IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Nowak v. Biocomposites Inc.,*
2018 BCSC 785

Date: 20180511
Docket: S177761
Registry: Vancouver

Between:

Mariusz (Mark) Nowak

Plaintiff

And

Biocomposites Inc.

Defendant

Before: The Honourable Mr. Justice Smith

Reasons for Judgment

Counsel for the Plaintiff:	B. Curtis A. Konikowski, Articled Student
Counsel for the Defendant:	A. Amos-Stewart
Place and Date of Hearing:	Vancouver, B.C. March 8 and 9, 2018
Place and Date of Judgment:	Vancouver, B.C. May 11, 2018

[1] The defendant, Biocomposites Inc., applies for a stay of proceedings in a wrongful dismissal action. It says its employment contract with the plaintiff, Marius (Mark) Nowak, was made subject to the laws of North Carolina, U.S.A., and to the exclusive jurisdiction of that state's courts. Mr. Nowak, says those provisions are unenforceable.

[2] Mr. Nowak was employed by Biocomposites as a salesperson, with the title of Regional Manager, responsible for Western Canada. His employment was terminated, purportedly for cause, after approximately 13 months.

[3] Biocomposites is the North American arm of a company based in the United Kingdom and has a North American office in Wilmington, North Carolina. Mr. Nowak was its only employee in British Columbia at the relevant time and one of only three in Canada. Biocomposites is not registered as a company in any Canadian jurisdiction.

[4] Mr. Nowak was verbally offered and accepted his position on April 28, 2016 in a telephone conversation with Vernon Watkins, Vice-President of Biocomposites. Mr. Watkins had interviewed Mr. Nowak in Vancouver two days earlier and says he told Mr. Nowak during that interview that he would be required to sign an employment contract if he was the successful candidate.

[5] On or about May 4, 2016, Mr. Nowak received a letter by email from Biocomposites' U.K. head office confirming the offer of employment. That letter said employment was to be effective from May, 16, 2016 and set out the basic terms of employment, including Mr. Nowak's annual salary, monthly car allowance, annual vacation entitlement, the fact the company would provide necessary equipment such as a laptop computer and cellular phone, and the fact that the job would involve "a significant travel schedule." It also said:

> The terms of your employment are detailed in your service agreement and job specification, copies of which will be sent to you by post to your home address…

[6] A further term of employment set out in the letter was that the employer would match employee contributions to a retirement account and pay health insurance costs. Those benefits were stated to become effective "within 12 weeks of your starting date and on completion of your service agreement."

[7] Although the offer letter said that Mr. Nowak would receive a further service agreement, it did not specify any further terms of employment that would be included in that document.

[8] Mr. Nowak started work on May 16, but did not receive the "service agreement" until June 8, 2016. He signed that agreement on or about June 10, 2016, and the chief executive officer of Biocomposites signed it the next day.

[9] The service agreement stated Mr. Nowak's employment was "at will." According to an affidavit from Norward P. Blanchard, a North Carolina lawyer, that phrase, under North Carolina law, refers to the ability of an employee to terminate an employee without cause and without notice or payment in lieu of notice. He says that all employment relationships in North Carolina are presumed to be at will and there is no equivalent to the common law right to reasonable notice that exists in Canadian law.

[10] Although the service agreement said Mr. Nowak's employment was "at will", it provided for two weeks' notice or a minimum of two weeks' pay in lieu of notice for termination without cause. No notice or pay in lieu of notice was required for a dismissal with cause.

[11] The service agreement contained a choice of law clause stating:

> This Agreement is governed by and shall be construed in accordance with the laws of North Carolina, USA

It also had a forum selection clause that read:

> The parties to this Agreement submit to the exclusive jurisdiction of the courts located in New Hanover County, North Carolina USA.

[12] Mr. Watkins states that “every person” who works for Biocomposites is “required” to sign a similar service agreement. He says the company wants to avoid litigation in multiple jurisdictions that it has no ties to, other than a salesperson assigned to that territory. Mr. Nowak did not raise any concerns about either the forum selection or choice of law clause, but the effect offrench Mr. Watkins’ evidence is that those terms were not negotiable.

[13] Mr. Nowak worked out of his home in Vancouver. Although the job included travel to Alberta, Saskatchewan, and Manitoba, he says he spent only 16 days outside British Columbia during the time he worked for Biocomposites. He says that he didn’t perform any employment duties in North Carolina, although he went there three times for staff meetings or workshops.

[14] Biocomposites says Mr. Nowak was in regular communication with the North Carolina office throughout his employment. Client contracts and invoices were administered from there and Mr. Nowak’s pay came from there.

[15] Biocomposites terminated Mr. Nowak’s employment on or about June 21, 2017. Although the termination was stated to be for cause, he was paid to the end of July 2017.

[16] Mr. Nowak filed a notice of civil claim on August 17, 2017. On October 13, 2017, Biocomposites filed a jurisdictional response pursuant to R. 21-8 of the *Supreme Court Civil Rules*. It has not filed a response to civil claim.

[17] Biocomposites agrees this Court has territorial competence over Mr. Nowak’s claim pursuant to the *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28 [*CJPTA*]. Section 3 of the *CJPTA* says that a British Columbia court has territorial competence if there is a real and substantial connection between British Columbia and the facts on which the proceeding is based. Section 10 sets out a number of circumstances in which a real and substantial connect is presumed, including where the case concerns contractual obligations that “to a substantial extent, were to be performed in British Columbia.” There is no dispute that a

substantial portion of Mr. Nowak's duties under the contract were performed in British Columbia.

[18] However, Biocomposites says the Court should decline to exercise that jurisdiction based on the existence of the choice of law and forum selection clauses.

[19] A party relying on a forum selection clause must first establish the clause is valid, clear, and enforceable, and that it applies to the cause of action before the Court. The Court, at that stage, applies the principles of contract law. If that test is satisfied, the party opposing the forum selection clause must show "strong cause" as to why it should not be enforced. The Court must consider all the circumstances, including the convenience of the parties, fairness between the parties and the interests of justice. Public policy may also be a relevant consideration: *Douez v. Facebook, Inc.*, 2017 SCC 33 at paras. 28-29.

[20] On the first branch of the test, the issue in this case is whether the forum selection and choice of law clauses form part of the contract between Mr. Nowak and Biocomposites.

[21] Employment was initially offered and accepted in the telephone conversation between Mr. Nowak and Mr. Watkins on April 28. That was followed by the letter of May 4, 2016, which said, "I am pleased, on behalf of the board of directors to confirm our offer to you of employment."

[22] As said above, the letter included the most significant terms of employment.

[23] Mr. Nowak responded with an email that asked no further questions about the terms of employment or what would be included in the service agreement. It simply thanked the sender and said "I look forward to meeting you and the rest of the team."

[24] If there is any doubt about whether Mr. Nowak was accepting the offer contained in the letter, it is resolved by the fact that he started work on May 16,

2016. There was, by that point, an offer and an acceptance and consideration. Mr. Nowak did not receive the service agreement until more than three weeks later.

[25] In *Holland v. Hostopia.com Inc.*, 2015 ONCA 762, the Ontario Court of Appeal referred to the vulnerable position of an employee who is asked to agree to additional terms after starting employment. Chief Justice Strathy set out the facts of that case in paras. 1 and 2:

> 1 The appellant accepted a written offer of employment, which contained a statement that he would be required to sign an employment agreement. He started work. Nine months later, he was presented with an employment agreement, which he signed. That agreement provided for termination by notice under the *Employment Standards Act, 2000*, S.O. 2000, c. 41 ("*ESA*").
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> 2 His employment was terminated without cause seven years later. The employer paid him an amount that was at least equal to his *ESA* entitlement. The trial judge dismissed his action for wrongful dismissal, holding that his damages were limited to the minimum amounts set out in the *ESA.*

[26] The Court held that the plaintiff was not limited to the statutory remedy and that he was entitled to common law reasonable notice or damages in lieu. The Court found that the initial offer letter constituted a complete contract of employment, with an implied term that the employee was entitled to reasonable notice of termination. The subsequent employment agreement was not consistent with that:

> 50 The Employment Agreement contained an inconsistent term. Instead of providing for reasonable notice, it limited the appellant's entitlement to notice of termination to the statutory minimum set out in the *ESA*. There was no evidence of any discussion of the subject prior to the appellant's acceptance of the Offer Letter, no evidence that he was told that the Employment Agreement would contain terms inconsistent with the Offer Letter and no evidence that he agreed to waive his right to reasonable notice of termination when he signed the Offer Letter. Accordingly, the Employment Agreement introduced a new, very material term, into the existing contract of employment -- a term to which the appellant had not previously consented and for which he received no consideration.

[27] Referring to the Court's earlier decision in *Hobbs v. TDI Canada Ltd.* (2004), 246 D.L.R. (4th) 43, Strathy C.J.O. said:

> 53 In my view, the law in this respect is a matter of simple fairness. It is also a matter of sound employment practice. As Juriansz J.A. noted in *Hobbs*, at para. 1:

> Accepting an offer of employment and committing the next stage of one's career to a new employer is an important life decision that most people make carefully. Instability in an individual's life, and in the workforce generally, is minimized when the decision is made on the basis of complete and accurate information about the new position.
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> 54 Juriansz J.A. noted the importance of fresh consideration where an employer seeks to amend the employment agreement. He stated, at para. 42:
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> > The requirement of consideration to support an amended agreement is especially important in the employment context where, generally, there is inequality in bargaining power between employees and employers. Some employees may enjoy a measure of bargaining power when negotiating the terms of prospective employment, but once they have been hired and are dependent on the remuneration of the new job, they become more vulnerable. The law recognizes this vulnerability, and the courts should be careful to apply *Maguire* [*v. Northland Drug. Co*, [1935] S.C.R. 412] and *Techniform Products* [v. *Wolder* (2001), 46 O.R. (3d) 1 (C.A.)] only when, on the facts of the case, the employee gains increased security of employment, or other consideration, for agreeing to the new terms of employment.
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> 55 Without fresh consideration, the Employment Agreement could not displace the implied term of reasonable notice contained in the Offer Letter. The result is that the appellant was entitled to reasonable notice of termination at common law. This impacts, potentially, his damages in lieu of notice and his entitlement to commissions that became payable after his termination.

[28] Although the time between Mr. Nowak starting work based on the initial offer and the presentation of the subsequent document was much shorter in this case than it was in *Holland*, I find the analysis applicable. The employment contract was complete on the basis of Mr. Nowak's acceptance of the offer letter and I do not agree with Biocomposites' submission that there was new consideration for the further terms in the service agreement.

[29] Biocomposites argues that Mr. Nowak received consideration in that he subsequently received pension and medical contributions, which the offer letter made clear that he would not receive until he signed the service agreement. However, his entitlement to those benefits were part of the terms of employment set out in the offer letter. As the Court said in *Holland* at para. 52, a promise to perform an existing contract is not consideration.

[30] Biocomposites further argues that there was new consideration in that the service agreement entitled Mr. Nowak to six paid "sick days" a year, which had not been referred to in the offer letter. I agree with Mr. Nowak's submission that a reasonable allowance for medical needs must be seen as an implied term of the employment contract. I also find that Mr. Nowak could reasonably assume he was allowed days off for medical reasons because, at some point before he started work, Mr. Watkins agreed that Mr. Nowak could take time off to attend a pre-existing medical appointment.

[31] I therefore find that the forum selection and choice of law clauses did not form part of the employment contract and are not enforceable.

[32] I also find the choice of law clause to be unenforceable because it is inconsistent with the *Employment Standards Act*, R.S.B.C. 1996, c. 113 [*ESA*]. Employees in British Columbia are entitled to the minimum notice of termination set out in s. 63(3)(a) of the *ESA*. Those minimum requirements are as follows:

> (i) one week's notice after 3 consecutive months of employment;
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> (ii) 2 weeks' notice after 12 consecutive months of employment;
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> (iii) 3 weeks' notice after 3 consecutive years of employment, plus one additional week for each additional year of employment, to a maximum of 8 weeks' notice;…

[33] The purposes of the *ESA*, set out in s. 2, include ensuring "...that employees in British Columbia receive at least basic standards of compensation and conditions of employment". Throughout his employment with Biocomposites, Mr. Nowak remained a resident of British Columbia and his unchallenged evidence is that he performed the vast majority of his employment duties within the province. In my view, he must be considered an employee in British Columbia for the purposes of the legislation. Section 4 states that an agreement to waive any of the *ESA* requirements is of no effect.

[34] In *Shore v. Ladner Downs* (1998), 52 B.C.L.R. (3d) 336 (C.A.), the Court of Appeal held that a termination provision is void if it would have become contrary to the statutory minimums at a future date even if it complied at the time of termination.

[35] In *Shore*, the employment contract provided for 30 days' notice of termination and the plaintiff was dismissed after approximately ten months. The Court said at para. 7:

> 7 It will be seen that the minimum period of notice under the statute would, at the date of termination in this case, have been only two weeks' notice, i.e. a shorter period than that called for by the contract of employment. The statutory minimum would not have exceeded the contractual period of 30 days until the period of employment was five years or more. That being so, the defendants contend that the contractual term was, at most, an agreement to waive the statutory requirement at a future time and that the agreement therefore would not become void until such time as the statutory requirement exceeded the contractual term. The plaintiff contends that the agreement for thirty days notice, applicable whenever the employer chose to terminate, constituted, in the words of the section, "an agreement to waive that requirement" and that it was therefore void from the beginning.

[36] The Court accepted the plaintiff's position. Referring to the Supreme Court of Canada decision in *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, the Court in *Shore* said at para. 16:

> 16. ...The policy considerations applied in Machtinger, supra, would not be served if the contract were to be interpreted in favour of the employer so as to leave the individual employee responsible for determining, at the point of termination, whether the statutory minimum had risen above the notice period stated in the contract. It is neither reasonable nor practical to leave the individual employee in the position of having to keep an eye on the relationship between the statutory minimum and the contractual term. In my view, the conclusion stated by Iacobucci J. at p.1005 applies equally to this case:
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> > I would conclude that both the plain meaning of ss. 3, 4 and 6 and a consideration of the objects of the Act lead to the same result: where an employment contract fails to comply with the minimum notice periods set out in the Act, the employee can only be dismissed without cause if he or she is given reasonable notice of termination.

[37] In this case, the service agreement is inconsistent in that it refers to a two week notice period while also stating that employment is at will, which implies no right to any notice. On the most favourable interpretation – that it required the employer to give two weeks' notice – it complied with the *ESA* at the time of Mr. Nowak's termination, but would have violated the minimum notice provisions following three years of consecutive employment. As in *Shore*, the notice provisions

in the service agreement would be void from the outset even if the service agreement formed part of the employment contract. It follows that a choice of law clause in favour of North Carolina, which would give effect to those provisions, must also be held unenforceable for failing to comply with the *ESA*.

[38] The effect of a provision in an employment contract that makes employment "at will" was referred to in *Houston v. Exigen (Canada) Inc.,* 2006 NBQB 29. There, an existing employee was required to sign a new agreement containing a clause making her employment "at will" and the contract subject to arbitration in California. The Court said at para. 12:

> 12 As I see it that paragraph 6 is so abusive of the rights of an employee in this jurisdiction that it taints the entire document, including the arbitration clause and the resulting reiteration of the arbitration clause subsequently in the employee handbook. In my view that paragraph 6 and paragraph 8 are void at law and unenforceable in this jurisdiction. ...

[39] Having found both the forum selection and choice of law clauses to be invalid and unenforceable, it is not necessary to make a final determination on the second branch of the *Douez* test. However, the plaintiff appears to have shown "strong cause" as to why the forum selection clause should not be enforced.

[40] In *Douez*, the Court was dealing with an online consumer contract that contained both a forum selection clause and a choice of law clause in favour of California. The reasons of Justices Karakatsanis, Wagner and Gascon drew a distinction between commercial cases and consumer contracts:

> 32 In *Pompey*, for example, our Court enforced a forum selection clause contained in a bill of lading concluded between two sophisticated shipping companies. The parties were of similar bargaining power and sophistication, since they were "corporations with significant experience in international maritime commerce ... [that] were aware of industry practices" (para. 29). The Court held that the "forum selection clause could very well have been negotiated" between the parties (*ibid.*). This context manifestly informed the Court's application of the strong cause test.
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> 33 But commercial and consumer relationships are very different. Irrespective of the formal validity of the contract, the consumer context may provide strong reasons not to enforce forum selection clauses. ...
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> ...

> 38. Therefore, we would modify the *Pompey* strong cause factors in the consumer context. When considering whether it is reasonable and just to enforce an otherwise binding forum selection clause in a consumer contract, courts should take account of all the circumstances of the particular case, including public policy considerations relating to the gross inequality of bargaining power between the parties and the nature of the rights at stake. ...

[41] Although *Douez* did not deal with an employment contract, I find that the circumstances of the employment contract in this case are much closer to those of a consumer contract than to a commercial case involving sophisticated parties of equal bargaining power.

[42] In that regard I agree with what was said in the recent Ontario case of *Cain v. Pfizer,* 2018 ONSC 297. There, the damages sought in a wrongful dismissal case included benefits owing under a Long Term Incentive Plan ("LTIP"). The plaintiff had begun participating in the LTIP long after commencing employment and, for that purpose, signed documents that contained a forum selection clause in favour of New York. The Court, at para. 83 found that the employer and employee were "in a relationship of unequal bargaining power that is inherent in to the employer-employee relationship" and said at paras. 84 and 85:

> 84 While the discussion of contracts of adhesion an inequality of bargaining power are discussed in *Facebook* in the context of consumers participating in social media, many of the court's comments are applicable here. As noted earlier, the weight to be given to forum selection clauses falls into a spectrum, keeping in mind the circumstances under which the contract was formed and the power of the parties. In commercial cases with sophisticated parties, forum selection clauses are afforded deference. In cases involving unequal bargains between consumers and multi-billion dollar corporations, forum selection clauses are given less weight.
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> 85 Employment cases fall closer to consumer cases than bill of lading cases. In the present case, Mr. Cain was not able to negotiate different terms for the LTIP. Rather, he was required to sign an Acknowledgement and Consent form which purported to agree to the complex matrix of terms and conditions applicable to the LTIP. This distinguishes Mr. Cain's case from *Pompey* and justifies the court's refusal to enforce the forum selection clause (if indeed there is one that is valid and enforceable).

[43] For reasons similar to those referred to in *Cain*, I would, if necessary, hold that the inequality of bargaining power at the time of the service agreement along

with the juridical disadvantage, expense and inconvenience imposed on Mr. Nowak justify a refusal of the Court to uphold the forum selection clause.

[44] I also note that role of public policy was discussed in *Douez* at para. 52:

> 52 There are generally strong public policy reasons to hold parties to their bargain and it is clear that forum selection clauses are not inherently contrary to public policy. But freedom of contract is not unfettered. A court has discretion under the strong cause test to deny the enforcement of a contract for reasons of public policy in appropriate circumstances. Generally, such limitations fall into two broad categories: those intended to protect a weaker party or those intended to protect "the social, economic, or political policies of the enacting state in [page780] the collective interest" (C. Walsh, "The Uses and Abuses of Party Autonomy in International Contracts" (2010), 60 U.N.B.L.J. 12, at p. 15). In this case, both of these categories are implicated. …

[45] The effect of the forum selection and choice of law clauses in this case is to deny a British Columbia resident who performed his duties in British Columbia the legal protection he is entitled to both under the common law and the specific legislation of this province. As such, I find that their enforcement on the facts of this case would be contrary to public policy.

[46] Biocomposites argues that even if the forum selection clause is not upheld, the Court should still find North Carolina to be the more appropriate forum under s. 11 of the *CJPTA*, which reads:

> **11** (1) After considering the interests of the parties to a proceeding and the ends of justice, a court may decline to exercise its territorial competence in the proceeding on the ground that a court of another state is a more appropriate forum in which to hear the proceeding.
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> (2) A court, in deciding the question of whether it or a court outside British Columbia is the more appropriate forum in which to hear a proceeding, must consider the circumstances relevant to the proceeding, including
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> (a) the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum,
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> (b) the law to be applied to issues in the proceeding,
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> (c) the desirability of avoiding multiplicity of legal proceedings,

> (d) the desirability of avoiding conflicting decisions in different courts,
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> (e) the enforcement of an eventual judgment, and
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> (f) the fair and efficient working of the Canadian legal system as a whole.

[47] I find that those factors, particularly the first one, clearly support British Columbia as the appropriate forum. Mr. Nowak resides in British Columbia, as do three witnesses he says he intends to call. I accept Mr. Nowak's evidence that the costs to him of litigating in North Carolina would be prohibitive. While Biocomposites may also be put to additional costs if it is required to defend that action in British Columbia, it is in a much better position to incur those additional expenses, some of which would be recoverable as costs if it successfully resists the claim.

[48] There is no risk of litigation of multiple proceedings or conflicting judgments because, based on the evidence of North Carolina law, there is no basis on which Mr. Nowak would be able to advance a viable claim in that jurisdiction and no evidence of any litigation contemplated by Biocomposites.

[49] In summary, Biocomposites' application for a stay of this proceeding is dismissed. Costs of this application will be in the cause.

"Smith J."