IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Dodich v. Leisure Care Canada,***
2006 BCSC 93

Date: 20060118
Docket: S047064
Registry: Vancouver

Between:

Linda Dodich

Plaintiff

And

Leisure Care Canada, The O'Keefe Company

Defendant

Before: The Honourable Mr. Justice R.R. Holmes

Reasons for Judgment

Counsel for the Plaintiff:	C.D. Martin
Counsel for the Defendant:	G. Catherwood
Date and Place of Trial/Hearing:	January 13, 2006 Vancouver, B.C.

[1] The plaintiff seeks judgment for damages pursuant to Rule 18A against the defendant for wrongful dismissal from employment.

[2] The plaintiff was employed by the defendant and Lifestyle Retirement Communities ("Lifestyle"), it's predecessor, as Manager, Recreation Services at the O'Keefe, a seniors residence in Vancouver. A letter contract dated November 16, 2002 for employment to commence December 9, 2002 sets the terms of that employment.

[3] The defendant became the management company for the O'Keefe on November 20, 2003. The defendant offered, and the plaintiff accepted, that her employment would continue on the original terms.

[4] The plaintiff was terminated without notice and not for cause on October 5, 2004 with payment of three weeks' salary.

[5] The plaintiff claims an entitlement to reasonable notice and payment of equivalent salary in lieu of that notice. The defendant's position is that there is a term of the plaintiff's letter contract of employment which rebuts the common law presumption of reasonable notice.

[6] The termination provision in the letter of employment reads:

Should it be necessary, Lifestyle may end the employment relationship by providing you with a minimum of two (2) weeks notice, or pay in lieu of notice, or such that is required by the ***Employment Standards Act***, whichever is greater. In any event, we guarantee that you will be provided with compensation upon the severance of the employment relationship, on a without cause basis, which shall not be less than two (2) weeks per year of service. This payment will include any statutory obligations Lifestyle may have under the ***Employment Standards Act***.

[7] Is the plaintiff's entitlement to reasonable notice governed by the letter of employment and, if so, what is the proper interpretation of the termination clause in issue?

[8] If the termination clause is unenforceable, what is the appropriate notice period under common law?

[9] The common law presumes employment may be terminated only on reasonable notice. As expressed by Mr. Justice Iacobucci J. in ***Machtinger v. HOJ Industries Ltd.***, [1992] 1 S.C.R. 986, the presumption can be rebutted only "... if the contract of employment clearly specifies some other period of notice, whether expressly or impliedly".

[10] The termination provision provides that if the plaintiff is terminated without cause the defendant must give two weeks advance notice, or pay two weeks salary in lieu of notice or, "such that is required by the ***Employment Standard Act***". The provision then goes on to "guarantee ... compensation ... shall not be less than two (2) weeks per year of service".

[11] The termination clause therefore purports to provide minimum amounts that will accrue to the plaintiff and to guarantee payment will not be less than a specified amount. The wording of the guarantee does not suggest a maximum or upper limit and the presumption of reasonable notice is not clearly displaced by another notice period.

[12] The defendant relies on a line of cases from the courts in Ontario, the progenitor of which was the decision in ***MacDonald v. ADGA Systems International Ltd.***, [1999] O.J. No. 146, 117 O.A.C. 95. They are basically concerned with contract wording impinging upon statutory notice periods under employment standards legislation. The notice provisions of the ***Employment Standards Act*** are not the issue here.

[13] I accept the defendant's premise that the guiding principles for construction require that one consider the plain meaning of the termination clause and seek to avoid absurdity in interpretation of it. The defendant is driven to interpret the termination provision's plain meaning to be that the minimum period of notice (two weeks per year of service) and the maximum are the same. I do not accept that to be a plain meaning and if intended could easily have been specified.

[14] The termination clause is ambiguous. The first provision for the greater of two weeks notice or the entitlement under the ***Act*** standing alone sets a maximum or limit on compensation to be paid. The entitlement under the ***Act*** of course is statutory and does not require the contract of the parties. The guarantee portion of the termination clause in contrast does not set a maximum and therefore leaves open the interpretation that if, for example, reasonable notice were found to be less than a period of two weeks for each year of service the plaintiff would have the protection of a minimum guarantee.

[15] The defendant drafted the termination clause and the principle of *contra proferentum* where competing interpretations are put forth must be construed against it.

[16] I find the defendant has not shown that the termination provision of the letter of employment has displaced the plaintiff's common law entitlement to reasonable notice.

[17] The factors of importance to determine a reasonable period of notice are:

a. the character of the plaintiff's employment

b the length of service of the plaintiff

c. the plaintiff's age

d. the availability of similar employment.

[18] The plaintiff is 47 years of age. The plaintiff worked with the management team of the O'Keefe and her responsibility was for the co-ordination of recreation programming for the residence. The plaintiff had supervisory duties, but not of employees. She supervised the "outside contractors" involved in recreation. It might be said she supervised those residents who volunteered their assistance.

[19] I conclude the plaintiff's position was low level management and required she personally attend to many of the menial aspects of her work such as shopping for supplies, and setting up and dismantling displays and decoration.

[20] The plaintiff's salary was modest at $38,000 per year. The plaintiff was employed for approximately 22 months. It appears there were several job opportunities advertised for suitable replacement employment although the plaintiff was not successful in finding a new job for five months. It is not suggested she was not diligent in her job search.

[21] Counsel have supplied me with several authorities in support of their submissions as to the reasonable notice period. The plaintiff contends six months is appropriate, the defendant argues for six weeks.

[22] The defendant factored awards in the authorities cited back to an equivalent of weeks per year of service. The plaintiff of course had very short term employment (less than two years) and suffers in that form of comparison. As noted in ***Shinn v. TBC Teletheatre B.C.*** (2001), 85 B.C.L.R. (3d) 75 (C.A.), awards regarding notice periods for short term employees has trended upwards.

[23] The authorities of the plaintiff were far ranging as to age, position, responsibility, skills, length of service, circumstances and salary making close comparison to the plaintiff problematic.

[24] Taking the factors for determining reasonable notice into account in the context of reference to relevant authority I set the period of reasonable notice for the plaintiff at three months.

[25] I understand counsel are agreed that the plaintiff's weekly salary at the date of termination was $730.77. The plaintiff was paid three weeks salary on termination. The plaintiff is therefore entitled to judgment for $6576.93 for the further nine weeks salary in lieu of notice, prejudgment interest, and costs on Scale 3.

"R.R. Holmes, J."
The Honourable Mr. Justice R.R. Holmes