

CANADA / JUDGMENT

Nicolas Jr. v. Ocean Pacific Hotels Ltd.

2022 BCSC 1052

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Supreme Court of British Columbia

DECIDED

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2022 BCSC 1052 Nicolas Jr. v. Ocean Pacific Hotels Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Nicolas Jr. v. Ocean Pacific Hotels Ltd.,

2022 BCSC 1052

Date: 20220623

Docket: S212194

Registry: Vancouver

Between:

Angelo Luna Nicolas Jr.

Plaintiff

And

Ocean Pacific Hotels Ltd. o/a Pan Pacific Vancouver

Defendant

Before: The Honourable Justice A. Ross

Reasons for Judgment

Counsel for the Plaintiff:

J. Leung

A. Wensel, Articled Student

Counsel for the Defendant:

I. Nathanson, Q.C.

J. Lockhart

Place and Date of Trial/Hearing:

Vancouver, B.C.

February 22-23, 2022

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Vancouver, B.C.

June 23, 2022

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- [1] In March 1988, the plaintiff, Angelo Luna Nicolas Jr. ("Mr. Nicolas"), commenced working as a houseperson at the Pan Pacific Vancouver (the "Hotel"). He remained employed at that hotel for the next 32 years.
- [2] In March 2020, the COVID-19 pandemic struck the world and virtually ceased international and business travel. As of the date of writing these reasons, the effects of that pandemic are still being felt.

- [3] The pandemic severely limited the hotel's ability to operate. That limitation affected the Hotel's ability to employ its staffing complement of approximately 440 people. The employer put Mr. Nicolas on temporary layoff as of April 2020, but ultimately notified him of the termination of his employment by a letter dated December 9, 2020.
- [4] In this action Mr. Nicolas claims damages for wrongful dismissal as well as punitive and aggravated damages. Given his lengthy employment, the plaintiff seeks two years' pay in lieu of notice.
- [5] The defendant acknowledges that compensatory damages are payable, but denies liability to pay any punitive or aggravated damages. In respect of the quantum of compensatory damages, the defendant says that the notice period should be shorter than the amount claimed by the plaintiff. In part, the defendant argues that, due to the pandemic, Mr. Nicolas would have received very few shifts over the relevant period.
- [6] The issues for me to decide are as follows:
 - a) What is the date of termination?
 - b) What is a reasonable notice period?
 - c) What amounts should be deducted?
 - d) Is there conduct that warrants punitive or aggravated damages?

Background Facts

- [7] Mr. Nicolas was employed as a houseperson at the Hotel from 1988 until 2020. He was originally hired by a different owner of the Hotel. The evidence of his employment contract is a half-page letter confirming his hiring as a temporary "houseman" for a period of six months. If he satisfied the probationary period, he would be eligible for coverage on the group benefits plan. There was no evidence of a further employment contract or terms. The letter does not restrict or limit the severance or notice period at the termination of employment.
- [8] The defendant Ocean Pacific Hotels Ltd. took over ownership of the Hotel in 2002 and assumed Mr. Nicolas' employment.
- [9] The Hotel is a luxury, full-service resort with 500 rooms and 25,000 square feet of meeting space. It caters primarily to corporate clientele but also attracts some leisure travellers. Its guests are 65% international, 30% Canadian, and 5% contract (airline staff). On average, before the pandemic, the Hotel was more than 85% occupied and employed approximately 440 "associates" (employees). The employees fell into three categories:
 - a) Salaried Employees: These were full-time employees, primarily involved in non-guest service positions, such as accounting and engineering. There were approximately 65 employees in this category.

- b) Hourly Employees: These were "associates" who would work primarily in guest-service roles, such as housekeeping, valet, food & beverage, and laundry. There were approximately 250 people in this category, including the houseperson department of nine people. Seniority for hourly employees was determined by the date of hire, or the date of starting in a new department. The employer says that the terms of employment provide that these associates would work when there was work available. In other words, they were not guaranteed hours.
 - c) Casual Employees: These people were primarily hired on an "event" basis. They would be called for specific events (e.g., conferences and large dinner functions) and could choose to accept or decline the work. Most of these individuals were also employed at other hotels and restaurants, but made themselves available when called upon by the Hotel.
- [10] Mr. Nicolas remained in the position of houseperson during his 32 years at the Hotel. He was classified as a "regular" employee. Not surprisingly, he rose to the top seniority level in the department. As of March 2020, he earned \$24.40 per hour plus benefits.
- [11] The houseperson position supported the housekeeping and other departments within the Hotel. In effect, the houseperson would act as a "runner" to help where needed in all areas other than Food & Beverage.
- [12] Because of his seniority, Mr. Nicolas worked near-full-time hours at the Hotel in the years before the pandemic.
- [13] There is a dispute as to the terms of Mr. Nicolas' employment. The plaintiff argues that he was a full-time employee, entitled to full-time hours. The employer argues that Mr. Nicolas was an "hourly" employee, who would be called when the Hotel required him. In that regard, the employer notes that his earnings in 2018 were based on an average of 34.3 hours per week, whereas his earnings in 2019 were based on working 38 hours per week.
- [14] The defendant relies on the testimony of Mr. Zul Somani, the senior asset manager at the Hotel. His role is equivalent to the general manager. He testified that, of the nine housepersons employed, the top half of the seniority list would receive full-time hours whereas the employees with lower seniority would not receive such hours. However, should the Hotel's business decrease, Mr. Nicolas' hours could be cut without raising the prospect that he had been constructively dismissed.
- [15] In March 2020, the effects of the COVID-19 pandemic started being felt in North America. Many aspects of the economy were deeply affected. The tourism industry was devastated. On March 18, 2020, Canada closed the land border with the United States.
- [16] Mr. Somani testified about the severe impact of the pandemic on the Hotel. In April 2020, the Hotel rented approximately 40 rooms, slightly more than one room per night.
- [17] Mr. Somani testified about the steps he took as the Hotel's manager with respect to its employees:

- a) In the last week of March, he cancelled all hours for "hourly" employees. He also laid off a number of "salaried" employees.
- b) In mid-June, he decided to offer salaried employees the option of working 2-3 days per week. This allowed all employees to remain employed and provided some income to the whole group. All of the salaried employees accepted this proposal.
- c) Also, in mid-June, Mr. Somani brought back a skeleton staff of hourly employees to operate a significantly scaled-down version of the Hotel. The complement of staff required for this operation was approximately 40 people.
- d) On June 28, 2020, with no prospect of a change in the pandemic situation, he decided to terminate the 48 hourly employees with the lowest seniority. At the same time, he decided to continue the employment of approximately 150 associates. He testified that he made this decision because, by doing so, the employer would keep the employees on the extended benefit plan. The employer was required to pay the premiums for that coverage. The move also delayed the employer's obligation to pay severance.
- e) Mr. Somani's decisions were dictated, to some extent, by the provisions of the Employment Standards Act, R.S.B.C. 1996, c. 113 [Act]. He was aware that the government of B.C. had amended the provisions of that Act to allow for temporary layoffs to be extended to August 30, 2020. That extension represented a doubling of the usual the 12-week period. However, after August 30, employers were required to apply for a variance to continue the temporary layoffs. In order to apply for a variance, the employer would require 51% of the approximately 150 employees in the "regular" group to agree to the proposal.
- f) In preparation for August 30 deadline, Mr. Somani decided to "create his own variance". In that regard, on July 10, 2020, he offered each of the 150 "hourly" associates a "casual" position. Acceptance was voluntary. Under the terms of the offer, the employees could switch to "casual" employment (as defined above) but keep their seniority and pay grade. Approximately 93 associates accepted the offer. Mr. Nicolas did not accept it. I discuss below the plaintiff's position on the employer's attempt to navigate its own path in this regard.
- g) In the period after the initial layoffs, the employer negotiated with the extended health benefit provider, Manulife, to continue coverage for the laid-off employees. Under the terms of the Manulife group plan, in order to be covered, employees had to be "active" and working more than 20 hours per week. However, the employer negotiated a continuation of coverage for all salaried and hourly employees. This meant that the employees kept their coverage and the employer continued to pay the premiums, approximately \$350 - \$400 per month for each employee.
- h) In December 2020, Manulife advised the employer that it would not extend coverage for inactive employees past January 1, 2021. The employer wrote a letter dated December 9, 2020, to all remaining regular (hourly) employees, including the plaintiff. The letter to Mr. Nicolas acknowledged that this step would result in the termination of his employment. The

employer advised that it would pay "the minimum individual termination pay entitlement that would be required under your contract for a without cause termination outside the circumstances of COVID-19." The legal effect of the letter is discussed below.

- i) The Hotel did not call any houseperson into work until June 26, 2021.
- [18] For his part, there are two steps that Mr. Nicolas took that need to be considered in respect of this claim:
 - a) He applied for, and received, Canadian Emergency Response Benefits ("CERB") over a period of 28 weeks. He received CERB in the amount of \$14,000 (\$500 per week) during the period between mid-March 2020 and September 26, 2020.
 - b) He obtained alternate employment at a care home commencing November 30, 2020. He started as a casual employee at the care home. He has not yet achieved full-time hours. He earns \$20.56 per hour (less than his wage at the Hotel).

Date of Termination

- [19] First, I note that the parties agree that Mr. Nicolas' employment contract was not frustrated. The employer acknowledges that Mr. Nicolas' employment was terminated and he is entitled to common law damages for wrongful dismissal.
- [20] Mr. Nicolas puts three dates forward as alternative termination dates: March 27, August 30, or December 9, 2020.
- [21] The legal basis for each date is as follows:
 - a) March 27, 2020: Section 63 of the Act allows for a temporary layoff of employees. However, if the employee's layoff continues beyond the allowable "temporary" period, then pursuant to s. 63(5) for the purpose of s. 63, the termination date is deemed to be the beginning of the temporary lay-off. Hence, pursuant to the Act, there is an argument that the termination should be dated at March 27, 2020.
 - b) August 30, 2020: As noted, the legislature amended the Act to allow for longer temporary layoffs. The usual 12-week temporary layoff was extended to August 30, 2020. The December 9, 2020 letter to Mr. Nicolas indicated that the Act "deems a temporary layoff beyond that date to be a termination of employment." The notice of civil claim alleges that Mr. Nicolas' employment was terminated on August 30, 2020.
 - c) December 9, 2020: As noted, the Hotel sent a letter (dated December 9, 2020) to Mr. Nicolas, advising him that his benefits coverage would be ending as of January 1, 2021. The letter sets out that, by operation of law, Mr. Nicolas' employment would have terminated on August 30, 2020. Of note, as of December 2020, the employer was purporting to pay severance on the basis of the Act. Hence, the choice of August 30 made sense within the context of the December 9 letter.

- [22] I do not accept the plaintiff's submission that his employment was terminated as of March 27, 2020. As noted, the plaintiff's pleading alleges that his employment was terminated as of August 30. In this regard, I accept the defence submission that deeming provision of s. 63(5) of the Act is limited to claims made under the Act and within that section. If an employee claims compensation under the Act after a temporary layoff, then the parameters of his or her employment are to be determined under s. 63. In contrast, Mr. Nicolas seeks common law damages for wrongful dismissal. Hence, s. 63(5) of the Act does not apply.
- [23] I noted above that the plaintiff pleads that his employment was terminated as of August 30, 2020. Further, the December 9, 2020 letter to Mr. Nicolas acknowledged that the Act "deems a temporary layoff beyond [August 30] to be a termination of employment." On that basis, the defendant accepts that date as a reasonable date for termination.
- [24] Hence, the plaintiff's pleading alleges a termination date of August 30, 2020. There is a legal basis for that being the termination date. The defendant accepts that date. On the basis of the application of the Act and the tacit agreement between the parties, I find that August 30, 2020, was the date of termination.

Reasonable Notice

- [25] The plaintiff submits that, as a long-term employee, he is entitled to 24 months' notice.
- [26] Both parties agree that I should apply the factors set out in *Bardal v. Globe and Mail Ltd.* (1960), 24 D.L.R. (2d) 140 (Ont. H.C.) to arrive at an objectively reasonable result, being fair to both the employee and the employer.
- [27] In addition to the *Bardal* factors, the defence argues that reasonable notice should consider the reasonable expectations of the parties. The defence notes that the plaintiff was an "hourly" employee and argues that the determination of a reasonable notice period is intended to place the employee in the same position as he or she would have been in if the employer had provided working notice. In the circumstances of the pandemic, the evidence establishes that the Hotel did not have any shifts for housepersons until June 2021.
- [28] As authority for this proposition, the defence relies on *Munoz v. Sierra Systems Group Inc.*, 2016 BCCA 140, wherein the Court of Appeal indicated that the court should look at the terms of the employee's contract and the reasonable expectations of the future earnings as of the date of termination. In *Munoz*, the employee chose a compensation format that paid him more income if he worked more billable hours. However, he would receive less income if there were fewer billable hours for him to work. In assessing the reasonable notice period, the Court of Appeal indicated that that the trial judge should have considered the future prospects for billable work as of the date of termination. The court wrote:
- [69] The assessment of Mr. Cuesta's loss must, however, take into account the term of his contract pursuant to which he would receive no wages while benched. I agree with the trial judge that the absence of work for an hourly employee which eventually leads to his dismissal cannot sensibly result in a notice period entirely without pay; that would equate to

no notice period at all. A notice period is intended to give an employee time to find work while he is still employed and receiving wages. The object of notice is to assist in an orderly transition from one job to the other without a precipitous drop in income (see *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 25, citing *Innis Christie, Geoffrey England & Brent Cotter*, *Employment Law in Canada*, 2d ed. (Toronto: Butterworths, 1993) at 572-81; *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701 at para. 69).

- [70] That said, an employee who has agreed to benefit from periods of increased income and to accept periods of reduced income cannot expect to avoid his part of the bargain and have his employer pay him only the higher income during the notice period.
- [29] The employer argues that, as of the date of termination, both parties understood that Mr. Nicolas would not be receiving any substantial hours over the next few months because of the continuation of the pandemic. I note that the employer does not submit that no damages are payable, only that the availability of work must be considered in the assessment of reasonable notice.
- [30] I set out the Bardal factors below with each party's position.

Responsibility (Character) of the Employment Function

- [31] In assessing the character of Mr. Nicolas' employment, I find that the responsibilities were, in many respects, commensurate with entry level workers. The responsibilities were modest.
- [32] The general principle is that, the more important the job, the more difficult it will be to replace. The assumption is that jobs that carry modest responsibilities are easier to find.
- [33] The plaintiff submits that the importance of this factor has diminished over time (*Saalfeld v. Absolute Software Corporation*, 2009 BCCA 18 at para.13). The defendant agrees that the courts have been reluctant to give too much weight to the modest responsibilities of an employee's job, but submits that the character of employment is still a factor to be considered.
- [34] I discuss below my consideration of the weight to be placed on the character of the plaintiff's employment.

Age

- [35] Mr. Nicolas is 58 years old.
- [36] The primary reason to consider the age of the plaintiff relates the possibility that it may be more difficult for an older person to replace their prior employment.
- [37] In this case, we know that Mr. Nicolas obtained the job at the care home in the first month that he applied. However, that job does not replace his prior position at the Hotel.

Length of Service

[38] Mr. Nicolas has been a loyal and valued employee of the Hotel for 32 years. On the spectrum of employment duration, this is, quite obviously, at the longest end.

Availability of Alternate Employment

[39] As noted, Mr. Nicolas was able to find alternate employment in a care home commencing in late November 2020. He has not achieved full-time hours at that new position. His new rate of pay is lower than the Hotel job.

Parties' Positions and Analysis

[40] The plaintiff submits that, applying the Bardal factors (before considering additional factors), the plaintiff is entitled to 21-24 months notice. In addition, the plaintiff submits that the reasonable notice should be increased due the following circumstances:

- a) The pandemic created a very difficult employment market for Mr. Nicolas.
- b) The employer did not notify Mr. Nicolas of his termination until December 9, despite the fact that he was deemed to be dismissed on August 30.

[41] The plaintiff submits that given these additional facts, with the employer being sophisticated, the notice period should be at the high end. He submits that these additional factors increase the reasonable notice period to 24 months.

[42] The defendant concedes that I should consider the facts that Mr. Nicolas was a long-term employee and is in his late 50s. The defendant submits that Mr. Nicolas' responsibilities were "modest" and that he was able to find replacement work soon after submitting his application in November 2020. The defence also submits that the court should consider the pandemic's effect on availability of work for Mr. Nicolas. Taking all of those factors into account, the defendant submits that reasonable notice would be approximately 12 months.

[43] There was some debate regarding Mr. Nicolas' evidence regarding the date upon which he became aware of the availability of employment at the care home. Part of his evidence suggested that he knew of the position by July 2020. However, in another part of his evidence, he testified that he applied for the care home position when it became available in November 2020. Although there was a clear inconsistency in Mr. Nicolas' evidence, I find the inconsistency does not change my assessment of the reasonable notice period. In my opinion, there was no failure to mitigate in this case. Mr. Nicolas obtained replacement employment before the Hotel notified him that his employment was terminated. His evidence was clear, and reasonable, that he was hoping to be called back to work at the Hotel. I am unable to find that his hope was unreasonable, given that the information coming from the Hotel indicated that he was still employed.

- [44] The fact remains, however, that when Mr. Nicolas decided to apply for a replacement job, he was able to obtain a position within a short period of time. Further, he applied for that position before being advised of the termination of his employment by the defendant.
- [45] In my opinion, the defence submission of 12 months is too low for a period of reasonable notice. Mr. Nicolas was a long-term employee, and he is entitled to be considered near the high-end for reasonable notice.
- [46] However, in my opinion, the period of reasonable notice is reduced somewhat (to some small extent) by the combination of the two related factors:
- a) the character of his employment; and
 - b) the fact that he was able to find (lesser) replacement employment quite quickly after he began applying.
- [47] I say that these factors are related because Mr. Nicolas was able to obtain his new job as soon as he applied for it. He had no period of job searching. That fact suggests that the character of his employment led to him finding (near) replacement employment quite quickly.
- [48] In my opinion, reasonable notice for Mr. Nicolas must also take into consideration the fact that he was an hourly employee who would be called upon when needed by the Hotel. It is not disputed that he was in the top seniority position for housepersons. Hence, his usual employment was "full-time". However, his employment was still subject to decreased hours if the employer's needs decreased. Given the circumstances of the pandemic, we know that the Hotel did not call any houseperson to work until July 2021. That (future) fact was unknown to the parties as of August 30 or December 9, 2020. However, it is clear that both sides foresaw that it would be some period of time before work became available for Mr. Nicolas. In my opinion, the fact that Mr. Nicolas obtained alternate employment, before being notified of his termination, is evidence of his expectations regarding work at the Hotel.
- [49] Taking all of these factors into account, in my opinion, the reasonable notice period for Mr. Nicolas was 18 months at his rate of income in 2019. That notice period began August 31, 2020, and would end February 28, 2022.

Deductions from Reasonable Notice

- [50] The parties agree that the following amounts must be deducted from the reasonable notice damages:
- a) The employer paid \$7,808, representing two months' pay in lieu of notice.

- b) Any amount received by Mr. Nicolas from his new employment at the care home. I am informed that Mr. Nicolas earned \$31,360.64 between November 30, 2020, and February 12, 2022. I do not know his exact earnings between November 30, 2020, and February 28, 2022. However, whatever the total amount received by Mr. Nicolas up to February 28, 2022, should be deducted.
- [51] In addition to these amounts, Mr. Nicolas also received CERB benefits of \$14,000 in 2020. He received \$500 per week for 28 weeks commencing in April 2020.
- [52] I made the finding above that the effective date of Mr. Nicolas' termination was August 30, 2020. He only received four weeks of CERB benefits (\$2,000) in the period between August 30, 2020 and September 26, 2020.
- [53] The plaintiff submits that the CERB benefits may be repayable. He points to s. 6(1)(b)(i) of the Canada Emergency Response Benefit Act, S.C. 2020, c. 5, which provides that an employee is eligible for CERB benefits if they do not receive "income from employment". The plaintiff submits that wrongful dismissal damages could be considered "income from employment" and could trigger an obligation for Mr. Nicolas to repay the CERB to the federal government.
- [54] In response, the defendant relies on two cases which have decided that the CERB benefits are deductible from wrongful dismissal damages: *Yates v. Langley Motor Sport Centre Ltd.*, 2021 BCSC 2175; *Hogan v. 1187938 B.C. Ltd.*, 2021 BCSC 1021.
- [55] In respect of these decisions, the defendant notes the twofold policy argument that underlies them. Employees would only receive the CERB benefit because they lost their jobs. Further, unlike unemployment insurance, the employees did not contribute to the CERB. As noted by Justice Mayer in *Yates*, after citing the *Hogan* decision:
- [43] In this case I find that CERB payments would not have been payable to Ms. Yates if she had not been terminated from her employment with Langley Hyundai - which termination constitutes a breach of her employment contract justifying payment in lieu of notice. Further, I find that CERB payments are a benefit intended by the Government of Canada to be an indemnity for the loss of regular salary arising from Langley Hyundai's breach of Ms. Yates' employment contract. Unlike an employee funded pension or a private disability insurance policy Ms. Yates did not contribute to the benefit.
- [56] In my opinion, I am bound by the decisions in *Yates* and *Hogan*. I also consider them to be correct. As a result, the CERB benefits of \$2,000 will be deducted from Mr. Nicolas' damages.

Punitive and Aggravated Damages

- [57] The plaintiff submits that certain actions of the defendant were taken in bad faith on the basis that the employer placed its own economic interests ahead of the interests of the staff. Alternatively, the employer took steps to avoid its statutory duties to its employees. He submits that an award of \$20,000 in punitive damages would be appropriate in these circumstances.
- [58] The plaintiff submits that the employer skirted the provisions of the Act and the deemed termination provisions. As noted above, as of August 30, 2020, the temporary layoffs were deemed to be permanent unless an employer applied for a variance under the Act. The plaintiff argues that the Hotel sought to skirt that provision by offering "casual" employment to all of its remaining employees.
- [59] The defendant submits that the clear flaw in the plaintiff's submission is that Mr. Nicolas did not accept the offer of casual employment. Hence, that offer was irrelevant to the circumstances of his case.
- [60] I agree with the defence on this submission on this point. I make no decision, and offer no opinion, on whether the offer of casual employment would represent a breach, or avoidance, of the provisions of the Act. The fact that the defendant made that offer did not affect Mr. Nicolas or his claim.
- [61] The plaintiff further submits that the employer used strong-arm tactics to attempt to have Mr. Nicolas discontinue his claim. He points to an offer made by the employer in November 2021. The employer offered Mr. Nicolas a janitorial position with a related company that operates the office-tower portion adjoining the Hotel, the World Trade Centre. The employment would commence in November 2021 at a similar salary to his former position. However, the offer required that Mr. Nicolas dismiss this action against his employer. Counsel for the plaintiff submits that, although the new employment was stated to be full-time, there was no guarantee of continued employment. In other words, the new employer could later terminate Mr. Nicolas' employment. Mr. Nicolas declined the offer.
- [62] Mr. Nicolas submits that making an enticing offer that required a plaintiff to give up a claim for damages was an act of bad faith.
- [63] He argues that the employer acted in further bad faith by withdrawing the offer two days later.
- [64] In response to this argument, the defendant notes that it made a good faith offer that would have settled this litigation and provided Mr. Nicolas with employment.
- [65] With respect to the allegation that its withdrawal of the offer was evidence of bad faith, the defendant denies any such suggestion. The defendant notes that, by a letter dated November 30, 2021, it made the offer. On the same day, Mr. Nicolas' counsel responded, indicating that Mr. Nicolas was interested in the new job, but not willing to execute a release or discontinue

his claim for damages. Hence, upon the rejection of the offer, by operation of law, the offer was revoked. The revocation of the offer was confirmed by defence counsel in a letter dated December 1, 2021.

[66] The defendant submits that this exchange of offers cannot be the basis of any alleged bad faith. It was a real offer to settle the action. The plaintiff did not accept it. Nothing arises from it.

[67] I accept the defendant's submission on this issue. There was nothing nefarious about the defendant offering something other than money damages to the plaintiff. The plaintiff was free to accept or reject the offer. He rejected it.

[68] I find no basis in the defendant's actions for any finding of bad faith or an award of punitive damages.

Aggravated Damages

[69] The plaintiff submits that the actions of the defendant affected him in a negative way and he is deserving of an award of aggravated damages. He points, in particular, to the quick-fire settlement offer that was withdrawn within a day. In his testimony, Mr. Nicolas said that he felt disappointed that the offer was withdrawn before he had a chance to think about it. He seeks an award of \$30,000 (if no punitive damages are awarded).

[70] In response, the employer submits that there is no basis for an award of aggravated damages. First, there was no evidence of actual emotional impact on Mr. Nicolas. When specifically asked (in direct) about the emotional impact, Mr. Nicolas answered that he felt the withdrawal of the settlement offer was "not right." In cross-examination, he agreed that, after receiving the settlement offer, he spoke to his lawyer, received advice, and provided instructions.

[71] I find that there was no evidence that would support an award for aggravated damages, and that claim is dismissed.

Summary and Conclusion

[72] On that basis, I find that:

- a) Mr. Nicolas' employment was terminated as of August 30, 2020;
- b) he was entitled to 18 months' notice;
- c) he is entitled to damages commensurate with 18 months' notice, based on his 2019 level of income;
- d) The following amounts should be deducted from his damages:
 - i. amounts already paid by the employer in lieu of severance (\$7,808);
 - ii. amounts earned by Mr. Nicolas between November 30, 2020, and February 28, 2022;

iii. CERB payments received by Mr. Nicolas in the amount of \$2,000.

[73] The claims for punitive and aggravated damages are dismissed.

[74] The plaintiff has been successful in this action. Absent the provision of any offers of which I am not aware, the plaintiff is entitled to his costs.

"A. Ross J."

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