SUPERIOR COURT OF JUSTICE
Judges' Administration
Court House
361 University Avenue, Room 170
TORONTO, ONTARIO M5G 1T3
Tel: (416-327-5284 Fax: (416) 327-5417

FAX COVER SHEET

Date: November 10, 2011

To: Yan David Payne/Andrew D. Pelletier	Fax No. 416 447 7529
Gary Luftspring	416 364 1697

From: Cheryl Alphonso, Judicial Assistant to The Honourable Mister Justice Michael Penny

No. of Pages (*incl. cover page*): 36

Message: Ranvir Rai v. Finecraft Fine Jewellery
Court File No: CV-10-412224

Endorsement attached.

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RANVIR RAI
PLAINTIFFS

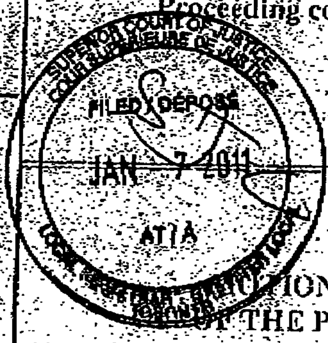
- and -

FINECRAFT FINE JEWELLERY
DEFENDANT

Court File No. CV-10-412224

Ontario
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto



[...]TION RECORD
[...] THE PLAINTIFFS

PAYNE LAW PROFESSIONAL CORPORATION
Barristers & Solicitors
Ontario Federation of Labour Building
6th Fl. - 15 Gervais Drive, Suite 605A
Toronto, Ontario M3C 1Y8

Yan David Payne

LSUC # 48587N
Tel: (416) 447-4529
Fax: (416) 447-7529

Lawyers for the Plaintiff

November 9, 2011
Y.D. Payne and A.D. Pallelan for the πs
G. Luftspring for the Δ

This is a motion for summary judgment under the simplified rules [illegible] in the context of an action for wrongful dismissal. In the prayer for relief, the πs ~~[illegible]~~ each seek damages of $100,000 for payment in lieu of reasonable notice (breach of contract) and damages for negligence, lost earnings, lost benefits, lost opportunity for advancement, special damages for out of pocket expenses, mental distress and punitive, aggravated and bad faith damages up to an additional 100,000. The Δ does not allege cause.

The ~~essential~~ The Notice ~~Period~~, undisputed facts are as follows: (9)

Ms. Rai

Ms. Rai was about to turn 51 when she was dismissed on August 3, 2010. She had been employed by Finecraft since October 9, 1984 (about 26 years). Her salary was $40,023.00 per year at the time of termination. She was paid severance of about 34 weeks (8 months). No cause is alleged.

Mr. Mitrovic

Mr. Mitrovic was 54 at the time of his dismissal on August 19, 2010. He had been employed by Finecraft since February 27, 1986 (about 24.5 years). His annually salary at the time of his dismissal was $46,655.65. He was paid severance of about 7 1/2 months. No cause is alleged.

Both the Πs worked on the shop floor and, for the purposes of this motion, had some, albeit quite limited, supervisory

Local jewellery manufacturing is essentially anachronistic. Finecraft is no longer in that business and other jewellery manufacturers have moved offshore to seek lower labour costs.

As noted, the one possible area of dispute is whether Mr. Gozlan told the TTs in January 2010 that Finecraft's manufacturing was closing and that there would soon be no work for them. Mr. Luftspring argues that advance warning that employment is unlikely to continue, while not constituting notice of termination, is a factor that can be taken into consideration in determining notice, citing <u>Ahmad</u> v. <u>Proctor & Gamble Inc.</u> 1991 Carswell Ont 909 (Ont. C.A.).

That was a case, however, in which the trial judge had found that he could not ignore the long period of forewarning during which the TT could and should seek out other employment

NOV-10-2011 15:54 JUDGES ADMIN RM 170 416 327 5417 P.012/042

The Court of Appeal accepted this approach, noting, however, that "the employer took every conceivable step to afford the [π] ample time to seek alternative employment prior to the date of termination, including providing professional guidance for him at the [company's] expense, and affording him the opportunity to seek employment by absenting himself from his duties."

In my view, the Δs evidence does not come close to achieving this level of concession to the πs while they were still employed. All Mr. Gozlan says is that the πs "were aware" since January 2010 that manufacturing was closing and that "there soon would be no work for them." Mr. Gozlan does not even say <u>how</u> the πs were aware and certainly makes no mention of any indulgences granted to them, or assistance offered to them in aid of finding new employment

Even if I accepted Mr. Gozlan's evidence (12)

Therefore, for the purposes of this motion (the πs deny they were "aware" manufacturing was closing and that they would soon have no jobs) I do not think his evidence provides any basis to limit, or reduce, the notice period on the authority of *Ahmad*. Accordingly, I do not think the Δ has shown there is a genuine issue requiring a trial on this issue. I should also add that it is, in my view, a minor factor in any event and would not, even if I had accepted this evidence, have had any material effect on my assessment of the period of notice to which the πs were otherwise entitled.

On this basis, I agree with Molloy J. in *Bullen* v. *Proctor & Redfern Ltd.*, [1996] O.J. No. 340 when she said

That while not every wrongful dismissal action is within the ambit of Rule 20, where there is no allegation of cause for dismissal and where the parties are in essential agreement on the underlying facts pertaining to the relevant factors to be taken into account in determining the appropriate notice period, summary judgment may well be appropriate.

In my view, this is one of those cases. No cause is alleged. There are no genuine issues of material fact affecting the relevant factors to be taken into account in determining the length of reasonable notice which require a trial. Accordingly I will proceed to analyze those factors in accordance with the relevant law in order to determine the reasonable notice to which these plaintiffs were entitled upon their summary dismissal.

NOV-10-2011 15:54 JUDGES ADMIN RM 170 416 327 5417 P.015/042

As McRuer C.J.H.C. observed in *Bardal*, there is no "catalogue" for what constitutes reasonable notice. Each case must turn on its own facts. That said, there is a public interest in the principle of like cases being decided alike. As a result, I have considered the factors applicable specifically to this case and attempted to place them in the context of similar cases as well.

Obviously, the weight to be given to each factor must vary according to the circumstances. A certain amount of discretion must be exercised in allocating that weight.

Character of employment deserves special attention in this case. Character of employment is generally said to mean the "responsibility" associated with the employee's function

or the person's "position in the heirarchy of" the business. It was the traditional view that placement of an employee in the lower end of the heirarchy would tend to reduce the notice period whereas placement in the upper regions of the heirarchy would tend to increase it. This was, I suppose, predicated on the assumption that lower level jobs were more plentiful and easier to find whereas higher level jobs were more rare and thus harder to find.

The Court of Appeal, however, appears to have raised serious doubts about the validity of that assumption and the appropriateness of reliance on this factor. In Di Tomaso v. Crown Metal Packaging Canada LP 2011 CarswellOnt 5556, the employer argued that the lower level functions of the dismissed

employee should minimize the reasonable notice to which he was entitled.

MacPherson J.A. said, for the Court,

I do not agree with that approach. Indeed, there is recent jurisprudence suggesting that, if anything, it is today a factor of declining relative importance [citations omitted]... This is particularly so if an employer attempts to use character of employment to say that low level unskilled employees deserve less notice because they have an easier time finding alternate employment. The empirical validity of that proposition cannot simply be taken for granted in today's world.

Accordingly, while character of employment is still a factor, it is of perhaps limited assistance and, in particular, ought not to be used for the inference that the Πs will have an easier time finding suitable employment.

NOV-10-2011 15:55 JUDGES ADMIN RM 170 416 327 5417 P.018/042

The facts, *prima facie*, of this very case tend to bear that out.

Length of Service

Ms. Rai had performed 26 years of faithful service at the time of her dismissal. Mr. Mitrovic had performed 24.5 years of faithful service. Generally, greater length of service is a factor that tends to increase the length of notice. Both Ms. Rai and Mr. Mitrovic were employees of long standing.

Character of Employment

This is a factor, because the Ps were shop floor employees with, for the purposes of this motion, limited supervisory responsibilities. This could have been a factor that would tend to shorten the notice period.

However, for the reasons outlined by

The Court of Appeal in Di Tomaso and having regard to the Δs own evidence that jewellery manufacturing in Ontario is "anachronistic" because all Fincraft's competitors have moved offshore in search of lower labour rates, I do not think this factor should be afforded much weight.

Age

Employees at upper age levels are generally entitled to longer periods of notice than younger workers. Ms. Rai was 51. Mr. Mitrovic was 54. While clearly still employable at this age, the Πs were in the senior end of the spectrum. As a rough indication if the working life of an unskilled worker spanned 45 years (from age 20 to 65), Ms. Rai's age, at 51, puts her ~~about~~ at 68% along that spectrum and Mr Mitrovic at 54 about 75% along the

spectrum.

Availability of Other Employment

As noted, the Δs evidence is that there is, effectively, no jewellery manufacturing industry in Ontario any more. While this, of course, is not the end of the story, it is a relevant factor. The Δ lead no other evidence of the availability of alternative employment, other than the unhelpful, self serving bromides that there was work out there and the plaintiffs could qualify for it. I do not think this evidence is of any assistance since it really represents Mr. Gozlan's opinion, not facts or real evidence.

The Precedents

Both sides referred to a number of prior cases which are [illegible]

comparable. They are, predictably all over the map, although I note that ~~[struck out]~~ (15) the Δs precedents come from the prior millenium (1990s) whereas most of the πs precedents come from the current millenium.

Taking into account the Bardal factors, placing greater weight on the age and length of service of the πs and attempting to invoke the principle, to the extent possible, of deciding like cases alike, the period of reasonable notice appropriate for these employees falls in the range of 20-24 months. Since Ms. Rai was a little younger but worked for Finecraft longer, and since Mr. Mitrovic is a little older but did not work there quite

[illegible]

NOV-10-2011 15:55 JUDGES ADMIN RM 170 416 327 5417 P.022/042

between them and the period of notice.
There is no perfect way to pinpoint the notice exactly, so I conclude, and find that the πs were entitled to a period of 22 months notice.

Ms Rai already received compensation in lieu of notice of 8 months. Accordingly Ms. Rai is, subject to the final issue, mitigation, entitled to additional compensation in lieu of notice of 14 months or (40,023 ÷ 12) × 14 = $46,693.50.

Mr. Mitrovic already received 7.5 months worth of compensation in lieu of notice. Accordingly, Mr. Mitrovic is entitled, again subject to the mitigation issue, to an additional 14.5 months of compensation in lieu of notice or (46,655.65 ÷ 12) × 14.5 = $56,375.57.

NOV-10-2011 15:55 JUDGES ADMIN RM 170 416 327 5417 P.023/042