent in every hiring process because the persuasion came from two former colleagues of Ms. Egan at Bell Canada who were long-time friends and who, unknown to Ms. Egan, knew that if they succeeded in getting her to leave Bell Canada, they would receive a substantial bonus. This is far different than a prospective employee being recruited by a head-hunter, who is not *a former colleague and long-time friend*, and who is known to the employee to be *getting paid* for his or her efforts.

[13] The trial judge concluded that the actions of the employees of Alcatel should be considered, along with all the other factors, in determining what would have been reasonable notice of termination in this case. While fully alive to the short period of employment, he determined that nine months was a reasonable period of notice.

[14] It is worthwhile to repeat what was said in *Wallace* at para. 83:

... 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" [Emphasis added.]

It was open to the trial judge to find that the statements made by Alcatel fell within this concept of inducement. Ms. Egan was given a substantial increase in salary, a signing bonus and stock options. She left a secure position with the Bell family of companies where she held a senior marketing position to become "Director of Global Marketing Programs, Broadband Networking Division". Ms. Stott told her that Alcatel was a large company that was entering into new global markets with much larger sales and that a large company like Alcatel provided security. Mr. Guillet told Ms. Egan about the "tremendous opportunities facing the company". He told her that it was an extremely large organization and "talked about the security that it offered employees".

[15] In addition, Iacobucci J. in para. 85 noted that "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."

[16] While the period of notice may well be at the high end of the range, on the facts of this case and being mindful of the deference to be accorded to a trial judge on this issue, I have not been persuaded that the trial judge made an overriding and palpable error either with respect to the findings of fact or in assigning the weight to these findings in the determination of the notice period.

[17] The trial judge also found that Ms. Egan had properly mitigated her damages. This finding is not attacked on the appeal.

ii) The costs issue

[18] Alcatel appeals the amount of the partial indemnity costs awarded by the trial judge at \$116,848.37.

[19] On this issue, the trial judge also provided detailed reasons. He explicitly averted to and considered the factors enumerated in Rule 57.01 of the *Rules of Civil Procedure*. He concluded that this was not a special case that justified an award of costs on a substantial indemnity basis. However, he noted that this had been a hard fought action at

every stage of the proceedings and with respect to all the issues raised in the trial. He fixed the costs at the amount stated above.

[20] The trial judge's familiarity with the issues and the process of the trial requires that great deference be accorded to the fixing of costs by a trial judge. Although the award may appear high, I have not been persuaded that the trial judge made any error of principle that would justify this Court's interference. He accepted the particulars of the bill of costs and there is no basis to second-guess successful counsel.

The cross-appeal

[21] In this action, Ms. Egan also claimed damages for lost disability insurance entitlements as she was covered for short and long-term benefit policies ("STD" and "LTD") as part of her compensation package. Each policy sets out a formula for the calculation of the benefits payable, representing approximately sixty per cent of regular salary.

[22] The trial judge found that Ms. Egan became disabled within the meaning of the disability policies as of October 1, 2002, having been diagnosed with a major depressive disorder on November 27, 2002. She remained 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 employment. This finding is amply supported by the evidence and is not attacked on this appeal.

[23] According to the trial judge, had Alcatel given Ms. Egan working notice of nine months, the disability coverage would 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. However, he declined to award her any damages for disability benefits because, in his view, she was left "whole" by his award of damages representing her full salary for the entire reasonable notice period of nine months. Ms. Egan appeals on the basis that the disability benefits should have been awarded in addition to damages for wrongful dismissal. I do not agree.

[24] The following time line is helpful:

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July 3/02	Oct. 1/02	Jan. 28/03	April 3/03	October 1/03
Dismissal	Disability begins (STD)	STD ends LTD begins	9 months notice ends	Disability ends

[25] In her dismissal letter dated July 3, 2002, Ms. Egan was advised that all her benefits, including STD and LTD, would be cancelled effective September 25, 2002, the date of the expiry of the statutory notice period. In February 2003, Ms. Egan applied to

the insurer for STD and LTD benefits. Not surprisingly, her application was rejected by the insurer on the basis that Ms. Egan's disability coverage was no longer in force when she became disabled. She was denied disability benefits because Alcatel had cancelled her coverage prior to the expiration of her period of reasonable notice.

[26] The policies for both STD and LTD benefits provided that Alcatel and not the insurer "determines" when coverage is terminated. The trial judge held that given that Ms. Egan's period of disability originated within the notice period awarded and that she was denied disability benefits during this time because Alcatel wrongfully discontinued her coverage prior to the onset of disability, Alcatel is liable for any resulting loss. I agree with the trial judge. Where an employee would otherwise have qualified for disability benefits during the reasonable notice period, but the application is denied on the basis that coverage was wrongfully discontinued by the employer, the employer must be liable for the value of the disability benefits that would otherwise have been payable. Ms. Egan was entitled to the continuation of all forms of compensation, including employee benefits, during the reasonable notice period.

[27] The trial judge found that it was not part of the contract of employment and that it could not be inferred that the parties had agreed that Ms. Egan would be entitled to receive both damages for wrongful dismissal and disability benefits. He noted that an employee, upon going on either STD or LTD benefits, is no longer entitled to his or her salary for the period of disability. Relying on the decision in *Sylvester v. British Columbia* (1997), 146 D.L.R. (4th) 207 (S.C.C.), he recognized the requirement under the law that a wrongfully dismissed employee must be kept "whole" during the entire reasonable notice period. He concluded that an award of damages which sees Ms. Egan 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, left Ms. Egan "whole" in the face of her dismissal.

[28] The disability benefits were clearly meant to be a substitute for salary. The trial judge was correct in deciding that to allow Ms. Egan her full salary and disability benefits for the nine months notice period would amount to double recovery.

[29] However, in my view, the trial judge erred in awarding Ms. Egan her full salary for the entire notice period for three reasons. The award (1) gives Ms. Egan full salary for the last six months of the notice period (Oct. 1 2002 to April 3, 2003) during which time she was under a disability and would not have been able to work; (2) gives Ms. Egan nothing from April 3, 2003 to October 1, 2003, during which time her disability continued; and (3) does not leave Ms. Egan "whole" throughout the entire reasonable notice period. She is overpaid salary and is underpaid disability benefits.

[30] As stated above, the trial judge found that Ms. Egan became disabled on October 1, 2002. Ms. Egan relies on this finding. He also found that Ms. Egan would have received disability benefits from October 1, 2002. Counsel for Alcatel questions this finding because under the policy, STD benefits were not payable for any period

preceding the date the employee was first treated by a legally licensed doctor of medicine which did not occur for Ms. Egan until November 27, 2002.

[31] In my view, it is appropriate to use the date of onset of her condition as found by the trial judge. At the time that she was found to be disabled because she was suffering from a major depressive disorder, Ms. Egan was not working and delayed seeing a doctor. Had she been working, her condition would likely have been noticeable and she would likely have seen a doctor at an earlier date, either on her own or at the request of her employer. The date is also to the advantage of Alcatel, as otherwise, Ms. Egan would be entitled to full salary to November 27, 2002. I would not disturb the finding of the trial judge.

[32] The trial judge considered that he might be wrong in his assessment of Ms. Egan's damages. Accordingly, he provided all the necessary numbers to assess her damages as I propose to do.

July 3, 2002 – October 1, 2002

[33] Ms. Egan should have been awarded her full salary from July 3, 2002, until October 1, 2002, a period of thirteen weeks during which she would have been working at Alcatel had she received working notice. Accepting the trial judge's figure of a weekly salary of \$2,596.15, Ms. Egan is entitled to \$33,749.95 for this period.

October 1, 2002 – January 28, 2003

[34] These dates represent the seventeen week period of short term disability benefits, which the trial judge found would entitle Ms. Egan to \$29,427 before gross up. As STD and LTD benefits are payable on a non-taxable basis, but damages awards for wrongful dismissal are taxable, a gross up should apply in recognition of the tax implication. See *Dowling v. Ontario (Workplace Safety and Insurance Board)* (2004), 246 D.L.R. (4th) 65 (Ont. C.A.) at para. 78. Based on the evidence before him, the trial judge used a gross up rate of 86.6%, which would increase the award of STD to \$54,910.78.

January 28, 2003 – October 1, 2003

[35] These dates represent the remaining eight month period of Ms. Egan's disability, for which she is entitled to LTD benefits. It is important to note that she is entitled to recover damages for the entire twelve months, regardless of when the notice period ended, as the trial judge found, correctly in my view, that had Alcatel given Ms. Egan 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 until October 1, 2003, when the period of disability ended. The trial judge found that she

would be entitled to LTD benefits of \$5,787.50 per month. The total entitlement for this period is \$46,300. After gross up, the amount increases to \$86,395.80.

Additional amounts

[36] The trial judge awarded Ms. Egan the following additional amounts: \$10,125.00 for lost benefits (ten percent of salary) during the nine month notice period; \$6,297.00 for lost group RSP/DPSP employer contributions; and \$564.68 for job search expenses. The trial judge noted that upon going on either STD or LTD benefits, the employee is immediately taken off Alcatel's payroll. Accordingly, I would also reduce the damage awards for lost benefits and lost group RSP/DPSP employer contributions, restricting them to the period for which Ms. Egan is entitled to her salary, from July 3, 2002, until October 1, 2002, only. The additional amounts are therefore as follows: \$3,375.00 for lost benefits; \$2,099.00 for three months' lost group RSP/DPSP employer contributions including gross up (\$1,125.00 before gross up); and \$564.68 for job search expenses.

Deductions

[37] The trial judge deducted two amounts from Ms. Egan's total entitlement: \$31,153.85, representing the sum already paid to Ms. Egan by Alcatel upon her dismissal; and \$3,115.38, representing her benefit continuation during the twelve week statutory notice period.

Total net entitlement

(a) Before gross up		(b) After gross up	
Salary	\$33,749.95	Salary	\$33,749.95
STD	\$29,427.00	STD	\$54,910.78
LTD	\$46,300.00	LTD	\$86,395.80
Lost benefits	\$3,375.00	Lost benefits	\$3,375.00
RSP/DPSP	\$1,125.00	RSP/DPSP	\$2,099.00
Job search	\$564.68	Job search	\$564.68
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Total	\$114,541.63	Total	\$181,095.21
Less salary paid	\$31,153.85	Less salary paid	\$31,153.85
benefits	\$3,115.38	benefits	\$3,115.38
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	\$34,269.23		\$34,269.23
Total	\$80,272.40	Total	\$146,825.98

[38] Ms. Egan's total net entitlement would therefore be \$80,272.40 before gross up. After gross up (86.6% applied to STD (\$54,940.78), LTD (\$86,395.80) and RSP/DPSP (\$2,099.00)), the amount increases to \$146,825.98.

[39] In my view, without altering the trial judge's findings of fact, this is the correct result that leaves Ms. Egan "whole". By withdrawing the award of full salary for the six month period during which her disability and reasonable notice overlap, but awarding her disability benefits for twelve months, the damage award is increased to reflect the tax implications of a damage award as compared to STD, LTD and RSP/DPSP benefits. I note that the result would not change if I had concluded that the trial judge was in error in determining the period of reasonable notice. If the reasonable notice period were shortened to six months such that it ended on January 3, 2003, Ms. Egan's disability would still have commenced during the notice period. Provided the reasonable notice period ended sometime after October 1, 2002, in my view Ms. Egan would be entitled to twelve months of disability benefits regardless of exactly when on the time line the notice period expired.

Disposition

[40] In the result, I would dismiss the appeal and allow the cross-appeal in terms of these reasons.

Costs

[41] On the basis of my calculations, Ms. Egan's success in upholding the period of notice is of little consequence. On the issue of disability benefits, Ms. Egan has succeeded. Both sides have submitted bills of costs of approximately \$37,000. In light of the results of the appeal, I would fix the costs payable to Ms. Egan at \$25,000.

[42] The parties are to be allowed fifteen days to bring to my attention any error in my calculations.

RELEASED: January 10, 2006

**Signed "J.M. Labrosse J.A."
"I agree: M. Rosenberg J.A."
"I agree: E.E. Gillese J.A."**