

CANADA / JUDGMENT

Burns v. Lyons

2015 BCSC 605

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Supreme Court of British Columbia

DECIDED

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2015 BCSC 605 Burns v. Lyons

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Burns v. Lyons,

2015 BCSC 605

Date: 20150421

Docket: S140257

Registry: Vancouver

Between:

Bridget Nancy Burns

Plaintiff

And:

0946791 BC Ltd. and Michael Lyons

Defendants

Before: The Honourable Mr. Justice D. M. Masuhara

Reasons for Judgment

(In Chambers)

Counsel for the plaintiff:

D. Peck

The defendant representing himself and 0946791 BC Ltd.:

M. Lyons

Place and Date of Trial:

Vancouver, B.C.

March 31, 2015

Further written submissions:

April 1, 2015

Place and Date of Judgment:

Vancouver, B.C.

April 21, 2015

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I. Introduction

- [1] These reasons deal with, in essence, a wrongful dismissal action. The trial was conducted as a summary trial under Rule 9-7. Both parties seek a determination under this procedure. Though the evidence adduced through this procedure is somewhat lacking, the parties' circumstances and the amount at stake justify proceeding this way and I accept that the merits of the action can be decided under this procedure.
- [2] The action arises out of the parties' involvement in a vegan restaurant called Graze located on Fraser Street in Vancouver. Ms. Burns says that from February 2012 she collaborated with Mr. Lyons in developing the plan for the restaurant, that she earned a 15% interest in it and took on the role of general manager from mid-April 2013. Unfortunately, things did not work out. Mr. Lyons, the owner of the restaurant, terminated Ms. Burns' employment summarily on June 19, 2013; only two months after Ms. Burns had been placed on the payroll of Graze. The defendants say that the termination was for cause. As a result no notice was given and no severance was paid. Further, the defendants have pleaded that Ms. Burns has failed to

mitigate by not taking reasonable steps to find other employment.

- [3] Ms. Burns claims that she was wrongfully dismissed and is entitled to reasonable notice of six months. She also seeks an order that she has a 15% beneficial interest in Graze Restaurant; or, in the alternative, an order that she be compensated on the basis of unjust enrichment. Ms. Burns claims that as a shareholder in the restaurant she was treated oppressively and unfairly and seeks a remedy pursuant to s. 227 of the Business Corporations Act, S.B.C. 2002, c. 57 (the "Act"). Specifically, Ms. Burns seeks an order that the defendants purchase the shares of Ms. Burns in Graze at a value that reflects the value that the shares would have had but for the wrongful acts of the defendants, or judgment for that amount. She further seeks an order directing the defendants to compensate Ms. Burns for losses to the value of her interest as shareholder sustained by reason of the breaches of the Act by the defendants and of the duties owed by the defendants to the plaintiff.

II. Background

- [4] Mr. Lyons is the sole director and sole shareholder of 0946791 BC Ltd., the company which holds Graze Restaurant. He formerly worked for a company which designed and built laneway homes. He left his job to open a vegan restaurant in Vancouver. He invested approximately \$200,000 to start up the restaurant.
- [5] Ms. Burns is the founder of a website "theVeganProject.com", which is visited approximately 30,000 times per month. It is a blog which promotes veganism through exploration of vegan cuisine, vegan fashion, vegan fitness and vegan restaurants in Vancouver. At the time she was introduced to Mr. Lyons, in addition to her writing on her blog, she was employed as a part-time worker at a Vancouver nightclub called Ginger 62. She has worked in the restaurant industry as a hostess and server for many years. She did not have management experience or formal education in business.
- [6] The two were introduced to each other by a mutual friend in or about February 2012. They shared their respective interests in starting a vegan restaurant. This progressed at some point to exploring the possibility of working together in developing a vegan restaurant in Vancouver. They met, according to Mr. Lyons, every few weeks to discuss the possibility. Ms. Burns continued with her activities relating to her website and part-time job at the nightclub.
- [7] From the documentary evidence it is evident that from a relatively early stage Mr. Lyons was advising Ms. Burns of specific activities regarding the restaurant project and requesting information from Ms. Burns. In an April 16, 2012 email, Mr. Lyons wrote to her:

Progress report:

- 1) I'm meeting with a restaurant equipment supplier later today.
- 2) Left a message for Don to call me about the location.

- 3) Spoke to a carpenter friend who does restaurant build-outs about process and budget (haven't forgotten our resource in Jay either).
- 4) Have some more menu ideas. :-)

I know you're busy this week, but do you want to eat at Templeton with me tonight to see Mandi in action? It's movie night. :-P

As I'm working towards a total budget and some financial forecasts for the first 2 years of operation, can you make a simple spreadsheet to estimate our monthly staffing costs based upon our chat last week about how many kitchen/wait/bar/mgmt staff? Don't worry about that profit sharing portion for now. You know better what people should be paid in those positions and how many of each we'll likely need.

Let's talk when you can, but I'm good to meet next week anytime.

[8] Ms. Burns was involved in identifying and reviewing various locations for the restaurant. In an August 3, 2012 email, Ms. Burns wrote to Mr. Lyons:

Hey Michael,

Here are my thoughts... I spoke to James and he said we could probably get the landlord up to \$40 for the TI, and they would need for you to personally guarantee the lease...we should probably all speak in person. Also, let me know if you want to come see the space on East Broadway, and you never got a chance to tell me what John Moody said..?

Also, word must be spreading cause I got our first congratulatory message yesterday from Edible Flours: "Heard today about The Project to open on Hastings at Abbott. Wonderful news...congrats to u and all the very best. Very happy for u guys!!!"

Lower rent to:

1-3 years 3000 \$27.00 \$6,750 \$81,000

4-6 years 3000 \$29.00 \$7,250 \$87,000

7-10years 3000 \$31.00 \$7,750 \$93,000

TI to remain at \$40 per sf

Tenant's [sic] conditions: moved to August 20th

Landlord's conditions: move to August 20th

Landlord's work:

Commercial size hot water heater to be provided, large enough to heat both upstairs and basement, including bathrooms and kitchen. We feel this is a necessity for the landlord to provide.

Front staircase: We will pay 25% of the cost of the stairway, with the landlord paying 75%, as it is a fixture that could not be taken with us upon termination of lease.

Free rent period: We ask for a 3 month free rent period immediately following the fixturing period

Early Termination: After 5 years, the right to terminate the lease with not less than 6 months notice. The tenant will pay back 50% of any unamortized portions of the TI Allowance with the landlord, possibly through a payment plan over the next 2 years?

Let me know what you think!

Bridget

- [9] Ms. Burns was involved in the search for and hiring of the chef for the restaurant. She arranged for a tasting of the chef's cooking for the two. Ultimately the chef was hired.
- [10] Mr. Lyons in his business concept document for third parties represented that the membership of the TheVeganProject.com and the expertise of those behind that website was part of the support base of the restaurant.
- [11] All of the capital required for the restaurant was invested by Mr. Lyons. Ms. Burns did not have the capital to contribute.
- [12] In February 2013, Mr. Lyons entered into a lease of the premises for the restaurant.
- [13] On February 15, 2013, Ms. Burns inquired of Mr. Lyons by email as to whether he could draft up a partnership agreement. She indicated that if he could not, she would handle it. Mr. Lyons replied that same day that he had already prepared a draft that his lawyer was looking over.
- [14] On February 19, 2013, Mr. Lyons sent a draft of key clauses for the agreement between the two to Ms. Burns. The covering email which attached the key clauses states:

So here's the deal for us to sign off on. These clauses will be incorporated into a more extensive shareholder agreement, but the spirit and intent is clarified here and can be made legal as is.

See the excel sheet that explains the preferred rate of additional shares you may purchase once the startup capital is repaid. You'll notice that the more valuable the company (higher profits) and the less I have to outlay in startup costs, the cheaper the shares become for you, down to potentially free. It takes into account that your efforts helped make the profits and that the less I have to put in the easier it should be for you to buy cheaper shares.

- [15] The attachment containing the key clauses is headed with the title "Key clauses to employment/shareholder agreement between Michael Lyons and Bridget Burns related to 0946791 BC Ltd.". The contents state the following:

Currently all shares of 0946791 BC Ltd (the company) are owned by Michael Lyons.

Upon commencement of employment with the company, Bridget will be granted 15% (fifteen percent) of the shares in the company for \$1 (one dollar). She will share all of the rights and responsibilities of ownership and will be recorded as an officer of the corporation on all related documentation.

Bridget's annual starting salary as the General Manager of the company shall be \$40K and it shall be reviewed at least annually or as the situation requires.

If Bridget is no longer in the employment of the company for whatever reason before the latter of 2 years or the date at which the startup capital has been returned to Michael, the shares shall be bought back from Bridget for the original nominal sale price.

The startup capital shall consist of all of the funds that have been invested into the company by Michael for the purpose of purchasing, planning, renovating, opening and other contributions to maintain or cover losses of the new restaurant leading up to its self-sustainability.

The startup capital shall be returned to Michael out of profits earned by the company in as timely a manner as reasonably possibly [sic] without damaging the company's ability to reasonably maintain and/or build operations.

Within 3 months from when Bridget's shares in the company become irredeemable, because the startup capital has been returned and 2 years have passed and she is still actively involved in the company, Bridget shall have the option to purchase an additional 9% of the shares in the company at a preferred rate. This rate shall be limited to 2% of the startup capital less 2% of the profits of the most recent full year of operations for each 1% of the company that Bridget wishes to purchase.

A shareholder's agreement shall be drafted and signed by each party which shall provide, among other benefits and responsibilities, the right of first refusal for existing shareholders to buy the shares of any other shareholder before a shareholder may sell to an outside party.

[16] On March 4, 2013, Ms. Burns in a short email to Mr. Lyons regarding various items included a reference to the above draft agreement. That reference was:

I have a couple of notes on our agreement and [then] should be ready to sign.

[17] Ms. Burns however never provided any comments on the draft to Mr. Lyons. She now says, however, that she was advised not to sign the agreement by her boyfriend and another friend because it did not protect her interests. Further, she did not provide a counter proposal.

[18] Ms. Burns maintained her employment at Ginger 62 until going onto the payroll of the restaurant on April 15, 2013 as General Manager. This was just prior to the scheduled opening date of Graze. The opening was delayed by a few weeks to mid-May.

- [19] In terms of Ms. Burns' contributions to the restaurant, she deposed that she:
- a) curated the bar menu and signature vegan beverages;
 - b) brought in a friend to design wood stool tops, who only charged Graze for materials because of the friendship with Ms. Burns;
 - c) enlisted her partner to do a mural for Graze free of charge (it is unfinished);
 - d) enlisted a friend to design the logo and other design materials;
 - e) enlisted a friend to write the copy and press release for the restaurant;
 - f) enlisted a friend who designed two speciality cocktails for the menu;
 - g) located and hired the chef for the restaurant;
 - h) hired a number of staff members;
 - i) contributed to many aesthetic elements of the design features of the restaurant such as chair covers, lighting and chair colours.
 - j) provided information on monthly staffing costs and size of staff.
 - k) explored and viewed various possible sites for the restaurant; and
 - l) participated in various interviews with media outlets to promote the opening of Graze.
- [20] Her contributions also included her allowing TheVeganProject.com and its following to be used in promoting the restaurant. Ms. Burns did not and was unable to contribute to the start-up costs or at any time after the opening.
- [21] The foregoing is uncontroverted; however, it is not clear as to whether all of the contributions were made before or after her employment started in April 2013. I have assumed, given the nature of the activities, that a significant amount was contributed before April 2013.
- [22] In terms of financial evidence, the only evidence adduced is a balance sheet for the restaurant prepared by the restaurant's bookkeeper which was produced by Mr. Lyons. The financial statement provided shows that the retained earnings for the fiscal year end of May 2013/14 equalled (\$182,858) and net income for 2014/15 to December 2014 was (\$58,253). Further, the statement shows that Mr. Lyons' credit card debt and his mortgage credit line totals \$115,579. Mr. Lyons deposed that the restaurant has been losing approximately \$15,000 per month. He also has deposed that his initial investment to start up the business was approximately \$200,000. The finances of the restaurant have been poor.

[23] My observation to the parties during the course of the hearing was that it seemed that the shares had no value. Contrary evidence was not tendered by the plaintiff and no cogent submission regarding an appropriate value for the shares as claimed was provided. My conclusion here is that the shares have no value and this would be the case whether Ms. Burns was with the restaurant or not.

[24] In terms of Ms. Burns' management skills, Mr. Lyons knew of her limited experience yet wanted her as general manager. In this regard, he deposed:

At the time of hiring, the Plaintiff had no experience or education in business management, business ownership, startup management or restaurant operations. Prior her employment at Graze, the Plaintiff worked a part time job at Ginger 62 Nightclub.

[25] Though not sworn evidence, Mr. Lyons in his written submissions stated:

[S]he was offered this position because I liked her enthusiasm, her commitment to veganism, and because I hoped that she would be good at the job and, if possible, also use her blog to our advantage.

[26] It is not contested by Ms. Burns that while she had worked in the restaurant business, she did so as a hostess, server and bartender; she had no prior management experience or business education.

[27] Soon after the restaurant space was occupied and set up began, it appears that difficulties were being encountered and Mr. Lyons hired a restaurant consultant, Mr. Morck, to implement operational systems.

[28] Mr. Morck deposed that in mid-April he was hired by Mr. Lyons to help with the restaurant. Mr. Morck deposed that Mr. Lyons told him that he was becoming concerned that Ms. Burns did not actually have the expertise to manage the restaurant. Mr. Morck was engaged on a short-term contract to build some operations systems. No description of these systems was provided in the materials.

[29] Mr. Morck's observations were that Ms. Burns was becoming disliked by service staff, could not coordinate kitchen staff, had no understanding of costing or cost control and other skills vital to managing a restaurant.

[30] Ms. Mcathy, head chef of the restaurant, observed arguments between Mr. Lyons and Ms. Burns and described complaints from her kitchen staff about their difficulties working with Ms. Burns.

[31] On May 15, 2013, Graze Restaurant opened for business.

[32] On June 19, 2013, Mr. Lyons met with Ms. Burns and advised her that she was terminated. He provided her a letter that formalized the termination. Excerpts from the letter are:

It is with deep reservation and great disappointment that I am writing to tell you that I no longer feel it is possible to continue to work together. Unfortunately I must end your employment at Graze Restaurant, effective today. I hope that this comes as no surprise as together we have failed horribly to find common ground and a method to create an effective and comfortable working relationship.

For my part, I would be pleased to assist you in finding or landing your next project. Whether you need a glowing recommendation or a compelling letter of reference or even if you would like a reasonable public statement and acknowledgement to go out on social media, you can count on me.

[33] Mr. Lyons in this proceeding deposed that Ms. Burns was terminated:

due to poor attitude, unprofessionalism and incompetence. As a result of the Plaintiff's many failings as an employee, the restaurant's management consult, chef, sous chef and serving staff lost faith in the Plaintiff's ability to manage. Not only was the Plaintiff incompetent, she was extremely disagreeable, and confrontational in the performance of her duties.

In regard to ability, Mr. Lyons deposed that:

Within the first few weeks of commencing setup of Graze Restaurant, it was apparent that the Plaintiff showed little aptitude for restaurant management. In response, I hired a management consultant to implement operational systems.

The management consultant was very active in attempting to train the plaintiff in the management of Graze, but the Plaintiff could never perform her managerial duties to satisfactory degree. As a result, the management consultant advised me that the Plaintiff should be terminated due to the Plaintiff's inability to fulfill her managerial duties.

In terms of the plaintiff's relations with the staff, Mr. Lyons deposed that:

The Plaintiff was very confrontational and argumentative with my staff and I during her course of employment at the restaurant. I advised the Plaintiff several times that she needed to improve with respect to her attitude and performance but the Plaintiff did not improve in response to my requests. Consequently, the Plaintiff was terminated on June 19, 2013 due to her argumentative nature and her inability to fulfill her duties as manager.

He further deposed that:

It was apparent that the Plaintiff showed little aptitude for restaurant management. In response, I hired a management consultant to implement operational systems.

[34] In an email sent by Mr. Lyons to Ms. Burns dated January 29, 2014, Mr. Lyons advised Ms. Burns that he had become aware of the new Kava Bar starting up in Vancouver and that it was looking for a recommendation for a general manager. He stated that "They are in search of an energetic, talented and ambitious GM ". He asks in his email, "Do you want the position? If so, I can help make it happen. If I do my best at that, whether it works out or not (because you still have to impress), I will expect you to withdraw your legal action."

[35] It appears that Ms. Burns did not take up the offer.

[36] There is no evidence as to whether Ms. Burns has since sought or obtained employment.

III. Issues

[37] The issues distill to the following:

- (a) Was there was an agreement to provide shares to Ms. Burns in the restaurant?
- (b) If Ms. Burns was a shareholder, then was she treated oppressively and unfairly? If so, what remedies are warranted? Alternatively, were the defendants unjustly enriched?
- (c) Did the defendants have cause to dismiss Ms. Burns summarily? More specifically, were the grounds as asserted adequate? If not, what reasonable notice period or payment in lieu was required?

IV DISCUSSION

[38] The dispute between the parties can be seen as arising in part out of the fact that Mr. Lyons had no experience in the restaurant business, and Ms. Burns' little to no experience in the development and management of a restaurant. As the restaurant opening neared, and after it did, it is apparent that the business and operational challenges led to conflict.

A. Was there an agreement to provide shares?

[39] I will deal with issues (a) and (b) here. The plaintiff asserts that she has an equitable interest in Graze Restaurant. She points to the draft agreement in support. The difficulty that I have with that assertion is that Ms. Burns did not accept that agreement. The reasons for not doing so were never communicated to Mr. Lyons. It is only in this litigation that Ms. Burns says she did not sign the agreement because she did not feel the draft provided to her did not protect her interests. Ms. Burns never sent a draft proposal of her own to Mr. Lyons.

[40] I conclude that no agreement was reached between the parties in regard to ownership of shares in the company. Accordingly, the oppression remedy is not available.

[41] In any event, the relief sought by Ms. Burns, that the defendants be required to compensate Ms. Burns for the value of the shares at a value they would be but for the wrongful acts of the defendants, is moot as no value has been established by the plaintiff.

[42] The lack of an agreement however is not the end of the analysis.

- [43] Ms. Burns submits in the absence of a finding of an ownership entitlement, that she is entitled to compensation based on unjust enrichment.
- [44] There are three elements which must be made out to establish a claim of unjust enrichment:
- (a) an enrichment or a benefit of the defendant;
 - (b) a corresponding deprivation of the plaintiff; and
 - (c) the absence of a juristic reason for the enrichment.
- [45] I do not accept Mr. Lyons' submission that he and Ms. Burns, prior to occupying the premises, only spoke in generalities regarding a vegan restaurant. The emails show that Mr. Lyons was involved in the planning for the restaurant with Ms. Burns. The two were collaborating, though it is clear that Ms. Burns was not assuming any of the financial or business risks of the restaurant. Nonetheless, Mr. Lyons was seeking specific contributions of work from Ms. Burns for the restaurant and she provided it. This included representing that the expertise of those behind TheVeganProject.com and its following supported the restaurant. I do not find that Mr. Lyons was seeking the contribution gratuitously, or that Ms. Burns was doing so on a gratuitous basis. A juristic reason to justify the unjust enrichment was not established. In my view the claim of unjust enrichment has been made out.
- [46] In regard to the amount of compensation, the plaintiff did not adduce any evidence in respect to actual time she provided in the pre-employment period. In submissions, it was argued that the value should be 15% of the \$200,000 start-up investment made by Mr. Lyons. Alternatively, Ms. Burns submitted that she should be entitled to \$30,000. However, I do not find that to be a fair measure. The reference to 15% in Mr. Lyons' proposal, which was not accepted by Ms. Burns, arose only after the start-up capital had been returned to Mr. Lyons; and that if she were no longer an employee within two years then the shares would be taken back at a nominal price. Based on the lack of evidence, I am unable to find a value for the shares as claimed. My view is that there would be no value given the financial evidence. I note again that Ms. Burns invested no capital and did not take responsibility for business liabilities. Doing what I can with the available evidence, it seems that when I consider the contributions of Ms. Burns including the benefits of her following on her website, recognizing that she retained her part-time job at Ginger 62 and continued with her blogging, that she was engaged early on by Mr. Lyons in planning, and recognizing that it appears Mr. Lyons did the bulk of the planning and execution of the plan, and contributed all of the capital; I find the value of her contributions prior to her employment in mid-April can be assessed using 2.5 months against her annual salary. This equates to \$8,300 (rounded).

B. Was there cause to dismiss summarily?

- [47] I now turn to issue (c), was there cause to summarily dismiss Ms. Burns?

- [48] The defendants bear the onus of proof in establishing whether there was cause to dismiss Ms. Burns.
- [49] In terms of mitigation, the onus is upon the defendants to prove that the plaintiff failed to take steps to mitigate her loss; and that had such steps been taken, new employment would have been obtained.
- [50] The defendants argue that there was cause to terminate summarily. The cause asserted is that Ms. Burns was "disagreeable, confrontational and incompetent in the performance of her managerial duties" at the restaurant. In support of Ms. Burns' lack of ability, Mr. Lyons deposed that he had to hire a management consultant, Mr. Morck, to implement operational systems for the restaurant. Mr. Morck deposed that he observed that Ms. Burns could not coordinate with kitchen staff, had no understanding of costing or cost control and was quickly becoming disliked by kitchen staff. Negative observations were also made by the head chef for the restaurant.
- [51] In the very recent case of *Steel v. Coast Capital Savings Credit Union*, 2015 BCCA 127, Donald J.A. stated that the approach to determining the justness of cause for dismissal is contextual and requires a consideration of proportionality. At para. 11 he quotes from the Supreme Court of Canada decision in *McKinley v. BC Tel*, 2001 SCC 38 at para. 53:
- [53] An effective balance must be struck between the severity of an employee's misconduct and the sanction imposed. The importance of this balance is better understood by considering the sense of identity and self-worth individuals frequently derive from their employment.
- [52] A convenient summary of the principles applicable to a case such as this was set out by Mr. Justice Macaulay in *Bomford v. Wayden Transportation Systems Inc.*, 2010 BCSC 1506 at paras. 5-7:
- [5] In order to dismiss an employee summarily, where the employer believes the employee's performance is substandard, the employer must provide the employee with a clear warning which specifically informs the employee that his or her job is in jeopardy. The employer cannot employ oblique language when warning the employee that his or her employment may be terminated. It is not sufficient for the employer to merely criticize the employee's performance or simply urge improvement.
- [6] In addition, although neither counsel referred to the decision, a convenient synthesizing of the requirement to warn is found in *Hennessy v. Excell Railing Systems Ltd.*, 2005 BCSC 734. There, the court, at para. 12, held that the employer must show:
- (a) it has established a reasonable objective standard of performance,
 - (b) the employee has failed to meet those standards,
 - (c) the employee has had warnings that he or she has failed to meet those standards and the employee's position will be in jeopardy if he or she continues to fail to meet them; and

- (d) the employee has been given reasonable time to correct the situation.
- [7] In short, a warning that the employee's job is at stake if performance does not improve is not in and of itself sufficient to satisfy the requirement to warn. A warning can only be considered sufficient as to the final two requirements listed above if the employer meaningfully assists the employee to improve. See *Rieta v. North American Air Travel Insurance Agents Ltd.*, 1996 CanLII 2374 (BC S.C.) at para 39, and cases referred to therein.
- [53] Based on the foregoing principles, it is apparent that while Mr. Lyons had significant concerns, he engaged Ms. Burns to be the general manager of Graze with full knowledge of her lack of experience, as evidenced by his statement quoted earlier in these reasons. This was a risk that he assumed. Though there is evidence that Ms. Burns was not meeting expectations, there are only generalized statements of her deficiencies, including those of Mr. Morck. Though there were heated discussions and demands made to Ms. Burns by Mr. Lyons that she "needed to improve with respect to her attitude and performance", there were no objective standards identified, no measures of her performance against such standards provided and no specified period for Ms. Burns to rectify the situation. I also note that Mr. Lyons in his submissions rejected the suggestion that in offering to recommend her for the management position with the kava bar that he was attempting to off load his problems to someone else, rather he affirmed the positive statements in his email. In the circumstances she was entitled to more in terms of specification of the deficiencies stated of her, the time to address any, and objective measures. I find that the summary dismissal was not justified.

C. Reasonable Notice Period

- [54] I turn to the question of a reasonable notice period. I note first that no terms regarding length of employment or notice were discussed. In these circumstances, the relationship is presumed to be indefinite. The plaintiff submits that six months is appropriate. In support, she relies principally upon *Collette v. AMV Enterprises Ltd.*, 2014 BCSC 816 as well as *Shore v. Ladner Downs*, [1997] B.C.J. No. 1013 (S.C.); *Kreager v. Davidson* (1992), 74 B.C.L.R. (2d) 205 (C.A.); and *Mackie v. West Coast Engineering Group Ltd.*, 2009 BCSC 1775.
- [55] The defendants submit that no notice period is required. They rely upon s. 63 of the *Employment Standards Act*, R.S.B.C. 1996, c. 113 ("ESA") which states that only after three months' employment is an employee entitled to severance. Since Ms. Burns' employment did not even last three months, she is not entitled to any notice or severance payment.
- [56] The ESA does not displace the plaintiff's claim and therefore cannot be relied upon as a defence.
- [57] Turning then to the parameters of determining a reasonable notice period, I note the often quoted guiding authority of *Bardal v. Globe and Mail Ltd.* (1960), 24 D.L.R. (2d) 140 (Ont. H.C.) where at p. 145 McRuer, C.J.H.C. said:

There can be no catalogue laid down as to what is reasonable notice in particular classes of cases. 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.

[58] This passage was adopted in *Ansari v. British Columbia Hydro and Power Authority* (1986), 2 B.C.L.R. (2d) 33 (S.C.) and in which McEachern C.J.S.C.(as he then was) stated at p. 43:

At the end of the day the question really comes down to what is objectively reasonable in the variable circumstances of each case, but I repeat that the most important factors are the responsibility of the employment function, age, length of service and the availability of equivalent alternative employment, but not necessarily in that order.

In restating this general rule I am not overlooking the importance of the experience, training and qualifications of the employee but I think these qualities are significant mainly in considering the importance of the employment function and in the context of alternative employment.

What all this means, in my view, is that the general statement of factors quoted above from Bardal are the governing factors, and it would be better if other individual or subjective factors had not crept into the determination of reasonable notice. In my view such other matters are of little importance in most cases.

[59] Each case is decided on its own specific circumstances. However, other cases can provide guidance on ranges, depending on how similar they are to the instant. The cases handed up by the plaintiff, in my view, are distinguishable on a combination of the longer terms of employment, the greater responsibilities, the age of the employee and the greater levels of experience. I also note that in *Kreager* the Court of Appeal comments that a six month notice period for a store manager who had been employed as such for five months was at the upper end of the range.

[60] Taking into consideration the relatively young age of the plaintiff (she is now 33 years old); that her term of employment at the restaurant was very short; that her ability to find work and obtain employment in her areas of experience (hostessing, serving and bartending, which had been part-time for many years) was relatively high; that limited weight regarding the responsibilities she held and her ability to find a management position is warranted here given her lack of experience and training as a manager; and that the plaintiff's argument that she was induced to give up her part-time job has little evidentiary support and lacks persuasive weight, I find the reasonable period of notice to be two months. This equates to \$6,700 (rounded).

[61] There is little evidence in respect to mitigation. The defendants have not made the case on this point.

IV. Conclusion

[62] The plaintiff is awarded damages of \$15,000. If the parties wish to speak to costs they have leave to do so. Otherwise, the plaintiff is awarded costs.

"The Honourable Mr. Justice Masuhara"

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