

Letourneau v. Honeywell Ltd.

Alberta Judgments

Alberta Court of Queen's Bench

Judicial Centre of Edmonton

Edmonton, Alberta

D. Lee J.

Heard: February 5, 2020.

Oral judgment: February 5, 2020.

Action No.: 1103-19307

E-File No.: EVQ20LETOURNEAUT

[2020] A.J. No. 592

Between Todd Michael Letourneau, Plaintiff, and Honeywell Limited, Defendant

(145 paras.)

Counsel

C.B. Falconer, For T. Letourneau.

A. LaRoche, For Honeywell Limited.

B.A. MacEachern, For Honeywell Limited.

Reasons for Judgment

D. LEE J. (orally)

1 So, I really appreciate your help, Counsel, and I am going to give you my decision now. I think legal counsel and legal representation in this matter from the three of you has been outstanding - really, really solid and the cooperation and the assistance you've given the Court is great.

2 It's a short case, but it's not a simple case necessarily. In some ways it's simple, but in other ways it isn't because there's a lot of moving parts here. But I'm going to give you my decision now and let you be gone.

3 I know you know this, but just for the non-lawyers in the room, my word and my decision today is final

for today from myself, but of course it's not the final word on this case. The parties are able to appeal the decision and the Court of Appeal has the final word on this.

4 So, this essentially is a case about constructive dismissal and commissions owed to the plaintiff, Mr. Letourneau, by his former employer, Honeywell Limited. Mr. Letourneau is seeking judgment against Honeywell for amounts owed to him for reasonable notice and commissions.

5 The material facts are not really in dispute. Mr. Letourneau began working for Honeywell as a sales representative for service contracts for the defendant Honeywell in Fort McMurray Region on approximately July 4th, 2005. There was no signed employment contract with the plaintiff, Mr. Letourneau. He was paid a base salary and he received commissions paid pursuant to Honeywell's published incentive plan.

6 In May of 2006, Mr. Letourneau was promoted to an account executive and he personally became responsible for managing Honeywell's clients in Fort McMurray. He was the single point of contact for Honeywell clients in Fort McMurray and he was very successful during his 6 years - a little over 6 years. Extremely successful - he was a top salesman. He was paid a significant amount of commissions.

7 What is specifically in issue with respect to Honeywell's published incentive plan, which is found in Exhibit 1 at tab 17, are seven specific contracts. The formula is somewhat complicated, but it's easily determinable. Mr. Letourneau, he -- Mr. Letourneau submits that he was entitled to commissions on all of the seven contracts in issue, and Honeywell effectively constructively dismissed him when it refused to pay at one point in February 2011 any of the commissions, like a zero amount. Honeywell also discussed with Mr. Letourneau the possibility or probability of severance, a severance package if Mr. Letourneau was not happy about his situation during the course of 2011.

8 Honeywell used various positions in determining not to pay any commissions in February of 2011. There was some indication that it was restructuring its sales staff, although restructuring is probably an over-exaggerated term for adding a few more people to sell to the Fort McMurray clients and to service them. In any event, they took the position that this disentitled Mr. Letourneau to any commissions payable.

9 Mr. Letourneau, the plaintiff, rejected Honeywell's position of zero commissions payable and eventually Honeywell credited Mr. Letourneau with \$130,614 in commission, which Mr. Letourneau reported as employment income on his tax return. This credit in April was paid into Mr. Letourneau's account in June.

10 There were a couple of emails that took place during the period of March to June. Particularly, I note tab 7, which is a "take it or leave it" compromise in the words of Mr. Letourneau, in an email he sent to Monica Fonzits (phonetic), the human resources officer for Honeywell. The first paragraph reads: (as read)

Since this email was sent on March 1st, I have been given a "take it or leave it" compromise of half my FVD owing (1.7 million out of 3.4 million owing as per attached PDF). I tentatively accepted this because I felt like I was backed into a corner with no recourse other than to take legal action. I still do not believe this is fair or equitable and I am evaluating my options. I am very disappointed in the complete lack of business ethics and disrespect I have been subjected to. Considering the level of ethics a company like Honeywell should adhere to, I really do not believe

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I should be forced to take a legal route. I enjoy my job and would like to continue here under a fair arrangement.

11 In April of 2011, tab 18 reveals a handwritten set of notes in the plaintiff's own handwriting where he describes the total settlement and the total pay-out before settlement. The word "settlement" is used twice. It roughly equates to the amount of money that Mr. Letourneau was paid, and it also compares this to what 6 months of settlement would result in. The two numbers are roughly close, \$162,261 on the pay-out before settlement, and \$181,137 in the severance at 6 months of pay-out.

12 What tab 18 suggests to me on a balance of probabilities is that Mr. Letourneau was quite aware of the various options he had. There's no doubt that Mr. Letourneau is just an individual who is a very successful salesman, making several hundred thousand dollars a year at the time in 2011. He is of course financially disparate from the Honeywell company which is a billion dollar corporation. But in terms of knowledge of his options, he was very aware. He was looking after his own interests, which of course is what he should do. He was taking responsibility for the situation. He was trying to make the best of a difficult situation. He only had, as his own words suggest, limited options after the sales structure was changed significantly on him without notice in February of 2011 and then memorialized in a slide show presentation dated March 1st, which is tab 14 of Exhibit 1.

13 Clearly, it was obvious to him and anyone else observing the situation that this March 1st reorganization was going to substantially affect in a negative way his ability to earn commissions, which was his main source of livelihood. So, there were only a few options available to the plaintiff, Mr. Letourneau, and he was having to deal with this in a relatively short period of time, on top of which he was suffering of course from the personal humiliation of being treated like this after being a highly successful, highly regarded employee. He questioned why this reorganization made any business sense, and I agree that on the face of it it doesn't make any business sense to have added more employees and taken away an excellent working relationship that Mr. Letourneau had with his Fort McMurray clients that he had built up for himself and for the company.

14 Having said that, it is generally within Honeywell's power under tab 14's incentive plan to make changes on a go-forward basis. I agree that in terms of constructive dismissal Honeywell should not, however, have taken the position that they weren't going to pay him anything for commissions earned simply because he was no longer servicing the contracts in question. The contracts were booked several years before and under normal circumstances he would have been and should have been allowed to complete the servicing of those contracts for which he was doing an excellent job on. None of the contracts were cancelled by the clients pursuant to provisions that they could have used.

15 So, in dealing with this matter on a wrongful dismissal, constructive dismissal basis I find that Mr. Letourneau was constructively dismissed because of these unilateral changes that substantially altered the essential terms of his employee's contract of employment.

16 Having said that, however, once the changes had been made, Mr. Letourneau had to either accept the changes or find alternate ways to deal with this matter. He could have sued for wrongful dismissal, he could have sued for the remaining amount of commission that he felt was owing to him, or he could have accepted some sort of compromise.

17 I have looked at this case from a number of perspectives, and while there is no formal documentation with respect to a settlement agreement that was found, for example, in the *Buterman* case that went to the Court of Appeal that counsel and I have discussed at some length, there is material before me with

respect to settlement. As I read earlier, the March 11th, tab 7, talks about a compromise. The tab 18 in Mr. Letourneau's own writing references settlement on two occasions. Tab 10, which is the official Honeywell investigation on harassment with the manager of the human resources department, talks about on the bottom of the first page at the end of paragraph 5: (as read)

After sales structure was changed, Brent ...

18 This is one of his managers.

... pulled me in and told me I wasn't getting my renewal commission for this year. I asked why. He said it was management's decision, shrugged his shoulders, and didn't seem to care. I put in a complaint to Honeywell and agreed ...

19 And the operative word is "agreed".

... on getting half to move on.

20 Another set of operative words, "agreed on getting half to move on". That of course is essentially what happened, he received half. And then of course Mr. Letourneau goes on to complain that he'd lost certain contracts and he talks about that in the same passage.

Immediately after I lost three contracts with the new structure and ever since I have been hounded about my negative attitude. Brent ...

21 His manager,

... had told me he can get me a good package and "you can leave", or "your attitude needs to change. I don't want to PIP you in a couple of months".

22 PIP is a description used in Honeywell's terminology about coaching and assistance to employees who they feel are having difficulty

23 The passage continues: (as read)

This was mid-March in a one-on-one conversation with Brent. I felt I was backed against the wall and would be fired/PIP'd if I didn't agree to his compromise on the commission settlement.

24 So, once again there's complaints and there was probably pressure in various aspects because there was quite a bit of money at stake here, but there was no duress as we know it in the legal term. The operating mind of Mr. Letourneau was quite clear, quite lucid. He knew his choices and his alternatives. He participated in the Honeywell investigation in harassment that he initiated, and he sent the March email in his own words.

25 Now, as part of the explanation as to why the Court shouldn't accept this as a settlement or a condonation of the wrongful dismissal, Mr. Letourneau points the Court to tab 28, which he suggests means that Honeywell themselves on April 4th didn't think this was over. So, there is an email from Monica Funzits to the manager Brent Ellacott. Monica writes: (as read)

Somehow, I get the feeling this isn't over yet. Hopefully I'm wrong about that. Let's wait and see.

26 And then the manager responds, or the manager actually wrote to Monica, I guess at 4:22: (as read)

Earlier this is the third time I've made that speech. I needed a witness. Hopefully it takes hold.

27 So, what does this email mean? I think the email is a equivocal in the sense that it does not acknowledge that Mr. Letourneau was going to sue or was threatening imminently to sue, although he had raised that issue obviously from the passages I read out that he knew he had that right to sue and had considered it.

28 I would think that Honeywell, being the billion dollar corporation it is, if they really believed that a lawsuit was around the corner, would have easily and conveniently accessed the in- house legal department it had and outside counsel which it has, Oslers, representing Honeywell quite capably and being the registered office in Alberta. Obviously, if the feeling was that this kind of lawsuit that I'm now dealing with was going to happen, the response from the HR director and management would not have been to hopefully wait and see and wait to be sued. They would have taken some form of action.

29 What they did do is they paid out \$130,614 as against the \$284,000 claim, just under half. That clearly, in Honeywell's mind, was their idea of a full and final settlement and Mr. Letourneau confirms that in those emails where he was given the "take it or leave it" compromise. His evidence was also that it was take it or leave it. So, his choice was between zero and what he felt he was owed. He received \$130,614. He was credited that amount in April, the money was received in June. In November, he resigns to go to another job that he had arranged. So, not only in my conclusion was there a settlement, but there was clearly a significant period of time between the settlement which constitutes a condemnation of whatever occurred to Mr. Letourneau.

30 I find that Mr. Letourneau settled in terms of the essential terms of that settlement as was described in the *Buterman* case from our Court of Appeal (2017 ABCA 196), and I also find that Mr. Letourneau condoned the changes to his employment agreement, either expressly or implicitly, and he is therefore estopped from claiming that he was constructively dismissed. An employee must act within a reasonable period of time. In this case 8 months passed. That is not a reasonable period of time in these circumstances. Employees of course are entitled to the opportunity to assess their changed situation for a reasonable time before deciding whether to accept it, but in this case I deem Mr. Letourneau to have condoned the changes. Eight months is beyond being a reasonable time to reject the changes. The case law overwhelmingly supports that proposition.

31 Mr. Letourneau gave no clear, unequivocal notice that he refused to accept the reorganization. He was told that if he didn't accept the changes he would be terminated. Mr. Letourneau negotiated a compromise with Honeywell, which saw him receive a significant payment of \$130,614, which he accepted.

32 In conclusion then, Mr. Letourneau settled his differences, compromised them, and received funds from Honeywell, and he condoned the changes that were made to his employment situation, therefore his claim is dismissed with costs which we can now discuss in detail.

33 MR. LAROCHE: Thank you, My Lord. Ms. MacEachern will actually be speaking to costs on behalf of Honeywell.

34 THE COURT: Thank you. Ms. MacEachern.

Submissions by Ms. MacEachern (Costs)

35 MS. MacEACHERN: Yes. Good afternoon, My Lord.

36 THE COURT: Good afternoon. Thank you.

37 MS. MacEACHERN: As you are no doubt aware, costs are at the discretion of the Court. I would like to present to you though a *Calderbank* offer that Honeywell -- or not -- me and my co-counsel presented on behalf of Honeywell to my friend on behalf of Mr. Letourneau.

38 THE COURT: Thank you.

39 MS. MacEACHERN: Admittedly, in full disclosure to the Court, the offer was made late in the litigation. As you can see, the offer was made January 13th, 2020, but notwithstanding -- notwithstanding the date of the offer, we submit that this is a valid *Calderbank* offer of \$40,000 inclusive of costs that was not accepted by Mr. Letourneau, and that this offer does justify an enhanced costs award if you see fit.

40 THE COURT: Okay, thank you.

41 MS. MacEACHERN: Thank you.

42 THE COURT: Mr. Falconer.

Submissions by Mr. Falconer (Costs)

43 MR. FALCONER: Thank you, My Lord. We did receive this offer from my friends.

44 THE COURT: Yes.

45 MR. FALCONER: So, we can't deny that. In relation to costs -- well, you didn't find for me, so it's not as though I have a lot to argue about in that regard. What I can say is that the litigation did drag on for an extensive period of time, not totally due to Mr. Letourneau or to my efforts.

46 THE COURT: Okay. So, tell me that, because I did notice it seemed to go on and on. Is there something, for example, the defendants did or didn't do that caused this, or was it the Court's delay, or what -- what happened here?

47 MR. FALCONER: Well, there -- I think there was -- to be fair, there was some delay in getting this to trial. Obviously, I can't say I'm without some responsibility in not pushing it ahead more aggressively. At the same time, there was about a year and a half there where the file sat dormant because prior counsel that was on the file with me was no longer with the firm, and I don't know what happened, but it didn't get assigned to anyone, and so literally we were sending out letters and emails to the ether for almost a year and a half because --

48 THE COURT: You were sending what?

49 MR. FALCONER: We were sending emails out and communications that weren't getting responses because the counsel who was on the other side was no longer with the firm.

50 THE COURT: Oh, yes, that's -- I recall that because the discovery transcript --

51 MR. FALCONER: So -- so, we didn't really know what was happening and we couldn't -- couldn't really tell. But then my friend -- my friend Mr. LaRoche got appointed to the file by the firm and he's been --

52 THE COURT: So, you're saying --

53 MR. FALCONER: -- handling it.

54 THE COURT: -- the year and a half delay was caused by Oslers not having a lawyer in charge of the file? Is that what you're saying?

55 MR. FALCONER: I don't know exactly when Ms. Chaffert (phonetic) ceased to be involved with the file. So, I -- I didn't want to comment, I just know that nothing happened for about a year and a half, and that was --

56 THE COURT: So -- so, what turns on that? Let's assume for the moment that's correct. So, what does that mean in terms of a costs award? Like, does it -- does it -- does it mean that I should --

57 MR. FALCONER: Well, there's -- there's no amounts payable, My Lord. It would apply if there was something due and there was interest payable.

58 THE COURT: Right. So, you're saying I shouldn't award interest for that year and a half. Is that what you're saying?

59 MR. FALCONER: Well --

60 THE COURT: I just want to know what it is you're saying.

61 MR. FALCONER: Yeah. I'm -- I'm saying if there was going to be any award for costs that had anything to do with the time that's expired, that's part of it - it's not totally our fault.

62 THE COURT: Okay.

63 MR. FALCONER: The other -- the other -- the other item I would raise is there is -- there was an order of Justice Nielsen to produce certain records by the date of trial and one of those was to identify all financial records of Honeywell to determine -- you know, based on what Your Lordship's reasoning is there was a settlement offer, it's not particularly determinative of anything. But there was a direction they were supposed to produce all their financial records in relation to the seven contracts at issue, and the whole point of that was to determine the total revenue realized by the company in order to calculate Mr. Letourneau's commissions, and the response from Honeywell was, well, we produced those records. As I have explained during the cross-examination, the records don't actually contain any contract numbers on them.

64 THE COURT: Right.

65 MR. FALCONER: So, they didn't really comply with His Lordship's direction, which was to produce

the records to show exactly what Honeywell was paid on those seven contracts so we can determine the correct amount of commissions payable to Mr. Letourneau.

66 THE COURT: All right. So, would you suggest that you -- that no costs are payable for that particular application? What -- I just want to know from a practical point of view what is it that we're deducting from what normally would be, I would think, is a party and party costs award with double costs from the date of the offer. Is that normally what we'd be looking at from Honeywell's point of view, Ms. MacEachern?

67 MR. LAROCHE: Yes, My Lord, under Column 3.

68 THE COURT: Yeah, Column 3.

69 MR. LAROCHE: But yes.

70 THE COURT: That's what you're looking for?

71 MR. LAROCHE: Yes, My Lord.

72 THE COURT: So, are you suggesting these are deductible items from that column?

73 MR. FALCONER: What I'm suggesting, My Lord, is that doubling the costs as considered by *Calderbank* is obviously in the discretion of the Court.

74 THE COURT: Right.

75 MR. FALCONER: And did --

76 THE COURT: But given the lateness of the offer, the doubling of costs has a relative -- I mean, everything is going to be significant, but you're doubling costs from January of 2020, basically for this trial.

77 MR. FALCONER: Well, the trial.

78 THE COURT: Yeah. Nothing else happened, I assume. So, you're suggesting that I take those things into account that you've just talked about and not double costs. Is that what you're saying? I just want to know what it is you want me to consider.

79 MR. FALCONER: What I'm saying is it's in the discretion of the Court as to what the costs should be, but what I'm saying is that non-compliance with a court order or clear direction is a fact that a Court can consider in determining whether to award heightened costs or not. What I'm suggesting is that an offer to double costs made just before trial doesn't really give people much time to respond, although --

80 THE COURT: So, was there a response to this? Did you respond?

81 MR. FALCONER: My -- my -- my client said that it was not sufficient.

82 THE COURT: Right. So, you just didn't accept.

83 MR. FALCONER: It wasn't acceptable.

84 THE COURT: Okay.

85 MR. FALCONER: And so, all I'm saying, My Lord, is that had this been given -- I don't know (INDISCERNIBLE) accept the \$40,000 anyway, so I don't want to put that before the Court.

86 THE COURT: Pardon me?

87 MR. FALCONER: I don't know that my client would have accepted \$40,000 anyway, so I don't want to suggest that to the Court.

88 THE COURT: Right.

89 MR. FALCONER: I don't think that's fair. But giving this to me on the eve of trial doesn't really provide us a lot of time to try to bridge much of a gap between parties.

90 THE COURT: But you didn't try to bridge it, from what you've just told me. You just --

91 MR. FALCONER: We weren't --

92 THE COURT: -- didn't respond.

93 MR. FALCONER: We weren't able to.

94 THE COURT: Right. Like you fairly point out, even if this had been a year before he probably wouldn't have accepted 40,000 either. Like, I'm just thinking out loud that 40,000 -- I don't think it was the lateness in time, but if there was -- if there was a sincere counteroffer that you responded to the January 13th offer with and then you ran out of time, why -- I get --

95 MR. FALCONER: What happened, My Lord, is we made an offer and this was their counteroffer.

96 THE COURT: Okay. So, when did you make your offer?

97 MR. FALCONER: Like a year --

98 THE COURT: Late too? Pardon me?

99 MR. FALCONER: Like a year ago.

100 THE COURT: A year ago.

101 MR. FALCONER: And this was the response we received just prior to trial.

102 THE COURT: So you made an offer a year before this and this is what --

103 MR. FALCONER: This is what we got in response.

104 THE COURT: But presumably you didn't beat -- whatever offer you made it wasn't --

105 MR. FALCONER: Nowhere near.

106 THE COURT: It wasn't -- it wasn't a good offer in this context that we're dealing with.

107 MR. FALCONER: Well, following your (INDISCERNIBLE), no, it wasn't a good offer, but we had met with Justice Nielsen and based on his thoughts of the case we made our offer.

108 THE COURT: Okay. So -- so, you're saying Justice Nielsen was somewhat trying to mediate for you.

109 MR. FALCONER: He tried direct both counsel to a resolution.

110 THE COURT: Okay.

111 MR. FALCONER: And based on his recommendations we --

112 THE COURT: So, did he throw out some numbers or --

113 MR. FALCONER: His -- yeah, based on his sense of the case we made an offer.

114 THE COURT: Okay.

115 MR. FALCONER: So, that was that simple.

116 THE COURT: So, you tried - tried and failed.

117 MR. FALCONER: We did.

118 THE COURT: But would it be fair to say you were fairly far apart?

119 MR. FALCONER: Well --

120 THE COURT: Like I don't know what your offer is, I don't need to know, but was there -- were you fairly far apart or could you have pulled this together in the week before trial, for example?

121 MR. FALCONER: Pulling together settlement offers in the week before trial might have happened, but to be honest with you we were wasting our time on things like agreed exhibit books and agreed statements of fact and other things. Like we --

122 THE COURT: Yeah. Well, you didn't waste enough time on that, but anyway ...

123 MR. FALCONER: Well, we -- we -- we did. We did, Sir.

124 THE COURT: I get it.

125 MR. FALCONER: We did because there just came a point where counsel just said, okay, well, I -- I literally said, okay, well, we're not going to agree on this, so I need to get on --

126 THE COURT: Okay.

127 MR. FALCONER: -- preparing for trial if we can't get an agreement. And I'm not blaming my friend, there just -- there just came to a point where it was like we have a trial coming, so we have to get -- we have to get these documents prepared. So, you know, the -- the idea that the plaintiff's counsel or defendant's counsel made no efforts to resolve this isn't fair. We did have some direction. Your Lordship's given quite different direction which, as I advised my client, can happen. And -- and so, you know, we came into this thinking, you know, we might get something different. We'll just leave it at that.

128 THE COURT: Sure.

129 MR. FALCONER: Closer to --

Ruling (Costs)

130 THE COURT: You'll recall that at the beginning of this trial before I knew anything, literally nothing, I had mentioned as a general principle because it's a sound one, regardless on which side you find yourself on you don't want to go through even 3 days of trial if you don't have to, because it's a very painful process, and you'll recall I said that somebody is going to win and somebody is --

131 MR. FALCONER: You did, My Lord.

132 THE COURT: -- going to lose. So, there's nothing that -- beyond that, and obviously in hindsight now that I know where the positions are, there was nothing I could have done to bring you together. So, a trial was necessary, notwithstanding the -- whatever efforts you made, Mr. Falconer.

133 MR. FALCONER: And I appreciate that.

134 THE COURT: So, you have to appreciate that in the sense that had I seen something different, then I might have been able to mediate it, but that could have compromised my position. There was no area of compromise here that anybody could have pulled together from what I can see, from now -- now knowing what the position of the parties were in terms of settlement.

135 So, unless you have something else, I think double costs are warranted from the date of the offer, which clearly wasn't met or beaten, and Column 3 is the appropriate column.

136 By the way, I did want to say that the full citation for purposes of the reasons for judgment in *Buterman* is 2017 ABCA 196. I want the record to reflect that, 2017 ABCA 196 and the leading case that was relied on in that *Buterman* decision was *Fieguth v. Acklands*, 1989 CanLII 2744, alternate citations 1989, 37 BCLR (2d) 62, and finally 1989, 59 DLR (4th) 114.

137 So, we're done with costs then? Is there anything else -- I have awarded Column 3 costs, double from the date of the offer. Is there anything else we need to discuss here?

138 MR. LAROCHE: No, My Lord. Thank you.

139 THE COURT: I haven't really said a lot, but I don't think I can add anymore. I'll take the advice that I gratuitously offered Mr. Letourneau. Sometimes the less said the better, but I think you understand my

sentiment and my sympathies and the difficulties that I found myself in. And, as I indicated, my word is final for today but after that the matter can be appealed and the appeal court will have the final say if the matter is brought to them.

140 So, I do want to, however, unreservedly congratulate counsel. All three of you have been a credit to your clients, but more importantly to the Court and to myself personally for your responsiveness, your patience, missing lunch, sitting extra hours, doing all the things that you did in this case. That is a real credit to yourselves and I think, if you don't already have outstanding careers, I am sure you will if you continue this high standard of practice and work. So, thank you very much.

141 From that perspective the case has been a very pleasurable experience for the Court, hopefully for yourselves, too. Thank you again.

142 Good luck to you, Mr. Letourneau. I see you're doing quite well in your job. I guess you'll move on to the next step now.

143 MR. LETOURNEAU: Yes.

144 THE COURT: Thank you.

145 MR. LETOURNEAU: Thank you.