

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
BLACKBERRY LIMITED) *Sheila Block and Justin Nepal, for the*
) *Applicant*
Applicant)
)
– and –)
)
SEBASTIEN MARINEAU-MES) *M. Norman Grosman and Justin Tetreault,*
) *for the Respondent*
Respondent)
)
)
)
) **HEARD:** March 17, 2014

2014 ONSC 1790 (CanLII)

T. MCEWEN J.

REASONS FOR DECISION

INTRODUCTION

[1] The Applicant, BlackBerry Limited (“BlackBerry”), brings this application for the following declarations:

- (a) a declaration that the employment contract entered into between BlackBerry and the respondent Sebastien Marineau-Mes (“Marineau-Mes”), dated effective September 27, 2013 and signed on October 16, 2013 (the “Contract”), is binding on the parties thereto, and that Marineau-Mes is obligated, as set out in the Contract, to provide six months’ prior written notice of his resignation from employment with BlackBerry; and
- (b) a declaration that the notice period under the Contract expires on June 23, 2014.

[2] Marineau-Mes seeks a declaration that the Contract is not a valid and enforceable contract, or in the alternative, an order converting the application to an action pursuant to rule

38.10 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. Marineau-Mes submits that there are material facts in dispute, particularly with respect to the issue of whether Marineau-Mes assumed the role of Executive Vice-President, Platform Development (“EVP”). It is my view, however, that proceeding by way of application is appropriate when one considers the guidance recently provided by the Supreme Court of Canada in *Hryniak v. Mauldin*, 2014 SCC 7. The filed materials, including the transcripts, allow for a fair and just process and allow me to find the facts necessary to resolve the dispute and apply the relevant legal principles to the facts as found.

OVERVIEW

[3] Marineau-Mes had been a long-time employee of QNX Software Systems (“QNX”), which was acquired in 2010 by BlackBerry. Thereafter, he began working for BlackBerry and over time received a number of promotions that resulted in increased responsibility and enhanced compensation.

[4] In early 2013, Marineau-Mes held the position of Senior Vice-President, Software (“SVP”). He was responsible for a group of approximately 600 employees, including 3 Vice-Presidents.

[5] In the early fall of 2013, Marineau-Mes was offered the promotion to EVP. In this role, he would be responsible for approximately 3,000 employees, including 11 Vice-Presidents and 70 Directors. On September 24, 2013, he was provided with a letter from the Chief Operating Officer, Kristen Tear (“Tear”), confirming the promotion to EVP and providing him with the Contract to sign. In a September 2013 email to BlackBerry, Marineau-Mes indicated that he would have an employment lawyer review the Contract. Marineau-Mes signed the Contract on October 16, 2013.

[6] The Contract contained a number of terms and conditions, the most pertinent ones being as follows:

1 EMPLOYMENT

1.1 The Effective Date of this Agreement and your first day of work will be September 27, 2013, provided that the requirements of Section 5 have been met. If the requirements of Section 5 are not satisfied before the first day of work, then this Agreement, at BlackBerry’s option, is terminated and if so, the offer of employment contained herein is rescinded.

1.3 You will continue to be employed on a regular, full-time basis.

1.4 You will work at BlackBerry’s Waterloo office location. However, BlackBerry may, at its sole discretion, appoint another work location in the future.

1.5 Your position title will now be EVP, Platform Development, reporting to Kristian Tear.

1.7 You acknowledge and agree that, subject to the occurrence and consequences of an event of Good Reason, in order for BlackBerry to meet business demands BlackBerry may in its sole discretion modify, change, reduce or add to your duties and responsibilities from time to time.

4 CESSATION OF EMPLOYMENT

4.1 Termination by You – You may resign from employment with BlackBerry at any time upon providing six (6) months prior written notice. You will continue to provide active service during the notice period, unless the requirement for active employment is expressly waived in whole or in part by BlackBerry. Upon resignation, you will have no entitlement to compensation or damages of any kind except for unpaid base salary for the six month notice period, vacation earned to the Date of Termination (as defined in paragraph 4.5(b)¹ below) and reasonable unpaid expenses in accordance with prevailing BlackBerry policies. All of your benefits will cease upon the Date of Termination. For greater certainty, termination by you for Good Reason (as defined in paragraph 4.5(b) below) will not constitute a voluntary resignation for the purpose of this subsection 4.1.

4.5 Definitions – for the purpose of this Agreement,

(a) **“Date of Termination”** means:

(i) in the event of the termination of your employment as a result of your resignation, termination by BlackBerry for cause or termination by BlackBerry without cause, the earlier of the date specified in the written notice of termination, if any, and the last day worked;

(ii) for termination for Good Reason, the date determined in accordance with paragraph 4.5(b) below; or

(iii) for termination due to Change of Control, your last day worked.

(b) **“Good Reason”** means the occurrence of any of the following without your express written consent:

(i) a material and detrimental alteration of your position, duties or responsibilities with BlackBerry;

¹ The parties agreed at the motion that this was a typographical error that should read “4.5(a)”.

(ii) a reduction in your annual base salary of at least 10%, except where such reduction is part of a general reduction in the base salary of all members of the executive officers of BlackBerry which does not occur following a Change of Control and affects you in substantially the same manner as the other executive officers of BlackBerry;

(iii) the failure to continue your participation in any share option, share purchase, profit sharing, bonus or other incentive compensation plan unless BlackBerry provides replacement arrangements which are comparable in the aggregate;

(iv) the material breach of this Agreement by BlackBerry, which is not cured by BlackBerry within fifteen (15) days of written notice from you; or

(v) BlackBerry relocating your principal office to a location more than 50 km from its current location.

Your continued employment shall not constitute consent or a waiver of your rights to assert Good Reason hereunder on the condition that you may only effect a termination for Good Reason through notice thereof within thirty (30) days following the occurrence of actions or failures to act or your knowledge of the same giving rise to the Good Reason, and shall have duly notified BlackBerry of the basis of such Good Reason and providing BlackBerry with fifteen (15) days after receipt of such notice to cure the basis of such claim.

6 CONDITIONS OF EMPLOYMENT

6.1 As ongoing requirements of employment with BlackBerry, you agree:

(a) To continue to comply with the documents comprising the Business Standards and Principles and related documents, and the Employee Confidentiality and Intellectual Property Agreement

7 GENERAL

7.10 You acknowledge that you have been given the opportunity to read, evaluate and discuss the provisions of this Agreement and the attached schedules and documents with your personal advisors and with representatives of BlackBerry.

[7] The promotion took place notwithstanding the fact that BlackBerry had placed a freeze on promotions earlier in the year. The promotion was therefore not announced by the company to its employees other than the Senior Executives involved in the decision.

[8] During the fall of 2013, BlackBerry underwent some difficult times. In November 2013, John Chen (“Chen”) became BlackBerry’s new Chief Executive Officer.

[9] Marineau-Mes continued to play a central role at BlackBerry during these times, and had discussions with Chen about his future that were not all that satisfactory to Marineau-Mes. It was discussed, amongst other things, that Marineau-Mes’ role might ultimately be narrower in scope than originally contemplated.

[10] Marineau-Mes also began discussions with Apple Inc. (“Apple”) in September 2013. In December 2013, Apple offered Marineau-Mes the position of Vice-President Core OS. In this position, he will be involved with the development of software important to the operating system.

[11] On December 23, 2013, Marineau-Mes gave BlackBerry notice of his resignation in writing. The next day he advised BlackBerry that he would likely be joining Apple in California in approximately two months’ time.

[12] This led to the dispute between the parties as to whether Marineau-Mes is required to provide BlackBerry with six months’ written notice pursuant to s. 4.1 of the Contract.

[13] BlackBerry takes the position that s. 4.1 is binding upon Marineau-Mes, and he is therefore obligated to provide six months’ prior notice.

[14] Marineau-Mes takes the position that BlackBerry is not entitled to the relief sought and that BlackBerry cannot prevent Marineau-Mes from commencing employment with Apple. He submits that BlackBerry’s claim is confined to one of damages if Marineau-Mes were to commence employment with Apple prior to the expiration of the notice period.

[15] He also submits that the Contract is not a valid and enforceable contract as it pertains to him. He makes the following arguments:

- (i) The Contract offends the provisions of the *Employment Standards Act, 2000*, S.O. 2000, c. 41 (“ESA”).
- (ii) The Contract is unenforceable due to a material failure of consideration in that he did not assume the duties of EVP.
- (iii) The six-month notice period is equivalent to a non-compete covenant and void as against public policy.
- (iv) Pursuant to s. 4.5(b), Marineau-Mes had Good Reason to resign and as such is not required to provide six months’ notice.

[16] I will review each of these issues in turn.

BlackBerry Cannot Obtain the Relief that it Seeks

[17] Marineau-Mes relies upon the decision of the Supreme Court of Canada in *RBC Dominion Securities Inc. v. Merrill Lynch Canada Inc.*, 2008 SCC 54, [2008] 3 S.C.R. 79, in which the court stated, at paras. 18 and 19:

The majority of the Court of Appeal, by contrast, held that once the investment advisors left RBC, they were no longer under a duty not to compete with it. The view of the Court of Appeal on the law for the purposes of this issue may be summed up as follows. Generally, an employee who has terminated employment is not prevented from competing with his or her employer during the notice period, and the employer is confined to damages for failure to give reasonable notice (Southin J.A. for the majority). To this general proposition Rowles J.A. may be read as adding the qualification that a departing employee might be liable for specific wrongs such as improper use of confidential information during the notice period. This appears to be consistent with the current law, which restricts post-employment duties to the duty not to misuse confidential information, as well as duties arising out of a fiduciary duty or restrictive covenant: see England, *Employment Law in Canada* (4th ed. loose-leaf), § 11.141. Neither of the latter duties are at issue here.

For the purposes of this case, the law may be accepted as summarized by the preceding paragraph. The contract of employment ends when either the employer or the employee terminates the employment relationship, although residual duties may remain. An employee terminating his or her employment may be liable for failure to give reasonable notice and for breach of specific residual duties. Subject to these duties, the employee is free to compete against the former employer.

[18] Based on the above, Marineau-Mes submits that he is free to leave during the notice period, and BlackBerry's remedy is an action for damages, if any. BlackBerry submits that it is not seeking an injunction against Marineau-Mes. Rather, it is seeking an interpretation of the Contract and is only seeking a declaration that the notice period is effective until June 23, 2014. I prefer the position of BlackBerry, and I see no reason why the application cannot proceed given the relief sought.

(i) The Contract Offends the Provisions of the ESA

[19] Marineau-Mes submits that the Date of Termination for the purposes of the Contract was on or about January 6, 2014, which was the last day, to date, he has provided services to BlackBerry. Marineau-Mes submits a reasonable interpretation of s. 4.1 leads to the conclusion that his entitlement to vacation pay ended as of January 6, notwithstanding the fact that he remains an employee of BlackBerry for the remainder of the six-month notice period. He submits that the fact that BlackBerry continues to pay him vacation pay is irrelevant.

[20] Marineau-Mes submits that this is a violation of ss. 33(1) and 33(2) of the *ESA*, which provide that employees are entitled to accrue vacation during both active and inactive periods of employment. Accordingly, the elimination of Marineau-Mes' right to accrue vacation pay to the end of the six-month notice period violates s. 5(1) of the *ESA*, which states:

...no employer or agent of an employer and no employee or agent of an employee shall contract out of or waive an employment standard and any such contracting out or waiver is void.

[21] As a result of the foregoing, Marineau-Mes submits that based on the authorities set out in *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986 at 1000; *Love v. Acuity Investment Management Inc.*, 2011 ONCA 130, at para. 51; and *Wright v. Young and Rubicam Group of Companies (Wunderman)*, 2011 ONSC 4720, at paras. 16-17, s. 4.1 of the Contract is null and void and no notice need be given by Marineau-Mes to BlackBerry.

[22] I do not agree that the "Date of Termination" was triggered when Marineau-Mes was removed from active service. It is reasonable for BlackBerry to require that Marineau-Mes be available during the notice period. It is not surprising that Marineau-Mes has not been called upon to provide active service given the dispute between the parties over the notice period. Marineau-Mes continues to be paid, and according to Nigel Perks ("Perks"), the Executive Vice-President, Human Resources, Marineau-Mes may well be called upon to provide assistance to BlackBerry.

[23] Accordingly, Marineau-Mes, pursuant to s. 4.1, is being paid vacation pay for as long as he remains an employee of BlackBerry. This finding is consistent with the decision of the Court of Appeal in *Love*, wherein it held that where reasonable notice of termination is given, and an employee works during that notice period, the employment ceases at the end of that period.

[24] In any event, I do not accept Marineau-Mes' submission that the decisions in *Machtinger* and *Wright* stand for the proposition that a failure to pay vacation pay would result in the entirety of s. 4.1 of the Employment Agreement being null and void. In my view, a fair reading of those cases leads to the conclusion that the offending term would be considered to be null and void, but not the entirety of the section.

[25] I also do not accept Marineau-Mes' submission that s. 4.1 constitutes a termination pursuant to s. 56 of the *ESA*, which provides as follows:

An employer terminates the employment of an employee for the purposes of section 54 if:

- (a) the employer dismisses the employee or otherwise refuses or is unable to continue employing him or her.

[26] I am satisfied that BlackBerry legitimately required Marineau-Mes' services as part of his transition out of the company. The context of this case is quite different from the facts in the case of *Luft and Beaudry Inc. (Re)*, [1991] O.E.S.A.D. No. 85 at p. 2, which Marineau-Mes relies upon in support of his submission. I do not agree that BlackBerry ended Marineau-Mes' employment in the circumstances of this particular case, because I am satisfied that BlackBerry may very well require Marineau-Mes' services before the notice period expires. In my view, the provisions of s. 4.1 constitute a reasonable notice requirement given the industry and Marineau-Mes' senior position with BlackBerry.

(ii) Marineau-Mes Did not Assume the Duties of EVP

[27] This claim is not made out on the record before the court. First, Marineau-Mes did receive a pay increase commensurate with the announcement by BlackBerry of his promotion to EVP. While there is some dispute between the parties as to the exact amount, it is uncontested that he received an immediate increase in his yearly salary as well as a significant cash payout and further entitlements.

[28] Insofar as the failure to announce the promotion is concerned, the record discloses that both BlackBerry and Marineau-Mes agreed that it would be wise to delay the announcement of his promotion given the fact that a promotion freeze was in place. However, Tear, Marineau-Mes' superior, clearly confirmed and congratulated Marineau-Mes on the promotion, which was approved by the Board. Internal emails further confirm that the promotion took place. Marineau-Mes' own evidence at his cross examination confirms that through the fall of 2013 he continued to be an important part of the BlackBerry team, participating in critical discussions concerning the company's future.

[29] Lastly, Marineau-Mes made issue with the fact that when his departure was announced, it was announced that he had retained his previous position as SVP. In my view, not much turns on this given the fact that he was consulted about this form of announcement, and the announcement was made this way because the promotion had not been announced.

(iii) The Six-month Notice Period is the Equivalent of a Non-compete Covenant

[30] I do not agree with this submission. I agree with BlackBerry that having Marineau-Mes available is necessary. The notice period is one of the tools that allows BlackBerry to achieve that end. In this regard, I do not believe the case relied upon by Marineau-Mes, *Sure-Grip Fasteners Ltd. v. Allgrade Bolt & Chain Inc.*, [1993] O.J. No. 193 at para. 19, is of assistance. In that case, there was no written employment agreement. Further, unlike with a non-compete agreement, Marineau-Mes continues to receive remuneration during the notice period.

[31] In any event, Marineau-Mes does not dispute that such clauses are usual in the industry so that companies can attempt to protect themselves. In fact, Marineau-Mes had a similar type of provision in his previous employment contract with QNX, albeit the notice period was for a shorter period of time. But this is understandable given the lesser role he had at QNX than he did at BlackBerry. In these circumstances, I cannot find that the notice period is the equivalent of a non-compete covenant, particularly when BlackBerry has made it known to Marineau-Mes that he must remain available to perform duties to BlackBerry, who anticipates those services will be necessary for his transition out of the company. Lastly, it cannot be ignored that even if the notice period constituted a non-competition clause, reasonable competition clauses are enforceable. While the notice period does have some non-competition aspects, it is not, in my view, offensive or overreaching. In my view, s. 4.1 is reasonable.

(iv) Marineau-Mes had Good Reason to Terminate the Employment Agreement?

[32] As per s. 4.5(i), notice need not be given if there is a material and detrimental alteration of Marineau-Mes' position, duties or responsibilities with BlackBerry.

[33] At the motion, Marineau-Mes did not submit that such an alteration occurred prior to his resignation. This is sensible given his level of responsibility at the company. He did take issue with some of the conversations he had with Chen concerning his future. Such conversations, in my view, would not constitute "Good Reason", particularly given the changes that BlackBerry was experiencing, and the provisions of s. 1.7 of the Contract, which allow BlackBerry to modify, change, reduce or add to employment duties to meet business demands. In any event, the Contract stipulates that Marineau-Mes can only effect a termination for Good Reason if he provides notice of the breach, and provides BlackBerry with 15 days to cure the basis of his claim. Marineau-Mes did not comply with this term.

[34] Marineau-Mes instead takes the position that after he resigned from BlackBerry, the company materially altered his duties and responsibilities so as to constitute a material and detrimental alteration.

[35] In my view, this is not a tenable argument. It is not surprising that his role changed after he announced his resignation. Section 4.1 of the Contract provides that he will continue to provide active service for six months. I have found that BlackBerry had a legitimate interest in requiring Marineau-Mes' services after his resignation. I do not think that requiring Marineau-Mes to assist with his transition out of the company, rather than performing his usual duties as

SVP, constitutes a material and detrimental alteration within the meaning of s. 4.5 of the Contract. In my view, little turns on the fact that Marineau-Mes has not been consulted by BlackBerry since January 6. A dispute immediately arose between the parties that led to a deterioration in their relationship. Given this dispute, and the litigation that followed, it is not surprising that he has not been consulted. Given the given the evidence of Perks, however, it is likely that BlackBerry will require his services in the future.

[36] I agree with BlackBerry that this argument has no basis in the Contract itself, is not supported by any case law and is out of touch with commercial reality.

DISPOSITION

[37] For the reasons above, BlackBerry is entitled to a declaration that the Contract is binding on the parties and that Marineau-Mes is obligated as set out in the Contract to provide six months' prior written notice of his resignation from employment with BlackBerry, which notice period expires on June 23, 2014.

[38] BlackBerry is entitled to its costs. Counsel are to either agree on costs or re-attend upon me at a later date to make oral submissions in this regard.

T. McEwen J.

Released: March 24, 2014

CITATION: BlackBerry Limited v. Marineau-Mes, 2014 ONSC 1790
COURT FILE NO.: C-174-14
DATE: 20140324

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

BLACKBERRY LIMITED

Applicant

– and –

SEBASTIEN MARINEAU-MES

Respondent

REASONS FOR DECISION

T. McEwen J.

Released: March 24, 2014