Citation:	Bachynski v. DC DiagnostiCare Inc. 2001 BCSC 36	Date: Docket: Registry:	20010105 S000453 Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

JOHN BACHYNSKI AND
BACHYNSKI HOLDINGS INC.

PLAINTIFFS

AND:

DC DIAGNOSTICARE INC. AND
DC DIAGNOSTICARE (BC) INC.

DEFENDANTS

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE COULTAS

Counsel for the Plaintiffs	Richard H. Hamilton, Nicole R. Howell
Counsel for the Defendants	Benjamin J. Ingram,
Date and Place of Trial:	November 28, 29, 2000 Vancouver, B.C.

[1] The plaintiff is an experienced diagnostic radiologist, 61 years of age. For 10 years he was employed as a radiologist at Fraser Radiology Clinic in New Westminster, B.C. The Fraser Radiology Clinic was purchased by the defendants in January, 1998 and they employed the plaintiff as radiologist and in a new position, as medical director of the clinic.

[2] On October 20, 1999, the defendants terminated the plaintiff's employment effective December 31, 1999. They concede the notice period was not reasonable.

[3] There are two issues in the action. First, what was a reasonable notice period? The plaintiff submits it is 24 months, the defendants say about 9 months. Second, did the defendants agree to compensate the plaintiff for his new duties as medical director of the clinic?

THE PLAINTIFF AND HIS PROFESSIONAL EXPERIENCE

[4] Presently 61 years of age, the plaintiff obtained his medical degree in 1962 from the University of Manitoba. He took post-graduate studies in radiology at McGill, graduating in 1967. He was employed for 13 years as a radiologist at the University of Alberta Hospital where he also held the position of associate professor of radiology. In 1988, he came to British Columbia, took six-months' post-graduate studies in ultrasound and mammography and entered into a contract of employment with U.B.C. Hospital. In 1990, he joined Dr. Fraser, the owner of Fraser Radiology Clinic, was put in charge of diagnosing x-rays, and performed general diagnostic work. The Fraser Radiology Clinic did not perform MRI work and the plaintiff is not trained to do that work.

[5] Dr. Fraser owned and operated the clinic. From 1990 to 1993, the plaintiff worked 50% of his professional time for Dr. Fraser and the balance of his time he worked for other x-ray clinics. In 1993, Dr. Fraser began taking more time away and the plaintiff worked the hours that Dr. Fraser did not. At trial, he estimated he then worked 60-65% of his time at the Fraser Radiology Clinic; at Discovery he said it was less. In 1996, Dr. Fraser suffered a stroke and thereafter the plaintiff worked 95% full-time at the Fraser Clinic. From 1998 until termination he was fully engaged at Fraser Radiology Clinic.

[6] The defendant, DC DiagnostiCare Inc., is a large, publicly traded corporation listed on the Toronto Stock Exchange. Beginning in the 1990's, the defendants proceeded to acquire diagnostic clinics across Canada. In the fiscal year ending September, 2000, the defendants earned one hundred million dollars.

[7] In late 1997, the plaintiff met with Dr. Stringer, chief medical officer and now vice-chairman of the defendants, and with Don Little, CEO of the defendant companies, and they offered him continued employment at the Fraser Radiology Clinic. He says they offered him:

1. He was to carry on the practice of radiology in the same fashion and at the same premises. It was to be a full-time position and his hours would be 8:30 a.m. to 4:30 p.m.

2. He would be medical director of the clinic, a new appointment for him, and for that work he would be paid either $10,000 yearly or given yearly stock options in the defendant companies in that amount.

3. His share of the gross billings at the clinic would be reduced from 27%, which he had drawn when Dr. Fraser operated the clinic, to 25%.

4. He would continue to be the radiologist on staff at the clinic and would supervise the clerical staff and radiology technicians. There was one clerical position and two technician positions.

[8] He agreed to those terms and continued his work there. The defendants confirm that arrangement but say they did not offer to compensate him for his work as medical director. I shall address that issue later.

[9] His appointment as medical director was approved by the College of Physicians and Surgeons of British Columbia. In its letter of approval sent to Dr. Stringer, the Deputy Registrar of the College wrote, *inter alia*:

> The members of the (College Executive) Committee noted that Dr. John Bachynski is the Medical Director of the clinic and that he will have control of and be fully responsible for the practice of medicine in the facility.

His duties as medical director included management and hiring and firing of staff and supervising the technicians.

[10] When they made their offer the defendants knew that the plaintiff did not have MRI experience, nor had Dr. Fraser. There was no MRI instrument in the clinic.

[11] The plaintiff earned $154,739.71 at the clinic from June 1, 1998 to February 16, 2000. He did not receive any payment, either in money or shares, for his responsibilities as medical director. In October, 1998, he spoke to Mr. Mulcahy, the business manager of the defendants' B.C. operations, who professed to know nothing of the arrangement to pay him for his duties as medical director. He spoke to Dr. Stringer who replied he was too busy at the time to discuss the matter of that remuneration.

[12] Dr. Stringer's letter of October 20, 1999 terminating the plaintiff's employment reads:

> I would like to take the opportunity to thank you for the services you have provided us in the past.
>
> Reorganization and consolidation have brought about circumstances whereby your professional services will not be required beyond December 31, 1999. In addition, I have advised the Diagnostic Accreditation Program that you will not be held responsible as the Medical Director beyond that date.
>
> Again, that you for your past support and I hope there is some time in the future when we can work together.

[13] The defendants do not allege any misconduct on the plaintiff's part. They terminated his services solely for economic reasons which I now relate.

[14] Prior to 1995, the defendants had acquired two MRI instruments – they kept one in Richmond and one in North Vancouver. Over time, MRI work increased and radiologists trained in MRI work were hard to come by. The defendants approached Dr. Janzen who told them MRI work alone would not justify his being hired; he needed to do general radiology work as well. The defendants concluded there was not enough work to justify employing Dr. Janzen and the plaintiff. They hired Dr. Janzen and terminated the plaintiff's employment, transferring the plaintiff's general radiology work to Dr. Janzen. Before hiring Dr. Janzen they had not contemplated terminating the plaintiff's employment.

[15] When he received the termination letter, the plaintiff attempted to reach Dr. Stringer; he was not available. He tried again at the end of November, without success. Eventually, Dr. Stringer communicated with the plaintiff, told him that Dr. Janzen had been hired and would take over the plaintiff's work. The plaintiff continued to work for the defendants until the end of the notice period. He applied for work at all the firms in the Lower Mainland doing the kind of work

that he was qualified to do, approaching 8 or 9 radiology clinics. He was given only occasional days in various places, none of it permanent employment. Although failure to mitigate is pled, at trial the defendants abandoned that allegation. The plaintiff moved to Kelowna in April, 2000 because he could not find any permanent work in the Lower Mainland and because he owned a house there. He has sought work in Kelowna, without success. Radiology is a limited field.

[16] The plaintiff has earned approximately $11,000 since leaving the defendants' employ, doing occasional work in the Lower Mainland before moving to Kelowna.

DID THE DEFENDANTS AGREE TO RECOMPENSE THE PLAINTIFF FOR HIS WORK AS MEDICAL DIRECTOR?

[17] The defendants' evidence on the issue is given by Dr. Stringer. At trial, Dr. Stringer testified that he has no recollection of promising remuneration, either by payment of money or giving stock options. He said that the defendants do not pay for the services of a medical director and he does not know of any clinics that do. He conceded the position entailed some responsibilities and some tasks. However, at Discovery, Dr. Stringer testified:

> 237 Q Referring specifically to that initial discussion, do you deny that Dr. Bachynski was offered either $10,000 in stock options of $10,000 in cash?
>
> A I do not have a recollection of that. I do remember talking about stock options and I believe 10,000 was the number suggested, I don't remember the cash portion of it. And again this was a general discussion and it wasn't a definite one, it was depending on getting an agreement between us, a contract, a written contract.
>
> 238 Q So you say it's possible but you can't recall about the $10,000 in cash?
>
> A Yes.

At trial, Dr. Stringer admitted that answer adding (my notes):

> Anything is possible but I never offered it to anyone before.

However, Dr. Stringer later testified that on three occasions he has offered stock options to "prestigious" radiologists as a "carrot" to obtain their services.

[18] Dr. Stringer testified that when the defendants were contemplating the plaintiff's termination, Mr. Mulcahy mentioned the remuneration the plaintiff was seeking for his services as medical director. Mr. Mulcahy attended court during the trial but did not testify, nor did Mr. Little, whom the plaintiff says was present at the meeting when his remuneration and duties were discussed and agreed to.

THE LAW – CONCLUSIONS

[19] In ***Bardal v. Globe and Mail Ltd.*** (1960), 24 D.L.R. (2d) 140 (Ont. H.C.) McRuer, C.J.H.C. said at p. 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 the availability of similar employment, having regard to the experience, training and qualifications of the servant.

[20] In ***Ansari v. B.C. Hydro*** (1986), 2 B.C.L.R. (2d) 33 (S.C.) McEachern, C.J. (now C.J.B.C.) said at p. 42:

> In other words, the law seems to place a cap of reasonableness upon the notice period and does not compensate a discharged employee to retirement age, whatever that may be, even if there is no likelihood of alternate equivalent employment. . . .
>
> Subject, therefore, to exceptional cases such as *Suttie and Sorel,* where the degree of responsibility, age, and years of service were very extensive, it seems to me that 18 to 24 months is the rough upper limit for reasonable notice, and other cases should be scaled downward from there unless there are extenuating circumstances which cannot all be enumerated in this crude attempt to provide guidance for the many cases still outstanding.

McEachern, C.J. also spoke of skilled professional employees. At p. 39 he said:

> . . .in my view, it is not necessary minutely to investigate the degree or level of specialization of these plaintiffs. It is enough to observe that they are highly skilled graduate engineers whom B.C. Hydro was satisfied to employ in responsible positions. Those factors alone are sufficient to entitle these employees to a longer notice period than in many other cases.
>
> Also, I do not consider it useful to make distinctions between these professional employees who did or did not supervise other employees. Such a concept is pervasive in some disciplines, but it is not a particularly relevant consideration when employees are professionally skilled and are employed because of such skill.

McEachern, C.J. spoke of the age factor at p. 40:

> Advancing years are also an important factor to be considered along with years of service because age bears so importantly upon the prospects for other similar employment. The Court cannot be unmindful of the fact that employment opportunities for older engineers are extremely limited.

[21] The plaintiff is 61 years of age. In his long, professional career he has specialized in radiology. He has not practiced general medicine. Radiology is a limited field and the opportunities for work in that field are few. He has assiduously tried to replace his employment,

without success. He does not have experience in the new MRI technology and is less attractive to a prospective employer compared to a radiologist who has that training. I expect that he will continue to have great difficulty in replacing the employment, given his age and the limited field in which he practices.

[22] In ***Wallace v. United Grain Growers Ltd.*** (1997), 36 C.C.E.L. (2d) 1 (S.C.C.), Iacobucci, J. delivering the majority judgment said at p. 32:

> In determining what constitutes reasonable notice of termination, the courts have generally applied the principles articulated by McRuer, C.J.H.C. in *Bardal v. Globe and Mail Ltd.* . .
>
> This Court adopted. . .[the factors spoken of in *Bardal*] in *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986 (S.C.C.), at p. 998. Applying these factors in the instant case, I concur with the trial judge's finding that in light of the appellant's advanced age, his 14 year tenure as the company's top salesman and his limited prospects for re-employment, a lengthy period of notice is warranted.

Wallace was 59 years of age and was dismissed after 14 years of service. In ***Wallace*** the trial judge found 24 months' notice period was reasonable; the Court of Appeal reduced it to 15 months and the Supreme Court of Canada restored the trial judge's award.

[23] The defendants submit that the plaintiff's part-time work for Dr. Fraser from 1990-1996 should result in a shorter notice period. I do not agree. The plaintiff's loss arises from the failure to give reasonable notice and the court must consider the earnings of the plaintiff at the time of termination, not the remuneration he had received in previous years and average it out. It is the court's function to put the employee in the position he or she would have been in had reasonable notice been given. Reversing the situation, if an employee in the past had worked full-time but at the time of termination was working part-time, should the court average the full-time and part-time work to determine a reasonable notice period? I think not. The issue was addressed in ***Monti v. Hamilton-Wentworth (Regional Municipality)***, [1999] O.J. No. 2527 (Ont. S.C.J.). At pp. 3 and 4, Riley, J. said:

> I will deal first with a discrete issue raised by counsel, whether the notice period should be shorter for a so called "part-time" employee than for a "full-time" employee. In my view, it should not. No matter how many hours per week an employee works, he or she is still a permanent employee, and entitled to appropriate notice of compensation in lieu thereof. The difference in compensation between an employee who works five hours per week and one who works 50 hours per week will simply be reflected in their salary per week, month, or year, and the compensation in lieu of notice based upon those hours. Indeed, in this era of "job sharing" and of professionals who might work 60 hours per week or more, compared with a permanent employee who might work 30 hours per week or even less, it becomes problematic to even define what constitutes "part-time" employment, let alone to determine by what quantum the notice period should be reduced in the event of termination of employment.
>
> In my view, a permanent employee who has worked 20 hours per week for 10 years is entitled to the same period of notice as an employee who has worked 40 hours per week for the same 10 years. Obviously the quantum of compensation

> for such notice will differ, just as their salaries did, based upon hours of service per week and their respective responsibilities. The fact that Dr. Monti worked at the Clinic for only seven, 10 or 12 hours per week does not detract from her 22 years of permanent employment, which entitles her to appropriate notice based upon those years and compensation in lieu of such notice, based upon the number of hours she worked per week.

[24] With respect to the plaintiff's assertion that he was promised remuneration for his duties as medical director, I find for him. Dr. Stringer's evidence on the point was vague and unsatisfactory. He departed from his Discovery evidence. The defendants reduced the plaintiff's percentage of gross billings from 27% to 25% and imposed new duties upon him which he had not assumed before. I find the defendants made the promise which Dr. Bachynski alleges, a promise which he accepted. He is entitled to receive $10,000 yearly during the notice period.

[25] Given the plaintiff's age, his length of service, the restricted character of his work and the difficulty he has encountered in replacing it, I find that a 24 month notice period is reasonable.

[26] Counsel agree that the plaintiff earned approximately $100,000 in the last year of his employment and that figure will be used to calculate his loss of earnings over the notice period of 24 months. The defendants are entitled to receive credit of $26,000, the sum he earned after October 20, 1999.

[27] The plaintiff is entitled to costs of the action. At the moment, I am inclined to award costs at Scale 3. Counsel are at liberty to submit on the issue of costs if they choose to do so, either orally or in writing.

"G.R.B. Coultas, J."
The Honourable Mr. Justice G.R.B. Coultas

January 25, 2001 – ***Addendum to the Reasons for Judgment*** issued by Mr. Justice G.R.B. Coultas advising that

[1] This Addendum addresses Mr. Hamilton's letter of January 18, 2001, sent to the Supreme Court Registry.

[2] I apologize to Counsel for the trouble they have been put to as a result of my mistake in paragraph 24 of the Reasons for Judgment dated January 5, 2001 respecting the dates during which Dr. Bachynski is entitled to receive $10,000 for his services as medical director.

[3] I should not have said as I did in paragraph 24:

> "… He is entitled to receive $10,000 during the notice period."

[4] I should have said:

> "… He is entitled to receive that yearly sum from January 1, 1998 to the end of the notice period that I found was reasonable."

[5] This Addendum amends the Reasons to include an award of $20,000 for serving as medical director in 1998 and 1999.

"G.R.B. Coultas, J."
The Honourable Mr. Justice G.R.B. Coultas