IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Bjerke v. Great Canadian Casinos Incorporated,* 2023 BCSC 1829

Date: 20231005
Docket: S172254
Registry: Vancouver

Between:

Kenneth Bjerke

Plaintiff

And

Great Canadian Casinos Incorporated

Defendant

Before: The Honourable Mr. Justice Coval

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:	J. Peterson
Counsel for the Defendant:	J. Harrigan
Place and Date of Hearing:	Vancouver, B.C. October 5, 2023
Place and Date of Judgment:	Vancouver, B.C. October 5, 2023

[1] **THE COURT:** The defendant applies to dismiss the plaintiff's claim for want of prosecution under Rule 22-7 of the *Supreme Court Civil Rules*.

[2] For the reasons that follow, in my view the circumstances fall close to the line justifying such a dismissal but not quite over the line. The defendant's application is dismissed.

Facts

[3] The plaintiff was an employee of the defendant, Great Canadian Casinos Incorporated, for over 25 years. As the defendant acknowledges, his employment was terminated on June 2015, without cause. At the time of his termination, he was employed as a security manager. He was paid eight weeks of severance, as required under the *Employment Standards Act*, R.S.B.C. 1996, c. 113.

[4] In August 2015, there was correspondence between counsel for the parties regarding the case.

[5] On August 1, 2016, the plaintiff, Mr. Bjerke, was unfortunately diagnosed with amyotrophic lateral sclerosis.

[6] On August 2017, his notice of civil claim was served, and the response was served in July 2018.

[7] Mr. Bjerke succumbed to his ALS on December 21, 2018. His sister, Ms. Butterfield, was appointed executor of his estate on August 20, 2019.

[8] There were no further steps taken in the litigation until August 4, 2023, when plaintiff's counsel filed a notice of intention to proceed.

The Parties' Position

[9] The defendant says there have been no steps taken for over six years since the notice of civil claim was filed and therefore the delay has been inordinate and inexcusable. It says there is a real risk of prejudice because documents and

witnesses' memories may be lost due to the passage of time, being more than eight years since the termination in question.

[10] The plaintiff relies on an affidavit from litigation counsel for Mr. Bjerke and now for his estate (different from counsel on this application). Counsel's evidence is that the delay was solely due to his own inattention, and that he filed the notice of intention to proceed upon realizing his failure to attend to the file. He says his instructions from Mr. Bjerke and from his sister, the executor, have always been to pursue the claim and the claim was included as an asset in the probating of Mr. Bjerke's will.

Legal Framework

[11] The parties agree on the well-known test for dismissal for want of prosecution. It was recently stated by the Court of Appeal in *Wiegert v. Rogers*, 2019 BCCA 334, paras. 31–33.

[12] Dismissal for want of prosecution is a draconian remedy, in the sense that the plaintiff loses his or her right to have the claim heard on its merits. Understandably, therefore, the cases often say that it is a remedy that is not to be lightly ordered; see, e.g., *0690860 Manitoba Ltd. v. Country West Construction Ltd.*, 2009 BCCA 535.

[13] Weighing on the other side is the objective of our *Rules* to secure the just, speedy and inexpensive determination of proceedings on their merits.

Analysis

[14] In my view, the delay has been inordinate in the sense that it has been excessive, no steps having been taken for far too long. I believe this is a case, whether delay is measured from the filing of the notice of civil claim, the serving of the response, or the grant of probate to Ms. Butterfield as executor.

[15] In my view, the delay is so excessive that it comes close to inexcusable. However, the circumstances that make it just barely excusable, in my view, are the combination of (1) Mr. Bjerke's death, and (2) plaintiff's counsel's evidence that the

plaintiff and his executor always indicated to him their intention to pursue the claim and that "any delay in prosecution of this action was entirely due to inattention on my part, not the executors".

[16] Counsel falling on their sword in this way will not always excuse delay (*Wiegert*, para. 33). But I think in this case, where the personal plaintiff died early in the proceedings, it does. It is more understandable that a non-professional executor, as we have here, would rely on counsel to carry the case and move it forward as required.

[17] I also do not find that the delay is likely to cause the defendant serious prejudice. Given that the termination happened more than eight years ago, there is, of course, always the potential risk that memories have faded and evidence may be lost, but there is no evidence from the defendant that this has actually occurred or of any actual risk, i.e., no evidence that they are lacking any relevant files, correspondence or other documentation, or any witnesses are unavailable due to the passage of time.

[18] I find it likely that there will be little or no actual prejudice given the straightforward nature of the claim, i.e., a claim for wrongful termination where the defendant admits the termination was not for cause. The key factors in the assessment of the plaintiff's claim will be his age, years of employment and positions held; see, e.g., *Okano v. Cathay Pacific Airways Limited*, 2022 BCSC 881. These are of course straightforward matters. It is not clear to me how the delay will prejudice the assessment of these issues. This certainly does not appear to be a credibility or reliability case in any way.

[19] One aspect of prejudice that does give me some pause is Mr. Harrigan's submission that the defendant cannot prove failure to reasonably mitigate without being able to obtain the plaintiff's own evidence about his efforts. The evidence is that he found a job some nine-and-a-half months after his termination in a similar position.

[20] I accept, however, Mr. Peterson's submission in response that such prejudice, if it exists, does not arise from the plaintiff's delay. That evidence was lost when Mr. Bjerke died in 2018, one-and-a-half years after the notice of civil claim was filed. There may also be evidence available on this issue from Ms. Butterfield and records of job postings available at the time for security managers or similar positions. So the likelihood of serious prejudice on this issue, in my view, has not been established.

[21] One additional consideration in terms of the interests of justice is that, at least on the surface, there is strength to the plaintiff's claim. Eight weeks of severance for 25 years of employment as a security manager, or at least in part as a security manager, does appear, at least on the surface, as insufficient. See *Okano* where the plaintiff received 24 months severance for 35 years of employment.

[22] For these reasons, the defendant's application is dismissed.

[23] It seems to me there should be costs to the plaintiff in the cause, but if there are submissions on that I will of course hear from counsel.

[24] So let me ask, anything arising, any questions, any concerns?

[25] CNSL J. HARRIGAN: No, Justice.

[26] THE COURT: All right.

[27] CNSL J. PETERSON: No. Thank you, Justice.

[28] THE COURT: All right. The defendant's application is dismissed with costs to the plaintiff in the cause.

"Coval J."