Citation: Pardhan v. Caledonia Enterprises Ltd. 2007 BCPC 0289

Date: 20070907
File No: 0612537
Registry: Vancouver

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

BETWEEN:

NANEESHA PARDHAN

CLAIMANT

AND:

CALEDONIA ENTERPRISES LTD. doing business as SOCCER CENTS - DISCOUNT SOCCER

DEFENDANT

REASONS FOR JUDGMENT
OF THE
HONOURABLE JUDGE V. ROMILLY

Counsel for the Claimant:	R. Carter
Counsel for the Defendant:	S. Kent
Place of Hearing:	Vancouver, B.C.
Date of Hearing:	March 27th, 2007
Date of Judgment:	September 7, 2007

SUMMARY OF FACTS AND EVIDENCE

[1] The Claimant claims that the Defendant wrongfully dismissed her without just cause and without any or reasonable notice.

[2] The Defendant contends that the Claimant was properly dismissed because of an actual or potential conflict of interest, and that in any event the Claimant was given reasonable notice of eight weeks, and received eight weeks severance pay. The Defendant counterclaims for damage on the grounds that the Claimant's claim is "frivolous and vexatious", but I find that allegation to be groundless and dismiss the Counterclaim at the onset.

[3] The Claimant testified that she is 25 years of age, and has graduated from High School and has a Diploma in Medical Office Administration. She stated that she first started working in the Defendant's retail sports store in September, 1998, when she was still attending High School. She stated that her initial position was that of a part-time sales clerk which continued until May 2005 when she was appointed as a full-time Retail Store Manager with about 13 – 16 persons under her. She stated that she had a say in the hiring and terminating of employees and oversaw the hours that employees worked. She stated that there was never a written contract and that over the years her duties increased.

[4] She stated that her employment with the Defendant ended on May 4, 2006. She testified that her sister had telephoned her and advised her that the representative of the Defendant company, Mr. Lilley, was coming to "fire" her. She stated that her sister first said to her, "I guess you heard" that Mr. Lilley had said that she was in a conflict of interest situation and that they would have to let her go. She stated that she was deemed to be in a conflict of interest situation because her sister had opened a soccer retail store, very similar to that of the Defendant's, in North Vancouver. She stated that her sister told her that Mr. Lilley had said that she was a great employee and could find another job easily, and that she could continue working with the Defendant until she found another job, and that no time limit was set. She stated that she was "stunned" and felt insulted upon hearing this from her sister before she was approached by Mr. Lilley, and felt that she was being treated unfairly by the Defendant. She stated that she had worked for the company for a period pf eight years and did not expect to be treated in this manner. She stated that she was so embarrassed that she left the premises and never returned to work there again because she felt that she could never return to a working environment where she was not wanted. She stated that on that very night she telephoned the Defendant's Mr. Lilley and advised him that under the circumstances she would not be returning to work and that she felt that she was wrongfully dismissed. She stated that she was then provided with a letter of termination, but was not aware that she was offered a six week termination notice. She stated that she was promised a reference letter which she never received. She stated that her Record of Employment came late and as a result she could not receive unemployment insurance.

[5] She testified that she tried to find another job and prepared a new resume which she e-mailed and faxed to prospective employers and was only successful in obtaining employment at City Sports and Physiotherapy as an Administrative Assistant on August 22,2006 and is paid a semi-monthly salary of $1,126.67. She stated that she remained unemployed from May 4, 2006 to August 22, 2006 for a period of some fifteen weeks.

[6] On cross-examination she was shown an application she made to Vancouver Coastal Health dated July 22, 2006 and her resume which stated that she worked as a receptionist at Cross Roads Wellness Centre in July, 2006. She stated she was not sure if she was working at Cross Roads in 2005 or 2006, although her resume did not show her working at Cross Roads in 2005. She admitted that her resume showed that throughout the period she worked for the Defendant prior to her appointment as manager, she worked at several other jobs besides her job with the Defendant, and attended Quantlen College and Compu College

[7] She admitted that there was no mention in her job applications that she was looking for a job in retail. She stated that she wanted to try something different. She stated that the reason why no responses

to her job applications were entered into evidence was due to the fact that prospective employers either telephoned her or did not respond.

[8] The next witness called by the Claimant was her sister, Maleena Parhan, who worked for the Defendant from May, 1998 to April, 2006 . She stated that she was manager of the store where the Claimant worked for 3 ½ years before the Claimant became manager. She stated that while working there she also worked for ICBC. She stated that in her capacity of manager she believes that her duties were similar to those of her sister. She advised that she was the sister who telephoned the Claimant to tell her that she was going to be let go that day.

[9] She testified that a few months prior to that phone call taking place, she had talked to Andrew Lilley, the President of the Defendant, that there was a possibility that she was going to open a sports store of her own and wanted his advice and wanted to know if it was alright with him, since she was still doing commission sales for him. She stated that his response was that it was a good idea and they had a general discussion about business, but that there was no discussion about her sister. She testified that on May 4, 2006, Mr. Lilley telephoned her and said that he wanted to come and see her new store and that he visited and was shown the store. She stated that Mr. Lilley then told her that they were thinking about letting her sister go, which shocked her and she asked why. She stated that his response was that they thought that her sister was good at her job, but they felt that there was a conflict of interest situation because of the similarities of their stores, which did 85% soccer equipment sales. She stated that she told him that he was making a big mistake and that she and her sister thought of Mr. and Mrs. Lilley as "family". She stated that the conversation then became uncomfortable and he left, and she immediately telephoned her sister to tell her that she was going to be fired that day.. She stated that prior to May 4, 2006, she heard nothing about a conflict of interest, or the termination of her sister's employment.

[10] The only witness for the Defence was Andrew Lilley who stated that he and his wife were owners of Caledonia Enterprises Ltd which runs three stores selling soccer items, employing about 16 employees, and servicing soccer teams, clubs and associations. He stated that he has been in the business for 21 years. He stated that the Claimant started working for them one day per week as a Retail Sales Clerk in September, 1998 when she was still in high school, and while her sister was still working for them. He stated that for the next three years she worked three or four days per week (full days or half days) until June 19, 2005 when she was promoted to Manager at the Broadway location, with a possibility of her going to the Richmond location once per week. He stated that it was he only who hired and fired personnel. He stated that as a Manager of a store, her duties included completing inventory, attending sales meetings, and taking care of all orders. He stated that her sister on the other hand was in charge of corporate sales and that her salary was double that of the Claimant.

[11] He admitted that this was not a "cause" case. He stated that the Claimant's sister informed him and his wife that she was opening her own store and they encouraged her to do so, although they realized that it would be a "competing" store. He stated that he was reluctant to tell her that if she opened a competing store, there might be a problem with her sister working for them. He stated that negotiations for opening the store took a long time and he wanted to wait until the store was opened before any action was taken. He stated that he visited the Claimant's sister's store to ask her to employ the Claimant so that they would not have a conflict of interest situation. He stated that it seemed to him that it was a "no brainer" that a conflict of interest situation would arise. He stated that the Claimant's sister advised him that she could not afford to hire her sister, and he advised that he was sorry if they had to let her sister go. He stated that he knew that she was going to call her sister.

[12] He stated that when he returned to the store he told the Claimant about what he perceived as a conflict of interest, but she could not see it and she started crying and he stated that he and his wife were also upset at having to do what they planned to do. He denied that she was confronted in front of customers. He stated that he told her to let them know if she wanted to continue working because they were offering her the opportunity to continue working until she found another job. He stated that they assumed that she would continue working and they wanted her to, but she telephoned and said that she would not be coming in. He stated that he telephoned the Employment Standards Branch and he was advised that the appropriate Notice under the circumstances would be six weeks, but they told her that

she could stay on as long as it took her to find another job. He stated that at that time every store in the Metrotown Mall was hiring, and he foresaw no difficulty in her obtaining a similar position in Retail.

[13] He stated that they received a call from the Claimant saying that she is entitled to severance and he advised her to come in with her father. He stated that when they came in the father advised that he had talked to a lawyer but a dispute continued over a period of time as to the amount of money that would be acceptable. He stated that it was only after "talks had broken down" that he sent her her Record of Employment and a severance payment for a period of eight weeks. He stated that they were never asked for a reference letter which they would have readily given since they never had any problems with her work performance.

[14] On cross-examination he denied that he ever told the Claimant that her employment was terminated. He stated that when they talked the Claimant knew when they explained the reason why they came to their decision. He stated that during their discussion he used the term "6,8 or 10 weeks or however long it took for her to find a job". He denied that he ever used the term "notice period", and stated that no time limit was set for how long she could continue working. He stated that they considered that with the Claimant's sister operating a similar store in a competitive business as theirs, there was a real possibility that information would be given by the Claimant to their competitor.

It should be noted that the following letter dated May 4, 2006 was sent to the Claimant by the Defendant:

> May 4, 2006
>
> Naneesha:
>
> We are sorry you feel you are unable to take us up on our offer of working out your six week termination period and have given us notice effective immediately.
>
> As we discussed yesterday, we feel with your sister opening a soccer store there is too much of a conflict of interest to retain you in our employment. You should know we did not make this decision lightly. This was a business decision. We regret you have treated this decision as a personal issue. We had hoped the change would be harmonious.
>
> We are prepared to fully support you in your transition from our employment to another place of work. Please bring or email us a referral letter which we can endorse and make ready for you on company stationery.
>
> Sincerely,
>
> Andrew & Carol"

ANALYSIS AND DECISION

[15] The Claimant's counsel in his final submission argues that the Claimant is entitled to fifteen weeks notice together with an additional two months for what he alleges to be the "bad faith" exercised by the Defendant. He also argued that no evidence was led by the Defendant regarding mitigation. Defendant's counsel contends that the Claimant received adequate "working notice" and that under the

Employment Standards Act, her entitlement is seven weeks notice and she received a severance package for eight weeks, and according to calculation based on her income she in fact received a 10 ½ week severance package. He contends further that the Claimant failed to look for a similar job, but rather chose to look for a job in a totally different field, which goes towards her failure to mitigate.

[16] The Carswell publication of WRONGFUL DISMISSAL by David Harris states in paragraph #3.2 as follows:

> "What is Notice
>
> An employer is not liable for wrongful dismissal if it gives an employee adequate "working notice" or provide an adequate severance package. "Working notice" requires the employee to continue working until the end of the period. The notice must be clear and unequivocal. If the employee rejects either "working notice" or a severance package, he or she may sue for wrongful dismissal. However, if the employee accepts a severance package (in the absence of unconscionability), such acceptance is a complete defence to a wrongful dismissal action.
>
> "Working notice" must be, by its very nature, "reasonable notice." In effect, it is a calculation of notice by the employer. In order to be effective for its intended purpose, "working notice" must either (1) provide the amount of notice agreed upon in the parties' employment contract (provided that the latter was valid in the first place and continues to be enforceable at the date of the giving of notice); or (2) approximate the period of "reasonable notice" that courts have calculated in similar cases, having regard to the Bardal factors and other judicial guidance in this area…….
>
> Defects in the form of working notice or lack of sensitivity in mode of delivery do not generally compromise its effectiveness its……..
>
> There are two reciprocally related aspects to "working notice." Firstly, as noted above, the period offered must be reasonable in the circumstances of the case. Secondly, the employee is obligated to make his or her services available during the working notice period. (It should be emphasized that the concepts of "working notice" and "constructive dismissal" are mutually exclusive.)
>
> If the first aspect fails (for inadequacy or any other reason), the employer is disentitled to the protection of having given "working notice." And the employee is relieved of the obligation that would otherwise be incumbent on him or her to work through the "working notice" period. If, on the other hand, the second aspect fails, the employee is disentitled to sue for the "unworked" period of notice, in that he or she has unilaterally breached the employment contract……"

[17] The extract goes on to quote Lord Denning in Hill v. C.A. Parsons & Co. (1971), (1972) Ch.305, (1971) 3 W.L.R. 995, and continues as follows:

> "The above passages were adopted by the British Court of Appeal in Suleman v. British Columbia Research Council (1990) 52 B.C.L.R (2d) 138……..
>
> The Suleman case, supra, in turn illustrates the second aspect of "working notice." The employer in that case was held to be relieved of liability for wrongful dismissal by having given six months "working notice" to the plaintiff, a secretary/administrative assistant with a 13-year period of employment. NO cause was alleged. The plaintiff promptly alleged wrongful dismissal and commenced an action against the employer. The action

succeeded at trial but was reversed on appeal. Mr. Justice Hutcheon, writing for the court, held that the employer had provided reasonable "working notice." Given that it was otherwise feasible for the parties to have maintained their employment relationship during the "working notice" period, Hutcheon, J.A. held that

"the contract of employment (would not have been) terminated until the end of the notice period and during that period the employer (had) the right to the services of the employee."(p.142 B.C.L.R.)

In the result, the plaintiff lost the benefit of her wages during the "working notice" period.

To be effective, "working notice" must allow the recipient to actively seek re-employment during the period……."

[18] With regards the issue of "bad faith" alleged by the Claimant, the WRONFUL DISMISSAL text continues as follow at paragraph 4.53:

"ii) What are the Parameters of "Bad Faith Conduct" or "Unfair Dealing"?

It should be noted from the outset that the majority of the Supreme Court in Wallace did not draw a sharp distinction between the two types of activity cited in this subheading. One of the few cases to date which has treated these activities disjunctively was Hanley v. Ortech Corp (1999), 47 C.C.E.L (2D0 241…….Here, Beleghem J. concluded that the Wallace principle applied to employer misconduct that amounted to "unfair dealing" but did not specifically display "bad faith."……

(D) Intentionally or Recklessly Cruel Dismissal

A fourth type of bad faith dealing may be termed "intentional or reckless cruelty in connection with dismissal." The distinction between this Wallace factor and the tort of intentional infliction of mental distress is not entirely clear, particularly in cases where the employer knew, actually or constructively, that its dismissal strategy could virtually not fail to plunge the employee into depression and/or other serious psychological trauma. It should be noted, on the other hand (and in defence of this "Wallace factor"), that it is able to take into account several types of psychological cruelty and abuse which lack a tortuous element, yet are able to greviously affect employees' states of mind and their short-term prospects of mitigation……."

[19] With regards the issue of mitigation by returning to work during the notice period, the case of Farquar v Butler Brothers Supplies Ltd. (B.C.C.A) (1988) B.C.J. No. 191 deals with this issue and states at Page 4, paragraph 3 of the judgment as follows:

"The employee is only required to take the steps in mitigation that a reasonable person would take. Sometimes it is clear from the circumstances that any further relationship between the employer and the employee is over. One or the both of them may have behaved in such a way that it would be unreasonable to expect either of them to maintain any new relationship of employer or employee. The employee is not obliged to mitigate by working in an atmosphere of hostility, embarrassment, or humiliation. But once the employer is clearly told, by words or equivalent action, that the termination is accepted by the employee, then, if the employer continues to offer a position to the employee, and the

> position is such that a reasonable employee would accept it, if he were not counting on damages, then the duty to mitigate may require the employee to accept the position, on a temporary basis while he looks for work, even if it is roughly his old position before the constructive dismissal. Such circumstances may not arise frequently. Very often the relationship has become so strained that a reasonable person would not expect both sides to work together in harmony."

[20] On considering the issues raised in this particular case, I think it is appropriate to begin by quoting Southin J.A. comments in Stein v. British Columbia (Housing Management Commission), (1992) B.C.J. No. 280 at page 5:

> "I begin with the proposition that an employer has a right to determine how his business shall be conducted. He may lay down any procedures he thinks advisable so long as they are neither contrary to law nor dishonest nor dangerous to the health of the employees and are within the ambit of the job for which the particular employee was hired. It is not for the employee nor for the court to consider the wisdom of the procedures. The employer is the boss and it is an essential implied term of every employment contract that, subject to the limitations I have expressed, the employee must obey orders given to him."

[21] I am cognizant of the fact that the issues raised in this case do not allege any misconduct on the part of an employee in disobeying an edict of the employer, neither is cause alleged by the Defendant. However I find that the employer's decision to terminate an employee because of a perceived potential conflict of interest, certainly relates to an employer's right to conduct his business as he thinks fit subject to the limitations set forth by Southin J.A. I find that it matters not how the decision is received by the employee, nor whether the perception of a conflict has manifested itself. I find it not entirely unreasonable that a businessman with 21 years business experience would conceive that a past employee, presumably under whose tutelage and recommendation her sister, the Claimant, started off by being hired part-time while still attending high school, would pose a threat by starting a competing business, and may in all likelihood discretely solicit private business information about her competitor from her sister should she remain in the employ of that competitor. I find that we are not talking about an employee who had signed some confidentiality agreement with an employer, but merely a retail sales manager, who being not so bound, may advertently or inadvertently provide her sister with critical and private information about her competitor. I find that precautionary action taken by an employer to guard against such a conflict very much a part of the conduct of his business, and it is not for a court to question such action, subject to the limitations outlined by Southin J.A above.

[22] That being said, I find that the reaction of the Claimant to her termination for that reason not entirely unforeseeable, but I find that her employer neither intended to be cruel nor hurtful nor to humiliate the Claimant in any way, but was doing what he thought was necessary to preserve his business. I find that it is all well and good for the employee to interpret her employer's action as impugning her loyalty, and being ungrateful for her dedicated service to date. But I find that surely that is not the point, since it is the employer's right to take whatever action he deems necessary to protect his business, subject to the limitations set out above, and even if it means terminating an employee as long as he provides him or her with sufficient notice.

[23] With regards the fact that the employer conveyed the information to her sister, before he conveyed it to her, I find that Mr. Lilley had all the best intentions when in fact he sought to discuss the matter with her elder sister to canvass the possibility of her being hired by her, to ease the hurt of her dismissal. I find that there was a sufficient close relation between Mr. Lilley and the elder sister for him to discuss the matter with her first before terminating the sister. I find it merely unfortunate that one sister's loyalty to another had the effect of exacerbating a delicate situation, and that the blame for this cannot be placed at the Defendant's feet. I therefore find that the Claimant is not entitled to a "Wallace bump", since I find that the allegation of "bad faith" on the part of the employer untenable.

[24] I find that the issue of “working notice” is a moot point since the employer agreed that the Claimant was entitled to a severance payment in lieu of notice and has paid same to the employee. The only issue remaining in that regard is whether or not the severance payment was sufficient under the circumstances.

[25] I note that the Defendant has not strongly canvassed a failure to mitigate on the Claimant’s part, except to bring it to the attention of the Court that despite the fact that in the Mall itself where the Claimant worked, there were many positions available in retail, the Claimant seemed to have applied mostly for jobs which had nothing to do with retail, and her applications were rejected. It strikes me that liability can hardly be attributed to an employer where the dismissed employee decides to seek employment in a field totally different from the field she was dismissed from, except if she can demonstrate that she has exhausted that field in her search.

[26] With regards the remaining issue about the sufficiency of the notice provided by the Defendant and the payment in lieu thereof, I note that the Defendant paid the claimant 8 weeks wages in lieu of notice rather than the six weeks set out in its letter of termination. I also note that the Defendant was willing to give the claimant “working notice” of 6, 8 or 10 weeks or how long it took her to find another job. The evidence suggests that the Claimant started working for the Defendant part-time as a sales clerk from the time she was attending high school in 1998, which consisted of working 5 hours on Sundays for her first year with the Defendant, 10 hours per week the following year with her hours increasing to up to 36 hours per week until she was appointed Retail Manager in May, 2005, until her termination in May 2006. Her Resume that she complied to find new employment suggests that while she worked part-time with the Defendant, she worked as a cashier for Oakrest Foods in Richmond from January, 1997 to August, 1999; worked at Scottsdale Health Centre in Delta from October 2004 to April 2005, and at Marpole Community Centre in Vancouver from March 2005 to April 2005, as well as attending Kwantlen University College from January 2000 to September 2001 and Compu College School of Business from August 200 to August 2001. This suggests to me that during the period of her part-time employment she can hardly be described as devoting her full time and efforts in the employer’s employ and that if she was terminated prior to her being appointed Retail Manager she may very well be only entitled to the statutory period of notice as a regular part-time employee.

[27] I feel therefore that to describe the Claimant’s period of employment from May, 1998 to May, 2006, requiring notice for some eight years of employment, to be undeserved under the circumstances. I find that the maximum notice that the Claimant might have been entitled to up until the time she was appointed as Retail Manager is seven weeks notice, according to whether or not the period of her part-time employment could be calculated as “consecutive”. She was then appointed as Retail Manager for the period May, 2005 to May, 2006, a period of one year and taking into account the Bardal factors of (a) Character of employment; (b) length of service; (c) age of the Claimant (25 years); (d) the availability of similar employment; (e) Training qualifications and experience, I find firstly that the “character” of the Claimant’s employment as requiring no particular specialty, and was one she only had for a period of one year, and that she would have had no particular difficulty in finding similar employment in the retail industry. Secondly with regards “length of service”, I find that the Claimant only worked part-time for the Defendant as a sales clerk as well as working part-time for other employers during the same period, and only became a full-time employee of the Defendant with minor managerial tasks for a period of one year. Thirdly with regards “the age of the Claimant”, I find that Claimant’s young age of 25 years affords her many opportunities to find employment in the retail industry, which she chose on her own volition not to embrace. Fourthly with regards “the availability of similar employment”, I reiterate that there were many opportunities in the retail industry that the Claimant could have availed herself of, and she chose not to. Fifthly with regards “training qualifications and experience”, I find that the Claimant over the years obtained training and experience as sales clerk; she had one year’s experience as a retail manager and her education as set out in her resume, included one year from January 2000 – September 2001 attending Kwantlen University College, and obtaining a Diploma as a Medical Office Administrator at CompuCollege School of Business which she attended from August 2000 to August 2001. As it turned out the Claimant preferred to use her education as a Medical Office Administrator to obtain another job rather than seeking similar employment in the retail industry.

[28] While I find that the period of 8 weeks notice given to the Claimant more than sufficient under the circumstances. I am willing to extend that period of notice to 10 weeks in accordance with what the employer had originally offered by way of “working notice.” I find therefore that the Claimant is only entitled to receive the further sum of $960 (2 weeks X 32 hours X $15) and I award her judgment in that amount. The Claimant is entitled to Court Order Interest on that amount calculated from May 4, 2006, but I decline to award her costs.

_____

V. Romilly, PCJ