Citation: Brown v General Electric Canada, 2025 MBCA 37
Date: 20250425
Docket: AI24-30-10110

IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Marc M. Monnin
Mr. Justice Christopher J. Mainella
Madam Justice Janice L. leMaistre

BETWEEN:

BRADLEY BROWN	***B. A. Steidl*** *for the Appellant*
(Plaintiff) Appellant	***D. E. Jozefacki*** *and* ***R. M. Khan*** *for the Respondents*
- and -	
GENERAL ELECTRIC CANADA operating as GE TRANSPORTATION and the said GE TRANSPORTATION	*Appeal heard and Decision pronounced:* ***April 11, 2025***
(Defendants) Respondents	*Written reasons:* ***April 25, 2025***

On appeal from *Brown v General Electric Canada*, 2024 MBKB 95 [*Brown*]

MAINELLA JA (for the Court):

Introduction

[1] This wrongful dismissal appeal focuses on an employee's duty to mitigate their damages when an offer of comparable employment is provided by a successor employer but rejected. After hearing the plaintiff's appeal, we dismissed it with reasons to follow. These are those reasons.

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Background

[2] In 1992, the plaintiff, an electrical engineer, founded Iders Inc. (Iders) in Oakbank, Manitoba, an electronic product design and manufacturing company for the rail industry. On December 8, 2016, the defendant, GE Transportation (GE Transportation), a division of the General Electric Company, acquired Iders.

[3] On November 29, 2016, the plaintiff became an employee of GE Transportation by executing an employment agreement (the EA), a retention bonus agreement (the RBA) and a restrictive covenant agreement (the RCA).

[4] Under the terms of the RBA, the plaintiff was to receive a $300,000 retention bonus on the five-year anniversary of the closing date of the purchase of Iders, provided he satisfied the terms of that agreement, which included remaining actively employed on a full-time basis with GE Transportation.

[5] In May 2018, General Electric Company began discussing the divestiture and subsequent merger of its transportation business, GE Transportation, with the Wabtec Corporation (Wabtec), a global railway manufacturer (the Wabtec deal). The Wabtec deal involved the purchase of significant assets and liabilities in Canada and the United States.

[6] On February 1, 2019, the plaintiff contacted Todd Goodermuth (Mr. Goodermuth), a product director at GE Transportation, expressing

concern that he was going to be "involuntarily terminated" by the Wabtec deal. The plaintiff was also worried about the assignment of the EA, the RBA and the RCA as a result of the Wabtec deal because Wabtec was not an affiliated legal entity of the General Electric Company. The plaintiff believed that if he accepted a new position at Wabtec, that would disentitle him to his retention bonus under the RBA because he would be in breach of the RCA by voluntarily leaving GE Transportation for a competitor, Wabtec.

[7] Mr. Goodermuth replied that he was not aware of the plaintiff being terminated by the Wabtec deal and he would seek advice on the concerns raised.

[8] As part of the Wabtec deal, Wabtec made offers of employment to all staff at GE Transportation at the Oakbank facility. On February 8, 2019, the plaintiff received his written offer from Wabtec (the offer letter). According to the offer letter, the plaintiff's terms of employment would continue without change, including recognition of his prior service, his current title, reporting structure, compensation and benefits. The offer letter stated that, "[t]o the extent not specifically addressed in [the offer letter], [his] present terms and conditions of employment at GE [would] be substantially similar at Wabtec."

[9] From February 12 to February 14, 2019, the plaintiff discussed with senior management at GE Transportation how the Wabtec deal would impact him. The plaintiff was reassured in conversations and in written correspondence from senior management at GE Transportation that Wabtec would honour the RBA as it formed part of the assets and liabilities of GE Transportation that was being purchased by Wabtec. The plaintiff was

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told he was a valued employee and everyone looked forward to him continuing to work in the business after the Wabtec deal closed.

[10] On February 22, 2019, the plaintiff had three phone conversations with representatives of GE Transportation as he continued to have concerns about his future. During the third phone call, there was a discussion about the plaintiff receiving a revised offer letter from Wabtec that would expressly include reference to the RBA. After the final phone conversation, the plaintiff emailed a representative of GE Transportation and stated: "After having consulted with counsel and deliberated on it, I have decided that there is no point in Wabtec generating an offer letter updated as we discussed a few hours ago." He said he was "not terminating [his] employment with GE" and he was "not accepting an offer of employment with Wabtec as it [had] been presented to [him]."

[11] On February 25, 2019, when the Wabtec deal closed, the plaintiff did not become an employee of Wabtec.

[12] The plaintiff sued for wrongful dismissal.

[13] After a trial, the judge found that the plaintiff had been constructively dismissed from his employment because of the Wabtec deal but that he "failed to act reasonably in mitigation of his damages by not accepting Wabtec's offer of continued employment. Had he done so, he would have avoided all of the damages he [subsequently claimed]" (*Brown* at para 66).

[14] As a result, the judge limited the plaintiff's damages award to the sum of $133,000, plus prejudgment interest at the statutory rate, based on his

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entitlement under the RBA to a pro-rated bonus until his involuntary termination. The judge dismissed the plaintiff's claim for further damages in the amount of $763,640.84 (see *ibid* at para 65).

Discussion

[15] The first issue is a question of the judge's interpretation of non-standard form contracts: the RBA, the RCA and the offer letter. The standard of review is not in dispute (see *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53 at paras 50-55 [*Sattva*]).

[16] In addition to having to be actively employed with GE Transportation for sixty months to receive the full amount of the retention bonus, a further term of the RBA was that the plaintiff had to "comply with the terms and conditions of the attached [RCA]." Under the RCA, the General Electric Company, acting through GE Transportation, could assign the RCA "only to an affiliated legal entity." A further clause of the RCA was to the effect that it could not be amended or modified except by way of a written agreement signed by the parties.

[17] The plaintiff argued that the RBA and the RCA were "two parts of a single agreement" (*Brown* at para 37). His position was that, if he accepted employment with Wabtec, at law, he would be voluntarily leaving his employment at GE Transportation. The legal effect of that would be to "forfeit" (*ibid* at para 35) his right to the $300,000 retention bonus under the RBA by ceasing to be "actively employed" (*ibid*) with GE Transportation for the required five-year period. Finally, he submitted that his rights under the RBA, including the retention bonus, could not be assigned to Wabtec because,

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even if he consented to the assignment, Wabtec was not an affiliated legal entity of the General Electric Company.

[18] The judge rejected the plaintiff's interpretation of the RBA and the RCA. In his view, there was "no basis" to treat the RBA and the RCA "as one agreement" (*ibid* at para 38). The judge said, "[n]othing in either agreement justifie[d] such an interpretation" (*ibid*). He went on to conclude that there was nothing "in the [RBA] to justify incorporating into it" (*ibid*) the assignment restriction in the RCA. He noted there was no assignment restriction in the RBA whatsoever. In his view, "nothing prevented" (*ibid* at para 39) Wabtec from assuming GE Transportation's obligations to the plaintiff under the RBA by a binding agreement, such as the offer letter.

[19] In our view, the judge properly examined the ordinary meaning of the RBA and the RCA in light of the whole of the documents and the relevant surrounding circumstances and, in particular, that the RBA and the RCA arose from a "hybrid transaction [in 2016] that contain[ed] both commercial and employment elements" (*Dentalcorp Health Services Ltd v Dr Kenneth Hamin Dental Corporation*, 2024 MBCA 44 at para 34). The judge appropriately gave no weight to the plaintiff's *viva voce* evidence as to what particular words in the RBA and the RCA meant (see *Rosenberg v Securtek Monitoring Solutions Inc*, 2021 MBCA 100 at para 100).

[20] We also agree with the judge's comment that the offer letter "reasonably construed, ought to have allayed [the plaintiff's] concerns" (*Brown* at para 41). The RBA was a component of the plaintiff's conditions of employment at GE Transportation and, because the offer letter did not "specifically [address]" (*ibid*) the RBA, it would, as the judge found,

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"continue in force, and be enforceable against Wabtec" (*ibid*). As the judge explained, the employment offered by Wabtec in the offer letter "was not only comparable, but practically identical, to [the plaintiff's] employment with GE Transportation" (*ibid* at para 33).

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[21] We would also highlight the commercial efficaciousness of the judge's interpretation of the RBA, the RCA and the offer letter.

[22] As the defendants underscore, the RBA and RCA agreements have "separate and distinct promises, obligations, and consideration", some of which were directed to the sale of Iders to GE Transportation and others towards the plaintiff's employment with GE Transportation. We further agree with the judge's comment that "it [was] hard to imagine under what possible circumstances GE Transportation would or could have taken the position, post-closing, that [the plaintiff's] acceptance of Wabtec's offer of employment constituted an actionable breach of its [RCA]" (*ibid* at para 51). With respect, the plaintiff's view of the possible negative implications of the RCA to him collecting his retention bonus if he transferred his employment to Wabtec, a result GE Transportation was encouraging, appears to be an attempt to fit a round peg into a square hole.

[23] In terms of the offer letter, it should not be forgotten that Wabtec wanted all of GE Transportation's assets and liabilities in Canada. It was a mutual interest of the parties to the Wabtec deal that highly trained staff in Oakbank, such as the plaintiff, continued their employment at Wabtec. That meant Wabtec would honour promises made to employees by GE Transportation, such as the plaintiff's RBA. Nothing that occurred in the

Wabtec deal suggests otherwise and the plain wording of the offer letter needs to be considered in that factual matrix.

[24] In summary, we have not been convinced that the judge made a palpable and overriding error in his contractual interpretation of the RBA, the RCA or the offer letter.

[25] The next issue raises a finding of fact based on a credibility assessment of witnesses. The standard of review is palpable and overriding error (see *FH v McDougall*, 2008 SCC 53 at paras 70-73; *HL v Canada (Attorney General)*, 2005 SCC 25 at paras 41, 53; *Permaform Plastics Ltd v London & Midland General Insurance Co*, [1996] 7 WWR 457 at paras 39-47, 1996 CanLII 17951 (MBCA)).

[26] The judge found that the plaintiff's testimony was not reliable as to him raising concerns about the RCA with representatives of GE Transportation and Wabtec in February 2019. The judge said of the plaintiff, "I think he is mistaken in his recollection, for two reasons" (*Brown* at para 48): first, the absence of any written communications to support the plaintiff's narrative and, second, the conflicting testimony of four GE Transportation witnesses who did not recall the plaintiff ever raising a concern about the RCA, only about the RBA.

[27] Counsel for the plaintiff ably highlighted aspects of the record that suggest the judge made a palpable error in assessing the credibility of the plaintiff. This Court was referred to seven pieces of evidence consisting of emails from the plaintiff to representatives of GE Transportation where a concern about the impact of the RCA is raised, notes of the plaintiff of telephone conversations with representatives of GE Transportation to the

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same effect, and testimony of GE Transportation witnesses that could be corroborative of the plaintiff's statement that he raised concerns about the RCA with them.

[28] In our view, assuming without deciding that the judge made a palpable error, it could not be said to be an overriding error because it would not be "determinative of the outcome of the case" (*Albo v The Winnipeg Free Press*, 2020 MBCA 50 at para 19). Leaving aside the dubious relevance to the proposed evidence from the plaintiff as to the issue of contractual interpretation, such evidence is inadmissible to that issue. The text of the RCA and the RBA and the factual matrix when they were executed are unambiguous. As explained in *Vesturland Development Ltd v Gimli (Rural Municipality)*, 2021 MBCA 45, in the absence of contractual ambiguity, "[s]ubsequent conduct, or evidence of the behaviour of the parties after the execution of the contract, is not part of the factual matrix" (at para 40). As cases such as *Sattva* explain, the complaints of the plaintiff to staff at GE Transportation in 2019 shed no light in law as to what was the "objective intent" of the parties to the RBA and the RCA in 2016 (at para 49).

[29] When the judge's reasons are read as a whole and in the context of the issues in dispute and their importance, it is clear to us that the judge's credibility comment about the plaintiff's failure to raise concerns about the RCA in February 2019 was peripheral to his decision on the key issue as to whether the plaintiff's retention bonus would be forfeited by him transferring his employment to Wabtec due to the Wabtec deal. If the judge erred in his credibility assessment of the plaintiff, we are satisfied it did not affect the result.

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[30] The final issue is the duty of a wrongfully terminated employee to reasonably mitigate their loss. The applicable law was summarized by Hunt JA in *Globex Foreign Exchange Corporation v Kelcher*, 2011 ABCA 240 at para 55, as follows:

> A wrongfully terminated employee is entitled to damages, but a defendant employer can argue that damages ought to be reduced because of the employee's unreasonable failure to mitigate the loss by taking other employment: *Red Deer College v Michaels*, [1976] 2 SCR 324, [1975] 5 WWR 575. The defendant's burden of demonstrating a failure to mitigate is onerous, however, because although in breach, he is demanding positive action from the innocent party: *Cheshire, Fifoot and Furmston* at 683. Defendants cannot complain of a failure to mitigate caused or materially contributed to by their own actions: *2438667 Manitoba Ltd v Husky Oil Limited*, 2007 MBCA 77, [2007] 9 WWR 642 at 654.

[31] The judge decided that "GE Transportation ha[d] satisfied its onus with the evidence of Wabtec's offer of continued employment with it on substantially similar terms" (*Brown* at para 55). He said the plaintiff's reason for rejecting comparable employment with Wabtec—the concern of losing the retention bonus based on an interpretation of the RBA and the RCA—was unreasonable (see *ibid* at para 33).

[32] The judge's finding of whether GE Transportation had met its onus of proving that a reasonable person in the place of the plaintiff would have accepted the Wabtec offer is a question of mixed fact and law (see *Evans v Teamsters Local Union No 31*, 2008 SCC 20 at para 35 [*Evans*]).

[33] The judge said there was "no merit" (*Brown* at para 53) to the plaintiff's argument that, "as a matter of law GE Transportation [was] not entitled to rely on his refusal of Wabtec's employment offer, because the offer

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was made before the termination of his employment on February 23, 2019 and was never revived thereafter" (*ibid*). He went on to comment in his reasons that, "[w]hile the timing of an offer of employment may be relevant in determining whether a plaintiff's decision to reject it was unreasonable in the circumstances, it is not determinative. It is simply one of a number of factors to be taken into account when assessing a dismissed employee's performance of their duty to mitigate" (*ibid* at para 57).

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[34] In our view, it was made clear in *Evans* that a multi-factored and contextual approach is to be taken into the inquiry of whether an employee has failed in their duty to reasonably mitigate their damages. As Finch CJA observed in *Silva v Leippi*, 2011 BCCA 495, "a reasonable person should be expected to take available employment where the salary offered is the same, where the working conditions are not substantially different, and where there are no acrimonious relations" (at para 29).

[35] Several features of this case are noteworthy:

(a) The Wabtec offer of continued employment to the plaintiff was reasonably comparable to the terms of employment at GE Transportation (see *Evans* at para 30), unlike the case in *Giduturi v LG Electronics Canada Inc*, 2023 ONSC 5476 at para 21; *Dussault v Imperial Oil Limited*, 2018 ONSC 1168 at para 66, aff'd 2019 ONCA 448 at paras 6-7; *Frederickson v Newtech Dental Laboratory Inc*, 2015 BCCA 357 at paras 24-26;

(b) The Wabtec offer of continued employment did not require the plaintiff to work "in an atmosphere of hostility, embarrassment

or humiliation" (*Evans* at para 30), unlike the situations in *Cox v Robertson*, 1999 BCCA 640; *Farquhar v Butler Brothers Supplies Ltd*, 1988 CanLII 185 (BCCA); and

(c) The judge discounted the significance of the timing of the Wabtec offer occurring *before* the termination because he drew an inference on the evidence that Wabtec would have re-extended its offer to the plaintiff *after* the termination if there was any suggestion the plaintiff changed his mind, as Wabtec wanted the plaintiff to continue in his employment and took no steps to fill the position (see *Brown* at paras 55-56).

[36] While the timing of a new offer of employment may be significant in the *Evans* analysis as to whether an employer can prove a failure by an employee to reasonably mitigate their loss, the factual context of whether reasonable steps have been taken to attempt to mitigate a loss is important (see *2438667 Manitoba Ltd v Husky Oil Limited*, 2007 MBCA 77 at 17). Here there is an evidentiary basis to the judge's finding that the precise timing of the offer of continued employment to the employee was not material to the question of mitigation, unlike the situation in cases such as *Farwell v Citair, Inc (General Coach Canada)*, 2014 ONCA 177 at paras 20-21 (see also *Hickey v Christie & Walther Communications Limited*, 2020 ONSC 7214 at para 81).

[37] The circumstances here are that the termination of the plaintiff's employment contract with GE Transportation was due to a reorganization of a business on a North American-wide basis; it had nothing to do with the plaintiff personally. There is a complete absence of evidence of any material

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changes to the terms of employment, conditions rendering continuing employment with the successor employer unreasonable, or any evidence of acrimony, humiliation or loss of dignity that would arise by the plaintiff accepting Wabtec's offer (see *Evans* at paras 29-31).

[38] The thrust of the plaintiff's submissions asks this Court to retry the issue of mitigation of damages and substitute our view for that of the judge. That is contrary to the deferential standard of review (see *Housen v Nikolaisen*, 2002 SCC 33 at para 3). In our view, the judge thoroughly considered the evidence and relevant factors as to whether GE Transportation had met its onus to establish that the plaintiff's damages should be reduced because he unreasonably failed to mitigate the loss by taking other comparable employment at Wabtec.

[39] In conclusion, we have not been persuaded that the judge made a palpable and overriding error in his finding on mitigation of damages. There is no basis to disturb his damages award.

Disposition

[40] In the result, the appeal was dismissed with costs.

_______________________________ JA

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