IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Rothberger v. Concord Excavating & Contracting Ltd.*, 2015 BCSC 729

Date: 20150505
Docket: S27080
Registry: Chilliwack

Between:

Ralph Herman Rothberger

Plaintiff

And

Concord Excavating & Contracting Ltd.

Defendant

Before: The Honourable Mr. Justice Harvey

Reasons for Judgment

Counsel for the Plaintiff:	D. Sorensen
Counsel for the Defendant:	L. Coulter
Place and Dates of Trial:	Chilliwack, B.C. March 3 and 4, 2015
Place and Date of Judgment:	Chilliwack, B.C. May 5, 2015

Overview

[1] The plaintiff, Mr. Ralph Herman Rothberger, seeks damages from the defendant, Concord Excavating & Contracting Ltd., arising from his employment as a heavy equipment operator from 2001 until October 2, 2012. On October 2, 2012, the plaintiff alleges he was constructively dismissed by the defendant as a result of unilateral changes made to his contract of employment imposed by the defendant. The defendant's principal throughout the relevant time period was Mr. Robin Maybin.

[2] The defendant says that the plaintiff quit his position as a heavy equipment operator with the defendant. Alternatively, if constructive dismissal is made out, the defendant says the plaintiff failed to mitigate his damages by refusing an offer from the defendant to return to work at the end of October 2012.

[3] The plaintiff also asserts he is entitled to damages for unpaid overtime hours worked during the term of his employment.

Background

[4] From 2001 to 2012, the plaintiff was a seasonal worker in the steady employment of the defendant. He worked primarily as an excavator operator at an hourly wage. During the busy season, between early spring to late fall, the plaintiff frequently worked in excess of eight hours per day and 40 hours per week. He was paid no overtime for these additional hours.

[5] Several events occurred throughout the spring and summer of 2012, which resulted in the defendant, through one of its officers, informing the plaintiff that any subsequent loss or damage to the defendant's equipment, specifically wedges, would be deducted from the plaintiff's income. Such was communicated to him by way of a handwritten note on his pay cheque at the end of August 2012.

[6] The first incident was an issue over the plaintiff's machine causing a power arc which resulted in power failure at a Delta work site. There were also two other instances of damage involving equipment breakdown. The wedge, a fabricated

piece of metal necessary to keep the excavator's bucket in place, became detached. The result was the machine's bucket came off. In both instances time was lost on the job. On the second occasion, the wedge was lost in the ditch where the plaintiff was operating the machine. The result was a longer shutdown time at the work site and fabricating costs to replace the lost part.

[7] The defendant suggests each incident came about due to the plaintiff's conduct in the operation or maintenance of the machine. The plaintiff denies this.

[8] However, the defendant does not refer to the incidents for the purpose of alleging grounds for dismissal. Instead, it points out that the plaintiff voluntarily resigned his position. Thus, in my view, as the defendant is not arguing that the plaintiff was fired for cause, it is unnecessary to the result to decide whether the incidents were the plaintiff's fault, as alleged by the defendant.

[9] Were it necessary, I would conclude the defendant has led insufficient evidence to allow me to conclude whether the latter two incidents were as a result of the plaintiff's failure to properly maintain the company's equipment.

[10] Following the second of the two incidents involving the wedge, Sheena Maybin, the wife of the defendant's principal and the company's bookkeeper, wrote the following notation on the plaintiff's pay slip, dated August 31, 2012:

> Note
>
> EFFECTIVE IMMEDIATE:
>
> AS CONCORD HAS REPLACED TWO (2) WEDGES DO TO OPERATOR FAULT, THE CHARGE OF ANY FURTHER WILL BE MADE TO YOU.

[11] The plaintiff does not acknowledge that the breakdown and equipment loss was as a result of any misconduct or failure to maintain the equipment on his part. Nor does he acknowledge the two wedges were lost.

[12] Upon receiving notification of the defendant's intention to deduct future costs from his pay, the plaintiff testified he sought the first reasonable opportunity to

speak to the defendant's principal, Mr. Maybin, concerning the note. He approached Mr. Maybin the last Friday in September at a co-employees home and raised the matter with him. The plaintiff states that Mr. Maybin waved him off, telling him to forget about it. Mr. Maybin testified that although his wife, Sheena, who had written the note, wanted to charge the plaintiff for the second incident, he had told her to write the note without actually pursuing payment from the plaintiff, and that the incident was behind them.

[13] However, Mr. Maybin did not resile from the stated position that future equipment losses would be charged back to the plaintiff. To the contrary, at trial he testified such was his intention.

[14] The plaintiff testified he was unsatisfied with what he perceived was a dismissal of his concern and the prospect of paying for future equipment loss and possibly associated shutdown costs in the future.

[15] The plaintiff and Mr. Maybin disagree as to whether the matter came up again at a safety meeting on the following Saturday. Mr. Maybin says that the plaintiff approached him again to speak of the matter, but was told it was not the time or place to discuss it. The plaintiff could not recall such a conversation.

[16] In any event, after the initial conversation with Mr. Maybin, the plaintiff investigated the propriety of the defendant's proposed course of action and learned such was prohibited by the *Employment Standards Act,* R.S.B.C. 1996, c. 113 [*ESA*].

[17] Rather than speak directly to Mr. Maybin about the legality of the proposed course of action, he left a copy of the relevant passages from the *ESA* in his employer's mailbox when he picked up his September pay cheque on October 1, 2012 from the defendant's residence.

[18] This action resulted in an angry email from Ms. Maybin, which read as follows:

> Ralph,
>
> I am aware as an employer what my rights are and what your rights are (Parke Esposito) I suggest you keep this handbook for future reference.
>
> The incident was a second time offence with a written notification, I suggest you talk to someone at the labour relation department and review [your] efforts to suggest that we are being unreasonable for your actions in not maintaining and checking equipment before operating. If at anytime the bucket is to come loose and hit someone underneath who is to blame?
>
> You are constantly reminded to check the equipment you use, you are constantly reminded to maintain the equipment you use. Your lack of safety checks and lack of safety requirements are noted and filed should I need them for any future legal action you may want to pursue.
>
> I am available with my lawyer anytime you wish to pursue this matter.
>
> Sheena Maybin

[19] The contents of that communication led the plaintiff to the conclusion that he could no longer work for the defendant. On October 2, 2012, he walked off the job, leaving his excavator at a Delta job site after telling a supervisor of the project, a City of Delta employee, that he was quitting the defendant's employ. He asked the supervisor, Mr. Rock, to convey this to Mr. Maybin. Mr. Rock testified that he so informed the defendant.

[20] The plaintiff alleges that the original note on his pay slip amounted to a change to his terms of his employment. Such, coupled with the email from Ms. Maybin, with what he alleges to be an implied threat, amounted to constructive dismissal.

[21] He testified, as well, that his investigation into the *ESA* informed him of his right to receive overtime, at time and one half, for hours worked in excess of eight hours per day or forty hours per week.

[22] On March 5, 2013, the plaintiff resumed employment with another employer and earned income equal to or greater than that which he earned from the defendant, and accordingly incurred no further loss beyond that date.

[23] He pursued a claim for unpaid overtime through the *ESA* and was awarded back pay from the employer for the six month period prior to his cessation of work,

beginning on April 1, 2012. Six months is the statutory maximum period of time which could be awarded under the legislation.

Issues

[24] The following issues arise:

1. Was the plaintiff constructively dismissed, entitling him to damages, or did he resign?

2. If dismissed, did the plaintiff properly mitigate his loss?

3. Is the plaintiff entitled to payment for overtime hours performed previous to April 1, 2012?

Position of the Parties

[25] The plaintiff, while acknowledging that he voluntarily left his employment, argues he was left without an option, given the defendant's unilateral change to the terms of his employment, coupled with the email sent him on October 1, 2012 after he had drawn the illegality of their intended course of conduct to his employer's attention and attempted to discuss the matter with the defendant's principal.

[26] Despite acknowledging that it was made clear to him at the time of his hiring that no overtime would be paid, the plaintiff asserts he is entitled to overtime for all hours worked in excess of 40 hours weekly or days where he worked in excess of eight hours, and seeks retroactive payment for the whole of his 11 year term of employment, or portions of it, based on the doctrine of unjust enrichment.

[27] The defendant denies that the plaintiff was constructively dismissed, and instead alleges he quit without providing proper notice. Alternatively, if it is established that the plaintiff was constructively dismissed, the defendant says that he failed to mitigate his damages by not seeking employment in a timely fashion and not accepting the invitation to rejoin the defendant's employ at the end of October. The defendant also argues that, in any event, between October 2 and

March 5, 2013, the plaintiff's income would have suffered as a result of seasonal layoffs common in the construction industry.

[28] As to the claim for retroactive unpaid overtime, the defendant argues that the plaintiff, having pursued a remedy through the *Employment Standards Branch*, is confined to the six-month retroactive payments he received, and it is not open to him to seek damages in this action for the period dating back to the commencement of his employment.

Discussion

[29] There is no suggestion, based upon the seasonal nature of the plaintiff's work for the defendant, that he was anything other than a long-term employee of the defendant.

[30] Nor is it suggested he was anything other than a 'good' employee. The plaintiff had received several pay increases since the commencement of his employment and was always called back to resume working for the defendant in early spring when work became available.

[31] Other than the notation on his paycheque on August 31, 2012 there is no recorded disciplinary action in the plaintiff's file (assuming such existed, given the modest scope of the defendant's business).

[32] The plaintiff was paid $30 per hour at the time of his dismissal, plus holiday pay of 6% of his earnings. The parties never reduced the terms of the plaintiff's employment to writing.

[33] During those times he was off work, the plaintiff did not work for others, but relied, instead, on payments of Employment Insurance. Occasionally, his employer called him back during periods of layoff to work for one or two days on a small project. For that work he was paid and he duly reported the receipt of income to Service Canada.

[34] The plaintiff was the defendant's longest standing employee. He was understandably upset over the defendant's stated intention to charge him for future equipment loss. The plaintiff also noted that it was unclear from the notation on his pay slip whether his employer intended to hold him responsible for other charges, such as down time and delay in operations.

[35] In my view, the plaintiff spoke to Mr. Maybin at the first reasonable opportunity to discuss the matter and, for want of a better term, his concern was "brushed off".

[36] It is clear from Mr. Maybin's testimony that the defendant was going to deduct future costs from the plaintiff's pay cheque, an admitted infringement of the governing legislation. The flavour of Mr. Maybin's testimony was that the plaintiff was lucky not to have been charged for the second wedge.

[37] When the plaintiff brought the illegality of the defendant's proposed course of action to the attention of Ms. Maybin, she replied with an email that she agreed in her testimony was ill-conceived.

[38] I agree with the plaintiff that the email was threatening and provocative. It was wholly unresponsive to his legitimate effort to have the defendant resile from its stated intention to charge him with respect of future incidents involving the loss of a wedge.

[39] I accept the plaintiff's interpretation placed upon the reference in Ms. Maybin's email to "Parke Esposito", a former employee who ended up leaving the defendant's employ under unhappy circumstances. I agree the letter implied that a further complaint by the plaintiff over the employer's intended course of action would result in him having to deal with the defendant's legal counsel.

[40] Further, I reject Mr. Maybin's evidence that he did not know the plaintiff had actually quit until late October when they spoke by telephone. After leaving the job site on October 2, 2012, the plaintiff attended Service Canada to apply for Employment Insurance. The defendant was notified that a record of employment

was required and promptly sent it electronically. The document stated that the plaintiff had quit his employment with the defendant.

[41] When the plaintiff described the circumstances of his 'quitting' the defendant's employ, Service Canada accepted that he was entitled to insurance benefits. The defendant, upon being notified of this decision, appealed the plaintiff's entitlement to Employment Insurance. The dispute was eventually resolved in the plaintiff's favour. The defendant's appeal was, in my view, indicative of the level of hostility which had arisen between the plaintiff and Sheena Maybin.

[42] The plaintiff says he checked Craigslist and job postings at Service Canada to seek other employment shortly following his leaving his position with the defendant. It was not until March 5, 2013 that he obtained employment. He denies being called continuously by Mr. Maybin throughout October 2012 to offer him his position back, as suggested by Mr. Maybin in his testimony.

[43] The plaintiff's new position provided him with an income equal to or in excess of that which he earned from the defendant. Thus, he concedes that regardless of the appropriate period of notice, he suffered no loss beyond early March of 2013.

[44] The plaintiff brought proceedings through the *ESA* as against the defendant, and, in keeping with the legislation, was provided with compensation for those overtime hours he worked for the six months preceding his dismissal. Such is the statutory maximum that the Employment Standards Branch can impose. The defendant paid the back the overtime which was owed.

Credibility

[45] To the extent I need determine issues surrounding credibility, I prefer the evidence of the plaintiff to that of the defendant's two principals, Mr. and Ms. Maybin.

[46] Such is founded primarily on the vagueness of Mr. Maybin's testimony surrounding the events leading up to the notation, in addition to his suggestion that

wedges were lost on two occasions with a possible third occasion where the bucket came off the machine. I also found Mr. Maybin to not be a credible witness in relation to his statement that he had not known the plaintiff had quit until late October 2013, when in fact he had provided Service Canada with a record of employment stating that the plaintiff had quit earlier that month.

[47] I also found Ms. Maybin to be a less than credible witness. She was unable to give a plausible alternative explanation as to the inclusion of Parke Esposito's name in her email if not to intimidate the plaintiff and suggest he might receive similar treatment to that afforded to Mr. Esposito if he did not drop the matter.

The Applicable Law

[48] The matter of whether the plaintiff resigned or whether he was constructively dismissed turns on the interpretation placed on the defendant's notation on the plaintiff's August 2012 paycheck, the failure of the defendant, through Mr. Maybin, to address the plaintiff's concerns over the note and, finally, the email sent by Ms. Maybin on October 1, 2012.

[49] Whether constructive dismissal has occurred is a question of fact.

[50] The applicable law is found in *Farber v. Royal Trust Co.*, [1997] 1 S.C.R. 846, at paras. 24, 26 and 33, where Justice Gonthier, on behalf of the Court, said the following:

> 24. Where an employer decides unilaterally to make substantial changes to the essential terms of an employee's contract of employment and the employee does not agree to the changes and leaves his or her job, the employee has not resigned, but has been dismissed. Since the employer has not formally dismissed the employee, this is referred to as "constructive dismissal". By unilaterally seeking to make substantial changes to the essential terms of the employment contract, the employer is ceasing to meet its obligations and is therefore terminating the contract. The employee can then treat the contract as resiliated for breach and can leave. In such circumstances, the employee is entitled to compensation in lieu of notice and, where appropriate, damages.
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> ...
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> 26. To reach the conclusion that an employee has been constructively dismissed, the court must therefore determine whether the unilateral changes

> imposed by the employer substantially altered the essential terms of the employee's contract of employment. For this purpose, the judge must ask whether, at the time the offer was made, a reasonable person in the same situation as the employee would have felt that the essential terms of the employment contract were being substantially changed. The fact that the employee may have been prepared to accept some of the changes is not conclusive, because there might be other reasons for the employee's willingness to accept less than what he or she was entitled to have.
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> ...
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> 33. In cases of constructive dismissal, the courts in the common law provinces have applied the general principle that where one party to a contract demonstrates an intention no longer to be bound by it, that party is committing a fundamental breach of the contract that results in its termination. The leading case on this question is an English decision, *In re Rubel Bronze and Metal Co. and Vos*, [1918] 1 K.B. 315, in which the following was stated at pp. 321-22:
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> > But if a claim for wrongful dismissal be founded on repudiation by the master, then I think that the general and recognized rules which apply in the case of ordinary contracts should apply also in the case of master and servant. ... It has been authoritatively stated that the question to be asked in cases of alleged repudiation is "whether the acts and conduct of the party evince an intention no longer to be bound by the contract". ... The doctrine of repudiation must of course be applied in a just and reasonable manner. A dispute as to one or several minor provisions in an elaborate contract or a refusal to act upon what is subsequently held to be the proper interpretation of such provisions should not, as a rule, be deemed to amount to repudiation. ... But ... a deliberate breach of a single provision of a contract may, under special circumstances, and particularly if the provision be important, amount to a repudiation of the whole bargain. ...

[51] In *Farquhar v. Butler Brothers Supplies Ltd.*, 23 B.C.L.R. (2d) 89 (C.A.), Lambert J.A. stated the following at p. 3:

> A constructive dismissal occurs when the employer commits either a present breach or an anticipatory breach of a fundamental term of a contract of employment, thereby giving the employee a right, but not an obligation, to treat the employment contract as being at an end. See Reber v. Lloyds Bank (1985), 61 B.C.L.R. 361 (B.C.C.A.). The employee's decision must be made within a reasonable time. But he is entitled to a few days, or even a couple of weeks, to think it over.

[52] Accordingly, I must determine whether the unilateral change imposed by the defendant upon the plaintiff through the notation on the plaintiff's paycheck significantly altered the essential terms of his employment contract, based upon

whether a reasonable person in the plaintiff's circumstances would have felt as though the material terms had been substantially changed.

[53] I agree with the plaintiff that the notation on his paycheck, indicating that future losses of wedges would result in a deduction of his paycheck in an unspecified sum, was a material change to the employment contract, which entitled the plaintiff to receive an hourly wage for hours worked.

[54] In my view, even if not contrary to the provisions of the *ESA*, the intended change substantially affected the plaintiff's rights. He had no knowledge of the scope of the costs the defendant intended to recover given the vagueness of the initial notation on his pay slip. His efforts to speak to Mr. Maybin were rebuffed.

[55] The wedge, itself, might be a reasonably inexpensive piece of material. However, its loss stalled operations and required a mechanic to attend the work site. Given that the defendant's note to the plaintiff was unclear as to the scope of the intended charge, and the plaintiff's efforts to discuss it with Mr. Maybin were declined, a reasonable person in his position would have assumed he or she could be responsible for significant costs in the future.

[56] I agree with counsel for the plaintiff that this deduction constituted a change to the plaintiff's compensation package, which goes to the heart of the plaintiff's contract of employment.

[57] I also agree that the plaintiff did not have to remain in the employ of the defendant and await implementation of the deduction policy before treating the contract as at an end.

[58] Finally, I agree with the plaintiff's counsel when he suggests that it is a fundamental term of any employment relationship that the employer will treat the employee with civility, decency, respect and dignity: *Morgan v. Chukal Enterprises Ltd.*, 2000 BCSC 1163 [*Morgan*] at para. 10.

[59] The defendant's manner of communicating with the plaintiff, both in the original notation on his pay slip, which contained allegations of fault with respect to the lost wedges, and the October 1, 2012 email, with its implied threat that the plaintiff would experience the same fate as Parke Esposito if he continued with his complaint, was a breach of the implied terms referenced in *Morgan*.

[60] The combined effect of the defendant's stated intention to charge for broken wedges, and possibly other charges arising from downtime, coupled with the unwillingness of both Mr. and Ms. Maybin to address the plaintiff's concerns in a civil manner, entitled the plaintiff to treat his contract of employment as at an end.

[61] In the result, I find that the plaintiff was constructively dismissed from his employment.

[62] In addition, I find that the plaintiff's efforts to secure employment thereafter were reasonable. Work for heavy equipment operators was admittedly in short supply during the time period when these events occurred. Thus, I reject the defendant's claim that the plaintiff failed to mitigate his damages between October 2012 and March 2013.

Damages

[63] The seasonal nature of the plaintiff's work does not mean he was not a full-time, long-term employee of the defendant. I find there was a tacit arrangement between the defendant and the plaintiff that he would be rehired each spring, when work became available.

[64] Save for the record of employment provided by the defendant in 2012, indicating the plaintiff had quit his position, the other records of employment referenced a shortage of work as the reason the defendant could no longer offer the plaintiff employment.

[65] Accordingly, I find the plaintiff was a long-time employee entitled to reasonable notice. For the purpose of assessing reasonable notice, I treat the plaintiff as an employee with an 11 year employment history with the defendant.

[66] The length of notice is dependent upon a number of factors, including the length of his employment, the nature of his duties, the age of the employee, his training and experience and the ease or difficulty with which the plaintiff will find comparable alternative employment.

[67] In determining the reasonable notice period, no two cases are alike. I have referred to *Carter v. Packall Packaging Inc.,* [2004] O.T.C. 80 (Ont. S.C.) [*Carter*]; *Birch v. London Drugs Ltd.,* 2003 BCSC 1253 [*Birch*]; *Dawson v. FAG Bearings Ltd.,* 2008 CanLII 55459 (Ont. S.C.) [*Dawson*]; and *Burnett v. Wayden Transportation Systems Inc.*, 2010 BCPC 9 [*Burnett*].

[68] *Carter* and *Dawson* involved equipment operators. The plaintiffs in *Birch* and *Burnett*, respectively, worked as a merchandise handler and deckhand. One of the plaintiffs had managerial duties, which is similar to the plaintiff's situation.

[69] The range of notice found in these cases was from six to 12 months. The lower figure was found in *Burnett*, where the plaintiff's length of service was six years.

[70] In considering these cases, reasonable notice for the plaintiff, in my view, would be six months. However, he had wholly mitigated his loss by March 5, 2013, which was approximately five months into the notice period.

[71] Over that five-month period, the plaintiff's compensation would vary depending on the amount of work available. In busy months, the plaintiff could earn as much as $8,800 per month. In slower months, usually in December, he earned no income.

[72] The plaintiff suggests that an appropriate manner in which to assess his damages would be to take an average of his annual income and convert that into a monthly sum. I disagree.

[73] The totality of the evidence, both from the plaintiff and on behalf of the defendant, indicates that full employment was generally available until mid-November. Thereafter, the plaintiff's timesheets or diary entries indicate he was sporadically contacted to work for the defendant throughout the winter months. In some years, full-time work became available in early January. In other years, full-time work did not commence until later into the spring.

[74] The defendant offered no evidence as to when work was available to it in 2013. In recent years, the plaintiff commenced his employment with the defendant in mid-January 2010, early February 2011 and early January 2012.

[75] On the evidence available to me, I conclude that the plaintiff would have, at best, worked a 40 hour work week over the latter part of 2012, with a layoff beginning at the middle of November to the end of December. He would have then re-commenced, at 40 hours or less weekly, in early January until March 5, 2013, the date upon which he secured alternate employment at a similar or better rate of pay.

[76] Recognizing there is no precision in the assessment of the plaintiff's damages owing to the unavailability of the precise hours of work he lost as a result of his dismissal, I assess his damages as 12 weeks of lost employment at 40 hours per week. At $30 per hour, his total lost wages were $14,400. To that sum should be added 6% for holiday pay, such that the total damages arising from his dismissal are $15,264.

[77] I am buttressed in that conclusion by reference to the plaintiff's recorded hours of work prior to March in 2012, where he worked 239 hours during a similar time period.

[78] Given my preference of the plaintiff's evidence over that of Mr. Maybin, I am not persuaded that the defendant offered to resume the plaintiff's employment at

any time. In October 2012, and, in any event, given the circumstances of the plaintiff's departure, it was not, in my view, incumbent upon him to accept such an offer of employment.

The Claim for Overtime

[79] The plaintiff accepts that he cannot rely upon the *ESA* to enforce, in this action, a claim for retroactive overtime beyond that which he recovered under procedures unique to the *ESA* following his dismissal.

[80] Instead, he relies upon the doctrine of constructive trust. He argues the overtime performed for his usual hourly rate amounted to the conferral of a benefit to the defendant, a corresponding deprivation to him, and no juristic reason for the defendant to be 'enriched' by his working long hours at straight time.

[81] With respect, that submission overlooks the obvious: the contractual arrangement between the parties respecting the hours of work and the rate of pay: *Garland v. Consumers' Gas Co.,* [2004] 1 S.C.R. 629.

[82] The rights granted by the employment standards legislation are not automatically incorporated into employment contracts as a matter of law, as the intention of the parties must be considered: *Macaraeg v. E Care Contact Centers Ltd.,* 2008 BCCA 182 [*Macaraeg*] at para. 100.

[83] Further, a plaintiff is not entitled to enforce his or her statutory rights to overtime pay in a civil action, as the statutory mechanisms under the *ESA* have the exclusive jurisdiction to determine such claims. Given that the plaintiff availed himself to the full extent of the statutory remedy available under the *ESA,* he cannot recover beyond that in this action: *Macaraeg v. E Care Contact Centers Ltd.,* 2008 BCCA 182 at paras. 101-104.

[84] In terms of the doctrine of constructive trust, I find that the defendant received no additional benefit by virtue of the plaintiff's overtime because they did

not charge their clients any additional fees for hours worked beyond eight hours per day or 40 hours per week.

[85] Accordingly, the plaintiff's claim for overtime hours under the doctrine of constructive trust must fail.

Costs

[86] Rule 14-1(10) of the *Supreme Court Civil Rules,* B.C. Reg. 168/2009 states that a plaintiff who recovers a sum within the jurisdiction of the Provincial Court under the *Small Claims Act,* R.S.B.C. 1996, c. 430 is not entitled to costs, other than disbursements, unless the court finds that there was sufficient reason for bringing the proceeding in the Supreme Court and so orders.

[87] I have awarded the plaintiff $15,264, which is within the $25,000 monetary jurisdiction of Small Claims Court. Accordingly, I must determine whether there was sufficient reason for him to bring his action in the Supreme Court.

[88] The Legislature did not intend for the words "sufficient reason" to be limited to the potential quantum of damages as assessed at the outset of the claim. However, the words should be interpreted with restraint. While quantum is perhaps the most important factor for determining sufficient reason, courts may exercise discretion in considering what is "sufficient" in the circumstances: *Gradek v. DaimlerChrysler Financial Services Canada Inc.,* 2011 BCCA 136.

[89] The burden is on the plaintiff to establish sufficient reason by showing proof of persuasive and compelling circumstances for bringing the action in Supreme Court, measured on an objective standard: *Gehlen v. Rana,* 2011 BCCA 219 [*Gehlen*] at paras. 32 and 37; *Khan v. All-Can Express Ltd.,* 2014 BCSC 2066 at para. 28.

[90] Kirkpatrick J.A. in *Gehlen* found no sufficient reason for the plaintiff to have brought her action in Supreme Court, as the plaintiff's minor injuries suggested that

it was plain and obvious at all material times that this was a proper action to be tried in Small Claims Court.

[91] In the present case, the plaintiff was seeking damages in lieu of notice as well as compensation for overtime worked over his 11 year employment history with the defendant based on the doctrine of constructive trust. The plaintiff's damages relating to his reasonable notice period would clearly have been within Provincial Court jurisdiction, given that he found comparable employment within five months of his constructive dismissal.

[92] On the other hand, if successful, the plaintiff's constructive trust claim could have resulted in a significant damage award. I note that there were some deficiencies in the plaintiff's claim for unpaid overtime wages, such that an objective observer may believe that the claim could not succeed. However, in my view, it was not plain or obvious at the time the plaintiff initiated his action that this cause of action would fail. I conclude that a reasonable person would believe there was sufficient reason to bring this claim in the Supreme Court, given the potential for a significantly higher monetary award.

[93] Accordingly, I award the plaintiff his costs at Scale B.

Summary

[94] The plaintiffs entitled to damages of $15,264 in respect of his constructive dismissal at the hands of the defendant his employer, together with court order interest at registrar's rates.

"Harvey J."