
CANADA / JUDGMENT

Sollows v. Albion Fisheries Ltd.

2017 BCSC 376

COURT

Supreme Court of British Columbia

DECIDED

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2017 BCSC 376 Sollows v. Albion Fisheries Ltd

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Sollows v. Albion Fisheries Ltd,

2017 BCSC 376

Date: 20170307

Docket: S167375

Registry: Vancouver

Between:

Don Sollows

Plaintiff

And

Albion Fisheries Ltd. dba Albion Farms and Fisheries and the said

Albion Farms and Fisheries

Defendant

Before: The Honourable Madam Justice Gropper

Reasons for Judgment

Counsel for Plaintiff:

M. Sheard

I. Hosseini (articling student)

Counsel for Defendant:

G. Marshall

C. Munroe

Place and Date of Trial:

Vancouver, B.C.

November 30, 2016

December 1, 2016

Place and Date of Judgment:

Vancouver, B.C.

March 7, 2017

Introduction

- [1] This is a wrongful dismissal action. Don Sollows was dismissed by the defendant Albion Fisheries Ltd. (Albion) without reasonable cause, which is admitted by the defendant.
- [2] Upon his dismissal on July 15, 2016, Albion continued to pay Mr. Sollows his regular salary and car allowance on regular paydays from that date until October 21, 2016, in the total amount of \$41,997.54 (severance), equivalent to just over three months of pay in lieu of notice. He also received benefits: a car allowance of \$500 per month; an RRSP contribution from Albion equal to 3% of salary; extended health and dental benefits; consideration for variable compensation in the form of financial bonuses for each fiscal year (the "Scorecard Bonus"), under plans maintained by Albion, that were conditional on the department and corporate performance of Albion.
- [3] The issue before me is whether the severance provided adequate compensation in lieu of reasonable notice in Mr. Sollows' particular circumstances.

Suitability

- [4] The parties agree that this matter may be determined by way of summary trial, in accordance with R. 9-7 of the Supreme Court Civil Rules, B.C. Reg. 168/2009.
- [5] Wrongful dismissal is a cause of action which is routinely resolved summarily, even in contentious cases where just cause is alleged: *Bomford v. Wayden Transportation Systems Inc.*, 2010 BCSC 1506.
- [6] Summary judgments and summary trials are important tools in making justice accessible. In the context of the current legal system in Canada justice demands that courts make every effort to resolve cases summarily: *Hryniak v Mauldin*, 2014 SCC 7.

- [7] I agree that the matter is suitable for summary trial: there are sufficient facts before the Court to make necessary findings of fact and it is not unjust to decide the case on the summary trial application: *McVeigh v. Boeriu*, 2011 BCSC 400 at para. 42.

Background

- [8] Mr. Sollows is 60 years old. From 1985 to 2004, he was employed by the defendant Albion Fisheries in Kelowna, British Columbia ("Albion"). In the fall of 2004, he left his employment with the defendant, voluntarily, and began working for the defendant's competitor, Sysco Canada ("Sysco"). Mr. Sollows worked for Sysco from 2004 until 2013, when he returned to the defendant's employ.
- [9] While Mr. Sollows was employed by Sysco, John Milobar, the President of Albion at the time, spoke to Mr. Sollows three times in which he mentioned open positions at Albion, once in 2009, once in 2010 or 2011, and the last time, in 2013.
- [10] Mr. Sollows resisted returning to Albion until October 2013 when Mr. Milobar contacted him to see if he was interested in a position as Director of Marketing and Chief Sustainability Officer (CSO) at Albion. Mr. Milobar told Mr. Sollows that he intended to retire soon and his position as president would be open for competition between him and at least one other of the defendant's employees. Mr. Milobar told Mr. Sollows that both he and the other candidate were qualified for the position of president.
- [11] Mr. Sollows decided to return to the defendant's employment. He quit his job at Sysco. His wife quit her job. They moved from Calgary to Vancouver where Mr. Sollows took on the position offered by Mr. Milobar.
- [12] On October 25, 2013, Albion made an employment offer to Mr. Sollows that he accepted on October 27, 2013. The offer outlined the duties and responsibilities of the position; provided remuneration in salary of \$110,000 per year; a scorecard bonus of up to 20% of salary for the first year and then 10% increase in each following year until the cap of 50% is achieved; a car allowance of \$500 per month; four weeks' vacation starting in year one moving to five weeks in five years; participation in the Gordon Food Services (GFS), (the owner of Albion) benefit package and RRSP program to take effect immediately; moving costs up to \$5,000; and up to \$10,000 reimbursement for realtor commissions for the sale of Mr. Sollows' residence in Calgary.
- [13] The offer did not make any reference to the treatment of prior service or to compensation in the event of without cause termination. It did not specify a requirement that Mr. Sollows serve a probationary period. It provided four weeks of vacation to Mr. Sollows in recognition of his industry experience. Albion says it made a competitive offer that was consistent with the terms of employment for similar positions.

- [14] In late 2013 and early 2014, Albion conducted a competitive process to find a successor for Mr. Milobar as president. Albion offered the president position to Mr. Sollows on the basis of a recommendation of Mark Eriks, then the vice president of strategic alliances of Gordon Food Services (GFC), the parent company of Albion, on the basis of his conclusion that Mr. Sollows was the better of two available candidates. Mr. Milobar retired in October 2014 and in November 2014 Mr. Sollows was promoted to the position of president of Albion. His salary increased accordingly to \$160,000 per year.
- [15] In May 2015, Mr. Eriks and Andrew Thomson, the national regional vice president of Intercity Packers Ltd. ("Intercity") and Albion, toured the Albion Richmond facility with Mr. Sollows. Mr. Eriks and Mr. Thomson told Mr. Sollows about a plan to align the business operations of Intercity and Albion, code-named "Project M".
- [16] In May 2015, Albion and Intercity implemented "Project M" and strategically aligned their business operations. They operated under a single operating name: Albion Farms and Fisheries. As part of the realignment, Albion and Intercity management selected a new General Manager for the aligned operations and the president position at Albion was eliminated. Mr. Sollows was considered for the new General Manager role but he did not receive an offer. Albion management selected Danny Ransom as its new General Manager. Mr. Sollows was informed of the decision in late December 2015 or early January 2016.
- [17] In January 2016, Albion awarded Mr. Sollows a bonus for the Fiscal Year ("FY") ending October 31, 2015 of about \$51,000 based on the scorecard system. This was the only bonus the plaintiff received for a complete fiscal year while he was employed as president.
- [18] Albion says Mr. Sollows accepted the position of Vice President of Procurement reporting to the General Manager effective when the planned alignment between Intercity and Albion took place in May 2015. Albion says that Mr. Sollows participated in three in-person announcements of "Project M" to Albion employees and the announcement included Mr. Sollows' new role of Vice President of Procurement.
- [19] In that position, Mr. Sollows had the responsibility to manage all aspects of the Procurement Department; oversee pricing and product strategies; and serve as a liaison for procurement issues. His remuneration and bonus entitlement did not change with his new role.
- [20] Mr. Sollows says that there was no finalized agreement about his position. Albion, on the other hand, says that Mr. Sollows agreed to the new role of Vice President of Procurement as an alternative to his returning to a position leading Albion's Calgary operation.
- [21] Although Albion is not alleging cause, its management formed the opinion that Mr. Sollows' attitude towards the business integration of Albion and Intercity was negative and not helpful to the planning process. Mr. Thomson considered that Mr. Sollows did not think the business integration was a good idea because Mr. Sollows did not think Intercity, a non-seafood meat distribution company, had the experience or ability to run a seafood distribution business. Albion's management considers that Mr. Sollows' performance did not

improve when he assumed the position of Vice President of Procurement in May 2016.

[22] On July 15, 2016, Mr. Sollows' employment was terminated by Albion.

[23] Between July 15, 2016 and October 21, 2016, Albion continued to pay severance and benefits to Mr. Sollows (as described in para. 2 above).

Damages for Wrongful Dismissal

[24] A wrongful dismissal is one without notice and without cause. Damages are payable in lieu of the reasonable notice period. Emphasis is routinely placed on the plaintiff's age, seniority, length of service and availability of similar employment: *Bardal v. Globe & Mail Ltd.*, (1960) 24 D.L.R. (2d) 140. The list is not exhaustive and a court must consider the entire factual matrix in a given case. These factors must be weighed together. No one factor should be given undue emphasis or weight: each case will be decided on the circumstances prevailing in that case when viewed on an objectively reasonable basis: *Phillips v. Jakin Engineering & Construction Ltd.*, 2012 BCSC 2066 at para. 52.

[25] In the context of an older employee, *Gillies v. Goldman Sachs Canada Inc.*, 2001 BCCA 683, directs that, for persons of specialized employment skills who are nearing the older end of the workforce spectrum for the occupation, at a high level of responsibility, in circumstances where replacement employment may not be readily available, 12 months will not be unusual notice and longer notice will be the norm (para. 32).

[26] Before determining the period of reasonable notice, two issues must be resolved: the first is whether Mr. Sollows was induced to leave his job at Sysco and return to Albion, and the second is whether Mr. Sollows should be credited for the years that he was employed by Albion before the break in service of nine years.

Inducement

Legal Framework

[27] In *Wallace v. United Grain Growers Ltd.* [1997], 3 S.C.R. 701, the Court ruled:

- (a) that inducements are another factor added to the four well-known *Bardal* factors in assessing the reasonable notice period;
- (b) that not all inducements will carry the same weight;
- (c) the reason for the relevance of inducements is the expectation interest of the parties involved; and
- (d) representations of potential career advancement are important. (paras. 83 to 85).

[28] Since *Wallace*, a more rigorous evidence-based approach has been applied to compensatory damages in employment cases. If additional damages are to be granted, the source of those additional damages must be found within the contractual matrix by asking what was in the

reasonable contemplation of the parties when the contract was formed?: *Fidler v. Sun Life Assurance Co. of Canada*, 2006 SCC 30; *Honda Canada Inc. v. Keays*, 2008 SCC 39. Each of Wallace, Fidler and Honda held that there must be some evidence of a representation by the employer creating an expectation or reliance interest at the time the contract is made for the loss to be compensable.

- [29] In *Munoz v. Sierra Systems Group Inc.*, 2016 BCCA 140, the court relied on the principles in Wallace and found that the existence of "some inducement" justified an award of a lengthier notice for a short term employee (at para. 36). The Court did not express a strong view on the matter of inducement. It found that the trial judge did not err in finding that there had been some inducement, although she did not place great weight on it. In that case, in the period before Mr. Munoz took the job, the employer had promised Mr. Munoz that his employment was secure until December 2014 and held out that the client with whom Mr. Munoz would work was a long-term client. The client declined to work with Mr. Munoz after June 17, 2013, which the trial judge found was the actual date of his termination.

Position of the Parties

The Plaintiff

- [30] The facts that are relied upon by the plaintiff to demonstrate inducement are:

- a) Mr. Sollows was pursued several times by Mr. Milobar in repeated attempts to recruit the former back to the defendant's employ;
- b) 2-3 direct overtures were made during Mr. Sollows' tenure at Sysco when suitable roles arose at Albion Fisheries;
- c) each such overture was unsuccessful and the plaintiff had no desire to leave Sysco absent a better opportunity for career advancement;
- d) in or around 2013 Mr. Milobar again made such an overture, but this time with the promise of potential career advancement in the form of replacing him as president upon his retirement;
- e) the only difference in the final (successful) overture was this potential for advancement; and
- f) no formal interview process took place, but rather Mr. Sollows' candidacy was adjudged exclusively on the familiarity between him and the defendant.

- [31] Mr. Sollows says that he was not looking to move out of his position with Sysco in 2013 and there is no evidence to suggest his employment there was insecure. He was persuaded to take the position with Albion on Mr. Milobar's clear representation that it was an opportunity for growth beyond the confines of the role Mr. Sollows held at Sysco. He moved to Vancouver and became the breadwinner of his family with the reasonable expectation of job security in all the circumstances.

- [32] The plaintiff argues that establishing that Mr. Milobar spoke words to the effect of "the job hereby offered shall be a secure one" is not the standard which this court should apply. Wallace demonstrates that the reliance and expectation interests of the plaintiff are the most important considerations. In this case the plaintiff argues that the evidence of both parties support the finding that the plaintiff had a reasonable expectation of job security.
- [33] The plaintiff says that this case involved more than the ordinary amount of persuasion. Mr. Milobar clearly represented this as an opportunity for growth beyond the confines of the role Mr. Sollows held at Sysco.

The Defendant

- [34] The defendant says that there must be some evidence of a representation by the employer that creates an expectation or reliance interest at the time the contract is made, such that the loss of which can be compensated. The hallmark of the evidence-based approach is missing.
- [35] Albion maintains that there was no inducement in this case. There was no representation from Albion to Mr. Sollows of job security or long-term employment, on which to find an expectation or reliance interest. While Mr. Milobar spoke to Mr. Sollows about job opportunities with Albion, neither he nor anyone else at Albion promised Sollows long-term or secure employment, nor did anyone at Albion actually promise Mr. Sollows the position of president. He was promised an opportunity to compete for the position of president.
- [36] Albion asserts that its representations to Mr. Sollows fall into an "ordinary course of business category". Employers recruit employees. Employees regularly move between employers in order to advance their careers. Mr. Sollows decided to leave Sysco in order to take a position with Albion that came with the chance of obtaining a more senior position. He was equally as interested in joining Albion as Albion was in obtaining Mr. Sollows as an employee.

Decision on Inducement

- [37] In considering whether there was inducement in this case, I reject Mr. Sollows' argument that his subjective reliance and expectation interests are the controlling factors in determining whether the employer induced the employee to accept a position. I expect that every employee who accepts a new position has the expectation that the job will be secure. If an employer is enthusiastic about the prospective employee joining the employer's organization, does that amount to inducement in every case? If that were the test, inducement would be found in nearly all wrongful dismissal cases.
- [38] The facts here do not compare with Wallace. In that case, the trial judge found that the defendant employer gave the plaintiff a guarantee of job security through a promise that the plaintiff could continue to work for the company until retirement; it promised him that it would implement a unique commission structure for him; and offered assurances of fair

treatment (paras. 86-87). The Court considered that "these inducements, in particular the guarantee of job security, are factors which support [the trial judge's] decision to award damages at the high end of the scale" (para. 87). It was in this context that the Court considered the plaintiff's reliance and expectation interests. They were reasonable in the circumstances where these promises were explicitly made.

- [39] In *Fidler*, compensatory damages were provided for a failed promise of peace of mind related to the insurance contract. The court asked what was actually promised under the contract and what the parties reasonably expected at the time the contract was formed, based upon the evidence (at para 44).
- [40] Mr. Milobar provided two affidavits. In the first one, he deposes that "it would be reasonable for Mr. Sollows to expect job security from day one." On his second affidavit, he clarifies that statement and says that he had complete confidence in Mr. Sollows' ability to fill that role into which he was hired, director of marketing and chief sustainability officer, but told Mr. Sollows that he would have to earn the president position." He continues (at para. 27 of the second affidavit): "We never discussed job security expressly and I never promised him secure or long-term employment."
- [41] In its offer of employment, the most that Albion said was "we are excited at building on the opportunities that are here at Albion today and in the future." It offered the job to Mr. Sollows and provided for the terms of his employment. Mr. Sollows' own evidence also indicates that he was promised a chance at the president position and other leading roles in the company but nothing was guaranteed.
- [42] These facts distinguish this case from *Fidler* where the mental distress caused by the breach of the insurance contract was found to be reasonably contemplated by the parties at the time the contract was made.
- [43] *Honda* involved a claim for mental distress damages arising from the breach of an employment contract. The Supreme Court of Canada's decision in that case made clear that a rigorous evidence-based approach was preferred to an arbitrary increase in damages through the extension of the notice period. Any "special circumstances" under which the contract was "actually made" had to be "communicated between the parties", and "known to both parties" in order to be compensable (paras. 54 & 59).
- [44] In the cases upon which the plaintiff relies, inducement is found based upon some evidence of promises made by the employer beyond the usual course of business involving the hiring of employees, such as a discussion of the viability of the employer and the amount of work available: *Pollock v. Cotter*, 2005 BCSC 1799.

- [45] Even applying the somewhat muted expression of the test for inducement in *Munoz* does not advance the argument raised by the plaintiff here. In that case there was explicit evidence of a promise of job security to a particular date and the promise of a long-term relationship with a particular client. The court found that it amounted only to "some inducement" and bore little weight.
- [46] I agree with Albion that Mr. Sollows was not induced to take the position at Albion and leave his position at Sysco. Not all recruitment and negotiation between contracting parties in equal bargaining positions amounts to inducement in law. It is clear that Albion valued Mr. Sollows as an employee and Mr. Milobar was consistent in that regard; he mentioned openings at Albion that Mr. Sollows might be interested in taking. At the same time, Mr. Milobar did not make any mention of job security. Neither did Mr. Sollows.
- [47] Mr. Sollows obviously found the third offer intriguing; it included the chance to compete for the position of president upon Mr. Milobar's retirement. But the evidence does not support that Mr. Milobar offered the position of president to Mr. Sollows or that he was guaranteed that position. Mr. Sollows entered an open competition for the position as president and he was successful.
- [48] On the evidence before me, I find that Mr. Sollows was not induced to take the position that Mr. Milobar offered him in October 2013. He was not given an assurance that he would become president of Albion. There were no assurances about the circumstances of his employment or potential termination and there was no guarantee of job security.

Break in Service

Legal Framework

- [49] A break in service that is relatively brief may be overlooked and considered to be of minor importance in assessing damages for reasonable notice. It may be disregarded if the parties expressly agreed that prior service would be recognized or if the parties conducted themselves in a manner consistent with the employee's prior service being recognized: *Cheong v. Grand Pacific Travel Trade (Canada) Corp.*, 2016 BCSC 1321, paras. 46-52.
- [50] In *George v. Cowichan Tribes*, 2015 BCSC 513, Mr. Justice Skolrood referred to the court's discretion to disregard interruptions in service when determining the reasonable notice period and found that the exercise of this discretion will be informed by the specific circumstances of the interruption at para. 217.
- [51] At paras. 218 & 219, Skolrood, J determined that discretion will be informed by the specific circumstances of the interruption in each case, such as: whether the employer treated the employee as continuously employed or recognized her as a long-term employee; the length of the employee's hiatus; whether the employee left voluntarily and whether she was induced to return. In the appropriate case, the purpose of the employee's hiatus may also be an important consideration; did the employee leave employment to take a better position

with a competing employer or was she pressured to leave her employment temporarily because of medical concerns, family obligations, or short-term retraining with the intention of returning.

- [52] In *Dobbs v. Cambie Malone's Corp.*, 2011 BCSC 1830, Madam Justice Wedge was satisfied that the discussions that led to Mr. Dobbs' return to the employer after an 11 month hiatus, demonstrated that the parties assumed that Mr. Dobbs would be treated as an employee with many years of service with the company and not as a newly hired employee. On that basis she concluded that Mr. Dobbs had 11 years of service with the company when he was terminated and should be regarded as such for the purposes of determining the appropriate notice period (para. 52).
- [53] In *Coppin v. MPR Teltech Ltd.* 1997 CarswellBC 1482 (S.C.) the plaintiff worked for the defendant and its related company for 22 years in total with a break in service of 8 years with an unrelated employer. Although the defendant employer calculated the plaintiff's pension entitlement on the basis of the entire length of service including the 22 years, Taylor J. noted at para. 70 that:

In my view, a lacuna of some eight years of employment cannot result in a conclusion that the plaintiff had a 22 year period of employment that should be taken into account in terms of a period of notice, even though the pension consideration period is conceded to have been 22 years. The two concepts are quite distinct.

- [54] In para 71, the court expressly distinguished *Wilson v. Sandwell & Co.* [1986] B.C.J. No. 1343 (S.C.), where Mr. Justice MacKay considered a 12 year break in employment and found that the hiatus had been specifically addressed by the employer for the purpose of seniority credit upon re-engagement for the purpose of determining pension rights. MacKay, J. took the prior service into account to determine the length of reasonable notice. In doing so, he treated the two concepts as the same, of which *Coppin* expressly disapproves.

Position of the Parties

The plaintiff

- [55] The plaintiff acknowledges that there was no discussion about credit for length of employment service provided by Mr. Sollows to Albion from 1985 to 2004 (19 years). The offer of October 2013 did not make reference to Mr. Sollows' previous employment with Albion. Nevertheless, Mr. Sollows says that, despite the hiatus of nine years, with his previous 19 years of service, he is not simply a 3 year employee of Albion and should not be treated that way for the purpose of assessing damages.
- [56] Mr. Sollows claims that the overtures made to him by Mr. Milobar over the years, suggesting that he return to Albion, provide a basis for determining that his prior service would be considered in the context of termination.

- [57] The plaintiff is critical of Albion for not including a termination clause in the hiring letter and claims that that was an error on the part of Albion. He asserts that Albion, a large and sophisticated organization, ought to have included a clause in the offer that would have clarified Albion's intended treatment of Mr. Sollows pre-hiatus year of service.

The defendant

- [58] The defendant asserts that in the cases where an employee has been credited for previous service after a hiatus, none address a break in service of over nine years with a competitor employer. Albion also refers to those cases where the employee and the employer have specifically turned their minds to the length of service at the time the employment contract was made.
- [59] The defendant argues that Mr. Sollows voluntarily resigned from Albion in 2004 and went to work for a competitor for 9 years. There is no evidence to support the assertion that Albion agreed to recognize Mr. Sollows as a long-term employee in spite of its agreement to give Mr. Sollows 4 weeks of vacation and its decision not to impose a probationary period. The defendant argues that those terms of employment recognized Mr. Sollows' industry experience and are consistent with its general practices for managers and the nature of the position being offered. It was not recognition of prior service.

Decision on Break in Service

- [60] Because the parties did not discuss credit for prior service in their discussions and it is not referred to in the October 2013 agreement, my discretion must be informed by the particular circumstances of this case. In this regard:
- a) I accept that Mr. Milobar, in his overtures to Mr. Sollows to quit his job with Sysco and join Albion, demonstrated enthusiasm about the prospects of Mr. Sollows coming back to the employ of the defendant. Perhaps if Mr. Sollows accepted an earlier offer, so that his break in service was less than 9 years, credit for prior service may have been implied. However, there is no evidence beyond Mr. Milobar's overtures to support such a position.
 - b) While Albion's recognition of Mr. Sollows' prior service may be construed from the length of the vacation offered and the lack of the requirement of a probationary period, I accept Albion's evidence that this is consistent with its general practice for managers.
 - c) Mr. Sollows' hiatus was 9 years. Only one of the cases relied upon refer to a hiatus of similar length, Wilson. That case was distinguished in Coppin, which makes it clear that a "lacuna of some eight years" is simply too long to assume credit for prior service.
 - d) Mr. Sollows left Albion's employ voluntarily.
 - e) Mr. Sollows was not induced to return to Albion's employ.

- f) The purpose of Mr. Sollows leaving Albion's employment in 2004 was to take a better position with a competing employer; there is no evidence of his intention of returning.
- [61] I do not accept the it was a failure on Albion's part not to include a termination clause that referred to whether it would consider his previous service in the event of termination. As Mr. Sollows considered that he was pursued by Albion during his hiatus, a clarification by him of the years of service credit would have been equally desirable. In the circumstances since Mr. Sollows considered that Albion induced him to return to its employment, it would have been appropriate for Mr. Sollows to ask whether he would be credited for his years of service with Albion after a long hiatus of 9 years, when he was offered the position in October 2013. Without such an inquiry, it is difficult to imply an agreement that his previous service with Albion would be credited for length of service.

Reasonable Notice

Legal Framework

- [62] As I have already noted, the Bardal factors remain applicable, with each factor receiving the same weight.

Position of the Parties

Plaintiff

- [63] The plaintiff's position is that he should be treated as a 60-year-old senior executive with more than 3 but less than 31 years' service, relying on Gillies.
- [64] At the time of his dismissal, Mr. Gillies had been employed with the defendant for 4 years and 9 1/2 months. Goldman Sachs recruited him from another firm with whom he had been steadily employed in Toronto in a similar capacity for 13 years. The offer required a move to Vancouver. Mr. Gillies had expressed his concern about security of tenure to Goldman Sachs and was told there was a low turnover rate at the firm.
- [65] The trial judge determined that Mr. Gillies was entitled to 12 months' notice. There had been an inducement to Mr. Gillies to leave secure employment on a representation of job security. That was significant and tends to lengthen the amount of notice required (para. 30). The court stated at para. 33:

33 In my view, in the circumstances of this case, 12 months is at the lowest end of the range of notice which might be considered reasonable. I say this considering the fact that Mr. Gillies was, in the words of witnesses, in a "young person's" business, that he had been moved by the respondents to Vancouver which had a limited market for people of his skills, that the respondents had dissuaded him from joining a firm in Vancouver thus further limiting his employability in this employment market, and that the respondents had recruited Mr. Gillies from a long-term employer with representations of secure employment.

[66] The plaintiff argues that the 12 months' notice which was determined to be reasonable in the Gillies case is the floor in this case and 24 months represents the ceiling. He asserts that that is the range within which reasonable notice should be determined. He suggests that 18 months is a reasonable compromise.

[67] The plaintiff relies on Ellen E. Mole, *Wrongful Dismissal Practice Manual*, 2nd ed, vol 1 (Markham, ON: LexisNexis Canada Inc., 2006), p. 7-101, the learned author writes:

Age 50 and above - For most employees in their 50's or above, age tends to increase the length of the notice period, presumably due to the well-known problems of older people in finding new employment. Employees dismissed in their mid-50's may be particularly vulnerable, as they may be too young to retire but too old to easily retrain, while employees dismissed in their 60's may in effect be forced into early retirement.

Defendant

[68] The defendant cites several other authorities where older employees with a similar length of service as Mr. Sollows were provided a reasonable notice period of 4 to 7 months: *Parks v. Vancouver International Airport Authority*, 2005 BCSC 1883; *Pede v. Plaza Pontiac Buick GMC Inc.*, 2011 ONSC 698; *Kurtz v. Carquest Canada Ltd.*, 2015 ONSC 7997; *Jivraj v. Strategic Maintenance Ltd.*, 2014 ABQB 463.

Decision on Reasonable Notice

[69] Given my conclusion that Mr. Sollows' was not induced to take the position at Albion and that the hiatus in his employment does not justify credit for length of service, I am unable to equate the decision in Gillies with his circumstances. Without these factors, his tenure becomes two years and nine months instead of the almost 23 years to which the plaintiff refers.

[70] I will now address the factors.

Character of employment

[71] Mr. Sollows was hired into a senior management position. As president of the company he was effectively the most senior manager. When he left Albion's employment he was still in an executive position. The period of notice must take that into account. While I have found that there was no agreement to credit prior service, it was Mr. Sollows' experience in the industry and his specific expertise in sustainability that were factors in his obtaining the president's position in the open competition. I accept that it is unlikely that there are a number of presidential positions available and that this factor should favour Mr. Sollows.

The Length of Service

[72] I consider the length of service to be 2 years and 9 months.

Age

[73] Mr. Sollows was almost 60 years of age when he was dismissed. He emphasizes this factor.

[74] I have referred to Phillips earlier. Mr. Sheard, counsel for the plaintiff here and in that case, made a similar assertion. Mr. Justice Greyall addressed it in Phillips:

57 Mr. Sheard says that these cases and several others to which he referred suggest nine months' pay in lieu of notice is the standard measure for an award of damages for senior managers, over age 50 with length of service of less than two years. That is, in such cases age weighs heavily on the assessment of the notice period.

58 Counsel for the plaintiff in essence, suggests the length of service subsumes all the other Bardal factors in the first few months or years of employment.

59 I disagree with this assessment of the law.

60 To accept the plaintiff's submissions would give pre-eminence to the factors of age over a consideration of the other circumstances of the employment relationship, that is, the other factors referred to in Bardal.

[75] Although age is not a subsuming factor, Phillips relies on Pollock in acknowledging that the plaintiff's "efforts to mitigate his losses have likely been impacted by his age (para. 69).

[76] I accept that an older employee may have a more difficult time finding new employment. However, this factor does not automatically justify a 12 month notice period. The very fact that Mr. Sollows could change positions at that age of 57 and assume a senior management position at another company, demonstrates that he has significant executive and specialized skills that may serve him well in obtaining other employment. Nevertheless, I consider that age is a factor that supports a longer period of notice.

Prevailing circumstances

[77] There was limited reference to the prevailing circumstances as a factor under reasonable notice. The plaintiff's evidence on the prevailing circumstance is the same as the evidence under the heading of mitigation.

[78] The parties disagree on the circumstances in the industry. The plaintiff says that while there are "several major players in [his] specialized field. He has built his reputation on holding himself and his employers to high ethical standards, including good press, ethical fishing practices and sustainability. In Mr. Sollows' opinion, there are only three companies that meet his criteria.

[79] The defendant asserts that the industry is dominated by key players and that with Mr. Sollows having occupied managerial positions such as business relationship manager; he is known in the industry and has contacts that would assist him in finding a comparable position in the industry.

[80] Because of the competing versions of the prevailing circumstances, I find this to be a neutral factor.

Consideration of all of the factors

[81] In light of the above, I find that the notice period should be on the lengthier side, and the often applied range of one month for each year of service is not reasonable under the circumstances.

[82] I find Dobbs instructive, particularly where Wedge J. made the alternative finding that the plaintiff would have been entitled to 9 months' notice if his service has been for 30 months. She found at paras. 63-66 that:

63 In the event that Mr. Dobbs' length of service was 30 months and not 11 years, he nevertheless would be entitled to a significant notice period

64 In *Mackie v. West Coast Engineering Group Ltd.*, 2009 BCSC 1775, a 48-year-old manager with 21 months service received damages based on a nine-month notice period.

65 I have also found instructive the cases cited and analysed by Madam Justice Loo in *Nishina v. Azuma Foods (Canada) Co., Ltd.*, 2010 BCSC 502, at para. 246. In the cases cited, employees of advancing age who occupied senior positions within the employer's structure and who had been terminated after three years or less were awarded severance in the range of six to nine months' notice.

66 In this case, had I found Mr. Dobbs to have 30 months service, I would have awarded him damages in the range of nine months' pay in lieu of notice as well as lost bonuses for that period of time.

[83] I find that a period of 10 months' notice is appropriate in this case. Mr. Dobbs was 51 at the time of termination, and while the length of service is similar, Mr. Sollows occupied a more senior position. The defendant agrees that damages should include salary, RRSP contributions, and 30% of the would-be car allowance for the reasonable notice period. It has provided Mr. Sollows with three months of payments in lieu of notice. Mr. Sollows is entitled to an additional 7 months of payments.

[84] In order to address the matter of bonus, I find that the period of reasonable notice would have ended on May 14, 2017.

Bonus

Position of the parties

Plaintiff

- [85] Albion had a scorecard bonus that was intended to create an incentive for managers for profitable behaviour in each applicable Fiscal Year (FY). It is payable at the end of the FY once the financial results of the organization are known. During the partial year that Mr. Sollows was president, his bonus was \$550. During the full year when he was president his bonus was \$51,672.04.
- [86] The plaintiff asserts that the reasonable parameters to determine what the bonus would have been for FY 2016 and a portion of FY 2017 is to consider the amount of \$80,000 (50% of his annual salary) as the maximum payable bonus (while acknowledging that the maximum was never paid). He says that \$42,898.19 is the halfway point between the parties' respective positions. It is \$10,000 less than the bonus payment which Mr. Sollows received in the only full year during which the last agreed-upon bonus was paid.

Defendant

- [87] Albion says its FY is November 1 to October 31 and scorecard bonuses are calculated at fiscal year-end and typically paid in January of the next calendar year. Bonuses are only paid to employees who are employed on the payment date. The scorecard bonuses are intended to set deliverables for the next FY and create an incentive for business activities and decision-making by managers that will improve the overall performance of the company and the bottom line.
- [88] Albion explains that Mr. Sollows was paid a scorecard bonus as follows: FY 2014- \$550, FY 2015- \$51,672.04 and FY 2016- nil. For Mr. Sollows, as Director of Marketing and CSO, the role he held in FY 2014, his maximum scorecard bonus was 20% of his salary. As President, the role he held in FY 2015, Mr. Sollows' maximum possible scorecard bonus was 50% of his salary. If an employee fully achieves all defined goals, there are a total of 100 points available. For example, because Mr. Sollows' total possible scorecard bonus for 2014 was \$22,000, each point was worth \$220.
- [89] Albion says that the Scorecard bonus goals for a particular employee are specific, reflecting both the division and department goals. They are set at the end of the prior fiscal years and form part of the annual operating plan or AOP. A certain number of points are allocated to each of these goals. Out of the specified maximum points for each goal a certain percentage of points are available for achieving between 90% and 100% of the goal.
- [90] The scorecard bonus that Mr. Sollows was paid in FY 2015 was \$51,672.04. The defendant says that 50 of the 67 points Mr. Sollows earned for that calculation came from corporate achievement of the "operating earnings" goal. A GFS audit was completed in April 2016 which revealed that Mr. Sollows made an accounting decision, contrary to GFS' accounting policy, that inflated Albion's operating earnings in that FY. This decision resulted in an abnormally large scorecard bonus for certain employees including Mr. Sollows.

- [91] In the fall of 2015, Mr. Sollows met with Guy Dean, who was in charge of the "Closer To Source" (CTS) program, and requested Mr. Dean to transfer approximately \$250,000 from the CTS account and assign that amount to the general revenue for Albion. The defendant says the assignment was contrary to GFS' accounting policy which Mr. Sollows was supposed to follow. It resulted in Albion's financial statement showing higher operating earnings and that had the effect of artificially improving Albion's financial performance for FY 2015. It also had the effect of improving Mr. Sollows' performance under the bonus scorecard goal - "achieve operating earnings". As a result, Mr. Sollows earned the maximum 50 points available for the "achieve operating earnings" goal. If the \$250,000 from CTS had not been transferred, Albion would not have achieved its operating earnings. It would have achieved less than 95% of its corporate financial margin goal and Mr. Sollows would have earned only 15.44 points for a total scorecard bonus of about \$12,000.
- [92] The defendant is not suggesting that the transfer directed by Mr. Sollows is an attempt to relitigate Mr. Sollows' FY 2015 scorecard bonus or allege unlawful conduct. However, it says that the evidence does not support a scorecard bonus for Mr. Sollows for FY 2016 and that in any case the anomalous FY 2015 scorecard bonus must be fully understood and disregarded.
- [93] The defendant said that the scorecard bonus is paid to employees who are actively at work when it is paid. In accordance with the reasonable notice that I have determined, Mr. Sollows would have worked for the entire FY 2016 and would have been employed at the time the bonus was paid out.
- [94] The defendant says that, in those circumstances, the scorecard bonus Mr. Sollows would have qualified for in FY 2016 would have been in the amount of \$5,796.37 based on Albion's financial performance that year.

Decision on Bonus

- [95] I am satisfied that the defendant's evidence concerning the allocation directed by Mr. Sollows in 2015 is anomalous and to deduce a bonus based on that anomalous allocation would be an error. I accept the defendant's position that Mr. Sollows, if employed at the end of the FY 2016 and still employed in January 2017 (which he would be, based on my determination of the reasonable notice period) is entitled to a bonus of \$5,796.37.
- [96] Mr. Sollows would not be entitled to a bonus for FY 2017, because the reasonable notice period would have ended in May 2016 and he would not have been employed in October 2017 or in January 2018.

Mitigation

Legal Framework

- [97] In *Luchuk v. Starbucks Coffee Canada Inc.*, 2016 BCSC 830, Madam Justice Gray analyzed the test to be applied in respect of mitigation (at para. 39):

In summary, the burden on a defendant to prove that a plaintiff failed to mitigate is a high one. The defence has to prove not only that the employee did not take such steps as a reasonable person in the dismissed employee's position would have taken in their own interests, but must also show that if the plaintiff had taken those steps, the employee likely would have found equivalent employment.

Position of the Parties

Defendant

- [98] The defendant says that the seafood distribution business, where Mr. Sollows has worked in for approximately 31 years, is dominated by key players in the Vancouver area. Mr. Sollows confirmed on his examination for discovery that he has contacted only a few of them. Instead, the defendant says, he appears to have applied for only open positions advertised on various websites.
- [99] The defendant asserts that Mr. Sollows is sophisticated. He has occupied senior leadership positions. He has a degree in marketing. Over his career he has been a business relationship manager, and knows how to cultivate business relationships.
- [100] The defendant says that it is impossible to know if other seafood industry businesses are interested in engaging Mr. Sollows, because he has not reached out to many of them. His work experience demonstrates that networking and contacts are a common way to secure employment in the seafood distribution business, and employment opportunities sometimes arise even if no position is specifically posted. The defendant argues that as an experienced senior manager in the seafood business, in order to act reasonably, Mr. Sollows ought to have communicated with all his contacts to advise them that he was looking for work in the industry.
- [101] The defendant does not deny that Mr. Sollows has made some efforts to mitigate. However, the defendant claims that he has failed "to explore what is available through all means". Albion says that, for a person with his professional standing, his efforts have fallen short of "a constant and assiduous application for alternative employment, an exploration of what is available through all means" referring to *Besse v. Dr. A.S. Machner Inc.*, 2009 BCSC 1316, at para. 94 and seq (citing from *Bates v. John Bishop Jewellers Ltd.*, 2009 BCSC 158. See also *Smith v. Aker Kvaerner Canada Inc. and Kvaerner Power Inc.*, 2005 BCSC 117).
- [102] The defendant argues that Mr. Sollows has applied for many senior management positions for which he has no, or very limited, qualifications.
- [103] In respect of Mr. Sollows' criteria for finding a job with a new employer, the defendant says that his efforts have been impeded by personal qualms that play no part in the duty to mitigate. In *Besse*, at paras. 26 and 95-96 the court notes that the employee did not pursue potential employment opportunities that required a short commute and therefore she failed to mitigate her damages. The defendant says that "Mr. Sollows prefers not to bother

looking at seafood businesses that are not 'sustainable' (but says he would take a job with one)".

[104] The defendant says that it is impossible to tell whether an assiduous search would have landed Mr. Sollows a job by now, because he has qualified his own efforts. He has failed to act reasonably to mitigate his damages. It has now been approximately 4 months from Sollows' dismissal. Albion submits that any damages awarded ought to be cut off at 4 months due to Mr. Sollows' failure to mitigate.

Plaintiff

[105] The plaintiff compares his circumstances with that of Mr. Luchuk:

- a) In Luchuk, the plaintiff made four applications in the five months between his dismissal and the trial. In the present case, Mr. Sollows gives uncontested evidence in his first affidavit that he made 51 applications with 15 further applications found in the exhibits to his second affidavit. This was all in a span of slightly more than four months since his termination.
- b) In Luchuk the defendant paid for outplacement services. In this case the defendants did not. Notwithstanding that, Mr. Sollows reached out to the defendants' expert in job placement to offer to pay the latter out of pocket if he could place the former or even give him job searching advice.
- c) Both Luchuk and this case involve daily internet job searches and marketing via LinkedIn.

[106] In his affidavit of November 10, 2016, Mr. Sollows says that he has reached out to every contact that he can think of, including customers and suppliers that he has worked with over the years.

[107] The plaintiff submits that those efforts are reasonable not only on the basis of Luchuk, but also on the basis of patent conformity with the reasonable person standard as set out above. As such, the second part of the mitigation test, under which the defendant must show that the plaintiff would have likely found equivalent employment if he had taken reasonable steps, is also sufficient to dispose of the defendant's argument in this case.

Decision on Mitigation

[108] I apply the two part test described in Luchuk the facts of this case, bearing in mind the difficulty to satisfy the test.

[109] The defendant's assertion about the methods that Mr. Sollows has adopted in seeking alternate employment has some initial attraction. Nevertheless, I accept Mr. Sollows' evidence that he has responded to 51 job postings and responded to specific job applications. I also accept his evidence that he has reached out to his contacts. The defendant has not established, on a balance of probabilities, that Mr. Sollows did not take reasonable steps to find alternative employment.

[110] In respect of the second part of the test, that if the plaintiff had taken those steps, the employee likely would have found equivalent employment, the defendant's evidence is speculative. Albion asks me to assume that if Mr. Sollows had taken the steps that it asserts were reasonable; he would have found a new job by November 2016. I cannot assume that without evidentiary support.

Contingency

Legal Framework

[111] In *Foster v. Kockums Cancar Division Hawker Siddeley Canada Inc.*, (1993) 83 B.C.L.R. (2d) 207 (C.A.), the court reduced the notice period from 20 to 15 months, taking into account a contingency factor, among other reasons:

14 With this summary trial being heard just short of five months after the dismissal I think there must be built into the notice period a contingency factor that recognizes the possibility that the employee will obtain employment within the notice period.

15 In my opinion a notice period of 20 months in this case "is outside the range of reasonableness to a degree warranting this Court's intervention".

16 I think a reasonable notice period in this case would be 15 months and I would allow the appeal on this issue and substitute 15 months for 20 months.

[112] Foster was followed by Mr. Justice Ehrcke in *Earl v. Canada Bread Co.*, 2007 BCSC 1574 at para 14.

[113] In *Luchuk*, Gray, J addressed the contingency factor at paras. 46 to 51. At para 46, Gray, J discusses that concept:

Wrongful dismissal cases are awkward, because the claim arises when the individual has been dismissed without reasonable notice, and then there is a bit of a race. Naturally the person who was dismissed would prefer to have an award from the Court and then afterwards get a job, because they would have a windfall, in the sense of receiving income from two sources representing the same time period. Naturally the defense would prefer that the plaintiff had found a job before the court hearing, because if the plaintiff has replaced the employment with another job, then he or she will not have suffered the loss of their entire employment income for the notice period. This tension is always present in wrongful dismissal cases, and it is something that the Court has to be mindful of.

[114] After referring to *Foster* and *Earl*, the court determined that a one month reduction in the notice period was the appropriate contingency factor, taking into account that the summary trial was heard within 5 months of the dismissal and that Mr. Luchuk had a specialized job, with a national and international scope, that was unusual in Vancouver.

Position of the Parties

The defendant

[115] Albion points out that the court must use its discretion to reduce the period of reasonable notice based upon the contingency that the plaintiff finds a job within the period of reasonable notice, particularly because the summary trial was conducted less than five months after the dismissal. It asserts that the reduction imposed should be in the range of 20-25%.

The plaintiff

[116] Mr Sollows argues that applying a contingency factor in circumstances where the plaintiff is found to have made reasonable efforts to obtain alternative employment engages in inconsistent reasoning. If the plaintiff has made reasonable efforts, and the court has determined the reasonable period of notice, it should not then apply a significant reduction to the period of notice based upon an assumption that the plaintiff will find a job in the notice period.

[117] The plaintiff asserts that if I consider that a contingency reduction is appropriate, then I should look to Luchuk as a guide. Mr. Luchuk's period of notice was discounted by one month. The plaintiff argues that his circumstances differ from that of Mr. Luchuk because he is older than Mr. Luchuk by 12 years; there are fewer players in the relevant industry; and his skills are not readily portable to other industries

Decision on Contingency

[118] In this case, I find that a contingency reduction is not appropriate. Having found that Mr. Sollows has made reasonable efforts to find alternative employment, it would be inconsistent to also reduce the period of notice based upon the contingency that he will find a job before the notice period expires. This case does not engage the push-pull analysis that was applied by Gray J. in Luchuk. Mr. Sollows is making reasonable efforts to find new employment that match his skills and expertise. Having found that, I cannot also find that he would "naturally prefer to have an award from the Court and then afterwards get a job, in order to achieve a windfall".

[119] Assuming that Mr. Sollows would find a job within the notice period is as speculative as finding that the second part of the test for mitigation has been established.

[120] With respect, I must also comment that the scant analysis in Foster, does not provide a sufficient basis for exercising my discretion to impose a contingency reduction. In that case the period of reasonable notice was found by the trial judge to be 20 months which the court of appeal considered to be unreasonable for multiple reasons, including considering the mid-level position held by the employee (paras 11-13). The contingency factor was only a contributory factor to the reduction but not a determinative one.

[121] Finally, while the summary trial was heard within 5 months of the dismissal, these reasons are provided 8 months into a 10 month notice period. I am assuming that Mr. Sollows has continued to make reasonable efforts to mitigate his losses, as he is required to do and as his evidence shows he has done thus far. If he has found alternative employment in the period between the hearing and the publication of these reasons, that fact should be made known to defendant's counsel and the notice period should be reduced accordingly. In my view, this is preferable than imposing an arbitrary contingency reduction.

Conclusion

[122] I have not found that Albion induced Mr. Sollows into accepting employment. I have found that Mr. Sollows' break in service was of sufficient length that it cannot be implied that the parties agreed that it would be credited to him in the event he was dismissed without cause.

[123] Mr. Sollows is entitled to reasonable notice of 10 months. He has received 3 months of salary and benefits and he is entitled 7 more months of salary, RRSP contributions, and 30% of the would-be car allowance for the reasonable notice period.

[124] Mr. Sollows is entitled to the payout of a bonus in the amount of \$5,796.37 as of January 2017.

[125] The defendant has not proven a failure to mitigate.

[126] I have declined to impose a contingency reduction, however, I require that Mr. Sollows disclose to the defendant's counsel if he has obtained alternative employment between the date of the hearing and the publication of these reasons and if so, the notice period shall be reduced accordingly.

[127] The parties may speak to costs, either by setting a hearing date before me for that purpose, or by making written submissions in accordance with an agreed upon schedule.

"Gropper, J."

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