

IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20110330
Docket: S093523
Registry: Vancouver

Between:

Patrick Devlin

Plaintiff

And

NEMI Northern Energy & Mining Inc.

Defendant

COPY

Before: The Honourable Mr. Justice Silverman

Oral Reasons for Judgment

Counsel for the Plaintiff

D. Gleadle

Counsel for the Defendant

R.W. Taylor

Place and Date of Hearing:

New Westminster, B.C.
March 30, 2011

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- [1] This matter is before me for a determination of costs after a trial in which I delivered judgment on December 17, 2010.
- [2] This is a wrongful dismissal case.
- [3] The plaintiff argues that he had substantial success in this case and therefore is entitled to his costs in the ordinary course and in accordance with the usual rules set out in R. 14-1(9), which states the basic principle that costs must be awarded to the successful party unless otherwise ordered.
- [4] The defendant argues that this is a case where I should order otherwise and should order an apportionment of costs in accordance with R. 14-1(15) which grants the court a discretion to award an apportionment in specific circumstances. There is no dispute about what the relevant law is. The defendant argues that each case turns on the facts and in this particular case there was divided success, the defendant having won particular issues, as well as a particular discrete issue which should give rise to the exercise of the discretion he seeks.
- [5] In this particular case, the plaintiff won several of the important issues, including the question of whether or not he was dismissed at all. I concluded that he was actually dismissed, or in the alternative, he was constructively dismissed.
- [6] The plaintiff also won the issue, which was hotly disputed, with respect to how much he was entitled to as a result of his wrongful dismissal. And while my order was that he would win an amount payable according to a formula that was in the evidence and required interpretation, I am told today that the amount of that award, with interest, is approximately \$415,000.
- [7] The defendant does not dispute any of what I have said to this point but notes that the plaintiff lost two significant issues: that of a bonus, which would have, if it had been successful, been approximately a \$200,000 award for the plaintiff; and the defendant also won the issue of punitive damages, all of which were argued and hotly contested.

[8] As I have indicated, there is no dispute with respect to what the relevant law is. That being the case, it is not necessary for me to go through the case law except to note that I have been provided with cases by both parties and will simply note that the parties are agreed that the important principles are set out in a number of significant cases in this province, including *The Queen v. Worthington*, 1988 CanLII 175, a B.C. Court of Appeal decision, and *Sutherland v. The Attorney General of Canada*, 2008 BCCA 27. There are a number of other cases, including a number of wrongful dismissal cases which the plaintiff has referred me to.

[9] The defence does not dispute all that, but notes as well the significant and often followed case of Mr. Justice Bouck in *Fotheringham v. Fotheringham*, [2001] B.C.J. No. 2083, where he sets out the well-known four-part test with respect to the question of what substantial success should mean. From that, the defendant argues that when that test is applied here, an apportionment should occur.

[10] The defence also points to a discrete issue on which time was spent in evidence and in argument, and in my judgment. That issue is the question of the conduct of the individual who replaced the plaintiff as the primary decision-maker and director of this public company, which the defendant was at the time. Much time was spent on what that person said and did to and about the plaintiff. The defendant points out that that was done because it was essential to the questions of the bonus, and, more particularly, of the punitive damages which the plaintiff was pursuing.

[11] The defendant again correctly points out that I decided that at a certain point in time, before a proxy vote that converted the person subsequently responsible for the defendant's actions into a position of power, his comments and so on could not be used to bind the company in any negative way. In other words, he was responsible for those pre-proxy vote comments; the company was not. It was to a large extent, on the basis of that finding, that the bonus issue and the punitive damages issues were dismissed.

[12] However, my view is that that is not as important a discrete issue as the defendant argues. There are several reasons for this. One is that the pleadings do

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not frame the claim for punitive damages as being at an earlier time, but rather frame them after the date when the actual transfer of power occurred, by which time the comments of the person to whom I refer did bind the company.

[13] Second, that evidence, while important to the issues which the defence won, were essential as well to the issue of whether or not Mr. Devlin was dismissed at all, and consequently I do not see that as a discrete issue which should result in an apportionment.


[14] In terms of the divided success that the defence argues about, there is no question that there is an approximately \$200,000 difference just on the basis of the bonus. However, in my view, the case law as it is developed in this province does not call for this to be a balancing of exclusively time spent or dollars won or lost on these kind of cases.

[15] While there is not a separate costs rule that relates to wrongful dismissal cases, there is a body of wrongful dismissal cases where this issue has arisen, and the kind of issues that here resulted in divided results have commonly not been the kinds of issue that have called for apportionment. In particular, I am referred to the case of *Lewis v. Lehigh*, 2009 BCCA 424; *Samuda v. Recipco*, 2009 BCCA 33; *Davidson v. Tahtsa*, 2010 BCCA 528; and *Whiting v. First Data*, 2011 BCCA 84.

[16] In my view, it is the facts of this case which are similar to the facts in those cases. This is not a particularly rare or unusual sort of situation where some issues relating to damages are won by a wrongfully dismissed employee and others are lost. Generally the Court of Appeal has indicated that those kinds of issues on a fact by fact case-by-case basis, in the absence of something unusual, do not result in an apportionment.

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[17] I see nothing in this case which would call for the exercise of the discretion which the defendant seeks. Consequently the usual rule will apply. The plaintiff has won \$415,000 in this lawsuit. He is entitled to his costs.



The Honourable Mr. Justice Silverman