SUPREME COURT OF NOVA SCOTIA

Citation: *Dillon v. AMEC Foster Wheeler Americas Ltd.*, 2017 NSSC 211

Date: 2017-08-10
Docket: Hfx No. 452766
Registry: Halifax

Between:

Sean Matthew Dillon

Plaintiff

v.

AMEC Foster Wheeler Americas Limited

Defendant

Judge:	The Honourable Justice Peter Rosinski
Heard:	July 20, 2017, in Halifax, Nova Scotia
Decision:	August 10, 2017
Counsel:	Peter Landry, for the plaintiff Michelle Black, for the defendant

By the Court:

Introduction

[1] The court has competing motions to compel the other party to provide disclosure, filed by the defendant June 26 and by the plaintiff July 12, 2017.

[2] The statement of claim was filed June 23, 2016, and indicates this action is within Rule 57. The defence was filed August 4, 2016.

[3] The controversy arises as a result of Mr. Dillon being terminated from his approximately six-year employment with AMEC on or about December 18, 2015. He claims it was a wrongful dismissal without notice. The defendant claims his employment agreement contains an express term that he could be terminated upon providing notice or paying in lieu of notice pursuant to employment standards legislation. The employer says his position was being eliminated as a matter of company downsizing; that originally he was going to be provided with three weeks working notice from December 18, 2015 to January 8, 2016 and one week's pay in lieu of notice, however subsequently AMEC waived the working notice period, and terminated his employment on December 18 having paid him one week in lieu of notice, ultimately paying him the further three weeks pay in lieu of notice on or about July 8, 2016.

The motions

[4] Mr. Dillon's motion seeks a court order that:

> the defendant produce all electronic transmissions generated by the defendant, including emails, from January 1, 2015 to the date of retention of counsel for for this matter, being July 12, 2016, where such transmissions contain the term "Dillon" or the first name "Sean" where such reference is to the plaintiff in this proceeding.

[5] AMEC's amended motion seeks a court order that:

> the plaintiff shall provide to counsel for the defendant the following documents and information which were agreed to as undertakings at the plaintiff's discovery on February 22 2017 by no later than August 31, 2017:

> the email from the plaintiff to Kevin Hicks as well as all information regarding the plaintiff's attempts to contact Kevin Hicks and Jordan Moores;
>
> details of any discussions between the plaintiff and GWL, including when discussions were held, with whom the plaintiff spoke, and what confusion he says arose from those discussions; and
>
> the plaintiff's complete employment insurance file.
>
> the plaintiff shall provide to counsel for the defendant the following documents and information as requested in writing by no later than August 31, 2017:
>
> the plaintiff's mitigation efforts, including his 2015 and 2016 income information; and
>
> full particulars of the plaintiff's claim for "Wallace damages".

Each party's position

[6] This matter began as an Appearance Day defendant's motion, identical to its present form.

[7] AMEC takes the position that: Mr. Dillon's request for disclosure is "overbroad and that all relevant documents have already been produced."; whereas his own statement of claim is "very sparse". The key questions in dispute are whether Mr. Dillon was provided with proper notice and the related question of whether he properly mitigated his damages. Mr. Dillon says that he has made his best efforts to comply with the undertakings, and has provided the requested (required) other information.

[8] The issues the court must determine may broadly be stated to be, questions of relevance; namely whether there is a sufficient evidentiary and legal basis to establish the suggested relevance of each party's requests.

[9] Notably the defendant objects to the compendium of documents filed, (copies of letters between counsel, case law, and the complete transcript of the February 22, 2017 discovery of Philip Sullivan AMEC Nova Scotia operations manager since 2013). While filed without an affidavit, which would be a more proper manner of introducing such evidence, both the letters between counsel and the complete discovery transcript of Philip Sullivan's evidence are non-contentious items that could have been included in an affidavit from counsel. As officers of the court, counsel can make representations of uncontested factual matters, without

filing affidavits (e.g. in the trial context Rule 40.05 allows for a book of documents to be filed with the trial brief "if the authenticity of the documents or electronic information is uncontested"). Generally, ethical guidelines and the jurisprudence admonish counsel not to put any controversial factual matters in their affidavits. In this case the defendant has not insisted on an affidavit from plaintiff's counsel or someone else able to do so. In its brief of July 17, 2017, they state:

> However the correspondence and transcript were filed without an affidavit. Even if this Honourable Court accepts the documents as filed, AMEC says that they do not constitute the evidence required by the plaintiff to meet his burden of proving relevance, nor do they provide any explanation or justification for the request [by the plaintiff].

[10] The defendant filed its own affidavit from Tyler James, articled clerk to defendant's counsel. Attached as exhibits are correspondence between counsel for the defendant and plaintiff. A comparison of that affidavit with the plaintiff's filed compendium of correspondence shows that the defendant's affidavit omits five letters between counsel regarding the subject matter of these motions. Moreover, the defendant has not provided the discovery transcript of Mr. Dillon completed February 22, 2017, which would set out the exchanges between counsel and the precise wording of the undertakings in dispute.

[11] I will consider the letters and discovery transcript.

An examination of the merits of Mr. Dillon's motion

[12] He says that the requested emails containing his name "Sean" or "Dillon" [i.e. any emails to the plaintiff, from the plaintiff, or about the plaintiff] are relevant because they are directly relevant or will likely lead to relevant evidence, and that such emails within the time frame January 1, 2015 – July 12, 2016 would be found to be relevant by a judge at trial. He claims that the dismissal was "wrongful" because it was not given with the appropriate period of notice (or I infer, pay in lieu thereof). He cites in support Justice Saunders reasons in *Laushway v Messervey* 2014 NSCA 7. Therein he stated:

> 24 CPR 14 is a lengthy and very detailed Rule entitled "DISCLOSURE AND DISCOVERY IN GENERAL" which begins with an important definition section and goes on to explain procedures and deadlines for complying with, challenging, or resisting the obligation to produce electronic information or other types of evidence during the litigation process.

25 The Rule also contains a clear statement of applicable presumptions which is important in recognizing and properly assigning the burden of proof. I will come back to these definitions and presumptions later in these reasons because they were not adequately canvassed by counsel or the Chambers judge when this motion was argued.

26 Finally, Rule 14.12 describes the judge's discretionary authority to compel production:

> 14.12 (1) A judge may order a person to deliver a copy of a relevant document or relevant electronic information to a party or at the trial or hearing of a proceeding.
>
> (2) A judge may order a person to produce the original of a relevant document, or provide access to an original source of relevant electronic information, to a party or at the trial or hearing. (Underlining mine)

The Rule goes on to offer guidance to trial judges as to the terms which might be included in such an order, to protect for example, privileged information or otherwise control the way in which access is to be exercised. This Rule also suggests various criteria the judge may wish to take into account when exercising his or her discretion in deciding whether or not to grant the production order. See for example, Rule 14.08(3) and 14.12(4) to which I will also refer in more detail later.

…47 From this we know that Robertson, J. was obliged to imagine herself in the shoes of the trial judge and from that perspective decide whether she (if she were presiding over the trial) would find the metadata from Mr. Laushway's computer to be relevant or irrelevant. In arriving at that decision she would apply a "trial relevance" test, which replaced the old "semblance of relevancy" test when the new Rules came into effect on January 1, 2009. See for example, the decisions of Bryson, J.A., writing for a unanimous Court, in Brown v. Cape Breton (Regional Municipality), 2011 NSCA 32; and Moir, J. in Saturley v. CIBC World Markets Inc., 2011 NSSC 4.

48 In Brown, my colleague Justice Bryson expressed this Court's endorsement of Justice Moir's comments in Saturley. He declared:

> [12] ... In any event, I agree with Justice Moir's comments at para. 46 of *Saturley* that:
>
> > [46] This examination of the legislative history, the recent jurisprudence, and the text of Rule 14.01 leads to the following conclusions:
> >
> > The semblance of relevancy test for disclosure and discovery has been abolished.
> >
> > The underlying reasoning, that it is too difficult to assess relevancy before trial, has been replaced by a requirement that judges do just

> that. Chambers judges are required to assess relevancy from the vantage of a trial, as best as it can be constructed.
>
> The determination of relevancy for disclosure of relevant documents, discovery of relevant evidence, or discovery of information likely to lead to relevant evidence must be made according to the meaning of relevance in evidence law generally. The Rule does not permit a watered-down version.
>
> Just as at trial, the determination is made on the pleadings and evidence known to the judge when the ruling is made.
>
> In my opinion, these conclusions follow from, and are enlightened by, the principle that disclosure of relevant, rather than irrelevant, information is fundamental to justice and the recognition that an overly broad requirement worked injustices in the past.
>
> [13] I also agree with Justice Moir that this does not mean a retreat from liberal disclosure of relevant information.

49 The observations of Wood, J. in a subsequent decision in Saturley v. CIBC World Markets Inc., 2012 NSSC 57 are also instructive. In particular, I agree with Justice Wood's comments at para.9-10 where he said::

> [9] In my view, the Court should take a somewhat more liberal view of the scope of relevance in the context of disclosure than it might at trial. This is subject, of course, to concerns with respect to confidentiality, privilege, cost of production, timing and probative value.
>
> [10] At the disclosure and discovery stage of litigation, it is better to err on the side of requiring disclosure of material that, with the benefit of hindsight, is determined to be irrelevant rather than refusing disclosure of material that subsequently appears to have been relevant. In the latter situation, there is a risk that the fairness of the trial could be adversely affected.

50 In my opinion, Justice Robertson did exactly that. She applied the proper test to the issues and evidence before her.

…

To assist judges in future cases, the 3-step analysis that ought to be conducted when disposing of motions such as this are:

- 1. Has the moving party satisfied the court that the sought-after information is "electronic information" and therefore subject to a production order under the Rules?

  2. If so, has the moving party established that the sought-after information, now properly characterized as electronic information is relevant?

3. If so, the moving party is then entitled to the presumption established by Rule 14.08 such that the responding party must then rebut the presumption in order to defeat the request for a production order. When considering whether or not the presumption has been rebutted several Rules offer illustrations of the kinds of criteria which might be considered by the judge -- see for example, Rule 14.08(3), (6); 14.12(3), (4); and Rule 16.

…86 If it would assist trial judges in the exercise of their discretion when considering whether or not to grant production orders in cases like this one, let me suggest that their inquiry might focus on the following questions. They would supplement the guidance already contained in the Rules. The list I have prepared is by no means static and is not intended to be exhaustive. No doubt the points I have included will be refined and improved over time, and adjusted to suit the circumstances of any given case:

1. Connection: What is the nature of the claim and how do the issues and circumstances relate to the information sought to be produced?

2. Proximity: How close is the connection between the sought-after information, and the matters that are in dispute? Demonstrating that there is a close connection would weigh in favour of its compelled disclosure; whereas a distant connection would weigh against its forced production;

3. Discoverability: What are the prospects that the sought-after information will be discoverable in the ordered search? A reasonable prospect or chance that it can be discovered will weigh in favour of its compelled disclosure.

4. Reliability: What are the prospects that if the sought-after information is discovered, the data will be reliable (for example, has not been adulterated by other unidentified non-party users)?

5. Proportionality: Will the anticipated time and expense required to discover the sought-after information be reasonable having regard to the importance of the sought-after information to the issues in dispute?

6. Alternative Measures: Are there other, less intrusive means available to the applicant, to obtain the sought-after information?

7. Privacy: What safeguards have been put in place to ensure that the legitimate privacy interests of anyone affected by the sought-after order will be protected?

8. Balancing: What is the result when one weighs the privacy interests of the individual; the public interest in the search for truth; fairness to the litigants who have engaged the court's process; and the court's responsibility to ensure effective management of time and resources?

9. Objectivity: Will the proposed analysis of the information be conducted by an independent and duly qualified third party expert?

> 10. Limits: What terms and conditions ought to be contained in the production order to achieve the object of the Rules which is to ensure the just, speedy and inexpensive determination of every proceeding?

87 It goes without saying that some of these same points may arise at trial when the judge may again be faced with challenges related to the relevance and reliability of the evidence. It is hoped that these suggested points for inquiry will enable trial judges to take a flexible approach when fashioning production orders containing terms and conditions which will best suit the circumstances of any given case.

[13] I note that Rule 14 has been amended since the release of *Laushway*, and 14.12 now reads:

> Order for production
>
> 14.12
>
> (1) A judge may order a person to deliver a *copy* of a relevant document or relevant electronic information to a party or at the trial or hearing of a proceeding if the moving party provides all of the following representations:
>
> (a) the party is in compliance with Rule 15 - Disclosure of Documents and Rule 16 - Disclosure of Electronic Information;
>
> (b) the party believes the delivery would promote the just, speedy, and inexpensive resolution of the proceeding, including a concise statement of the grounds for the belief;
>
> (c) the party will pay the reasonable costs of making the delivery, unless a judge directs otherwise.
>
> (2) A judge may order a person to produce the *original* of a relevant document, or provide access to an original source of relevant electronic information, to a party or at the trial or hearing.
>
> (3) A judge who orders a person to provide access to an *original source* of relevant electronic information may include in the order terms under which the access is to be exercised, including terms on any of the following:
>
> (a) a requirement that a person assist the party in obtaining temporary access to the source;
>
> (b) permission for a person to take temporary control of a computer, part of a computer, or a storage medium;
>
> (c) appointment of an independent person to exercise the access;
>
> (d) appointment of a lawyer to advise the independent person and supervise the access;
>
> (e) payment of the independent person and the person's lawyer;

> (f) protection of privileged information that may be found when the access is exercised;
>
> (g) protection of the privacy of irrelevant information that may be found when the access is exercised;
>
> (h) identification and disclosure of relevant information, or information that could lead to relevant information;
>
> (i) reporting to the other party on relevant electronic information found during the access.
>
> (4) A judge who is satisfied that the requirement is disproportionate under Rule 14.08 may limit a requirement to produce a copy of a document, to produce exactly copied electronic information, or to provide access to electronic information.
>
> (5) A motion for an order for production must be made on notice, unless it is permitted to be made ex parte as provided in Rule 22 - General Provisions for Motions.

[14] Nevertheless, for my purposes, I still find justice Saunders comments to be instructive. Thus I ask myself, bearing in mind Justice Saunders comments: are the sought-after emails "relevant" as defined in Rule 14?

[15] In trials, relevance must be assessed by reference to, the material issues in a case, the context of the entirety of the evidence, and position of the parties. Relevance has been defined as including logical relevance and legal relevance- *R. v. Mohan*, [1994] 2 S.C.R. 9. Logical relevance refers to the relationship between the evidence and the fact in issue it is tendered to establish. One asks, whether as a matter of human experience and logic, the existence of a particular fact, directly or indirectly, makes the existence or nonexistence of a material fact more probable than it would be otherwise. If it does, the fact is relevant.

[16] Legal relevance involves a cost of benefit analysis. Evidence may be excluded on this basis if the probative value thereof is outweighed by the disproportionate efforts and costs required to obtain the claimed evidence. While the criminal common law evidentiary rule requiring the cost-benefit analysis described in *Mohan* is not directly applicable to the civil law motion herein, our Rule 14.08(3) does serve a similar purpose.

[17] Our Rules provide exceptions to the general rule of presumptive disclosure of all relevant information set out in CPR 14.08, e.g.:

> 14.05 – regarding privileged information; and

> 14.08(3) – exceptionally disclosure may be limited as a result of cost, burden and delay disproportionate to:
>
> > the likely probative value of evidence that may be found or acquired if the obligation is not limited;
> >
> > the importance of the issues in the proceeding to the parties.

[18] Notably, Rule 14.08(4) reads: "The party who seeks to rebut the presumption must fully disclose the party's knowledge of what evidence is likely to be found or acquired if the disclosure obligation is not limited."

[19] As this action is within Rule 57, I must also give weight to Rule 57.02 which reads:

> (1)This Rule provides for the economical conduct of certain defended actions by limiting pretrial and trial procedures.
>
> (2)A party to an action under $100,000 must advance the claim, or conduct the defence, within the limits prescribed by this Rule.

[20] Rule 57.08 reads:

> (1) A judge may, in an action under $100,000, give directions for economical ways of Making full disclosure of documents, electronic information, or other evidence.

[21] That Rule is in addition to Rule 1.01, which reads:

> These rules are for the just, speedy, and inexpensive determination of every proceeding.

[22] At the hearing, plaintiff's counsel elaborated that the relevance of the sought disclosure of emails is premised on the plaintiff's position that this was a wrongful dismissal without notice, and that the plaintiff was an employee in circumstances where "moral damages" are arguably appropriate- see *Honda Canada Inc. v. Keays*, 2008 SCC 39. As the majority stated therein:

> An action for wrongful dismissal is based on an implied obligation in the employment contract to give reasonable notice of an intention to terminate the relationship in the absence of just cause. Thus, if an employer fails to provide reasonable notice of termination, the employee can bring an action for breach of the implied term (*Wallace*, at para. 115). The general rule, which stems from the British case of *Addis v. Gramaphone Co.*, [1909] A.C. 488 (H.L.), is that damages allocated in such actions are confined to the loss suffered as a result of the employer's failure to give proper notice and that no damages are available to the employee for the actual loss of his of her job and/or pain and distress that may

have been suffered as a consequence of being terminated. This Court affirmed this rule in *Peso Silver Mines Ltd. (N.P.L.) v. Cropper*, [1966] S.C.R. 673, at p. 684:

[T]he damages cannot be increased by reason of the circumstances of dismissal whether in respect of the [employee's] wounded feelings or the prejudicial effect upon his reputation and chances of finding other employment.

51 Later in *Vorvis v. Insurance Corp. of British Columbia*, [1989] 1 S.C.R. 1085, McIntyre J. stated at p. 1103:

I would conclude that while aggravated damages may be awarded in actions for breach of contract in appropriate cases, this is not a case where they should be given. The rule long established in the *Addis* and *Peso Silver Mines* cases has generally been applied to deny such damages, and the employer/employee relationship (in the absence of collective agreements which involve consideration of the modern labour law régime) has always been one where either party could terminate the contract of employment by due notice, and therefore the only damage which could arise would result from a failure to give such notice.

52 The Court in *Vorvis* nevertheless left open the possibility of allocating aggravated damages in wrongful dismissal cases where the acts complained of were also independently actionable. McIntyre J. stated at p. 1103:

I would not wish to be taken as saying that aggravated damages could never be awarded in a case of wrongful dismissal, particularly where the acts complained of were also independently actionable, a factor not present here. [Emphasis added.]

53 In *Wallace*, Iacobucci J. endorsed a strict interpretation of the *Vorvis* "independently actionable wrong" approach, rejecting both an implied contractual duty of good faith and a tort of bad faith discharge. At para. 73, he said:

Relying upon the principles enunciated in *Vorvis, supra*, the Court of Appeal held that any award of damages beyond compensation for breach of contract for failure to give reasonable notice of termination "must be founded on a separately actionable course of conduct" (p. 184). Although there has been criticism of *Vorvis* ... this is an accurate statement of the law....An employment contract is not one in which peace of mind is the very matter contracted for (see e.g. *Jarvis v. Swan Tours Ltd.*, [1973] 1 Q.B. 233 (C.A.)) and so, absent an independently actionable wrong, the foreseeability of mental distress or the fact that the parties contemplated its occurrence is of no consequence. [Emphasis added.]

54 This brings us to *Fidler*, where the Court, *per* McLachlin C.J. and Abella J., concluded that it was no longer necessary that there be an independent actionable wrong before damages for mental distress can be awarded for breach of contract, whether or not it is a "peace of mind" contract. It stated at para. 49:

We conclude that the "peace of mind" class of cases should not be viewed as an exception to the general rule of the non-availability of damages for mental

distress in contract law, but rather as an application of the reasonable contemplation or foreseeability principle that applies generally to determine the availability of damages for breach of contract.

This conclusion was based on the principle, articulated in *Hadley v. Baxendale* (1854), 9 Ex. 341, 156 E.R. 145, that damages are recoverable for a contractual breach if the damages are "such as may fairly and reasonably be considered either arising naturally... from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties" (p. 151). The court in *Hadley* explained the principle of reasonable expectation as follows:

Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. [p. 151]

55 Thus, in cases where parties have contemplated at the time of the contract that a breach in certain circumstances would cause the plaintiff mental distress, the plaintiff is entitled to recover (para. 42 of *Fidler*; p. 1102 of *Vorvis*). **This principle was reaffirmed in para. 54 of *Fidler*, where the Court recognized that the *Hadley* rule explains the extended notice period in** *Wallace*.

It follows that there is only one rule by which compensatory damages for breach of contract should be assessed: the rule in *Hadley v. Baxendale*. The *Hadley* test unites all forms of contractual damages under a single principle. It explains why damages may be awarded where an object of the contract is to secure a psychological benefit, just as they may be awarded where an object of the contract is to secure a material one. It also explains why an extended period of notice may have been awarded upon wrongful dismissal in employment law: see *Wallace* ***v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701. In all cases, these results are based on what was in the reasonable contemplation of the parties at the time of contract formation. [Emphasis deleted.]**

56 We must therefore begin by asking what was contemplated by the parties at the time of the formation of the contract, or, as stated in para. 44 of *Fidler*: "what did the contract promise?" The contract of employment is, by its very terms, subject to cancellation on notice or subject to payment of damages in lieu of notice without regard to the ordinary psychological impact of that decision. At the time the contract was formed, there would not

> **ordinarily be contemplation of psychological damage resulting from the dismissal since the dismissal is a clear legal possibility. The normal distress and hurt feelings resulting from dismissal are not compensable**.
>
> [My emphasis added]

[23] A recent example of these principles can be found in *Lau v. Royal Bank of Canada*, 2017 BCCA 253.

[24] The plaintiff seemed to suggest that the emails may be relevant to the terms of employment, and to the knowledge the employer had about his health issues, which are the lens through which the employer should have considered the manner and nature of his termination, on or about December 18, 2015.

[25] The plaintiff has restricted the email request to January 1, 2015 through to and including July 12, 2016. The evidence suggests that Mr. Dillon commenced employment in 2010. Notably, it does appear that his final termination benefits were not paid until July 8, 2016.

[26] Plaintiff's counsel was not able to give a definitive statement about why emails between January 1, 2015 and December 18, 2015, the date of termination, were relevant. It was suggested that at the time of his termination Mr. Dillon had health issues which the employer was aware of, and therefore this brings into question for how long was the employer aware of those issues. However, this relevancy argument may be summarized as: "we believe there is such information in the emails *about* Mr. Dillon"; as opposed to "we have provided reasonable evidentiary bases to support our belief and position that there is such information in the emails *about* Mr. Dillon".

[27] I observe here that the defendant requests an order from this court that the plaintiff provide it "the plaintiff's mitigation efforts, including his 2015 and 2016 income information".

[28] Clearly, the defendant employer believes the time period January 1 – December 31, 2015, is relevant to *mitigation of damages* by the plaintiff. The defendant presented no evidence that its obligation to make disclosure should be modified as a result of a cost, burden or delay concern, as noted in Rule 14.08(3), nor fully disclosed the defendant's knowledge of what evidence is likely to be found or acquired if the disclosure obligation is not limited per Rule 14.08(4). Having said that, the moving party has the onus to establish that the sought after disclosure is relevant as defined by Rule 14 and the jurisprudence-eg *3008361*

Nova Scotia Ltd. v. Scotia Recycling Ltd., 2013 NSSC 256, at para. 10, per Scaravelli J.

[29] At page 44 of Mr. Sullivan's discovery transcript, defendant's counsel indicated that she was going to check to see if it was possible to provide the emails sought. In her April 28, 2017 letter, exhibit "I", to Tyler James affidavit she stated: "We understand that a review of some email accounts as possible; however AMEC maintains that the scope of this request is overly broad."

[30] In all the circumstances, I am satisfied that the plaintiff is entitled to have the defendant search for and locate, and then produce to him within a short reasonable period of time, all electronic transmissions generated by the defendant, including emails, which are *to or from* Mr. Dillon between January 1, 2015 to July 12, 2016. Mr. Dillon was a party to these, and I infer he is unable to access his account any longer as it was an employer-based email service.

[31] In contrast, I am not satisfied of the relevancy of electronic transmissions generated by the defendant, including emails, which are merely *about* Mr. Dillon within that same time period.

An examination of the merits of the defendant's motion

1. *AMEC insists on proper responses to undertakings from the discovery of Sean Dillon on February 22 2017 (see Rule18.16(6) and 18.18)*

> i) the email from the plaintiff to Kevin Hicks as well as all information regarding the plaintiff's attempts to contact Kevin Hicks and Jordan Moores

[32] The plaintiff's position is summarized at exhibit "E" of the defendant Tyler James' affidavit. He does not have the emails anymore and is unable to retrieve them. These persons I understand are associated with the defendant company. I asked defendant's counsel, if they were sent to these persons, would not the defendant have copies of those already? Counsel did not deny that suggestion. I have already ordered the defendant to produce to the plaintiff all the emails to or from Mr. Dillon between January 1 2015 – July 12, 2016.

[33] It is also unclear from the evidence how these emails are relevant to the proceeding.

Therefore, I will not order production of those emails by the plaintiff.

ii) Details of any discussions between the plaintiff and GWL (disability insurer Great West Life), including when the discussions were held, with whom the plaintiff spoke, and what confusion he claims arose from those discussions.

[34] As I understand it, as an employee, Mr. Dillon had benefits, which included disability coverage by GWL. Once terminated, he lost these benefits. Defendant's counsel suggested that these discussions are relevant to the plaintiff's obligation to mitigate his damages.

[35] Since Mr. Dillon's discovery transcript (February 22, 2017) was not in evidence, the only evidence on this point is to be gleaned from the letters between counsel - see exhibit "E" to James Tyler's affidavit - March 21, 2017 letter from plaintiff's to defendant's counsel. In part, plaintiff's counsel wrote in response:

> The application of the plaintiff made to Great West Life (GWL) for short-term disability income benefits, which material was produced behind tab five of the plaintiff's affidavit, resulted in certain telephone conferences that the plaintiff had with officials of GWL, where there was some confusion, on GWL's end, as to what point the coverage was extended, confusion that possibly emanated from the defendant's employer – maybe to January 8, 2016 and then again maybe with January 15, 2016. As part of this exchange we enclose a letter from GWL dated January 11, 2016. At any rate, this could be seen by Mr. Dillon's testimony that the coverage was denied…

[36] In exhibit "I" to Tyler James' affidavit, one finds the April 21, 2017 letter of plaintiff's counsel to defendant's counsel, wherein he notes:

> We have given the best explanation received from Sean Dillon in regards to his dealings with GWL-if you find it confusing; I can advise you that certainly Mr. Dillon did. We have set all we can about that particular topic.

[37] Thus, it appears that the plaintiff applied for short-term disability income benefits, and he was declined coverage. The plaintiff has stated he cannot provide any clearer information. Documents have been provided.

[38] Therefore, I will not order further production.

iii) The plaintiff's complete Employment Insurance file

[39] The defendant argues that the plaintiff's employment insurance file, could contain relevant information such as when he made claims, on what bases his claims were made, and how much he was paid in the years 2015 and 2016.

[40] Since Mr. Dillon's discovery transcript was not in evidence, the only evidence on this point is to be gleaned from the letters between counsel – see exhibit "G" to Tyler James affidavit, which includes the April 5, 2017 letter from defendant's counsel which reads in part regarding this issue:

> Your response is not sufficient. The request was for a copy of Mr. Dillon's EI file. What you have produced appears to be a screenshot with no information (aside from what you have written in your letter) indicating where the screenshot is from. Please arrange to have the EI file produced.

[41] Also, at exhibit "I", plaintiff's counsel responds on April 21, 2017:

> You may find the response "not sufficient", but as we have been advised, Mr. Dillon approached the EI people requesting the file and all they would give him is what he received which in turn we sent to you. If there is material in a third party's hands which you would like to get a hold of, you are on your own.

[42] At exhibit "K", defendant's counsel responded on May 3, 2017:

> The undertaking provided at discovery was for Mr. Dillon to provide a copy of his employment insurance file. It is up to him, not AMEC , to produce this undertaking. Your having said "if there is material in the third parties hands which you would like to get a hold of, you are on your own" clearly does not fulfil this undertaking and we expect that you will produce this information as soon as possible. Please also produce all records of Mr. Dillon's attempts, to which you referred in your April 21, 2017 letter, to obtain his EI file.

[43] In relation to this matter, I noted that during the hearing, plaintiff's counsel undertook to provide to the defendant, if he had not already done so, Mr. Dillon's income tax returns *and* notices of assessment for the calendar years 2015 and 2016. That production would account for in summary, what amounts of incomes Mr. Dillon had during those years, including employment insurance.

[44] The plaintiff has confirmed that he has made his "best efforts" to obtain the information. He has produced something to the defendant. There is no evidence before the court to allow it to determine that that is not the entirety of the information held by the employment insurance authorities, or at least that portion to which the plaintiff is entitled to have access.

[45] I observe that Rules 15.03, 16.03 and 16.09 place significant responsibility on parties, (and their counsel by requiring certifications), to make disclosure, and those affidavits must be sworn or affirmed. To the extent that documents or electronic information are not in possession of the party, but are "in the party's control", the obligation by way of undertaking arises- Rules 15.03(2)(g) and 16.09(2)(g).

[46] In these circumstances, I am not prepared to order production, but I am prepared to order that the plaintiff provide an effective release in favour of the defendant, which will permit the EI authorities to release his file to the defendant for the period January 1– December 31, 2015. This is consistent with the undertaking given, and will ensure the defendant is satisfied that the proper parameters of the request is made known to the EI authorities.

2. AMEC's further production requests

[47] The defendant also claims production should be ordered "in response to written requests by counsel for the defendant (Rules 14,15 and 16):

> i) the plaintiff's mitigation efforts, including his 2015 and 2016 income information [as noted plaintiff's counsel has undertaken in court to provide to AMEC, the income tax returns and notices of assessment of Mr. Dillon for the years 2015 and 2016, thus obviating the need for the court to deal with this issue further since "the plaintiff's mitigation efforts" is in the nature of an interrogatory request which are presumptively not permitted under rule 57.09 and I see no reason to depart therefrom];
>
> ii) plaintiff's counsel responded on May 9, 2017, but did not produce any of the plaintiff's income information (or provide an explanation of why that was not produced). With respect to the claim for a *Wallace* damages, plaintiff's counsel wrote: "possibly if you read the *Wallace* decision and match it up to the manner in which Mr. Dillon was treated (as far as we can figure because we still do not have the production that is requested from the defendant) then you might understand that the defendant should expect a substantial claim" (emphasis added); [these arise from requests made by defendant's counsel in her March 28, (and May 3, 2017) letter: "there was no pleading of "Wallace damages" in the statement of

> claim, and AMEC has been proceeding on the basis of what was actually pled. However, in the interest of expediency, AMEC asked that you provide *full particulars* for your client's allegations that he suffered "Wallace damages", *including all facts* on which that claim is based." Essentially this is an informal request for further and better particulars-see Rule 38.08 and *Penwell v Harwood*, 2011 NSSC 309; *Korecki v Nova Scotia (Minister of Justice)*, 2013 NSSC 312. The defendant's factual concerns are procedurally a matter for discovery. Therefore, this court need not deal with this issue further].
>
> iii) with regard to the "production that is requested from the defendant", plaintiff's counsel has been requesting the defendant make an overly broad search for any emails "where the name "Dillon" comes up in the body of the email" [this item was dealt with above].

Summary

[48] The plaintiff is entitled to have the defendant search for and locate, and then produce to him within a short reasonable period of time, all electronic transmissions generated by the defendant, including emails, which are *to or from* Mr. Dillon between January 1, 2015 to July 12, 2016.

[49] The defendant is entitled to have the plaintiff provide within a short reasonable period of time, an effective release document in favour of the defendant, and to do all such incidental matters, which will permit the EI authorities to release Mr. Dillon's file for the period January 1– December 31, 2015 to the defendant.

[50] In all other respects, each of the parties' motions are dismissed.

[51] If the parties are unable to agree on the matter of costs, I direct the parties to file brief materials in support of their position by August 18 (plaintiff) and September 7, 2017 (defendant).

Rosinski, J.

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