IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Wong v. Polynova Industries Inc.,*
2021 BCSC 603

Date: 20210401
Docket: S229106
Registry: New Westminster

Between:

Jason Wong

Plaintiff

And

Polynova Industries Inc.

Defendant

Before: The Honourable Mr. Justice Tammen

Reasons for Judgment

Counsel for the Plaintiff:	J. Wu
Counsel for the Defendant:	B.E. Tarnow
Place and Date of Trial:	New Westminster, B.C. February 12, 2021
Place and Date of Judgment:	New Westminster, B.C. April 1, 2021

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Introduction and Overview

[1] At issue in this summary trial is the termination of an employment relationship between the parties. The plaintiff, Jason Wong, submits that he was terminated without cause after 15 years of continuous employment with the defendant, Polynova Industries Inc. ("Polynova"). Polynova submits that Mr. Wong abandoned his job, thereby repudiating the employment contract, and that it accepted the repudiation in April, 2020. In the alternative, Polynova submits that Mr. Wong has failed to mitigate his damages by declining Polynova's offer of re-employment in July, 2020.

[2] The parties agree that the matter is suitable for determination by summary trial, and that the aforementioned are the sole issues I must determine, apart from quantum of damages, if I find that Mr. Wong was wrongfully dismissed.

[3] The defendant is a small business, with premises in Richmond, British Columbia, that manufactures and sells poly bags. Dennis Wong is the owner and president of Polynova. Wendy Kwong is the human resources manager of Polynova, and the spouse of Dennis Wong. Polynova has 57 employees.

[4] The plaintiff is 70 years old. He started working at Polynova as a machinist in March, 2005, and thus as of March, 2020, had 15 years of continuous service. He worked full time and was paid an hourly wage. His gross income was approximately $42,000.00 in 2019.

The Facts

[5] The essential facts are uncontroversial and straightforward.

[6] On March 24, 2020, the plaintiff communicated with a supervisor at Polynova, albeit not his direct supervisor, using a platform called WeChat. In that communication, the plaintiff said he was not feeling well, and would be resting at home for a few days. Apparently the reason the plaintiff reported to that individual, Steven Fung, rather than his actual supervisor, was based on a personality conflict that led to Mr. Fung acting as an intermediary in that regard. On March 24, 2020,

Mr. Fung advised the plaintiff that he would pass on the information to the "person at the relevant department."

[7] There was a further WeChat exchange between the plaintiff and Steven Fung on March 27, 2020. Mr. Fung advised the plaintiff that it would be best if he told "boss Wong" directly about his intended absence from work. There was then an exchange about the availability of emergency pandemic benefits. The plaintiff concluded by advising Mr. Fung that he did not have the boss's WeChat contact information, and thus asked Mr. Fung to pass on that the plaintiff would be isolating at home for two weeks.

[8] There was then a complete failure to communicate between the parties for over two months.

[9] The plaintiff did not return to work until June 1, 2020. In the interim, he did not attempt to communicate with anybody at Polynova about his extended absence.

[10] Dennis Wong attempted twice to telephone the plaintiff in April, 2020, but was not able to speak with him. That is in hindsight unsurprising, since the plaintiff had disconnected his land line, which was the only phone number on file for him at Polynova.

[11] Polynova made no effort to communicate with the plaintiff in writing, or in any formal manner. Significantly, Polynova did not advise the plaintiff that if he did not return to work by a certain date, he risked losing his job, nor did Polynova issue a Record of Employment ("ROE") to the plaintiff.

[12] During the month of April, 2020, Polynova trained an employee to do the plaintiff's job, and considered that person to have effectively replaced the plaintiff.

[13] On June 1, 2020, the plaintiff attended at work for a regular shift. He clocked in and had his temperature taken by Wendy Kwong, who then telephoned Dennis Wong to advise him that the plaintiff had returned to work. At Dennis Wong's request, the plaintiff waited in a break room, rather than commence work.

[14] There was then a brief meeting between Dennis Wong and the plaintiff. The conversation that occurred is in dispute.

[15] The plaintiff described the meeting in his affidavit as follows:

> 17. At around 9:00AM or so, President Wong approached and escorted me to his office. There, he asked me why I was here in which I responded I am here to work. He then told me that he already had someone doing my job but that since I was here today, he would pay me four hours of work and that I can go home. He also added that because my age was old ad dirt, I ought to be retiring anyways.
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> 18. I confirmed with President Wong whether he was laying me off. He confirmed that he was laying me off and that he would issuing my Record of Employment shortly.

[16] Dennis Wong described the meeting in this way:

> 21. At approximately 9am I arrived at Polynova and met briefly with Jason in my office. I told Jason that I was surprised to see him there as he had failed to attend work for an extended period, and also failed to communicate with the company regarding his absence. I explained to him that I tried to contact him during his absence on a few occasions, without success.
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> 22. In response to paragraph 17 of Jason's affidavit, during our brief meeting at no time did I say to Jason that he was "old as dirt" and I did not suggest to him that it was time for him to retire. Jason had previously mentioned the possibility of retirement to management on several occasions and he had been absent about one day/week for several months prior to March 2020, and so I did ask him if during his extended absence if he retired, to which he did not provide a direct response.
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> …
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> 25. At the conclusion of the meeting, Jason asked for "paperwork", and I advised him that Polynova would send him a Record of Employment (ROE) within a few days. As noted above, at no time did I advise or represent to Jason that the ROE would indicate that he was "laid off".
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> 26. I further advised Jason that, notwithstanding that he abandoned his employment, the Company would provide him with a gratuitous payment equivalent to four hours pay. As Jason did not conduct any maintenance work that morning, this payment was obviously not for any work performed but rather as a sign of good will. This gesture was consistent with Chinese culture that I practice of treating other with generosity and respect.

[17] On June 2, 2020, Dennis Wong wrote to the plaintiff in relation to the ROE. In that letter, Dennis Wong advised the plaintiff that, after obtaining an opinion from outside consultants, Polynova decided it could not issue the ROE for an "EI

application" and provided the reasons. In essence, the reasons were an assertion that the plaintiff had quit his job by his extended unexplained absence, and that Polynova had arranged for other workers to cover the plaintiff's duties.

[18] The plaintiff became extremely concerned that he would not qualify for either Employment Insurance benefits or the Canada Emergency Relief Benefit if he was deemed to have quit his job. The plaintiff also disagreed with the characterization of the circumstances in the June 2, 2020 letter. He thus wrote to Polynova on June 4, 2020, setting out his position on the matter, and requested compensation in lieu of notice, assuming termination of his employment by Polynova.

[19] Dennis Wong responded by email on June 4, 2020, reiterating Polynova's position, and again advising that the ROE would be issued as soon as possible.

[20] The ROE was issued on June 10, 2020. It was completed by Wendy Kwong.

[21] The ROE indicates "Quit" as the reason for its issuance, and lists the plaintiff's last day of work as March 23, 2020. There is no reference in the ROE to payment for any employment income on June 1, 2020. Polynova issued a final paycheque to the plaintiff for 4 hours work at his regular wage on June 1, 2020.

[22] Wendy Kwong deposed that she believed all the data in the fields she populated in the ROE were accurate, and she had no intention to mislead. She said she entered the gratuitous payment for June 1, 2020 into the computer software as a "special payment", since the plaintiff did not perform any actual work on June 1, 2020.

[23] On June 12, 2020, the plaintiff wrote to Dennis Wong, disputing the accuracy of the ROE, and advising that he had consulted counsel regarding his legal options, which he listed in the letter. Among the options were a lawsuit in Supreme Court and a complaint to the BC Human Rights Tribunal.

[24] On July 9, 2020, Polynova wrote to the plaintiff, offering him re- employment at the same rate of pay, with back pay to June 1, 2020, commencing July 13, 2020.

[25] On July 12, 2020, the plaintiff rejected that offer, citing breakdown of good faith between the parties.

Issues

[26] The issues I must determine are these:

1) What is the correct legal characterization of the termination of the plaintiff's employment by the defendant?
2) Has the defendant proved that the plaintiff failed to mitigate his damages, by refusing the offer of re-employment?
3) If I find wrongful termination, what is the appropriate notice period?
4) Is the plaintiff entitled to aggravated and/or punitive damages?

Discussion and Analysis

Issue 1: Termination of employment

[27] The employment relationship is a contractual one, and as such is governed by the law of contract. Many employment contracts, as is the case here, are not in writing, and contain many implied terms. One of the important implied terms is that neither party will terminate the contract without notice to the other. The law requires that an employer who wishes to terminate an employment contract, other than for cause, must give an employee reasonable notice. Absent such notice, the employee may sue for damages.

[28] If, on the other hand, an employee terminates the contract and thereby repudiates it, the employee may not sue for damages. An employee can repudiate an employment contract by resigning, quitting or abandoning their job. In order to constitute repudiation at law, the employer must also accept the repudiation.

[29] In this case, Polynova submits that by his conduct, failing to come to work for over two months without communicating his reasons to the employer, the plaintiff abandoned his job. That, says Polynova, was a repudiation of the employment

contract, which Polynova accepted in April, when it trained another employee to do the plaintiff's job.

[30] The defendant submits that I should apply a wholly objective test to the conduct of the plaintiff, and when I do so, it is obvious that it was objectively reasonable for the defendant to conclude that the plaintiff had abandoned his employment.

[31] The plaintiff submits that he did not quit or abandon his job, but rather was on an extended leave of absence, which the employer knew. The plaintiff submits that I should consider his subjective intention in considering the question of abandonment, citing *Beggs v. Westport Foods Ltd*., 2011 BCCA 76. At paras. 36 and 37, Madam Justice Smith for the Court said this:

> [36] It is common ground that both a dismissal by an employer and a voluntary resignation by an employee require a clear and unequivocal act by the party seeking to end the employment relationship. There is a distinction, however, in the tests to be met in order to establish each of these methods for ending the employment relationship. A finding of dismissal must be based on an objective test: whether the acts of the employer, objectively viewed, amount to a dismissal. A finding of resignation requires the application of both a subjective and objective test: whether the employee intended to resign and whether the employee's words and acts, objectively viewed, support a finding that she resigned.
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> [37] David Harris summarizes the distinction between the two methods in his text *Wrongful Dismissal*, loose-leaf (consulted on 13 January 2011), (Toronto: Thompson Canada Ltd. 1989) at pages 3-4, 3-5 and 3-9:
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> > §3.0 Dismissal
> >
> > Summary: Dismissal is a matter of substance, not form. It is effective when it leaves no reasonable doubt in the mind of the employee that his or her employment has already come to an end or will end on a set date
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> > ...
> >
> > The crucial factor in assessing the effectiveness of a dismissal is the clarity with which it was communicated to the employee. Mr. Justice Macfarlane of the British Columbia Court of Appeal stated the law in this regard as follows in *Kalaman v. Singer Valve Co.* (1997), 1997 CanLII 4035 (BC CA), 31 C.C.E.L. (2d) 1, 93 B.C.A.C. 93, 151 W.A.C. 93, 38 B.C.L.R. (3d) 331, [1998] 2 W.W.R. 112, 97 C.L.L.C. 210-017, 1997 Carswell BC 1459, [1997] B.C.J. No. 1393:

> A notice must be specific and unequivocal such that a reasonable person will be led to the clear understanding that *his or her employment is at an end at some date certain in the future*. Whether a purported notice is specific and unequivocal is a matter to be determined on an objective basis in all the circumstances of each case. (p. 11 [C.C.E.L.]; emphasis added)
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> ...
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> §3.0A Dismissal versus Voluntary Resignation
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> Summary: The test for voluntary resignation (as opposed to dismissal) is objective, focusing on the perceptions of a "reasonable employer" of the intentions of the employee based on what the employee actually says or does or, in some cases, on what he or she fails to say or do. Among the relevant circumstances are the employee's state of mind, any ambiguities in relation to the conduct which is alleged to constitute "resignation" and, to a certain degree, the employee's timely retraction, or attempted retraction, of his or her "resignation."
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> [Emphasis added.]

[32] The defendant says that the test for voluntary resignation is, as noted in the indented quote from the text by D. Harris, objective, and that other judgments of the Court of Appeal, decided both before and after *Beggs*, have applied an objective test. The defendants point to the discussion on this topic in *Conway v. Griff Building Supplies Ltd*., 2020 BCSC 1899, a decision of Justice Gomery.

[33] Like Gomery J. in *Conway*, I find it unnecessary to determine this interesting question. In my view, the evidence before me amply supports the plaintiff's position that he did not intend to resign his position. However, it equally supports the defendant's position that it was objectively reasonable for Polynova to conclude that the plaintiff had in fact abandoned his job, effectively resigning through his conduct.

[34] Nonetheless, this case really turns on the question of acceptance of repudiation of the contract by the defendant. I find that Polynova did not accept the repudiation of the employment contract. All of Polynova's conduct, at least that directed at the plaintiff, is inconsistent with such acceptance.

[35] Here, I refer to the failure to make formal inquiries of the plaintiff; the modest efforts to contact him at all; the failure to terminate his health benefits; the failure to put him on notice that his job was at risk; and, most importantly, the failure to issue a ROE to the plaintiff until June 10, 2020, approximately two months after Polynova says it accepted the repudiation.

[36] Polynova knew the plaintiff would not be at work for approximately 14 days, commencing March 27, 2020. When he had not returned by mid-April, Polynova decided to train another employee to perform the plaintiff's duties. That, says the defendant, constituted acceptance of the repudiation. However, Polynova did nothing to communicate that acceptance to the plaintiff. Indeed, all the other actions (or inaction) of the defendant are consistent with an intention to continue to employ the plaintiff.

[37] It would clearly have been to the defendant's benefit to remove the plaintiff from the benefits scheme. That did not occur until June, 2020. If the defendant considered that the plaintiff had resigned, the ROE should have issued immediately. The timing of the issuance of the ROE is consistent with the defendant terminating the employment relationship in June, 2020, not the plaintiff doing so in April, 2020. I accept Ms. Kwong's evidence that she did not deliberately input misleading data in the ROE. However, I cannot accept her stated reason for the delay in issuing the ROE. She affirmed that the sole reason she did not issue it before June 10, 2020 was because she was focused on implementing safety measures related to the pandemic. I fail to see how such tasks could prevent her from dealing with something as routine as issuing a ROE for an employee who resigned his position.

[38] In my view, the reason the defendant did not issue the ROE to the plaintiff in April or May, 2020 was because Polynova had not accepted any perceived repudiation of the employment contract by the plaintiff. Thus, when the defendant advised the plaintiff on June 1, 2020, that he no longer had a job at Polynova, that action amounted to termination without notice.

Issue 2: Failure to mitigate

[39] An extremely helpful discussion on this topic is contained in *Beggs*, at paras. 44-47. The salient parts, for present purposes are as follows:

> [44] The test for establishing an employee's failure to mitigate was summarized in *Evans v. Teamsters Local Union No. 31,* 2008 SCC 20, [2008] 1 S.C.R. 661:
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> > [30] I do not mean to suggest with the above analysis that an employee should always be required to return to work for the dismissing employer and my qualification that this should only occur where there are no barriers to re-employment is significant. This Court has held that the employer bears the onus of demonstrating both that an employee has failed to make reasonable efforts to find work and that work could have been found (*Red Deer College v. Michaels,* 1975 CanLII 15 (SCC), [1976] 2 S.C.R. 324). Where the employer offers the employee a chance to mitigate damages by returning to work for him or her, the central issue is whether a reasonable person would accept such an opportunity. In 1989, the Ontario Court of Appeal held that a reasonable person should be expected to do so "[w]her the salary offered is the same, where the working conditions are not substantially different or the work demeaning, and where the personal relationships involved are not acrimonious" (*Mifsud v. MacMillan Bathurst Inc.* (1989), 1989 CanLII 260 (ON CA), 70 O.R. (2d) 701, at p. 710). In *Cox,* the British Columbia Court of Appeal held that other relevant factors include the history and nature of the employment, whether or not the employee has commenced litigation, and whether the offer of re-employment was made while the employee was still working for the employer or only after he or she had already left (paras. 12-18). In my view, the foregoing elements all underline the importance of a multi-factored and contextual analysis. The critical element is that an employee "not [be] obliged to mitigate by working in an atmosphere of hostility, embarrassment or humiliation" ([*Farquhar v. Butler Brothers Supplies Ltd.* (1988), 1988 CanLII 185 (BC CA), 23 B.C.L.R. (2d) 89]*,* at p. 94), and it is that factor which must be at the forefront of the inquiry into what is reasonable. Thus, although an objective standard must be used to evaluate whether a reasonable person in the employee's position would have accepted the employer's offer (*Reibl v. Hughes,* 1980 CanLII 23 (SCC), [1980] 2 S.C.R. 880), it is extremely important that the non-tangible elements of the situation - including work atmosphere, stigma and loss of dignity, as well as nature and conditions of employment, the tangible elements - be included in the evaluation.
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> …

> [46] The context in which the offer was made is also relevant. The offer was made on August 28, 2009, after the appellant had rejected the respondent's explanation for her absence. The respondent's evidence was that by this point she felt the letters from the appellant's lawyer were "very cold hearted [and] cruel".
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> [47] In my view, any chance of repairing the employment relationship was irretrievably lost after the parties' lawyers became involved in an exchange of allegations that were markedly unhelpful to their respective clients' interests. It is not surprising that by August 28, 2009, the respondent no longer had any interest in returning to the appellant's workplace. A reasonable person, in my view, would not have been expected to accept the offer in these circumstances. I would not accede to this ground of appeal.

[40] Much of what is said at para. 47 of *Beggs* applies with equal force in this case. After June 1, 2020, the parties became entrenched in their positions, and their communication took on an adversarial tone. There was fundamental disagreement about which party had terminated the employment relationship. The plaintiff's belief, which may not have been accurate, but was certainly sincerely held, was that Polynova had deliberately scuppered his chances of obtaining Employment Insurance benefits by stating on the ROE that he quit his job.

[41] The defendant, in its initial letter to the plaintiff on June 1, 2020, claimed that it had already received advice from a third party concerning the ROE. The communication between the parties then became increasingly strident, commencing with the exchange of letters on June 4, 2020, and culminating in the formal demand letter the plaintiff delivered on June 12, 2020. The defendant did not respond for almost a month, finally delivering the offer of re-employment on July 9, 2020. It can be assumed the defendant had once again consulted a third party, as it had done on June 1, 2020.

[42] It is hardly surprising that the plaintiff perceived the trust between the parties to have been irreparably broken by that time. From his perspective, his only remaining viable options were legal ones. The defendant must have recognized that fact, and prepared a carefully worded offer of continuing employment. It was reasonable for the plaintiff to decline such an offer, given the irretrievably damaged relationship between the parties at that juncture.

[43] I do not find that the plaintiff failed to mitigate, and thus he is entitled to damages in lieu of notice.

Issue 3: Appropriate notice

[44] The plaintiff submits a reasonable notice period is 20 months. He notes that the plaintiff's age and lack of facility with English will make it exceedingly difficult for him to secure employment.

[45] The defendant submits that 10 to 11 months' notice is reasonable. The defendant notes that the plaintiff held a skilled labour position, as opposed to a management role.

[46] Each of the parties relies on several cases in support of its proposed notice period. However, each concedes that a determination of what constitutes reasonable notice in a given case is a very fact-specific exercise.

[47] In my view, an appropriate period of notice is 15 months, which amounts to one month for each year of continuous service. I have taken into account the age of the plaintiff, which will no doubt make it more difficult for him to secure alternate employment. Many cases have recognized that for older employees, those too young to retire, but too old to retrain or dramatically alter career paths, increased notice is appropriate.

[48] However, in this case, I have also considered the evidence of Dennis Wong that the plaintiff had spoken to management of possible retirement, and had been absent from work an average of one day per week for several months prior to March, 2020. The plaintiff did not respond to those assertions in his reply affidavit. Nor did the plaintiff state what his long term plans were, in particular, for how long he wished to continue to work.

[49] On balance, 15 months seems like an appropriate period of notice. Based on annual earnings of $42,000.00, the plaintiff is entitled to an award of $52,500.00 for breach of the employment contract.

Issue 4: Aggravated/punitive damages

[50] The law in Canada is now well settled that the fact of termination does not give rise to a claim for aggravated damages, but the manner of termination may do so in certain circumstances. Conduct of the employer which is marked by bad faith, dishonesty or may otherwise be viewed as treating the employee unfairly will often lead to an award of aggravated or punitive damages.

[51] However, the two types of damages are not identical. Aggravated damages are compensatory, designed to recognize the impact on the plaintiff, usually emotional upset and damage to sense of self-worth, caused by the conduct of the employer at time of termination. Punitive damages are intended to punish the employer for reprehensible conduct and deter others from behaving in that fashion.

[52] In my view, neither aggravated damages nor punitive damages are appropriate in this case. I do not find any bad faith or dishonesty on the part of Polynova. There was nothing unusual about the manner of termination. The parties had a fundamental disagreement about which of them had terminated the employment relationship. That disagreement required a ruling from the court. There was nothing dishonest nor unreasonable in the behaviour of the defendant.

[53] I do not find that Dennis Wong made the comments attributed to him by the plaintiff during the June 1, 2020 meeting. Nor do I find that Dennis Wong made any assurances about the content of the ROE that would be forthcoming. I accept that Wendy Kwong filled out that form based on the reasonably held belief that the plaintiff had abandoned his employment. The failure of the defendant was in not communicating their belief to the plaintiff in a timely way.

[54] I accept that the plaintiff suffered a great deal of anxiety as a result of the ROE, which stated that he quit his job. However, his anxiety was caused by his worry that CERB or Employment Insurance benefits might be clawed back if a determination to that effect was made by the courts or other entity. The anxiety related directly to the fundamental issue in dispute between the parties, not to any high-handed or dishonest behaviour of the defendant.

[55] In these circumstances, the claim for both aggravated and punitive damages must be dismissed.

Conclusion

[56] The plaintiff, Jason Wong, was terminated from his employment without cause and in the absence of any notice. He did not fail to mitigate his damages by his refusal of the offer of re-employment, made after the plaintiff had threatened legal action against the defendant. A reasonable period of notice was 15 months, and the plaintiff is awarded damages of $52,500.00 in lieu of notice. All other claims for damages are dismissed. The plaintiff has been substantially successful in this action. Unless there are circumstances of which I am unaware, the plaintiff is entitled to costs at Scale B.

"Tammen J."