# COURT OF APPEAL OF YUKON

Citation: *Cabott v. Urban Systems Ltd.*,
2016 YKCA 4

Date: 20160427
Docket: 15-YU757

Between:

**Lesley Cabott**

Respondent
(Plaintiff)

And

**Urban Systems Ltd.**

Appellant
(Defendant)

Before: The Honourable Madam Justice Saunders
The Honourable Mr. Justice Groberman
The Honourable Madam Justice Shaner

On appeal from: An order of the Supreme Court of Yukon, dated May 8, 2015
(*Cabott v. Urban Systems*, 2015 YKSC 25, Whitehorse Docket No. 14-A0053).

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| Counsel for the Appellant: | R.G. Macdonald, Q.C. |
| Counsel for the Respondent: | D. Fendrick |
| Place and Date of Hearing: | Whitehorse, Yukon<br>November 17, 2015 |
| Place and Date of Judgment: | Vancouver, British Columbia<br>April 27, 2016 |

**Written Reasons by:**
The Honourable Madam Justice Saunders

**Concurred in by:**
The Honourable Mr. Justice Groberman
The Honourable Madam Justice Shaner

***Summary:***

*The appeal is from a damages award for wrongful dismissal. The employee was employed for about 14 months in a responsible professional position. There was nothing unusual in the circumstances that took the period of reasonable notice beyond the normal range. Held: appeal allowed. The damages are reduced to accord with a four-month notice period.*

**Reasons for Judgment of the Honourable Madam Justice Saunders:**

[1] Urban Systems Ltd. appeals from the order of the Supreme Court of Yukon requiring it to pay damages to its former employee, Ms. Cabott, based on six months' notice for wrongful dismissal. It contends the damages award is excessive.

[2] On April 3, 2013, Ms. Cabott, resident of Whitehorse, Yukon, commenced employment with the appellant in the capacity of a professional planner and supervisor for the appellant's practice in Whitehorse. She was dismissed without cause on May 27, 2014, just short of 14 months (not 13 months as stated by the judge). The appellant paid Ms. Cabott two weeks' termination pay in accordance with legislative requirements, and a further 12 weeks' salary in lieu of notice.

[3] The appellant acknowledges that the contract of employment required it to give Ms. Cabott reasonable notice of the termination of her employment, and as a remedy for failing to do so is required to pay her an amount equal to salary and benefits she would have earned in that notice period (less any sums earned during that period in mitigation). The questions on this appeal are whether the judge erred in considering the respondent's hope of transferring her employment to Vancouver, British Columbia, as a factor supporting a notice period of six months, and whether the six months' notice period established by the judge is so far outside the range of notice as to be unreasonable.

The Circumstances

[4] There is little description of the appellant's enterprise in the reasons for judgment. I have taken the description of it, therefore, from the pleadings and the affidavits filed in this summary trial, including material given to Ms. Cabott during the hiring process and which is attached as exhibits to her affidavit. That material describes the appellant as a corporation that provides planning services to various entities in the areas of transportation, water and wastewater, and communities. As well as Whitehorse, the appellant has offices in Western Canada, including the Vancouver area. The description of Ms. Cabott's job included "leading and

increasing … market presence with target clients in the Yukon, NWT Territories and Alaska, including First Nation communities, economic development corporations, incorporated communities and the territorial government."

[5] Ms. Cabott was 53 years old at the time of trial. She holds a Master's degree in town and regional planning. The judge described her as having "prior extensive work experience in planning and development in the Yukon for both the private sector and the City of Whitehorse." Ms. Cabott came from the Lower Mainland of British Columbia, and wished to eventually return and retire there.

[6] In December 2011 Ms. Cabott commenced employment with a national engineering and related infrastructure firm. That employment included opening a Whitehorse office. In 2012 Ms. Cabott met representatives of the appellant, both at business events and socially. That introduction led to discussions of employment and her engagement by the appellant. The judge described the respondent's hiring and dismissal:

> [6] There is conflicting evidence as to who induced whom for the plaintiff to ultimately join employment with the defendant's firm.
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> [7] I have concluded, ultimately, there were mutuality of interests beneficially to both parties for the plaintiff to be employed with the defendant. The plaintiff had extensive specialty work experience in the North, for which the defendant wished to expand their business. She was featured to be the face representative for the company with managerial and supervisory responsibilities for other sales employees.
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> [8] The opportunity for work and advancement was much better than with her previous employer, … with whom she was becoming disenchanted before joining the defendant. Her position with the defendant was a senior managerial role with specialized professional skills. She had received assurance that her employment would be secure with potential opportunity for eventual partnership if justified by her performance.
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> [11] The defendant, however, after 13 months decided for their own reasons to terminate the services of the plaintiff without cause. There was nothing unusual in the manner of termination.
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> [12] The plaintiff quickly became self-employed as a consultant.
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> [16] I conclude the following factors are relevant in determining the appropriate notice period:

> 1. At the time of her hiring, the plaintiff was an established resident and professional planner in Whitehorse. She was not induced to relocate to Whitehorse to take employment with the defendant.
> …
> 3. The plaintiff's notice of termination of [her former employer] was approximately one month.
> 4. On the evidence, the plaintiff was not induced to join the defendant but, rather, made that decision for her own reasons.
> 5. When the plaintiff gave her notice to [her former employer], she was not committed to joining Urban Systems Ltd. but, rather, was considering whether she should join Urban Systems or go into business for herself.
> …
> 7. The decision by the defendant to terminate the plaintiff's employment was based on legitimate commercial and business reasons, and for no ulterior motive.
> 8. The defendant made every effort to carry out the termination of the plaintiff's employment in a discrete, professional, and businesslike manner.

[7] In assessing the length of notice Ms. Cabott was entitled to receive the judge referred to *Bardal v. Globe & Mail Ltd.* (1960), 24 D.L.R. (2d) 140 (Ont. H.C.J.), and *Saalfeld v. Absolute Software Corp.*, 2009 BCCA 18. He concluded:

> [17] However, when one considers also the plaintiff's age of 53 years, the latter part of her career, the specialized professional skills, the expectation of secure employment and possible eventual transition of work and retirement to Vancouver, together with her role of senior and supervisory management in Whitehorse, I conclude an appropriate period of notice in this case is six months.

Discussion

[8] This case, at its base, is a case in contract concerning the implied term that the employer must provide reasonable notice to the employee in the event of dismissal without cause. As observed in *Saalfeld* at para. 36, quoting from *Dunlop v. B.C.Hydro & Power Authority* (1988), 32 B.C.L.R. (2d) 334 at 338 "The implied term is not a term to the effect that the employer may give pay in lieu of notice".

[9] In answering what would have been reasonable notice, the judge referred to the familiar *Bardal* factors which are applied in determining the period of reasonable

notice. In *Ansari v. B.C. Hydro and Power Authority* (1986), 2 B.C.L.R. (2d) 33, aff'd 55 B.C.L.R. (2d) xxxiii, 1986 B.C.J. No. 3006, Chief Justice McEachern refined the *Bardal* factors, ending with this statement at p. 43:

> At the end of the day the question really comes down to what is objectively reasonable in the variable circumstances of each case, but I repeat that the most important factors are the responsibility of the employment function, age, length of service and the availability of equivalent alternative employment, but not necessarily in that order.

[10] The application of these factors is not linear and is highly dependent on circumstances. In the context of short term employment, the ratio of length of notice to the length of service is higher than it usually is in medium or long service situations, but at a reducing rate. There are, therefore, no formulas for determining the length of reasonable notice.

[11] Further, some of the *Bardal* factors are interrelated, and the emphasis placed on them in any era to some degree reflects the job market and the courts' perception of workers of a certain age or expertise. For example, the significance of the character of the employment (described in *Ansari* as "the responsibility of the employment function"), relates at least in part to the availability of replacement employment, and the emphasis on age in part reflects a perception that people of certain ages may have more success or difficulty in obtaining replacement employment, particularly in cases of long service in which the employee has not been required to seek out new employment for considerable time. In this imprecise framework, a body of jurisprudence has developed applying the usual factors to various circumstances – a bed of legal experience – that provides a range of notice periods for like cases. The concept of range in wrongful dismissal cases promotes the orderly resolution of differences by guiding the employer community in determining fair notice periods on termination of employment, and the employee community in assessing the fitness of a severance package. A practical consequence of this development is that a notice period that is anomalous, without good reason, will be said to be unreasonable and subject to interference by an appellate court.

[12] The question before us is whether the six months' notice period determined by the judge is anomalous without good reason. In my view it is.

[13] Some guidance in the length of the appropriate range for a short term employee may be had from *Saalfeld* and *Hall v. Quicksilver Resources Canada Inc.*, 2015 BCCA 291. In *Saalfeld* the employee was 35 years old when dismissed. She had been a senior software salesperson employed for nine months before she was laid off into a difficult job market. She took nine months to find another position. The judge described her position with the defendant as responsible and relatively senior, although one without management responsibilities. The judge observed that the length of time it took to find replacement employment was some evidence "supporting that the brevity of employment may affect a subsequent job search", and assessed damages on the basis of five months' notice.

[14] On appeal the notice period was upheld, but found to be at the very high end of the range. In a passage quoted by the judge in this case, Madam Justice Huddart addressed the issue of notice in short service claims:

> [15] …. the respondent submits that the recent jurisprudence supports a notice period of five to six months in short service cases. While B.C. precedents are consistent that proportionately longer notice periods are appropriate for employees dismissed in the first three years of their employment, I see little support for the proposition that five to six months is the norm in short service cases for employees in their thirties or early forties whose function is significant for their employer, but not one of senior management. … Absent inducement, evidence of a specialized or otherwise difficult employment market, bad faith conduct or some other reason for extending the notice period, the B.C. precedents suggest a range of two to three months for a nine-month employee in the shoes of the respondent when adjusted for age, length of service and job responsibility: [List of authorities omitted.]

[15] In *Hall* this court shortened a notice period of seven months to three months for a 42-year-old skilled employee with approximately nine months' service with his employer. Madam Justice Newbury, for the court, summarized:

> [42] Of course, courts of law must also look to what awards have been given in similar cases. In this regard, Ms. Gill referred us to a number of cases involving employees with short-term periods of service in which notice periods of two or three months were selected: see especially *Jimmo v. Chief*

> *Hauling Contractors Ltd*. [2009] C.L.A.D. No. 129 and *Allen v. Assaly Holdings Ltd.* [1991] 34 C.C.E.L. 81 (Ont. S.C.J.) We were also referred to this court's decision in *Saalfeld v. Absolute Software Corp.* 2009 BCCA 18, in which a "norm" of five to six months' notice in "short service cases for employees in their thirties or early forties whose function is significant for their employer, but not one of senior management," was rejected. (Para. 15.) The Court suggested that British Columbia precedents indicated a range of two to three months for a nine-month employee in the shoes of the plaintiff in *Saalfeld*.
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> [44] In this case, the trial judge's choice of seven months as the appropriate period of notice did fall outside the usual range, which as we have seen is generally around two to three months in cases involving short periods of employment and skilled employees who are in their forties. I would allow the appeal on this ground as well.

[16] On behalf of Ms. Cabott it is said that this case is unlike *Saalfeld* and *Hall* because those cases concerned younger employees in less responsible positions, and thus this case warrants the award based on six months' notice.

[17] It is true that Ms. Cabott is somewhat older than the employees in the cases just mentioned. It is not apparent to me, however, that the notice period should be extended in this case for that reason. It is not invariable that a mature person will have difficulty securing a new position. Some occupations by their nature are more likely to be occupied by individuals who, as a consequence of wisdom, experience and reputation acquired over the years, are older. This is demonstrated by the manner in which Ms. Cabott was engaged by the appellant. From the description of her position one may conclude that her prior contacts and experience, gained over her working life, made her candidacy attractive. It is not apparent on the record that Ms. Cabott's field of expertise is a "young person's game", and this was not the subject of comment by the judge. I cannot conclude that Ms. Cabott's age, which is some distance from the common age of retirement, favours a longer than usual notice period, or is a basis to distinguish *Saalfeld* and *Hall*.

[18] On the other hand, there is some force to the submission that Ms. Cabott's position in Whitehorse, described by the judge as senior and supervisory management, involved somewhat greater responsibility than the positions discussed

in *Saalfeld* and *Hall*. Accepting the description of the range of notice for specialized employees in short term positions as two to three months as observed in *Saalfeld* and *Hall,* the character of this employment would justify an award modestly beyond that range.

[19] Are there then, special circumstances that would extend the notice even further? In the factors listed by the judge as supporting a notice period of six months, only one could be said to be unusual – the expectation of secure employment and possible eventual transition of work and retirement to Vancouver. The appellant challenges this finding of an expectation, and says it was always the premise of her position that Ms. Cabott would be based in Whitehorse.

[20] In my view, the judge erred in referring to an "expectation of … possible eventual transition … to Vancouver". The evidence does not support a finding of a mutual expectation, or even a realistic possibility, of a move; it goes no further than describing Ms. Cabott's desire to transfer to British Columbia, demonstrating her openness to such a possibility. To state it another way, there is no evidence that Ms. Cabott's aspiration was consistent with the employer's purpose in offering her employment, which was to advance its Whitehorse office by developing business in the Yukon and Northwest Territories. On the evidence, Ms. Cabott's employment was geographically specific. Her hope of using the position to return to the Lower Mainland of British Columbia was in the realm of speculation.

[21] This is an action in contract. That means that a unilateral life plan is outside the contract unless and until expressed in, or in some fashion brought within, the employment relationship. It is possible that a promise of a move may have compensable value to an employee, for example when a promise induced the employee to leave a secure position. On its own, however, a unilateral life plan that is not reflected in the employment contract does not extend the parties' rights or obligations.

[22] I consider the judge erred in putting weight on the appellant's desire to use this employment as a springboard to return to British Columbia. That being so, in my

view the damage award wrongly compensates for a factor that does not admit of compensation.

[23] For a short term employee the useful starting place in discussing range is the two to three months spoken of in *Saalfeld* and *Hall*. The only feature of this case that would extend that range (there being no special circumstances such as inducement, bad faith or a poor labour market) is a level of responsibility not present in those cases.

[24] Adjusting the judge's finding that six months was a reasonable notice period to take account of his erroneous reference to Ms. Cabott's hope of returning to British Columbia, and considering the range for this type of case which I would put generally at three to four months, I would allow the appeal, set aside the order and grant judgment to Ms. Cabott based upon four months' notice. As the appellant has been successful on the appeal, I consider the usual rule that costs follow the event should apply, but would give liberty to the parties to make submissions on the issue of costs if desired.

"The Honourable Madam Justice Saunders"

I AGREE:

"The Honourable Mr. Justice Groberman"

I AGREE:

"The Honourable Madam Justice Shaner"