IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Scott v. Fresh Tracks (Canada) Inc.,*
2023 BCSC 1724

Date: 20231004
Docket: S222388
Registry: Vancouver

Between:

Michael Scott

Plaintiff

And

Fresh Tracks (Canada) Inc.

Defendant

Corrected Judgment: The text of the judgment was corrected at paragraph 44 on October 11, 2023.

Before: Master Bilawich

Reasons for Judgment

Counsel for the Plaintiff:	J. Pak
Counsel for the Defendant:	C. R. Wardell
Place and Date of Hearing:	Vancouver, B.C. August 16, 2023
Place and Date of Judgment:	Vancouver, B.C. October 4, 2023

Introduction

[1] This is a wrongful dismissal action. The claimant alleges he was fired or constructively dismissed from his employment. The defendant denies the plaintiff was dismissed and says he ended his own employment. It also claims there is after-acquired cause to terminate him.

[2] Before me are cross-applications.

[3] The defendant seeks orders arising from the plaintiff's failure to attend at an examination for discovery it scheduled on February 28, 2023. It asks that he be ordered to attend for an in person for discovery on a date to be scheduled and costs thrown away of the missed discovery. It also seeks an order that the plaintiff produce various classes of documents.

[4] The plaintiff applies for a direction that the defendant's examination of him for discovery be conducted virtually (by Zoom) rather than in person. The plaintiff resides in North Vancouver, BC and is able to attend in person, but plaintiff's counsel is located in Toronto, ON. Virtual discovery is sought in an effort to avoid having counsel incur travel and accommodation costs.

Background

[5] The defendant is a BC company that provides marketing and travel agency services.

[6] The plaintiff began working for the defendant on October 1, 2020. He was originally hired as "Director, Marketing". On January 1, 2021, he was promoted to "Vice President, Marketing".

[7] On September 25, 2021, the plaintiff's spouse gave birth to their second child. He took a month of vacation to help with childcare. He alleges that when he returned to work, the defendant's CEO, Mr. Parker, commented negatively.

[8] The plaintiff alleges he subsequently requested additional vacation time but his request was rejected. He then informed the Human Resources department that he intended to take parental leave starting in January 2022. He says shortly thereafter, he received a negative performance review. His formal parental leave began on December 31, 2021.

[9] On December 31, 2021, plaintiff's counsel wrote to the defendant, taking the position that his employment had been terminated or he had been constructively dismissed. The defendant responded, advising the plaintiff's employment had not been terminated and he was expected to return to work when his parental leave ended in July 2022.

[10] On March 14, 2022, the plaintiff filed a notice of civil claim. Relief sought includes damages for wrongful or constructive dismissal, or alternatively contractual severance, special damages, bad faith, aggravated and/or punitive damages, interest and costs.

[11] On April 12, 2022, the defendant filed a response to civil claim. It denies it terminated the plaintiff's employment and says he did so himself. Alternatively, if he was dismissed, he failed to take reasonable steps to mitigate his alleged damages by pursuing other employment or income. It claims the right to set off any income the plaintiff earned during the notice period.

[12] On October 11, 2022, the plaintiff issued his list of documents. The defendant says his document production gave rise to significant revelations.

[13] On October 25, 2022, the defendant filed an amended response to civil claim adding an allegation that the plaintiff misconducted himself to an extend which constitutes after-acquired cause for dismissal. The misconduct includes:

a) Collecting, retaining and using the defendant's confidential records for his own purposes;

b) Surreptitiously making recordings of meetings the plaintiff had with Mr. Parker and a new incoming CEO; and

c) Pursuing other employment or business opportunities while he was employed with the defendant, including with Explore Edmonton Corporation ("EEC") and Fable Home Goods ("FHG"), among other entities.

[14] On this last point, the plaintiff's employment contract with the defendant includes a provision that the plaintiff would not engage in any other employment, business or occupation, except with the defendant's express permission.

[15] On November 8, 2022, the plaintiff filed a reply denying any misconduct on his part and denying there was after-acquired cause to terminate his employment.

Mode of Attendance at Examination for Discovery

Background

[16] The plaintiff resides in North Vancouver. Plaintiff's counsel is located in Toronto, ON.

[17] The parties were able to agree that the plaintiff's examination for discovery of Mr. Parker as representative of the defendant would be conducted virtually (by Zoom) on February 27, 2023.

[18] Starting on November 29, 2022, an associate working with plaintiff's counsel proposed to make the plaintiff available for a virtual examination (also by Zoom). Defendant's counsel rejected virtual examination of the plaintiff, insisting it wanted and was entitled to in person examination.

[19] There was considerable correspondence back and forth, with both sides repeating their respective positions. Plaintiff's counsel insisted that virtual examinations had become commonplace during the pandemic and that in person examination would unnecessarily increase the plaintiff's expenses. Defendant's counsel insisting that examinations are presumptively in person and there is nothing in the rules about virtual examinations. He suggested that plaintiff's counsel could

attend the examination however she wished or arrange a local agent, but the plaintiff had to attend in person.

[20] On December 28, 2022, defendant's counsel served an appointment to examine the plaintiff in person at the office of Charest Reporting in Vancouver on February 28, 2023. He included conduct money calculated based on the plaintiff's home address.

[21] In January 2023, plaintiff's counsel suggested they would produce the plaintiff in person if the defendant agreed to pay plaintiff counsel's travel and accommodation expenses to come to Vancouver. Failing agreement, he would only attend via videoconference. Defendant's counsel advised his client would not pay travel costs and warned he would seek remedies if the plaintiff failed to appear. Plaintiff's counsel again confirmed he would not appear in person.

[22] On February 9, 2023, defendant's counsel sent an email repeating and expanding on his position. It included the following:

> Turning to Mr. Scott: as his documents show, Mr. Scott has in the past utilized electronic means in a manner that is deceitful. We note that he has surreptitiously recorded virtual meetings in the past (using his phone to ensure no one was aware) and that he spent a great deal of time secretly collecting documents and recordings from his employer in late 2021.
>
> Further, the assessment of witness credibility is a cornerstone of our judicial system. Our system relies on being face to face with a witness to assess credibility. The exceptional circumstances caused by COVID-19 that required us to temporarily move away from that are no longer present (touch wood).
>
> Finally, I have attended virtual examinations and conducted in-person ones. It is my strong view that in-person examinations are preferable for many reasons, including the foregoing. I can assure you that our request has nothing to do with your fees (aside from that there is no way we will or should agree to pay for them) but everything to do with what is proper and preferable in the circumstances.

[23] On February 27, 2023, plaintiff's counsel examined Mr. Parker for discovery via Zoom.

[24] On February 28, 2023, the plaintiff failed to appear at the defendant's scheduled examination of him. The court reporter issued a certificate of non-attendance.

Position of the Parties

[25] The defendant argues that COVID-19 related public health concerns have receded and the court has now returned to pre-pandemic modes in proceedings. In the context of this application, in person examination is once again the default mode of examination contemplated under Rule 7-2(11). Examination for discovery is a critical part of the litigation process. It is important that the plaintiff be required to look his examiner in the eye and answer questions in a "morally persuasive environment". In person examination will allow counsel to better assess the plaintiff's credibility. Finally, it says there are indicators that the plaintiff has the potential to abuse the virtual hearing process, including the fact that he made surreptitious recordings of meetings and his "staggered and reluctant disclosure" of documents.

[26] The plaintiff argues he has offered to make himself available for examination via Zoom. Requiring his counsel of choice to travel from Toronto to Vancouver for an in person examination would require him to incur unnecessary travel and accommodation expenses. Rule 7-2(11) should be read in conjunction with Rule 1-3, which provides that the object of the rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits and in a proportional manner. Virtual examination is a cost-effective and efficient way to conduct his examination in a fair and balanced manner. There is no compelling reason to insist on in person examination and the defendant would not be prejudiced by a virtual process.

Applicable Law

[27] Rule 7-2(11) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 sets out the place for an examination for discovery:

Place

> (11) Unless the court otherwise orders or the parties to the examination for discovery otherwise agree, an examination for discovery must take place at a location within 30 kilometres of the registry that is nearest to the place where the person to be examined resides.

[28] This has been interpreted as meaning that parties are to be examined in BC, but where it is just and convenient, an exception can be made for persons who reside outside of the province. See *Lo v. Lo,* [1991] B.C.J. No. 3005 (S.C.); *Le Soleil Hotel & Suites Ltd. v. Le Soleil Management Inc. et al.*, 2007 BCSC 2049 and *Huang v. Silvercorp Metals Inc.*, 2016 BCSC 778 [*Huang*] at paras. 12-13. At para. 15 of *Huang*, Justice Warren concluded that the court has wide discretion to modify the location of an examination based on what is just and convenient to both parties.

[29] In *Baldface Mountain Lodge Limited Partnership v. Swan Engineering*, 2013 BCSC 2198 at para. 15, Master Bouck indicated her understanding that the purpose of Rule 7-2(11) was to convenience the party who was being examined, not any of the counsel involved in the proceeding. She was addressing competing proposals for the location and timing of in person discoveries.

[30] With the arrival of the COVID-19 pandemic, the court and legal profession adopted virtual hearings for examinations, court hearings and trials. Justice Baker addressed virtual examinations in particular in *Hudema v. Moore*, 2020 BCSC 1502 [*Hudema*] at para. 23:

> **23** Counsel for the respondent advised me that he has consulted with the reporting agencies and they have protocols in place to conduct discoveries remotely during the pandemic. While in ordinary times it is unusual for parties to conduct discoveries over video technology such as Skype or Zoom, these are not ordinary times. During the pandemic, witnesses' evidence is often called in trials using these technologies, mediations are routinely now being conducted using remote technology, and discoveries are being conducted routinely using video technology. Given the pandemic, I would easily grant an order that the parties may attend discoveries using remote technologies. The judicial system must adapt and ensure that the participants are safe during these times as they continue to advance their litigation.

[31] A key authority that Justice Baker referred to and adopted reasoning from was *Arconti v. Smith*, 2020 ONSC 2782 [*Arconti*]. The passages reproduced in her

reasons emphasize the importance of the court and legal profession adopting videoconferencing technologies. See paras. 19-20, 33 and 43-44:

> [19] In my view, the simplest answer to this issue is, "It's 2020". We no longer record evidence using quill and ink. In fact, we apparently do not even teach children to use cursive writing in all schools anymore. We now have the technological ability to communicate remotely effectively. Using it is more efficient and far less costly than personal attendance. We should not be going back.
>
> [20] That is not to say that there are not legitimate issues that deserve consideration. Technology is a tool, not an answer. In this case, the parties cannot attend in the same location due to health concerns and governmental orders. So, the question is whether the tool of videoconference ought to be required to keep this matter moving or if the mini-trial ought to be delayed further due to the plaintiffs' desire to conduct an examination for discovery in person.
>
> …
>
> [33] In my view, in 2020, use of readily available technology is part of the basic skillset required of civil litigators and courts. This is not new and, unlike the pandemic, did not arise on the sudden. However, the need for the court to operate during the pandemic has brought to the fore the availability of alternative processes and the imperative of technological competency. Efforts can and should be made to help people who remain uncomfortable to obtain any necessary training and education. Parties and counsel may require some delay to let one or both sides prepare to deal with unfamiliar surroundings. …
>
> …
>
> [43] …. In my view, much of the hesitancy and concern that led to the conclusions that the process is "unsatisfactory" or raises "due process concerns" stems from our own unfamiliarity with the technology. As noted above, it is just a tool. It does not produce perfection. But neither is its use as horrible as it is uncomfortable.
>
> [44] In my view, the plaintiffs' concerns with the prospect of conducting an examination remotely do not outweigh the desirability of proceeding with this matter and do not justify further delay. These actions have been outstanding for several years. The defendants are entitled to have their motion heard just as the plaintiffs are entitled to seek compensation. The plaintiffs' concerns, in the main, are soluble either by creative alternatives or by increased familiarity with the technology. I do not accept that anything will be lost that is not more than offset by the proportionality of proceeding efficiently and affordably.

[32] In *Bockhold v. Richardson GMP Ltd.*, 2021 BCSC 2581 [*Bockhold*], Master Elwood, as he then was, considered a plaintiff's request that his examination for discovery be conducted by video. His counsel was located in Toronto and indicated that he preferred not to travel unnecessarily. At paras. 46-52:

46 The reason why Mr. Bockhold would prefer to attend his discovery by video is that his legal counsel lives and works in Toronto and, understandably at this time, would prefer not to travel unnecessarily.

47 CIBC agrees that Mr. Bockhold's legal counsel may participate by video, but requires that Mr. Bockhold attend in person in the same room as CIBC's examining counsel. CIBC argues that it is more convenient to have the witness in the same room and more efficient for matters such as handling documents.

48 I respectfully adopt the following statement by Justice Baker in *Hudema v. Moore*, 2020 BCSC 1502, at para. 23:

> … [*reproduced earlier*] …

49 It can be intimidating, even for a person of Mr. Bockhold's education and experience, to be cross-examined at an examination for discovery. Although the witness cannot discuss his or her evidence while under cross-examination, there is a benefit from having counsel physically present who can explain the process and discuss other matters and put the witness at ease. When counsel cannot be physically present, and the witness is physically alone in the examination room with examining counsel, the appropriate supportive presence of counsel is lost.

50 This is not to say there is any risk that CIBC's counsel would do anything inappropriate. Quite the opposite; I am positive that CIBC's counsel would be completely professional. However, I am not persuaded that the inconvenience of conducting an examination for discovery remotely - which, by necessity, has become a new skill for all counsel - outweighs Mr. Bockhold's desire not to undergo the discovery in a room alone with counsel representing his former employer.

51 Nor do I think that allowing Mr. Bockhold to bring an agent or local counsel to the examination for discovery is an appropriate solution. Mr. Bockhold's counsel of choice works in a small law firm in Toronto. His local agent was retained for filings only. If Mr. Bockhold retained local counsel to accompany him to the examination for discovery, it would increase his legal expenses, in my view unnecessarily.

52 Accordingly, I will make a direction that Mr. Bockhold may attend his examination for discovery by CIBC remotely.

[33] Rule 1-3 is as follows:

> Object
>
> (1) The object of these Supreme Court Civil Rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits.
>
> Proportionality
>
> (2) Securing the just, speedy and inexpensive determination of a proceeding on its merits includes, so far as is practicable, conducting the proceeding in ways that are proportionate to
>
> (a) the amount involved in the proceeding,

(b) the importance of the issues in dispute, and

(c) the complexity of the proceeding

Analysis

[34] At issue is whether the court should exercise its discretion to direct a virtual examination for discovery of the plaintiff so he can avoid travel expenses associated with having his Toronto counsel travel to Vancouver.

[35] Rule 7-2(11) contemplates that unless the court orders otherwise or the parties agree otherwise, is that the examination must take place at a location within 30 kilometres of the registry that is nearest to the place where the person to be examined resides. In this case, Vancouver registry is nearest to the plaintiff's residence.

[36] I have discretion to modify the location of the examination based on what is just and convenient to both parties: *Huang* at para. 15. In my view, that discretion includes being able to order there be a virtual examination, if I am satisfied it would be just and convenient to do so. The plaintiff bears to onus of establishing that a virtual examination is warranted.

[37] An issue I have with the plaintiff's materials is his failure to tender evidence quantifying anticipated travel and accommodation costs and costs of retaining a local agent. It is difficult to balance potential prejudice without actual costs in evidence. As a general proposition, I do accept that there would be a significant expense involved for a return flight between Toronto and Vancouver and hotel accommodation in Vancouver or for retaining a lawyer as local agent.

[38] During submissions, defendant's counsel argued the pandemic has receded and it is now appropriate to return to pre-pandemic practices for discoveries and hearings. The proposition that COVID-19 is behind us came across as an expression of hope. It is correct that in person examinations, hearings and trials are once again the default mode of most proceedings. That said, there are still regular

requests received for virtual attendance at hearings and for select witness testimony at trials.

[39] Plaintiff's counsel did not raise a public health basis for not wanting to travel to Vancouver. She focused on virtual examination allowing the plaintiff to avoid incurring substantial travel and accommodation expenses for counsel to come to Vancouver. The absence of a public health component differentiates this application somewhat from *Hudema*, *Arconti* and *Bockhold*.

[40] *Hudema* and *Arconti* both emphasized the general importance of the court and legal profession embracing and adopting widely available videoconferencing technologies to allow for more efficient and effective remote communication. The widespread adoption of virtual discoveries, hearings and trials during the pandemic was an unqualified success. The relaxation of public health concerns does not mean these technologies can or should be set aside. They remain an important tool.

[41] The defendant emphasizes the importance of the examiner being able to confront the plaintiff in person, look him in the eye and assess the examinee's credibility in a "morally persuasive environment". A witness can be confronted during a virtual examination. As for assessing credibility, a witness can also be observed during a virtual examination, albeit by video. The court reporter generates a written transcript for use in subsequent proceedings. A witness' physical demeanour is generally not apparent from reading the transcript. Further, assessment of credibility does not rely solely on seeing a witness: see *Faryna v. Chorney*, [1951] B.C.J. No. 152 (C.A.) at para. 10.

[42] The defendant argues that the plaintiff's conduct, including making surreptitious recordings of meetings and his "staggered and reluctant disclosure" of documents, give rise to a concern that he may abuse the virtual hearing process. I am not persuaded that either of those factors is suggestive of the plaintiff being a risk to misconduct himself during a virtual examination.

[43] There were two alternatives to avoid virtual examination presented, namely having plaintiff's counsel attend remotely while the plaintiff attends in person, or having the plaintiff retain a local agent to sit in. The plaintiff argues the former is not acceptable and the latter would be an unnecessary expense. Master Elwood addressed both options in *Bockhold* at paras. 49-51. He was not persuaded that the inconvenience of conducting an examination remotely outweighed the plaintiff's desire not to undergo the discovery in a room alone with opposing counsel. He also concluded that the cost to retain a local agent would increase the plaintiff's legal expenses unnecessarily. In my view, his reasoning on those two issues is persuasive in the present case.

[44] There is no evidence suggesting that the plaintiff had an ulterior motive for retaining Toronto counsel. There is no suggestion that plaintiff's counsel has sought to take liberties based on her geographic location. Both counsel appear to have been conducting themselves professionally thus far. Both are vigorously advocating for their respective clients.

[45] Turning to proportionality considerations under Rule 1-3(2), the amount involved is substantial. In argument, counsel indicated the plaintiff is seeking a one-year reasonable notice period. His base salary was $191,475, plus bonus with a target of 12.5% of salary, group benefits, 5 weeks paid vacation and cell phone expenses. He also seeks bad faith, aggravated and/or punitive damages. The issues are being hard fought but do not appear to be more complex than one would expect for a claim of this kind.

[46] I am satisfied that a virtual examination is appropriate, as this will allow the plaintiff to avoid substantial out of pocket expenses which he would have to incur if there is an in person examination. The defendant has not persuaded me that a virtual examination of the plaintiff would be materially less effective than an in-person examination, or otherwise prejudice its ability to defend this action. I exercise my discretion to direct that the plaintiff be examined for discovery virtually (by Zoom

or other mutually agreeable videoconferencing service), on a mutually convenient date to be agreed between counsel.

[47] It follows that I dismiss the defendant's application for an order that the plaintiff attend its examination for discovery of him in person and the application to strike the notice of civil claim.

Costs Thrown Away

[48] The defendant also applied for an order that the plaintiff pay its costs thrown away of the February 28, 2023 appointment. Defendant's counsel selected a date which he knew plaintiff's counsel would be unlikely to attend in person, given that she was conducting a virtual examination of Mr. Parker on February 27, 2023. It was also clear from the exchanges of correspondence between counsel that the plaintiff was refusing to attend in person. Incurring the cost to obtain a certificate of non-appearance from a court reporter was arguably unnecessary. In the circumstances, I decline to order the plaintiff to pay costs thrown away relating to the February 28, 2023 appointment.

Production of Documents

Background

[49] On October 11, 2022, the plaintiff issued a list of documents which included contracts for services between his company ET Marketing and each of EEC and FHG respectively.

[50] On December 23, 2022, defendant's counsel wrote to plaintiff's counsel demanding broader discovery of documents relating ET Marketing, EEC, FHG and the plaintiff's efforts to mitigate his losses generally. Counsel complained that the plaintiff had not produced documents for the period leading up to his engagement with EEC and FHG, and noted the defendant had alleged in its response to civil claim. The specific requests include:

a) Item 1 – Documents relating to the plaintiff's engagement by EEC, including pre-engagement correspondence, applications, draft contracts and the like;

b) Item 2 – Documents relating to the plaintiff's engagement by FHG, including pre-engagement correspondence, applications, draft contracts and the like;

c) Item 4 – Documents relating to job postings reviewed and applications the plaintiff made regarding his attempts to secure alternate employment or contract work and other actions in pursuit of income of any kind;

d) Item 5 – Documents relating to payments made to the plaintiff as employee or contractor, direct or indirect through a corporation, contracts executed or proposed, relating to his efforts to mitigate alleged loss and his earnings in mitigation from November 1, 2021 to the end of the notice period for which he claims.

e) Item 6 – Documents relating to the activities of ET Marketing as they relate to the foregoing, including its earnings and revenues during 2021, 2022 and 2023.

[51] On February 14, 2023, plaintiff's counsel responded, declining to produce the majority of the documents and classes of documents sought.

Applicable Law

[52] The defendant relies on Rules 7-1(1), (10), (11) and (14).

[53] Sub-rule (1) provides that each party of record is required to prepare a list of documents that lists all documents that are or have been in their possession or control, and that would, if available, be used by a party or by any party of record at trial to prove or disprove a material fact, and all other documents to which the party intends to refer to at trial.

[54] Sub-rule (10) provides that if a party who has received a list of documents believes it omits documents or a class of documents that should have been disclosed under Sub-rule (1), the party may, by written demand, require the list be amended to add them.

[55] Sub-rule (11) provides that if a party who has received a list believes the list should include documents or classes of documents that are within the listing party's possession, power, or control, which relate to any or all matters in question in the action and which are additional to the documents or classes of documents required under sub-rule (1), in that case the requesting party is required to make a written demand that identifies the additional documents or classes of documents with reasonable specificity, and indicate the reason why such additional documents or classes of documents should be disclosed.

[56] In *Mann v. Jagpal*, 2020 BCSC 1919 at paras. 39-41, Justice Giaschi summarized the process for requesting additional documents:

> **39** The rules have a clearly defined procedure to obtain additional documentary discovery from a party. The procedure is for the party demanding additional discovery to make a demand in writing under Rule 7-1(10) if the party believes first tier documents have not been produced or Rule 7-1 (11) if the party wishes production of documents relating to a question in the action (the broader Peruvian Guano test). The party from whom the additional disclosure is requested then has 35 days to comply with the demand. Pursuant to Rule 7-1(13), an application may only be brought if the demand is not complied with.
>
> **40** I note that Rule 7-1(14) gives the court discretion to waive the requirement for a prior written demand under Rules 7-1(10) and (11), however, no such application was made by Manreet and, in any event, the court should be cautious and reluctant to waive the demand requirement.
>
> **41** The requirement for a prior written demand in Rules 7-1(10) and (11) is not optional and failure to comply will not be readily forgiven. (See *Lit v Hare*, 2012 BCSC 1918, at para. 65) As was noted by Master Keighley, a purpose of the prior demand is to prevent unnecessary applications to the court relating to document production. A prior demand allows the parties to address the document disclosure issues, hopefully, without the expense and delay of an application. This process furthers the object of the Rules, as described in Rule 1-3, to secure the just, speedy and inexpensive determination of the proceeding on the merits.

[57] In *Addison v. Whitefox Technologies Ltd.*, 2014 BCSC 633 at para. 28, Master Muir noted that the applicant must demonstrate a connection between the documents sought and the issues beyond a mere possibility; there must be some air of reality between the documents and the issues in the action.

> **28** … Whitefox must demonstrate a connection between the documents sought and the issues beyond a "mere possibility", see *Przybysz v.*

> *Crowe,* 2011 BCSC 731 at para. 45, referencing *Gorse v. Straker*, 2010 BCSC 119 at para. 53. As held by Master Bouck in *Edwards v. Ganzer*, 2012 BCSC 138, at para. 51, "there must be some "air of reality" between the documents and the issues in the action ..."

Analysis

[58] **Items 1 and 2:** The plaintiff says he has produced all relevant communications regarding his potential engagement or hire with EEC and FHG, his contract with each (each of which sets out scope of his services and start date), invoices for services rendered and payment history from each during the claimed notice period. Counsel takes the position that other communications between the plaintiff and these entities are not relevant to the matters in issue.

[59] The defendant has not persuaded me that disclosure of broader communications between the plaintiff, EEC and FHG are appropriate at this time. These items are dismissed, but with leave for the defendant to reapply on better evidence if such develops through examination for discovery or otherwise.

[60] **Item 4:** The plaintiff says he has produced all relevant documentation pertaining to his efforts to secure new work and repeats that EEC and FHG reached out to him and he did not engage with them until 2022. I take this to mean that the plaintiff did not seek any work beyond EEC and FHG,

[61] The defendant has not persuaded me that there are broader documents in existence relating to the plaintiff's efforts to mitigate his losses during the claimed notice period. This item is dismissed, but with leave for the defendant to reapply on better evidence if such develops through examination for discovery or otherwise.

[62] **Item 5:** The plaintiff says he has produced a summary of invoices for services rendered to EEC and FHG. This represents all relevant documents pertaining to mitigation activities and income earned during the notice period claimed.

[63] I agree with the defendant that the plaintiff should also produce copies of all of the relevant invoices and documents relating to dates / amounts received from EEC and FHG for those invoices. I so order.

[64] **Item 6:** The plaintiff says the request for all documents and records pertaining to ET Marketing's activities and its earnings and revenues during 2021, 2022 and 2023 are overly broad. The notice period claimed is 12 months. The potential termination date is between October 1, 2021 and December 31, 2021. The relevant mitigation period thus ends by December 31, 2022.

[65] The defendant has tendered affidavit evidence from Mr. Parker indicating that on July 13, 2023, the plaintiff listed and produced records relating to work he did as an advisor for Overstory Media Inc. ("Overstory"). There are 13 invoices listed and dated between May 1, 2021 to February 1, 2022, and involving about $26,250 inclusive of tax. During 2021, the plaintiff was employed with the defendant and thus was prohibited from pursuing other employment without its consent. Mr. Parker says the plaintiff did not disclose that he was working with Overstory and it did not consent to him doing so.

[66] The alleged breach involving Overstory is not expressly referenced in the amended response to civil claim. I presume this is because it came to the defendant's attention after the last amendment. Part 1, Division 2, paragraph 32(a) is arguably broad enough to encompass the Overstory situation as a further breach by the plaintiff and after-acquired cause.

[67] During argument, plaintiff's counsel suggested the Overstory invoices related to a period which pre-dates the plaintiff's employment with the defendant. This does not appear to be the case. The employment contract is dated September 4, 2020. The Overstory invoices are dated in 2021 and 2022. I order that the plaintiff produce the following:

a) Copies of all invoices that the plaintiff or ET Marketing issued during the 2021-2022 calendar years or which relate to or include services provided during the 2021-2022 calendar years;

b) Any contract(s) associated with the foregoing;

c) A copy of ET Marketing's financial statements, income tax returns and notices of assessment for any fiscal years which fall (in whole or in part) within 2021-2022.

Costs

[68] There has been mixed success. The parties will each bear their own costs of these applications.

"Master Bilawich"