

THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Pecoskie v. Holloway Lodging Corporation, 2015 NSSM 16

Between:

Helen Pecoskie

Claimant

-and-

Holloway Lodging Corporation

Defendant

Adjudicator: David TR Parker QC

Heard: March 26, 2015

Final Submissions: April 1, 2015

Decision: April 8, 2015

Counsel: Bernadine MacAuley represented the claimant

Michelle Black represented the defendant

DECISION:

1. This matter came before the Small Claims Court in Halifax, Nova Scotia on March 26, 2015 as a wrongful dismissal action against the defendant.
2. Before proceeding with the matter the parties were asked if there were any preliminary motions that they wish to make to the court. Counsel for the defendant raised an issue concerning one of the exhibits intended to be entered by the claimant. Instead of dealing with the matter at the beginning of the trial, I determined that it would be dealt with at the time the claimant wished to enter it into evidence.
3. Counsels were then asked if they wished to change any of their pleadings and both Counsels were satisfied with their pleadings so the matter proceeded accordingly.
4. There were two witnesses called upon to provide testimony in this trial. The claimant and Jane Rafuse, Chief Financial Officer for the defendant Company.

Basic Facts:

5. The bare bone facts of this case are: the claimant was hired on January 10, 2012. She was terminated on November 18, 2014 and she received 6 weeks' pay in lieu of notice.

The Issues

6. The issues before this court are:
 - a. Was this sufficient notice and pay in lieu thereof in the circumstances?
 - b. What other damages, if any, should have accrued to the claimant?
 - c. What role if any does mitigation play in this particular case?

The Facts:

7. The claimant is 54 years of age, received a Bachelor of Commerce degree in 1990 along with a Certificate in Management. In 2007 she received her Certified General Accountant designation. The claimant's curriculum vitae suggest a very qualified and experienced person in the skills related to the job for which she was hired. The claimant's duties involved preparation and reporting financial statements and analysis of those statements for the defendant corporation. She was one of 4 designated authorized signatories when cheques were issued by the company and exceeded \$10,000.00. The defendant company was a publicly trading organization with 36 hotels across Canada and one hotel in the United States of America. No one reported to the claimant nor was she responsible for supervising anyone that worked in the office where she worked. She reported to the Chief Financial Officer, Jane Rafuse who reported to the chairman of the defendant company.
8. The claimant received bonuses. In 2012 and 2013 fiscal years the claimant received a bonus of \$3900.00 and \$3700.00 respectively. The claimant also received insider stock options which she did purchase. During her time of employment she also received payment for her courses related to her professional development, and payment towards her continued certification as a Certified General Accountant. The claimant also received 4 weeks annual vacation. The claimant also received a salary increase of 3% in the year 2014 bringing her salary up to \$80,340.00.

9. When the claimant was hired by the company in January 2012 she executed a contract which provided for a base salary of \$70,000 per year, eligibility for a benefit group plan, 4 weeks annual vacation and the cost of annual dues to maintain her designation in good standing with the Society of General Accountants. The contract also stated that a performance review would be conducted after 6 months probationary period and subject to a satisfactory review, her employment would become permanent.
10. The defendant company went through a restructuring process and in July 2014 increased its size with the purchase of a number of hotels with the acquisition of Royal Host Hotels.
11. A consequence of this acquisition and restructuring of the company it was necessary to terminate the claimant which occurred on November 18, 2014.

Analysis:

12. There are numerous cases involving dismissal of an employee without cause however it is virtually impossible to find a case which is exactly the same or on all fours with each case that comes before the courts. There are many instances where authors have tried to group cases into categories, such as type of work or position held by the employee, years of employment and many other categories.
13. This province as many others has minimal notice period or pay in lieu thereof requirements as prescribed in legislation. The common-law has allowed the courts such as this one, to hand down decisions which exceed those minimum statutory requirements. A properly drafted or crafted employment contract can or so it would appear require the courts to adhere to the minimum statutory requirements for notice of termination. I refer here to the recent case of:
14. **Gerry Miller v. Convergys CMG Canada Limited Partnership, Convergys Corporation, Convergys Information Management Group Inc., Convergys New**

15. The headnote in that case provided the following summary: "Case Summary: The applicant was dismissed without cause after seven years of employment with the respondent Convergys CMG Canada Limited Partnership. The respondent paid the applicant seven weeks' pay in lieu of notice in accordance with an employment agreement signed five years previous. That notice period was in compliance with the Employment Standards Act, R.S.B.C. 1996, c. 113. The applicant brought an action for wrongful dismissal seeking damages equivalent to 12 months' income and benefits, plus punitive damages. He argued that the employment contract was unenforceable because it did not apply to his new position, the termination provision was ambiguous and the contract was unconscionable. The Supreme Court of British Columbia dismissed the action, finding that the applicant's entitlement to severance was governed by his employment agreement rather than the common law. The Court of Appeal for British Columbia dismissed the appeal."
16. The case before this court is not restricted by such an employment contract however no doubt employers will be lining up to fit within the scope and ambit of the Supreme Court of Canada decision.
17. **Bardal v. Globe & Mail Ltd.** (1960), [1960] O.W.N. 253, 24 D.L.R. (2d) 140, is the quintessential case dealing with the factors a court should consider in determining whether the notice period was reasonable.
18. In the Bardal case the habitually quoted Chief Justice McRuer stated: "***There can be no catalog laid down as to what is reasonable notice in particular classes of cases. The reasonableness of the notice must be decided with reference to each particular case, having regard to the character of the employment, the length of service of the servant, the length of service of the servant and the availability of similar employment, having regard to experience training and qualifications of the servant.***"

19. To bring that forward to the present case I will begin with articulated characterizations provided in the Bardal case.

20. The character of the employment: The defendants say that the claimant's position was not senior and it was not management. She was hired into a small office where she, along with other employees in that office reported to Jane Rafuse. There was no one reporting to the claimant and the duties included routine work which was similar to work performed by fellow employees.

21. The claimant presented evidence of what her responsibilities were with respect to her employment and these were not substantively challenged by the defendant. The claimant's responsibilities included: preparation and presentation of timely and accurate consolidated financial statements on a quarterly and annual basis in accordance with IFRS for 36 locations across Canada and the United States. Preparation and assistance in the quarterly and annual management discussions and analysis. Preparation and review of monthly financial records and financial statements for the corporation/head office entities. Preparation of consolidated monthly reports, financial analysis and commentary for senior management and the Board of Directors. Review of the hotels monthly financial statements, reports and working paper files. Documentation of corporate disclosure and other internal controls and processes and to ensure financial information is complete and accurate. Review of corporate and hotel internal control documentation process and 52 – 109 testing requirements. Preparation and review of working paper files for external auditors. Provide assistance to external auditors during their on-site visits. Assistance in due diligence materials and transition for hotel acquisitions and dispositions. Preparation of journal entries for hotel transactions, financing transactions (mortgages, debentures and units). Review of annual capital plan approval. Review of annual budget and monthly variance report analysis. Analysis and review of outstanding aging accounts receivable and commentaries. Preparation of quarterly and annual financial reporting with note disclosure and management discussion analysis. Review of monthly corporate/head

office statements and consolidate reports of hotel properties and participate and coordinate the quarterly audit committee report.

22. **The Length of Service of the Servant:** The claimant was hired on January 10, 2014 and following her notice of termination was paid through to December 31, 2014. The defendant provided notice of 2 weeks per year of service that is 6 weeks' pay plus all accrued vacation to which she was entitled.

23. **The Availability of Similar Employment:** The Claimant provided a list of 61 businesses that she tried to obtain employment from sensor termination with the defendant company. Ten of those businesses she had interviews with although nothing came to fruition. The claimant obtained employment with a company. It involved employment from January 28, 2015 and was to end on April 3, 2015. The defendant noted in their summation that a backdated employment contract, innuendo the employment would last longer than April 3, 2015. At the time of receiving the submissions from Counsel and the date of this decision I have no evidence that her work would continue beyond April 3, 2015 therefore I will just assume it ended at that date.

24. I have reviewed all the cases provided to me by counsel and I do not intend to go through each of the cases but I do appreciate counsel providing same and for particular areas of each case which are of some relevance in making a determination in this case.

25. The period of employment was short. The claimant's position was not a senior position in the sense that people had to report to her. However it was a senior position in terms of what was required of her within the context of the company. She had a very responsible position of employment with that company. The possibility of the claimant obtaining a similar job at a similar rate of pay appears to be slight based on the specialized area in which he was involved. In addition to the number of inquiries for work since her termination it would appear to me that work in her category is difficult to

obtain at least at the same level she was at with the defendant and based on her previous employment and her expertise.

26. Therefore, based on the case law provided to me, the article of Mr. O'Hara I would find that 25 weeks would be on the high end of what reasonable notice should be in and in this case a total of 17 weeks would be appropriate in these circumstances.

27. With respect to the bonus the main criteria for same would be determined on the health of the company. There were other factors of course that played a part such as whether the employee did their work or not, but it was primarily based on the health of the company. That is the financial health of course. In the past the bonus for a fiscal year was provided to the employees in the succeeding fiscal year. In this particular case the defendant takes the position that the Claimant was no longer employed when the bonuses were handed out so she did not get a bonus. The bonus however relates to and has always related to the fiscal year. It is also noted in the testimony that John Griffin was in the same position as the claimant and he got a bonus for the 2014 fiscal year in 2015. In my view that the claimant would have received a bonus for the time she was at the company and paid in 2015. There was no evidence as to what Mr. Griffin received as a bonus in 2015 for the 2014 fiscal year however based on the previous bonuses I believe \$3800.00 would be appropriate and in line with previous years bonuses. The case law is also clear that bonuses would be an award the court could provide.

28. With respect to vacation pay the contract allows 1.66 vacation days for each month work therefore 17 vacation days pay would be appropriate.

29. These amounts would be less the statutory deductions, less the 6 weeks severance already paid the claimant and less the earnings received by the claimant when she did work with Stream Financial between January 28 and April 3, 2015.

30. With respect to the professional development fees the claimant did not apply for same and I would not include that as a head of damage and that would also be the same with respect to any other fees and dues for her certified general accounting.

31. If the parties cannot determine the exact amount I would be glad to hear them on same. As well if a formal Order is required I would be glad to hear on that as well

The court cost would be awarded to the claimant in the amount of \$193.05.

Dated at Halifax this 8th day of April 2015