COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Lewis v. Lehigh Northwest Cement Limited,* 2009 BCCA 424

Date: 20091008
Docket: CA035818

Between:

Robert Lewis

Appellant/
Respondent on Cross Appeal
(Plaintiff)

And

Lehigh Northwest Cement Limited

Respondent/
Appellant on Cross Appeal
(Defendant)

Before: The Honourable Chief Justice Finch
The Honourable Mr. Justice Lowry
The Honourable Mr. Justice Groberman

On appeal from: Supreme Court of British Columbia, January 25 and March 28, 2008 (*Lewis v. Lehigh Northwest Cement Limited*, Docket S068175)

Counsel for the Appellant: S. K. Kent

Counsel for the Respondent: M. J. Weiler and E. A. Reid

Place and Date of Hearing: Vancouver, British Columbia
September 21, 2009

Place and Date of Judgment: Vancouver, British Columbia
October 8, 2009

Written Reasons by:
The Honourable Mr. Justice Lowry and
The Honourable Mr. Justice Groberman

Concurred in by:
The Honourable Chief Justice Finch

VANCOUVER
OCT - 8 2009
COURT OF APPEAL
REGISTRY

Reasons for Judgment of the Honourable Mr. Justice Lowry and the Honourable Mr. Justice Groberman:

[1] The question on this appeal is whether any error was made in awards of damages and costs in an action for wrongful dismissal.

[2] The appellant, Robert Lewis, was employed by the respondent, Lehigh Northwest Cement Limited, for 26 years. He became a manager of computer systems. He was dismissed without cause in September 2006, following a 28-month medical leave of absence, because there was no position available for him when he was able to return to work. He was then 58 years of age. Lehigh proposed to pay him 15 months' salary in severance, which he considered unacceptable. On a two-day summary trial, Mr. Justice Silverman concluded Mr. Lewis was entitled to 22 months' notice of his termination, and awarded damages of about $200,000. After further submissions on costs, he awarded Mr. Lewis what, after set-off, effectively amounted to only 30% of his costs. Mr. Lewis now appeals, and Lehigh cross appeals, with respect to various aspects of the awards.

Mr. Lewis's Salary

[3] Mr. Lewis began his medical leave in May 2004, at which time he was earning approximately $116,000 per year, as well as what was referred to as a special allowance of $10,000 paid to him only because he was, at the time, working for a related company in California. The position in California was not expected to be available beyond the end of May 2004 and, at least by November of that year, Mr. Lewis was told that position was no longer available to him. He nonetheless received disability benefits based on an income of $126,000 for the entire period he was on medical leave.

[4] The parties are at odds as to whether Mr. Lewis's salary at the time his employment was terminated can, for the purpose of awarding damages, be said to have been $116,000, as Lehigh says, or $126,000, as Mr. Lewis contends. The judge considered the relevant salary to be the salary at the time Mr. Lewis

commenced his medical leave and, on his consideration of the whole of the evidence bearing on the issue, he found Mr. Lewis's salary in that year to be the lesser amount. It did not include the special allowance which, as Mr. Lewis knew, would not have been available to him upon his return to work.

[5] Mr. Lewis says damages for loss of salary during the notice period are to be assessed at the date of the breach, citing *Noble v. Principal Consultants Ltd. (Trustee of)*, 2000 ABCA 133, 187 D.L.R. (4th) 80. He says the judge erred in speculating that the special allowance would in fact not have been available to him had he been permitted to return to work. We see no such error in the approach the judge took. He made a finding of fact as to the proper salary for the purposes of the calculation of damages based on his assessment of the evidence. No purpose would be served in discussing that evidence now because, as the judge noted, Mr. Lewis actually pleaded his "compensation package" included "an annual salary of approximately $116,150" as well as "compensation for services provided in the United States of America". It is argued that Mr. Lewis is for some reason not bound by his pleading, which he never sought to amend. We see no basis on which that should be so. In any event, the judge's conclusion on his assessment of the evidence was a finding of fact, and no sound basis is now advanced upon which this Court could interfere.

Annual Raise in Salary

[6] Mr. Lewis received an annual increase in his salary of about 3% in each of the five years preceding his medical leave. It was not an express term of his employment contract, and certainly not a pleaded term. However, Lehigh's employees received discretionary increases in salary of 3% to 4% subsequent to Mr. Lewis's employment being terminated and he contends he is entitled to have his salary as of the date he was terminated adjusted accordingly over the course of the 22-month notice period for the purpose of assessing his damages. He says the salary amount should be increased by 3% for the first 12 months and then increased a further 3% for the next 10 months. He relies on *Turner v. Canadian Admiral Corp.*

(1980), 1 C.C.E.L. 130 (Ont. H.C.), where annual increases, historically received as a matter of course every year, were taken into account, as Mr. Lewis maintains the judge should have done here.

[7] Apart from what can be taken from his finding that the appropriate salary for the purpose of calculating damages was $116,150, the judge said nothing about taking into account salary increases. Mr. Lewis contends for an implied term of his employment contract that he, like others, would have received an increase in salary had he continued to work at Lehigh beyond September 2006.

[8] Discretionary increases in salary, like salary bonuses, usually reflect an assessment of the organization's financial performance and an employee's job performance. Mr. Lewis's situation differed from other employees. He had been on an extended medical leave, during which, unlike other employees, he had of course made no contribution to Lehigh's financial performance and he had no job performance to assess. We do not consider the judge was bound to find an implied term of Mr. Lewis's employment contract to the effect he would, in the circumstances, have received a discretionary increase in salary during the 22 months following September 2006.

Pension Benefits

[9] Mr. Lewis contends he is to be compensated for what he maintains are the pension benefits that would have accrued over the notice period. It is clear that, as a matter of principle, Mr. Lewis was entitled to damages in respect of the pension benefits he lost as a result of the employer's failure to give him proper notice prior to termination; these were an integral part of his remuneration for employment: *Durrant v. British Columbia Hydro & Power Authority* (1990), 49 B.C.L.R. (2d) 263 (C.A.).

[10] The company's pension plan was a defined benefit plan. The value of the employee's pension was determined by two factors – the employee's average salary for the five years when he or she was most highly remunerated (the employee's "pensionable earnings"), and the total length of the employee's pensionable service.

When a beneficiary qualified for an unreduced pension, the total annual pension entitlement was 2% of the employee's pensionable earnings multiplied by the number of years of pensionable service. As is usual in defined benefit plans, the benefits paid by the plan are reduced to take into account benefits provided by the Canada Pension Plan; thus, rather than paying 2% on all pensionable earnings, the company plan only pays 1.4% on earnings up to the average "year's maximum pensionable earnings" (YMPE) for the Canada Pension Plan for the years on which the pensionable earnings are calculated.

[11] Mr. Lewis had 22.25 years of pensionable service, and pensionable earnings of $125,821. The average YMPE was $40,100, so the difference between his pensionable earnings and the average YMPE was $125,821 - $40,100 = $85,721. The formula to determine his unreduced annual pension was, therefore:

> ((1.4% × $40,100) + (2.0% × $85,721)) × 22.25 = $50,637/yr.
> ($4,219.75/month)

[12] The plan provided beneficiaries in Mr. Lewis's position with several different options as to how they would receive their benefits. He could accept a monthly pension of $4,219.75 for life, beginning at age 62 (guaranteed for five years in the event of early death), or could accept a reduced pension payable at an earlier date, or guaranteed for a longer period of years. He could also accept a lesser pension that would continue to provide specified payments to his wife after his death if she survived him. Finally, he could choose to have a lump sum representing the value of the pension transferred to a self-directed retirement account. In all, he had nine different options that he could elect.

[13] Mr. Lewis chose to have his pension entitlement paid to him as a lump sum, and received a total of $596,312. Among his reasons for choosing a lump sum was his belief that he could invest the funds with a higher rate of return than he would receive by electing any of the pension options. This proved not to be the case.

[14] At trial, Mr. Lewis claimed that if he had remained employed, he would not have qualified to receive a lump sum until his termination date. The lump sum

payable on termination would have been significantly greater. Although there was no evidence establishing the value of the pension after a 22-month notice period, there was actuarial evidence establishing a present value for the pension of $645,033 following a 15-month notice period and at least $675,332 after a 24-month period. The plaintiff claimed an entitlement to the difference between the lump sum he actually received and the lump sum that he would have been eligible to receive had he elected to receive a lump sum at the end of the notice period.

[15] Not surprisingly, the trial judge rejected that measure of damages. He noted that Mr. Lewis had withdrawn his entitlement from the pension fund on termination, and held that he was, therefore, not entitled to any growth that his entitlement would have enjoyed had it been left in the fund. He found that Mr. Lewis was not entitled to any amount for loss of pension entitlement.

[16] We consider the trial judge was right to deny the claim as it was put forward by Mr. Lewis. He was not entitled to withdraw his funds from the pension plan, and still be compensated for growth that those funds would have attracted had they remained in the plan.

[17] In completely rejecting Mr. Lewis's claim, however, the trial judge ignored the fact that Mr. Lewis would have had an additional 22 months of pensionable service had he been employed by Lehigh to the end of the notice period. The additional pension rights would have accrued not from the funds that he took out of the pension fund, but from his additional pensionable service. Mr. Lewis did not in any way waive his right to damages in respect of the loss of pensionable service by taking a lump sum payout of his pension.

[18] Unfortunately, because Mr. Lewis made a more extravagant claim, and because Lehigh argued that he was not entitled to anything in respect of lost pension entitlement, the evidence adduced does not explicitly address the value of the lost pensionable service. Fortunately, however, because the benefit entitlement formula is fairly straightforward, a fair estimate of his loss can be made.

[19] Had Mr. Lewis been credited with a further 22 months of pensionable service, his pensionable service would have been 24 years and 1 month rather than 22 years and 3 months, an increase in pensionable service of 8.24%. This would have resulted in an increased pension entitlement, also of 8.24%:

((1.4% × $40,100) + (2.0% × $85,721)) × 24.083 = $54,809/yr.
($4,567.44/month)

[20] It follows that if Mr. Lewis had been credited for 22 additional months of pensionable service, he would have received a lump sum 8.24% greater than the sum he received. Instead of receiving $596,312, he would have been entitled to $645,448, a difference of $49,136.

[21] The pension plan was a contributory one, and Mr. Lewis did not, of course, have to make contributions after he ceased to be enrolled in the pension plan. The evidence indicates that his contributions would have been $5,000 for a 21-month period. Extrapolating that amount to account for a 22-month notice period suggests that he saved $5,238. This amount should be deducted from his loss of pension entitlement in order to establish the appropriate award of damages.

[22] It follows that Mr. Lewis ought to have been awarded the amount of $43,898 for loss of pension entitlement.

[23] Lehigh contends this amount overstates Mr. Lewis's loss, because the pension plan did not have the benefit of his contributions during the notice period. We do not consider this to be of any moment for a number of reasons. First, and most important, Mr. Lewis's lump sum entitlement is a value already discounted to reflect the commuted value of his pension on the date that he chose to receive his benefit. The $43,898 figure represents the loss to Mr. Lewis as at that date, not as at the date that his notice period would have ended. There is, therefore, no need for any further actuarial calculations to account for "early" access to the benefit.

[24] As well, it should be remembered that liability for the loss of pension entitlement (as opposed to liability for the pension itself) is a liability of the employer,

and not of the pension fund. Finally, it should be pointed out that Mr. Lewis was not entitled (much less required) to contribute to additional pension entitlement once he was terminated.

[25] We find, therefore, that the judge erred in not including Mr. Lewis's lost pension entitlement in the damages awarded. Properly analysed, Mr. Lewis's loss attributable to reduced pensionable service was $43,898 as at the date of termination.

Mitigation

[26] For about three months following his termination in September 2006, Mr. Lewis took no steps toward finding alternative employment. He then embarked on searching, and applying, for a variety of positions, somewhat tenuously in January and February of 2007 and then more earnestly thereafter. The parties divide over whether his efforts constitute what was required of him to mitigate the damages attributable to his being wrongfully dismissed. On his review of the evidence, the judge found Lehigh had failed to discharge its onus of proving a failure to mitigate. The judge said he was satisfied Mr. Lewis's efforts to find employment were "genuine and sufficient" and that he was "unable and indeed unlikely to have found suitable employment in any event" given his age, his history of medical leave, and the arthritis from which he had begun to suffer at the time his employment was terminated. By its cross appeal, Lehigh challenges the judge's conclusion – a conclusion which is, of course, essentially a finding of fact: *Mosher v. Epic Energy Inc.*, 2001 BCCA 253, [2001] 6 W.W.R. 218 at para. 20.

[27] Lehigh's challenge appears to us to be no more than an attempt to re-argue the case it advanced at trial where it maintained Mr. Lewis had done nothing but go through the motions of trying to find alternative employment. Lehigh focuses on two aspects of its case. It first says Mr. Lewis was not entitled to wait three, if not five, months to begin seeking alternative employment in earnest. Lehigh then says he restricted his opportunities by determining he would not relocate and, further, actually turned down an acceptable position with Lehigh's chief competitor in eastern

Canada, although that assertion requires drawing an adverse inference concerning some notes Mr. Lewis had made, which the judge declined to draw.

[28] The principal difficulty with Lehigh's contention is that the question raised on both counts is fundamentally one of what was reasonable in the circumstances. With respect to the first, the judge concluded:

> [67] I am not satisfied that the date that he started his search was unreasonably delayed. These courts have recognized the appropriateness of delays in such situations, and I refer to *Jackson v. SNC Lavalin Engineers & Constructors Inc.*, 2003 BCSC 394.

[29] With respect to the second, the judge said:

> [66] Given his age, the number of years of service, and his medical condition, I am not satisfied that the self-imposed restrictions that he placed on himself were unreasonable. I am not satisfied that his notes of August 9 point to anything other than an ambiguity which may or may not have been a job offer, and I am unable to resolve that one way or the other, so that it remains ambiguous in my mind. But I am certainly not satisfied that he had a real job offer which he could have accepted, but instead turned down.

[30] Unless it could be said it was not open to the judge on the evidence to conclude as he did that Lehigh had failed in establishing that Mr. Lewis had not acted reasonably in attempting to mitigate his loss, there is no place for the intervention of this Court. Lehigh's contention appears confined to urging upon us a different view of the evidence than that taken by the judge. There are instances when delays in seeking alternative employment have been held to be reasonable and not evidence of a failure to mitigate. See, for example, *Smith v. Aker Kvaerner Canada Inc.*, 2005 BCSC 117, and *Stuart v. Navigata Communications Ltd.*, 2007 BCSC 463, [2007] 9 W.W.R. 504. By the same token, it cannot be said that a self-imposed restriction on relocation can never be said to be reasonable. Both are matters to be considered having regard for the circumstances of the dismissed employee involved. Here, the judge carefully considered Mr. Lewis's situation and concluded that, having regard for his age and health in particular, he had not been shown to have acted unreasonably – Lehigh had not proved he failed to mitigate his

damages. We do not consider there to be any basis on which it could be said it was not open to the judge to reach that factual conclusion.

Costs

[31] The judge awarded costs 65% to Mr. Lewis and 35% to Lehigh, setting one against the other. The judge did so on the basis of Rule 57 (9) and (15):

> 57 ...
>
> (9) Subject to subrule (12), costs of and incidental to a proceeding shall follow the event unless the court otherwise orders.
>
> * * *
>
> (15) The court may award costs that relate to some particular issue or part of the proceeding or may award costs except so far as they relate to some particular issue or part of the proceeding.

[32] In the result, having succeeded in obtaining almost a $200,000 judgment against Lehigh for having been wrongly dismissed in breach of his contract of employment after 26 years with the company, Mr. Lewis cannot recover more than 30% of his costs of the action.

[33] The judge took the view there was divided success: Mr. Lewis succeeded on some issues and Lehigh succeeded on other issues, warranting a departure from Rule 57(9). The judge stated the issues as follows:

> [6] The issues that were dealt with at the trial and dealt with in my Reasons were seven, and they are as follows:
>
> 1. How much notice was reasonable notice;
> 2. What was the date of termination;
> 3. What was the amount of the plaintiff's salary;
> 4. Whether the plaintiff had lost any bonus money;
> 5. The amount of pension funds to which the plaintiff was entitled;
> 6. Whether the plaintiff was entitled to *Wallace* damages;
> 7. Whether the plaintiff had taken sufficient steps to mitigate his loss.
>
> There was evidence, argument, and Reasons with respect to each of these issues. The decision I made with respect to each had an effect on the final damage award.

[34] He appears to have seen the issues as discrete, occupying distinct portions of time in the two-day summary trial and involving discrete questions of law or fact upon which it could be said one or the other of the parties was successful, quoting from *Poirier v. Wal-Mart Canada Corp.*, 2007 BCSC 66, 69 B.C.L.R. (4th) 106 at para. 46. He identified the importance of each issue, identified which party had been successful and said:

> [26] ... I have determined and order that there will be a split of costs in this case in the amount of 65/35 in favour of the plaintiff. My assessment is that 65% of the success in these proceedings has fallen to the benefit of the plaintiff. The plaintiff is therefore entitled to recover 65% of his costs. The defendant is entitled to recover 35% of its costs. Each party is entitled to have their costs set off against the other, the difference to be paid to the party in whose favour it lies.

[35] It is not for this Court to interfere with the trial judge's award of costs unless it can be said that, in making the award, he made an error in principle. We consider, however, that is what has happened here.

[36] The governing authority on the applicability of Rule 59(15) is this Court's recent decision in *Sutherland v. Canada (Attorney General)*, 2008 BCCA 27, 77 B.C.L.R. (4th) 142. There, it was made clear that apportioning costs is unusual:

> [7] Applications to apportion costs are not a regular part of litigation. They should be confined to relatively rare cases: *British Columbia v. Worthington (Canada) Inc. et al.* (1988), 32 C.P.C. (2d) 166, 29 B.C.L.R. (2d) 145 (B.C.C.A.) (*Worthington*).

[37] In *Sutherland* at para. 26, it was said that absent special considerations, a successful litigant can reasonably expect an order for the payment of his costs, citing *Currie v. Thomas* (1985), 19 D.L.R. (4th) 594 (B.C.C.A.) at 608.

[38] This is not a rare case; there is nothing extraordinary about it. There were two primary issues: 1) what notice of the termination of his contract of employment Mr. Lewis was entitled to receive; and 2) what damages he was to be awarded as a consequence of Lehigh's breach of the employment contract. Those two issues, and each of the sub-issues pertaining to the award of damages, with the possible exception of the claim for what are referred to as *Wallace* damages (*Wallace v.*

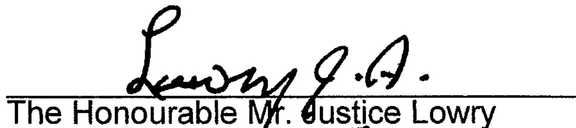
United Grain Growers Ltd., [1997] 3 S.C.R. 701), are the kind of issues that routinely arise in actions for wrongful dismissal. Mr. Lewis simply failed to prove all of the damages he claimed. We are unable to see any basis upon which it could be said this is a case that gives rise to special considerations permitting Rule 57(15) to be invoked.

[39] Mr. Lewis was successful in his action against Lehigh. He was awarded almost $200,000 (now to be increased by $43,898). There is, in our view, no sound reason in principle why he should be able to recover no more than 30% of his costs. He is entitled to tax his costs of the action. There should be no allocation of costs between the parties.

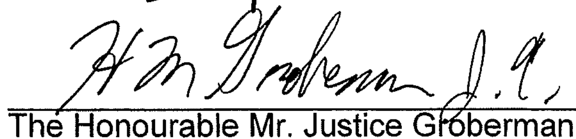
<u>Disposition</u>

[40] We would allow the appeal, set aside the award of damages and increase the amount that was awarded by $43,898. We would set aside the order apportioning the costs of the action between Mr. Lewis and Lehigh and substitute an order awarding Mr. Lewis the costs of the action.

[41] We would dismiss the cross appeal.

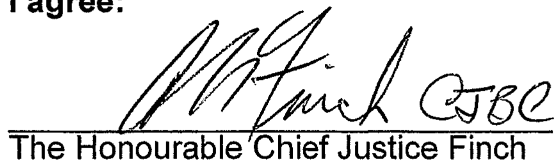


The Honourable Mr. Justice Lowry



The Honourable Mr. Justice Groberman

I agree:



The Honourable Chief Justice Finch