Citation: Fisher v. Visions Electronics
2008 BCPC 0079

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IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

BETWEEN:

Stephan Fisher

CLAIMANT

AND:

668824 Alberta Ltd. dba Visions Electronics

DEFENDANT

REASONS FOR JUDGMENT
OF THE
HONOURABLE JUDGE EHRCKE

Counsel for the Claimant:	C. Martin
Counsel for the Defendant:	H. S. Delaney
Place of Hearing:	Vancouver, B.C.
Date of Hearing:	February 14, 2008
Date of Judgment:	March 4, 2008

[1] This is a claim for wrongful dismissal. The defendant does not assert cause for termination. The issues are length of service, the appropriate notice period and whether the claimant failed to mitigate his damages. The claims for extended notice and aggravated damages have been abandoned.

FACTS

[2] The claimant was employed as a sales representative for the defendant for two periods: October 15, 2001 to May 30, 2003, and June 1, 2004 to March 2, 2006. The last day worked in 2003 was May 26, but the claimant was paid to May 30. When his employment was terminated on March 2, 2006, he was given two weeks pay in lieu of notice.

[3] The claimant is 27. He has grade 11. His work experience includes acting as a buyer for a lumber retailer, sales, working in pizza parlours, general labour, and more recently bartending, as a DJ, and serving at a restaurant.

[4] When the claimant worked for the defendant the first time, he earned about $2500 per month in commissions. For the second period, his earnings were $8 an hour or commissions. In 2005, he earned an average of $2669 per month. Although he was ostensibly hired as a manager for the second period, he had no management responsibilities, and I find he was essentially a sales person. His position as the "third key holder", that is someone who can open and close the shop, was given to someone else in May, 2005.

[5] The claimant said that when he left in 2003 Mr. Gill, his direct manager at the time, told him he could have a leave of absence. Mr. Gill denied this. The regional manager at the time testified that he told the claimant this was not available, but that he could simply quit. The claimant wanted to go to Europe for an extended period. He in fact was in Belfast for about 6 months, where he worked as a bartender and DJ. He returned to this area and worked as a waiter for about 6 months, after which he went back to work for the defendant.

[6] In order to return to work for the defendant, he went through a hiring procedure including completing various forms, providing a reference, and signing a confidentiality agreement and a consent to a criminal record check.

[7] I find there was no leave of absence. There is no documentation of any leave and no specific terms were alleged. The claimant took other employment when he returned to British Columbia. He waited until a particular employee of the defendant became the manager of a store and then obtained employment with the defendant at that store. He went through a hiring process before the second period of employment.

[8] Although the defendant is not alleging cause, the claimant was terminated under a cloud. There was a theft investigation and he refused to take a polygraph as requested. This was after he had been told about the unreliability of polygraphs. Mr. Gill, who was the regional manager in 2006 and terminated the claimant, said the reasons were the polygraph, some commission irregularities or errors, and the "demotion" from being a key holder.

[9] The claimant testified that he sought employment daily following his termination. He obtained a profile from a website called monster, and applied for all the positions available. He also applied for other local positions. He did not apply for sales jobs in electronics because he was disillusioned by his termination by the defendant. The only documentary evidence of the job applications is exhibit 2, a print-out indicating that various emails were sent on various dates. Two of them show attachments, which the claimant says were his resume. Despite requests for disclosure the claimant did not print out the attachments. He testified that he did not retain any other records. I note that almost all of the 28 emails are dated July and August, with one in June and one in September.

[10] Mr. Gill testified that at the time there were many electronic sales positions available, and that the defendant hires new sales representatives frequently. There was no evidence on the effect the claimant's termination by the defendant may have had on applications to similar employers.

[11] The claimant received employment insurance for a number of months, and ended up working for his landlord as an insulation installer. He is now managing his landlord's company. It is not clear from the evidence exactly when the claimant started working again, but it was well after six months had elapsed.

LEGAL CONSIDERATIONS AND CONCLUSIONS

Length of Employment

[12] After reviewing the cases provided by counsel on this point, I conclude that the length of employment was 21 months, from June 1, 2004 to March 2, 2006. This is the second period during which the claimant worked for the defendant. I have found that there was no leave of absence. One telling factor is that the claimant was employed by someone else for a period of time when he returned for Ireland, he did not go directly back to employment with the defendant.

[13] This is not a case of interrupted employment where the gap in employment should be bridged. The claimant did not continue to work for the same employer but in different capacities and/or at different locations, as was the case in *Long v. PHF Acquisition Co.,* 2003 BCSC 598. The break in his employment was not due to a termination as in *Silvo v. Finning International Inc.,* 2003 BCSC 484. The claimant was not a particularly long term employee, as in *Krewenchuk v. Lewis Construction Ltd.* [1985] B.C.J. No. 1553 (S.C.).

Mitigation

[14] The defendant submits that the claimant failed to mitigate his damages. The defendant also submits that the lack of disclosure in this case affected its ability to show a failure to mitigate.

[15] Although there is a duty to mitigate, the defendant bears the onus of showing a failure to do so: *Silvo,* above; *Coutts v. Brian Jessel Autosports,* 2005 BCCA 224. The employee must take reasonable steps to find other employment: *Coutts; Carlysle-Smith v. Dennison Dodge Chrysler Ltd.* (1997), 33 C.C.E.L. (2d) (BCSC).

[16] The evidence respecting mitigation was somewhat weak in this case, as it was in *Silvo*. However, the claimant did testify that he continually applied for employment. The primary issue is whether he ought to have applied for employment selling electronics equipment. That is where the onus becomes important. While a witness from the defendant company testified that the defendant was hiring for similar positions at the time, there was no testimony from any other potential employers, as there was in *Coutts*. Nor was there any evidence about the likely effect of the claimant's termination on applications for similar positions. Presumably there would be a request for references, and the claimant did not leave his employment on good terms. I am not satisfied that, had the claimant taken further steps, he would have found employment with a competitor, or other comparable employment, within the notice period. On balance, a failure to mitigate has not been shown.

[17] I agree with the defendant that the claimant should have printed out attachments to his emailed applications, and given this material to the defendant in a timely fashion. However, the defendant could have provided evidence of other available positions in any event by calling witnesses from competitors or other employers or employment agencies. For this reason, the lack of disclosure should not lead to an adverse finding in this particular case.

Reasonable Notice

[18] The factors to be considered in a determination of reasonable notice include the nature of the employment, the length of service, the age of the employee and the availability of similar employment in view of the age, training and qualifications of the employee: *Bardal v. The Globe and Mail* (1960) 24 D.L.R. (2d) 140. These factors are not exhaustive: *Shinn v. TBC Teletheatre B.C.* 2001 BCCA 83. The purpose of the notice is to bridge the time reasonably required to find other suitable employment: *Shinn*.

[19] In this case, the claimant was a salesperson of electronic equipment, which requires a certain level of knowledge about the equipment. He is 27, considerably younger that the employees in many of the reported decisions. He has grade 11 and has had varied employment. His length of employment was 21 months.

[20] The cases vary considerably in terms of periods of notice. In *Shinn*, the plaintiff was given 8 months notice. He was 44 and was employed for three years and three months in a specialized marketing position. This amounts to almost three months per year. In *Larsen v. A & B Sound*, [1996] B.C.J. No 696 (S.C.) the plaintiff was 47 and had worked as a salesman for the defendant for about 32 months. The court allowed 8 months notice, over two months for each year of employment. Larsen had worked for A & B sound previously, and was recruited to return to the company. There were allegations of theft against him which proved groundless. In *Dodich v. Leisure Care Canada*, 2006 BCSC 93, the plaintiff was the coordinator of recreational programming in a seniors

residence. She supervised volunteers. She was terminated after 22 months at age 47. The court awarded 3 months notice.

[21] In a number of other decisions, for example *Krewenchuk v. Lewis Construction Ltd.*, *supra*, the period of notice per year is considerably lower. That case, decided in 1985, involved a carpenter, aged 47, with 23 years service. The notice period was 12 months. *Husband v. Labatt Brewing Co.*, [1998] B.C.J. No 3193 (S.C.) involved a senior sales representative, aged 41, who had worked for Labatts for 14 years. Brenner J. held that notice of about 2.5 weeks per year was appropriate:

> "The defence provided the Court with a number of cases in support of its contention that 10 months was an appropriate notice period. Generally in "salesman" and "sales manager" cases the courts have consistently awarded notice in the range of 2.5 weeks per year of service even where the plaintiffs are in their 50's and 60's. The principle underlying this is the fact that the skills of sales employees are considered to be more readily transferrable, thus enabling them to secure new employment with relative ease..."

[22] I cannot see any reason to deviate significantly from that general guideline in this case. Although I have some question, as noted above, about the effect of the termination in this particular case on similar employment prospects, the claimant is young and did not try to obtain other employment selling electronic equipment. The other factor of note is that there was an earlier period of employment with the defendant. This meant that the claimant already had significant knowledge of the defendant's business, and presumably needed little or no instruction when he was rehired, thus prolonging the length of service as an experienced employee.

[23] Considering all of these factors, I find that the appropriate notice period was two months. The claimant has already been paid for two weeks. According to the claimant, his monthly earnings were $2669. This was not questioned by the defendant. There will therefore be judgement for the claimant for $4004, the equivalent of 6 weeks earnings.

[24] Subject to any submissions, the claimant should have his reasonable disbursements and court order interest from March 17, 2006, the last day for which he was paid.