
CANADA / JUDGMENT

Austin v. Kitsumkalum First Nation

2020 BCSC 2298

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 2298 Austin v. Kitsumkalum First Nation

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Austin v. Kitsumkalum First Nation,

2020 BCSC 2298

Date: 20201208

Docket: S198567

Registry: Vancouver

Between:

Colleen Austin

Plaintiff

And

Kitsumkalum First Nation

(also known as Kitsumkalum Indian Band)

Defendant

Before: The Honourable Mr. Justice Groves

Oral Reasons for Judgment from a

Summary Trial in a Wrongful Dismissal Action

Counsel for the Plaintiff:

P.L. Krawus

Counsel for the Defendant:

S. Ashcroft

Place and Date of Summary Trial:

Vancouver, B.C.

June 6 & December 8, 2020

Place and Date of Reasons for Judgment:

Vancouver, B.C.

December 8, 2020

- [1] THE COURT: My decision on the matter of Colleen Austin versus Kitsumkalum First Nation. This is a summary trial application brought on in the context of an employment relationship that ended around the 30th of June of 2019. The plaintiff, Colleen Austin (referred to in these reasons as "Austin" or the plaintiff) began her employment with the Kitsumkalum First Nation (referred to in these reasons as "Kitsumkalum") in or about 2005 when they operated a school that was an adult learning centre. She began working there as a teacher and was paid a teacher's salary she says of about \$45 an hour.
- [2] In 2011, the school operated by Kitsumkalum was transitioned from an adult learning centre to a K to 12 school, with full accreditation from the provincial government, including the ability to issue Dogwood Diplomas. The plaintiff and others then worked as teachers at the school. In 2017, the plaintiff was promoted to the position of principal. I am satisfied at the time of her dismissal that her salary was \$104,000 a year, and additionally she received a figure of I believe \$420 a month as compensation for medical and other benefits.
- [3] The first act of ending this employment relationship began on the 20th of December 2018 when the plaintiff sent a letter to Kitsumkalum indicating that it was her desire to end her employment as of the 30th of November 2019, which is a little over 11 months later. The letter points out that it was her desire to continue as the school principal through the school year of 2018/2019, so until June. Then, she indicated she would on for the first three months of the next school year, 2019/2020 for the purpose of facilitating a smooth transition to a new principal.
- [4] There are a Facebook posts in evidence around the time Austin gave her notice to leave that are suggestive that perhaps she might be willing to leave a little bit earlier if a replacement is found. That does not appear to have come to fruition, at least until the next intervening event, which was sometime around the 26th of April of 2019.
- [5] I should note here that despite sending a letter of December 20, 2018, there was no acknowledgment at all Kitsumkalum, and as such Austin would no doubt be of the belief that having silence from them, that her proposal to end employment with Kitsumkalum was

acceptable, and that she would continue to work her time through to November 30, 2019. There is no evidence before me that a replacement principal was found until the start of September 2019, and in any event on the 26th of April 2019 when the letter was sent, there does not appear to be a new principal in the waiting.

- [6] I will summarize the letter sent from the defendant to the plaintiff on the 26th of April. I agree with counsel for the plaintiff, that the language is not derogatory or condescending or negative. The letter says that her services are no longer required as of the 30th of June 2019. It points to the fact that additional costs would be incurred by having two principals. She is terminated at that point. Having given her notice for November 30, 2018, she is informed on April 26, 2019 that her employment will be terminated on June 30, 2019.
- [7] The extent of her claim for damages is modest. It is the loss for those months less mitigation. From the 30th of June 2019 and the 30th of November 2019, the plaintiff has calculated, and I accept, damages from loss of employment less mitigation of \$16,547.62, plus the five months loss of benefits at \$420 a month totalling \$2,100, for a grand total of \$18647.62.
- [8] A bit of is segue here. It would appear that the plaintiff was able to get additional work with another northern British Columbia aboriginal school or educational organization. The details of this are not important to my reasons. Suffice its to say that she did mitigate her damages, and the claim for wrongful dismissal is, in fact, modest.
- [9] The plaintiff commenced her claim in July of 2019. The response to civil claim dated the 26th of August, 2019 cited a number of allegations of misconduct. For the first time, it was alleged that there was actual cause to dismiss Austin. I note the letter from Kitsumkalum to Austin on April 26, 2019, does not raise any cause.
- [10] An argument has been advanced here for after-acquired cause. I find on the facts before me that after-acquired cause is really not applicable. All of the allegations of cause seem to have been available or in the minds or certainly within the knowledge of Kitsumkalum at the time of the December 20, 2018, and on April 26, 2019, when they sent the letter.
- [11] There are four areas of cause, as I will characterize them, which are raised in the statement of defence.
- [12] The first relates to some renos done to the plaintiff's basement, and this is a bit of a story, but nonetheless. One of the things that the plaintiff did as a principal at the first nation school operated by Kitsumkalum was that she seems to have applied for various grants for various activities. One grant that she was successful in receiving was a First Nations youth employment strategy grant, and the letters confirming that grant is dated September 14, 2017. It is a modest grant of \$74,865. The grant itself does not authorize capital construction of a building or the purchase of lands or buildings, but it does authorize for capital costs and the language is important, "other than small repairs or renovations to support the participation of persons with disabilities."

- [13] There are two ways to read that phrase. One way to read that phrase is that capital costs could be used for small repairs or renovations, all to support the participation of persons with disabilities. Another way it could be read is that you could undertake small repairs, or renovations which are themselves, the renovations, designed to support persons with disabilities. The language is uncertain. It is certainly not definitive.
- [14] The repairs in question amounted to about \$4,600 or thereabouts. The repairs were done in the plaintiff's home, and they were done for the purpose of creating within the plaintiff's home a studio for the purposes of this youth initiative program and specifically for the art instruction associated with the person hired to run the program. The repairs are relatively modest. At the end of the day some drywall work was done, and some shelves installed. There was flooring added, a cushion floor, no doubt to make it more like a studio. For reasons not clear to me, the entire area was painted black. In hindsight this was not the wisest thing for then plaintiff to do, but I do note that it did happen. It happened with the knowledge of the defendant. It happened with the defendant's servants and/or employees doing the repairs and the defendant paying for the repairs. This was done sometime in 2017 or 2018 and was not raised as an issue resulting in a justification for the plaintiff's early dismissal until the statement of defence was filed in August of 2019.
- [15] The second allegation of cause raised in the statement of defence is that certain items owned by Kitsumkalum were retained by the plaintiff. This includes a Pegasus hard drive, a paddle, is a "salmon panel" and a 2014 laptop.
- [16] The evidence about the Pegasus hard drive and the paddle are that someone from the defendants has sworn an affidavit indicating that these were removed by the plaintiff, and the plaintiff has denied removing those two items.
- [17] In regards salmon panel, the plaintiff said she had the salmon panel but believed she had not been reimbursed for the cost of it by Kitsumkalum. Therefore, she had paid for it herself. When Kitsumkalum provided proof that they had paid for the salmon panel, she returned it.
- [18] The laptop was a 2014 laptop, and this laptop led to much discussion and debate both at this summary trial and at a previously scheduled summary trial. The history appears to be this. Sometime in 2014 for the purposes of doing her job, the plaintiff was given a laptop by her employer Kitsumkalum. Sometime thereafter, the various persons who were employed at this school were given laptops as Christmas gifts. When the request was first made in 2019 for the return of the laptop, the plaintiff said, not surprisingly, "but that was a Christmas gift". It was then pointed out sometime in February of 2020 that the laptop they were talking about was not the Christmas gift laptop but, in fact, one that had been given to her in 2014. That laptop by then had its location in Austin's home in Mexico. When she was next in Mexico, she retrieved the laptop and brought it back and returned it.

- [19] The next third area of alleged cause relates to what I will call general expenditures. The plaintiff was a principal of the school. She seemed to use her personal charge card, with permission of her employer, to purchase items for the school and to incur expenses for the school as well as to incur expenses for things like travel and meals. These activities she undertook, she believes, in her responsibilities to both the school and in her responsibilities as president of an organization with the acronym NFSA, which I understand is a First Nations educational organization.. She was the president of the NFSA, and she represented a number of First Nations schools, which I am led to believe in excess of 100 in the province, in their dealings with both the provincial and federal government regarding funding and perhaps other issues.
- [20] So as a principal and perhaps even as a teacher, for many years she used her own charge card to buy things for the school, and she was reimbursed. She incurred expenses in her role as principal for perhaps staff gifts, perhaps staff lunches, and she was regularly reimbursed. She travelled as principal and as president of NFSA, attending board meetings for this organization generally in her role as principal, and she was always reimbursed.
- [21] It is only in August of 2019 that the allegations that these reimbursements were inappropriate were first raised with the plaintiff. And the raising of them is raised in a significant way. I have had the opportunity to read the statement of defence and the documents associated with that, and from a balanced reading of that it is suggested the plaintiff acted dishonestly and disreputably, and she committed either theft or fraud as a result of claiming for expenses which the employer says in August of 2019 were inappropriate expenses or expenditures.
- [22] Finally, there is allegations of disruptive and combative conduct towards others in her role as principal. Again, these allegations were first, it seems, and only raised in the statement of defence and associated documents filed in August of 2019. I note particularly in regards to this claim that there was no discipline for any of these alleged combative or disruptive behaviours. There was no expression of concern. There was no writing up, for lack of a better term. There was absolutely no communication about any concerns by the employer prior to the filing of the statement of defence.
- [23] Now, in regards to the renovation costs, the four items that were allegedly taken, some of which have been return, and in relation to the expenditures, it is fair to say that the defendant in this matter has a rather non-traditional accounting system within their organization. There do not appear to be any rules. Nor do there appear to be any guidelines in regards to expenditures.

- [24] The plaintiff clearly from 2005 through to 2019, when she left regularly incurred expenditures, regularly sought reimbursement and was regularly provided reimbursement. The one and only time it appears that questions about the expenditures that she sought reimbursement for arose was sometime in May of 2019 after this letter of April 26, 2019, where there is an email before me and perhaps some other documents questioning and asking for further information about a number of claimed expenses recent to that time.
- [25] So we have an employee who had been there for close to 13 or 14 years, someone who was a senior employee, someone who was a principal, someone who regularly incurred costs for the school, regularly sought reimbursement and received it, regularly made significant purchases for the school, including things artwork, and at no time was she informed that she was not complying with proper accounting procedures by her employer in the way she was making expenditures or seeking reimbursements. It is only raised in a negative way and in a way which suggests potentially dishonest behaviour when and only when litigation began and it was necessary to file a statement of defence.
- [26] The issue is, of course, whether or not there is cause. I am not satisfied on a balance of probabilities that the defendants have shown that there is cause. Simply put, in regards to the renovations, expenses and the expenditures generally, the employer knew about these expenditures. They reimbursed these expenditures. They tacitly approved these expenditures. They allowed these expenditures to happen, and they paid for them. Now, only after litigation was commenced, they seem to want to retroactively make allegations that the expenditures were somehow inappropriate, when in fact they were cutting cheques for these expenditures at the time. There is no formal written policy about incurring expenditures and reimbursement. There is no suggestion prior to litigation being commenced that somehow this plaintiff had done anything inappropriate, and to me it simply strikes as a desperate attempt by a defendant to retroactively create some cause.
- [27] As for the disruptive behaviour complaints, there was a lot of he said/she said, none of which rises to the level of proof on a balance of probabilities, and again, I note that until such time as litigation began, there was not one iota of concern expressed by the defendant in regards to the alleged improper excessively disruptive or alleged combative behaviour of the plaintiff.
- [28] In regards to the items, there was a bona fide dispute about two of the items that were allegedly taken, and when that dispute was resolved, those items were returned. And it is fair to say that this plaintiff was mistaken in taking those items, but at the time she felt in regards to the laptop that the laptop they wanted back was the one they had gifted to her, and she felt that she had not been reimbursed for the salmon panel that she took when, in fact, she had been. And both items were returned as soon as further information was provided.

- [29] In regards to her alleged retention of the Pegasus hard drive and a paddle, again, that is a he said/she said, which does not in my view rise to a sufficient level of believable evidence that I can conclude that she, in fact, has the Pegasus hard drive or took it or that she has the panel and took it. So in regards to the allegations of cause, I find on a balance of probabilities that the defendant has not proven cause on a balance of probabilities, and as such the plaintiff was wrongfully dismissed. I set damages for wrongful of dismissal at \$16,547.62, and plus \$2,100 for loss of health benefits for a total of \$18,647.62.
- [30] There is additionally a claim for aggravated and punitive damages. I am not satisfied that the test in *Witten v. Pilot Insurance Company*, 2002 1 S.C.R. 595 is made out here. The punitive damages are a significant matter, and they are damages which call upon the court and those advocating for them to reach a very high threshold of a claim. Punitive damages in the employment law contest are not necessarily related to the basis on which dismissal was undertaken but relate to the conduct in the litigation, conduct in which the plaintiff was treated in an exceedingly difficult and disreputable manner by a former employer, and in my view the plaintiff has not satisfied me on a balance of probabilities that the very high threshold for punitive damages have been made out in this case.
- [31] As for aggravated damages, in the case of *Cottrill v. Utopia Day Spas and Salons Ltd.*, 2018 B.C.J. No. 3405, our Court of Appeal has summarized the law related to aggravated damages in that decision as follows:

An award for aggravated damages resulting from the manner of dismissal requires:

- a) a finding that the employer engaged in conduct during the course of the dismissal that was unfair or in bad faith; and
 - b) a finding that the manner of the dismissal caused the employee mental distress.
- [32] As pointed out by counsel for the plaintiff, the determination of mental distress does not require expert medical opinion. As noted by Madam Justice Griffin as she then was in *Bailey v. Service Corporation International (Canada) ULC*, 2018 BCSC 235, at paragraph 205 (5) and (6):
5. Aggravated damages are compensatory based on foreseeable injury for breach of the duty of good faith and fairness. Because of this there must be some evidence that the manner of dismissal (as opposed to the mere fact of dismissal) is the cause of damaging effects on the dismissed employee, whether mental distress or intangible effects such as damage to reputation (Lau at paras. 54, 59-60, 62).
 6. Medical evidence is not necessary to award aggravated damages based on mental distress caused by the manner of dismissal but there must be some evidence that transcends ordinary upset or distress (Lau at para. 49). This can include evidence from the employee or from family members or friends.

- [33] In my view this defendant in raising in their statement of defence unfounded allegations which through a reasonable interpretation suggest potential criminal behaviour, suggest theft, suggest inappropriate reimbursement for expenditures, support a finding that this employer engaged in conduct that was unfair and in bad faith. They are not saying she did not do her job. They are saying she was dishonest. They were saying she was fraudulent. They are saying she conducted herself in a semi criminal manner. All those things have not been proven, and in my view as they are unproven, they are both unfair and they were made in bad faith.
- [34] In regards to the required provision of a finding that the actions caused the employee's mental distress, that mental distress is before me in two areas of evidence. First, her affidavit, which talks about it in a general way. More importantly the examination for discovery of the plaintiff conducted by the defendant reveals significant details as to the mental distress that the plaintiff suffers from.
- [35] And let us put this in context. She is a teacher in a small aboriginal community in Northern British Columbia near Terrace. She resides in that community. Upon her dismissal, everyone, she says, knew that she was dismissed. It was apparent. It is not like she is living in a big city and loses her job and no one knows.
- [36] In regards to the questions asked and answered in the examination for discovery, I start at question 542 of that discovery:

Okay. In paragraph 47 of your affidavit, which reads "the embarrassment and humiliation I felt as a result of the dismissal itself does not compare to the hurt I felt after reading Kitsumkalum's response to civil claim and ARCC. To have my employer of 15 years call me a thief and a fraud in a public document is shocking and emotional distressing for me. Ever since I read allegations in the RCC, which I think is a response to civil claim, on August of 2019 I have had difficulty sleeping. I am normally a positive and joyful person, but since reading the allegations my overall mood and disposition has worsened. I have experienced anxiety at an almost daily basis about the allegations, who knows about them and how many more people will find out. Terrace is a small town, and defending myself against these allegations has been extremely stressful ..."

- [37] The details of the concern and the continuation of the concern, including asking questions about whether or not she has confronted people, which she appears not to have done because she stays in her home, whether or not she is still having sleeping problems, to which she answers in the affirmative, are further dealt with in the continuation of the questioning at that examination for discovery in questions 543 through to 560, which I will not read for the record because, in fact, her initial answer to question 542 says all that needs to be said.

[38] I am satisfied here that both elements necessary for aggravated damages have been met in that the plaintiff has satisfied me on a balance of probabilities that the employer engaged in conduct during the course of the dismissal that was unfair and in bad faith in that this employer made unfounded allegations of disreputable conduct, of fraud and of actions amounting to theft or close to it, none of which have been proven on a balance of probabilities.

[39] And secondly, I am satisfied that the manner in which this allegation of cause was raised in the context of this dismissal has caused the employee mental distress. I am cognizant, however, in assessing damages for aggravated damages that this is at the end of the day a modest claim for wrongful dismissal. I will assess aggravated damages in the amount of \$15,000.

(SUBMISSIONS ON COSTS)

[40] THE COURT: The plaintiff is entitled to her costs on a regular scale. Thank you.

"J.R. Groves J."

GROVES J.

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