

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

KEN SEGBOER



PLAINTIFF

- and -

WESTERN ARCTIC BUSINESS DEVELOPMENT SERVICES

DEFENDANT

Special case stated by the parties for the opinion of the Court pursuant to Rule 235, in an action for wrongful dismissal.

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE J.E. RICHARD

Heard at Yellowknife, N.W.T. on May 20, 1993

Reasons filed: June 1, 1993

Counsel for defendant: Paul A. Bolo, Esq.  
Counsel for plaintiff: Earl D. Johnson, Q.C.

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Special leave granted by the parties for the opinion of the Court pursuant to Rule 235 in an action for wrongful dismissal.

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE J.E. RICHARD

Heard at Edmonton, N.W.T. on May 20, 1983



Paul A. Bois, Esq.  
Earl D. Johnson, O.C.

Counsel for defendant  
Counsel for plaintiff

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

KEN SEGBOER

Plaintiff

- and -

WESTERN ARCTIC BUSINESS  
DEVELOPMENT SERVICES

Defendant

**REASONS FOR JUDGMENT**

This is a wrongful dismissal lawsuit which has yet to be entered for trial.

The defendant employer dismissed the plaintiff from his employment and alleges that it had just cause to do so. The parties have concurred in stating, for the opinion of the court, a question of law the answer to which may well resolve the litigation. The question can be stated thus: If the employer is found by the court to have dismissed the plaintiff without just cause, is the plaintiff then bound by the two-week notice period in the written contract of employment, or can the plaintiff claim compensation in lieu of "reasonable notice" of a longer time period to be determined by the trial judge?

3 For the purpose of arguing this special case pursuant to Rule 235, the parties agreed on the following facts. The plaintiff entered into an informal contract of employment with the defendant on October 9, 1991, and this contract was replaced by a formal written contract executed on December 17, 1991. That document outlined the plaintiff's duties as the Business Analyst for the defendant, and his salary and benefits. The contract stated that his employment commenced November 11, 1991 and was for an indeterminate period. As to termination of the contract, it stated: "This agreement may be terminated at any time with two weeks notice by either of the parties (notwithstanding any legislation in the Northwest Territories which may limit such action)."

4 The contract of employment was drafted by the defendant and it is agreed that the plaintiff entered into it freely and voluntarily and without any duress exerted by the defendant.

5 On May 8, 1992 the defendant verbally dismissed the plaintiff from his employment. By letter of May 15, 1992 the plaintiff requested from the defendant a written letter of dismissal, with reasons. In the plaintiff's letter he further stated "I also request my two weeks termination pay and overtime due to me".

6 By letter of May 19, 1992 to the plaintiff, the defendant stated its reasons for terminating the plaintiff's employment. In that letter the defendant further stated "As to your request for severance pay, employees that are dismissed for just cause are not

entitled to severance pay".

Generally speaking, the law treats contracts of employment like other legal contracts. A contract is a creation of the parties. The parties have the freedom to contract as they choose. In the present case the parties agreed, in clear and unambiguous words, that one party could terminate the relationship by giving two weeks notice to the other party. During oral argument plaintiff's counsel conceded that, had the defendant employer on May 8, 1992 given to the plaintiff two weeks notice of dismissal, the plaintiff would have no cause of action.

How then can the plaintiff now claim that he is entitled to liquidated damages of an amount greater than two weeks salary? Plaintiff's counsel submits that by summarily dismissing the plaintiff on May 8, 1992, the defendant employer was repudiating the contract and the plaintiff employee accepted that repudiation. The contract having been repudiated and at an end, it is further argued that the employer can no longer refer to the terms of the contract in limiting its liability in defending an action for wrongful dismissal. No case authority was cited for such a proposition, and, with respect, I find there is no merit in it.

Certain consequences do flow from the fact of repudiation of a contract, and the acceptance of that repudiation by the innocent party. The innocent party is entitled to consider himself no longer bound to perform his duties under the contract. Chitty on Contracts, 26th ed., para. 1711. The contract is still there for the court to refer to in

determining what it was that the parties agreed to, what the parties' intention was.

10 Here, on the assumption that the plaintiff establishes that the defendant breached the contract by dismissing him without just cause, he is entitled to compensation for the loss suffered by him because of that breach. Had the defendant given him proper notice under the contract they had agreed to, he would have been allowed to work out his two week notice period and receive his regular remuneration for that period. The defendant cannot now be held to be liable, by way of liquidated damages, for more than what it was legally obliged to do, i.e., provide the plaintiff with two weeks' paid employment. In assessing damages for breach of contract, a court can only take into consideration the contract-breaker's legal obligation and not anything beyond that. Chitty on Contracts, 26th ed., para. 1771 and Park v. Parsons Brown & Co. (1989) 27 C.C.E.L. 224 (B.C.C.A.) at p. 232-233.

11 The cases of Chadburn v. Sinclair Canada Oil Co. (1966) 57 W.W.R. 477 (Alta.S.C.) and Allison v. Amoco Production Co. [1975] 5 W.W.R. 501 (Alta.S.C.), cited in support of the plaintiff's position that he is entitled to "reasonable notice" rather than the two week notice period agreed to, are distinguishable.

12 In Chadburn, the employment contract did not contain any provision as to notice and the court was required to "write in" a provision requiring the employer to give reasonable notice to the employee prior to termination.

In Allison, the employee was dismissed after working for his employer for 25 years. A document which the parties signed on a date six years after the commencement of the employment dealt primarily with the maintenance of confidentiality of the company's affairs and incidentally provided that the company would give the employee 30 days notice of its desire to terminate his employment. No reference was made to the document by the parties throughout the balance of the period of employment. The trial judge in Allison held that the parties had not intended for that particular document to deal with the general terms of employment, and for that reason the 30 day notice period was not used in assessing damages for wrongful dismissal. The facts in Allison are far different than the facts of the present case.

14 In this special case brought pursuant to Rule 235, the parties have stated a second question for the opinion of the court, on the matter of costs. I re-word this question as follows: In the event the defendant employer is entitled to rely on the 2 weeks notice provision, is the plaintiff, following success at trial, entitled to his costs on a solicitor-client basis?

15 It is the submission of the plaintiff that as the defendant failed to raise the 2 week termination clause in its Statement of Defence and only raised the issue during the course of examinations for discovery, the court should utilize its discretion on the matter of costs by penalizing the defendant employer in awarding full solicitor-client costs.

16 In my respectful view this question is not a "question of law" contemplated by the

provisions of Rule 235.

17           Costs of litigation, in favour of a successful or partially successful litigant, are within the discretion of the trial judge. In this case the trial judge will have the benefit of hearing all of the evidence, will assess the conduct of the parties, will rule on the issue of "just cause", will rule on the merits of the defendant's counterclaim, etc. It would be inappropriate for me as a chambers judge to predetermine that one litigant, if successful, should or should not be awarded a certain level of costs. To do so would be to usurp the domain of the trial judge.

18           In conclusion, the particular questions stated in this special case are decided as follows:

Q1.    In the event that the Plaintiff was not terminated for cause, did Schedule "C" constitute a repudiation of the contract such as to disentitle the Defendant from now relying on the term of the contract appearing in the second paragraph on the last page of Schedule "A" which provides that either party may terminate the agreement on two weeks' notice.

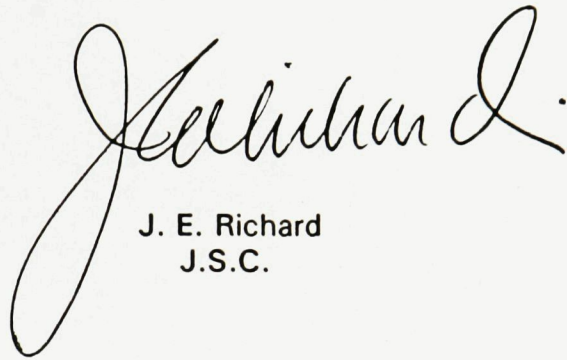
A.    No.

Q2.    If the answer to question 1 is that the Defendant is entitled to rely on the termination clause, is the Plaintiff entitled to an award of costs on a solicitor/client basis.



A. Not necessarily.

9 Inasmuch as this special case was stated by both parties pursuant to the Rules of Court, each party shall be responsible for its own costs incidental thereto.

A handwritten signature in black ink, appearing to read "J. E. Richard". The signature is written in a cursive style with a large, looping initial "J".

J. E. Richard  
J.S.C.

As the plaintiff has stated by both parties pursuant to the terms of the contract, each party shall be responsible for its own costs and costs of litigation.

It is the intention of the parties that the costs of litigation shall be borne by the party who is found to be liable. The costs of the proceedings shall be paid by the party who is found to be liable. The costs of the proceedings shall be paid by the party who is found to be liable.

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J.P.L.

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