IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Ferweda v. Mercer Celgar Limited Partnership,* 2024 BCSC 844

Date: 20240516
Docket: S214506
Registry: Vancouver

Between:

Gerald Ferweda

Plaintiff

And

Mercer Celgar Limited Partnership

Defendant

Before: The Honourable Justice Tammen

Reasons for Judgment

Counsel for the Plaintiff:	C. Forguson
Counsel for the Defendant:	N. Mitha, K.C. I. Martinich
Place and Dates of Trial:	Vancouver, B.C. December 4-7, 2023
Place and Date of Judgment:	Vancouver, B.C. May 16, 2024

Table of Contents

INTRODUCTION AND OVERVIEW **3**
FACTUAL BACKGROUND **3**
ISSUES **7**
Issue One: Was Mr. Ferweda Induced to Leave Catalyst? 7
Issue Two: Reasonable Notice 10
Issue Three: Did Mr. Ferweda Fail to Mitigate His Loss? 12
Issue Four: Compensation for Medical Expenses 14
CONCLUSION **15**

Introduction and Overview

[1] The plaintiff, Gerald Ferweda, was employed by the defendant, Mercer Celgar Limited Partnership ("Celgar"), from April 23, 2018–September 22, 2020, slightly less than two-and-a-half years. On September 22, 2020, Celgar terminated Mr. Ferweda's employment without cause. Mr. Ferweda worked as an operations specialist in a pulp mill owned and operated by Celgar in Castlegar, BC (the "Celgar Mill"). Prior to April 23, 2018, Mr. Ferweda held a similar position at a pulp mill owned by Catalyst Paper Corporation ("Catalyst") in Duncan, BC (the "Crofton Mill"). In total, Mr. Ferweda worked for Catalyst or its legal predecessors for 27 years.

[2] The main issue I must decide is the appropriate period of notice to which Mr. Ferweda was entitled. There are ancillary issues related to Mr. Ferweda's efforts to mitigate post-termination and his claims for certain health care expenses incurred by him during the notice period. However, the critical issue from both parties' perspective is the notice period. To date, Celgar has paid Mr. Ferweda the equivalent of five months' salary in lieu of notice. Mr. Ferweda seeks a lengthier period than that, based on his claim that he was induced by Celgar to leave his employment with Catalyst in 2018.

Factual Background

[3] Mr. Ferweda is a chemical engineer, who obtained his degree in 1987 from McMaster University. He moved to BC in 1991, and has remained here ever since, and for most of that time, he has worked at a pulp mill. Mr. Ferweda started working at the Crofton Mill on Vancouver Island in July 1992, as a junior engineer. Over time, he was promoted into positions of greater responsibility. In 2004, Mr. Ferweda became the operations specialist for the bleach plant at the Crofton Mill, and in 2013, he assumed the same responsibilities for the digester area. The bleach plant and digester area are the two primary components of a pulp mill, and each has a single operations specialist, who oversees all operations. An operations specialist is the senior, non-management, position in a pulp mill, reporting directly to the mill manager.

[4] In early 2018, Mr. Ferweda was 53 years old. His plan was to remain at the Crofton Mill until he retired at age 61. Mr. Ferweda was not particularly happy at the Crofton Mill, and considered himself to be overworked and underpaid. He believed that Catalyst was not adequately investing in the future in its Crofton Mill operations. Mr. Ferweda felt secure in his job, although he worried that the Crofton Mill might shut down prior to his planned retirement date.

[5] Although Mr. Ferweda shared his dissatisfaction with several people, including at least one high ranking employee of Celgar, in 2018 Mr. Ferweda was not actively looking for alternative employment.

[6] In January 2018, Vern Phillips, a recruiter working for Celgar, contacted Mr. Ferweda by email regarding a job at the Celgar mill in Castlegar. The email was addressed to Mr. Ferweda using his first name (“Gerry”), and said Mr. Phillips was recruiting for the position of “Area Manager, Fibreline”, which would have been a slight step up from Mr. Ferweda’s position at the Crofton Mill. The second paragraph referred to the job as “the opportunity to lead a world class team and mill.” The email closed with the following:

> If you can think of anyone we should be speaking with who would be suitable and interested, please let me know. An opportunity to go into more detail about this position would be greatly appreciated. It’s a great role for the right person.

[7] Following an exchange of email communications between Mr. Ferweda and Mr. Phillips, Mr. Ferweda travelled to Castlegar on February 1, 2018, to tour the facility and meet with some senior management staff. Among the people who met with Mr. Ferweda on February 1 were Rick Percy (Celgar Mill manager), Josh Bellamy (production manager), and John Belland (manager of human resources).

[8] Mr. Ferweda’s interactions with Celgar staff included the following:

a) Mr. Percy told Mr. Ferweda that the Celgar Mill had very good fibre supply, both from a sawmill on-site and from a source in the United States;

b) Mr. Percy told Mr. Ferweda that the benefits at Celgar were far better than those at Catalyst, where Mr. Percy had previously worked;

c) Mr. Percy told Mr. Ferweda that, unlike Catalyst, Celgar paid for overtime;

d) Mr. Percy told Mr. Ferweda that Celgar hired for the "long term"; and

e) Mr. Belland asked Mr. Ferweda how long he was prepared to commit to Celgar, and Mr. Ferweda said he could commit to five years, or more if he was enjoying the job.

[9] The visit to the Celgar Mill site included: lunch with senior management staff on February 1, 2018, followed by a dinner later that night; and, several nights hotel stay in Castlegar. Following the site visit, Celgar reimbursed Mr. Ferweda for all travel expenses incurred by him and his spouse, who also attended.

[10] Celgar then requested that Mr. Ferweda take a series of on-line aptitude tests, which he completed over several hours.

[11] On March 13, 2018, Mr. Belland formally made an offer of employment to Mr. Ferweda. At that time, Mr. Ferweda was the only candidate who had attended the Celgar Mill for a site visit and interview. Celgar had no other candidates for the job which was eventually offered to Mr. Ferweda.

[12] The actual position offered to Mr. Ferweda was not fibreline manager, but rather operations specialist, the same position Mr. Ferweda held at Catalyst. Mr. Bellamy testified that the original job description conveyed to Mr. Ferweda was a mistake, that the position was always envisaged to be an operations specialist.

[13] Mr. Ferweda thought the original offer was attractive, but not sufficient to cause him to leave Catalyst. The pension benefit was slightly better. The paid vacation time was identical to Catalyst. The benefits were better than those at Catalyst. The base salary offered was $130,000, almost exactly what Mr. Ferweda was making at Catalyst.

[14] On balance, Mr. Ferweda was not persuaded that he should leave his job at Catalyst based on the offer from Celgar. Mr. Ferweda had many years of continuous employment at Catalyst, and did not believe his job was in any jeopardy. He was somewhat worried that the Crofton Mill might shut down and all employees would then be terminated, but he was not concerned about being fired or laid off.

[15] Mr. Ferweda telephoned Mr. Percy, and advised him that there was insufficient incentive in the offer to cause Mr. Ferweda to leave Catalyst, so he was declining. Mr. Percy gave Mr. Ferweda Mr. Bellamy's cellular number, and Mr. Ferweda called him as well, and discussed the offer. Mr. Bellamy said there might be some flexibility on salary. Thereafter, Celgar made a second offer to Mr. Ferweda, with identical terms as the first, except for salary, which increased to $140,000. Mr. Ferweda accepted that offer and then resigned his employment at Catalyst.

[16] The offer which Mr. Ferweda accepted contained neither a probationary period, nor a termination clause. Both Mr. Ferweda and Mr. Bellamy testified that they viewed the job as a long-term hire.

[17] Mr. Ferweda frankly conceded that there were many aspects of the Celgar position that were extremely favourable from his perspective. He viewed Celgar as a more attractive employer than Catalyst, for a variety of reasons, which he detailed. Also, he found the location to his liking, as he was then in a relationship with a partner who lived in Alberta. Moreover, he said the variety of outdoor activities in the Castlegar area suited his lifestyle.

[18] Mr. Ferweda commenced working at Celgar in April 2018. In summer 2019, he purchased a property between Nelson and Castlegar and started building a house. In late September 2019, Mr. Ferweda fell from the roof of the house, and fractured several vertebrae in both his back and neck. As a result, Mr. Ferweda was off work for several months.

[19] While Mr. Ferweda was off work, Celgar trained a younger employee to fill the operations specialist role for which Mr. Ferweda had been hired. Mr. Ferweda

returned to work gradually, commencing in February 2020. By summer 2020, he was close to working at 100% capacity.

[20] Mr. Ferweda's employment was terminated on September 22, 2020.

[21] The reason for termination was downsizing. Mr. Bellamy testified that he received a corporate directive to cut the head count at the mill site by a considerable number. Celgar created a list of 18-20 people to potentially be terminated, and from that list, approximately 15, including Mr. Ferweda, were let go.

[22] At the time of trial, Mr. Ferweda remained unemployed. I will set out some of the evidence he gave of his attempts to find new employment when I address the Celgar's submissions on failure to mitigate.

[23] Initially, Celgar paid Mr. Ferweda eight weeks salary in lieu of notice, but has since made additional payments which total approximately five months' salary.

Issues

[24] The four issues I must decide are these:

a) Did the Celgar induce Mr. Ferweda to leave his existing long-term employment?

b) What is an appropriate notice period?

c) Did Mr. Ferweda fail to mitigate his loss?

d) Is Mr. Ferweda entitled to compensation for out-of-pocket expenditures for health care expenses that should be covered by his employee benefits plan?

Issue One: Was Mr. Ferweda Induced to Leave Catalyst?

[25] This is by far the most important issue I must decide in this case. The amount of notice to which Mr. Ferweda is entitled will be directly affected by the answer to the inducement question.

[26] The leading case on inducement in the wrongful dismissal context remains *Wallace v. United Grain Growers Ltd*., [1997] 3 S.C.R. 701, 1997 CanLII 332 (S.C.C.). There, at paras. 83 and 85, the Court said this:

> One such factor that has often been considered is whether the dismissed employee had been induced to leave previous secure employment: see e.g. *Jackson v. Makeup Lab Inc.* (1989), 27 C.C.E.L. 317 (Ont. H.C.); *Murphy v. Rolland Inc.* (1991), 39 C.C.E.L. 86 (Ont. Ct. (Gen. Div.)); *Craig v. Interland Window Mfg. Ltd.* (1993), 1993 CanLII 1821 (BC SC), 47 C.C.E.L. 57 (B.C.S.C.). According to one authority, many courts have sought to compensate the reliance and expectation interests of terminated employees by increasing the period of reasonable notice where the employer has induced the employee to "quit a secure, well-paying job . . . on the strength of promises of career advancement and greater responsibility, security and compensation with the new organization" (I. Christie et al., *supra*, at p. 623).
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> …
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> In my opinion, such inducements are properly included among the considerations which tend to lengthen the amount of notice required. I concur with the comments of Christie et al., *supra*, and recognize that there is a need to safeguard the employee's reliance and expectation interests in inducement situations. I note, however, that not all inducements will carry equal weight when determining the appropriate period of notice. The significance of the inducement in question will vary with the circumstances of the particular case and its effect, if any, on the notice period is a matter best left to the discretion of the trial judge.

[27] Both counsel provided summaries of cases, in the main previous decisions of this Court, in which judges either did or did not find that things said and done by the employer at time of hiring amounted to an inducement which would serve to elongate the period of notice. Those cases, and the disparity of results reached in them, serve to highlight the inherently fact-specific nature of the legal exercise.

[28] In *Sollows v. Albion Fisheries Ltd*., 2017 BCSC 376, at paras. 27–48, Justice Gropper set out a helpful distillation of some of the important considerations, as gleaned from appellate authorities. I agree with Gropper J. that the analysis is not wholly subjective (i.e., based only on the expectations of the employee). Rather, it must be a consideration of what was within the "reasonable contemplation of the parties when the contract was formed": para. 28.

[29] For the conduct said to constitute an inducement to lead to an increased period of notice, there must be "some evidence of a representation by the employer

creating an expectation or reliance interest at the time the contract is made": *Sollows* at para. 28.

[30] I also take from the various cases cited by counsel, and from the earlier quoted portion of *Wallace*, that even if an inducement is found, there is no set formula by which it will then increase the period of notice. Rather, the presence of an inducement will result in some additional notice period, but the amount will vary based on the exact nature of the body of evidence on the issue, and importantly, the strength of the representation.

[31] In this case, I am satisfied that there was an inducement made by the employer on which Mr. Ferweda reasonably relied. Based on all the circumstances surrounding the creation of the employment contract, Celgar created an expectation on the part of Mr. Ferweda that the opportunity at Celgar was such that it would be advantageous to him to leave his secure long-standing employment and take a job which was expected to be long-term.

[32] I do not accept the position of Celgar that there was equal interest on the part of both parties, nor that Mr. Ferweda was so unhappy at Catalyst that he was actively looking for alternate employment.

[33] In reaching this conclusion, I find the following facts to be important considerations:

a) Celgar recruited Mr. Ferweda. Mr. Ferweda was not actively looking for a different job, nor did he respond to a newspaper advertisement. Rather, he responded to an email sent directly to him by a recruiter retained by the employer;

b) Celgar attempted to make the job attractive to Mr. Ferweda during the visit to the Celgar Mill, which was paid for by the Celgar;

c) During the Celgar Mill visit, Mr. Percy, who had previously worked for Catalyst, made statements which pointed out the aspects of

employment with Celgar that were superior to Catalyst, including paid overtime, better benefits and a stable fibre supply;

d) Mr. Percy expressly told Mr. Ferweda that Celgar hired for the "long term";

e) Mr. Belland specifically asked Mr. Ferweda how long he was prepared to commit to Celgar for, implying that the position was meant to be comparatively long-term; and

f) Mr. Ferweda did not accept the first offer, but only took the job after Celgar offered an increased salary.

[34] Based on the totality of things said and done by Celgar at the time the employment contract was formed, Mr. Ferweda reasonably believed that he was being offered an opportunity to potentially end his career with Celgar, in a position which although identical to the one he was leaving, offered greater job satisfaction, and considerably better remuneration and benefits.

Issue Two: Reasonable Notice

[35] Having found an inducement, I must determine the extent to which that increases the period of notice to which Mr. Ferweda is entitled. I must consider the impact of the inducement, along with the other factors which affect notice, from the well-known case of *Bardal v. Globe & Mail Ltd*. (1960), 24 D.L.R. (2d) 140, 1960 CanLII 294 (O.N.S.C.). Those are:

a) The character of the employment;

b) The length of service of the employee;

c) The age of the employee; and

d) The availability of similar employment.

[36] In *Ansari v. British Columbia Hydro and Power Authority*, [1986] 4 W.W.R. 123, 1986 CanLII 1023 (B.C.S.C.), Chief Justice McEachern confirmed that the four

factors listed in *Bardal*, although not exhaustive, were the most important considerations in fixing an appropriate notice period. Chief Justice McEachern also noted that there is a "rough upper limit" for reasonable notice, which he fixed at 18–24 months, absent exceptional circumstances.

[37] More recently, the Court of Appeal, in a series of cases, has stated that for short term employees, a notice period of 2–3 months, perhaps extended to five months, is appropriate, absent some other unusual factor: *Saalfeld v. Absolute Software Corporation*, 2009 BCCA 18, at para. 15.

[38] In a number of appeals, the court reduced the notice period awarded by trial judges. For example, in *Hall v. Quicksilver Resources Canada Inc.*, 2015 BCCA 291, where a seven-month notice period for a nine-month employee was reduced to three months, the court directed trial judges to "look to what awards have been given in similar cases": para. 42. In *Pakozdi v. B & B Heavy Civil Construction Ltd.,* 2018 BCCA 23, the court also allowed an appeal and reduced a notice period for a one-year employee from eight to five months, as the vulnerability of the terminated employee resulting from his health problems was not sufficient to place "the notice period outside of the range of reasonableness": para. 30.

[39] Notably, no issues of inducement were raised in those appeals. Whereas, in *Saalfeld* the court listed inducement among the reasons for extending the notice period for short term employees: para. 15.

[40] Thus, were it not for the inducement, I would be inclined to agree with Celgar that the amount already paid, the equivalent of five months notice, was appropriate.

[41] However, the inducement I have found results in an increase to that notice period. I also agree with Mr. Ferweda's submission that the unique character of the employment and circumstances of Mr. Ferweda, including his age, lead to an increase to the appropriate period of notice.

[42] Mr. Ferweda occupied the senior, non-management position in the Crofton Mill—operations specialist. In every pulp mill, there are two such positions, one in

the bleach plant, one in the digester area. There are a finite number of operating pulp mills in BC, and the number is decreasing. Thus, there are very few comparable positions available. Mr. Ferweda had worked his way up through the ranks at Catalyst, and earned the position of operations specialist. He was clearly qualified to assume a comparable role with Celgar. However, despite his expertise and years of work in the business, he had no management experience. When he was terminated by Celgar, he was not qualified for any management role, and would likely not be viewed as someone who could be groomed for such a position, because of his age.

[43] Thus, Mr. Ferweda's options for new comparable employment were extremely limited. He had spent the vast majority of his adult working life in the pulp mill sector. Although there may have been numerous job opportunities for similarly qualified engineers in that field, all such jobs would have been a significant step down from the positions he had occupied for several years, with an attendant decrease in remuneration.

[44] Those matters, in addition to the inducement I have found, lead me to conclude that an appropriate notice period is as suggested by counsel for Mr. Ferweda, something between 12–18 months. The notice period of 12 months for a 16-month employee based on inducement was upheld by the Court of Appeal in *Kussmann v. AT&T Capital Canada Inc.*, 2002 BCCA 281 at para. 28. Here, Mr. Ferweda was employed by Celgar for a longer period; however, because the inducement was not in the nature of a promise of promotion or other advancement, I tend to view it as a factor which results in a somewhat more modest increase in the notice period. I would fix the appropriate notice period at 12 months.

Issue Three: Did Mr. Ferweda Fail to Mitigate His Loss?

[45] The law is clear that an employee who is terminated without cause has a duty to mitigate their losses. The basic duty is to take reasonable steps to obtain equivalent employment elsewhere and to accept such employment if available: *Forshaw v. Aluminex Extrusions Ltd*., (1989) 39 B.C.L.R. (2d) 140 at 141, 1989 CanLII 234 (B.C.C.A).

[46] The defendant bears the burden of showing on a balance of probabilities that the plaintiff has failed to make reasonable efforts to find work and that work could have been found, if reasonable efforts had been made: *Evans v. Teamsters Local Union No. 31*, 2008 SCC 20 at para. 30, citing *Red Deer College v. Michaels*, [1976] 2 S.C.R. 324, 1975 CanLII 15 (S.C.C.).

[47] The duty to act reasonably in seeking alternate employment must be viewed from the perspective of the wrongly dismissed employee, as noted by the Court of Appeal in *Forshaw* at 143–44:

> The duty to "act reasonably", in seeking and accepting alternate employment, cannot be a duty to take such steps as will reduce the claim against the defaulting former employer, but must be a duty to take such steps as a reasonable person in the dismissed employee's position would take in his own interests—to maintain his income and his position in his industry, trade or profession. The question whether or not the employee has acted reasonably must be judged in relation to his own position, and not in relation to that of the employer who has wrongfully dismissed him.

[48] Here, Celgar submits that it has met its burden of demonstrating a failure to mitigate by Mr. Ferweda. Counsel points to Mr. Ferweda's minimal steps in the first several months following his termination to find work. His efforts were essentially confined to reaching out to his industry contacts via email to make general inquiries as to potential jobs. His first formal application for a new position was five months post-termination. Thereafter, Mr. Ferweda limited his job search both geographically and in terms of the type of jobs he was seeking, focussing almost exclusively on similar positions within the pulp industry.

[49] Mr. Ferweda concedes that his efforts might be viewed as "somewhat lacking from an objective standpoint", but points out that there is no evidence that he missed out on any equivalent employment in the time during which he was not actively applying for jobs. Counsel also stresses Mr. Ferweda's lack of skill and experience in seeking employment using modern search techniques, and points out that Celgar offered no assistance in that regard.

[50] I find that Celgar has proved that, at least for the first five months following his termination, Mr. Ferweda failed to make reasonable efforts to find equivalent

employment. However, Celgar has failed to prove that such employment could have been found, if Mr. Ferweda had made reasonable efforts.

[51] I accept that there need not be actual evidence of missed opportunities, and that an inference can be drawn from other evidence. However, in this case there is simply no evidence from which to draw the inference sought. There is certainly evidence, including from Mr. Ferweda himself, that he is qualified for a variety of positions in both the pulp industry and potentially the mining industry. Nonetheless, there is no evidence of any equivalent employment to that from which he was fired being available to Mr. Ferweda during the period he was not actively looking for work. Indeed, Mr. Ferweda at time of trial had exhausted almost all potential opportunities in that regard, without success. He remained unemployed. At some point, Mr. Ferweda must consider broadening his job search considerably, and perhaps he should take a job for which he is overqualified, in a different field, for considerably less remuneration. Perhaps Mr. Ferweda should already have done so. However, there was no obligation on him to do so in the timeframe advocated by Celgar.

[52] I repeat, Celgar has failed to demonstrate that, despite Mr. Ferweda's failure to make reasonable efforts to find equivalent employment post-termination, such equivalent employment was available. That being so, Celgar has failed to prove a failure to mitigate on the part of Mr. Ferweda.

Issue Four: Compensation for Medical Expenses

[53] Mr. Ferweda claims that he should be reimbursed for expenses he incurred for medical treatments and prescriptions for both himself and his spouse during the reasonable notice period, which would have been covered by his employee benefits plan were he still employed by Celgar.

[54] In support of that claim, Mr. Ferweda has provided a heavily redacted summary of the claimed expenses. The redactions are to the column in which there is a description of the item being claimed. Many of those items are said to be associated to Mr. Ferweda's spouse. Mr. Ferweda testified that he redacted the

descriptions in order to protect his spouse's privacy. I note that the descriptions of his own claims are also redacted.

[55] In my view, the failure to present complete evidence is fatal to Mr. Ferweda's claim for reimbursement. Without an ability to see what each claimed item represents, it is impossible to determine if each would have been covered by the employee benefits plan, or would potentially have been subject to one of the exclusions.

[56] The claim for reimbursement of medical expenses is dismissed.

Conclusion

[57] In summary, I find that Mr. Ferweda was induced by Celgar to leave long-standing, stable employment with Catalyst and accept a position with Celgar. The appropriate period of notice to which Mr. Ferweda was entitled, in all the circumstances, is 12 months. I make no deduction for failure to mitigate, which I find Celgar has failed to prove. I make no award for any medical expenses incurred by Mr. Ferweda during the period of reasonable notice.

[58] Mr. Ferweda has been substantially successful in this action. Unless there are circumstances of which I am unaware, he is entitled to his costs of this proceeding at Scale B.

"Tammen J."