

CANADA / JUDGMENT

Reotech Construction Ltd. v. Snider

2022 BCSC 317

COURT

Supreme Court of British Columbia

DECIDED

2 March 2022

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2022 BCSC 317 Reotech Construction Ltd. v. Snider

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Reotech Construction Ltd. v. Snider,

2022 BCSC 317

Date: 20220302

Docket: S240998

Registry: New Westminster

Between:

Reotech Construction Ltd.

Appellant

And

Dean Snider

Respondent

Before: The Honourable Justice Fleming

On appeal from: A decision of the Provincial Court of British Columbia, dated August 24, 2021
(Dean Snider v. Reotech Construction Ltd.,

New Westminster Action No. C18327).

Reasons for Judgment

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Place and Date of Hearing:

New Westminster, B.C.

January 14, 2022

Place and Date of Judgment:

New Westminster, B.C.

March 2, 2022

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Introduction

- [1] Reotech Construction Ltd. ("Reotech") appeals on 12 grounds the small claims decision made by the Provincial Court regarding Dean Snider's claim for damages based on his wrongful dismissal.

- [2] Section 12 of the Small Claims Act, R.S.B.C. 1996, c. 430 allows for an appeal to this Court on questions of fact and law. Section 13 empowers the Supreme Court to make any order the Provincial Court could have made; impose reasonable terms and conditions in an order; make an additional order that it considers just; and award costs in accordance with the Supreme Court Civil Rules [Rules].
- [3] For the reasons that follow I am dismissing the appeal on ten grounds and allowing it on two grounds, which results in a reduction of Mr. Snider's award of damages and eliminates the requirement for Reotech to pay a penalty. I am also, however, ordering Reotech to pay his party to party costs.

Overview

- [4] Mr. Snider worked for Reotech as a general construction labourer for two years and four months, starting in early February 2018. On or about March 18, 2020, Reotech placed Mr. Snider on a temporary layoff and never recalled him to work.
- [5] Reotech acknowledged terminating him without cause. On September 30, 2020, it paid him two weeks salary as compensation, relying on the termination provision in a policy and procedure manual (the "Manual") that Mr. Snider received and signed after his employment began.
- [6] In his notice of claim Mr. Snider sought \$35,000 in damages, including damages for reasonable notice (five months), special damages arising from mitigation expenses, and punitive damages. His claim for punitive damages was based in part on Reotech's counterclaim for the return of the compensation payment. In his amended notice of claim, Mr. Snider identified an annual bonus of \$500 as part of his remuneration package and claimed that he was entitled to his entire remuneration package for the duration of the reasonable notice period. In addition he pleaded there should be no set off based on any amounts he received under the Canada Emergency Response Benefit ("CERB").
- [7] In its reply, Reotech pleaded the provisions in the Manual, namely the termination provision, formed part of the terms and conditions of Mr. Snider's employment. The termination provision reads in part: "[a]n employee, where there is no just cause to terminate, may be eligible for written working notice, payment in lieu of notice or a combination of the two as follows: After twelve (12) months: two weeks compensation or working notice .".
- [8] In the alternative, Reotech asserted the employment contract did not contain an implied term requiring reasonable notice. Instead, there was an implied term that Mr. Snider could be dismissed without any notice based on industry custom and Mr. Snider's express rejection of the Manual. Reotech also pleaded that if Mr. Snider suffered any loss or damage, he had mitigated that loss or damage through receipt of CERB.

- [9] Following a two-day trial and supplemental submissions, the trial judge issued reasons for judgment in an 18-page decision (the "Decision"). The Decision awarded Mr. Snider damages for reasonable notice, dismissed his claim for punitive damages, and dismissed Reotech's counterclaim.
- [10] The entered order (the "Order") reads:
1. The Defendant terminated Dean Snider without cause and without notice.
 2. The reasonable notice period is 4-and-a-half (4.5) months.
 3. The Defendant's counterclaim is dismissed.
 4. The Claimant's claim for punitive damages and aggravated damages is dismissed.
 5. The Defendant shall pay to the Claimant:
 - a. damages in the equivalent to 4.5 months salary less any amount paid by the defendant in Sept. 2020.
 - b. \$500 in lieu of the Claimant's annual bonus;
 - c. vacation pay;
 - d. CPP contributions that would have been made by the Defendant during the notice period;
 - e. filing fees;
 - f. disbursements; and
 - g. court order interest on the above amounts.
 6. Additionally, the Defendant shall pay to the Claimant \$1,500 as a penalty under Rule 101(6).

The Decision

- [11] Near the outset of her reasons, the trial judge identified a conflict in the evidence about whether Reotech offered Mr. Snider employment at his interview on January 31, 2018, or sometime later as Reotech's witness stated. She found however that Mr. Snider accepted an offer, and then on February 5, 2018, began working as a general labourer earning \$17 per hour with an agreed upon four-day work week. The trial judge also found that before Mr. Snider starting working, Reotech informed him that he would have to sign some documentation for payroll purposes and a package of payroll documents would arrive soon. He received the package, which included payroll documents and the Manual after February 5, 2018. Mr. Snider admitted to not reading the Manual apart from the signature page before signing it. He returned all of the documents to Reotech on February 8, 2018.
- [12] On March 19, 2020, Reotech imposed a 16-week temporary layoff on Mr. Snider. On June 11 and 30, 2020, Reotech advised him it could not guarantee him work. On June 30, 2020, Reotech also advised him that his benefits would end on July 31, 2020.

- [13] The trial judge's additional findings related to termination included Reotech making the two-week compensation payment "six months" later, and after Mr. Snider sought the assistance of counsel, on September 30, 2020.
- [14] Addressing what occurred after Mr. Snider was laid off or terminated, the trial judge found that Mr. Snider applied for CERB and searched for a new job, but his job search was made difficult by the Covid-19 lockdown and Public Health directives. He eventually sought retraining and certification in fields related to previous employment.
- [15] After identifying the leading authorities on the assessment of credibility, the trial judge assessed the evidence of Mr. Snider and the defence witnesses. She found Mr. Snider's testimony was truthful and credible. She also found that the defence witnesses had been candid and forthright, but their memories or knowledge of the circumstances were limited or less than detailed. Observing the events surrounding Mr. Snider's hiring and termination were more significant to him, the trial judge concluded that where there was a conflict in the evidence, she preferred his.
- [16] Turning to the substantive issues, the trial judge concluded the termination provision in the Manual was not binding on Mr. Snider because it did not form part of the employment contract and there was no evidence he agreed to amend the contract or enter into a new contract. In reaching this conclusion, the trial judge cited *Valle Torres v. Vancouver Native Health Society*, 2019 BCSC 523 at para. 66. She also specified that the terms of Mr. Snider's employment "crystallized before he started his job" on February 5, 2018, reiterated her earlier finding that the Manual was delivered to him after he started, and made the additional finding that Reotech did not advance any new consideration.
- [17] The trial judge also made other findings regarding the termination provision, namely that Mr. Snider did not consent to it, and in contrast to other provisions in the Manual, it was permissive, vague, and uncertain in its meaning.
- [18] The trial judge began her analysis of the appropriate notice period with a discussion of the factors to be considered and the approach articulated in *Bardal v. Globe & Mail Ltd.* (1960), 24 D.L.R. (2d) 140, [1960] O.J. No. 149 (Ont. H.C.). Guided by *Bardal*, she rejected Reotech's argument that the standard in the construction industry is that general labourers are not entitled to any reasonable notice or pay in lieu. In doing so, she noted the absence of any independent evidence regarding an industry standard or custom. Instead it was Reotech's employees who provided some evidence to this effect. Further, Mr. Snider contradicted their evidence and was not challenged on this point.
- [19] Identifying Mr. Snider as a short-service employee, the trial judge relied on *Saalfeld v. Absolute Software Corporation*, 2008 BCSC 760, as setting out two to three months notice as the starting point for short-service employees. She also relied on *Latham v. Bartle & Gibson Co. Ltd.*, [1997] B.C.J. No. 2011, 1997 CarswellBC 1945 (S.C.) quoting from para. 25:

- [25] The plaintiff was a pleasant, committed labourer, employed at a relatively low level in the hierarchy of the company. That should not detract from his value as a person, nor his value to the company, but it places him at a level that dictates a defined amount of notice.
- [20] The trial judge observed the Court in Latham found the plaintiff was entitled to four months' notice after 28 months of service, before reasoning:
- [58] To that, I would add an additional two weeks based on the challenges posed by COVID-19 and the availability of similar employment, as contemplated by the Bardal factors. The defendant terminated the claimant during a serious global pandemic. He has retrained but still has not found another job. In the circumstances, I find that four and a half months is the appropriate notice given the claimant's inability to find alternate and available employment.
- [21] The trial judge went on to find Mr. Snider was also entitled to compensation for the loss of a \$500 annual bonus, vacation pay accumulated to the time of termination, and CPP benefits that Reotech would otherwise have paid until the end of the notice period, citing Valle Torres again.
- [22] Addressing the issue of whether CERB payments were deductible from a damage award, the trial judge identified the BC authorities at that time, *Hogan v. 1187938 B.C. Ltd.*, 2021 BCSC 1021, which found CERB was deducted, and *Andrews v. Allnorth Consultants Limited*, 2021 BCSC 1246, which found it was not, as in conflict. She also referred to *Iriotakis v. Peninsula Employment Services Limited*, 2021 ONSC 998, and *Slater v. Halifax Herald Limited*, 2021 NSSC 210, which considered *Hogan*, and like *Andrews*, declined to deduct the CERB.
- [23] In discussing *Hogan*, the trial judge identified the articulated concern as a potential windfall for the claimant if CERB was not deducted. Referring to counsel's submissions about the government website and Mr. Snider's opinion about his understanding of the CERB scheme, the trial judge found there was no evidence to support a finding one way or the other about whether Mr. Snider would be obligated to repay. She then indicated that she preferred the reasoning in *Slater* and quoted at length from the decision. I include only part of the quotation:
- [57] In *Hogan* the damage award was based on the income that the plaintiff would have earned if he had continued to work during the reasonable notice period. If the deduction were not made, he would be compensated for income that he had not lost. The employee would be in a better economic position than he would otherwise be. It is difficult to disagree with that logic. But the understanding of CERB seems to be developing.
- [58] As the country begins to move out of the pandemic more questions are being asked about the nature of the ad hoc CERB program. Clearly there are people who will have to pay it back. Mr. Slater will likely to have repay EI benefits for the period to which the damages relate. EI benefits are not deducted from awards for damages for wrongful dismissal. They do not have to be repaid. Mr. Slater may have to repay CERB as well. While CERB payments

were not provided as part of an insurance program, they were intended as a form of income replacement, provided by the federal government. The requirement for repayment makes them analogous to EI benefits.

- [24] In declining to deduct Mr. Snider's CERB benefits, the trial judge also commented that any repayment obligation was between him and the federal government, not Reotech.
- [25] After dismissing the counterclaim and Mr. Snider's claim for punitive damages, the trial judge awarded Mr. Snider \$1,500 pursuant to R. 10.1 of the Small Claims Rules, B.C. Reg. 261/93, based on a settlement offer he made in February 2021.
- [26] At the appeal hearing the parties agreed the offer was approximately \$12,000.

Issues on Appeal

- [27] As I have indicated, Reotech's notice of appeal sets out 12 grounds of appeal (the "Grounds/Issues"). It reads as follows:
1. The Judge was clearly wrong in finding that the Appellant's employee manual (the "Manual") was not binding on the Respondent. The Judge erred in finding that there was no consideration for agreeing to the Manual. In addition or in the alternative, the Judge applied the wrong law, and there was in fact no need for any new consideration ["Ground/Issue #1"].
 2. The Judge was clearly wrong in finding that all the terms of the Respondent's employment had crystallized before the Manual was provided to him ["Ground/Issue #2"].
 3. The Judge was clearly wrong in finding that the Respondent did not agree to the termination clause in the Manual ["Ground/Issue #3"].
 4. The Judge was clearly wrong in finding that the termination clause in the Manual was meaningless and therefore did not limit the Respondent's entitlement to two weeks' compensation. The Judge did not give proper weight to the evidence and the Agreed Statement of Facts. The Respondent did not plead that the termination clause itself was ambiguous, unenforceable or meaningless based on how it was worded, and the parties did not argue that point in any event ["Ground/Issue #4"].
 5. The Judge was clearly wrong in finding that the Appellant breached the Manual. No such breach was pleaded by the Respondent, and the parties' Agreed Statement of Facts provided that "Following the termination of the Claimant's employment, the Defendant paid to him two weeks' compensation (\$1,520 gross) in accordance with the Manual" [underlining added.] The Judge also incorrectly found that there was a delay of six months in paying the two weeks' compensation ["Ground/ Issue #5"].

6. The Judge was clearly wrong when she interfered with the Appellant's cross-examination of the Respondent on the circumstances surrounding the payment of two weeks' compensation to the Respondent pursuant to the Manual. During cross-examination, the Judge interrupted counsel for the Appellant and stated that her decision would not depend on those circumstances, but she then erroneously based her decision, in part, on those circumstances ["Ground/Issue #6"].
 7. The Judge was clearly wrong in finding that a notice period of 4.5 months was reasonable. The Judge misapplied the law and did not give proper weight to the evidence ["Ground/Issue #7"].
 8. The Judge was clearly wrong in awarding the Respondent vacation pay during the notice period. Vacation pay is not to be included with payment in lieu of notice except in very limited circumstances that were not in evidence ["Ground/Issue #8"].
 9. The Judge was clearly wrong in awarding CPP contributions to the Respondent when those CPP contributions will have to be deducted and remitted from the damage award, therefore requiring the Appellant to pay CPP contributions twice ["Ground/Issue #9"].
 10. The Judge was clearly wrong in declining to deduct CERB benefits from the damage award. The Judge erroneously distinguished a binding BC Supreme Court case in favour of a distinguishable and non-binding case from another Province ["Ground/Issue #10"].
 11. The Judge was clearly wrong in awarding a \$500 annual bonus to the Respondent. There was no evidence that a bonus would have otherwise been paid to the Respondent during the notice period or at all ["Ground/ Issue #11"].
 12. The Judge was clearly wrong in awarding the Respondent \$1,500 in costs ["Issue #12"].
- [28] As can be seen, none of the grounds of appeal identify the nature of the alleged error and some, if not several, include multiple alleged errors.
- [29] The same is true of Reotech's almost 24 pages, mostly single-spaced statement of argument, which replicates the grounds as issues. Nor does the statement of argument identify the requisite standards of review or discuss their application to the many Grounds/Issues.
- [30] Mr. Snider asserts, and I largely agree, that much of Reotech's statement of argument and submissions involves an attempt to reargue its case. I accept that the multiplicity of grounds and their unwieldy framing made the task of responding to the appeal unnecessarily difficult and time consuming.

Standard of Review

- [31] As Justice Affleck observed in *Wang v. Chandi*, 2019 BCSC 205, a small claims appeal is not a rehearing of the Provincial Court trial, nor is it an opportunity to reargue the result of the trial in an effort to achieve a different outcome (para. 5).

- [32] The standard of review on pure questions of law is one of correctness. The standard of review for findings of fact requires a palpable and overriding error. A palpable error is one that is obvious or plainly seen: *Housen v. Nikolaisen*, 2002 SCC 33 at para. 5. An overriding error is an error that affects the outcome of the case.
- [33] On questions of mixed fact and law, the standard of review exists along a spectrum. Where there is an extricable question of law, the standard of review is correctness. However, with respect to the application of the correct legal principles to the evidence, the standard is palpable and overriding error: *Housen* at paras. 26-36.
- [34] The Grounds/Issues before me mostly involve questions of mixed law and fact. Therefore, as will be further outlined in each section, the standard for most of the Grounds/Issues is palpable and overriding error. That said, I find that Ground/Issue #10, or the deductibility of CERB, is a question of law. Accordingly, the applicable standard of review for this section is correctness.

Discussion

- [35] I turn now to the enumerated Grounds/Issues.

Termination Provision

- [36] Grounds/Issues #1, #2, and #3 relate to the trial judge's findings that the Manual and the termination provision did not form part of the employment contract, or part of an amended or new contract for want of consideration.
- [37] Reotech asserts the trial judge was clearly wrong in finding the Manual was not binding on Mr. Snider and there was no consideration for the Manual. It also asserts the trial judge was clearly wrong in finding that all the terms of Mr. Snider's employment crystallized before the Manual was provided to him.
- [38] Reotech's argument in support of these Grounds/Issues includes a series of assertions about the facts, such as "the interview took place on Wednesday, January 31, 2018, but it is clear that the parties were still actively negotiating the terms of Mr. Snider's employment up to and including Friday, February 2, 2018 by email". There is no attempt to relay the factual assertions to the trial judge's findings of fact.
- [39] Reotech also asserts some facts alongside purported legal principles. For example, at para. 65, it writes:

The employment agreement was not concluded prior to Mr. Snider expressly agreeing to deal with the Paperwork later, which he knew he would have to complete as part of the hiring process. All the terms of the contractual relationship did not crystallize until Mr. Snider signed the Paperwork: *Bern v. AMEC E&C Services Limited*, 2007 BCSC 856 (paras. 35 to 38).

- [40] Bern does not stand for this proposition. The Court found the plaintiff was bound by the written agreement containing a termination provision, and rejected the notion the employment agreement was reached verbally at a meeting before the written agreement was signed. It did so based on the evidence that during the meeting the plaintiff was told there would be an employment agreement to sign. The Court also relied on evidence the parties had always conducted themselves in accordance with the written agreement. In other words, the case turned on its particular facts, and the Court's assessment of the objective intention of the contracting parties.
- [41] More importantly, here, the trial judge cited Valle Torres, which dealt with the specific question of whether the policy manual formed part of an employment contract. I note Valle Torres considered a number of other authorities that also dealt with this question, including *Rahemtulla v. Vanfed Credit Union*, [1984] B.C.J. 2790, 51 B.C.L.R. 200 (S.C.) at paras. 22 - 24; *Ellison v. Burnaby Hospital Society*, [1992] B.C.J. 858, 1992 CarswellBC 863 (S.C.); and *Cheong v. Grand Pacific Travel and Trade (Canada) Corp.*, 2016 BCSC 1321, none of which found the manual was part of the employment contract.
- [42] In *Rahemtulla*, Justice McLachlin, as she then was, explained that in order for a policy manual to be binding, it must have contractual force, which depends on whether the elements of a contract have been established, including offer and acceptance, consideration, and the common intention that it has legal effect.
- [43] Questions related to the formation and interpretation of a contract and its terms involve mixed questions of fact and law, reviewable on the palpable and overriding error standard (See: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at paras. 50-55; *AM Gold Inc. v. Kaizen Discovery Inc.*, 2022 BCCA 21 at paras. 53-54; and *Garcha Bros Meat Shop Ltd. v. Singh*, 2022 BCCA 36 at para. 78). Referring to *Sattva*, in *Kaizen* the Court of Appeal very recently stated "as the interpretation of a contract involves the interpretation of the written word in the context of the factual matrix in order to determine the objective intentions of the parties, the standard of review is the same as the one to be applied to a question of mixed fact and law" (at para. 54).
- [44] Here there is no indication the trial judge made any error in the application of the relevant legal principles - essentially the basic principles of contract law - in finding the Manual was not binding on Mr. Snider, or implicitly, the Manual was not incorporated into the employment agreement. This finding rests on other findings, including that the employment contract was formed before Mr. Snider started working on February 5, 2018, which was before he received the package of documents that included the Manual. Further, Reotech told Mr. Snider that he would receive payroll documents, not a manual or the Manual. In other words, the trial judge concluded the Manual was not binding based on her findings about the timing of the formation of the employment contract, what was discussed about the documents he would receive, and the timing of the delivery of the Manual.

- [45] The remaining question is whether any of the underlying findings involved a palpable and overriding error in light of the evidence.
- [46] During the appeal, Reotech referred me to an exchange of emails between it and Mr. Snider on February 1, 2018 that were in evidence. They begin with Reotech offering Mr. Snider employment at \$17 per hour and a four day per week schedule, along with a request that he identify which day he will not be working. Mr. Snider responds by essentially accepting the offer and identifying Wednesdays as his day off. He also asks Reotech to advise him if it requires any additional information "to help me setup for payroll and reporting" and inquires about payment of accrued vacation pay. Reotech replies the next day in a further email that includes "we have paperwork that I will need to get you to fill out". At no point is there any discussion or reference to a manual or the Manual.
- [47] Reotech also suggested that at the trial Mr. Snider agreed the Manual was part of his employment contract. That is not how I would interpret the whole of his testimony on this issue or its effect.
- [48] Despite the Grounds/Issues, Reotech did not suggest the trial judge separately erred in finding there was no consideration for the Manual. In other words, Reotech made no submissions that the trial judge ought to have found an amended or new contract based on fresh consideration.
- [49] Not only can I see no basis for concluding the trial judge made a palpable and overriding error in relation to the termination provision, I agree with her findings.
- [50] Having reached this conclusion, it is unnecessary for me to consider Grounds/Issues #4, #5, and #6.

Reasonable Notice

- [51] I move now to Ground/Issue #7.
- [52] Reotech argues that the trial judge was clearly wrong in finding a notice period of four and a half months was reasonable, based on the same arguments advanced at the trial. In the outline of argument, Reotech asserted it is generally accepted "in the jurisprudence" that construction site labourers can be terminated with relatively little to no notice. The so-called jurisprudence includes however two decisions of the Workers' Compensation Appeal Tribunal (WCAT Decision No. A1801594; and WCAT Decision No. A1703892), *Scapillati v. A. Potvin Construction Ltd.*, [1999] O.J. No. 2187, 1999 CanLII 1473 (Ont. C.A.), and s. 65 of the Employment Standards Act, R.S.B.C. 1996, c. 113, which exclude workers employed at more than one construction site from the prescribed notice requirements in s. 63.

[53] If Reotech intends to suggest s. 65 abrogates Mr. Snider's common law entitlement to damages for reasonable notice through implied term of reasonable notice, I disagree. Nor does it assist in determining the length of the reasonable notice period. This very point was made by the trial judge in Scapillati based on a comparable provision in the Ontario legislation and with reference to *Krewenchuk v. Lewis Construction Ltd.* (1985), 8 C.C.E.L. 206 (B.C.S.C.), a decision of this court.

[54] Of course, the WCAT decisions offer no authority.

[55] The Ontario Court of Appeal's decision in Scapillati is persuasive but not binding. Although the Court upheld the trial judge's decision that the plaintiff, a carpenter, was not entitled to notice based on a custom of his trade, the decision was fact based. The head note provides an accurate summary and reads in part:

The establishment of a custom or usage as to the appropriate length of notice does not end the discussion; the court may accept or reject the custom. If a custom or usage is proven, it is simply a factor to be taken into account, along with other factors, in determining reasonable notice based on the particular circumstances of the case.

[56] Frankly, it strikes me as obvious that evidence would be required to establish a particular industry standard or custom for the purpose of determining reasonable notice. Reotech did not dispute the trial judge's rejection of its argument that the standard or custom in the construction industry is that general labourers are not entitled to reasonable notice, based on an absence of independent evidence. Yet Reotech relies on the same "authorities" again, and its assertion that short-service employment cases "don't apply" to construction labourers, to argue the trial judge erred in fixing a notice period that fell outside the range of what is reasonable in the circumstances.

[57] Clearly, Scapillati, the WCAT decisions, and s. 65 cannot establish "the range of what is reasonable in the circumstances".

[58] Bardal tells us that reasonable notice must be decided with reference to the particular case, having regard to a range of factors, including the character of employment, the length of service, the age of the employee, the availability of similar employment, and their experience, training, and qualification (para. 21).

[59] There is simply no merit to Reotech's related argument that the trial judge was clearly wrong when she relied on Latham in fixing the notice period because the employee in that case was a warehouse worker and not employed in construction. The same is true of Reotech's attack on her reliance on Saalfeld as establishing a starting point of two to three months' notice for short-service employees. Latham entirely undermines Reotech's assertion that "this questionable rule of thumb", that is the relative longer reasonable notice period for short-service employees, is limited to cases involving more senior positions or where the employee was induced to leave a previous employer.

[60] Again, I can see no palpable and overriding error in the trial judge's finding regarding the reasonable notice period. The Decision makes it plain she considered and weighed the Bardal factors, rooted in the particular circumstances of the case.

Vacation Pay

[61] In regards to Ground/Issue #8, the parties dispute the scope of the trial judge's Order regarding vacation pay. Reotech does not appeal if the Order required Reotech to provide vacation pay until termination, as opposed to also during the reasonable notice period.

[62] Based on the Decision, the trial record, the Order (which simply refers to "vacation pay"), and the settled law recited in Valle Torres at para. 79, it is clear to me that the Order limits Mr. Snider's entitlement to vacation pay that had accumulated at the time of termination.

[63] There is therefore no issue to address.

Annual Bonus

[64] I move now to Ground/Issue #11. Reotech argues the trial judge's award of \$500 for an annual bonus was clearly wrong because there was no evidence that a bonus would have been paid to Mr. Snider in 2020 during the notice period or at all. Reotech emphasizes the only evidence was Mr. Snider's testimony that he received a \$500 bonus in 2019. Reotech also emphasizes that Mr. Snider had the burden of proving his damages including his claim to a non-discretionary bonus.

[65] Mr. Snider suggests the failure is Reotech's because it did not argue he should not be paid the bonus or adduce evidence that a bonus would not have accrued to him during the notice period.

[66] Recently, in *Matthews v. Ocean Nutrition Canada Ltd.*, 2020 SCC 26, the Supreme Court of Canada clarified the proper approach to determining whether the amount of damages in lieu of reasonable notice should include bonus payments:

[52] First, courts should "consider the [employee's] common law rights" (para. 30). That is, courts should examine whether, but for the termination, the employee would have been entitled to the bonus during the reasonable notice period. Second, courts should "determine whether there is something in the bonus plan that would specifically remove the [employee's] common law entitlement"

[67] In discussing the notion of entitlement to the bonus, the Court reiterated that the purpose of damages in lieu of notice is to put the employee in the position they would have been in, had the employer performed the contract, meaning had the employee continued to work through to the end of the notice period. The focus, in other words, is on what the employee would have received.

- [68] Implicit in the trial judge's finding that Mr. Snider was entitled to compensation for the loss of his \$500 annual bonus, is the inference that he would have received a \$500 bonus in 2020, had he continued to work through to the end of the notice period.
- [69] The finding and the inference are reviewable on the palpable and overriding error standard. The standard involves a high threshold. While Mr. Snider's evidence was limited to what happened in 2019, the Reotech's witnesses provided no evidence at all. I cannot say that the finding and inference involved a plain and obvious error.

CPP Contributions

- [70] Ground/Issue #9 relates to CPP contributions. The trial judge concluded that Mr. Snider was entitled to the CPP benefits that Reotech would have otherwise paid, until the end of the notice period. In reaching this conclusion, the trial judge cited Valle Torres.
- [71] Reotech argues the trial judge was clearly wrong in awarding Mr. Snider CPP contributions when they will have to be deducted from the damage award and remitted by Reotech, therefore requiring it to pay the contributions twice.
- [72] The argument is frankly confusing if Reotech is suggesting that it will deduct and remit from Mr. Snider's damages, an amount equal to the contributions it is required to make and remit. Unfortunately, the issue was not clarified during the appeal hearing.
- [73] Reotech also seems to suggest the trial judge made a mixed error of fact and law, relying on *Simmons v. United Gear & Machine Works Ltd.*, [1993] B.C.J. No. 630, 1993 CanLII 2553 (S.C.), and an absence of evidence showing Mr. Snider suffered any loss arising from Reotech's non-payment of CPP contributions that it otherwise would have paid during the notice period. Additionally, during the appeal hearing, Reotech argued that the trial judge incorrectly cited Valle Torres as authority for awarding lost CPP premiums during a notice period, asserting Valle Torres misinterpreted *Steven Shinn v. TBC Teletheatre B.C. et al.*, 2001 BCCA 83, on this point.
- [74] No submissions were made about the relevant aspects of CPP legislation.
- [75] Based on my reading of both cases, as well as the other relevant authorities including *Ostrow v. Abacus Management Corporation Mergers and Acquisitions*, 2014 BCSC 938 at paras. 116-120; and *Preuss v. Dr. P. Safari-Pour Inc. (I.Q. Dental)*, 2021 BCSC 973 at paras. 100-102, I am not able to accept that Valle Torres incorrectly interprets Shinn.
- [76] In Shinn, the Court of Appeal discussed the issue as follows:

[18] The trial judge awarded the plaintiff the amount of the employer's Canada Pension Plan premiums of \$98.88 per month during the notice period. Generally speaking these amounts have not been allowed since the decision in *McLachlin J. (now C.J.C.), in Wilks v. Moore Dry Kiln Co. of Canada* (1981), 1981 CanLII 597 (BC SC), 32 B.C.L.R. 149 (B.C.S.C.), which was followed by this Court in *Sorel v. Tomenson Saunders Whitehead Ltd. et al.* (1987), 1987 CanLII 154 (BC CA), 16 C.C.E.L. 223. In *Wilks, McLachlin J.* said:

[]

[19] In this case, however, plaintiff's counsel referred us to the relevant CPP legislation which shows that the maximum pension payable under the Plan of \$762.92 is only payable, at age 65, if the employee has had contributions paid on his behalf for all but seven years between the ages of 18 and 65 years. The plaintiff was 18 years in 1972, but he only came to Canada in 1983 so he had no premiums paid for eleven years. Thus, the plaintiff cannot recover a full pension. Every loss of premiums paid, however, will reduce his pension by some amount, but it would take an actuarial study to determine if his loss is dollar for dollar for any premiums unpaid.

[20] In my judgment, it should not be necessary in a wrongful dismissal action like this one to require a plaintiff to bear the cost of such a study. The legislation demonstrates that pension entitlement depends upon the amount of contributions, and such amounts should be recovered unless the defendant establishes that the loss is something less than the actual premium dollar shortfall during the period of reasonable notice.

[Emphasis added.]

[77] In *Valle Torres* at para. 84, Justice Murray writes: "[a] wrongfully dismissed employee is entitled to the amount of CPP contributions that would have been made on his behalf unless the employer establishes that the loss is something less than actual premium shortfall during the period of reasonable notice", citing para. 20 of *Shinn*.

[78] In my view, her interpretation of *Shinn* is consistent with other authorities. In both *Preuss* and *Ostrow*, the Court relied on *Shinn* to conclude that the respective plaintiffs were entitled to compensation for the loss of CPP contributions during the relevant notice period.

[79] I conclude therefore that the trial judge did not err by relying on *Valle Torres* and in determining Mr. Snider was entitled to the (amount of) the CPP benefits that Reotech would have otherwise paid, until the end of the notice period.

Deductibility of CERB

- [80] With respect to Ground/Issue #10, Reotech asserts the trial judge was clearly wrong in declining to deduct the CERB that Mr. Snider received during the notice period from the damage award. There are several prongs to this Ground/Issue, but essentially Reotech argues the conclusion that Mr. Snider's CERB was not deductible is an error of law. As I have indicated, the applicable standard of review is correctness.
- [81] At the appeal hearing, Reotech relied on *Yates v. Langley Motor Sport Centre Ltd.*, 2021 BCSC 2175, which was decided after the trial and Hogan.
- [82] In Hogan, Justice Gerow found that CERB payments received by the plaintiff were deductible, writing at paras. 100 and 101:
- [100] The CERB payments raise a compensating advantage issue. If the CERB payments are not deducted the plaintiff would be in a better position than he would have been if there had been no breach of the employment contract.
- [101] But for his dismissal, the plaintiff would not have received the benefit. The nature of the benefit is an indemnity for the wage loss caused by the employer's breach of contract. There is no evidence that the plaintiff contributed to obtain the benefit by paying for it directly or indirectly.
- [83] Justice Gerow also considered that CERB payments are not private insurance and the employer and employee do not contribute to them.
- [84] In *Andrews*, without reference to Hogan, the Court declined to deduct CERB, finding it was likely that the plaintiff would have to repay the benefits.
- [85] In *Yates*, Justice Mayer declined to follow *Andrews*, agreed with Hogan, and concluded that CERB should be deducted from the award of damages. His conclusion was also based on a review s. 6(1)(b) of the Canada Emergency Response Benefit Act, S.C. 2020, c. 5, s. 8, an absence of evidence that the plaintiff would be required to repay the CERB, and the law of collateral benefits, as set out in *IBM Canada Limited v. Waterman*, 2013 SCC 70 [IBM].
- [86] In that case, the Supreme Court of Canada held a collateral benefit, or a benefit flowing to a plaintiff and connected to the defendant's breach, is considered a compensating advantage justifying a deduction from a damage award when the advantage is one that: (a) would not have accrued to the plaintiff if the breach had not occurred; or (b) was intended to indemnify the plaintiff for the sort of loss resulting from the breach (IBM at paras. 27-28). IBM also identified charitable gifts and private insurance as exceptions to the requirement that collateral benefits be deducted from a damages award.

- [87] Justice Mayer found neither exception applicable (at para. 41). He also found that CERB payments are a benefit intended by the Government of Canada to be an indemnity for the loss of regular salary; they arose from the employer's breach of the employment contract; and, unlike an employee-funded pension or a private disability insurance policy, the plaintiff did not contribute to them.
- [88] Whether or not there is any conflict between Hogan and Andrews, Yates followed Hogan. Both Hogan and Yates provided a reasoned analysis in support of the conclusion that CERB payments are deductible from damage awards. Importantly, Yates established that CERB payments are a collateral benefit, after reviewing the relevant statutory provision and the applicable law.
- [89] Of course the trial judge did not have the benefit of Yates. There is, however, no basis for distinguishing Yates. In the absence of any evidence that Mr. Snider will be required to repay the CERB payments he received, I conclude that the trial judge erred in law by declining to deduct them from the damage award. If I am wrong in characterizing the nature of the error and instead the error is one of mixed fact and law, I would also conclude the error was palpable and overriding.
- [90] During the appeal hearing, the parties agreed that Mr. Snider received \$9,000 in CERB payments during the notice period. Accordingly, the damage award must be reduced by this amount.

\$1,500 Penalty

- [91] Ground/Issue #12 relates to the \$1,500 penalty. As I have indicated, the trial judge awarded Mr. Snider \$1,500 based on an offer to settle of approximately \$12,000 made several months before the trial. Rule 10.1(6) empowers a trial judge to order a defendant to pay the claimant a penalty, if the defendant does not accept an offer to settle, and the claimant is awarded an amount including interest and all expenses that equals or exceeds the offer.
- [92] Given my determination that \$9,000 must be deducted from the damage award ordered by the trial judge, the remaining award falls below the amount he offered. Accordingly, the penalty must be set aside.

Costs

- [93] In his statement of argument and submissions, Mr. Snider sought special costs, or in the alternative, costs at Scale 3 based on what he described as the unnecessary complexity involved in the appeal.

- [94] Mr. Snider argues that absent a clear basis for the appeal, Reotech attacked nearly all the trial judge's core findings of fact, law, and mixed fact and law, and engaged in a great deal of re-argument. He also argues the multiplicity and muddled nature of the Grounds/Issues, along with Reotech's failure to delineate the nature of the error, made responding to the appeal difficult and time consuming and resulted in the need for a full-day hearing.
- [95] As I have indicated, under s. 13 of the Small Claims Act, costs may be ordered in accordance with the Rules.
- [96] Rule 14-1(1)(b)(i) empowers the Court to order special costs. They are primarily awarded to punish or chastise a party for reprehensible conduct in the course of the litigation. Only in truly exceptional circumstances will they be awarded for non-punitive purpose (*Tanious v. The Empire Life Insurance Company*, 2019 BCCA 329). Mr. Snider has not asserted, nor would I accept, that Reotech's approach to this appeal, although problematic, meets the reprehensibility threshold or that the circumstances here are exceptional.
- [97] Rule 14-1(9) of the Rules provides, in relevant part, that costs of a proceeding must be awarded to the successful party, unless the court orders otherwise.
- [98] The case law defines success as substantial success (see: *Redstone Enterprises Ltd. v. FT Synthetics Inc.*, 2021 BCSC 2343 at para. 6; and *Fotheringham v. Fotheringham*, 2001 BCSC 1321). The measure of substantial success was described in *Fotheringham* as approximately 75%. Determining the issue does not involve however a purely quantitative examination. Instead, the court considers the matters in dispute, assesses their weight and importance to the parties, globally determines the overall "winner", and decides whether there are reasons to deny the winner their costs.
- [99] Reotech was successful in appealing only two of 12 grounds of appeal. Although one of those grounds, the deductibility of CERB, resulted in a significant reduction in the damage award, assessing the weight and importance of the matters in dispute and examining the results globally, I am satisfied that Mr. Snider was the substantially successful party. In very large measure this appeal involved an impermissible attempt to relitigate the issues decided by the trial judge.
- [100] If I am wrong in finding Mr. Snider was substantially successful, I would exercise my discretion to award him costs based on his degree of success and most of the circumstances he relies on in seeking special or increased costs. To those I would add the unnecessary use of judicial resources involved in hearing and deciding this appeal caused by Reotech, as well as the importance of not upsetting the balance achieved by the award of damages, or put another way, depriving Mr. Snider of the benefit of his success.
- [101] Accordingly, I order Reotech to pay Mr. Snider his party and party costs for the appeal proceeding assessed at Scale B in accordance with Appendix B.

"Fleming J."

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Prepared on 28 October 2026 · Esheria