

CITATION: Maximenko v. Zim, 2024 ONSC 5540
COURT FILE NO.: CV-23-00697286-0000
DATE: 20241010

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
HELENA MAXIMENKO)
) *Nikolay Y. Chsherbinin, for the Applicant*
Plaintiff)
- and -)
)
ZIM INTEGRATED SHIPPING)
SERVICES (CANADA) CO. LTD.)
) *Tiffany Thomas and Lexa Cutler, for the*
Defendant) *Respondent*
)
)
)
) **HEARD: September 26-27, 2024**

2024 ONSC 5540 (CanLII)

L. BROWNSTONE J.

Introduction

[1] The plaintiff, Helena Maximenko, immigrated to Canada in April 2002. On May 16, 2002, she started working for the defendant Zim Integrated Shipping Services (Canada) Co. Ltd. (“Zim”). Zim is incorporated under the laws of Canada and carries on business in the ocean freight services industry. It operates Canadian offices in Toronto, Montreal, Halifax, and Vancouver and is headquartered in Haifa, Israel.

[2] Ms. Maximenko continued working for Zim in various roles until her employment was terminated without cause on March 15, 2023, at which point she was a month shy of her 59th birthday. She brings this claim seeking 24 months’ payment in lieu of notice. She seeks compensation for her base salary, quarterly and annual bonuses, pension, and car allowance during the notice period. She asks that Zim be required to continue to contribute to her health benefits for the duration of the 24 months’ notice.

[3] Zim acknowledges Ms. Maximenko was terminated without cause and acknowledges it owes her some pay in lieu of notice. Zim claims Ms. Maximenko has made insufficient efforts to mitigate her damages and the notice period should therefore be in the range of 18-20 months. It disputes the figure on which Ms. Maximenko relies for her base salary, disputes her bonus

calculations, and argues that she has not adduced the evidence required to calculate any pension entitlement.

[4] For the reasons that follow, I find that Ms. Maximenko is entitled to 24 months' pay in lieu of notice. I find that Zim has not proven Ms. Maximenko failed to mitigate her damages. I have calculated the damages for the elements of her compensation in their respective categories below.

Ms. Maximenko's employment history

[5] Ms. Maximenko worked for Zim for 20 years and 10 months. She never had a written employment contract. She started as an Export Documentation Clerk and was promoted on at least two occasions throughout her employment. From November 2006 until February 2022, she served as the General Manager in Toronto, a position acknowledged by Zim to be a senior management position. Ms. Maximenko was administratively responsible for the entire Toronto office, which comprised about 20 employees. A number of those employees reported directly to her in substantive, not simply administrative, ways.

[6] On February 1, 2022, Zim's offices underwent a restructuring. Rather than reporting to Zim's president, Ms. Maximenko reported to its vice president of sales. Her duties did not change. She continued to supervise employees, perform all administrative, hiring, and management tasks at Zim's Toronto office, and oversee staff scheduling issues such as vacation, sick day, and work from home requests.

[7] On March 15, 2023, Zim terminated Ms. Maximenko's employment without cause. It provided her the following letter:

Dear Helena,

By the present, we have the regret to inform you that Zim Integrated Shipping Services (Canada) Co. Ltd has decided to put an end to your employment as of today, March 15, 2023.

Considering your many years of service, Zim is offering you a generous notice equivalent to eight (8) Month's of salary a gross amount of 68,600\$. Note that this is significantly superior to minimum labour standards. You will additionally receive vacation owed as well as your bonus for 2022 as determined by ZIM Head Office. The total amount will be paid out following your signature of the release below. You have five (5) business days to proceed.

In closing, we are truly sorry things did not work out and wish you the very best in your future endeavors.

[8] Under the Zim signatures, the release component stated:

FULL AND FINAL RELEASE: By signing the present, the employee accepts reasonable notice has been given and gives full and final release to the employer and its representatives and employees regarding any and all claims or recourses, in any form, past, present or future, pertaining to the employment or end of employment.

[9] Ms. Maximenko did not sign the release. Zim paid only her statutory entitlements. It did not pay her 2022 bonus of \$13,000 that it acknowledged she had earned.

What is the reasonable notice period?

[10] Ms. Maximenko asserts the reasonable notice period is 24 months. Zim states the period should be 18-20 months, relying in part on what it claims is Ms. Maximenko's failure to mitigate her loss.

[11] The assessment of reasonable notice is a fact-driven exercise. The court considers the character of the employment, the age and length of service of the employee, and the availability of similar employment, having regard to the employee's training, experience, and qualifications: *Bardal v. Globe & Mail Ltd.* (1960), 24 D.L.R. (2d) 140 (H.C.), at p. 145.

[12] Generally, older employees with long-term service are entitled to longer notice periods, recognizing that it is more difficult for them to secure new employment: *Drysdale v. Panasonic Canada Inc.*, 2015 ONSC 6878, 2015 CarswellOnt 18495, at paras. 13-14 [*Drysdale*]; *Poole v. Whirlpool Corporation*, 2011 ONSC 4100, 2011 CarswellOnt 7245, at paras. 22-23.

[13] Ms. Maximenko had worked for just under 21 years, her entire Canadian professional life, for Zim, her only employer in Canada. At the time her employment was terminated, Ms. Maximenko was just shy of her 59th birthday. She had held a senior management position with Zim since 2006.

[14] Mr. Felder, Zim's former president who Zim put forward as its trial witness, testified that he would hope that the skills one gains in the ocean freight industry are transferable. However, he acknowledged it is a "nuanced", if not niche, industry. He stated that Ms. Maximenko had developed relationships with Zim clients over the years. She therefore held customer accounts, which assisted in her meeting her sales targets, which in turn contributed to her quarterly bonus calculation.

[15] Given these factors, particularly the length of Ms. Maximenko's service, her age, the seniority of her position, the nuanced nature of the industry, and her lack of other experience in Canada, I find that Ms. Maximenko is entitled to 24 months' notice. There remains the question of whether that period should be reduced due to inadequate mitigation efforts.

[16] In order to prove that an employee has failed to mitigate, an employer must demonstrate that (1) the employee failed to take reasonable steps to mitigate damages, and (2) if reasonable steps had been taken, the employee would have been expected to secure a comparable position

reasonably adapted to their abilities: *Lake v. La Presse*, 2022 ONCA 742, 2022 CarswellNat 4579, at paras. 7, 12.

[17] The standard for job efforts in mitigation is not perfection: *Drysdale*, at para. 21.

[18] Zim acknowledges that Ms. Maximenko has applied for more than 70 jobs since her employment was terminated. However, it argues that her efforts to find other employment have been inadequate.

[19] Zim sent Ms. Maximenko a number of job links after it dismissed her. Ms. Maximenko made notes regarding these links. Her notes indicate that some positions were no longer available, some required qualifications and experience that she did not have, such as bilingualism, and some she appears to have applied for. However, in her affidavit that served as her evidence-in-chief at trial, she stated:

I state that in the ostensible effort to assist me in my mitigation effort, ZIM provided me with a number of job listings. However, I state that every single one of the provided listing[s] made it clear that the prospective employer was "no longer accepting applications." Attached hereto and marked as Exhibit "P" is a true copy of ZIM's job postings.

I state that my counsel forwarded the job listings that ZIM provided to him within 1 to 2 hours following their receipt. Upon receipt, I immediately checked the provided job listings and, I state that, every single listing that I reviewed indicated that the prospective employer was "no longer accepting applications."

[20] Zim argues Ms. Maximenko has been untruthful about her mitigation efforts due to these inconsistencies in her evidence. I agree that the contemporaneous notes she made on the job listings are inconsistent with her affidavit evidence. However, I find the inconsistencies to be relatively minor. I accept Zim's submission that the statement in Ms. Maximenko's affidavit set out above is an overstatement. However, I accept Ms. Maximenko's evidence that she followed up on each link sent by Zim and determined that some were unsuitable and some were unavailable. This inconsistency does not detract in any way from the fact, on which the parties have agreed, that Ms. Maximenko has applied for at least 70 jobs since she was dismissed.

[21] In about November 2023, Ms. Maximenko's mother fell ill. She died on March 28, 2024. Ms. Maximenko's mitigation efforts during this time decreased, as she was caring for her mother.

[22] Zim suspected that Ms. Maximenko was working for a company called Sparx Logistics. Ms. Maximenko denied this. Zim summoned Mr. David Pupco, the president of Sparx Logistics, to testify at trial. He confirmed that Sparx Logistics had never offered Ms. Maximenko a job, and Ms. Maximenko has never worked for Sparx Logistics.

[23] I find that Ms. Maximenko's mitigation efforts may not reach the standard of perfection, but they have been reasonable. She has applied for at least 70 jobs with no success. She has

investigated the links provided to her by Zim. As noted above, the common law notice periods tend to be longer for older employees in recognition that they find it more difficult to find new employment. This is certainly consistent with Ms. Maximenko having applied for 70 positions without success.

[24] I find Zim has not met its burden of demonstrating that Ms. Maximenko has failed to take reasonable steps to mitigate her damages. Nor has it demonstrated that, had she taken reasonable steps, she could have been successful. Mr. Felder acknowledged that, according to the job printouts, hundreds of people applied for some of the jobs Zim sent to Ms. Maximenko.

[25] There is therefore no failure to mitigate that would lead to a reduction of the 24-month notice period I have found appropriate.

Elements of Ms. Maximenko's compensation

[26] The parties agree that Ms. Maximenko's compensation comprised her annual salary, bonuses, car allowance, health benefits, and participation in Zim's defined benefit plan. Zim does not dispute that she is entitled to be paid for these elements of her compensation. However, for reasons described below, Zim takes issue with the annual salary figure put forth by Ms. Maximenko, her entitlement to the annual bonus at least for the year 2023, and her pension loss entitlement.

Ms. Maximenko's base salary

[27] Ms. Maximenko's 2022 salary was \$104,410. In Zim's initial statement of defence dated May 9, 2023, less than two months after her termination, it stated that her salary as of the date of termination was \$112,763.28. In his examination for discovery and in his affidavit at trial, Mr. Felder stated that her salary was \$104,410. Zim brought a motion at the outset of trial, which Ms. Maximenko did not oppose and which I granted, to amend its statement of defence to replace the \$112,763.28 figure with the \$104,410 figure.

[28] Mr. Felder testified that both figures, the \$112,763.28 in the statement of defence and the \$104,410 in his affidavit, were provided by Zim's human resources department.

[29] Ms. Maximenko's salary was subject to annual increases that were effective on January 1 of each calendar year. Mr. Felder testified that at times, the amount of the salary increase was communicated in April, but the increase was made retroactive to January 1. The salary increases took into account inflation rates and, according to the letters that accompanied them, also took into account performance and market rates within the industry. In 2021, Ms. Maximenko's increase was about 8.7 percent, in 2020 about 1.6 percent. In those years, the increases were communicated to Ms. Maximenko in writing in early January.

[30] Mr. Felder testified that there would have been salary increases planned in March or April of 2023, to be made retroactive to January 1, 2023.

[31] I find that the appropriate figure for Ms. Maximenko's base compensation for 2023 is \$112,763.28. I find that the \$112,763.28 figure represents the 8 percent increase Ms. Maximenko would have received retroactively to January 1, 2023, had her employment not been terminated. I find this based on the uncontested evidence that salaries increased annually, and on Mr. Felder's evidence that sometimes the increase would be determined in April and applied retroactively to January. The \$104,410 figure put forth by Zim represents no increase over Ms. Maximenko's 2022 salary. This was not consistent with the evidence that Ms. Maximenko's salary increased annually, which was not contested by Zim. Further, I note that the salary figure of \$112,763.28, reflecting an 8 percent increase, is displayed in the records produced at Exhibit GG to Mr. Felder's affidavit, described as "a true copy of Zim's record of the payment calculated for Ms. Maximenko's annual bonus for recognition of her service in 2022", under the heading "new salary local".

Ms. Maximenko's bonuses

[32] Zim paid both quarterly and annual bonuses. The quarterly bonuses were non-discretionary. Zim states that annual bonuses were discretionary. The decisions about whether to pay them and how much to pay were "top-down" decisions made in Haifa, largely on the basis of whether the company had performed well the year before. Annual bonuses were paid out in the spring following the year in respect of which they were earned.

[33] On April 1, 2021, and March 9, 2022, Ms. Maximenko was advised that she was being awarded bonuses in recognition of her contribution and dedication to the company and its continued success for the previous year. In 2023, Ms. Maximenko was advised she was to receive an annual bonus of \$13,000 for her work in 2022. However, the bonuses were paid out after she was terminated. Zim's policy was that employees must be working at Zim on April 1 to be paid out their bonus. However, the only reason Ms. Maximenko was not working on April 1, 2023, was because she had been dismissed without cause or notice two weeks earlier. Zim owes her the \$13,000 bonus she earned in 2022 and was not paid.

[34] It was suggested to Mr. Felder in cross-examination that, in 2020, Ms. Maximenko earned but was never paid a \$12,670 bonus. Mr. Felder disagreed and advised that this would be a double counting. There is no evidence that this bonus was earned and not paid, and I do not award it.

[35] Mr. Felder acknowledged that Zim's human resource record-keeping was incomplete. The records adduced in the litigation made it difficult to determine what was paid as annual bonuses and what was paid as quarterly bonuses.

[36] The parties agree that applying a three-year average to Ms. Maximenko's bonuses earned, in accordance with *Celestini v. Shoplogix Inc.*, 2023 ONCA 131, 166 O.R. (3d) 368, at para. 59, is appropriate.

[37] However, Zim argues that the three-year average should be reduced by 47 percent. This is because in 2022, Ms. Maximenko's annual bonus represented 47 percent of her bonus paid. Zim argues that no Zim employee received an annual bonus for their 2023 work. Therefore, it claims,

for Ms. Maximenko to receive a bonus for 2023 would constitute an improper windfall: *Gazier v. Ciena Canada, ULC*, 2024 ONSC 865, 2024 CarswellOnt 1480, at para. 36.

[38] Mr. Felder acknowledged that Ms. Maximenko was never provided with Zim’s internal policy on bonuses and was never advised of the criteria used for calculating the bonuses. Indeed, the bonus policy was expressly not to be communicated to employees in Ms. Maximenko’s position. Therefore, although Zim argues that “Ms. Maximenko has provided no evidence that she would have received the annual bonus throughout her reasonable notice period”, it concedes that she had no way to provide such evidence.

[39] Ms. Maximenko relies on Zim’s 2023 SEC filings to support its argument that bonuses were paid for 2023. However, the bonuses paid in 2023 related to 2022. They do not answer the question of whether bonuses were paid in 2024 for 2023.

[40] Mr. Felder swore that “In or about February or March of 2024, I was informed by the Board that no Zim employee would receive an annual bonus in recognition of service in 2023. To my knowledge, no Zim employee received an annual bonus in 2024 in recognition of service in 2023, including myself.”

[41] While the first statement is hearsay, I accept Mr. Felder’s evidence that he did not receive a bonus for 2023 and that, as then president of Zim, to his knowledge no Zim employee received a bonus that year. I accept that no annual bonuses were paid in 2024 for work done in 2023 and therefore the average should be discounted somewhat.

[42] There is no evidence regarding 2024 annual bonuses. Zim’s suggestion of a 47 percent reduction presumes no annual bonuses will be payable for 2024. I do not accept that assumption. 2023 is the only year since annual bonuses were instituted that they have not been paid. I find it more likely than not that the annual bonuses will be payable for 2024. If this were not going to be the case, Zim is the only party that could have adduced that evidence. It did not do so. I therefore reduce the average bonus amount by 23.5 percent to reflect the lack of annual bonus in 2023.

[43] In 2020, Ms. Maximenko received \$15,486.90 in total bonuses; in 2021, that figure was \$26,373.50 and in 2022, \$41,316.15. The average of these numbers is \$27,725.52. When reduced by 23.5 percent, the annual bonus average figure is \$21,210.02. This is the bonus figure to which I find Ms. Maximenko entitled for each 12-month period of her notice.

Ms. Maximenko’s car allowance

[44] The parties agree that Ms. Maximenko was entitled to a car allowance of \$9000 per year (or \$750 per month). The damages for the loss of this benefit over a 24-month period amount to \$18,000.

Ms. Maximenko’s health benefits

[45] Zim has continued to pay \$431.42 monthly for Ms. Maximenko's health coverage since terminating her employment. It shall continue playing those amounts until March 15, 2025.

Ms. Maximenko's pension benefits

[46] Ms. Maximenko's participation in Zim's defined benefit pension plan started on the second anniversary of her hiring date. Only the employer contributed to the plan. Ms. Maximenko's T4 returns for 2020-2022 show a pension adjustment of \$17,400.

[47] The pension plan was an exhibit to Mr. Felder's affidavit. It provided formulas for how the pension would be calculated. Early departure from the plan affects the amounts payable.

[48] Undoubtedly, Ms. Maximenko's pension entitlement has been adversely affected by her termination without notice. There is no evidence that she has obtained any benefit from the pension during the notice period.

[49] However, there was no evidence of the commuted value of Ms. Maximenko's entitlement.

[50] Zim argues that this puts an end to the matter, as this is the only kind of evidence that the court can rely upon to determine pension damages: *Peet v. Babcock & Wilcox Industries Ltd.*, (2001) 53 O.R. (3d) 321, at paras. 29-30; *Ng v. Canadian Imperial Bank of Commerce*, 2003 CanLII 21054 (ON SC), at para. 157.

[51] Given that Zim has not paid Ms. Maximenko for the past 18 months, despite its acknowledgement that at least 18 months' pay in lieu of notice is appropriate, it is unsurprising that Ms. Maximenko did not obtain actuarial evidence to provide these calculations. The courts have held that in the absence of evidence regarding present and commuted values of pension plans, the value of the pension contribution is a reasonable measure of damages: *Panimondo v. Shorewood Packaging Corporation* (2009), 2009 CanLII 16744 (ON SC), at para. 58. *O'Reilly v. Imax Corporation*, 2019 ONSC 342, 2019 CarswellOnt 1044, at paras. 66-69; *aff'd* 2019 ONCA 991, 2019 CarswellOnt 20419.

[52] Zim led evidence that its pension is fully funded and required no contribution from Zim in 2023. However, this does not mean that Zim's liabilities under the plan are frozen; it simply means the pension plan is forecasted to be able to meet those obligations without further contribution at this time. I find that the value of Zim's recent pension contributions is a reasonable measure of the pension damages suffered, in accordance with the case law above.

[53] Ms. Maximenko is therefore entitled to \$34,800 in damages for lost pension.

Disposition

[54] Ms. Maximenko is entitled to payment in lieu of 24 months' notice calculated as follows:

Base salary of \$112,763.28 x 2

Bonus of \$21,210.02 x 2

Car allowance of \$9,000 x 2

Pension benefit of \$17,400 x 2

[55] This sum totals \$320,746.60. From this sum, the \$32,777.60 paid to date will be deducted, resulting in an amount of \$287,969.00. Five months of the notice period have yet to run. 19/24 of the payments will be made immediately, resulting in an immediate payment from Zim to Ms. Maximenko of \$227,975.46. The remaining 5/24 of this amount will be paid to the plaintiff's counsel in trust. The plaintiff's counsel will invest the monies into a separate trust account. The monies will be paid out to the plaintiff in equal monthly instalments in arrears on the 15th day of the following month, subject to any income earned by the plaintiff during each month. On the last day of each month, the plaintiff's counsel will be required to deliver to the defendant's counsel a statement indicating whether the plaintiff has earned any income during that month and if so, how much. If income is earned, the amount of the income will be deducted from the amounts held in trust and returned to the defendant.

[56] Zim will continue to pay for Ms. Maximenko's health benefits and maintain her on its benefits plan until March 15, 2025.

[57] In addition, Zim will pay forthwith to Ms. Maximenko her unpaid bonus for 2022 of \$13,000.

Costs

[58] The parties are encouraged to agree on costs of the trial. Should they be unable to do so, the plaintiff may provide costs submissions of no more than five pages double spaced, along with a bill of costs and any offers to settle, within seven days. The defendant shall have seven days to respond, with the same page limits. There shall be no reply submissions without leave. These submissions may be sent to my judicial assistant at linda.bunoza@ontario.ca.

L. Brownstone J.

Released: October 10, 2024

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ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

HELENA MAXIMENKO

Plaintiff

– and –

ZIM INTEGRATED SHIPPING SERVICES
(CANADA) CO. LTD.

Defendant

REASONS FOR JUDGMENT

L. Brownstone J.

Released: October 10, 2024