IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Cvjetkovich v. Breezemax Web (Ca) Ltd.,* 2024 BCSC 808

Date: 20240513
Docket: S249485
Registry: New Westminster

Between:

Stevan Peter Cvjetkovich

Plaintiff

And

Breezemax Web (Ca) Ltd.

Defendant

Before: The Honourable Justice Branch

Reasons for Judgment

Counsel for the Plaintiff:	N. Chhina
The Defendant:	No Appearance
Place and Date of Hearing:	New Westminster, B.C. April 9 and 16, 2024
Place and Date of Judgment:	New Westminster, B.C. May 13, 2024

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I. INTRODUCTION

[1] This is an application for default judgment.

II. BACKGROUND

[2] The plaintiff, Mr. Cvjetkovich, is currently 44 years old. He was the defendant's senior vice president of sales ("SVP") prior to his dismissal.

[3] The defendant is a Canadian digital marketing agency with a head office in Toronto, Ontario ("Toronto Office") and a sales office on Richards Street in Vancouver.

[4] The plaintiff worked for the defendant from July 2010 until his dismissal on May 15, 2023 (except for the period from September 2011 to September 2013, during which time he accepts that he only provided the defendant with consulting services).

[5] The parties' relationship was not governed by a written contract. Rather, the plaintiff relies on an alleged oral contract (the "Contract"). The plaintiff asserts that the material terms of the Contract were as follows:

a) a monthly salary of $6,500;

b) benefits, including dental care; and

c) a commission typically calculated as follows:

    a. a one-time commission calculated as 50% of each plaintiff-acquired customer's set up fee;

    b. 25% of a customer's set up fee when assisting another sales representative with the sale;

    c. $5,000 per CDAP sale (CDAP is a grant available from the Canadian government to help small businesses develop a digital marketing strategy plan); and

d. 10-33% of recurring residual amounts from subscriptions.

[6] As SVP, the plaintiff's duties included:

a) hiring office staff;

b) managing the sales team;

c) marketing;

d) leading weekly national sales meetings with the defendant's sales team and making sales calls; and

e) reforming the defendant's business model in response to the Covid-19 pandemic.

[7] The plaintiff also asserts that:

a) he has worked solely for the defendant since 2013;

b) during his time with the defendant, the defendant was his only source of income;

c) he worked under (1) Andrew Faridani, the defendant’s CEO and founder, and (2) Vishal Nanchahal, the defendant’s COO, but eventually reported solely to Mr. Nanchahal;

d) Mr. Faridani and Mr. Nanchahal had control over the plaintiff’s:

i. title;

ii. wages;

iii. hours of work;

iv. place of work;

v. vacation time and time away from work;

vi. performance reviews;

vii. expense reimbursement; and

viii. manner of work;

e) he never hired anyone to help him with his role, nor did he expect to be able to;

f) he devoted time, energy and working hours to grow the defendant's business;

g) he did not undertake any financial risk – the only variable aspect of his remuneration was the commission.

[8] During the first week of May 2023, the plaintiff advised the defendant that he would be working remotely from Toronto instead of being in Vancouver. The defendant took the position that the plaintiff was not permitted to work remotely in Toronto because the plaintiff did not obtain prior written authorization as required by company policy. The defendant advised the plaintiff that he could either deem the week unpaid vacation (including the days already worked) or he could terminate his contract with the defendant (the "Termination Threat").

[9] The plaintiff says that he never saw this purported company policy and had the defendant's prior approval in any event. The plaintiff requested a copy of the alleged policy and agreed to take the remainder of the week as vacation, provided the defendant paid him for the days already worked. The defendant did not agree.

[10] As of May 2023, the plaintiff says that the defendant owed him a portion of his commissions for 2021, 2022 and 2023. While certain commissions were paid over those years, the plaintiff says that it was not the proper amount. The plaintiff calculates that he is owed at least $47,11.19 in commissions. The defendant tracked sales using a shared Google document and the plaintiff bases his claim for commissions on the data in this document.

[11] The plaintiffs says that he discussed the commission payment issue with the defendant on several occasions. He says that the defendant's representative "gaslit [him] into believing that the Defendant would reconcile [his] payroll and pay all outstanding commission to subsequent pay periods". The plaintiff claims that these assurances were provided at least four times between May 22, 2021, and May 23, 2023. For example, in a text message dated May 25, 2021, Mr. Nanchahal thanks the plaintiff for providing an extension to pay any outstanding commissions.

[12] On May 10, 2023, the plaintiff filed a formal complaint with the defendant's human resources representative regarding:

a) the Termination Threat;

b) the outstanding commissions; and

c) the toxic work environment created by the defendants.

[13] The defendants did not acknowledge or address the plaintiff's complaint.

[14] On May 15, 2023, the plaintiff purported to accept the defendant's conduct as a repudiation of his Contract (the "Termination").

[15] On May 16, 2023, the plaintiff incurred $941 for a dental procedure. The defendant had terminated his benefits effective that day, leaving the plaintiff out of pocket for this amount.

[16] On May 22, 2023, the plaintiff received a payment of $12,498 from the defendant. Since then, he has not received any further payments from the defendant.

[17] On May 26, 2023, the plaintiff commenced the within action, alleging that he was an employee who suffered a constructive dismissal.

[18] On August 25, 2023, the plaintiff obtained default judgment.

[19] On December 15, 2023, the plaintiff's application to assess damages was adjourned generally, with directions to serve the defendant with the Notice of Civil Claim at its registered office address, vacate the existing default judgment and apply again for any default judgment along with the assessment of damages.

[20] On December 19, 2023, an amended Notice of Civil Claim, amended Notice of Fast Track Action and a cover letter (collectively, the "Service Package") were served on the defendant via registered mail to 35 10520 Yonge Street, Suite 421, Richmond Hill, Ontario, L4C 3C7 – the office registered by the defendant. However, there was a problem: there was no Unit 35 at this address, only 35A and 35B.

[21] After an online inquiry, plaintiff’s counsel determined that Unit 35B was the address of a numbered company whose director, Andrew Faridani, was also the defendant’s president, secretary and treasurer. The plaintiff adjusted the address to 35B, and delivered the Service Package again. The Service Package was also sent to the defendant’s Vancouver address by registered mail. On May 30, 2023, the plaintiff also emailed the Service Package to the defendant’s chief operating officer.

[22] No Response to Civil Claim has been delivered.

[23] The plaintiff was able to obtain a new position in July 2023, a position in which he earns $60,000 per annum. He earned approximately $56,750.60 in gross income from July 2023 to February 29, 2024.

III. ANALYSIS

A. Introduction

[24] The plaintiff seeks default judgment and the assessment of his damages pursuant to R. 3-8(1) and (13)(a) of the *Supreme Court Civil Rules*.

B. Service

[25] On any application for default judgment, the first key issue is proof of service – absent such proof, there is no underpinning for an application based on the lack of a filed Response.

[26] In this case, the service situation is complex, but I am prepared to accept that service was effective. The plaintiff did everything required: he delivered the material by registered mail to the defendant's address in the relevant corporate registry. The effect of the fact that the defendant provided a flawed address should not fall at the feet of the plaintiff.

[27] That said, the uncertainty as to whether the defendant has actually been informed of the proceeding, as well as the potential that the defendant may have a reasonable explanation for the service problems, causes me to require a term that the defendant may apply to set aside the other orders made below on 30 days' notice to the plaintiff.

C. Default Judgment

[28] I set aside the earlier default judgment and grant judgment afresh now that adequate service efforts have been performed and no Response has been filed.

D. The Role of the Pleadings and Evidence

[29] The plaintiff sought to rely on case law stating that where no Response is filed, the facts alleged in the Notice of Civil Claim are assumed to be true: *Paragon Testing Enterprises Inc. v. Lee*, 2018 BCSC 634 at para. 8; *McHugh v. Cameron*, 2022 BCSC 2405 at para. 5.

[30] While the facts alleged are deemed to be true, the Court is still entitled to draw its own legal conclusions based on those facts: *E. Sands and Associates Inc. v. Dextras Engineering & Construction Ltd.*, 2008 BCSC 1809 at paras. 35-37.

[31] Additionally, the plaintiff accepted that the Court is entitled to consider the effect of the filed evidence in assessing damages. As indicated in *McHugh*:

> [45] Pursuant to Rule 3-8(3) of the Supreme Court Civil Rules, where a plaintiff has obtained a default judgment with damages to be assessed, the plaintiff may apply to the court to have the assessment conducted summarily on affidavit evidence.
>
> [Emphasis added.]

E. Employee, Dependant Contractor or Independent Contractor

[32] The complexity associated with this application arises out of the fact that, notwithstanding that the plaintiff pleads that he was an employee, it is clear from the evidence filed by the plaintiff that the defendant intended for the plaintiff to be treated as a contractor, not an employee. The plaintiff accepted that this was the defendant's intention. Indeed, there was no evidence referring to the plaintiff as an employee. What documentary evidence exists is to the contrary. In particular, the defendant never issued the plaintiff a T4, but rather issued tax documentation in the form applicable to a contractor. The plaintiff also treated the arrangement as that of a contractor, at least for tax purposes.

[33] Notwithstanding this evidence of intention, the plaintiff sought to argue that he was in fact an employee given the evidence regarding control and lack of discretion.

[34] I accept this evidence but find that, on balance, the more appropriate legal characterization of the relationship is that it falls into the hybrid "dependent contractor" category.

[35] Guiding my conclusion is the parties' mutual intention to create a contractor relationship at the outset, along with the objective steps each took in furtherance of that intention. In *Skylight Travel & Tours Inc. v. M.N.R.*, 2024 TCC 26, the Court stated:

> [64] In *Connor Homes*, the Federal Court of Appeal noted that, in determining whether a worker is an employee or an independent contractor, it is necessary to consider the intention of the worker and the person who hired the worker, as well as considering the traditional factors enunciated in Sagaz Industries and Wiebe Door. Those factors are:
>
> (a) Does the hirer control the worker's activities?
>
> (b) Does the hirer provide the tools and equipment required by the worker, or is the worker required to provide his or her own tools and equipment?
>
> (c) Does the worker hire his or her own helpers?
>
> (d) What is the degree of financial risk taken by the worker? In other words, does the worker have a risk of loss?

> (e) What is the degree of responsibility for investment and management held by the worker?
>
> (f) Does the worker have an opportunity for profit in the performance of his or her tasks?
>
> [Emphasis added. Footnotes omitted.]

[36] Not all contractors are independent. There is a recognized hybrid "dependent" contractor category. The evaluation of whether a contractor is dependent depends on the worker's reliance on, or exclusivity with, the subject company. The proper approach to the determination of whether an individual falls within this hybrid category was helpfully summarized in *Thomas v. Vancouver Free Press Publishing Corp*., 2019 BCPC 9:

> [59] The leading case in this area is that of *McKee v. Reid's Heritage Homes Ltd.*, 2009 ONCA 916 (CanLII), where the court states:
>
> > [30] I conclude that an intermediate category exists, which consists, at least, of those non-employment work relationships that exhibit a certain minimum economic dependency, which may be demonstrated by complete or near-complete exclusivity. Workers in this category are known as "dependent contractors" and they are owed reasonable notice upon termination.
>
> [60] The most recent statement of the law in B.C. regarding dependent contractors is found at *Lightstream Telecommunications Inc. v. Telecon Inc.*, 2018 BCSC 1940, where the court discussed whether a person named Daniel Wray was a dependent contractor of the defendant Telecon. The court stated:
>
> > [122] The plaintiffs allege that the relationship between Telecon and Wray establishes either an employment or dependent contractor relationship. If Wray were an employee or dependent contractor of Telecon, he would have an independent, actionable claim of wrongful dismissal against the defendant as a result of the false allegation of theft.
> >
> > [123] In support of their position, the plaintiffs rely upon *McKee v. Reid's Heritage Homes Ltd*., 2009 ONCA 916 at paras 24-30 and paras. 38-39 and *Truong v. British Columbia*, 1999 BCCA 513, paras. 24 to 36. These decisions reinforce the principle that the whole of the relationship between the parties must be carefully examined in order to determine the true character of the relationship.
>
> …
>
> [81] If I am wrong and Mr. Thomas is a dependent contractor, he is entitled to reasonable notice upon the termination of his position as a theatre reviewer for The Georgia Straight.

> …
>
> [89] It stands to reason that a dependent contractor may be entitled to a lower notice period than an employee. This would recognize the fact that the dependent contractor occupies an intermediate category between employee and independent contractor, as referred to in such cases as Carter v. Bell & Sons (Canada) Ltd., 1936 CanLII 75 (ON CA), [1936] 2 DLR 438.
>
> …
>
> [94] On the particular facts of this case, I have considered the following:
>
> 1. Mr. Thomas's relationship with The Georgia Straight lasted over 28 years.
>
> 2. Mr. Thomas was 64 years old at the time his relationship with the paper ended.
>
> 3. Mr. Thomas worked part time.
>
> 4. Mr. Thomas was not prevented from doing other work.
>
> 5. There was never any guarantee of work or job security. Pitches for stories were submitted and The Georgia Straight had the sole discretion to accept or reject the proposal.
>
> 6. The opportunities for similar employment were very poor. There were only a few publications in Vancouver that printed theatre reviews with no indication that they accepted freelance submissions.
>
> 7. Mr. Thomas was a dependent contractor and not an employee.
>
> [95] Some of these factors, such as the length of employment, the age of Mr. Thomas and the limited availability of similar work, call for a longer notice period. Others factors call for a reduced notice period [sic]. Given all the above, I fix the period of reasonable notice at 20 months.

[37] Applying the test in *1392644 Ontario Inc. (Connor Homes) v. Canada (National Revenue)*, 2013 FCA 85 and the factors in 6*71122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59 [*Sagaz*]*,* many of the factors here support a finding that the plaintiff is an employee. However, I find that these are more than counterbalanced by the weight of the objective evidence of the parties' mutual intention to create a contractor relationship.

[38] In terms of their conduct in furtherance of that intention, I accept that how a relationship is characterized for tax purposes is not necessarily determinative, but it is a key factor to consider in characterizing the relationship: *Jacks v. Victoria Amateur Swimming Club et al*., 2005 BCSC 778 at paras. 14-16; *King v. Merrill Lynch Canada Inc*., [2005] O.J. No. 5028 (Crt. J.), 2005 CanLII 43679 at para. 38.

[39] Tax treatment provides objective evidence as to how the parties subjectively saw their relationship. I am concerned that a plaintiff should not generally be allowed to obtain the benefits of a contractor relationship for tax purposes, and then simply deny such that such a relationship exists for employment law purposes: *Pasche v. MDE Enterprises Ltd*., 2018 BCSC 701 at paras. 75, 90-92. In *Pasche* at paras. 89-106, the Court determined that the plaintiff was a dependent contractor. While acknowledging it was not determinative, the Court in *Pasche* began by considering the parties' mutual intention that the plaintiff was to provide services as an independent contractor. Among other things, the plaintiff had filed his tax returns as an independent contractor. There was minimal supervision: the worker was not required to provide details on his work, provide activity reports or attend performance reviews. The plaintiff had discretion over his own hours and holidays. The plaintiff wore a uniform, and he was part of a team in that he was included in internal emails and phone lists. The parties had mutual dependency and business integration, shown by the plaintiff working exclusively for the defendant for 18 years.

[40] While I accept that the present case is close to the line, I am satisfied that the plaintiff's position was closer in kind to that of the plaintiff in *Pasche*. The plaintiff and defendant here similarly showed a mutual intention to treat the plaintiff as an independent contractor, as demonstrated through the subsequent tax treatment. There are admittedly more indicia of an employment relationship here than in *Pasche*, given that the degree of control exercised over the plaintiff seems to have been greater than was the case for Mr. Pasche. But the relative weight of each factor depends on the particular facts and circumstances of the case: *Sagaz* at para. 48. Here, I conclude that the weight of years of objective tax declarations was sufficient to sustain the parties' initial mutual intention to create a contractor relationship. Despite the control being more significant than in *Pasche*, the plaintiff still exercised control over how he completed tasks and had relative autonomy in his working life.

[41] It is notable that the plaintiff's decision to launch a claim was triggered by the defendant seeking to apply more control over the plaintiff's work than the plaintiff

believed it was entitled to do under the terms of the Contract. Assuming the plaintiff's perspective is correct for purposes of this default judgment application, then the control was somewhat attenuated.

[42] There are additional points that undercut the control evidence proffered by the plaintiff. First, there was no written contract purporting to control his conduct. Second, on the plaintiff's own evidence as to the terms of the Contract, he was able to perform his work in a completely different province. Third, the plaintiff was not only entitled to a salary, but was also entitled to a share of the firm's revenues through the various commissions.

[43] That said, given the economic interdependency, exclusivity, longevity, and the relatively degree of control the defendant exercised over the plaintiff, I find that the plaintiff should be treated as a dependent rather than an independent contractor.

[44] A dependent contractor is generally entitled to notice of termination. Certain authorities suggest that the amount awarded will be somewhat less than what would be payable to an employee: *Pasche* at para. 83. But this is not settled law: *Liebreich v. Farmers of North America,* 2019 BCSC 1074 at paras. 98-106. I adopt the reasoning of Justice Russell in *Liebreich*, and reject any hard and fast rule. I would say that the notice period ought to reflect where the relationship falls on the continuum between employee and independent contractor, after considering all the factors.

[45] Reasonable notice must be decided on a case-by-case basis, with reference to the employee's character of employment, age, length of service, availability of alternate comparable employment and any other relevant factors: *Ansari v. British Columbia Hydro and Power Authority*, 2 B.C.L.R. (2d) 33 at 43, 1986 CanLII 1023 (S.C.); *Bardal v. Globe & Mail Ltd*. (1960), 24 D.L.R. (2d) 140 at 145, 1960 CanLII 294 (Ont. H.C.)

[46] Here, while the jointly intended form of the relationship created a contractor structure, the substance brought the situation very close to that of

employee/employer. As such, the reasonable notice period ought to be close to that of an employee.

[47] As noted above, the plaintiff was the defendant's SVP of Sales, was 44 years old, and had been working with the defendant for 13 years at the time of his termination.

[48] The plaintiff says that he should be entitled to damages representing a notice period of 13 months, relying on the following authorities:

Case	**Position**	**Age**	**Length of Service**	**Notice Period**
Spalti v. MDA Systems Ltd., 2018 BCSC 2296	Sales Director	55	13 years, 7 months	14 months (16 months with a two-month contingency deduction)
Haff v. Valeant Pharmaceuticals International Inc., 2013 BCSC 1720	Regional Sales Manager	57	13 years	16 months
Williams v. Heinz, 2001 BCSC 666	Sales Manager	(not mentioned)	13 years	16 months
Taner v. Great Canadian Gaming Corporation, 2008 BCSC 129	Vice President of Marketing	36	6 months	10 months
Turner v. Westburne Electrical Inc., 2004 ABQB 605	Industrial Sales Representative	37	13 years	10 months

[49] Despite certain unique aspects of some of the above cases, I agree that 13 months would generally reflect reasonable notice for an employee in such circumstances. However, given that I have found that the plaintiff was a dependant contractor, I reduce the award slightly to 12 months to account for their somewhat

less interwoven relationship. I decline to make a larger deduction given how close the plaintiff's situation was to that of an employee.

[50] The plaintiff advances the following financial claims:

a)	Base salary of $6,500 per month x 13 months =	$84,500.00
b)	Commissions likely to have been earned during the notice period, calculated using the plaintiff's average commissions earned during the 13-month period from May 2022 to May 2023: $33,527.60/13 months = $2,579.04 per month.	
	$2,579.04 x 13 =	$33,527.60
c)	Dental procedure	$941.00
d)	Commissions earned, but not paid	$46,032.09
e)	Costs of $8,000 plus taxes	$8,960
f)	Disbursements	$645.81
g)	Punitive damages	$20,000
h)	Less mitigation income	$56,750.60
	Total	$137,855.90

[51] I have already addressed the first element of the claim. As noted, I would reduce the amount to one reflecting a 12-month notice period, or $78,000.

[52] In terms of the second element, I accept that commissions that would have been payable during the notice period can be claimed, and I have no reason to disagree with the plaintiff's calculation: *Stuart v. Navigata Communications Ltd.,* 2007 BCSC 463 at paras. 30, 35; *Hawes v. Dell Canada Inc*., 2021 BCSC 1149 at paras. 19-29; *TCF Ventures Corp. v. The Cambie Malone's Corporation*, 2017

BCCA 129 at paras. 37-45. However, the commission claim needs to be adjusted downwards to $30,948.48 to account for the fact that I have reduced the notice period to 12 months.

[53] For the third element, I am prepared to allow the dental benefit claim, as the evidence suggests that the plaintiff would have pursued this treatment during the notice period, and it would have been paid absent his dismissal: *Shalagin v. Mercer Celgar Limited Partnership*, 2022 BCSC 112 at paras. 93-95; O*.W.L. (Orphaned Wildlife) Rehabilitation Society v. Day*, 2018 BCSC 1724 at para. 280.

[54] In terms of the past commission claim, although I initially had a concern that the lack of payment of the first few months' worth of commissions was discoverable, such that such claims may be beyond the limitation period, the plaintiff supplemented the record by confirming that there was a conversation with the defendant that can reasonably be characterized as affirming the cause of action, thereby creating a deferral of the period under s. 24 of the *Limitation Act,* S.B.C. 2012, c. 13.

[55] Given that I cannot properly determine if the costs claim is inflated, I direct the plaintiff to attend before the Registrar to settle costs.

[56] As I have concluded that the plaintiff was owed notice for 12 months, the mitigation reduction should be $74,485.11. This reflects the fact that the plaintiff was (reasonably) unemployed for a month and a half, then has, or can be expected to make, an average of $7,093.82 a month for the following 10.5 months.

[57] In terms of the claim for punitive damages, in oral argument, counsel agreed that there would be no basis to make such an award if the Court were to find that the plaintiff was a dependent contractor rather than an employee. Hence, I do not need to consider this aspect of the claim further.

IV. CONCLUSION

[58] The defendant shall pay the plaintiff $81,436.46.

[59] The plaintiff may attend before the Registrar to settle costs.

[60] The defendant may apply to set aside the present orders on 30 days' notice to the plaintiff.

"The Honourable Mr. Justice Branch"