

CANADA / JUDGMENT

Costello v. ITB Marine Group Ltd.

2020 BCSC 438

COURT

Supreme Court of British Columbia

DECIDED

26 March 2020

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2020 BCSC 438 Costello v. ITB Marine Group Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Costello v. ITB Marine Group Ltd.,

2020 BCSC 438

Date: 20200326

Docket: S191003

Registry: Vancouver

Between:

Cheryl Frances Costello

Plaintiff

And

ITB Marine Group Ltd. and ITB Subsea Ltd.

Defendants

In Chambers

Before: The Honourable Mr. Justice Gomery

Reasons for Judgment

Counsel for the Plaintiff:

M. Sheard

Counsel for the Defendants:

M. Davies

C. Scheuer

Place and Date of Hearing:

Vancouver, B.C.

February 27, 2020

Place and Date of Judgment:

Vancouver, B.C.

March 26, 2020

Table of Contents

Overview... 3

Suitability for summary disposition.. 5

Legal test for constructive dismissal.. 6

Analysis.. 7

Ms. Costello's contract of employment 8

Did ITB strip Ms. Costello of substantially all her job duties?. 9

Did ITB require Ms. Costello to work in an unsafe environment?. 11

Did ITB address Ms. Costello in an aggressive and disdainful manner?. 13

Conclusion. 14

Disposition.. 14

Overview

- [1] Ms. Costello was employed by the defendants ("ITB") or a predecessor company for 34 years. Her late husband started the branch of the business in which Ms. Costello was employed, and she and her husband continued working for the business after he sold it in 2011. Ms. Costello was the office manager, working out of an office in North Vancouver. She continued working after her husband died in 2015, finding the work therapeutic.
- [2] By 2018, the business in North Vancouver consisted of two kinds of operations: commercial diving services; and the installation, repair, maintenance and inspection of underwater cables. In the fall of that year, ITB sold the commercial diving operations to an employee of the business. It made plans to close the office in North Vancouver and move Ms. Costello to its offices in Burnaby, effective January 2, 2019.

- [3] The office move to Burnaby did not go well for Ms. Costello. She was placed into one unsatisfactory office and then another, and was then permitted to work from home. She had little to do. She raised these matters in an email of January 21, 2019 to her superiors. She described her situation as "disrespectful, embarrassing, unsafe, untenable and unbecoming of my 34 year tenure".
- [4] ITB arranged a meeting to discuss Ms. Costello's complaints. After some discussion, she was asked what she wanted and she replied, she says, "a settlement". The meeting ended there. The next day, her counsel wrote ITB stating:

Ms. Costello accepts your recent conduct as a repudiation of her contract. Accordingly she has been constructively dismissed. She will not return to work for you again.

She will sue you in short order by serving a lawsuit upon your registered office

Particulars of the recent conduct include, without limitation:

- Stripping her of all, or substantially all job duties.
- Moving her into an unsafe working environment.
- Calling a meeting yesterday (January 24, 2019) to tell her that neither of the foregoing bullet points were accurate, which was false and degrading.

- [5] ITB's counsel responded as follows:

In brief response to the three "particulars" set out in your letter, I can advise that your client's position as Office Manager remains as it [has] always been; her work environment is entirely safe; and the meeting on January 24, 2019 came about after your client sent an inflammatory and inaccurate email. The meeting was, on our client's part, respectful and professional.

Ms. Costello was, of course, free to resign from ITB. If we do not hear from you to the contrary by the close of business today, our client will accept your letter as confirmation of Ms. Costello's resignation effective January 25, [2019] and her final pay and paper work will be processed accordingly.

- [6] Ms. Costello did not return to work and this lawsuit followed. It comes before me on Ms. Costello's application for judgment on a summary trial.
- [7] I am satisfied that the case is suitable for disposition on a summary trial. I dismiss Ms. Costello's claim for reasons to be developed below. They may be summarized as follows.
- [8] Ms. Costello's primary complaint is that ITB stripped her of her duties. It did not. Her title and salary were unaffected by the sale of the commercial diving operations. ITB was in a state of transition following the sale and Ms. Costello's day to day responsibilities were affected, but she retained responsibilities commensurate with her prior role in the business. Until her email of January 21, 2019, Ms. Costello was not telling her superiors that she had nothing substantial to do. She did not give them a reasonable opportunity to respond to this

complaint before taking the position that she had been constructively dismissed.

- [9] ITB failed to make reasonable arrangements for Ms. Costello's transfer to Burnaby in January 2019. When she complained, it responded quickly and sensitively, and took appropriate steps to rectify the situation.
- [10] Ms. Costello's meeting with her superiors on January 24, 2019, was tense and difficult. They did not lie to her during the meeting. She was not subjected to degrading treatment.
- [11] Taking everything into account, ITB did not make unilateral changes to the terms of Ms. Costello's employment that were so fundamental as to amount to a repudiation by ITB of the employment relationship. There was no constructive dismissal. It follows that ITB was right to treat the correspondence from Ms. Costello's counsel, and her subsequent failure to take up ITB's invitation to return to work, as a resignation.

Suitability for summary disposition

- [12] Pursuant to Supreme Court Civil Rule R. 9-7(15)(a), the court may grant judgment in favour of any party on a summary trial application, either on an issue or generally, unless:
- (i) the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or
 - (ii) the court is of the opinion that it would be unjust to decide the issues on the application.
- [13] The first question - whether the court can find the facts necessary to decide the issues of fact or law - requires an assessment of the evidence and the law that determines what must be proved to establish or defeat a claim. The second question - whether it would be unjust to decide the issues on a summary trial - involves the exercise of judicial discretion, taking a variety of factors into account; *Gichuru v. Pallai*, 2013 BCCA 60, at paras. 28-31.
- [14] In this case, some of the arguments advanced by ITB would require findings as to Ms. Costello's intentions that I cannot make in the absence of oral evidence with cross-examination in court. However, I need not consider those arguments to decide the case. The record is sufficient to enable me to make the factual findings set out below.
- [15] Ms. Costello seeks summary determination of the case. ITB does not oppose it. I am satisfied that it is not unjust to decide the case summarily on Ms. Costello's application.

Legal test for constructive dismissal

- [16] Ms. Costello's contract of employment with ITB included an implied term that, absent just cause, it would only dismiss her with reasonable notice. Ms. Costello's claim for constructive dismissal is a claim that ITB substantially or fundamentally breached the contract of employment, entitling her to treat the contract as terminated by ITB without reasonable notice; *Farber v. Royal Trust Co.*, [1997] 1 S.C.R. 846 at para. 24; *Potter v. New Brunswick Legal Aid Services Commission*, 2015 SCC 10 at paras. 31-32 [Potter]. If Ms. Costello's claim is

made out, she is entitled to damages based on the period of reasonable notice she was entitled to receive.

- [17] In *Potter*, Wagner J. (as he then was) gave judgment for the majority. He stated that the underlying question is whether the employer's conduct evinced an intention no longer to be bound by the contract of employment. He identified a test with two branches. Ms. Costello rests her case on the first branch of the test. Wagner J. stated it as follows:
- [34] The first branch of the test for constructive dismissal, the one that requires a review of specific terms of the contract, has two steps: first, the employer's unilateral change must be found to constitute a breach of the employment contract and, second, if it does constitute such a breach, it must be found to substantially alter an essential term of the contract [citation omitted].
- [37] At the first step of the analysis, the court must determine objectively whether a breach has occurred. To do so, it must ascertain whether the employer has unilaterally changed the contract. If an express or an implied term gives the employer the authority to make the change, the change is not a unilateral act and therefore will not constitute a breach. If so, it does not amount to constructive dismissal. Moreover, to qualify as a breach, the change must be detrimental to the employee.
- [39] Once it has been objectively established that a breach has occurred, the court must turn to the second step of the analysis and ask whether, "at the time the [breach occurred], a reasonable person in the same situation as the employee would have felt that the essential terms of the employment contract were being substantially changed" (Farber, at para. 26).
- [18] Generally speaking, employers are entitled to determine how the workplace will be organized and the work performed; *Baraty v. Wellons Canada Corp.*, 2019 BCSC 33 at paras. 71-80. However, an employer may have contracted with an employee that she will have certain responsibilities, and may breach the contract of employment by removing those responsibilities unilaterally; *Allen v. Ainsworth Lumber Co. Ltd.*, 2013 BCCA 271 at paras. 14 and 28-29; *Doran v. Ontario Power Generation Inc.* (2006), 61 C.C.E.L. (3d) 232 (Ont. S.C.J.) at para. 64.
- [19] Accordingly, the law requires me to assess: first, what rights and responsibilities were afforded to Ms. Costello under her contract of employment with ITB; second, whether ITB breached the contract by interfering with her rights and responsibilities; and third, if so, whether a reasonable person in Ms. Costello's position would have felt that essential terms of her contract of employment were substantially changed.

Analysis

- [20] In paragraph 7 of Part 1 of her notice of civil claim, Ms. Costello pleads that she was dismissed - that is, that ITB fundamentally and substantially breached its contract with her - in the following three ways:

- a) Removing all or substantially all of her duties;
- b) Creating an unsafe working environment, including moving her to new premises which were objectively unsuitable or unsafe; and
- c) Responding to her expressed desire to remedy the foregoing issues by calling a meeting and aggressively and disdainfully telling her that she was wrong to complain, that her duties had not been removed, and that the working premises were fine (all of which was false).

Ms. Costello's contract of employment

- [21] Nothing in this case turns on the details of exactly which of several companies served as Ms. Costello's employer from time to time. Along with the defendants, I will refer to ITB's predecessors and affiliates globally as ITB.
- [22] Ms. Costello started working for ITB in 1983, three years after Mr. Costello had started the business. She held the position of office manager or office administrator before and after Ms. Costello sold the business in 2011. Concurrently with the sale, she entered into a written employment agreement. It had a one-year term and was not renewed. The written agreement described her duties as including "providing overall leadership and management direction for the operations of [ITB]". It noted that "this position is based in North Vancouver".
- [23] After the written employment agreement expired in 2012, Ms. Costello's continuing contract of employment was oral. Its terms are to be inferred from the parties' practices.
- [24] Before and after 2011, Ms. Costello administered the office in North Vancouver. It was a modest facility, containing two large desks, two computers, and filing cabinets. Ms. Costello dealt with customers, pricing, proposals, collections and invoicing and generally provided administrative support for the business's operations. She worked weekdays from 7:30 am until 5 pm, although she was on call outside those hours. There is no evidence that she supervised subordinates. She earned \$95,697 in 2018.
- [25] Ms. Costello reported to Mike Shaw, who had served as Operations Manager under Mr. Costello. In 2014, Mr. Shaw became General Manager of ITB Subsea Ltd. Mr. Shaw worked in the North Vancouver office and reported to Adrian Samuel. Mr. Samuel became the president of ITB in December 2017.
- [26] Until the fall of 2018, ITB employed four or so commercial divers in commercial diving operations. These operations were run from the office in North Vancouver. The head of diving operations was Ryan Anderson.

Did ITB strip Ms. Costello of substantially all her job duties?

[27] Mr. Anderson was the purchaser of the commercial diving operations in 2018. He incorporated a company ("Canpac Marine") and took over the office in North Vancouver. ITB contracted with Canpac Marine for the services of Canpac Marine's divers at preferred rates. In exchange, ITB made equipment available to Canpac Marine and was an important source of work for the new company. Mr. Samuel deposes:

The contractual relationship between Canpac Marine and [ITB] Subsea meant that the two companies would be inextricably linked for several years. The contract would require significant and on-going management.

[28] The sale took place on October 1, 2018. In late September 2018, Ms. Costello was told about the sale in a meeting with Mr. Anderson and Mr. Samuel. Mr. Samuel told her that she would continue working with Canpac Marine in the North Vancouver office until the end of the year, when she and Mr. Shaw would then move to Burnaby. Ms. Costello expressed concern that she would not have much to do after the move. She anticipated that the sale of ITB's commercial diving operations in late 2018 would have a big effect on her workload. She deposes:

The commercial diving business was the more laborious and time consuming part of the company's business as it had day to day operations and projects while the cable side of the business undertook three to four projects per year; generally with a duration of approximately one to three weeks for each project.

[29] At the meeting, Mr. Samuel assured her that there would be plenty for her to do. He told her that her duties and responsibilities would remain the same, except that she would no longer be handling commercial diver payroll. In place of payroll, she would be managing diver costs through ITB's service contract with Canpac Marine.

[30] Ms. Costello says that, with the sale of the commercial diving operations, the work she used to do for ITB "all but vanished". She did not express concerns or complaints about her workload and job responsibilities to Mr. Samuel or Mr. Shaw until her email of January 21, 2019 to both of them. In that email, she stated:

I am unable to tolerate the current situation with ITB Subsea.

As discussed during Adrian's visit to North Vancouver in September, I advised that there was no work for me given that the diving arm of the business was sold. I asked what I would be doing. Adrian's reply was "don't worry, we will find things for you to do". I was hesitant to accept that but, in good faith, have waited for either of you to deliver. It is now January, 2019 and I have no substantial duties of any kind - other than packing boxes which is a minimum wage/labourer's position.

[Emphasis added]

- [31] Ms. Costello's reference to packing boxes is to work she did packing up and moving banker's boxes of files belonging to ITB in the North Vancouver office. Ms. Costello says that she asked for help with this chore and did not receive it. Mr. Samuel says that he offered to send help shortly after the September meeting and Ms. Costello said that she would prefer to do the work herself, and would arrange for help with Mr. Shaw if she needed it. What is clear is that the move had been completed by the time Ms. Costello sent her email in late January 2019. Whether or not her disgruntlement on this point was justified, it had nothing to do with her complaint that there was now nothing for her to do.
- [32] In response to Mr. Costello's email, Mr. Samuel and Mr. Shaw met with her on January 24, 2019. They discussed Ms. Costello's complaint. Mr. Samuel told Mr. Shaw that he should be providing work to Ms. Costello. He told Ms. Costello that there were, as he puts it, "at least two years of projects for her to work on, projects that would greatly benefit from her knowledge and experience". As she puts it, he made reference to his "to do list".
- [33] In my view, the evidence does not support Ms. Costello's complaint that ITB stripped her of substantially all her job duties. Some changes were necessary in consequence of the sale of the commercial diving operations and the restructuring of ITB's operations. Ms. Costello's contract of employment with ITB did not commit it to providing her the work she had traditionally performed. It did require ITB to continue to provide Ms. Costello with work appropriate to her background and abilities, but ITB had to be allowed a reasonable time to manage the transition.
- [34] Ms. Costello's anticipation that she would not have enough appropriate work was merely an apprehension when she raised it in late September 2018. Mr. Samuel's response was reassuring. Ms. Costello did not follow up until January 21, 2019. She did not give Mr. Samuel and Mr. Shaw a reasonable opportunity to address her complaint after that. At the meeting on January 24, she was uninterested in learning more about the projects Mr. Samuel had in mind for her to pursue, and shifted the conversation to a request for a severance package. The following day, her counsel took the position that she had been constructively dismissed.
- [35] I conclude that ITB did not breach the contract of employment by stripping Ms. Costello of substantially all of her duties. On January 24, 2019, a reasonable person in Ms. Costello's position would not have concluded that essential terms of her contract of employment were substantially changed.

Did ITB require Ms. Costello to work in an unsafe environment?

- [36] ITB's lease of the office in North Vancouver expired at the end of December 2018. Canpac Marine took over the space. Ms. Costello and Mr. Shaw moved out. Ms. Costello does not take the position that her contract of employment guaranteed that she would continue to be based in North Vancouver. A move to Burnaby was appropriate in the circumstances.

- [37] ITB's offices in Burnaby are located on a floating barge. It also has a shipping and receiving office in a trailer. The offices on the barge were not suitable for Ms. Costello, who suffers from motion sickness. ITB made arrangements for Ms. Costello to move into the shipping and receiving office in the trailer, though the arrangements were incomplete when Ms. Costello arrived on January 2, 2019. It took an hour or so to clear a space for Ms. Costello to occupy. Ms. Costello complained to Mr. Samuel who apologized. This was a temporary move, while ITB readied a new office, also in a trailer, for her to use. The new office required extensive renovations.
- [38] Unfortunately, the new office was not yet fit for occupancy when Ms. Costello moved into it on January 9, 2019. It is unclear who made the decision that Ms. Costello should move that day. Among other problems, there was black mould growing on the walls and the stairs were unsafe. Ms. Costello immediately complained and ITB's safety officer told her to leave. She did so. After this, she worked from home, travelling to North Vancouver and Burnaby as needed.
- [39] Mr. Samuel and Ms. Costello agree that the new office was not fit for occupancy on January 9, 2019 and that Ms. Costello was not required to return to it after January 9. Mr. Samuel says that it made no sense for Ms. Costello to be moved into the new office before it was renovated. ITB eventually spent \$26,000 to renovate the new office but the renovations were not complete when Ms. Costello's employment came to an end.
- [40] In Ms. Costello's email of January 21, 2019, she stated:
- Additionally, I am supposed to work in an office trailer which would be unacceptable if I lived in the slums of Mumbai. The mould, rotting floor and generally filthy condition of the trailer is uninhabitable. There is no bathroom. The stairs leading to the trailer are unsafe and the trailer is not level.
- As you are both well aware, I cannot work on the office barge. Specifically I suffer due to illness. The trailer adds to my condition.
- [41] Ms. Costello's complaint that the new office ("the trailer") was unsafe was justified, but ITB was not requiring Ms. Costello to work there.
- [42] However it was made, the decision to move Ms. Costello into the new office on January 9, 2019, was unjustified, but the company moved her back out of the new office immediately and made no effort to return her there after that. On January 24, 2019, a reasonable person in Ms. Costello's position would not have concluded that essential terms of her contract of employment were substantially changed by the aborted move or the arrangement permitting her to work from her home.

Did ITB address Ms. Costello in an aggressive and disdainful manner?

- [43] Ms. Costello's meeting with Mr. Shaw and Mr. Samuel on January 24, 2019, lasted about 30 minutes. Ms. Costello was angry and upset. Mr. Samuel was at least annoyed. Mr. Samuel and Ms. Costello agree that much of his annoyance was directed at Mr. Shaw for failing to manage effectively the complaints in Ms. Costello's email. I think that he was probably also put off by the tone of Ms. Costello's email. Notably, Mr. Samuel asked Ms. Costello how she had come to be moved in to the new office on January 9, and Ms. Costello responded only that she had nothing to do with it. At this stage, Mr. Samuel suspected that Ms. Costello was positioning herself for a lawsuit because she did not want to move to Burnaby.
- [44] While tempers were present on both sides, there is no suggestion that Mr. Samuel raised his voice or used inappropriate or disrespectful language. The core of Ms. Costello's complaint is that "I was not even being heard".
- [45] Ms. Costello describes the culmination of the meeting as follows:
82. Though I was fairly clear at this point in the conversation that he would not answer directly, I once again asked what I would do now, on a day-to-day basis. Mr. Samuel responded "what do you want?"
83. Given the lack of answers to my questions, my frustration with my working conditions, my treatment from the company I had been working for during the better part of four decades and my lack of duties I responded with "a settlement". By this I meant to say I was not satisfied with any of the answers I had received in this meeting.
84. Mr. Samuel told me that he wanted to talk to Mike. I asked if he wanted me to leave and he replied that he did.

[Emphasis added]

- [46] I am not satisfied that Mr. Samuel's conduct at the meeting was at all inappropriate. There is no evidence that Mr. Shaw said or did anything of substance. The conduct of this meeting did not involve a breach by ITB of its contract of employment with Ms. Costello.

Conclusion

- [47] Ms. Costello's claim that she was constructively dismissed by ITB is not made out. Its conduct did not amount to a repudiation of its obligations under Ms. Costello's contract of employment. On January 25, 2019, Ms. Costello was not entitled to take the position that ITB had dismissed her without cause and without notice.

Disposition

- [48] The action is dismissed. Unless there are matters that must be brought to my attention, ITB is entitled to ordinary costs on scale B. If counsel wish to, they may arrange through the registry to speak to costs at 9 a.m. on a day when I am sitting in Vancouver.

"Gomery J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/20/04/2020BCSC0438.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/costello-v-itb-marine-group-ltd-2020>

Prepared on 27 October 2026 · Esheria