Claim Case Studies & Legislation Whiting v. Boys and Girls Club Services of Greater Victoria, 2011 BCSC Wrongful Dismissal

Facts

Ms. Whiting was employed as a program manager for the Boys and Girls Club of Greater Victoria from November 1995 through August 2008. She was given a notice of termination with eight weeks working notice. She was 57 years old at the time.

Ms. Whiting was not terminated for something she did, or did not do. She was terminated when the funding for the programs she was responsible for diminished. With diminished funding, the Club had to let her go.

After being let go, Ms. Whiting found other employment as a social worker. The position paid less money and had fewer benefits.

Ms. Whiting sought damages from the Boys and Girls Club for failure to give reasonable notice, costs for retraining and lost benefits.

The Club stated that not only did Ms. Whiting fail to mitigate her damages, but that the employment contract they had with her clearly stated the notice requirement to be the standard under the *Employment Standards Act*, (R.S.B.C 1996).

Issues

1. What was the nature of the employment arrangement?
2. Was Ms. Whiting entitled to the notice specified in the employments contracts, or was the employment relationship one of 'indeterminate term' requiring a period of 'reasonable notice'?
3. If she was entitled to 'reasonable notice' then what was that period?
4. Did Ms. Whiting fail to mitigate her damages?

Plaintiff's Employment Contracts and Relevant Law

During the course of her employment with the Club, she signed several employment contracts:

a. Probationary Contract dated November 15, 1995. Term: November 15, 1995 to May 14, 1995.
b. Employment Contract dated May 3, 2004. Term: May 3, 2004 to March 31, 2005.
c. Time Limited Employment Contract dated July 4, 2006. Term: July 4, 2006 to September 1, 2006.
d. Employment Contract dated September 8, 2006. Term: September 4, 2006 to March 31, 2007.
e. Employment Contract dated October 2, 2006. Term: October 2, 2006 to March 31, 2007.

The Probationary Contract contained the following provision:

"In any event, the Employer shall not, on termination, be liable to give notice (or pay in lieu of notice) to any Employee in excess of the minimum requirements as set out in the *Employment Standards Act* as amended from time to time".

The subsequent written contracts contained the following provision:

"In no event shall the Employer be liable on termination to give notice (or pay in lieu of notice) to the Employee in excess of the minimum requirements as set out in the *Employment Standards Act* as amended from time to time". The contracts also contained a provision that specified that the termination of the contract would be at the expiry of the specified term in the contract.

The agreements were a standard form contract used by the Club. There was no negotiation of terms and Mrs. Whiting

was not advised to seek legal advice. However, as a part of her duties, Ms. Whiting had had employees under her sign the same contract.

Ms. Whiting received the notice of termination on June 25th, 2008. The reason for termination was stated that as a result of the Club's strategic planning "there was a need for organizational changes and as a result her position would no longer exist".

Ms. Whiting remained on good terms with the Club and worked until mid-August 2008. After leaving the Club she searched for new employment, took a course and sought employment counseling. In August 2010 she obtained employment as front line staff with a local child welfare agency.

In general, employment contracts for an indefinite term have an implied term that it can be terminated by the provision of 'reasonable notice'. Case law indicates that when an employee continues working past the end date of a definite contract term, they are deemed to be employed for an 'indefinite term'. Legislation also supports this. Section 65(2) of the *Employment Standards Act* reads:

"If an employee who is employed for a definite term or specific work continues to be employed for at least 3 months after completing the definite term or specific work, the employment is

(a) deemed not to be for a definite term or specific work, and

(b) deemed to have started at the beginning of the definite term or specific work".

In terms of mitigation, the burden is on the Club to show that Ms. Whiting did not take reasonable steps to mitigate her damages. The judge in this case stated that "the defendant must establish that the plaintiff failed to make reasonable efforts to find alternative work and that such work could have been found had the plaintiff done so".

Findings

1. The Nature of the Employment Contract.

The judge found it significant that after the probationary period of 6 months, Ms. Whiting was employed for approximately 8 years without a written agreement in place. After that, there were various contracts governing various periods. The Club's main argument is that the original agreement, the probationary contract, and the notice provision contained in it had carried on throughout the entirety of the employment relationship. The judge found that the defendant's reliance on the probationary contract was not sustainable. That agreement was only to cover the probationary period. The judge also did not believe that the subsequent employment contracts governed. He stated that it was clear that there was "no written agreement in place at the time that the termination notice was provided" and that "the defendant sought to have written agreements put into place at various times but that there are various periods of employment which were not covered by written agreements". Each of the employment agreements specifically stated that they were to terminate upon expiry of the specified term of the agreement. There was also little evidence that Ms. Whiting was advised of the notice provisions by the Club. It appeared to the court that the administration of the contracts was inconsistent and the terms were not fully explained. The judge also noted that the "reference in the agreements to the programs being contingent on funding is not itself sufficient to reduce the entitlement of Ms. Whiting to something less than reasonable notice. The question of finances is a factor that applies in virtually all employments relationships".

The judge found that the employment relationship was an 'indefinite' one and was not governed by the termination provisions in the written contracts.

2. Reasonable Notice

Reasonable notice is determined by the circumstances of each particular case. The judgment in *Bardel v. Globe & Mail Ltd* (1960, Ont. H.C.J) was considered. The Court in that case stated:

"There can be no catalogue laid down as to what is reasonable notice in particular classes of cases. The reasonableness of the notice must be decided with reference to each particular case, having regard to the character of the employment, the length of service of the servant, the age of the servant and the availability of similar employment, having regard to the experience, training and qualifications of the servant".

Ansari v. British Columbia Hydro Power Authority (1986 BC SC) was also applied in the determination of reasonable notice. That court identified the following list of non-exhaustive factors:

a. responsibility of the employment function;
b. age;
c. length of service; and
d. availability of equivalent alternative employment.

Ms. Whiting was 57 years old when she was terminated. It took her 2 years to find a job in her field and the position was not in a supervisory role as she had previously held. Considering the specifics of this case, the judge found that a period of reasonable notice was 18 months.

3. Mitigation

The Club took the position that Ms. Whiting did not take reasonable steps to mitigate her damages. They argued the following:

a. she did not start looking for a job until after the employer's stated notice period expired, even though the defendant did not require her to work;
b. she did not look for work in the most obvious market, Vancouver;
c. she did not look for work in doing "front-line work";
d. she took retraining that was limited or of no applicability to her employment;

In the judge's view, these points did not establish a failure to mitigate. The judge stated that the evidence supports the finding that the plaintiff took reasonable steps. He stated that "it was not unreasonable for Ms. Whiting to take some time to regroup following her termination. In regard to moving to Vancouver to pursue a position in social work, I agree with the view that it was impractical as her spouse worked on Vancouver Island, she owned a home on Vancouver Island, and her brother for whom she had care responsibilities was integrated into the community where they lived".

In terms of the suggestion that Ms. Whiting could have taken up a new career path, the duty to mitigate relates to take steps to maintain her position in her industry, trade, or profession.The judge commented that "Ms. Whiting should not be penalized for not embarking on an entirely new career path following dismissal in the circumstances of an employee who is 58 years old, whose education, training, and experience has been in the field of social services work".

Ruling

Ms. Whiting was entitled to reasonable notice of 18 months.

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