

CITATION: Shelp v. GoSecure Inc., 2025 ONSC 0049
COURT FILE NO.: CV-22-90060
DATE: 2025/01/02

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Henry Brent Shelp, Plaintiff

AND

GoSecure Inc, Defendant

COUNSEL: J.F. Lalonde and Morgan McCartney, counsel for the Plaintiff

Martin J. Thompson and Hamza Bettah, counsel for the Defendant

HEARD: November 29, 2024 (Ottawa)

DECISION ON A SUMMARY JUDGEMENT MOTION

Justice Charles T. Hackland

[1] The plaintiff brings this motion for summary judgement in a wrongful dismissal action. The main issue is the period of common law reasonable notice to which the plaintiff is entitled and the calculation of the plaintiff's income loss, particularly his entitlement to sales commissions, referable to the notice period. The defendant seeks a dismissal of this motion, contending the issues require a trial. For the reasons discussed below, I find the issues are entirely appropriate for disposition on this summary judgement motion and a trial of the action is not required. As the Court of Appeal observed in *Arnone v. Best Theatronics Ltd.*, 2015 ONCA 63 "...a straight forward claim for wrongful dismissal without cause...strikes me as the type of case usually amenable to a Rule 20 summary judgement motion". This is clearly such a case.

Agreed Upon Matters

[2] I will summarize the facts which are specifically agreed to by counsel, or which are not in dispute. The defendant is a U.S. based company in the security software business. On August 5, 2022 the plaintiff was summarily dismissed from his position as the defendant's Vice President, Sales, for Ontario and Western Canada. He was 51 years of age at the time and had been with the defendant in this executive sales position for only 10 months. This was a not for cause termination

resulting from an economic downturn in the company's business, in which a number of other employees were also terminated.

[3] The terms of the plaintiff's employment entitled him to an annual base salary of \$190,000 plus commissions of up to a further \$190,000 as well as comprehensive benefits and a monthly cell phone allowance of \$110. The plaintiff managed a 3 person sales team. Aside from that he had no other significant budgetary or autonomous decision-making authority.

[4] The plaintiff was provided with a letter agreement summarizing the terms of his employment, dated July 27, 2021, which provided "... should GoSecure terminate your employment you will be given notice as is stipulated by Ontario Labour Standards". The defendant properly concedes this is not an enforceable termination provision under Ontario law, with the result that the plaintiff is entitled to a severance payment calculated on a common law notice basis. The defendant did pay one week's salary to the plaintiff subsequent to his termination.

[5] The parties have agreed that the plaintiff made reasonable efforts to find new employment in a similar position after his termination and accordingly there is no allegation of failure to mitigate. The parties further agree that the defendant is entitled to a credit for offsetting income the plaintiff was able to earn subsequent to his termination, in the amount of \$20,642.

[6] About 11 months following the termination of his employment by the defendant, the plaintiff was engaged by another software company, Gurukul Solutions (in June of 2023) in a sales management capacity, at a very similar rate of remuneration as he had at GoSecure. The plaintiff was engaged by Gurukul under a consulting agreement with the Plaintiff's company 2583573 Ontario Inc. under which he was stated to be an "independent contractor".

[7] The parties agree the reasonable notice period is to be calculated on the basis of the well settled principles set out in the case of *Bardal v Globe and Mail Ltd.*, (1960) 24 D.L.R. (2d) 140 (the Bardal factors"). The court in *Bardal* explained 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.

Matters in Dispute

[8] The following issues were the focus of argument on this motion: [1] in connection with his hiring, was the plaintiff induced by the defendant to leave secure employment?; [2] the manner in which the plaintiff's estimated sales commission should be calculated over the common law notice period and [3] in all the circumstances, what the duration of the common law notice period should be. I will discuss each of these issues.

Inducement from Secure Employment

[9] The plaintiff says he was induced to leave secure employment with his former employer Skybox, by promises of greater opportunity for advancement with GoSecure. In the result he was terminated after only 10 months employment with the defendant, a scenario sometimes recognized as increasing the notice period otherwise applicable. I note there are no allegations of negligent misrepresentations about the employment opportunity. The defendant hired the plaintiff in good faith without knowledge of a likely downsizing and indeed the plaintiff initially received more than he bargained for. He was hired to be a Director of Sales but was staffed into a Vice President of Sales position, due to an opening that occurred in the company.

[10] I accept the plaintiff's evidence that the employment opportunity with GoSecure came up in a conversation he had with Tom Ross, a senior executive with GoSecure. The plaintiff and Mr. Ross had known each other for some time and periodically discussed career opportunities. In that context Mr. Ross attempted successfully to interest the plaintiff in the GoSecure position. Before the hiring was completed, Mr. Ross and his superior Mr. Miller were aware of the senior sales position the plaintiff held with Skybox and that he had been with Skybox for 4 and a half years.

[11] There is no suggestion the plaintiff was actively looking to leave Skybox or that his position there was in jeopardy. The plaintiff's working relationship with Skybox was governed by a consulting agreement wherein the plaintiff, or his numbered company was an independent contractor. Nevertheless, his relationship with Skybox was exclusive. He had no other clients. This

was a de facto employment relationship, commonly referred to as a “dependant contractor”. The plaintiff resumed this type of relationship in his present business with Gurucul Solutions.

[12] In any event, I am unable to conclude the plaintiff was induced or actively recruited to join GoSecure. Rather, he was advised of an opportunity by a GoSecure senior manager, a person he knew professionally and he chose to follow up this opportunity. His generous remuneration package with GoSecure was very similar to his existing package with Skybox. The plaintiff had 7 different “employers” over his successful career, prior to joining the defendant. His mobility seems to have enhanced his experience and contributed to his professional advancement. On the other hand, GoSecure was aware they were hiring someone who had secure ‘employment’ (albeit via an exclusive consulting arrangement). In the court’s view, this scenario is not a major factor in fixing the common law notice period, particularly in the context of an occupation (software sales managers) in which there is a great deal of professional mobility.

Common Law Notice

[13] As noted, the plaintiff was a 51 year old Vice President of Sales, when he was summarily dismissed from his executive position after only 10 months of employment, as part of a company downsizing affecting some 60 employees. His impressive achievements in re-organizing his sales team and achieving close to his maximum commission ceiling demonstrate his skills and commitment to his new position with the defendant. He did leave a secure working relationship in a similar position with Skybox, something he would likely have declined to do if he had reason to suspect he would be terminated by GoSecure within a year. It took the plaintiff about 11 months after his termination to find an equivalent position in his line of work.

[14] In the circumstances, the plaintiff submits a proper period of reasonable notice is 12 months, whereas the defendant submits the proper notice period is 2-4 months. The case law, summarized in the charts below, reflects a remarkable range in notice periods awarded by courts to older senior executives with relatively short periods of employment.

[15] The defendant relies on the following cases:

Case Name	Age	Position	Length of Employment	Salary	Notice Awarded
<i>George v. Laurentian Bank Securities Inc.</i> , 2020 ONSC 5415	58	Vice President, Equity Training	6 months	\$100,000 salary	2 months
<i>Cho v Stonebridge Solutions Inc.</i> , 2020 BCSC 1560	49	Vice President	5 months	\$224,900	2 months
<i>Nogueira v Second Cup</i> , 2017 ONSC 6315	47	Manager, senior person in a three-person marketing group	8 ½ months	\$125,000 salary	4 months
<i>Fraser v Canerector Inc.</i> , 2015 ONSC 2138	46	Division Liaison	34 months	\$205,000 salary	4.5 months (the court would have awarded 3 months, but time of year factored into calculation)
Average	50		13.3 months	\$163,725	3.1

[16] The plaintiff relies on the following cases, recognizing significantly longer notice periods:

Case Name	Age	Position	Length of Employment	Notice Awarded
<i>Rodgers v. CEVA Freight Canada Corp.</i> , 2014 ONSC 6583	55	Country Manager (salary \$276,000)	2.8 years	14 months
<i>West v. Mex Precision Wire Corporation</i> , 2018 ONSC 6572	59	General Manager (salary \$95,000)	12 months	12 months
<i>Felice v. Cardinal Health Canada Inc.</i> , 2014 ONSC 1190	52	National Director, Supply Chain Management (salary \$130,000)	1.7 year	12 months

<i>Davies v. Canadian Satellite Radio Inc.</i> 2010 CarswellOnt 7708, 2010 ONSC 5628,	55	Vice-President (salary \$ 250,000)	2 years	12 months
Average	55		1.8 years	12.5 months

[17] These cases illustrate there is a remarkable range in notice periods awarded by courts to executives with short periods of employment. Each of these cases turns on its own facts. In the present case the 51-year-old plaintiff was interested in expanding his experience in his field, which, as noted, was sales of specialized software products and related services. The defendant offered what appeared to be an excellent opportunity for him, which the plaintiff proceeded to make the most of, until the corporate downsizing unexpectedly occurred. Thereafter the plaintiff was able to transition and advance his career in a reasonably timely way.

[18] The plaintiff's sales experience and skills were not highly specialized with the result he was in a strong position to market his skills as a senior sales manager broadly. His career progression was interrupted but not significantly prejudiced by his termination. His termination was not a career ending development. Notably, his position with the defendant did not involve broad senior executive responsibility and he had a sales staff of only 3 persons. On the other hand, reasonable notice should not ignore the seniority the defendant gave up when he was hired away from his former employer.

[19] In the court's opinion, considering the *Bardal* factors and related jurisprudence, including the cases put forward by the parties as outlined above, the reasonable notice period applicable to the plaintiff is a period of 6 months.

Sales Commissions

[20] For the purposes of this motion, the parties are in agreement and Ontario case law dictates that the plaintiff is entitled to recover the sales commissions he would have earned if his employment had continued through the period of reasonable notice, in this case 6 months. His commission was an essential component of his remuneration package with the defendant.

[21] In regard to the calculation of the plaintiff's commission earnings, the defendant's human resources director deposed: "during the approximately ten (10) months of Shelp's employment with GoSecure, he earned \$137,964.09 in total commission payments" and "during his approximately ten (10) months of employment with GoSecure, Shelp earned an average monthly commission payment of \$13,790.41". The plaintiff accepts the accuracy of these commission amounts.

[22] The plaintiff takes the position that his monthly average commission earnings should be applied to the notice period as a reasonable estimate of the commission he would have earned. He points out that had he remained in his position he would have continued to personally contribute to an increase in sales in his territory, as would his re-organized 3 person sales team. He says that on a balance of probabilities he would have continued to earn commission at least at the same rate and certainly not less than his monthly average commission prior to his termination. I observe that it is common practice in the caselaw for courts to estimate a terminated employee's commission income based on averaging pre-termination earnings, see *O'Reilly v. Imax Corporation* 2019 ONSC 342.

[23] The defendant has not provided affidavit evidence taking a specific position on what commission the plaintiff would have earned had he remained in his position through the period of reasonable notice. Instead, the defendant has provided commission statements showing commission earnings by 9 members of the defendant's sales staff. These individuals were allotted commissions, at various rates between 3-15%, for their work in reference to 6 clients who were formerly serviced by the plaintiff, before his employment was terminated. The commission entitlements of these 9 employees are unclear and the clients referenced on these statements do not purport to be all clients in regard to which the plaintiff would have earned commissions in a 6 month period following his termination. In all the circumstances the court finds that the most reliable and fair estimate of the plaintiff's projected commission earnings over the 6 months following his termination should be calculated using his average monthly commissions he earned during his 10 months employment with the defendant.

Disposition

[24] In the court's view the plaintiff has established he is entitled to damages calculated on a reasonable notice basis equivalent to what he would have earned on a notice period of 6 months. Against that sum the defendant will be credited with the one week's salary paid after termination (\$3653.85), plus the sum of \$20,624.00 being the agreed upon sum representing mitigation income the plaintiff earned subsequent to his termination. Also allowed is a conventional amount for benefits of 10% of salary plus the monthly cell phone allowance of \$110. The plaintiff's entitlement is calculated is as follows:

6 months base salary x \$15,833.33 = \$ 95,000.00

6 months commissions x \$13,796.41 = \$ 82,778.46

6 months benefits at 10% of salary (6 x \$1,583.33) = \$ 9,500.

6 months cellphone allowance x \$110 = \$660.00

Subtotal: \$187,938.46

less the plaintiff's mitigation income: \$20,624.69

and less one weeks salary paid post termination: \$3653.85

Total: \$163,659.92

[25] The plaintiff is awarded damages in the sum of \$163,659.92 together with pre-judgement interest pursuant to the *Courts of Justice Act*, calculated from the date of termination of his employment. If the parties are unable to agree on costs, the plaintiff is to provide a written submission within 30 days of the release of these reasons, including any Rule 49 offers and relevant notices to admit, and the defendant may respond within 14 days of receiving the plaintiff's submission.

Justice Charles T. Hackland

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Released: January 2, 2025