IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20161130
Docket: S160132
Registry: Vancouver

Between:

Edward Prinsen

Plaintiff

And

SAP Canada Inc.

Defendant

Before: The Honourable Madam Justice Beames

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:	K. Ho B. Curtis
Counsel for the Defendant:	L. Novakowski M. Ronning
Place and Date of Hearing:	Vancouver, B.C. November 16, 2016
Place and Date of Judgment:	Vancouver, B.C. November 30, 2016

[1] **THE COURT:** On July 7, 2015, the plaintiff, Edward Prinsen, was given notice of the termination of his employment with the defendant, SAP Canada Inc. He now applies pursuant to Rule 9-7, the summary trial rule, for damages. Both parties were of the view that the summary trial procedure is appropriate for this case.

[2] By way of background, the plaintiff is 46 years old. He was 45 at the time he was given notice of the termination. He has an architecture degree, but for approximately 18 years, he has been working in the software industry, and specifically in the field of user experience.

[3] The defendant is a subsidiary of an international company, SAP SE, which is said to be a worldwide leader in the development of business software solutions.

[4] On August 29, 2005, the plaintiff commenced employment with a company that was purchased by the defendant in 2007. It is agreed that the date of August 29, 2005, is the effective date for the plaintiff's employment commencement with the defendant for the purpose of assessing his damages.

[5] I understand that the plaintiff was initially a designer. In 2009 he had the title of senior user interface design specialist. In 2010, he was promoted to the position of user interface design manager. Commencing in 2011, his title changed to user experience design manager. In both capacities he was responsible for managing a team of user experience designers. He continued to be a manager, with people directly reporting to him, until May 7, 2015. The number of people who reported to him between 2010 and 2015 varied from a low of 11 to a high of 18.

[6] In May 2015, unbeknownst to the plaintiff I gather, the defendant concluded that the plaintiff was not meeting expectations as a manager with 16 direct reports, as he then had, and the defendant assigned the plaintiff to a new role, that of user experience design expert. His seniority, career grade level and compensation remained unchanged, but he no longer had any employees reporting to him and he had no managerial duties. He says he continued to play a strategic role and to work

closely with the user experience team and the designers. The move was considered to be a lateral move by both parties.

[7] On July 7, 2015, the plaintiff was given notice of his termination. It is agreed that it was a termination without cause. The defendant said the plaintiff's new position was one of 35 positions eliminated by the defendant in July 2015. The plaintiff was provided with four weeks of working notice, and his last day of work was August 6, 2015. Upon termination, he was paid four weeks' salary plus his outstanding wages and vacation pay.

[8] The issues to be determined are:

1. The length of notice reasonable in the circumstances.

2. Which components of the plaintiff's compensation package are to be included in the damages awarded.

3. Whether the plaintiff has taken reasonable steps to mitigate his damages and, if not, what deduction or reduction should be made in the damages award.

[9] The plaintiff says reasonable notice would be 14 to 16 months, that all bonuses and other benefits he would have received had he worked through the notice period should be included in the determination of quantum and that he has taken reasonable steps to mitigate his damages.

[10] The defendant says that eight months is the length of notice the plaintiff was entitled to receive, that most of the amount the plaintiff claims over and above his base salary should not be included in the damage calculation, and that the plaintiff failed to mitigate such that the damages should be limited to a reduced notice period of seven months instead of eight months.

Length of Notice

[11] In order to determine what “reasonable notice” would have been in this case, it is necessary to consider the factors set out in *Ansari v. British Columbia Hydro and Power Authority*, 1986 CanLII 1023 (BCSC) at para. 41, 2 B.C.L.R. (2d) 33 at 43, aff'd [1986] B.C.J. No. 3006 (C.A.): the responsibility of the employment function, the employee's age, the length of service, and the availability of equivalent alternative employment.

[12] With respect to employment functions and the responsibilities the plaintiff had, it is clear that the plaintiff was a senior employee with the defendant. He had a T4-2 designation, which he says was a classification held by only 15 of SAP's over 80,000 employees worldwide. As a user experience design manager, his position between January 2011 and May 2015, the plaintiff's grade designation internally was T4PM, and he had between 11 and 18 people report to him directly, as I said earlier. When he was assigned to the role of user experience expert, his grade design was T4PF, a position and grade which the defendant treats as equal in terms of seniority and grade level to the manager position.

[13] Given the nature of the plaintiff's employment responsibility and function, I am not prepared to accept that the fact that he had no direct manager or supervisor functions for the last two months of his employment with the defendant should result in a shorter length of reasonable notice. As McEachern CJSC, as he then was, said in *Ansari*:

> [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.
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> [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. …

[14] As Mr. Justice MacKenzie noted in *Szczypiorkowski v. Coast Capital Savings Credit Union*, 2011 BCSC 1376 at para. 54, supervisory functions are not necessarily a major indicator of responsibility.

[15] I accept that the plaintiff's position with the defendant was one of significant responsibility.

[16] The plaintiff says that he is entitled to longer notice because he was 45 at the time of his dismissal, on the basis that his age presents an impediment to re-employment. He points to a 26-year-old case from the Supreme Court of Canada in which the court said, “it is generally known that persons over 45 have more difficulty finding work than others.”: *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229 at 299.

[17] It must be noted that that statement was prefaced by the words "barring specific skills"; that society as changed since 1990, including with regard to attitudes towards retirement; and that, in any event, the plaintiff was not over 45 at the time of dismissal. The plaintiff's age is clearly a factor but it, in my view, does not weigh heavily, if at all, in favour of longer notice.

[18] The parties are agreed that the plaintiff's length of service was just under or just shy of ten years.

[19] With respect to the availability of alternative employment, it is clear that there are other positions available in Vancouver and elsewhere for people with extensive backgrounds in user experience of the kind the plaintiff has. However, there is also evidence, including in the affidavits filed on behalf of the defendant, that there are fewer user design positions than, for example, software developer positions. Consequently, while the plaintiff certainly has specialized job skills, they are not so unique as to mean that there is no other suitable alternative employment available. I do not accept the fact that the plaintiff remains unemployed after approximately 16 months is conclusive evidence that there is no alternative employment available. However, that fact is a piece of evidence to be considered.

[20] Both the plaintiff and the defendant have provided numerous cases in support of their respective positions on length of notice and additional cases on other points which bear on the issue of length of notice. I will append a list of all of the cases provided to me in the event a transcript is ordered. Each case is, of course, distinguishable from the facts of this case. The cases the plaintiff relies on are older cases, having been decided between 1986 and 2005. The most recent decision specifically on the issue of length of notice provided by the plaintiff, which is a 2005 case, in fact related to a termination in 2001. That case, *Major v. Philips Electronics Ltd.*, 2004 BCSC 438, in which 12 months' notice was found to be reasonable after seven years' employment, involved very unique circumstances. As the trial judge said, quoted in paragraph 38 of the Court of Appeal decision (2005 BCCA 170) at para. 38:

> [38] …
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> > [46] I have taken into account that Mr. Major is 50, highly educated, and had significant managerial experience with Philips before taking the position at the Richmond Plant. He was in a senior management position over the seven years of his employment. His position at the Richmond Plant was very senior with considerable responsibility. He had every reason to believe when he accepted the Richmond position that it was a long term position in which his career would advance even further. He had to relocate to obtain the position, lost his "ex-pat" status, and was left in the position where he only had a work permit for that specific employment. In these circumstances an appropriate notice period is an additional twelve months at an income of $198,000 per annum. His earnings at Holley will be deducted.

[21] The defendant's noted cases are similarly older cases, and in some instances involve employees with far less specialized or responsible positions than that which the plaintiff occupied with the defendant.

[22] I have found most useful to my analysis the following cases:

- *Steinebach v. Clean Energy Compression Corp.*, 2015 BCSC 460, in which the plaintiff was a 49-year-old with 19 and a half years' work with the defendant, who finished in the position of VP of business development, had no supervisory role, worked primarily in sales but in a very specialized

industry, and who had acquired significant skill and knowledge in which 16 months of notice was found to be reasonable.

- *Schinnerl v. Kwantlen Polytechnic University*, 2016 BCSC 2026, in which the 48-year-old plaintiff had been employed for nine and a half years in the position of director of international programs and exchanges. It was found that the plaintiff's responsibility was at a high level, and ten months was considered to be reasonable notice.

- *Matusiak v. IBM Canada Ltd.*, 2012 BCSC 1784, in which the 60-year-old plaintiff had nine and a half years of employment with the defendant. There were 35 people at IBM with the same job. The plaintiff had no management experience, but did have sales and additional responsibility and 14 months was found to be appropriate in part based on the plaintiff's age of 60.

[23] Considering all of the factors in this case, I find that the plaintiff was entitled to 12 months' notice of his termination commencing July 7, 2015, when his working notice commenced.

[24] I turn now to the elements of compensation to be included in the assessment of damages. The parties, of course, agree that the plaintiff is entitled to his regular salary over the notice period, subject to deductions, and they agree that he should be paid the bonus that had accrued in 2015 until the plaintiff's last day worked, in the amount of $21,905.95. It is also agreed that the plaintiff is entitled to be reimbursed for life insurance premiums he paid to replace his employment life insurance in the amount of $53.33 per month commencing September 2, 2015, through the notice period.

[25] I will deal now with the benefits in issue.

Benefits

[26] The plaintiff claims that he is entitled to be paid a bonus for the duration of the length of the notice. It is his position that he was paid a bonus every year, which did

not vary greatly from year to year. The bonus was a significant and integral part of his compensation package. In the three years prior to his termination, it was between $29,017 and $32,696. The defendant says that the employment contract between the plaintiff and the defendant expressly provides that no bonus entitlement, after termination, is payable and that by agreeing to pay the plaintiff the *pro rata* bonus up to the last day worked, no further payment is owed.

[27] The evidence in this case, including in the defendant's own documents, make it clear that the bonus pay was, in fact, an integral part of the compensation package provided to the plaintiff. It was regularly provided, in relatively consistent amounts, and amounted to a significant percentage of the plaintiff's overall compensation. The bonus was represented to be part of the “total target cash” the plaintiff could expect to be paid on an annual basis (see Exhibit “K” to the affidavit of the plaintiff).

[28] Given that evidence, I am satisfied that unless the contractual terms clearly exclude the payment of a bonus after termination, a calculation of the plaintiff's damages must include an amount for bonus over the notice period: *Szczypiorkowski* at para. 76; *Paquette v. TeraGo Networks Inc.*, 2016 ONCA 618 at paras. 30, 35, 49.

[29] With regard to the defendant's argument concerning the terms of the contract, the company's bonus plan provided that the employees who left the defendant's employ involuntarily would be “treated according to their local policy on eligibility for bonus payments.” Ms. Narang, an HR business partner with the defendant, says “local policy is to prorate the bonus for the 0month worked”. No copy of such a policy in writing was produced, or at least I was unable to find any such document in the voluminous exhibits contained in the chambers record.

[30] I do not accept that there is anything in the defendant's evidence which would prove contractual terms that would “unambiguously alter or remove the [plaintiff's] common law right to damages, which would include compensation for the bonuses he would have received … during the period of reasonable notice”: *Lin v. Ontario Teachers' Pension Plan Board*, 2016 ONCA 619 at para. 89.

[31] Consequently, I find that the calculation of the plaintiff's damages must include bonus payable over the length of the notice period. Given the variability of the bonus, the bonus payable will be calculated using the average of the plaintiff's bonus over the three years preceding his termination.

[32] The next issue is the plaintiff's claim related to the defendant's stock option plan, currently called the Own SAP Plan, which replaced the previously existing Share Match Program and the Employee Participation Plan the defendant used to have. The plaintiff always participated in the defendant's share purchase incentive plans. The defendant says that the plaintiff received his restricted share units in 2015, under the Employee Participation Plan, and that the plan ended in 2015; and that he bought shares in 2015 under the Share Matching Plan, which plan also ended in 2015. Consequently, I find no entitlement to share option benefits through 2015. However, I do conclude that if the plaintiff had been employed by the defendant in 2016, up to the end of his reasonable notice period, he would have participated in the Own SAP Program and would have received the benefit of the defendant making a 40 percent matching contribution to his purchase of shares, plus 20 Euros per month. The amount of that benefit from June 1, 2016, to the end of the notice period, must be included in the damage calculation.

Calculation

[33] I turn now to the Lunch on Us Program. It was program which provided an allowance to employees to purchase lunch at certain restaurants within walking distance of the defendant's office. There is no evidence that the plaintiff continued to eat out or incur expenses for lunch that would otherwise have been covered by the defendant on a taxable benefit basis. Consequently, no allowance and no inclusion in the damages award for the Lunch on Us Program is proved.

[34] The plaintiff claims for dental expenses he has incurred since he lost the dental coverage provided by the defendant. He is entitled to be reimbursed for the one dental visit he had during the notice period, which according to the dental invoice was on February 9, 2016, to the extent that the dental policy would have

covered that cost. I am unable, on the information before me, to determine whether he would have been reimbursed for all three units of scaling or only two units of scaling and, as I will come to in my summary, I am going to leave final calculation of damages to counsel with an ability to intervene and resolve any issues that counsel are unable to resolve.

[35] Finally, the plaintiff claims for damages for the lost benefit of the defendant's annual contribution into the defendant's defined contribution pension plan. By the terms of the plan, the plaintiff could, and did at least in the last four years of his employment with the defendant, voluntarily contribute the sum of $2,500 to his own pension. The defendant paid a standard $2,500 into the defined pension plan as well, which was a contribution required by company policy, as I understand it, of 2.5 percent of base pay to a maximum of $2,500 and the defendant matched the plaintiff's voluntary contributions to a maximum of $2,000 per year. In total, the defendant paid $4,500 per year into the plaintiff's pension plan.

[36] The defendant takes the position that the plaintiff is only entitled to damages based on the defendant's automatic contribution of $2,500 per year and not with regard to the matching, to a maximum of $2,000 per year of the plaintiff's contribution, as he did not and indeed could not make any contributions after he was terminated.

[37] I disagree with that submission. I accept that if the plaintiff had been given reasonable notice and permitted to work out his reasonable notice, he would have continued to make voluntary contributions to the pension plan and would have had those contributions matched by the defendant to the maximum of $2,000. Consequently, the damage assessment must include the $4,500 per year contribution to the pension plan the defendant would otherwise have made for the plaintiff prorated as necessary.

[38] I turn now to mitigation.

Mitigation

[39] A plaintiff who has been wrongfully dismissed has an obligation to make reasonable efforts to mitigate his damages. The duty or obligation was described by the British Columbia Court of Appeal in *Forshaw v. Aluminex Extrusions Ltd.*, (1980), 39 B.C.L.R. (2d) 140, 1989 CanLII 234 (BCCA) at 6, as "a duty to take such steps as a reasonable person in the dismissed employee's position would take in his own interest - to maintain his income and his position in his industry, trade or profession."

[40] Where a defendant alleges the plaintiff has failed to mitigate, the onus is on the defendant to prove that failure, and the onus is "by no means a light one" (*Ostrow v. Abacus Management Corporation Mergers and Acquisitions*, 2014 BCSC 938 at para. 99, quoting *Michaels v. Red Deer College*, [1976] 2 S.C.R. 324 at 332). "The employer can meet the onus by providing evidence of the availability of actual alternative employment or evidence that, had the employee taken reasonable steps to mitigate, he would have been likely to obtain comparable alternative employment": *Ostrow* at para. 100, quoting *Nardulli v. C-W Agencies Inc.*, 2012 BCSC 1686 at para. 449).

[41] In this case, the defendant has provided evidence in the form, primarily, of a compilation of the number and type of companies that employ people in user design capacities, listing employees who left user design positions with the defendant between 2013 and 2016 and now claim, on their LinkedIn profiles, to be working elsewhere in user design, and an analysis of the user design market in Vancouver using data collected from LinkedIn.

[42] From that data, an employee of the defendant, in the position of America's sourcing manager for the defendant, based in Boston, has offered opinions, including about the availability of jobs in Vancouver, the high mobility of employees in the technology sector, and about the candidate pools for user design management positions.

[43] I have concluded that the evidence of the sourcing manager is of little assistance. It provides me with no evidence of specific jobs which were available to

the plaintiff during the notice period. Against that evidence, I have the plaintiff's evidence that he has made diligent efforts to find work. He worked with a re-employment counsellor for six months after his termination to update his resume and prepare for interviews. He has had contact with current and former employees of the defendant who he had worked with. He has reached out to industry contacts, joined an online recruiting site, maintained an active presence on LinkedIn, visited a job web site daily to search for positions, interviewed for a position with SAP in Germany, and applied to at least 12 different companies.

[44] I conclude that the plaintiff has made reasonable efforts to find alternative comparable employment and has met his obligation to mitigate. There will be no reduction in the notice period or in the damages for failure to mitigate.

[45] In summary, then, I find the following:

1. The reasonable notice period in this case is 12 months, from July 7, 2015.
2. The plaintiff is entitled to damages over that period comprised of the following:
    a) his basic salary;
    b) the accrued bonus to the last day worked in 2015 in the amount of $21,905.95;
    c) reimbursement of life insurance premiums paid by the plaintiff up to the end of the notice period;
    d) a bonus payment from the last day worked to the end of the notice period, calculated using the average of the plaintiff's last three years of bonuses paid;
    e) an amount equal to what the defendant's contributions would have been to the plaintiff’s Own SAP Plan, calculated using an assumed contribution by the plaintiff of 10 percent of his monthly base salary

plus the 20 Euro per month subsidy for the months of January to June 2016;

f) reimbursement of the plaintiff's dental expenses incurred during the notice period, to the extent they would have been covered by the dental plan the plaintiff had when he was employed by the defendant; and

g) an amount equal to the employer contribution of $4,500 per year, prorated as necessary, to the plaintiff's defined contribution pension plan.

[46] From the damages must be deducted the amounts already paid by the defendant to the plaintiff and, of course, statutory deductions.

[47] In the event counsel are unable to agree with regard to the calculation of the damages, they may reappear before me by telephone for the purpose of having the issue resolved. They make arrangements for doing so by filing a requisition to reappear or by telephoning the Supreme Court scheduler in either Vancouver or Kelowna.

[48] Are there any submissions to make with respect to costs?

[49] MS. HO: My Lady, I would ask that we have an opportunity to work costs between counsel before providing any submissions. We will still have to do some calculations based on the judgment that was just given.

[50] THE COURT: All right. I would have assumed that probably there would have been some offers and that you may need some time. I will leave the issue of costs to be resolved by counsel and, if necessary, the same instructions will apply in terms of contacting the scheduler in Vancouver or Kelowna or filing a requisition to reappear.

[51] I will tell counsel that I am relatively available up to the 16th of December and then not again until after the end of January, or perhaps it is the last week of January, but in any event I am away for a period of time. It is obviously my

preference that if you have to come back before me, you do it sooner rather than later, so I have some chance of remembering something about you and the case. Consequently, please do what you can to get back before me sometime before the end of the court's sitting schedule for the year, which is December 16th. If not, as soon as I am back in January.

[52] MS. HO: Yes, My Lady.

"A.J. Beames J."

Appendix

PLAINTIFF

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DEFENDANT

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TAB BOOKS AND CASES

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