** Unedited **

Indexed as:

Kennedy v. Gescan Ltd.

Between
Reginald Kennedy, Plaintiff, and
Gescan Ltd., Defendant

[1991] B.C.J. No. 3612
DRS 93-08288
Vancouver Registry No. C914451

Also reported at:
41 C.C.E.L. 134

British Columbia Supreme Court
Vancouver, British Columbia
Wong J.

Heard: October 15 and 18, 1991
Judgment: December 6, 1991
(12 pp.)

Master and servant — Wrongful dismissal — 42-year-old plaintiff induced to leave position with competing firm after 18 years — Plaintiff dismissed after 4 years — Quantum of damages — Length of notice period.

The plaintiff brought a motion for summary judgment in a wrongful dismissal claim where liability was admitted.

HELD: Judgment for the plaintiff. The court concluded that the plaintiff was entitled to a notice period of 14 months, that his salary level at termination was $56,000.00 per annum, and that he was entitled to an additional bonus of 8 per cent of his last annual salary. The most important factors when assessing length of notice were age, length of service, the responsibility of the employment function and the availability of equivalent alternative employment. The plaintiff was 41 years old at the time of dismissal, with almost 4 years of service with the defendant. His last position in the firm was characterized as one of senior management. He had been unsuccessful in obtaining equivalent employment since leaving the defendant. After 4 years of service with the defendant, in the absence of unconscionable prejudicial behaviour by the employer, of which there was none, inducement to leave his previous job was no longer a factor for consideration. The plaintiff had the onus of establishing that there was in place a later salary agreement than the one shown, and all its essential terms. The law could not create terms of an agreement which did not previously exist between the parties. The court was able to conclude that the annual bonus was an integral part of the plaintiff's remuneration.

STATUTES, REGULATIONS AND RULES CITED:

British Columbia Supreme Court Rules, Rule 18A.

Counsel for the Plaintiff: F.G. Potts.
Counsel for the Defendant: K.R. Doyle.

WONG J.:—

INTRODUCTION

This is a Rule 18A summary trial claim for damages for wrongful dismissal. Liability is not in dispute. The main issues for determination are the length of appropriate notice in this case and whether there was an agreed level of compensation, salary and bonus, which the Plaintiff was entitled to for his last employment position before termination.

The Plaintiff submitted that because he was induced by the Defendant to leave a previous long term secure employment to work for the Defendant, he is entitled to more than usual notice. The Defendant disagreed. The Plaintiff said he is entitled to a range of 18 - 20 months notice; the Defendant's response is that 10 - 12 months notice, based on objective factors, is adequate.

The dispute with respect to the level of pay arises because the Plaintiff said that 6 months before his termination, the Defendant promised a salary increase, from $56,000. to $65,000., would be paid together with a bonus scheme; in consideration of that offer, the Plaintiff performed expanded responsibilities of another position.

There are additional issues with respect to eligibility for pension benefits, the amount of loss for fringe benefits such as car allowance, vacation pay, and medical, disability, and life insurance benefits.

After counsel concluded their submissions on this case, the British Columbia Court of Appeal on November 7, 1991, in Scott v. The Board of School Trustees of School District No. 29 (Lillooet), [1991] B.C.J. No. 3295, CA011810, in a five member panel decision overruled its earlier decision in Stauder v. B.C. Hydro end Peer Authority (1987), 25 B.C.L.R. (2d) 40 and refused, in the absence of proof of actual loss of employee time, to award damages for vacation pay on top of an award for salary for the period of notice. The Scott decision is binding upon me and I need not consider the Plaintiff's claim for vacation pay.

I have concluded that the Plaintiff is entitled to a notice period of 14 months; that his salary level at termination was $56,000 per annum; and that he is entitled to an additional bonus of 8% of his last annual salary. Counsel can work out the necessary calculation.

BACKGROUND

The Plaintiff is 42 years of age. He has a high school diploma and thereafter received additional training from courses in marketing, sales, inventory control and accounting. Prior to working for the Defendant, the Plaintiff spent 18 years with General Electric Canada, a manufacturer of electrical products, as a technical sales representative selling a wide range of electrical products to electrical wholesale distributors, including the Defendant, and made sales calls on customers. He had technical knowledge about his product line but no management responsibilities. His employment tenure with General Electric was secure and General Electric continues to market lighting products to wholesale distributors in Canada.

Until 1983, the Defendant Gescan was a division of Canadian General Electric. Mr. Keith McGuire, later general manager of Gescan, was a colleague and friend of the Plaintiff. Gescan was sold in 1983 to private interests and Mr. McGuire left to work for Gescan. The Plaintiff stayed with General Electric.

In 1987, Mr. McGuire and Mr. Edward Comerford, then president of Gescan, approached the Plaintiff to work for Gescan as manager of a new lighting division to be created in the Gescan organization. The Plaintiff and his wife were reluctant to leave the security of General Electric and after much coaxing with respect

to security, promise of more salary with a bonus scheme, and wider future career opportunities with Gescan, the Plaintiff started employment with Gescan on June 1, 1987, as manager of their lighting sales division. This position entailed training and management of sales staff, providing service information to customers, and planning and achieving target sales goals. The Plaintiff thereafter received steady salary increments to $56,000. per annum and annual discretionary bonuses in addition of 8% in 1987, 12% in 1988, 19% in 1989 and 7.9% in 1990. Messrs. Comerford and McGuire were pleased with the Plaintiff's job performance.

In 1989 Gescan was purchased by a French company, Sonepar. Gescan decided to adopt Sonepar's distribution system with a restructuring of its organization. In 1990 Gescan encountered significant financial losses. There were considerable staff layoffs and terminations and Gescan's operations had to be restructured.

Gescan Ltd. is a wholesale and retail distributor of electrical parts and equipment. It deals primarily with the commercial wholesale market but also retails electrical products, including lighting fixtures and accessories, from its Norburn Lighting Centre in Burnaby. Gescan operates in the four western provinces. Its operations are divided into two regions, the British Columbia and Prairie regions. Each region has a general manager reporting to the president. Under each general manager are a number of divisions which provide a variety of support functions. Marketing and financial personnel do not, however, report to the general managers.

In the British Columbia region, there are a number of branch managers as well as Vancouver managers of industry sales, contractor sales and inside sales. Below the branch managers and the Vancouver managers are the sales and other support personnel.

As part of the 1990 reorganization, Messrs. Comerford and McGuire in November 1990 asked the Plaintiff to head up its new construction sales division. That position reported directly to Mr. McGuire, the general manager, Pacific region. In assuming the position of manager, construction sales, the Plaintiff had 5 of the 9 British Columbia branch managers reporting to him and was responsible for approximately 55 employees.

Before the Plaintiff assumed the position of manager, constructions sales, I think that Messrs. Comerford and McGuire told the Plaintiff he would likely receive a substantial wage increase for his expanded responsibilities. A possible figure of $65,000. plus bonus was discussed and likely indicated but was never settled nor implemented. On the evidence I think implementation was always uncertain. New managerial positions were part of an organizational restructuring proposed by Mr. Comerford to Gescan's board of directors. When the Board failed to approve his proposal, Mr. Comerford resigned at the end of 1990. An interim president could not or would not deal with the Plaintiff's unresolved salary level. The present president, Mr. Ross Hurst, came on to the scene and terminated the employment not only of the Plaintiff but also a number of other managers, including the general manager, Mr. McGuire. The Plaintiff served in his new position for almost 6 months before being dismissed on May 6, 1991.

ISSUES

1. Notice

When assessing reasonable notice, the most important factors are age, length of service, the responsibility of the employment function and the availability of equivalent alternative employment. In respect to the latter, poor employment conditions may also be a factor. The amount of notice in any given case must be reasonable to both the employer and to the employee.

Ansari et al v. British Columbia Hydro and Power Authority (1986), 2 B.C.L.R. (2d) 33 (B.C.S.C.) established that 18 to 24 months is the rough upper limit for reasonable notice and that other cases should be scaled downward from there unless there are extenuating circumstances.

The Plaintiff at time of dismissal was 41 years of age, with almost 4 years of service with the Defendant. His last position of responsibility I would characterize as one of senior management.

Since leaving Gescan, the plaintiff has sought employment positions comparable to ones last held at Gescan. He has been unsuccessful. There are junior sales positions at considerably reduced salaries available in related fields, but in my opinion, the Plaintiff is not obliged to accept them.

There is evidence that the electrical industry is in an economic downturn along with the present general economic recession. Although there are hopeful signs of the Canadian economy showing recovery, the Plaintiff was terminated at a time when economic conditions were poor and the industry has yet to recover. I think the Plaintiff will have difficulty obtaining equivalent employment.

The Plaintiff has submitted that because he was induced to leave his previous secure position with General Electric on an understanding that his position with the Defendant would also be secure, this is an exceptional circumstance justifying extra period of notice. I think inducement is a subjective factor applicable only in cases where an employee is terminated relatively early in his new position, having been induced to leave his previously secure position, and is basically a compensating factor for the short period of new employment but ceases to be a factor as the length of service increases: Ansari, supra, at pp. 41 and 43; Mott v. Hayward Securities, July 10, 1986, No. C844853, Vancouver Registry (B.C.S.C.) at pp. 6-7; Skene v. Dearhorn Motors Ltd. (1990), 29 C.C.E.L. 107 (B.C.C.A.) at p. 108. It is also applicable only in situations where the inducement and subsequent termination behaviour of the employer results in unconscionable prejudice to the dismissed employee: Webster v. B.C. Hydro end Power Authority (1990), 31 C.C.E.L. 224 (B.C.S.C.).

Although the Plaintiff had initial reservations about leaving General Electric, I am satisfied he joined Gescan because of perceived better future career opportunities, particularly in management. After 4 years of service with Gescan, absent unconscionable prejudicial behaviour by the employer -- of which I find none -- inducement is no longer a factor for consideration.

Taking the above factors into account, I conclude that the appropriate length of notice is 14 months. The Defendant has also submitted that it is appropriate in this case, which has been heard within the period of notice I have found to be appropriate, that there should be a contingency deduction based on the likelihood of the Plaintiff finding employment within that period. A deduction of 2 months was suggested. I am not satisfied that on the evidence the degree of likelihood of the Plaintiff finding suitable employment within the period of notice awarded outweighs the degree of likelihood that it will take longer. Accordingly I decline to apply any contingency discount in this case.

2. Level of compensation at time of dismissal

The Plaintiff has the onus of establishing that there was indeed in place a later salary agreement and all its essential terms. On the evidence I think at best the Plaintiff was told that he would likely receive a substantial salary increase but given the reconsideration of the company's structural organization, and its incentive programs for review by the board of directors together with adverse financial circumstances of the company, negotiation and settlement of the precise terms of any increase were deferred. Unfortunately that unresolved issue was not satisfactorily addressed before the Plaintiff's dismissal. Morally, I think the Plaintiff should have been paid more than his previous salary of $56,000. for performing 6 months of expanded employment responsibilities. How much more remains objectively unclear.

The law cannot create terms of an agreement which did not previously exist between the parties. A restitutionary action of quantum meruit was not pled but the state of evidence advanced does not disclose bad faith nor does it assist in a proper quantum meruit assessment in any event. To that extent I think the result is that the Defendant has been somewhat unjustly enriched.

With respect to annual bonuses the Plaintiff was paid a discretionary bonus based on his performance each year he was with the Defendant. Even in 1990 when Gescan was experiencing financial difficulties, a 7.9% bonus was paid to the Plaintiff. The Defendant's original offer of employment to the Plaintiff included a term of annual bonus up to 10% of his salary. Under these circumstances, I can only conclude that an annual bonus was indeed an integral part of the Plaintiff's remuneration. Given the present financial difficulties of the Defendant company I think that the appropriate amount of bonus should be comparable to what was paid to the Plaintiff in 1990. Rounding it off to the nearest number I would fix it at 8% of his last salary level of $56,000.

FRINGE BENEFITS

The Plaintiff was supplied with the use of a company car to carry out his employment duties. He paid a monthly charge of $75.00 as contribution for his personal use of the car. However the Plaintiff was also required to declare $316.60 with Revenue Canada as a monthly taxable benefit to him of the personal use portion of the car and its operational expenses paid by Gescan. The Plaintiff submitted that a monthly claim of $125.00 per month for loss in his use of a company car is reasonable compensation over the notice period. I agree.

Counsel have indicated that they are able to work out the Plaintiff's entitlement to pension benefits once the notice period is determined by this Court.

There is no reliable evidence to show what the plaintiff's replacement cost would be for life, medical, dental and disability insurance - currently provided by the Defendant until December 31, 1991 - over the balance of the notice period. That aspect of the claim is adjourned generally pending resolution by the parties. If that amount cannot be settled, counsel are at liberty to make further submissions.

Judgment accordingly after deducting severance payments already made to the Plaintiff, with costs to the Plaintiff and court order interest at the varying rates set by the Registrar commencing from May 6, 1991.

WONG J.

DRS/DRS