IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20090415
Docket: S090729
Registry: Vancouver

Between

David Jakubcak

Plaintiff

And

Dr. R.A. Melnyk Inc.
doing business as Coast Dental Centre

Defendant

Before: The Honourable Madam Justice Wedge

Oral Reasons for Judgment
(In Chambers)

Counsel for the Plaintiff:	B.J. Lotzkar
Counsel for the Defendant:	C. Martin
Place and Date of Hearing:	Vancouver, B.C. April 8, 2009
Place and Date of Judgment:	Vancouver, B.C. April 15, 2009

[1] **THE COURT:** The plaintiff has brought an application for a summary trial of his wrongful dismissal claim against the defendant pursuant to Rule 18A of the *Rules of Court*.

[2] The plaintiff is a registered dental hygienist. He was hired by the defendant dental practice to perform temporary work as a hygienist while the regular full-time hygienist was on maternity leave. He commenced employment December 1, 2008. It was anticipated at that time that the regular hygienist would return August 1, 2009; however, the plaintiff was summarily dismissed on December 22, 2008.

[3] The plaintiff commenced this action claiming that he was hired on an eight-month definite-term contract which precluded the defendant from terminating him on reasonable notice. He argued that he is entitled to damages equal to the amount he would have earned in the eight-month period as well as any bonuses and other benefits to which he says he would have been entitled during that period.

[4] The defendant argued that the plaintiff agreed to accept temporary work in a maternity leave position which would not extend beyond August 1, 2009, but there was no agreement that the plaintiff would be guaranteed work for the entire eight months nor any agreement that he could not be terminated on reasonable notice within that time.

[5] The narrow issue in this case is whether the plaintiff's employment contract guaranteed him work for the eight-month period such that he is entitled to damages in an amount equal to that owing on the unexpired term of the contract and all benefits he would have accrued during that period.

[6] The issue can be stated more generally as follows: is an offer of temporary work necessarily an offer of employment for a definite term that cannot be terminated on reasonable notice?

[7] It is the position of the plaintiff that a contract of temporary employment is by definition a contract for a fixed or definite term because it has a fixed end date. It is the defendant's position that the precise nature of the employment contract is a

question of fact based on the language of the agreement and the reasonableness of the parties' assumptions arising from the language.

[8] The parties agreed the case was suitable for a summary disposition. Evidence was tendered by way of affidavits sworn by the plaintiff as well as the office manager of the defendant, Ms. Roma, and the dental practitioner, Dr. Melnyk.

[9] By way of background, Dr. Melnyk is a dentist licensed to practice in British Columbia. His practice is incorporated as Dr. R.A. Melnyk Inc. and currently does business as Coast Dental Centre at Champlain Square in Vancouver. The dental practice employs nine people: Dr. Melnyk, two dental hygienists, an office manager, two receptionists, and four support staff.

[10] In August of 2008, Connie Tse, one of the full-time dental hygienists working for the defendant, requested a period of maternity leave from August 2008 to July 30, 2009. As a result of the maternity leave, the office manager, Ms. Roma, was responsible for finding a replacement. In August of 2008, Ms. Roma hired a replacement who filled the position from August until November of 2008. In November, however, the replacement hygienist terminated her employment with the defendant because she, too, was pregnant. In order to find a further replacement, Ms. Roma contacted North Shore Dental Temps Inc. She explained to North Shore that the defendant was attempting to fill a maternity leave position that was expected to last until August 1, 2009.

[11] Prior to November of 2008, the plaintiff had previously been referred by North Shore to Dr. Melnyk's dental practice on four occasions. One each occasion, the assignment was for one day. On November 24, 2008, North Shore told Ms. Roma that the plaintiff had accepted the temporary work. Shortly thereafter, Ms. Roma received a telephone call from the plaintiff. The conversation was informal. At the outset, the plaintiff informed Ms. Roma that he would accept the position and wanted to confirm some details of the employment that had been explained to him by North Shore.

[12] Ms. Roma's evidence was that during the telephone conversation with the plaintiff, she explained that the work was temporary and the opportunity for employment would begin on December 1, 2008. The plaintiff then confirmed with Ms. Roma that Ms. Tse was currently expected to return to work on about August 1, 2009. Ms. Roma's evidence was that, at no time during the telephone conversation with the plaintiff, did she inform him that he was being offered a contract guaranteeing him work for the entire eight months.

[13] The plaintiff, in his examination for discovery, said that he understood he was obtaining an eight-month maternity leave position. He acknowledged that Ms. Roma may not have used the words "eight-month contract," but that he was informed of the start date of December 1, 2008. He also said Ms. Roma may have mentioned that the employee on maternity leave would be returning on August 1, 2009. The plaintiff agreed Ms. Roma did not say he would be guaranteed work until July 30, 2009, or that he could not be terminated on reasonable notice, but he thought there would be no reason why he would not be employed for the full eight months.

[14] There was no discussion between Ms. Roma and the plaintiff to the effect that if his employment ended before that time, the defendant would pay him for the remaining term of the position.

[15] On discovery, the plaintiff was asked the following question and gave the following answer:

> Q Did Ms. Roma say that your employment would start on December 1st and end of July 30th, 2009, with the defendant?
>
> A I don't remember exactly.

The plaintiff could not recall whether he was told that work was available for that period of time or that his employment would cover that period of time.

[16] It was common ground that at no time during the telephone conversation or, for that matter, during his brief employment with the defendant, did Ms. Roma advise the plaintiff that he could not be terminated on reasonable notice. Ms. Roma

deposed that if the plaintiff sought the assurance that he would be employed continuously for the period in question, she would have refused to hire him. Ms. Roma deposed that she could not make any such guarantee for the following reasons. First, she could not guarantee employment to the plaintiff for the entire period because Ms. Tse could elect to come back early from maternity leave and the defendant would be obligated to take her back. Second, although the plaintiff had previously worked for the defendant on one-day assignments, Ms. Roma did not know what the plaintiff's professional capabilities or his personal abilities were over an entire work week or for an extended period of time. Third, ultimately any dental hygienist hired by the defendant had to be evaluated by Dr. Melnyk to confirm his or her professional capabilities were of industry standard and had the requisite personality to work in a team environment and deal with client demands.

[17] Ms. Roma deposed that in the telephone conversation with the plaintiff she discussed his hourly rate and hours of work that would be expected. She also explained to the plaintiff that if the employment relationship worked out and he did, in fact, work for the remaining period of Ms. Tse's maternity leave, he would be eligible for a performance bonus. Her evidence on this point was not contradicted.

[18] In answer to the plaintiff's inquiries, Ms. Roma informed him that the dental practice offered its employees free dental treatment excluding lab costs but did not pay its dental hygienists for the cost of uniforms. The plaintiff asked whether the defendant would pay for his attendance at the Pacific Dental Conference. Ms. Roma told the plaintiff that the defendant usually paid for its employees to register at the conference.

[19] At the conclusion of the telephone conversation, the plaintiff advised Ms. Roma he was prepared to start work on December 1, 2008, and requested that she provide him a brief email summarizing what had been discussed on the phone. On November 24, 2008, Ms. Roma sent the plaintiff an email highlighting the various points in their telephone discussion. The email commenced with the following comment:

> Thank you for taking the maternity leave position from December 1, 2008, to July 30, 2009.

Ms. Roma deposed that when she composed the email she was summarizing the information that had previously been provided to the plaintiff; that is, that the work was only temporary in nature, and would only be available from December 1, 2008, until July 30, 2009, because Ms. Tse had stated she would be returning from maternity leave at that time. Ms. Roma deposed it was not her intention to guarantee the plaintiff employment during that period.

[20] The plaintiff did commence employment with the defendant on December 1, 2008. However, on December 22, 2008, Ms. Roma advised the plaintiff that his employment with the defendant would end on December 23. The only basis for the termination advanced at trial was the earlier-than-anticipated return of Ms. Tse from her maternity leave. Cause for dismissal was not alleged at trial.

[21] The central issue, then, is whether the plaintiff has established that his employment contract included a term, either express or by necessary implication, that the defendant was not entitled to terminate his employment on reasonable notice. The plaintiff bears the onus of establishing that he was offered such a contract. As noted by our court in *Herold v. Marathon Developments Inc.*, [1999] B.C.J. No. 878 (S.C.), at para. 23, there must be unequivocal and express language to establish a contract of employment for a fixed term which precludes the employer from terminating an employee on reasonable notice.

[22] The plaintiff relied on the email sent by the office manager thanking him for "taking the maternity leave position from December 1, 2008, to July 30, 2009." There was no written contract of employment. There were only verbal discussions between the parties which lead to the plaintiff's acceptance of the temporary work. It is unclear, even from the email, whether Ms. Roma was simply confirming the temporary nature of the work and the duration of its availability. Both Ms. Roma and the plaintiff agree there was no discussion about a fixed-term contract or an eight-month contract. It is common ground that Ms. Roma did not tell the plaintiff he would

be guaranteed employment for the entire period of the maternity leave. The email, taken together with the evidence of the discussions between the parties, establishes that the defendant confirmed with the plaintiff that the work was available on a temporary basis only.

[23] The existence of a contract for a definite term is a question of fact. It is not based solely on an understanding that work will be available on a temporary basis. When the end date of the temporary work is specified, the existence of contract for a definite term must be based both on the words used in the contract and the reasonable assumptions of the parties based on those words: *Riddell v. City of Vancouver*, [1984] B.C.J. No. 1088 (S.C.), aff'd [1985] B.C.J. No. 1783 (C.A.).

[24] One party's assumption will not generally create a contract for a definite term which cannot be terminated on reasonable notice unless that assumption is communicated to the other party or is based on the representations of the other party. In *Ceccol v. Ontario Gymnastic Federation*, [2001] O.J. No. 3488 (C.A.), the Ontario Court of Appeal discussed the significance of the reasonable expectations of the parties in the context of employment contracts. At para. 13, MacPherson J.A. writing for the court said the following:

> I agree with the Trial Judge's conclusion. His observation about the importance of the parties' reasonable expectations is a faithful application of one of the leading decisions of the Supreme Court of Canada in the contract law domain. In *Consolidated Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co.*, [1980] 1 S.C.R. 888 at 901, Estey J. said:
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> > [T]he normal rules of construction lead a court to search for an interpretation which, from the whole of the contract, would appear to promote or advance the true intent of the parties at the time of entry into the contract. Consequently, literal meaning should not be applied where to do so would bring about an unrealistic result or a result which would not be contemplated in the commercial atmosphere in which the insurance was contracted. Where words may bear two constructions, the more reasonable one, that which produces a fair result, must certainly be taken as the interpretation which would promote the intention of the parties.

[25] In *Chitty on Contracts*, 29th ed., Vol. I (London: Sweet & Maxwell, 2004) at paragraph 12-043, the learned author said:

> In the modern law, the courts will, in principle, look at all the circumstances surrounding the making of the contract which would assist in determining how the language of the document would have been understood by a reasonable man.

[26] The literal meaning of a contract will not be applied where to do so would lead to a result that was not contemplated. In this case, there was no contract of employment reduced to writing. There was only the discussion between the plaintiff and the office manager concerning the offer of temporary work created by the maternity leave, and the email confirming with thanks that the plaintiff had accepted the work in question.

[27] I do not accept that every offer of temporary employment creates an employment contract which effectively guarantees an employee work for the term of the contract. If the plaintiff's argument was accepted, every offer of temporary employment with a specified end date would create a contract that could not be terminated on reasonable notice.

[28] I do accept that a temporary employment contract may create a contract for a definite term pursuant to which an employer will be liable for the entire period of the employment offered. However, in the absence of a written contract, the court must determine the nature of the bargain reached between the parties from the discussions that took place between them. On the basis of the plaintiff's discovery evidence and the affidavit evidence of both parties, I conclude that the offer of employment in this case contemplated that work was available on a temporary basis until August 1, 2009, when the maternity leave of Ms. Tse was expected to end, but not that the plaintiff was guaranteed employment for that period of time. In my view, the overriding aspect of the defendant's offer of employment was its temporary nature rather and not its definite term. Although the work was to end at a specified time, there was no suggestion that the employer could not terminate on reasonable notice.

[29] I am satisfied that had the plaintiff communicated to the defendant his assumption or understanding that the offer was for a fixed-term employment

contract, the defendant would have insisted on a mechanism for termination of the contract on reasonable notice within that period of time.

[30] I conclude that the defendant was entitled to terminate the plaintiff on reasonable notice

[31] The plaintiff had worked for the defendant for a three-week period. However, when he was terminated on December 23, 2008, the plaintiff could not realistically look for alternate employment until the first week of January due to the Christmas break. In the circumstances, I have concluded that the plaintiff is entitled to the equivalent of one week's pay (he worked a four-day work week). The claim is otherwise dismissed.

[DISCUSSION ON COSTS]

[32] THE COURT: All right. I am going to consider the matter and I will let the parties know through the registry.

The Honourable Madam Justice C. A. Wedge