

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Sever v. Western Magnesium Corporation*,
2023 BCSC 1833

Date: 20230915
Docket: S209728
Registry: Vancouver

Between:

James Sever

Plaintiff

And:

Western Magnesium Corporation

Defendant

Before: The Honourable Justice Murray

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

J. Mason

Place and Date of Hearing:

Vancouver, B.C.
September 5 and 12, 2023

Place and Date of Judgment:

Vancouver, B.C.
September 15, 2023

[1] **THE COURT:** These are my reasons for judgment on the application that I heard on September 5th and 12th. Before I launch into them, if they are ordered in writing I reserve the right to edit the reasons, including adding references to the law. The decision will not change.

[2] The plaintiff seeks damages arising from what he alleges is the termination of his employment agreement with the defendant company, Western Magnesium Corporation (WMC) including non-payment of salary, reimbursement of expenses, severance pay, and indemnification for legal fees pursuant to Directors' and officers' insurance.

[3] In addition, the plaintiff seeks a preservation order and injunction against the defendants to prevent the transfer of funds deemed payable to him other than in the execution of this order.

[4] The claim arises from the termination of a written employment agreement between the plaintiff and the defendant company.

[5] None of the key facts are in issue, including that there was a valid employment contract, and that the plaintiff's employment contract did come to an end. There is no question that the plaintiff is entitled to remuneration under the contract for wages and expenses, including indemnification for legal fees pursuant to the insurance, regardless of how his employment ended.

[6] The key issue is whether the plaintiff resigned or was terminated. If he was terminated, he is entitled to severance pay of \$2 million as specified in the contract of employment.

[7] The defendant did not appear at the hearing of this application, although duly served.

[8] The issues are as follows:

- 1) Whether this matter is suitable for summary trial;

- 2) If so, whether the plaintiff resigned or was terminated,
- 3) If he was terminated, was his dismissal wrongful?
- 4) If it was wrongful, what reasonable notice is the plaintiff entitled to?
- 5) Are special costs warranted?

[9] I will consider the issues in turn.

Issue 1, Whether Suitable for Summary Trial

[10] For the following reasons, I am satisfied that this matter is suitable for summary trial:

- a) Although the amount in issue is significant, it is calculable;
- b) The matters in issue are not complex. This is a straightforward breach of contract case. The facts in the main are not disputed:
 - The parties agree that the plaintiff was retained by the defendant pursuant to the executive employment agreement (the Agreement).
 - The parties agree that the Agreement was valid and enforceable.
 - The terms of the Agreement are clear and unambiguous. The defendants do not dispute the terms of the Agreement, including the termination provision.
 - The plaintiff's entitlement to compensation is further identified in the defendant's own evidence and documents, including minutes and resolutions of its board of directors' meetings. All of these documents have been presented to me on this application.
- c) There are no issues of credibility that need to be resolved. Most of the key facts are sworn in the defendant's affidavit of Mr. Ataya or pled in the defendant's response and amended response to civil claim.

- d) There is some urgency and significant prejudice to the plaintiff should this matter be delayed. Mr. Sever is 75 years old. The defendants have consistently attempted to delay proceedings. They have sued the plaintiff twice in the United States, causing him to incur significant legal fees to have the actions dismissed. While the defendant has repeatedly agreed to compensate the plaintiff for his services under the contract, they have failed to do so. The plaintiff has some concerns about the ability of the defendant to pay an award, as they have failed to pay him what they agree is owed. This matter is scheduled for a ten-day trial in August 2024, which will be costly, not just from the perspective of legal fees, but witnesses will have to be brought from out of town, and the plaintiff himself will have to travel from his home in Washington State.

- e) Finally, this summary trial will determine all issues.

Issue 2, Did the Plaintiff Resign or Was He Terminated?

[11] As mentioned above, this is the key issue. Under the terms of the contract, the plaintiff is entitled to \$2 million in severance pay if he was terminated. The plaintiff says he was terminated. The defendant says that Mr. Sever resigned. The defendant relies on a part of a voice mail from the plaintiff in which the plaintiff is voicing his concerns about contract negotiations as follows:

The contract has time issues. It is also punitive. It also is open ended. I wanted -- I wanted a determinate contract because I cannot keep working beyond a point in time, and I set that at three years, with a three-year option at my choice. If I am physically not able to keep going, I will not. Now, there are a number of ways to approach that. If I have to sign this existing contract that is open ended, you will have a letter of resignation dated three years from the date of contract.

[Emphasis added.]

[12] The plaintiff relies on the following evidence in support of his argument that he was constructively dismissed:

- 1) The defendant changed the terms of his employment without consulting him.
- 2) The defendants stopped communicating with him.
- 3) The defendants retained new staff that subsumed the plaintiff's duties.
- 4) The defendant did not pay him.
- 5) The defendant voted him in as director after shutting him out of his employment without advising him.

[13] There is no issue that there was a written employment agreement. There are only two parties to the agreement, the plaintiff and the defendant. There is no issue that the contract was ended by one of the parties. Having considered all of the evidence, the only rational conclusion is that the plaintiff was terminated by the defendant. I do not find the plaintiff's email to be a resignation. In fact, it is clear that it is not. The plaintiff clearly states that he will work for three more years and then maybe three more after that.

[14] I am satisfied that the company, through its actions, constructively dismissed the plaintiff.

Issue 3, Was the Dismissal Wrongful?

[15] It is an implied term in each employment contract that absent just cause or an agreement to the contrary, the employer must give reasonable notice of its intention to terminate the employment relationship: *Honda Canada Inc. v. Keays*, 2008 SCC 39 at para. 50.

[16] There is no evidence that the plaintiff was terminated for just cause. Nor was he given notice.

[17] Accordingly, I am satisfied that the dismissal was wrongful.

Issue 4, What Notice Was the Plaintiff Entitled To?

[18] The plaintiff is entitled to damages for wrongful dismissal equal to the loss suffered as a result of the defendant's failure to give proper notice: *Honda* at para. 50.

[19] The length of reasonable notice depends on the facts of each individual case, having particular regard to the following factors:

- 1) the character of the employment.
- 2) the length of service.
- 3) the age of the employee.
- 4) the ability of similar employment, having regard to the employee's, training, and qualifications.

Ansari v. British Columbia Hydro and Power Authority, [1986] B.C.J. No. 3005 (BCSC) citing *Bardal v. Globe & Mail Ltd.* (1960), 24 D.L.R. (2d) 140 (Ont. H.C.).

[20] The plaintiff is 75. Re-employment would likely be difficult, particularly at the level of compensation he received. The plaintiff's field of expertise is specialized and unique. The defendant profited from the plaintiff's knowledge and expertise. In fact, they still use the technology he developed. The manner in which the defendant has treated the plaintiff in shutting him out and then suing him twice without merit has impacted him both financially and emotionally. It is an unfortunate end to his exemplary career.

[21] I agree with the plaintiff that given the above, he is entitled to damages of one month's pay for each year of service, being seven months at \$25,000 USD per month.

Issue 5, Is the Plaintiff Entitled to Special Costs?

[22] As the plaintiff is the successful party, he is entitled to his costs. In addition to regular costs, he seeks special costs.

[23] Special costs are awarded as a means of penalizing a party's conduct in the litigation. An often-cited decision regarding special costs is *Mayer v. Osborne Contracting Ltd.*, 2011 BCSC 914, where Justice Walker reviewed the law as follows:

[8] Special costs are awarded where a litigant engaged in reprehensible conduct. The purpose of an award of special costs is to chastise a litigant. Special costs are punitive in nature and encompass an element of deterrence. A wide meaning is given to the word "reprehensible". The term represents a general and all encompassing expression of the applicable standard for an award of special costs. "Reprehensible" conduct includes conduct that is scandalous, outrageous, or constitutes misbehaviour, as well as milder forms of misconduct that in a court's view deserves reproof or rebuke. In determining whether the conduct of a party is reprehensible, courts may consider whether the conduct complained of is a type from which it should seek to dissociate itself: *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 1994 CanLII 2570 (BC CA), 119 D.L.R. (4th) 740 at 745 - 747 (C.A.); *Stiles v. B.C. (W.C.B.)* (1989), 1989 CanLII 235 (BC CA), 38 B.C.L.R. (2d) 307 at 311 (C.A.); *Leung v. Leung* (1993), 77 B.C.L.R. (2d) 314 at para. 5 (S.C.); *International Hi-Tech Industries Inc. v. FANUC Robotics Canada Ltd.*, 2007 BCSC 1724 at para. 6; and *Fullerton v. Matsqui (District)* (1992), 74 B.C.L.R. (2d) 311 at para. 23 (C.A.).

[24] Special costs may be ordered where a party has displayed reckless indifference by not recognizing early on that its claim was manifestly deficient, where a party has made the resolution of an issue far more difficult than it should have been, where a party presents a case so weak that it is bound to fail and continues to pursue its meritless claim after it is drawn to its attention that the claim is without merit. See: *Buchan v. Moss Management Inc.*, 2008 BCSC 1286 (CanLII), 2008 BCSC 1286 at paras. 11-12; and *Edwards v. Bell*, 2004 BCSC 399 (CanLII), 2004 BCSC 399 at paras. 12, 43-45.

[25] In this case, the defendant brought a meritless defence. Instead of conceding, it chose not to attend court on this application for summary judgment, causing the

plaintiff to incur further legal costs. I am satisfied that the defendant's actions in this matter are deserving of special costs.

CONCLUSION

[26] I make the following orders:

- 1) The defendant shall pay damages to the plaintiff as follows:
 - a. \$374,729.17 USD representing the dumped remuneration previously directed by the defendant's board of directors.
 - b. \$54,000 USD representing \$18,000 USD per month for three months for unpaid salary under the executive employment agreement, being the period the agreement was executed to the defendant's termination of the agreement less partial payments already made.
 - c. \$3,360 US representing \$1,120 US per month for three months for unpaid salary under the executive employment agreement, being the period the agreement was executed to the defendant's termination of the agreement.
 - d. \$181,688.13 USD representing unpaid remuneration for the salary adjustment and the tax liability as previously directed by the defendant's board of directors.
 - e. delivery of the 2 percent of the total number of common shares of the defendant company, being 5,289,103 shares.
 - f. delivery of options for rights to purchase 300,000 common shares in the defendant company in proportions equivalent to other directors of the company since July 31, 2019, as previously approved by the board of directors.
- 2) Damages in the amount of \$2 million USD representing the severance pay.

- 3) \$83,530.50 USD representing indemnification for legal fees incurred in the actions brought in the US by the defendant company against the plaintiff. This is pursuant to the directors and officers' insurance.
- 4) \$175,000 USD representing seven months' notice of termination under the executive employment agreement.
- 5) Costs in the cause.
- 6) Special costs.
- 7) Prejudgment interest under the *Court Order Interest Act*.
- 8) Currency adjustment for amounts to be paid in Canadian dollars as required by s. 1 of the *Foreign Money Claims Act*.

[27] In addition I order the injunction sought by the plaintiff as follows: The defendants and any other person or legal entity with notice of this order must not transfer, assign, hypothecate, discharge, grant, create, or permit to be created any charge or security interest, encumbrance, or lien, or claim in respect of the sum of the above funds and damages payable to the plaintiff other than as permitted by this order and in execution of this order.

“The Honourable Madam Justice Murray”