COURT FILE NO. 05-4152-SR
DATE: 2006/06/27

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	
BONNIE KENT	Nickolaus de Koning, for the Plaintiff
PLAINTIFF	
- and -	
STOP 'N' CASH 1000 INC., STOP 'N'CASH 1010 INC., and STOP 'N'CASH 1020 INC.	Kevin L. MacDonald, for the Defendants Stop 'N'Cash 1000 Inc. and Stop 'N'Cash 1020 Inc. J. Gordon Ross, for the Defendant Stop 'N'Cash 1010 Inc.
DEFENDANTS	

HEARD: May 15, 16, and 18, 2006

Turnbull, J.

[1] The plaintiff brings this wrongful dismissal action under the simplified Rules of Civil Procedure. The defendants have acknowledged that there has been a dismissal without cause. The issues have been helpfully framed by counsel as follows:

> (a) Was the Plaintiff an employee of Stop N' Cash 1020 Inc. and Stop N' Cash 1000 Inc. as well as Stop N' Cash 1010 Inc.?
>
> (b) What is the appropriate common-law reasonable notice period and accordingly the quantum of damages?
>
> (c) Has the Plaintiff failed to mitigate her damages?

Overview of the Case:

[2] The Plaintiff, age 59, brings the lawsuit as a result of dismissal from her employment on or around November 1, 2004. The Statement of Claim was issued May 2, 2005.

[3] The Defendants are related companies, all doing business in the Kitchener-Waterloo area during the Plaintiff's employment, and owned by family trusts known as D. T. Voisin Family Business Trust and the C. R. Metcalf Family Business Trust, established by Mr. Tim Voisin ("Voisin") and Mr. Clive Metcalf ("Metcalf") respectively. Metcalf and Voisin were the founding principals of the Stop 'N' Cash organization and the Defendant corporations.

[4] The Plaintiff was hired in October 1998, for an indefinite period of time, pursuant to an oral contract of employment, with an entity known to her as the "Cash Stop." Initially, it was part time employment. "Cash Stop" was under the control of Voisin and Metcalf. In 1999, during the Plaintiff's employment, a decision was made to reorganize into the Stop 'N' Cash organization, and carry on business under the name Stop 'N' Cash. The defendant Stop 'N' Cash 1000 Inc. was incorporated in that year and the directing minds were that of Voisin and Metcalf. They held their interests through various investment vehicles from time to time, including trusts.

[5] The Defendants Stop 'N' Cash 1010 (hereinafter called 1010) and Stop 'N' Cash 1020 (hereinafter called 1020) are corporate franchises opened by the other defendant Stop 'N' Cash 1000 (hereinafter called 1000). This court was advised that the same shareholders, Voisin and Metcalfe were the controlling shareholders of these companies as well as 1000.

[6] The Stop 'N'Cash companies, including the three Defendants, exist to provide alternative financial services, including payday loans. Payday loans were described as very short loans granted to qualified customers for a short period of time until they receive their next pay cheque. At that time, the loan and associated lending costs are to be fully repaid.

[7] The Defendant,1000, is the franchisor of the Stop 'N' Cash payday loan organization across Canada. In the early stages of development of the franchise system, it was determined that franchised outlets in Kitchener would be corporate outlets, meaning that these outlets would be owned, operated, and managed by Stop 'N' Cash 1000 Inc. and its owners and principals. 1020 and1010 were established as corporate franchisees doing business in Kitchener at 2880 King Street East and 215 Highland Road West, respectively. During the Plaintiff's employment, all three Defendant companies were under the effective control and direction of Metcalf and Voisin.

[8] The evidence indicated that the number of Stop 'N'Cash franchises grew to 64 in number before internal difficulties led to erosion of the franchise numbers. At the time of trial, there were 26 franchises in existence.

[9] The defendants have agreed there was a termination without cause. The real issue is whether the plaintiff was an employee at the time of termination of 1000 and/or 1010. Thereafter, the issues of the appropriate notice period and mitigation must be considered.

Employment History Pre Stop N'Cash

[10] The Plaintiff has a grade 12 education. She subsequently has taken some university courses but due to the arrival of children and the associated responsibilities, she chose not to pursue her degree. Ms. Kent testified that she had worked at the University of Waterloo from 1981 to approximately 1989 as an office manager and senior administrative assistant. Prior to working for the Cash Stop, the Plaintiff worked at the Royal Bank in Kitchener from 1990 to 1998, as a business service representative, customer assistance officer, customer service representative, receptionist, and corporate secretary. This is confirmed in her resume found in Exhibit 1, tab 62.

Employment History with Stop N' Cash Organization:

[11] After starting part time with Cash Stop in 1998, the Plaintiff was soon working full time. In 1999, the business name Stop N' Cash began to be developed as a franchise system and she was involved with various aspects of the development of the operational "template" for franchises that might be sold. She testified that as far as she was concerned, she was employed by "Tim and Clyde" (Voisin and Metcalfe). Mr. Voisin agreed by all parties, until sometime in 2002, to be the hands on, operational director and his partner was the financier of the organization.

[12] In 1999, the Plaintiff developed a System Operator's Manual, for Stop 'N' Cash 1000 Inc. for use in all Stop 'N' Cash franchised outlets. The Plaintiff also worked from early September 1999 to late October 1999 on an "Office and Human Resources Manual," for Stop 'N' Cash 1000 Inc., for use in all franchised locations. In this same period of time, she assisted in training a new franchisee, Douglas Battler who was called as a witness by the plaintiff. Ms. Kent testified that in this same period of time, she was in charge of dealing with Bell Canada to establish uniform "310-CASH" telephone numbers for all Stop 'N' Cash locations across Canada.

[13] Mr. George Davey testified that on December 6, 1999, the plaintiff was promoted from her position as a loans manager for 1010 to be the manager of 1020, which she knew was a corporate franchise. However, though she was the manager of that corporate store, she continued to do work for the franchisor 1000 in the form of corporate training and problem solving.

[14] Ms. Kent's T4 slips for the income tax year of 1999 (exhibit 1, tab 2) were issued by three different companies. The T4 which was issued by 1020, records $3,000.00 of employment income. A second T4 for the same year, issued by Stop 'N' Cash reveals she was paid an additional $11,250.00. And a further T4 issued by The Cash Stop Inc. discloses she was paid $10,390.00 by that company.

[15] Mr. Davey further stated that on February 1, 2000, Ms. Kent became the trainer for 1000 on a full time basis due to the increased number of franchises that were opening. He described 1020 and 1010 as "flagship" stores in the developing franchise system where prospective franchisees were shown an operating outlet and where franchisees, who had paid their franchise fees, were trained in the details of the Stop N' Cash operating systems. I find Ms. Kent was instrumental in that training process at those locations from time to time but also at various franchise locations in southern Ontario. This training work was for the direct benefit of 1000 which depended on healthy franchises to generate royalties and attract other interested parties to purchase a franchise. I accept her evidence and find as a fact that such training for 1000 remained an integral part of her employment by the defendants until the time of her termination of employment in 2004.

[16] During 2000, in addition to managing Stop 'N' Cash 1020 Inc., the Plaintiff testified that she had significant responsibilities as "corporate trainer" for 1000. The Plaintiff was required to travel to London, Stoney Creek, Hamilton, Stratford, and Toronto to assist new franchisees with learning various operating procedures under the Stop 'N' Cash system. The Plaintiff had two business cards at this time, one referring to her as "Corporate Trainer" and the other as "Manager." The business cards found at Exhibit 1, tab 41 simply refer to Stop 'N' Cash without specific reference to the 1000, 1010, and 1020 nomenclature.

[17] In 2000, the Plaintiff assumed responsibility for "Tips," the weekly newsletter prepared by 1000 for distribution to franchisees. It was prepared by her and distributed weekly for approximately two years. She prepared franchise packages for marketing purposes of 1000.(see exhibit 1, tab 12). She assisted in the choice of colours and layouts of franchises. She assisted some franchise locations with the selection of furniture.

[18] In early November, 2000, the Plaintiff wrote a letter of complaint to Mr. Voisin. It is dated November 10, 2000 and is found at exhibit 1, tab 18. Of interest, the plaintiff indicated in the first sentence that it was being written "to address my work for Stop N'Cash". In the second to last paragraph of the letter, she wrote, " I love my work here and want to continue working at Stop N' Cash". It is significant that she identifies herself in that letter, well before any litigation is envisaged, as an employee of the Stop N' Cash organization and not the employee of any one company even though she was officially the manager of 1020 at the time.

[19] In late November, 2000, the Plaintiff was notified in writing that her base compensation would increase to $40,000.00 effective retroactively to November 1, 2000. This letter was presumably a timely response to the Plaintiff's letter. The responding letter was signed by Mr. George E. Davey ("Davey"), Chief Operations Officer for 1000 , on the letterhead of 1000. The letter concludes by thanking the Plaintiff for her "loyalty, dedication, and hard-working efforts towards the successful growth of Stop 'N' Cash Inc." [with no reference to 1000, 1010, or 1020 Inc.] and "we wish you continued success in your career with the company." The letter found at Exhibit 1, tab 20 and does not differentiate between 1000, 1010, and/or 1020.

[20] Her T4 slips for the year ending December 31, 2000 are found at Exhibit 1, tab 21 and tab 22. They indicate that her employment income for the year was $38,800.00 and it was almost equally paid by 1020 and Stop N' Cash.

[21] On January 23, 2001, the plaintiff was promoted to the position of manager of 1010 located at 215 Highland Road West in Kitchener. The letter confirming this promotion was written on the letterhead of 1000 by George Davey, the chief operating officer of 1000. It is found at Exhibit 1, tab 24. It indicates that she was being promoted, which suggests an upward movement within a corporation. It does not say that her employer is changing. It simply indicates that she will be managing another corporate store. (that ultimately was beneficially owned Mr. Voisin and Mr. Metcalfe or their holding companies or family trusts). She was advised of an increase in her salary. If 1010 was to be considered to be her employer, one would have expected to have the letter at least written on that company's letterhead and/or to have indicated to her that her employer would thereafter be 1010. Her bonus, which the evidence indicates was paid to her from 1000 (though funded by 1010), was to be based on the effectiveness of the training program and comments received from store trainees, which as I have indicated above is clearly in the interest of 1000. The training of new franchisees was of little or no benefit to 1010. The bonus was not restricted to the financial success of 1010. And of particular import, the letter concludes with the comment "we wish you continued success in your new position with the company". Mrs. Kent believed this meant she continued to be employed by 1000 though she was paid from the account of 1010. I accept that that was her understanding and it was objectively based on this letter, the history of her employment to that time and the role she otherwise played in the Stop and Cash Organization.

[22] This understanding was reasonably reinforced when she received a further letter dated February 4, 2002 from Mr. Davey. (exhibit 1, tab 26). It again is on the letterhead of 1000 and confirms her compensation for the fiscal period February 1, 2002 to January 31, 2003. The letter opens as follows: "We are pleased to confirm your compensation for Fiscal 2003". "We" can only refer to 1000 and its principals. The letter, in my view, is consistent with the plaintiff's understanding that she continued to be employed by 1000 and by 1010 as part of the Stop N' Cash franchise organization.

[23] During 2002, the Plaintiff recalls undertaking further training for 1000 as franchisor while managing 1010. On one occasion she had to travel to Toronto and stay with her sister while she trained the staff at a new franchise located at O'Connor and Sunrise Avenues. She did this on direction of either Mr. Davey or Tim Voisin. In 2002, she was involved in "operation Geronimo". She was sent to Toronto for a week by Mr. Davey because a Toronto corporate store was in difficulty. She recalled having to spend at least three days in Stratford in late 2002 or early 2003 when Mr. Davey and his brother took over the Stratford location. She testified that she had to train the staff at that location as well as teaching them to do cold calls. When the corporate store opened on Victoria Street in Kitchener in 2001 or 2002, she recalled having Ron Silver in her store for several months as she trained him in the business. Though Mr. Battler had opened his franchise in Guelph in 1999, she was sent to assist him a number of times in 2003 and 2004. As Mr. Davey indicated in his testimony, to have a successful franchise system it is

necessary to provide excellent and timely support to franchisees. I find as a fact that Ms. Kent was part of that support system offered by 1000 to its franchisees and she responded, as directed by the principals of the franchisor, to assist franchisees in whatever way she was directed right up to the time she left on stress leave on July 1, 2004.

[24] In 2003, the Plaintiff's employment income was $44,400.00. The T4 (exhibit 1, tab 32) was issued by 1010. The defendants argue that this clearly indicates the plaintiff was employed only by 1010 at the time of her termination of employment in October, 2004. In cross examination, the plaintiff acknowledged she knew that 1000, 1010 and 1020 were separate corporations. She agreed that 1010 had a separate bank account from 1000 and 1020 and kept totally separate books and payroll records. While there is no issue that these can be strong indices of an employer, they are not conclusive of the matter at all.

[25] This is supported by the fact that the Plaintiff received a bonus of $4,765.63 on April 28, 2004, drawn on an account held by 1000 (exhibit 1, tab 35). If the Plaintiff was not employed by 1000, it is illogical that it would be issuing a bonus cheque on its account to her. It would otherwise just be issued from 1010's account. No explanation for this arrangement was offered by Mr. Davey nor any other witness for the defendants.

[26] During the period February 1, 2001 until the termination of her employment, the Plaintiff was described as manager for 1010., but she also performed duties for 1000. She continued to be responsible for training of new franchisees. She continued to prepare the weekly newsletter distributed to all employees of the all three Defendants. The final corporate franchisee that the Plaintiff trained, which was done at the premises of 1010, was for Stop 'N' Cash 1660 Inc., owned and operated by a Mr. Bill Pihura. His location in Mississauga opened on March 1, 2004.

[27] The Plaintiff applied for and obtained permission to go on a stress leave commencing July 1, 2004. This was during a period of time of considerable turbulence in the Stop N' Cash organization. A number of franchisees had begun to leave the chain in May 2004 and some started competing businesses in the ensuing months. The Plaintiff went on an unpaid leave of absence in July 2004. The anticipated return to work date was in November 2004. The leave of absence was authorized by Mr. Davey on behalf of Stop N'Cash. A "Leave of Absence Request and Approval Form" signed by Davey on June 29, 2004, is at Exhibit 1, tab 36. Ms. Kent testified that she believed she was entitled to holiday time for July so that the actual leave period would commence August 1, 2004 as shown on the exhibit. She testified that at all times she intended to return to work when the leave was over.

[28] Mr. Davey testified on behalf of 1,000 and 1020. I found him to be a credible witness who did not try to amplify his evidence to support the position of his employer. He was responsive and clear and fair in his testimony.

[29] George Davey recalled that when she applied for the unpaid leave, he and George Metcalfe discussed the matter with her. Mr. Metcalfe did not testify at trial. Mr. Davey testified that Bonnie Kent did not know at that time if she was going to return to Stop N' Cash. He drove

her home on June 30, 2004 and she seemed to him to be quite relieved. He sensed that she was glad to be gone and that she would not be back to work. This was reinforced by his knowledge that she had found a new tenant in her residence who had paid her a substantial down payment on a rental term.

Issues Between Voisin and Metcalfe:

[30] Mr. Davey testified that in the autumn of 2002, Mr. Metcalfe realized that Mr. Voisin had breached his trust in the course of arranging several personal loans without the authorization of his partner. As a resulty, Stop N' Cash became liable for the loans. Mr. Davey stated that Mr. Voisin had allegedly misappropriated the monies obtained from these loans for his personal purposes. Not surprisingly, difficulties arose in the Metcalfe/Voisin relationship. In the ensuing negotiations, Mr. Metcalfe became the majority owner of the shares of 1000 and president of the company. Mr. Davey indicated that Mr. Voisin's presence around the company became more and more scarce after that time. However, in October 21, 2004, Mr. Voisin obtained an order of the court granting him exclusive management rights over 1010 on an interim basis. Mr. Metcalfe was effectively given the same exclusive management rights over 1020 on the same terms and conditions. This order was issued in the ten day period immediately preceeding Ms. Kent's intended return to work.

[31] She testified that she heard from some other employees that she was apparently not returning to work for Stop N'Cash. She tried to unsuccessfully contact Mr. Metcalfe and Mr. Voisin and then sought legal advice. Her counsel wrote to Mr. Metcalfe on or about September 27, 2004 in an effort to establish her employment status with the company (exhibit 1, tab 37). A follow up letter (exhibit 1, tab 38) was sent on October 20, 2004 to Mr. Metcalfe.

[32] On October 21, 2004, Mr. Davey replied in writing (exhibit 1, tab 39). He indicated that because of the court order issued that same day with respect to the interim management of 1010, Ms. Kent should deal directly with Mr. Voisin. Mrs. Kent testified that about that time, she learned that other staff members had been hired in her place. On October 29, 2004, she received an email from Mr. Davey (exhibit 1, tab 40). The letter confirmed that she was on an authorized leave of absence with a scheduled return to work date of November 1, 2004. She was directed to report to Mr. Voisin. When she spoke with Mr. Voisin, he told her he was the manager (not her) and that she was now the responsibility of 1000. She then tried to contact Mr. Metcalfe and arranged to have lunch with him on November 3, 2004. He did not attend the lunch without advising her of his unavailability. On November 10, 2004, she was advised by Mr. Steven Padveen that all future communications with 1000 must be through legal counsel.

[33] The plaintiff commenced an action in Small Claims Court in December 2004 claiming approximately $10,000.00. She then instituted this action in the Superior Court of Ontario in May 2005. In this action, she submits that she is entitled to 12 months pay in lieu of notice of termination of her employment by the defendants.

Issue #1: Was the Plaintiff an employee of 1000 and 1020 as well as an Employee of 1010?

[34] Mr. Davey was the only witness on the issue of the nature of the Plaintiff's employment called by the defendants. He felt that after she became the manager of 1010, she ceased to be an employee of 1000. He noted that she did not have an office at 1000, she did not have a 1000 business card, and she enjoyed the use of a company car due to the marketing and advertising out of the 1010 franchise store. She knew that all the books and records for 1010 were kept at that location.

[35] He agreed that the accumulated time of employment (her seniority) Ms Kent would enjoy from Cash Stop, 1000, and 1020 was intended to be carried with Ms. Kent when she moved to become the manager of 1010. He acknowledged that the real control over Ms. Kent's employment remained with himself, Mr. Voisin and Mr. Metcalfe from time to time. If Ms. Kent was to be fired or moved or directed to do something, such decisions would come from 1000. He acknowledged in a non corporately owned franchise, the ultimate decision on such matters would come from the franchisee who had hired such an employee. The subject of employee leaves and vacations would all be discussed with Mr. Voisin or Mr. Metcalfe as he considered such things to be their business decisions to make. Thus, the application for leave by Ms. Kent had to be formally made and submitted to Mr. Metcalfe. He did not seriously contest the evidence of Mrs. Kent that she had done and was expected to do considerable training for the benefit of 1000 and its shareholders. He agreed in cross-examination that he was not privy to every conversation that took place between Mr. Voisin and the Plaintiff.

[36] The law is quite clear that an employee can in fact be an employee of two companies at one time. The Ontario Court of Appeal has called this the "common employer" doctrine.[1] In Ontario, the Employment Standards Act, R.S.O. 1990, c. E.14 legislates in section 12 the right of an employee to benefits under the Act from associated or related businesses. The British Columbia Court of Appeal has also rejected the notion that an employee can only contract for employment with a single employer.[2] In the Downtown Eatery case, the Court applied reasoning which is applicable to the corporate structuring of the defendants:

> "Although an employer is entitled to establish complex corporate structures and relationships, the law should be vigilant to ensure that permissible complexity in corporate arrangements does not work an injustice in the realm of employment law. At the end of the day, Alouche's situation is a simple, common, and important one – he is a man who had a job with a salary, benefits, and duties. He was fired- wrongfully. His employer must meet its legal responsibility to compensate him for its unlawful conduct. The definition of "employer" in this simple and common scenario should be one that recognizes the complexity of

[1] Downtown Eatery (1993) Ltd. v. Her Majesty the Queen in Right of Ontario et al, 54 O.R. (3d) 161 at p.4, paragr. 2.

[2] Sinclair v. Dover Engineering Services [1987], 11 B.C.L.R. (2d) 176.

modern corporate structures, but does not permit that complexity to defeat the legitimate entitlements of wrongfully dismissed employees."[3]

[37] On review of all the evidence, this court finds there was a common intention of the parties that the Plaintiff would be an employee of both 1000 and 1010 at all material times. Mr. Davey acknowledged in cross examination that when someone's employment was terminated, a record of employment would be created but no such documents were created for the Plaintiff's transitions within the Stop N'Cash group of companies. At the time of her termination of employment on October 31, 2004, I find that the parties knew and understood she was an employee of both corporations, as they were part of the Stop N' Cash organization. She was performing services on behalf of both those corporations and receiving payment of her salary and earned bonus from both of these named defendants. She was at all times under the supervision, control and direction of the corporate officers and directors of 1000.

[38] The plaintiff acknowledged in her testimony that from the time she left the management of 1020 in 2001, she was not an employee of 1020 and hence her claim against that defendant is dismissed without costs.

Issue #2: What is the Appropriate Common Law Notice Period and hence the damages?

[39] Counsel have agreed that the leading decision on the quantification of the notice period is Bardhal v. Globe and Mail, [1960] O.J No. 149. At paragraph 19 of that decision, some of the factors for the court to consider in determining the appropriate common law notice period (recognizing that every case is different and turns on its own facts) include the character of the employment, the length of service of the servant, the age of the servant, the availability of similar employment, having regard to the experience and training of the employee.

[40] Counsel for the Plaintiff has urged that in the circumstances of the case, twelve months notice ought to have been given to the Plaintiff. He notes her age (she will be 60 in June 2006), her management responsibilities and the fact that she is a female, all require a longer period of notice be given than otherwise might be the case based on her six years of employment.

[41] Mr. McDonald urged the court to consider three months salary in lieu of notice in light of the fact that she found work within three months of actually retaining an employment counselling and placement firm. In other words, he argued that the best evidence is exactly what occurred. He has further argued that the failure to provide the best evidence to the court that she had tried to find employment should weight against the Plaintiff. I will deal with the issue of mitigation more fully in considering Issue # 3 of this judgment. Had I had no concerns with respect to the Plaintiff's efforts to mitigate, I would award her 9 months salary in lieu of notice.

[42] It is not unreasonable to assume that a woman of 59 years of age who is seeking a managerial/administrative position similar to what the Plaintiff had performed or a position of

[3] Downtown Eatery (1993) Ltd. v. Her Majesty the Queen in Right of Ontario et al, supra, paragraph 36.

roughly equivalent status and remuneration is going to have a more difficult time to find alternative employment than a younger woman.

[43] At the time of her dismissal, the Plaintiff was earning an annual salary of $42,000.00. She was entitled to a $200.00 per month for automobile expenses (or $2400.00 per year). She further was given $100.00 per month ($1200.00 per year) for the RRSP program. She also received $100.00 per month ($1200.00 per year) in lieu of her participation in the corporate health benefits program. She was entitled to an annual bonus, which in her last year of employment was $4,765.63. I find on the evidence that this was a merit based bonus and not discretionary. Thus, the Plaintiff's compensation at the time of her dismissal was $51,565.63 inclusive of bonus.

[44] The defendants 1000 and 1020 called Helen Jowett who is the president of McDonald Green, employment consultants. There was no issue relative to her qualifications. She gave evidence about the job market and the availability of jobs for someone such as the plaintiff in the Kitchener Waterloo area from November 2004 to November 2005. She noted that the unemployment rate was the lowest it had been in thirty years for females and for administrative type personnel . It was her opinion that Bonnie Kent would have fallen within the definition of a prospective administrative employee with a financial background. Within her firm alone, Mrs. Jowett found 37 permanent full time positions which her clients needed filled by people with those qualifications. She estimated that there were at least ten other firms in the Kitchener-Waterloo area who were competitors to McDonald Green, some of which were national firms. She extrapolated that if each of them had at least the same number of positions to fill, there arguably could have been in excess of 370 positions for which Ms. Kent could have submitted her application for employment in the one year period she considered.

[45] In cross-examination, she admitted that she had never interviewed the Plaintiff. She agreed that she could not say the 37 placements for which her firm had been retained would provide benefits for the employee or the use of a vehicle. She did not know how many of those positions required someone with a college diploma or a university degree. She could not state what effect the Plaintiff's age would have on job eligibility. She felt that the majority of the advertised positions would generally have been in the $15.00 per hour range providing a weekly income of approximately $600.00 per week or approximately $30,000.00 per year. However, she did not have the specifics of the financial aspects of these positions because of client confidentiality considerations. She candidly agreed that it would be much easier to find a job for a prospective employee when that person is flexible with income expectations.

[46] The Plaintiff called Elizabeth Straub who was an employment advisor with 55 Plus in Rockwood Ontario. She has been in this type of business for approximately 15 years, two of which were with her present employer. It is an agency funded by the government to assist clients 55 and over to find work. Clearly, that age group is considered to need assistance in seeking jobs for age related reasons. That is something that was not discussed or considered by Ms. Jowett in her testimony. Ms. Straub only became involved with Ms. Kent's job search in June 2005,

shortly before her Employment Insurance benefits were to run out and after this litigation had commenced. Hence, her testimony was of little assistance to this court.

[47] The Plaintiff was a managerial employee with a high level of responsibility, assisting with the set up and running of new franchise locations. She was responsible for training new franchisees, which required knowledge, good people skills, and the ability to inspire confidence in new and prospective franchisees. The evidence indicates that the Plaintiff was in charge of one of the company's "flagship" stores for most of her six years of employment with annual sales in excess of one million dollars. She was well paid to reflect the responsibilities she bore in her job. Clearly from the evidence of Ms. Jowett, that would make it more difficult for someone such as the Plaintiff to find equivalent employment elsewhere.

[48] The plaintiff is almost 60 years of age, which is an important variable in the calculation of reasonable notice in this case. In his text entitled Canadian Employment Law (Aurora: Canada Law Book, 1999), Stacey Ball states at paragraph 9:40.2,

> The age of the Plaintiff is an important variable in the calculation of a reasonable notice. Jurists are very cognizant that an older employee will often have a weight will be given to the age of the employee.

[49] The Plaintiff should not be expected to immediately accept the first position available to her when it will mean she suffers a significant reduction in salary and/or responsibility.

[50] Bearing in mind all the factors of this case, including the length of employment, I find that the appropriate notice period should have been 9 months.

Issue #3: Has the Plaintiff failed to mitigate her damages?

[51] It is important at the outset to recognize that this trial proceeded under Rule 76 as a simplified trial. It is clear from reading that rule, that its efficacy is founded on full and early production of all relevant documents and evidence. Only then can the cost efficiencies envisaged by the rule be realized without compromising the rights of all parties to full production in advance of trial. In other words, trial by ambush is not to be permitted. Without full disclosure, the ability of a party to effectively use Rule 49 to make meaningful offers to settle prior to trial is negated.

[52] Counsel for the defendant has argued that that is exactly what has occurred in this case. He has contended that there has not been full and open disclosure and that this is because the Plaintiff has not been forthright with the court. For instance, the Plaintiff has not provided her 2005 income tax return. She contended that as she was self employed in 2005, she did not have to file it before June 30, 2006. However, knowing that this trial was taking place within 60 days of the required filing date, this court would have expected that tax return to be completed in a timely way to provide such sworn evidence of 2005 income to this court.

[53] Closely related to this deficiency is the defendants' concern that 8 invoices (exhibit 4) allegedly rendered by the Plaintiff for services rendered in her consulting business were only produced at 3:06pm on the Friday afternoon immediately preceeding the Monday morning when this trial was to begin. These were purportedly prepared by the Plaintiff on computers owned by her friends because she did not have access to her own computer. When counsel for the defendant demanded further information relative to the generation of the invoices (exhibit 10), such requested information was not produced. In looking at the invoices which make up exhibit 4, they are strangely similar considering they are purportedly generated on different computers and by different printers. The revenues generated by these invoices were presumably deposited into a bank account but the Plaintiff did not produce the statements of that account to show that those deposits were in fact made and that there was not other income coming into the account for other jobs for which an invoice was not produced.

[54] In her resume found at tab 62 of exhibit 2, it states that "since October 2004, I have been a private consultant, assisting in training of personnel." Counsel for the defendant argues that this is inconsistent with her termination allegedly occurring October 31, 2004. He notes the Plaintiff did not provide any notes or records or evidence from her accountant with respect to setting up her business. Mr. Battler was called by the Plaintiff with respect to consulting services rendered to him by the Plaintiff after her termination. However, neither Mr. Battler or Ms. Kent provided any documentation such as emails, copies of cheques, account particulars or deposit records with respect to their dealings.

[55] When the motion for summary judgment was argued before this court earlier this year and at the end of which this trial was ordered, the Plaintiff was present in the courtroom. She was aware of the arguments made at that time by the defendant on the issue of mitigation and the necessity to produce relevant information. That was one of the reasons summary judgment was denied and a trial ordered. She has been represented by counsel from an early stage in this matter. She contacted her lawyer in September 2004 and he wrote to counsel for the defendants on September 27, 2004.(exhibit 1, tab 37). I am certain she was advised of her legal obligation to mitigate her damages and the importance of providing documentation to substantiate such efforts.

[56] She collected employment insurance benefits to approximately the end of June 2005. By correspondence dated June 13, 2005 (exhibit 7), counsel for the defendant demanded production of the Plaintiff's job search documentation and all information relating to her application for and receipt of employment insurance benefits. At trial, he noted the only information relating to her job search that was produced is a summary of her efforts to secure alternative employment found at exhibit 2, tab 59. Virtually none of the supporting information one would have expected to see was presented to this court. The covering letters and/or emails were not included. The responses received were not included nor were notes of follow-up phone calls. There were no newspaper advertisements cut out and the application letters attached for proof of continuing effort to find another job. Furthermore, only part of the employment insurance records were provided and no effort made to produce the full file from the Employment insurance office.

Counsel for the defendants argues that the employment insurance summaries from her date of termination should have been produced.

[57] Counsel for the defendants also noted that the first time the Plaintiff contacted an employment counselor to seek professional advice in finding alternative employment was in June 2005. At that time, she spoke with Ms. Straub who found the plaintiff to have been pro active and appropriate in her reported efforts to find work. However, as noted, this contact was first initiated shortly before the Plaintiff's employment insurance benefits were to end and shortly after the letter of June 13th , 2005 sent by defendants' counsel demanding evidence of her efforts to seek alternative employment.

[58] I am not satisfied that the Plaintiff has taken all reasonable steps to mitigate her damages. The evidence provided to this court is largely unsubstantiated. Much of the production that should have been provided to the defendant in the ordinary course of a case such as this, has not been done by the Plaintiff. I am not satisfied that the Plaintiff moved to find alternative work with the diligence and resourcefulness that one one might reasonably have expected from someone who was trying to find another job. I recognize that she was hopeful of landing a position with the Regional police in the spring of 2005 but it appears that was almost the only job she was concentrating on. The defendants note that that the Plaintiff was able to find a job within three months of obtaining professional advice in June 2005. By August, the plaintiff was employed (albeit at a lower salary) at Huntley O'Hagen earning somewhere between $15.00 and $20.00 per hour. Once again however, the plaintiff neglected to provide verification of income earned in that job and the hourly rate of pay. The defendants have argued that the "proof is in the pudding" in that she was able to get a job in the marketplace within three months of truly turning her mind to finding one. Hence they argue that she is entitled to only three months notice.

[59] In McGregor on Damages, 14th ed. at pp. 150 and 151, the learned author has noted the Plaintiff must take all reasonable steps to mitigate the loss sustained by her as a result of her termination and she cannot recover damages for any such loss which she could have avoided but failed to avoid through unreasonable action or inaction.

[60] The Plaintiff was quite entitled to start her own consulting business but it is not reasonable that she did not undertake a full and extensive job search at the same time. She can not assume that the defendants are responsible for the "financing" of her new business. I am not satisfied that in the months following her termination, the plaintiff exercised her best efforts to find alternative employment commensurate with the job she had just lost. The first notes of such job search efforts are dated March 2005 (exhibit 2, tab 56). The paucity of documentation provided to the court with respect to her job search efforts supports my view in this matter. The failure to produce so much clearly relevant documentation creates an adverse inference against the plaintiff with respect to her efforts to mitigate her damages.

[61] I therefore reduce the notice period for which the Plaintiff is entitled to damages to six months. The plaintiff is entitled to damages calculated as follows:

6 months salary, bonus and benefits in lieu of notice.....$25,782.81
Less: consulting income earned in the notice period .....$ 4,230.00
Total damages to which Plaintiff is entitled:.....$21,552.81.

[62] The plaintiff is denied pre judgment interest on this award for failure to produce documentation in a timely and complete manner.

[63] I will receive brief written submissions and copies of any relevant offers to settle from counsel on the issue of costs unless the parties can resolve the issue themselves. In the event they are necessary, I would suggest the following schedule:

(a) Plaintiffs submissions to be forwarded on or before July 15, 2006.
(b) Defendants' submissions to be forwarded on or before July 25, 2006.
(c) Plaintiff's reply submissions to be forwarded on or before August 1, 2006.

If such a schedule is not agreeable to counsel, they can adapt it themselves to suit their schedules and simply let the Trial Co-ordinator know of any agreed amended schedule for such submissions.

Mr. Justice J. R. Turnbull

Released: June 27, 2006