Hatlevik v. Commissioner of the NWT et al, 2002 NWTSC 54

Date: 2002 08 19
Docket: CV 07779

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

NORMAN HATLEVIK

Plaintiff

- and -

THE COMMISSIONER OF THE NORTHWEST TERRITORIES and
DAVID RAMSDEN

Defendants

Action for breach of employment contract and for inducing breach of contract. Dismissed.

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE J.Z. VERTES

Heard at Yellowknife, Northwest Territories
on July 29, 30 and 31, 2002

Reasons Filed: August 19, 2002

Counsel for the Plaintiff: Austin F. Marshall and
James Mahon

Counsel for the Crown: Sheldon N. Toner and
Bradley E. Patzer

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REASONS FOR JUDGMENT

[1] The plaintiff held a senior management position in the Government of the Northwest Territories. In 1998 he took new employment but claimed entitlement to certain lay-off benefits from his former employer, the defendant Commissioner. The defendant denied that he was entitled to those benefits and instead deemed the plaintiff to have abandoned his former employment. The plaintiff then brought this action claiming damages against his former employer for breach of his employment contract. He also claims damages against the defendant, David Ramsden, for inducing breach of that contract.

The Employment Contract:

[2] To fully appreciate the facts, it is necessary to understand the legislation and policies that governed the employment relationship in this case.

[3] The plaintiff was a non-union employee of the defendant Commissioner. He held an indeterminate management position. His claim is based on the fact that his position was eliminated thus entitling him to certain severance benefits due to lay-off.

[4] At common law, a lay-off would be considered a repudiation of the employment contract by the employer. The employer would then be required to give reasonable notice or wages in lieu of notice. In the absence of either, the employee may sue for damages for constructive dismissal: see G. England & R. Wood, *Employment Law in Canada* (3rd ed.), at paras. 18.26 - 18.30. In the present case, however, the common law has been modified by both legislation and specific provisions in the employer's human resources policy (a policy of which the plaintiff was aware and by which he was bound).

[5] The *Public Services Act*, R.S.N.W.T. 1985, c.P-16, expressly recognizes the employer's right to lay-off employees:

> 27.(1) Where the duties of a position held by an employee are no longer required to be performed, the Minister may lay-off the employee in accordance with the regulations.
>
> (2) An employee ceases to be an employee when the employee is laid-off under subsection (1).
>
> (3) Notwithstanding any other provision in this Act, the Minister may, without competition, appoint a lay-off to any position in the public service to which he or she is qualified.

[6] The government's Managers' Handbook and section 1602 of its Human Resources Manual outline the principles and procedures governing lay-offs. In general, lay-offs are used in situations of structural changes or reduction of functions. Lay-offs are not to be used to terminate the employment of an employee for poor performance or misconduct. The primary aim, when an employee is marked for lay-off, is to find an alternative position within the public service. This is the point of subsection 27(3) of the Act and it is specifically identified in the policy:

> 16. Every reasonable effort will be made to avoid lay-offs by placing employees in other vacant positions for which they are qualified within the department.

The goal of finding a reasonable alternative position is emphasized by the policy since it provides that an employee who refuses a reasonable job offer waives the right to lay-off benefits and is deemed to have resigned.

[7] The procedures set out in the policy envisage a process whereby the search for an alternative position is carried out first. Employees identified for lay-off are given an opportunity to apply for vacant positions. If the job search, or the applications, are unsuccessful, then the employees are given a formal "notice of lay-off". The policy defines this as written notification that the employee will cease to be an employee at the end of a three-month notice period. The letter giving notice of lay-off stipulates the effective date of termination and outlines certain options available to the employee. Those options include severance priority (severance pay plus staffing priority for a period of twelve months after termination of employment), separation assistance (higher severance pay but no staffing priority), and a period of education assistance. All this is set out in sections 32-36 and 38 of the policy:

> 32. Departmental management and a representative of the Personnel Secretariat meet with the affected employee(s). Employees are advised of the rationale behind the department's recommendation for lay-off and the time frame in which the duties of the positions will be deleted or reorganized.
>
> 33. Where the number of indeterminate employees in positions of the same occupational nature and level must be reduced, merit interviews are used to determine which employees will remain appointed and which employees will be identified for lay-off.
>
> 34. Employees identified for lay-off are advised of vacancies in the department and are given the opportunity to apply for the vacancies. Employees are given five working days to do so. Internal competitions are held to determine if employees are qualified and suitable for the vacancies.
>
> 35. The Deputy Head writes to the affected employees confirming the previous discussions. This includes a description of the lay-off process and the specific date(s) that lay-off notices will be issued. This letter also confirms the rights of employees who are laid off.
>
> 36. The department conducts internal competitions. Using normal competition procedures, qualified and suitable employees who have been identified for lay-off are interviewed, selected and offered appointments.
>
> ...
>
> 38. Employees identified for lay-off receive formal notice of lay-off in a letter jointly signed by the Deputy Head of the department and the Assistant Deputy Minister

> of the Personnel Secretariat. The letter stipulates the effective date of termination and summarizes the options available to the employee. A copy of this letter is provided to LR&C in the FMBS.

[8] Together, the legislation and the human resources policy constituted integral parts of the plaintiff's employment contract. There was no real dispute on this point. Indeed, the thrust of the plaintiff's case is that his employer breached the employment contract by not extending to him the lay-off benefits outlined in the policy.

Facts:

[9] The plaintiff has a lengthy career in the field of health-care administration. He joined the public service of the Northwest Territories in 1988. In 1994 he was appointed to the position of Director of Population Health and Board Management with the Department of Health and Social Services. This was a senior management position reporting directly to the department's Deputy Minister. It is acknowledged by the defendants that the plaintiff was a highly competent and dedicated public servant.

[10] In 1997, the then Deputy Minister, the defendant Ramsden, instituted a reorganization of the department. This was due in part to the need to refocus programme delivery vehicles, in part in anticipation of the pending division of the Northwest Territories in 1999, and in part on the need to reduce staffing so as to meet government financial restraints. Mr. Ramsden, however, was optimistic that any "downsizing" could be accomplished through attrition, as opposed to forcing people out of their jobs. The plaintiff, as a member of the senior management team, participated in the planning and implementation of this reorganization.

[11] Unfortunately one of the results of the reorganization exercise was the elimination of the plaintiff's position. He was not the only senior manager so affected, however, and I accept Mr. Ramsden's evidence to the effect that the reorganization was done on a functional basis, not on a personal assessment of individuals. There was no suggestion that the reorganization was not a bona fide management exercise or that the plaintiff was somehow specifically targeted in that exercise.

[12] On June 2, 1997, the plaintiff received a letter from Mr. Ramsden advising him of the organizational changes and the composition of the new senior management team for the department. The letter mentioned that the changes were to be implemented incrementally with a view to full implementation by September 1, 1997. The letter sent to the plaintiff was similar in form and content to letters sent to other senior members of

the department who were also affected by the reorganization. The letter did not say that the plaintiff was to be laid off from the public service; it did not reference lay-off at all. Instead it noted that all existing senior staff maintained their positions and that further assessments would be done as to each individual's career:

> All of the existing members of the Senior Management Committee maintain their current appointments, and responsibilities to lead the work of their division and their respective staff. Therefore, for now you will continue on with your current reporting relationship.
>
> ...
>
> The changes to the organization will be implemented incrementally over the next few months and each staff member will be consulted by their senior managers on the changes that will effect them. I hope to have the new organization fully implemented by September 1st, 1997.
>
> As discussed at the staff meetings, the Genesis Group of human resource consultants (John Simpson, Alan Twissell, Susan Starr, and David Jempson) have been contracted by the Department in order to conduct meetings with individual staff members.
>
> Currently, the Department is not positioned to develop an effective human resource plan which balances the human resource goals of the organization with the goals of individual staff members. The information we gain from this exercise will help the Department improve our human resource planning efforts and will help you to begin or improve upon your own career planning. Some of the information from these interviews will also be used as a resource as we work through the establishment of a new organizational structure.

[13] Mr. Ramsden testified that prior to sending this letter he spoke to all of the directors who, like the plaintiff, were affected by the reorganization and undertook to try to find suitable alternative positions in the public service for each of them by September 1, 1997. Specifically, he telephoned the plaintiff and expressed his desire to keep the plaintiff in the public service and to find him an acceptable new position. None of this was contested by the plaintiff's evidence. Only in case he was unable to find suitable new positions for the affected staff would Mr. Ramsden initiate lay-offs. He never told the plaintiff that he was to be laid-off. The plaintiff acknowledged at trial that no one ever told him that he was to be laid-off.

[14] There were several meetings between the plaintiff and Mr. Ramsden during the ensuing three months. Three positions were identified as possibly suitable new ones for the plaintiff: Director of Policy & Planning, manager of a new "health intelligence" unit

within the department, or executive director of the Northwest Territories Health Care Association. Mr. Ramsden testified that he was prepared to make a direct appointment of the plaintiff to the Director's position. The plaintiff denied that there was such an offer. This dispute in the evidence is immaterial, however, since it was undisputed that the plaintiff preferred to go through a competition (as opposed to being appointed directly) and he did not want the Director's position. By August the discussion was narrowed down to the Association executive director position. However, since the Association was an external body, the plaintiff's placement in that position had to be done through a secondment.

[15] The evidence is clear that the plaintiff and Mr. Ramsden agreed that the secondment would be for a term of two years and that the plaintiff's salary and benefits would continue throughout the term. I am also satisfied that both sides understood that as a safeguard the plaintiff would be given a notice of lay-off prior to the end of the two-year term if no suitable position in the public service was identified in the meantime. Mr. Ramsden wanted to keep the plaintiff in the public service but he could not guarantee anything for the end of the term. The notice of lay-off would then enable the plaintiff to access the various entitlements available to laid-off employees (pursuant to the government's human resource policies).

[16] As part of the secondment process, it was necessary to prepare a secondment agreement between the government as the employer, the receiving body, and the employee to be seconded. Mr. Ramsden left this task to the department's Manager of Human Resources, Mr. Rick Trimp. This was pretty much a straightforward task since the government's policy manual provides a form of standard agreement. For some reason, however, the draft of the agreement was not forwarded to the plaintiff until sometime in October, 1997.

[17] The plaintiff started working in the Association's office in September. He testified that, even though he had not received a lay-off notice, and even though no one told him he was to be laid-off, he assumed that the elimination of his position amounted to the same thing and that he was now entitled to lay-off benefits, if he chose to access them. Notwithstanding his acceptance of the secondment position, the plaintiff came to the view that his career in the Northwest Territories was likely to end in the near future and so he started investigating other job opportunities.

[18] The plaintiff sent the draft secondment agreement to his solicitor for review and advice. Eventually, on January 12, 1998, he wrote to Mr. Trimp expressing several

concerns with the draft. The primary one had to do with what the plaintiff considered to be his right to trigger lay-off entitlements at any time.

[19] The draft agreement contained the following clause number 11:

> 11. At the end of this agreement, Norman Hatlevik's current position will no longer exist. As a result, the Employing Department can not guarantee that upon completion of the secondment, a position within the Employing Department, will be provided to Norman Hatlevik.
>
> Three months prior to the end of this secondment, Norman Hatlevik will receive written notice of lay-off in accordance with the lay-off provisions in force when this agreement was signed.

[20] The concern of the plaintiff was articulated as follows in his letter of January 12:

> I would also like to deal with the fact that my position has already been eliminated. As of June 2nd, 1997 I was entitled to a period of notice and layoff provisions. In the interests of further career development, I require wording in either this agreement or the separate MOU that I am entitled to exercise these two options, period of notice and layoff provisions, at any time during the two-year period. This paragraph, or paragraph #6, could be amended to add that my period of notice and the layoff provisions could be exercised at any time during the term of the agreement. A decision to exercise these provisions would result in an early termination of this agreement. I would of course, exercise my period of notice immediately.

[21] Mr. Trimp, upon receiving the plaintiff's letter, met with Mr. Ramsden so as to obtain further instructions. Mr. Ramsden expressed his disagreement with the plaintiff's interpretation of entitlement to lay-off benefits and told Mr. Trimp to convey that to the plaintiff. Mr. Trimp then tried to contact the plaintiff to arrange a meeting to discuss this issue further, but was unsuccessful in doing so.

[22] Prior to writing his letter of January 12, the plaintiff had an interview for a position in Saskatchewan. He received a job offer on January 22 and accepted it in early February. Then on February 9, 1998, the plaintiff wrote to Mr. Ramsden and Mr. Trimp informing them that he had decided to pursue other career opportunities. He also wrote: "Please consider this as my formal notification to exercise the period of notice and layoff provisions to which I am entitled as a result of the departmental reorganization."

[23] On February 16, 1998, the plaintiff wrote to one of the people working in the department's human resources section to advise that his last working day would be February 27, that he will use up his vacation entitlement prior to starting the calculation of his notice period, and that he is seeking tax advice as to the payouts he would be entitled to under the lay-off policy. The plaintiff had already received information, from someone in that section, that his severance pay for "separation assistance" under the lay-off policy would amount to $29,900.88.

[24] Finally, on February 26, the plaintiff met directly with Mr. Ramsden. The plaintiff reiterated his belief that the lay-off process was triggered by the reorganization of the department the previous summer. It was his position, one that he maintained throughout this trial, that the letter of June 2, 1997, entitled him to exercise his lay-off rights and that he could exercise them at any time. This was so even though no one expressly told him that he was to be laid off. When the rights he thought he had were not addressed in the draft secondment agreement, he felt that there was too much uncertainty over his employment future and thus he sought and obtained other employment. Mr. Ramsden, for his part, explained that it was always his desire to find appropriate employment for the plaintiff within the department and he was willing to keep trying to do so but could not make any guarantee of indeterminate employment at the end of the secondment period. By the time of this meeting, both sides were consulting lawyers.

[25] Eventually Mr. Ramsden advised the plaintiff that in his view the plaintiff had no entitlement to lay-off benefits. He wrote to the plaintiff on March 4, 1998, as follows:

> I do not think this matter is one where a layoff at this time is appropriate. We have made efforts to make you a reasonable job offer, because people of your service and experience are needed in the public service. I have always maintained that position with you. Based on our discussions until last week, I believed I had made one, and you had agreed.

[26] The plaintiff left Yellowknife on March 4. He started his new employment in Saskatchewan on March 5. On March 26 he received a "Record of Employment" form from the government. On it was the notation for "reason for issuance" as "quit". There was correspondence between the respective lawyers. The government's solicitor suggested that, unless the plaintiff were to resign, he would be considered to be "absent without leave". Finally, on June 9, 1998, Mr. Ramsden issued a letter deeming the plaintiff to have abandoned his position.

Analysis:

[27] The fundamental question in this case is: Was the plaintiff laid-off? In my opinion, he was not. Thus he is not entitled to the benefits provided by the lay-off policy.

[28] I gave a summary of the lay-off provisions previously in these reasons. Plaintiff's counsel also summarized them in his written trial brief:

> ... it is submitted that the employer must notify the employee that the employee's position is affected; advise the employee of vacancies in the department; give the employee an opportunity to apply; hold internal competitions; and confirm the discussions in writing, including a description of the lay-off process and the dates lay-off notices will be issued. The letter confirms the rights of employees who are laid off.
>
> It is submitted that the policy, if applied properly, reflects the standard of fairness that must prevail in the employer's dealings with an employee who is being terminated.

Plaintiff's counsel argued that the defendants did not follow the policy. They did not give the plaintiff anything in writing outlining his rights and options nor putting him on notice that he would be relinquishing those rights by accepting the secondment.

[29] In my respectful opinion, this argument misapprehends the policy procedures and the effect of the plaintiff's own evidence. It is true that nothing was ever given in writing to the plaintiff identifying the lay-off options. But that is because the employer, specifically Mr. Ramsden, did not want to lay-off the plaintiff. He wanted to find a suitable new position for him, within the department preferably, but at a minimum in the health field. So, for all intents and purposes, the employer was still in the process of finding a reasonable job and the secondment was viewed as fulfilling that function for the time-being. At least that much was agreed to by the plaintiff and Mr. Ramsden. Therefore, there was no obligation to inform the plaintiff in writing of his lay-off options.

[30] The policy itself speaks of identifying the affected employee for lay-off, advising him or her of available vacancies, and confirming everything in writing, including a description of the lay-off process and the date that a lay-off notice will be issued. Competitions for the vacancies are held. If the affected employee is unsuccessful in those competitions, then a lay-off notice is issued. Since it is the written notice of lay-off, referred to in s.38 of the policy (set out previously), that is the formal written notification to the employee that he or she will cease to be employed at the end of the notice period, it is this document that formally triggers the employee's right to one of the optional benefits. This makes sense because up until issuance of the written notice all efforts are geared to placing the affected employee into a suitable new position.

[31] The plaintiff, in my opinion, implicitly recognized this in his testimony when he stated that he simply assumed he was entitled to the lay-off benefits because his position was eliminated. No one told him he was laid-off; no one told him he was entitled to lay-off benefits. He just assumed he was so entitled. As a senior manager in the department he was aware of these policies. He acknowledged that he knew that ordinarily a letter of lay-off would be sent out. He never received one. He also acknowledged that the type of arrangement he thought he was entitled to, i.e., the right to exercise the lay-off options at any time during the two-year secondment (what the plaintiff referred to as "parking" his entitlement), was not a standard part of the policy and would require specific approval by the deputy minister.

[32] The only conclusion I can draw from the evidence is that the plaintiff was never laid-off. That was not Mr. Ramsden's intent. And, in my opinion, the plaintiff was fully aware of that. The secondment was viewed as a temporary placement, to be sure, but there were going to be further efforts made by Mr. Ramsden to find a suitable indeterminate position. No issue was taken with Mr. Ramsden's professed intentions in that regard. But there were no guarantees. A lay-off provision was therefore put into the draft secondment agreement in case a new position was not found. But there was no decision made to lay-off the plaintiff. There was no exercise of the discretionary power granted to the employer by s.27 of the *Public Service Act*.

[33] Plaintiff's counsel submitted that the fact that the plaintiff's position was eliminated automatically triggered the lay-off policy. This, in counsel's words, amounted to a unilateral breach of the employment contract. With respect, I cannot agree.

[34] The mere fact that the plaintiff's position was eliminated may amount to repudiation by the employer if the plaintiff had ceased being an employee. But the plaintiff never ceased being an employee (at least not until he left to take up a new job). The policy clearly draws a distinction between a position being eliminated, hence raising the possibility of lay-off, and the employment being terminated through lay-off. The plaintiff's position may have been gone but his status as an employee remained.

[35] It may be that if there were no bona fide attempts made to find a suitable alternative position for the plaintiff then he could treat the elimination of his position as constructive dismissal. But that is not the case here. No one doubted the sincerity of Mr. Ramsden's efforts to find a suitable position for the plaintiff. The plaintiff was given three choices in that regard. He chose to turn one down, one that could have provided an indeterminate senior management position. He also chose to go through competitions

as opposed to a direct appointment. These were his choices. And just as the lay-off policy imposes obligations on the employer, it also imposes some on the employee (such as the obligation to accept a reasonable job offer). Here the parties agreed on a reasonable, albeit term limited, position. It was only when the disagreement arose over the plaintiff's ability to exercise his self-assumed right to lay-off benefits at any time during the term that this arrangement apparently became unsatisfactory.

[36] So what was the situation in January when the dispute arose over the wording of the secondment agreement? In my opinion, the result was that since there was no agreement on the terms of the secondment then the secondment was off. The parties were back to where they were between June and September of 1997: the plaintiff continued as an employee and the employer was to try and find a suitable new position. If that was not successful, then the employer could choose to lay-off the plaintiff. Then, but only then in my opinion, would the plaintiff become entitled to lay-off benefits.

[37] One of the issues that arose in this case was whether, by its pleading, the employer admitted that at least up until September 1, 1997, the plaintiff was entitled to claim lay-off benefits. This is due to paragraph 8 of the Statement of Defence:

> 8. In reply to paragraph 11 of the Statement of Claim these Defendants state that the Plaintiff could have requested on or about September 1, 1997 and would have been eligible to receive on of the lay-off options contained in section 1602 of the Human Resources Manual.

[38] On its face this paragraph certainly seems to admit that the plaintiff was entitled to claim lay-off benefits up until September 1, 1997. But within the scope of the defence position advocated at trial this is not the intent. Part of the problem is that the paragraph it purports to respond to (paragraph 11 of the Statement of Claim) is one that alleges that the defendant Ramsden made no effort to identify an equivalent position for the plaintiff and thus the plaintiff believed his employment had come to an end thereby entitling him to benefits. But all the evidence was to the contrary since Mr. Ramsden did make such efforts. So the pleading is immaterial. It also seems to me that the paragraph in the defence is really pleading an alternative: If the plaintiff felt his employment had come to an end, he could have requested consideration of the lay-off process. This does not, however, negate the essential thrust of the defence, to wit, the plaintiff was never laid-off and therefore never entitled to lay-off benefits. That was the way the case was argued and that was the defence the plaintiff addressed.

[39] The September 1, 1997, date is significant because that was the deadline for the departmental reorganization. By then the plaintiff's position had been eliminated. But, by then, the plaintiff had agreed to the secondment to the Health Care Association. Ordinarily, the acceptance of a reasonable alternative position would vitiate an employee's entitlement to lay-off benefits. It would be inconsistent with the policy's framework to allow an employee to accept a reasonable job offer while still holding on to the right to claim lay-off benefits. It is one or the other.

[40] On the facts of this particular case I need not come to a definitive conclusion that the acceptance of the secondment vitiated the plaintiff's entitlements (if in fact he had any). The secondment was subject to an agreement. That agreement was never perfected. So, as I said above, the parties would have been back where they were before. If they could not agree on the secondment then the employer was required to find a new suitable position, if it could. The plaintiff, however, had no entitlements because he still had not been laid off.

[41] What happened here, in my opinion, is that the plaintiff pre-empted the process. He went out and found a new job. There was nothing to prevent him from doing so. But, because he had not been laid-off, and because the terms of the secondment had not been perfected, he in effect usurped the discretionary power of the employer by making the decision for himself to leave the public service. He never gave the employer the opportunity to find another suitable job for him. He did not wait for a formal notice of lay-off. Indeed he did not even ask his employer if he was to be laid-off. He just assumed he was entitled to benefits so, acting on that assumption, he voluntarily left his employment with the government.

[42] In my respectful opinion, the plaintiff's assumption was wrong. Therefore the claim for breach of contract cannot succeed.

[43] Much was made in argument about the employer's duty of good faith. Counsel referred me to the majority judgment authored by Iacobucci J. in *Wallace* v. *United Grain Growers Ltd.*, [1997] 3 S.C.R. 701 (at paras. 95 & 98):

> The point at which the employment relationship ruptures is the time when the employee is most vulnerable and hence, most in need of protection. In recognition of this need, the law ought to encourage conduct that minimizes the damage and dislocation (both economic and personal) that result from dismissal. In Machtinger, supra, it was noted that the manner in which employment can be terminated is equally important to an individual's identity as the work itself (at p. 1002). By way of expanding upon this statement, I note that the loss of

> one's job is always a traumatic event. However, when termination is accompanied by acts of bad faith in the manner of discharge, the results can be especially devastating. In my opinion, to ensure that employees receive adequate protection, employers ought to be held to an obligation of good faith and fair dealing in the manner of dismissal, the breach of which will be compensated for by adding to the length of the notice period.
>
> ...
>
> The obligation of good faith and fair dealing is incapable of precise definition. However, at a minimum, I believe that in the course of dismissal employers ought to be candid, reasonable, honest and forthright with their employees and should refrain from engaging in conduct that is unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive.

[44] Plaintiff's counsel noted that if September 1 was a deadline of some type, or the terms of the secondment agreement were material, then the employer had a good faith obligation to tell the plaintiff that. But, as I find on the evidence, there was no deadline because there was never a decision taken to lay-off the plaintiff. All of Mr. Ramsden's words and actions pointed to the opposite intention, the desire to keep the plaintiff in the public service. Furthermore, it was the plaintiff who made the terms of the proposed secondment agreement material. He objected to the lack of an explicit recognition of what he assumed was his right to claim lay-off benefits at any time. But even before he met with Mr. Ramsden to discuss this dispute he accepted the job offer from Saskatchewan.

[45] In my opinion, the employer did act in good faith throughout. It was "candid, reasonable, honest and forthright" (to quote *Wallace*). No one led the plaintiff to believe in some non-existent state of affairs. He is the one who made various assumptions, particularly about his employment in the public service coming to an end. His employer, on the other hand, was trying to keep him in the public service.

[46] Plaintiff's counsel also referred me to the case of *Grimes* v. *Alberta* (1997), 202 A.R. 305 (Q.B.). There an employee of a government department was given notice of a privatization and given the choice of accepting a buy-out option or joining the successor corporation. The employee did not exercise the option in time and was deemed to have joined the successor. The court held that, since there was no legislation authorizing this procedure, the employer could not unilaterally impose such a choice on the employee. To do so amounts to constructive dismissal (particularly since an employee in that person's position was entitled to other procedures and benefits under the existing

legislation). In other words, the defendant government failed to follow its own legislation in dealing with employees affected by privatization. Therefore, when the plaintiff in that case refused a job offer from the successor, and the government terminated his employment for that, the court held that the government's actions amounted to an abolishment of the plaintiff's position, that the termination of his employment was void, and that he was entitled to severance pay under the appropriate legislation.

[47] In my opinion, the *Grimes* case does not assist the plaintiff here. First, there is nothing in the evidence here showing that the employer failed to follow its policies or the applicable legislation. Second, and most significant, the plaintiff here was never terminated in his employment. He never ceased to be an employee until he voluntarily chose to accept other employment. It was the plaintiff who severed the employment relationship.

[48] The plaintiff's claim against the defendant Commissioner is therefore dismissed. Since I find no breach of contract by the employer, it follows that the claim against the defendant Ramsden for inducing a breach of contract must also be dismissed. I will only say that the evidence convinced me that the actions of this defendant were taken in good faith and, indeed, with a view to preserving the employment relationship. When that was no longer possible, he at least tried to convince the plaintiff to submit a formal resignation (which may have, depending on the length of notice and the plaintiff's length of service at the time, enabled the plaintiff to receive some severance pay, albeit not as much as claimed under the lay-off separation assistance). In the absence of a formal resignation, it was logical to conclude that the plaintiff "abandoned" his position.

Damages:

[49] In case I am wrong in my conclusion dismissing the claim, I will say a few words about damages.

[50] If I had found in favour of the plaintiff I would have awarded the full amount of the severance calculated on the basis of separation assistance ($29,900.88). This is a breach of contract claim so there is no issue of mitigation. The plaintiff would have been entitled to damages equivalent to what he would have received if the contract had been honoured. The fact that the plaintiff commenced new employment right away is irrelevant.

[51] There was a claim for punitive damages. The plaintiff asserted that the label that he "abandoned" his position is a permanent blot on his otherwise sterling employment

record. He further asserted that the declaration of abandonment injured his character and reputation and brought him into public scandal and contempt.

[52] Punitive damages are normally awarded so as to punish the defendant for harsh, vindictive, reprehensible or malicious conduct. There must be a finding of the commission of an actionable wrong which caused injury to the plaintiff, such as mental distress or exposure to scandal and public odium. And while it would be rare in a breach of contract case to award punitive damages, that is not to say that such damages could not be awarded where the breach or the manner of its commission was egregious: see *Vorvis* v. *Insurance Corporation of British Columbia*, [1989] 1 S.C.R. 1085.

[53] In this case there was no evidence of harsh, vindictive, reprehensible or malicious conduct on the part of the employer (as an entity) or on the part of Mr. Ramsden. There was no evidence of any particular or additional injury suffered by the plaintiff as a result of the termination of his employment. Except for the general comment that the reference to abandonment acts as a "blot" on his record, there was no evidence of any actual detrimental effect on the plaintiff. Therefore, I would not have awarded punitive damages in this case.

Conclusions:

[54] The action is dismissed. Counsel may make further submissions as to costs if they are unable to agree.

J.Z. Vertes
J.S.C.

Dated this 19th day of August, 2002.

Counsel for the Plaintiff: Austin F. Marshall and
James Mahon

Counsel for the Crown: Sheldon N. Toner and
Bradley E. Patzer

CV 0779

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REASONS FOR JUDGMENT OF
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