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Sabirsh v. Montreal Trust Co.

Clifford A. Sabirsh, Plaintiff and Montreal Trust Company, Defendant

Montreal Trust Company, Plaintiff by Counterclaim and Clifford A. Sabirsh and Loretta Marie Sabirsh, Defendants to Counterclaim

Ontario District Court

Phelan D.C.J.

Judgment: May 28, 1986

Docket: 233646/84

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Counsel: *Richard Kesten, Esq.*, for the Plaintiffs

David Hager, Esq., for the Defendant

Subject: Labour and Employment; Public

Employment law

Phelan D.C.J.:

1 The plaintiff who was 39 years of age commenced employment with the defendant trust company on May 4th, 1981 and his services were terminated by the company on July 19th, 1984. At the time of his termination he was earning \$50,350 annually together with other company benefits. He was unable to obtain suitable employment with any other financial institution and since October 1985 has been working as a self-employed financial consultant.

2 This action is brought by the plaintiff for wrongful dismissal and he claims the following damages:

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- Twelve months salary -	\$50,350.00
- Bonus at 10 per cent -	\$ 5,035.00
- Salary increase at 5 percent	\$ 2,517.50
- Vacation pay (four weeks)	\$ 3,873.00
- Company benefits including club annual fees, dental expenses for self and family, life insurance premiums, and OHIP	\$ 6,012.12
- Expenses seeking new employment	\$ 721.75
	\$68,509.37
LESS payment received from defendant	2,041.00
Net Claim:	\$66,468.37

3 The plaintiff who had been residing with his wife and two young children in Richmond, British Columbia, close to Vancouver, prior to commencing employment with the defendant in its Toronto office is also claiming damages for a loss which he alleges he sustained on the sale of his Richmond home and takes the position that the defendant company arranged a purchase price for his residence at \$23,600 less than its market value.

4 Finally the plaintiff claims punitive damages on the ground that his immediate superior, Robert Weller, being jealous of the plaintiff's skill, strength and effectiveness in his position, acted maliciously, callously and arbitrarily in arranging for the plaintiff's termination.

5 The trust company concedes that the plaintiff was discharged from his position of deputy manager of the Toronto branch without cause. It denies that it acted maliciously in terminating him and alleges that termination was brought about as a result of his lack of knowledge of the trust industry and his lack of effective management skills. The company offered him a package at the time of termination which included the monetary equivalent of six months' notice.

6 Respecting the plaintiff's claim concerning his Richmond property, the defendant alleges that to assist the plaintiff in disposing of his home, at a time when the real estate market in the Vancouver area was plummeting, the company agreed to purchase that residence for \$235,000 and to provide the plaintiff with the difference between the purchase price and the eventual sale price. The residence was subsequently sold for \$240,000 and the defendant paid to the plaintiff the sum of \$5,000, being the net difference.

7 The defendant counterclaims against Sabirsh and his wife for the sum of \$59,687.71, the balance owing on a first mortgage held by the company on the plaintiff's newly acquired home in Mississauga, Ontario, to which mortgage Mrs. Sabirsh was a party, together with interest owing since August 1st, 1984, at a rate of interest which is in dispute.

8 Prior to joining the defendant company the plaintiff had had 21 years experience in the banking industry, 16 years with the Royal Bank and five years with the Bank of British Columbia. With both of these banks his supervising experience was quite minimal. The defendant's advertisement which the plaintiff answered, referred to the job as a "branch management position". The areas of expertise required included administrative and corporate business development. Following interviews with

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company representatives in Toronto and Montreal Sabirsh commenced employment as deputy branch manager in Toronto on May 4th, 1981.

9 The terms of the plaintiff's employment are set forth in the company's letter to him of March 7th, 1984 and included the following:

- (a) an annual salary of \$40,000 (subject to annual review);
- (b) a company automobile "as per current Montreal Trust policy;"
- (c) a staff mortgage "as per current Montreal Trust policy;"
- (d) membership in an appropriate club;
- (e) participation in the earnings related bonus plan for branch managers in 1981.

10 The company paid the plaintiff's expenses in making the transfer to Toronto totalling \$29,873.66. This included all legal fees respecting the purchase of the Mississauga property and sale of the Richmond property, the real estate commission on the sale of the Richmond property, \$10,500, and travelling and moving expenses which were in excess of \$13,500.

11 I shall deal first with the plaintiff's claim for damages respecting the sale of his Richmond residence.

12 There was considerable conflict between the evidence of Sabirsh and the evidence of Roberta Tilbe, the manager of the real estate department of the Montreal Trust Company in Vancouver. Mrs. Tilbe has held this position for eleven years and controls a staff of 35 or 40 employees. She had previous experience for 3- 1/2 years selling property, she is a member of the Vancouver Real Estate Board and is on the discipline and ethics committee of that Board. For five years she has been a teacher at a senior real estate seminar in Vancouver and has for four years acted as an arbitrator in real estate disputes. She was most impressive while testifying at the trial and I accept her testimony without hesitation where it differs from that of the plaintiff.

13 My impression of the plaintiff which will appear from subsequent references to his evidence was that he is very demanding, and was not at all times completely honest in his dealings with the trust company which leads me to the conclusion that his evidence was not at all times reliable and I so find.

14 A \$233,000 appraisal of the Sabirsh Richmond property was made by Mrs. Tilbe on March 24th, 1981. Because work extending over several months was still in progress on his patio, Sabirsh was unwilling to have the premises listed for sale until this work was completed on or about April 21st, 1981. The evidence of Mrs. Tilbe was that a dramatic plunge in the real estate market in Vancouver took place in May. Two different appraisals were done at the request of Sabirsh late in the month of May, the one for \$260,000, the other for \$265,000. The first report refers to sales activity having been "sluggish for the past two or three months." The second appraisal stated that because of high interest rates and other economic factors the market had shown a considerable decline in sales during the past three months.

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15 Mrs. Tilbe had recommended listing the property slightly below \$260,000 for valid reasons which she expressed. She also recommended using the multiple listing service. Mr. and Mrs. Sabirsh were dissatisfied with the listing price and requested that it be listed at \$275,000 with which request the company complied, although with misgivings.

16 A company policy memorandum which applied only to employees of the company who were permanently transferred at the request of the company provided for the company to pay the reasonable costs and expenses related to the transfer. Respecting the "old residence" the company and the employee would each obtain one appraisal and the fair market value would be the average of the two appraisals. The company would provide the employee with an offer to purchase the property at the fair market value and upon acceptance the employee would execute a multiple listing service agreement with the company. The memo also indicates that the company would pay all legal fees and real estate commissions but is specific in stating,

This policy covers only the transfer of employees who were full-time employees of the company prior to being asked to relocate. Expenses for newly hired employees who have been hired with the intention of moving to the required company location will be treated in a much more limited manner and on a case-by-case basis.

17 The attitude of Sabirsh was that he was in the same position as an employee of the company who was being transferred. To suggest he was otherwise was in his words, "just academic." He felt he should be treated as any other employee being transferred. He conceded that what he received from the company was considerably more than the company had obligated itself to provide as set out in the letter of March 17th, 1981. However in his view what the company gave him was just part of the normal transfer process. He felt no gratitude whatsoever for what they did for him. Their practice, he said, was "micky mouse."

18 Since the Sabirsh children were attending school in Vancouver Sabirsh was not anxious to move his family to Toronto until early July. Recognizing the difficulties he experienced in selling the Richmond home and since the closing of the transaction for the purchase of the Mississauga home was scheduled for June 15th Sabirsh sought and obtained financial assistance from the company. He had requested the company to purchase the Richmond premises from him at the average appraisal price shown on the two appraisals he had obtained, which would have been \$262,500. The company refused to do so but agreed to purchase the house from him for \$235,000 and to turn over to him any additional amount received when the sale to a third party was accomplished. To this proposal Sabirsh reluctantly agreed.

19 In testifying at trial the plaintiff's attitude to this assistance from the company was negative. He viewed the actions of the company respecting his Richmond home as having catapulted him into an impossible position. If he rejected their proposal to purchase the home he would have been in the position of having to sell the home himself and he agreed it might have taken him up to a year to dispose of the premises during which time he would have been subject to carrying charges on both the Richmond property and the Mississauga property. It was, he said, "an impossible decision, the numbers dictated the result. I had no choice but to accept their offer."

20 Mrs. Sabirsh in her testimony stated that it was her wish that the premises should be sold quickly since she was aware of the rapidly falling real estate market. She agreed that the listing of the property had been deferred until April 21st, 1981 because of continuing work respecting the deck patio which had been under construction for several months.

21 In my view the attitude of Sabirsh respecting the Richmond premises was completely unjustified. He wished the matter to be handled as if he was a regular employee being transferred. The company had no such obligation to treat him in that

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fashion. What they did for him was excessively liberal in my view and I grant no relief to the plaintiff on this part of his claim.

22 I turn next to a summary of the events during the plaintiff's 3 ¹/₄ years employment with the defendant leading to his being terminated on July 19th, 1984.

23 Sabirsh had been hired by the defendant largely on the strength of his banking background. He had had little previous supervisory experience and was thrust into a position of considerable responsibility as deputy manager of the Toronto branch of the company, the manager of which was one Mr. Gordon C. McDonell who was also a vice-president of the company. It is clear from the records produced that Sabirsh did not occupy an executive position with the company and that he was at no time an officer.

24 There were twenty departments in the Toronto branch in 1981 of which nine departments with about 256 employees reported to Sabirsh. The company appraisal report concerning his performance in 1981 merited him an increase in salary of \$4,500 to \$44,500. The next appraisal in May 1982 produced another increase to \$47,500.

25 In early 1983 under the guidance of a new president the company underwent a complete reorganization, as a result of which by mid-1983 the Toronto branch was divided into two divisions, a corporate services division and a personal services division. Mr. McDonell continued as vice-president of the Toronto branch of the Ontario region. At this time the company advertised for a vice-president for their corporate services division which position Sabirsh applied for but the company selected another applicant, Mr. Robert Weller, to fill the position.

26 Weller was 51 years of age, a University graduate in political science and had had over sixteen years experience with other trust companies including considerable supervisory control over staff personnel. Out of the twenty departments of the Toronto branch thirteen went into the corporate services division of which five only reported to Sabirsh, the other eight departments reporting to Weller. The workload of Sabirsh was very substantially decreased as a result of this restructuring.

27 The services of Weller with the defendant commenced October 3rd, 1983 and he continues to serve the company in the position for which he was employed up to this time. Among other tasks his job entailed reviewing the employees of the various departments and making recommendations concerning them with a view to strengthening the organization. Sabirsh was appointed to assist Weller in this work. Between October 1983 and December 1983 Weller's relationship with Sabirsh was satisfactory. They met regularly and as a result of the more than two years' experience that Sabirsh had had with the company he was able to provide Weller during those two months with the benefit of that experience and knowledge of the personnel and the operation of the various departments.

28 On November 24th, 1983, Weller wrote a report to the senior vice-president of corporate services of the company respecting Sabirsh saying that Sabirsh had shown excellent co-operation and enthusiasm towards his new assignment but that he lacked knowledge in certain areas of the corporate services division but Weller felt that he was a strong asset and should be seriously considered in the company's long-term planning. Weller recommended that Sabirsh be reclassified as assistant vice-president corporate services and that he be granted a 6 per cent merit salary increase, particularly on his past performance and Weller's expectation for the coming year.

29 At the same time McDonell wrote a letter to the senior vice-president which contained some reservation with respect to

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Sabirsh's performance but nevertheless McDonell rated that performance "satisfactory." The senior vice-president responded to Weller's memorandum on November 30th, 1983 saying that he had signed and approved Weller's salary recommendation for Sabirsh and stated further:

I will in the near future bring up the question of the assistant vice-president title; but you should realize that if we apply it to Cliff's position it will build up an expectation for the same title in a number of other locations. The president has not shown any inclination to use the assistant vice-president title extensively.

In the result the salary of Sabirsh was increased to \$50,300.

30 On December 28th, 1983 Weller sent a memorandum to the various managers in his division, including Sabirsh, in which he said:

In order to give each department manager a larger scope in performing his or her duties I would like to establish a uniform job description which,

- (1) sets out overall responsibilities,
- (2) covers the area of responsibilities,
- (3) provides specific duties for which each department manager has discretionary authority — ...

Weller requested a reply by March 1st, 1984. Sabirsh testified that he responded to this request prior to the date mentioned but heard no more about it.

31 In the early weeks of 1984 the relationship between Sabirsh and Weller deteriorated. Weller started to have a feeling of concern respecting the performance of Sabirsh primarily due to his lack of knowledge of the corporate side of the trust business. As Weller expressed it, he did not seem to have a good handle on the trust industry. Seminars and courses were available to Sabirsh respecting corporate services which Weller suggested Sabirsh should attend but Sabirsh considered that they were not necessary. Many instances were related by Weller of what he felt were defects in the way in which Sabirsh was performing which led to arguments between them. According to Weller, "We were supposed to be a team. I was getting opposition." He requested Sabirsh to arrange regular meetings with his departments and to get more involved with their day-to-day activities but Sabirsh seemed reluctant to do so.

32 The plaintiff's version of the differences which developed between himself and Weller in early 1984 was that Weller was the type of person who wanted total control and did not welcome assistance. In February 1984 Weller removed from the control of Sabirsh to his own control the property management division which Sabirsh resented, and he requested a meeting with Weller to discuss his role in the company and his job description, inasmuch as since the reorganization there had effectively been no position of deputy branch manager for which position Sabirsh had originally been employed by the company.

33 There was a conflict of testimony between these two witnesses as to whether a meeting had taken place in February

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1984 to discuss their differences. I must accept the evidence of Weller that such a meeting was held on or about February 9th, 1984, which was followed by Weller's memo to Sabirsh's personal file dated February 9th in which Weller made the following statement:

I attempted to assure him that we must work as a team and that with few exceptions he would be kept fully informed of my activities and results. I advised him that there would be times when I must deal directly with department heads that report to him, and I would keep him advised. Mr. Sabirsh has been restricting some department managers from replying directly to me on special requests from me. This has delayed in my completing projects on requests from head office. It was agreed that this would not happen in the future. It was discussed in depth the shortcomings in Mr. Sabirsh's management of the departments reporting to him. He must get more involved in their day-to-day activities, ask more questions, think of ways to assist each department manager in doing his assignment better. In general, manage the department and learn more about the corporate function ... He does not dig deep enough into the daily operations and workings of the departments and staff reporting directly to him. This results in lack of knowledge to do proper performance appraisals of his staff. He seems to only look at the surface with no real thought or logic. He continually rates his people far more favourably than proper research can support.

34 In early April 1984 a set of objectives for all members of Weller's so-called management team had been prepared by him but he did not prepare one for Sabirsh since as of that month he was of the view that the employment of Sabirsh with the company was not likely to last much longer. By the end of April Weller's view of Sabirsh's performance was even more negative. He complained to McDonell telling him that Sabirsh was not doing anything to learn about his new duties in the corporate services division and inquired of McDonell whether there might be some position within the company where Sabirsh could be used to greater advantage because of his banking background. McDonell was unable to be of assistance.

35 On June 18th Weller prepared a draft letter of termination for Sabirsh and said that as of that date he was 90 per cent certain that Sabirsh would be terminated.

36 Between October 1983 and July 1984 the company under the reorganization was in a state of considerable turmoil and a target was set on economic belt-tightening. Several instances were related by Weller which indicated that Sabirsh did not seem to be aware of the changes.

37 A very impressive witness on behalf of the defendant was Mrs. Sheila Wharton, the manager of the personnel department of the Toronto branch, who reported to Weller. In February 1984 Weller first expressed his concern respecting Sabirsh to her and his inability to trust the management decisions which Sabirsh was making. Preparations were instigated about mid-June to terminate him. Messrs. Axsmith and Associates, a firm of consultants in the de-hiring process were approached to assist Mrs. Wharton and Weller in the preparation of a letter of termination which the company intended to give him. The company was also prepared to pay a very substantial fee to this firm to provide career counselling for Sabirsh. Weller, after consultation with the company's head office in Montreal, was authorized to offer Sabirsh a package on termination which included six months' pay in lieu of notice and the right to purchase the company automobile which he had been using at a very reduced rate. Weller had recommended to the company that Sabirsh should receive seven months' notice.

38 Mrs. Wharton referred to a luncheon that she had had with Sabirsh on July 3rd, 1984, at which time she was fully aware of the termination plans, during which Sabirsh discussed seriously with her the subject of Christianity, and informed her that

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demonic forces were at work within the company which were working against him. She said he appeared to be very insecure.

39 Mrs. Wharton confirmed a number of events to which Weller had referred in his evidence concerning Sabirsh which indicated his apparent non understanding of the corporate services division responsibilities of the trust company business. I accept her evidence without hesitation where it may be in conflict with that of Sabirsh.

40 On July 3rd, 1984, the same day as Sabirsh had luncheon with Mrs. Wharton he wrote a memorandum to Weller suggesting a meeting and added this footnote for his own information:

I said that I was looking forward to setting some new goals and objectives.

41 When Sabirsh attended the July 19th meeting he was promptly informed that he was terminated that day and that an Axsmith representative was awaiting him in an adjoining room to counsel him in selecting a new career.

42 It was Weller's evidence that if Sabirsh had continued with the company he would have been reviewed in the fall of 1984 at which time Weller would have rated his performance between unsatisfactory and not quite satisfactory and as such would not have recommended any salary increase for that year. It was also his evidence that he found the termination meeting very distasteful and that he was unable to sleep for three nights preceding it. The news of the termination, as one might expect, came as a bombshell to Sabirsh who had no previous inkling of it.

43 The termination letter of July 19th set out what the company was prepared to do for Sabirsh and included the following: salary would cease on August 2nd; company benefits would remain in effect until August 2nd; life insurance would continue until September 2nd; since the pension plan had not vested Sabirsh could elect to have the contributions plus interest totalling \$7,708.31 refunded or all or part transferred directly into an RRSP; the interest rate on the staff mortgage on the Mississauga home which would jump from 12-³/₈ per cent to 18-¹/₄ per cent on termination would be continued at 14-¹/₄ per cent commencing September 1st; the company car could be purchased for \$7,000; the company would pay the equivalent of six months' salary, and paid club memberships would continue to the end of 1984. This offer Sabirsh rejected. No letter of recommendation was sought by him nor was one volunteered by the defendant.

44 The defendant has made it clear that it is not suggesting that the dismissal of Sabirsh was for cause. The defendant did present considerable evidence, however, to rebut the plaintiff's allegation that Weller acted maliciously, callously and arbitrarily in terminating him. Having observed Weller carefully during the course of his lengthy examination and cross-examination I can see nothing in his conduct in dealing with Sabirsh which would justify any such conclusion. It may be that at the time of reorganization when the duties for which Sabirsh had been hired were substantially altered that he had grounds for constructive dismissal but he did not act at that time and continued his services with the company. In the early stages of Weller's career with the company he thought highly of Sabirsh to the extent of recommending him as an officer of the company. However, early in 1984 Weller became aware of Sabirsh's shortcomings in the trust industry. Weller impressed me as a hard-working, dedicated employee who had the best interests of the company at heart. He undoubtedly is outspoken and is prone to criticize deficiencies in others whenever they became apparent to him and in this respect he did not hesitate to be critical of Sabirsh whenever he felt the latter's activities on behalf of the company left something to be desired. His evidence supported as it was by that of Mrs. Wharton makes it perfectly clear to me that there was nothing whatsoever that smacked of capriciousness or callousness in his recommending to the company that Sabirsh should be terminated. There is accordingly no

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basis whatsoever for the imposition of punitive damages.

45 In *Brown v. Waterloo Regional Board of Commissioners*, [37 O.R. \(2d\) 277](#), it was held that the Court has jurisdiction to award punitive damages where a contract has been breached in a high-handed and outrageous fashion so as to demand condemnation by the Court as a deterrent. It was held that the chief aim of punitive damages is not compensatory but prophylactic and retributive. Certainly in my view there was nothing in the manner in which the defendant company treated Sabirsh which demanded castigation.

46 No bonus had been paid to Sabirsh or any other non executive employee in 1981 or 1982. However in 1983 he had received a bonus of \$5,000 which was related to his performance with the company in that year and was based on the successful financial results of the company's operations. A notice accompanying the cheque informs Sabirsh and the others receiving it that the bonus plan in effect up to that stage was being terminated December 31st, 1983 and that a new plan would be effective in 1984. Under the new plan Sabirsh would come under the section entitled "award pool". This was for selected senior managers and specialists who during this year had made special contributions or who attained a level of performance substantially above what was expected. The bonus would be paid "on the basis of special achievements and/or a level of performance which substantially exceeds expectations for the past year." Final disputes regarding attainment of objectives were the sole prerogative of the senior management committee.

47 Of the four employees in the Toronto branch who were eligible for a bonus which included Sabirsh, in fact, in 1984 only one received it since the financial results of the company did not warrant additional bonuses being paid. In the circumstances it is completely improbable and indeed inconceivable that he would have been the one chosen since he had by no means attained a level of performance substantially above that expected up to the time of his termination.

48 The claim for a bonus in 1984 is accordingly denied. The same reasoning applies to the claim for salary increase which is also denied.

49 I next turn to the question of reasonable notice which depends upon a great many diverse factors including the specific circumstances of the case under review. Recent Ontario Court of Appeal decisions give useful guidance and I shall refer to them:

50 In *Bohemier v. Storwal International Inc.* [40 O.R. \(2d\) 264](#), and on appeal, [44 O.R. \(2d\) 361](#), the plaintiff, age 59 with 35 years employment, his entire working life, was dismissed due to the financial situation of the employer. He was within two years of earning full pension entitlement. The trial Judge awarded eight months' salary. The Court of Appeal varied the award and allowed eleven months in lieu of notice.

51 In *Isaacs v. MHG International Inc.* [45 O.R. \(2d\) 693](#), the plaintiff, a University graduate who was hired as purchasing agent by the defendant, an engineering firm, was wrongfully terminated at age 38 after seven months employment, his salary being \$41,000 together with substantial fringe benefits. The trial Judge awarded nine months' notice, but had erred in taking into consideration that the terminating occurred at a time when alternate employment was scarce. The Appeal Court did not think that the nine-month notice represented an error in principle in the circumstances although Lacourciere J.A., who wrote the judgment of the Court, said that members of the Court individually might have been disposed to fix a shorter period of notice such as six months but there was not such a palpable error as to warrant intervention.

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52 In *Hall v. Canadian Corporate Management Company Ltd. et al.* (1984) [4 C.C.E.L. 166](#), a 51 year old plaintiff was dismissed after eleven months employment as a vice-president of marketing and merchandising. He had left his home in Peterborough and moved to Mississauga, selling his business in the Peterborough area. He did not leave a secure position or pension in order to do this but he did leave a community in which he had developed a profitable business. The trial Judge awarded damages on the basis of a twelve months notice period. In light of the plaintiff's brief period of service the Court of Appeal reduced the period to six months.

53 In *Chang v. Simplex Textiles Ltd.* (1985) [6 C.C.E.L. 247](#), the plaintiff, age 44, who underwent considerable personal dislocation, left a position in the United States at the defendant's invitation to become plant manager of the defendant's textile plant in Ontario. The plaintiff had made it clear that he would only accept this change provided it gave him the opportunity of employment through to retirement. He was terminated after four months. The trial Judge awarded twelve months' notice which was reduced by the Court of Appeal to eight months holding that it was reasonable to imply that if employment did not work out the amount of notice to which the plaintiff would be entitled would vary according to the length of his actual employment.

54 In *Helbig v. Oxford Warehousing Ltd.* [51 O.R. \(2d\) 421](#), it was held that the conduct of the plaintiff, which was not sufficient to justify his discharge, cannot be used against him in determining severance time.

55 In *Eyers v. City Buick Cadillac Ltd.* (1984) [6 C.C.E.L. 234](#), the plaintiff, in eight years employment with the defendant corporation, had worked his way up to the position of general sales manager at an annual salary of \$40,000 plus bonus which together amounted to \$56,000 in the year of termination. Potts J. considered that twelve months in the circumstances would be appropriate notice but since the company had dismissed the plaintiff in a callous, summary fashion the notice period was increased to seventeen months.

56 The law is clear that reasonable notice is decided in each particular case having regard to, *inter alia*, the character of the employment, the length of service and the age of the employee. I do not take into consideration the failure of the defendant to provide the plaintiff with a letter of reference. It was not sought by the plaintiff and in view of his unsatisfactory performance over the several months prior to his termination any reference provided by the company would necessarily have been restrained in the language used.

57 Having regard to the plaintiff's age at the time of discharge, 42, his position with the company which was in the middle management category, his length of service of just over three years, his salary at the time of termination, the fact that while he was not lured by the defendant he did give up a secure position with the Bank of British Columbia, it is my view that the appropriate notice period should be nine months. His monthly earning based on his annual salary of \$50,350 or \$4,196 monthly his entitlement for nine months is accordingly \$37,764. On termination he was paid \$2,041 leaving a net balance owing of \$35,723.

58 The plaintiff did all that was reasonably possible to mitigate his damages. The only offer of comparable work was a two-month position with another trust company which proposal he declined since at that stage, to have accepted, he would have placed himself in the position of having to reject full-time employment with other companies to which he had applied if an opportunity presented itself which, in fact, did not happen.

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59 Respecting the plaintiff's claim for four weeks' vacation pay, there was evidence of a four-day trip to Washington, D.C., early in 1984 two of which days were substantially devoted to company business, the other two days being strictly for personal matters. He also attended a three-day personal seminar in March. He did take a week's vacation between August 27th and September 4th, 1984 following termination and it is argued for the defence that this was during a period when he should have been seeking other employment and mitigating his damages. Owing to the upsetting experience of his termination he should not be penalized for taking a few days from his search for work. I therefore consider him to be entitled to three weeks vacation pay at \$967.30 a week, less \$298.24 vacation pay he received on termination, in the net amount of \$2,603.66.

60 The plaintiff claims loss of benefits amounting to \$6,012.12 comprising the following: club fees \$950; dental expenses \$982; insurance \$1,050.24; car lease to May 1st, 1985, \$2,643; OHIP \$386.88. I shall deal with each of these benefit claims in the order mentioned.

61 In view of company policy effective January 1st, 1984, Sabirsh would have been entitled to membership, "one only in less expensive business clubs." While he had enjoyed memberships in the Ontario Club, Board of Trade Club, Board of Trade Golf Club, and other less expensive clubs at company expense he would have been entitled to membership in the Board of Trade Club from August 17th, 1984, his dues having been paid by the company to that date. Based on nine months' notice from July 19th, the monthly rate of dues being \$17.50, he is entitled to payment of \$140.00

62 The fees in the Board of Trade Golfing section had also been paid by the company to August 17th. Under a "grandfathering clause" in the January 1984 company directory, applicable to branch managers, the company undertook to honour and pay 1984 membership dues for clubs to which employees belonged in 1983. However effective January 1st, 1985, memberships falling outside the regulations would be the personal responsibility of the employee. Accordingly the fees of Sabirsh in the Board of Trade Golf Club were payable to December 31st, 1984. The annual fee being \$907 he is entitled to payment from August 17th to December 31st in the amount of \$337.28. The total claim for recovery of club fees is accordingly \$477.28.

63 Under the company's dental plan the company paid 75 per cent of the costs with an annual deductible of \$50 per family. Based on the dental expenses of the Sabirsh family over a period of two years the amount payable by the company works out to \$26.52 per month entitling Sabirsh to recover for the nine-month period, \$238.68.

64 Under the life insurance plans which Sabirsh had through the company he paid \$51.11 a month. The premiums were paid up to December 15th, 1984 following which Sabirsh obtained other comparable insurance coverage and paid out \$139 a month for it with a net monthly difference of \$87.89 which for the additional four-month period ending April 19th, 1985, totals \$351.56.

65 Concerning OHIP, 50 per cent of the payments were made by the company being \$29.75 per month and were paid to December 1st, 1984. The loss to Sabirsh to April 19th, 1985, approximately 4-¹/₂ months, totals \$134.00.

66 The final benefit for which Sabirsh claims is loss of his car lease at \$293.67 a month to May 1st, 1985. Under the new company policy Sabirsh would have lost his car benefits when the car had travelled 100,000 kilometers. As of July 19th, 1984 it had been driven just under 75,000 kilometers. On average the vehicle was operated at about 3,300 kilometers per month and it would appear that the car would have reached the 100,000 kilometer level in about eight months after termination, that is, about March 19th, 1985. The car was retained by Sabirsh to August 17th, 1984. Another vehicle was leased on September 18th

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at \$293.67 a month. The loss from September 18th, 1984 to March 19th, 1985, six months, is therefore \$1,762.02.

67 The defendant does not take issue with the plaintiff for expenses incurred in seeking new employment amounting to \$721.75.

68 Finally I turn to the issue of the defendant's counterclaim.

69 Originally the company agreed to advance to Sabirsh \$80,000 to be secured by a first mortgage on his Mississauga home at 18- $\frac{1}{4}$ per cent interest. This was confirmed to him by company memorandum of June 3rd, 1981 immediately following his employment with the company. He was informed that although the mortgage document stipulated an interest rate of 18- $\frac{1}{4}$ per cent he could accept the memorandum as evidence that as long as he was the owner and occupant of the property and in the employment of the trust company the effective rate of interest would be 12- $\frac{5}{8}$ per cent. It was further stipulated that the mortgage was to incorporate a condition that in the event that Sabirsh did not occupy, or should sell the property, or should leave the employ of the company the balance of the loan outstanding together with all interest accrued thereon should immediately become due and exigible. The mortgage when drawn, executed and registered did indeed contain this condition.

70 Owing to difficulties which Sabirsh had in disposing of his Richmond home changes were made in the advances to him to accommodate his needs. Subsequently when the Richmond home had been disposed of, the company wrote to Sabirsh on July 21st, 1981 stating that while the mortgage had been registered for \$80,000 only \$60,000 was to be advanced and again confirmed that although the mortgage showed an interest rate of 18- $\frac{1}{4}$ per cent that rate would be 12- $\frac{5}{8}$ per cent so long as Sabirsh occupied the property and continued to be employed by the trust company and while the loan was not in default.

71 That was the situation so far as \$50,000 of the \$60,000 loan was concerned. The remaining \$10,000 was to be treated somewhat differently, there being no interest or principal payments for the first year. For the second year \$1,000 would bear interest at 12- $\frac{5}{8}$ per cent, the third year \$2,000 would similarly bear interest and the fourth year, \$3,000 and the fifth year \$4,000 with no interest or principal payments on the then remaining \$6,000.

72 Shortly thereafter at the request of Sabirsh the amount advanced was increased by \$800 for a total loan of \$60,800.

73 In November 1981 Sabirsh applied for and obtained from the company a mortgage life insurance contract the monthly premium for which was \$23.44.

74 As of July 19th, 1984 the principal amount outstanding on the mortgage was \$59,687.71 with monthly payments of \$554.31. The mortgage provided that in the event of default compound interest was payable after six months but the defendant advises that it is foregoing its entitlement to compound interest.

75 Counsel for the plaintiff has computed the balance owing as of April 1st, 1986 using 12- $\frac{5}{8}$ per cent interest rate for a six-month period from July 19th, 1984 ending January 18th, 1985 with interest thereafter at 18- $\frac{1}{4}$ per cent. This together with the life insurance premiums unpaid since August 1st, 1984 which amount to \$534.24 totals \$77,315.84.

76 In view of my finding of nine months' notice this figure should be reduced by \$404.02 per month for a three month

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period reflecting the lower $12\frac{5}{8}$ per cent interest rate for those months and reducing the balance owing on the counterclaim by \$1,212.06 to a final figure of \$76,103.76.

77 The interest on the mortgage will continue to accrue at the rate of $18\frac{1}{4}$ per cent per month from April 1, 1986.

78 The defendant has sought possession of the Mississauga premises in its pleadings. Hopefully, satisfactory arrangements respecting payment owing under the mortgage can be reached between the parties. In the event that agreement cannot be reached there should be an order for possession effective January 2nd, 1987.

79 In the result the plaintiff should have judgment against the defendant for \$42,011.95 made up as follows:

Nine months' salary, less one month received	\$35,723.00
Net vacation pay	\$ 2,603.66
Club fees	\$ 477.28
Dental plan	\$ 238.68
Life insurance	\$ 351.56
OHIP	\$ 134.00
Car lease	\$ 1,762.02
New employment expenses	\$ 721.75
Total:	\$42,011.95

The plaintiff should also have interest on this amount at the rate of 11 per cent per annum from the date of the issue of the writ, November 29th, 1984.

80 The defendant shall have judgment on its counterclaim against Mr. and Mrs. Sabirsh for \$76,103.76.

81 Counsel inform me that since written offers of settlement were made the question of costs should be deferred until they have spoken to me. They may do so and at the same time I would ask them to inform me of any errors in my calculation of the damages that they may perceive.

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