IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Koos v. A & A Customs Brokers Ltd.,***
2009 BCSC 563

Date: 20090429
Docket: SO81266
Registry: Vancouver

Between:

Jennifer Koos

Plaintiff

And

A & A Contract Customs Brokers Ltd.

Defendant

Before: The Honourable Mr. Justice Rice

Reasons for Judgment

Counsel for the Plaintiff:	Jonas McKay
Counsel for the Defendant:	John D. Whyte
Date and Place of Trial/Hearing:	March 3, 4 & 5, 2009 Vancouver, B.C.

INTRODUCTION

[1] The plaintiff Ms. Koos claims that she was wrongfully dismissed from her employment with the defendant A & A Contract Customs Brokers Ltd. The defendant denies that it terminated the plaintiff. Rather the plaintiff resigned by abandoning her employment

FACTS

[2] On the morning of December 14, 2007, the plaintiff left her desk at work to do a personal errand at the nearby Canada Customs Office. She let her group manager know that she would be gone for a few minutes. At the Customs Office, the plaintiff was delayed and so didn't return for more than half an hour.

[3] Displeased, her manager reprimanded the plaintiff and, among other things, called the plaintiff a liar for having said she would be gone only for a few minutes.

[4] Upset by the accusation, particularly because the words were spoken loudly enough to be heard by other co-workers, the plaintiff reported the incident to her superior, Jane Arnett. Ms. Arnett convened a meeting, which both the plaintiff and her manager attended.

[5] Ms. Arnett thought the meeting went well. However, the next morning, she was displeased to learn from another employee that the plaintiff had confided in her about the meeting, saying it had been one-sided against her. Ms. Arnett testified that she called the plaintiff to her office to express her disappointment because she had

thought that the plaintiff had left it to her to speak to the other employees about the meeting.

[6] Feeling as though she had received a second uncalled-for blow to her dignity, the plaintiff returned to her desk and broke into tears. Not long after, Ms. Arnett approached her and suggested that she leave for the day. The plaintiff then called her boyfriend who came and picked her up and drove her away, but not before stepping into the office himself to express his thoughts on the matter. Those who heard his remarks were in agreement that his choice of words was unflattering.

[7] Without mentioning it before she left, the plaintiff had her boyfriend take her to the Surrey Memorial General Hospital emergency room. There she asked for medication to settle her nerves and a note to be faxed to her employer advising that she must take two weeks off work due to anxiety. She could not say for certain that the note was sent to the defendant, but I accept that she was told that it was and that she believed it was. A form of note was produced in evidence to this effect and evidently it was received that day by the defendant, although it was not brought to the attention of Ms. Arnett until mid-February 2008.

[8] Ms. Arnett testified that she telephoned the plaintiff at about 4:00 p.m. and then again at about 4:30 p.m. on December 21, 2007 to ask how she was. She received no answer but she was able to leave a message on an answering service requesting that the plaintiff return her call. The plaintiff never did so.

[9] Over the next week, the plaintiff continued to do nothing to advise the defendant of her condition. She testified that she believed that the defendant must

have received her doctor's note by fax, and therefore knew that she would not be returning for two weeks. Ms. Arnett said that, not having received any note, she expected that the plaintiff would answer the message left on her telephone if she intended to come back.

[10] On December 31, Ms. Arnett sent a letter by registered mail to the plaintiff, which was received on or about January 3, 2008. The letter stated that the defendant, having not heard from the plaintiff despite the message asking her to call, assumed that she was abandoning her position and would not be returning. The letter included a cheque for her vacation pay, and advised her that all further amounts owed to her would be coming to her in due course.

[11] The plaintiff, on receiving this letter, responded by letter dated January 4, returning the vacation pay cheque and expressing with emphasis that she had not terminated her employment. She was away due to sickness, as the note from the hospital doctor should surely have explained.

[12] There was no further communication between the plaintiff and the defendant until January 11, 2008, when Ms. Arnett replied by letter to the plaintiff saying that the defendant did not accept her explanation, and that the plaintiff's actions constituted an abandonment of her position. The letter also expressed the possibility that the defendant would reconsider if a doctor were to provide a certificate as to her unfitness for work.

[13] The next correspondence was from the lawyers for the plaintiff demanding reinstatement and threatening action.

RESIGNATION

[14] In a case of alleged resignation the test is whether a reasonable person would have understood by the plaintiff's statements and actions that he or she had resigned: ***Assouline v. Ogivar Inc.*** (1991), 39 C.C.E.L. 100, at 104 (B.C.S.C.). The test is an objective one: ***Assouline*** at 104. However, to be effective, the resignation must be clear and unequivocal. There must be a clear statement of an intention to resign, or conduct from which that intention would clearly appear: ***Danroth v. Farrow Holdings Ltd.***, 2005 BCCA 593, 47 B.C.L.R. (4th) 56, at para. 8.

[15] In this case, the issue is whether the plaintiff's conduct was such that the defendant was entitled to treat it as abandonment of her employment. I conclude that the defendant was not so entitled. The plaintiff never told Ms. Arnett at any time that she was quitting. Ms. Arnett did not ask the plaintiff whether she was quitting. On the contrary, she told the plaintiff only to take the rest of her day off. The plaintiff received no warning not to leave her employment in the manner that she did, nor was she forbidden to take sick leave. In fact, the plaintiff had taken three months off earlier in the year on medical grounds. Ms. Arnett could not know for certain that the plaintiff had received her telephone messages, particularly because the plaintiff's answering service was recorded with a male voice, and she did not follow up the messages until she sent a letter on December 31 advising the plaintiff that her employment was terminated.

[16] Ms. Arnett was no doubt displeased with the plaintiff's conduct at work and with her failure to communicate with her employer afterwards. I do not assume that

Ms. Arnett ever received the doctor's note. I do not say that it was reasonable or justifiable for the plaintiff to obtain on request a two-week sickness pass without full examination of the reasons why she might or might not need to be away from work. In some circumstances this could be judged to be cause for dismissal, but not in this case, and in any event, the defendant did not plead cause in this action.

[17] I do not overlook the conduct of the plaintiff in denying that she received the telephone messages from Ms. Arnett. Another employee at the defendant's office testified to having visited the plaintiff on December 27, 2007 at which time she informed him that she had, in fact, heard the telephone messages but had chosen not to answer them.

[18] Not to answer the messages was, of course, irresponsible of her. In other circumstances it might have sufficed as proof of her resignation. However, it remained Ms. Arnett's responsibility to clarify the facts with the plaintiff before she confirmed the termination of the employment. Her actions after receiving the answer from the plaintiff on January 4, 2008 suggest that the desire to be rid of the plaintiff coloured her judgment of the facts, and induced her to act prematurely.

[19] In the circumstances, I cannot find that a reasonable person would have regarded the actions of the plaintiff as an unequivocal resignation or abandonment of her employment. Therefore the letters sent by Ms. Arnett to the plaintiff on December 31st, 2007 and January 11, 2008, constituted a wrongful dismissal. The plaintiff is entitled to damages.

REASONABLE NOTICE

[20] The leading case ***Bardal v. Globe & Mail Ltd.***, [1960] O.W.N. 253, 24 D.L.R. (2d) 140 (H.C.), sets out the factors to be considered in determining reasonable notice, at 145:

> The reasonableness of the notice must be decided with reference to each particular case, having regard to the character of the employment, the length of service of the servant, the age of the servant and the availability of similar employment, having regard to the experience, training and qualifications of the servant.

[21] The factors in ***Bardal*** were adopted by the Supreme Court of Canada in ***Machtinger v. HOJ Industries Ltd.***, [1992] 1 S.C.R. 986, at 998-999. No one ***Bardal*** factor should be given disproportionate weight: ***Keays v. Honda Canada Inc.***, 2008 SCC 39, [2008] 2 S.C.R. 362, at para. 32.

[22] The plaintiff cited ***Langan v. Kootenay Region Metis Association***, 2008 BCSC 1169, ***Cheng v. British Columbia Hydro and Power Authority***, [1985] B.C.J. No. 630, and ***Lightburn v. Mid Island Consumer Services Co-operative*** (1984), 4 C.C.E.L. 263, in support of a notice period of 14 to 15 months.

[23] In ***Langan***, the court awarded a notice period of 15 months, based in part on the lack of comparable employment. Ms. Langan was 46, had worked for the defendant employer for nine years, and before her dismissal held a senior administrative position.

[24] In ***Cheng***, the plaintiff was 38 years old and had been employed for approximately 10 years when he was dismissed from his employment as a civil

engineer. The court noted that Mr. Cheng had a great deal of experience that was extremely limited in scope because of its specialization. The court went on to state, at para. 14:

> The plaintiff held no managerial responsibilities; he was an intermediate employee. I have compared his position with the position of the defendant in *Burton v. MacMillan Bloedel*. Although he certainly didn't have the managerial responsibility that the Plaintiff in that case had, I feel that the circumstance is offset to some extent by his highly specialized employment and the difficulties which that highly specialized experience produces in the present labour market.

[25] In ***Lightburn***, the plaintiff was 49 years old and at the time of dismissal was a hardware store department manager. He had been employed by the defendant for 10 years. The plaintiff had a Grade 10 education and had come to work for the defendant after 19 years in the armed forces. The appropriate notice period was found to be 15 months.

[26] The defendant cited ***Palidwor v. Julian Ceramic Tile Inc.***, 2006 BCSC 1976, aff'd 2008 BCCA 395, ***Birch v. London Drugs Ltd.***, 2003 BCSC 1253, 27 C.C.E.L. (3d) 19, and ***Barrie v. Voith Canada Inc.***, 2004 BCSC 1728, in support of a notice period of 8 to 10 months.

[27] In ***Palidwor***, the plaintiff, who was a bookkeeper, had been employed for 12 years. Her position carried a high degree of responsibility but no managerial or supervisory duties. The notice period was assessed at 6 months.

[28] In ***Birch***, the plaintiff, who was 35 years old, had worked for the defendant for 10 years. For the last eight years of his employment he had been a receiver and merchandise handler in a warehouse. The court noted, at para. 17:

> Here, the plaintiff was a relatively young man at the time of dismissal, the length of employment was 10 years. With respect to the character of the employment, the job was not one of particular skill or sophistication, I would assess it as slightly above entry level but not significantly so. One would not expect similar employment to be enormously difficult to find.

The notice period was assessed at 30 weeks.

[29] In ***Barrie v. Voith***, the plaintiff was 45 years old and had worked for the defendant for 11.5 years. He worked in a specialized and technical area (the sale of paper machine clothing), which made his knowledge and experience less transferable to a new job, but did not have managerial or supervisory responsibilities. The court set the notice period at nine months.

[30] In this case, the plaintiff's salary was approximately $50,000 per year and she had been employed by the defendant for ten years.

[31] By all accounts the plaintiff's position was a specialized one. It involved the gathering and understanding of the various regulations affecting imports and exports, advising customers on customs duties and tariffs, and studying the policies and practices of governments with respect to these matters. The evidence was that the plaintiff's job did not carry with it any supervisory or management duties. A great many employees consulted her on particulars of customs compliance but they did not report to her.

[32] The plaintiff, who is now 40 years old, must reckon with the fact that she has no post-secondary institutional degree or diploma. Her job is unique and not easily transferable except within the brokerage industry. Her increased learning has been gained mainly on the job, and although she is “specialized”, her work is distinguishable from that involving sophisticated conceptual tasks and branches of technical expertise. Given the narrow scope of the plaintiff’s expertise there is a strong possibility that comparable employment will be unavailable to her.

[33] I favour the defendants’ authorities because they are closer to the case at bar on the questions of specialization and management duties.

[34] Considering all of these cases as a whole in relation to the nature of the plaintiff’s position, I conclude that an appropriate compensation would be 10 months, subject to the plaintiff’s obligation to mitigate.

MITIGATION

[35] The plaintiff has an obligation to mitigate her loss, that is, to take such steps as a reasonable person in the plaintiff’s position would take in her own interest to maintain her income and her position in her industry, trade or profession: see ***Smith v. Aker Kvaerner Canada Inc.***, 2005 BCSC 117, at para. 31. The onus is on the defendant to prove that the plaintiff has failed to mitigate or failed to take reasonable steps to mitigate. The defendant must show not only that the plaintiff failed to take steps to mitigate but also that had the plaintiff taken those steps she could likely have found equivalent employment: see ***Jorgenson v. Jack Cewe Ltd.***

(1978), 93 D.L.R. (3d) 464, 9 B.C.L.R. 292 at 296 (C.A.), aff'd [1980] 1 S.C.R. 812, 111 D.L.R. (3d) 577.

[36] In this case, the plaintiff adduced evidence that she searched for employment, but she has not had any interviews and has not obtained new employment. The plaintiff also gave evidence that the only positions available were senior management positions that were not at her level. There is also some evidence from the defendant that because of the current state of the economy the brokerage industry is slow. While I have some reservations that the plaintiff was likely less diligent than she might have been in seeking a new position similar to that which she had, or other employment if there was any available, evidence submitted by the defendant falls short in showing that equivalent employment was available to her. Therefore, I do not find any basis for finding that the plaintiff failed to mitigate her losses.

WALLACE DAMAGES

[37] The general rule is that damages in wrongful dismissal cases are confined to the losses suffered as a result of the employer's failure to give proper notice. No damages are available for the actual loss of the job or for any pain or distress that is suffered as a consequence of the dismissal. However, damages resulting from the manner of dismissal are available, but only if the employer engages in conduct during the course of dismissal that is unfair or in bad faith "by being, for example, untruthful, misleading or unduly insensitive": ***Wallace v. United Grain Growers Ltd.***, [1997] 3 S.C.R. 701, at para. 98.

[38] The plaintiff submitted that the fact that she failed to respond to Ms. Arnett's telephone messages was no more than a pretext to fire her. While I agree that there is a possibility of this, I also note that the plaintiff was not entirely candid regarding whether she received the telephone message from Ms. Arnett.

[39] In my opinion, there is no basis on any of the evidence for a conclusion of bad faith or unfairness on the defendant's part. There is no evidence that the manner in which the plaintiff was dismissed was untruthful, misleading or unduly insensitive.

COSTS

[40] Counsel for the defendant argues that to submit a claim for Wallace damages with no evidence to support it should disentitle the plaintiff to costs. The plaintiff argues that the failure of the defendant to negotiate reasonably for a settlement should entitle the plaintiff to double costs for the trial. I find no basis in this case for departing from the usual rule that costs follow the event. The plaintiff will have her costs at Scale B.

"The Honourable Mr. Justice Rice"