IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Common et al. v. Superpages,***
2005 BCSC 1092

Date: 20050722
Docket: S90379
Registry: New Westminster

Between:

Sandy Common, Heather Larke and Marisa MacDonald

Plaintiffs

And

Advertising Directory Solutions Inc./ Solutions Publicite Annuaire Inc. doing business as Superpages

Defendant

Before: The Honourable Mr. Justice Truscott

Reasons for Judgment

Counsel for the Plaintiffs	K. Slade-Kerr
Counsel for the Defendant	A. Favell
Date and Place of Hearing:	June 29, 2005 New Westminster, B.C.

[1] On December 15, 2004, the three plaintiffs were terminated from their employment with the defendant. They each received approximately 11 months of base pay and some fringe benefits voluntarily paid by the defendant, but they claim that these payments were insufficient to compensate them for lack of reasonable notice of termination. They each seek 18-20 months of base pay and benefits in lieu of what they say should have been the reasonable notice period for each of them.

[2] The defendant submits that the appropriate notice period for each of the plaintiffs is in the range of 10-15 months, and some of the extra benefits claimed by the plaintiffs are not payable in law. Further, it alleges that two of the plaintiffs, Ms Common and Ms Larke, have failed to mitigate their claims during the notice period and accordingly their claims should be dismissed or reduced by what they should have earned in mitigation.

[3] Finally, the defendant submits that if the court should decide that the notice period is longer than the approximate 11 month period already accepted by the defendant, a discount in the notice period assessed should be made for the possibilities that the plaintiffs will become alternatively employed before the end of the notice periods assessed by the court.

[4] The plaintiffs are each 42 or 43 years of age with high school educations. They have all worked their entire careers of approximately 24 years for the defendant and each was earning approximately $50,000 in base salary at the time of their terminations.

[5] Ms Common joined the defendant in 1981 at 18 years of age. She joined as a file clerk following completion of high school. From 1988 to the date of termination she held a position of Billing Agent in the Finance department, responsible for all aspects of invoicing as well as customer inquiries relating to their accounts.

[6] According to her affidavit most of her work was performed using specialized software unique to the defendant and non-transferable to any other employer. Use of common computer software applications such as Word or Excel was almost non-existent in her day-to-day duties. She does not consider that she had any marketable computer skills at the time of her termination.

[7] Ms Larke joined the defendant in 1980 at 18 years of age, also as a file clerk, following her high school education. She held the position of file clerk until 1988 and was then a receptionist for one year. In the period between 1989-2000, she was a Customer Service Representative and from 2000 to termination in 2004 she was a Product Developer-Internet Operations, responsible for building on-line advertising for customers using a templated web based program unique to the defendant. She says she was not a web site designer and her computer expertise was also limited.

[8] In 2001, the defendant paid her to take a course in basic HTML and in 2002 a basic PhotoShop course at B.C.I.T. In 2003, she took a one day in-house seminar in advanced PhotoShop. HTML and PhotoShop are described as two computer applications commonly used by web page designers. While she took the courses she says she did not use most of the skills taught there in her day-to-day work as a product developer. That was because the program she used to create on-line

advertising created the HTML code automatically. Her use of PhotoShop was also limited to scanning and copying pictures.

[9] Ms MacDonald also commenced employment with the defendant as a file clerk in 1980 when she was 17 years old after having just left high school. She held a variety of positions with the defendant, but from 1998 to the date of her termination was the Purchasing Agent in the HR/Administrative Services department. In that position she was responsible for purchasing goods and services, negotiating contracts, doing some inventory control and managing purchasing budgets for all offices across Canada. She also managed the cafeteria. Her role included making independent decisions regarding renovations and major purchases, and reconfiguration of services and staffing. She also took B.C.I.T. courses in the 1980s and 1990s to assist her job development, but other than a PMAC basic purchasing course she says she did not have any formal purchasing qualifications on her termination.

The Period of Reasonable Notice

[10] The leading case on reasonable notice is still ***Bardal v. Globe and Mail Ltd.*** (1960), 24 D.L.R. (2d) 140 (Ont. H.C.), where McRuer C.J.H.C. said 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.

[11] In the case of ***Ansari v. B.C. Hydro*** (1986), 2 B.C.L.R. (2d) 33 (B.C.S.C.), McEachern C.J.S.C., adopted the principles set out in ***Bardal***. He acknowledged that the character of employment and level of responsibility of the employee are important as is the availability of similar employment. However, he confirmed that the length of notice required is not equivalent to the period required to find new employment because that would amount to making the employer solely responsible for the lack of available alternative positions.

[12] He also stated that subject to exceptional cases, where the degree of responsibility, age and years of service are very extensive, 18-24 months is the rough upper limit for reasonable notice and other cases should be scaled downward from there.

[13] The plaintiffs submit that in recent years the character of employment or level of responsibility of the employee has been given less emphasis by the courts in the absence of evidence that it is more difficult for a more senior employee to find suitable alternative employment than it is for a less senior one. They point to the decision of Macaulay J. in ***Streight v. Dean***, [2002] B.C.J. No. 819, where he said that it must be recognized that the character of employment is now considered less significant than it once was and the court must have a proper evidentiary basis before reaching any conclusion about the availability of equivalent employment. It cannot take judicial notice of any distinction between higher level and lower level employees on that issue.

[14] In ***Bavaro v. North American Tea, Coffee & Herbs Trading Co.***, [2000] B.C.J. No. 536, Wilson J. also accepted that the character of employment should not be given undue weight in the assessment of the various factors, in the absence of evidence.

[15] On the other hand, in ***Burry v. Unitel Communications Inc.***, [1997] B.C.J. No. 2790, Newbury J.A., writing the reasons for the Court of Appeal, said that in the absence of appropriate evidence, it is not open to disregard the longstanding presumption that a person terminated from a very responsible position is, all other things being equal, generally entitled to greater notice than a person at the lower level of responsibility, and that the performance of supervisory functions is a major indication of responsibility.

[16] The distinction between the two lines of cases may be that as a matter of legal presumption, a person in a very responsible position is generally entitled to greater notice than a person at the lower level of responsibility, while a determination about the availability of equivalent employment is a separate issue that must be based upon evidence and not upon presumptions, and the two factors cannot be collapsed into one. This was said by the Ontario Court of Appeal in ***Cronk v. Canadian General Insurance Co.*** (1995), 14 C.C.E.L. (2d) 1.

[17] Be that as it may, I do not consider the plaintiffs here are entitled to notice in the upper range of 18-24 months, considering the factors of the character of their employments, the length of service they put in for the defendant, their ages and the

availability of similar employment, having regard to their experience, training and qualifications.

[18] In ***Streight***, the plaintiff was a 45 year old lab technician who had been employed in a dental practice for 20 years. She had a lack of other marketable skills due to lack of education and restricted work experience and there was a limited opportunity for her to obtain equivalent, alternative employment. She was awarded 16 months notice.

[19] The plaintiffs here are slightly younger and probably have more marketable skills available to them and I expect that they have more opportunity to obtain equivalent, alternative employment.

[20] It is my assessment that each of the plaintiffs here is entitled to 15 months' notice of termination, subject to their duties to mitigate to which I now turn.

Duty to Mitigate

[21] The defendant submits that the plaintiffs, Ms Common and Ms Larke, failed to mitigate their claims by taking alternative employment available to them.

[22] In ***Smith v. Aker Kvaerner Canada Inc.***, [2005] B.C.J. No. 150, Burnyeat J. said the following:

> In seeking and accepting alternative employment, the plaintiff has a duty to act reasonably and to take such steps as a reasonable person in the plaintiff's position would take in his own interest to maintain his income and his position in his industry, trade or profession. The duty involves a constant and assiduous application for alternative employment, an exploration of what is available through all means:

> ***Forshaw v. Aluminex Extrusions Ltd.*** (1989) 39 B.C.L.R. (2d) 140 (B.C.C.A.) and ***Leawood v. Thunderbird Home Centres*** (unreported) April 3, 1995 decision of Koenigsberg J. (Supreme Court of British Columbia action no. C941213 - Vancouver Registry).
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> The burden of proving that Mr. Smith has failed to mitigate his losses rests with the Defendants: ***Red Deer College v. Michaels*** (1975), 57 D.L.R. (3d) 386 (S.C.C.). There is a heavy onus to demonstrate a failure to mitigate. In this regard, Edwards J. in ***Petersen v. Labatt Breweries of British Columbia*** (1996) 25 C.C.E.L. (2d) 241 (B.C.S.C.) stated:
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> > The onus on a defendant alleging a plaintiff has failed to mitigate in an action of this kind is "by no means a light one". See: ***Michaels v. Red Deer College*** (1976), 57 D.L.R. (3d) 386. The defendant must show not only that the plaintiff failed to take steps to mitigate but also that had the plaintiff taken those steps he could likely have found equivalent employment. See: ***Jorgenson v. Jack Cewe Ltd.***, (1978), 93 D.L.R. (3d) 464, [1979] 1 A.C.W.S. 138 and ***Munana v. MacMillan Bloedel Ltd.***, [1977] 2 A.C.W.S. 364. (at para. 10)

[23] The skills and qualifications of the plaintiffs, according to their evidence, have already been set out above.

[24] The evidence of Ms Larke is challenged by the evidence of Ms Robinson, who was Team Leader of Internet Operations for the defendant. In her affidavit, she says that she was Ms Larke's superior from February 2004 to December 2004 and became quite familiar with her skills and abilities. She says that although Ms Larke at one time was not responsible for designing websites for clients, about four years ago her job duties did expand to include construction of websites. She deposes that Ms Larke successfully met corporate objectives and did not indicate that she was struggling and that she acquired a competent computer skill level when Ms

Robinson was her superior with the technical expertise required for a position as Product Developer.

[25] Ms Robinson says that Ms Larke took an in-house Advanced PhotoShop course in September 2004 and was knowledgeable of other programs that allowed her to customize websites for customers in addition to using a template to build websites. She refers specifically to Ms Larke having built a website for a customer that was chosen as website of the month.

[26] Ms Robinson challenges the statement that Ms Larke could only scan and crop pictures as she observed Ms Larke using the pen tool, selection tools and slicing tools to create animations as required for her job.

[27] Finally, Ms Robinson offers the opinion that with the skills Ms Larke learned and applied on a daily basis for three years, she could take on a job that requires beginner or intermediate PhotoShop capabilities.

[28] Ms Larke responds in a subsequent affidavit that in her February 2003 performance review she received a “requires development” for technical expertise and the review expressly acknowledged that she was struggling with the software used in the position. She says she often told Ms Robinson that she was frustrated and overwhelmed. As far as her ability to use the pen tool and create animation was concerned, she says that 99% of the time a co-worker did it for her and gave her a lot of assistance.

[29] She says she had to customize less than 10% of her projects and she says this still involved using a template rather than building a website from scratch. On the one project Ms Robinson says she built a website for a customer, Ms Larke says it was by far the best project she did and she received a lot of help on that from her co-worker. She says the logos and images were scanned from the customer's existing sales brochure. She says that she does not have the technical skills required for the graphic designer or website developer/programmer positions.

[30] Defence counsel submits that both Ms Common and Ms Larke have passed up opportunities to take on comparable employment available to them.

[31] In the case of Ms Common, defence counsel says that following her termination she did not apply for any jobs in January or February 2005.

[32] I observe, however, that termination was just before Christmas 2004 and I also observe that in ***Smith***, Burnyeat J. said that any employee should be given a reasonable period of time to get over having their employment terminated, to organize their thoughts as how best to go about obtaining new employment, and to undertake the necessary research and preparation of resumes so that they are in a position to compete for available positions.

[33] I do not have any criticism of Ms Common for not applying for other employment in the months of January and February 2005. Her record of efforts attached as an exhibit to her affidavit indicates that she did seek career counselling in January 2005 and it was recommended that she take a career builders program which she took at the end of January 2005. She says that in February 2005 she met

with a career coach and discussed a career path and she also attended a resume builder workshop because she had never before prepared a resume. She also says that she reviewed different job postings that were advertised to see what type of jobs were in the market and the qualifications she would need.

[34] She says that most of the postings she saw were for billing positions requiring intermediate or advanced knowledge of Word and Excel and she believed that her lack of experience with these computer applications was going to be a significant stumbling block in obtaining a position similar to the one she held with the defendant.

[35] She also says that she came to realize that most jobs in this area paid much less than she earned at the defendant and she concluded she would have to take on a career change with significant training to improve her chances of earning the same level of income.

[36] She learned through testing that she is best suited for a position as a medical office assistant and she embarked on a three months certification course offered by the Burnaby School District that ended on June 30, 2005.

[37] She also says that she has not stopped looking for employment and she continues to review various job search websites and the newspaper.

[38] In her examination for discovery, she said that in January and February 2005 she started checking the Internet and looking through her local municipal newspapers and she posted her resume on one website on March 7, 2005.

[39] The defendant submits that Ms Common never reviewed any other newspapers other than her local ones and never posted a resume to more than one job site. She also never sent her resume to any placement agency. Instead, she took herself out of the job market by enrolling in the medical office assistant course full-time until June 30, 2005.

[40] Ms Common was shown specific job postings on her examination for discovery. One was for a billing specialist with Deloitte & Touche in Vancouver. She said she did not know why she would not have applied for that position. The posting itself does not indicate the level of income offered and, of course, there is no evidence of whether Ms Common would have been successful in obtaining it.

[41] Similarly with a job posting for a service coordinator, Ms Common did not know why she would not have applied for that job either. Again, there is no income level indicated in that posting.

[42] Ms Common also said on her examination for discovery, however, that she did not consider that she had the computer skills necessary for a lot of the postings.

[43] In the case of one posting for an accounts receivable clerk, she said that given the salary offered of $30,000, she would not apply for that position.

[44] The defendant submits that as the evidence of the plaintiffs appears that it will be difficult for them to ever find employment in their fields that will pay the income they enjoyed with the defendant, they are obliged as a matter of their duty to

mitigate, to accept lesser paying employment like the one Ms Common refused to apply for, at $30,000.

[45] In ***Forshaw v. Aluminex Extrusions Ltd.***, [1989] B.C.J. No. 1527, Taylor J.A., for the court, in dismissing the appeal, said the following:

> That "duty" - to take reasonable steps to obtain equivalent employment elsewhere and to accept such employment if available - is not an obligation owed by the dismissed employee to the former employer to act in the employer's interests. It would indeed be strange that such a duty would arise where an employer has breached his contractual obligation to his employee, having in mind that no duty to seek other employment lies on an employee who receives proper notice.
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> The duty to "act reasonably", in seeking and accepting alternate employment, cannot be a duty to take such steps as will reduce the claim against the defaulting former employer, but must be a duty to take such steps as a reasonable person in the dismissed employee's position would take In his own interests - to maintain his income and his position in his industry, trade or profession. The question whether or not the employee has acted reasonably must be judged in relation to his own position, and not in relation to that of the employer who has wrongfully dismissed him. The former employer cannot have any right to expect that the former employee will accept lower-paying alternate employment with doubtful prospects, and then sue for the difference between what he makes in that work and what he would have made had he received the notice to which he was entitled.
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> The learned trial judge was, in my view, entitled to find the plaintiff justified in rejecting the offer of employment in question. He plainly regarded the position in question, while similar in terms of the level of managerial responsibility and the nature of the business involved to that which he held with the defendant, as not similar in terms of the scope of business to be done and the opportunity for achieving the income which he previously enjoyed.

[46] In ***Boyd v. Whistler Mountain Ski Corporation***, [1990] B.C.J. No. 821, Sheppard L.J.S.C. said that an employee who was offered a position that paid $12,000 less per year than his position with the defendant, had no pension plan, no

other benefits and no opportunity for future advancement, had no duty to accept that position in fulfillment of a duty to mitigate.

[47] On the other hand, in ***Hester v. International Land Corp.***, [1995] B.C.J. No. 632, Errico J. found that a plaintiff had failed to mitigate by not taking a similar job at a salary of $24,000 instead of $31,000, where there was little opportunity for advancement and where she had at that time arranged to take a computer training course sponsored by the Unemployment Insurance Commission. Errico J. said:

> The salary was less, but it must be borne in mind that she had the advantages of increments in salary over 16 years at her previous place of employment.

[48] I confess that I do not understand the relevance of this last statement.

[49] Another decision that considered this issue was ***Nevin v. British Columbia Hazardous Waste Management Corp.***, [1995] B.C.J. No. 2301, a decision of the Court of Appeal where Newbury J.A. wrote the judgment. In that case, the alternative employment offered about 12% less income than the plaintiff's former position but was comparable or substantially similar and the court considered that job was comparable or substantially similar and she was bound to consider it as part of her duty to mitigate, although on the facts she was found not to have breached that duty by not accepting the position.

[50] As previously stated, in ***Forshaw***, Taylor J.A. set out the correct statement of the duty to mitigate and on the facts found that the plaintiff was justified in rejecting the offer of employment because although it was similar in terms of level of

managerial responsibility and the nature of the business involved, it was not similar in terms of the scope of the business to be done and the opportunity for achieving the income which the plaintiff had previously enjoyed.

[51] Mr. Forshaw had been earning approximately $80,000 annually as a general manager with the defendant and turned down a job for $40,000 annually plus undefined commissions as a manager with a company that was planning to start up a new division in competition with the plaintiff. Instead, he went into business on his own.

[52] On the facts before me I conclude that the plaintiff, Ms Common, did not fail in her duty to herself to mitigate her damages by failing to take a comparable position at $30,000, which would have involved a loss of about 40% of her former salary. It may be that it will be difficult for the plaintiffs to find alternative comparable employment at their former incomes, but there is no evidence before me that the defendant was the only employer offering this income and I doubt that was the case.

[53] I do not consider that she has acted unreasonably in her own interest and I consider that it was beyond her duty to herself to take such a reduction in salary. To require her to do so would be to impose upon her a duty to the defendant, which is not the law of mitigation.

[54] The defendant also submits that Ms Common's claim should be dismissed because she took herself out of the marketplace to go to school to retrain from March 30, 2005 to June 30, 2005, without knowing whether she can get a job as a medical office assistant, nor what income she can expect to make.

[55] It is my conclusion that Ms Common has not acted unreasonably in retraining herself to be a medical office assistant in the hopes of regaining her former income level, although the job postings in evidence before me indicate that those opportunities may only allow for an income of $30,000-$38,000 per year. If she is wrong, she will eventually suffer the consequences financially.

[56] Ms Common is only now completing her course. It is unknown if or when she will be able to obtain employment as a medical office assistant, nor the salary she might make. I will have to consider the possibility of her obtaining employment in this field during the notice period when I consider whether there should be a discount of her notice period for that possibility.

[57] For Ms Larke, the defendant concedes that she is now making consistent efforts to find alternative employment but submits that she did not start making reasonable efforts until the end of March 2005.

[58] Ms Larke also says in her affidavit that she attended a career building course and a resume building course in January and February 2005 and that in March 2005 she purchased a computer and began looking for postings every day. She says she has been applying for jobs using her background as a Call Centre/Customer Service Representative because she does not have the technical skills nor experience required for a traditional web designer position.

[59] She also says that it is apparent to her that most Customer Service Representative positions do not pay anywhere near the wage that she was making for the defendant as a Product Developer/Internet Operations. She concluded that

she would have difficulty ever finding new employment at the wage she formerly earned without a career change or significant retraining and/or upgrading and to that end she enrolled in a 12 week computer application course at B.C.I.T. which also ends on June 30, 2005.

[60] Ms Larke turned down one position as a Call Centre Representative offering $12.00 per hour or $23,400 because she says she could not meet her expenses on that wage. She says that she hopes that after she finishes her course she can apply for a greater range of positions with higher earning potential.

[61] Again the defendant submits that she was not making adequate efforts initially as she only applied for one call centre position by March 28, 2005 and only posted her resume to one Internet site in February 2005. She did not register with any placement agencies, nor review the career section of the Vancouver Sun until March 16, 2005.

[62] It is also submitted by the defendant that Ms Larke was unreasonably restricting her job search to call centre positions, in view of the evidence of Ms Robinson.

[63] Again, on considering Ms Larke's job search efforts as disclosed in her affidavit, I do not consider that she has acted unreasonably in taking the steps she has taken to research opportunities and upgrade her computer skills. I do not consider that she was obliged to take a call centre position offering only $12.00-$16.00 per hour. She owed no such duty to the defendant or to herself. With the conflict between the evidence of Ms Larke and the evidence of Ms Robinson, I do

not consider that the defendant has satisfied its onus of showing that she has failed to mitigate by not pursuing traditional web designer positions.

[64] As previously stated, the defendant does not take the position that Ms MacDonald has made unreasonable mitigation efforts. In her affidavit, she says that she has applied for at least 24 job openings and received only one interview and she needs to work near home as she has two children with health issues that require her constant attention.

Contingency Deduction during the Notice Period

[65] I have established the notice period for each of these plaintiffs at 15 months. They were dismissed on December 15, 2004 and therefore these claims come before me for judgment after only 7½ months approximately, with another 7½ months to go in their notice periods.

[66] The issue is whether the notice periods for any of the three plaintiffs should be discounted for the possibility that they will find alternate employment in the next 7½ months before their notice period expires.

[67] In the case of Ms Common and Ms Larke, they have both just completed courses that either upgrade their computer skills, in the case of Ms Larke, or retrain for a different occupation, in the case of Ms Common. They have taken these courses as part of their duties to mitigate in the hopes of obtaining alternate employment at comparable incomes. The question now is whether their efforts will in fact result in new positions of employment during the notice period.

[68] It is unfortunate that these applications for judgment have come before me just as they are completing their courses and before there is any evidence of whether their efforts will be successful.

[69] Plaintiffs' counsel submits that there should be no deduction made for possible future mitigation and relies upon a decision of Esson C.J.S.C., in ***Cooper v. MacMillan Bloedel Ltd.*** (1991), 56 B.C.L.R. (2d) 341, where he said that there was no basis in the evidence before him for holding that the degree of likelihood of finding suitable employment within the period outweighed the degree of likelihood that it would take longer. This theory of offsetting negative contingencies against positive contingencies during the notice period was also accepted by Bouck J. in ***Smith v. Pacific National Exhibition*** (1991), 34 C.C.E.L. 64.

[70] On the other hand, in ***Beach v. Ikon Office Solutions Inc.***, [1999] B.C.J. No. 1574, Lysyk J. reduced the notice period by two months to take account of both pre-trial job seeking efforts and the possibility of alternative employment being obtained during the notice period.

[71] Ms Common and Ms Larke are both in their early 40s and fully employable for at least another 20 years of working life expectancy. They both should be somewhat attractive to employers because they have many years left to offer to any employer. They both have taken retraining or upgrading to improve their chances of alternate employment at a comparable income.

[72] I consider it appropriate in the case of Ms Common and Ms Larke to reduce their notice periods by one month. Because of their new training and their relatively

young ages, I consider it possible that they will obtain alternate suitable employment before the end of their notice periods. Accordingly, I reduce their notice periods to 14 months.

[73] In the case of Ms MacDonald, the situation is different. The defendant takes no position that she has failed to mitigate already and does not suggest any alternate employment opportunities at any income that she should have pursued. In addition, her evidence is that she has two children with health issues that require her to work close to home and she says that her family situation does not allow her to expand her job search to all areas of the Lower Mainland. The defendant does not challenge any of this evidence.

[74] In my view, Ms MacDonald's chances of alternate suitable employment during the notice period are much less than the other two plaintiffs and I do not consider it appropriate to discount her notice period at all. It will remain at 15 months.

Loss of Savings Plan Contribution

[75] The evidence is that the defendant contributed 50% of an employee's contribution to their own savings plan. In the case of Ms Common, the defendant was contributing 3%, in the case of Ms Larke 2% and in the case of Ms MacDonald 3%. The defendant does not dispute their entitlements to continuing contributions from it during their notice periods and I so order. I leave it to counsel to work out the numbers.

Loss of Opportunity to Earn Merit Salary Increases

[76] The evidence is that the plaintiffs each received regular salary increases based upon performances. Ms Common says she received an average wage increase of 3.29% per year over the last six years. Ms Larke says she received an average 3.9% wage increase over the previous five years, while Ms MacDonald says she received an average 2.91% wage increase over the last six years.

[77] Again, the defendant concedes their entitlements but relies upon the evidence of Mr. Jones, the Manager of Compensation and Benefits, who says in his affidavit that the company's salary increase guide for 2004 and 2005 limits the salary increase for Ms Common and Ms Larke to 2.25% and to Ms MacDonald to 3.25%. I award these figures to these plaintiffs for their notice periods and counsel again can work out the numbers.

Loss of Opportunity to Earn Bonuses

[78] Each of the plaintiffs say that they received annual bonuses based upon corporate and individual performance targets. The evidence is that the bonuses ranged between 7.41% and 11.18%, depending upon the plaintiff and the year. They claim in this action their averages over the previous three years.

[79] Again the defendant relies upon the evidence of Mr. Jones that the bonus plan changed from 2004 to 2005 such that in 2005 the company must reach 95% of its net income target before bonuses can be paid. So far in 2005, he says it is questionable whether the bonus threshold will be met by the company.

[80] The plaintiffs rely on a document entitled “Employee Frequently Asked Questions” provided to all employees in September 2004, where the defendant said that they could expect future bonus compensation to be comparable in 2005.

[81] In addition, Ms MacDonald was told in March 2004 by her superior that she would get her bonus entitlement for 2003 even though the defendant did not reach its net income target for that year.

[82] It is my conclusion that the plaintiffs’ bonus entitlement for the notice periods would not have been necessarily lost even if the corporate net income target is not reached. However, I do have to take that possibility into account and accordingly I set each plaintiff’s bonus entitlement during their notice periods at 8%. Again, I leave it to counsel to work out the numbers.

Loss of Opportunity to Earn Overtime

[83] Ms Common and Ms Larke say they regularly worked overtime hours in the last three years, both at time-and-a-half and double time. Ms MacDonald makes no such claim. Plaintiffs’ counsel has taken the averages for the last two years for Ms Common and Ms Larke for the purpose of their claims.

[84] The defendant relies upon the evidence of Mr. Jones who says that the overtime amounts for 2004 were unusual due to the fact that the company was expanding its operation then. However, as a result of recent events and the reduction of the number of employees following reorganization of the business, he says there will be very little overtime work in 2005.

[85] The plaintiffs reply that Mr. Jones' evidence is insufficient and having a reduced workforce logically means that there will probably be more chance of overtime rather than less chance. In addition, they repeat that their claims are based on averages only.

[86] Again, I have to take into account Mr. Jones' evidence to some extent and I award the plaintiffs, Ms Common and Ms Larke, 50% of their averages as presented over the last two years. Counsel can work out the numbers.

Expenses Incurred or to be Incurred During the Notice Periods that would have been covered by the Defendant

[87] The defendant has paid some benefits to the plaintiffs for 11 months, so the issue is whether the plaintiffs will or have incurred other expenses in the notice periods that should be covered by the defendant.

[88] Ms Larke seeks recovery of her expenses of $475 for her 12 week computer course at B.C.I.T. The defendant concedes this amount and so it is also ordered.

[89] In the case of Ms MacDonald, she estimates that by May 2006 she will be out-of-pocket approximately $2,000 for her son's medical expenses that would have been covered by the defendant's plan.

[90] The notice period that I have awarded to Ms MacDonald will end on March 15, 2006 so that most of these expenses will probably fall within her notice period.

[91] The defendant relies upon a decision of MacLachlin J., as she then was, in ***Wilks v. Moore Dry Kiln Company of Canada Ltd.*** (1932), 32 B.C.L.R. 149, where

she said that a plaintiff must show an actual loss by reason of the absence of fringe benefits before a claim for expenses can succeed.

[92] I observe, however, that in that case the right of the plaintiff to claim a loss of fringe benefits was brought to trial at the end of the notice period, not in the middle of it, as it is here.

[93] In ***Tull v. Norske Skoge Canada Ltd.***, [2004] B.C.J. No. 1691, Pitfield J. considered ***Wilks*** and distinguished it, relying upon a decision of Esson C.J.S.C., in ***Cooper v. MacMillan Bloedel*** (1991), 56 B.C.L.R. (2d) 341, where he allowed a claim for the cost of benefits that would be incurred by the plaintiff during the notice period.

[94] As I am also dealing with a claim during the notice period, as Esson C.J.S.C. did in ***Cooper***, I accept the evidence of Ms MacDonald that she will incur these expenses and I award her these expenses during her notice period. Again, I am hopeful that counsel can work out the numbers.

[95] I assume, of course, that the defendant will continue to pay all other benefits for the notice periods that it has been prepared to pay and has been paying to the plaintiffs for the appropriate 11 months period.

Pension Benefits

[96] Finally, the plaintiffs will be entitled to their pension benefits which counsel have advised me they can work out on their own.

Summary

1. The plaintiffs, Ms Common and Ms Larke are entitled to their base pay for 14 months from December 15, 2004.

   The plaintiff, Ms MacDonald, is entitled to her base pay for 15 months from December 15, 2004.

2. The plaintiff, Ms Common, is entitled to the loss of a 3% contribution from the defendant to her saving plan for her notice period of 14 months.

   The plaintiff, Ms Larke, will be entitled to a 2% contribution for 14 months.

   The plaintiff, Ms MacDonald will be entitled to a 3% contribution for 15 months.

3. The plaintiffs, Ms Common and Ms Larke, are entitled to the loss of a merit salary increase for 14 months of 2.25% of their base salary.

   The plaintiff, Ms MacDonald, is entitled to a merit salary increase for 15 months of 3.25% of base salary.

4. Each plaintiff is entitled to a bonus entitlement of 8% for their notice periods.

5. The plaintiffs, Ms Common and Ms Larke, are entitled to loss of overtime income of 50% of their averages over the last two years for their notice periods of 14 months.

6. The plaintiff, Ms Larke, is entitled to $475 to reimburse her for her professional development expense.

   The plaintiff, Ms MacDonald is entitled to her expected medical expenses for her notice period of 15 months.

7. Each plaintiff is entitled to a continuation of all other benefits the defendant is already paying, to continue to the end of their notice periods.

8. The plaintiffs are each entitled to pension contributions as determined by the parties.

[97] The plaintiffs will have one set of costs at Scale 3 in the absence of any issue of offers to settle.

"Truscott J."