

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

LEONARD KENNETH TONN

Plaintiff



SEARS CANADA INC.

Defendant

Proceeding under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50

RESPONSE TO CIVIL CLAIM

Filed by: Sears Canada Inc.

PART 1: RESPONSE TO NOTICE OF CIVIL CLAIM FACTS

Division 1 - Defendant's Response to Facts

1. The facts alleged in paragraph 2 of part 1 of the notice of civil claim are admitted.
2. The facts alleged in paragraphs 1 (first sentence only), 3, 15, 16(b), 20-27 of the notice of civil claim are, wholly or in part, outside the knowledge of the defendant ("Sears").
3. Sears denies the allegations in the balance of the paragraphs of part 1 of the notice of civil claim.

Division 2 - Defendant's Version of Facts

Sears

4. Sears is a multi-channel retail company incorporated pursuant to the laws of Canada, with its headquarters in Toronto, Ontario. Sears has operations across Canada, including in British Columbia.

The Plaintiff's Employment With Sears

5. The plaintiff ("Tonn") was formerly employed by Sears as a sales associate in its home services business.
6. Tonn was employed by Sears until on or about March 2, 2013, after which point his employment continued with SHS Services Management Inc. ("SHS") in the circumstances described further below.
7. The terms of Tonn's employment agreement with Sears did not prohibit the assignment or other transfer of it, or of obligations of employment contained in it, to third parties.

The Sale of Business From Sears to SHS

8. In late 2012, Sears entered into agreements with SHS to sell its home services business to SHS. This was the area of the business in which Tonn was employed.
9. SHS was a corporation independent of Sears. It was incorporated under the laws of Canada to operate, at a national level, an installed home improvement business under the brand name Sears Home Services.
10. The sale transaction with SHS was completed on or about March 2, 2013.

Relevant Provisions in the Asset Transfer Agreement

11. As part of the sale transaction with SHS, Sears and SHS entered into an Asset Transfer Agreement dated December 20, 2012. The Asset Transfer Agreement contained the following terms relating to employees:
 - (i) SHS had discretion to offer continued employment to the Sears employees, contrary to the allegation at paragraph 13 of part 1 of the notice of civil claim;
 - (ii) to the extent that SHS decided to offer continued employment to a Sears employee, such offer of employment was required to be on terms and conditions substantially similar, in the aggregate, to the individual employee's agreement with Sears;

- (iii) those employees who were offered and accepted employment with SHS became “Hired Employees” under the Asset Transfer Agreement, for whom SHS assumed all liabilities (broadly defined) after the close of the transaction on March 2, 2013; and
- (iv) any employees who were not offered or did not accept employment with SHS would become “Non-Transferring Employees” under the Asset Transfer Agreement. Sears remained responsible for all liabilities relating to the employment of any Non-Transferring Employee which accrued up to the close of the transaction. Sears had the right to terminate the employment of any Non-Transferring Employees.

Tonn’s Continued Employment with SHS

12. In mid-February 2013, Sears’ employees in the home services business, including Tonn, were notified of the pending sale transaction with SHS. At that time, Tonn was offered continued employment with SHS on terms substantially similar to his existing terms of employment with Sears, conditional on the closing of the transaction. Tonn had the opportunity to obtain legal advice in connection with that offer.
13. Tonn chose to accept continued employment with SHS, and entered into an employment agreement with SHS effective on or about March 2, 2013. In accepting employment, Tonn became a “Hired Employee” under the terms of the Asset Transfer Agreement, with the result that SHS assumed all liabilities in respect of his employment going forward, including any liabilities associated with any subsequent termination of his employment.
14. In consideration of SHS offering Tonn employment, he agreed to the following terms (among others) in his employment agreement with SHS:
 - (i) SHS would become his sole employer effective on or about March 2, 2013.
 - (ii) SHS would recognize his prior years of continuous service and seniority with Sears for the purpose of calculating vacation entitlements and any statutory or common law notice entitlements. In these respects, Tonn’s agreement stated:

2. Commencement Date

The commencement of your employment with SHS will be on the Closing Date, immediately after closing (the **Commencement Date**), but SHS will recognize your prior years of continuous service with Sears for the purposes of vacation entitlement and statutory or common law severance entitlement. Your seniority date will remain as **5/27/1994**. [emphasis in original]

...

12. Termination

... SHS may also terminate your employment immediately, for any reason that does not constitute cause. SHS will recognize your prior years of continuous service with Sears for the purposes of calculating your entitlement to working notice, or payment in lieu of working notice.

- (iii) Tonn's responsibilities at SHS would continue, in essence, as they existed with Sears.
 - (iv) Tonn would execute a Statement of Understanding of Employment and/or Engagement Form. This Statement of Understanding acknowledged that Tonn was no longer employed by Sears, including for the purpose of any claims in the future. In particular, this acknowledgement provided that: "I further understand that I am not and shall not be deemed to be an employee of Sears Canada Inc. for any purpose whatsoever, including but not limited to, any future claims pursuant to Workers' Compensation, Employment Standards or Human Rights Legislation or any other possible claims, actions or demands."
15. Accordingly, Tonn agreed and consented to the transfer of employment obligations from Sears to SHS, including any obligations to provide severance or notice pay upon termination of employment. For this purpose, Tonn's prior years of service and seniority with Sears were expressly recognized and assumed by SHS.
16. Further, under section 97 of the *Employment Standards Act*, there was statutorily deemed to be a continuation of employment with SHS for purposes of the *Act*.
17. In the circumstances, there was no wrongful termination of Tonn's employment by Sears and no entitlement to receive reasonable notice or pay in lieu of notice from Sears was

triggered. Sears expressly denies the allegations to the contrary in the notice of civil claim, including the allegations in paragraphs 16 to 19 of part 1.

The Subsequent Receivership of SHS and Termination of Employment

18. Sears understands that Tonn continued to be employed by SHS from March 2, 2013 until mid-December 2013, a period of about 9.5 months. At that time, as a result of financial difficulties, a receivership order was made and a receiver was appointed in respect of SHS. Sears understands that SHS at that point terminated Tonn's employment.
19. Paragraphs 24 to 27 of the notice of civil claim contain allegations regarding the SHS receivership and reasons for it that are irrelevant to the matters at issue in this action, and that are denied.
20. It is SHS that is responsible for the termination of Tonn's employment in December 2013, not Sears.

Division 3 - Additional Facts

21. N/A

PART 2: RESPONSE TO RELIEF SOUGHT

22. Sears opposes the granting of the relief sought in paragraph 1 of part 2 of the notice of civil claim.

PART 3: LEGAL BASIS

No Claim for Wrongful Dismissal

23. At law, there was no wrongful termination of Tonn's employment by Sears, and no obligation on Sears to provide reasonable notice or pay in lieu of notice as of March 2, 2013.
24. Any entitlement that Tonn may have to reasonable notice or pay in lieu of notice, would be from SHS in respect of the subsequent termination of his employment in December 2013:

- (i) Tonn's employment was continued with SHS after March 2013, until December 2013;
 - (ii) at law, in the circumstances described above, there was a transfer, a novation and/or an assignment of Tonn's employment from Sears to SHS as of March 2013 going forward, including in respect of any obligation to provide notice or pay in lieu of notice upon a termination of employment that may arise; and
 - (iii) in accepting continued employment with SHS, Tonn accepted that he would not have any claim against Sears after that point.
25. In the alternative and in any event, even if Tonn's employment were terminated by Sears in March 2013 triggering an entitlement to notice of termination by Sears – which is denied – Tonn received two weeks' advance notice from Sears, and then mitigated by accepting employment with SHS and continuing employment with SHS until mid-December 2013.
26. In the circumstances, there is no liability against Sears, and no compensable loss for which it is responsible. Alternatively, the loss claimed is excessive and remote, and Tonn failed to reasonably mitigate any such loss.

No Basis for Punitive Damages Claim

27. With respect to paragraphs 9 to 10 of part 3 of the notice of civil claim, there is no basis in fact or law for a claim for punitive damages.

Class Proceedings

28. With respect to paragraphs 1 to 5 of part 3 of the notice of civil claim, Sears denies that a class proceeding is the appropriate procedure for the prosecution of the claims in this action.

29. Sears reserves the right to defend the proposed class claim in the event, if ever, it is certified.

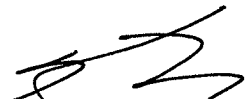
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Dated: September 18, 2015



Signature of Lawyer for Defendant

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.