



No. VLC-S-S-207024
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

Between:

JAMES HAWES

Plaintiff

And:

DELL CANADA INC., OPERATING AS DELL CANADA

Defendant

APPLICATION RESPONSE

Application response of the Plaintiff, Dell Canada Inc., operating as Dell Canada (the "application respondent")

THIS IS A RESPONSE TO the Notice of Application of James Hawes filed 7/May/2021, to be heard by way of Microsoft Teams videoconference on May 31, 2021 at 10:00am.

Lawyer for the Defendant
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Part 1: ORDERS CONSENTED TO

The application respondent consents to the granting of NONE of the orders set out in Part 1 of the Notice of Application.

Part 2: ORDERS OPPOSED

The application respondent opposes the granting of ALL of the orders set out in Part 1 of the Notice of Application.

Part 3: ORDERS ON WHICH NO POSITION IS TAKEN

The application respondent takes no position on the granting of the orders set out in paragraphs NIL of Part 1 of the Notice of Application.

Part 4: FACTUAL BASIS

1. The Plaintiff, James Hawes, was employed with Dell Canada Inc. operating as Dell Canada (“**Dell**” or the “**Company**”) or its predecessors for a period of 23 years. His employment terminated on April 10, 2020.
2. The Plaintiff was employed as a Sales Representative as part of Dell’s Data Centre Technologies team. In this position, he sold data centre technology to government-related clients and commercial clients. Data centre technology includes all the technology within a data centre, such as servers, network and storage.
3. At the time the Plaintiff’s employment ended, he was responsible for 13 client accounts, almost all of which were located in British Columbia. The Plaintiff’s clients included the British Columbia Health Authorities and Alberta Health Services.

The Plaintiff’s Compensation

4. The Plaintiff’s compensation was a 50/50 split of fixed salary-based compensation, and variable commission-based compensation. Since 2013, the Plaintiff’s total target compensation or on-target earnings was \$265,000 (“**OTE**”).
5. Under the compensation system, the Plaintiff received:
 - (a) \$132,500 as a base salary (“**Base Salary**”), which equaled half of the OTE; and
 - (b) an amount as commissions, which changed from year to year. The calculation of the Plaintiff’s commission was based on his actual sales revenue in relation to sales quotas set by Dell. Dell changed the sales quotas every six months based on sales performance over the preceding three years and the growth or shrinkage of clients’ business in the industry (“**Commissions**”).
6. The Plaintiff’s Base Salary and Commissions earned from 2013 to 2019 is summarized below:

Year	Base Salary	Commissions	Total
2013	\$132,499.90	\$162,155.95	\$294,655.85

2014	\$132,499.90	\$133,166.22	\$265,666.12
2015	\$132,499.90	\$163,822.35	\$296,322.25
2016	\$132,499.90	\$66,709.22	\$199,209.12
2017	\$137,594.58*	\$166,041.89	\$303,636.47
2018	\$132,498.08	\$346,959.38	\$479,457.46
2019	\$132,498.08	\$167,327.57	\$299,825.65
Average		\$172,311.80	\$305,538.99
Average excluding outlier years 2016 and 2018		\$158,502.80	\$292,021.27
*See paragraph 15 of Affidavit #1 of Clayton Correia			

7. If the Plaintiff's sales revenue met the quota, he received the remaining half of the OTE as Commissions. If his sales exceeded quota, the compensation plan could provide further Commissions at a multiplier of two-times the usual rate. If his sales were below quota, he received a portion of the remaining half of the OTE as Commissions.
8. Since the quota is based on sales performance over the preceding three years and the growth or shrinkage of the clients' business, when the Plaintiff exceeded quota that weighed in favour of pushing the quota higher for the following three years. For example, in the first half of 2018, the Plaintiff's quota was \$5.7 million. As discussed below, in 2018 the Plaintiff's sales far exceeded his quota because of two large sales and securing a five-year contract with one client. As a result, his quota was increased to \$14.3 million for the first half of 2019.
9. The result is that the greater the amount by which the quota is exceeded, the more difficult it becomes to earn high commissions in the following years because the threshold is higher before commissions are earned at a multiplier.
10. Conversely, if the Plaintiff did not meet quota, that weighed in favour of reducing the quota over the course of the following three years.

The Plaintiff's 2018 Commissions were an Outlier

11. The Plaintiff states that his average earnings from the last three full years of employment (i.e. 2017-2019) were \$392,249.60. However, this number is based on his T4 slips, which include other forms of compensation such as benefits, remote work allowance and car allowance. From 2017 to 2019, the average difference between the Plaintiff's T4 earnings and his actual compensation is \$31,276.41. To the extent the Plaintiff is seeking damages based on his T4 earnings in addition to a claim for loss of benefits or other forms of compensation, that would be impermissible double-counting.
12. Moreover, a three-year average of earnings from 2017 to 2019 does not accurately represent the Plaintiff's usual earnings or what he likely would have been able to earn during a reasonable notice period because it includes, and is skewed by, Commissions in 2018. The Plaintiff's 2018 Commissions were a once-in-a-career outlier, and would not be replicated again for the for the following reasons:
 - (a) The reason the Plaintiff's 2018 Commissions were so abnormally high was that one customer made two extremely large purchases and entered into a five-year contract with Dell. It is extremely unlikely the Plaintiff would have been able to make another sale close to that size to that customer again, and certainly not within the period of their five-year contract. In fact, the revenue from that client since the end of the Plaintiff's employment in April 2020 has consistently and sharply declined by double-digit percentages;
 - (b) The Plaintiff would not have made a similar sale to any other customers because the other customers he serviced do not operate by securing long-term contracts with one or two vendors. Instead, their business is spread out amongst numerous vendors which does not allow for such a large sale;
 - (c) When a sales representative has a year of very high sales, his or her compensation generally decreases for the next few years before it starts to move back up again because the high sales cause subsequent quotas to be adjusted upward and this upward pressure on quotas continues for 12 quarters or three years. In the Plaintiff's case, his high 2018 sales revenue caused a sharp increase in his quota, and would have continued to exert an upward pressure on quota for the following three years, well beyond his last day of employment in April 2020;
 - (d) The customers serviced by the Plaintiff, most of which are in the healthcare industry and have been dealing with the COVID-19 pandemic, have not had any

large projects that resulted in significant sales since the end of the Plaintiff's employment; and

- (e) At least three of the 13 customer accounts serviced by Mr. Hawes have not purchased products from Dell since the last day of his employment in April 2020.

Termination and Post-Termination

13. On March 25, 2020, Dell provided the Plaintiff with two weeks of working notice that his employment would be terminated effective April 10, 2020. Shortly after termination, Dell paid the Plaintiff:
 - (a) \$40,769.23 as eight weeks of statutory pay in lieu of notice;
 - (b) \$3,261.54 as vacation pay on the statutory pay in lieu; and
 - (c) \$6,625.00 in commissions.
14. Dell has continued the Plaintiff's participation in its Health and Dental, Basic Life Insurance and Accidental Death and Dismemberment benefits plan until September 10, 2021.
15. After the termination of his employment, on April 10, 2020 the Plaintiff emailed one of Dell's clients and negatively referred to Dell and its products and suggested it may be beneficial to replace Dell's products. He also posted a reference to confidential settlement discussions on his LinkedIn profile, indicating that he was "[w]orking on a massive settlement with Dell".
16. As a result, Dell requested that the Plaintiff confirm he would cease such conduct and comply with his contractual and common law obligations with respect to confidentiality, non-solicitation and unfair competitive activities as a condition of continuing negotiation of an additional severance package. He did not provide such confirmation or attempt to resume negotiation. In the course of document disclosure in these proceedings he produced a signed letter purporting to agree to comply with such obligations; however, that letter was not previously received by Dell.

Other Remuneration

17. In addition to Base Salary and Commissions, the Plaintiff's regular remuneration included the following during the last two full years of his employment:
 - (a) An annual car allowance of \$6,600.10;

- (b) Taxable benefits in the amount of \$1,916.86 per year;
 - (c) Vacation pay on Commissions;
 - (d) A remote work allowance averaging \$389.55 per year; and
 - (e) Contributions to a deferred profit sharing plan (“**DPSP**”) as described below.
18. Dell did not make any contributions to the Plaintiff’s registered retirement savings plan (“**RRSP**”) account. The Plaintiff made personal contributions to his RRSP account through deductions from his wages.
19. Dell contributed to a DPSP account in the Plaintiff’s name in an amount that matched his personal RRSP contributions, up to a maximum of 5% of his eligible earnings and subject to the maximum annual RRSP deduction limit set by the Canada Revenue Agency. In 2019, this amount was \$13,615.00.

Part 5: LEGAL BASIS

20. With respect to the *Bardal* factors to be considered in determining the reasonable notice period, the Plaintiff was a 64 year-old sales representative with 23 years of service. He was primarily responsible for 13 client accounts mainly located in British Columbia.
21. There is no evidence that the effect of the COVID-19 pandemic has caused additional difficulty finding and obtaining employment in the technology industry, such that the pandemic should favour a longer period of notice. It would be inappropriate to speculate on the effect of the pandemic without evidence.
22. Dell did not impair Mr. Hawes’ ability to obtain new employment by insisting on enforcing restrictive covenants as claimed. Rather, Dell sought Mr. Hawes’ confirmation that he would comply with his contractual and common law obligations with respect to confidentiality, non-disparagement and unfair competitive activities. The terms of the contractual obligations were set out in a letter from Dell’s legal counsel. Under those terms, Mr. Hawes was simply prohibited for a period of 12 months from the date of his termination from:
- (a) attempting to divert the business of any customers with whom Mr. Hawes dealt with during the last year of his employment; and
 - (b) competing with the Company while having an ownership interest of at least 1% in the competing enterprise or while holding an officership, directorship or other policy-making position with the competing enterprise.

23. The restrictive covenants do not weigh in favour of an extended notice period.
24. In this case, the range of reasonable notice is between 18-22 months.
25. Given that this summary trial is being held just over one year after the termination of Mr. Hawes' employment, the applicable notice period awarded to Mr. Hawes should be reduced for a contingency that he may obtain employment in mitigation during the remainder of the notice period.

Matusiak v. IBM Canada Ltd., 2012 BCSC 1784 at paras. 49-50

Jamieson v. Finning International Inc., 2009 BCSC 861 at para. 23

Foster v. Kockums Cancar Division Hawker Siddeley Canada Inc., 1993 CarswellBC 244 (BCCA) at para. 14

26. The general approach to assessing damages in a wrongful dismissal action is to put the plaintiff, so far as possible, in the position he would have been had he been given proper notice.

Jamieson v. Finning International Inc., 2009 BCSC 861 [**"Jamieson"**] at para 26

27. Damages over a notice period should be based on the sum of money the plaintiff would have received during the period of reasonable notice; in this case, that is the salary and commissions Mr. Hawes would have received if he worked throughout the reasonable notice period. The measure of damages is not what the plaintiff earned in the past, but what he would earn during the period of reasonable notice.

Jamieson at para 28

O'Reilly v. Imax Corporation, 2019 ONSC 342 [**"O'Reilly"**] at para. 43

Serrao v. National Bank of Financial Inc., 2004 Carswell Ont 2748 (ONSC) [**"Serrao"**] at para. 34

28. With respect to loss of commissions, it is appropriate to use evidence of the past as a guide to the future where it is reasonable to project that relevant circumstances in the past will continue into the future. Allowances must be made for contingencies. A party claiming a loss bears the onus of proving that a loss occurred and the value of that loss.

TCF Ventures Corp. v. Cambie Malone's Corp., 2017 BCCA 129 at paras. 40, 43

29. Where historical commissions fluctuate, the plaintiff's income for a number of years may reflect a representative income figure in relation to the plaintiff's loss. In those circumstances, a five-year average may be appropriate.

Veach v. Diversey Inc., 1993 CarswellBC 1194 (BCSC) at paras. 30-32

30. However, an historical average of earnings would be an inappropriate measure of lost commissions if it is calculated based on years of earnings that the evidence indicates do not represent what the plaintiff likely would have earned over the notice period.

O'Reilly at para. 46

31. The use of an historical average for the purpose of quantifying damages in a wrongful dismissal action when income fluctuates from year to year, should not be blindly applied. It would be inappropriate to rely solely on an historical average that disproportionately takes into consideration an outlier year like 2018. Where, as here, the evidence indicates that the historical earnings include extraordinary years of Commissions that are aberrant, those years should be excluded to avoid skewing the average.

Serrao at paras. 27, 29

32. In this case, the evidence indicates that the Plaintiff's Commissions in 2018 were an extraordinary outlier and he would not have repeated that amount of Commissions in the years after his employment ended in April 2020, if ever. The Plaintiff's 2018 earnings should be excluded from any calculation of average compensation.

33. The most appropriate method of determining the Plaintiff's measure of lost earnings in this case would be to exclude the low and high outlier years of 2016 and 2018, and calculate a five-year average from the years 2013, 2014, 2015, 2017 and 2019. As shown in paragraph 6, this results in average Commissions of \$158,502.80, and a total annual compensation of \$292,021.27.

34. The Plaintiff has not established any losses or damages related to benefits. Dell has continued his participation in its Health and Dental, Basic Life Insurance and Accidental Death and Dismemberment benefits plan until September 10, 2021.

35. The Plaintiff has not established, and is not entitled to, any damages or losses related to the car allowance or remote work allowance.

36. Any award of damages should be reduced by the two weeks of working notice and eight weeks of pay in lieu of notice provided to the Plaintiff upon termination.

Part 6: MATERIAL TO BE RELIED ON

1. Affidavit #1 of Clayton Correia, made 21/May/2021;
2. Affidavit #1 of Judith Anne Downey, made 25/May/2021;
3. The pleadings and materials filed herein; and

4. Such further and other materials as counsel may advise and this Honourable Court may allow.

The application respondent estimates that the application will take 2.5 hours.

- The application respondent has filed in this proceeding a document that contains the application respondent's address for service.

Date: 25/May/2021



Signature of Jillian Frank
Lawyer for application respondent,
Dell Canada Inc.