Citation: Mercier v. Trans-Globe

Date: 20020307
File No: 2001-67384
Registry: Vancouver

In the Provincial Court of British Columbia

(CIVIL DIVISION)

BETWEEN:

MARY MERCIER

CLAIMANT

AND:

TRANS-GLOBE TRAVEL LIMITED

DEFENDANT

REASONS FOR JUDGMENT

OF

THE HONOURABLE JUDGE MEYERS

COPY

Counsel for the Claimant: N. Howell
Counsel for the Defendant: G. Puil, Agent

Place of Hearing: Vancouver, B.C.
Date of Judgment: March 7, 2002

[1] This is a case where Ms. Mercier's employment with a travel agency was terminated. As a result Ms. Mercier has sued the travel agency on the grounds that she was not given reasonable notice. The defendant travel agency took the position that Ms. Mercier was dismissed for just cause, and that in the circumstances two months' pay was reasonable substitution for notice to her.

[2] MARY MERCIER: Not too months' pay, Your Honour, two weeks.

[3] THE COURT: Sorry, two weeks' pay was seen as reasonable as it complied with the Employment Standards Act. The Employment Standards Act, of course, is a minimal amount that the legislation sets out for employees who are terminated. It does not intend, nor has the case law interpreted it as anything other than a minimal guideline.

[4] Ms. Mercier was with another travel agency, and the defendant travel agency had heard through Ms. Mercier's ex-husband that she was unhappy there, and approached her with an offer to

join the defendant travel agency. A dispute arose in this trial as to exactly what position she was hired to fill; was she hired as simply a travel agent or as a manager.

[5] I am satisfied on the evidence, Ms. Mercier was hired as the manager of the travel agency. One of the employees called as a witness, Ms. Blum, said that she regarded Ms. Mercier as her boss; Ms. Mercier was the only one of three travel agents who had their own office, while the others sat at desks in the common area; Ms. Mercier was also responsible for some accounting and collection of accounts receivable; and when the principal of the defendant travel agency came into the office, he would regularly meet just with her behind closed doors. I find as a fact that she was employed as the manager of the travel agency.

[6] She was employed just over two years. The problems arose when customer complaints were made, both to a co-worker and then to management. The complaints were concerning the competence of Ms. Mercier. Now, "competence" can be interpreted narrowly or broadly. In the context of employment cases, generally "competence" is interpreted more broadly.

[7] The nature of the complaints that were made to the principal of the company had to do with her general attitude and demeanour in dealing with clients. Three different clients, two of whom were major clients, told the principal of the travel agency that they did not enjoy dealing with her because of her attitude and "manner". One of the main clients had said that they found some of the work, in particular with respect to a major accounting transaction, was incompetent and they did not want her to deal with their files any more.

[8] There were instances which were observed by one of the co-workers. Ms. Blum testified to a number of instances where Ms. Mercier, in her view, had been less than pleasant when dealing with potential customers. However, Ms. Blum never brought these incidents to the attention of either Ms. Mercier or the principal of the travel agency. The reason Ms. Blum gave was that Ms. Mercier was her supervisor and she thought it would be "rather cheeky" to be criticizing her boss for the way she was behaving. However, on one occasion, and only one occasion, she did report an incident to the principal of the company.

[9] Now, if the principal of the company had been told all of this information by Ms. Blum, together with the three instances that he did know about, he certainly would have had, in my view, sufficient reason to begin warnings and follow-ups with Ms. Mercier regarding her behaviour on the job. Ultimately, if his warnings were not heeded, he would have had the right to terminate her for cause.

[10] The problem arises due to the personality of the principal of the company. Perhaps, the view of Ms. Mercier who dealt with him in the business field would feel differently, but, Mr. Puil said, and he also came across to me that way, as a person who did not like personal confrontations and tried to avoid them. He said that he was basically a nice person and did not want to hurt people's feelings. I take it, by that he meant, he didn't like to hurt the feelings of people he was working with or people with whom he had some personal relationship. It should also be noted that Ms. Mercier was the ex-wife of the principal's partner in the business.

[11] In any event, what happened when each of these instances came to the attention of the principal of Trans-Global Limited, he, at best, tactfully, but in a very roundabout general way, gave Ms. Mercier a pep talk as opposed to specifically, assertively setting out what the complaint was, how she should improve her dealings with clients, set a time when her performance would be looked at again, and ultimately, if need be, give her a final warning that if her actions were continued, she would be terminated.

[12] This is a small company, but yet the rules of wrongful dismissal apply equally to large companies and small ones. By that I mean, the law has recognized that an employee is in a very precarious position when it comes to ongoing employment with an employer and there have to be certain safeguards so as to prevent an employer from the unfair exercise of power over the employee.

[13] What the courts have said, is that for an employer to establish just grounds for dismissal based on incompetence, they show that, one, they brought to the attention of the employee the specific problems with their work; two, that they gave the employee instruction as to how to better handle those problems; and three, that the employee has been given both a firm warning and advice that, failure to meet the standard of behaviour that was required, would result in future dismissal. The employer must warn the employee clearly and specifically that continuing the unsatisfactory job performance may lead to dismissal.

[14] In this particular case, although Ms. Mercier says that she was never told of any concerns about her employment performance, I prefer the evidence of Mr. Puil on behalf of Trans-Globe Travel Limited that he did bring to her attention that there were certain aspects of her behaviour in dealing with clients that was a cause for concern. However, in those conversations he did not assertively point out to her the circumstances of each complaint, nor why they were valid complaints, nor what she should do to improve, nor did he ultimately ever warn her that if she did not improve, she would eventually be disciplined or fired.

[15] I do understand Ms. Mercier's view that she was never told at all about any of these complaints. I do not suggest that she was lying at all, but it would be understandable why she would believe they were not brought to her attention at all. It is equally understandable why Mr. Puil would think he did bring them to her attention. He brought them to her attention in a very general, nice and roundabout way, as opposed to telling her specific details of the complaint, giving her specific advice as to how to do better, and finally warning that if things did not get better she would be fired. He was "too nice", and understandably, the message was not grasped.

[16] The best example to demonstrate these conversations is that both Mr. Puil and Ms. Mercier agreed in evidence that generally, the comments concerning complaints were to remember that the customer is always right, some people are difficult to deal with, you have to roll with the punches, don't take things personally. These type of comments, although intended by the employer to point out the problem areas of behaviour and advise as to what should be done, did not go far enough. The employer took the view that the employee knew what the complaints were all about, so it was not really necessary to specifically set out each and every one with her. He chose just to say that he was aware of a particular problem which had arisen and she should remember that they are in a service industry. In law, that of course is not sufficient.

[17] One of the reasons the law requires the employer to warn the employee that their job is in danger and that the employee must be given a reasonable opportunity to improve, was set out in a case called ***Manning v. Surrey***, 54 DLR (3d) 312.

[18] The employee who works week after week, month after month, without really knowing that anything is wrong, and is not permitted an opportunity to improve their work, can, in effect, be "sandbagged" later when they are suddenly fired. In fairness, the employee must have specific warnings. It must be shown that the employer had brought home to them, that they had done wrong and the employer was not going to tolerate it should it continue.

[19] There is another aspect of this case that flows from the fact that the employer did not specifically warn Ms. Mercier, and that is what the case law calls "condonation of misconduct". Condonation is a situation where a misconduct occurs, it is discussed, and then a number of months pass by without any comment or action by the employer. That would lead an employee who was chastised for a wrongful behaviour to reasonably conclude that their behaviour had been forgiven by the employer. In this particular case the employee had been with the company for just over two years. The last complaint prior to her termination was six months before, and prior to that, four months before. In effect, what the concept of "condonation" is all about is to prevent an employer from later resurrecting behaviour that reasonably might be said to have been forgiven by them by virtue of the passage of considerable time and not them raising it with the employee.

[20] In this particular case, what ought to have happened is: as each of these incidences came to the attention of the employer, he should have called in Ms. Mercier and discussed what the complaint was, give her an opportunity to explain, tell her why it was inappropriate, guide her with some guidance as how to change that behaviour, and then indicate to her that he was going to be watching her, that it was important for her to turn that behaviour around or else her job was in jeopardy. Although, of course it is always best it be done in writing and be documented so that when disputes end up at trial, there will not be the frequent consequence of one party saying that the employee was told, and the other party saying that they were not told, or disputing how and in what manner they were told. In this particular case, I find Mr. Puil to be a very honest witness, and I accept his evidence that he did talk to Ms. Mercier, but as I said before, he did it in a way that was too nice, too roundabout, and too general. It was not specific enough to alert her to the fact that she was heading down the road to termination.

[21] Cumulatively, I find that the ultimate decision by Mr. Puil to terminate Ms. Mercier was justified, but the fact that he did not comply with the steps that are required before a just determination can be said to have occurred, he has failed in his obligation to prove on the balance of probabilities, that he justifiably terminated Ms. Mercier.

[22] The court relies on the cases of ***Brown v. Cyr***, (1998) 88NCR (2d) 426, 225, and ***Bogden v. Purolator***, (1996) 19 CCEL (2d) 177.

[23] The court now has to look at what is the appropriate payment in lieu of notice. Counsel for Ms. Mercier has presented a number of wrongful dismissal cases that she argues are cases involving comparable people in comparable jobs with comparable salaries. The salary, in lieu of notice, awards run from four to ten months. Each case, of course, is different on the facts and the circumstances, but there are certain guiding principles that the courts are required to consider when deciding what the appropriate pay in lieu of notice should be.

[24] The leading cases are ***Bardell v. Globe and Mail***, (1960) 24 DLR (2d) 140; and ***Gillespie v. Bulkley Valley Forest***, (1979) 1 Western Weekly, 607.

[25] In the case at bar, Ms. Mercier is 57 years of age. She had been employed in the travel agency business for about 15 years, including her employment with the defendant company. She was employed with the defendant company for just over two years. She was dismissed at a time when Air Canada were laying off employees. She testified that she was not able to find replacement work. She testified that she looked in the newspapers, she talked to professionals who were also in the business, and she read through the trade journals, but she was unable to discover any jobs or job prospects.

[26] Mr. Puil cross-examined Ms. Mercier as to any specific written material or documentation that she had, to show that she actively did look for work. She did not have anything specific with her that she could point to and say, "I called here, I called there, I sent resumes here, I sent resumes there." The defendant attempted, by way of argument, to suggest there were many jobs that were available, and had she looked closely, she would have found them. Of course, that was only argument by the defendant and not supported by hard evidence. What the evidence is, is that she did look for jobs but was unable to find any.

[27] The obligation is on the defendant to show that Ms. Mercier did not do what was necessary to mitigate her losses. It would have been better for the defendant to have produced and shown newspaper ads, travel journal ads and internet ads to show that there was work available, but she chose not to apply for any of these jobs. However, I am still able to consider that when Ms. Mercier was directly questioned as to what, specifically, she did in terms of her job search; who did she go to see about specific employment, what journals did she look at for jobs, what newspaper ads did she consider, she was unable to be specific. I can and do take this into account in deciding that Ms.

Mercier did not do everything in her power to find a comparable job after being terminated by the defendant.

[28] Guided by the case law, I find that Ms. Mercier, as a 57-year-old, who managed a small travel agency for just over two years, earning $2,500 a month, was dismissed without just cause and by that again I mean not being given warnings along the way she would be and should be entitled to five months' worth of salary in lieu of notice. However, due to what I find to be a lack of attempts by her to mitigate her losses, I will take off two months from that award. Accordingly, Ms. Mercier will be awarded the equivalent of three months' salary at $2,500 per month. That equals $7,500, less whatever amount of money she has already been paid. I should have said "three months of net salary". Rather than award $7,500, I should award three months of net salary, because that would take into consideration the need to deduct whatever statutory deductions which would have been required, such as income tax, UIC, CPP and so on. Ms. Howell, please correct me if I am wrong, but if Ms. Mercier collected employment insurance during the three months, that under the law EI would have to be paid back for those three months of payment to her? Am I correct on that?

[29] MS. HOWELL: Yes, Your Honour.

[30] THE COURT: All right. Now, in order to facilitate the money going in the right directions, I order the defendant pay to the claimant three months of net salary, and also the defendant pay to the statutory bodies, meaning income tax, EI and pension, whatever would have been required for those three months. And then as far as EI is concerned, if the employer (the defendant) is going to send that in, presumably he would have to know the dollar amount to be remitted to EI. Do you know that, Ms. Howell?

[31] THE DEFENDANT: Could I ask a question?

[32] THE COURT: Sure.

[33] THE DEFENDANT: So, $7,500, three months, minus the $1,250 that was paid, I pay directly to her?

[34] THE COURT: We are just going to sort that out, because some of it has to go to Revenue Canada, some to EI, some to the pension.

[35] THE DEFENDANT: I see, so the deductions I would pay to EI and CPP?

[36] THE COURT: And Revenue Canada, and then the balance to her. It is as if she continued on with you for three months after her termination.

[37] THE DEFENDANT: So I pay her the balance?

[38] THE COURT: That is right.

[39] THE DEFENDANT: Thank you.

[40] THE COURT: All right, so you will let Mr. Puil know then what that figure is?

[41] MS. HOWELL: Yes.

[42] THE COURT: All right. We have to set a date by which all this can be paid.

[43] THE DEFENDANT: Well, I just have to work out the EI and CPP deductions. I would say, today is Thursday, I will get somebody to do it for Monday.

[44] MS. HOWELL: Next Friday.

[45] THE COURT: Will a week give you enough time?

[46] THE DEFENDANT: Oh, yes.

[47] THE COURT: So, make it by March 14th.

[48] THE DEFENDANT: March 14th?

[49] THE COURT: Yes, and that is next Thursday.

[50] THE DEFENDANT: And I pay that to Ms. Mercier?

[51] THE COURT: You can pay it to Ms. Howell in trust.

[52] THE DEFENDANT: Ms. Howell.

[53] THE COURT: And you can just give Mr. Puil your card.

[54] MS. HOWELL: I'll give him instructions on who to make the cheque out to.

[55] THE COURT: What you are to find out is, how much money goes to Revenue Canada and CPP, and Ms. Howell will tell you how much money goes to EI. The balance goes to Ms. Howell in trust.

[56] THE DEFENDANT: Your Honour, we normally deduct both the employer -- or we do, the employer and the employee share. So would I deduct both shares, or would I leave the employee share up to them? See what I mean, when we pay EI and CPP, we deduct their share and we pay our share.

[57] THE COURT: The required deductions continue as if she had continued on as an employee. So whatever would have been the deductions, continue as is during those three months.

[58] Now, as to the issue of costs. Ms. Howell, were there any settlement offers which I should be considering at this juncture, in terms of costs?

[59] MS. HOWELL: Yes, we offered to settle for this amount.

[60] THE COURT: The reason I am asking this, Mr. Puil, is that under the Small Claims Rules, if there was a formal offer to settle by either side and the side rejected the offer, and it turned out at the end of the day, that they ought to have accepted that offer, then the court has the right to consider a penalty for not accepting what turned out to be a reasonable offer.

[61] THE DEFENDANT: A formal offer only?

[62] THE COURT: A formal offer only.

[63] MS. HOWELL: You know, Your Honour, I apologize. We made an offer, we made an informal offer.

[64] THE COURT: Informal? All right. In view of the decision I think it would fairer for each party to pay their own costs in this case.

[65] THE DEFENDANT: Thank you very much.

[66] THE COURT: All right, thank you.

[67] (PROCEEDINGS CONCLUDED)