

CANADA / JUDGMENT

Wells v. Patina Salons Ltd.

2003 BCSC 1731

COURT

Supreme Court of British Columbia

DECIDED

17 November 2003

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2003BCSC1731

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Wells v. Patina Salons Ltd.,

2003 BCSC 1731

Date: 20031117

Docket: S026495

Registry: Vancouver

Between:

Jeanette Wells

Plaintiff

And

Patina Salons Ltd.

Defendant

Before: The Honourable Madam Justice Satanove

Reasons for Judgment

Counsel for the Plaintiff:

Thomas G. Keast

Counsel for the Defendant:

Harvey Oreck

Dates and Place of Trial:

October 22 and 23, 2003

Vancouver, B.C.

- [1] The plaintiff immigrated to Canada in 1977 to work as a nanny. However, she had been trained in England as an esthetician and when the opportunity arose she accepted employment in that field.
- [2] In 1989, she went into partnership with Dr. Franzblow, for whose family she had worked as a nanny. They incorporated the defendant company, Patina Salons Ltd., and opened a full-service beauty salon on West 11th Avenue in Vancouver.
- [3] Dr. Franzblow contributed the financial support to the business and the plaintiff contributed her expertise and performed the day-to-day management of operations. Initially, she held 25% of the shares of the defendant and Dr. Franzblow held 75%. Later this became an equal shareholding arrangement.
- [4] In December 2000, the defendant opened a second location on West 4th Avenue. This turned out to be a costly move and the defendant's financial situation deteriorated. In February 2002, Dr. Franzblow purported to terminate the plaintiff's employment, alleging that her mismanagement had caused the defendant's precarious financial position.
- [5] One could query how one 50% shareholder could cause a corporation to dismiss another 50% shareholder. One could also query why the plaintiff brought this claim for damages for breach of an employment contract instead of seeking a shareholder's remedy. Nevertheless, the statement of claim is pleaded as a conventional claim for wrongful dismissal wherein the plaintiff pleads an employment contract and seeks damages for breach of contract together with damages for the manner in which she was terminated.
- [6] The statement of defence does not deny the existence of the contract except to state that it was oral and remuneration was to be based on the business's success. The defendant did not plead just cause, but did refer to facts that could support a plea of just cause. The original statement of defence contained no plea of failure to mitigate.
- [7] Neither party conducted examinations for discovery nor did they attempt to amend the pleadings until the first day of trial. At trial, the defendant's new counsel sought to abandon the facts relating to just cause and conceded that the defendant owed the plaintiff a reasonable notice period. He also sought to add a plea of failure to mitigate. I allowed both amendments.

- [8] Notwithstanding that the case was pleaded to deal with the employment issues only, it was complicated by both sides raising the shareholder's dispute. The plaintiff relied on the dispute as an aggravating factor entitling her to increased notice and the defendant endeavoured throughout to characterize their relationship as one of joint venture rather than one of employment.
- [9] For obvious reasons, I have approached the case as one for wrongful dismissal.

Notice Period

- [10] The defendant concedes that the plaintiff worked long and hard during her 12 years as the defendant's manager. The defendant abandoned any allegations of incompetence. In the defendant's submission, the factors in *Ansari v. British Columbia Hydro and Power Authority* (1986), 2 B.C.L.R. (2d) 33 (C.A.) suggest that a 12 month notice period would be reasonable.
- [11] The plaintiff submits that she should have received between 12 and 15 months notice based on her age, length of service, level of responsibility and the fact that "she was the business".
- [12] Ordinarily, I would have found 12 months to be adequate notice but I think because the plaintiff managed every aspect of the defendant's day-to-day operations, including maintaining customer relations and overseeing the construction of the second premises, she deserved 14 months notice.

Extended Notice Period

- [13] The plaintiff claims an additional three months of notice for the manner in which she was terminated and the defendant's subsequent conduct. This part of the claim is based on the fact that Dr. Franzblow purported to exercise a right to purchase the plaintiff's shares for \$1 and then simultaneously caused the defendant to terminate the plaintiff's contract of employment without warning. Dr. Franzblow apparently also told the plaintiff that she could not go back to the premises and that there would be a security guard to prevent her from doing so.
- [14] As further grounds for a prolonged notice period, the plaintiff points to the defendant's failure to pay her minimum severance, to give her vacation pay for the years 1999 and 2000, or to provide her with a record of employment, all of which the plaintiff says is a breach of the Employment Standards Act, R.S.B.C. 1996, c. 113. Finally, the plaintiff relies on the fact that the defendant alleged cause for termination right up to trial and then abandoned that allegation.

- [15] In certain circumstances, some of these factors might warrant damages based on an extension of the notice period, but not in this case. Counsel for the defendant cited my decision in *Chaffee v. Columbia Dodge (1967) Ltd.*, [2000] B.C.J. No. 340 (S.C.) (Q.L.), wherein I said an extension of a notice period based on the principles in *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701, has at its heart a finding that the plaintiff has suffered some form of mental distress.
- [16] There was no objective evidence that the plaintiff suffered any mental distress other than the usual disappointment and anger at being dismissed from a job. The termination took place in a private meeting to which the plaintiff's husband had been invited. Although there may have been tension, there was no evidence of any aggression or inappropriate behaviour. The shareholder's agreement arguably allowed Dr. Franzblow to take the position he did. The plaintiff was offered six month's wages in lieu of notice, which was in excess of the minimum amount under the Employment Standards Act. As discussed below, the plaintiff was not entitled to vacation pay for 1999 and 2000. The plaintiff did not need a record of employment and her complaint to the Employment Standards Branch concerning the defendant's failure to issue such a record hints of mischief.
- [17] The plaintiff fails in her claim for an extended notice period.

Mitigation

- [18] The defendant submitted that the plaintiff had not tried hard enough to find alternate employment and when she did find another job, she sacrificed remuneration for convenience by choosing to work as a part-time esthetician close to where she lived.
- [19] The plaintiff testified that she looked for a position as a spa manager but nothing was available. She searched the newspapers and spoke to people she knew in the industry. At the end of May she was offered her present position working three days a week, which she accepted. She did not start until July 2002 and in December she left on maternity leave. She returned to work one day a week in April 2003 and then three days a week starting in June 2003. She travelled to England for five weeks during the summer of 2003 and since then has worked three or four days a week.
- [20] It is trite law that the onus is on the defendant to prove failure to mitigate and that the plaintiff need only make reasonable efforts to find comparable work. In all the circumstances, I am satisfied that the plaintiff's efforts to find re-employment were reasonable.
- [21] There was also an issue of whether the plaintiff's maternity leave interrupted the notice period or whether the notice period ceased at that point. Madam Justice Allan discussed this issue in *Whelehan v. Laidlaw Environmental Service Ltd.* (1998) 55 B.C.L.R. (3d) 129 (S.C.). In that case, the plaintiff was on maternity leave when the defendant gave her notice of termination, but in my view the same reasoning should apply. Pregnant women are entitled to take a leave of absence from their jobs in order to accommodate childbirth and they are

also entitled to an assurance that their job is secure during their absence. This policy of protecting women from penalties in the workplace due to pregnancy would be defeated if an employer could include maternity leave as part of a notice period.

- [22] Thus, I find that the plaintiff's notice period should be 14 months exclusive of the time she was on maternity leave.

Holiday Pay

- [23] The plaintiff claims that at the time of her termination the defendant owed her \$4,731 on account of five week's vacation she did not take (two weeks in 1999 and three weeks in 2000). In his submissions, counsel for the plaintiff relied on the provisions of the Employment Standards Act, particularly sections 57 and 58, to support this claim.
- [24] The decision in *Sitka Forest Products Ltd. v. Andrew* (1988), 32 B.C.L.R. (2d) 62 (S.C.) following *Vanderhelm v. Best-Bi Food Ltd.* (1967), 65 D.L.R. (2d) 537 (B.C.S.C.) stands for the proposition that an employee who seeks the benefit of annual vacation pay pursuant to the Employment Standards Act is confined to seeking redress by and through the machinery of the Act. The Act does not confer upon her an independent civil remedy. Where a statute confers upon a person a right which is not available at common law, and provides a particular mode of enforcing this right, the remedies provided by the statute are intended to be the sole remedies available to individuals who have suffered by reason of a breach of the statute.
- [25] Thus, unless the plaintiff can show that it was a term of her employment contract that she receive vacation pay, she cannot make a claim for vacation pay in the context of this wrongful dismissal action. The evidence at trial was insufficient to establish that holiday pay was a term of the oral employment contract between the plaintiff and defendant. I note in passing that where the entitlement to vacation pay is a term of the contract, there is authority that an employee in a senior management position is not entitled to "bank" vacation pay over the years and demand payment on termination (*Annett v. Electrohome Ltd.*, [1979] O.J. No. 57 (H.C.) (Q.L.)).

Reimbursement for Expenses

- [26] The defendant conceded that it owed the plaintiff \$4,181 as reimbursement for expenses and claimed a set-off of \$3,939.41. However, the defendant called no evidence and the plaintiff refused to concede any amount was owing by her to the defendant. Therefore, the claim for set-off was not made out.

- [27] The plaintiff's wages at the time of termination were \$4,100 per month. This equates to \$57,400 damages in lieu of notice. Her income tax records indicate that she earned income during that period as a part-time esthetician. She also admitted in cross-examination that she did not declare her tips and that a good, full-time esthetician could earn between \$1,000 and \$1,500 per month in tips. Accordingly, I impute extra income of \$500 per month while she was working at The Sanctuary in Deep Cove.
- [28] Counsel did not provide me with the actual amount of earnings of the plaintiff during the notice period as extended by the maternity leave which should be deducted from the award of damages. Counsel will need to make their own calculations. If they cannot agree they may appear before the Registrar for an accounting of the commissions and tips the plaintiff earned during the notice period which should be deducted from the \$57,400 awarded in lieu of notice. Five weeks' worth of wages should also be deducted to reflect the time that the plaintiff was in England.

Costs

- [29] The parties made no submissions as to costs. Subject to the Rules of Court, the plaintiff is entitled to her party/party costs on Scale 3.

"D.A. Satanove, J."

The Honourable Madam Justice D.A. Satanove

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