

Date: 20021216
Docket: S017164
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

Oral Reasons for Judgment
Madam Justice B. Brown
In Chambers

BETWEEN:

ANIL MANGAL and DR. ANIL MANGAL, INC.

PLAINTIFFS

AND:

CANADIAN BLOOD SERVICES

DEFENDANT

Counsel for the Plaintiffs N.R. Howell

Counsel for the Defendant K.D. Loo

[1] THE COURT: Dr. Mangal seeks damages for wrongful dismissal plus retroactive salary increases to April 1st, 1998. By way of background, Dr. Mangal assumed the position of Medical Officer for Vancouver Centre with the Red Cross effective April 1st, 1997. He was terminated by letter dated February 12th, 2001. He received payment for ninety days in lieu of notice. Dr. Mangal is a haematologist. He is now fifty years old.

[2] Dr. Mangal obtained employment in a temporary position with reduced salary in October, 2001. Dr. Mangal's contract appears to have been partly oral, partly in writing. It is reflected in two letters. The first is dated March 18, 1997 from Mr. Parslow, the Vancouver Centre Director. In that letter, Dr. Mangal is offered the position as Medical Officer. He was given a choice. He may take the position as a salaried employee or on a fee-for-service basis. In either case, the base salary would be \$135,000. In the fee-for-service scenario, Red Cross estimated the benefits for employees at \$25,000 and those were to be paid in lieu of benefits directly to Dr.

Mangal. The responsibilities, hours, place of work, etcetera, would be the same under either scenario. Dr. Mangal could continue his appointment at UBC also under either scenario.

[3] Dr. Mangal confirmed additional terms in his letter of March 21st, 1997. Notably, the Red Cross could terminate the contract during the first year on ninety days' notice. He also set out terms for vacation, sick leave, and continuing education, the right to pursue other contracts, hospital appointments, reimbursements for out-of-pocket expenses. He requested an annual review of the terms of his contract within one month of the anniversary date April 1st, 1998.

[4] By the spring of 1998, the Red Cross was embroiled in the tainted blood problems. However, on June 15, 1998, Dr. Mangal wrote to Mr. Parslow confirming that the review was delayed, but would be effective April 1st, 1998. He suggested a six-month notice of termination and a \$10,000 per annum increase in his remuneration to bring it closer to B.C. pathologist levels with a view to further increases over the next few years. This increase appears to have been accepted by Mr. Parslow as he communicated to Ms. Dion, Administrative Staff in Ottawa, in a memorandum dated July 3rd, 1998. Dr. Mangal confirms this in a memorandum dated September 25th, 1998 to Mr. Parslow:

Based on our discussions of early August, it was my understanding that some adjustments would be forthcoming soon.

However, on September 1st, 1998, Red Cross had announced that all salary increases would be postponed pending the Companies' Creditors Arrangement Act proceedings.

[5] While these events were transpiring, Dr. Mangal received a letter from Linda Cranston, the Chief Executive Officer of Canadian Blood Services ("CBS") dated June 15th, 1998, anticipating the CBS assumption of the blood program effective September 1st, 1998. CBS offered to continue Dr. Mangal's Red Cross contract on the same terms and conditions effective September 1st, 1998. Dr. Mangal accepted this offer on August 7th, 1998 attaching a letter in which he indicated his understanding that CBS would initiate discussions to address outstanding issues with respect to his contract as soon as possible after the transfer of the blood program. CBS did not disagree.

[6] On September 4th, 1998, Ms. Cranston advised center directors,

On September 1st, 1998 the Red Cross announced that as a result of its obligations under the rules of the Companies' Creditors Arrangement Act, all salary increases were postponed

until further notice. CBS would like to assure employees who transfer to Canadian Blood Services whose increase was affected by the Red Cross pay freeze that they will receive their adjustment or increment after the transfer. In addition, CBS will compensate individuals retroactively for the period during which there entitlement to an increase was deferred by the freeze. I would appreciate it if you could pass this information on to your staff so that they know that the CBS commitment to transfer employees with no change in salary or terms and conditions of employment will mean that they will receive scheduled pay adjustments and increments and that they will receive retroactive pay for any period of delay.

[7] By March, 1999, Dr. Mangal had yet to receive any retroactive pay increase. He met with Dr. Shur of CBS in Toronto to discuss these matters and provided him with some of the correspondence referred to. Dr. Shur advised Dr. Mangal that CBS was undertaking a review of medical compensation. Dr. Mangal confirmed his understanding to Dr. Shur by e-mail March 15, 1999. Dr. Mangal suggested \$230,000 per year plus benefits would be comparable to the rates and other benefits of B.C. pathologists. Dr. Shur indicated that he considered that amount to be too high and unlikely, however, he did not suggest that Dr. Mangal would not be receiving compensation retroactive to April 1st, 1998.

[8] By September 1999 the comprehensive review of the salaries for medical staff was not yet completed. Dr. Shur, in a conference call with CBS medical directors, said that the compensation package would be announced in November and would be retroactive to June 1999. He said that he expected substantial movement toward equity in the market. By a letter dated November 16, 1999, CBS advised Dr. Mangal that the salary plan would be announced in January 2000. The letter also said that those with consulting agreements would have their contracts reviewed to determine the timing and applicability of their conversation to CBS payroll. In January, 2001, Dr. Shur told Dr. Mangal that his contract review would be completed by February, 2001. Dr. Mangal received Notice of Termination dated February 12, 2001.

[9] Dr. Mangal says that he continued to work in reliance on the promises by CBS that the salaries would be reviewed, brought into line with equity, which he understood to mean the pay received by others in a position comparable to Dr. Mangal's in B.C., that he would receive retroactive compensation. CBS says that Dr. Mangal's contract terms are set out in the letter of March 18, 1997; that it never agreed to anything else. It says it has met those contract terms and nothing more is due.

[10] As I have noted above, Dr. Mangal's contract was partly written, partly oral. He clarified missing terms, orally agreed to, in his letter of March 21st, 1997. Red Cross, by its silence, must be taken to have agreed to those terms as Dr. Mangal became the Vancouver Centre Medical Officer. That contract provided for an annual review of its terms, but was not for a limited term. The 90-day notice provision applied to the first year only. Following the first year, Dr. Mangal suggested various modifications. These include a six-month notice, five weeks' vacation, and a \$10,000 increase in salary pending further review. Of these, only the \$10,000 increase in salary appears to have been specifically agreed.

[11] In support of Dr. Mangal's assertion that the \$10,000 increase was agreed to is Mr. Parslow's memorandum to Ms. Dion of July 3rd, 1998. In that memorandum, Mr. Parslow says,

We are proposing to make small adjustment to the remuneration level immediately and that the contract itself will be reviewed in full as soon as CBS is in a position to permit this,

As well as Dr. Mangal's memorandum to Mr. Parslow of September 25, 1998:

Based on our discussion of early August, it was my understanding that some adjustments would be forthcoming soon.

[12] I am satisfied that the Red Cross had accepted Dr. Mangal's suggestion of an increase to \$170,000 prior to the CBS assumption of the contract. Thereafter, while it is clear that Dr. Mangal anticipated a significant increase in compensation, I do not find that CBS made such a promise. In September, 1999, Dr. Shur indicated that he expected that there would be a substantial movement toward equity with the existing market retroactive to June, 1999. To my mind, that is too vague to constitute a contractual promise. It is an expression of Dr. Shur's expectation.

[13] Dealing with the applicable notice period, the 90 day notice period referred to in Dr. Mangal's letter of March 21st, 1997 was expressly limited to the first year. In 1998, which would be the second year, Dr. Mangal suggested six months would be appropriate. Red Cross did not address the issue, presumably due to the turmoil in changeover to CBS. Dr. Mangal continued to work for more than two years after that.

[14] The British Columbia Court of Appeal has considered the issue of notice in circumstances such as these. In *Marbry Distributors Ltd. V. Avrencan International Inc.*, [1999] B.C.J. No. 635 there Mr. Justice Braidwood said at para. 4,

I will start the analysis by first considering the principles that would apply in the standard employer/employee or independent contractor situation and then consider whether those same principles are appropriate to the corporate distributor relationship.

When the courts are implying a term into a contract, like reasonable notice upon termination, heed should be paid to MacKinnon, L.J. in *Shirlaw v. Southern Foundries (1926) Ltd.*, [1939] 2 All E.R. 113 where, at 124, he said:

Prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying. Thus, if while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common, "Oh, of course."

When dealing with a continuing relationship, the above test can be applied at various stage of that relationship.

In assessing whether a party is entitled to have a term providing for reasonable notice implied, when terminated without cause and without any binding contractual provision, the courts have traditionally been faced with determining whether the relationship between the parties is one of employer/employee or independent contractor. Historically, this determination focused on the degree of control the employer had over the employee. The greater the control, the more likely it was that the relationship was one of master and servant. As the law developed and as society became increasingly complex, the single test of degree of control was adjusted. Possibly the most frequently cited "test" is that of Lord Wright in the Privy Council decision of *Montreal v. Montreal Locomotive Works*. . . .

Continuing at para. 9:

At the heart of the court's inquiry is the true nature of the relationship between the parties. All relationships in the workplace setting can perhaps be thought of as existing on a continuum. At one end of the continuum lies the employer/employee relationship where reasonable notice is required to terminate. At the other extremity are independent contracting or strict agency relationships where notice is not required. The difficulty obviously lies in determining where upon that continuum one is resemblance to the employer/employee or the independent contractor status?

Continuing at para. 15, he quotes from Mr. Justice Middleton in *Carter v. Bell*, [1936] 2 D.L.R. 438 (Ont. C.A.):

There are many cases of an intermediate nature where the relationship of master and servant does not exist, but where an agreement to terminate the arrangement upon some reasonable notice may be implied.

[15] On the continuum referred to, this relationship falls at the employer/employee end of the continuum so that Dr. Mangal is entitled to reasonable notice. The status as employee or fee-for-service was of no moment to Red Cross. Clearly, the medical officer would conduct himself in the same way regardless of the form of the arrangement. Dr. Mangal was subject to the control of the Red Cross. He had no investment in the business or tools of the business. He had no expectation of profit. His services would not be limited exclusively to Red Cross whether he chose to be a salaried employee or a fee-for-service contractor. He was entitled to reasonable notice of termination. The contract provided for ninety days within the first year, but that does not reflect the reasonable expectation of Dr. Mangal on an ongoing basis as he clearly limited that notice to the first year.

[16] The parties have provided me with cases reflecting awards in similar cases. The factors to consider are: (1) The character of the position. Dr. Mangal is a medical specialist with a responsible position. (2) Age. Dr. Mangal is fifty. (3) Length of service. Dr. Mangal held the position for almost four years. (4) Availability of similar employment. Dr. Mangal took seven-and-a-half months to find employment. The plaintiff's cases indicate the range of eight to fourteen months, the defendant's six to seven months. In the circumstances of this case, eight months is reasonable notice to Dr. Mangal.

[17] In conclusion, I find that Dr. Mangal is entitled to \$170,000 from April 1st, 1998 and eight months' notice. I assume that the parties will be able to make the necessary mathematical calculation, and I award costs at the scale of three.