

Citation: Leung v. MDSI Mobile Data Solutions Inc.
2002 BCSC 1597

Date: 20021120
Docket: SO21045
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

SAM LEUNG

PLAINTIFF

AND:

MDSI MOBILE DATA SOLUTIONS INC.

DEFENDANT

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE WILLIAMSON

Counsel for the Plaintiff: Nicole R. Howell

Counsel for the Defendant: R. Patrick Saul

Date and Place of Hearing: October 23, 2002
Vancouver, BC

[1] This is a claim for wrongful dismissal. Mr. Leung is a 44 year old computer engineer. He holds a PhD. He had worked for the defendant MDSI Mobile Date Solutions Inc. ("MDSI") for almost five years when MDSI dismissed him on November 30, 2001. At the time, his salary was \$96,960.00 per year plus an annual bonus.

[2] The position that he held at MDSI was Director of Implementation Engineering. As such, he was responsible for a project team of approximately nine people. He also co-managed a broader group of people in conjunction with the Vice-President of the company. In this position, he claims, he was responsible for staffing various projects, recruiting, and managing and mentoring project engineers.

[3] He has been unable to find employment since he was terminated. The evidence is that he has applied for over 60 positions in this province but received no job offers. Because he has connections in Hong Kong and China, he has also applied for 10 positions overseas and has had a number of interviews. But again, he has been unsuccessful at obtaining a position.

[4] At the time of his dismissal, the company stated that the dismissal was a result of general market conditions and a company reorganization. A number of other employees were laid off at the same time.

[5] MDSI, in a letter dated November 30, 2001, confirmed that it would continue to pay Mr. Leung for a period of seven months after the dismissal. However, this offer included the condition that these payments would cease if he obtained other employment within that period. Indeed, MDSI took the position that "the entire severance package is subject to Mr. Leung's duty to mitigate his damages and MDSI will terminate all payments upon notice from Mr. Leung that he has found suitable alternative employment". As stated above, he has not to date found suitable, alternative employment.

ISSUES

[6] There are two issues:

- (1) what is the period of reasonable notice?; and
- (2) does the monthly amount payable for reasonable notice include the annual bonus?

REASONABLE NOTICE

[7] Counsel are not in significant disagreement about either the facts or the law. Both accept that the four factors set out in *Bardal v. Globe and Mail* (1960), 24 D.L.R. (2d) 140 (Ont. H.C.) are apposite. They are:

- (a) the character of employment;
- (b) the length of service;
- (c) the age of the plaintiff; and
- (d) the availability of similar employment.

[8] It is the position of the plaintiff that he is a highly skilled professional who was in a relatively high management position with a number of people reporting to him. Ms. Howell submits that this brings him within *Ansari v. British Columbia Hydro and Power Authority*, 2 B.C.L.R. (2d) 33(S.C.), in which McEachern C.J.S.C., as he then was, pointed out that once it is determined that a plaintiff is highly skilled and in a responsible position, there is an entitlement to a longer notice period than "in many other cases". She also relies upon *Bavaro v. North American Tea, Coffee & Herbs Trading Co.*, 2000 B.C.S.C. 419 (S.C.). She submits *Bavaro* stands for the proposition that post-*Ansari* authorities have had the effect of increasing the period of notice with respect to those in menial positions rather than reducing that awarded to management people. I note that there is no evidence in the instant case concerning whether a job such as that held by Mr. Leung would be more or less available than so-called menial positions. There is evidence, however, of substantial efforts on his part to obtain employment.

[9] I have noted that Mr. Leung is 44 years old and that he was employed by the plaintiff for just under five years.

[10] In considering the availability of similar employment, counsel for the plaintiff has asked me to take judicial notice of the depressed nature of the economy, particularly in the computer and software industry. I have some doubts about whether I am able to take judicial notice of that fact. While there seems to be much concern about the state of the software industry, there are varying opinions about its prospects. However, I do accept that the evidence of Mr. Leung's extensive efforts to obtain employment is some indication of the depressed nature of the economy in his specific field.

[11] Each party has set out a number of cases where the plaintiff was a similar age, in a similar position, and employed for a similar length of time as the plaintiff in this case. Understandably, as counsel for the defendant candidly pointed out, he has tended to list those cases which would point to a shorter period of notice, while counsel for the plaintiff has selected cases where the period is longer. In the end, the plaintiff says the appropriate notice period is 10 to 12 months. The defendant says the appropriate notice period is six to eight. Thus, Mr. Saul argues that the continuation of salary for a period of seven months is a reasonable approach for the employer in these circumstances and should be accepted as reasonable notice.

[12] Another factor in this case is the issue of the salary continuance for the period of seven months. Because there was a condition on that salary continuance (that it would be cancelled if the plaintiff found alternate employment), counsel for the plaintiff says that I should apply the principle in *Albach v. Vortek Industries Ltd.*, 2000 B.C.S.C. 1228, in which a judge of this court found that when there are conditions attached to a salary continuance, that offer is less valuable than a lump sum payment. He came to that conclusion after reviewing a number of other cases.

[13] I am satisfied that approach is appropriate and has some impact in the present case.

[14] I conclude that the appropriate range of reasonable notice is in the vicinity of 10 months, and I would therefore set the notice period in the circumstances of this case at 10 months.

ENTITLEMENT TO BONUS

[15] During the course of his employment, the plaintiff was entitled to a bonus which was originally set at 6% of his annual salary. In January of 2001, this was increased to 7%. As a result, Mr. Leung submits that he is also entitled to 7% of his salary for the period found to be the appropriate notice period.

[16] In support of this claim, the plaintiff has filed three letters from 1999, 2000, and 2001 respectively, which set out the amounts of bonuses he received in those years.

[17] A review of these letters, however, does not substantiate this portion of his claim. The letter for November 22, 1999, which sets out that there will be a bonus of \$3,150.00 states that "this payment also includes the Q3'99 profit sharing bonus".

[18] It is apparent from the correspondence that the Q3'99 profit sharing bonus was dependent upon the performance of MDSI during the year. However, the evidence is that from the time of Mr. Leung's dismissal the company has been losing money. As such, even had he kept his position, Mr. Leung would not have received that bonus during the period with which we are concerned.

[19] On the material before me, I am unable to ascertain what portion of the funds paid to him as a bonus was a bonus simpliciter and what was related to MDSI's performance during the relevant period. As such, the plaintiff has failed to prove this claim and I decline to include any amount for a bonus.

ORDER

[20] The plaintiff will have judgment based upon 10 months' salary. The amount already paid to him under the salary continuance will be set off. There will be no amount included for a bonus. There will be court ordered interest.

[21] As the plaintiff has succeeded on the notice issue, but the defendant has succeeded on the bonus issue, each party will bear its own costs.

"L.P. Williamson, J."
The Honourable Mr. Justice L.P. Williamson