

CANADA / JUDGMENT

Conway v. Griff Building Supplies Ltd

2020 BCSC 1899

COURT

Supreme Court of British Columbia

DECIDED

3 December 2020

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2020 BCSC 1899 Conway v. Griff Building Supplies Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Conway v. Griff Building Supplies Ltd.,

2020 BCSC 1899

Date: 20201203

Docket: Vancouver

Registry: S191794

Between:

Kyle Joshua Conway

Plaintiff

And

Griff Building Supplies Ltd.

Defendant

In Chambers

Before: The Honourable Mr. Justice Gomery

Reasons for Judgment

Counsel for the Plaintiff:

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N.C.M. Toye

Place and Dates of Hearing:

Vancouver, B.C.

October 21-22, 2020

Place and Date of Judgment:

Vancouver, B.C.

December 3, 2020

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Overview

- [1] Griff Building Supplies Ltd. ("Griff") is in the business of selling lumber and building supplies. It was founded in 1964 by the father of the present owner, Deborah White. Kyle Conway started working for Griff as a technician in 1998. Twenty years later, he was a member of the senior management team.
- [2] Mr. Conway's employment with Griff ended and he maintains that he was wrongfully dismissed. The essential question in this action is whether Mr. Conway resigned at a meeting with Ms. White on December 21, 2018. It is clear that he stated his intention to resign at the meeting, and it was then agreed that he would deliver a formal letter of resignation by the end of the year and would continue working until February 28, 2019.
- [3] If he did not resign, Griff accepts that it dismissed Mr. Conway without cause on December 28, 2018.
- [4] Mr. Conway says that, although he maintained a calm demeanor, he was emotional and upset at the meeting and did not intend his decision to be final until he delivered a letter confirming his resignation. He submits that Griff snapped at his resignation before he was fairly and truly committed. He relies on case authority for the legal proposition that a resignation is only legally effective when the employee subjectively intends to resign.
- [5] Griff maintains that Mr. Conway offered to resign at the meeting on December 21, 2018, and Griff accepted the offer. It submits that the agreement at the meeting had an immediate legal effect. Griff says that written confirmation of the resignation was merely a formality. Griff denies that it snapped at Mr. Conway's resignation or that it had any reason to believe that a cooling-off period was required. It submits that this case turns on the objectively reasonable interpretation to be accorded to Mr. Conway's words and actions, and not on any subjective reservations on his part concerning his decision to resign.
- [6] For the reasons that follow, I have concluded that Griff is correct. Mr. Conway's subjective understanding is legally irrelevant. Viewing the matter from the perspective of a reasonable outside observer of the parties' words and actions at the meeting of December 21, 2018, and in the immediate aftermath of the meeting, I find that the parties agreed that Mr. Conway's employment would end on February 28, 2019. The letter to be delivered by Mr. Conway was just a formality. Griff paid Mr. Conway everything he was entitled to receive and it follows that his action must be dismissed.
- [7] The case comes before the Court on Mr. Conway's application for judgment on a summary trial. The parties agree, and I concur, that the action is suitable for determination on a summary trial. The requirements of Supreme Court Civil Rules R. 9-7(15) are satisfied: I am able to find the facts necessary to decide the action, and it is not unjust to do so.

Facts

Background

- [8] Griff operates in two divisions: retail and contractor sales of lumber; and wholesale and export sales. It has approximately 50 employees. Ms. White is the president.
- [9] Mr. Conway has a high school education. He was born in 1975 and is 46 years old. He was hired by Griff as a technician at the age of 23 in 1998. Mr. Conway and Griff never entered into a written contract of employment.
- [10] Over the years of his employment with Griff, Mr. Conway took on managerial responsibilities. Beginning in 2012, he managed the wholesale/export division, directing a team of at least six subordinates. By 2018, his annual salary was approximately \$168,000.
- [11] Mr. Conway reported to Ms. White. Another employee, John Reynolds, managed retail/contractor sales. Mr. Reynolds also reported to Ms. White.
- [12] Over the course of at least several years, Mr. Conway repeatedly told Ms. White that he wanted to acquire an equity interest in Griff. He said that he wanted to have "skin in the game" and, if this was not possible within Griff, he would leave and do something on his own. Ms. White never agreed, but neither did she shut the door to the idea. She said it was something she would have to consider.
- [13] In early 2018, Mr. Conway proposed to Ms. White, in general terms, that Griff's wholesale/export business be put into a separate company, which he would run and in which he would have an equity interest. Three of Ms. White's children and her stepson worked for Griff. She was thinking about retirement and about passing her interest in the company to the next generation. Ms. White engaged two consultants, Mr. Frith and Mr. Noronha, to assist Griff in a strategic planning exercise that would include consideration of Mr. Conway's proposal. The strategic planning process began in August 2018 and was continuing in December 2018.
- [14] Ms. White, Mr. Conway, Mr. Reynolds, and the family members participated as "stakeholders" in a series of meetings convened with the consultants. The meetings culminated in a series of proposals. One of them was Mr. Conway's proposal.
- [15] In group discussions and in presenting his proposal, Mr. Conway stated several times that, if Griff did not implement his proposal, he would quit his employment and do it himself. Mr. Conway also made this statement in one-on-one meetings with Mr. Noronha and Mr. Frith. He told Mr. Reynolds that he already had 50 investors lined up.
- [16] Mr. Conway presented his proposal formally on November 10, 2018. Mr. Reynolds also made a presentation, and two of the children made a joint presentation. The presentations were rated by the stakeholders. Mr. Conway's presentation did not receive high scores.

- [17] Mr. Conway came to Ms. White's home to ask if he might have another chance to present his proposal. Ms. White agreed and directed the consultants to work with Mr. Conway to help him refine the presentation of his proposal. He presented it again on December 18, 2018.
- [18] Mr. Conway's second presentation was framed as a pitch for an investment opportunity. He proposed that Griff invest \$5 million and take responsibility for the long-term debt of a new company to be formed to take over wholesale/export sales. Mr. Conway's team of employees would move over to the new company. Mr. Conway would be the president and board chair, and would own a majority of the shares.
- [19] Ms. White reflected on the proposal and decided to reject it. She scheduled the meeting with Mr. Conway on December 21, 2018, to advise him of her decision. She asked Mr. Frith to join her at the meeting. She considered that it was likely, but not certain, that Mr. Conway would resign. She hoped that he would not.
- [20] In advance of the meeting, Mr. Noronha provided to Ms. White a suggested script. Ms. White rehearsed it with Mr. Frith before the meeting began. She was nervous. She considered Mr. Conway a hard person to say no to.

The meeting of December 21, 2018

- [21] The meeting on December 21, 2018, lasted only about 15 minutes. It took place in a boardroom. Ms. White and Mr. Frith were already there when Mr. Conway arrived.
- [22] Ms. White began by following her script. She told Mr. Conway that, after careful consideration, she had decided not to pursue his proposal. She referred to their discussions over the years and said that the process had been helpful in making her decision not to move forward with separating the wholesale/export business from the retail/contractor business. Then she referred to Mr. Conway's past statements that, given this decision, he would not be staying with Griff. Ms. White and Mr. Conway recall that she asked if this was still his intent.
- [23] Mr. Conway said that it was. He said he would be tendering his resignation. While there is some disagreement as to the exact words he used, nothing turns on it.
- [24] Ms. White abandoned her script and Mr. Frith took over speaking on Griff's behalf. He said Mr. Conway's resignation was accepted. They agreed that Mr. Conway would provide a formal letter of resignation by January 1, 2019, and would continue working for Griff until February 28, 2019. The meeting ended and Mr. Conway left the boardroom.
- [25] The meeting was polite and business-like. There were no raised voices or displays of emotion.
- [26] Mr. Conway swears that, notwithstanding his calm exterior, he was shocked, dismayed, confused, reeling, and very disappointed. He says that he was not prepared to formally or officially resign at that time.

[27] Later that day, Ms. White drafted a confirming email to Mr. Conway. Though it was not sent at the time, this contemporaneous document is consistent with the sworn evidence of Ms. White, Mr. Frith, and Mr. Conway, and I find that it accurately reflects the substance of what was stated and agreed at the meeting. It states:

Through this process, you have been very clear about your aspirations and long term goals. Given my decision, you have decided to tender your resignation. You will have your formal resignation letter to me by January 1st/2019. You have indicated February 28th will be your last day. We talked about collaboratively planning a transition that works for you and for the team. You agreed.

Events following the meeting of December 21, 2018

[28] Mr. Conway went to his office and reflected on what had just happened. He says that he "literally had the longest contemplation that I have had in a long time".

[29] Ms. White and Mr. Frith stayed in the boardroom and talked about next steps. Ms. White decided that people had to be informed, starting with senior staff. She met with her children, texted Mr. Reynolds, and met with members of the wholesale/export team who reported to Mr. Conway. Steps were taken to inform key customers who dealt with Mr. Conway.

[30] Within an hour or so, Mr. Conway was approached by members of his team who told him that they had heard that he was leaving, and was it true? He told them that it was. As he put it on discovery, referring to a discussion he had with a team member:

A And he came to my office and informed me that Deb had told everyone that I had resigned.

Q And what did you say to him?

A I said oh, I didn't know that's what we were doing. I thought we were working on a transition plan first, so I had to admit to him that yes, I -

Q You had to admit to him what?

A I had to admit to him that yes, that's the meeting I had, that we were working on a transition plan.

Q Did you say no, I didn't resign?

A Did I say no, I didn't resign? No, I did not say that.

[Emphasis added]

[31] Mr. Conway left the office a little later. At some point that day, he received a telephone call from Rod Rempel, a customer of Griff who had heard that he was leaving and wanted to talk to him about offering him a job. Mr. Conway was not interested in the job in question and put Mr. Rempel off.

[32] This was a Friday and the last working day before Christmas. Late that afternoon, Ms. White sent an email to all staff announcing Mr. Conway's decision to leave to pursue other career opportunities. She stated:

Kyle will be working with myself and the rest of the leadership team to transition his responsibilities prior to his departure.

[33] Mr. Conway received the email and read it at some point over the weekend.

[34] Ms. White did not immediately send Mr. Conway the confirming email she drafted on December 21, 2018. Instead, she sent it to Mr. Noronha for his review. He replied the next day advising that keeping Mr. Conway as an employee until February 28 was too long and would not serve anyone well. He followed up suggesting that Ms. Conway ask for Mr. Conway's resignation letter by December 27.

[35] Ms. White did not do anything more until December 27, 2018, no doubt because of the Christmas holiday. She made changes to her draft email, accepting Mr. Noronha's suggestion that she ask to receive Mr. Conway's letter of resignation immediately, but not the suggestion that the working notice period be shortened. Her revised email sent at 8:30 a.m. on December 27 requested the formal resignation letter by 5 p.m. that day.

[36] Just before 5 p.m. on December 27, 2018, Mr. Conway replied that he had consulted counsel and been advised to defer responding until he had had a chance to meet with counsel on January 3, 2019.

[37] On December 28, 2018, Ms. White replied that Griff would no longer require Mr. Conway to work his notice period through February 28, 2019. She asked him to return his laptop and other company possessions immediately and he did so the next day.

[38] On January 3, 2019, Mr. Conway incorporated Kanata Forest Products Ltd. ("Kanata") with himself as the sole director and shareholder. He began selling lumber in competition with Griff through Kanata. Griff learned of Kanata's activities and, on January 25, 2019, advised Mr. Conway that it was terminating his employment for cause.

Analysis

[39] The issue is whether Mr. Conway resigned prior to Ms. White's communication to Mr. Conway on December 28, 2018. If not, Griff concedes that he was wrongfully dismissed on December 28.

[40] A legal issue is important to the determination of the dispute. The issue concerns the materiality of Mr. Conway's subjective intentions at the meeting of December 21, 2018. Mr. Conway contends that, as a matter of law, there can only be a finding that he resigned if he subjectively intended to resign. If that is so, then a finding in Griff's favour would require that I reject Mr. Conway's evidence that he did not intend to resign prior to delivering a formal letter of resignation.

Legal character of a "resignation"

- [41] The relationship between employer and employee is contractual and an action for wrongful dismissal is an action for breach of contract.
- [42] Contracts of employment have some special features. As in this case, they are often not in writing, of indefinite duration, and their terms are modified over the years with promotions and salary increases. They contain important implied terms. These contracts govern a relationship recognized as important to the employee's sense of identity, self-worth and emotional well-being, and marked by a power imbalance; *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701 at para. 93. In light of the employee's vulnerability and the importance of the relationship, the employer owes the employee obligations of good faith and fair dealing in terminating the relationship; *Wallace*, at para. 95.
- [43] These special features shape the terms of a contract of employment and its interpretation, but they do not change the essential legal character of employment as a legal relationship constituted by an agreement of the parties.
- [44] In principle, a contract of employment for an indefinite term may be terminated in one of three ways.
- [45] First, employment contracts of indefinite duration contain an implied term that they may be terminated by either party giving reasonable notice of an intention to terminate the contract; *Honda Canada Inc. v. Keys*, 2008 SCC 39 at para. 50. Where the contract is ended by reasonable notice of termination provided to the other party, there is no breach of contract. The contract is terminated in accordance with the implied term.
- [46] Second, the parties may negotiate an amendment to the contract permitting termination on less than reasonable notice or even on no notice at all; *Kerr v. Valley Volkswagen*, 2015 NSCA 7 at paras. 12-14. In this case, the amended contract is terminated in accordance with the parties' agreement and there is again no breach of contract.
- [47] Third, the contract may be repudiated by one or the other party, in which case the counterparty may accept the repudiation, bringing the contract and the employment relationship to an end. A contract is repudiated when the repudiating party's words or conduct evince an intention no longer to be bound by the contract. In this case, the repudiation is a breach of contract, and the party accepting the repudiation is entitled to sue for damages.
- [48] In *Potter v. New Brunswick Legal Aid Services Commission*, 2015 SCC 10 at para. 32, Justice Wagner (as he then was), giving judgment for the majority, described employment contracts as "dynamic in comparison with commercial contracts". He held that this dynamism warrants taking a flexible approach in determining whether the employer's conduct evinces an intention no longer to be bound by the contract. The same is true in evaluating whether an employee's conduct evinces an intention no longer to be bound. Such a flexible approach is reflected in cases holding that it is not always open to an employer to treat a spontaneous announcement by an obviously emotional and angry employee that he or she is quitting as a

repudiation of the contract that the employer can immediately accept; *Bru v. AGM Enterprises Inc.*, 2008 BCSC 1680 at paras. 95-109; *Bishop v. Rexel Canada Electrical Inc.*, 2016 BCSC 2351 at paras. 48-51. A cooling off period may be required.

- [49] Successful actions for wrongful dismissal all fall into the category of termination of the contract by repudiation and acceptance. By firing the employee without notice and without cause, the employer repudiates the employment contract. The employee is entitled to accept the repudiation and sue for damages.
- [50] Conversely, it is possible for the employee to repudiate by quitting without notice, and for the employer to accept the repudiation. Depending on the case, it may be said that the employee resigned, quit, or abandoned the employment, with the consequence that the employer is the innocent party, and the employee cannot sue for wrongful dismissal.
- [51] Accordingly, a case involving a "resignation" as a defence to an employee's action for wrongful dismissal may fall into any one of these three categories of cases involving termination of the employment contract. A "resignation" that is not effective immediately may constitute reasonable notice under the employment contract. An employee's stated intention to resign may lead to an agreed termination by amendment of the employment contract. The result is an agreed "resignation". Or an employee's "resignation" may constitute a repudiation of the employment contract by the employee, bringing the contract to an end upon acceptance by the employer.
- [52] With these distinctions in mind, it may be seen that this is a case involving the second kind of resignation, one constituted by what Griff says was an agreement to amend the employment contract from a contract of indefinite duration into one that would come to an end on February 28, 2019. The burden is on Griff to establish that the employment contract was amended on December 21, 2017. Mr. Conway denies that it was amended.

Relevance of subjective intentions in a case of an agreed resignation

- [53] It is settled law that the court must approach the question of whether parties have agreed to make or amend a contract objectively, without reference to their subjective intentions.
- [54] In a very recent decision, the Supreme Court of Canada emphasized that the approach taken to determining whether a contract has been formed is objective rather than subjective; *Owners, Strata Plan LMS 3905 v Crystal Square Parking Corp*, 2020 SCC 29 at paras. 29-33 [Crystal Square]. The law of contract is concerned with reasonable expectations arising from the words and conduct of the parties; *Gill v. Khural*, 2020 BCCA 332 at para. 10. Accordingly, the court must examine "how each party's conduct would appear to a reasonable person in the position of the other party"; *Crystal Square*, at para. 33, quoting P. Benson, *Justice in Transactions: A Theory of Contract Law* (2019), at pp. 112-13.
- [55] In *Crystal Square*, Justice Côté spoke for the Court in explaining that, at para. 31:

[P]arties' reasonable expectations are generally protected in the common law of contracts: McCamus, at pp. 32-33; Waddams, at §§141 and 148. This general rule means that 'a subjective mutual consensus is neither necessary nor sufficient for the creation of an enforceable contract' and that 'a person may be bound by contractual obligations that she did not intend (subjectively) to assume': Waddams, at §§92 and 146. At common law, the risk arising from one party's reasonable reliance on the existence of an agreement is allocated to the party whose conduct gave rise to a reasonable expectation that a contract between the parties would be legally binding.

- [56] The approach must be the same whether the issue involves the making or amendment of a contract, because the fundamental question is the same. The question is whether the reasonable expectations of the parties have been altered by words and conduct having contractual effect.
- [57] The principle that contracts are established and interpreted objectively is fundamental and is not rendered inapplicable because the contract is a contract of employment; Kerr, at para. 12.
- [58] In support of his contention that he could only be found to have resigned if he subjectively intended to resign, Mr. Conway relies on *Beggs v. Westport Foods Ltd.*, 2011 BCCA 76 at para. 36, *Bishop* at paras. 13-15, *Kok v. Adera Natural Stone Supply Co. Ltd.*, 2018 BCSC 1542 at para. 41, *Coutlee v. Apex Granite & Tile Inc.*, 2020 BCSC 315, and *Avalon Ford Sales (1996) Limited v. Evans*, 2017 NLCA 9 at para. 24. These cases do not involve an alleged agreement that the employment will end at a certain future date. They all engage the third kind of "resignation", one arising from alleged conduct on the part of the employee said to constitute a repudiation of the employment relationship. In this context, courts have sometimes held that a focus on the subjective intentions of the employee is appropriate.
- [59] In *Beggs*, the plaintiff failed to show up for work when her house burnt to the ground. The issue was whether she had repudiated the employment contract by abandoning her job. Justice D. Smith gave judgment for the Court and stated:
- [36] It is common ground that both a dismissal by an employer and a voluntary resignation by an employee require a clear and unequivocal act by the party seeking to end the employment relationship. There is a distinction, however, in the tests to be met in order to establish each of these methods for ending the employment relationship. A finding of dismissal must be based on an objective test: whether the acts of the employer, objectively viewed, amount to a dismissal. A finding of resignation requires the application of both a subjective and objective test: whether the employee intended to resign and whether the employee's words and acts, objectively viewed, support a finding that she resigned.
- [37] David Harris summarizes the distinction between the two methods in his text *Wrongful Dismissal*, loose-leaf (consulted on 13 January 2011), (Toronto: Thompson Canada Ltd. 1989) at pages 3-4, 3-5 and 3-9:

§3.0 Dismissal

Summary: Dismissal is a matter of substance, not form. It is effective when it leaves no reasonable doubt in the mind of the employee that his or her employment has already come to an end or will end on a set date

...

The crucial factor in assessing the effectiveness of a dismissal is the clarity with which it was communicated to the employee. Mr. Justice Macfarlane of the British Columbia Court of Appeal stated the law in this regard as follows in *Kalaman v. Singer Valve Co.* (1997), 1997 CanLII 4035 (BC CA), 31 C.C.E.L. (2d) 1, 93 B.C.A.C. 93, 151 W.A.C. 93, 38 B.C.L.R. (3d) 331, [1998] 2 W.W.R. 112, 97 C.L.L.C. 210-017, 1997 Carswell BC 1459, [1997] B.C.J. No. 1393:

A notice must be specific and unequivocal such that a reasonable person will be led to the clear understanding that his or her employment is at an end at some date certain in the future. Whether a purported notice is specific and unequivocal is a matter to be determined on an objective basis in all the circumstances of each case. (p. 11 [C.C.E.L.]; emphasis added)

...

§3.0A Dismissal versus Voluntary Resignation

Summary: The test for voluntary resignation (as opposed to dismissal) is objective, focusing on the perceptions of a "reasonable employer" of the intentions of the employee based on what the employee actually says or does or, in some cases, on what he or she fails to say or do. Among the relevant circumstances are the employee's state of mind, any ambiguities in relation to the conduct which is alleged to constitute "resignation" and, to a certain degree, the employee's timely retraction, or attempted retraction, of his or her "resignation."

[Emphasis by underlining added; emphasis by italics is that of Smith J.A.]

[60] Beggs is cited as authority for the proposition that there is no resignation unless the employee subjectively intended to resign in the cases cited by Mr. Conway and also in *Canuck Security Services Ltd. v. Gill*, 2013 BCSC 893 at para. 75, *Movassaghi v. Steels Industrial Products Ltd.*, 2012 BCSC 1663 at para. 135, and *Grewal v. Khalsa Credit Union*, 2011 BCSC 648 at para. 96.

[61] Of all these cases, only *Movassaghi* involved an agreement to amend an employment agreement. Having cited *Beggs*, Butler J. (as he then was) adopted an objective approach in finding that Mr. *Movassaghi* retracted his resignation before the defendants accepted it and then concluded a new short term agreement with the defendants (at paras. 136-137).

- [62] I conclude that Beggs and the other cases cited above are not authority for the proposition that Mr. Conway's subjective state of mind is relevant to determining whether, on December 21, 2018, he agreed to resign by amending his contract of employment so that it would terminate on February 28, 2019. Rather, as in any case involving the making or amendment of a contract, the matter must be approached objectively, having regard to what was said and done by Mr. Conway and Griff's representatives.
- [63] I do not need to address the relevance of subjective intentions in a case involving the third kind of "resignation", that is, conduct on the part of the employee alleged to constitute a repudiation of the employment contract. However, I should observe that there are authorities that are difficult to reconcile with the passage I have quoted from Beggs. For example:
- a) Generally speaking, whether a contracting party has repudiated a contract is determined objectively; *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423 at para. 40; *Clausen v. Canada Timber & Lands Ltd.*, [1923] 4 D.L.R. 751 (P.C., Canada) at 755;
 - b) In *Danroth v. Farrow Holdings Ltd.*, 2005 BCCA 593 at paras. 8 to 10 and again in *Pereira v. The Business Depot Ltd.*, 2011 BCCA 361 at paras. 47 and 55-58, before and after Beggs was decided, the British Columbia Court of Appeal adopted an exclusively objective test in determining whether an employee's conduct constituted a "resignation";
 - c) *Danroth* applied *Kieran v. Ingram* (2004), 189 O.A.C. 58 where the Ontario Court of Appeal held, at para. 27, that "be clear and unequivocal, the resignation must objectively reflect an intention to resign, or conduct evidencing such an intention"; and
 - d) The passage from Harris' text, *Wrongful Dismissal*, quoted in Beggs at para. 37 and reproduced above, states that "the test for voluntary resignation (as opposed to dismissal) is objective". In this light, Harris' subsequent reference to "the employee's state of mind" as a relevant consideration might best be understood as shorthand for 'the employee's state of mind, so far as it would be apparent to a reasonable person in the position of the employer'.
- [64] It is at least arguable that neither Beggs nor any of the cases that cites Beggs as authority for the proposition that repudiation by an employee of the employment contract requires a subjective intention to repudiate actually turns on the presence or absence of subjective intent. Fortunately, this is a question I need not further address.

Application of an objective test

- [65] I must examine the parties' words and conduct on December 21, 2018, from the perspective of a reasonable third party who has knowledge of the surrounding circumstances known to both parties. The onus is on Griff to establish that Mr. Conway clearly and unequivocally agreed to resign his employment as of February 28, 2019, and that the letter was to be no more than a formality. I should bear in mind Mr. Conway's vulnerability and what was at stake for him.

- [66] If I find that the parties' words and conduct at the meeting on December 21, 2018, are ambiguous, I may also have regard to their conduct after the meeting and prior to December 28, 2018, albeit with caution and only to the extent that it unambiguously reveals what the parties intended on December 21; *Re Canadian National Railways and Canadian Pacific Ltd.* (1978), 95 D.L.R. (3d) 242 (B.C.C.A.) at 262, *aff'd* [1979] 2 S.C.R. 668; *Shewchuk v. Blackmont Capital Inc.*, 2016 ONCA 912 at paras. 51-56; *Wade v. Duck*, 2018 BCCA 176 at paras. 25-31.
- [67] The parties came to the meeting on December 21, 2018, against the backdrop of Mr. Conway's repeated assertions that, if his proposal was not accepted, he would resign. It was something he had been saying for months.
- [68] At the meeting, Mr. Conway appeared calm. When he announced his intention to resign in response to Ms. White's rejection of his proposal, his presentation and behaviour at the meeting would lead a reasonable person in the position of the employer to believe that he was following through on a course of conduct he had long settled on in his own mind.
- [69] It appears from Mr. Conway's evidence that he had been bluffing, and had never really thought through what would happen if his proposal was rejected. The point is that Ms. White and Mr. Frith had no way of knowing this. It was reasonable for them to take what Mr. Conway was saying at face value. Griff was not taking advantage of Mr. Conway when it accepted his offer to resign and settled on a period of working notice in a short, unemotional discussion.
- [70] It is still necessary to consider the agreement that a letter was to be provided. Was it a condition of the agreement that Mr. Conway would resign? Viewed in isolation, the parties' agreement at the meeting is ambiguous because it is unclear from the discussion at the meeting, viewed in isolation, why a letter of resignation was required. If the letter was purely a formality, then it is unclear why Mr. Conway would need ten days to prepare it, even allowing for the disruption of the Christmas holiday.
- [71] In my view, the parties' subsequent conduct resolves the ambiguity. Griff did not wait to receive the anticipated letter of resignation. It took immediate steps to notify employees and customers that Mr. Conway was resigning. Mr. Conway was aware of these steps within hours. He did not tell Griff, or anyone else, that he had not yet agreed to resign. He confirmed to the members of his team that what they had learned from the company was correct, and he was working with the company on a transition plan.
- [72] Viewed reasonably and objectively, the subsequent conduct of both parties unequivocally establishes that they viewed the anticipated letter as a formality. The substance of the matter was that Mr. Conway had already agreed that his employment would end on February 28, 2019.

- [73] In short, Mr. Conway and Griff agreed to amend the contract of employment. In light of the amendment, I do not think that Griff's advice to Mr. Conway to stop coming to work for the balance of the term of the contract constituted a repudiation, and Mr. Conway did not assert that it did. The amended contract remained in force into January 2019.
- [74] Mr. Conway's conduct in entering into competition with Griff through Kanata in January 2019 was a breach amounting to a repudiation of the amended contract of employment. Griff was entitled to accept the repudiation and bring the amended contract to an end. It did so on January 25, 2019. It follows that Mr. Conway's action for wrongful dismissal must fail.

Damages

- [75] In case I am wrong, I will assess damages on the footing that Mr. Conway was wrongfully dismissed on December 28, 2018.
- [76] The parties agree that, assuming liability, Mr. Conway's damages are a function of the reasonable notice he should have received at a rate of \$14,029.83 per month, less income that he earned or reasonably should have earned to mitigate his damages during the notice period. The issues are as follows:
- What is reasonable notice in this case?
 - To what extent are Mr. Conway's damages reduced by income that he earned or should have earned during the notice period?

Reasonable notice

- [77] Mr. Conway says that reasonable notice in this case would be 20 months, or one month per year of service. Griff says that it would be 16 to 18 months.
- [78] What constitutes reasonable notice is the subject of a very large volume of cases involving the application of legal principles to ever-changing facts. Structure is provided by the well-known list of factors identified in *Bardal v. Globe & Mail Ltd.* (1960), 24 D.L.R. (2d) 140 (Ont. H.C.) at 145 and *Ansari v. British Columbia Hydro and Power Authority* (1986), 2 B.C.L.R. (2d) 33 (S.C.), *aff'd* (1986), 55 B.C.L.R. (2d) xxxiii (C.A.). The factors include:
- character of the employment;
 - length of service;
 - age of the employee; and
 - availability of similar employment, having regard to the experience, training, and qualifications of the employee.
- [79] The factors assist the court in comparing the case at hand to cases said to be comparable. As Justice Huddart observed, in *Saalfeld v. Absolute Software Corporation*, 2009 BCCA 18 at para. 14:

The exercise of looking to comparables and adjusting for differences permits a reasoned objective analysis, not only by a court, but by all those who must determine reasonable notice in particular circumstances.

[80] In *Ansari*, McEachern C.J.S.C. (as he then was) identified 18 to 24 months as the rough upper limit for reasonable notice, absent extenuating circumstances.

[81] I turn to consideration of the Bardal/Ansari factors.

a) Character of the employment

[82] All other things being equal, a higher level of responsibility occupied by an employee imports a longer period of reasonable notice.

[83] Mr. Conway occupied a position of substantial responsibility as a member of the senior management team. He directed one of Griff's two operational divisions and reported directly to the president, Ms. White. A team of at least six employees reported directly to him.

b) Length of service

[84] Mr. Conway had 20 years of service with Griff. All other things being equal, the cases tend to recognize periods of reasonable notice that are proportionate to the length of service, with exceptions for employees who were employed for short or very long periods.

[85] Cases may be compared on the basis of months of notice awarded per year of service, recognizing that the comparison is no more than a sign post and reasonable notice is not determined by an arithmetical formula; *Spalti v. MDA Systems Ltd.*, 2018 BCSC 2296 at paras. 24-34.

c) Age of the employee

[86] Subject to the rough upper limit identified in *Ansari*, employees in their 50s or 60s dismissed from positions of significant responsibility tend to get notice exceeding one month per year of service; *Stanley v. Advertising Directory Solutions Inc.*, 2014 BCSC 376 at para. 64; *Luchuk v. Starbucks Coffee Canada Inc.*, 2016 BCSC 830 at paras. 31-33.

[87] Mr. Conway was 44 years old when his employment ended. This puts him close to the mid-point of his working career. All other things being equal, the cases recognize that reasonable notice is longer in the case of an older employee than a younger employee. At a certain point, depending on the industry, advancing age can make it difficult for a long-time employee to find alternate employment. There is no evidence to suggest that Mr. Conway was at that point in 2018.

Availability of similar employment

- [88] It is important that Mr. Conway has only a high school education, without post-secondary qualifications, because it limits his ability to find alternate employment. He is well qualified by his experience with Griff to work in the lumber and building supply industry. Mr. Conway describes it as "a very specialized industry with few jobs for senior managers" and that the industry is currently suffering a major economic slump. This evidence is not disputed.
- [89] As I have noted, Mr. Conway received a job overture from Mr. Rempel on the announcement of his resignation. Mr. Rempel asked Mr. Conway whether he would be interested in starting a Canadian wholesale/export division for a Japanese company, Mitsui Homes. Mr. Conway was uninterested because he felt that he did not get along well with Mr. Rempel, he doubted Mr. Rempel's authority, he was uncertain of his own plans, and he anticipated that, as a Japanese company, Mitsui Homes would not be prepared to offer him equity in the business to be established.
- [90] Mitsui Homes has not pursued the establishment of a wholesale/export division. I do not take Mr. Rempel's discussion with Mr. Conway as cogent evidence of the availability of similar employment.

Comparable cases

- [91] Mr. Conway cites 10 cases. The three I find most helpful are *Price v. 481530 B.C. Ltd.*, 2016 BCSC 1940, *Luchuk*, and *Cook v. Royal Trust Co.*, 1990 CanLII 247 (B.C.S.C.). In *Price*, the employee was 44 years old and the manager of a hair loss clinic that employed two to three employees. He had been employed for 20 years and was awarded 20 months' notice. In *Luchuk*, the plaintiff was a regional manager with significant responsibilities that required him to be on call 24 hours a day, seven days a week. He was 48 years old and had been employed for 18 years. At para. 33, Justice Gray noted that, while he did not fall into the category of employees in their 50s or 60s, he was close. Mr. Luchuk was awarded 18 months' notice. In *Cook*, the plaintiff was a 46-year-old Area Manager-Lending with 20 years of experience working for the defendant trust company. He supervised as many as nine employees engaged in mortgage lending. He was awarded 18 months' notice.
- [92] In *Price* and *Luchuk*, the plaintiffs obtained 1 month of notice per year of service. In *Cook*, the plaintiff obtained .9 months of notice per year of service.
- [93] Griff cites *Steinebach v. Clean Energy Compression Corp.*, 2015 BCSC 460, rev'd on other grounds 2016 BCCA 112, *Peticca v. Oracle Canada ULC*, [2015] O.J. No. 1985 (S.C.J.), and *Chandran v. National Bank of Canada*, 2011 ONSC 777, aff'd 2012 ONCA 205. In *Steinebach*, the plaintiff was 49 years old and had been employed by the defendant for 19.5 years in a sales position requiring significant skill and knowledge in a specialized industry. He was awarded 16 months' notice. In *Peticca*, the plaintiff was 47 years old, a middle manager who supervised 25 employees. She had little formal training or experience and had worked her way up in the company over 19 years of service. She was awarded 17 months' notice. In

Chandran, the plaintiff was 41 years old and was a senior manager with a chartered bank. Over 18 years of service, he had worked his way up from an initial position as an account trainee. He was awarded 18 months' notice.

- [94] In Steinbach and Peticca, the plaintiffs obtained .82 and .89 months of notice per year of service. In Chandran, the plaintiff obtained 1 month of notice per year of service.

Conclusion concerning reasonable notice

- [95] Taking all this into account, in my view, the reasonable notice period in this case is 18 months. This is a notice period lying within the range identified in the cases. In finding that reasonable notice is less than one month per year of service (.9 to be precise), I am influenced by the rough upper limit identified in Ansari and the fact that, at 44 years of age, Mr. Conway was not yet in, or approaching, his 50s and 60s.

Mitigation of loss

- [96] Amounts actually earned by Mr. Conway as employment income during the notice period must be deducted in determining the net award.
- [97] Griff paid Mr. Conway \$8,080.87 (gross) in 2019 before cutting off further payments on the ground that he had entered into competition with Griff.
- [98] Kanata is not yet profitable. Mr. Conway has made shareholder loans to Kanata, some of which have been repaid. Kanata's books record \$30,000 of its payments to Mr. Conway as salary paid to him during the notice period on April 15, 2020. In my view, the \$30,000, but not the loan repayments, should be treated as employment income earned by Mr. Conway during the notice period.
- [99] Griff maintains that Mr. Conway has failed to make reasonable efforts to mitigate his loss and should be credited with more than the \$38,080.87 actually paid to him.
- [100] The law prevents a plaintiff from recovering damages beyond the extent to which a reasonable person in the position of the plaintiff, having taken such steps as a reasonable person would take in his or her own interest, would suffer a loss; *Forshaw v. Aluminex Extrusions Ltd.* (1989), 39 B.C.L.R. (2d) 140 (C.A.) at 143-144. While the cases often speak of a duty to mitigate, it "is not a duty owed to an employer, rather it is a duty an employee owes to conduct himself or herself as a reasonable person"; *Coutts v. Brian Jessel Autosports Inc.*, 2005 BCCA 224 at para. 22.
- [101] The onus of establishing a failure to mitigate lies on the employer; *Red Deer College v. Michaels*, [1976] 2 S.C.R. 324 at 331. It is sometimes described as a heavy onus; *Smith v. Aker Kvaerner Canada Inc.*, 2005 BCSC 117 at para. 32. The employer must establish: (1) that the plaintiff failed to take reasonable steps in his or her own interest to limit the loss by another source of income; and (2) that had the plaintiff taken those steps, the loss would have been reduced; *Nardulli v. C-W Agencies Inc.*, 2012 BCSC 1686 at paras. 449-450, varied on other

grounds 2014 BCCA 31. These are both questions of fact.

- [102] Griff maintains that Mr. Conway failed to take reasonable steps because he did not pursue the possibility of employment with Mitsui Homes and he did not apply for jobs with established employers in the industry. It submits that his decision to incorporate Kanata was the unreasonable pursuit of a speculative business venture that should have been a last resort, citing *Allan v. Westinghouse Canada Inc.*, [2000] O.J. No. 5054 (S.C.J.) at para. 87.
- [103] It is worth noting that in *Allan*, the mitigation defence failed even though the plaintiff employee had become "enthralled with the prospect of self-employment", failed to market his business reasonably, and the business could not be characterized as a success (at para. 96). Justice Whitten rejected the defence because an outplacement service retained by the employer had presented self-employment as an option, and there was no evidence of alternate employment options available to the plaintiff.
- [104] Similarly, in *Munoz v. Sierra Systems Group Inc.*, 2015 BCSC 269 at para. 107, *aff'd* 2016 BCCA 140 at paras. 55-61, Justice Bruce rejected a defence of failure to mitigate, even though the plaintiff had taken few steps to mitigate his loss, where there was no evidence that the plaintiff would otherwise have found appropriate work.
- [105] In the case at bar, the only evidence of an employment opportunity available to Mr. Conway is the Mitsui Homes prospect. It appears to have been an idea spontaneously conceived by Mr. Rempel when he learned that Mr. Conway was on the market. Mitsui Homes has not followed through to establish a wholesale log export business in British Columbia. I am not persuaded that there was a substantial prospect of employment with Mitsui Homes, had Mr. Conway pursued discussions with Mr. Rempel.
- [106] Whether or not Mr. Conway acted reasonably, in the absence of evidence of suitable employment opportunities available to Mr. Conway in the industry, I am not persuaded that Mr. Conway's damages should be reduced on the basis of a failure to mitigate. For the purpose of determining damages, I find that Mr. Conway should not be credited with having earned additional income over and above that which he actually received.

Conclusion as to damages

- [107] Assuming liability, Mr. Conway's damages are the amount he would have earned during a notice period of 18 months ($18 * \$14,029.83$) or \$252,536.94, less the \$38,080.87 he actually earned during the notice period. The net amount is \$214,456.07.

Disposition

- [108] For these reasons, Mr. Conway's action must be dismissed, with costs. If there is anything that must be brought to my attention concerning costs, the parties may make arrangements to speak to it through the registry.

"Gomery J."

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