IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Bates v. John Bishop Jewellers Limited,*** 2009 BCSC 158

Date: 20090212
Docket: S082271
Registry: Vancouver

Between:

Errol Bates

Plaintiff

And

John Bishop Jewellers Limited

Defendant

Before: The Honourable Madam Justice Gill

Reasons for Judgment

Counsel for the Plaintiff:	D.W. Lahay
Counsel for the Defendant:	D.J. Manson
Date and Place of Trial/Hearing:	November 21, 2008; January 16, 2009 Vancouver, B.C.

[1] The plaintiff seeks damages for wrongful dismissal. His full-time employment with the defendant as a bench jeweller / goldsmith, which began in September, 1970, terminated on March 29, 2008, when the business was sold. The matter comes before the Court pursuant to Rule 18A. No objection was taken to the appropriateness of proceeding in that manner.

[2] There are three issues: has the plaintiff failed to mitigate, what constitutes reasonable notice and whether punitive damages should be awarded. The plaintiff submits that the appropriate notice period is 24 months and that the employer has not proven a failure to mitigate. The defendant argues that the plaintiff should receive 12 months' salary, less six months for failure to mitigate. In respect of the third issue, counsel for the plaintiff describes this as a "borderline case", and only a modest award of $2,000 is sought. The defendant argues that neither the law nor the facts support this claim.

MITIGATION

[3] In ***Smith v. Aker Kvaerner Canada Inc. and Kvaerner Power Inc.***, 2005 BCSC 117, Burnyeat J. summarized the law at paras. 31 and 32:

> [31] In seeking and accepting alternative employment, the plaintiff has a duty to act reasonably and to take such steps as a reasonable person in the plaintiff's position would take in his own interest to maintain his income and his position in his industry, trade or profession. The duty involves a constant and assiduous application for alternative employment, an exploration of what is available through all means: *Forshaw v. Aluminex Extrusions Ltd.* (1989) 39 B.C.L.R. (2d) 140 (B.C.C.A.) and *Leawood v. Thunderbird Home Centres* (unreported) April 3, 1995 decision of Koenigsberg J. (Supreme Court of British Columbia action no. C941213 – Vancouver Registry).

> [32] The burden of proving that Mr. Smith has failed to mitigate his losses rests with the Defendants: *Red Deer College v. Michaels* (1975), 57 D.L.R. (3d) 386 (S.C.C.). There is a heavy onus to demonstrate a failure to mitigate. In this regard, Edwards J. in *Petersen v. Labatt Breweries of British Columbia* (1996) 25 C.C.E.L. (2d) 241 (B.C.S.C.) stated:
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> > The onus on a defendant alleging a plaintiff has failed to mitigate in an action of this kind is "by no means a light one". See: *Michaels v. Red Deer College* (1976), 57 D.L.R. (3d) 386. The defendant must show not only that the plaintiff failed to take steps to mitigate but also that had the plaintiff taken those steps he could likely have found equivalent employment. See: *Jorgenson v. Jack Cewe Ltd.*, (1978), 93 D.L.R. (3d) 464, [1979] 1 A.C.W.S. 138 and *Munana v. MacMillan Bloedel Ltd.*, [1977] 2 A.C.W.S. 364. (at para. 10)

[4] The defendant argues that the plaintiff has not taken such steps as a reasonable person in his position would take in his own interests. In the eight months after his employment terminated, he spoke to nine potential employers, none of whom were approached because they had a position available, and the steps taken by Mr. Bates did not even include reviewing employment ads in the newspaper or the internet or registering with a job search agency. Further, Mr. Bates failed to follow up on job opportunities. It is argued that the plaintiff's efforts may be equated to those of the plaintiff in ***Guerra v. Alexander Metal Products (1965) Ltd.***, [1997] O.J. No. 4532 (ON Ct. of Justice, Gen. Div.), and that as in ***Guerra***, the notice period should be reduced by six months. Reference was also made to ***Byers v. Prince George (City) (Downtown Parking Commission)*** (1998) 53 B.C.L.R. (3d) 345 and ***Carlysle-Smith v. Dennison Dodge Chrysler Ltd.***, [1997] B.C.J. No. 3075 (S.C.).

[5] It is argued on behalf of the plaintiff that the defendant has not met the onus of proof on this issue. Further, it is said that there is a "fundamental flaw" in the defendant's position in that there is no evidence that Mr. Bates could find employment at his former hourly rate of $26.50 and Mr. Bishop admitted at his examination for discovery that it is unlikely that Mr. Bates will find employment at that rate.

[6] I will deal first with the submission that the defendant cannot succeed on the issue of mitigation because of the lack of evidence that the plaintiff could obtain employment at his former hourly rate. The difficulty with the plaintiff's position is that based on the evidence of Mr. Bishouri and others, it appears that while employed by the defendant, Mr. Bates was earning more than the going rate. To accept the submission of the plaintiff in such circumstances would effectively negate any obligation to mitigate and I therefore do not accept that submission. In any event, Mr. Bates accepted part-time employment at a lesser rate.

[7] Turning to the evidence on the mitigation issue, it was not until March 15, 2008, that Mr. Bates was advised by Wayne Bishop, one of the owners of the defendant, that the business had been sold. On that day, Mr. Bishop also told Mr. Bates that the purchasers of the business, Mr. Kochkarian and his wife, Ms. Zakarain, would be willing to employ the plaintiff. Mr. Bishop has deposed that the new purchasers had not given any specific commitments regarding the employment of the plaintiff. He assumed that Mr. Bates would be required on a full-time basis and would be paid the same rate as before, being $26.50 per hour,

although he understood that the new purchasers would assess their needs after they took over.

[8] A letter to plaintiff's counsel dated April 8, 2008, from Mr. Kochkarian and Ms. Zakarain states that on the last day of his employment, Mr. Bates had been offered continued employment but showed no interest in their offer. The plaintiff does not recall this conversation but was admittedly very upset on that day. In any event, on April 10, a letter was sent to Mr. Bates offering him employment for three days per week at $20 per hour and soon after, Mr. Bates and Mr. Kochkarian met to discuss the terms of employment. When they met, Mr. Bates was told that only two days of work per week was available and it would be at a pay rate of $20 per hour. The plaintiff accepted the position as he needed the income. He has continued to work on a part-time basis generally doing the same type of work that he did when employed by the defendant. He has acknowledged that there would be no impediment to working part-time for another employer and accepts that he could have begun working for Mr. Kochkarian on April 1, but did not do so because he had reservations.

[9] The affidavits of the plaintiff refer to his attempts to obtain employment. He deposed that he sent his resume to a number of prospective employers, but had no response and that he had spoken with individuals at Courtney Gold regarding opportunities for jewellers. During argument, defence counsel referred to the plaintiff's evidence at his examination for discovery, which clarifies what was done. Mr. Bates testified that he provided his resume to eight possible employers who

were chosen because he had some familiarity with them and resumes were personally delivered to these businesses on either June 4 or 27, 2008.

[10] The plaintiff's second affidavit, which was sworn on November 19, 2008, is stated to be in response to allegations that he has failed to mitigate his losses. As it does not describe any further attempts to obtain employment or even to explore what opportunities were available, other than to speak to individuals at Courtney Gold, it can be concluded that the efforts of Mr. Bates to obtain employment have been limited to the above.

[11] Although counsel for the plaintiff objects to some of the affidavit evidence offered by the defence on the issue of mitigation, the following is, in my view, relevant and admissible.

[12] Mr. Bishouri, the owner of Gee 'N Gee Importers Ltd, has been involved in the jewellery business in Greater Vancouver for 32 years and has employed goldsmiths for 30 years. His affidavit was sworn on September 25, 2008, and was provided to the plaintiff's counsel by October 6. He deposed as follows:

> 3. My company, Gee 'N Gee Importers, employs 6 goldsmiths. We have recently had two jewellery positions available. The first position, which we filled last month, is for a setter (for diamonds and precious stones) with a minimum of seven years of experience in the jewellery and manufacturing industry. This is a permanent, full-time position (40 hours per week) which pays $25 per hour.
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> 4. The other position we have which is still available is for a goldsmith/wax carver with a minimum of five years of experience. This position pays $15 - $20 per hour, depending on the individual's experience, and is also a permanent, full-time position. We need someone to start as soon as possible.

> 5. My experience is that there is currently a strong demand for experienced goldsmiths with strong skill in the Vancouver area and I have been unable to fill the goldsmith position which we have.
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> 6. In general, a goldsmith's wages depend upon his skill and knowledge. I estimate that a goldsmith with twenty or more years of experience and good skills would earn $22 to $26 per hour working full-time or part-time in the Vancouver jewellery industry.

[13] The affidavit of Wayne Bishop sworn September 6, 2008, appends printouts from the Government of Canada's job bank website and another job search website, Job Shark. Although counsel for the plaintiff objects to the admissibility of these materials, in my view they are at least admissible to show that there were a number of positions open which would bear investigation: see ***MacLean v. Whistler and Blackcomb Mountain Resorts Ltd.***, 2004 BCSC 1814 at para. 25.

[14] From the above, it can be concluded that Mr. Bates has done relatively little to look for other employment and did not even follow up on a particular opportunity which he learned of through the defendant. In all of the circumstances, it is my view that the employer has proven a failure to mitigate and that there ought to be a deduction as submitted.

REASONABLE NOTICE

[15] In ***Saalfeld v. Absolute Software Corporation***, 2009 BCCA 18, the importance of determining a range of reasonableness from recent British Columbia precedents was reaffirmed. As was stated by Huddart J.A. at para. 14, looking to comparables and adjusting for differences permits a reasoned objective analysis.

The difficulty in the present case is in finding what may be described as comparables.

[16] Counsel for the plaintiff made reference to a number of authorities including ***Burry v. Unitel Communications Inc.*** (1996), 21 C.C.E.L. (2d) 36 (B.C.S.C.); ***Coutts v. British Columbia*** (2000), 4 C.C.E.L. (3d) 279 (B.C.C.A.); ***Ferguson v. Kodak Canada Inc.*** (1992), 93 C.L.L.C. ¶14,026, [1992] B.C.J. No. 2545, 1992 CanLII 622 (B.C.S.C.); ***Inskip v. Jacobson Ford Mercury Sales Ltd.*** (1999), 88 A.C.W.S. (3d) 805 (B.C.S.C.); ***MacLean v. Audiovox Corp.*** (1994), 8 C.C.E.L. (2d) 24 (B.C.C.A.); ***Petit v. Insurance Corp. of British Columbia*** (1995), 13 C.C.E.L. (2d) 62 (B.C.S.C.); and ***Taylor v. CBHN Information Systems Ltd.*** (1996), 25 C.C.E.L. (2d) 36 (B.C.S.C.).

[17] The defendant concedes that the plaintiff's age (63) and length of service (37 years) tend to increase the notice period but argues that there are two factors which should decrease the notice period, being the nature of the plaintiff's employment and the availability of similar employment. It is argued that the plaintiff was a skilled labourer with no supervisory or management duties, and similar employment is available.

[18] I agree with the defence submission. In my view, considering all of the relevant factors, 18 months would be a reasonable notice period. Having concluded that there has been a failure to mitigate, the 18 months will be reduced by six months.

[19] The plaintiff's annual salary was $58,396.08. It is agreed that there should be a deduction of $2,433.17 representing two weeks' working notice and that the plaintiff's earnings of $320 per week should also be deducted from this amount.

[20] Counsel agreed that any deduction for a failure to mitigate should be based on earnings of $20 per hour or, to say it another way, that the plaintiff could not mitigate a portion of his loss. I had understood that it was agreed that the amount to be deducted is $22,035.76 but if that is incorrect, further submissions may be made.

PUNITIVE DAMAGES

[21] Counsel for the plaintiff argues that the defendant's refusal to provide any severance to Mr. Bates and the filing of misleading hearsay evidence on this application demonstrates utter disregard for Mr. Bates.

[22] The evidence which is described as misleading hearsay relates to the availability of alternative employment, the position of the plaintiff being that certain of the evidence proffered by Mr. Bishop was misleading. Perhaps the evidence was potentially misleading, but in the end result, no one was misled.

[23] With respect to what is described as the defendant's refusal to make any payments to Mr. Bates in lieu of proper notice, Mr. Bishop deposed that on March 15, 2008, he advised Mr. Bates that they intended to pay him eight weeks' severance pay plus $30,000 when the sale of the business completed. By letter dated March 20, 2008, counsel for Mr. Bates advised Mr. Bishop that they were of the opinion that the proposal did not provide the plaintiff with sufficient compensation

for the termination of his employment. The letter stated that Mr. Bates would agree to accept 24 months' pay in lieu of notice and that the offer was open for acceptance until 4:00 p.m. on March 28. It was not suggested that there should be any deduction, notwithstanding Mr. Bishop's earlier advice that the new owners would be willing to employ the plaintiff. Mr. Bishop has deposed that he understood this letter to mean that the plaintiff had rejected the severance offer of eight weeks' pay plus $30,000 and that the issue of how much the plaintiff was entitled to would have to be settled through their respective lawyers. In my view, that was a reasonable assumption.

[24] The plaintiff deposed that on March 29, 2008, he received nothing from the defendant other than his regular pay and his holiday pay although the holiday pay was more than he expected. He received a cheque for four weeks, reflecting holiday pay for one year, when he would have been entitled to only one week of holiday pay for January to March, 2008. I would add that the plaintiff did not believe that any of his benefits continued, but the evidence is that his disability insurance coverage continues until March, 2009.

[25] In these circumstances, I have difficulty seeing any basis for an award of punitive damages. That claim is dismissed.

[26] The final matter is costs. If counsel are unable to agree, further submissions may be made.

"Gill J."