

CANADA / JUDGMENT

Peacey v. Suckling

2000 BCSC 1397

COURT

Supreme Court of British Columbia

DECIDED

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2000 BCSC 1397

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IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

WILLIAM PEACEY AND KIRK PEACEY COBA
PERFORMANCE PLUS AUTO CLEANING AND POLISHING
APPELLANTS

AND:

KEVIN SUCKLING
RESPONDENT

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE COHEN

Counsel for the Appellants: A. Berns

The Respondent Appearing on his own behalf

Date and Place of Hearing: April 28, 2000

Victoria, B.C.

- [1] This is an appeal from the decision of The Honourable Judge MacKenzie P.C.J., given December 8, 1999, granting judgment in favour of the respondent in the amount of \$5,277.21. The relief sought by the appellants is as follows:

- (a) an order that there was an enforceable contract which took effect on February 24, 1998, and that the respondent was an employee of the appellants from that date until July 21, 1998; and
- (b) an order that the amount of the judgment ordered at trial, \$5,277.21, be reduced to \$2,425.61 to reflect the change in the employment relationship between the parties.

[2] The issues on appeal are, as follows:

- (i) whether there was a meeting of the minds between the respondent and the appellants as to a change in the respondent's remuneration?

(ii) whether the appellants owe the respondent the amount of the judgment ordered at trial, or the reduced amount of \$2,425.61?

[3] In his reasons dated December 8, 1999, the learned trial judge held, as follows:

The Defendants have acknowledged some wages are owed to Mr. Suckling but dispute the amount. The only two issues are whether Mr. Suckling was to earn 13% on the work performed or on the amount actually invoiced to customers. The second issue is whether Mr. Suckling and the defendants had a meeting of the minds with respect to Mr. Suckling being paid \$10 per hour pursuant to a Federal Government "training" contract between February 24th, 1998 and his departure day of July 21st, 1998.

On the second issue I am unable to conclude the evidence supports the Defendant's position that Mr. Suckling had agreed to change his rate of remuneration from 13% of gross sales to \$10 an hour. I accept the evidence of Mr. Suckling that he told Mr. William Peacey he did not want to engage in this arrangement because he had been there approximately a year and a half and could not be considered a person in training.

[4] First, the appellants contended that the learned trial judge misapprehended the evidence. They claimed that the totality of the evidence indicated that the respondent did become an employee of the appellants. Specifically, they referred to the respondent's evidence that he requested, and received a T4 slip from the appellants, and argued that the respondent's application to be placed on the Federal Government Training Program (the "Program"), and his request for a T4 slip were hallmarks of an employer/employee relationship.

[5] Secondly, the appellants contended that the learned trial judge misapplied the facts to the law in finding that the respondent and the appellants did not have a meeting of the minds as to a change in the respondent's remuneration. The appellants pointed to the evidence that the respondent attended the office of Ms. Christine Barlow, the government representative for the Program, after having agreed with the appellants to apply to be placed on the Program. At her office the respondent filled out some forms, and signed them.

[6] In support of their position, the appellants referred to the respondent's evidence, in chief, that he was envious of other employees who were on the Program because they were receiving regular pay cheques, and, on cross-examination, where the respondent admitted that he wanted to be placed on the Program so that he would receive more regular pay

cheques. It was the appellants' submission that these facts established that there was a meeting of the minds with respect to a change in the respondent's remuneration, and that a new employment contract was formed when the respondent applied for the Program.

- [7] The respondent contended that the totality of the evidence did not indicate that he entered into a new contract of employment with the appellants. While he conceded that he did sign up for the Program, he claimed that after reading the information about the Program he realized that he was not eligible for the Program. The respondent submitted that, as a result, he and Mr. Peacey agreed to withdraw his application to be placed on the Program.
- [8] The respondent also contended that his evidence clearly showed that his request for a T4 slip from the appellants was simply a challenge to the position taken by the appellants. He said that the appellants had no intention of providing a T4 slip to him until a challenge was issued by him at the settlement conference. The respondent submitted that his request to be withdrawn from the Program, and the appellant's failure to properly issue a T4 slip to him, indicated that there was no new employment contract entered into by the parties. He insisted that there was no meeting of the minds with respect to a change in his remuneration. He also argued that the only meeting of the minds was that the appellants, at the respondent's request, would withdraw his application for the Program.
- [9] In the result, the respondent sought an order that the decision of the learned trial judge should be upheld, and that he be entitled to receive \$5,277.21.
- [10] When the appeal came on for hearing before me on April 28, 2000, it was adjourned generally, on my direction that counsel for the appellants provide the court with a memorandum regarding the procedure for hearing new evidence, or ordering a new trial. Furthermore, leave was granted to the parties to provide submissions to the court regarding whether the appeal could be disposed of on the basis of the record.
- [11] I received the appellants' submission under cover of letter dated May 24, 2000. I received the respondent's submission under cover of letter dated July 19, 2000. The appellants' submission in reply to the respondent's submission was received by me under cover of letter dated July 25, 2000.
- [12] Upon a review of the parties' submissions, I have concluded not only that the appeal can be disposed of based upon the record, but also that the appeal should be allowed.
- [13] The appellants have identified two grounds for allowing the appeal. I accept both.
- [14] The first ground relates to the appellants' submission that the learned trial judge misapprehended the facts with respect to whether or not the respondent agreed to be placed on the Program. Counsel referred to that part of the learned trial judge's reasons where he said, as follows:

I accept the evidence of Mr. Suckling that he told Mr. William Peacey he did not want to engage in this arrangement because he had been there approximately a year and a half and could not be considered a person in training.

[15] The appellants submitted, and I agree, that the evidence the learned trial judge relied upon in rejecting the appellants' position that the respondent had agreed to change his rate of remuneration was insufficient, given the other evidence before the court. Firstly, the evidence at trial established that the respondent was envious of others on the Program. He testified, as follows:

A Well, we kept going this way and it gradually was getting worse, and then he hired a couple of people on and put them on this subsidy, Target program it's called. It's for people that are just on UI and then they -- you kind of get them off UI by -- it was setting them up with a full-time job and it's to train them, basically.

THE COURT: Yes.

A. And so they were getting paid before me, they were getting paid on a regular basis, and they were only working Monday to Friday. so, at this time I had been here, you know, about a year or so, maybe not quite, and they're working Monday to Friday.

We said -- we had two sides at our shop, like it was -- the building is, like, a -- it could be two separate businesses. They've just leased both sides. Bill and Ken and the other people were on one side and Kirk and I were on the other, and we -- Kirk and I used to joke around, "Oh, yeah, they're the union side," 'cause they had, like, bankers hours, you know, whatever, eh? So, yeah, it was kind of like we just joked about that.

And so one day I just got really -- this is getting near the end of when I was there. I was getting really frustrated with not getting paid. It was starting to cause problems at home. Like, I'd go home. Karen would be, like, "Did you get paid today?"

[16] Secondly, the respondent approached the appellants to discuss remuneration matters and was offered a new contract of employment involving a government wage subsidy. The respondent testified, as follows:

A. Just after Christmas. It was just before he put me on the program.

I go, "Bill, you know, like all these guys are getting paid before me," or whatever, and that's when Bill came up with the idea of putting me on this program, and it was near the end of one day and he said, "Okay, you've got to go up and talk to Christine Barlow [phonetic], up at the place." It was just up the road.

[17] Thirdly, the respondent applied for the Program. He testified, in chief, as follows:

A So, I went up there, I filled out all the paperwork or whatever, and Christine was actually just getting ready to leave. So, she handed me the paperwork about what it's all about and said, "Okay," you know, "I'll take care of all the rest."

[18] In cross-examination the respondent said, as follows:

Q And you did go down to Targets Of [sic] Employment?

A Yes, I did.

Q And what did you do there?

A Oh, it was at the end of the day he asked me to go in and ask for a Christine Barlow and talk to her. So, I went in there. She had said to me, "Okay" you know, "Bill told me we're going to put you on the Target program. Here's all the paperwork." She was in a hurry, like she had to get out of there, it was the end of the day. She goes, "Alls you got to do is sign here and I'll take care of the rest." I signed it.

[19] Fourthly, the respondent received consideration in the form of a promise of regular pay periods. The respondent testified, in cross-examination, as follows:

Q What do you mean by get more money out? Do you mean --

A That's -- that's not -- I didn't say I would get more money. What I said is I would get -- Bill explained to me, you know, "We're going to have more money coming in, so I'm going to be able to pay you on a more regular basis," and, you know, basically he told me what I wanted to hear --

Q Right.

A -- you know.

Q So, you weren't going to earn more money.

A That's right.

Q You would just get paid more regularly and get up -- the back wages back up to speed?

A Exactly.

[20] Finally, the respondent requested, and received a T4 slip from the appellants.

[21] The respondent testified, in chief, that Mr. Peacey agreed with him that he was not eligible for the program and that he would call Ms. Barlow and cancel the respondent's application to be placed on the Program. He testified, "So, I said to Bill, I go, you know, 'it's just kind of risky,' and Bill's like, 'yeah, I agree. I'll call Christine and get it cancelled. So that's the last I heard about this Program until we came to our settlement hearing, and that's when Bill threw it up...". On the other hand, Mr. Peacey gave evidence that the respondent knew that the old employment contract was replaced by the new contract. He testified, in chief, as follows:

Q And having put Mr. Suckling on this program, was he informed that the thirteen percent would no longer be the deal between you and, in fact, a new employment contract had been formed?

A Yes, he did. Yes, he was.

THE COURT: When was that?

A When was that? It would just be about the middle of February, just when we were setting up the contract, or when the contract had been signed.

- [22] The learned trial judge advised the respondent that he could ask Mr. Peacey any questions he had with respect to the Program. However, the respondent did not put to Mr. Peacey his evidence that he had told him that he did not think he should be placed on the Program, or that Mr. Peacey agreed with him that his application should be cancelled. The appellants submitted, and I agree, that the failure of the respondent to put statements made by him to Mr. Peacey not only cast doubt on the veracity of his statements, but also on the weight that the learned trial judge should have attached to his statements.
- [23] Ground two is the appellants' submission that the learned trial judge misapplied the facts to the law in finding that the respondent and the appellants did not have a meeting of the minds, and by implication no enforceable contract. The appellants submitted that the learned trial judge made an error of law as offer, acceptance and consideration were all present. I agree with this contention.
- [24] First, as the appellants pointed out, the offer of employment was made when the appellants suggested to the respondent that he apply to be placed on the Program.
- [25] The respondent accepted the appellants' offer by attending at the Program office, and by completing and signing the application to be placed on the Program.
- [26] As appellants' counsel pointed out, consideration was present in that the appellants offered to pay the respondent \$10 per hour, and in return the respondent promised to provide his services.
- [27] The appellants submitted, and I accept, that the above factors established that there was a binding contract in effect between the parties.
- [28] I also accept the appellants' submission that the factual underpinning that the learned trial judge relied upon in support of his finding that there was no meeting of the minds was an error. The respondent's evidence is that after applying for the Program he told Mr. Peacey that he did not want to be placed on the Program. As appellants' counsel argued, this is evidence of repudiation, not of intention and in order for the learned trial judge to find an unenforceable contract he would have required evidence before him that the appellants had accepted the respondent's repudiation. There was no such evidence, and no such finding.
- [29] Finally, it is the respondent's submission that if a contract of employment involving remuneration at a rate of \$10 an hour did exist, then the respondent's ineligibility for the Program frustrated the new employment contract. I do not accept the argument of the respondent on this point. The doctrine of frustration is relevant when it is alleged that a change of circumstances after the formation of the contract renders it physically or commercially impossible to fulfil the contract. However, in the instant case the evidence

established that there was no change that would amount to frustration of the contract: the respondent's application to the Program was accepted and the government contributed to the respondent's wages. Mr. Peacey testified, in chief, that Human Resources Development Canada paid the appellants \$6,240 as a contribution to the respondent's wages of \$10 per hour.

- [30] Accordingly, the appeal is allowed. The respondent submitted that should the court accept the appellants' argument, then he should be given an opportunity to prove the number of hours he worked. The appellants submitted, and I agree, that given the events at trial, as disclosed by the record, the respondent should not be granted leave to present evidence on this point. In the result, the appellants are entitled to an order that there was an enforceable contract between the parties which took effect on February 24, 1998, and that the respondent was an employee of the appellants from that date until July 21, 1998; and for an order that the amount of the judgment ordered at trial be reduced to \$2,425.61.

"B.I. Cohen, J."

The Honourable Mr. Justice B.I. Cohen

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