See paras. 13-15

Case Name:

Seyedi v. Nexen Inc.

Between
Ali Seyedi, Appellant (Plaintiff), and
Nexen Inc., Respondent (Defendant)

[2016] A.J. No. 82

2016 ABCA 24

Docket: 1501-0104-AC

Registry: Calgary

Alberta Court of Appeal

M.B. Bielby, B.K. O'Ferrall and B.L. Veldhuis JJ.A.

January 28, 2016.

(33 paras.)

Civil litigation -- Civil procedure -- Appeals -- Grounds for review -- Misapprehension of or failure to consider evidence -- Reasonable apprehension of bias -- Appeal by Seyedi from dismissal of claims against Nexen and from judgment in favour of Nexen on counterclaim dismissed -- Seyedi failed to prove Nexen misappropriated intellectual property he developed during three-month practicum -- No evidence Nexen discriminated against Seyedi in failing to hire him after practicum, or defamed Seyedi to other prospective employers -- No bias on judge's part in requiring self-represented Seyedi to comply with rules of procedure and evidence he did not understand.

Employment law -- Implied duties of employer -- Pay for work -- Appeal by Seyedi from dismissal of claims against Nexen and from judgment in favour of Nexen on counterclaim dismissed -- Seyedi failed to prove Nexen misappropriated intellectual property he developed during three-month practicum -- True nature of Seyedi's claim was that Nexen was obliged to use Plan he developed and compensate him for it, something Nexen under no obligation to do.

Employment law -- Implied duties of employee -- Confidential information and privacy -- Appeal by

Seyedi from dismissal of claims against Nexen and from judgment in favour of Nexen on counterclaim dismissed -- On own admission, Seyedi removed confidential information from Nexen at end of three-month practicum -- Seyedi knew from workshop he was prohibited from doing so -- Judgment in favour of Nexen on counterclaim and order requiring Seyedi to destroy confidential information reasonable.

Appeal by Seyedi from the dismissal of his $50 million claims against Nexen, and from the judgment in favour of Nexen on its counterclaims. Seyedi was a foreign-trained engineer who participated in a three-month unpaid practicum program to gain Canadian experience. He worked on a program he called the Plan during the practicum. He attended a workshop, during which he was informed he was prohibited from removing confidential information from Nexen in the event of his departure. Seyedi was not hired on by Nexen at the end of the practicum. He was provided with a letter of reference but had yet to find a job. He claimed Nexen discriminated against him in making the decision not to offer him employment at the end of the practicum, and defamed him to prospective employers who contacted Nexen after reading the reference letter. Seyedi also sought damages for misappropriation of intellectual property, alleging Nexen was using the Plan after his departure. Nexen successfully counterclaimed for misappropriation of confidential information. Seyedi, self-represented, admitted that he removed material he knew was confidential from Nexen upon his departure. Seyedi called Nexen employees as witnesses, against the warnings of the judge. These witnesses provided uncontroverted evidence that Nexen never used the Plan Seyedi developed. The judge found Nexen was the owner of the Plan in any event, because Seyedi developed it while an employee. The judge found no evidence to support the discrimination and defamation claims. She ordered Seyedi to return or destroy any information he took from Nexen, and ordered him to pay double costs based on a rejected formal offer of settlement from Nexen.

HELD: Appeal dismissed. The judge did not err in finding as a fact that Nexen did not use the Plan Seyedi developed. He was actually trying to impose a duty on Nexen to use the Plan and compensate him for it, which was something Nexen had no obligation to do. Seyedi was aware that all the Nexen business documents and information imparted to him during his practicum were confidential, such that the judge was correct in finding he was prohibited from removing them upon his departure. There was no evidence that discrimination was the motivator for Nexen's decision not to hire on Seyedi, and no evidence to support the assertion Nexen defamed Seyedi to potential employers. The judge demonstrated no bias in requiring Seyedi to adhere to rules of procedure and evidence. The costs award was appropriate given Seyedi's complete lack of success at trial and Nexen's formal offer of discontinuance without costs.

Appeal From:

On appeal from the Decision by The Honourable Madam Justice S.L. Hunt McDonald Dated the 10th day of April, 2015, Filed on the 30th day of April, 2015 (Docket: 1401 03198).

Counsel:

Appellant A. Seyedi, in Person.

K.D. Marlowe/S. Parker, for the Respondent.

Memorandum of Judgment

The following judgment was delivered by

THE COURT:--

OVERVIEW OF APPEAL

1 The appellant, Ali Seyedi, is an experienced foreign-trained engineer who participated in the Alberta Human Services' program to provide him with Canadian engineering experience. The program was administered by the Calgary Catholic Immigration Society (CCIS). A letter of understanding was entered into between CCIS, Mr. Seyedi and the Respondent Nexen Inc. pursuant to which Mr. Seyedi served a three-month unpaid practicum with Nexen.

2 At the conclusion of that practicum, Nexen did not offer employment to Mr. Seyedi as he had hoped. He then sued Nexen for $50,175,000 in damages, claiming misappropriation of certain intellectual property (the Plan) he had provided to it, aimed at solving a certain environmental problem. He also claimed that its refusal to hire him was discriminatory and that it had defamed him to other prospective employers. Nexen counterclaimed, asserting that Mr. Seyedi had misappropriated confidential information when he departed at the end of his practicum.

3 Mr. Seyedi has been self-represented throughout. He was assisted by a Farsi interpreter during the four-day trial. He did not rely on an interpreter while arguing the appeal, believing one unnecessary as so much of the appeal process is written in nature.

4 Nexen called no evidence at trial. Mr. Seyedi called, in addition to testifying himself, two witnesses, both Nexen employees, managers John Moore and Tom Kemp, notwithstanding the trial judge's repeated warnings about the risks of calling witnesses allied with Nexen as part of his own case. Both of these witnesses denied that Nexen used his Plan at any time. It had identified and adopted another approach to solving the problem to which the Plan was directed. Mr. Seyedi unsuccessfully attempted to convince the judge otherwise, although he led no other direct evidence on this point. Mr. Seyedi admitted to having no personal knowledge to the contrary during his own testimony, also admitting that, upon his departure from Nexen, he took Nexen documents without consent.

5 In dismissing his claim, the trial judge held that Mr. Seyedi's unpaid practicum constituted "employment", with the result that the Plan developed while with Nexen belonged to it. In any event, the Plan was not unique to him as the same concept had been examined and rejected twice previously by Nexen. Most importantly, Mr. Seyedi had not proven that Nexen used the Plan, or any intellectual property that he had developed.

6 The trial judge found that there was not "a shred of evidence" to support Mr. Seyedi's claim of discrimination and defamation. In fact, Nexen had departed from its usual practice and had provided him with a letter of reference to use in his search for employment.

7 The trial judge awarded Nexen judgment on the counterclaim, based on evidence including Mr. Seyedi's admission that he had taken technical engineering reports and analysis, emails and other documents from Nexen upon his departure. This was a violation of his obligation to keep all information learned while at Nexen confidential. As a result, she ordered Mr. Seyedi to return or destroy all information that he had taken.

8 An earlier formal offer by Nexen led to an award of double costs on Column 3 and a second counsel fee against Mr. Seyedi.

9 The appeal is dismissed for the reasons that follow.

ISSUES

10 The following issues are raised on this appeal:

(a) Can misappropriation be established where Nexen made no use of the Plan after Mr. Seyedi's departure?

(b) Was Mr. Seyedi prohibited from taking information belonging to Nexen upon departure?

(c) Did the trial judge misapprehend the evidence relating to discrimination and defamation?

(d) Did the trial judge display bias?

(e) Did the trial judge err in making her costs award?

STANDARD OF REVIEW

11 A trial judge's findings of fact and inferences drawn from those findings are entitled to deference absent palpable and overriding error: *Housen v Nikolaisen*, 2002 SCC 33 at para 10 and 25. Finding palpable and overriding error is equivalent to concluding that her findings of fact or inferences are "clearly wrong", "unreasonable" or "unsupported by the evidence": *HL v Canada*, (A-G) 2005 SCC 25. An appellate court should intervene only "if the judge has made a manifest error, has ignored conclusive or relevant evidence, has misunderstood the evidence, or has drawn erroneous conclusions from it": *Toneguzzo-Norvell v Savein*, [1994] 1 SCR 114.

12 Trial fairness or a reasonable apprehension of bias is reviewed for reasonableness: *R v Lupyrypa*, 2011 ABCA 324 at para 6. Costs decisions are discretionary but may be set aside if the trial judge misdirected herself on the applicable law or made a palpable error in her assessment of the facts: *Deans v Thachuk*, 2005 ABCA 368 at para 16.

ANALYSIS

Can misappropriation be established where Nexen made no use of the Plan after Mr. Seyedi's departure?

13 Misappropriation of information obtained in confidence creates a cause of action only where the respondent makes use of that property. As observed in the decision under appeal, in *Lac Minerals Ltd v International Corona Resources Ltd*, [1989] 2 SCR 574 at 635 La Forest J stated:

> The test for whether there has been a breach of confidence...consists in establishing three elements: that the information conveyed was confidential, that it was communicated in confidence and *that it was misused by the party to whom it was communicated.* [Emphasis added.]

14 Master Robertson recently applied this law, by way of example, in *Geophysical Service Incorporated v Nwest Energy Corp*, 2014 ABQB 205 at para 71 where he stated, "[w]here Party A gives confidential information to Party B but Party B does nothing with it, there is no breach".

15 The uncontroverted evidence at trial was that Nexen had made no use of the Plan after his departure and had no intention to do so in the future. Mr. Seyedi himself had no personal knowledge of what Nexen did or did not do with this information after his departure. In particular, the uncontroverted evidence from Messrs. Moore and Kemp was that Nexen had never implemented the Plan. The trial judge refused to draw inferences that these witnesses were lying from coincidental timing concerns, innuendo and suspicion raised by Mr. Seyedi, including inferences that the dates on certain Nexen documents were wrong based on gas pricing information contained in them. Mr. Seyedi has failed to show that the trial judge was clearly wrong in failing to draw these inferences based on what was, at best, a thin, speculative argument.

16 Indeed, the evidence he himself led shows he wanted Nexen to use his idea; the whole purpose of his suggestion of an alternate process to solve an upgrader problem was that Nexen would adopt

the process. It did not. His claim is not, at heart, that Nexen should not have used his idea; it is that Nexen should have used his idea and compensated him for it. There is no basis in the evidence or law to impose such obligations on Nexen.

17 Mr. Seyedi misunderstood the principles in *Lac Minerals*, arguing that because of twenty-seven factual similarities he suggested existed between that case and his. He believed that because *Lac Minerals* had been awarded damages for misuse of confidential information so should he. However, in that case a damage award was upheld on the basis that *Lac Minerals* misused confidential geological and mining exploration results provided to it during the course of an ultimately unsuccessful negotiation to purchase property from the party providing it with that confidential information. That case dealt with the results of the misuse of information by *Lac Minerals* to stake favourable claims on neighboring property. Nexen made no use of Mr. Seyedi's Plan, which is the core of his claim.

18 Mr. Seyedi has not established that the trial judge made a palpable and overriding error in finding that no such misappropriation occurred. This ground of appeal is dismissed.

Was Mr. Seyedi prohibited from taking information belonging to Nexen upon departure?

19 Mr. Seyedi acknowledged, on cross-examination, that he took technical engineering reports, emails containing Nexen's technical engineering analysis and emails concerning Nexen's internal affairs. He argued that this did not amount to misappropriation of confidential information for the following reasons:

* he did not believe what he took was confidential as it was not marked "confidential";

* he had not signed a non-disclosure agreement with Nexen;

* Nexen was unreasonable in claiming that all its documentation and information was confidential unless made public;

* no harm was done as he had shown this information to no one post-departure; and,

* he had a duty to take documents showing Nexen was unnecessarily polluting the environment to show regulators. It appears he is referring to the Plan in making this claim, suggesting that if only Nexen had implemented the Plan pollution would have been reduced. He did not

> testify, however, that he showed any of this information to any regulator.

20 Mr. Kemp testified on cross-examination that the documents Mr. Seyedi took were not generally available to the public and contained sensitive technical information about Nexen's operations. He testified that Nexen's business, including its competitive position in the marketplace, would be harmed if they became public.

21 The trial judge found that Seyedi's relationship with Nexen was akin to that of employer-employee and, as such, he had a duty as an employee not to disclose confidential employer information. It is not necessary to now determine whether the obligations of an employee extend to unpaid interns because the obligation not to misappropriate confidential material is not limited to employees and did, in these circumstances, extend to Mr. Seyedi: see *Lac Minerals* at para 635.

22 While Mr. Seyedi disputed Nexen's claims that he signed a confidentiality agreement with it, and the trial judge made no express finding on this point, obligations of confidence can exist without such a signed agreement or a contract of employment. The obligation not to disclose confidential information arises from the second branch of the *Lac Minerals* test, in relation to any information that "was communicated in confidence" whether or not the party to whom it was communicated was employed by the party doing the communication.

23 Whether information is communicated in confidence or not is determined by applying a "reasonable man" test, as described in *Lac Minerals* at 612-613, 636, applying the statements of Megarry J in *Coco v AN Clark (Engineers) Ltd* [1968] FSR 415 at 419 (Ch) at 420-421:

> It seems to me that if the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realized that upon reasonable grounds the information was being given to him in confidence, then this should suffice to impose upon him the equitable obligation of confidence. In particular, where information of commercial or industrial value is given on a business-like basis and with some avowed common object in mind,...I would regard the recipient as carrying a heavy burden if he seeks to repel a contention that he was bound by an obligation of confidence...

24 Applying this test to this appeal, Mr. Seyedi was under an obligation not to take confidential information, as any reasonable person in his position would have realized that the information was given to him in confidence. The evidence was uncontroverted on this point: Mr. Seyedi had attended a workshop where he was told that all business records and information imparted to him during his practicum were confidential.

25 Thus, the trial judge was correct in reaching her conclusion that Mr. Seyedi was prohibited from taking information belonging to Nexen upon departure, whether or not he was otherwise bound by the same obligations as an employee. This ground of appeal is dismissed.

Did the trial judge misapprehend the evidence relating to discrimination and defamation?

26 The trial judge found that Mr. Seyedi hoped to obtain employment with Nexen at the conclusion of his practicum. She stated, "I don't doubt for one moment that Mr. Seyedi's inability to secure employment with Nexen was a heartbreaking disappointment for him". His evidence and argument amply support this conclusion. He had 27 years of experience as a chemical engineer in Iran prior to immigrating to Calgary in 2012. He had not obtained employment in that field here prior to commencing the Nexen practicum in 2013. He had not found related employment between the conclusion of his practicum in June 2013 and the time of trial.

27 While Nexen provided him with a positive letter of reference at the conclusion of his practicum, and he presented it to potential employers as he applied for available positions, he speculated that Nexen gave a negative reference when contacted directly by these employers. He believed that occurred because while certain employers expressed initial interest during phone interviews with him, they did not call him back or made some excuse for not employing him after having been given an opportunity to call their contacts at Nexen for references. From this, he argues that the trial judge should have inferred that Nexen had given him a negative reference when called by potential employers, and that reference should be presumed to be defamatory because there is no other reason he would not be offered employment. He has the experience and knowledge to make him a good potential employee yet he has not been able to secure employment in his field.

28 He led no evidence of any conduct on Nexen's part which would constitute discrimination other than that it has not hired him for positions for which he believes he is qualified since the conclusion of his practicum. He asks that discrimination be inferred from Nexen's failure to offer him permanent employment and, from their choice to follow, successfully, certain procedural avenues during the course of preparation for trial and from the fact that both Mr. Moore and Mr. Kemp advised CCIS that they were not interested in future participation in its work experience program subsequent to his departure from Nexen. Those procedural avenues were launching a successful challenge to his Affidavit of Records, with the result that material in it which Nexen believed was confidential to them was removed. It also includes Nexen's launch of its counterclaim, seeking the destruction or return of this confidential material.

29 The trial judge declined to draw an inference of discrimination. Mr. Seyedi has not established that she made any error in that regard, let alone one that is palpable and overriding. There are legitimate alternate explanations for Mr. Seyedi's failure to secure employment as an engineer other than that Nexen poisoned the well for him in Calgary. The trial judge cannot be faulted for refusing to draw an inference otherwise. This ground of appeal is dismissed.

Did the trial judge display bias?

30 Mr. Seyedi argued that the trial judge displayed bias by:

* allowing Nexen to enter a document into evidence entitled "Long Lake

Project Implementation Memorandum Report" dated April 2011 although from the prices for oil and gas given in that report it appears to have been made in 2015. He argued that Nexen altered the content of this report prior to providing it to him because the gas price forecasts in it appeared to be more in accord with the price of gas in 2014 than in 2011. This is contrary to Mr. Moore's testimony to the effect that those forecasts appeared consistent with 2011 gas prices. Mr. Seyedi has not explained how, even if this document had not been created until 2015, that fact would have assisted him in proving that Nexen used his Plan;

* refusing to accept hearsay evidence from him while accepting it from Mr. Moore and Mr. Kemp. In particular, this refers to her refusal to treat as evidence: his description of 2011 gas prices, proffered at a time when he was not on the stand; an email from a CSIS volunteer to Mr. Kemp proffered when Mr. Kemp was not on the stand; and oral statements he believed Mr. Kemp to have made to that volunteer when he was not present. This appears to have resulted from his misunderstanding as to what hearsay means, submitting in oral argument that evidence can never be hearsay if it is relevant;

* refusing to allow him to ask questions of Mr. Moore during his own examination-in-chief by accepting evidence from Messrs. Moore and Kemp that Nexen had not adopted or used his Plan in any way; however, their evidence was direct, not hearsay, on this point;

* by accepting the evidence of Mr. Moore and Mr. Kemp which he submitted was untruthful. Setting aside for the moment the prohibition against challenging the integrity of one's own witnesses in this way, he argues that she should have disbelieved their evidence on certain points because of their failure to recall certain things he believed they should recall;

* by placing time limits on his questioning of his witnesses-in-chief while imposing no such limits on Nexen in cross-examination. He has identified no portion of the transcript that reveals such conduct .

31 As noted in the above discussion of standard of review, trial fairness or a reasonable apprehension of bias is reviewed for reasonableness. Mr. Seyedi has failed to establish any hint of a

reasonable apprehension of bias on the part of the trial judge. His misunderstanding of the rules of evidence at different points in the trial cannot be elevated into proof of bias on the part of the trial judge who made every reasonable effort to assist him. This ground of appeal is dismissed.

Did the trial judge err in making her costs award?

32 The trial judge ordered that Mr. Seyedi pay double Column 3 costs to Nexen based on its early offer to him of a discontinuance without costs. As he was completely unsuccessful at trial, he did no better than that offer. It was therefore completely within the discretion of the trial judge to award double costs as she did.

CONCLUSION/COSTS OF APPEAL

33 The appeal is dismissed. Nexen advised during oral argument that if it was successful on the appeal it would also seek augmented costs, based on a settlement offer earlier made by it and refused by Mr. Seyedi. Nexen is therefore at liberty to provide evidence of such an offer and any resulting submissions in writing within 14 days of the date of this decision, and Mr. Seyedi is entitled to make any written submissions on whether Nexen should be awarded costs of this appeal on any basis within the 7 days following that. Whether or not he provides any written submissions to us, we will then proceed to render a further decision on costs without oral argument.

Memorandum filed at Calgary, Alberta this 28th day of January, 2016

M.B. BIELBY J.A.
B.K. O'FERRALL J.A.
B.L. VELDHUIS J.A.