Citation: ***Stant v. Elaho Logging Ltd.,***
2006 BCSC 718

IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20060412
Docket: S060477
Registry: Vancouver

Between:

Harry Stant

Plaintiff

And:

Elaho Logging Ltd.

Defendant

Before: The Honourable Madam Justice Garson

Oral Reasons for Judgment

(April 12, 2006)

Counsel for Plaintiff	J.D. Kondopulos
Counsel for Defendant	A.E. Thiele K. Okimaw
Date and Place of Trial:	March 29, 30 and 31, 2006 Vancouver, B.C.

[1] **THE COURT:** This wrongful dismissal action turns primarily on the question of whether Mr. Stant failed to mitigate his damages when he refused the defendant's offer to reemploy him on the same terms and conditions as the employment that was terminated one month earlier.

[2] Harry Stant worked for Elaho Logging (“Elaho”) as its logging superintendent. He began his employment relationship with Elaho in about 1984. He was employed as logging superintendent at that time. Elaho was purchased by the Welch group of companies, and Mr. Stant continued his employment with Elaho under the new owners. In 1994 his employment was terminated. Neither party led evidence about the reason for the termination. I did hear evidence that Brian Welch, now the president of Elaho, and Mr. Stant met at Troll's Restaurant at Horseshoe Bay and over lunch they "arm wrestled" until they negotiated a severance payment of $20,000.

[3] Mr. Stant lives and works in the Squamish area. After his 1994 termination from Elaho he was employed by another employer in that area. From May to November 1996, he was rehired by Elaho in a unionized, hourly paid position. He was laid off in November when the company laid off its hourly paid employees for the winter shutdown.

[4] In February 1997, Mr. Stant resumed his position as logging superintendent. Mr. Welch testified that, "This time under our rules rather than the people we bought it from," from which I inferred that Mr. Stant's employment was terminated over some

type of disagreement about the manner in which the business was managed. Mr. Stant remained employed as logging superintendent until December 13, 2005.

[5] Mr. Stant's salary was $80,000 per annum plus benefits, and he was also paid an incentive payment calculated at about $11,000 per annum.

[6] On September 13, 2005, Mr. Stant began a leave of absence from his employment for medical reasons. He was diagnosed by his family physician, Dr. Jamieson, with depression and hypertension. Mr. Stant was paid short-term disability, about one-third of his usual income, by SunLife. SunLife terminated his short-term disability payments on November 21, 2005, effective November 18, 2005. Dr. Jaimeson disagreed with the reasons stated by SunLife, and wrote a letter to SunLife disputing their assertion that Mr. Stant was no longer disabled.

[7] Although Mr. Stant was still being treated with anti-depressant and hypertension medication, in December 2005, he approached his supervisor, Derek Sayle, and advised him that he wished to return to work on modified duties.

[8] Dr. Jaimeson testified that it was his opinion when he saw Mr. Stant on December 15th, 2005 that Mr. Stant was still disabled from his regular duties and that he needed a modified, less stressful or less responsible position.

[9] Mr. Stant's evidence is that he asked Mr. Sayle if his job could be modified when he spoke to him in late November after he was cut off short-term disability. He explained that he had financial commitments and needed money so he had to return to work. Mr. Stant testified that Mr. Sayle expressed some doubt that Mr. Welch

would agree to job modifications. Mr. Sayle disputed that Mr. Stant asked for lighter work although he acknowledged that he and Mr. Stant did discuss some job modifications about Mr. Stant doing more of the financial work. Mr. Sayle also testified that he and Mr. Welch had discussed alternate positions for Mr. Stant, but I concluded that they did not discuss the potential alternate positions with Mr. Stant.

[10] Mr. Stant says that by December 13, 2005, he felt good and he was ready to return to work. He met with Brian Welch and Derek Sayle. Mr. Stant went into the meeting expecting to discuss the terms of his return to work. He intended to discuss easing his workload and the stress that his heavy workload had caused him. In December, Elaho was shut down for the winter months as it was every winter. Mr. Stant described the meeting in this way:

> They just dived into me, they said Elaho was run like a boy scout camp. Everything was a mess. The trucking costs terrible, invoicing terrible and that was all my fault. I had to do more e-mail and become oriented in Excel computer program. My job got bigger. Going back this year bigger quota would have been harder – would have made incentive better. They said you are as moody as an old woman. You are abusive. I was pretty choked, really choked. I didn't believe all this was happening. I felt like they were trying to make me quit. They told me I was laid off. They said when we get some work we will give you a call. I told them they can't do that – I am salaried for 12 months. I said you are punishing me for getting sick. I was pretty mad. I stomped out. This whole 45 minutes was – get Harry. I did not provide a medical letter because I was laid off. I did not ask (at the meeting) if my job could be modified because I did not have time – the meeting directed at criticism.

[11] Mr. Sayle and Mr. Welch do not dispute this version of the meeting. Mr. Welch handwrote some notes in his planning for the meeting. The notes corroborate Mr. Stant's account of the conversation.

[12] Following the meeting, Mr. Stant sought legal advice from Mr. Kondopulos. Mr. Kondopulos wrote to Elaho demanding severance. He did not demand that Elaho rehire Mr. Stant. He took the position on behalf of his client that Mr. Stant's lay-off constituted termination without cause and that Mr. Stant was entitled to reasonable severance.

[13] Mr. Welch sought legal advice, and on January 13, 2006, through legal counsel, advised Mr. Stant that he could return to his position as logging superintendent on the same terms and conditions as he had been employed when he went on his medical disability.

[14] The evidence is a little confusing about Mr. Stant's medical disability. He says he continued to appeal SunLife's decision to terminate his short-term disability benefits. Dr. Jaimeson, for his part, says that when he wrote to SunLife on December 21, 2005, he thought Mr. Stant was not fit to return to work unless his job was modified.

[15] Mr. Stant pursued his disability benefits at the same time as he told his employer he was fit to return to work. This he explains by saying that he had to get some money from somewhere. He does not now claim to be disabled, and he has not pursued an appeal of SunLife's refusal to pay disability benefits. He said his blood pressure is still a concern but he feels much butter. He is still on his anti-depressant medication but expects that medication to soon be reduced by his doctor.

[16] Mr. Stant testified that the reason he declined to accept the January 13, 2006, offer to return to work was because, “They would hang me out to dry, they would put together an opportunity to fire me.”

[17] The first issue to resolve in this litigation is whether Mr. Stant's employment was wrongfully terminated.

[18] In her opening submission, Ms. Thiele, for Elaho, said that Mr. Welch made a mistake. He was mistaken when he treated Mr. Stant like an hourly employee. Hourly employees are all laid off for the winter shutdown and rehired in the spring in accordance with their collective agreement. She said that as soon as Mr. Welch received legal advice he acknowledged his error and offered to rehire Mr. Stant.

[19] In his evidence Mr. Welch resiled from this position. He said he did not terminate Mr. Stant - he just said that he would lay him off but that he did not actually do so. I reject this evidence. There is no doubt at all in my mind that Mr. Stant was told at the December 13, 2005, meeting that he was laid off and that the lay-off was immediately effective. This is corroborated by Mr. Sayle who testified that Mr. Stant was told he would be laid off and was not told when his layoff would end because nobody knew. It was weather dependent. Elaho never denied it had laid off Mr. Stant on December 13, 2005, until Mr. Welch testified. In further corroboration of this finding is the fact that Elaho did not pay Mr. Stant in December. I find that Mr. Stant's employment was terminated without cause on December 13, 2005.

[20] This brings me to the next issue - the issue on which I think this case turns: Did Mr. Stant have a legal duty to mitigate his damages by accepting the offer to

return to his employment? This offered return to employment was an indefinite offer. That is, he was told he could simply return to his previous position.

[21] In the case of ***Foreshaw v. Aluminex Extrusions Ltd.*** (1989), 16 A.C.W.S. (3d) 375 (B.C.C.A.), Taylor J.A. discussed the duty of an employee to mitigate his or her damages. He said at ¶ 15 to 17:

> That "duty" to take reasonable steps to obtain equivalent employment elsewhere and to accept such employment if available-is not an obligation owed by the dismissed employee to the former employer to act in the employer's interests. It would indeed be strange that such a duty would arise where an employer has breached his contractual obligation to his employee, having in mind that no duty to seek other employment lies on an employee who receives proper notice.
>
> The duty to "act reasonably", in seeking and accepting alternate employment, cannot be a duty to take such steps as will reduce the claim against the defaulting former employer, but must be a duty to take such steps as a reasonable person in the dismissed employee's position would take **in his own interests**-to maintain his income and his position in his industry, trade or profession. The question whether or not the employee has acted reasonably must be judged in relation to his own position, and not in relation to that of the employer who has wrongfully dismissed him. The former employer cannot have any right to expect that the former employee will accept lower-paying alternate employment with doubtful prospects, and then sue for the difference between what he makes in that work and what he would have made had he received the notice to which he was entitled. [emphasis added.]

[22] In ***Farquar v. Butler Brothers Supplies Ltd.***, [1988] 3 W.W.R. 347 (B.C.C.A.), Lambert J.A. discussed the circumstances in which a terminated employee may be expected to mitigate his losses by working out his notice period with the employer. He said,

> The employee is only required to take the steps in mitigation that a reasonable person would take. Sometimes it is clear from the circumstances that any further relationship between the employer and

> the employee is over. One or the other or both of them may have behaved in such a way that it would be unreasonable to expect either of them to maintain any new relationship of employer and employee. The employee is not obliged to mitigate by working in an atmosphere of hostility, embarrassment, or humiliation. But once the employer is clearly told, by words or equivalent action, that the termination is accepted by the employee, then, if the employer continues to offer a position to the employee, and the position is such that a reasonable employee would accept it, if he were not counting on damages, then the duty to mitigate may require the employee to accept the position, on a temporary basis while he looks for other work, even if it is roughly his old position before the constructive dismissal. Such circumstances may not arise frequently. Very often the relationship between the employer and the employee will have become so frayed that a reasonable person would not expect both sides to work together again in harmony. But sometimes it would be unreasonable for the employee to decline to continue in employment through the period equal to reasonable notice, while he looks for other work. That was so in Lesiuk, where the constructive dismissal, if any, was caused only by the hard times facing the employer. Indeed, in the Lesiuk case, the employer frequently expressed satisfaction with the employee, and the hope that the employment relationship would continue at no reduction in salary, but at different duties forced by the economic climate.
>
> The cases where there is an obligation to continue in the work force of the employer, under a new employment relationship, following a constructive dismissal, will roughly correspond with those cases where it is reasonable to expect the employment relationship to continue through a period of notice, rather than to end with pay in lieu of notice. There must be a situation of mutual understanding and respect, and a situation where neither the employer nor the employee is likely to put the others' interests in jeopardy. But if there is such a situation, then a reasonable employee should offer to work out the notice period, either where notice is given, or where there is a constructive dismissal and an offer of a new working relationship.

[23] In ***Monti v. Hamilton Wentworth (Regional Municipality)*** (1999), 89 A.C.W.S. (3d) 722, the court discussed the obligation of a fired employee to continue his employment with the same employer after he had accepted the repudiation of the employment agreement. Reilly J. stated that the reasonableness of such a

proposition is very much dependent upon the relationship between the employer and employee.

[24] Counsel in this case did not direct my attention to any cases where the repudiation of the employment contract was withdrawn, as it was here, but, rather, the cases cited to me concerned the obligation of the terminated employee to work through his or her notice period with the former employer. In principle I see no reason why the same considerations ought not to apply to a withdrawn repudiation. The cases cited to me by Ms. Thiele, ***Trevitt v. Blanche Equipment Rental Ltd.***, 2006 BCSC 94; ***Mackenzie v. Atlantic Neon & Plastic Signs Ltd.***, [1986] N.B.J. No. 787; ***Michaud v. RBC Dominion Securities Inc.***, 2002 BCCA 630, and ***Cayen v. Woodwards Stores Ltd.***, [1993] B.C.J. No. 83 (C.A.) were all, in my view, distinguishable because the relationship between the employer and employee was not particularly frayed as was the case here. Accordingly, I turn to the evidence concerning the relationship between Mr. Stant and his employer.

[25] Ms. Thiele, counsel for Elaho, contends that the appropriate test to apply is an objective test. I agree with her on this point. She says that in the circumstances of this case Mr. Stant ought to have accepted the offer of reemployment because only Elaho had a legal duty to accommodate his disability. He could only obtain disability benefits through a continuation of his employment with Elaho; the employment relationship had survived a previous termination (in 1995); historically there had been considerable friction in the employment relationship marked by a hostile relationship with Jack Welch, the brother of Brian Welch (president of Elaho); Mr. Stant had been given previous reprimands and previous criticisms of his

performance; Mr. Stant continued to have a good relationship with Mr. Sayle, his direct supervisor; and that he did not have daily interaction with Brian Welch. Ms. Thiele contends as well "that a reasonable 58 year-old plaintiff who provides the major source of financial support to his household with known health concerns, is more likely than not going to seek the security of known employment if he were not counting on damages."

[26] In reply, Mr. Kondopulos notes that the already frayed relationship was worsened when following the December 13th meeting Mr. Welch accused Mr. Stant of theft by his alleged wrongful use of the company credit card for his company during his disability period. The theft allegation was not pursued at trial. Furthermore, Mr. Kondopulos notes that Mr. Stant's salary was not paid until shortly before trial even though Mr. Welch knew that Mr. Stant was in difficult financial circumstances, Elaho failed to pay the $11,000 incentive pay that was due and owing by the date of the termination. Mr. Kondopulos says that in all these circumstances it would be unreasonable to require Mr. Stant to return to such a hostile, poisoned workplace.

[27] I conclude from the rough way in which Mr. Stant was treated at the December 13, 2005, meeting that he was justifiably humiliated. He struck me as a man who was a loyal, hard-working employee - one who was proud of his long record of employment in the logging industry. He spoke quite emotionally and with some pride about the positive reaction of the employees at the company Christmas party to the news he was returning to work. I have no doubt that he was at times a difficult, not particularly adaptable employee. The issue is whether a reasonable

employee in Mr. Stant's position would have recovered from the brow-beating he received on December 13, 2005, followed by an allegation of theft and failure to pay his salary and incentive pay sufficiently to enable him to perform his previous duties. It must also be remember that Mr. Stant was already suffering from stress and hypertension and had been diagnosed with depression. He had not by December 13, 2005, completely recovered from those conditions. I infer from the evidence of Dr. Jaimeson and from the evidence of Mr. Stant that his medical condition weakened his resilience and self-confidence. I conclude also that Mr. Welch made no effort to accommodate or temper his criticism of Mr. Stant in consideration of this medical condition. I do not think any reasonable employee in Mr. Stant's circumstances should be expected to have returned to work for Elaho. I do note that Elaho Logging may not have been historically a gentle place to work and that Mr. Stant would have been accustomed to plain talk and perhaps some criticism, but not to the degree to which he was subjected on December 13, 2005.

NOTICE PERIOD

[28] Mr. Stant contends that he is entitled to 18 months severance. Elaho contends that the appropriate notice period is 12 months.

[29] Mr. Stant is almost 59 years of age. His responsibilities included supervising the logging aspects of the company's business. He was responsible for gross revenues of about $3 million. He had about 35 employees reporting to him directly as well as about 30 independent contractors and subcontractors. His position was described as mid-range management. His salary, as previously noted, was $80,000

plus benefits and incentive pay. His health is good enough for him to work but may be an impediment to his finding similar employment. I am satisfied that he has attempted to mitigate his damages in the short period of time since he was terminated (four months) by looking for other positions. There was not a lot of evidence about the likelihood of Mr. Stant finding suitable replacement employment. Ms. Thiele pointed out that Mr. Sayle obtained his present employment with Elaho, four years ago, when he was in his mid-50s. Mr. Sayle testified that there are six other companies in the lumber business in the immediate area of Squamish. Mr. Stant has another home in 100 Mile House, and he indicated that he would also consider employment in that area. Mr. Stant has a long history of successful employment in the logging industry. He is also a licensed heavy duty mechanic, and he may be qualified for supervisory work in that area as well. I formed the impression from Mr. Stant's evidence that he is reasonably confident that he will find suitable replacement employment. Most logging companies in this area will have closed or have limited operations in the past four months, so it is only now that Mr. Stant could reasonably expect to find a position.

[30] The parties spent some considerable time in their submissions on the question of whether Mr. Stant's notice period should be assessed on the basis of his last nine years of employment or on the basis of 18 years of employment, that is, the total number of years he worked for Elaho. In 1995, Mr. Stant was paid $20,000 severance, and on December 31, 1994, he signed a release from future claims. In May 1996, he returned to Elaho in an hourly paid, unionized position, and then early in 1997 he resumed his previous duties. In my view, this is one of those cases in

which past service should be ignored. According to the release signed by Mr. Stant he left, as I mentioned, on December 31, 1994. Mr. Welch testified that Mr. Stant did not resume his logging supervisor's job until February 1997, having worked at a lower hourly paid position for several months in 1996. In my view, this is a complete break in the period of employment, and the earlier period of employment with Elaho should not be taken into account in assessing a reasonable notice period (see ***McIlvaney v. Estee Lauder Cosmetics***, [1991] B.C.J. No. 3408 (S.C.)).

[31] I therefore assess damages on the basis of Mr. Stant's employment with Elaho from May 1996 to December 2005, a period of nine years.

[32] I have considered the cases cited to me by counsel. One of those cases is ***Hamilton v. Doman Industries Ltd.***, [1992] B.C.J. No. 2004 (S.C.) in which Mr. Hamilton was awarded 12 months notice. Hamilton was 54 years-old. His annual salary was $54,500. He was a quality control supervisor at a lumber mill at the low end of management ladder. After his dismissal he faced a difficult job market and poor prospects. He had worked for the defendant for 12 years. In this case before me Mr. Stant had greater responsibilities than Mr. Hamilton, is somewhat older than Mr. Hamilton, has a somewhat limiting medical condition but probably faces a stronger job market.

[33] Another case involving a similarly situated plaintiff is ***Landry v. Canadian Forest Products***, [1992] B.C.J. No. 979 (C.A.). Mr. Landry was described in this way by Hinds J.A:

> As Woodlands manager of the combined Taylor and Fort St. John Divisions the appellant was in charge of a staff of 10 and a contract work force of between 200 and 250 workers. He was responsible for the delivery to the respondent's mills of approximately 1.3 million cubic meters of wood per year. His position entailed responsibilities for safety measures, budgeting, cost performance, forestry and logging planning, compliance with government regulations and supervision of personnel. He was responsible for a budget of approximately $18,000,000 per year. It was a position of responsibility and, in the hierarchy of the respondent, a large integrated forest products company which operates a number of divisions in British Columbia, he was in a middle management position.
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> At the time of his termination on June 15, 1990, the appellant was 47 years of age. He had worked for the respondent (or Peace) for 10 years and 10 months as a loyal and competent employee. His annual salary at the date of termination was $65,700 per annum plus a benefit package which cost the respondent approximately $15,000 per year.
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> In 1987 the appellant was diagnosed as having spinal degeneration and in 1990 he was diagnosed as having diabetes. Neither of those conditions precluded him from working.

[34] In considering the appropriate notice period Mr. Justice Hinds quoted from the following authority:

> In ***Ansari v. British Columbia Power Authority*** (1986), 13 C.C.E.L. 238 at p. 242, McEachern C.J.S.C. (as he then was) made the following frequently quoted statement:
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> In what is often regarded as a leading case, *Bardal v. Globe & Mail Ltd.*, [1960] O.W.N. 253, 24 D.L.R. (2d) 140 (Ont.H.C.), McRuer C.J.H.C. said at p. 145:

> There can be no catalogue laid down as to what is reasonable notice in particular classes of cases. The reasonableness of the notice must be decided with reference to each particular case, having regard to the character of the employment, the length of service of the servant, the age of the servant and the availability of similar employment, having regard to the experience, training and qualifications of the servant.
>
> . . .

[35] Later after reviewing a number of authorities and considering a number of subordinate factors, McEachern C.J.S.C. went on to say at p. 248:

> At the end of the day the question really comes down to what is objectively reasonable in the variable circumstances of each case, but I repeat that the most important factors are the responsibility of the employment function, age, length of service and the availability of equivalent alternative employment, but not necessarily in that order.

[36] Mr. Landry in that case was awarded 15 months notice. Mr. Landry was younger by ten years than Mr. Stant. He had some difficulty in finding alternative suitable employment. Mr. Landry was responsible for a larger operation than Mr. Stant.

[37] As I have already mentioned, the evidence about the availability or non-availability of alternative employment in this case is sparse. The burden of proof on this point is on the plaintiff. Given the evidence before me and the case law I have cited, I conclude that the appropriate notice period is 13 months.

EXTENSIONS OF NOTICE PERIOD BASED ON WALLACE FACTORS.

[38] The plaintiff relies upon the decision of ***Wallace v. United Grain Growers Ltd.***, [1997] 3 S.C.R. 701 for the proposition that he is entitled to extended notice. Mr. Stant points particularly to the wrongful accusation of theft, the refusal to provide

a letter of reference and the termination when Mr. Stant was disabled as ***Wallace***-type factors. In this case Elaho attempted to make amends as soon as it received legal advice. Elaho unconditionally offered Mr. Stant the opportunity to return to his previous employment. Mr. Stant has been paid his salary for the period following his termination to date, although I recognize it was not paid until shortly before trial. While I have decided that in the circumstances it was not unreasonable for Mr. Stant to have refused the offer of reemployment, I conclude that in this case Elaho made a genuine attempt to make amends, and I conclude that looking at the whole of the employer's conduct it cannot be said Elaho acted in bad faith or in such an egregious manner towards Mr. Stant that he should be entitled to extended notice. (see***Yanez v. Canac Kitchens***, [2004] O.J. No. 5238. For the same reasons, I would not award punitive damages.

DISPOSITION

[39] The plaintiff was wrongfully terminated, and is entitled to damages for wrongful dismissal.

[40] The notice period is 13 months.

[41] The plaintiff is entitled to MSP or the equivalent of MSP premiums.

[42] The claims for extended notice and punitive damages are dismissed.

(DISCUSSION BETWEEN COURT AND COUNSEL)

[43] Costs to the plaintiff should be on scale 3 then.

"N. Garson, J."
The Honourable Madam Justice N. Garson

May 10, 2006 – ***Revised Judgment***

Corrigendum to the Oral Reasons for Judgment issued advising that the names of counsel for the plaintiff and the defendant were listed incorrectly. The correct listing is J.D. Kondopulos as counsel for the plaintiff and A.E. Thiele and K. Okimaw as counsel for the defendant.