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SCAM 291115

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Brander v. Northumberland Golf Club, 2008 NSSM 31

Between:

SHEILA BRANDER

CLAIMANT

- and –

NORTHUMBERLAND GOLF CLUB

DEFENDANT

DECISION

Adjudicator: **David T.R. Parker**

Heard: **March 27, 2008**

Decision: **May 29, 2008**

Counsel: **Brian S. Creighton for the Claimant**

Cindy A. Bourgeois for the Defendant

constructive dismissal of seasonal employee–senior citizen-28 years employed-1 season pay in leu of sufficient notice

This action came before the Small Claims Court on March 27, 2008, at Amherst, Nova Scotia. The action was based on a claim of wrongful dismissal and the Claimant was requesting twelve (12) months pay in lieu of notice, along with a bump up of approximately one and one-half (1.5) months in accordance with the principles laid down in Wallace v United Grain Growers Limited [1997] 3SCR 701, a decision of the Supreme Court of Canada, and their costs.

The Defendant at the end of the day conceded that there was a fundamental change in the Claimant's employment; however, the Defendant contended that there was appropriate notice provided to the Claimant and a number of cases were relied upon for this assertion, which cases I will refer to later in this decision.

SUMMARY OF FACTS

The Claimant is a 64 year old widow who had worked as a seasonal employee for the Defendant and its successors for twenty-eight (28) years. The Claimant was advised of changes in her hours of work at the end of the 2007 season. The Claimant did not accept these changes and ultimately sued for wrongful dismissal.

The Claimant's employment involved working at a golf course during the season which began usually in the first part of May, or sometime in May, and would last until the Thanksgiving weekend. According to her own evidence, which was not refuted, she never missed a day's work, she was never late and she enjoyed dealing with people. In the early part of her employment with the Defendant, she worked in the food services area of the golf club; however, in 1992 she worked primarily in the pro

shop selling green fees, cleaning clubs, renting golf carts, selling equipment and golf accessories, and cleaning up. In the beginning of her employment, the Defendant was the Claimant's original employer. There was a transition over to the Province of Nova Scotia for a period of time and subsequently the club was transferred back to the Defendant, which occurred a number of years ago.

The Claimant said her intention was to retire at the end of the 2009 golf season although she was not certain of that as she might possibly retire at the end of the 2008 golf season. The Claimant, on the final day of her employment for the 2007 season, was contacted by the manager of the pro shop. The Claimant was advised by the manager that he wished to have a meeting with her for the purpose of an evaluation. A formal evaluation had never occurred in the past. When the Claimant and the manager met for the purpose of the evaluation, the Claimant in her evidence stated that she was told by the manager that he thought she might be thinking of retiring in which case he would not bring her back but would bring the three girls back who had been working there that summer. According to the Claimant, she was told he could only give her two to three hours a week depending on the workload. The manager, on the other hand, in his evidence said he did not say anything about two to three hours a week. A follow-up letter by the manager indicated her position would be guaranteed for twenty-four (24) hours per week. However, I am certain that she was being offered substantially less than the forty (40) hours per week that she had been working in the past. At any rate, when the Claimant left the meeting she said she was devastated and that that weekend she did nothing but cry all weekend and she never got out of bed. She said she lost 50 pounds worrying about what had happened, she couldn't sleep at night and continues to not sleep well.

The manager did phone the Claimant several days after their meeting as he was not happy with the way their meeting ended and he was told by the Claimant at that time that she was not prepared to meet with him again and that she had spoken to her lawyer who would be in contact with the club. That was the last contact between the parties.

The Claimant earned $11,134.69 during the 2006 season in which she was employed, $8,980.05 during the 2005 season and $9,082.17 during the 2004 season. The fluctuation in amounts would be attributable to the length of the season and also the hourly rate that was paid to the Claimant by the Defendant.

There were never any formal complaints lodged against the Claimant during her work term, there were no written warnings and there were no suggestions given to the Claimant about how to conduct or change her work affairs. The manager did indicate that there were some problems with the Claimant taking information over the phone, repeating recorded conversations to others that should not have been repeated, and that people did not want to work with her at night. None of these concerns were raised with the Claimant. The manager indicated these were small things and that may have been the reason that they were not raised.

John Mills was the overall manager and superintendent of the golf club and, according to his evidence, the relationship with the Claimant was excellent. He said in his testimony she was terrific as a friend and a co-worker and contributed to the success of the golf club over the years. He said, in his testimony, there was actually no cause for change in her employment, she was a friend, a valuable employee, and never said anything negative. He said that working at this type of industry you get a lot of things

said about every employee and you have to filter it. In this last year there were more things said concerning the Claimant than before. He said they were just little things but said more frequently. In his view, the Claimant seemed a little more stressed, anxious and inconsistent. He said, "these were observations I made as I was concerned on a friendship level". Mr. Mills was aware of the meeting to take place between the Claimant and the manager of the pro shop and it was his view that "we had a valued employee and had some concerns about anxiety and stress level and we felt this would relieve the stress".

ANALYSIS

Counsel for the Claimant brought forward a number of cases on constructive dismissal and I refer to them as they are illustrative of this type of situation.

Fisher v Eastern Bakeries Limited (1986), 73 NSR [2d] 336 as appeal 77 NSR [2d] 90

> "Whether or not an employee has been unjustly dismissed is largely a question of fact. Where a plaintiff has resigned from his employment, as in the present case, and claims that the resignation was merely the final result of a constructive dismissal, the court ought scrutinize all of the facts very carefully and determine whether or not a reasonable interpretation of those facts supports the plaintiff's contention. In a case such as this, the court must be satisfied that the plaintiff has established on the balance of probabilities that the defendant's conduct, vis-à-vis the plaintiff, was such that the duties required of the plaintiff were substantially different from those for which the plaintiff had contracted. If the plaintiff establishes that, then a court may find that the defendant's conduct amounted to constructive dismissal."

Chambers v Axia Netmedia Corp., 2004 NSJ No 22

> "The test for determining whether an employee has been constructively dismissed is an objective one and essentially a question of fact. The Court must decide whether, on a reasonable interpretation of the facts, the employee has established he was constructively dismissed, as a result of conduct by the employer, that breaches a fundamental or essential term of the employment contract. The employee's perception of the employer's conduct is not determinative. Rather, the Court must ask whether a reasonable person, in a similar position as the employee, would have concluded the employer had substantially changed an essential term of the employment contract. [**Lane v. Carsen Group Inc.,** [2002] N.S.J. No. 428, 2002 NSSC 218; **Miller v. Fetterly & Associates Inc.** (1999), 177 N.S.R. (2d) 44 (N.S.S.C.)]"

I am satisfied that the facts before this Court lead to only one conclusion, the terms of employment consistently offered to and accepted by the Claimant over the years were fundamentally changed by the Defendant at the end of the 2007 golf season. The result is that the Defendant's conduct in treating the Claimant with an entirely different offer of employment in terms of hours of employment amounted to the Defendant constructively dismissing the Claimant. The lost hours were to be filled, however, by other people and there was no obvious economic reason for reducing the Claimant's hours or work. Further, the Defendant did not provide any warning about the Claimant's conduct, nor did it provide any educational direction on how the Claimant might conform to expected duties required of employees. Instead, the Defendant took on its own analysis of the mental state of the Claimant by finding her stressed and anxious. At the same time, I do not have any factual basis for believing there was any malicious intent to cause the stress that occurred to the Claimant as a result of her dismissal. In fact, just the opposite was intended. The Defendant superintendent felt he would be helping the Claimant. The Defendant did not show disregard for the Claimant in front of other employees or fashion her dismissal in line with the elements shown in a Wallace type situation.

Counsel, Ms. Bourgeois, representing the Defendant, provided a number of interesting cases involving seasonal employees and notice. I have reproduced Counsel's comments on these cases as they have had some impact on modifying the notice requirement that I believe is applicable in this particular case.

In **Levy v. Ken-Wo Country Club**, 2001 NSSC 84, the sixty-eight year old plaintiff was told he would not be recalled to his seasonal employment as a full-time groundskeeper at a golf club, after twenty-four years of service. It was found that the plaintiff was not a seasonal worker but an employee for an indefinite term who could not be terminated without reasonable notice.

In speaking for the Court Justice Boudreau discussed the appropriate notice period as follows:

> "14. On the question of reasonable notice what then is reasonable notice in the circumstances considering Mr. Levy's age, his length of service and his exemplary service record. I find, as in the *Saunders* case, that a season's notice was reasonable to terminate Mr. Levy's yearly employment with Ken-Wo. This would have given Mr. Levy a reasonable opportunity to find alternate sources of income to replace his lost annual income from Ken-Wo and E.I. benefits."

The New Brunswick Court of Appeal in **Saunders v. Fredericton Golf & Curling Club Inc.** (1994), 151 N.B.R. (2d) 184, determined that the sixty-three year old, thirty-year employee (employed for seasonal work) was entitled to one season's notice. The plaintiff was advised when he contacted the employer to inquire about returning to work for the 1992 season, that his job was no longer available but he could continue his employment if he was prepared to undertake more strenuous work. The plaintiff's health did not allow him to undertake the more strenuous employment. In writing for the Court, Hoyt, C.J.N.B. stated as follows:

> "8. Mr. Saunders attempted to mitigate his damages by trying, unsuccessfully as it turned out, to find comparable work. Taking into account Mr. Saunders' age, his limited employment prospects

> and, most importantly, the seasonal nature of his employment, I am of the opinion that the Club should have given him notice of the change in his duties when the 1991 season ended so that Mr. Saunders would have had the winter to seek other employment. He was not told until the spring of 1992, when he inquired about returning. The trial Judge did not provisionally assess damages. Mr. Saunders is, in my opinion, entitled to damages of $6,953.62, which is based on his 1991 summary earnings from the Club, in lieu of notice." (Emphasis added)

In **Van Tent v. Cloverdale Raceway Ltd.** (1997), 37 C.C.E.L. (2d) 127 (B.C.S.C.), the Court reviewed decisions respecting seasonal employees as follows:

> "6. I do not, however, consider that Ms. Van Tent was entitled to the period of notice for which she contends. In *Saunders* a golf course gardener who had been seasonally employed for 30 years was awarded only six months notice on the basis that he should have been told that he would not be further employed at the end of what was his last season, and not, as he was, near the beginning of the next season six months later. In *Gray* the operator of municipal trucks and snowploughs who had been seasonally employed for 16 years, and who had worked more than a month of what was a six-month season when he was dismissed, was also said to be entitled to six months notice. It was observed that he could not have realistically expected to work beyond each season for which he was employed."

In awarding the plaintiff eight months notice, the Court considered that while the plaintiff had been an employee of the defendant's for almost twenty years, only the last five were seasonal. It was also noted that the plaintiff should have been advised of the defendant's decision at the end of the previous season. Lowry, J., in writing for the Court, stated as follows:

> "10. Ms. Van Tent was told she would not be employed for the 1996-97 season six weeks before she would have returned to work. She was, then, given six weeks notice and paid in lieu of eight weeks more for a total of 14 weeks. She should have been paid another 18 weeks in addition. Consistent with what was said in

> *Saunders*, Ms. Van Tent could have been told that she was not working for the 1996-97 season when she stopped working in April 1996. Indeed, the evidence suggests that was her employer's intention but, unfortunately, intervening events resulted in her not being told that she would not be returning in September until August. Orangeville will now have to bear the financial consequences of the delay in notice being given."

Counsel, Brian S. Creighton, for the Claimant, has also provided a thorough review of the law on behalf of his client and for the Court, which is much appreciated.

He agrees with the Defendant that a contract of employment for an indefinite period requires notice and refers to the following:

> **"Machtinger v. HOJ Industries Ltd.,** [1992] I.S.C.R. 986 at 997 (para. 1 of ***Ceccol* v. *The Ontario Gymnastic Federation*** (2001) 55 O.R. (3rd) 614.

A number of cases were also cited which provided increased notice periods for "senior citizens", including:

Chapman v. Zimmcor Co. (1974) 17 N.S.R. (2d) 452, involving a 62 year old manager with five years experience receiving 12 months pay in lieu of notice;
McKeough v. H. B. Nickerson & Sons Ltd. (1985), 71 N.S.R. (2d) 134, involving a 63 year old senior manager with seven years service and awarded 18 months notice; and
Moran v. Atlantic Co-Operative Publishers (1988) 88 N.S.R. (2d) 117, involving a 62 year old managing editor with nine years service and awarded 18 months notice."

Everything, it seems, flows from the **Bardal v. The Globe & Mail Ltd**. (1960) 24 D.L.R., where at paragraph 21 Justice McRuer stated:

> "There can be no catalogue 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 and the availability of similar employment, having regard to the experience, training and qualifications of the servant."

In this particular case we have a Claimant who has worked a good portion of her lifetime working with this one employer. The job is not managerial but is obviously a vital link in this golfing establishment. She was in charge of the fundamental activities associated with allowing golfers to golf. While the Claimant had a winter lay-off to seek alternate employment, the evidence was that she attempted to do so, notwithstanding the stress she was under, but to no avail. At the Claimant's age and with minimal educational background and with a narrow work experience, she is not likely to find work easily that would be commensurate with what she is able to do as an employee.

I was prepared to agree with the Claimant's assertion that 12 months pay in lieu of notice would be appropriate. However, based on strong arguments from Ms. Bourgeois, I would consider one season's pay to reflect the proper notice period this Claimant should be provided and that being the last season. The Claimant's total income that year was $11,135.00 and that would be the base less statutory deductions and benefits relating to this income. If there is disagreement as to the appropriate deductions then I would be glad to hear from Counsel.

The Claimant will also be awarded her costs of $170.88.

Dated at Amherst, this 29th day of May, A.D., 2008.

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David T.R. Parker
Adjudicator of the Small Claims
Court of Nova Scotia