IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20140918
Docket: S141640
Registry: Vancouver

Between:

Kenneth Andrew Hall

Plaintiff

And:

Quicksilver Resources Canada Inc.

Defendant

Before: The Honourable Mr. Justice Groves

Oral Reasons for Judgment
In Chambers

Counsel for Plaintiff:	M. Sheard
Counsel for Defendant:	J.A. D'Andrea, QC L.M. Gill
Place and Date of Trial/Hearing:	Vancouver, B.C. August 26-27, 2014
Place and Date of Judgment:	Vancouver, B.C. September 18, 2014

Introduction

[1] **THE COURT:** This is a Rule 9-7 application brought on by the plaintiff by way of a notice of application dated June 2, 2014. The context for the application is that the litigation involves a claim for wrongful dismissal.

[2] I will first discuss some non-contentious facts to set the context of the litigation, then discuss Rule 9-7 and its appropriateness for determination of the issues before the parties.

Facts

[3] The broad factual matrix, to set the scene, is that at the time of Mr. Hall's dismissal on February 5, 2014, he was 42 years old and was employed as a superintendent with the defendant Quicksilver Resources Canada Inc. ("Quicksilver"). He was, as superintendent, the only employee of Quicksilver at its industrial site in Campbell River. This industrial site is a former pulp mill site in Campbell River, the Elk Falls mill site, that was previously owned by Catalyst Paper Corporation ("Catalyst").

[4] When this site was sold by Catalyst, Brian Hall was also, at that time Catalyst's only employee at the site. He had worked for Catalyst for over 24 years starting part-time when he was in high school and continuing from that point on. While a mill was in operation, he moved up from a position which appears to be that of labourer to that of facilities manager, his last position with Catalyst.

[5] There is not a lot of evidence before me about this industrial site, but from the evidence of Mr. Hall's job description and the additional bits of evidence one can glean from the context of the affidavits, it seems clear that Mr. Hall's job was important, highly specialized, and unique. He was responsible for a 400-acre site Elk Falls mill site which was, as noted, formerly a pulp mill which was purchased by Quicksilver with the eventual intent of conversion of this land to a LNG facility.

[6] Clearly there are environmental, regulatory and safety considerations associated with the decommissioning of a 400-acre mill site, and Mr. Hall appears, from all the evidence, to be the guy responsible. Responsible in the context for things such as regulatory compliance, managing the various contractors on the site, site security and site safety, and importantly secondary effluent treatment, to name only a few of the responsibility he appears to have had.

[7] Another important fact, again for which there is limited evidence, is the purchase of the site from Catalyst by Quicksilver and notably the marketing of the site by Catalyst.

[8] Some time prior to 2012 the mill was decommissioned. By the summer of 2012 Mr. Hall was, as noted, Catalyst's only employee at the site. It was around this time, or perhaps earlier, that Catalyst began to market the site to prospective purchasers. It was eventually purchased by Quicksilver with the closing date of May 23 or 24 of 2013.

[9] The details of the purchase are not before the court. They are no doubt in the hands of Quicksilver but have not been disclosed, or so I am informed, in this litigation.

Rule 9-7 Suitability

[10] With those introductory and preliminary facts in mind, I return, as required, to the issue of the suitability of determination of the matters between the parties on a summary basis. I start by noting that though this is not determinative of the issue, that neither party opposed a Rule 9-7 determination.

[11] The law suggests generally, and specifically as it relates to wrongful dismissal cases, that the court should take a robust approach to resolving issues summarily. That is the direction in the *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 (C.A.), [1989] B.C.L.R. (2d) 202.

[12] Additionally, in the recent decision of *Hryniak v. Mauldin*, 2014 SCC 7, Madam Justice Karakatsanis of the Supreme Court of Canada talks about the importance of the use of summary trial to resolve cases, to create effective use of courts and ensure access to justice.

[13] In *Bomford v. Wayden Transportation Systems Inc.,* 2010 BCSC 1506, my brother, Mr. Justice Macaulay, speaks to the use of this procedure in wrongful dismissal cases, even if challenging, where there is no need to resolve credibility issues, or where, as I find here, these credibility issues can be resolved through reference to other evidence.

[14] I am satisfied that this case can be resolved summarily.

[15] The evidence before the court on behalf of the plaintiff is the evidence of Kenneth Hall. The evidence before the court on behalf of the defendant is the affidavit evidence of John Rushford, who is with Quicksilver in their Calgary office, and Steve Boniferro who was, or perhaps still is, a human resource senior vice-president for Catalyst.

[16] In determining any matter, at trial or summarily, courts must analyze the evidence. Following the evidence, and any reasonable inferences that can be drawn from the evidence, leads the court to the important findings of fact. On summary trial applications the court must be able to find the necessary facts through its analysis of the evidence to determine the merits of the claim or the merits of the defence before it can grant judgment either way.

[17] Here it is not argued that there was cause for dismissal, what is argued primarily is whether Quicksilver's relationship with Mr. Hall is that of an eight-and-a-half to nine-month employer/employee relationship, or whether, as the plaintiff suggests, is that of a 24-year plus employment relationship.

[18] The law is, in my view, clear on two points: First off, there is a presumption in law that if an employee continues to be employed in a business after its sale the

common law recognizes that past service is an implied term of any subsequent contract of employment: See *Sorel v. Tomenson Saunders Whitehead Ltd.*, [1987] B.C.J. No. 1332 (C.A.).

[19] Though not expressly argued here, a point may be made that this sale was not a business sale but was an asset sale. I would reject that distinction or that point if it had been argued based on the facts here. I note that it is possible, though I do not have the sale documents before me, that the transfer of the Elk Falls site from Catalyst to Quicksilver was primarily an asset sale. I note that these assets are assets which had with them ongoing responsibilities that needed to be attended to; maintenance, regulatory compliance, environmental monitoring, and so on. These are obligations or business actually that accompany these assets, and as such this is perhaps best characterized as an asset sale with an ongoing business or responsibility associated with it.

[20] It is clear that there were legal requirements that any purchaser would have to comply with related to environmental and other concerns, and Mr. Hall, and only Mr. Hall, was capable of fulfilling those responsibilities.

[21] I note as well that this issue was dealt with by this court, the issue being whether or not an asset sale is, in law, different than a sale of a business as a going concern. This was dealt with in the case of *Rhodes v. Koksilah Nursery* (1997), 29 C.C.E.L. (2d) 303 (B.C.S.C.), aff'd 1999 BCCA 283, and that case stands for the proposition that the principle of recognition of past service from continued employment applies whether it is an asset or a share sale.

[22] Likewise a second point in law, which is equally clear, is that an employer and employee are free to contract not to recognize past service.

[23] The case of *Sorel*, previously cited, also stands for the proposition that employers are free to advise the employee if they are not willing to recognize past service. In those circumstances the employer must do so expressly so as to give

the assumed employee an opportunity to pursue his previous employer for any remedy related to that service.

[24] I note here that Quicksilver appears to be a large international company. I have to assume that in putting together this significant purchase it had legal advice. Despite this Quicksilver had Mr. Hall sign an employment agreement that is silent on this issue. It provides no waiver of past service, nor does it appear on the evidence before me that the issue was ever discussed by Mr. Hall.

[25] I note as well, in terms of the contractual relationship between these two parties, again Quicksilver appears to be a large international company and Mr. Hall, I note, is high school educated. He has, it appears, one job, at this mill site, for his entire life, and so what one is looking at here is a contractual relationship between a sophisticated, experienced corporate entity, and an inexperienced individual. That creates, in my view, a heavier onus on Quicksilver.

Hall's evidence

[26] The evidence of Hall, I find, to be clear and unchallenged. In 2012 Catalyst informed him of their marketing of this site and Catalyst informed him of their need to retain him. Catalyst had concluded and communicated that Hall was an important asset to bring to any deal to sell the Elk Falls site.

[27] Hall suggests, and I accept, that Catalyst knew that he had a family and responsibilities and they knew in advising him of their desire to sell the site that that could cause him to look around for other work. That was not in Catalyst's interest in terms of its marketing of the site or its sale of the site. They needed to keep Hall. His loss might jeopardize, or make difficult, any sale.

[28] This only makes sense. On the facts it seems clear that Hall, and only Hall, was the one who knew what the needs of the site were. He was their only employee and he was the one responsible for all environmental and other regulatory compliance on the site. Clearly his leaving would make the maintenance of the site more difficult, and would make the eventual sale of the site more difficult.

[29] I note parenthetically that upon commencing due diligence in regards to this purchase Quicksilver quickly came to the same conclusion, the importance about retaining Hall.

[30] As a result of Catalyst's advice to Hall, and Catalyst's clear need to retain him, the parties began discussing a contract, a contract which would guarantee that Hall would stay and that Catalyst could, in marketing the site and selling the site and maintaining the site during the time of marketing, retain the services of Hall. This contract is in Exhibit E of Hall's affidavit dated September 28, 2012. The contract is signed by Hall sometime in October of 2012, and I accept Hall's evidence, because it is uncontradicted, that the contract had an attached release which he has attached to his affidavit. Hall says when he signed the contract, it had an attached release which is Exhibit F to his affidavit. Hall calls this contract a retention bonus contract. He says he agreed to stay in consideration for a lump sum payment after any sale, as well as his regular wages ongoing. He says that the contract he signed in October of 2012 was the deal, a deal which he negotiated, and it is clear from the evidence before me that in negotiating the agreement the word proposed by Catalyst "severance" was removed from both the contract and from the release. That was the deal that Catalyst made with Hall to retain him; a deal in which the words "severance" did not appear in either the contract or in the proposed release.

[31] I note that this assertion by Hall is not directly disputed by Steve Boniferro, a Catalyst human resource manager, who negotiated with Hall, though for reasons which will become clear, if there is a conflict between the affidavit of Mr. Boniferro and Mr. Hall, I prefer the evidence of Mr. Hall.

[32] Objectively, it is odd to think that Hall would agree to put his life on hold, to provide a benefit to Catalyst, and to agree to stay and face eventual uncertainty only for the benefit of receiving severance. Frankly, the minute discussions with Catalyst began, notice given that they were considering the selling of the plant that would result in Mr. Hall losing his employment, the potential of a severance obligation arose. Essentially it is hard to see the benefit to Hall and the sacrifice to Catalyst to

get what it needed to sell the Elk Falls plant, the continued and guaranteed services of Hall, and availability of Hall to do his job until sale, and one month afterwards, if they were simply agreeing to pay out severance as Quicksilver and Boniferro suggest.

[33] Quicksilver relies on a subsequent release signed by Hall and in that subsequent release the word "severance" is in it. But I note that this release is not what Hall and Catalyst earlier agreed to. Hall says he never agreed to that release when he signed the contract, and this is not disputed by Boniferro. Hall says that when he did sign the new release he was now employed by Quicksilver, he was anxious to get his retention bonus, and he signed the release without much thought or legal advice.

[34] I note again that when the original contract was made the contract included a release form. There is in fact no new consideration provided to Hall by Catalyst for this new release.

[35] I accept Hall's explanation as contained in his affidavit for signing the new release especially in light of the fact that I have serious concerns about the somewhat duplicitous actions of Catalyst which I will discuss shortly; but also because I am satisfied on the evidence that I believe, the better evidence, that the deal between Hall and Catalyst was in fact a deal for a retention bonus to keep Hall there, and the deal, when it was signed by Hall, had attached, as Hall swears, and as is not denied, a proposed release, none of which contain the word severance. And again I note there is no new consideration provided to Hall for this new release.

Quicksilver's evidence

[36] Quicksilver is in an unfortunate position. The person who discussed matters with Catalyst, Ms. Grinnell Price, is not available due to ill health to sign an affidavit. At the end of the day, however, nothing turns on that unfortunate circumstance. I have the defence evidence, the evidence of John Rushford, and the evidence of Steve Boniferro.

[37] In Mr. Rushford's evidence he deposes to the fact that in January of 2013 he had learned of Hall and his importance at the Elk Falls mill site.

[38] In April of 2013 Quicksilver sought Catalyst's permission to approach Hall, who was Catalyst's employee.

[39] In May of 2013 Mr. Rushford turned his mind, and recognized, that the recognition of severance would be important to Hall. In terms of resolving that last concern, Quicksilver did not raise the issue with Hall, rather they approached Catalyst. They appear to have approached Mr. Boniferro.

[40] When Quicksilver approached Mr. Boniferro it is important to note what Mr. Boniferro clearly knew. Mr. Boniferro knew that he had negotiated with Hall and signed a contract, a contract which had an attached release. This was done in September and October of 2012. Mr. Boniferro knew that from his discussions with Hall and from the negotiations over the language of the contract that the word "severance" had been expressly removed from the agreement. Yet despite this it appears that Mr. Boniferro told Ms. Grinnell Price that Catalyst and Hall had agreed on severance; and they had not.

[41] These are the duplicitous actions of Catalyst. They knew they had a contract with Hall and they knew the need to have the contract was to retain Hall, not to pre-determine an amount of severance. They agreed not to use the word, or include the word severance, in the contract or the release. Catalyst had contracted with Hall not to resolve severance, but neither, I find, to keep him to facilitate the sale, of their millsite. Yet they told Quicksilver they had resolved the severance issue.

[42] Accepting John Rushford's affidavit on this point I conclude that Catalyst was not being truthful with Quicksilver, that is the only thing that can be concluded from the clear facts.

[43] As for Quicksilver, they failed to take the necessary steps to protect themselves by being direct about their intentions with Hall when they employed him.

The law clearly allows them to do so and if they had, Hall could have pursued his remedy for severance against Catalyst.

[44] Turning to the Boniferro affidavit. There is not much to it and certainly not much that contradicts the clear affidavit of Hall. It attaches a number of documents. But as for the assertions contained in the Boniferro affidavit I do not accept his evidence as truthful. I cannot accept his assertion in paragraph 16 where he says:

> Throughout my discussions with Mr. Hall in 2012 and 2013 I explained to Mr. Hall that the payment he was to receive from Catalyst under the termination agreement included any severance amount that he would be entitled to receive based on his length of service with Catalyst and that he would be required to sign a release.

[45] That language suggests that a required release would have to be signed which dealt with severance and yet the release that was negotiated does not contain the word "severance". That is an inconsistency which I find causes me to place very little weight on what Mr. Boniferro has to say.

[46] He misses in his affidavit any explanation for the negotiated-out language of severance. He fails in the affidavit to dispute directly Hall's assertion that in September and October he signed a contract with the release attached, which I find forms part of the then contract.

[47] He fails to explain why in May of 2013, when he knew Catalyst had a contract and a release form agreed to with Hall he apparently advised Quicksilver that Catalyst and Hall had agreed on severance when they had not, and he fails to justify and explain or show any consideration for the new release when the earlier release was agreed to.

[48] I find Mr. Boniferro to have been less than forthright in his dealings with Quicksilver, and less than forthright in his dealings with Mr. Hall in sending a release for his signature which was not consistent with the release the parties agreed to. Someone who is less than forthright, duplicitous, cannot be believed. I prefer and accept the evidence of Hall, and I do not accept the evidence of Boniferro.

[49] Not accepting Boniferro's evidence, and not accepting that there was any consideration for the new release, having no explanation for the need for a new release when one had already been agreed to, one can only speculate as to the motives in Boniferro in drafting the new release. Speculation, however, is not needed or required to determine the issues. I find the second release to be invalid as there was, I find, no severance aspect to the retention bonus negotiated by Catalyst and Hall. As there was no express discussion, between Quicksilver and Hall on the issue continued employment, never mind a release or a notice of a refusal to recognize seniority or service. I conclude that when Quicksilver employed Brian Hall they did so in law, recognizing his past service. As such when he was dismissed I find, without cause, he was a 24- to 25-year employee.

Damages

[50] On the point of damages I note that while employed by Quicksilver Mr. Hall's salary was $125,000 a year, that works out to $10,416.66 per month. During the approximate seven months that he was employed in 2013 he received a car allowance of $6,134.12. That works out to $876.30 a month. For the year 2013, as well, he received a bonus of $4,698.99 for a seven-month period, or a bonus of $671.28 a month. It is argued that other types of compensation should be added to his salary, specifically an equity bonus. There was no award for an equity bonus during his time that he was employed and I find that it would be inappropriate to guess or to impose upon Quicksilver an obligation to pay on an equity bonus or equity plan, which Hall never received and which appears to be completely discretionary.

[51] Based on those three types of sources of income, the monthly salary, the car allowance prorated monthly, and the bonus prorated monthly, I find Hall's monthly income to be $11,964.24 per month.

[52] Turning to the Bardal factors associated with Mr. Hall, I note that he is in a highly specialized job, he was sought out to be retained by Quicksilver. There were a unique set of job skills associated with doing this job, and it would have been hard

for Quicksilver to find anyone to do the job, if not impossible. For Hall, it would be hard to find a similar job.

[53] I note that working at this jobsite was the only job that he had really ever had, though the job that he filled changed considerably over time. Campbell River, I note, is an isolated location and there would be, as a result, less ability to find replacement work. I note positively for Quicksilver that Hall was 42 years of age at the time of his dismissal, relatively young. The service as noted was 24 to 25 years.

[54] I conclude as a result of considering those factors, as well as the case law provided by counsel for which I thank them, that 18 months is reasonable notice in light of the unique nature of the skills employed here, the inability to find replacement work or the lack of replacement work in the area, and yet noting, as I do, on the positive side his relative young age.

[55] I note in reviewing the cases provided and the law generally, in determining severance at 18 months, the perhaps unstated language in many cases of a two-year maximum payment for a wrongful dismissal.

[56] I also note, having concluded on the monies advanced by Catalyst was a retention bonus, payment for Mr. Hall agreeing to stay as long as he did so as to assist Catalyst in continuing to maintain its Elk Falls mill, maintain its regulatory requirements and sell its property, that I need not consider, because it was a retention bonus, a double recovery argument advanced by the defendant.

Mitigation

[57] Turning to the issue of mitigation and the arguments advanced. Clearly on the facts, after 6.2 months of being unemployed, Mr. Hall has gone a long way to mitigating his damages by accepting other employment. The question on mitigation is should he have taken an earlier offered, lower paying, job?

[58] I note generally that Mr. Hall made significant efforts, it appears, to find work. He was restricted, however. He had a wife who worked, who had her own career

and her own responsibilities in that career. She was a RCMP officer, and perhaps still is. He had two daughters and there were responsibilities associated with his children in light of his wife's occupation, as well as his own.

[59] The affidavit evidence before me confirms an almost nation-wide search Mr. Hall undertook to find employment, including contact with various recruiters. He was not failing, I find, to take his obligation to mitigate seriously. He was active in the pursuit of new employment.

[60] The question on mitigation really boils down to whether or not Mr. Hall should have taken the first job offered to him about six weeks after his employment with Quicksilver ended. The job he was offered was a job some distance away. He was offered a job at $87,000 per year, which is 69½ percent of his earlier pay. There was no bonus component and no car benefit component. When those components are added into the package, again considering his total compensation from Quicksilver, $11,694.24, as I have found, the new job was only 60 percent of his earlier compensation. That is substantially less compensation.

[61] Additionally, the job was a two-hour drive from his home. He approached the employer about possibly topping up, at least temporarily, his salary, in the form of a relocation allowance. He tried to make this new job work for him. The prospective employer refused. He was faced with a decision of taking a job that was 60 percent of his former compensation, a job which would have considerable personal disruption, considerable additional costs. I find his only reasonable way to do the job would be to have secured a second accommodation closer to work, and again he tried to make the job work by trying to get the prospective employer to sweeten the deal, so to speak. He clearly could not move immediately because of his wife's position and the need for her to transfer.

[62] I conclude it was reasonable for Mr. Hall on March 15, 2014, to keep looking. He has, I conclude, not failed to mitigate by taking that first offered job.

Calculation of damages

[63] In terms of damage, for 6.2 months, Hall had no income. 6.2 months at $11,964.24 per month is $74,178.29. For the balance of the notice period, 11.8 months, again the amount that he was earning at Quicksilver was $11,964.24. His new job pays him $9,585 per month. His monthly loss is therefore $2,379.24. For a 11.8-month period that is $28,075.03. His total damages, as such, are $102,253.32, less any funds that he has received from Quicksilver which I understand to be one-week's pay.

Alternative

[64] If I am wrong in regards to my conclusion that Quicksilver had an obligation to Hall, to recognize his past service, and in being wrong the obligation would only be for that of an employee of 8½ to 9 months, I would determine reasonable notice at 7 months. In this regard I am persuaded and influenced by the unique factual matrix of Mr. Hall's skill set, the clear need of Quicksilver to have him work for them, as it turns out temporarily, to rely on his knowledge of, and his abilities at, the Elk Falls mill site that they purchased. He was initially crucial to them for the purchase. Though the details of the regulatory requirements which Mr. Hall was responsible for are scant, the job description which is detailed, and the knowledge of government's concerns about environmental health hazards, about environmental clean-up, and about regulations related to toxic substances on industrial land, are all suggestive, frankly, that Quicksilver would likely not have been able to successfully complete and maintain its regulatory obligations it had assumed when it purchased the Elk Falls site absent Mr. Hall.

[65] Additionally, I note that Quicksilver pursued him, having identified him as critical. They provided him with a significant increase in salary to keep him.

[66] Noting as I do the decision of this court in *Ansari v. BC Hydro*, (1986), 2 B.C.L.R. (2d), and the principled approach to this type of short employment notice requirements in the decision of Madam Justice Watchuk of this court in *Ostrow v. Abicus Management*, 2014 BCSC 938, those two cases confirm the court's approach

that with managerial responsibility, there should be an approach taken which increases the notice requirement.

[67] I am convinced and persuaded that the court must further extend the notice requirement when, as here, the level of knowledge the employed person has, and their responsibility in their job, is critical for the employer's needs as I find to be the case here. Mr. Hall was recruited by Quicksilver as he was the only one who could do the job that Quicksilver needed done.

[68] As I said, if I am wrong in my determination as to Quicksilver's obligation to Mr. Hall as a 24- to 25-year employee, I would determine his reasonable notice at seven months. 6.2 of those months, as I have calculated earlier, results in damages of $74,178.29. The additional .8 of a month at $2,379.24 produces damages of $1,903.39. As such, if I am wrong, the total damages on the main issue argued, the length of service, and if the service was only 8½ to 9 months, then the damages would be $76,081.68 less any funds advanced by Quicksilver to date.

Costs

[69] Costs will be to Mr. Hall subject to any offers.

[SUBMISSIONS]

[70] THE COURT: I will give you ten days to sort it out yourselves, or else set the matter back in front of me. I am not in the habit of taking written submissions, you will have to appear in front of me.

[71] Certainly on that point, Mr. D'Andrea or Ms. Gill can appear in front of me by telephone.

"The Honourable Mr. Justice Groves"