
CANADA / JUDGMENT

Coupe v. Malone's Restaurant Ltd.

2006 BCSC 1350

COURT

Supreme Court of British Columbia

DECIDED

17 July 2006

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2006 BCSC 1350 Coupe v. Malone's Restaurant Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Coupe v. Malone's Restaurant Ltd.,

2006 BCSC 1350

Date: 20060717

Docket: S041440

Registry: Vancouver

Between:

John J. Coupe

Plaintiff

And:

Malone's Restaurant Limited,

Malone's Restaurant (Clarence) Limited,

Malone's Restaurant (Kitsilano) Limited,

Eats Café Inc., Esmail Esmail, Trevor Magee,

Jonathan Moscovich and Sam Yehia

Defendants

Before: The Honourable Mr. Justice Myers

Oral Reasons for Judgment

July 17, 2006

Counsel for Plaintiff

A. J. Markham-Zantvoort

Counsel for Defendants Malone's Restaurant (Kitsilano) Ltd., Eats Café Inc., Esmail Esmail and Sam Yehia

D. H. Murray

Place of Hearing:

Vancouver, B.C.

- [1] THE COURT: This is a claim for wrongful dismissal which engages the issues of cause, common employer and successorship.
- [2] At the time of his dismissal, the plaintiff was working at a restaurant on Seymour Street in Vancouver owned by the defendant Eats Café Inc. and operated as Malone's Restaurant. Eats Café Inc. was in turn owned by the defendant Sam Yehia.
- [3] The issues of common employer and successorship arise because the plaintiff had previously worked at a number of other locations also operated as Malone's Restaurant, but owned by different corporate entities, most or all of whom are also defendants. The plaintiff seeks a judgment against all the defendants jointly and severally.
- [4] A number of defendants did not defend this lawsuit. When I refer to the defendants' argument, I am referring only to the defendants who appeared at trial.

I. FACTS

A. Plaintiff's Employment History

- [5] From October 25, 1996, to the end of 2001, the plaintiff worked for a restaurant branded and operated as "Malone's" located at an ice rink in Coquitlam. The establishment was owned by the defendant Malone's Restaurant Limited, which was in turn owned directly or indirectly by the defendant Trevor Magee.
- [6] The plaintiff was initially employed as a busboy for work on weekends, then moved up to a bar porter and then bartender. The payroll records show a hiatus in employment from November 1998 to February 1999, but no explanation of this was provided.
- [7] Around September 21, 2001, the plaintiff moved to a restaurant - also branded and operated as "Malone's" - located on Seymour Street, in downtown Vancouver. The downtown location was owned by a company called Malone's Restaurant (Clarence) Limited. That company was also owned in whole or in part by Trevor Magee. At the time of the transfer the plaintiff was working as a bartender, and initially continued in that position. Sometime in 2002 he became a shift manager.

- [8] In May 2002, at the request of one of Mr. Magee's partners, Jonathan Moscovich, the plaintiff transferred to another restaurant operated as "Malone's" in Burnaby, continuing as shift manager. The name of the corporate owner of the Burnaby location was not known by any of the witnesses, but that company was in turn owned or controlled by Mr. Magee.
- [9] Some of the witnesses referred to the appointment of a receiver of the Burnaby business in May 2002, but as will be seen later in this Judgment, I do not place any weight on this evidence.
- [10] From time to time employees at one of the Malone's locations were asked to work the odd shift at other Malone's locations. This included a location in Kitsilano, which Mr. Magee and Yehia owned together until 2002.
- [11] In June 2002, an unrelated business, the Shark Club, took over the Burnaby Malone's premises and the plaintiff moved back to the downtown location the weekend after the takeover. He continued in his role as shift manager. The move was done at the suggestion of Kelly Bellman who was then the general manager of the downtown location.
- [12] By the time of the plaintiff's move to the downtown location it was under new ownership. It had been taken over from Malone's (Clarence) Limited by Eats Café Inc. around May 2, 2002 under the following circumstances. The owner of Eats Café, Sam Yehia, was the landlord, either personally or through another corporation, of the downtown location. Malone's (Clarence) Limited ran into financial difficulties at the beginning of May and Eats Café took over the downtown business after Mr. Yehia or his company exercised the right of distraint.

B. The Termination of the Plaintiff's Employment

- [13] The plaintiff was fired on March 31, 2003, by Mr. Jamie Moberg whose title was "area manager of Malone's". Mr. Moberg had been asked to fire the plaintiff by the then manager of the downtown location, Rachel Trefiak. (By the time of the trial, Ms. Trefiak had moved to Ontario and I was asked to admit her evidence by way of affidavit. I refused to do so.)
- [14] Mr. Moberg was frank in acknowledging that he did not observe any of the plaintiff's conduct which the defendants rely on as grounds for termination; rather he was told by Ms. Trefiak what to put on a form that was handed to the plaintiff at the meeting, and what to tell the plaintiff at the meeting.
- [15] The form given to the plaintiff listed five items as the reasons for termination as follows:
- a) promoting and supporting drinking on the job re: staff members;
 - b) drinking while on shift;
 - c) does not follow protocol and is insubordinate regarding company policies;
 - d) not an effective leader, nor is he a team player; and

e) does not consistently perform his duties as manager.

[16] Mr. Moberg told the plaintiff that he was being fired because:

- a) he had been drinking on the job. Mr. Moberg referred to a drink he had after a meeting with Ms. Trefiak;
- b) he had allowed other staff to drink. This related to an incident when Ms. Trefiak noted that a busboy was drunk on the plaintiff's shift; and
- c) he had refused to do the closing liquor inventory at the end of his shift.

[17] Since Mr. Moberg did not observe any of this conduct himself, ironically the only direct, and therefore admissible evidence on the subject, came from the plaintiff himself.

[18] The plaintiff says that several weeks before he was terminated, Ms. Trefiak spoke to him about a busboy who she noted as being drunk on his shift. They discussed the company's drinking policy - which I will return to later in this Judgment - following which she bought the plaintiff and several other staff a drink.

[19] The plaintiff also testified about another conversation he had with Ms. Trefiak, this time with respect to taking inventory of the liquor stock at the end of his shifts. He said that he had found it very difficult to do this along with his other duties. Ms. Trefiak told him he had to do it and he complied with this until he was fired.

[20] Finally the plaintiff testified as to an incident in which he voided a tab for a regular customer who had mistakenly left without paying, rather than follow company policy and charge it to the "dine and dash fund". He decided to do that, he said, because he was certain the customer would return to pay his bill.

[21] The defendants say that the plaintiff was warned that these actions would be grounds for termination. This took place, they say, at a meeting between the plaintiff and Mr. Moberg two or three weeks prior to the plaintiff being terminated. The meeting was held at the request of Ms. Trefiak. Mr. Moberg told the plaintiff that the plaintiff had a new boss, Ms. Trefiak, and that he had to adhere to her rules and stipulations. Mr. Moberg told the plaintiff that Ms. Trefiak was "not there to mess around". He did not use the word "warning", nor did he put any of the specific things that he had been told by Ms. Trefiak to the plaintiff. Mr. Moberg characterized the discussion as giving a "heads-up to a buddy".

II. Was the Plaintiff Wrongfully Dismissed?

A. Was the plaintiff adequately warned of his alleged misconduct?

- [22] Eats Café argued that plaintiff was given adequate warning of his misconduct during his meeting with Mr. Moberg described in the preceding paragraph. But all of the plaintiff's alleged misconduct took place before the meeting with Mr. Moberg and was not repeated afterward. Therefore whether or not the plaintiff was given an adequate warning is irrelevant.
- [23] In any event, I find that an adequate warning was not provided. A warning must be clear and unequivocal; it must indicate to the employee that his job is at risk. The discussion between Mr. Moberg and the plaintiff did not have the tenor of a formal warning, nor did Mr. Moberg communicate to the plaintiff that his job was at risk.

B. The Policy Prohibiting Drinking by Staff

- [24] The main ground relied on at trial by Eats Café as justifying the plaintiff's dismissal was his disregard for what was said by it to be the company's zero-tolerance policy prohibiting drinking by staff. It was argued that this was demonstrated by the incident of the drunk busboy.
- [25] I do not accept that argument. There is insufficient evidence to show that the drunkenness of the busboy should be attributed to lack of diligence on behalf of the plaintiff. There is no evidence as to when he became drunk or the circumstances surrounding the event. The only evidence is that Ms. Trefiak told the plaintiff that a busboy was drunk on his shift.
- [26] Regarding drinking by the plaintiff himself, there is no evidence that he drank on the job apart from the drink that he had with Ms. Trefiak. Although when firing the plaintiff that was one of the grounds for dismissal that was relied on, at trial the defendant did not appear to rely on that as cause for dismissal nor could it, given that the conduct was instigated by Ms. Trefiak buying the drink.
- [27] Finally, the zero-tolerance, no-drinking policy was one in name only. The plaintiff did acknowledge in his examination for discovery that when Mr. Yehia took over the company, he instituted a "strict no-drinking policy". However, the evidence is clear that that policy was not strictly or consistently enforced. One need look no further for this than the drink which Ms. Trefiak bought the plaintiff and other staff members referred to above.
- [28] But there is more. Mr. Moberg gave evidence as to the drinking policy both before and after Mr. Yehia took over the business. He said that there were exceptions to it. For example, employees could be given a drink as a reward for good service; staff could come to manager and ask for permission to have a drink with patrons; employees could buy themselves drinks with managerial approval; staff could drink, as did Mr. Moberg, after they had punched out; managers could buy drinks for staff. Insofar as Mr. Yehia implementing a new zero-tolerance policy, Mr. Moberg stated that not allowing staff drinking was always a policy but that each supervisor or general manager made decisions about implementing the policy according to his or her own discretion. I therefore find that the zero-tolerance policy was not sufficiently clear or uniformly enforced to justify summary dismissal for an alleged

breach.

C. Taking Inventory of the Liquor Stock

- [29] The defendants rely on the plaintiff's reluctance to do the liquor inventory as grounds for dismissal and argue that it showed his lack of respect for company direction and policies.
- [30] This argument fails because the plaintiff's uncontradicted evidence was that after this was discussed with Ms. Trefiak, he did do the liquor inventory up to the time he was terminated.

D. The Voiding of the Transaction

- [31] This was brought to the plaintiff's attention and also subsequently raised at a managers' meeting attended by the plaintiff as an example of what not to do. There is no evidence of a similar incident having reoccurred. The defendant seems to argue that it was entitled to dismiss the plaintiff not for the actual incident - the plaintiff was not dismissed at the time of the incident or immediately afterwards - but rather because "the plaintiff did not treat those events as any indication that his superiors found his job performance deficient". That argument does not bear scrutiny because the plaintiff did not repeat the impugned incident.
- [32] I therefore find the defendant Eats Café Ltd. dismissed the defendant without cause.

III. The Common Employer and Successorship Issues

- [33] The plaintiff argues that all of the Malone's locations which Mr. Magee controlled were common employers. That would mean that the plaintiff was consistently employed by them from 1996 to 2002.
- [34] Eats Café, as noted above, was not a company controlled by Mr. Magee. The plaintiff argues that as a successor business it assumed the common employer status of Malone's Restaurant (Clarence) Limited and thereby inherited the seniority of the plaintiff for wrongful dismissal purposes. Therefore when assessing the reasonable notice period to which the plaintiff is entitled, his employment should be regarded as continuous from 1996 through to his termination in 2002.
- [35] Mr. Murray, on behalf of the defendants who defended the lawsuit, does not seriously dispute that the locations controlled by Mr. Magee were common employers. But he says that the Burnaby location was placed in receivership in May 2002 when the plaintiff was employed there. This, he argues, resulted in a termination of the plaintiff by the company which owned the Burnaby location and a re-hiring of the plaintiff by the receiver. Following from that, he argues that when the plaintiff moved to the downtown branch in June 2002, then owned by Eats Café, there was no connection between the Burnaby location and the downtown location and that therefore the plaintiff's seniority there began at zero.

A. Common Employer - the Period Prior to May 2002

[36] The doctrine of common employer for wrongful dismissal purposes may be said to have had its genesis in a decision by Mr. Justice Wood in *Sinclair v. Dover Engineering Services Ltd.* (1987), 11 B.C.L.R. (2d) 176 (S.C.), [1987] B.C.J. No. 60 (QL), and affirmed by the British Columbia Court of Appeal at (1988), 49 D.L.R. (4th) 297. Wood J. held that a person may be employed by more than employer at a time. He stated at p. 181:

The first serious issue raised may be simply stated as one of determining with whom the plaintiff contracted for employment in January 1973. The defendants argue that an employee can only contract for employment with a single employer and that, in this case, that single entity was obviously Dover.

I see no reason why such an inflexible notion of contract must necessarily be imposed upon the modern employment relationship. Recognizing the situation for what it was, I see no reason, in fact or in law, why both Dover and Cyril should not be regarded jointly as the plaintiff's employer. The old-fashioned notion that no man can serve two masters fails to recognize the realities of modern-day business, accounting and tax considerations.

There is nothing sinister or irregular about the apparently complex intercorporate relationship existing between Cyril and Dover. ... Similar arrangements may result from corporate take-overs, from tax planning considerations, or from other legitimate business motives too numerous to catalogue.

As long as there exists a sufficient degree of relationship between the different legal entities who apparently compete for the role of employer, there is no reason in law or in equity why they ought not all to be regarded as one for the purpose of determining liability for obligations owed to those employees who, in effect, have served all without regard for any precise notion of to whom they were bound in contract. What will constitute a sufficient degree of relationship will depend, in each case, on the details of such relationship, including such factors as individual shareholdings, corporate shareholding, and interlocking directorships. The essence of that relationship will be the element of common control. (Emphasis added).

[37] That decision was quoted with approval and applied to the case before it by the Ontario Court of Appeal in *Downtown Eatery (1993) Ltd. v. Ontario* (2001), 54 O.R. (3d) 161 (C.A.), [2001] O.J. No. 1879 (QL), which is now frequently cited as the leading case in the area.

[38] Both of these decisions have frequently been applied in British Columbia and Ontario.

[39] Turning to the facts of the case at bar, as I indicated in the factual recitation, up until approximately May 2002, the various Malone's locations were owned by different companies, but those companies were all controlled by Trevor Magee. Thus:

(a) the Coquitlam Planet Ice location was owned by Malone's Restaurant Ltd.;

- (b) the downtown Seymour Street location was owned by Malone's Restaurant (Clarence) Limited; and
 - (c) it is unclear which corporate entity owned the Burnaby location, but it was another company owned or controlled by Trevor Magee.
- [40] Trevor Magee ran and controlled all of these locations out of one head office.
- [41] Mr. Yehia had no direct connection to the Coquitlam or Burnaby location. He did have a 50.1 percent interest in the Kitsilano location, in which Mr. Magee held the balance of the interest. In 2002 the location was closed and renovated. It re-opened in March 2003 under the indirect ownership of Mr. Yehia, Mr. Magee no longer being involved in it.
- [42] There are several indicia of the various locations, and hence their corporate owners, acting as one business. Some of these are:
- (a) The plaintiff and various other witnesses gave evidence that they wore the same Malone's T-shirt in all of the locations. The look and the content of the menus were similar and the same Malone's logo was used in all the locations.
 - (b) The pay stubs from the various Malone's locations subsequent to mid-1997 have, with one exception, no reference to any corporate name. For example, the ones from Coquitlam identified as "Malone's Sports Bar Planet Ice," and the ones from Kitsilano are identified as "Malone's Sports Grill - Kitsilano". The ones from downtown state "Malone's Bar and Grill at Seymour." The ones from Burnaby are similarly identified as "Malone's Restaurant - Burnaby." The only stubs on which a corporation is identified are those which state "Malone's Restaurant (Clarence) Limited," and these are from August 2001 through to December 2002. There is a Record of Employment for the plaintiff from the Burnaby location and it shows the employer's name as "Malone's Bar and Grill". The T4 slips issued by the various locations essentially mirrored the names used on the pay stubs.
 - (c) An employee manual for the downtown location in use in 1994 was headed up "Malone's Bar and Grill". It listed a single head office for all locations.
 - (d) As I mentioned earlier in these Reasons, employees at the various locations, including the plaintiff, were asked to work temporarily at other locations, including Kitsilano.
 - (e) Mr. Moberg worked at a number of different locations and referred to being "transferred" from Coquitlam to Maple Ridge and to Kitsilano.
- [43] Based on the common ownership and control by Mr. Magee and the factors referred to in the previous paragraph, I conclude that the companies which owned the Burnaby, Coquitlam, downtown and Kitsilano locations were common employers of the plaintiff as at the beginning of May 2002.

B. The Defendant's Receivership Argument

- [44] I have noted the defendant's argument with respect to this issue earlier in these Reasons at paragraph 35.
- [45] While the underlying legal proposition may be correct, I think the argument fails on the facts. There was only tangential reference to a receiver having been appointed, all of it indirect and second hand. There was no direct evidence of exactly when a receiver was appointed, by whom or over exactly what. If a receiver was indeed appointed, there is no evidence as to what arrangements he made with the staff at that time. The one witness who could have given direct evidence on the point, Mr. Magee, was not called as a witness, although he is working as a consultant to Mr. Yehia's companies.
- [46] Therefore, I find that when the plaintiff left the Burnaby location for the downtown location, he was still working for the Malone's group of companies that I have held to be common employers.

C. Successorship - The Takeover of the Downtown Location by Eats Cafe in May 2002

- [47] As stated above, in May 2002 Eats Café took over the downtown location from Mr. Magee's company, Malone's Restaurant (Clarence) Limited. The plaintiff moved to that location in June 2002.
- [48] Counsel for the plaintiff argued that Eats Café was the successor to Malone's Restaurant (Clarence) Limited and as such was bound by the prior years of service of the plaintiff with the former common employers.
- [49] The plaintiff relies on a decision of the British Columbia Court of Appeal in *Sorel v. Tomenson Saunders Whitehead Ltd.* (1987), 15 B.C.L.R. (2d) 38 (C.A.), 39 D.L.R. (4th) 460, [1987] B.C.J. No. 1332 (QL). In that case, an employee was wrongfully terminated after 37 years of employment, however, during the time of his tenure, the company was bought by another company. The court held that in the absence of an agreement to the contrary, there was an implied term that an employee's years of service would be recognized by the successor company. The Court said as follows at pp. 40-1:

In every case, of course, the judge must assess reasonable notice based on the particular circumstances before him. Where there has been merely a change in ownership, it is open to the judge to consider the period of continuous employment as a whole.

We think the legal situation might be conceptualized as follows:

1. When a purchaser acquires a business as a going concern, there is an implied term in the contract of employment between it and those employees continuing in the service of the business, that the employees will be given credit for years past service with the vendor for purposes of such incidents of employment as salaries, bonuses and notice of termination.

2. This implied term may be negated by an express term to the contrary. In other words, the purchasing employer may, at his option, advise the employees that he does not intend to give them credit for past services to the vendor. If this is done, the employees have the option of entering into the new contract of employment on these terms or of declining to work for the purchasing company and suing the vendor for wrongful dismissal and damages in lieu of notice.
 3. Where the new employer does not advise the employees that he is unwilling to contract on the basis that the employees have credit for past years of service, the employer is deemed to have contracted with the employees on the basis that the employees will be given such credit.
- [50] That decision, however, dealt with employees who were in place at the time of the takeover. That is not the situation in the case at bar because the plaintiff only moved to the downtown location the month after Eats Café took it over. Can the can the principal enunciated by the Court of Appeal in the Sorel apply in the circumstances of this case? For the reasons that follow I conclude it can.
- [51] The plaintiff was asked to come to the downtown location by the manager of that location, Mr. Bellman. He had previously worked with the plaintiff. The plaintiff did not go through an application process as if he were seeking new employment. There is nothing to indicate that the plaintiff was treated as a new employee. The plaintiff was not advised of the change in the corporate structure: he only became aware of it after he started work downtown in June 2002.
- [52] Furthermore, when the plaintiff moved to the downtown location, it was to do the identical job he was doing at the Burnaby location for a business that was operated in virtually the identical manner as all of the prior employers who operated the various Malone's branches he had previously worked at. This includes the downtown location where he had previously worked in 2001.
- [53] In short, the move from the Burnaby location to the downtown location was, from the plaintiff's point view, seamless and Eats Café did not tell the plaintiff that his prior years of service would not be recognised.
- [54] In these particular circumstances, for the purposes of assessing reasonable notice, I find that the plaintiff's employment should be regarded as continuous from the time he started at the Planet Ice location in 1996 to the time of his dismissal by Eats Café in March 2003.

IV. DAMAGES

A. Did the Plaintiff Fail to Mitigate His Damages?

- [55] The defendant argues that the plaintiff did not make reasonable efforts to mitigate his damages. However the plaintiff did make attempts to find alternate work. In fact, he found a job in the computer industry, but it did not last. The defendant has not met its onus of proof in establishing that these efforts were unreasonable.

B. The Appropriate Notice Period

- [56] The plaintiff was hired as a busboy in 1996. He was promoted to a bartender and then to the position of shift manager reporting directly to the general manager. His salary increased along with his pay. At the time of his dismissal, he had been working for two years as a manager.
- [57] As manager, the plaintiff managed both the front of the restaurant and the kitchen staff.
- [58] At the time of his dismissal, the plaintiff was 26.
- [59] I do not accept the defendant's submission that the hiatus in the plaintiff's employment in 1999 should have any significant effect in the assessment of the notice period. It is not in evidence whether that hiatus was for a leave of absence, vacation or otherwise. Further, a three-month gap in employment that lasted for some six years is not meaningful.
- [60] I have reviewed the cases cited to me by plaintiff's counsel. Of particular relevance was *Rowe v. Keg Restaurants Ltd.*, [1996] B.C.J. No. 13 (QL) (S.C.) Defence counsel provided no authority. I conclude that the plaintiff was entitled to a reasonable notice period of six months.

C. Wallace Damages

- [61] The plaintiff asked for damages to be awarded pursuant to *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701 (S.C.C.), [1997] S.C.J. No. 94 (QL). In order to succeed in a claim for so-called Wallace damages, the defendant must -- to paraphrase Sopinka J., at para. 103 of *Wallace* -- establish that the employer engaged in bad faith conduct or unfair dealing in the course of the dismissal resulting in injuries such as humiliation, embarrassment and damage to the plaintiff's self-esteem. As Sopinka J. pointed out in the same paragraph the plaintiff's right to increased compensation in these circumstances does not arise from the fact of the dismissal itself, but rather from the manner in which the employee was dismissed.
- [62] While the defendant did not succeed in its allegation of cause, and by at least at the start of the trial, it should have been apparent to it that it would not succeed, I do not think that its conduct or the consequences to the plaintiff rise to the level to merit Wallace damages. Apart from the fact of being fired itself, there was nothing done to humiliate the plaintiff. Mr. Moberg acted appropriately at the meeting in which he terminated the plaintiff's employment, and there is no evidence of the plaintiff being embarrassed or humiliated.

D. Conclusion

- [63] Taking the plaintiff's 2003 income, averaging it and projecting it to six months, results in a figure of \$17,250. The plaintiff is entitled to this amount plus 6 percent vacation entitlement, being \$1,035. From this figure must be subtracted the unemployment insurance earnings recovered by the plaintiff in the amount of \$3,917 and the amount earned at the job he worked at for several weeks, being \$2,264.17. This results in a net figure of \$12,104. The plaintiff is further entitled to court order interest and costs at Scale 3.
- [64] The plaintiff is entitled to judgment in that amount against Eats Café Inc. I see no case having been made out against any of the personal defendants, and therefore the action should be dismissed against all of them.
- [65] With respect to the other corporate defendants who have not defended and whom I have held to be common employers up to June 2003 when the plaintiff left the Burnaby location, they should only be liable for five months' notice and Eats Café should be jointly liable with them for that.

"E. Myers, J."

The Honourable Mr. Justice E. Myers

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