

CANADA / JUDGMENT

Quach v. Mitrux Services Ltd.

2020 BCCA 25

COURT

British Columbia Court of Appeal

DECIDED

23 January 2020

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2020 BCCA 25 Quach v. Mitrux Services Ltd.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Quach v. Mitrux Services Ltd.,

2020 BCCA 25

Date: 20200123

Docket: CA45644

Between:

Tri Quach

Respondent

(Plaintiff)

And

Mitrux Services Ltd. and Ameri-Can Freight Systems Inc.

Appellants

(Defendants)

Before:

The Honourable Madam Justice Saunders

The Honourable Mr. Justice Harris

The Honourable Mr. Justice Hunter

On appeal from: An order of the Supreme Court of British Columbia,

dated September 6, 2018 (Quach v. MitruX Services Ltd., 2018 BCSC 1535,
Chilliwack Docket S030413).

Counsel for the Appellants:

E.A.W. Heath

Counsel for the Respondent:

D.A. Sorensen

M.A. Truong

Place and Date of Hearing:

Vancouver, British Columbia

September 6, 2019

Place and Date of Judgment:

Vancouver, British Columbia

January 23, 2020

Written Reasons by:

The Honourable Madam Justice Saunders

Concurred in by:

The Honourable Mr. Justice Harris

The Honourable Mr. Justice Hunter

Summary:

The appeal is from an award of a year's salary, under a fixed-term contract providing that upon termination by the employer, the balance of the salary for the remaining portion of the term would become due and owing, and an award of aggravated damages. The parties had signed a second agreement making the contract a month to month contract. The judge found new consideration was not given to the employee in exchange for agreeing to the second contract, and hence the fixed-term contract applied. The employer appealed. Held: Appeal allowed on the issue of aggravated damages only. The language of the second contract contemplated fresh consideration but none was given. The judge's conclusions that the fixed-term contract applied were correct. The award for aggravated damages is set aside. The record did not support a conclusion that the employee suffered more than normal distress, stress and anxiety as a result of the dismissal. Comments on the law of mitigation of damages in an employment setting are provided.

Reasons for Judgment of the Honourable Madam Justice Saunders:

- [1] This appeal concerns damages assessed under a one-year fixed-term contract of employment in circumstances in which the employer, Mitrux Services Ltd. and Ameri-Can Freight Systems Inc., repudiated the contract before the employment began and in which the employee, Mr. Quach, obtained alternative employment soon after the repudiation. The judgment was in an amount equal to the total annual salary of \$138,000, plus \$15,000 in aggravated damages, plus costs.
- [2] In these reasons, I refer to the employee as having been dismissed even though the employment never began. In doing so I adopt the language of the parties, which seems to be a convenient entry into relevant authorities, remembering that employment law in any case is but a specialized field of the law of contract.
- [3] The main issue in the trial was which of two signed contractual documents applies as the operative contract between the parties. The first in time, referred to as the "Fixed-Term Contract", was prepared by a lawyer engaged by the employee to record the employment offer made to him by the employer, accepted by e-mail on August 7, 2015. The operating mind of the employer was Mr. Arora and Ms. Ali was, at the material time, the employer's sales manager. Mr. Arora and Ms. Ali met with Mr. Quach on August 25, 2015, and each signed the Fixed-Term Contract. This document described a one-year term of employment from October 1, 2015, to September 30, 2016, at an annual salary of \$138,000.
- [4] The second contract, entitled "Employment Agreement and Contract Waiver" referred to as the "Second Contract", was signed by the parties on September 28, 2015. It came into being after Mr. Arora sought legal advice regarding the Fixed-Term Contract, and asked the employee to agree to a month-to-month contract in its place. The employee resisted, and in doing so reminded Mr. Arora he had not been reimbursed \$1,000 for his preparation of the Fixed-Term Contract. Mr. Arora replied that he would reimburse the employee when he started work. On September 28, 2015, Mr. Arora advised the employee that he required a new contract to be in place before the employee started work. By then, the employee had left his secure previous employment. The employee signed the Second Contract later that same day. That document provided for month-to-month employment commencing October 1, 2015, terminable upon four weeks' written notice or payment of one month's salary in lieu of notice. On the employee's insistence, it included as a term:
- 5.6 Any failure to comply the terms [sic] of the Employment Agreement or misrepresentation by the Employer will void this Employment Agreement.
- [5] On September 30, 2015, Mr. Arora "terminated" the employment, offering reasons that the judge found did not constitute cause for dismissal.
- [6] The employee sued for damages for wrongful dismissal, basing his claim for damages on the Fixed-Term Contract. The employer, in response, alleged cause and advanced the Second Contract as the operative agreement between the parties.

- [7] In his reasons for judgment concerning the operative contract, the judge rejected the employer's two submissions that the Fixed-Term Contract was unenforceable by reason of non est factum and because the fixed-term provision was mistakenly included. The judge accepted the employee's submissions that the Second Contract failed for lack of fresh consideration. Alternatively, the judge found that the Second Contract was void on the basis that Mr. Arora had misrepresented his intentions to employ Mr. Quach and failed to comply with the terms of the Second Contract by not allowing the employee to begin employment on October 1, 2015, both contrary to clause 5.6 set out above.

Grounds of Appeal

- [8] The employer appeals from the order for damages and costs. It contends the judge erred:
1. in finding the \$1,000 payable to the employee as reimbursement of legal fees incurred in preparing the Fixed-Term Contract was not good consideration for the Second Contract;
 2. in determining that the employer had made a misrepresentation to the employee that voided the contract; and
 3. in awarding the employee aggravated damages.
- [9] To succeed in establishing the Second Contract as the operative agreement, the employer must succeed on both ground 1 and ground 2.

Discussion

- [10] It is useful to start with the scope of this court's appellate role. Our function is not to retry a case, but rather to determine whether the judge made a reversible error. In respect of errors of law, we must ask whether the judge was correct on the question of law posed. On questions of fact or mixed questions of fact and law, we must ask whether a judge made an obvious (palpable) and material (over-riding) error: *Housen v. Nikolaisen*, 2002 SCC 33.

Consideration for the Second Contract

- [11] It is a basic principle of contract law that consideration between parties is required to create a binding contract. There has been shifting of this principle in cases of variation of terms of the contract, discussed in *Rosas v. Toca*, 2018 BCCA 191. Rosas considered a series of informal arrangements to extend the time for payment of a debt, to the point that the limitation period on the original debt expired before an action was commenced seeking to recover it. Chief Justice Bauman, writing for the court, addressed the law of fresh consideration as it should apply to variations of existing contracts and concluded at para. 183:

- [183] When parties to a contract agree to vary its terms, the variation should be enforceable without fresh consideration, absent duress, unconscionability, or other public policy concerns, which would render an otherwise valid term unenforceable. A variation supported by valid consideration may continue to be enforceable for that reason, but a lack of fresh consideration will no longer be determinative.
- [12] Employment contracts, even where reduced to writing, rarely define the consideration for the contract. They are commonly devised so that the benefit (consideration) received by the employer is the services of the employee, and the benefit received by the employee is the pay and other emoluments flowing on performance of the duties. From time to time employment contracts, both written and oral, are modified. When that occurs, we may come to the issue as to which terms apply: those of the original agreement or those after modification. An example of an oral agreement subsequently modified to the disadvantage of the employee in a written agreement is *Singh v. Empire Life Ins. Co.*, 2002 BCCA 452. In *Singh*, Chief Justice Finch explained:
- [12] I am also of the opinion that the defendant cannot rely on those provisions of the subsequently signed Regional Manager's Agreement, which are less advantageous to the plaintiff than the terms of the original contract. In *Watson v. Moore Corporation Ltd.*, [1996] B.C.J. No. 525 (C.A.), a majority of the court held that continued employment, without more, could not amount to consideration. There was no evidence that forbearance to discharge the plaintiff could amount to consideration.
- [13] A similar conclusion was reached by the Ontario Court of Appeal in *Francis v. Canadian Imperial Bank of Commerce* (1994), 21 O.R. (3d) 75. The court affirmed the general principle that modification of a pre-existing contract will not be enforced unless there is a further benefit to both parties.
- [13] The judge relied upon *Singh* in reaching his conclusion that fresh consideration was required to solidify the Second Contract as a binding agreement. The effect of *Rosas* upon *Singh* (not referred to in *Rosas*) has not been addressed in this case. It seems to me that the import of *Rosas* may not change the authority of *Singh* in the nuanced world of employer and employee contractual relationships. Whether it does is an interesting question that can and should be left to another day because, in my view, the Second Contract presents much more than a *Rosas*-style variation in any event.
- [14] The nature of the Second Contract is exposed in its formal name "Employment Agreement & Contract Waiver". The name demonstrates that something more than employment is the subject of the agreement. That 'something more' is the cancellation of the Fixed-Term Contract. This Second Contract, then, is much more than variation of the Fixed-Term Contract. By the terms of the Second Contract, that first contract would come to an end and would be replaced by an arrangement favourable to the employer and unfavourable to the employee. Recognizing that this new contract bestows benefit on the employer, the Second Contract expressly contemplates consideration (benefit) to the employee for the

cancellation, in these words:

2.2 In consideration of the termination of the prior Employment Agreement, the Employer agrees to waive probationary requirements as set out by the Labour Standards of BC and will adhere strictly to the terms of Termination of Employment.

- [15] When analyzed carefully, however, this clause provides no consideration, although it pretends to do so. It may be that the reference to "probationary requirements" is a reference to the three month period during which, by s. 63 of the Employment Standards Act, R.S.B.C. 1996, c.113, an employee is not entitled to termination pay. Section 63, however, would not apply in the circumstances present here because the Employment Standards Act establishes a floor of standards, and does not interfere with higher standards resulting from the common law, or contracts of employment. In other words, the "consideration" spoken of in clause 2.2 of the Second Contract gives no benefit to the employee. Yet the contract contemplates a purported benefit to the employee for giving up the Fixed-Term Contract. It is to this point that the employer advanced the payment of \$1,000 as consideration capable of supporting the Second Contract.
- [16] The judge found that the mutual benefit required to form the Second Contract was not established. He said:
- [252] I do not find the defendants' promise to pay \$1,000 towards the plaintiff's legal bill for the drafting of the First Contract is consideration for the Second Contract. They are unrelated.
- [264] I find in the case at bar that the plaintiff received no further benefit from the Second Contract; in fact, he suffered the loss of the benefit of the Term provision, and its guarantee of employment for a term of one year, as he had over the first term under the Fixed-Term Contract, with nothing in exchange. Counsel for the plaintiff pointed out, aptly in my opinion, that the defendants, on the other hand, received a significant benefit because they were no longer liable to the plaintiff for damages over the first term.
- [265] There is a conspicuous difference in Mr. Quach's entitlement to damages on termination under the Fixed-Term Contract (12 months) and the second contract, (one month). I agree with the plaintiff that from a policy standpoint it would lead to an unrealistic and unfair result if the principles of fresh consideration did not apply in a situation where employment had not yet commenced but there was a subsequent contract that amended the initial expected terms of employment, as did the Fixed-Term contract.
- [17] The employer says the judge erred in his conclusions and that its commitment to pay \$1,000 to reimburse the legal fees incurred by the employee in creating the Fixed-Term Contract was sufficient benefit to the employee to create the Second Contract as a binding agreement. In support of that submission it refers us to the following cross-examination of the employee:

Q Now, one of your claims is that you have claimed that you are entitled to be reimbursed for a thousand dollars for the cost of drafting the first contract, correct?

A Yes.

Q And who told you that -- that that would be something you'd be entitled to?

A Mr. Arora.

Q When?

A When I was discussing with him about changing the contract again in late September, when he asked me to get the contract redrafted again by a lawyer and I told him that the first contract had already cost me a thousand dollars, where he had previously promised me that he would pay for that and still have done so.

Q I see. So that had never been discussed prior to the execution of the first contract, it was only discussed at the time of the second contract?

A That is correct.

Q Well, how much -- how long before the signing of the second contract did you agree that you'd be reimbursed for the \$1,000?

A The 1100 dollars?

Q Well, I'm just talking about the 1,000, for now.

A Okay, well, the 1,000 was probably made a few days or maybe a week before that.

Q But Jas said, "If you sign this contract, we'll make sure to reimburse you the 1,100 dollars even."

A If I sign this contract?

Q Yeah, if -- if you chan --

A No, it was --

Q -- if you change the contract that -- that you'd -- you'd certainly get your reimbursement.

A To change the contract.

Q Yes.

[18] The employee says the promise to reimburse \$1,000 was not good consideration because the evidence does not establish that the promise to pay was given in exchange for his agreement to the Second Contract. He denies that the portions of the cross-examination relied upon by the employer, read in the context of his entire testimony, establish that the promise to pay him \$1,000 was made in exchange for his signing the Second Contract. He refers us, also, to other passages of the transcript in which he describes a previous promise by the employer to reimburse him for his legal fees related to the Fixed-Term Contract, and adopts the judge's characterization of the evidence as "vague". Further, he says that the offer to pay \$1,000 was

illusory because the amount was not paid, although at trial the employer agreed that it owed him that amount. He also asks the court to draw an adverse inference from the absence of a plea of fresh consideration in the employer's amended response to civil claim, as it was written at the time of trial.

- [19] The question whether fresh consideration was provided to the employee as part of the "price" for the employer securing a more favourable contract with the employee is a question of fact, to which the deferential standard applies.
- [20] In my view, the judge accurately described the evidence on the issue of whether reimbursement is fresh consideration when he said it was "vague". Apart from the problem that "consideration" is referred to in the Second Contract, but not in the form of the \$1,000 payment consideration now posited as its basis, it is clear that the terms of the Second Contract were not settled when the employer offered to reimburse the employee \$1,000. It is equally clear that the sum of \$1,000 was not paid to the employee on signing the contract, or at any later time. Absent payment of \$1,000, or a commitment given in the Second Contract to pay it, any discussion of such a payment is fairly characterized as "vague". It was open, in my view, to the judge to find the employer had not established fresh consideration of \$1,000. I see no basis on which we may interfere with the judge's conclusion on this factual issue.
- [21] The Second Contract was premised upon the cancellation of the Fixed-Term Contract for consideration, but no consideration was provided. In these circumstances, I cannot say the judge erred in his conclusion in respect to the consideration issue.
- [22] In the result, I would not accede to this ground of appeal, and accordingly, the submission that the Second Contract governs the dispute cannot prevail.

Misrepresentation

- [23] The judge found, in the alternative to his conclusion that the employer had failed to establish fresh consideration for the Second Contract, that the employer's failure to allow the employee to commence his employment was a misrepresentation by the employer that voided the Second Contract pursuant to clause 5.6 replicated above at para. 4.
- [24] The employer contends the judge erred in this conclusion. Given my conclusion on the first ground of appeal, I will not address this ground in these reasons.

Aggravated Damages

- [25] The employer contends the judge erred in awarding \$15,000 as aggravated damages.
- [26] The circumstances in which aggravated damages may be awarded are described by Mr. Justice Goepel in *Cottrill v. Utopia Day Spas and Salons Ltd.*, 2018 BCCA 383, leave to appeal ref'd [2018] S.C.C.A. No. 533:

- [14] "It has long been accepted that a dismissed employee is not entitled to compensation for injuries flowing from the fact of the dismissal itself": *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701 at para. 103. While the loss of a job is very often the cause of injured feelings and emotional upset, the "normal distress and hurt feelings resulting from dismissal are not compensable": [*Honda Canada Inc. v. Keays*, 2008 SCC 39] at para. 56.
- [15] Ms. Cottrill argued that unfairness in the manner of dismissal was sufficient in itself to ground an award for aggravated damages. The authorities do not support that proposition. An award of aggravated damages resulting from the manner of dismissal requires: (a) a finding that an employer engaged in conduct during the course of dismissal that was unfair or in bad faith, and (b) a finding that the manner of dismissal caused the employee mental distress: *Honda* at para. 59.
- [Emphasis in original]
- [27] On the reasoning in *Honda*, not all mental distress from the fact of dismissal attracts an award of aggravated damages - the plaintiff is required to establish something well beyond the normal distress and hurt feelings that invariably accompanies loss of employment. As Mr. Justice Savage explained in *Lau v. Royal Bank of Canada*, 2017 BCCA 253 at para. 49, referring to *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, and *Saadati v. Moorhead*, 2017 SCC 28, testimony showing a "serious and prolonged disruption that transcended ordinary emotional upset of distress" may constitute a sufficient evidentiary foundation but "the demeanor of the plaintiff in the witness stand" is an insufficient basis for a finding of the requisite distress.
- [28] The judge in the present case found both of the Cottrill conditions were present. The employer, on appeal, does not dispute the judge's finding of bad faith. Its challenge to the award is directed to the second condition - that the manner of dismissal caused the employee mental distress.
- [29] Having found that the employer's behaviour during the dismissal satisfied the criterion of bad faith, the judge summarized the effects of the dismissal on the employee:
- [317] I found credible Mr. Quach's testimony regarding the "devastation" he felt, feeling like a complete failure; the stress and anxiety he felt. As he put it, he had been fired from a job he had not even started. As I related earlier in these reasons, he had a baby coming, financial obligations, in-laws moving to live at his home and no other source of income. I find Mr. Arora knew Mr. Quach's situation and despite promises Mr. Quach would keep his employment, ignored his situation.
- [30] The judge then observed that the employee had found new employment quickly, and awarded what he said was an amount at the low end of the range of aggravated damages - \$15,000, concluding with this description of the employer's conduct:
- [329] The defendants' conduct was spiteful and deserving of compensation to the plaintiff.

[31] The points that follow the judge's description in his para. 317 of the "devastation" attested to by the employee are the employee's life circumstances at the time of the dismissal, and in the normal course are not matters that will increase damages. Rather, the question in this aspect of the aggravated damages analysis is the impact of the termination on the employee and his mental state, as to which the judge says little. Although he quotes the word "devastation" and refers to the employee's stress and anxiety, there is no indication that the employee's feeling of strong dismay and anxiety for himself and family was beyond the "normal distress and hurt feelings" that are not compensable. On the contrary, there is considerable evidence that he recovered quickly from his loss of the position. For example, the record shows that the employee was at least partially prepared for the possibility he would lose his job; he had already sought out other employment opportunities, and because of that anticipatory search, he found new employment soon after he learned he would not be starting work with the employer. So too, the employee's frank exchanges with Mr. Arora, quickly corresponding with Mr. Arora and saying that he would "see [Mr. Arora] in court", demonstrate a sturdy response to the "dismissal".

[32] I conclude that as in Cottrill at para. 18, the record "falls well short of the legal standard that requires a serious and prolonged disruption that transcends ordinary emotional upset or distress." While the judge was entitled to factor his view on the employer's "spiteful" behaviour into the first condition (bad faith) for aggravated damages, evidence of more than the normal transitory dismay, stress and anxiety is required to satisfy the second condition of the test for aggravated damages. Here the quality of the employee's response does not equate to the sort of mental distress required for this exceptional remedy.

[33] I conclude the award for aggravated damages must be set aside.

Mitigation of Damages

[34] The Fixed-Term Contract, which governs the parties, provides:

4.1 The parties understand and agree that the Employee's employment pursuant to this agreement may be terminated as follows:

- (a) By the Employee, at any time, for any reason, on the giving of four weeks written notice to the Employer;
- (b) By the Employer, in its absolute discretion, at any time, on the giving of written notice to the Employee at which time payment of the full balance of the compensation due to the Employee for the entire First Term or Second Term as the case may be will become due and payable within two weeks of such notice of termination. For greater clarity, the Employer shall pay to the Employee, all compensation due to the Employee at the date of termination as well as all compensation due to the Employee from the date of termination through to the expiration of the First Term or Second Term as the case may be.

- [35] The judge made no deduction for mitigation of damages through post-dismissal earnings, relying upon *Howard v. Benson Group Inc. (The Benson Group Inc.)*, 2016 ONCA 256, leave to appeal ref'd [2016] S.C.C.A. No. 240. Howard was a case of a fixed-term contract that did not contain a notice period provision determining the employer's obligations upon termination. The court in Howard applied the court's earlier case, *Bowes v. Goss Power Products Ltd.*, 2012 ONCA 425, and said at para. 22 that "if the parties to a fixed term employment contract do not specify a pre-determined notice period, an employee is entitled on early termination to the wages the employee would have received to the end of the term". This conclusion in Howard extends Bowes, a case of a contract with a fixed notice period provision that provided for payment in lieu. In Bowes, the court held at para. 30 that the amount agreed upon should be treated as "liquidated damages or a contractual amount".
- [36] The leading authority in British Columbia in a Howard sort of situation, however, is *Neilson v. Vancouver Hockey Club Ltd.* (1988), 51 D.L.R. (4th) 40, (B.C.C.A.), not referred to in either Howard or Bowes. Rather than approaching the damages issue from the singular question whether the contract is for a fixed term, as Howard does, Neilson distinguishes between a fixed-term contract without a termination clause and a contract with a termination clause providing for payment of a fixed amount. Observing that employment law is governed by the law of contract, Mr. Justice Seaton in Neilson closely analyzed the status of the contract once the employee is refused continuing employment. He observed that the employee's action then is for damages, not remuneration, and that the employee is not entitled to treat the contract as subsisting. Justice Seaton then turned to the issue of mitigation. Without resolving whether there is a duty to mitigate, an issue on which there are conflicting authorities based on competing theories, Justice Seaton concluded that unless the contract provides otherwise, the employer derives the benefit of mitigation, even in a fixed-term contract. For this conclusion, he relied on *Cockburn v. Trusts & Guar. Co.* (1917), 55 S.C.R. 264, 37 D.L.R. 701, which held at 703 that even where an employee is under no duty to mitigate, "the actual diminution of his loss may be taken into account". After referring to *Br. Westinghouse Elec. & Mfg. Co. v. Underground Elec. Ry. Co. of London*, [1912] A.C. 673 (H.L.), Justice Seaton stated the general principle that applies in British Columbia:
- [14] On this question I conclude that whether or not the plaintiff was bound to mitigate is irrelevant. He cannot recover for avoided loss in any case.
- [37] At the same time as stating the general principle applicable to contracts that do not have fixed provisions for termination, Justice Seaton recognized that the parties can agree to a term that compels a different result on the effect of mitigating earnings, referring to a contract that "may provide otherwise".

- [38] Neilson has been followed by this court in *Mosher v. Epic Energy Inc.*, 2001 BCCA 253, and *Alsip v. Top Rollshutters Inc. dba Talus*, 2016 BCCA 252. In addition, Neilson was relied upon by Justice Major in *Wells v. Newfoundland*, [1999] 3 S.C.R. 199 at para. 65, for the proposition that in a contractual claim, whether arising from a fixed-term contract or not, the usual rules of mitigation of damages apply.
- [39] The result of these authorities, in my view, is that in British Columbia, on the authority of Neilson, the fixed-term nature of a contract does not entitle the employee to damages in the full amount of unpaid wages for the balance of the term without deduction of monies earned elsewhere during the term, absent a provision otherwise. In this way Neilson is at odds with Howard but not Bowes.
- [40] I mention all of this lest the judge's reference to Howard, and our silence on it, be taken as agreement with the conclusion that in all cases of fixed-term contracts, mitigation of damages may not be considered. Instead, I suggest the jurisprudence is to the effect that consideration of mitigated damages will depend on the particular termination provisions of the contract at issue.
- [41] In this case, of course, the contractual language in clause 4.1(b) expressly establishes the amount of the payment owing to the employee by the employer immediately upon termination of the employment by the employer. For that reason, and applying the notion of "otherwise provided" allowed in Neilson, the judge's conclusion that the employee is entitled to damages equal to one full year of earnings provides the correct remedy under the Fixed-Term Contract.

Disposition

- [42] I would allow the appeal to the extent only of setting aside the award of aggravated damages.

"The Honourable Madam Justice Saunders"

I agree:

"The Honourable Mr. Justice Harris"

I agree:

"The Honourable Mr. Justice Hunter"

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Prepared on 28 October 2026 · Esheria