

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Suri v. North American Tea & Coffee
Inc.,***
2007 BCSC 534

Date: 20070424
Docket: S043236
Registry: Vancouver

Between:

Madhu Suri

Plaintiff

And

North American Tea & Coffee Inc.

Defendant

Before: The Honourable Mr. Justice Hinkson

Reasons for Judgment

Counsel for the Plaintiff

Nazeer T. Mitha
Alka Kundi

Counsel for the Defendant

Stephen D. Gill

Date and Place of Trial/Hearing:

March 12-16, 2007
Vancouver, B.C.

Introduction

[1] The plaintiff, Madhu Suri, claims damages for wrongful dismissal. The defendant, North American Tea and Coffee Inc. (“NATCO”) and Western Basic Ingredients Inc. (“WBI”), are related companies who employed Mr. Suri from February 18, 2002 until January 2003 when they terminated him without cause. Mr. Suri claims 18 months’ salary pursuant to the terms of an employment contract. The defendant denies that they agreed to a contractual term of 18 months’ severance, and in the alternative argue that Mr. Suri agreed when terminated, to accept 5 months’ severance. In the further alternative they submit that Mr. Suri has failed to take proper steps to mitigate his loss. The issues for determination are the terms of Mr. Suri’s employment contract, accord and satisfaction and mitigation.

Background

[2] From 1980 to 2001 Mr. Suri was employed by a succession of corporate entities engaged in the packaging of dry goods and bakery goods, and the sale of those goods to wholesalers. Over this period of time Mr. Suri rose to become the General Manager, and then a Director and the Business Manager of the enterprise. In July of 2001 English Bay Blending (“EBB”) purchased the enterprise. Subsequent to EBB’s purchase of his employer, Mr. Suri began considering other employment options. He believed he had a limited future with the new corporate owners.

[3] NATCO was a client of Mr. Suri’s employers as of 1999 or 2000, and Mr. Suri’s contact with NATCO was Mr. Riyaz Devji.

[4] Mr. Devji was looking for a manager for WBI by September/October of 2001, which was approximately the same time that Mr. Suri began considering his options.

[5] Mr. Devji and Mr. Suri both gave evidence that they engaged in discussions about Mr. Suri joining Mr. Devji's company, but the two did not agree upon the details of what was said, or when.

[6] Mr. Suri's employment contract with EBB entitled him to 24 months severance if he was terminated without cause. In the event that he obtained new employment, his severance payments would be reduced to 12 months.

[7] Mr. Suri said that he discussed the issue of severance with Mr. Devji prior to his termination by EBB. Mr. Suri said that he proposed that, if he resigned from EBB and came to work for Mr. Devji, his employment contract should include 24 months of severance if terminated without cause. Mr. Suri said that Mr. Devji proposed that the contract should include 12 months of severance if terminated without cause and that the two settled on 18 months, regardless of whether Mr. Suri received any severance from EBB.

[8] Mr. Devji said that he discussed the prospect of Mr. Suri quitting EBB and was advised of Mr. Suri's salary and benefits, and also discussed the prospect of similar terms for Mr. Suri, were he to be employed by Mr. Devji's company. He said Mr. Suri advised him that he was entitled to 18 and not 24 months severance, if terminated by EBB without cause.

[9] Mr. Devji said he was told by Mr. Suri that his benefits and salary at EBB

were:

- a) salary of \$100,000 per year;
- b) 6 percent guaranteed matching pension plan;
- c) entitlement to a company car;
- d) vacation entitlement of, he believed, 4 weeks; and
- e) 18 months severance if terminated without cause.

[10] Mr. Devji told Mr. Suri that if he quit at EBB, he would receive the same package from Mr. Devji's company that he had had at EBB.

[11] Mr. Suri was terminated by EBB on December 3rd, and said that he so advised Mr. Devji shortly thereafter. Mr. Suri accepted a lump sum settlement from EBB equivalent to 12 months severance. His settlement was documented in an agreement which he signed December 12, 2001.

[12] Mr. Devji said that he did not learn of Mr. Suri's severance agreement with EBB until March 14, 2002 when he received a copy of correspondence from EBB's solicitors to Mr. Suri dated March 14, 2002. He said he was quite upset to learn of the lump sum settlement and NATCO's lawyer, Mr. Don Jordan Q.C., gave evidence that it was his impression that Mr. Devji was indeed upset with this news.

[13] Between December 12, 2001 and February 18, 2002 when Mr. Suri commenced employment, the parties negotiated the terms of Mr. Suri's employment. While the discussions between Mr. Suri and Mr. Devji prior to February 18, 2002 did not resolve all outstanding matters, I find that by the time Mr. Suri commenced work on the 18th of February 2002, there was agreement between them on essential

terms. Those terms included:

- a) a starting date of February 18, 2002;
- b) the position of General Manager of the operations of WBI, with some consulting expectations to NATCO;
- c) salary of \$100,000;
- d) the benefit package set out in the pamphlet provided to Mr. Suri by Mr. Devji in November 2001;
- e) vacation of 2 weeks for the first 4 years, and 3 weeks per year thereafter;
- f) profit-sharing of 6 percent; and
- g) severance in the event of termination without cause of 6 months, and after that, if comparable alternate employment is not found, up to a further 12 months salary.

[14] In an e-mail of March 6, 2002 Mr. Suri sought changes to significant terms of the contract of employment. Mr Devji agreed to increase Mr. Suri's salary to \$108,000 per year, to increase his vacation to 4 weeks per year, to alter the arrangements for his vehicle allowance and to increase his profit sharing entitlement to 10 percent. Had he not done so, Mr. Suri would have been bound by the terms set out in paragraph 13.

[15] While Mr. Suri's salary and potentially his benefit package are of relevance in these proceedings, the most significant term is, of course, the severance period.

[16] While a commitment of up to 18 months severance for a new employee seems generous in the extreme, Mr. Suri was not unknown to Mr. Devji, and Mr. Suri had held positions of significance in the series of companies for which he had been employed for some 21 years.

[17] The severance term is contained in various draft agreements sent to Mr. Suri and confirmed in an e-mail sent to NATCO's lawyer, Donald Jordan Q.C., to Sharon Shudo, NATCO's Human Resource Manager. This e-mail stated in part:

In this transmission I am also confirming my advice to Riyaz that, in the event Madhu does not find employment after six (6) months, then the Company may well be obliged to keep him on full salary for 18 months. In other words, if Madhu is unsuccessful in obtaining employment then the concept of "differential payments" may be the difference between whether (sic) NATCO salary and zero. In those circumstances Madhu will continue to receive his full salary from NATCO for the 18 month period. I confirm that I have advised Riyaz of this and he has told me that this is the Company's intention.

[18] In cross-examination Mr. Jordan agreed that even after March 14, 2002 he was never asked to word Mr. Suri's severance provisions to take into account what Mr. Suri received from EBB, and he confirmed that the wording he had drafted was according to the instructions he received.

[19] In the result, I find that Mr. Devji agreed to a severance period with the results that Mr. Jordan warned of in his e-mail of February 26, 2002.

[20] In February 2002, NATCO and WBI had separate worksites. Mr. Suri agreed that he commenced work at the WBI worksite, rather than the NATCO worksite, but said that he, nevertheless, considered himself to be employed by NATCO at all material times. There can be no question that Mr. Suri was employed by one or both of NATCO and WBI. Counsel have agreed that the question of who Mr. Suri's employer was is of no real importance as NATCO has agreed to guarantee any obligation that WBI may have to Mr. Suri.

[21] Mr. Devji said that while Mr. Suri was General Manager of WBI, he was unable to turn that company's fortunes around by the summer of 2002, so was transferred to the NATCO worksite and remained there performing duties for NATCO until his termination in January 2003. He pointed to pay stubs and a Record of Employment as corroboration of Mr. Suri's employment by WBI.

[22] Given the various indicia of employment in this case, I am satisfied that Mr. Suri was employed by NATCO at all times, although delegated by that company to perform specific services for WBI for at least a part of his tenure. See ***Sinclair v. Dover Engineering Services Ltd.*** (1987), 11 B.C.L.R. (2d) 176 (S.C.), aff'd (1988) 49 D.L.R. (4th) 297 (B.C.C.A.).

[23] Mr. Suri's employment was terminated without cause at a meeting that took place on either January 2nd or 3rd, 2003. Severance was discussed at the meeting. The parties do not agree on what was said. Mr. Devji says that Mr. Suri agreed to accept 5 months severance. Mr. Suri denies making any such agreement.

[24] Mr. Suri did agree that on the same day that the termination occurred, he was given a letter and a Release, albeit in favour of Carriage Trade Foods Limited, both of which he took away with him. He said that he later was given another copy of the Release by Ms. Sharon Shudo, and that he ultimately endorsed it with qualifications and returned it to her. Mr. Devji denies seeing the Release in the form that Mr. Suri says that he gave to Ms. Shudo. That form bears an endorsement by Mr. Suri above his signature that reads:

As I, Madhu Suri, have received this release hours prior to my

departure for India, I have not received any independent legal advice as it relates to the above contents, and under these circumstances I am signing this only for the purposes of temporary salary continuance.
Signed under duress

[25] After his termination, Mr. Suri travelled to India on a pre-planned trip, and then returned to British Columbia where he made efforts to obtain employment.

Those efforts included:

- a) contacting friends and others to determine whether they knew of any opportunities for him in terms of work;
- b) considering various business opportunities; and
- c) making contact with and communicating with at least three search companies.

[26] In addition, he responded to various newspaper advertisements by sending out letters and e-mails for potential jobs. Unfortunately his efforts to find new employment were unsuccessful.

[27] After termination Mr. Suri received five monthly payments from the company.

[28] On May 26, 2003 he sent an e-mail to the company asking for an extension of “financial and medical support as things have been tough, but one has to stay positive” on what amounted to compassionate grounds. Mr. Suri explained this language as referring his attempts to mitigate as opposed to any agreement to accept 5 months severance.

[29] Mr. Suri agreed in cross-examination that he did not raise the issue of severance following the termination meeting until May of 2003.

Accord and Satisfaction

[30] I find that Mr. Suri was terminated at a meeting on the morning of January 2, 2003. This is the only date which is consistent with Mr. Jordan's e-mail of 10:16 a.m. on January 2, 2003.

[31] Mr. Jagani, Mr. Devji's uncle and NATCO's President and Director, was present at the meeting. I do not accept that Mr. Jagani had any recollection of this meeting. He conceded in cross-examination that he had attended other such meetings with other employees, but could not even recall the names of those other employees. I do not find that Mr. Jagani was dishonest in his evidence, but I have concluded that his was simply a reconstruction of what happened, based not on his recollection, but rather upon discussions he has had with Mr. Devji.

[32] The details of the meeting of January 2, 2003, therefore, come down to the evidence of Mr. Suri, on the one hand, and Mr. Devji on the other. One is correct, and the other is not.

[33] The onus of proof on this issue is upon the defendant.

[34] I am troubled by the fact that Mr. Devji kept no notes of this important meeting, particularly given that he had faced prior litigation regarding a union issue, as well as by the fact that the papers upon which he says that he and Mr. Suri wrote their severance figures, or at least the one upon which Mr. Devji wrote his number,

were not kept.

[35] I am also troubled by Mr. Suri's own words in his e-mail of May 26, 2003, wherein he requested an "extension of financial and medical support".

[36] Having found, however, that Mr. Suri and Mr. Devji had agreed to a severance period of 18 months if no cause was asserted, it simply makes no sense that Mr. Suri would concede less and I have concluded, after careful thought, that the words chosen by Mr. Suri were more diplomatic than they should have been. I conclude that they were the result of the position Mr. Devji attempted to advance on January 2, 2003 and Mr. Suri's non-confrontational personality.

[37] I have further concluded that at the time this e-mail was sent, Mr. Suri remained optimistic and did not expect to need ongoing severance for the full 18 months as the explanation for his request for an extension beyond what Mr. Devji had offered January 2, 2003.

[38] If, as Mr. Devji asserts, the meeting of January 2nd was amicable, and Mr. Suri was given a Release, it seems reasonable that he would have been asked to sign the Release that day. Indeed, in his letter to Mr. Suri of January 2nd, 2003, at least on one reading of it, Mr. Devji asserts that the parties had reached agreement. It is, however, also possible to read the letter as the position of the employer as to what it was prepared to offer Mr. Suri by way of severance, rather than a description of a mutual agreement.

[39] Accepting, however, that Mr. Devji was prepared to give Mr. Suri some time

to consider the wording of the Release before signing it, as the document indeed contemplates in the second last paragraph, he said himself that monthly payments to Mr. Suri should not have been made until the Release was signed and returned, presumably in a form other than that which he says was produced after the proceedings commenced.

[40] Apparently, parts of what should have been in Mr. Suri's personnel file at NATCO could not be located after these proceedings were commenced. What was found was not easily found.

[41] Given his past experience with litigation, Mr. Devji said that he was careful to have his uncle attend with him at the meeting of January 2nd. This attitude is inconsistent with the fact that Mr. Devji failed to document the agreement he alleges the parties reached, given what a dramatic departure it was from what he and Mr. Suri agreed to in 2001 and 2002.

[42] Neither party to the litigation called Ms. Shudo to give evidence about the form of Release she received from Mr. Suri. Mr. Devji understood from Ms. Shudo that Mr. Suri had given some form of Release to her following the January 2nd, 2003 meeting. I invited counsel to provide me with their comments as to whether I could or should draw an adverse inference from the failure to call Ms. Shudo. Ms. Shudo was of course available to both sides, but not particularly necessary to the plaintiff.

[43] Having had the benefit of submissions from counsel, I have concluded that I need not draw any inference from the choice of the parties to refrain from calling Ms. Shudo as a witness at trial. Mr. Suri's evidence about the form he provided to

Ms. Shudo stands uncontradicted, and I accept it.

[44] While I am, as I have said above, troubled by the wording of Mr. Suri's e-mail of May 26th, 2003, it is consistent with his obligation, and the intention that I have found he had to mitigate his position by seeking alternate employment. The e-mail refers to such efforts, and on balance, I am unable to say that the defendant has satisfied me that there was accord and satisfaction.

Mitigation

[45] Absent any accord and satisfaction, counsel for the defendant says that Mr. Suri's efforts to secure employment following his termination by NATCO were insufficient and represent a failure on his part to mitigate his position. I disagree.

[46] The onus is on the defendant to prove that the plaintiff failed to take steps to mitigate his loss and that, had such steps been taken, new employment would have been obtained. See ***Red Deer College v. Michaels***, [1976] 2 S.C.R. 324, 57 D.L.R. (1975) (3d) 386, cited in ***Smith v. Aker Kvaerner Canada Inc.***, 2005 BCSC 117 at para. 23.

[47] The common law duty to mitigate is succinctly set out in ***Carpenter v. Vancouver (City) Police Board*** (1988), 33 B.C.L.R. (2d) 182 at 196 (S.C.) as follows:

Although it is said that a wronged employee has a "duty" to mitigate his loss his failure to perform that duty does not confer upon the wrongdoing employer a right of affirmative action against the employee. It is a right to receive credit in the case of avoided loss for what the employee in fact earned and in the case of avoidable loss

what the employee could have earned had he taken reasonable steps to obtain other employment and receive earnings from that employment. The burden of proof is upon the employer and it is a heavy burden and not made less so by the fact that it "is upon the defendant to show that the plaintiff either found, or, by the exercise of proper industry in the search, could have procured other employment of an approximately similar kind reasonably adapted to his abilities, and that in absence of such proof the plaintiff is entitled to recover the salary fixed by the contract", per Laskin C.J. in *Red Deer College v. Michael* [1976] 2 S.C.R. 324 at p. 331 adopting a passage from Williston on Contracts. ...

[48] In meeting his or her duty to mitigate, an employee must act reasonably, but is entitled to consider his or her own interests. As explained in ***Forshaw v.***

Aluminex Extrusions Ltd. (1989), 39 B.C.L.R. (2d) 140, 27 C.C.E.L. 208 (C.A.):

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.

[49] A terminated employee may, in appropriate circumstances, mitigate by establishing their own company. See ***Ward v. Royal Trust Corporation of Canada*** (1993), 1 C.C.E.L. (2d) 153 (B.C.S.C.).

[50] Similarly, where an employee had been unsuccessful in an extensive job search, but had set up a consulting business, this was found to be reasonable mitigation. See ***Nevin v. B.C. Hazardous Waste Management Corp.*** (1995), 14 B.C.L.R. (3d) 314 (C.A.), 129 D.L.R. (4th) 569.

[51] Mr. Suri was in a senior management position in a relatively small business community, and was 44 years of age at the time of his termination. It is not a situation of an employee who sat and did nothing; quite to the contrary, Mr. Suri was actively engaged in all reasonable efforts to seek alternate employment, or to seek income from operating a business. In all circumstances, his efforts were reasonable.

[52] I find that the defendant has failed to establish that Mr. Suri did not act reasonably after his termination or that there were job opportunities for which he did not apply or which he could have obtained had he applied for them.

Conclusion

[53] I am simply not satisfied on the evidence before me that the defendant has met its onus of proof on the issue of accord and satisfaction, and as a result, I find that the plaintiff is entitled to 18 months salary following his termination by NATCO.

[54] In the result, I find that Mr. Suri is entitled to severance of 18 months salary in total. That is, Mr. Suri is not entitled to benefits in addition to salary for that period. To the extent that any benefits have been paid to him since January 2, 2003, their value, and the salary paid to Mr. Suri since that time will be offset against the additional salary to which I have found he is entitled.

[55] Counsel have asked for the opportunity to make submissions as to costs

once they have received these reasons for judgment, and they may provide them to me in writing, or make arrangements for oral submissions through the Registry.

“C. Hinkson, J.”

The Honourable Mr. Justice C. Hinkson

April 30, 2007 – ***Revised Judgment***

Please be advised that the attached Reasons for Judgment of Mr. Justice C. Hinkson have been edited.

In the style of cause, counsel for the plaintiffs should read:

Nazeer T. Mitha and Alka Kundi