CITATION: Kennedy v. RBC, 2018 ONSC 2894
COURT FILE NO.: CV-12-457337
DATE: 20180510

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
CHANTAL KENNEDY	)	*Cindy Cohen*, for the Responding Party/Plaintiff
Responding Party/Plaintiff	)	
	)	
– and –	)	
	)	
	)	
ROYAL BANK OF CANADA	)	*Jordan Winch*, for the Moving Party/Defendant
Moving Party/Defendant	)	
	)	
	)	
	)	
	)	**HEARD:** April 25, 2018

NAKATSURU J.

[1] This is a motion for summary judgment. The defendant, the Royal Bank of Canada ("RBC"), has filed the motion and submits that the plaintiff, Ms. Kennedy, commenced her action after the two-year limitation period had ended. The key issue has to do with the "discoverability" of Ms. Kennedy's claim and when the limitation period started to run. There is no dispute that this issue can be determined on this motion for summary judgment.[1]

[2] For these reasons, the motion is granted. The action is dismissed.

[1] There is a Request for an Interim Order that is not being pursued. It is agreed that this is no obstacle to disposing this matter by way of summary judgment.

A. TEST ON SUMMARY JUDGMENT MOTION

[3] This test is both well-established and well-understood.

[4] Rule 20.04(2) (a) of the *Rules of Civil Procedure* provides that the court shall grant summary judgment if: "the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence." The Supreme Court of Canada in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, held at para. 49:

> There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.

[5] A responding party may not rest solely on the allegations or denials in the party's pleadings. Under rule 20.0(2), they "must set out, in affidavit material or other evidence, specific facts showing that there is a genuine issue requiring a trial". Each side must "put its best foot forward" with respect to the existence or non-existence of material issues to be tried. A court is entitled to assume that the record contains all the evidence that the parties would present if the matter proceeded to trial

[6] The court should first determine if there is a genuine issue requiring trial based only on the evidence in the motion record, without using the fact-finding powers set out in rule 20.04(2.1) and (2.2). The analysis of whether there is a genuine issue requiring a trial should be done by reviewing the factual record and granting a summary judgment if there is sufficient evidence to fairly and justly adjudicate the dispute and a summary judgment would be a timely, affordable and proportionate procedure.

[7] If there appears to be a genuine issue requiring a trial, then the court should determine if the need for a trial can be avoided by using the fact-finding powers under rule 20.04. Their use will not be against the interest of justice if their use will lead to a fair and just result and will serve the goals of timeliness, affordability and proportionality in light of the litigation as a whole.

[8] I have determined that there is no genuine issue requiring a trial based on the evidence in the motion record. I grant summary judgment as there is sufficient evidence to fairly and justly adjudicate the dispute, and a summary judgment is a timely, affordable and proportionate procedure.

B. LIMITATIONS ACT

[9] The issue is governed by the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B:

Basic limitation period

4 Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered. 2002, c. 24, Sched. B, s. 4.

Discovery

5 (1) A claim is discovered on the earlier of,

(a) the day on which the person with the claim first knew,

(i) that the injury, loss or damage had occurred,

(ii) that the injury, loss or damage was caused by or contributed to by an act or omission,

(iii) that the act or omission was that of the person against whom the claim is made, and

(iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and

(b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a). 2002, c. 24, Sched. B, s. 5 (1).

Presumption

(2) A person with a claim shall be presumed to have known of the matters referred to in clause (1) (a) on the day the act or omission on which the claim is based took place, unless the contrary is proved. 2002, c. 24, Sched. B, s. 5 (2).

C. ANALYSIS

[10] The cause of action is based upon a breach of an employment agreement. Generally speaking, a cause of action in contract arises when the alleged breach occurs: *Germain v. Clement* (2008), 166 A.C.W.S. (3d) 978, at para. 7; *Jones v. Friedman* (2006), 206 O.A.C. 214 (Ont. C.A.), at para. 4. A plaintiff need not know all the facts that support the claim for the claim to be discovered; once a plaintiff knows that some damage has occurred, the claim has been

discovered. It is not required that the plaintiff know the extent or the exact type of damage: *Sampson v. Empire (Binbrook Estates)*, 2016 ONSC 5730, 270 A.C.W.S. (3d) 858, at paras. 37-38.

[11] The essence of the plaintiff's position on this motion is that her claim was not discovered until sometime between July 1, 2010 and November 16, 2010, when she found out that any more payments from RBC arising out of her termination were not forthcoming. She submits that she did not know she suffered damages until RBC finally said they would not pay. She further submits that she did not know commencing litigation was the appropriate means to recover her damages until then. She submits that she then commenced litigation within the two-year limitation period.

[12] I do not agree. In my view, both the pre-termination and post-termination claims were discovered at the time of termination or shortly afterwards. The evidence and the history of the dealings after termination clearly show that Ms. Kennedy knew of her damages and that suing was an appropriate means to remedy it soon after the termination took place.

[13] It is important that Ms. Kennedy retained a lawyer who represented her before and after the termination.

[14] Ms. Kennedy retained Ms. Cohen as early as November 27, 2009. Ms. Cohen wrote to RBC on behalf of Ms. Kennedy, stating that she wanted to withdraw her resignation and return to work for RBC. In that letter, Ms. Cohen asked RBC for certain accommodations on Ms. Kennedy's behalf when she returned.

[15] On December 17, 2009, counsel representing RBC wrote to Ms. Cohen. In this letter, RBC advised that many of Ms. Kennedy's requests were not acceptable, that there had been a breakdown in the employment relationship, and that she was being discharged. In that letter, RBC counsel writes that RBC was prepared to offer her a separation package, set out the terms, and stated they looked forward to concluding the terms of her separation.

[16] On December 23, 2009, Ms. Cohen wrote back asking that RBC consider the continuation of her employment. Ms. Cohen then asked that RBC pay for a return flight so that she could deal with matters in Trinidad and that RBC pay for storage in Toronto for a number of months.

[17] On January 8, 2010, counsel for RBC confirmed the termination, stated that there was no work for her in Toronto. However, they did agree to arrange for a flight to Trinidad to tie up her affairs and to continue paying for storage costs until September. The lawyer ends by writing that "Ms. Kennedy will need to execute a comprehensive Release Agreement." Ms. Cohen sent an email to RBC counsel about an extended stay in Trinidad and stated that Ms. Kennedy wanted to use a condo for an extended stay.

[18] A further letter dated January 22, 2010 from RBC lawyers dispute the extended stay Ms. Kennedy was taking and her use of RBC credit cards. Further email exchanges occurred regarding her stay in Trinidad and the expenses she had incurred.

[19] On February 24, 2010, Ms. Kennedy provided RBC with a detailed breakdown of her expenses from 2008, including coaching for a new career, legal fees, and accounting fees. Based upon the record, including the cross-examination of Ms. Kennedy, it is clear and obvious that she was aware of almost all of her pre-termination claims by then.

[20] On February 25, 2010, Ms. Cohen wrote to RBC counsel, stating that Ms. Kennedy had retrieved her belongings and attended to relevant matters in Trinidad, and she was "now in the position to consider and respond substantively to your offer". In the letter of December 17, 2009, Ms. Cohen wrote:

> Given that Ms. Kennedy became ill directly as a result of her employment conditions in Trinidad, that she had made the move to Trinidad based upon a two year commitment of RBTT with recognition of future employment with RBC upon repatriation and that she had given up her home and moved to Trinidad for the position with RBTT thereby making many personal sacrifices resulting in the loss of her marriage and loss of her exceptional career, your offer enclosed thereunder is unacceptable. In order to resolve matters with Ms. Kennedy, she requires the following from RBTT:

Thereafter, Ms. Cohen lists a number of specific demands, damages and amounts including legal fees, many of which are the subject of her present lawsuit. She alleges that termination was not a result of a breakdown in the relationship but a refusal by RBC to make appropriate accommodations for her illness and disability that resulted from her employment. Ms. Cohen ends with "Ms. Kennedy will be commending [*sic*] legal action against RBTT for all damages suffered by her should this matter not be resolved amicably. Please consider and provide your client's position in this regard within 10 days of the date hereof." By this time, all the fundamental claims founded in the statement of claim later issued were being addressed through counsel. Ms. Cohen made a clear indication regarding instituting legal proceedings, which was directly acknowledged to be tied to the circumstances of Ms. Kennedy's termination: see *Sampson v. Empire (Binbrook Estates)*, at paras. 42-43; and *Channa v. Carleton Condominium Corp. No. 429*, 2011 ONSC 7260, 210 A.C.W.S. (3d) 801, at paras. 38-39.

[21] On May 26, 2010, Ms. Cohen wrote that she has not received any substantive response. She advised RBC counsel that her client had instructed her to commence proceedings to collect all amounts outstanding and owing by RBTT, including but not limited to, her RBC annual bonus, RBTT assignment bonus, income continuation, expenses and legal fees. I agree with RBC counsel that if there was any lingering doubt, Ms. Kennedy gave evidence that all outstanding amounts comprised the amounts included in the statement of claim, whether pre-termination or post-termination claims. Further, all post-termination claims would have been

incurred by Ms. Kennedy by then. It is obvious that she intended to commence proceedings against RBC by May 26th if not much earlier, on February 25th.

[22] More correspondence between RBC counsel and Ms. Cohen followed. On May 27th, RBC counsel advised Ms. Cohen of what RBC was and was not willing to pay. On June 16th, he again wrote that on July 1, 2010, Ms. Kennedy would receive a lump sum payment, additional salary, and career transition services. On July 20, 2010, Ms. Cohen wrote that there were some outstanding matters and listed them. On August 6th, Ms. Cohen wrote that she received a payment on July 29th but did not know what it was for and asked for response to the July 20th letter. She sent another reminder on August 12th. On September 13th, Ms. Cohen wrote that her client did not receive the base salary payment at the end of August and asks for other information. On September 15, 2010, Mr. Hurdon, RBC counsel, responded specifically to her letter of July 20, 2010. Some payments had already been made, some were agreed to, and others were denied. On October 19, 2010, Ms. Cohen made further requests and asked for a response within two weeks. On November 10, 2010, Mr. Hurdon responded with RBC's positions and concluded that RBC was not prepared to consider any additional requests. When Ms. Kennedy agreed to execute a comprehensive release agreement, RBC would make the payments in the letter.

[23] It is evident to me that during this period of time, Ms. Kennedy was negotiating with counsel for RBC through her lawyer for the payment of any resulting losses arising from the breach of her employment contract. These negotiations do not extend the limitation period. As the Ontario Court of Appeal held in *Federation Insurance Co. of Canada v. Markel Insurance Co. of Canada*, 2012 ONCA 218, 109 O.R. (3d) 652, at para. 34, limitation periods are not postponed until settlement discussions end for good reasons since to require "the court to assess the tone and tenor of communications in search of a clear denial [of settlement] would ... inject an unacceptable element of uncertainty into the law of limitations of actions": see also *Berta v. Arcor Windows and Doors Inc.,* 2016 ONSC 7395, 273 A.C.W.S. (3d) 736, at para. 19.

[24] When I assess Ms. Kennedy's conduct, I conclude that Ms. Kennedy knew that she had suffered damages and that commencing an action to recover them was appropriate. After her termination, negotiations took place between counsel about what was going to be accepted and what was not in terms of payment for her losses. The fact that some payments were made by RBC during this time does not alter this characterization of the events. This is far removed from a situation, for example, where an unsophisticated, lawyer-less ex-employee is strung along by her employer and then fails to commence an action in a timely fashion. I cannot agree with Ms. Kennedy that this course of action meant that her claim was not discoverable until sometime in July or the fall of 2010.

[25] In addition, Ms. Kennedy's reliance on authorities for the proposition that in some circumstances or relationships, ongoing good faith efforts to remedy the loss or fix the problem, can "toll" the limitation period has no application on the facts here. I see a significant distinction between a case where a limitation period is suspended because a physician is trying to fix the outcome of a surgery with a patient and this case. The evidence here is clear that Ms. Kennedy

was well-placed to appreciate her losses and to remedy them. Her arguments on the power imbalance between employer and employee have no application in this instance since Ms. Kennedy did not remain an employee beyond the date of her termination.

[26] In addition, I do not accept that negotiations here were an alternative process that suspended the limitation period. I see a significant difference between what occurred here and other processes, often statutory in nature that could appropriately delay the commencement of an action: see for instance *407 ETR Concession Co. v. Day*, 2016 ONCA 709, 133 O.R. (3d) 762.

[27] Ms. Kennedy argues that s. 5(1) (b) of the Act requires that a court consider the "circumstances of the person with the claim" when determining when a claim ought to have been discovered. She submits that requiring a party to sue before their demand for payment has been met or before response to the demand has been received is not appropriate in these circumstances. Both in her evidence and in submissions before me, she contended that given the power imbalance between employee and employer and the need of employees for income during the negotiation period, commencing an action during negotiations would jeopardize any amounts that could come from that negotiation.

[28] The test under this subsection is objective and requires a determination of when a reasonable person in the claimant's position with her abilities and circumstances would have been alerted to the elements of the claim: *Reynolds v. Harwood*, 2017 ONSC 4899, 283 A.C.W.S. (3d) 298, at para. 13.

[29] I cannot accept Ms. Kennedy's submission. There is nothing in the record to support that circumstances prevented her from knowing the facts that led to her claim. Ms. Kennedy was a business person. She was represented by a lawyer, who she retained early on in her dealings with RBC. This argument is essentially a repetition of submissions Ms. Kennedy already has made.

[30] In *Novak v. Bond*, [1999] 1 S.C.R. 808, a case relied upon by Ms. Kennedy, the Supreme Court of Canada held at para. 86 that while circumstances or interests that could prevent a plaintiff from being able to commence an action are assessed on the facts of each individual case, purely tactical concerns played no role in the analysis. In this case, the negotiations and the decision not to file a statement of claim immediately in order to get as much money from RBC as possible was such a tactical concern.

[31] In summary, I find that I can determine the limitations issue on the motion materials and there is no genuine issue for trial. I fully appreciate both the issue and the evidence and find that the statement of claim was filed beyond the two-year limitation period. The claims made by the plaintiff were likely discovered on the date of termination but were certainly discovered by February 25th or at the very latest, May 26, 2010. Thus, her claim is barred by the limitation period.

[32] If the issues of costs cannot be resolved between the parties, I will entertain written submissions, each one limited to two pages excluding any attachments (any Bill of Costs, Costs Outline, and authorities). Royal Bank of Canada shall file within 30 days of the release of these reasons. Ms. Kennedy shall file within 15 days thereafter. There will be no reply submissions without leave of the court.

Justice S. Nakatsuru

Released: May 10, 2018

CITATION: Kennedy v. RBC, 2018 ONSC 2894
COURT FILE NO.: CV-12-457337
DATE: 20180510

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

CHANTAL KENNEDY

Responding Party/Plaintiff

– and –

ROYAL BANK OF CANADA

Moving Party/Defendant

REASONS FOR JUDGMENT

NAKATSURU J.

Released: May 10, 2018