Date: 19980323
Docket: CA021878/CA022494
Registry: Vancouver

COURT OF APPEAL FOR BRITISH COLUMBIA

BETWEEN:

MICHELLE RIETA

PLAINTIFF (RESPONDENT)

AND:

NORTH AMERICAN AIR TRAVEL INSURANCE AGENTS LTD.

DEFENDANT (APPELLANT)

Before: The Honourable Mr. Justice Goldie

The Honourable Mr. Justice Donald

The Honourable Madam Justice Huddart

Counsel for the Appellant: K.A.G. Bridge

Counsel for the Respondent: R.H. Hamilton, C.E. Cordell

Place and Date of Hearing: Vancouver, British Columbia, January 28, 1998
Place and Date of Judgment: Vancouver, British Columbia, March 23, 1998
Written Reasons by: The Honourable Mr. Justice Donal

Concurred in by:

The Honourable Mr. Justice Goldie
The Honourable Madam Justice Huddart

Reasons for Judgment of the Honourable Mr. Justice Donald:

[1] The defendant terminated the plaintiff's employment for cause and without notice. The learned trial judge upheld the plaintiff's claim for wrongful dismissal and awarded her damages equal to six months salary plus an allowance for overtime.

[2] The plaintiff sought an order for increased costs. The learned trial judge refused the request because the plaintiff recovered double costs when she obtained a judgment in an amount higher than an offer to settle presented before trial. With the doubling effect, the order of costs represented 68.5% of special costs and, consequently, the learned trial judge did not find that party and party costs at scale 3 produced an unjust result.

[3] The defendant appeals the finding of liability for breach of contract and, in the alternative, appeals from the overtime component in the damage award. The plaintiff cross-appeals the refusal of the claim for increased costs. The main decision is reported at (1996), 19 C.C.E.L. (2d) 117 (B.C.S.C.) and the decision on costs at [1996] B.C.J. No. 3085 (S.C.).

BACKGROUND

[4] The defendant hired the plaintiff in April 1991 as a claims examiner and promoted her to the position of claims supervisor in December 1991. She was dismissed on 27 January 1994.

[5] The plaintiff was occasionally harsh and abrasive in dealing with the employees under her supervision. This was the real reason why she was fired, although the defendant alleged other misconduct as giving just cause for dismissal.

[6] The learned trial judge found that the defendant did not give proper warning to the plaintiff that her job was in jeopardy if she did not correct her rough handling of subordinates. In mid-November 1993, a new manager in the plaintiff's office spoke to her about her conduct towards other employees. At the same time, the manager gave the plaintiff a promotion and raise effective 1 January 1994. He did not clearly say that she would lose her job if she did not mend her ways.

[7] In mid-December 1993, the plaintiff received a favourable written performance appraisal from the manager. She was rated above standard and her promotion was noted.

[8] On 26 January 1994, an employee under the plaintiff's supervision made what the plaintiff thought was a serious mistake. During a meeting to discuss the problem the plaintiff treated the employee in a harsh manner and criticized her in front of others. The manager witnessed this behaviour and formed the intention to fire the plaintiff because of the incident, but he waited until the next day and itemized in a letter of dismissal eight events upon which he relied as cause for termination. At the trial of this action the defendant relied on only two grounds, the harsh treatment of employees and irregularities regarding her pay.

BREACH OF CONTRACT

[9] The defendant alleges on appeal that the learned trial judge wrongly held that the defendant breached the contract of employment:

(1) in finding that the plaintiff was not adequately warned regarding her behaviour towards other employees; and

(2) in failing to find that the plaintiff was guilty of other misconduct amounting to sufficient cause for dismissal.

WARNING

[10] The manager did not plainly warn the plaintiff of the risk in repeating her abrasive behaviour towards the employees under her supervision. The defendant argues that that message ought to have been inferred because the manager said that he would not discuss the matter with her again and the learned trial judge misapprehended the evidence in not drawing this inference. I can find no ground for interfering with the learned trial judge's appreciation of the evidence. It was open to her to find that the criticism fell short of what was required and that when it was combined with a promotion and raise, the plaintiff received a mixed message.

PAID ABSENCES

[11] The other grounds for discharge relate to the plaintiff's absences on 22 November and 30 December 1993. She was responsible for keeping accurate records of hours worked by herself and those under her. Although she was absent on those days, she marked herself as having worked and collected regular pay, her sick leave entitlement having run out. She said her intention was to make up the time by working an equivalent period of overtime which she said she did for the first absence, but she was fired before she could make up for the second absence. This was alleged by the defendant to constitute a breach of her record keeping duty and, in the case of 22 November 1993, the taking of an unauthorized advance.

[12] The learned trial judge found the plaintiff to be a credible witness. She heard the plaintiff's explanation and accepted it. She concluded that the defendant had tolerated a loose practice in which employees made up days absent with overtime and that the plaintiff worked overtime after 22 November for which she submitted no claim. I quote from the learned trial judge's reasons at 123:

The Plaintiff said she had made up all but three hours by the time she was discharged. The Defendant urged me not to believe her, but as I have stated I found the Plaintiff to be credible and I have no reason to disbelieve her. Furthermore, I find support for her testimony from the overtime documents. The Plaintiff submitted overtime forms for the months of September, October and November averaging around 10 hours overtime and 11 after hour calls. She submitted no claims for overtime or after hour calls for the months of December, 1993 and January, 1994, the inference being she applied any overtime earned during that period to her two excess sick days.

Therefore I find as a fact that the Plaintiff did not appropriate the Defendant's money or falsify her attendance records and the defence fails on this ground.

[13] On this appeal we were invited by counsel for the defendant to carefully examine the details of the evidence relating to these allegations and reach a different conclusion on the facts. All that exercise accomplished was to demonstrate that there may be another conclusion available on the evidence. But that is no basis for overturning the result. The learned trial judge's findings were supported on evidence which she was entitled to accept or reject and cannot be disturbed in the absence of a palpable and overriding error.

[14] I would dismiss the appeal against the finding of breach of contract.

DAMAGES

[15] The defendant challenges the award of damages on the basis that there was no proper foundation in the evidence for an allowance for overtime and after hour calls. The learned trial judge examined the plaintiff's earnings records for 1993 and concluded that she would have earned in the six months notice period $1,092.75 in overtime and $1,080.00 for after hours calls.

[16] The defendant submits that the plaintiff cannot recover on these amounts because she failed to plead an entitlement for them.

[17] This contention is without merit. There is no requirement to plead each item of loss in a claim for damages for breach of contract.

[18] The defendant further alleges that there was no evidentiary basis for an award of overtime. Yet, the plaintiff adduced a record of her earnings which clearly demonstrated a pattern of overtime and after hours calls for which she was compensated. Therefore, this contention must also be rejected.

[19] Finally, the defendant argues that there was no evidence that it was contractually bound to assign overtime or the taking of after hours calls. In my respectful opinion, that is beside the point. Damages had to be calculated on an assessment of what the employee would have earned during the notice period of six months. The only contractual entitlement that the plaintiff was required to establish was that if she worked overtime and took after hours calls, she would be paid additional compensation. By proving that this was a regular aspect of her work history, she discharged the evidentiary burden upon her.

[20] The defendant's argument rests on the authority of French v. Victoria Aerie No. 12 Fraternal. Order of Eagles, [1987] B.C.J. No. 510 (S.C.) where the learned judge said:

As for overtime it is true that during the period of his employment there was evidence that from time to time French worked overtime for which he requested payment and was paid, nevertheless, overtime only becomes payable if worked at the request of the employer. It cannot be forced upon him. So also the employee cannot be compelled to work overtime. An employee cannot claim for the loss of benefit he might have earned if those benefits were of a kind which the employer was not contractually bound to confer upon him but lie entirely in the employer's discretion. Lavarick [sic] v. Woods of Colchester Ltd. (1967) 1 Q.B. 278. Requesting an employee to work overtime is a matter which lies entirely within the discretion of an employer and, in any event, "damages against a contract breaker must be assessed on the basis that he will perform the contract in the manner most beneficial to himself". McGregor Damages (14th Ed) para. 935.

[21] With respect, I do not find that the principle extracted from McGregor on Damages has any application to the circumstances here. The defendant led no evidence that in the six months after the plaintiff was fired it had changed its practice regarding overtime. The fact that it had the prerogative to do so, unhindered by any contractual obligation to supply overtime to employees in the plaintiff's position, does not assist in calculating the loss. The court is entitled to assume in the absence of any evidence of an actual change in the administration of overtime or after hours calls that a proven pattern would continue during the notice period. The case of Laverach v. Woods of Colchester, cited in French, supra, illustrates the point. A claim for a

bonus was denied because after the employee was terminated, the employer replaced a bonus scheme with an arrangement for increased salaries. In that limited sense the employer was entitled to perform the employment contracts in a manner most favourable to it. However, it is my view that the burden of adducing evidence of a change lies on the employer and as I have said, the defendant did not discharge that burden here.

COSTS

[22] The cross-appeal on costs raises two issues for our determination:

1. whether leave was required; and

2. should the learned trial judge have granted increased costs.

1. The Leave Issue

[23] The cross-appeal on costs was brought without leave. Section 7(2)(b) of the Court of Appeal Act, R.S.B.C. 1996, c. 77 provides:

(2) Despite section 6(1), an appeal does not lie to the court from

(a) an interlocutory order,

(b) an order respecting costs only, or

(c) an order or determination under Rule 50 of the Supreme Court Rules, without leave of a justice.

During the hearing we decided to treat the notice of cross-appeal as a notice of application for leave and we granted leave. This was subject to further argument in writing regarding the need for leave. We took this course because no procedural objection was taken by the defendant. The parties proceeded throughout the appeal on the basis that the cross-appeal was properly brought and they prepared their factums as though the cross-appeal were as of right.

[24] After the hearing, counsel for the plaintiff submitted two decisions for our consideration: National Hockey League v. Pepsi-Cola Canada Ltd. (7 June 1993), Vancouver Registry CA015177, [1993] B.C.J. No. 2906, 28 B.C.A.C. 316 and Heppner v. Schmand (1997), 29 B.C.L.R. (3d) 128.

[25] Both cases concern an appeal on costs by a party who also challenged the main judgment. In each case, judgment regarding costs was pronounced after the notice of appeal against the main judgment was filed, as it was in the present case. In National Hockey League, Mr. Justice Goldie, in chambers, allowed the appellant to amend its notice of appeal to include costs without requiring leave, because the costs judgment was integral to the main judgment. No order had been entered.

[26] In Heppner v. Schmand no formal order had been entered when the notice of appeal was filed. At that stage, the judgment as pronounced indicated that if no agreement could be reached on costs they might be spoken to. No agreement was in fact reached. A judgment subsequently pronounced fixed special costs and a notice of appeal was filed in respect of that judgment. Formal orders in respect of both the main judgment and the judgment on costs were entered on the same day. Until then the trial judge was not functus and could have recalled either one of his orders. The respondent took the position leave was required on the costs appeal. Esson J.A., applying the National Hockey League decision, concluded the costs judgment was integral to the main judgment and decided no leave was required.

[27] In the present case, two formal orders were entered on 15 January 1997. The first related to the main judgment pronounced 15 April 1996. As to costs, it provided:

THIS COURT FURTHER ORDERS THAT Plaintiff is entitled to costs.

[28] The second formal order related to the costs judgment pronounced 18 October 1996 after a further application. The notice of appeal in respect of the main judgment was filed 15 May 1996. A notice of appeal in respect of the costs disposition was filed 13 November 1996.

[29] It was because the orders were not entered until 15 January 1997 that the trial judge had jurisdiction to consider the plaintiff's application for special costs. In effect, the plaintiff was asking the trial judge to recall the judgment she pronounced in the main action but only as to costs. If the plaintiff had been successful there would have been substituted for the direction with respect to costs a new direction awarding the plaintiff special costs.

[30] The plaintiff failed to persuade the trial judge to alter the disposition she made in the main action. At this point it was decided two formal orders were required. I think the second was unnecessary. The first could have included a clause to the effect that upon hearing the plaintiff's motion for special costs on such and such a day, the application was dismissed.

[31] If this had been done no cross-appeal would have been necessary. The plaintiff as respondent could have contended that this court should make the order for costs that the trial court should have made. Since this would have been open to the respondent under s. 9(1)(a) of the Court of Appeal Act, leave was not required in the circumstances.

2. Increased Costs

[32] The plaintiff's attack on the refusal of increased costs was directed at the learned trial judge's consideration of the effect of double costs on the justice of the outcome. According to the plaintiff, the proper approach was to ignore double costs in determining that question and if increased costs are awarded, then those costs are to be doubled from the time of presentation of the offer to settle.

[33] Appendix B of the Supreme Court Rules provides for increased costs in s.7:

(1) Where the court determines that for any reason there would be an unjust result if costs were assessed under Scales 1 to 5, the court may, at any time before the assessment has been completed, order that costs be assessed as increased costs under subsection (2).

(2) Where costs are ordered to be assessed as increased costs, the assessing officer shall fix the fees that would have been allowed if an order for special costs had been made under Rule 57(3), and shall then allow 1/2 of those fees, or a higher or lower proportion as the court may order, together with all proper expenses and disbursements.

[34] In my view, the cross-appeal cannot succeed because the facts do not support an award of increased costs even if double costs are excluded from consideration.

[35] The analysis under s.7 of the Appendix usually begins by determining whether party and party costs would roughly equal 50% of special costs. As was discussed in Bradshaw Const. Ltd. v. Bank of N.S. (1991), 54 B.C.L.R. (2d) 309 at 323, an objective of the tariff of costs as revised in 1990 was to achieve 50% indemnity of the client's actual legal fees or at least special costs which often represent 80%-90% of the lawyer's bill. The judgment on costs in Bradshaw was affirmed in this Court: (1992), 73 B.C.L.R. (2d) 212 at 233.

[36] The learned trial judge in the instant case estimated special costs at $20,664.40 and party and party costs at $9,120.00, an amount which represents 44.1% of special costs. After double costs are added, ordinary costs would be $14,160.00 or 68.5% of special costs.

[37] Having noted that the disparity between ordinary and special costs was less than 50% after adding double costs, the learned trial judge then examined whether there was any other basis for awarding increased costs. In that regard she rejected the plaintiff's argument that the defendant was guilty of oppressive conduct in the action. In particular she found that although the cause for discharge based on the pay irregularities involved an allegation of dishonesty and the defendant failed on that ground, nevertheless the issue was properly triable as a result of the plaintiff's inaccurate record keeping. The learned trial judge also considered the argument that the defendant issued lengthy particulars and made the plaintiff answer many more allegations than the defendant actually relied on at trial. In my opinion, the learned trial judge was in the best position to assess the character of the parties' conduct in the action and I would not substitute my assessment for hers.

[38] For reasons which I will discuss shortly I do not think that the analysis should have included the recovery of double costs. That leaves the plaintiff with a disparity of 44.1% and no other reason manifesting an injustice. In my opinion, the function of increased costs is not to fine tune every costs award to bring it up to 50%. The disparity in this case is not large enough to justify increased costs: National Hockey League v. Pepsi Cola Canada Ltd. (1995), 2 B.C.L.R. (3d) 13 at 21, per Wood J.A.:

I agree with the trial judge that in some cases such a discrepancy may alone be a sufficient basis upon which to make an award of increased costs.

[39] In that case ordinary costs were only 15% of special costs and there were other grounds relating to the unsuccessful party's conduct which supported increased costs.

[40] The law on costs has now evolved to the point where a discrepancy must be accompanied by some other reason in order to justify an order of increased costs. My use of the phrase "presumptive injustice" in referring to any discrepancy greater than 50% in Just v. British Columbia (1992), 9 C.P.C. 302 at 308, may not have been happily chosen. The better and current view is that a discrepancy is only a factor, and by itself not a decisive factor, in deciding a claim for increased costs. As has been observed in a number of the cases cited to us, a large

disparity is often associated with some additional factor relating to the nature of the case or the conduct of the parties which usually provides an explanation for the disparity. The following statement by Madam Justice Rowles in Edgar v. Freedman, [1997] B.C.J. No. 1643 at para.79 reflects the present state of the law:

My impression is that a quite significant disparity must be found to trigger an order for increased costs and even then, such an order is by no means likely to be made "as of course" or automatically. Usually, there must be found special importance, difficulties or complication associated with the litigation or as seen in National Hockey League, supra, conduct of a litigant which the court finds deserving of a penalty in added costs.

[41] The plaintiff's claim for increased costs suffers from two disabilities: the discrepancy is slight and there is no other factor. Counsel for the plaintiff endeavoured to persuade us that another reason for increased costs exists in that this claim, like most claims of moderate size where most of the judgment goes to pay the lawyer's bill, leads to an inherently unfair result. In this case the actual fees charged are $25,830.00 and the plaintiff recovered approximately $24,000.00 in damages and pre-judgment interest. With double costs the plaintiff recovers $14,160.00 from the defendant.

[42] I do not think the provision on increased costs was designed to redress problems endemic to what has been sometimes referred to as "uneconomic litigation". As regrettable as the plight of many litigants with relatively modest claims may be, the answer does not lie in giving increased costs to a whole class of cases. I am in respectful agreement with what was said by Mr. Justice MacDonald in Holmes Greenslade v. Texada Properties Ltd., [1997] B.C.J. No. 1456 referring to his earlier decision in Barwise v. Royal Bank, [1997] B.C.J. No. 839:

Barwise v. Royal Bank points out that unless something more than a considerable discrepancy between party and party costs on a particular scale and 50% of special costs is present, inflation alone will dictate an application for increased costs in almost every future case. Indeed, it is already a "growth industry". I remarked that any such discrepancy, standing alone, should be accommodated by an appropriate amendment to the tariff, rather than an application in the majority of cases for exercise of the court's discretion thereunder.

[43] Finally, I return to the issue whether double costs should be included in the consideration of increased costs. There are differing views on the subject in the Supreme Court. The learned trial judge in this case said:

Counsel for the plaintiff says that I should perform my calculation based on the agreed ordinary costs before doubling up under the offer to settle. She submits that the doubling up should take place after I have increased the costs. I do not agree with this submission because of the potential for the plaintiff to receive a windfall, or more than indemnification for her actual legal fees. That would not be a just result.

[44] This was the approach taken by Mr. Justice Warren in Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd., [1995] B.C.J. No. 2064 (appeal on costs pending; the principal judgment reversed (1995), 33 C.C.L.I. (2d) 71, [1997] B.C.J. No 2355). At p. 74 Mr. Justice Warren said:

The plaintiff argues that the double costs ought not to be considered as a part of the calculation of disparity as they represent a penalty imposed upon a litigant who has not accepted an

appropriate offer to settle. As a penalty, they are not part of the costs. I disagree with the plaintiff on that point. Penalty or not, they represent part of the recovery in costs by the successful litigant and properly should be considered.

[45] But in Midland Mortgage Corp. v. Jawl and Bundon, [1997] B.C.J. No. 1724, Mr. Justice Tysoe relying in part on what was said by Madam Justice Stromberg-Stein in Kalman v. Singer Valve Company, [1997] B.C.J. No. 877, thought it was wrong to allow a defendant, who should have accepted an offer to settle, to derive an advantage from the award of double costs. At para.15 he said:

With respect, I prefer the view expressed in Kalaman. A defendant who has refused or failed to accept an offer to settle in an amount less than the judgment awarded should not be permitted to use the non-acceptance of the offer as a means of reducing the amount of costs to which the plaintiff would otherwise be entitled.

[46] I have reached the conclusion that on the proper interpretation of s.7(1) of Appendix B and on grounds of policy, double costs should not be considered in determining increased costs.

[47] Section 7(1) begins:

Where the court determines that for any reason therewould be an unjust result if costs were assessed under Scales 1 to 5, ...

[48] Those words confine the inquiry to an examination of costs assessed on the appropriate scale. Double costs relate to settlement procedures dealt with elsewhere in the Rules and are extraneous to tariff calculations under Appendix B.

[49] On the question of policy, it is generally acknowledged that increased costs are primarily concerned with providing a just indemnity to the successful party; whereas double costs are a form of penalty against the party who did not accept an offer to settle. The objectives and philosophy behind the two are different. I agree with the argument for the plaintiff that if double costs operated to lessen or defeat an otherwise justifiable claim for increased costs, the deterrent effect of double costs would be diminished. The offer to settle provisions are intended to encourage resolution of claims without trial. This policy is enhanced if a defendant faces the risk of double costs assessed as increased costs when deciding whether to settle on the offer presented. Subject to reservations about a plaintiff recovering more than full indemnity through the combined effect of double and increased costs, a prospect which troubled Mr. Justice Brenner in Foundation Co. of Canada Ltd. v. United Grain Growers Ltd., [1996] B.C.J. No. 2090, I see nothing wrong with forcing a party to look very carefully at an offer to settle. Nor do I think that this amounts to a double penalty.

[50] Increased costs will only be awarded if there is some unusual feature in the case or misconduct which justifies greater indemnity than provided by ordinary costs. The refusal to accept an offer of settlement is separately dealt with under Rule 37 and the default should not be held against the party in an inquiry under s.7 of Appendix B. A defendant is not punished twice for refusing to settle, although the consequences may be more severe if the defendant did something else which justifies greater indemnity.

[51] In sum, though I accept the plaintiff's submission that the learned trial judge erred in taking into account double costs when considering whether to award increased costs, I would not disturb the finding that increased costs were not warranted in this particular case.

[52] Accordingly, I would dismiss the cross-appeal on costs.

"The Honourable Mr. Justice Donald"

I AGREE: "The Honourable Mr. Justice Goldie"

I AGREE: "The Honourable Madam Justice Huddart"