
CANADA / JUDGMENT

Bean v. Emco Corporation

2021 BCSC 2047

COURT

Supreme Court of British Columbia

DECIDED

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2021 BCSC 2047 Bean v. Emco Corporation

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Bean v. Emco Corporation,

2021 BCSC 2047

Date: 20211020

Docket: S215078

Registry: Vancouver

Between:

Brenton Bean

Plaintiff

And

Emco Corporation

Defendant

Before: Master Elwood

Reasons for Judgment

Counsel for the Plaintiff:

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N.T. Mitha, QC

Place and Date of Hearing:

Vancouver, B.C.

September 15, 2021

Place and Date of Judgment:

Vancouver, B.C.

October 20, 2021

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I. INTRODUCTION

- [1] The defendant applies to remove this action from the fast track procedure under Rule 15-1 of the Supreme Court Civil Rules.

II. BACKGROUND

- [2] Brenton Bean worked for Emco Corporation for 37 years. He was their Outside Account Manager. Emco is in the construction business. It is one of Canada's largest manufacturers and distributors of construction materials and products.
- [3] On October 17, 2018, Emco gave Mr. Bean notice that he was being transferred to the position of Inside Sales Manager, effective October 22, 2018. Emco informed Mr. Bean that his compensation would remain substantially the same for two years, after which time it would drop to the level of other Inside Sales Managers.
- [4] The day after he received this notice, Mr. Bean went on a medically-supported leave of absence for stress, anxiety and depression. He did not return to work for over two years.
- [5] On October 23, 2018, while on leave, Mr. Bean sent a note to Emco indicating that he was struggling with what he refereed to as their proposal, and that he would be in further contact when he felt better.

- [6] In January 2021, Mr. Bean attempted to return to his job as Outside Account Manager. Emco informed him the position was no longer available, and instructed him to assume the role of Inside Account Manager.
- [7] Mr. Bean provided Emco with a doctor's note, which he says demonstrated that, for medical reasons, he could not work as an Inside Account Manager. Emco asked Mr. Bean to provide further medical information or submit to an independent medical examination.
- [8] Mr. Bean resigned from Emco in February 2021.
- [9] In March 2021, Mr. Bean found new employment with Bartie & Gibson Co. Ltd. under a one-year fixed term contract at lower compensation.
- [10] Mr. Bean brings this action in wrongful or constructive dismissal. He alleges that, through its conduct, Emco repudiated the contract of employment.
- [11] Mr. Bean filed the notice of civil claim on May 26, 2021. He also issued a notice of fast track litigation pursuant to Rule 15-1. The notice of civil claim alleges that:
- a) The notice by Emco on October 17, 2018, was a unilateral change to the terms Mr. Bean's employment, which Mr. Bean rejected in his note of October 23, 2018.
 - b) In demanding that he return to work as an Inside Account Manager, Emco disregarded Mr. Bean's note of October 23, 2018, as well as his medical condition and on-going restrictions or limitations which precluded him from working as an Inside Sales Manager.
- [12] The notice of civil claim also alleges conduct by Emco preceding the notice in October 2018. Mr. Bean alleges that:
- a) Commencing in 2008, Emco introduced a number of changes at the company, including a reassignment of his sprinkler accounts.
 - b) In 2017, Emco started inquiring about his retirement plans and taking steps to push him toward retirement.
 - c) In March 2018, Emco told him he would not receive profit sharing, and in August 2018, suggested that he switch to part-time work.
- [13] The action is still in its early stages. Emco has demanded, and Mr. Bean has provided, particulars of certain paragraphs of the notice of civil claim. The parties have delivered their initial lists of documents: Mr. Bean has listed 24 documents; Emco has listed 366.
- [14] The parties have agreed to secure a fast track trial date as contemplated by Rule 15-1(13), without prejudice to Emco's position on this application.

III. ANALYSIS

[15] Emco argues that that this action does not qualify as fast track litigation under Rule 15-1(1) or, alternatively, the court should order pursuant to Rule 15-1(6) that it cease to be fast track litigation, because: (a) the plaintiff is claiming more than \$100,000; (b) the case cannot be tried within three days; and (c) the defendant will be prejudiced with respect to discovery rights and costs.

A. Rule 15-1 - Fast Track Litigation

[16] The relevant parts of Rule 15-1 provide as follows:

When rule applies

- (1) Subject to subrule (4) [the rule does not apply to class actions] and unless the court otherwise orders, this rule applies to an action if
 - (a) the only claims in the action are for one or more of money, real property, a builder's lien and personal property and the total of the following amounts is \$100 000 or less, exclusive of interest and costs: [or]

...

- (b) the trial of the action can be completed within 3 days,
 - (c) the parties to the action consent, or
 - (d) the court, on its own motion or on the application of any party, so orders.

...

Damages not limited

- (3) Nothing in this rule prevents a court from awarding damages to a plaintiff in a fast track action for an amount in excess of \$100 000.

...

When rule ceases to apply

- (6) This rule ceases to apply to a fast track action if the court, on its own motion or on the application of any party, so orders.

...

Oral discovery

- (11) Unless the court otherwise orders, in a fast track action the examinations for discovery of a party of record, including any person referred to in Rule 7-2 (1) (b) who is examined in relation to that party of record, by all parties of record who are adverse in interest must not, in total, exceed in duration
- (a) 2 hours, or
 - (b) any greater period to which the person to be examined consents.
- ...

Costs

- (15) Unless the court otherwise orders or the parties consent, and subject to Rule 14-1 (10), the amount of costs, exclusive of disbursements, to which a party to a fast track action is entitled is as follows:
- ...
- (c) if the time spent on the hearing of the trial is more than 2 days, \$11 000.
- [17] Justice Joyce described the purpose of Rule 15-1 in *Shaker v. Chow*, 2012 BCSC 617, at para. 27:
- [27] In my view, the purpose behind Rule 15-1 is to provide a process for a more efficient and economical litigation of those cases that are relatively straightforward, can be prepared for trial and tried relatively quickly, and do not require as extensive a process as the more complex cases. The rule is one example of how the object of proportionality referred to in Rule 1-3(2) is achieved.
- [18] In *Bagri v. Bagri*, 2015 BCSC 2132, Master Scarth described two stages of analysis for whether an action is, or should remain, a fast track action:
- [18] An action is not a fast track action simply because a party has filed a notice of fast track action. Rather, a fast track action occurs in the circumstances set out in Rule 15-1(1): see *Musgrove v. Elliot*, 2014 BCSC 40 at para. 17, quoting *Narain v. Gill*, 2012 BCSC 1468 at para. 17. An action can be fast tracked as long as one or more of the criteria in Rule 15-1(1) are met: see *Hermani v. Hillard*, 2011 BCSC 1381 at paras. 10-17.
- [19] Even if an action qualifies as a fast track action, pursuant to Rule 15-1(6), a court may order that the action is to proceed as a regular action. When determining whether or not an action should proceed as a fast track action, the court has considered numerous factors, including:
- (i) the time required for trial: *Shaker*, at para. 21;

(ii) whether all parties have consented or acquiesced to use fast track procedures: Musgrove at paras. 19-21;

(iii) the risk of prejudice to a party, including prejudice with respect to costs: Shaker at paras. 33-34;

(iv) whether a party is using the application of fast track for an improper purpose, for example as a back door method to strike a jury notice: see *Tong v. Lanser*, [2012] B.C.J. No. 2956 at paras. 45-46, 51 (S.C.); and *Beckett v. Tong*, [2013] B.C.J. No. 1434 at para. 15 (S.C.); and

(v) the interests of justice and the purpose of Rule 15-1, which was designed to provide a more efficient and economical procedure for more straightforward or less valuable cases: Shaker at paras. 24-26; and Tong at paras. 32-33.

[19] Before me, there was discussion of the standard against the circumstances are measured to determine whether the action qualifies for or should remain as fast track litigation. Mr. Bean argued that an action will remain suitable for fast track so long as there is a "rational possibility" the trial can be completed within three days or the damages awarded will be \$100,000 or less.

[20] Mr. Bean cites *Cooper v. Jordan*, 2005 BCSC 783, where Master Bolton held:

[3] [I]t seems to me that it should now be necessary to show quite clearly that the matter cannot reasonably be expected to be completed in two days, and that so long as there remains a rational possibility that it can be completed in two days, even if it is somewhat unlikely or even perhaps very unlikely, the matter should stay on the fast track until it becomes clear that it cannot be. Obviously, the further away from trial these applications are brought, the greater will be the uncertainty of the issues to be canvassed at trial and number of necessary witnesses, and so on, and consequently the harder will be the task of the applicant. (emphasis added)

[21] Emco points out that Cooper decided under the previous Rule 66. Rule 66 focussed on the amount of trial time the action would require. Rule 66(1) provided:

(1) The object of this rule is to provide a speedier and less expensive determination of certain actions the trial of which can be completed within two days.

[22] On an application under Rule 66(8)(b) to remove a matter from fast track, the court was required to consider, under Rule 66(9):

(a) the likelihood that a trial of the action will occupy more than two days,

[23] Emco argues that a more exacting standard is required by Rule 15-1(1), which requires that at least one of five conditions be met before the Rule applies and the action may be considered a fast track action.

- [24] In response, Mr. Bean notes that, in *Sutton v. Jones*, 2010 BCSC 1864, which was decided shortly after the new Rule 15-1 was enacted, Master Bishop said:
- [3] [I]n my view, given the test set out by Master Bolton [in *Cooper*] that the defendant must show quite clearly that the matter cannot be completed in two days -- three days, sorry, I believe the defendant fails on that basis. I believe there is a rational possibility that counsel, particularly given the case management conference that is happening tomorrow, can complete matters within the three days, and therefore that application is dismissed.
- [25] I am not persuaded that this brief statement in oral reasons for judgement reflects a considered view of the court on the potential implications of the change in the Rule. However, it seems to me that Master Bolton's rationale for a low threshold for a case to remain in Rule 66 remains compelling with respect to whether an action qualifies for fast track litigation under Rule 15-1(1).
- [26] In my view, a party invoking Rule 15-1 based on subrule 1(a) (the only claim is for damages of \$100,000 or less) or subrule 1(b) (the trial can be completed within three days) should not be put to strict proof the action qualifies on these grounds. The purpose of the Rule as explained by Justice Joyce in *Shaker* would easily be frustrated if litigants seeking its procedural advantages are required to demonstrate from the outset of the proceeding a certain length or outcome of a trial that may be some time away. In many cases, these matters may be uncertain when a case is filed (although they may become clearer as the proceeding progresses). Responsible counsel are entitled to some deference from the court as to whether a case with which they are much more familiar qualifies for fast track litigation under Rule 15-1(1)(a) or (b).
- [27] For these reasons, I agree with Mr. Bean that, so long as there is a "rational possibility" the trial can be completed within three days or the damages awarded will be \$100,000 or less, the action qualifies for fast track litigation under Rule 15-1(1).
- [28] However, an application under Rule 15-1(6), for an order that the Rule ceases to apply, requires a more holistic analysis, including consideration of the potential prejudice to other parties. Under Rule 15-1(6), the court must consider whether the procedures and limitations of Rule 15-1 are fair to both parties in light of the purpose of the Rule and the principle of proportionality. In my view, the considerations on this second stage of the analysis include:
- a) The number of documents in the case and the ability of the parties to obtain meaningful early discovery;
 - b) The length of examinations for discovery the parties reasonably require;
 - c) Whether it is realistic the case can be ready for trial within four months after a trial date is set (or within eight months after the notice of fast track litigation was first issued);
 - d) Whether there is doubt the trial can realistically be completed within three days (as this may prejudice the successful party's entitlement to costs); and

- e) Any other prejudice the party seeking the order removing the case may suffer if the order is not made and any prejudice the party resisting its removal may suffer if it is not made.

See Shaker, at paras. 23-25

B. Does This Action Qualify for Fast Track Litigation?

- [29] In my view, Mr. Bean's damages are likely to exceed \$100,000.
- [30] Mr. Bean sets out his compensation at Emco in paragraph 20 of the notice of civil claim. A rough estimate based on those numbers is that he was earning \$150,000 per year (or \$12,500 per month) at the time he left Emco.
- [31] Asked by the court what Mr. Bean will seek by way of damages in lieu of reasonable notice, counsel responded that the notice to which Mr. Bean was entitled is uncertain, but may be 18 to 24 months. Eighteen to 24 months equates to between \$225,000 and \$300,000 in damages.
- [32] Mr. Bean has mitigated his damages. He sets out his compensation at his new job in paragraph 7 of the reply. He is currently earning \$80,000 in base salary, plus unspecified commission (at a lower amount than at Emco) and benefits (at lower amounts than at Emco).
- [33] Defence counsel estimated Mr. Bean's mitigation will be approximately \$120,000, assuming his one-year contract is not extended. Mr. Bean's counsel did not disagree with this estimate, although he pointed out that Mr. Bean's commission is currently unknown.
- [34] These estimates yield likely damages in the rough range of \$115,000 to \$180,000, or more. Even on the deferential standard of review discussed above, I don't think this case qualifies for fast track litigation under Rule 15-1(1)(a).
- [35] Turning to Rule 15-1(1)(b), Emco argues that it is also readily apparent the trial cannot be completed within three days. Given the way Mr. Bean has pleaded his case, Emco argues, evidence will be required concerning conduct dating back to 2008. Also, Mr. Bean has put his medical condition in issue, which Emco argues will require expert medical evidence.
- [36] Emco's counsel expects that the trial will require six or seven lay witnesses, an expert called by each party, and submissions on the various issues of fact and law. As a result, he anticipates the trial will be five to seven days.
- [37] I agree with Emco's counsel that Mr. Bean has put more in issue than simply the decision to transfer him to Indoor Account Manager and whether that change was a constructive dismissal. The notice of civil claim puts in issue statements or conduct by Emco in 2008, 2007 and 2018. It also puts in issue Mr. Bean's mental health, at least when he returned to work in January 2021.

- [38] However, Mr. Bean argues, this is, at its core, a straight forward constructive dismissal case, with limited witnesses, limited documents and few seriously disputed facts. The focus, he says, will be on the events in October 2018 and January 2021, and the employer's knowledge of his medical limitations. The employer's conduct prior to October 2018 will more in the nature of background to the dismissal, he argues, and should not be time consuming at trial.
- [39] Mr. Bean's counsel anticipates calling his client and Mr. Bean's family doctor as witnesses. He says Emco should be able answer all of the allegations in the notice of civil claim by calling Mike Reid and George Corning, two additional witnesses to testify briefly about the sprinkler accounts, and a medical expert.
- [40] I find it very difficult to question the considered judgment of Mr. Bean's counsel that the trial can be completed within three days. It may become clearer as the case progresses that this is not a realistic estimate. However, at this time, there is at least a rational possibility the trial can be completed within three days.
- [41] Accordingly, the case qualifies for fast track litigation under Rule 15-1(1)(b).

C. Should the Action be Removed From Fast Track?

- [42] Emco argues that it will require more than the two hours normally allowed under Rule 15-1 to examine Mr. Bean for discovery. In particular, Emco says, it will need adequate time to fully explore Mr. Bean's reasons for refusing the transfer, including his medical limitations, as well as his ability to find alternate employment.
- [43] Further, Emco anticipates it will have requests that will extend document discovery beyond the initial list of documents produced by Mr. Bean.
- [44] Then, Emco says, it will need to take the facts from discovery and provide them to a medical expert, and possibly also require Mr. Bean to attend an independent medical examination, in order to obtain the expert evidence necessitated by his allegation that the employer ignored his medical condition and limitations.
- [45] In the circumstances, Emco argues, keeping the action in fast track will expose it to significant prejudice with respect to costs. Even if the trial concludes within three days, which it doubts, the successful party will be limited to costs of \$11,000 unless the court orders otherwise. If the trial extends to five or more days, as Emco anticipates it will, the shortfall in recoverable costs will be even greater.
- [46] Finally, Emco argues, it will fair to both parties if the case proceeds to trial on a normal timeframe. Not only will there be more time for discoveries and expert reports, but Mr. Bean's damages will be clearer by the time a longer trial can be heard. If the case is brought to trial by the end of January 2023 on the expedited timeframe of Rule 15-1(13), Mr. Bean will still be under his current one-year contract and his total mitigation income may still be uncertain, as well as his future employment prospects.

- [47] These are valid concerns. However, in my view, they are largely speculative at this stage of the proceeding. The time allowed for examinations for discovery can be extended by consent, if required. The process for Emco to obtain production of documents and an expert report may go smoothly. The parties will likely be able to agree on reasonable steps to simplify and streamline the issues, including an agreed statement of facts and a document agreement. The trial may be completed within three days.
- [48] Mr. Bean has compelling reasons for seeking the procedural advantages of Rule 15-1. Mr. Bean is 64 years old. He has a grade seven education and a limited skill set. He expects that it will be very difficult for him to find further employment after his current contract comes to an end in March 2022.
- [49] Mr. Bean deposes that he cannot afford to pay the costs of a lengthy court proceeding. He seeks an efficient and economical resolution of his claim against Emco so that he can move on with his life.
- [50] The purpose behind Rule 15-1 is to provide a process for more efficient and economical litigation. I am not persuaded that this case necessarily requires a more extensive process, a longer trial or greater potential recovery in costs.
- [51] In my view, it is in the interests of justice to keep this case in fast track litigation. The situation may evolve over time. Counsel should reassess its suitability for fast track as the case progresses. The issue can be revisited at a case planning conference or the trial management conference. If necessary, Emco can apply again for an order removing the action from fast track.
- [52] At this time, the prejudice to Mr. Bean of an order removing the case from fast track litigation outweighs the potential prejudice to Emco of remaining under Rule 15-1.

IV. CONCLUSION

- [53] The application for an order removing this action from the fast track procedure under Rule 15-1 is dismissed with costs to Mr. Bean in the cause.

"Master Elwood"

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