IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20120217
Docket: S115412
Registry: Vancouver

Between:

Dwayne Carson

Plaintiff

And:

Coastland Wood Industries Ltd.

Defendant

Before: The Honourable Mr. Justice Pearlman

Oral Reasons for Judgment

Counsel for the Plaintiff:	C. Forguson
Counsel for the Defendant:	J. Coutts
Date and Place of Hearing:	February 17, 2012 Vancouver, B.C.
Date and Place of Judgment:	February 17, 2012 Vancouver, B.C.

[1] **THE COURT:** Gentlemen, while I organize the materials, let me just say that because I am delivering these reasons more or less extemporaneously, in the event that a transcript is ordered, I do reserve the right to edit my reasons for style and grammar. However, neither the substance nor the result will change.

[2] On this summary trial application, the plaintiff, Dwayne Carson, claims damages for wrongful dismissal against his former employer, the defendant Coastland Wood Industries Ltd., pre-judgment interest and costs. The parties agree that this matter is suitable for disposition under Rule 9-7, and I find that I am able to find the facts necessary to dispose of this matter and that it is just to do so by way of summary trial.

[3] The defendant admits that Mr. Carson was dismissed without cause on July 18, 2011, from his position as equipment manager and that the plaintiff had 23 years of service with Coastland Wood Industries Ltd.

[4] It was an implied term of the plaintiff's contract of employment with the defendant that if Coastland terminated his employment without cause, it would provide him with reasonable notice of termination.

[5] The issues that arise on this application are first, what was the appropriate period of reasonable notice? Second, whether the notice period runs from July 18, 2011, or from April 11, 2011, when the defendant delivered a letter to the plaintiff concerning the termination of the equipment manager's position. And third, whether there should be any reduction of the notice period to allow for the contingency that the plaintiff may secure new employment before the notice period expires.

[6] Mr. Carson was 47 years old when his employment terminated. He had started with Coastland in December 1987 as a log loader operator. By 1993, he had worked himself up to what became the log yard manager position. The plaintiff has no post-secondary education. In fact, his education ended when he completed grade 9. He has no formal professional or trade qualifications.

[7] Coastland operates a veneer mill at Nanaimo, which produces engineered woods, as well as another mill at Annacis Island near New Westminster. From 1993 until July of 2009, the plaintiff served in a position which was initially designated log yard coordinator and subsequently became the position of log yard manager.

[8] As the log yard manager, Mr. Carson was responsible for the operations of Coastland's Nanaimo log yard. He supervised somewhere between 14 and 25 employees, and was responsible for mobile heavy equipment in the log yard, which at times involved him being called out at all hours of the day and night to ensure that the equipment did was it was intended to do.

[9] He also had responsibilities for the purchase of equipment, for corporate relations with First Nations, and for ensuring that certain permits from government required for the operation of the log yard were maintained in force.

[10] In 2007, Mr. Hans De Visser became involved with the senior management of the defendant and by 2008, he had assumed the position of President. In 2008, as a result of a downturn in the economy and in the forest industry, the defendant began to look for economies in its operations. Mr. De Visser was also concerned about the fact that the plaintiff's wife worked with him in the log yard and assisted him in managing the operations of the log yard. He was concerned about potential conflicts.

[11] As a result, Mr. De Visser appointed Mr. Carson to the position of equipment manager while the plaintiff's wife took over the management of the log yard itself. Mr. Carson continued to receive the same pay and benefits in the position of equipment manager as he had received as log yard manager. At the time of the termination of his employment, he received salary and benefits totalling $8,394 per month.

[12] In April of 2011, Mr. De Visser had a discussion with the plaintiff about reducing his salary by $5,000 on the basis that the position of equipment manager was really in the nature of a supervisory rather than managerial position and that

Mr. Carson's salary should be reduced by $5,000, while his wife's salary would be increased by the same amount. Mr. Carson strongly disagreed. He was not prepared to accept a reduction to a supervisor's or a foreman's grade of pay.

[13] During his conversation with Mr. De Visser on or about April 8, 2011, when he was told about the proposed reduction in his salary, Mr. Carson responded with words to the effect, "Give me a cheque and I am out of here," which I infer was an assertion that he would accept severance pay and relinquish his position.

[14] However at this stage, Mr. De Visser wanted to retain Mr. Carson within the corporate organization. There were in total five members of the Carson family employed by Coastland, and he was concerned not only with continuing to make use of Mr. Carson's skills, but also about the potential for disruption in the work force if Mr. Carson's employment was terminated.

[15] On April 11, 2011, Mr. De Visser provided a letter to Mr. Carson giving notice of termination of the equipment manager's position and stating that it was the defendant's intention to offer the plaintiff a supervisor's position. Mr. Carson says that at no time during his conversation with Mr. De Visser in April of 2011 was he told that his employment with Coastland was coming to an end. Rather, he says he was told that he would be offered a supervisory position following the elimination of the equipment manager's position in April 2012.

[16] After the delivery of the letter dated April 8, 2011, there were further discussions between the plaintiff and Mr. De Visser respecting the salary for an equipment supervisor's position. Mr. Carson says that during this conversation, Mr. De Visser said that it was not the defendant's intention to get rid of the plaintiff. That evidence is not contested by the defendant.

[17] In his examination for discovery, Mr. De Visser acknowledged that his discussions with Mr. Carson at or about the time he presented the April 8 letter were not about terminating Mr. Carson's employment with Coastland, but rather were about transitioning him to the new position.

[18] Following the delivery of the April 8, 2011 letter, Mr. Carson continued to perform the duties of equipment manager. However, matters changed in July of 2011. Mr. De Visser had received advice from his maintenance manager that he did not know what to do with the plaintiff. Mr. De Visser concluded that it no longer made sense to continue Mr. Carson in the equipment manager's position. As a result of the changes in the management structure initiated by Mr. De Visser and Coastland's continuing economic difficulties, the defendant also concluded that it would not be in a position to offer Mr. Carson a supervisor's position when his employment in the equipment manager position came to an end.

[19] There were further discussions between the defendant and Mr. Carson on July 14, 2011, at which time the defendant offered to pay the plaintiff for the nine months remaining in the 12-month period of notice referred to in his letter of April 11, 2011.

[20] The parties also discussed the feasibility of placing Mr. Carson in an equipment operator's position, but both concluded that this was likely to be disruptive of labour relations with members of the Employees Association, who would be resistant to a manager bumping into a line position.

[21] On or about July 20, 2011, Coastland presented Mr. Carson with a letter dated July 18, 2011, which terminated Mr. Carson's employment effective July 18.

[22] The defendant offered the plaintiff a lump-sum payment equivalent to 12 months wages and benefits, which he was not prepared to accept. He made a counter-proposal of 15 months, which was also rejected, and in the result, Mr. Carson's employment came to an end. He has received no payment in lieu of notice for the period subsequent to July 18, 2011.

[23] Since the termination of his employment, Mr. Carson has made inquiries about the availability of work in the Nanaimo area at other dry land sorts and with other enterprises that operate sufficient numbers of pieces of heavy equipment to

have positions for the management of the operations of such equipment. His inquiries and efforts to find alternate employment have so far been unsuccessful.

[24] I turn now to the first issue, which is the length of the notice period. In the leading case of *Ansari v. British Columbia Hydro and Power Authority*, Chief Justice McEachern stated that the most important factors for determining the period of reasonable notice are those set out in *Bardal v. Globe and Mail Ltd.* at page 145:

> 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.

[25] The plaintiff submits that his age, his 23 and a half years of service, his mid-level management position and the restricted opportunities for comparable employment given his grade 9 education and the limited numbers of prospective employers in the Nanaimo area support a notice period of 22 months. The defendant submits that the appropriate notice period is in the range of 15 months.

[26] Counsel for the plaintiff and the defendant have each referred me to authorities which they say support their proposed notice periods. I have had an opportunity to review the cases and will refer only to a select number of them in my oral reasons this afternoon.

[27] First of all, the plaintiff places some reliance on *Ansari v. British Columbia Hydro and Power Authority*. There, the court awarded a notice period of 21 months to a 54-year-old conservation engineer with just over 19 years of service. I note that the plaintiff in that case possessed specialized skills and that he was one of many members of BC Hydro's engineering department who were dismissed at the same time.

[28] The plaintiff also relies on *Brien v. Niagara Motors Limited*, a 2008 decision of the Ontario Supreme Court, where a 51-year-old office manager, whose position was characterized as being in low to middle management, with 23 years of service, received an award equivalent to 24 months' notice. There, the plaintiff was about

four years older than Mr. Carson, and had a similar length of service. Whereas in *Brien*, the position was characterized as being in low to middle management, for reasons I will develop in more detail shortly, Mr. Carson's position at the termination of his employment in my view would be fairly characterized as a lower level management position.

[29] In *Ellison v. Burnaby Hospital Society*, a 59-year-old director of nursing who occupied a middle management position and had 24 years and nine months of service received a notice of award equivalent to 22 months.

[30] The plaintiff has also referred the court to *MacLean v. Audiovox Corporation*. There, the plaintiff was substantially older at age 62, but had a significantly shorter period of service of only 15 years. He received notice equivalent to 20 months. Mr. MacLean was the Vice-President of the defendant's western office and had responsibilities for the supervision of between seven and 14 employees.

[31] In *Sylvester v. Her Majesty the Queen in Right of the Province of British Columbia*, again, a plaintiff somewhat older than Mr. Carson, a 55-year-old professional public service administrator with 19 years' service received notice of 20 months.

[32] Finally I note that in *Tucker v. Weyerhaeuser Company Limited*, 2008 BCSC 349, a supervisor in the forest industry, age 45, with only 15 years' service, received notice equivalent to 16 months.

[33] The defendant relies on various authorities, including *Sifton v. Wheaton Pontiac Buick GMC (Nanaimo) Ltd.*, 2010 BCSC 353, affirmed 2010 BCCA 541, where a 51-year-old plaintiff with 16 years' service, earning an annual salary of $78,000, who was a shop foreman and manager, received an award of 14 months.

[34] However, there was evidence in that case indicating that the plaintiff had reasonable prospects for alternate employment and was not as restricted both by his educational qualifications and the nature of his work experience as the plaintiff is in this case.

[35] In *Potter v. Halliburton Group Canada Inc.*, 2004 BCSC 1376, a 48-year-old senior supervisor with 17 years' service received an award of 12 months. However, the court noted that this individual was not a management level employee. The plaintiff in *Potter* had also achieved considerable success in mitigating his loss by the time of trial. On both of those grounds, *Potter* is distinguishable from the case at bar.

[36] In *Foster v. Kockums Cancar Division Hawker Siddeley Canada Inc.*, [1993] B.C.J. No. 1884, a decision of the Court of Appeal, a senior sales manager, 46 years old with 26 years of service received a severance award equivalent to 15 months' notice.

[37] None of these cases are, of course, on all fours with the case at bar. However, the notice cases cited by the plaintiff and particularly the cases of *Ansari*, *Ellison* and *Sylvester* suggest to me that given the plaintiff's 23 years of service and the fact that he occupied a management position at the time of the termination of his employment and through much of his career with the defendant, that the appropriate range for notice in this case is somewhere between 18 and 22 months.

[38] I must, of course, consider the *Bardal* factors as they apply to the particular circumstances of this case. I begin with the character of employment. At the time of his termination, Mr. Carson was employed as an equipment manager. While he was no longer responsible for the management of any employees or the log area itself, he did have significant responsibilities for the operation of specialized heavy equipment and for the purchase of that equipment.

[39] From 1993 until 2009, as the log area manager, he had been responsible for management of between 14 and 25 employees, the management of log deliveries, scaling of logs and the flow of logs to the mill. When he was appointed his position of equipment manager, his salary was maintained at the same level as his former position with the base salary of $90,105 per annum. I infer from the fact that his salary was continued at that level, that the employer continued to regard the position as one that involved significant and important responsibilities.

[40] Mr. Carson was not, at the time of his termination, as I understand the facts of this case, in a direct reporting relationship to senior management. The removal of any responsibility for the management of personnel leads me to conclude that his position, as I have already said, is properly characterized as a low level management position at the time of dismissal.

[41] His length of service of over 23 years militates in favour of a significant notice period. At the age of 47, Mr. Carson is a mature employee with the benefit of experience in his field, which is of course a somewhat narrow field. He is not so old that age is a major deterrent to him securing other employment. However, it is nonetheless a factor that I do take into account.

[42] I turn now to the availability of similar employment. With a grade 9 education and no formal professional or trade qualifications, Mr. Carson is unlikely to secure employment that pays as well as his former position unless he is able to find work that involves the management of a fleet of heavy equipment, or a managerial position at another log sorting operation.

[43] His wife and other members of his family are all employed in the Nanaimo area. There are a limited number of employers who could provide him with comparable employment in that area. As I have already noted, Mr. Carson has made efforts to seek out comparable employment, as yet without any success.

[44] Taking all of these factors into account, I find that the reasonable period of notice is 20 months.

[45] I must now consider whether that notice period should be reduced to take into account the three months' pay received by Mr. Carson between April 11 and July of 2011, and whether to allow for a contingency that Mr. Carson may find new employment before the expiry of the notice period.

[46] Dealing first with the question of whether Mr. Carson received notice of termination of employment on April 11, 2011, I must determine whether he was given clear and unequivocal notice of the termination of his employment at that time.

Counsel for the plaintiff has referred me to *Tucker v. Weyerhaeuser Company Limited*, 2008 BCSC 349, where the court at para. 41 cites from the test stated by the Court of Appeal in *Kalaman v. Singer Valve Co.* 1997 CanLII4035 (BCCA), (1997), 38 B.C.L.R. (3d) 331 (C.A.) at para. 38:

> Counsel agree that, to be valid and effective, a notice of termination must be clearly communicated to the employee. A notice must be specific and unequivocal such that a reasonable person will be led to the clear understanding that his or her employment is at an end as of some date certain in the future. Whether a purported notice is specific and unequivocal is a matter to be determined on an objective basis in all the circumstances of each case.

[47] The letter of April 8, 2011, delivered to Mr. Carson by the defendant, is captioned "Re Termination of Equipment Manager Position." In the first paragraph of the letter, Mr. De Visser discusses the change over the past several years in Mr. Carson's role at Coastland and then goes on in the second paragraph to state that:

> With the recent hiring of a maintenance manager for the mill, now is the time to realign your present duties with the overall structure of the company.

[48] In the course of that discussion, he says that:

> The present structure of having the equipment manager reporting to the log department makes no sense.

He then refers to the more logical scenario being for the mobile equipment function to report to the maintenance manager for the mill.

[49] In the penultimate paragraph of the letter, Mr. De Visser states:

> The position of equipment manager will be eliminated and replaced with an equipment supervisor's position at a supervisor's salary, more in line with the analyst positions within the mill.

[50] The letter concludes with this paragraph:

> This letter is written notice of termination of your employment in 12 months, April 15, 2012. However, the company will offer you a supervisor's position with new terms of employment commencing after

> the date of termination. The details of that offer will be made closer to the date of termination of employment.

[51] In considering all of the circumstances, it is important to bear in mind the discussion which had taken place between Mr. De Visser and Mr. Carson, in which Mr. Carson had expressed himself firmly that he was not prepared to accept a reduction in his salary.

[52] Mr. De Visser deposed, and I accept, that when he presented the letter of April 8, 2011, to Mr. Carson, he did not expect that Mr. Carson would accept the offer of the new position of equipment supervisor with a lower salary when that position was offered to Mr. Carson.

[53] The letter of April 8, 2011 does expressly state that it constitutes written notice of termination of Mr. Carson's employment in 12 months' time. The notice provided by the defendant to the plaintiff in this case is distinguishable from the situation in *Tucker v. Weyerhaeuser Company Limited*, where the employer there did not clearly communicate that the plaintiff's employment with Weyerhaeuser would end.

[54] In *Tucker*, the employer's letter referred to the plaintiff's role continuing with the company, although it indicated that the employment would not do so indefinitely. There was no communication that the employment relationship between Mr. Tucker and Weyerhaeuser would terminate. Accordingly, the court in *Tucker* found that a reasonable person reading the letter in that case would understand that it was about a particular work assignment, rather than a time-limited term of employment.

[55] Here, in my view, a reasonable person receiving the letter of April 8, 2011, would understand that the defendant was giving notice of termination of the plaintiff's employment in 12 months' time, that is effective April 15, 2012, and that while the defendant intended to offer the plaintiff a new position, whether the plaintiff's employment in that position came to pass would depend upon the parties reaching agreement upon new terms of employment.

[56] There was clear and unequivocal notice that the plaintiff's employment as equipment manager would end on April 15, 2012. Accordingly, it is appropriate to reduce the notice period from 20 months to 17 months to take into account the wages and benefits paid to the plaintiff between April and July of 2011.

[57] Finally, I turn to the question of whether there should be a further reduction for the contingency of the plaintiff finding new employment before the expiry of the notice period. In *Albach v. Vortek Industries Ltd.*, 2000 BCSC 1228 at para. 22, Mr. Justice Brooke emphasized that the court must take into account both positive and negative contingencies.

[58] Here, there is a possibility that the plaintiff might find new employment before the expiry of the notice period. The plaintiff has skills and experience, but only in a field where his opportunities are restricted. He has no formal qualifications. He is not in a position to relocate to seek alternate employment. The number of prospective employers in the Nanaimo area is limited, and so far, the plaintiff has had no success in securing alternate employment.

[59] In the particular circumstances of this case, I am not persuaded that there is a real and substantial possibility that the plaintiff will find alternate employment within the remaining 10 months of what I have determined to be the effective notice period, and, accordingly, I would make no further deduction for this contingency.

[60] In the result, I find that the plaintiff is entitled to an award of damages equivalent to 17 months' salary and benefits. That amount will be calculated on the basis of what I understand to be the agreed monthly figure of $8,394 gross.

[61] Now, I will hear from you briefly on costs.

MR. COUTTS: I think at this point there was an offer. I am not sure if it is -- I think we have to do a bit of calculation to figure out whether or not the offer has been exceeded. I think it has not been.

MR. FORGUSON: Might I --

MR. COUTTS: No, it is not, no.

MR. FORGUSON: You are confident in that. Okay. I think that is the case. So I think -- I am content with costs of Scale 3.

THE COURT: Scale B?

MR. FORGUSON: Is it B now?

THE COURT: It is B.

MR. FORGUSON: Yes. And I think there is a matter of pre-judgment interest, but again that would be a normal form of the order.

THE COURT: Yes.

MR. FORGUSON: And we can calculate what that is.

[62] THE COURT: Thank you very much.

Pearlman J.

PEARLMAN J.