IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Wiederhold v. Aspen Technology, Inc.,* 2024 BCSC 1731

Date: 20240918
Docket: S231467
Registry: Vancouver

Between:

David M. Wiederhold

Plaintiff

And

Aspen Technology, Inc. and Aspentech Canada Corporation

Defendants

Before: The Honourable Mr. Justice Milman

Reasons for Judgment

Counsel for the Plaintiff:	N. Mitha, K.C. I. Martinich
Counsel for the Defendants:	D. Price C. Penn
Place and Date of Hearing:	Vancouver, B.C. July 26, 2024
Place and Date of Judgment:	Vancouver, B.C. September 18, 2024

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I. Introduction

[1] In this action, the plaintiff, David Wiederhold, has sued his employer, the defendant, Aspentech Canada Corporation ("ACC") and its parent company, Aspen Technology, Inc. ("ATI"), seeking to recover $103,067.60 in unpaid bonuses and commissions that he claims to be owing to him under an incentive plan that the defendants offer to certain of their employees.

[2] The defendants contend that the matter is not properly before this court, but should instead be resolved by a panel of three arbitrators in Boston, Massachusetts, as the parties previously agreed. To that end, they have applied for a stay of this action pursuant to s. 7 of the *Arbitration Act*, S.B.C. 2020, c. 2 [*Act*].

[3] Mr. Wiederhold opposes the application. He argues that he ought to be allowed to proceed with his claim in this court because the arbitration agreement asserted by the defendants should not be enforced, for a variety of reasons.

[4] For the reasons that follow, I have concluded that the application should be refused.

II. Background Facts

[5] ATI is in the business of developing and supplying software for use in industrial settings. It operates in 22 countries worldwide, including in Canada through its subsidiary, ACC. It has a market capitalisation in excess of US $12 billion and over 3,700 employees. Its headquarters are in Bedford, Massachusetts, a suburb of Boston.

[6] Mr. Wiederhold is an engineer who resides in Vancouver.

[7] By letter dated July 10, 2008, the defendants offered Mr. Wiederhold employment as a "Sr. Sales Account Manager" with ACC. Under the heading "Compensation", the letter stated, among other things, that if hired, he could expect to receive a base salary of $100,000 and, in addition, would be eligible to participate

in the defendants' 2008 Sales Account Manager incentive plan, in accordance with its terms. His annualised commission target was said to be $66,687.37 for that year.

[8] The letter added the following:

> Please note that [ACC] reserves the right to modify and/or amend its incentive and bonus plans from time to time in its sole discretion and/or in accordance with business needs with or without prior notice to employees.

[9] On July 15, 2008, Mr. Wiederhold signed the letter to indicate his acceptance of its terms. He has been employed by ACC since then, based in Vancouver. On September 2, 2021 he was promoted to the position of "sales account executive" and remains in that position today.

[10] Soon after Mr. Wiederhold began working for ACC, he was presented with another document setting out the terms of the defendants' 2008 incentive plan. He was asked to sign that document to indicate his acceptance of its terms, which he did.

[11] Between 2008 and 2020, Mr. Wiederhold and other participating employees were presented in July with new incentive plan terms for the ensuing fiscal year, which runs from July 1 to June 30. On each such occasion, Mr. Wiederhold signed the revised plan document when requested to do so.

[12] Each iteration of the incentive plan presented to Mr. Wiederhold concluded with the following "General Provisions":

> 1.Severability
>
> If any term or condition of this Plan is determined to be unenforceable under any applicable local, state or national statute or regulation, then: (i) the unenforceability of that term or condition will have no effect on the remaining terms and conditions of the Plan; and (ii) the Company will substitute a new, enforceable provision that most closely approximates the meaning and intent of the unenforceable term or condition.
>
> 2.Dispute Resolution
>
> Prior to bringing any legal action concerning commission under this Plan, the Plan Participant must submit a commission service request in Oracle to the IS Client Services Helpdesk or otherwise provide written notice to the Company with an explanation of the issue within 30 days of the date

> commissions for the applicable quarter were reported in the Xactly Incent online platform. If the Plan Participant fails to provide timely notice, any claim concerning such commissions shall be waived and forfeited unless otherwise required by the applicable law of the Plan Participant's residence.
>
> Unless otherwise required by the applicable law of the jurisdiction of the Plan Participant's residence, any legal action brought in support of any claim pursuant to this Plan shall be resolved exclusively by arbitration in the City of Boston, Massachusetts, USA in accordance with the commercial arbitration rules of the American Arbitration Association in a three-arbitrator panel, with all arbitrator fees and expenses shared equally between the Company and the Plan Participant. THE COMPANY WILL NOT BE LIABLE FOR DAMAGES OR ANY OTHER CLAIM, WHETHER IN TORT, CONTRACT, NEGLIGENCE, OR OTHERWISE, ARISING FROM EVENTS THAT OCCURRED MORE THAN ONE YEAR PRIOR TO INSTITUTION OF ARBITRATION PROCEEDINGS PREDICATED THEREON.
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> 3.Governing Law
>
> The adjudication of all claims raised under the Plan and the interpretation, application, enforcement or determination of validity, of the Plan and/or of any provision of the Plan Documents, in any form of action, shall be subject in all cases to the laws of the State of Delaware, USA, without regard to its conflicts of law provisions.

[13] On September 19, 2020, the defendants withdrew the form of incentive plan that Mr. Wiederhold and others had signed in July and issued a different set of terms in its place. One effect of the revision was to reduce the size of the bonuses and commissions to which Mr. Wiederhold was eligible in that fiscal year. He refused to sign the revised form when it was presented to him. Nevertheless, the defendants continued to calculate and pay him bonuses and commissions as if he had.

[14] On October 2, 2020, Mr. Wiederhold asked to be paid commissions on two sales he had arranged in August and September 2020, respectively, using the formula set out in the July version of the incentive plan, rather than the revised version issued in September. The defendants responded by informing him that his commissions on those sales would be calculated and paid according to the September formula.

[15] On March 14, 2023, Mr. Wiederhold commenced this action. In his notice of civil claim, he complains about the manner in which his commissions and bonuses were calculated in respect of six sales he arranged between August 2020 and June

2021, including the two that were the subject of his request in October 2020. He seeks damages of $103,067.60, reflecting the difference between his entitlement to bonuses and commissions for those sales under the July and the September 2020 versions of the incentive plan.

[16] On September 26, 2023, the defendants applied to stay this action in favour of arbitration. The application was amended on December 8, 2023, after Mr. Wiederhold amended the notice of civil claim.

III. Legal Framework

[17] Section 7 of the *Act* states as follows:

> 7(1) If a party commences legal proceedings in a court in respect of a matter agreed to be submitted to arbitration, a party to the legal proceedings may, before submitting the party's first response on the substance of the dispute, apply to that court to stay the legal proceedings.
>
> (2) In an application under subsection (1), the court must make an order staying the legal proceedings unless it determines that the arbitration agreement is void, inoperative or incapable of being performed.
>
> …

[18] The principles to be applied on an application such as this for a stay under that provision were conveniently summarised by Kirchner J. in *Tahmasebpour v. Freedom Mobile Inc*., 2024 BCSC 726, as follows:

> [19] In making a stay application under s. 7, a defendant need only satisfy the court that there is an "arguable case" that an arbitrator has jurisdiction over parties and the dispute: *Clayworth v. Octaform Systems.,* 2020 BCCA 117 at paras. 21-30. If an arguable case is made out, it must be left to the arbitrator to ultimately decide that jurisdictional question: *Peace River Hydro Partners v. Petrowest Corp.* 2022 SCC 41 at para. 39.
>
> [20] The "arguable case" standard is a relatively low bar and will be met unless there is "no nexus between the claims and the matters reserved for arbitration". Any "legitimate question of the scope of the arbitration jurisdiction" is to be deferred to the arbitrator: *Clayworth* at para. 30; *Peace River Hydro*, para. 85.
>
> [21] If the issue of jurisdiction turns on a pure question of law, that question may be determined by the court. However, where it turns on a question of fact or mixed fact and law, the court should only decide that issue if it can do so with a superficial regard to the record before it; otherwise, the question should be referred to the arbitrator: *Peace River Hydro,* para. 42;

> *Spark Event Rentals v. Google LLC*, 2024 BCCA 148, paras. 15-18; *3-Sigma Consulting Inc. v. Ostara Nutrient Recovery Technologies Inc*., 2023 BCSC 100 at para 19. To make findings based on a "superficial" review of the record, the facts must either be evident on the face of the record or undisputed by the parties: *Uber Technologies Inc. v. Heller*, 2020 SCC 16, para. 36.
>
> [22] As the Court of Appeal very recently confirmed, the question of whether the arbitration clause is void, inoperative or incapable of being performed is also to be referred to the arbitrator for determination unless that question can be clearly answered on a superficial regard to the record: *Spark Event Rentals,* paras. 15-18, 41, 47.
>
> [23] Alternatively, the court may substantively address the questions of jurisdiction, validity, operability, or ability to perform the arbitration agreement if it is shown on a limited assessment of the evidence that there is a real prospect that referring those questions to arbitration would result in the issues never being resolved: *Spark Event Rentals* paras. 19-23 and 40. Only if this threshold is met on a limited review of the evidence can the court then embark on a thorough analysis of the evidence to determine the issues of jurisdiction or enforceability substantively: *Spark Event Rentals,* para. 24 and 45.

IV. Discussion

A. The Issues Raised

[19] On its face, the arbitration clause cited above applies to this dispute. Nevertheless, Mr. Wiederhold argues that it should not be enforced, and the defendants' application for a stay should be dismissed on the basis that the clause is "void, inoperative or incapable of being performed" for the following reasons:

a) Mr. Wiederhold received no fresh consideration in exchange for its imposition after he was hired, rendering it unenforceable;

b) it is contrary to public policy, insofar as it purports to deprive Mr. Wiederhold of the protection of mandatory provisions of the *Employment Standards Act*, R.S.B.C. 1996, c. 113 [*ESA*], namely, his entitlement to "wages";

c) it is unconscionable, particularly in view of the disproportionate cost to Mr. Wiederhold of pursuing arbitration as stipulated, relative to the size of

his claim (as a result, he says, if this court does not hear his claim, no one will); and

d) it is coupled with a forum selection clause that is itself unenforceable.

[20] With respect to that last point, Mr. Wiederhold argues that the presence of a forum selection clause makes it necessary, in resolving this application, to apply the test set out in *Douez v. Facebook, Inc.* 2017 SCC 33, rather than the test applicable in arbitration cases, such as those summarised by Kirchner J. in the passage quoted above. However, in *Williams v. Amazon.com Inc.,* 2023 BCCA 314, DeWitt-Van Oosten J.A., writing for the Court, specifically refused to apply the *Douez* test in an arbitration case. I agree with the defendants that it is the arbitration test that applies here.

[21] In answer to Mr. Wiederhold's substantive arguments attacking the enforceability of the arbitration clause, the defendants invoke the so-called "competence-competence" principle, according to which a challenge to an arbitrator's jurisdiction should ordinarily be decided in the first instance by the arbitral tribunal itself, rather than this court. The preliminary issue that arises is therefore whether one or more of the recognised exceptions to that principle applies in the circumstances of this case.

[22] In *Spark Event Rentals Ltd. v. Google LLC*, 2024 BCCA 148, Harris J.A., writing for the Court, summarised the "two distinct but potentially complementary approaches to displacing the competence-competence principle", which he described colloquially as the "*Dell* framework" (after *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34) and the "brick wall framework."

[23] Mr. Wiederhold relies on both of them. The issues he raises are not ones of pure law, but of fact or mixed fact and law. Accordingly, under the *Dell* framework, they can only be resolved by this court if resolution is possible on a superficial review of the record, in the sense that the facts are either evident on the face of the record or undisputed by the parties.

[24] Under the brick wall framework, the preliminary question that arises is whether, on a limited assessment of the evidence, Mr. Wiederhold has demonstrated that there is a real prospect that referring these questions to arbitration would effectively prevent them from being resolved at all.

B. Consideration

[25] Turning first to the question of consideration, it is evident on the record before me that the defendants' initial offer of employment to Mr. Wiederhold expressly included provision for Mr. Wiederhold to participate in the defendants' incentive plan as it might be revised from time to time.

[26] However, it was silent on the question of dispute resolution mechanisms. In the absence of any such term, the proper law of the contract would be British Columbia law and this court would have subject matter jurisdiction over claims of the kind advanced here, under ss. 3 and 10 of the *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28.

[27] It is also evident on the record before me that the arbitration, forum selection and choice of law clauses were imposed later, after Mr. Wiederhold had already begun working for ACC, when he was asked to sign the incentive plan for that fiscal year.

[28] Nevertheless, the defendants argue that the essential facts are disputed and not evident on the record before me, and therefore that the question of whether the arbitration clause is supported by consideration should be referred to the arbitral tribunal to resolve. In particular, they say that:

a) Mr. Wiederhold was given an opportunity to earn a mid-year achievement bonus for the first time in the 2021 fiscal year, which amounted to fresh consideration; and

b) alternatively, no fresh consideration was required because the offer letter expressly stipulated that the defendants could modify the terms of the incentive plans as they wished.

[29] I agree with Mr. Wiederhold that it is possible to resolve this issue on a superficial review of the record. There are numerous authorities holding that restrictive terms added to an employment contract after the employee has already begun working must be supported by fresh consideration to be enforceable: *Adams v. Thinkific Labs Inc*., 2024 BCSC 1129; *Matijczak v. Homewood Health Inc*., 2021 BCSC 1658; *Nowak v. Biocomposites Inc*., 2018 BCSC 785; *Bailey v. Service Corporation International (Canada) ULC*, 2018 BCSC 235; and *Holland v. Hostopia Inc.*, 2015 ONCA 762.

[30] When Mr. Wiederhold began working for ACC, he already had the right to participate in the incentive plan as it might be revised from to time, including with the later addition of a mid-year bonus. I therefore find that the arbitration clause is unenforceable for want of fresh consideration to support it.

C. Public Policy

[31] Mr. Wiederhold also argues that the arbitration clause is void because it contravenes public policy, inasmuch as it effectively strips him of the minimum protection of the *ESA* provisions entitling him to wages (including those earned by way of commissions), contrary to ss. 4 and 17.

[32] Strictly speaking, that is an attack on the choice of law and forum selection clauses, rather than the arbitration clause itself. However, the combined effect of all three clauses is that Mr. Wiederhold would be required, if a stay is granted, to bring his claim in a foreign country where a foreign law is to be applied by a foreign arbitral tribunal. The tribunal would be directed to apply Delaware law “without regard to its conflicts of law provisions” in resolving the dispute.

[33] In an effort to address this concern, the defendants have adduced opinion evidence from Margaret M. DiBianca, an expert in Delaware law. Her conclusion is

that an arbitrator applying Delaware law would indeed apply the mandatory provisions of the *ESA*, for the following reasons:

> It is well settled under Delaware law that, in determining which jurisdiction's law applies to a contract, Delaware generally follows the Restatement (Second) of Conflict of Laws (the "Restatement"), under which the parties' choice of law will generally control. The Restatement recognizes an exception to the general principle, however, where the public policy of the "default state" (the state which would otherwise govern the parties' dispute absent a choice-of-law provisions) would limit or void a provision in the parties' agreement. In other words, as explained by the Delaware Court of Chancery in *Ascension*, the seminal case on this issue in the context of employment disputes, Delaware law will not permit parties to circumvent the law of the jurisdiction in which the employment was performed in favor of Delaware law where the public policy of the default state (the other jurisdiction) would prohibit the contractual provision.
>
> Here, Mr. Wiederhold's employment with AspenTech was in British Columbia and, thus, British Columbia is the "default state". Consequently, absent the Governing-Law Provision in the Plans, which provides for the application of Delaware law, the law of British Columbia would apply to the Amended Claim. Thus, in accordance with Delaware law, an arbitrator would ask three questions:
>
> (1) whether, absent the Governing-Law , the law of British Columbia would apply;
>
> (2) whether the enforcement of the Plan would "conflict with a fundamental policy" of British Columbia's law; and
>
> (3) whether British Columbia has a materially greater interest in the enforcement (or not) of the Plans with regard to the payment of wages and commissions to Mr. Wiederhold.
>
> If those questions are answered in the affirmative, the law of British Columbia will be applied notwithstanding the Governing-Law .
>
> It is my Opinion that this analysis requires the application of the law of British Columbia instead of Delaware. Ascension and its progeny make clear that the situs of employment is the "default state". Thus, British Columbia, as the default state, has the most significant relationship to the dispute, thereby answering the first question in the affirmative.
>
> As to the second question—whether the provisions of the Plans would conflict with a "fundamental policy" of British Columbia—I also answer this in the affirmative. British Columbia has made clear that it protects employees with certain guarantees relating to wages as set forth in the ESA. Thus, under Delaware law, a contractual provision that provides for less than the guarantees of the ESA would violate the "fundamental policy" of British Columbia.
>
> Finally, with regard to the third question—whether British Columbia's public policy outweighs Delaware's interest in the sanctity of contract—I also answer this in the affirmative. Delaware courts have consistently found that

> employment protections offered to employees by the law of the default state, where the employment occurred, the default state's interest will outweigh the interest of Delaware in protecting the right to contract.

[34] The defendants argue, relying on that opinion, that the public policy question cannot be resolved on a superficial review of the evidence, but must be determined by the arbitral tribunal, citing *Petty v. Niantic Inc*., 2022 BCSC 1077, aff'd 2023 BCCA 315 and *Difederico v. Amazon.Com, Inc*., 2022 FC 1256, aff'd 2023 FCA 165. Alternatively, if the court reaches the merits, they submit, on the same basis, that there is no risk that the *ESA* would be ignored in the arbitration. Further, they say, any illegality would be severable under the severability clause.

[35] The difficulty I have with that submission is that Ms. DiBianca appears to have assumed, incorrectly, that the choice of law clause provides for the application of Delaware law, without mentioning that it provides for the application of that law "without regard to its conflicts of law provisions". Her opinion rests entirely on Delaware's conflicts of law provisions. There is therefore no opinion before me as to the effect of the choice of law clause that actually applies in this case. Given that there appears to be no provision in the contract that would be illegal under the substantive law of Delaware, the *ESA* would be ignored and the severability clause would be of no assistance to Mr. Wiederhold.

[36] Here too, I am able to conclude on a superficial review of the record before me that the combined effect of the arbitration, forum selection and choice of law clauses would be to circumvent the mandatory provisions of the *ESA*, thereby depriving Mr. Wiederhold of the right to rely on those provisions in advancing his claim. The clauses are therefore unenforceable for that reason as well.

D. Unconscionability and the Brick Wall

[37] A bargain will be set aside as unconscionable where there was an inequality of bargaining power resulting in an improvident bargain: *Uber Technologies Inc. v. Heller*, 2020 SCC 16.

[38] Mr. Wiederhold argues that the arbitration clause in issue here is unconscionable for reasons similar to those that led the majority of the Supreme Court of Canada to refuse to stay an action in favour of arbitration in *Uber*, with the following additional factors present here:

a) he is an employee, rather than an independent contractor like Mr. Heller; and

b) the arbitration clause in issue here stipulates that:

i. the arbitration must be conducted by a panel of three arbitrators, rather than just one; and

ii. Mr. Wiederhold must pay half of the arbitration costs, regardless of whether his claim succeeds or not.

[39] The defendants argue that Mr. Wiederhold has not satisfied the evidentiary requirements for either the *Dell* or brick wall frameworks in asserting that the arbitration clause is unconscionable. In particular, they say that Mr. Wiederhold, unlike Mr. Heller, is a sophisticated litigant with a professional accreditation and, at least since September 2021, an executive-level position. Moreover, they say that, whereas Mr. Heller, with an annual income of between $20,800 and $31,200, was faced with the burden of paying over $14,500 in up-front filing fees to arbitrate the dispute (a figure out of all proportion to the size of his claim), Mr. Wiederhold earns a six-figure income and faces up-front filing fees that may be as low as $350 to pursue a claim said to be worth $103,067.60.

[40] In fact, the parties have put forward wildly divergent estimates as to the cost of arbitrating this dispute pursuant to the arbitration clause.

[41] Mr. Wiederhold estimates that total cost to be about CDN $35,000-76,000. On the other hand, the defendants anticipate Mr. Wiederhold’s up-front filing fees to be between US $350 and $440, and the total cost of the arbitration to be between CDN $12,569.75 and $18,221.

[42] Both estimates rest on a number of dubious assumptions.

[43] Mr. Wiederhold has based his estimate on an hourly rate of $750 for each of the three arbitrators. The evidence suggests that the actual range is more likely to be between USD $350 and $500. He has assumed that the hearing would take five days, when it could be completed in less. He has used travel and hotel rates assuming the arbitration would take place in December, the busiest and most expensive time of year. Further, as the defendants note, the Commercial Arbitration Rules of the American Arbitration Association allow for hearings to be held by videoconferences, although the defendants do not expressly waive their right to insist on an in-person hearing.

[44] On the other hand, the defendants have assumed that the parties may be charged under the tariff applicable to employment disputes, even though the arbitration clause invokes the commercial rules exclusively. They estimate that the entire arbitration can be completed in one day, even though their application before me for a stay, by itself, occupied a full day of court time. Moreover, the defendants have failed to account for the up-front filing fees applicable to an arbitration, like this one, to be held before three arbitrators rather than one. The result is a mandatory up-front filing fee of approximately CDN $11,000, or over 10% of the claim, merely to commence the process. Were the matter to be heard by a single arbitrator alone, initial filing fees of that magnitude would be reserved for claims worth between US $300,000 and $500,000.

[45] Overall, I am satisfied that the true cost to arbitrate in accordance with the arbitration clause lies somewhere between the estimates put forward by the parties, but closer to the low end of Mr. Wiederhold's postulated range. Regardless of precisely where on that spectrum the actual cost would land, however, I am satisfied that, even to resolve Mr. Wiederhold's preliminary jurisdictional objections alone, that cost is likely to be disproportionate having regard to the size of his claim.

[46] Accordingly, I find that Mr. Wiederhold has shown that there is a real prospect that requiring him to make his jurisdictional challenge in the manner contemplated by

the arbitration clause would effectively prevent that challenge from being resolved at all. I therefore refuse the defendants' application for a stay on that basis as well.

V. Summary and Disposition

[47] I have found that the arbitration clause upon which the defendants rely is void and inoperative for various reasons. Their application for a stay of this action in favour of arbitration is therefore refused.

[48] As the successful party, Mr. Wiederhold is entitled to his costs.

"Milman J."