
CANADA / JUDGMENT

Cho v. Stonebridge Solutions Inc.

2020 BCSC 1560

COURT

Supreme Court of British Columbia

DECIDED

23 October 2020

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2020 BCSC 1560 Cho v. Stonebridge Solutions Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Cho v. Stonebridge Solutions Inc.,

2020 BCSC 1560

Date: 20201023

Docket: S197570

Registry: Vancouver

Between:

Harry Cho

Plaintiff

And

Stonebridge Solutions Inc.

Defendant

Before: The Honourable Madam Justice Marzari

Reasons for Judgment

Counsel for the Plaintiff:

P.L. Krawus

Agent for the Defendant:

J. Cafik

Place and Date of Trial/Hearing:

Vancouver, B.C.

September 16 and 17, 2020

Place and Date of Judgment:

Vancouver, B.C.

October 23, 2020

Table of Contents

INTRODUCTION. 3

SUMMARY TRIAL. 3

BACKGROUND AND FACTUAL FINDINGS. 3

NATURE OF THE RELATIONSHIP. 7

(a) Level of worker control 7

(b) Ownership of equipment and tools. 8

(c) Profit/loss opportunity. 8

(d) Business integration. 9

Conclusion on the Nature of the Relationship. 10

CAUSE. 10

GENERAL DAMAGES. 11

The Contract 12

Notice Period. 13

Mitigation. 15

Conclusion on General Damages. 15

PUNITIVE DAMAGES. 16

COSTS. 16

INTRODUCTION

- [1] Mr. Cho applies for damages in lieu of notice with respect to the termination of his working relationship with Stonebridge Solutions Inc. ("Stonebridge") after approximately five months. Stonebridge says that Mr. Cho was an independent contractor, and so no notice of termination was required.

- [2] The issues before me in this summary trial are whether Mr. Cho's retainer was such that he was entitled to notice, and if so, how much. Stonebridge also raised an alternative defence of after-acquired cause, but as I understood its position at summary trial, it relied primarily on its position that Mr. Cho was not its employee.

SUMMARY TRIAL

- [3] I note that no issue was raised as to whether this matter could properly be heard by summary trial. Although Stonebridge was represented by its shareholder, Ms. Cafik, at the hearing, it had counsel for approximately one year leading up to the hearing, and I understand that no issue was taken by counsel with proceeding by summary trial. The amounts at issue are not substantial, and I agree with Mr. Cho that this one-day summary trial is a proportionate approach to the relief sought. I am also satisfied that where there are discrepancies in the evidence of Mr. Cho and Ms. Cafik, I can resolve them sufficiently on the evidence to determine the issues before me.

BACKGROUND AND FACTUAL FINDINGS

- [4] Much of the background to the parties' working relationship is uncontentious.
- [5] At the time he began working for Stonebridge, Mr. Cho was 48 or 49 years old and had approximately 20 years of sales experience, with specific experience in payment processing and the financial technology sector. In early 2018, he left his position as Vice President National Sales for JP Morgan Chase Bank, where he represented JP Morgan's payment processing platform. While working in that role, he met Ms. Cafik, whose company was developing payment products for JP Morgan.
- [6] In mid-2018, Ms. Cafik was looking for someone with senior management sales experience in the financial technology sector to assist with her start-up company involving the development of an anti-fraud online payment product called XUMI.
- [7] At that time, Ms. Cafik was managing XUMI through her company Stonebridge, although it was anticipated that a new company would be incorporated for the XUMI product once it was ready to launch.
- [8] Over the course of the summer of 2018, Mr. Cho and Ms. Cafik exchanged correspondence about his potential involvement with the developing XUMI product. Mr. Cho signed a non-disclosure agreement in relation to XUMI, and in September 2018 they exchanged emails regarding a possible position.
- [9] In her September 14 email, Ms. Cafik described the position as follows:
1. Job description:
 - a. Vice President Tantalus Technologies Inc., parent Company of Xumi Technology and infrastructure products;

- b. The role would initially be business development, strategic partnerships and building a plan and budget for establishing initial commercial offerings with specific merchants in relevant retail sectors for Xumi;
- 2. Nature of the role: Currently we are flexible and are open to a contract position with the option to migrate to a salaried position if that is desirable;
- 3. Compensation and sign-on bonus: I need to understand your expectations but will offer a very competitive salary as well as sign-on bonus;
- 4. Vacation: 4 weeks to start;
- 5. Budget:
 - a. All expenses are paid by the Company and a per diem for travel will be established on mutual agreement;
 - d. Laptop, cell Phone and all necessary tools will be provided by the company.

[10] Mr. Cho responded to this email on September 17, 2018, with his own proposed terms for his employment, which included the following:

My preference is a commitment of salary plus compensation bonuses. Please see the details below:

- Annual salary of \$224,900 paid every 2 weeks
- Sign-on bonus of \$35,000
- Medical and dental benefits
- Compensation Bonuses for the sale of Tantalus Technologies Inc. (or Xumi technology's) products & legal rights to the new owner .
- Expenses
-
- Cell phone allowance of \$120/month
- Other usual expenses

[11] Mr. Cho met with Ms. Cafik and her primary investor on October 3, 2018. At the end of that meeting, Ms. Cafik indicated that they were ready to take Mr. Cho on. In response to whether she would be able to meet his proposed terms, Mr. Cho says that Ms. Cafik indicated "we" could, and they agreed he would start on November 1, 2018. Ms. Cafik said "welcome to the team."

- [12] Ms. Cafik does not contest this version of events, but says that she was very clear with Mr. Cho throughout that, until XUMI had its own corporation, everyone was on contract with fixed deliverables. She says that Mr. Cho frequently asked her for a letter of employment confirming his terms and benefits, both before he started and while he was working, and that she told him that all of that would have to wait until XUMI launched and the new company was formed.
- [13] In December 2018, Mr. Cho again asked for a letter of employment setting out his employment terms, including salary and benefits, and Ms. Cafik responded by email confirming his salary was based on \$224,900 gross annual salary, and that medical and dental benefits, and any signing bonus, would have to wait until the new company was formed and an employment contract signed with that company. She declined to provide a letter of employment at that time, suggesting they discuss it further.
- [14] There is nothing further in writing that describes Mr. Cho's work description or terms. Nor did the parties ever enter into a contract setting out work deliverables or compensation.
- [15] What did happen was that Mr. Cho began to work for Stonebridge on November 1, 2018. He was paid \$9,370 semi-monthly, which corresponded to his proposed salary of \$224,900 annually, without any statutory deductions. His semi-monthly cheque also included \$120 for his cell phone costs, and frequently other expense reimbursement. He was paid this amount monthly by a bank draft drawn on Ms. Cafik's personal bank account, with a cover sheet stating "contract payment." Mr. Cho never invoiced for this semi-monthly payment, and the payment never included the 5% GST applicable to contracted services.
- [16] Mr. Cho was given a laptop and the various software and licenses necessary to perform his work, as well as an email account where his signature line stated he was "Vice President" of Stonebridge.
- [17] Mr. Cho took vacation and his monthly payments continued unchanged.
- [18] Mr. Cho was never paid a signing bonus. He did not receive medical or dental benefits.
- [19] On April 1, 2019, in a meeting that lasted over two hours, Ms. Cafik told Mr. Cho that they could no longer work together, but said they would continue the conversation on April 3. Mr. Cho continued to work for Stonebridge until April 3, 2019, when he met again with Ms. Cafik. At that second meeting, Ms. Cafik told Mr. Cho to propose his own departure terms. He did so by letter later that day, without the assistance of counsel. Although this letter was placed in evidence, I put no weight on it as to determining an appropriate notice period. Mr. Cho's proposal was not accepted, and neither Stoneridge nor Ms. Cafik have paid Mr. Cho for his work over the last two weeks of March or the first three days of April.

NATURE OF THE RELATIONSHIP

- [20] It is now well established that there is a continuum of working relationships between that of an employee and that of an independent contractor: *Liebreich v. Farmers of North America*, 2019 BCSC 1074 at para. 58. Even where the traditional employer-employee relationship is not established, a term of reasonable notice of termination may nonetheless be implied in a contract where a party falls at an intermediary stage on this continuum, as a dependent contractor. Employees and dependent contractors are entitled to reasonable notice of termination: see *Leibreich* at para. 57. Only an independent contractor is not entitled to notice upon termination of the working relationship.
- [21] In every case, the court must review the parties' relationship as a whole and consider all relevant factors to determine the nature of the relationship. The central question is whether the person has been engaged to perform services as a person in business on their own account: see *Leibreich* at paras. 59-61. Without detracting from the breadth of the factors considered, there are four organizing factors used to focus the determination of where a worker falls on the employment continuum:
- a) level of worker control;
 - b) ownership of equipment and tools;
 - c) profit/lost opportunity; and
 - d) business integration.
- [22] I have considered the full breadth of the evidence in this case with respect to the relationship between Mr. Cho and Stonebridge, and I have concluded that Mr. Cho falls closer to the employee end of the spectrum than that of an independent contractor, or even a dependent contractor.
- (a) Level of worker control
- [23] With respect to the level of worker control involved in his position, I find that Mr. Cho exercised a level of independence, but not the level of independence one would expect of an independent contractor. While perhaps Ms. Cafik and Stonebridge may have preferred to have had him work more independently than he in fact did, the evidence establishes that Mr. Cho had no defined deliverables and that his work obligations shifted regularly based on direction from Ms. Cafik. The working relationship was not based on independent progress towards a product, service or goal. Instead, both Mr. Cho's evidence and Ms. Cafik's evidence indicate a consistent level of direction and intervention by Ms. Cafik on behalf of Stonebridge.
- (b) Ownership of equipment and tools

[24] With respect to ownership of equipment and tools, Mr. Cho was provided with the tools he required to perform his work by Stonebridge, including his laptop, software licenses, and email. The company also paid for his cell phone expenses and other expenses. Although the evidence is not entirely clear on this point, it would appear that Stonebridge had limited office space, and that Mr. Cho was largely expected to work in his own space, though he did also pursue office space rental as part of his work at Stonebridge.

(c) Profit/loss opportunity

[25] In terms of Mr. Cho's exposure to financial risks and rewards, again, Mr. Cho's working relationship was more similar to that of an employee than an independent contractor. He was paid a fixed semi-monthly salary, regardless of his performance or completion of projects or tasks. He did not invoice for his time, but was paid automatically, including while he was on vacation. While statutory employment deductions were not made from this salary, no GST on services rendered were paid either.

[26] Ms. Cafik argued that the reason Mr. Cho received his salary regardless of whether he was taking vacation, and regardless of invoice or performance, was because he was a fixed-rate contractor, and it was not her job to tell him how to perform the deliverables he was responsible for under his contract. However, in the absence of a contract, or indeed any evidence that Mr. Cho had any clear deliverables, I am unable to accept this characterization of Mr. Cho's contract.

(d) Business integration

[27] Mr. Cho represented himself exclusively as the Vice President of Stonebridge. He was not separately incorporated or in business in any other way.

[28] Ms. Cafik points to the non-disclosure agreement, in which Mr. Cho is defined, by the standard language of the contract, as "the Company". This does not make Mr. Cho his own company, nor is it meaningful evidence of Mr. Cho representing himself as his own company. Nor does the label "contract payment" on Mr. Cho's bank draft determine the nature of those payments. Both Mr. Cho, and Ms. Cafik at times, referred to this payment as a "salary." Overall, I find that the various labels used to refer to the payments are not helpful in this case.

[29] Ms. Cafik also says that it is standard practice for technology start-ups to assign independent contractors titles and email addresses that represent them as integrated with the company for outward-facing purposes. She says that for inward-facing purposes, however, Stonebridge had no employees, only "contracted resources".

- [30] This was in part because Stonebridge had no capacity to employ people. It had no human relations department. It had no payroll department. It had no organizational charts or formal chains of command, other than that Ms. Cafik, as the sole shareholder and owner of the XUMI products, directed everything. While her intention was to create such a company, the development of XUMI was still in its early stages, and no company capable of having employees had been formed.
- [31] Ms. Cafik's evidence with respect to what is standard in the tech start-up sector in terms of contracted versus employed workers is evidence for which I have no independent expert opinion. However, even if I were to accept this as a statement of the normative behaviour of technology start-ups in Vancouver, this does not address the question of whether or not Mr. Cho was legally an employee or an independent contractor.
- [32] It is clear that Ms. Cafik had retained a number of true independent contractors: companies that were performing services for Stonebridge, such as developing an online marketing strategy. Mr. Cho's engagement was nothing like these contracted services.

Conclusion on the Nature of the Relationship

- [33] I therefore find that, despite Ms. Cafik's impression or understanding of Mr. Cho's employment status within Stonebridge, at law he was an employee. As such, Stonebridge had an implied duty to provide reasonable notice of dismissal, and Mr. Cho was entitled to reasonable notice of termination.

CAUSE

- [34] In Stonebridge's response to civil claim, which was prepared with the assistance of counsel, cause is not alleged. However, after-acquired cause is alleged, and Mr. Cho's performance as Vice President of sales is said to have been performed inadequately so as to justify the termination of Mr. Cho's consulting services contract.
- [35] Mr. Cho's alleged performance deficiencies are raised only in the context of him being an independent contractor as a basis for the termination of that contract. There is no suggestion in Stonebridge's defence materials or in the submissions before me that these deficiencies amounted to cause for the purpose of terminating an employment relationship. In any event, I find that the evidence before me does not establish cause for the termination of Mr. Cho's employment relationship.
- [36] The pleadings do raise the defence of after-acquired cause in the alternative that an employment relationship is found. I understand that argument is based on an alleged breach by Mr. Cho of his non-disclosure agreement. In her submissions, Ms. Cafik clarified that Stonebridge is not alleging that Mr. Cho breached the non-disclosure agreement, but rather that he did not require the signing of non-disclosure agreements with other potential service providers before discussing or soliciting their services on behalf of Stonebridge. Ms. Cafik also clarified that she discovered this in late March 2019, before she terminated Mr.

Cho's working relationship with Stonebridge on April 3, 2019.

[37] I find that this evidence is not sufficient to establish cause for termination in this case, and that the defence of after-acquired cause is not applicable to events that were discovered prior to termination.

[38] I turn then to the damages in lieu of reasonable notice that Mr. Cho is entitled to.

GENERAL DAMAGES

[39] Mr. Cho seeks the following damages:

- i. His semi-monthly salary payment for the second half of March 2019 in the amount of \$9,370.83;
- ii. Payment for three days worked in April prior to his termination in the amount of \$1,874.17;
- iii. Payment for his unpaid cell phone allowance for March 2019 in the amount of \$120;
- iv. Payment of his unpaid signing bonus of \$35,000;
- v. Six months' salary and benefits in lieu of notice, including:
 - (1) \$112,450 salary;
 - (2) \$720 for cell phone allowance; and
 - (3) \$1,321.85 for loss of medical and dental benefits from January 2019 to the end of the six-month notice period.

[40] The amounts owed by Stonebridge to Mr. Cho in lieu of reasonable notice first require determination of what Mr. Cho was contractually entitled to.

The Contract

[41] Mr. Cho argues that his employment contract included the terms of employment that he proposed in his email to Ms. Cafik on September 17, 2018, including his salary, benefits, and signing bonus.

[42] In its pleadings, Stonebridge acknowledges that it agreed to the stated annual salary (although it characterizes this as a contractual fee) and cell phone allowance, but says that the signing bonus was intended to be available only when Stonebridge's products generated revenue on the market.

[43] Ms. Cafik denies that there was an agreement that Stonebridge would pay the signing bonus or medical or dental benefits. She says that this remuneration was to be reserved until the new XUMI company was launched. She does not contest that she agreed to the payment of the annual salary requested and the cell phone allowance stated in the September 17 email.

- [44] Mr. Cho acknowledges that there is a potential conflict in the evidence before me with respect to the bonus and the medical and dental benefits. He says that, despite this conflict, I may resolve this issue in this summary trial by way of referencing the conduct of the parties. He says that the conduct of Ms. Cafik confirms Stonebridge's agreement to pay his annual salary of \$224,900 on a semi-monthly basis and to pay his cell phone expenses of \$120 per month.
- [45] In this summary trial, I am not satisfied that Mr. Cho has discharged his burden to establish that Stonebridge agreed to pay him a \$35,000 signing bonus in advance of the launch of the anticipated new company. I find the same is true with respect to the medical and dental benefits.
- [46] However, I am satisfied based on the conduct of Stonebridge and Ms. Cafik, as well as Stonebridge's own pleadings, that Stonebridge agreed to pay Mr. Cho an annual salary of \$224,900 on a semi-monthly basis and a \$120 per month cell phone allowance.
- [47] I find that Stonebridge failed to pay Mr. Cho both his second semi-monthly payment for the month of March 2019 and his cell phone allowance for that month, contrary to his employment contract. I also find that Stonebridge failed to pay Mr. Cho for the three days in April that he worked before being terminated from his employment.
- [48] Stonebridge is therefore ordered to pay Mr. Cho \$11,365 with respect to his employment prior to termination.

Notice Period

- [49] What constitutes reasonable notice in any given case depends on a number of non-exhaustive factors, including the level of responsibility of the position, the length of service, the age of the employee, and the availability of alternate employment: *Bardal v. Globe & Mail Ltd.*, 24 D.L.R. (2d) 140 at 145, [1960] O.J. No. 149 (H.C.); *Ansari v. BC Hydro & Power Authority*, [1986] 4 W.W.R. 123 at 127-128, 2 B.C.L.R. (2d) 33 (S.C.).
- [50] Mr. Cho argues that a reasonable notice period in his case would be six months, given the executive and high-level nature of his work, his age, the short duration of his work, and the specialization of his expertise in the financial technology sector. He has had difficulty finding work in this specialized area since leaving Stonebridge, despite significant efforts to do so, and despite a willingness to apply for positions of less seniority and compensation.
- [51] He cites a number of cases in which this Court and other courts have recognized these factors as the basis for a longer notice period, including *Felice v. Cardinal Health Canada Inc.*, 2014 ONSC 1190; *Sciancamerli v. Comtech (Communication Technologies) Ltd.*, 2014 BCSC 2140; *Taner v. Great Canadian Gaming Corporation*, 2008 BCSC 129; and *Ostrow v. Abacus Management Corporation Mergers and Acquisitions*, 2014 BCSC 938.

- [52] In Felice, a 52-year-old employee who was a senior executive with a 19-month tenure was awarded a 12-month notice period. In Sciancamerli, a 57-year-old senior account executive with 10 months' tenure received an award of five months' severance. In Ostrow, a 40-year-old senior employee with a tax specialization and a nine-month tenure received six months' severance. In Taner, a 36-year-old senior marketing executive with six months' tenure was awarded ten months' severance.
- [53] Stonebridge relied on its position that Mr. Cho was an independent contractor, and so did not make submissions as to what would be a reasonable notice period. Ms. Cafik did, however, underline that this was only a five-month engagement.
- [54] I have reviewed the precedents relied upon by Mr. Cho and the Bardal factors of responsibility, tenure, age, and availability of alternate employment. I have concluded that two months is an appropriate notice period for Mr. Cho in this case.
- [55] While I recognize that the cases relied on by Mr. Cho would support a longer notice period, I am not satisfied that Mr. Cho had the level of responsibility described in any of the above cases. Although his title was Vice President, Mr. Cho had no managerial responsibilities and no one reported to him. He did not prepare high-level operations plans or business plans for the launch of the company, or manage or coordinate others to do so. Ms. Cafik described Mr. Cho as needing a great deal of direction, and Mr. Cho described a situation in which he was not getting the support and direction he needed.
- [56] Based on the evidence before me, primarily that of Mr. Cho, he spent a good deal of his five-month tenure educating himself about the XUMI product and how it worked, identifying and following up with business opportunities, and looking for commercial office space. In other words, while salary level and job title are usually reflective of an employee's level of responsibility, I find that it is not the case here. The evidence before me on this summary trial indicates that Mr. Cho had, in fact, no genuine management level responsibility.
- [57] In addition, although Mr. Cho has many years of specialization in financial technology, it is not apparent from his own description of his work, or that of Ms. Cafik, that this was a specialization that was leveraged during his tenure at Stonebridge. His salary was significant, but I am not satisfied on the evidence before me that his responsibilities and specialization had yet to match that salary (perhaps because of the very early stage of the work) by the time of his termination.
- [58] Mr. Cho was 49 at the time of his termination, but I have no evidence that this is an impediment in his area of work.
- [59] In terms of availability of similar work, Mr. Cho has applied for many senior sales and business development positions since his termination, some of which appear to have been in the financial technology sector, but has yet to have been successful.

[60] I consider the most significant factors here to be the facts that Mr. Cho had only five months' service with Stonebridge and that his work responsibilities were not yet significant prior to his termination. A two-month notice period recognizes that Mr. Cho's work was somewhat specialized and that he has had difficulty finding alternate work in the same sector despite his substantial efforts.

Mitigation

[61] Mr. Cho's evidence establishes that he has made significant efforts to mitigate his loss. Stonebridge does not contest this.

Conclusion on General Damages

[62] I therefore award Mr. Cho damages in relation to his salary and cell phone allowance prior to his termination, and damages in lieu of notice and cell phone expenses as follows:

- a) Damages for amounts owing prior to termination: \$11,365;
- b) Damages in lieu of two months' notice: \$37,483; and
- c) Damages in lieu of two months' cell phone allowance: \$240.

[63] Stonebridge is therefore required to pay Mr. Cho \$49,088 in general damages. The salary amounts will be subject to any prescribed statutory deductions. Mr. Cho is also entitled to pre-judgment interest on these amounts.

PUNITIVE DAMAGES

[64] Mr. Cho also seeks an award of \$20,000 for punitive damages. He says that Stonebridge breached its duty of good faith and fair dealing when it refused to pay Mr. Cho for the work he had already performed before his termination, and advanced a baseless cause allegation. He references the decision of *Kelly v. Norsemont Mining Inc.*, 2013 BCSC 147, where an award of \$100,000 in punitive damages was awarded for a great number of reasons, including the defendant's refusal to pay the plaintiff the wages owed to the date of termination.

[65] Punitive damages are not compensatory in nature. The objects of punitive damages are retribution, denunciation and deterrence, not compensation for breach or injury. I am not satisfied that the weak allegation of cause in this case is grounds for such damages. However, I think it is important that the Court denounce and deter the practice of withholding payment for work performed prior to termination. I award \$5,000 in punitive damages against Stonebridge for requiring Mr. Cho to seek a remedy in this Court simply to be paid his employment income for his work prior to his termination.

COSTS

[66] Mr. Cho was substantially successful in these proceedings and is entitled to his costs at the ordinary scale, subject to any submissions related to offers of settlement or other matters of which I am not aware. Should the parties wish to speak to the issue of costs, they may make arrangements to appear before me for that purpose. Any such request should be made in the next 30 days.

"Marzari J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/20/15/2020BCSC1560.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/cho-v-stonebridge-solutions-inc-2020>

Prepared on 26 October 2026 · Esheria