Citation:	Winterburn v. Domtar Inc. 2002 BCSC 1418	Date: Docket: Registry:	20021008 S016687 Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

JULIE WINTERBURN

PLAINTIFF

AND:

DOMTAR INC.

DEFENDANT

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE T.M. McEWAN

Counsel for the Plaintiff:	N.R. Howell
Counsel for the Defendant:	M. Cooperwilliams
Date and Place of Hearing/Trial:	September 11-13,2002 Vancouver, BC

[1] The plaintiff Julie Winterburn is a chemical engineer.

[2] The defendant is a company incorporated under the laws of Canada. It is registered extra-provincially in British Columbia and, at material times, operated a mill in the province manufacturing specialized paper products.

[3] Ms. Winterburn was hired by Domtar on March 16, 1999, with the title of “Manager, Quality Control”, in the Technical Department. The position entailed, among other things, ensuring paper quality standards and involved the management of 12-13 people.

[4] When Ms. Winterburn was hired by Domtar she had over ten years experience in the pulp and paper field. She had worked for a company called Atlantic Packaging in Whitby,

Ontario. She was happy with her position there and was apparently secure. In 1998 she nevertheless submitted her resume to two different recruiters to see what opportunities for advancement might exist outside her own workplace.

[5] From about June of 1998 on, Domtar had been looking for an engineer with the qualifications to fill a new Quality Manager position. In about February of 1999 Domtar received Ms. Winterburn's resume. She appeared to have the sort of experience Domtar was looking for, so Robert McFadden, then Domtar's Manager of Human Resources at its Vancouver mill, contacted her to discuss the job they had in mind. Domtar was keen enough to meet with Ms. Winterburn that she was flown out to Vancouver immediately so that a Cuban vacation she had planned would not postpone an offer if Domtar found her suitable.

[6] On March 10, 1999, following Ms. Winterburn's attendance in Vancouver, Domtar made an offer. It included the following terms:

> We have highlighted the major aspects of the offer below:
>
> 1. Your salary will be $75,000 per annum, deposited after deductions in equal semi-monthly payments in the chartered bank of your choice. General salary reviews are normally conducted annually.
>
> You will be entitled to coverage under the various parts of the salaried health and welfare package and the salaried pension plan, and which may be amended from time to time.
>
> The various benefits will be reviewed with you.
>
> 2. You will be entitled to 3 weeks vacation commencing in the year 2000. Vacation for 1999 will be prorated. The vacation policy will be reviewed with you.
> 3. The Company will pay for the cost of moving and transportation from Oshawa, Ontario to Greater Vancouver for you and your immediate family, and after approval of proper estimates from several reputable moving companies, of which one will be selected. In addition, the Company will pay your reasonable expenses for meals and temporary accommodation for up to 60 days for your family in Vancouver, providing the accommodation is approved in advance by the Manager of Human Resources. The company will also pay for storage of your personal effects for up to thirty days after arrival in Vancouver, if required, providing this is approved in advance by the Manager of Human Resources.
> 4. You and/or your spouse will be provided with up to 2 air economy round trips from Oshawa to Vancouver for the purpose of securing accommodation.
> 5. To assist you in relocating to Vancouver, we have offered you the follows:
>
> (a) To advance, on security of a second mortgage in a form approved by the Company's solicitors, up to $45,000 at an annual interest rate of 5% to be used in the purchase of your personal living accommodation. The second mortgage will be repaid in 180 equal monthly blended payments of principal and interest. The payments will commence 6 months after the purchase of the new residence. In the event you cease to be an employee of the Company for any reasons, the whole amount then outstanding will be due and payable within 30 days.

(b) To pay legal fees, disbursement and real property transfer tax in connection with the purchase and mortgage for your personal living accommodation in Vancouver.

(c) If you require temporary financial assistance to complete the purchase of a home in Vancouver, the company will provide temporary financing, appropriately secured up to 90% of your equity in your present home, interest free for a period of up to 90 days, and such longer time as authorized by the Vice President and Resident Manager. Any extension will bear interest at the prime bank rate plus one half of one percent. All equity advances are payable to the company at the time you receive proceeds from the sale of your principal residence in Oshawa.

(d) An allowance of a maximum of the equivalent of one month's gross salary at the rate in effect following the transfer to cover any incidental expenses incurred during the move and the purchase of your new residence in Vancouver.

6. In the event the Company, in its absolute discretion, decides to terminate the relationship in the first year of your employment for other than performance related matters, you will be entitled in lieu of any notice or other claim or entitlement arising out of the employment to an amount equal to one month's salary. After 2 years, normal severance provisions under B.C. law will apply.

[7] The plaintiff considered the offer and replied on March 12, 1999:

> My husband and I have carefully considered your offer of employment for the position of Manager, Quality Control in your Technical department. We have agreed that this would be a good move for my career and our family. Presently I have two concerns to be addressed before we proceed further. In view of my experience and expertise, I feel a salary of **$90,000** per annum would be appropriate. Secondly, **four** weeks vacation with one week supplemental after five years would be appropriate, given my length of service in the industry.
>
> If you are in agreement with these two terms, I would like to discuss some of other minor points of the offer of employment. I look forward to your response.

[8] Mr. McFadden replied on March 14, 1999. He made an improved offer, significant features of which were an increase in salary to $80,000 and a change in the offer of mortgage assistance from $75,000, to a $30,000 interest free loan forgivable over five years and a $45,000 mortgage. The terms on which the $30,000 was advanced were as follows:

> To advance, on security of a promissory note in a form approved by the company's solicitors, $30,000 interest free and which $6000 will be forgiven on completion of each full year of service for the first 5 years of employment. In the event you cease to be an employee for the Company, for any reason, the whole amount then outstanding will be due and payable within 30 days.

[9] Ms. Winterburn says that in the conversations leading up to the final offer she understood Mr. McFadden to be offering $30,000 conditional only upon her remaining with Domtar for five years.

[10] In any event, Ms. Winterburn signed the March 16, 1999 communication and moved with her husband and two-year-old daughter from Ontario to Vancouver. This required her husband to leave his job in Ontario as well and take a chance on obtaining new employment in the Vancouver area.

[11] There is no suggestion that Ms. Winterburn did not perform her duties at Domtar capably. She was nevertheless terminated, along with nine other people, on September 13, 2001 for what Domtar termed "external business reasons that commands [sic] the company to take drastic measures to ensure its further competitiveness".

[12] At issue in this proceeding is what, if anything, Ms. Winterburn is entitled to from Domtar as a result of her termination without cause.

[13] When Ms. Winterburn relocated to the lower mainland of British Columbia she accepted the $30,000 Domtar had agreed to advance, and the $45,000 mortgage it had offered to assist in the relocation. The $30,000 was secured by a promissory note that characterized the advance as a "Home Relocation Loan". It provided:

> **FOR THE VALUE RECEIVED**, the undersigned hereby promises to pay Eddy Specialty Papers Division, Domtar Inc., at Island paper Mills, 1010 Derwent Way, Annacis Island, Delta, British Columbia, the sum of Thirty Thousand Dollars ($30,000.00 Cdn), interest free, of which the sum of Six Thousand Dollars ($6,000.00 Cdn) will be forgiven on completion of each full year of service in the employment of Eddy Specialty Papers Division, Domtar Inc. after April 12, 1999.
>
> If the undersigned ceases to be an employee of Eddy Specialty Papers Division, Domtar Inc. for any reason, the whole amount then outstanding will be due and payable within thirty days of the date employment ceased.

It was signed by Ms. Winterburn and witnessed.

[14] In addition to the $80,000 salary Ms. Winterburn negotiated with Domtar, employees at her level also participated in a profit sharing plan. The plan was calculated on 8% of base salary multiplied by a factor determined by the profitability of the company. The bonus was paid annually on a calendar year basis. In 2000 the unit multiplier was $1.95 which meant a payment of $12,851.28 to Ms. Winterburn. In 2001 the value of a unit was $0.77. That would have meant an entitlement of $5307.46 for Ms. Winterburn had she worked through 2001.

[15] The terms Domtar offered Ms. Winterburn to "lessen the impact" of her termination were:

(a) a "termination allowance" of 9 weeks pay calculated at $14,911.71;

(b) repayment of $18,000 of the $30,000 "forgivable loan" (2 anniversaries having passed) by October 14, 2001;

(c) repayment of the mortgage balance (then $41,707.83) 90 days after termination;

(d) continuation of group insurance, medical and dental plans to November 15, 2001.

Additional arrangements were offered with respect to the pension plan, share purchase plan and the payout of vacations.

[16] Ms. Winterburn's position is that she is entitled to a much longer period of notice in the circumstances than nine weeks. She cites the factors in ***Bardal v. Globe and Mail Ltd.*** (1960), 24 D.L.R. (2d) 140 (Ont. H.C.) per McRuer, C.J.H.C. at page 145:

> 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 availability of similar employment, having regard to the experience, training and qualifications of the servant.

[17] She submits that these factors have been expanded in more recent times in such cases as ***Wallace v. United Grain Growers Ltd.***, [1997] 3 S.C.R. 701. In that case, Mr. Justice Iacobucci noted, among other things, that the fact that an employee had been "induced" to leave previous secure employment may properly be "included among the considerations which tend to lengthen the amount of notice required".

[18] Ms. Winterburn claims that she was induced to leave a secure position in a manner that should lengthen the notice period. She further submits that the fact that she was some four and a half months pregnant at the time she was terminated should weigh in the balance. Lastly she submits that the peremptory manner in which Domtar demanded repayment of the "loan" and mortgage and purported to withhold her termination allowance should also be a factor in assessing a longer period of notice.

[19] Having regard, first of all, to the factors in ***Bartle*** (supra) I make the following observations:

(a) The character of the employment and the availability of similar employment having regard to experience, training and qualification of the servant:

[20] Ms. Winterburn is a highly trained person who has developed significant specialized skills within the field of chemical engineering that are particularly adapted to paper making and, in another skills dimension, in the specialized field of quality assurance.

[21] While these skills are adaptable to other circumstances, Ms. Winterburn's best opportunities would be found in using the skills and experience she was able to apply at Domtar.

[22] The evidence is that these positions are somewhat limited and the opportunities occasional.

[23] I am of the view that while Ms. Winterburn had some responsibility to supervise staff, her place at Domtar really depended on her technical skills and her acquired skills in the field of quality assurance and less on the specifically "managerial" character of her job.

(b) Age:

[24] Ms. Winterburn is 37 years old. She is at about the minimum age she would have to be to have acquired the degree of training and experience she can offer a prospective employer. Age is not a particular factor in this case.

(c) Length of service:

[25] Length of service, as such, is not a factor in this case. Ms. Winterburn did not have the opportunity to give a substantial part of her working life to Domtar. It is, rather, a case, in her terms, of her being willing to make a long-term commitment to the company, and of the company unilaterally frustrating the expectations that had led her to make major adjustments in her life.

[26] Additional factors I am urged to consider in this case include:

(d) Inducement:

[27] Ms. Winterburn claims that she was "induced" to leave secure employment to come to work for Domtar. She suggests that the fact that Domtar was willing to offer the loan and mortgage package it did and to raise its initial salary offer to "sweeten the deal" were inducements to leave her previous employment. She also submits that the fact that Domtar wanted to see her as soon as possible and "make it happen" is an indicator of inducement as well.

[28] I do not think that is quite the correct characterization of what happened. Although Ms. Winterburn was happy with her previous employer she was interested in improving her situation and had given her resume to "head hunters" to see what was available. When her application came to the attention of Domtar they moved decisively to ascertain if Ms. Winterburn would meet their needs, but I cannot find that there was anything importunate about their approach.

[29] The situation was rather that of parties who bargained in the implicit faith that they were dealing with a relationship that could last some time. Mr. McFadden allowed that Domtar was not seeking a short-term employee although he did say that nothing was guaranteed. In context, I do not think the 5-year and 15-year commitments represented by the loan and mortgage respectively were "inducements" but they do reflect the parties' mutual understanding that the arrangement had the potential to last.

(d) Pregnancy:

[30] Ms. Winterburn submits that her pregnancy should be accounted in the analysis of her position in two ways. First, she submits that to the degree there is an overlap between the maternity leave to which she was entitled and the appropriate notice period, the notice period should be extended. What unfortunately happened in this case is that Ms. Winterburn delivered a child on February 17, 2002 but the baby died. She was, in the circumstances, paid 15 weeks maternity leave, under Canada's Employment Insurance Scheme.

[31] I have no difficulty accepting that during that period of time Ms. Winterburn would not have been available to her employer had she continued to work, and that during that period of time she was effectively unable to look for work. The relevant principle was enunciated by Madam Justice Allan of this court in ***Whelehan v. Laidlaw Environmental Services Ltd.***,

[1998] B.C.J. No. 847 Vancouver Registry No. C974146. There, at paragraphs 18 to 20, Madam Justice Allan observed:

> [18] It is useful to compare the underlying purposes of reasonable notice and maternity leave. The law requires employers to provide dismissed employees with compensation for an adequate period of time to enable them to pursue suitable re-employment without unreasonable financial disadvantage. The philosophy behind maternity leave is that women who are pregnant are entitled to a leave of absence from their jobs in order to accommodate childbirth and they are entitled to the assurance that their job tenure is secure during the period of their absence. That philosophy is reflected in s. 56 of the Employment Standards Act, R.S.B.C. 1996, c. 113 ("the Act") which provides that the services of an employee on maternity leave are deemed to be continuous for the purposes of calculating vacation entitlement, pensions, medical benefits or other plans beneficial to the employee.
>
> [19] The policy basis underlying maternity leave – protecting pregnant women against penalties with respect to their job tenure and other terms of their employment by reason of pregnancy and childbirth -- would be defeated if an employer could terminate a pregnant employee at the commencement of her maternity leave so that her period of notice was spent during that leave.
>
> [20] I conclude that Ms. Whelehan's maternity leave should not coincide with the applicable notice period which I have determined to be eight months.

[32] The second point Ms. Winterburn makes is that the simple fact that Ms. Winterburn was pregnant when she was terminated should be taken into account as a factor that should lengthen the notice period. The issue came up in ***Woolard v. Urban Life Insurance Company of Canada Ltd.***, 2002 BCSC 1178, although it did not need to be decided on the facts. The court quoted from ***Harris Wrongful Dismissal*** 1999 edition (Ontario: Don Mills) Vol. II at paragraph 125:

> It is conceivable to argue that an individual who was fired during pregnancy, whether or not that termination was due to the pregnancy itself, ought to have greater compensation than one normally would expect in ordinary circumstances. The argument may presumably be made that a terminated pregnant woman has very little opportunity of finding alternate employment in a realistic market place. For that reason one could possibly argue that compensation should follow through to the date of delivery of the baby and following a period of pregnancy leave, the real notice obligation should start. This, of course, is strictly speculation and no authority exists to support this proposition. (at p.7-17)

[33] I think I would have difficulty with the concept that a person's choice to become pregnant could become an employer's problem beyond the extent of the accommodations presently built into our law, notwithstanding the textbook authors' observation that such an argument is "conceivable". In the specific unhappy circumstances of this case, however, apart from taking account of the potential for overlap of the pregnancy leave and the notice period, I do not think the plaintiff's pregnancy has been shown to have had any particular bearing on her opportunities to find other employment. Even if it had, I do not see how a condition that was not known to Domtar at the time of the termination could impose any obligation on Domtar. Ms.

Winterburn suggested that this factor was analogous to “age” but the parallel is inexact, age being both inevitable, and generally apparent.

[34] Ms. Winterburn submits that an additional factor in assessing the appropriate length of notice is the defendant’s failure, in the circumstances, to act in good faith as that concept was described in ***Wallace v. United Grain Growers Ltd.***, [1997] 3 S.C.R. 701. In that case, at paragraph 98, Mr. Justice Iacobucci noted:

> [98] The obligation of good faith and fair dealing is incapable of precise definition. However, at a minimum, I believe that in the course of dismissal employers ought to be candid, reasonable, honest and forthright with their employees and should refrain from engaging in conduct that is unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive. In order to illustrate possible breaches of this obligation, I refer now to some examples of the conduct over which the courts expressed their disapproval in the cases cited above.

[35] Ms. Winterburn contends that her treatment by Domtar was unduly insensitive in the manner in which Domtar demanded repayment of the loan and mortgage and purported to withhold her severance allowance against those obligations. The defendant has conceded that it was wrong to immediately demand those sums be repaid and that they should have been expressed to be repayable at the end of the notice period. In any event, Ms. Winterburn has paid back the mortgage.

[36] The “loan” remains in issue in that Ms. Winterburn takes the position that Mr. McFadden orally represented to her that the $30,000 advance was conditional only upon Ms. Winterburn remaining with Domtar for five years, and that inasmuch as she had at all times been willing to live up to her end of that bargain she should not be expected to repay it.

[37] Even if I were to accept that Mr. McFadden made such a representation, or did not articulate the arrangement Domtar wished to make in exactly the terms of the subsequent written communication, there is nothing on the evidence that would persuade me I ought to treat the oral representation as the “real” contract and the subsequent confirmation as superfluous. The agreement was embodied in the March 16, 1999 letter. Ms. Winterburn had the opportunity to review it and signed it. The fact that neither party was then dwelling on negatives does not change the fact that the agreement plainly did not include the particular terms Ms. Winterburn now claims were the actual arrangement in the event that Domtar unilaterally terminated the employment relationship.

[38] One authority the plaintiff relies on is ***Singh v. Empire Life Insurance Co.***, [2002] B.C.J. No. 1854 (B.C.L.R.). That case and others like it are readily distinguishable from the case at bar. ***Singh*** is one of a class of cases where an agreement is made – although it may be expressed to be “interim” to a final contract – and the consideration passes on the faith of its terms (i.e. the person starts work). In such circumstances, subsequent terms introduced into the “written” agreement sometimes fail on the basis that they amount to unilateral alterations to the contract without consideration. Such situations are distinguishable from this case because the written terms which followed upon the oral discussions between the parties were received and considered by Ms. Winterburn <u>before</u> she performed any part of her obligations under the contract. That is critical to the only point that matters. It simply is not the law that discussions leading up to terms put in writing, executed before the contract is performed, supercede the written contract. That argument must fail.

[39] The plaintiff submits in the alternative that the oral representation by Mr. McFadden was of sufficient force to bring the case within ***Bank of Montreal v. Murphy***, [1985] B.C.J. 1767 (B.C.C.A.) where at paragraph 10 Mr. Justice Lambert observed in the context of a guarantee:

> Where an oral representation is intended to carry sufficient force, either as a representation of fact (a warranty) or representation of intention (a promise), to modify the legal relationships of the parties and induce the person to whom it is made to enter into a contract, orally or in writing, the representation will bind the person who makes it and will form a part of the total legal relationship between the parties.

[40] In this case it is clear that anything Mr. McFadden said was intended as a prelude to, or description of, an arrangement that would be reduced to writing. I am sure, as I have observed earlier, that he did not dwell on negative contingencies when he spoke to Ms. Winterburn. They were however contemplated and embodied in the written agreement that was forwarded, and that Ms. Winterburn signed. She did so in circumstances affording an adequate opportunity to consider what that writing meant. That agreement is unambiguous about the terms on which the loan was given. This submission must fail as well.

[41] For its part Domtar submits that Ms. Winterburn has failed in her duty to mitigate. The evidence is that she has made numerous contacts in an attempt to find work. Domtar does not submit that she has not, in general, made reasonable efforts, but submits that with respect to one particular opportunity she took a position that was unreasonable. The evidence is that a company called Original Cakerie was seeking someone to implement a quality control program, and on April 24, 2000 offered Ms. Winterburn a position with a salary of $55,000. Ms. Winterburn said it seemed like a “great job” but that in discussions with the company she had asked if they had could improve on the salary and the three weeks of vacation they offered. The offer was then, rather summarily, rescinded. The defendant characterized this as an unreasonable rejection by the plaintiff of an offer of substantially similar employment.

[42] Given the salary she had commanded at Domtar, I do not see how Ms. Winterburn could be faulted for attempting to negotiate something better from Original Cakerie. She cannot have anticipated or controlled the company’s reaction. She did not, by reason of attempting to negotiate a better position in that instance, fail to mitigate her damages. The defence submission is tantamount to saying she should have taken whatever she could get. That is not what the duty to mitigate implies.

[43] In summary, Ms. Winterburn was dismissed on September 13, 2001 from a specialized position for which she was recruited and which struck her as good enough to risk a move across the country. While there were no guarantees of continued employment, I find that there was a mutual expectation in the negotiations leading up to Ms. Winterburn’s employment, that provided Ms. Winterburn performed her duties she could continue to work at Domtar. That expectation underlies the relatively long terms on the loan forgiveness provisions, and the mortgage. These were advantages to Ms. Winterburn, but were also obligations that should have been accounted for in properly assessing what it would be fair to allow Ms. Winterburn as notice. The terms offered Ms. Winterburn on September 13, 2001 had the effect of plunging her immediately into a situation of financial crisis, with no employment income and serious financial obligations back to the company.

[44] Considering the nature of Ms. Winterburn’s employment, the circumstances under which she came to work for Domtar, and the difficulty she has faced and will face in finding

comparable employment, I am of the view that the appropriate period of notice is 10 months. I include within that period an allowance for the fact that she should have been given that period of notice before demand was made for the loan and mortgage principal repayment, but do not specifically isolate a factor for "insensitivity".

[45] The notice period does not include the 15 weeks of maternity leave to which Ms. Winterburn would in any case have been entitled, in accordance with the principle in ***Whelehan*** (supra).

[46] The bonus Ms. Winterburn would have received had she continued working through 2001 in the amount of $5307.46 shall be paid to her. There is no evidence as to any bonus for the part of 2002 incorporated in the notice period I have allowed, and accordingly I make no further award under that heading.

[47] Because the third anniversary of the "Relocation Loan" is within the notice period, and the period on notice equates with service, the amount that must be repaid is $12,000. The counter-claim is allowed to that extent.

[48] The benefits which Ms. Winterburn was receiving as part of her remuneration are also payable for the notice period I have found to be appropriate. The parties have indicated that they will believe they can agree on those sums. Should there be a need to seek directions regarding those matters, or special damages, or the application of court order or contractual interest, there shall be liberty to apply.

[49] While I recognize there is a counter-claim and a theoretical case that success was divided in some manner, I think the appropriate order taking a comprehensive view of the litigation, is that the plaintiff is entitled to her costs on scale 3.

"T.M. McEwan, J."
The Honourable Mr. Justice T.M. McEwan