

CANADA / JUDGMENT

Wayne Beatty v. Canadian Mill

2003 BCSC 1053

COURT

Supreme Court of British Columbia

DECIDED

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2003BCSC1053 IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Wayne Beatty v. Canadian Mill Services Association, 2003 BCSC 1053 Date: 20030708 Docket: S022980 Registry: Vancouver Between: Wayne Beatty Plaintiff And Canadian Mill Services Association Defendant Before: The Honourable Mr. Justice Joyce Reasons for Judgment Counsel for the plaintiff Ronald M. Snyder Counsel for the defendant Gavin A. Marshall Date and Place of Trial/Hearing: February 21 and April 28, 2003 New Westminster, B.C.

INTRODUCTION

- [1] On January 14, 2002 the defendant dismissed the plaintiff from his employment as its Executive Director. The defendant does not suggest it had just cause to terminate the employment without notice or pay in lieu of notice. The defendant offered to continue the plaintiff's regular salary for a period of up to 12 months and in the event the plaintiff found alternate employment before the expiration of 12 months to pay him one-half of the remaining unpaid salary continuance. When the plaintiff rejected the offer the defendant continued to pay his salary for a period of 11 months.
- [2] The plaintiff sues for damages for wrongful dismissal. He says 20 months would have been reasonable notice. He also alleges he is entitled to increased damages because of the manner in which the dismissal was carried out. The plaintiff therefore claims damages based on an additional 13 months' notice. He also claims damages for the loss of a number of fringe benefits.
- [3] The defendant brought this application under Rule 18A to determine the appropriate length of notice and to determine what additional damages, if any, the plaintiff is entitled to for loss of fringe benefits.

FACTS

- [4] Canadian Mill Services Association ("CMSA") is a non-profit forest industry association founded in 1994. It provides inspection and educational services related to lumber quality standards to forest products companies in British Columbia on a fee-for-service basis. The board of directors of CMSA consists of representatives from a number of the forest companies who use its services. The plaintiff was the Executive Director of CMSA, a member of the board of directors and held the office of Secretary-Treasurer.
- [5] In addition to the plaintiff, CMSA employed three permanent supervisors and, sometimes a fourth temporary supervisor. The supervisors travel to sawmills in British Columbia and deliver educational seminars concerning the maintenance of lumber quality standards and proper lumber grading techniques. They act as consultants or advisors to forest companies and deliver a number of services to forest companies, including grading classes, performance management, tally classes, grader training, plant health inspections, safety audits, and job description writing. The supervisors set their own schedules and generally work without any close supervision.
- [6] CMSA also employed two permanent administrative office staff and occasionally one or two part-time staff.
- [7] As Executive Director of CMSA, the plaintiff was responsible for management of the day-to-day activities of the society. He also had responsibility, along with the other employees, for maintaining client relationships with the member companies who used the services of CMSA. The plaintiff played an important role in the conception, design and implementation of program initiatives for CMSA and in finding and developing opportunities to expand the membership of the society. Further, the plaintiff represented the society on various national and international committees.
- [8] The plaintiff reported to the board of directors on roughly a quarterly basis. For these meetings the plaintiff, in conjunction with the Manager of Education and Administrative Services (one of the office staff positions), prepared an information package for the board. He was also responsible for overseeing the preparation of the annual budget and presenting it to the board of directors. The CMSA budget for 2001 was approximately 1.3 million dollars, most of which was for salaries, travel expense and vehicle lease expense.
- [9] Before the creation of CMSA, a predecessor group under the direction of the Council of Forest Industries ("COFI") provided similar services. The plaintiff was employed by COFI as Manager of Sawmill Services from September 1990 until the creation of CMSA, when he became its Executive Director. The defendant agrees that the plaintiff's period of employment should include his time with COFI and was, therefore, about 11 ½ years.

- [10] There is a dispute between the parties concerning the plaintiff's role in the creation of CMSA. It is the plaintiff's position that he essentially "founded" CMSA. He says he drafted its constitution and by-laws, hired staff, solicited new corporate memberships, developed program initiatives and approved contracts.
- [11] The defendant suggests the plaintiff exaggerates his role in the creation of the new entity. It says the idea for CMSA came from a number of senior managers of B.C. forest products companies and that there was a pool of potential members available once the society was operational so that the job of soliciting members was not as suggested by the plaintiff. I am satisfied the plaintiff played an important role by doing a lot of the leg-work while he was with COFI but that CMSA was not his creation. The plaintiff retained a lawyer to draft by-laws, most of the staff for CMSA migrated over from COFI and there was a large interested client base so that extensive work was not required to bring them on board.
- [12] In November 2001, the plaintiff submitted a proposal to Canadian Forest Products Ltd. ("CANFOR") to supply them with education grading services. The plaintiff considered a staff reorganization would be required in order to deliver the services to CANFOR. In early December 2001, the plaintiff prepared a draft reorganization proposal, which he sent out to the employees. The proposal involved a reorganization of the field territory and would have required existing employees to re-apply for their jobs. The plaintiff had not discussed his proposal with the board of directors before he sent a draft to his staff.
- [13] The staff employees expressed concern to Mr. David Lebeter, the Chairman of the Board of Directors, and on December 10, 2001 they sent a memorandum to Mr. Lebeter outlining their concerns. The memorandum was highly critical of the plaintiff. Mr. Lebeter and other members of the board of directors, excluding the plaintiff, reviewed the memorandum and on December 23, 2001, Mr. Lebeter told the plaintiff he wanted to talk to him about staff complaints.
- [14] On December 27, 2001 Mr. Lebeter met with the plaintiff. Another board member, Mr. Jim Fenton, and a past Chairman, Mr. Russell Jenkins also attended the meeting. Mr. Lebeter advised the plaintiff that he had received a memorandum setting out a number of complaints but did not provide a copy of it to the plaintiff. Mr. Lebeter's evidence is that he told the plaintiff at this meeting that the termination of his employment was an option.
- [15] There is a dispute on the evidence as to what Mr. Lebeter asked the plaintiff to do. Mr. Lebeter's evidence is that he expressly requested that the plaintiff report to him by January 2, 2002 on the measures he intended to take to restore confidence in him. The plaintiff agrees Mr. Lebeter requested that he provide him with an action plan to address the staff concerns but did not specify a date by which such plan was to be provided. His evidence is that Mr. Lebeter had requested that he provide an organizational plan and budget by January 2, 2002 but that he had told Mr. Lebeter he could not do so until the next board meeting scheduled for January 24, 2002.

- [16] In any event, by January 8, 2002 Mr. Lebeter had decided to recommend to the board that the plaintiff's employment be terminated on a "without cause" basis and the board accepted his recommendation.
- [17] On January 14, 2002, Mr. Lebeter asked the plaintiff to meet him at his office in New Westminster. When the plaintiff arrived, Mr. Lebeter told him, in private, that the board had decided to terminate his employment. Mr. Lebeter's evidence is that he simply told the plaintiff the board wanted CMSA to go in a different direction. The plaintiff's evidence is that Mr. Lebeter gave him no reason for the termination. Mr. Lebeter provided the plaintiff with the offer of a severance package and asked for his keys to the CMSA office, his pass cards and parking pass and cellular telephone. Mr. Lebeter told the plaintiff to turn in his lease vehicle within 2 weeks. Arrangements were made for the plaintiff to attend at his office on January 16, 2002 to collect his personal belongings.
- [18] On January 14, 2002 the board of directors issued a letter to the companies using its services advising of the termination of the plaintiff's employment.
- [19] At the time of his termination, the plaintiff was 50 years old. His salary was \$104,592 per year or approximately \$8,716 per month. APPLICABLE NOTICE PERIOD
- [20] *Bardal v. Globe & Mail Ltd.*, [1960] O.W.N. 253, 24 D.L.R. (2d) 140 (H.C.) is a good starting point for an analysis of what would have been an appropriate period of notice. At p. 145, McRuer C.J.H.C. said: There can be no catalogue laid down as to what is reasonable notice in particular classes of cases. The reasonableness of the notice must be decided with reference to each particular case, having regard to the character of the employment, the length of service of the servant, the age of the servant and the availability of similar employment, having regard to the experience, training and qualifications of the servant.
- [21] The factors enumerated in *Bardal* are not exhaustive (*Wallace v. United Grain Growers Ltd.* [1997] 3 S.C.R. 701), but they are important ones and I intend to consider each of them.
Character of the employment
- [22] The plaintiff occupied the highest paid position in CMSA at a salary of \$104,592 per year, a position described in his formal job description as Chief Executive Officer. The defendant makes the point that the plaintiff prepared his own job description. However, Mr. Michael MacDougall, Director of the Center for Career Management at PricewaterhouseCoopers, provided an expert opinion based upon the plaintiff's description of his position in which he concluded that the plaintiff carried out the duties of a Chief Executive Officer.
- [23] On the other hand, the nature of the position has to be assessed in light of the nature of the organization. CMSA is an association consisting of a few employees providing highly specialized services to forest companies. The plaintiff was not required to oversee a large workforce. I am not satisfied that he faced the same degree of challenge in terms of such things as financial management, industry competition or quality control that many C.E.O.'s of private industry face. That is not to say the plaintiff did not occupy an important position

within the organization but a proper assessment of the nature of his employment requires more than simply looking at his title. Length of service

- [24] The parties agree it is appropriate to include the years that the plaintiff spent with CMSA's predecessor in determining his length of service. He had therefore been the senior employee of the organization for 11 ½ years. Age of the employee
- [25] The plaintiff was 50 years old when the defendant terminated his employment. Availability of similar employment
- [26] In my opinion, this is an important factor in the present case. The plaintiff's whole career has been in the forest industry. During the last 11 ½ years the plaintiff was involved in a very specialized aspect of that industry. I am satisfied the plaintiff has limited opportunity within the forest industry directly to apply his specialized knowledge because of the depressed state of the forest industry. I also accept the opinion of Mr. MacDougall that the transferability of his "heightened level of knowledge, skill and expertise to senior positions outside the industry is limited".
- [27] Where an employee's skills of management are not easily transferred to another kind of business and the opportunities open to him are remote, a longer period of notice may be appropriate (see *Suttie v. Metro Transit Operating Co.* (1985) 28 D.L.R. (4th) 36 (B.C.C.A.) at p. 40).
- [28] In submitting the appropriate notice period is 11 months, the defendant refers to the following decisions: *Hosking v. Saskatchewan (Department of Health)* (1998), 36 C.C.E.L. (2d) 179 (Sask. Q.B.) · position = Regional Executive Director, Mental Health Services · length of service = 17 years · age = 55 · salary = \$68,000 · notice period = 17 months *Ally v. Institute of Chartered Accountants (Ontario)* (1992), 42 C.C.E.L. 118 (Ont. Ct.Just.) · position = Director of Education · length of service = 10 years · age = 54 · salary = not stated · notice period = 12 months *Stewart v. Standard Broadcasting Corp.* (1989), 29 C.C.E.L. 290 (Que. S.C.) · position = Vice-president and General Manager of radio stations · length of service = 9 years · age = 42 · salary = \$100,000 · notice period = 12 months *Baker v. British Columbia Insurance Co.* (1992), 41 C.C.E.L. 107 (B.C.C.A.) · position = Vice-President and Chief Operating Officer · length of service = 10 years · age = 46 · salary = \$70,000 · notice period = 12 months *Dunning v. Royal Bank of Canada* (1996), 23 C.C.E.L. (2d) 71 (Ont. Ct.Just.) · position = Senior Manager of Corporate Banking · length of service = 10.5 years · age = 40 · salary = US \$81,700 · notice period = 12 months *Gryba v. Moneta Porcupine Mines Ltd.* (2000), 5 C.C.E.L. (3d) 43 (Ont. C.A.) · position = President and director of mining company · length of service = 9 years · age = 46 · salary = \$84,000 · notice period = 9.5 months *McPhee v. Torino Motors (1975) Ltd.* (1989), 28 C.C.E.L. 68 (B.C. Co. Ct.) · position = Sales and Business Manager · length of service = 11 years · age = 46 · salary = approximately \$58,000 · notice period = 12 months *Brock v. Matthews Group Ltd.* (1988), 20 C.C.E.L. 110 (Ont. S.C.) · position = President and Chief Operating Officer · length of service = 11 years · age = 40 · salary = \$100,000+ · notice period = 12 months *Dreaver v. Saskatchewan Treaty Council* [1994] SJ No 383 (Q.B.) · position =

Executive Director · length of service = 8 years · age = 43 · salary = \$32,000+ · notice period = 6 months Moore v. University of Western Ontario (1985) 8 C.C.E.L. 157 (Ont. S.C.) · position = Director of University Relations · length of service = 11 years · age = 48 · salary = \$38,500+ · notice period = 12 months

- [29] In submitting that the appropriate notice period is 20 months the plaintiff refers to the following decisions: Spence v. Wyeth [1983] OJ No. 447 (Ont. S.C.) · position = President and Chief Executive Officer · length of service = 9 ½ years · age = 50 · salary = not stated · notice period = 18 months if there had been a finding of wrongful dismissal Waters v. MTI Canada Ltd. (1996), 19 C.C.E.L. (2d) 24 (Ont. Ct.Just.) · position = Vice-President and Chief Operating Officer · length of service = 6 years · age = 46 · salary = \$104,000+ · notice period = 15 months Landry v. Canadian Forest Products Ltd. (1992), 67 B.C.L.R. (2d) 165 (C.A.) · position = Woodlands manager (middle manager) in large forest products company · length of service = 11 years · age = 47 · salary = \$65,700 · notice period = 15 months
- [30] Having considered these authorities and having regard to the particular circumstances of this case and, in particular, my view of the challenges facing the plaintiff in securing alternative employment because of the specialized nature of his expertise, I am of the opinion that reasonable notice would have been 15 months. IS THE PLAINTIFF ENTITLED TO ADDITIONAL DAMAGES BECAUSE OF THE MANNER OF HIS DISMISSAL?
- [31] In Wallace v. United Grain Growers Ltd. [1997] 3 S.C.R. 701, the Supreme Court of Canada held that an employer owes an obligation of good faith and fair dealing in the manner in which it dismisses an employee and that a breach of this obligation can result in an increase in the notice period. At para. 88, Mr. Justice Iacobucci said: The appellant urged this Court to recognize the ability of a dismissed employee to sue in contract or alternatively in tort for "bad faith discharge". Although I have rejected both as avenues for recovery, by no means do I condone the behaviour of employers who subject employees to callous and insensitive treatment in their dismissal, showing no regard for their welfare. Rather, I believe that such bad faith conduct in the manner of dismissal is another factor that is properly compensated for by an addition to the notice period.
- [32] At para. 95, Mr. Justice Iacobucci made this comment: I note that the loss of one's job is always a traumatic event. However, when termination is accompanied by acts of bad faith in the manner of discharge, the results can be especially devastating. In my opinion, to ensure that employees receive adequate protection, employers ought to be held to an obligation of good faith and fair dealing in the manner of dismissal, the breach of which will be compensated for by adding to the length of the notice period.
- [33] And at para. 98, he said: The obligation of good faith and fair dealing is incapable of precise definition. However, at a minimum, I believe that in the course of dismissal employers ought to be candid, reasonable, honest and forthright with their employees and should refrain from engaging in conduct that is unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive.

- [34] At paragraph 103, Mr. Justice Iacobucci distinguished between injuries flowing from the fact of the dismissal themselves, which are not compensable, and those flowing from bad faith conduct or unfair dealing, which are compensable: It has long been accepted that a dismissed employee is not entitled to compensation for injuries flowing from the fact of the dismissal itself; see e.g. *Addis*, supra. Thus, although the loss of a job is very often the cause of injured feelings and emotional upset, the law does not recognize these as compensable losses. However, where an employee can establish that an employer engaged in bad faith conduct or unfair dealing in the course of dismissal, injuries such as humiliation, embarrassment and damage to one's sense of self-worth and self-esteem might all be worthy of compensation depending on the circumstances of the case. In these situations, compensation does not flow from the fact of dismissal itself, but rather from the manner in which the employer effected the dismissal.
- [35] Bad faith conduct or unfair dealing which adversely affects the dismissed employee's ability to find other employment can be seen as a tangible loss and may be deserving of greater compensation than that which results in the intangible injury such as that referred to in the preceding quotation from *Wallace*, but even the intangible injury is capable of compensation.
- [36] In *Wallace* the conduct that constituted bad faith and unfair dealing was dismissing Mr. Wallace in an abrupt manner after he had received compliments on his work only days before and playing "hardball" and maintaining unfounded allegations of cause until the day the trial began.
- [37] In this case, the plaintiff submits that even though the termination was on a "without-cause" basis the manner in which it was carried out was "dishonest, unfair, insensitive and callous and was designed to send a message to the plaintiff, his staff and the public at large that the dismissal was indeed for cause".
- [38] The plaintiff says the manner in which he was informed of his termination was insensitive and callous. He was asked to report to Mr. Lebeter's office where he was informed of his dismissal and given a letter of termination. The plaintiff says he had received no prior warning he might be dismissed nor was he advised of the reasons. Mr. Lebeter disputes this and says that he had told the plaintiff on December 27, 2001 that termination was an option and was told upon dismissal that the board had decided that it wanted CMSA to go in a different direction.
- [39] I cannot accept that the plaintiff had no idea why he was being terminated. Mr. Lebeter had expressed his concerns to the plaintiff in late December. In my view he was not required to express any more extensive reasons for the termination than he did when the defendant was not attempting to dismiss the plaintiff for cause. In my view, Mr. Lebeter acted with sensitivity when he informed the plaintiff of the board's decision without reviewing in detail all the reasons why the board had lost confidence in him.

- [40] The plaintiff says the defendant acted in bad faith when it failed to continue the long-term disability coverage, knowing of the plaintiff's past medical conditions. However, Mr. Lebeter had inquired about the plaintiff's health in the December meeting and the plaintiff had denied any medical problems.
- [41] The plaintiff says the defendant acted in bad faith when Mr. Lebeter told the plaintiff to turn over his keys, return his leased vehicle, not contact the staff and prevented access to the association's e-mail server. While those actions are more common in the case of a termination made for cause I am not prepared to say the defendant acted in bad faith by taking these precautions to protect its interests.
- [42] The plaintiff says the defendant acted in bad faith in sending out a notice to its customers that advised it had "severed" the plaintiff's employment. While a memorandum using that word was drafted, it is not clear whether it is that memorandum that was sent out. If it was, it was accurate. It did not allege any wrongdoing on the part of the plaintiff. The defendant could not honestly say that the plaintiff had resigned or that the plaintiff and defendant had mutually agreed to sever their relationship. It is difficult to think how the defendant could phrase the notice without leaving the suspicion that it was the defendant that decided to terminate the employment. I am not persuaded this memorandum is evidence of bad faith.
- [43] The plaintiff suggests Mr. Lebeter had decided by December 10, 2001 to terminate the plaintiff's employment and took steps to manipulate the board so that it would support his decision. In my opinion, the evidence simply does not support such a suggestion. I am satisfied that when Mr. Lebeter met with the plaintiff on December 27, 2001 he had serious concerns but was prepared to hear the plaintiff's explanations for the approach he had taken. I am satisfied the plaintiff failed to satisfy Mr. Lebeter or the board sufficiently for them to continue to have confidence in him. They made the decision to terminate his employment because they had lost confidence in him as they were entitled to do. At that point, having decided to terminate the employment on a without-cause basis, the defendant did not have an obligation to give the plaintiff further opportunity to justify his actions or to try to convince the board to change its mind.
- [44] I am not persuaded the defendant acted in bad faith or treated the plaintiff unfairly in the manner of effecting the dismissal. I am not persuaded the plaintiff is entitled to any additional damages pursuant to the Wallace principle. FAILURE TO PROVIDE A REFERENCE LETTER
- [45] The plaintiff says the defendant's failure to provide a letter of reference or recommendation warrants an increase in the period of reasonable notice quite independent of the Wallace principle. Counsel for the plaintiff submits an employer's failure to provide a favourable letter of reference or assist in finding the dismissed employee alternate employment can increase the period of reasonable notice. He relies on *Ballard v. Alberni Valley Chamber of Commerce* (1992), 65 B.C.L.R. (2d) 378 (S.C.). I can find nothing in that decision to support the submission of counsel. There is no discussion in it of a letter of reference. In *Ballard* the

court found that that manner in which the employer dismissed its employee was one of those rare cases where "the conduct of the defendant is a tort in and of itself". To the extent the conduct to which the court referred relates to the manner of dismissal, this case appears to be contrary to Wallace.

- [46] I accept the position of the defendant that it could not in good conscience provide a favourable letter of reference and that it was under no obligation to do so. In *Shinn v. TBC Teletheatre B.C., a Partnership* (2001), 85 B.C.L.R. (3d) 75 (C.A.) the trial judge had taken into account the failure to provide a letter of reference as a factor in determining the period of reasonable notice. On appeal, McEachern C.J.B.C. stated at p. 80: There was no obligation upon the defendant to provide a letter of reference. there could be many reasons why an employer may not wish to give a letter of reference, or a favourable letter of reference. In many cases, including this case, it would seldom be known if the employer could honestly give a favourable letter. The risk of increased damages could become an inducement to employers to give misleading references. Wrongful dismissal litigation should not be burdened by investigation into such matters unless the quality of the plaintiff's performance is already an issue in the case such as where there is a plea of dismissal for cause or the circumstances justify a special award under the decision in *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701 (S.C.C.). With respect, I would not follow the decisions cited by the plaintiff that suggest the lack of a favourable reference might increase the period of reasonable notice except in the circumstances I have described.
- [47] Having concluded this is not a case where Wallace damages apply, I am of the opinion the failure to provide a letter of reference cannot increase the notice period. Nor do I accept the submission that the failure by the defendant to provide outplacement services or similar support is a factor that should increase the period of notice. In my view the obligation is to provide reasonable notice or pay in lieu and to not engage in bad faith conduct. I do not accept the employer has an obligation to provide employment counselling. Failing to do so is not acting in bad faith. FAILURE TO PROVIDE THE PLAINTIFF WITH HIS COMPLETE CONTACTS LIST
- [48] The plaintiff suggests the defendant's action in failing to provide him with his complete computer contacts list, as opposed to his personal contacts, impeded his ability to secure alternate employment. Even if the contact list was not the property of the employer the evidence does not support the submission that the absence of the list impaired the plaintiff's search for alternate employment. ALLEGED INTERFERENCE WITH MASTERS THESIS
- [49] The plaintiff also submits that the defendant interfered with his ability to complete his masters' thesis thereby adversely affecting his ability to secure alternative employment. With the knowledge of the defendant, the plaintiff had intended to use data and information obtained in connection with his work at CMSA to prepare his thesis. When his employment was terminated he lost access to the past and future data. The plaintiff deposed that, as a result, he had to change his thesis topic, which increased the amount of time he had to spend on obtaining his degree. He deposed that during the period from February to

September 2002 he had to devote about 35% of his time to his thesis work.

- [50] In my view, the defendant had the right to deny the plaintiff access to the data in connection with the defendant's contractual arrangements once the plaintiff's employment was terminated. In any event, I am not satisfied the plaintiff was delayed in obtaining his masters'degree even though he was required to choose a different thesis topic.
- [51] In my opinion, none of the matters of the reference letter, the contacts list or the masters' thesis warrant an increase in the period of notice. DAMAGES FOR LOSS OF BENEFITS
Pension entitlement
- [52] The parties are agreed that the plaintiff is entitled to damages for loss of pension contribution equal to 2.4% of his base salary. Bonus/Profit Sharing
- [53] The award of damages in lieu of notice should place the dismissed employee in the same position he would have been in at the end of the notice period had he been given the appropriate notice. A dismissed employee is entitled to recover bonuses or profit sharing that he would have earned during the notice period if they were integral to the remuneration package (*Stewart v. British Columbia Sugar Refinery Co. (1994)*, 2 C.C.E.L. (2d) 125 (Man. Q.B.)).
- [54] CMSA has a profit sharing plan with its employees. Payment is made in the month of January based on the previous year's performance. Entitlement is limited to those who are employees at the time the bonus is paid. It is agreed that if Mr. Beatty had been an employee in January 2003 he would have received \$3,000.00 under the profit sharing scheme based on the 2002 performance. CMSA submits, however, that Mr. Beatty was not an employee in January 2003 and is not entitled to compensation for the loss of profit sharing for 2002.
- [55] As I have decided that the appropriate notice was 15 months, Mr. Beatty would have been employed in January 2003 if he had been given that notice. He is entitled to damages under this head of \$3,000. Computer
- [56] The plaintiff says he is entitled to compensation for a computer he says he bought in 1994 at a cost of \$4,203. He says the computer was his property and was not returned to him. Given the age of the computer I am satisfied it had nominal value only and award \$100.00 under this heading. Contacts list
- [57] Mr. Beatty says he was not given all the contacts he had assembled on CMSA's Maximizer database. His says this list was his personal property. CMSA's position is that it provided Mr. Beatty with a list of his personal contacts that it prepared from the Maximizer list, but the other names that Mr. Beatty has placed in the file while Mr. Beatty was an employee are the defendant's property.

- [58] The plaintiff has not satisfied me that the entire list of contacts on the Maximizer file was his property. In any event, he has not satisfied me the list of names had any monetary value or that he suffered any loss as a result of not getting the list of contacts. In my opinion, the plaintiff is not entitled to damages under this heading. Automobile benefits
- [59] CMSA leased a 2001 Audi automobile for Mr. Beatty's use. The monthly payment was \$1,634.57. Mr. Beatty had the vehicle for both business and personal use. CMSA also provided Mr. Beatty with a monthly vehicle allowance of \$1,250 for running expenses. I am satisfied that amount was intended to cover insurance, gas, oil and maintenance.
- [60] Mr. Beatty's evidence was that CMSA paid \$1,454.93 of the monthly lease payment and he paid the balance of \$179.64. He also said he reimbursed CMSA \$120 per month on account of the running costs. I am satisfied that was not the case. I find that no deductions were made from his salary.
- [61] When CMSA terminated Mr. Beatty's employment it required him to surrender the leased vehicle. Mr. Beatty did not, in fact, replace the leased vehicle by leasing or purchasing a replacement vehicle.
- [62] Mr. Beatty claims \$1,710.18 on account of the loss of automobile benefits, comprised of the following: Portion of lease paid by CMSA \$1,454.93 Insurance cost 135.25 Personal use of operating costs 120.00

\$1,710.18

- [63] CMSA disputed Mr. Beatty's entitlement to lease a luxury automobile but I am satisfied Mr. Beatty had the discretion to lease the car he did and that his employer was aware of the nature of the car and approved that expense.
- [64] CMSA submits Mr. Beatty is not entitled to any compensation for loss of automobile benefits because he did not replace the leased vehicle with one of his own. In the alternative, CMSA submits Mr. Beatty is only entitled to compensation for the personal portion of the automobile expense, which he himself declared to be 9.4% for the purpose of his income tax return. The defendant's position, therefore, is that at most the plaintiff is entitled to 9.4% of (\$1,634.57 + \$1,250.00), or \$271.15 per month on account of lost automobile benefits.
- [65] In support of its primary position, CMSA relies on this statement by Brenner J. (as he then was) in *Sheehan v. British Columbia Hydro and Power Authority* (1999), 72 B.C.L.R. (3d) 154 (SC) at p. 199: Damages for lost fringe benefits are to be measured not by the total value of the benefits provided by the employer to the employee prior to dismissal, but by the amount that the employee has actually expended to replace those benefits following termination. This principle was expressed by McLachlin J. (as she then was) in *Wilks v. Moore Dry Kiln Co. of Canada* (1981), 32 B.C.L.R. 149 (B.C.S.C.) at pp.152-153 where she stated: The question is not what the Defendant has gained by the dismissal, but what the Plaintiff has lost. The

loss must be established on the evidence. If the Plaintiff fails to show that he has paid out or lost money or has otherwise suffered by reason of the absence of fringe benefits, his claim cannot succeed. In *Sorel v. Tomenson Saunders Whitehead Ltd.* (1987), 15 B.C.L.R. (2d) 38 (B.C.C.A.), the Court of Appeal reduced the employee's damages for lost fringe benefits (including various employer insurance contributions, car allowances and club memberships) from \$28,556.00 to \$204.00 upon finding that the employee had expended only the latter sum to replace those benefits. From these authorities, I conclude that the plaintiff can be awarded special damages for only those amounts he actually expended to replace the items for which he is claiming.

- [66] In support of his position, Mr. Beatty relies upon *Bruce-Vaughan v. Dalmy's Canada Ltd.* (1992), 40 C.C.E.L. 112 (B.C.S.C.) in which Hood J. dealt with a situation similar to that in the present case where the dismissed employee did not replace the leased car that she enjoyed as a benefit of her employment because she lacked the funds to do so. In that case the employer paid \$424 per month on the lease while the employee paid \$22 per month. The employer also paid the annual licensing and insurance costs for the vehicle. The defendant, relying on *Wilks v. Moore Dry Kiln & Co. of Canada*, argued that since the plaintiff had not replaced the vehicle and incurred any expenses in connection with a replacement vehicle, she was not entitled to any damages on account of loss of automobile benefits.
- [67] After referring to *Sorel v. Thomenson Saunders Whitehead Ltd.* and *Tosa Ltd.*, Hood J. said: In *Wood v. BBC Brown Bovier Canada Inc.* (1986), 15 C.C.E.L. 178 (B.C.C.A.) the lower court included in its award the cost of leasing a car for the notice period, despite the plaintiff's admission that he had not in fact replaced the lease car because of his financial situation. The Court dismissed the appeal stating: Although the plaintiff did not in fact lease a car during the 15 month period, he was nonetheless denied the benefits of that use which would otherwise have been available to him had he been given proper notice. As such, it could not be said that the plaintiff suffered no damage in that respect. The value of loss of the vehicle was said to be the cost of leasing it.
- [68] Mr. Justice Hood also said: It seems to me that save for the parking expense of \$302.33, which I do not believe to be a loss to the plaintiff, she should recover the other sums claimed whether or not *Wilks* is applicable in the case at bar. It seems to me that the subject losses might well fall within McLachlin J.'s definition of lost money or a loss otherwise suffered by reason of the absence of fringe benefits. On the other hand, if *Wilks* is to be confined to the specific fringe benefits with which it was concerned, and which are by nature a type of insurance and contingent, then the plaintiff should still be entitled to recover. Clearly there has been a loss suffered, which is not contingent, as a result of a loss of benefits, as in *Wood*. If a proper notice had been given to the plaintiff she would have had the use of that vehicle, for business and private purposes, for one year. Her insurance and licensing requirements would have been paid, as well as her parking, gas and other running expenses. She has lost the defendant's portion of the monthly lease costs, which I understand to be \$424, the cost of insuring and licensing the vehicle for the year in the sum of \$1,034, and the portion of the

gas and other running costs or maintenance attributable to the personal use of the vehicle.

- [69] In the case before me, I am satisfied one of Mr. Beatty's employment benefits was the use of a car for private use as well as business use. When he was terminated without notice and his car was taken away, he lost that benefit during the appropriate notice period. I find that is a "loss otherwise suffered by reason of the absence of fringe benefits" within the meaning of Wilks and that Mr. Beatty is entitled to damages as a result of that loss.
- [70] The issue of the quantum of damages relating to the loss of the automobile remains to be determined. The defendant submits the proper measure of the damage is the value of the personal benefit to Mr. Beatty, which Mr. Beatty determined to be 9.4%. The defendant relies on *Preston v. British Columbia* (1993), 81 B.C.L.R. (2d) 218 (B.C.S.C.) in which Allan J. said at p. 219: I consider it to be settled law that the plaintiff is entitled only to compensation for the loss of the personal use of the vehicle and not to the full value of the benefit which would compensate him for loss of business use as well as personal use.
- [71] Because *Preston* was not required to declare his personal use of the vehicle as a taxable benefit, Allan J. held the loss had no value. She referred to *Hache v. New Brunswick* (1989), 97 N.B.R. (2d) 78 (Q.B.) in which the Court said: Surely no one should recover more in damages for the loss of such a benefit than he is prepared to pay income tax on.
- [72] I am of the opinion the plaintiff is entitled to damages based on the value of the personal use of the automobile. For income tax purposes he reported the personal use as 9.4% of the total use and calculated the value of the personal benefit based on 9.4% of the total cost. In my opinion, following *Preston*, it is not now open to Mr. Beatty to claim that the personal use of the automobile had a greater value than he declared for income tax purposes. I therefore allow damages of \$271.15 per month on account of the loss of the automobile benefit.
- Professional Dues
- [73] During Mr. Beatty's employment CMSA paid his annual professional Applied Science and Technology dues. In 2002 Mr. Beatty paid his own dues of \$246.10. He is entitled to recover that amount as part of his special damages. Mitigation expenses
- [74] Mr. Beatty claims additional damages representing his expenses incurred in an effort to mitigate his loss. In particular, he claims \$4,867.06 for meals, parking and travel expenses incurred in pursuit of alternative employment opportunities. In addition, Mr. Beatty claims \$1,025.00 representing the costs incurred to incorporate a company, Shogate Trade Solutions Corporation, through which he conducted a consulting business in an effort to earn income to replace his lost employment income.
- [75] Finally, Mr. Beatty seeks to recover the loss incurred by Shogate Trade Solutions Corporations in the amount of \$22,980.54.
- [76] The plaintiff referred to decisions from Ontario in support of his claim to recover the costs of mitigation expenses. His Counsel conceded that the law in British Columbia does not support this claim. In *MacWilliam v. Rudy's Petroleum Services Ltd.* (1990), 32 C.C.E.L. 310

(B.C.S.C.) Drossos, L.J.S.C. said that: expenses reasonably and properly incurred during the notice period by the plaintiff employee on carrying out his obligation to mitigate his damages arising from the breach of failure to give adequate notice (sic) or payment in lieu are properly recoverable against and to the extent of the benefit resulting from the mitigation to the employer, who would otherwise failing such mitigation, be called upon to pay the full amount in lieu of notice. The employer should not have the benefit of the amount mitigated free of such costs in mitigation at the expense of the employee. [emphasis added]

[77] The principle to be derived from MacWilliam is that if the plaintiff has in fact earned income during the notice period in mitigation of his damages, his costs incurred in earning that income should be deducted from the amount earned before credit for the mitigation is given to the employer. It is not authority for the proposition that the plaintiff may recover the costs of mitigation that exceed any amount actually earned in mitigation. Such amounts cannot be said to flow from the breach of the obligation to give reasonable notice or payment in lieu thereof.

[78] In this case the defendant has not satisfied me Mr. Beatty failed to take reasonable steps in mitigation and Mr. Beatty did not earn any net income during the notice period. There is no amount by which the damages should be reduced on account of mitigation in fact or failure to mitigate and, consequently, no amount from which the costs of mitigation can be deducted. The plaintiff is not entitled to any damages under this heading. SUMMARY

[79] Mr. Beatty is entitled to damages as follows:

- (1) 4 months salary at \$8,716.00 per month \$ 34,864.00
- (2) Loss of pension benefits 836.74
- (3) Loss of profit share 3,000.00
- (4) Computer 100.00
- (5) Loss of automobile benefits at \$271.15 per month 1,084.60
- (6) Professional dues 246.10

\$ 40,131.44

[80] The plaintiff is entitled to interest on the above sums in at the Registrar's pre-judgment interest rate. COSTS

[81] Counsel for the defendant sought an order denying the plaintiff his costs in the event he was not successful in recovering additional damages under the Wallace principle. Even though the plaintiff was not successful on that aspect of his claim and did not obtain as favourable a result as sought with respect to the length of notice and some of the claims based on fringe benefits, he was forced to bring this action to recover additional damages to which he was

entitled. I am not prepared to exercise my discretion under Rule 57(15) and apportion costs. The plaintiff is entitled to his costs of the proceeding at scale 3. "B.M. Joyce, J." The Honourable Mr. Justice B.M. Joyce

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