

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Lewis v. PMC-Sierra Ltd.***,  
2007 BCSC 1611

Date: 20070905  
Docket: S072873  
Registry: Vancouver

Between:

**Neil Lewis**

Plaintiff

And:

**PMC-Sierra Ltd.**

Defendant

Docket: S072874  
Registry: Vancouver

Between:

**Dan Lee**

Plaintiff

And:

**PMC-Sierra Ltd.**

Defendant

Docket: S072875  
Registry: Vancouver

Between:

**Marc Eden**

Plaintiff

And:

**PMC-Sierra Ltd.**

Defendant

**Before: The Honourable Mr. Justice Bauman**

**Oral Reasons for Judgment**

In Chambers

September 5, 2007

Counsel for the Plaintiffs

C. Ferguson

Counsel for the Defendant

M. R. Howcroft

Place of Trial/Hearing:

Vancouver, B.C.

[1] **THE COURT:** These three actions for wrongful dismissal have been tried together by consent under Rule 18A. It was agreed by the parties for greater clarity that the evidence led in each proceeding would be evidence in the other.

[2] Each of the plaintiffs is an engineer employed, until recently, in the business of the defendant, which designs, manufactures and sells semiconductors.

[3] The plaintiffs are highly skilled individuals in a highly technical field.

[4] There is no issue that they were each dismissed without cause from the defendant's Burnaby facility on 30 March 2007, as part of a larger reduction in the defendant's workforce.

[5] The heads of claim which I must address include:

- (i) the periods of reasonable notice; and
- (ii) each plaintiff's entitlement to bonuses during the period of reasonable notice, together with sums on account of the defendant's Employee Share Purchase Plan, the defendant's Stock Option Plan, the defendant's RRSP Matching Plan and the defendant's alleged Sabbatical Plan.

[6] I will first deal with the assessment of the periods of reasonable notice.

[7] The plaintiffs, of course, rely heavily on the leading case of ***Ansari v. British Columbia Hydro and Power Authority*** (1986), 2 B.C.L.R. (2d) 33 (S.C.), a decision of then Chief Justice McEachern which was affirmed by the Court of Appeal without substantial comment, at [1986] B.C.J. 3006.

[8] *Ansari* is particularly helpful because it dealt with the mass termination of highly skilled BC Hydro engineers in the mid 1980s.

[9] I can do no better than to highlight these statements from Chief Justice McEachern's reasons. Under the heading of the "Period of Reasonable Notice," the Chief Justice began by referring to Chief Justice McRuer's classic statement in *Bardal v. Globe and Mail* (1960), 24 D.L.R. (2d) 140 (Ont.H.C.), at 145:

21 There can be no catalogue laid down as to what is reasonable notice in particular classes of cases. The reasonableness of the notice must be decided with reference to each particular case, having regard to the character of the employment, the length of service of the servant, the age of the servant and the availability of similar employment, having regard to the experience, training and qualifications of the servant.

[10] Chief Justice McEachern continues:

17 While the character of employment and levels of responsibility are important, it does not appear to me that the courts have been seriously concerned with the minutia of the employment being terminated or with the specific competence or incompetence of the employee. Perhaps proceeding on the biblical direction that "the labourer is worthy of his hire" (Luke 10:7), the law does not seem to treat special competence or the lack of it as a particularly important factor in the determination of the notice period, although courts have occasionally commented upon the performance of the dismissed employee.

...

23 Further, it does not appear useful to attempt nice distinctions between the comparative employment functions of these employees. Thus, in my view, it is not necessary minutely to investigate the degree or level of specialization of these plaintiffs. It is enough to observe that they are all highly skilled graduate engineers whom B.C. Hydro was satisfied to employ in responsible positions. Those factors alone are sufficient to entitle these employees to a longer notice period than in many other cases.

24 Also, I do not consider it useful to make distinctions between these professional employees who did or did not supervise other employees. Such a concept is pervasive in some disciplines, but it is not a particularly relevant consideration when employees are professionally skilled and are employed because of such skill. This point was apparently argued in *Suttie v. Metro Transit Operating Co.*, 42 B.C.L.R. 234, [1983] 3 W.W.R. 71, 1 C.C.E.L. 123, affirmed 9 C.C.E.L. 19 (C.A.), but the court does not appear to have given effect to it.

25 The next important factor in fixing the period of reasonable notice is length of service. This is the only important factor that does bear directly upon the employee's prospects for future employment although long service may add materially to the age of the employee which does bear upon employment possibilities.

26 For reasons which are largely subjective and which I would not presume to disturb, the law requires a longer notice period for a long-term employee even though discharged employees of the same age, skill and responsibility suffering under the same economic factors must be assumed to require an equal period to obtain equivalent employment. The reasons for this anomaly may be that a long-term employee has a moral claim which has matured into a legal entitlement to a longer notice period.

27 Advancing years are also an important factor to be considered along with years of service because age bears so importantly upon the prospects for other similar employment. The court cannot be unmindful of the fact that employment opportunities for older engineers are extremely limited.

28 Next, there has been some judicial discussion about what is called the "economic factor" which I understand refers to the economic circumstances making discharge necessary or affecting the likelihood of alternative employment. I believe the common law first established the requirement of reasonable notice upon the termination of a general engagement by either party in order to permit the other to find a replacement employee or comparable alternative employment. Thus, in logic, the period of notice should be fixed solely by a consideration of that question, but that is not the law and the other factors mentioned in *Bardal* plus a few other subjective factors have become part of the equation.

29 The law on the question of the economic factor is stated in *Hunter v. Northwood Pulp & Timber Ltd.* (1985), 62 B.C.L.R. 367, 7 C.C.E.L. 260 at 267 (C.A.), as follows:

The length of notice is not equivalent to the period required to find new employment. To so hold would make the employer solely responsible for the lack of available positions resulting from a depressed economy. No employer would agree to such a condition of employment.

30 Further, at p. 271, the court summarized the situation by saying that the correct approach to the economic factor is:

- (1) The lack of available employment opportunities resulting from a depressed economy is a factor to be taken into account.
- (2) The economic factor must not be given undue emphasis.

[11] Finally, I restate Chief Justice McEachern's conclusion at page 7:

44 At the end of the day the question really comes down to what is objectively reasonable in the variable circumstances of each case, but I repeat that the most important factors are the responsibility of the employment function, age, length of service and the availability of equivalent alternative employment, but not necessarily in that order.

[12] I turn to describe each of the plaintiffs in the cases at bar.

[13] Dan Lee is 35 years old. He is a trained engineer. He has worked for the defendant for 12 years. His last job title was Leader, System Development. In the scheme of the defendant's operations, leaders do not have significant management responsibilities, but they do have some supervisory responsibilities.

[14] Mr. Lee's base salary at termination was \$153, 225 per year.

[15] Neil Lewis is 31 years old. He is a trained engineer. He has worked for the defendant for nine years. His last job title was Intermediate Verification Engineer.

That is a position below that of Leader. It does not involve any significant management or supervisory responsibilities.

[16] Mr. Lewis' base salary at termination was \$104,000 per year.

[17] Marc Eden is 41 years old. He is a trained engineer. He has worked for the defendant for 11 years. His last job title was Leader, Product Development. He had some supervisory responsibilities but no significant management responsibilities.

[18] Mr. Eden's base salary at termination was \$178,180 per year.

[19] Plaintiffs' counsel looked at the various BC Hydro cases following upon **Ansari**, which include:

**Cheng**, [1985] B.C.J. No. 630 (S.C.);

**Campbell**, [1986] B.C.J. No. 1310 (S.C.); and

**Stauder**, [1986] B.C.J. No. 1740 (S.C.).

[20] Plaintiffs' counsel chose employee "Yu" in **Ansari** as comparable to the plaintiffs at bar on the **Bardal** criteria. Counsel then produced this table:

Plaintiff	Age	Years of Service	Award
Yu	46	11	15
Cheng	38	10	14
Stauder	41	Under 12	18

Campbell	45	7 1/2	15
----------	----	-------	----

[21] In the result, plaintiffs' counsel suggests reasonable notice for Mr. Lee at 15 months; Mr. Lewis at between 10 and 12 months; and Mr. Eden at 15 months.

[22] Counsel for the defendant counters with 9 to 11 months for Mr. Lee; 6 to 8 months for Mr. Lewis; and 8 to 10 months for Mr. Eden.

[23] Mr. Howcroft, for the defendant, refers to a number of extra-provincial decisions in support of his reasonable notice submission and one helpful additional British Columbia case which concerned a number of dismissed professional employees, *Woodlock v. Novacorp International Consulting Inc.* (1989), 24 C.P.R. (3d) 533 (B.C.S.C.), affirmed (1990), 48 B.C.L.R. (2d) 28.

[24] In *Woodlock*, the engineers with *Bardal* criteria similar to the plaintiffs at bar received notice periods of 8 to 10 months.

[25] Of significance in *Woodlock*, however, was the fact that each of the plaintiffs there was offered and accepted employment with the purchaser of the employer who had just terminated them, although at reduced salaries and benefits. The availability of this alternative employment was a significant consideration in *Woodlock*.

[26] In the case before me I am guided by all of the British Columbia decisions. In particular I judicially note, however, that economic conditions in British Columbia today are much improved from the mid 1980s. The job market is quite favourable

generally. At the same time, this case lacks the significant feature found in **Woodlock**.

[27] In the circumstances, I find a period of reasonable notice for Messrs. Lee and Eden at 12 months and for Mr. Lewis at 10 months.

[28] I turn to consider the plaintiffs' other heads of loss.

**Short Term Investment Plan**

[29] Payments under this plan were considered by the defendant every two fiscal quarters.

[30] The defendant's Mr. Marshall described the plan so in his affidavit in the Lee proceedings:

15. In addition to a base salary, certain PMC-Sierra employees, including Mr. Lee, are eligible to receive compensation through PMC-Sierra's Short Term Incentive Plan ("STIP"). Eligible employees may be entitled to a STIP payment twice yearly, paid in relation to the periods January 1 to June 30 and July 1 to December 31. In order to be eligible for a STIP payment, PMC-Sierra must meet its financial goals for the applicable period and the employee must meet a satisfactory level of performance for the same period. If either PMC-Sierra fails to meet its corporate performance objectives or the employee fails to perform at the satisfactory level, no STIP payment will be paid for that period. In that regard, the STIP payment is discretionary, depending on an assessment of the employee's performance by the applicable manager responsible for that employee.

[31] The law regarding payment of bonuses and the like, during the notice period is summarized in **Martell v. Ewos Canada Ltd.**, 2005 BCCA 554, where Justice Thackray adopted this portion of the trial judge's reasons at ¶ 26:

26 The issue is whether Mr. Martell was entitled to participate in the bonus and share option programs initiated by Ewos in March 2001. Mr. Justice Williams said as follows in that regard:

[67] The defendants argue that these provisions [of the bonus and stock option agreements] act to prevent the plaintiff from being able to claim entitlement to the option and bonus arrangements, since they appear to require continued employment as a condition of receiving any of the options or bonuses, and provide that the entitlement is limited to options or bonuses which have vested by the date the employee has been informed of the termination. In my view, that argument cannot succeed. As indicated, it has been determined that the plaintiff was terminated without cause. The termination was not of his volition, but rather was that of the employer. It has been found to have been unlawful. In the circumstances, the employer cannot thus benefit from having wrongfully dismissed the plaintiff. The correct course is that the plaintiff will be entitled to benefits which he would have had a right to claim, had he been employed. Accordingly, it is my finding that he is entitled to the benefit of the option and bonus agreements to which he would have been entitled, had he remained employed for a period of 16 months following the date of his dismissal. That is, he is entitled to the benefit of those programs as though he was employed through May 5, 2002.

[68] In the circumstances, I find that the plaintiff is entitled to the share options which were granted on May 1, 2001, and the second instalment of share options, granted May 1, 2002. I am informed that each of those instalments represented 5,000 shares with a value of NOK 400 per share. In addition, the plaintiff is entitled to be compensated for the bonus payment made on May 1, 2001 in the amount of NOK 1 million and a second bonus payment which was paid on May 1, 2002 in the same amount. It follows from this analysis that he has no entitlement to the share options which were granted in May, 2003, nor the bonus payment granted in May, 2003.

[32] The summary of the law found in *Leduc v. Canadian Erectors Ltd.*, (1996), 18 C.C.E.L. (2d) 216 (Ont. Gen. Div.), is helpful at ¶ 46 and 47 and reads:

46 From my review of the authorities, with respect to bonuses, I have distilled the following principles:

- (a) The starting point is always to attempt to determine if there is any evidence of the intention of the parties regarding the entitlement to, and the quantification of, the bonus.
- (b) Bonuses probably can be classified into 3 categories:
  - (i) formula bonuses
  - (ii) quasi-formula bonuses
  - (iii) non-formula bonuses.
- (c) A formula bonus is one that is determined by means of an arithmetical formula.
- (d) A quasi-formula bonus is one that is determined by means of certain factors, some or all of which are subjective in nature.
- (e) A non-formula bonus is one that is determined by the employer without the obligation to take into account specified factors or to weigh factors in a specified manner.
- (f) If, in the case of quasi or non-formula bonuses, they are routinely awarded in a certain amount or in a certain range, they should be included in the assessment of damages, just like any other fringe benefit.
- (g) In the case of quasi or non-formula bonuses, which, due to their very nature, require an element of discretion, that discretion must be exercised reasonably and, wherever possible, on the basis of objective criteria.
- (h) A bonus scheme that, historically, has become an integral part of an employee's wage or salary structure is a benefit that has a value and should form part of the calculation of the employee's damages.
- (i) If the historical conduct of the parties gives rise to a reasonable expectation of a bonus, then the bonus is a benefit that has a value and should form part of the calculation of the employee's damages.

- (j) A distinction must be made between the entitlement to a bonus and the quantification of the bonus. If the former is established the court will grapple with the latter.

47 To the above list I would add that, with respect to quasi and non-formula bonuses, there may be instances where it would be appropriate, in quantifying the bonus, to allow for positive and negative contingencies.

[33] The evidence discloses that Mr. Lee in recent years has earned a bonus of approximately \$10,000 per year. I award him that sum for the 12 months of his notice period.

[34] Mr. Lewis has been receiving, in addition to his salary, approximately \$1,200 per year by way of bonuses. I award him 10/12 of that sum.

[35] Mr. Eden received \$4,000 per year in two of the past three years. Mr. Eden did not qualify for the bonus in 2006. I apply a negative contingency factor of 50 percent in respect of his bonus and award him the sum of \$2,000.

### **Employee Share Purchase Plan**

[36] The plan is described in this way at Exhibit D to Mr. Lee's affidavit at tab 3:

The Purchase Plan has overlapping two-year offering periods that begin every six months, starting on the first trading day on or after February 15<sup>th</sup> and August 15<sup>th</sup> of each year. Each two-year offering period includes four six-month "purchase periods." An eligible employee of the Company may authorize payroll deductions of between 1% and 10% of his or her compensation. The amounts deducted are accumulated and, at the end of each of six month purchase period, applied to purchase shares of common stock. The purchase price generally will be 15% less than the fair market value on either the first day of the offering period or the last day of the purchase period, whichever is lower. However, participants in an offering period may elect to purchase shares at the lower of: (i) 100% of the fair

market value on the first day of the offering period, or (ii) 85% of the fair market value on the last day of the purchase period.

[37] Each of the plaintiffs participated in this plan while employed with the defendant.

[38] I award them the following sums based on the evidence at trial using the share price in effect at the time each plaintiff swore his affidavit:

Mr. Lee, \$8,924;

Mr. Lewis, 10/12 of \$6,055; and

Mr. Eden – now, apparently there was a calculation error here. I will give him a sum which is the annual value to Mr. Eden calculated in accordance with the formula used just above for Messrs. Lee and Lewis.

### **Restricted Stock Units**

[39] The evidence discloses that this was a new incentive plan introduced by the defendant just before termination of the plaintiffs.

[40] According to Mr. Marshall of the defendant, under the plan as implemented, no restricted stock units will vest until 25 May, 2008. This is beyond the notice periods I have awarded. Based on the decision in *Mandell v. Apple Canada Inc.* (1990), 34 C.C.E.L. 319 (B.C.S.C.), no award is appropriate.

**Stock Options**

[41] The plaintiffs seek recovery for options that would have vested during the reasonable notice period. The defendant apparently concedes that recovery in this regard is appropriate but disputes the claims for a tax gross-up because of the different tax treatment accorded damages. Such a gross-up does not appear to be the practice in our court. See the cases cited at paragraph 65 of the defendant's brief, and I decline to award a gross-up here.

[42] The plaintiffs seek additional damages for vested options exercised and sold by the plaintiffs immediately following termination of their employment with the defendant.

[43] The plaintiffs argue that they should be compensated for the early exercise and sale of the options because of their termination. I cannot agree. The choice to sell when the plaintiffs did, was theirs. They could have retained the shares and continued to enjoy whatever appreciation they might have experienced; they did not.

[44] With these findings I trust that the parties can now undertake the calculations of the claims under this head. There is liberty to apply failing agreement, and the parties should use the stock price as at the date of hearing for the purposes of calculating losses under this head.

**RRSPs**

[45] The defendant maintained an employee RRSP matching program which the plaintiffs each fully participated in during their employment.

[46] They are entitled to the amount of contributions from the defendant they would have been otherwise entitled to during the period of notice in which I have awarded. If the plaintiffs direct that the sum be paid directly into their RRSP account, the tax gross-up issue becomes moot.

**Sabbatical**

[47] I accept the evidence of Mr. Marshall that the defendant ceased offering a second four-week sabbatical after 11 years of service in 1998.

[48] Even if the plaintiffs, or one of them, was eligible for this sabbatical during the period of notice, the sabbatical gave no separate entitlement to wages and benefits. As the plaintiffs have been given their salaries and benefits during the period of notice, no loss has been sustained. See *Hadjis v. Morningstar Research Inc.*, 2006 O.J. 1417.

**Medical Benefits**

[49] These are allowed as claimed by Messrs. Eden and Lee.

[50] I believe that covers the various heads. Submissions on costs, counsel?

[51] MR. FORGUSON: This is Chris Forguson, My Lord, counsel for the plaintiff, and my submission would be that the costs would be the normal costs at scale 3 payable to each plaintiff except where there was duplication in that there was a hearing date. I do not submit that they are all entitled to a hearing date each. I would say that we should get the units of one day and split it out three ways.

[52] THE COURT: Anything contrary?

[53] MR. HOWCROFT: My Lord, Michael Howcroft. Nothing contrary.

[54] THE COURT: Counsel, the new tariff is in effect. It is scale B, and I award costs as suggested by Mr. Morgan, on scale B. You will be happy to see that that is a considerably increased tariff.

[55] MR. HOWCROFT: Not all of us would be happy about that, My Lord.

[56] THE COURT: No. Well, quite so, Mr. Howcroft.

[57] MR. FORGUSON: My Lord, Chris Forguson again. Just one very small matter of clarification. With respect to the medical benefits, and I know it was very small, and I just wanted to make sure that we are able to draft up an order as appropriate. The claims of each of them were somewhat different in that some of them had – I believe – sorry, you have not included benefits for Mr. Lee and he is the one that had some receipts. So I guess on that basis – or, sorry, you have for Mr. Lee.

[58] THE COURT: Yes, that is correct.

[59] MR. FORGUSON: There was some concern raised by my friend at the hearing as to the veracity of plans that people haven't yet got -- again, sorry, my mistake, it was Mr. Eden. Mr. Eden had managed to get himself onto his wife's group plan, but he had not yet received the invoices for them.

[60] THE COURT: I thought he quoted the sum he thought he was paying.

[61] MR. FORGUSON: Pardon me? Sorry, I missed that, My Lord.

[62] THE COURT: I thought he gave evidence of the sum that he thought he was paying.

[63] MR. FORGUSON: Yes, he did, and so long as that is the amount that we are going to be putting into the judgment that is fine. I just wanted to clarify that.

[64] THE COURT: Well, I accepted that evidence. I apologize. I said Morgan. It is Mr. Ferguson, of course.

[65] MR. FORGUSON: Thank you.

[66] THE COURT: Anything else, counsel?

[67] MR. FORGUSON: No.

[68] MR. HOWCROFT: No, My Lord.

[69] THE COURT: Thank you very much, and I am sorry that it took so long.

[70] MR. FORGUSON: Thank you, my lord

[71] MR. HOWCROFT: Thank you, My Lord.

[72] THE COURT: Thank you.

"Bauman J."