

CANADA / JUDGMENT

Wachsmann v. Valley Christian School Society

2001 BCSC 1789

COURT

Supreme Court of British Columbia

DECIDED

31 December 2001

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2001 BCSC 1789 Docket:

SO12420

Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

WIN WACHSMANN
PLAINTIFF

AND:

VALLEY CHRISTIAN SCHOOL SOCIETY
DEFENDANT

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE HUTCHINSON

Counsel for the plaintiff: R.A. Finlay

Counsel for the defendant: D. MacAdams, Q.C.

Date and Place of Hearing: 7 December 2001

Vancouver, BC

- [1] The plaintiff was employed by the defendant as a Development Director. He was appointed for a one-year term, commencing 13 September 1999, and his special areas of interest were public relations and fundraising. The letter confirming his appointment stated:

Please consider this as a letter of appointment to the position of Development Director. Although this is not a formal contract, it is a continuing appointment with a built-in formal review at the end of the first year of service. Thus, the term is for one year, with the option of continuing past the end of that first year.

On 5 July 2000 the principal of the school reported to the Board of Directors that the plaintiff had fulfilled his responsibilities satisfactorily, and concluded by saying " . . . I recommend that he be given a second one year contract." The Directors approved the recommendation on 28 August 2000, and the plaintiff was informed of that decision.

[2] On 29 September 2000 the school administration and the plaintiff received a complaint from the school librarian of sexual harassment. The plaintiff was suspended with pay, and then reinstated by the Board of Directors on 17 October 2000 on certain conditions. His salary was not reduced, but he was informed by letter as follows:-

. . . the will of the board is to not renew your contract following this current contract year (September 2000 to August 2001)

[3] The school had experienced reduced enrolment, and was undergoing financial difficulties. On 27 September 2000 the plaintiff and all staff members were informed their salaries would be reduced by 10%. In addition, the plaintiff was told that his position would be reduced from full-time to four days a week (i.e. by 80%) and his pay would be reduced by a further 20%. This amounted to a total reduction of \$525 per paycheque. These steps were taken without consultation with the employees, some of whom complained. The Board received legal advice to the effect that the 10% rollback breached each employee's contract of service. On 15th December 2000 the Board restored to each employee, including the plaintiff, the 10% rollback, and invited them to forgo the money deducted as a donation.

[4] The plaintiff's paycheque was now \$425 per month less than the contract amount; the plaintiff hoped the financial difficulties would be resolved, but hearing nothing further he wrote to the Chairman of the Board on 9 February 2001 asking his salary be restored in full, that he be paid in full for the 20% reduction; he also asked that the 10% deduction from 1 October to 15 December 2000 be repaid.

[5] The response from the Board was immediate. It was contained in two letters dated 13 February 2001. In one he was terminated on the grounds that the defendant could no longer afford to pay him; he was given two weeks notice. In the other, the Board informed him the defendant would not reimburse him retroactively for full-time work as his position had been reduced to a part-time position, so no money was owing. It is common ground that the reduction of hours and the termination of his employment were not for cause.

[6] The issues are:

1. Could the plaintiff be terminated on two weeks notice or did he have the right to be paid in lieu of notice to the end of his contract year i.e. 13 September 2001?

2. Did the defendant wrongfully withhold 20% of his pay from 1 October 2000 to 28 February 2001?
3. Is the plaintiff entitled to recover the 10% deducted from 1 October 2000, to 15 December 2000?
4. Is the plaintiff entitled to \$900 for lost benefits?
5. Is the plaintiff entitled to greater notice by reason of the way he was terminated?
6. Did the plaintiff mitigate his loss?

1. Notice

[7] The plaintiff was employed for a one-year term with the option of continuing past the end of that year. His performance was reviewed and the Board decided in August 2000 to renew the contract for a second year. He was notified of that fact, and started his second contract on 13 September 2000. His salary was set annually (\$51,000) and it was in his mind, as well as that of the Board, that he had been given "a second one year contract." He started to work on that basis, which was not changed despite the allegations of harassment.

[8] The law is clear that in the case of a fixed term contract an employee dismissed without cause is entitled to recover damages for loss of income for the balance of the term of the contract. See *Canadian Ice Machine Co. Ltd. v. Sinclair* [1955] S.C.R. 777 at 781; I find this was a fixed term contract that was to expire on 13 September 2001, so the plaintiff is, *prima facie*, entitled to \$27,625 being the amount due from 1 March 2001 to 13 September 2001, subject to a deduction for income that he earned or should have earned in mitigation.

[9] In argument the defendant said the words in the original letter of employment that "this is not a formal contract" takes it out of the fixed term category. I disagree: the review process and the offer of a second one year contract is unambiguous, and indicates a desire by the plaintiff and the defendant to be contractually bound for another year. I find that contract existed regardless of whether it was formally enshrined in a document.

2. Did the defendant wrongfully withhold 20% of the plaintiff's?

[10] The defendant argued that the plaintiff acquiesced in the decision to reduce his hours and salary by 20%: he accepted the change. The law does not support the defendant's position. In *Rahemtulla v. Vanfed Credit Union*, [1984] 3 W.W.R. 296 McLachlin J. (as she then was) said at 304:

... Communication of assent cannot be inferred from the fact that the plaintiff continued to work after being given the manual. She had contracted to work for the defendant prior to receiving the manual. The fact that she continued to fulfil this obligation after being given the manual cannot be taken as an assent to its terms.

In *Hill v. Peter Gorman Ltd.* (1957), 9 D.L.R. (2d) 124 Mackay J.A. said at 131:

I am respectfully of the opinion that it cannot be said as a matter of law, that an employee accepts an attempted variation simply by the fact alone of continuing in this employment. Where an employer attempts to vary the contractual terms, the position of the employee is this: he may accept the variation expressly or impliedly in which case there is a new contract. He may refuse to accept it and if the employer persists in the attempted variation the employee may treat this persistence as a breach of contract and sue the employer for damages, or while refusing to accept it he may continue in his employment and if the employer permits him to discharge his obligations and the employer makes it plain he is not accepting the variation, then the employee is entitled to insist on the original terms I cannot agree that an employer has any unilateral right to change a contract or that by attempting to make a (sic) such a change he can force an employee to either accept it or quit.

[11] The plaintiff in this case finally raised this matter in a letter dated 9 February 2001, nine weeks after the defendants had decided its 10% roll back was unlawful. I find that by waiting a reasonable time, then raising the issue directly in a letter does not amount to acceptance or acquiescence. I conclude the plaintiff is entitled to recover 20% of his pay that was unilaterally withheld from 1 October 2000 to 28 February 2001 amounting to \$4,250. (\$425 for 10 pay periods).

3. Is the plaintiff entitled to recover 10% of his pay withheld from 1 October 2000 to 15 December 2000?

[12] The restoration of the 10% rollback from 1 October to 15 December 2001 is in a different category. The plaintiff was invited to indicate his decision in an inter-office memo sent to all employees regarding the 10% rollback. He varied the form by stating:

I am asking for a return to my full paycheque (without retroactive pay to the beginning of October).

[13] In his affidavit he said he expected the defendant to provide him with a receipt for that amount that he could use for tax purposes. He does not state in his affidavit how he communicated that request to the defendant: it is not contained in the form he returned to the principal, nor did he in an affidavit swear to any communication he had with the principal or other members of the administration. He did raise that issue in his letter of 9 February 2001, but I find this is inconsistent with the note he wrote. The defendant is entitled to rely on the plaintiff's note to refuse to pay the 10% rollback retroactively from 1 October to 15 December.

4. Lost Benefits

[14] In the letter of employment of 13 September 1999 the plaintiff was told his "base salary" was \$51,000. He was asked to contact the bookkeeper to become acquainted with the benefits package. From 13 September 1999 he was provided with life insurance, medical, dental and pension benefits paid for in whole or in part by the defendant. The details of this benefit package was not in evidence; the defendant did not disagree that the cost to the plaintiff for

this coverage would be \$150 per month or \$900 in total. The defendant took the position it was not a part of the contract of employment so could not be recovered, as all those payments had been made gratuitously.

- [15] The letter of employment suggested he become acquainted with the benefits package from which I infer it was included in the contract. The defendant then made payments on the plaintiff's behalf for the first year of employment and continued the payments into the second year. Both parties acted on that understanding, and the payments were recorded in the statements given the plaintiff with his paycheques. I find the conduct of the parties over that period is evidence of an implied agreement he would receive those benefits. Under this head I find he is entitled to \$900 for the cost of replacing the portion of those benefits paid by the defendant.
5. Did the manner of dismissal entitle the plaintiff to greater damages or longer notice?
- [16] The plaintiff argued that the circumstances of the plaintiff's dismissal entitles him to longer notice, in effect giving him more damages. The basis of this claim is to be found in *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701. That case concerned an indeterminate contract of employment of a salesperson who had been encouraged by the defendant at the age of 45 to leave a secure position with another firm. He was top salesperson with the defendant for 14 years when he was summarily dismissed at the age of 59. The majority of the Supreme Court of Canada found there is an obligation on the part of an employer to be reasonable, honest and forthright in the course of dismissal, and should refrain from conduct that is in bad faith or unfair.
- [17] With an indeterminate contract of employment the court exercises its discretion to determine the length of reasonable notice; usually a range is canvassed by the parties which takes into account many factors such as ability, length of service, inducements, and vulnerability at the time of dismissal. The Supreme Court approved an award in the high range where the defendant has acted in bad faith or has been unfair, effectively penalizing the defendant and giving the plaintiff greater compensation for the manner of dismissal.
- [18] I find those issues do not arise here. The plaintiff had been told on 17 October 2000 that the Board of Directors would not renew his contract after that school year concluded in August 2001; his term was fixed and had been subject to review before renewal. Had his contract been indeterminate, based on his age, length of service, skills, prospects of re-employment and conduct as an employee it is most improbable that a court would have found as much as six months to be the optimum length of notice, even if bad faith or unfairness were proven.
- [19] I conclude the fact that he was dismissed four days after he asked to be reimbursed for the 20% deducted from his pay is too great for mere coincidence, and it is linked to the cause of his dismissal. If the plaintiff had only been entitled to two weeks notice, as the defendant believed, then the manner and effect of his dismissal would have had a bearing on the length of notice. However, he had the protection of the fixed contract which I find provides him with generous and fair damages and amply compensates him for the manner in which

he was dismissed. The claim for greater damages or on notice is disallowed.

6. Mitigation

[20] The defendant argues that the plaintiff failed to mitigate his loss after he was dismissed, and the damages should be reduced. The burden is on the defendant to establish this allegation.

[21] Before becoming employed by the defendant the plaintiff was self-employed. In 1999 he declared \$15,463.46 as total employment income, and after expenses declared a net income of \$7,767.09. His gross and net income increased dramatically when employed by the defendant. He continued to derive an income from extra-curricular activities during his employment with the defendant, but he also incurred expenses to do so. According to defence counsel he generated \$8,236.56 from self-employment from March to September 2001 and this should be deducted from the award. Plaintiff's counsel points out that this figure excludes his expenses, and that this income was part of his normal extra curricular activity that he carried on while employed by the defendant.

[22] The plaintiff's 2001 tax returns were not in evidence. His records showed expenses for 2000 of \$14,849.39 and income from his private business interests at \$18,759.70, leaving a net income of a little under \$4,000. His figures for 2001, which are only complete to October 2001, show income of \$10,674.42 and expenses of \$11,400 resulting in a net loss. The affidavit material and the extracts from the examination for discovery do not advance the defendant's argument further. I find the defendant has failed to discharge the onus on it to prove the plaintiff has failed to mitigate his loss.

SUMMARY

[23] The plaintiff will be afforded the following relief:

1. Damages for breach of contract

\$27,625.00

2. Reimbursement of 20% of pay withheld from 1 October to 15 December 2000

4,250.00

3. Cost of benefits terminated from 1 March to 31 August 2001

900.00

4. Interest on the above sums at the rates set by the Registrar under the Court Order Interest Act.

5. Costs on scale 3.

"R.M.J. Hutchinson, J."

The Honourable Mr. Justice R.M.J. Hutchinson

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