Court of King's Bench of Alberta

Citation: Challis v Maverick Oilfield Services Ltd., 2023 ABKB 514

Date:20230908
Docket: 1901 13117
Registry: Calgary

Between:

Christopher W. Challis

Plaintiff

- and -

Maverick Oilfield Services Ltd.

Defendant

Reasons for Decision
of the
Honourable Justice R.W. Armstrong

Appeal from the Order by

J.L. Mason, The Honourable Applications Judge,

Dated the 14th day of December 2021

These are reasons that were delivered orally on September 8, 2023. I have decided to publish these reasons for the purpose of greater accessibility. In this written version I have added case citations to the reasons previously provided orally. The oral version that was delivered in court remains the official version.

Introduction

[1] The Respondent, Christopher Challis, was employed by the Appellant, Maverick Oilfield Services Ltd. ("Maverick"), as its CEO. Mr. Challis's employment started on June 25, 2012, and ended on May 31, 2018, following his resignation.

[2] When Mr. Challis started his employment with Maverick, there was no written employment agreement. The terms of an oral agreement were set out in a draft contract that was never signed. In 2017, a written employment agreement between Maverick and Mr. Challis was signed. It contained a clause providing for a severance payment in the amount of $200,000 if Mr. Challis's employment ceased for any reason, including his resignation or termination for cause. Maverick claims those severance terms were never agreed to and ought not to have been included in the agreement.

[3] In 2015, while Mr. Challis was employed by Maverick, Maverick declared a bonus for its executives, including Mr. Challis. Half of the bonus was paid when it was declared, and half of the bonus was deferred. When Mr. Challis's employment ended, Maverick refused to pay the deferred portion of his bonus.

[4] Mr. Challis sought summary judgment for payment of severance in the amount of $200,000.00 and for payment of the deferred portion of his bonus in the amount of $26,442.31. The Applications Judge dismissed the application for summary judgment of the severance but granted summary judgment in the amount of $26,442.31 for the deferred portion of Mr. Challis's bonus.

[5] Maverick appeals the decision of the Applications Judge granting summary judgment for the deferred portion of Mr. Challis's bonus.

Preliminary Issue – Scope of Appeal

[6] The Applications Judge determined two distinct issues when the matter was before her. There was the issue of the deferred bonus payment and the issue of the severance payment. Each party was successful on one issue and unsuccessful on the other.

[7] The notice of appeal filed on behalf of Maverick did not clearly specify that it was only appealing the decision on the deferred bonus. It stated: "The Appellant appeals to the Alberta Court of Queen's Bench a decision of Master J.L. Mason, sitting at Calgary, Alberta, who on December 14, 2021, made the Order in your favor." While not clearly stated it can be fairly inferred that the only issue being appealed was the issue of the deferred bonus as that is the issue that the Applications Judge determined in Mr. Challis's favor.

[8] In its brief, Maverick was much clearer. Paragraph 4 of Maverick's brief says "The within Appeal is brought by Maverick and relates only to Master Mason's determination that the 2015 Deferred Bonus is owing and payable to the Plaintiff.

[9] The issue as to the scope of the appeal was raised because Mr. Challis's brief argued both the deferred bonus issue and the entitlement to the severance payment issue and sought relief requiring Maverick to pay the deferred bonus and pay severance in the amount of $200,000.00.

[10] Mr. Challis did not file a notice of appeal and so Maverick did not have notice that Mr. Challis was seeking to appeal the Application Judge's decision on the issue of the severance payment. Mr. Challis argued that because an appeal from an Applications Judge is a hearing *de novo*, he was not required to file a notice of appeal order for all the issues that were before the Applications Judge to be subject to review.

[11] I do not accept Mr. Challis's position. It is based on a misunderstanding of the term *de novo* as it has been applied to appeals from decisions made by applications judges. The origin of the term *de novo* and its meaning in the context of appeals from decisions of applications judges was thoroughly canvassed in the decision of ***Sewak Gill Enterprises Inc. v Bedaux Real Estate Inc.***, 2018 ABQB 823 at paras 15-19 (overturned on other grounds 2020 ABCA 125). The relevant points arising from that decision may be summarized as follows.

[12] First, the description of an appeal of a decision made by an applications judge as *de novo* originates from the decision of Justice Côté in ***Bahcheli v Yorkton Securities Inc.***, 2012 ABCA166. His use of the term *de novo* was in relation to the applicable standard of review and not the mechanics of appeals from applications judges.

[13] Second, while the threshold for the introduction of new evidence on an appeal from an applications judge is low and the standard of review is correctness, an appeal from an applications judge may look like a hearing *de novo*, but it is not. An appeal of an applications judge's decision is not a "new hearing of the matter, conducted as though the original hearing had not taken place."

[14] Third and finally, rule 6.14(3) states that an appeal from an applications judge's order is an appeal on the record. If the appeal was truly a hearing *de novo* there would be no need to speak of standard of review, there would be no need for a judge to make a finding that additional evidence must be relevant and material before it can be adduced on appeal, and there would be no need for the appellant to provide a transcript of the proceedings below for the purpose of the appeal.

[15] I agree with the description of appeals from decisions of applications judges set out in the ***Sewak*** decision. An appeal of a decision of an applications judge is an appeal on the record. While there are elements of the appeal that are similar to a hearing *de novo*, in that the threshold for the introduction of new evidence is low and the standard of review is correctness, that does not relieve a party who takes issue with a decision, or an element of a decision, of an applications judge from having to comply with rule 6.14 and file and serve a notice of appeal thereby giving the opposing party notice of the intent to appeal a ruling.

[16] Having not filed a notice of appeal in respect of the Applications Judge's decision on the issue of the severance payment, Mr. Challis is not entitled to pursue a remedy in respect of that issue. The appeal therefore proceeded on the issue of the deferred bonus only.

Standard of Review

[17] The standard of review on an appeal from the decision of an Applications Judge is correctness. No deference need be given to the Applications Judge's decision: ***Bahcheli v Yorkton Securities Inc.***, 2012 ABCA 166 at para 30.

Summary Judgment

[18] Summary judgment is meant to provide a more expeditious and less expensive means of fairly adjudicating a claim. Summary judgment applications are governed by rules 7.2 and 7.3 of the Alberta *Rules of Court*.

[19] The Supreme Court of Canada articulated the modern approach to summary forms of adjudication, such as summary judgment, in its decision of ***Hryniak v Mauldin***, 2014 SCC 7. The Court stressed the need for a "simplified" and "proportionate" means of adjudicating cases that is fair and just, recognizing that not every claim requires the same level of pre-trial process to achieve a fair result: ***Hryniak*** at paras 27 and 28.

[20] Building on the Supreme Court of Canada's call for an expeditious and proportionate

means of adjudicating claims, the Alberta Court of Appeal provided a comprehensive overview of the circumstances in which a fair and just result may be obtained by way of summary judgment in its decision of ***Weir-Jones Technical Services Inc v Purolator Courier Ltd.***, 2019 ABCA 49. At paragraph 47 of the decision, the Court of Appeal outlined four key considerations applicable in summary judgment applications which may be summarized as follows:

> 1) a genuine issue requiring a trial can arise because of uncertainties in the facts, the record, or the law;
>
> 2) an applicant for summary judgment must demonstrate there is either no merit or no defence to a claim and there is therefore no genuine issue for trial;
>
> 3) the respondent must put its best foot forward when resisting a summary judgment application. It is not sufficient for the resisting party to say that it will make its case at trial; and
>
> 4) looking at the totality of the record, a judge must be satisfied that the record is sufficient to permit that judge to summarily decide the case. A dispute on material facts that cannot be resolved on the record or that may require a credibility assessment to resolve may result in the judge finding there is a genuine issue for trial resulting in dismissal of a summary judgment application.

[21] In the present case, there were two issues before the Applications Judge: first, whether Maverick was liable to pay Mr. Challis the deferred portion of his declared performance bonus and second, whether Mr. Challis was entitled to receive the severance payment contemplated in his signed employment agreement. As previously stated, the only issue before me on appeal was whether Maverick is liable to pay Mr. Challis the deferred portion of his declared performance bonus. The Applications Judge determined that issue was suitable for summary disposition, and she granted judgment to Mr. Challis for $26,442.31, that being the amount of the deferred portion of Mr. Challis's bonus.

The Deferred Bonus Payment

[22] On appeal, Maverick asserts that Mr. Challis is not entitled to receipt of the deferred portion of his bonus and that the Applications Judge erred in granting Mr. Challis summary judgment for that deferred bonus. According to Maverick, based on the verbal agreement to defer payment, the deferred portion of the bonus did not become payable until Maverick began to generate net income, meaning retained profits after accounting for costs and operating expenses. As Maverick has not generated net income since the bonus was declared, the deferred portion of the bonus is not payable.

[23] In the alternative, Maverick asserts that if there was no verbal agreement to defer payment of half the bonus, then Mr. Challis is statute barred from pursuing the claim for the unpaid bonus as it would have been payable within 60 days of the end of the fiscal year in which the bonus was declared, and the applicable limitation period expired before Mr. Challis filed his statement of claim.

[24] Mr. Challis agrees that the deferral agreement delayed payment of the bonus until Maverick's financial position had improved but he also contends that it was understood if an employee left their employment with Maverick before the event triggering payment occurred, the deferred portion of the bonus would be paid out when that employee's employment ceased.

[25] There is a factual dispute regarding the terms of the deferral agreement. However, not every factual dispute automatically gives rise to a triable issue. The factual dispute with respect

to payment of the deferred bonus can be resolved on the record before me such that it does not raise a triable issue.

[26] There are several undisputed facts that assist in the resolution of the disputed facts. First, there is no issue that a bonus, in the amount of $52,884.62 was declared for a group of Maverick's senior managers and executives in December 2015. Having been declared, the bonus was payable to each recipient as part of their accrued earnings.

[27] Second, there is no dispute that all the bonus recipients agreed to defer payment of ½ of the amount of the declared bonus. Each recipient received $26,442.31 at the time the bonus was declared and agreed to defer payment of the remaining bonus until the company's financial picture improved.

[28] Third, the parties agree that the deferral agreement was the same for all the bonus recipients. Mr. Challis was to be treated the same as all the other bonus recipients.

[29] Fourth, it is not in dispute that Maverick's financial position never improved to the point sufficient to trigger payment of the deferred bonus.

[30] Fifth, it is undisputed that all the bonus recipients who are no longer employed by Maverick received payout of the deferred portion of their bonus when their employment ended.

[31] These undisputed facts lead to the conclusion that it was understood that any accrued bonus owing to an employee would be paid out if an employee's employment with Maverick ended. If that were not the case, there would have been no reason for Maverick to pay out the bonus to other departing employees.

[32] In their submissions, Maverick suggested that the payout to departed employees was simply an exercise of Maverick's discretion to pay the deferred bonus to the departing employee; however, there is no evidence to support this submission.

[33] Maverick is required to put its best foot forward when resisting a summary judgment application. If it is Maverick's contention that it exercised its discretion to pay some departing employees out but not others, then it is incumbent on Maverick to lead evidence with respect to that exercise of discretion. In the absence of any evidence, I am not persuaded that Maverick was simply exercising its discretion when it paid out departing bonus recipients other than Mr. Challis.

[34] There are two additional factors that cause me to conclude Maverick was not exercising its discretion when it paid out departing bonus recipients. First, there is an email exchange between Mr. Schnell, the owner and president of Maverick, and Mr. Challis on June 18, 2018. When Mr. Challis inquired about payment of the deferred portion of his accrued bonus, Mr. Schnell did not advise that he was not exercising his discretion to pay the bonus. Rather, he advised "We should have the funds to pay you out either late this week or early next week." Mr. Schnell's response is strongly indicative of an understanding on his part that the deferred portion of Mr. Challis's bonus was payable given that Mr. Challis's employment had ended.

[35] The second additional factor at play is the *Employment Standards Code*, RSA 2000, c E-9. Section 8(2) of the *Employment Standards Code* requires an employer to pay an employee's earnings within 10 days of the end of the pay period in which the termination of employment occurs or 31 days after the employee's last day of employment.

[36] While a bonus that is a gift or that is dependent on the discretion of an employer that is not related to hours of work, production or efficiency, may not be captured in the definition of earnings or wages (earnings includes wages), I find that this bonus had been declared and had therefore accrued as earnings to the recipients. Even if there was a residual discretion as to when the deferred portion of the bonus would be paid, that does not change the fact that the bonus had

been declared and was payable to each of the recipients. In other words, once the bonus was declared, payment was no longer discretionary even if the timing of the payment was. As the declared bonus formed part of Mr. Challis's earnings, he was entitled to payment of the deferred portion of the bonus when his employment ended.

[37] The *Employment Standards Code* provides minimum standards to protect employees and those minimum standards cannot be avoided by agreement or otherwise. Section 4 provides that any agreement that the Act or a provision thereof does not apply, or that the remedies provided in the Act are not available to an employee is against public policy and void. I am unable to find that Maverick and its managers and executives who received the bonus would have entered into a deferral agreement that purported to override the operation of section 8(2) of the Act and would therefore be considered against public policy and void.

[38] Taking into account the uncontroverted evidence, particularly the treatment of the other managers and executives who has the same bonus deferral agreement as Mr. Challis, the correspondence between Mr. Schnell and Mr. Challis following Mr. Challis's resignation, and recognizing the minimum protections provided by the *Employment Standards Code*, I am able to resolve the disputed facts regarding the terms of the bonus deferral agreement. I am satisfied that it was a term of the deferral agreement, whether express or implied, that any bonus recipient who left the employee of Maverick would be entitled to payout of the deferred portion of the bonus at the time the employment ended.

[39] Given the deferral agreement, Mr. Challis's entitlement to payment did not arise until his employment ended and therefore his claim was commenced before the expiry of any limitation period.

[40] For these reasons, I am unable to find any merit in Maverick's position with respect to the deferred bonus and there is therefore no genuine issue for trial with respect to payment of the deferred portion of the bonus.

[41] I note at this juncture that there remains an issue to be determined at trial with respect to the governing employment agreement. The determination of that issue will have no bearing on the payment of the deferred portion of the bonus. Both versions of the disputed contract provide for payment of accrued earnings upon the termination of Mr. Challis's employment. As I have found, the deferred portion of the declared bonus constituted accrued earnings and neither agreement is at odds with the terms of the deferral agreement such that an issue as to Mr. Challis's entitlement to the deferred portion of his bonus may arise depending on the outcome of the trial.

[42] I agree with the conclusion reached by the Applications Judge and am satisfied that the decision was correct. There is no merit to Maverick's assertion that Mr. Challis is not entitled to immediate payment of the deferred portion of his bonus. Accordingly, there is no genuine issue for trial with respect to the payment of the deferred portion of the declared bonus. Mr. Challis is entitled to judgment in the amount of $26,442.31 plus prejudgment interest. The funds held in court shall be released to Mr. Challis.

[43] Mr. Challis shall have his costs of this appeal. If the parties are unable to agree on the costs, they may apply to me in writing within 30 days for a determination of costs.

Heard on the 6th day of September, 2023.
Dated at the City of Calgary, Alberta this 8th day of September, 2023.

R.W. Armstrong
J.C.K.B.A.

Appearances:

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