

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Earl v. Canada Bread Company,
Limited,***
2007 BCSC 1574

Date: 20070928
Docket: S074608
Registry: Vancouver

Between:

Steven Earl

Plaintiff

And:

Canada Bread Company, Limited

Defendant

Before: The Honourable Mr. Justice Ehrcke

Oral Reasons for Judgment

September 28, 2007

Counsel for Plaintiff

D. Gleadle

Counsel for Defendant

R. Sieg

Place of Trial/Hearing:

Vancouver, B.C.

[1] The plaintiff applies for judgment pursuant to Rule 18A of the ***Rules of Court*** and for damages for wrongful dismissal. The defendant terminated the plaintiff's employment on May 29, 2007, without cause. The plaintiff was given no notice. He therefore seeks damages as a lump sum for the defendant's breach of his employment contract by failure to give proper notice.

[2] The defendant is a company engaged in the business of baking and distributing bread and other baked goods. The plaintiff had been working for the defendant or its predecessor companies continuously for almost 19 years. He is now 49 years old, married and has two school-aged children.

[3] He first started working as a delivery driver, but over the years worked his way up to the position of territory manager for northern Vancouver Island. Territory managers are the first level of management within the defendant's sales structure.

[4] As a territory manager, the plaintiff's primary responsibility was to act as a liaison with approximately eight of the defendant's franchisees and from time to time the customers included in the delivery routes of the franchisees. The plaintiff was responsible for ensuring that the defendant's programs were properly executed by the franchisees when the defendant's products were delivered to its customers at the store level, to coach the franchisees about the defendant's programs, to answer each of the franchisees' questions concerning the defendant's products and to help the franchisees with schematic changes such as moving products on the shelf and preparing exception and quality of product reports.

[5] The defendant's programs included such plans as new product information, sales promotions, sales target programs, sales plans for each of the products distributed and manufactured by the defendant, new product launches and marketing of product plans. It was the responsibility of the plaintiff to ensure that the franchisees and the customers that the franchisees delivered to executed these programs properly. On occasion, the plaintiff would also perform sales activities on behalf of the defendant.

[6] As a territory manager, the plaintiff did not have the authority to hire personnel without informing or seeking approval of an immediate supervisor or someone within the defendant's human resources department. However, when hiring was to be done, he did participate in the interview process.

[7] On May 29, 2007, the defendant gave the plaintiff a termination letter in which it terminated his employment immediately but offered to continue paying his base salary of \$59,296 per year and some benefits for a maximum of 52 weeks, provided that he sign a release with various conditions, including a restrictive covenant that he would not compete and that his payments would be reduced if he became re-employed or self-employed. The plaintiff did not accept this proposal, but the defendant has nevertheless unilaterally continued paying his base salary for that period.

[8] The principles relating to damages for wrongful dismissal are set out in ***Ansari v. British Columbia Hydro and Power Authority***, [1986] 2 B.C.L.R. (2d) 33 (S.C.) where McEachern C.J.S.C. wrote:

The underlining principle which arises out of the law of master and servant (as they were called at common law), is that, absent contractual provisions, the master who terminates the employment of a servant must give reasonable notice, and upon doing so he is not required to compensate the servant in any way. If the master does not give reasonable notice then the law requires him to compensate the servant by an award of damages that is intended to put the servant in the position he would be in if he had received proper notice. In the assessment of these damages the recovery of lost income is not limited to salary, but includes other benefits incidental to the employment being terminated: **Lawson v. Dominion Securities Corp.** [1977] 2 A.C.W.S. 259 (Ont.C.A.).

[9] Under the heading "The Period of Reasonable Notice," he went on to list the relevant factors:

In what is often regarded as a leading case, **Bardal v. Globe and Mail Ltd.**, (1960), 24 D.L.R. (2d) 140 (Ont.H.C.), McRuer, C.J.H.C. said at p.145:

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] In paragraph 15 of his affidavit, sworn September 24, 2007, the plaintiff described his efforts at finding new employment:

When I was examined for discovery on September 12, 2007, by counsel for the defendant, I mentioned a few leads that I was pursuing. Here is an update:

(a) Old Dutch: I have not heard anything more regarding this potential lead. What I have heard from Jim Johansson and Phil Riesig, both Canada Bread Territory Managers for mid and southern Vancouver Island, is that there is an Old Dutch Territory Manager that may be nearing retirement. The territory is on the north island. The possible opportunity would only be if and when this territory becomes available,

which may or may not occur. Thus, my information is that Old Dutch is not presently looking for anyone to fill a role suitable for me - but it might happen at some future date. It is just a very preliminary "feeler" that I have made;

(b) Frito Lay: I have learned that there are no openings at present on mid or northern Vancouver Island;

(c) Terra International/Tall Grass: There are no openings, the positions that my contact Ryan Rangano told me about of have been filled;

(d) Marty Kusz, Canada Bread Franchisee: he has expressed an interest in having me work for him one or two days a week. I do not see this sort of position as worthwhile, as it would be a very junior and low paying role. He would not have any work for me that would be suitable for my experience and qualifications, nor would it lead to a suitable role. I believe that I am much better off focusing my efforts on trying to find a suitable job.

[11] The plaintiff has not yet found other employment, nor has he earned any income since he was dismissed.

[12] The parties have each referred me to a large number of cases on the appropriate length of the notice period for employees of similar age and similar length of service, with notice periods ranging from 12 to 24 months. I will not cite all these cases. The parties know what those cases are, and I have considered them all. No two cases are identical, of course, and each case must be decided on its own particular facts.

[13] In addition to determining a proper notice period, allowance must also be made for the fact that only four months have elapsed since termination, and the plaintiff might yet find employment within a reasonable notice period. The award of

damages should take into account in a mitigation contingency. See **Smith v. Pacific National Exhibition** [1991] B.C.J. No. 255, 34 C.C.E.L. 64 (S.C.).

[14] In my view, the facts of this case bear some resemblance to those in **Foster v. Kockums Cancar Division Hawker Siddeley Canada Inc.**, [1993] B.C.J. No. 1884 (C.A.). There the Court of Appeal reduced a trial award of 20 months to 15 months for wrongful dismissal, at least partly on the basis that no proper reduction had been made for the mitigation contingency. In my view, a proper notice period for this plaintiff, given his age, years of service, type of work, level of responsibility and his efforts to date, so far unsuccessful, to find suitable employment would be 17 months but reduced by 2 months for the mitigation contingency that he may soon find work, for a net notice period of 15 months.

[15] The next issue is whether an award for damages should be made as a lump sum or by way of salary continuance. This issue was thoroughly canvassed in **Tull v. Norske Skog Canada Limited**, 2004 BCSC 1098. There Pitfield J. said at paras. 60 to 62:

[60] In my opinion, the principle that damages must be assessed on a once and for all, one-time basis, the requirement that the court resort to a kind of mandatory injunction or adjourn judgment to a point following expiry of the notice period if the effectiveness of a salary continuance arrangement is to be assured, and the fact that a salary continuance arrangement to which the employee does not agree reflects the employer's attempt to unilaterally amend the employment contract, suggest that such arrangements should not be endorsed as a means of compensating an employee for damages in a wrongful dismissal action. It is obvious, of course, that nothing should prevent an employer and employee from agreeing to enter into a salary continuance arrangement.

[61] That said, I appreciate the relevant principles that have evolved in relation to the appropriate approach in awarding damages for wrongful dismissal in British Columbia to be the following:

(1) A contract of employment, otherwise silent on the manner of termination, may be terminated by providing reasonable working notice, or upon payment of a lump sum in lieu of reasonable notice: ***Ansari, supra***.

(2) The amount payable in lieu of working notice must include all compensation that would have been received in, or in respect of, the reasonable period of working notice and an amount that will permit replacement of employment benefits that would have been enjoyed in the period of working notice had such benefits not been terminated: ***Ansari, supra***.

(3) The employer's failure to properly determine the amount payable as a lump sum in lieu of working notice will permit the terminated employee to commence an action for wrongful dismissal. In that action, damages will ordinarily be assessed as a lump sum in satisfaction of all claims. The amount assessed in relation to lost benefits from employment will normally be determined by reference to the cost incurred by the employee to replace the benefit or, where the lost benefit has not been replaced but the court is persuaded on the balance of probabilities that they will be replaced, the reasonable cost that will be incurred to procure the replacement: ***Cooper, supra; Wilks, supra; MacDonald, supra***.

(4) The court may, in its discretion, endorse the use of an employer-imposed salary continuance arrangement as a means of providing the employee with payment in lieu of notice provided the amount determined by the employer to be payable on its terms is a reasonable reflection of that which the employee has lost as a result of not being provided with working notice: ***Spooner, supra; Polak, supra***.

[62] In my opinion, discretion should only be exercised in favour of a salary continuance arrangement if the amount to be paid to the employee in accordance with its terms is equivalent to that which the employee would have received had he or she been dismissed with working notice: ***Spooner, supra***.

[16] The defendant argues that *Tull* is of doubtful authority in light of the decision of the Supreme Court of Canada in *Hamilton v. Open Window Bakery Ltd.*, [2004] 1 S.C.R. 303, where Arbour J., delivering the judgment of the court, said at para. 20:

The assessment of damages required only a determination of the minimum performance the plaintiff was entitled to under the contract, i.e., the performance which was least burdensome for the defendant. The plaintiff agreed at the outset that she was entitled to no more by contracting for a contractual term that could be truncated with notice entirely at the discretion of the defendant.

[17] That case however was one in which the contract of employment specifically provided two different modes by which an employee could be terminated. The ratio of the case, in my view, is found at para. 17, where the court said:

However, under the general principle applicable in breach of contracts with alternative performances enunciated above, it is not necessary that the non-breaching party be restored to the position they would likely, as a matter of fact, have been in but for the repudiation. Rather, the non-breaching party is entitled to be restored to the position they would have been in had the contract been performed.

[18] Where as in the present case, the contract is not one that by its terms may be performed in different ways, the principle in *Hamilton* has no application. I am therefore satisfied that there should be a lump sum damage award in the present case based on a net 15-month notice period.

[19] The plaintiff's compensation at the time of his termination consisted of a base salary of \$59,296 per year, or \$4,941.33 per month, a bonus plan and benefits. The plaintiff has calculated the monthly value of the bonus plan and benefits as follows:

(a) \$4,941.33 in lieu of base salary;

- (b) \$296.21 in lieu of personal bonus;
- (c) \$148.24 in lieu of pension contributions;
- (d) \$108.00 Medical Services Plan;
- (e) \$259.00 family extended medical and dental coverage;
- (f) \$126.00 life insurance;
- (g) \$244.00 long-term disability insurance;
- (h) \$60.00 cellular telephone replacement;
- (i) \$740.00 vehicle replacement.

[20] The defendant agrees with some of those items, but takes issue with others, specifically the bonus plan, the long-term disability insurance, the cell phone and the vehicle replacement. I will deal with the cell phone first.

[21] The plaintiff had use of a cell phone from his employer which he used for both business and personal calls. He said that he made the defendant aware of his personal use and the defendant did not complain about it. Nevertheless, it was company policy that the phone was for business use only. The fact that the plaintiff used the phone for personal calls contrary to company policy does not entitle him to compensation for loss of that improper use.

[22] Regarding the long-term disability insurance, the defendant submits that the plaintiff should not be compensated for its loss because he has not yet purchased replacement insurance. The plaintiff was cross-examined about this at his examination for discovery. As I interpret the evidence, his intention is to purchase such insurance, even though he has not yet done so. I would therefore allow his claim for \$244.00 per month to replace the long-term disability insurance.

[23] As to vehicle replacement, the defendant agrees the plaintiff should have some allowance for his loss of personal use of the company vehicle, but disagrees with the amount. While he was employed, the plaintiff kept track of the amount of his personal use of the vehicle and declared it to be 4% for income tax purposes. In my view, the plaintiff's claim of \$740.00 per month is inflated. I would fix the amount for vehicle allowance at \$400.00 per month.

[24] Finally we come to the bonus plan. In previous years, the plaintiff was awarded an annual bonus of between 4.5 and 6% of his base salary. The defendant submits, however, that shortly before the plaintiff's dismissal, the bonus scheme was changed from one based on an employee's personal performance to one based on his team's performance and the plaintiff's team was not performing well in the months leading up to his dismissal. The plaintiff counters that if he had not been fired, his team would have improved its performance and earned the bonus allowance.

[25] We will never know with certainty whether or not that eventuality would have come about. The reason for that, however, is the fact that the defendant breached the employment contract by terminating the plaintiff without notice. I am satisfied that the plaintiff is entitled to compensation in lieu of bonus, but only at the rate he earned in the most recent year, namely 4.5% of his base salary, which works out to \$222.36 per month.

[26] To summarize, the plaintiff is entitled to damages in lieu of notice based on the following monthly figures:

- (a) \$4,941.33 in lieu of base salary;
- (b) \$222.36 in lieu of personal bonus;
- (c) \$148.24 in lieu of pension contributions;
- (d) \$108.00 Medical Services Plan;
- (e) \$259.00 family extended medical and dental coverage;
- (f) \$126.00 life insurance;
- (g) \$244.00 long term disability insurance;
- (h) \$400.00 vehicle replacement.

That gives a total of \$6,448.93 per month for a 15-month period for a lump sum damages award of \$96,733.95.

[27] In addition, there are amounts owing to the plaintiff from the defendant for bonus pay and vacation pay for the period before his termination. The bonus pay would be at a rate of 4.5% of base salary. I understand that the parties can agree on those amounts and include them in the final order.

[28] Finally, from the total award, all the amounts that the defendant has already paid to the plaintiff must be deducted. Again, I understand that the parties can agree on those amounts.

[29] There will be judgment for the plaintiff accordingly, with costs at Scale B.

[30] MR. SIEG: One matter of clarification, My Lord.

[31] THE COURT: Yes.

[32] MR. SIEG: The sum of those benefits were paid up until the date of the -- of the hearing. So, for example, the life insurance, the medical insurance, the dental insurance. And so just to clarify, the deduction is not only for the amounts paid to the plaintiff, but also amounts paid on behalf of the plaintiff.

[33] THE COURT: Yes.

[34] MR. SIEG: In order to keep those benefits in place.

[35] THE COURT: Yes.

The Honourable Mr. Justice W. F. Ehrcke