

In the Court of Appeal of Alberta

Citation: Kirke v Spartan Controls Ltd, 2025 ABCA 40

Date: 20250207
Docket: 2301-0322AC
Registry: Calgary

Between:

Bruce Walter Kirke

Appellant/Cross-Respondent

- and -

Spartan Controls Ltd.

Respondent/Cross-Appellant

The Court:

**The Honourable Justice Jack Watson
The Honourable Justice Anne Kirker
The Honourable Justice April Grosse**

Memorandum of Judgment

Appeal from the Decision by
The Honourable Justice C.A. Rickards
Pronounced on the 22nd day of November, 2023
Order dated the 7th day of March, 2024
(Docket: 2201-05876)

Memorandum of Judgment

The Court:

Introduction

[1] At common law, employers have the right to terminate employment contracts without cause, subject to the obligation to provide reasonable notice. A failure to provide reasonable notice is a contractual breach that can lead to an award of damages.

[2] The issues in this appeal arise from a summary trial decision assessing the damages suffered by Bruce Kirke because of Spartan Controls Ltd.'s failure to provide him with reasonable notice when his employment with the company came to an end. Mr. Kirke worked for Spartan Controls from November 1997 until April 2022, when he was advised his position as Manager, Projects & Solutions Services was being terminated. The summary trial judge determined that the period of reasonable notice was 20 months. This finding is not challenged.

[3] It was not disputed that Mr. Kirke was entitled to damages for the loss of his base pay, benefits, and quarterly bonus payments during the reasonable notice period. The parties disagreed about whether Mr. Kirke's damages should also include any loss of the payments he received as a participant in Spartan Controls' optional shareholder profit sharing (SHPS) program.

[4] The summary trial judge found that the SHPS payments were a part of Mr. Kirke's compensation as an employee of Spartan Controls. However, because the unanimous shareholder agreement (USA) signed by Mr. Kirke authorized the company to buy back employee-owned shares at any time on 90 days' notice, Mr. Kirke's damages for the loss of SHPS payments during the reasonable notice period were likewise limited.

[5] Both sides appeal.

Background

Spartan Controls' SHPS Program

[6] The SHPS program was made available to all permanent employees of Spartan Controls after three years of employment. To receive SHPS payments, eligible employees had to purchase shares in Spartan Controls' parent company, Spartech 1991 Limited. Proceeds from the issuance of these shares were used by the company to help finance Spartan Controls' operations and growth. Spartan Controls' board of directors set the allocations of available shares for eligible employees based on employee job roles. Spartan Controls had "comfort agreements" with certain banks to

facilitate loans to employees for the purpose of purchasing shares if they chose to do so. The SHPS payments reflected a return amount per share determined annually based on company profitability. The payments were paid as either employment income or as a combination of employment income and dividend income, depending on what was most tax advantageous to shareholders. The payments were generally made at the end of March, with a second payment occasionally made at the end of June each year.

[7] Not all employees participated in the SHPS program. Mr. Kirke did. He purchased 73,600 shares over several years beginning in 2000, when he signed the USA that governed employee share ownership. The USA contained provisions entitling Spartech to buy back shares. Of relevance in this appeal are the following:

2.4 In the event any Shareholder's employment or association with the Company is terminated, for any other reason than above stated, before reaching normal retirement age, then the Company shall have the exclusive right (but not the obligation) to purchase all (but not less than all) Shares then owned by such Shareholder. Such right may be exercised by notice in writing to such Shareholder at any time within ninety (90) days after his employment terminates.

...

2.6 The Company may at any time, by Ninety (90) days notice in writing to the Shareholder, require that the Shareholder sell all or a part of the Shares then owned by such Shareholder to the Company. Upon the elapse of the notice period to the Shareholder [sic] shall have the obligation to sell and the Company shall have the obligation to buy such Shares set out in the notice.

Mr. Kirke's Termination and Notice Requiring the Sale of His Shares

[8] The termination letter that Spartan Controls provided to Mr. Kirke on April 4, 2022, stated, in part:

As a shareholder, you will need to arrange for the return of your shares to Spartan. As per the Unanimous Shareholder Agreement between you and Spartech 1991 Limited ("the Company"), the Company is hereby giving notice that you are required to sell all Spartech 1991 Limited shares owned by yourself back to the Company. Your final prorated shareholder profit sharing will be paid out to you once the share buyback has been finalized. Please contact ... Finance, over the next two (2) days to make these arrangements.

[9] Mr. Kirke was paid the purchase price for his shares based on the 2022 share price, without prejudice to his claim for damages for the loss of SHPS payments during the reasonable notice period.

The Summary Trial Decision Regarding Mr. Kirke's Entitlement to SHPS Payments

[10] It was Mr. Kirke's position that but for his wrongful dismissal, he would have retained his shares and received SHPS payments during the reasonable notice period. He argued there was nothing in his employment contract, the SHPS program, or the USA that unambiguously took away or limited his common law right to claim damages for the loss of this part of his compensation.

[11] Spartan Controls argued that Mr. Kirke received SHPS payments in his capacity as a shareholder, not as a part of his compensation as an employee of Spartan Controls, and consequently, the common law relating to damages for breaches of employment contracts did not apply. In the alternative, Spartan Controls maintained that sections 2.4 and 2.6 of the USA unambiguously took away or limited Mr. Kirke's entitlement to claim SHPS payments as part of his damages in lieu of reasonable notice.

[12] The summary trial judge considered the two questions the Supreme Court of Canada in *Matthews v Ocean Nutrition Canada Ltd*, 2020 SCC 26, instructed courts to ask to determine whether damages for a breach of the implied term to provide reasonable notice ought to include bonus payments and certain other benefits. First, "[w]ould the employee have been entitled to the bonus or benefit as part of their compensation during the reasonable notice period? If so, do the terms of the employment contract or bonus plan unambiguously take away or limit that common law right?": *Matthews* at para 55.

[13] The summary trial judge accepted that the SHPS payments were a part of Mr. Kirke's employment compensation and therefore, as a starting point in the analysis, Mr. Kirke had established an entitlement to claim SHPS payments during the reasonable notice period. The summary trial judge was not satisfied that section 2.4 of the USA unambiguously took away Mr. Kirke's common law right because the word "terminated" could be interpreted as referring to the end of the reasonable notice period. However, he found that section 2.6 of the USA plainly enabled Spartan Controls to trigger a buy back of shares at any time on 90 days' notice and that this agreed upon term unambiguously limited Mr. Kirke's common law right to damages. Reassured by the principle from *Hamilton v Open Window Bakery Ltd*, 2004 SCC 9, that the defendant's least onerous method of performing a contract should be the basis for calculating damages, the summary trial judge assessed Mr. Kirke's damages to include the loss of SHPS payments for the limited period of 90 days from the date of receipt of notice.

Grounds of Appeal and Standards of Review

- [14] Mr. Kirke appealed the summary trial decision on grounds the summary trial judge erred:
- (a) in finding that section 2.6 of the USA unambiguously limited his right to compensation for the loss of the SHPS payments during the reasonable notice period; or alternatively,

- (b) in failing to find it was oppressive and bad faith conduct to trigger the buy back of his shares during the reasonable notice period; and
- (c) in finding that the principle in *Hamilton* applied.

[15] Spartan Controls cross-appealed on the basis the summary trial judge erred in finding the SHPS payments were a form of employment compensation potentially payable during the reasonable notice period as wrongful dismissal damages.

[16] During the hearing it became apparent that Spartan Controls accepted the SHPS program and USA were not collateral to but rather formed part of Mr. Kirke's employment agreement. Consequently, we see no basis upon which this Court can interfere with the summary trial judge's conclusion that following Mr. Kirke's wrongful dismissal, he could claim damages for the loss of the SHPS payments he was entitled to under the terms of the USA.

[17] While Spartan Controls argued the SHPS payments were exclusively a return on investment, we are satisfied that on the facts of this case, Mr. Kirke had a right, as an employee, to acquire and to benefit from the shares -- albeit on the terms of, and under the limitations of, the USA. Because eligibility for the SHPS program was an element of Mr. Kirke's employment relationship with Spartan Controls, his entitlement to SHPS payments was appropriately considered by the summary trial judge in calculating damages as part of the sequelae to Mr. Kirke's termination.

[18] Respecting this topic, the summary trial judge had difficulty with the decision in *Mikelsteins v Morrison Hershfield Limited*, 2021 ONCA 155, leave to appeal to SCC ref'd, 38806 (20 January 2022) on the basis that, in his view, the Ontario Court of Appeal had departed from the order of analysis set out in *Matthews*, by moving to determine contractual rights without first considering the common law reasonable notice question. We do not need to decide whether that critique is well founded. If the summary trial judge made an error in this respect, which we do not say he did, it is irrelevant because, as set out later in these reasons, he reached an appropriate conclusion on the facts of this case.

[19] That leaves Mr. Kirke's appeal, which turns on whether the summary trial judge erred in deciding that Spartan Controls could, in the circumstances, rely on section 2.6 of the USA to limit Mr. Kirke's wrongful dismissal damages. The standard of review of palpable and overriding error applies to the issues raised with one exception. Determining whether the trial judge erred in applying *Hamilton* in the context of his *Matthews* analysis is a question of law reviewed for correctness: *Atos IT Solutions v Sapient Canada Inc*, 2018 ONCA 374 at para 28, leave to appeal to SCC ref'd, 38173 (21 March 2019).

Decision

[20] Mr. Kirke's position is predicated on the assertion that but for his wrongful dismissal, he had not just the right to work but the right to retain ownership of his shares and receive SHPS

payments. He submits that the circumstances of his case are analogous to cases where the entitlement at issue was defined to require “active employment.”¹

[21] The difficulty with the analogy Mr. Kirke seeks to draw is that his right to retain shares and receive SHPS payments was not dependant solely on active employment. It was also and always subject to Spartech’s right to buy back shares pursuant to the terms of the USA. The summary trial judge made no palpable and overriding error in concluding that, among other rights, the USA gave Spartech an unrestricted right to buy back Mr. Kirke’s shares at any time upon 90 days’ notice. There can be no debate that is what section 2.6 of the USA says. The plain language of the USA enabling the 90-day buy back of shares distinguishes Mr. Kirke’s case from the cases upon which he relies. In each of them, the terminated employee received the bonus or benefit at issue as part of their wrongful dismissal damages because they had an otherwise unrestricted right to receive the bonus or retain the benefit had they worked during the reasonable notice period. In *Taggart*, for instance, Sharpe JA concluded the employee was entitled to common law contract damages for the loss of pension benefits (i.e., payment in lieu of notice) because the employee “had the contractual right to work and to be paid his salary and receive benefits throughout the entire ... notice period”: at para 16. In contrast to the USA in Mr. Kirke’s case, there was no language in the *Taggart* pension terms that unambiguously permitted the employer to cease paying the pension benefit during the employee’s period of employment, including the reasonable notice period. See also, *Matthews* at para 65.

[22] Mr. Kirke alternatively argues that Spartan Controls “should be caught by a plea of oppression or bad faith” because it decided it was financially advantageous to dismiss him and buy back his shares contrary to his reasonable expectations. He says Spartan Controls demanded the repurchase of his shares solely to deprive him of SHPS payments and that the discretionary repurchase of shares upon termination of employment should not be permitted in such circumstances.

¹ For example, *Paquette v TeraGo Networks Inc*, 2016 ONCA 618 and *Schumacher v Toronto Dominion Bank* (1997), 147 DLR (4th) 128, 1997 CanLII 12329 (ON SC), aff’d 173 DLR (4th) 577 (Ont CA), leave to appeal to SCC ref’d, 27423 (20 January 2000), where bonus plans required the recipient to be “actively employed” at the time the bonus was paid; *Hawkes v Levelton Holdings Ltd*, 2013 BCCA 306, where, pursuant to an employee “Shareholders Buy/Sell Agreement”, the ability to maintain status as a shareholder was subject to continued employment; *McDonald v Lac Minerals Ltd*, [1987] OJ No 1216 (HC) (QL), 1987 CarswellOnt 2333 (WL), where under a stock option plan the employee’s right to exercise the option terminated 30 days after their employment “cease[d]”; and, *Taggart v Canada Life Assurance Co*, [2006] OJ No 310 (QL), 2006 CanLII 53345 (ON CA), where “active service” was a prerequisite for the accrual of pension benefits.

[23] We see no reviewable error in the summary trial judge’s rejection of this argument given the facts of this case. The concept of “reasonable expectations” that underlies the oppression remedy is objective and contextual and the actual expectations of a specific stakeholder are not conclusive: *BCE Inc v 1976 Debentureholders*, 2008 SCC 69 at para 62. To determine whether a stakeholder’s expectation is reasonable, the court may consider, among other things, the nature of the corporation, the relationship between the parties, past practice, and representations and agreements: *BCE* at para 72. The evidence in this case supports the summary trial judge’s conclusion that Mr. Kirke had failed to establish any reasonable expectation he would not be required to sell his shares back to Spartech if his employment was terminated and the company exercised its buy back rights under the USA. Employees participating in the SHPS program have always been asked to sell their shares back to Spartech upon termination pursuant to the terms of the USA. The SHPS program has been able to deliver its historical returns to shareholders in part because departing employees have done so. Further, and contrary to what Mr. Kirke contends, there is no evidence of the type of abusive or unfair conduct required to establish “oppressive” action or bad faith conduct on the part of Spartan Controls: *BCE* at paras 89-94.

[24] *Matthews* did not introduce a generalized concept of good faith as a conflicting paradigm against the contractual rights Spartan Controls always had and Mr. Kirke knew about. Mr. Kirke cannot ask the Court to invoke Spartan Controls’ reliance on unambiguous terms of the USA as a lack of good faith to write out of existence the employer’s contractual rights: see for e.g., *Churchill Falls (Labrador) Corp v Hydro Québec*, 2018 SCC 46 at paras 116-118. Put another way, it would conflict with equity for Mr. Kirke to receive a benefit under the SHPS program considerably more beneficial than other shareholders and inconsistent with the clear language in section 2.6 of the USA. As stated in *Barnes v Addy* (1874) LR 9 Ch App 244 at 251, per Lord Selborne, LC: “There would be no better mode of undermining the sound doctrines of equity than to make unreasonable and inequitable applications of them.”

[25] Mr. Kirke relatedly submits that Spartan Controls should not have been permitted to rely on section 2.6 of the USA to limit the damages payable because it did not, at any time, say it was relying on that provision to buy back his shares and because it had to make the election before the reasonable notice period began to run. The contention here is the summary trial judge erred in allowing Spartan Controls to take advantage of a term of a contract it had breached and to take unilateral action that it was not, as a matter of employment law, entitled to take upon notifying him of his termination. Mr. Kirke equates such conduct with constructive dismissal.

[26] Again, Mr. Kirke predicates his right to receive SHPS payments on his right to work, overlooking the language in the USA that governed the terms of his share ownership and unambiguously limited his minimum guaranteed entitlement to SHPS payments to 90 days. Accepting Mr. Kirke’s argument would render the agreed upon terms of the USA meaningless. The facts reveal no unilateral act that breached an essential term of Mr. Kirke’s employment agreement or an intention on the part of Spartan Controls to no longer be bound by it: see, *Potter*

v New Brunswick Legal Aid Services Commission, 2015 SCC 10 at paras 30-43 for what constitutes constructive dismissal.

[27] Mr. Kirke's final argument, that the summary trial judge's reference to the principle in *Hamilton* constitutes a legal error warranting this Court's interference, is also without merit. What Mr. Kirke sought, and in effect continues to seek, is a tort-like inquiry into whether, but for the termination of his employment, he would have continued to own shares and receive SHPS payments. However, damages for a contractual breach in failing to provide reasonable notice are not payable to restore a terminated employee to the position they would have been in had they not been terminated. As *Hamilton* illuminates, they aim to put the wrongfully terminated employee in the position they would have been in had the employer complied with its reasonable notice obligation. The breach of contract damages needed to restore Mr. Kirke to the position he would have been in had he been given reasonable notice were justly calculated with reference to section 2.6 of the USA because it unambiguously limited the time for which Mr. Kirke could claim the SHPS entitlement.

[28] In *Hamilton*, the Supreme Court of Canada addressed how damages are to be assessed for the breach or repudiation of a contract with alternate modes of performance. At paragraph 11, the Court confirmed that, "[g]enerally speaking, where there are several ways in which the contract might be performed, that mode is adopted which is the least profitable to the plaintiff, and the least burdensome to the defendant." See also, *Sumner v PCL Constructors Inc*, 2011 ABCA 326 at para 61, leave to appeal to SCC ref'd, 34630 (28 June 2012); *Agribrands Purina Canada Inc v Kasamekas*, 2011 ONCA 460 at paras 44-45; *Atos IT Solutions* at paras 30-37, where the principle from *Hamilton* is explained. Having found that section 2.4 of the USA was not clear enough to alter Mr. Kirke's common law right to damages but that section 2.6 was, the summary trial judge made no error in considering that the least burdensome way for Spartan Controls to discharge its reasonable notice obligation while respecting the agreed upon rights and obligations of the parties under the USA was to allow Mr. Kirke to retain his shares and receive SHPS payments for 90 days. Put differently, the decisions in *Hamilton* and *Matthews* converge on the effect of the minimum performance principle on the expectancy principle. As stated in *Matthews*, any contractual limits on common law rights of an employee must be clear and unambiguous, but if they are, they govern. Because the SHPS program, governed by the USA, provided Spartan Controls with the option as to when and under what circumstances it may trigger the buy back of shares on 90 days' notice, it was not incorrect for the summary trial judge to refer to the principle in *Hamilton* in assessing damages.

[29] The summary trial judge made no reviewable error in his assessment of Mr. Kirke's damages.

Disposition

[30] The appeal and cross-appeal are both dismissed.

Appeal heard on November 5, 2024

Memorandum filed at Calgary, Alberta
this 7th day of February, 2025

Watson J.A.

Kirker J.A.

Grosse J.A.

Appearances:

R.J.C. Stack
A.E. Louie
for the Appellant

D.S. Bailey, KC
A. MacDonald
for the Respondent