



No.: *Court File No. VLC-S-S-207024*
Vancouver Registry

In the Supreme Court of British Columbia

B E T W E E N:

JAMES HAWES

Plaintiff

- and -

DELL CANADA INC.
operating as **DELL CANADA**

Defendant

NOTICE OF CIVIL CLAIM

This action has been started by the plaintiff(s) for the relief set out in Part 2 below.

If you intend to respond to this action, you or your lawyer must

- (a) file a response to civil claim in Form 2 in the above-named registry of this court within the time for response to civil claim described below, and
- (b) serve a copy of the filed response to civil claim on the plaintiff.

If you intend to make a counterclaim, you or your lawyer must

- (a) file a response to civil claim in Form 2 and a counterclaim in Form 3 in the above-named registry of this court within the time for response to civil claim described below, and
- (b) serve a copy of the filed response to civil claim and counterclaim on the plaintiff on any new parties named in the counterclaim.

JUDGMENT MAY BE PRONOUNCED AGAINST YOU IF YOU FAIL to file the response to civil claim within the time for response to civil claim described below.

Time for response to civil claim

A response to civil claim must be filed and served on the plaintiff(s),

- (a) if you were served with the notice of civil claim anywhere in Canada, within 21 days after that service,
- (b) if you were served with the notice of civil claim anywhere in the United States of America, within 35 days after that service,
- (c) if you were served with the notice of civil claim anywhere else, within 49 days after that service, or
- (d) if the time for response to civil claim has been set by order of the court, within that time.

Part 1: STATEMENT OF FACTS

The Parties

1. The plaintiff in this wrongful dismissal action is James Hawes (the “Plaintiff”), residing in Burnaby, British Columbia. The Plaintiff has an address for service at 580 Hornby Street, Suite 520, Vancouver, BC V6C 3B6, care of Samfiru Tumarkin LLP.
2. The defendant is Dell Canada Inc. operating as Dell Canada (the “Defendant”). Dell Canada Inc. is the sole proprietor of Dell Canada, and a company incorporated pursuant to the laws of Canada. The Defendant has an address for service at 200 Burrard Street, 1200 Waterfront Centre, Vancouver, BC V7X 1T2, care of Borden Ladner Gervais LLP.

Background of Wrongful Dismissal

3. The Plaintiff commenced employment with the Defendant’s predecessor, Data General (Canada) Company (“Data General”), in or around March of 1997. The terms and conditions of the Plaintiff’s employment with Data General were set out by way of an offer letter dated March 11, 1997 (the “Data General Agreement”) and were accepted by the Plaintiff on March 13, 1997.
4. In or around October of 1999, Data General was acquired by EMC Corporation (“EMC”) and the Plaintiff’s employment continued without interruption. The Plaintiff was asked to sign an employment agreement (the “EMC Agreement”) as part of the transition but was not provided with consideration for his execution of same.
5. In 2016, the Defendant acquired EMC and the Plaintiff’s employment continued without interruption. The Plaintiff was not asked or required to execute any offer letter, agreement or contract with the Defendant.
6. On or about March 25, 2020, the Plaintiff’s employment was terminated.
7. The Plaintiff states that he has twenty-three (23) recognized years of service with the Defendant.

8. At the time of his termination, the Plaintiff was a Sales Representative who enjoyed the considerable benefit of having spent such a long period of his life with the same employer, same industry and same products to be sold. As a result, the Plaintiff's total annual earnings were consistently well above his Total Target Compensation, which, for 2020, was \$265,000.00.
9. The Plaintiff specifically states that his average earnings from 2017 to 2019 were \$392,249.60 per year.
10. In addition to his earnings, the Plaintiff was further remunerated for his services through enrollment in the Defendant's comprehensive benefits plans and matching contributions to his Registered Retirement Savings Plan ("RRSP") and Deferred Profit Sharing Plan.
11. On March 25, 2020, the Defendant terminated the Plaintiff's employment and provided him with two (2) weeks of working notice. Thereafter, the Defendant offered the Plaintiff an additional lump sum of fifty-five (55) weeks, calculated on the basis of his Total Target Compensation (rather than on his actual earnings).
12. The Defendant additionally offered to continue the Plaintiff's enrollment in extended health benefits and dental benefits for a fifty-five (55) week period, but did not make an offer to compensate the Plaintiff for the immediate cessation of his disability insurance, life insurance or accidental death and dismemberment insurance. There was no offer to compensation the Plaintiff for the loss of his pension contributions.
13. At the time of termination, the Plaintiff was sixty-four (64) years old.
14. On May 4, 2020, the Plaintiff received correspondence from the Defendant advising him of certain restrictive covenants, inclusive of a one (1) year non-competition agreement, that the Defendant considered binding on the Plaintiff. Despite the Defendant's assertion that it considered the Plaintiff already bound by these provisions (as they were set out in the Data General and EMC Agreements), the Defendant demanded that the Plaintiff execute an acknowledgment of these alleged obligations and his agreement that any breach of same would result in the clawback of "any amounts" received as severance pay. There was no

carve out to ensure that the Plaintiff received at least his minimum entitlements under provincial employment standards legislation (the “Acknowledgment”).

15. In fact, the Defendant advised the Plaintiff that it would not negotiate the terms of his severance unless and until he executed the Acknowledgment.

Part 2: RELIEF SOUGHT

1. The Plaintiff seeks the following relief:

- (a) damages for wrongful dismissal equivalent to twenty-four (24) months of notice, less amounts already paid;
- (b) special damages for out-of-pocket expenses incurred in attempting to mitigate his losses and obtain alternate, comparable employment, the full particulars of which will be provided prior to or at trial;
- (c) bad faith damages regarding the manner in which the Plaintiff was terminated;
- (d) pre-judgment interest on the aforementioned amounts pursuant to the *Court Order Interest Act*, R.S.B.C. 1996, c. 79;
- (e) post-judgment interest on the aforementioned amounts pursuant to the *Court Order Interest Act*, R.S.B.C. 1996, c. 79;
- (f) costs of this action, together with applicable taxes thereon, in accordance with the *Excise Tax Act*, R.S.C. 1985, c. E-15; and
- (g) such further and other relief as counsel may advise and this Honourable Court may permit.

Part 3: LEGAL BASIS

Wrongful Dismissal

1. The Plaintiff states that there is no enforceable agreement between him and the Defendant that limits or his termination entitlements. As such, the Plaintiff pleads that his entitlements are determinable in accordance with the common law.
2. The Plaintiff specifically pleads that the Defendant did not have just cause to terminate his employment, nor was cause alleged at the time of the termination.
3. The Plaintiff pleads that he is entitled to a period of reasonable notice period of twenty-four (24) months, based on the following circumstances:
 - (a) his tenure of over twenty-three (23) years;
 - (b) the sales role that he will be trying to replace, particularly given the mass layoffs by the Defendant and other companies, which have saturated the market with applicants for comparable roles;
 - (c) a recent and very serious injury to the Plaintiff's leg and knee, which continues to hamper the Plaintiff's ability to find and secure replacement work;
 - (d) his age;
 - (e) the current context within which the Plaintiff is searching for alternate work, including the ongoing global pandemic and economic recession; and,
 - (f) other factors which will be particularized prior to or at trial.
4. The Plaintiff states that he is entitled to damages for his economic losses as a consequence of the Defendant's failure to provide him with reasonable notice of termination, having regard to what he would have been entitled to receive had he been provided with working notice of his termination, Specifically, the Plaintiff states that he is entitled to be compensated for the loss of all components of his remuneration package over the applicable

notice period, including his salary, commissioned earnings, benefits, pension contributions, and any further form of compensation as particularized prior to trial.

5. With respect to the commissioned earnings, the Plaintiff pleads that he is entitled to be compensated for the lost opportunity to earn commissions over the applicable notice period, based on the most reasonable assessment of what the Plaintiff could have expected to earn over that period of time. Over the course of the three (3) years preceding the Plaintiff's termination, the Plaintiff earned, on average, \$392,249.60 per year. The Plaintiff pleads that his severance should reflect the true measure of damages sustained over the course of the applicable notice period.
6. The Plaintiff further pleads that he is or will be incurring out-of-pocket expenses to obtain replacement insurance or pay for insured services directly, all of which would not have been incurred had he been provided with notice of his termination instead of pay in lieu thereof.
7. The Plaintiff further pleads that he has suffered and will continue to suffer losses in the form of the total cessation of contributions to his pension plan and vacation pay.

Special Damages

8. As a consequence of the wrongful termination of his employment, the Plaintiff pleads that he is entitled to special damages for out-of-pocket expenses incurred in attempting to mitigate his losses and obtain alternate comparable employment, the full particulars of which will be provided prior to or at trial.
9. The Plaintiff has taken, and continues to take, diligent steps to mitigate his damages. Despite his best efforts, the Plaintiff has yet to find alternate employment similar to that which he had with the Defendant.

Plaintiff's address for service: **Samfiru Tumarkin LLP**
Barristers & Solicitors
580 Hornby Street, Suite 520
Vancouver, BC V6C 3B6

Fax number address for service: 604-637-5621

Email address for service: lia.moody@stlawyers.ca

Place of trial: Vancouver, BC

The address of the registry is: 800 Smithe Street
Vancouver, BC V6Z 2E1

Date: July 3, 2020



Signature of Lawyer for the Plaintiff
Lia Moody

Rule 7-1 (1) of the Supreme Court Civil Rules states:

- (1) Unless all parties of record consent or the court otherwise orders, each party of record to an action must, **within 35 days after the end of the pleading period,**
- (a) prepare a list of documents in Form 22 that lists
 - (i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party at trial to prove or disprove a material fact, and
 - (ii) all other documents to which the party intends to refer at trial, and
 - (b) serve the list on all parties of record.

APPENDIX

Part 1: CONCISE SUMMARY OF NATURE OF CLAIM:

This is an action for damages for *inter alia*, wrongful dismissal, and lost benefits.

Part 2: THIS CLAIM ARISES FROM THE FOLLOWING:

- a motor vehicle accident
- medical malpractice
- another cause
- contaminated sites
- construction defects
- real property (real estate)
- personal property
- the provision of goods or services or other general commercial matters
- investment losses
- the lending of money
- an employment relationship
- a will or other issues concerning the probate of an estate
- a matter not listed here

Part 3: THIS CLAIM INVOLVES:

- a class action
- maritime law
- aboriginal law
- constitutional law
- conflict of laws
- none of the above
- do not know

Part 4:

- Builders Lien Act
- Divorce Act
- Family Relations Act
- Insurance (Motor Vehicle) Act
- Insurance (Vehicle) Act

- Motor Vehicle Act
- Occupiers Liability Act
- Supreme Court Act
- Wills Variation Act
- Other:

1. *Employment Standards Act*, R.S.B.C. 1996, C. 113