Docket No.: CA 164674
Date: 20010214

NOVA SCOTIA COURT OF APPEAL

[Cite as: *Burton v. Howlett*, 2001 NSCA 35]

Bateman, Chipman and Saunders, JJ.A.

BETWEEN:

SANDRA J. HOWLETT

Appellant

- and -

DIANNE MARGARET BURTON

Respondent

REASONS FOR JUDGMENT

Counsel:	W. Bruce Gillis, Q.C., for the appellant Patrick J. Saulnier, for the respondent
Appeal Heard:	January 25th, 2001
Judgment Delivered:	February 14, 2001
THE COURT:	The appeal is dismissed per reasons for judgment of Saunders, J.A., Chipman and Bateman, JJ.A., concurring.

SAUNDERS, J.A.:

[1] This appeal is taken by an employer who was ordered to pay damages to a woman she engaged as a nanny for her four young children. After a two-day trial in April, 1999, Justice Hall of the Nova Scotia Supreme Court reserved judgment and by written decision filed July 7, 1999, ordered Dr. Howlett to pay $30,666.00 for breach of contract, less a sum for rent to be calculated by counsel for the period of time that Ms. Burton remained in an apartment attached to Dr. Howlett's house after her dismissal.

[2] Ms. Burton worked for Dr. Howlett during two periods of employment. The first engagement lasted 39 months, from January, 1989 through April, 1992. The second engagement, out of which this law suit and appeal arises, was, by written contract, to run from April 1, 1994, through September 1, 1997 - a period of 42 months.

[3] Dr. Howlett first hired Ms. Burton in January, 1989, as a nanny/babysitter for her young children. Their employment relationship continued until Dr. Howlett summarily dismissed Ms. Burton in April, 1992. After Ms. Burton's termination, Dr. Howlett went through five nannies, each one working for only a few months.

[4] Two years later, Dr. Howlett sought out Ms. Burton with an offer to come back to work as nanny to her children. Ms. Burton was reluctant, vividly recalling her summary dismissal and soured relationship with the appellant in 1992. If she were ever to return to work again, she insisted on a signed written contract for a fixed term. The appellant drafted the contract and it was duly executed and witnessed by the parties.

[5] Dr. Howlett required that Ms. Burton live in the apartment attached to the appellant's new house. Ms. Burton agreed and had to relocate from Kingston to the appellant's home in Middleton in order to take the job.

[6] On February 23, 1995, the respondent was summarily dismissed by the appellant. Following Ms. Burton's termination, Dr. Howlett, who until that time conducted her chiropractic practice at an office in Kingston, renovated the apartment vacated by Ms. Burton and began operating her chiropractic practice out of that space attached to her house.

[7] Justice Hall found that the appellant had failed to prove just cause and awarded damages to Ms. Burton for the unexpired portion of their contract. Hall, J. also found that Ms. Burton had made insufficient efforts to find alternative work within the employment period set out in the contract. Accordingly, he reduced the damages to which she would have otherwise been entitled by one-third.

[8] The appellant raises four alleged errors, on the basis of which we are urged to either order a new trial or vary the damages awarded to favour the appellant.

[9] I will consider the errors alleged by the appellant in the same order in which they were addressed during argument.

Did the Learned Trial Judge err in law by refusing to permit the Appellant to introduce in evidence at trial the Discovery transcript of the Respondent contrary to the provisions of Rule 18.14(1)(b)?

[10] Mr. Gillis, counsel for the appellant concluded his case with this exchange to the court:

> **MR. GILLIS:** I don't propose to call any more witnesses, Your Honour, but I would propose to submit, and I was trying to find the significant parts, and I can't do it, so I'm going to propose to submit all of the discovery.
>
> **THE COURT:** No, I won't receive all of the discovery. You want me to look at some parts of it, you want to make part of your case, I will certainly receive that. I am not going to receive a whole discovery transcript, wholus bolus, as part of the evidence.
>
> **MR. GILLIS:** Well, My Lord, the reason I'm suggesting this, is because it's very difficult to pick out any particular page
>
> **THE COURT:** Well, if you can't pick it out
>
> **MR. GILLIS:** Or any part that, that, in the context of what else is beside it, doesn't prove the point that I'm tr, I'm attempting to prove, which is, the question of the, this is all based on credibility, of course. The major issue here is credibility of the two primary witnesses. Uh, throughout the

> discovery, it's my contention that Ms. Burton was; well, actually, I don't want to put the whole discovery because **(words not made out)**
>
> **THE COURT:** You had her on the witness stand. You cross-examined her.
>
> **MR. GILLIS:** I'm sorry?
>
> **THE COURT:** You had her on the witness stand. You cross-examined Ms. Burton?
>
> **MR. GILLIS:** Yes?
>
> **THE COURT:** You had the discovery transcript available to you at the time and I think you did, did you not, cross-examine her some on the discovery transcript?
>
> **MR. GILLIS:** On, some on each of the discoveries, yes, there were two.
>
> **THE COURT:** And uh, if there's some particular part of her discovery evidence you want, you consider relevant and pertinent, that you want to put before the Court as part of your case, certainly the Court has to receive it. But I certainly am not going to just receive a discovery transcript in its entirety as part of the evidence. (Appeal Book Vol. 1 - Part 11 pp. 455-56) (Underlining mine)

[11] Besides a vague reference to "inconsistencies" and "credibility", counsel was not particularly helpful in explaining to Hall, J. exactly why the entire discovery transcript should be received into evidence.

[12] It appears counsel may not have taken the time to carefully extract from the entire transcript those particular portions pertinent to his theory of the case and ultimately changed his mind, preferring to leave the entire discovery transcript with the trial judge to read later. I can well understand that Justice Hall would not warm to that proposal.

[13] Nevertheless, I find that Hall, J. did err when he refused to permit Mr. Gillis to introduce the whole of the plaintiff's discovery transcript at the conclusion of the defendant's case. However, his refusal does not constitute reversible error

because the credibility of Ms. Burton was not essential or critical to Justice Hall's determination that Dr. Howlett had not made out a defence. Rather, there was ample evidence for all of the very clear, unequivocal findings by the trial judge.

[14] As Justice Chipman observed, in writing for this court in **1874000 Nova Scotia Ltd. v. Adams** (1997), 146 DLR (4th) at 466, (1997), 159 NSR (2nd) at 260, **Civil Procedure Rule 18.14** is very broad in scope and application. It states:

> At a trial . . . any part or all of a deposition, so far as admissible under the Rules of Evidence, may be used against any party . . .
>
> (b) where the deponent was a party . . . for any purpose by an adverse party; (Underlining mine)

[15] The Rule is clear, Justice Hall did not have any discretion, in my view, to refuse Mr. Gillis's request to introduce the whole of the plaintiff's discovery testimony, *subject only (and always)* to the admissibility of such evidence. In every case the trial judge serves as gatekeeper whose duty it is to admit proper evidence and exclude the rest. No judge is obliged to clutter the record with irrelevant or otherwise inadmissible evidence, whether from the testimony given by a party at discovery, or from any other source.

[16] Today's complex litigation may require years to prepare before ever getting inside a courtroom. "Lists" of documents are now copied and exchanged on CD Rom. Discoveries of parties and witnesses often last weeks, especially it would seem in Nova Scotia where the Rules permitting discovery may be too broadly cast. Transcripts from such discovery "examinations" are bound in thick volumes, with current fashion and technology now reducing four pages of evidence to a single page of text, miniaturized in the finest of font.

[17] Some common sense and reason must be applied to suit the circumstances of any given case. It could never have been the intention of those who drafted **Rule 18.14** that banker's boxes filled with unedited (for relevance or other policy or evidentiary exclusions) discovery transcripts could be dumped at the feet of the trial judge or civil jury with a request made for the first time in argument, that they be considered along with all the other evidence during deliberations. Quite apart from delay and hardship for the trier of facts, such an approach would hardly meet

the objectives of the Rules to secure the just, speedy and inexpensive determination of every proceeding **(Rule 1.03)**.

[18] In light of the very broad language employed in **Rule 18.14,** I commend the method employed by the trial judge in **Founders Square Ltd. v. Coopers & Lybrand** (1999), N.S.J. No. 376 where, as I was advised by counsel who appeared before me in **Fogo** v. **F.C.G. Securities Corp**. (1998), 172 N.S.R. (2d) 266 (C.A.), Justice Carver ordered the defendant to delete those portions of the discovery transcript which were admissible in evidence before he was prepared to consider such evidence at trial. Such an approach places the burden of work where it should be - squarely on the shoulders of counsel. They should be expected to take the time to isolate those pages or portions thereof, relevant and important to their theory of the case. Such extracts can then be introduced, as a package, during argument if that is the route chosen by counsel. If the lawyers cannot agree on what is "relevant" and properly admissible then the trial judge can set them straight.

[19] Counsel for the respondent opined that:

> ...it is difficult to reconcile s. 56 of the Nova Scotia *Evidence Act* with the application of the Civil Procedure Rule . . .

Section 56 of the **Evidence Act** provides:

> 56 If a witness, upon cross-examination as to a former statement made by him relative to the subject-matter of a cause, and inconsistent with his present testimony, does not distinctly admit that he made such statement, proof may be given that he did in fact make it, but before such proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, shall be mentioned to the witness, and he shall be asked whether or not he made such statement. R.S., c. 94, s. 53.

[20] In my opinion, there is no conflict between this section of the **Evidence Act** and **Civil Procedure Rule 18.14.** The two are easily reconciled. Section 56 of the **Evidence Act** deals with the situation of counsel making a strategic decision to impugn the witness while in the witness box and during cross-examination. That would be a tactic chosen by counsel who, for example, wanted the trier of fact - whether judge or jury - to observe the witness's demeanour while being confronted with the alleged prior inconsistent statement. That is quite different from the technique/tactic permitted an opposite party under **Civil Procedure Rule 18.14**, as

presently drafted, wherein - subject to the caveat I expressed earlier - counsel is allowed to file the entire discovery transcript, or portions thereof, for whatever purpose counsel intends, not the least of which might well be restricted to final argument. That is the point made by Grant, J. in **Johnston's Estate** (1984), 66 N.S.R. (2nd) 19:

> I think that it would be unnecessarily restrictive to deprive counsel of the option of the "garden path" cross-examination approach. I do not interpret the Rules or our practice as doing so. To lead a party or witness to an extreme position in cross-examination and then in argument show his position on oath at another time may be the most effective attack on the credibility of that person. This may be done by filing his discovery answers and not confronting him on the stand. To foreclose that opportunity to counsel is, I think, to deprive counsel of the scope permitted by the Rules. (at p. 37) (Underlining mine)

[21] Justice Hall's error in refusing to accept into evidence the respondent's complete discovery transcript was not critical to his ultimate conclusions. He was very alert to the issue of credibility of both the respondent and appellant. His recitation of her testimony was precise and accurate in his exchange with counsel over this issue. The text of his lengthy decision reflects the care he took in reviewing the evidence and applying the evidence and the weight he chose to give it, to the several issues requiring his determination. His frequent interjections during the plaintiff's evidence clearly show that he was alert to her particular circumstances. In my opinion, the "admission" of her entire discovery transcript would have added nothing useful to the exercise.

[22] During argument before this court, counsel for the appellant was asked to point to a single instance where the respondent's evidence at discovery was materially different from her testimony at trial; whether about smoking, doing the laundry, caring for the children, or anything else. No examples were forthcoming in response to our invitation. Mr. Gillis then suggested that the respondent "contradicted herself at various places within the discovery transcript". That is hardly the point, nor would such be unheard of in any discovery examination. He was unable to articulate how such contradictions within the discovery would assist in the trial judge's assessment of credibility. What a witness says at discovery does not become evidence at trial unless it is adopted by the witness, or becomes admissible through some other Rule or procedure.

[23] The burden of proof was on the appellant, Dr. Howlett, to show just cause. The trial judge found that she failed to adduce sufficient evidence to demonstrate that her firing Ms. Burton was justified. I agree with the respondent that the trial judge found for the respondent not because she convinced him of her credibility, but because of the appellant's failure to establish a sufficient case. As such, the discovery transcript would not have affected the outcome at trial.

[24] It is clear that the trial judge did not accept some of Dr. Howlett's evidence, both because it conflicted with that of her own witnesses, and because it was not in keeping with her presentation on the witness stand. There was ample evidence from the appellant's own witnesses to support Hall, J.'s findings. Accordingly, the appellant has not persuaded us that the reception into evidence of the entire transcript would have made any material difference, or that any miscarriage of justice arose by its exclusion.

Did the Learned Trial Judge err in law by admitting the statement of the Appellant's 13 year old daughter as to what she thought was the reason for the Respondent's dismissal?

[25] In answer to a question from the trial judge (during re-direct examination by counsel for the appellant, Dr. Howlett) Nichole, the appellant's daughter, gave an unsolicited answer, not responsive to the judge's question. Hall, J. asked her:

> **The Court:** Was Leane in day-care when Ms. Burton was working for your mother?
>
> . . .
>
> **A.** And I think the main reason she was released was because she was no longer needed. Or something like that.

[26] The appellant complains that this is hearsay. It is not. While it may have been technically objectionable as being nothing more than Nichole's "opinion", its inclusion in the record hardly justifies the appellant's demand for a new trial. Nichole was the appellant's witness. Counsel for the appellant did not re-examine Nichole as to the source of her knowledge or the reason for saying what she did. There is, therefore, no evidence that the statement was not based on Nichole's personal knowledge acquired from living with her mother.

[27] I see no error, and certainly no reversible error on the part of the trial judge, with respect to this "statement". It played no role in Justice Hall's decision. Nicole, after all, was the appellant's own witness. The appellant testified after her daughter and the comment from Nicole was put to her for rebuttal.

[28] Finally, the trial judge had concluded that the defence of just cause had not been proven *before* he made any comment about Nicole. His observation, looked at in the context of the trial and his own judgment, is that Nicole had reached the same conclusion he had. That is to say, Hall, J. simply noted that Nicole's statement was in accordance with his own conclusion based on the facts before him.

[29] Mr. Gillis pointed to the exchange between counsel and Hall, J. during the trial about this issue, urging us to find that it affected his reasoning and was essential to his ultimate disposition of the case in favour of the appellant. I cannot agree. After all, the trial took place two months before Justice Hall filed his decision. The exchange recorded in the trial transcript reflects, in my view, nothing more than Justice Hall extending a courtesy to counsel by pointing out Nicole's comment as having *potential significance*, so that they might address it if they chose to do so.

The Court:	I thought that you should have an opportunity to speak to <u>if it's something that I considered important and may be influenced by it</u>, so. Well, I'll leave it at that. Do you have any questions of my questions, Mr. Gillis?
Mr. Gillis	I'm just looking for my note of that comment, My Lord, to see what the context was. I (words not made out, the Court speaks)
The Court:	Well, I asked her a few questions about Leane starting into daycare, and she said Leane started daycare right after Dianne was discharged. And she went on, "the main reason", and this is my note, it's very accurate because I made a particular point of noting it, "the main reason she was released is because she was no longer needed".
Mr. Gillis:	Um hum.
The Court:	My words, not necessarily the witness's.

> Mr. Gillis: I guess, I guess the reason I didn't do anything further on that is, it's an opinion. I'm not sure that it's (words not made out, he and Court both speaking)
>
> The Court: Do you want to ask any questions about, arising from my question?
>
> Mr. Gillis: No.
>
> (Appeal Book pp. 452-3) (Underlining mine)

[30] Finally, and quite apart from the juxtaposition of Justice Hall's mention of Nicole in his decision, there was considerable other evidence to support his conclusion as to the appellant's motivations. For example, a live-in boyfriend who had time to look after the children, and with whom the appellant may have been discussing marriage; the offer of a lay-off to the respondent; a concern for the respondent's ability to get Unemployment Insurance; not hiring a replacement; not renting the apartment; moving her clinic into the apartment; the discussions with her financial advisors; and the fact that none of the professionals (bank manager, accountant, financial advisor) with whom the appellant spoke about the situation prior to the termination were called as witnesses.

Did the Learned Trial Judge err in law in refusing to apply the Common Law Rule respecting notice or dismissal of domestic employees?

[31] Relying upon **Nicholl v. Greaves,** [1864] 17 Common Bench Reports (New Series) 26, decided in England 137 years ago, the appellant urged us to apply what was described as a "common law rule" said to be "applicable to domestic servants". The principle is stated succinctly by A. S. Diamond, *The Law of Master and Servant*, (2nd Ed.) London 1946:

> ... a contract of service as a domestic servant, and the absence of agreement to the contrary, is terminable at any time by one calendar month's notice or by payment of one calendar month's wages. (Page 182)
>
> The custom applicable to domestic servants is that the master may terminate the contract at any time by a month's notice or payment of a months' wages and therefore the extent of the claim of a domestic servant dismissed and without notice is in general to recover the amount of one month's wages, payable under the custom, irrespective of the servant's actual pecuniary loss. (Page 183)

[32] The rationale behind what Diamond termed a "custom" was that a "master" and "servant" ought not be tethered together should their continued association prove to be intolerable.

> The point to be determined is whether or not the Plaintiff falls within the class of servants commonly termed in the cases and in the treatises on the subject of the relative rights and duties of masters and servants, menial or domestic; because the law is now firmly established that the hiring for a year of the person in that class is subject to the condition that either party may put an end to the relation at any time upon giving the other a month's notice or a month's wages . . . But it seems to me that the reason of the rule in these cases is that there are some contracts for services which bring the parties into such close proximity and frequency of intercourse - valuable if mutually agreeable but intolerably annoying should it be otherwise - that it is highly desirable that either party should be at liberty to put an end to them if so minded. Where the service is of such a domestic nature as to require the servant to be frequently about his master's person or, as in the case of the gardener, about his grounds, if any ill-feeling should arise between them the constant presence of the servant would be a source of an infinite irritation and annoyance to the master. The law and the reason of the law are mutual. The servant may have an exacting and dissatisfied master constantly finding or imagining faults or shortcomings: In such a case the sooner the servant can free himself from his disagreeable position the better for his comfort and happiness. It is therefore for the benefit of both that the contract which binds two incompatible tempers should be easily determinable. (*Nicholl v. Greaves*, supra at p. 33) (Underlining mine)

[33] I note that **Nicholl** was applied 70 years ago in Depression-torn Saskatchewan in the case of a farmhand assaulted by his employer, **Peidl v. Bonas**, [1931] 2 D.L.R. 362 (Sask.C.A.). Counsel were unable to find a single case where this 1864 judgment from England had ever found judicial favour in Atlantic Canada.

[34] It was also counsel's submission that this "common law rule" would apply to all engagements of present day "domestics", nannies, *au pairs*, or babysitters - essentially anyone hired to look after children or households - unless the parties had *explicitly* agreed to waive its application. Such an employee, according to Mr. Gillis, could be terminated in Nova Scotia, circa 2001, on the mere whim of the employer, at any time, by one month's notice. The written contract for a fixed term of employment, duly executed by Dr. Howlett and Ms. Burton in this case, was, he said, of no force or effect.

[35] I simply cannot accept those submissions.

[36] This is not the case where we need to decide whether there are any vestiges of this old relic worth saving. I hesitate to call it a "rule" of any sort. The *notion* of menial subservience somehow trumping an all but explicit contractual term to the contrary, is entirely irrelevant to the facts of this case.

[37] The appellant drafted this contract. Both she and the respondent intended to bind themselves for a fixed term of forty-two months. They each turned their minds to the possibility of termination:

> EMPLOYMENT CONTRACT
> BETWEEN: DR. SANDRA HOWLETT AND MS. DIANNE BURTON
>
> TERMS OF AGREEMENT
>
> ...
> - date of employment to begin: April 01, 1994
> - date of termination of contract: September 01, 1997
> ...
> - this contract may be terminated by mutual, signed consent.
> (Double underlining mine)

[38] The factual basis upon which the principle from **Nicholl v. Greaves** was premised, is missing here. Ms. Burton was not hired to cinch Dr. Howlett's corset, pick her tobacco, muck out her stable, or harvest her grapes such that they came to detest the mere presence and proximity of one to the other. Here, the appellant worked as a doctor of chiropractic away from her home while the respondent minded her four pre-school children. That was the very reason for their entering into this binding contract in the first place.

[39] The historical context between the parties is also most important. The respondent had been summarily dismissed by the appellant in their first encounter. She wanted protection; she wanted something concrete; and she got it. By the terms of the contract, she was engaged to work from April, 1994 until September, 1997, with a starting salary of $350.00 per week.

[40] Hall, J. was satisfied from the evidence that both parties wanted this to be a contract for a fixed term: the respondent because of her "unceremonious and

summary dismissal" and the appellant who, after a string of short-term nannies, wanted the respondent to stay until her youngest child started public school.

[41] In summary, the so-called common law "rule" (if ever a rule at all) respecting notice to or dismissal of domestic "servants", has no application in this case. The parties were free to fix their own terms of engagement and, in my opinion, did just that in the written contract they executed.

[42] Justice Hall found that the contract existed, that its terms were clear, and went on to enforce the terms of the contract by assessing damages on account of the defendant's breach. I find no error in his doing so.

[43] Finally, counsel for the appellant offered this proposition in support of his argument:

> ...the majority of families have two working parents, it is absolutely essential that Common Law principles which require a heavy responsibility on domestic servants, especially those looking after children . . . are subject to the requirement that if they and their employers have incompatible temperaments, the employment relationship cannot be forced to continue. (Underlining mine)

The portion I have underlined is indisputable. But it ignores the consequence: proper compensation in damages once the contract is unlawfully terminated.

Did the Learned Trial Judge err in not giving sufficient emphasis to the Respondent's complete failure to mitigate her damages?

[44] The onus was entirely upon Dr. Howlett to satisfy the trial judge that Ms. Burton did not exercise reasonable diligence in searching for other employment, and that had she done so, she could have procured other work during the unexpired portion of their written contract.

[45] Justice Hall decided, after a careful review of the evidence, that Ms. Burton ought to have done more to mitigate her loss.

> I am not satisfied, however, that the plaintiff has made sufficient efforts to reduce or mitigate her loss. It seems to me that she should have been able to find some

> employment within the employment period set out in the contract. The question remains, however, whether she could have obtained employment at the same rate that she was receiving from the defendant. Frankly, I doubt very much that she could have. Taking these factors into consideration and the fact of the disruption in her living accommodations, I have concluded that the plaintiff's entitlement to damages should be reduced by one-third. I, therefore, fix the plaintiff's damages for breach of contract at $30,666.00.

I am not persuaded that Justice Hall erred in his ultimate conclusion. None of the arguments advanced by the appellant would warrant any greater reduction in her favour.

[46] The appellant also complained that she ought not be obliged to pay anything more than three or four months' worth of wages because "the respondent could not have physically worked any longer than that due to her bad back". Justice Hall made no such finding. There was no evidence for any such conclusion, nor any obligation upon the trial judge to even consider it. Justice Hall's remark about Ms. Burton's health was not a "finding" but merely commentary within his judgment. He said:

> I suspect that the plaintiff became discouraged and with her worsening health problems gave up on finding suitable employment. (178 NSR (2nd) 325 at p. 336)

Consequently, there is no merit to this ground of appeal.

[47] The appeal is dismissed with costs to the respondent. Ms. Burton was awarded costs at trial of $5,467.00 plus disbursements. There is no reason here to depart from our usual practice of awarding 40% of trial costs to the successful party. Ms. Burton is therefore entitled to her costs on appeal of (rounded upwards) $2,200.00 plus disbursements.

Saunders, J.A.

Concurred in:

Chipman, J.A.

Bateman, J.A.