

CANADA / JUDGMENT

Wiltse v. Seastar Chemicals ULC

2020 BCSC 658

COURT

Supreme Court of British Columbia

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2020 BCSC 658 Wiltse v. Seastar Chemicals ULC

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Wiltse v. Seastar Chemicals ULC,

2020 BCSC 658

Date: 20200429

Docket: S190030

Registry: Victoria

Between:

William Wiltse

Plaintiff

And

Seastar Chemicals ULC

Defendant

Before: The Honourable Mr. Justice A. Saunders

Reasons for Judgment

Counsel for the Plaintiff:

C.A. Siver

Counsel for the Defendant:

C. Rea

Place and Date of Trial:

Victoria, B.C.

January 20, 2020

Written Submissions of the Plaintiff Received:

January 28, 2020

Written Submissions of the Defendant Received:

February 11, 2020

Place and Date of Judgment:

Victoria, B.C.

April 29, 2020

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Introduction

- [1] The Plaintiff, by way of summary trial, seeks damages for constructive wrongful dismissal from his position as a Production Manager with the Defendant ("Seastar"), a speciality chemical products manufacturer, in 2018, when he had been employed there for nearly 17 years. The constructive dismissal is alleged to arise out of Seastar changing the method of calculating the bonus component of his compensation. He claims damages based on a notice period of 20 months. Seastar denies any constructive dismissal occurred, saying that the changes it made to the compensation scheme were within its discretion, and that in any event the impact of the changes on Mr. Wiltse was not so great as to constitute fundamental breach of the employment contract. Seastar further says, in the alternative, that the appropriate notice period would be 15 months; and, that Mr. Wiltse failed to mitigate through continuing to work during the notional notice period.

Facts

Background

- [2] Mr. Wiltse holds a B.Sc. in chemistry. He joined Seastar on or around October 1, 2001 as a Quality Assurance Chemist. His initial salary was approximately \$35,000, plus an annual performance incentive described in the company's documents as "paid out based on a mix of both company and individual performance". In 2007 he was promoted to Production Chemist. His base salary increased to \$50,175; the documents in evidence do not disclose the exact amount of his performance incentive, but describe it as remaining unchanged. In 2011 he was again promoted, to the position of Production Supervisor. His base pay increased to \$65,246. The documents describe his performance incentive as remaining unchanged, and set at 8% of his salary.
- [3] In April 2016, Mr. Wiltse received his final promotion, to Production Manager. This was the position he held when he left the company in 2018. The evidence does not disclose details of his responsibilities. It appears from the documentary evidence that he directly reported to the Defendant's Director of Operations.
- [4] By the time of Mr. Wiltse's final promotion, Seastar had instituted what it referred to as the Performance Incentive Program (the "P.I.P."). The program was described in a July 20, 2015 memorandum distributed to employees, including Mr. Wiltse. The memorandum began by stating the purpose of the program:

Seastar Chemicals wants to retain and attract qualified and dedicated employees to meet the quality and service demands of our customers. To support the principle of paying for performance, Seastar Chemicals has introduced an annual Performance Incentive Program. The overall objective of the program is to provide all eligible employees with an opportunity to share in the company's success and to reinforce our desire to work toward measurable goals.

- [5] The memorandum then went on to explain that all permanent staff were eligible to participate, and would share 20% of the company's pre-tax profits, with each employee's portion being determined by their "salary band" and the total number of full-time equivalent employees. Participation also required that the employee be employed at the end of the fiscal year, March 31.
- [6] The memorandum also stated explicitly that Seastar "reserves the right to make changes to the Performance Incentive Program to account for changes in the business".
- [7] I find it then became a term of Mr. Wiltse's employment that his compensation would include a non-discretionary bonus based on a share of 20% of the corporate pre-tax profits of Seastar, subject only to Seastar having the right to make changes "to account for changes in the business".
- [8] Prior to his April 2016 promotion, Mr. Wiltse had been earning a base salary as Production and Maintenance Supervisor of \$83,963, plus a premium equivalent to an annual amount of \$12,594 in respect of a temporary assignment as Product Quality Supervisor. His share of the P.I.P. for the fiscal year ending March 18, 2016 was set at 1.185% of the profit pool of \$810,421, which amounted to \$9,604.89.
- [9] The terms of Mr. Wiltse's employment as Production Manager were set out in a letter from Seastar dated April 15, 2016. It provided for an annual base salary of \$87,412, plus a P.I.P. bonus which at then-current staffing levels, and his salary band, would have been 3.126% of the profit sharing pool. Mr. Wiltse, after a brief effort at negotiating a higher base salary, accepted the letter's terms.
- [10] Mr. Wiltse earned two P.I.P. bonus payments during his tenure as Production Manager. For the year ending March 31, 2017 he earned a 3.278% share of the profit pool of \$870,298.90, which amounted to \$28,528.40. This was nearly 33% of his base salary.
- [11] Seastar was then sold to a new owner, VWR International ("VWR"), and its fiscal year end was changed to December 31 to align with VWR's. For the truncated April 1 - December 31, 2017 fiscal year, Mr. Wiltse received 3.3643% of a profit pool of \$728,135.93, or \$24,496.37. There is no direct evidence of his base salary at that time period, but a March 28, 2018 "Compensation Letter" setting out his projected total compensation for the year indicated that his base salary was being increased to \$94,074.69 as of March 24, 2018, representing a 3.09% increase; on that basis, his prior year's base salary can be calculated at \$91,254.91 annually, or \$68,441.18 over the nine-month period ending December 31. On those figures, his P.I.P. bonus for that period was approximately 36% of his base salary.
- [12] In November 2017, Seastar's owner, VWR, was purchased by another company, Avantor Inc., based in Pennsylvania, USA ("Avantor"). In March, 2018 Mr. Wiltse received the aforementioned Compensation Letter, confirming that the P.I.P. program would continue for 2018, and projecting his share of the profit pool at 4.104%.

Avantor's Initiation of Changes to Compensation

[13] On June 4, 2018, Seastar's employees including Mr. Wiltse had individual meetings with Ms. Anna Obert, Human Resources Director and Chief Operating Officer - Organization of Avantor, and Ms. Shelley Carlson, Seastar's Human Resources Manager. Mr. Wiltse was given a letter advising of the following:

- a) that Mr. Wiltse's bonus for 2018 under the P.I.P. (which the letter referred to as the "SPS") would be capped at 22% of his base salary;
- b) that the P.I.P. would be discontinued as of January 1, 2019;
- c) that as of that date Mr. Wiltse would be eligible to participate in the VWR Management Incentive Program (the "MIP"), under which bonuses are calculated as a percentage of base salary, not corporate profit, "subject to the achievement of performance criteria established by VWR";
- d) that Mr. Wiltse's "target bonus" under the MIP would be 10% of his base salary; and
- e) that in consideration of Mr. Wiltse accepting these changes to his incentive compensation, "[i]n order to facilitate the transition from the SPS to the MIP", Mr. Wiltse's base salary would be increased effective June 16, 2018 to \$99,666.60.

The letter concluded with the request that Mr. Wiltse indicate his acceptance of these changes by signing and dating a provided copy and returning it by June 12, 2018.

[14] Ms. Obert was not an employee or officer of Seastar, but there is no issue as to her statements - in that letter and subsequently, as outlined below - binding the Defendant.

[15] On that same date, June 4, Ms. Obert circulated to Seastar's managers - including Mr. Wiltse - an email with a series of "talking points" explaining the changes in the incentive compensation policy, for use in discussion with the managers' team members. (Ms. Obert refers to that email as the "Manager Talking Points", and I adopt that nomenclature.) Amongst those points were the following:

- Incorporating Seastar into the global incentive program structure is another step towards becoming a global integrated organization.
- The implementation of these Avantor programs enables the entire organization to work towards common global goals.
- In several cases, we have adjusted base salaries where there are decreases in potential incentive earning. As a reminder, incentive payments are not guaranteed and not every associate is eligible to participate in an incentive program starting in 2019.

- [16] Ms. Obert's affidavit is silent on this point, but I infer that, as indicated in the latter bullet point, Mr. Wiltse was one of the employees who was being offered an increased base salary in recognition that the change to the MIP would have decreased his potential bonus. That email from Ms. Obert concluded with an invitation to reach out to her if anyone wished to discuss the changes with her.
- [17] On June 7, 2018, Ms. Carlson sent an email to several Seastar managers, including Mr. Wiltse, summarizing responses to a number of inquiries that had been made regarding the changes to compensation. She acknowledged that the cap on P.I.P. payouts had not been prorated to account for anyone (such as Mr. Wiltse) who had been promoted during the previous three fiscal year periods. Her email ended with the following two bullet points:
- Avantor expects all associates to sign the letter as presented. No edits to wording are permissible.
 - If an associate does not want to sign their letter, they are to contact Anna Obert as soon as possible.
- [18] Mr. Wiltse's superior, Mr. Ian Rose, responded the following day in an email Mr. Wiltse was also cc'd on, asking what the consequences would be if an employee did not sign the letter. "Anna", he wrote - presumably Ms. Obert - had "already communicated there is nothing she can do, this was approved by leadership and is a communication, not a negotiation". Ms. Carlson's reply email, also cc'd to Mr. Wiltse, stated:

Anna has replied back advised that there is nothing really to add to the responses we've provided thus far. Anna needs to be notified if an associate refuses to sign, and she will take it from there.

The Plaintiff's Reaction to the Compensation Changes

- [19] Mr. Wiltse did not accept these changes. He sent an email to Ms. Obert, cc'd to Ms. Carlson, on June 11, the day before the deadline for accepting the compensation changes, advising that he did not intend to sign and send the letter.
- [20] Mr. Wiltse then wrote to Ms. Obert on July 3, 2018, advising that he viewed the unilateral changes to his employment contract as constructive dismissal; that he considered himself entitled to 24 months' of salary and benefits; and that in recognition of his obligation to mitigate his loss, he would continue working until he was able to secure a comparable position with similar remuneration. He concluded by saying that if Seastar wished to discuss other arrangements, he was open to considering them.

[21] Ms. Obert replied in an email on July 13, 2018. She took issue with Mr. Wiltse's claim of constructive dismissal, asserting that the changes were not abusive nor so onerous that resignation was the only reasonable response. She further denied that Mr. Wiltse had an employment contract and asserted he was only an employee at will. (In her affidavit filed in opposition to the present summary trial application, Ms. Obert concedes the latter assertion was incorrect.) The email concluded:

Please let us know whether you remain fully committed to the success of Avantor (including Seastar) or whether we should consider your July 3rd letter as a resignation.

[22] Mr. Wiltse replied to Ms. Obert immediately by way of email, indicating that he was about to leave on his annual vacation in a couple of hours, and had not yet had the opportunity to consider the implications of her email. He affirmed that he had always been and remained a dedicated employee, committed to the success of the business, and said he would be in touch after he returned from vacation.

[23] Mr. Wiltse followed up with a letter dated August 13, 2018. He said - not unreasonably, I find - that he found Ms. Obert's July 13th email patronizing. He noted that her email had arrived only two hours before he was to leave for a three-week vacation, and asserted that he found the timing and the content of email insulting and humiliating. He complained of having lost sleep and been under stress due to Avantor's violation of his rights as an employee. He said that Avantor had broken trust so completely that he could not continue in his role as Production Manager, and he therefore resigned immediately.

Analysis

The Employer's Right to Make Changes

[24] I find that the changes imposed on Mr. Wiltse's employment contract were threefold:

- (1) Capping of his P.I.P. bonus payment for the 2018 fiscal year at 22% of his salary;
- (2) termination of profit sharing; and
- (3) substitution of the P.I.P. as of January 1, 2019 with a plan - the MIP - that made his bonus contingent on meeting newly imposed performance criteria, with his bonus limited to a fixed percentage of his base salary.

[25] Seastar submits that it had a right to make these changes to Mr. Wiltse's employment contract unilaterally under the terms of the P.I.P., which permitted changes "to account for changes in the business". I reject this defence, for two reasons.

[26] First, Seastar had only reserved to itself the right to make changes to the P.I.P., not changes to the compensation scheme generally. I find it was an essential feature of the P.I.P., as reflected in the July 2015 memorandum, that participants in the plan would be able to share in the company's success through profit sharing. Manifestly, the MIP, which did not allow for profit sharing, did not share that objective. The defendant provides no evidence to the

contrary. The changes imposed by Avantor on Seastar's employees did not simply "change" the Performance Incentive Program; they terminated it.

- [27] Second, I do not find that the change from the P.I.P. to the MIP was made to account for "changes in the business" as that phrase would have been mutually understood by the parties.
- [28] The principles for interpreting terms of an employment contract were neatly summarized by Madam Justice Nielson in *Miller v. Convergys CNG Canada Limited Partnership*, 2014 BCCA 311:
- [15] The court should strive to give effect to what the parties reasonably intended to agree to when the contract was made. The starting point is the language of the contract, which should be given its plain and literal meaning, and be interpreted in the context of the entire agreement. Consideration may also be given to the factual matrix surrounding the creation of the contract. If the contractual language reveals two possible interpretations, the court should seek to resolve this ambiguity by searching for an interpretation that reflects the true intent and reasonable expectations of the parties when they entered the contract, and achieves a result consistent with commercial efficacy and good sense. Considerations of reasonableness and fairness inform this exercise. If these principles do not resolve the ambiguity, extrinsic evidence may be admissible to assist in ascertaining the parties' intent. As a last resort the principle of *contra proferentem* may be invoked to favour construction of the ambiguity against the party that drew the agreement. This principle may not be used, however, to create or magnify an ambiguity. As to employment contracts in particular, these will be interpreted in a manner that favours employment law principles, specifically the protection of vulnerable employees in their dealings with their employers. Nevertheless, the construction of an employment contract remains an exercise in contractual interpretation, and the intentions of the parties will generally prevail, even if this detracts from employment law goals that are otherwise presumed to apply: Geoff R. Hall, *Canadian Contractual Interpretation Law*, 2d ed (Markham, Ont.: LexisNexis, 2012) at 9-52, 66-70, 187-88.
- [29] The only evidence Seastar offers of the rationales for the changes to Mr. Wiltse's contract, as summarized above, is Ms. Obert's affidavit evidence that the Management Talking Points "accurately set out, at a high level, the changes to Seastar's incentive compensation". Taken at its strongest, this is evidence that the elimination of profit sharing, and enrolling Seastar employees in the MIP, were intended as a step towards Avantor becoming a global integrated organization, and that implementation of these changes would enable the organization's subsidiaries to work towards "common global goals". What those common goals were, and how they related to the business of Seastar, was not disclosed and has not been proven. I note that neither of these points appears to justify the capping of Mr. Wiltse's bonus for the final year of the P.I.P.'s operation, and in particular they do not justify his bonus cap being set through factoring-in both Mr. Wiltse's pre- and post-promotion income level, as opposed to his current, post-promotion income level only.

- [30] I find that the phrase "changes in the business", in the context of an employment contract between Seastar and its employees, would likely have been mutually understood to mean changes in the business of Seastar, not changes in the corporate goals of any future new ownership. The phrase would naturally have been understood by the employer and the employees to include matters such as changes to Seastar's production or sales costs, to the labour market as it impacted on its employees, to demand for Seastar's products, or material changes in technology leading to the need for increased capital investment. Any of those changes could have necessitated adjustments in the formula or preconditions for profit sharing. The words, however, are not so broad as to signal an intent to encompass potential changes in the goals or policies of Seastar's corporate ownership, such as aligning the practices of its subsidiaries, particularly where not shown to have any connection to the business of Seastar. Seastar provides no evidence to the contrary concerning the factual matrix in which the parties' expectations were formed. There is no evidence that Seastar or its employees, in particular Mr. Wiltse, were ever contemplating future integration into a global organization. Nor is there evidence that profit sharing was so anomalous in the chemical products industry that this term of the contract would have been understood in terms of there being a risk that profit sharing might have to be eliminated in order, for example, for Seastar to remain competitive or profitable.
- [31] For these reasons, I find that the aforesaid changes to the terms of Mr. Wiltse's employment were not within the right to make changes to the P.I.P. that Seastar had reserved to itself, and were a breach of the employment contract.

Was There Constructive Dismissal?

- [32] Seastar next submits that the consequences of the breach were not so severe that the breach should be seen as fundamental, bringing the contract to an end as an act of repudiation. I note that in *Potter v. New Brunswick (Legal Aid Services Commission)*, 2015 SCC 10, the Supreme Court expressed a preference for using the term "substantial breach" in describing conduct essential to a finding of repudiation, as "fundamental breach" has taken on a specific meaning related to the function of exclusion clauses. I therefore use the former term.
- [33] Seastar relies on *Poole v. Tomenson Saunders Whitehead Ltd.* (1987), 43 D.L.R. (4th) 56 [Poole], including, in particular, the following passages from the decision, as delivered by Wallace J.A.:
- [23] The common theme, emphasized by every court, when determining whether a breach of contract justifies the innocent party terminating the contract rather than confining his remedy to the damages caused by the breach, is that the breach must be tantamount to the frustration of the contract either as a result of the unequivocal refusal of one party to perform his contractual obligation or as a result of conduct which has destroyed the commercial purpose of the contract, thereby entitling the innocent party to be relieved from future performance.

- [24] The non-payment of a relatively minor portion of the consideration to be paid for services which are to be performed over a prolonged time period would not by itself usually meet such criteria and hence would not qualify as a fundamental breach. Damages could be expected to afford a complete remedy: see *Mersey Steel & Iron Co. v. Naylor, Benzon & Co.*, [(1884), 9 App. Cas. 434 (H.L.)] (default in payment of an instalment payment). Accordingly, one must ascertain if there are special circumstances in the present case which warrant this particular breach of contract being characterized as a fundamental breach amounting to a repudiation of the contract.
- [38] As previously stated, I do not agree with the trial judge's conclusion that the non-payment of a portion of one's annual bonus, by itself, is equivalent to the refusal to pay the monthly salary agreed to by the terms of the contract of employment. Moreover, I am of the opinion that even in the case of non-payment of an agreed salary there must be evidence of other circumstances, such as dismissal, etc., from which one can infer that such non-payment can properly be construed as an absolute refusal of the employer to perform the contract or otherwise evinces an intention of the employer not to be bound by the contract of employment. Then, and only then, may the employee accept such conduct as a repudiation of the contract and elect to be no longer bound by it.
- [34] The authorities are clear that short of such conduct, amounting to repudiation by the employer of the employment contract, the employee's remedy is limited to suing for damages while continuing to work: see Poole at para. 43; *Zaraweh v. Hermon, Bunbury & Oke*, 2001 BCCA 524.
- [35] Seastar further relies on the following summary of the post-Poole case law, from the decision of Madam Justice Dorgan in *Pavlis v. HSBC Bank Canada*, 2009 BCSC 498 [Pavlis] regarding the range within which a unilateral reduction of salary will be found to constitute a "fundamental breach":
- [52] The authorities on point suggest that an employer's failure to pay a portion of an employee's salary may amount to a fundamental breach where the unpaid amount makes up a significant or substantial part of the employee's total remuneration. Relative dollar amounts matter.
- [53] Comparing the case law establishes that the failure to pay an employee up to approximately 9-10% of his or her average salary without more does not amount to a fundamental breach: Poole, supra, and *McSeveney v. Phone Directories Company, Inc.*, 2005 BCSC 1510. A failure to pay between 14-17% can amount to a fundamental breach, but only in conjunction with some other significant unilateral change to the employment contract: *Doran v. Ontario Power Generation Inc.* (2007), 61 C.C.E.L. (3d) 232 (Ont. S.C.). A reduction in remuneration amounting to anywhere between 20-46% (and presumably anything greater) by itself has been held to amount to a fundamental breach: *Boyd v. Whistler Mountain Ski Corp.*, [1990] B.C.J. No. 821; *Streight v. Dean*, 2002 BCSC 399; *Wood v. Owen De Bathe Ltd. (c.o.b. Canadian Tire)*, [1998] B.C.J. No. 288 (S.C.) (QL), aff'd 1999 BCCA 29; *Farquhar v. Butler Brothers*

Supplies Ltd. (1988), 23 B.C.L.R. (2d) 89 (C.A.); and *Ilkay v. Acadia Motors Ltd.*, 2006 NBCA 103.

- [36] To gauge the relevance of these authorities, it is necessary to quantify the impact on Mr. Wiltse's income of the unilateral changes made by Seastar. This in turn requires a determination of what Mr. Wiltse's base income would have been but for the changes, and would now be after taking the changes into account, going forward; and what his P.I.P. bonuses would have been, had the changes not been made.
- [37] On this issue, Mr. Wiltse presents a number of scenarios for calculating his loss for the balance of 2018 - when the P.I.P. was to remain in effect, but with a capped bonus - and for subsequent years. His with- and without-changes scenarios for 2018 and subsequent years presume no annual increase in his base salary, which I note was not the pattern of past years; Seastar, however, presents no evidence of base salary increases for employees in positions equivalent to Mr. Wiltse's. Mr. Wiltse's scenarios also assume the profit pool on which P.I.P. bonuses would have been based, for the year ending December 2018 and subsequently, would range from \$600,000 to \$1.2 million. With that range of profitability, \$600,000 to \$1.2 million, and with his base salary remaining fixed, Mr. Wiltse projects the percentage declines in his income arising from imposition of the compensation scheme changes to range from 0.4% to 18% for 2018, and from 8% to 24% in subsequent years.
- [38] Mr. Wiltse points to a summary provided to him, when he was still in Seastar's employ, of the company's financial results for the five months ending May 31, 2018, which indicated the profit pool for those first five months was more than \$320,000; annualized, the figure would be approximately \$775,000, but that, he says, would not take into account the fact that the months of June and July were historically very strong months. He also says that Seastar's Controller had forecast the 2018 profit pool to be likely more than \$1 million by year end. Again, Seastar presents no evidence to the contrary.
- [39] A finding that losses in income Mr. Wiltse would have sustained under the imposed changes would be toward the upper end of the ranges he gives is supported by the evidence Mr. Wiltse provides, and there is no evidence from Seastar to the contrary. Further, the failure of Seastar to adduce evidence of its employee salaries following Mr. Wiltse's resignation, and of the company's actual profitability, raises an adverse inference that Mr. Wiltse's assumptions as to his base salary and as to corporate profit are correct.
- [40] I find there to have been a substantial breach of Mr. Wiltse's employment contract. There are three aspects to the evidence that each, independently, support this conclusion.
- [41] First, the extent of the projected loss from January 2019 onwards alone brings the loss of salary within a range conventionally regarded as sufficient to constitute a substantial breach.

- [42] Second, even if the dollar value of the losses for 2018 and beyond, is regarded as on the margin of being "substantial", those monetary losses were accompanied by the loss of profit sharing as the form of bonus, and the loss of the bonuses being non-discretionary; these latter factors themselves were, to use the words of Dorgan J. in Pavlis, "significant unilateral changes to the employment contract", such that the changes to the compensation scheme, viewed holistically, were an act of repudiation.
- [43] Both of those grounds go to the issue of whether the changes to compensation alone constituted a substantial breach such that the contract was repudiated. The third, separate basis for this finding is that the employer's communications clearly signalled the employer's intent not to be bound by the terms of the contract. The June 4th letter from Ms. Obert asked for Mr. Wiltse to sign the copy of the letter to indicate his acceptance. Ms. Carlson's follow-up email of June 7th stated that all associates were expected to sign the letter as presented. Mr. Rose's email of June 8th imputed to Ms. Obert the statement that the letter was a communication, not a negotiation; Ms. Obert did not contest that imputation. In his email to Ms. Obert of July 3rd, Mr. Wiltse took the position that the changes constituted constructive dismissal. He also indicated his willingness to consider other arrangements, however, and his email therefore cannot be taken as a clear election of his remedies, nor as a resignation.
- [44] Ms. Obert's reply of July 3rd - which denied even the existence of a contract - presented Mr. Wiltse only with the options of confirming he remained fully committed to the success of Avantor, or resigning. It is the case that Ms. Obert said in her letter that the compensation changes were not so onerous that resignation was the only alternative; but given that she was denying the existence of a contract, and not responding to Mr. Wiltse's offer to continue working, or consider alternatives, I cannot find any meaning in that statement. Although the options were couched in the lingo of human resources, the implication of Ms. Obert's letter in the context of the earlier communications was clear: Mr. Wiltse was being given no alternative but to fully acquiesce in the new employment contract being offered, on the employer's terms. I find the employer's stance therefore gave Mr. Wiltse no opportunity to exercise his right to continue working and sue for damages. The effect of these communications, I find, was repudiation, regardless of whether the changes themselves constituted a substantial breach.
- [45] Both through the changes to the compensation scheme and through the employer's communications, Mr. Wiltse was constructively dismissed. The fact that he ultimately reacted to the constructive dismissal with a letter tendering his resignation is immaterial to the defendant's liability. The legal effect of the "resignation" was simply an election on Mr. Wiltse's part to treat the employer's repudiation as bringing the contract to an end. Mr. Wiltse is entitled to damages based on the lack of reasonable notice.

Damages

The Duty to Mitigate

- [46] Seastar submits that Mr. Wiltse's damages, however calculated, should be reduced to reflect a failure on his part to mitigate his loss. No issue is taken with respect to Mr. Wiltse's diligence in attempting to find new employment; but Seastar says Mr. Wiltse could have and should have kept working with them, at least until the end of the notice period, until he found new employment.
- [47] Employees who are wrongfully dismissed are under a duty to take reasonable steps to mitigate their loss. The burden of proving a failure to mitigate lies with the employer, and that burden "is by no means a light one": *Cheshire and Fifoot's The Law of Contract* (8th ed. 1972), quoted with approval by Laskin C.J.C. in *Red Deer College v. Michaels*, [1976] 2 SCR 324 at 332. In *Evans v. Teamsters Local Union No. 31*, 2008 SCC 20, the majority held, at para. 29, that the duty to mitigate of an employee who is constructively dismissed will require the employee to take temporary work with the employer, until new employment is found, "in the absence of conditions rendering the return to work unreasonable, on an objective basis". The majority went on to elaborate, at para. 30:

Where the employer offers the employee a chance to mitigate damages by returning to work for him or her, the central issue is whether a reasonable person would accept such an opportunity. In 1989, the Ontario Court of Appeal held that a reasonable person should be expected to do so "[w]here the salary offered is the same, where the working conditions are not substantially different or the work demeaning, and where the personal relationships involved are not acrimonious" (*Mifsud v. MacMillan Bathurst Inc.* (1989), 70 O.R. (2d) 701, at p. 710). In *Cox [v. Robertson]* (1999), 69 B.C.L.R. (3d) 65] the British Columbia Court of Appeal held that other relevant factors include the history and nature of the employment, whether or not the employee has commenced litigation, and whether the offer of re-employment was made while the employee was still working for the employer or only after he or she had already left (paras. 12-18). In my view, the foregoing elements all underline the importance of a multi-factored and contextual analysis. The critical element is that an employee "not [be] obliged to mitigate by working in an atmosphere of hostility, embarrassment or humiliation" (*Farquhar*, at p. 94), and it is that factor which must be at the forefront of the inquiry into what is reasonable. Thus, although an objective standard must be used to evaluate whether a reasonable person in the employee's position would have accepted the employer's offer (*Reibl v. Hughes*, [1980] 2 S.C.R. 880), it is extremely important that the non-tangible elements of the situation -- including work atmosphere, stigma and loss of dignity, as well as nature and conditions of employment, the tangible elements -- be included in the evaluation.

- [48] Mr. Wiltse's affidavit evidence document his efforts to find employment up to the end of September 2019, just over a year after he was constructively dismissed. As I have said, the defendant takes no issue with his inability to secure work with another employer.

- [49] Seastar, however, says Mr. Wiltse failed to mitigate through continuing in his employment until he found another position. I agree with Seastar that the reasons Mr. Wiltse provided in his August 13 letter for "resigning" were not such as to justify him not mitigating his loss through continuing to work at Seastar, had work been available. However Mr. Wiltse may have subjectively reacted to Ms. Obert's communications, the reality is that Ms. Obert was not a co-worker, but an employee of the new corporate owner, and located in the United States. There is no evidence that Mr. Wiltse would have had to continue to have dealings with her once the issue of the compensation changes had been addressed. There is no basis for concluding that the compensation changes would have affected the work atmosphere in respect of Mr. Wiltse's dealings with superiors or subordinates, for example through his authority being undermined. There was no particular stigma attached to the circumstances of the compensation changes; the changes affected all Seastar managers, not Mr. Wiltse alone. There was no acrimony or abusiveness on the employer's part. Loss of sleep and feeling of stress can naturally accompany any unforeseen change in employment, and Mr. Wiltse's complaints of same have not been shown to be a consequence of the unilateral change to his employment contract being made without notice.
- [50] But regardless, in order to prove a failure to mitigate Seastar must also show that Mr. Wiltse had the opportunity to continue his employment, without him having to accept the compensation changes. There is no evidence Seastar afforded him this opportunity. As I described above, the communications from the employer clearly implied the contrary. Mr. Wiltse had offered to continue working to mitigate his loss, in his email of July 3, 2018, but no one from Seastar or Avantor positively responded to this overture. In the circumstances, seen objectively, Mr. Wiltse would have been justified in concluding that continuing employment, other than on the condition that he accept the new compensation scheme, was not available. Whether or not Mr. Wiltse actually went through that thought process is immaterial; the onus is on the defendant to prove the failure to mitigate, and that onus has not been met.
- [51] Aside from the salary Mr. Wiltse continued to earn up to the point when he elected to treat the employment contract as at an end, as discussed below, there will be no deduction from Mr. Wiltse's damages by reason of any failure to mitigate.

Notice Period

- [52] Damages for constructive and wrongful dismissal are assessed on the basis of the value of the wages and benefits the employee would have earned by working through a period of due notice, had notice been given. The chief factors in determining the appropriate reasonable notice period are the employee's degree of responsibility; age; length of service; and the availability of alternative employment, all subject to a cap of 18 to 24 months: *Ansari v. British Columbia Hydro & Power Authority* (1986), 2 B.C.L.R. (2d) 33 (B.C.S.C.); *aff'd*, [1986] B.C.J. No. 3006 (B.C.C.A.) [*Ansari*]. Recent precedents involving similarly situated employees that reflect current economic realities are the most useful guide to determining what is

reasonable: Saalfeld v. Absolute Software Corporation, 2009 BCCA 18.

- [53] Mr. Wiltse contends that his damages should be assessed on the basis of 20 month's pay, benefits, and pro-rated P.I.P. payments. He relies on Zaitsoff v. Zellstoff Celgar Ltd. Partnership, 2009 BCSC 346, [Zaitsoff]; Jamieson v. Finning International Inc., 2009 BCSC 861 [Jamieson]; Price v. 481530 B.C. Ltd., 2016 BCSC 1940 [Price]; and Bishop v. Rexel Canada Electrical Inc., 2016 BCSC 2351 [Bishop].
- [54] Zaitsoff involved a 46-year-old pulp mill process engineer whose full time position was as production manager, with four directly reporting staff, and 215 indirectly reporting. He also acted occasionally as interim general manager for the whole mill. He was employed by the defendant for 19 years. He had not found employment at the time of trial, 15 months following his dismissal. Considering his age and years of service, his management responsibilities and specialized work, and the then-current downturn in the pulp and paper industry, Madam Justice Fenlon set his notice period at 20 months.
- [55] The plaintiff in Jamieson was Finning's manager of millyard systems equipment sales, with territorial responsibility for Western Canada. He was 53 years old, and had been employed with Finning for nearly 21 years. His reasonable notice period was determined to be 18 months.
- [56] In Price, the plaintiff was a 47-year-old, employed for nearly 20 years as a senior manager with a company that owned a hair loss clinic. He was awarded damages based on a 20-month notice period.
- [57] Bishop concerned a buyer in the defendant's purchasing department, which the trial judge described as a clerical position. He had worked there for 27 years. He was 61 years old. The reasonable notice period was assessed at 20 months.
- [58] Seastar submits that reasonable notice would have been 15 months, and that Mr. Wiltse should be entitled to damages equivalent to the value of pay and benefits over that time period. Seastar relies on Smith v. Pacific Coast Terminals Co. Ltd., 2016 BCSC 1876 [Smith]; Kerfoot v. Weyerhaeuser Company Limited, 2012 BCSC 640, appeal allowed in part, 2013 BCCA 330 [Kerfoot]; McLeod v. Lifelabs BC LP, 2015 BCSC 1857 [McLeod]; and Hooge v. Gillwood Remanufacturing Inc., 2014 BCSC 11 [Hooge].
- [59] In Smith the parties agreed on a 19-month notice period; the plaintiff in that case was a 48-year-old professional engineer with more than 16 years on the job, responsible for two departments and directly reporting to the defendant's most senior manager at his place of employment. He was described by the trial judge as an exemplary employee. The reasons do not disclose the availability of alternative employment.
- [60] There were two plaintiffs in Kerfoot. One was a 43-year-old operations superintendent with 15 years 9 months employment, the other a 45-year-old electrical project engineer, with somewhat greater seniority, at 18 years 5 months. The trial judge applied a formula of one month of notice for every year of employment, but the Court of Appeal rejected that

approach, emphasizing the need to look to the contextual Ansari factors. The trial judge's reasons had not described the plaintiffs' job responsibilities but the Court of Appeal considered the superintendent's job title to imply a somewhat greater degree of responsibility, with the engineer having a narrower focus. The former's greater degree of responsibility was considered to balance the latter's seniority. Both had been able to find new, similar employment relatively quickly, although the Court of Appeal said that, in the circumstances, this would be better treated as a matter of mitigation, than a factor influencing the notice period. The Court substituted for the notice periods set by the trial judge, periods of 15 months for both plaintiffs.

- [61] In McLeod, the plaintiff was a 50-year-old senior manager, who had been continuously employed by the defendant or its predecessors for 25½ years. She was terminated with only six weeks' notice. Based on her age, her years of service, and her position, the trial judge found a reasonable notice period to be 18 months.
- [62] In Hooze, the plaintiff was a production supervisor at a lumber mill. He was 57 years of age when he was dismissed without notice. He had worked for the defendant, or its predecessors, for 36 years. He had not found new employment by the time of trial, approximately 20 months after his dismissal. His reasonable notice period was determined to be 18 months.
- [63] In Bishop the plaintiff was only in a clerical position, and much older than Mr. Wiltse; those significant facts are at such variance that comparing the cases is not useful. The plaintiffs in Jamieson, Price, Smith, and McLeod were somewhat older than Mr. Wiltse, and with somewhat longer tenures. The Zaitsoff decision has close parallels, but the job responsibilities of the plaintiff in that case appear more significant than Mr. Wiltse's were. The position of the two plaintiffs in Kerfoot seems most analogous. However, even though the Court of Appeal in Kerfoot did not give weight to the plaintiffs having found employment, I do regard Mr. Wiltse's difficulties in finding comparable employment as a factor, though slight. I determine his reasonable notice period to be 16 months.

Base Salary

- [64] The base salary component of Mr. Wiltse's damages will be assessed on the basis of 16 months' notice.
- [65] The notice period will run from the date on which Mr. Wiltse was notified of the changes in his compensation, June 4, 2018. Although Mr. Wiltse did not formally take the position that the changes constituted constructive dismissal until July 3, and did not "resign", electing to treat the employer's breach as termination of the employment contract, until August 17, his claim was actionable as of June 4; see *Campbell v. MacMillan Bloedel Limited*, [1978] 2 W.W.R. 686 (B.C.S.C.) at p. 693. Although the detrimental changes in Mr. Wiltse's compensation that he was given notice of on June 4 did not have immediate effect, and would not have been effective until year-end when the capped P.I.P. bonus would have been due, the delay in the negative impact of the compensation changes does not delay

commencement of the notice period, because the employer's announcement of the compensation changes created the circumstances of an anticipatory breach: *Farquhar v. Butler Brothers Supplies Ltd.*, [1988] 3 W.W.R. 347 (B.C.C.A.).

- [66] There is in evidence a copy of Mr. Wiltse's pay stub for the period ending June 29, 2018. I derive from this evidence that the 16-month notice period from June 4, 2018 to October 4, 2019, 484 days, encompassed 34.57 two-week pay periods. On his former salary of \$94,074.69, his regular and vacation pay for each pay period would have been \$3,618.23. His gross loss of salary during the 16 months therefore amounted to \$125,082.21.
- [67] Against this amount, the employer is to be credited with the salary paid to Mr. Wiltse up until August 17, 2018. I calculate that on the basis of 12 days of pay at his former salary, i.e. 12/14ths of \$3,618.23; plus 4½ two-week pay periods, at his increased salary amount of \$3,833.34; for a total of \$20,351.37. His net loss of salary arising out of the constructive dismissal is therefore \$104,730.84.

Loss of Benefits

- [68] The parties are in agreement that Mr. Wiltse's damages include the loss of both salary and benefits during the portion of the notice period after his employment ceased. The only evidence before me as to the possible value of Mr. Wiltse's benefits were the entries on his June 29 pay stub for "Employer Paid Benefits". I had no submissions from the parties as to whether these entries reflect the actual value of the benefits. If the parties are unable to agree, there will be a reference to the Registrar to determine the value of Mr. Wiltse's employment benefits that would have accrued during the period of August 18, 2018 to October 4, 2019, inclusive.

Bonus Payments

- [69] The July 20, 2015 memorandum that described the P.I.P. stated explicitly that in order to remain eligible for the P.I.P. payout, employees must be employed with Seastar at the end of the fiscal year (which was then March 31).
- [70] Seastar, I find, cannot use this provision to deprive Mr. Wiltse of the benefit of the P.I.P. for the 2018 fiscal year. The provision cannot reasonably be interpreted as relieving Seastar of the obligation to pay P.I.P. bonuses otherwise due during the notice period when an employee has been wrongfully or constructively dismissed.
- [71] On the other hand, I find that provision does disentitle Mr. Wiltse to any P.I.P. payout for the 2019 fiscal year, as his notice period ended prior to the fiscal year end. In particular, the use of the verb "remain", and the mandatory wording "must be employed", clearly connote a situation in which the employee is actually still in Seastar's employ as of year end. The contracts in the cases relied on by Mr. Wiltse in claiming a pro rata entitlement to bonus monies for 2019 - principally *Ostrow v. Abacus Management Corp. Mergers & Acquisitions*, 2014 BCSC 938, and *Gillies v. Goldman Sachs Canada Inc.*, 2001 BCCA 683 - contained no such

language. The terms of the contract must prevail in determining entitlement. The wording of the memorandum is not reasonably compatible with any notion of a pro rata payout to an employee who may have been only employed for part of a year, whether they leave on their own accord, or following the end of a period of working notice. Mr. Wiltse's damages are constrained by the wages and benefits that would have accrued to him had he been given due notice. No P.I.P. bonus is recoverable for 2019, given his notice period would have ended in October of that year.

[72] I have reviewed above the evidence of Seastar's projected profitability. I assess Mr. Wiltse's loss of P.I.P. bonus payment for 2018 on the basis that the net profit pool would have been \$1 million. Applying the 4.104% share of the profit pool projected for Mr. Wiltse in his March 2018 compensation letter, his loss under this heading is \$41,040.

Conclusion

[73] Mr. Wiltse will have judgment against Seastar in the following amounts:

(1)

Net Loss of Salary:

\$104,730.84

(2)

Loss of Benefits:

To be determined

(3)

Loss of Bonus:

\$41,040.00

[74] If there are factors I am unaware of concerning costs, the parties may contact Supreme Court Scheduling to arrange a hearing; otherwise, Mr. Wiltse will have his costs of the action, at Scale B.

"A. Saunders J."

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