

Citation: Nicholson v. Richmond Cruiseship Center Inc.
2006 BCPC 0158

Date: 20060405
File No: 20418614
Registry: Richmond

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

BETWEEN:

NELLY NICHOLSON

CLAIMANT

AND:

RICHMOND CRUISESHIP CENTER INC.

DEFENDANT

**REASONS FOR JUDGMENT
OF THE
HONOURABLE JUDGE M.E. RAE**

Appearing in person:

N. Nicholson

Counsel for the Defendant:

C. Martin

Place of Hearing:

Richmond, B.C.

Date of Hearing:

March 28, 2006

Date of Judgment:

April 5, 2006

[1] The Claimant sues to recover commissions she says are owed to her. The Defendant has filed a counterclaim for damages which they allege arise from a breach of the Claimant's contract of employment.

The Claim

[2] The Claimant is a travel agent and she worked as an independent contractor with the Defendant for about 10 years. She worked two days a week on a commission basis. She was not paid any salary, but earned commissions on travel sales.

[3] On January 30, 2004, she responded to an advertisement for a position with another travel agent that was a competitor of the Defendant. The Claimant was successful in obtaining this position, and from her perspective it was a much better position because it paid a salary and offered other benefits which were not available to her while she worked with the Defendant. She accepted this position on February 2, 2004, and immediately left the Defendant's company.

[4] She says that she is owed commissions on travel sales that she had made and that were in process at the time she left, and that the Defendant has refused to pay these commissions.

[5] The Defendant has provided a list of commissions that they agree are payable, and the Claimant agrees with this calculation with one or two minor exceptions which I will detail below.

The Counterclaim

[6] The Defendant says that the Claimant breached the terms of an employment contract that she signed prior to working with the Defendant company. A copy of this agreement is filed at tab 16 of Exhibit 1.

[7] Clause 2.1 of that agreement provides that either party may terminate the agreement by one month's written notice by either party unless other earlier termination is provided. Clause 9.1 and 9.2 state as follows:

Either party may terminate this agreement without cause, upon one month's written notice to the other. Provided that the Center may terminate this Agreement immediately upon written notice to the I.C. in the event the I.C. shall commit a material breach of this agreement.

Termination of this Agreement shall not affect the rights, duties and obligations of the parties hereto that arose prior to such termination or the obligations of the I.C. pursuant to paragraph 8.2 hereof.

[8] Clause 8 of the agreement is titled "Confidential Information". It reads as follows:

8.1 All manuals, files, programmes, reports, proposals, customer lists and prospect lists (including any copies thereof) provided to or otherwise acquired by the I.C. in or to assist in providing the services (the Confidential Information), remain the exclusive property of the Center.

8.2 The I.C. agrees that during the term of this Agreement or at any time thereafter, he or she will not either directly or indirectly divulge, disclose or use for any purpose other than the performance of his or her obligations hereunder, the Confidential Information or any other information concerning the business or affairs of the Center or the Franchisor.

[9] The Defendant says that the Claimant breached conditions 2.1 and 9 by providing no notice of her resignation.

[10] They say further that the Claimant retained a client list belonging to the Defendant after she resigned and did not return it until approximately 6 weeks after her resignation. They say further that she allowed advertisements to be published in a local newspaper that stated that Ms. Nicholson who was formerly with the Defendant was now employed at Time Square Travel, which was in direct competition with the Defendant. They state further that the Claimant made a number of inappropriate contacts with former customers of the Defendant, and that on a couple of occasions she phoned a cruise line and alleged she was still working with the Defendant in order to gain information on the price of cruises booked through the Defendant's company.

The Evidence

[11] The Claimant agrees with all but three of the commission calculations provided by the Defendant and filed as an exhibit in these proceedings.

[12] The evidence was that the Claimant was entitled to her full commission on the sales although the Defendant was entitled to discount the commission for work that needed to be done to complete the file.

[13] I heard evidence from agents who worked on all three of the files at issue, and I am satisfied that the discounts claimed by the Defendant were fair on all of these files. I find that the commissions owing to the Claimant at the date of her resignation, inclusive of expenses owed to the Defendant amounted to a total of \$2384.92.

[14] The Claimant agrees that she accepted a position with another company on February 2, and advised the Defendant on February 6, which was a Friday, that she was leaving immediately. The Claimant indicated that over her time with the Defendant, it was customary that sales persons who submitted their resignation were terminated immediately, and she expected that would happen to her. She assumed this would be the case, and submitted her resignation upon advising the Defendant of her new position.

[15] Her new employer advised that it is the practice in his company to terminate immediately any employee who submitted a resignation, since there would be a concern that the employee's loyalties would not rest with the old employer. Since a sales agent is a travel agency's best asset, it would make sense that the employer be confident of the loyalty of each individual agent to the company.

[16] I cannot see that the Defendant suffered any losses as a result of this lack of notice, and in any event since the completed files remained with the Defendant. In addition the contract provides for earlier termination and that in any event, the rights and obligations of the parties toward each other would survive the termination.

[17] Just prior to her leaving, the Claimant says she spent some time cleaning up her uncompleted files so that a new agent could take them over. She also printed a copy of the company client list which contained names and phone numbers of all of the company's clients. It was understood that she was entitled to advise all of her family and close friends who had been clients of the company as to whether they wished to continue with the company, or transfer their business to her new employer.

[18] The Claimant met with Ms. Peterson, an owner of the Defendant company the day following her resignation. I think it fair to say that Ms. Peterson was upset by the sudden resignation, and that the Claimant was upset as well. The Claimant says she came to the meeting expecting to be intimidated by Ms. Peterson. It was likely not an especially happy occasion for either party. The Claimant returned the property of the Defendant which she had in her possession with the exception of the client list, which she says she needed to contact her family and friends. Ms. Peterson attempted to sit down with the Claimant at that meeting to go over the client list, but the Claimant was not prepared to do that. The Claimant says that she was never asked specifically to return the client list, and would have done so if asked.

[19] The Defendant did not become aware immediately that the Claimant had this client list, or did not take any action to have it returned for some time. They made a request for the return of the list some time in late February, and the Claimant returned it immediately upon request. She had indicated on this list which customers were her friends and family. There is no evidence that she made any use of this list to entice clients to her new employer. Her new employer confirmed that she was hired for her expertise, and not for the fact that she had a customer base.

[20] The Claimant says she retained the list only for the purpose of contacting her friends and family, and that it did not occur to her that it was property of the Defendant that she was required to return. She confirms that she returned it immediately on request.

[21] The Defendant says that shortly after her resignation an advertisement appeared in a local paper advising that the Claimant, formerly in the employ of the Defendant was now working for a competitor. The Defendant says that this was a deliberate attempt to lure customers away from the Defendant.

[22] The Claimant says she did not place the advertisement, and her employer confirms that he placed the ad through his marketing department. There is no evidence to suggest that the Claimant had any input into the

content of the advertisement.

[23] The Defendant says further that he believes the Claimant contacted some of the Defendant's customers after she had left their employ. He has no evidence to support this and the Claimant denies it.

[24] The Defendant says further that there have been a couple of occasions where the Claimant has made bookings with cruise lines indicating that her contact number was the Defendant's company. The Defendant believes this is an attempt to comparison shop and obtain a lower price for a customer. There are two or three booking confirmations provided as evidence that she did this.

[25] The Claimant says that she may have done this and accidentally given the wrong number since she had used the Defendant's phone number for nine years while in their employ. She makes the point that she had nothing to gain by doing this, since these were bookings and not price quotes, and again there is no evidence to suggest that the Defendant suffered any loss as a result.

Analysis of Counterclaim

[26] I am satisfied that the Claimant has not breached the terms of her employment contract. Pursuant to the terms of the contract her termination without notice did not affect any of her rights under the contract. She was still entitled to her commissions. The Defendant did not suffer any loss. There may have been some extra work in completing the booked trips, but they were compensated for that by discounting the commissions.

[27] Clause nine, which deals with confidential information does not specifically prohibit the Claimant from retaining the client list. It merely says she is not to make any unauthorized use of it. I am unable to find that the Claimant made any unauthorized use of this document. She used it only for the purpose of contacting her friends and family which everyone agrees she was entitled to do. She returned the document immediately on request, and not only that, she clearly indicated on the list which of her family and friends she had contacted from the list. There is no evidence to suggest she made any use of it to lure customers away from the Defendant company.

[28] The Defendant says they spent time and money going through their files as a result of the Claimant retaining this list, but they made no request for the return of the document before they did so, and had they done so they may well have avoided this expense.

[29] There is no evidence to suggest that the Claimant played any role in the advertisement, and even if she had, there is nothing in the contract to prohibit her from doing so.

[30] Accordingly, I find that the Claimant has not breached any of the terms of her employment contract and the counterclaim is dismissed.

[31] The Claimant is entitled to judgment in the amount of \$2384.92 together with her expenses and prejudgment interest.

MARGARET E. RAE, P.C.J.