Citation: Panton v. Everywoman's Health Centre Society (1988) 2000 BCCA 621

Date: 20001117
Docket: CA025089
Registry: Vancouver

COURT OF APPEAL FOR BRITISH COLUMBIA

BETWEEN:

MARGARET PANTON

PLAINTIFF
(APPELLANT)

AND:

EVERYWOMAN'S HEALTH CENTRE SOCIETY (1988)

DEFENDANT
(RESPONDENT)

Before: The Honourable Mr. Justice Epson
The Honourable Madam Justice Newbury
The Honourable Madam Justice Saunders

R. H. Hamilton, Q.C. — Counsel for the Appellant
D. G. Crane — Counsel for the Respondent

Place and Date of Hearing: Vancouver, British Columbia
19 May 2000

Place and Date of Judgment: Vancouver, British Columbia
17 November 2000

Written Reasons by:
The Honourable Madam Justice Saunders

Concurred in by:
The Honourable Mr. Justice Esson

Dissenting Reasons by:
The Honourable Madam Justice Newbury

Reasons for Judgment of the Honourable Madam Justice Saunders:

[1] Margaret Panton, the appellant, was dismissed from her employment as clinical administrator of Everywoman's Health Centre Society (1988) on March 1, 1996. She commenced an action for damages for wrongful dismissal. The learned trial judge dismissed her action, finding that the Society had cause to dismiss her without notice. Ms. Panton appeals that decision.

[2] The issue for this Court is whether the trial judge erred in finding cause for dismissal.

[3] The cause alleged by the Society was particularized in several pages of allegations which were summarized by the trial judge at para. 2 of his reasons, as allegations that Ms. Panton:

[1] acted in a manner inconsistent with the terms of her employment when, without advising the board of her actions, she complained on behalf of the Society to the Delta Police Department and asked that it convene a formal inquiry into the conduct of Constable Parker as it affected the Society and certain of its employees;

[2] omitted, or refused, to follow the direction of the president to deliver the Society's security logs to crown counsel for use in a prosecution concerned with the constitutionality of the ***Access to Abortion Services Act***, R.S.B.C. 1996, c.1; and

[3] challenged the board and its conduct and decisions in an open and hostile manner which undermined its efforts to manage the affairs of the Society.

[4] These faults were said by the Society, in its amended statement of defence, to have breached certain implied terms:

[3] In response to the whole of the Statement of Claim, there were implied terms in the contract of employment between the plaintiff and the defendant that the plaintiff would:

[1] act toward the defendant with all good faith, fidelity and loyalty;

[2] obey the reasonable and lawful directions of the defendants;

[3] not act so as to damage or destroy the trust and confidence between the plaintiff and the defendant;

[4] treat other staff members and physicians in such a way as not to undermine the morals and efficient operation of the Everywoman's Health Centre.

[5] The trial judge found that Ms. Panton's behaviour concerning the delivery of security logbooks to Crown counsel for use in a trial concerning the constitutionality of the ***Access to Abortion Services Act,*** constituted cause for dismissal. He did not decide whether the other incidents set out in the particulars amounted to cause.

[6] This appeal raises the issue of the duty of an employee to participate voluntarily as a witness in a prosecution of significance to her employer, and to report to her employer as to her actions with and statements to Crown counsel, a third party to the employment relationship.

[7] The issue of cause is an issue of mixed fact and law. To the extent that the issue is one of law, the standard of review is one of correctness: ***Mitchell v. Nanaimo District Teachers' Assn.*** (1994), 94 B.C.L.R. (2d) 81 at 89 (C.A.). Where the issue is one of fact, the standard of review is whether a palpable or overriding error is demonstrated: ***Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital***, [1994] 1 S.C.R. 114; ***Van Mol (Guardian ad litem of) v. Ashmore*** (1999), 58 B.C.L.R. (3d) 305 (C.A.).

I. THE FACTS

[8] Before I discuss the issues, it is useful to canvass the facts as found by the trial judge and as otherwise evident.

[9] The Everywoman's Health Centre Society (1988) is a non-profit society organized to provide abortion and reproduction counseling services in Vancouver. Ms. Panton was a founding member of the Society and was part of the "core staff" in the position of clinical administrator. She became an employee shortly after the Society's incorporation in 1988. She served as a director of the Society until 1989 when she resigned to conform to a Society policy that paid staff not serve as directors. Day to day management decisions affecting the clinic were made by the core staff in committee.

[10] A board of directors governed the Society. The president of the Society, a director, was also the chief executive officer. At relevant times Ms. Zander was the president. The management model of the Society was described by the trial judge in these terms:

> [7] Reaching a conclusion on the absence or existence of cause is difficult because some of Ms. Panton's actions in the course of her employment were responses to a breakdown in the cooperative management model adopted by the Society. The model contemplated shared decision making by the board of directors and key employees with respect to all-important matters affecting the Society. The model worked for a period of time. When it proved unsatisfactory, the board assumed a dominant role in the management of the Society's affairs, notwithstanding the objections of key employees and Ms. Panton in particular.

[11] The events leading to Ms. Panton's termination occurred in tense times for the Society and its employees. The Society's clinic had been a site of protest by those opposed to its operations; Ms. Panton had been assaulted by a protestor; a doctor who provided abortion services was shot in Vancouver; and there had been violent attacks in the United States against abortion clinics and staff. In December 1994 the Society had learned that a member of the Delta Police Department, Constable Parker, had identified the names of staff at the Society's clinic by using a police computer to search license plates, apparently for the benefit of opponents of the Society. Ms. Panton was one of the staff identified by Constable Parker.

[12] In addition to the strain created by these outside incidents, internal tensions were evident in the relations between the Board and staff. Ms. Panton received hate mail from an employee who subsequently resigned. The strains told on Ms. Panton and in the spring of 1995 she consulted a clinical psychologist.

[13] The matter of Constable Parker's computer search of license plates was not quickly resolved. In May 1995 Ms. Panton and other staff members filed complaints under the ***Police***

Act, S.B.C. 1988, c. 53 concerning the constable's conduct. After an internal investigation, the Delta Police Department resolved to suspend Constable Parker as discipline for his activity. By letter received June 16, 1995, the Chief Constable advised Ms. Panton that if she was not satisfied with the result, she could request a public inquiry within 30 days of receipt of the letter.

[14] On June 29, 1995 Ms. Panton wrote to the Chief Constable for Delta on Society letterhead requesting a public inquiry. The trial judge found that "the letter purported to be written 'on behalf of Everywoman's Health Centre and of the individual staff members whose licenses were searched'" and was signed by Ms. Panton as Clinical Administrator. While Ms. Panton copied her letter to the Society's lawyer, she did not advise any member of the Society's security committee or any member of the Board of her request for an inquiry, although the Parker matter was of some consequence to the Society. In mid-July the Delta police department advised Ms. Panton that her first request for an inquiry would not be acted upon and that a fresh request was required after the department sent another letter. Ms. Panton left on medical leave before that second letter arrived and another employee, receiving the letter, requested a public inquiry on August 25th by copying Ms. Panton's letter and signing it on her behalf.

[15] During the relevant period the Board was becoming increasingly involved in the Society's management and operation. It retained a consultant to interview staff. Ms. Panton did not co-operate with this process. In the course of completing her interviews with other staff, the consultant uncovered complaints concerning Ms. Panton. When these complaints were reported to the Board, Ms. Zander advised Ms. Panton by telephone and in a meeting. Concerns outlined by Ms. Zander focused on complaints by other employees about Ms. Panton's behaviour towards staff and Board members, and her failure to work as a team member. In September 1995 Ms. Zander sent a letter to Ms. Panton summarizing the discussion. The letter could be fairly characterized as critical of Ms. Panton, and warned of a need to change.

[16] On July 21, 1995 Ms. Panton advised the Board and staff that she was going on medical leave. Although her doctor recommended the leave begin immediately, she delayed to ensure that her tasks were reassigned to other staff. Her leave commenced August 8, 1995. She testified that her leave was made necessary by anxiety and depression.

[17] After Ms. Panton's medical leave commenced, her relations with the Board deteriorated steadily. It appears both parties contributed to this deterioration, but there is no doubt from the findings of the trial judge that Ms. Zander exacerbated the poor relationship by criticizing Ms. Panton, both personally and to the Board, incorrectly and inappropriately. Examples noted by the trial judge include:

> a) Ms. Panton did not attend one meeting because of a prior commitment made on behalf of the Society. Ms. Zander, knowing the reason for Ms. Panton's absence, nonetheless noted her absence, criticizing Ms. Panton either expressly or inferentially for not attending;
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> b) In November 1995, Ms. Zander reprimanded Ms. Panton for attending at the clinic to shred documents. Ms. Panton explained that her actions conformed to the Society's document destruction policy. The trial judge found Ms. Zander's criticism was inappropriate and was made without proper inquiry by Ms. Zander;

> c) In the November 1995 reprimand, Ms. Zander asked Ms. Panton to return her clinic keys to a Board member pending her return from medical leave. Ms. Panton returned the keys to the staff member responsible for monitoring keys, having explained her intention to return them to this person and her reasons for so doing in a letter to the Board written November 11, 1995. Her letter also addressed the reprimand she had received for attending at the clinic to shred documents. In a letter dated December 12, 1995, Ms. Zander reprimanded Ms. Panton for returning her keys to the clinic staff member.
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> d) Ms. Zander expected Ms. Panton would return to work from medical leave in mid-December, 1995. In late November she learned that Ms. Panton would not return until January 1996. Ms. Zander wrote Ms. Panton on December 8th advising her that paid sick leave would terminate and she should apply for long term disability benefits. However, Ms. Panton actually was cut from the payroll December 5th, 1995, and under the terms of the disability insurance policy, was unable to receive benefits immediately. She was without pay from December 5, 1994 until February 21, 1996, when she received retroactive long term disability benefits.
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> e) Ms. Zander falsely accused Ms. Panton of removing security photographs from the clinic without authorization. In fact, it was Crown counsel handling the prosecution of a protestor, Mr. Lewis, who had removed these photographs.

[18] On the other side of this deteriorating relationship was Ms. Panton. She was outspoken concerning the Board's method of handling complaints about her, concerning Ms. Zander and her leadership of the Society, and concerning Ms. Zander's conduct towards herself. She expressed disagreement with Board decisions and the Board's manner of decision-making in intemperate terms. The trial judge concluded:

> [53] The unfounded accusations directed at Ms. Panton by Ms. Zander as I have described and the actions of the Society in relation to long term disability do not reflect well upon Ms. Zander in her role as president and, therefore, chief executive officer of the Society. The best that can be said on her behalf is that her actions may have resulted from Ms. Panton's attitude toward the board from June 1995 until her termination in March 1996.

And:

> [56] The correspondence permits only one conclusion: Ms. Panton had no confidence in Ms. Zander or the board and its ability to govern the Society.

And:

> [61] I observe that Ms. Panton accepted employment with the Society which had adopted an atypical governance and operating model requiring

> joint and collegial decisions of the board and core staff in respect of matters of critical importance to the Society. The board and the core staff were, in a sense, partners in the Society's undertaking. The objective of governance through cooperation was laudable. It was achievable and achieved until tensions from internal and external sources made collective decision-making impractical.
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> [62] As the board asserted its authority over the affairs of the Society, Ms. Panton opposed board initiatives, was unwilling to participate in a discussion of her role in the Society absent agreement on process, and was prepared to persistently challenge the board. In the case of the Parker inquiry and the Lewis prosecution, she departed from the co-operative model she espoused to act on her own without gaining consensus or reporting her actions to anyone in a position of authority.
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> [63] Ms. Panton was aware that ultimate responsibility for the management and governance of the Society rested with the board. She had acknowledged the board's authority in her letter of January 5, 1996 to board members. She had been involved in the successful election of a slate of directors, including Ms. Zander, to replace the incumbents in 1993 in order to ensure that a proposal supported by the incumbents, but thought by many members of the Society to be against its interests, would not be acted upon.
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> [64] As Ms. Panton challenged Ms. Zander and the board, and as Ms. Zander made unjustified allegations against Ms. Panton, each developed a profound distrust of the other.

[19] In November 1995 the Board and Ms. Zander learned for the first time that the Society had requested a public inquiry into Constable Parker's license search. At trial, Ms. Zander testified that the request for a public inquiry compromised the flexibility of the Board because it could not withdraw from the inquiry process without loss of credibility, had it desired to do so. However, Ms. Zander never expressed that concern to Ms. Panton before the trial, the Board did not reprimand Ms. Panton when it learned of her request in November 1995 and the Board appeared to take no action against the other employee who sent the request in August 1995. Indeed the Board never discussed the issue with Ms. Panton although Ms. Panton referred to the Parker matter in her correspondence to the Board sent in November 1995. Nor did the Board lead evidence at trial that the public inquiry was not an appropriate avenue for the Society to pursue, or otherwise indicate that it would not have pursued an inquiry but for Ms. Panton's request.

[20] In the months leading to December 1995, the Society was interested in the outcome of the prosecution against Mr. Lewis for breach of the ***Access to Abortion Services Act***. The ***Act*** created a "bubble zone" around the clinic, in which protest activity, including speech, was prohibited. Mr. Lewis deliberately violated the ***Act*** in order that he would be charged, thereby permitting him to challenge the constitutional validity of the legislation.

[21] The Lewis trial commenced in late November 1995. Ms. Panton was expected to be a witness and was scheduled to meet with prosecutors on a Sunday late in November to review her evidence. She was, at this time, still on medical leave.

[22] The trial judge explained what then took place (I note that both parties agree that the following passages wrongly set the dates of meetings as December):

> [34] On December 1st, Ms. Zander met with Ms. Panton. She advised that the board had decided that the Society's security logs would be made available to prosecutors for use in the case. Ms. Zander instructed Ms. Panton to deliver a copy of the logs to the prosecutors when she met with them.
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> [35] Ms. Panton was aware of disagreement among members of the security committee on whether the logs should be so used. She also questioned whether Ms. Zander was acting on behalf of the board rather than on her own initiative. Ms. Panton was steadfast in her opposition to the use of the logs at the trial because of her concern that disclosure of the contents would affect the security and safety of the staff and volunteers.
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> [36] Over the weekend Ms. Panton determined that she would take the logs to the meeting with the prosecutors, place them on the table and announce that while the board had authorized their use, she would cease to be a voluntary witness should the prosecutors take the logs for review.
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> [37] I do not accept Ms. Panton's evidence that she said she would testify if served with a subpoena. Her evidence at trial is inconsistent with that at her examination for discovery. I am satisfied the import of her message to the prosecutors was that she would not be a willing witness in any circumstances if the logs were reviewed or used.
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> [38] Ms. Panton saw Ms. Zander at the hotel on December 3rd. She did not advise her of the terms upon which she had decided to deliver the logs to the prosecutors. She met with the prosecutors and advised of her position. The action had the desired result. The prosecutors did not take the logs and the information in them was not used at trial as a result.
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> [39] While Ms. Zander was told by prosecutors on December 3rd of a problem surrounding the logs and Ms. Panton's evidence, it was not until late February 1996 that Ms. Zander and the board learned that the prosecutors had not taken the logs because of [Ms. Panton's] position with respect to her evidence.

[23] On February 28, 1996 the Board resolved to dismiss Ms. Panton from her employment. Ms. Panton was advised of this decision March 1, 1996.

II. DISCUSSION

A. Cause

[24] The issue is whether Ms. Panton's behaviour, in law, amounted to cause. In the event it was cause, the Society was entitled to dismiss Ms. Panton without notice. In the event it was not, the Society was entitled to bring the employment relationship to an end by termination, but only on giving Ms. Panton reasonable notice. In the absence of reasonable notice, the law requires payment in lieu, making the employee whole. The question, therefore, is whether Ms. Panton's conduct was so egregious in the circumstances as to permit her employer to terminate the employment relationship without providing the cushion of reasonable notice.

[25] The degree of misconduct required to permit dismissal without notice has varied with the times in which the misconduct has been judged. In concept, cause was described as early as 1886 by Lord Esher, M.R. in ***Pearce v. Foster*** (1886), 17 Q.B.D. 536 at 539-40:

> The rule of law is that where a person has entered into the position of servant, if he does anything incompatible with the due or faithful discharge of his duty to his master, the latter has a right to dismiss him. The relation of master and servant implies necessarily that the servant shall be in a position to perform his duty duly and faithfully, and if by his own act he prevents himself from doing so, the master may dismiss him. It is not that the servant warrants that he will duly and faithfully perform his duty; because, if that were so, upon breach of his duty his master might bring an action against him on the warranty. But the question is, whether the breach of duty is a good ground for dismissal. I have never hitherto heard any doubt that that is the true proposition of law. What circumstances will put a servant into the position of not being able to perform, in a due manner, his duties, or of not being able to perform his duty in a faithful manner, it is impossible to enumerate. Innumerable circumstances have actually occurred which fall within that proposition, and innumerable other circumstances which never have yet occurred, will occur, which also will fall within the proposition. But if a servant is guilty of such a crime outside his service as to make it unsafe for a master to keep him in his employ, the servant may be dismissed by his master; and if the servant's conduct is so grossly immoral that all reasonable men would say that he cannot be trusted, the master may dismiss him.

[26] In Canada, Mr. Justice Schroeder described cause in these often quoted terms in ***R. v. Arthurs***, [1967] 2 O.R. 49, 62 D.L.R. (2d) 342 (C.A.), [reversed on other grounds 1969 S.C.R. 850] at p. 348:

> If an employee has been guilty of serious misconduct, habitual neglect of duty, incompetence, or conduct incompatible with his duties, or prejudicial to the employer's business, or if he has been guilty of wilful disobedience to the employer's orders in a matter of substance, the law recognizes the employer's right summarily to dismiss the delinquent employee.

[27] Mr. Justice Vancise discussed cause for dismissal in terms of a repudiation of the contract in ***Jim Pattison Industries v. Page***, [1984] 4 W.W.R. 481, 10 D.L.R. (4th) 430 (Sask.C.A.), saying at p. 490:

> There is no middle ground. The employer either has cause or he does not. ... An employee who repudiates the contract of employment is not

> entitled to "some" notice because he or she has been a "good" employee prior to such repudiation.

[28] In general, then, just cause is employee behaviour that, viewed in all the circumstances, is seriously incompatible with the employee's duties, conduct which goes to the root of the contract and fundamentally strikes at the employment relationship.

[29] The trial judge found cause in the events surrounding delivery of the security logbooks for the Lewis prosecution. In doing so he did not decide whether the actions prior to those events constituted cause for dismissal, even though he clearly found a lamentable breakdown in the employment relationship, with Ms. Panton's disrespectful and confrontational behaviour met by the Board's sorry display of managerial authority. It is useful to set out his discussion:

> [65] If, by her challenges to the board, which had ultimate responsibility for the management of the Society, she had not previously crossed the line of acceptable and respectful disagreement with an employer over difficult issues requiring resolution through discussion rather than confrontation, she most assuredly did so ... when her actions caused prosecutors to refrain from reviewing the security logs to determine their usefulness in the Lewis prosecution.
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> [66] Mr. Lewis was acquitted at trial because the legislation was found to be unconstitutional. The acquittal was reversed on appeal to this Court where the legislation was held not to be in violation of the ***Charter of Rights and Freedoms***: ***R. v. Lewis***, [1997] 1 W.W.R. 496. One of the difficulties with the case was the absence of direct evidence on which to base a finding with respect to the proportionality of the legislative restriction on free speech and assembly.
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> [67] One need not speculate about the course of the trial had the prosecutors had access to the logs. It is sufficient to note that Ms. Panton's conduct at her meeting with prosecutors was calculated to ensure the utility of the logs would not be assessed and that they would not be used as evidence in the trial.
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> [68] Ms. Panton's actions were a contravention of the employer's directive in relation to a matter of vital importance to the Society and its operations. Regardless of her motive, her actions on this occasion were inimical to the interests of the Society and the board.
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> [69] In my opinion, it is not sufficient, as counsel argues, to say that Ms. Panton was entitled to give or not give her evidence on such terms as she might decide. While she may have been entitled to stipulate the terms on which she would testify, she was not entitled to undermine the board's decision and attempt to dissuade the prosecutors from reviewing or using the security logs. If she was not prepared to carry out the employer's directive because of conscientious objection or doubt about board authorization of Ms. Zander's directive, she should have advised Ms. Zander that was the case. The Society would then have been in a position to counteract the intended effect of Ms. Panton's conduct.

> [70] Ms. Panton's decision in relation to the logs, alone or in conjunction with her other actions, constituted a repudiation of her responsibilities as an employee. ...[emphasis added]

[30] The issues of cause identified by the trial judge in the above quoted passage are disobedience on the part of Ms. Panton, her undermining of the Board's decision, and her failure to communicate her actions to Ms. Zander. The trial judge found these behaviours cumulatively amounted to cause for dismissal.

[31] This court must ask, however, whether each of these "faults" was established on the findings of fact in the reasons for judgment, and whether in law they constitute misconduct upon which a dismissal may be based in whole or part. Only then should we turn to the question of whether the proven misconduct, taken together, amounted to cause.

i) Disobedience

[32] As the trial judge concluded that Ms. Panton's actions "were a contravention of the employer's directive", I address first the issue of disobedience.

[33] In order for disobedience to constitute cause, the direction disobeyed must be clear and lawful, and the act of disobedience willful and one of substance. Mr. Justice MacKinnon accurately described disobedience as cause in ***Heyes v. First City Trust Co.***, (4 December 1981), Vancouver C812809 (B.C.S.C.), 12 A.C.W.S. (2d) 105, at p.9:

> Wilful disobedience is, of course, a ground upon which an employer may dismiss without notice. In order to justify the dismissal on those grounds there is an onus upon the defendant to establish there were acts willfully carried out by the employee in defiance of clear and unequivocal instructions of a superior or refusal to carry out policies or procedures well known by the employee as being necessary in the fulfillment of the employer's objectives.

I also rely upon the decision of this Court in ***Stein v. British Columbia (Housing Management Commission)*** (1992), 65 B.C.L.R. (2d) 181 (C.A.).

[34] In my view, the findings of fact in this case do not permit the conclusion that Ms. Panton committed an act of disobedience, for three reasons. First, the finding of the trial judge was that Ms. Panton was instructed "to deliver a copy of the logs to the prosecutors when she met them". This Ms. Panton did. Although counsel for the Society contended that the directive was "to cooperate with the Crown in its request to use the security logs in evidence", this submission does not accord with the evidence. Ms. Zander testified that she directed Ms. Panton to deliver the security logs and told Ms. Panton that she, Ms. Zander, "had been invested by the Board to cooperate with counsel". Thus, in my view, neither the trial judge's findings of the express direction, nor the evidence, permit the conclusion that Ms. Panton failed to comply with a clear directive.

[35] Second, if the finding of an act of disobedience was based on an implied directive to deliver the logs without reservation, the directive lacked the clarity necessary to attract the sanction of dismissal.

[36] Third, on the evidence Ms. Panton lacked the degree of willfulness required to constitute cause for dismissal. The only evidence on the issue of willfulness was from Ms. Panton. She testified that after she was directed to deliver the logbooks to Crown counsel she reflected on the options, discussed the matter with two other witnesses and resolved to deliver the logbooks, but withdrawing voluntary participation which she considered a personal matter. This conduct revealed an understanding of her obligation to obey the instruction to deliver the logs and an intention to comply with it.

[37] I conclude that disobedience could not be relied upon as cause given the trial judge's findings of fact and the evidence before him.

ii) Undermining the Board

[38] What, then, of the issue of undermining the Board's decision? This conduct took the form of Ms. Panton's advice to Crown counsel that she would not voluntarily testify in the trial in the event Crown counsel elected to review or use the logs.

[39] Again, I do not consider that this behaviour amounted to misconduct which could underpin a dismissal for cause. I observe firstly that the only first hand evidence before the court on the meeting between Ms. Panton and Crown counsel came from Ms. Panton herself. Ms. Zander's testimony on the meeting was hearsay, being a recitation of information obtained from Crown counsel. Crown counsel was not called to testify and the court could only speculate on the effect Ms. Panton's statements and explanation had on Crown Counsel. More significantly, Ms. Panton testified that she advised Crown counsel that the Board wished to cooperate. This advice was consistent with information she had received from Ms. Zander, and clearly and accurately described the Board's position to Crown counsel. Crown counsel was aware that it could obtain full cooperation by approaching the Board. These two factors combine, in my view, to erode the conclusion that Ms. Panton undermined the Board's decision.

[40] There is, however, a third flaw in the conclusion that Ms. Panton's withdrawal of voluntary testimony constituted misconduct. It assumes that the Board was entitled to require her voluntary participation and that it had done so. I consider that this suggestion transgresses into Ms. Panton's private realm of behaviour as a citizen. Her voluntary participation as a witness for the prosecution was a matter between herself and Crown counsel. Although her employer, the Society, was keenly interested in the outcome of the case, defence of the constitutional validity of the legislation was the responsibility of Crown counsel - the Society had no formal role in the proceeding. I think the statement made by Mr. Justice Goodridge (later C.J.N.) in ***Wells v. Newfoundland and Labrador Nurses Union*** (1986), 57 Nfld & P.I.I.R. 67 at para. 50 is equally applicable in this case:

> ... An employer espousing a cause may very well view with a jaundiced eye an employee who espouses an opposing cause but, unless it conflicts with the employee's function, there may be little to be done about it. None of the standard causes for dismissal are present - insubordination, dishonesty, conflict of interests, competing with employer, breaching trust, etc.

I recognize that the issue in ***Wells*** was not testimony in a legal action but the involvement of the employee in a Royal Commission which his employer opposed. However, the basic issue of

differentiating an employee's duty to the employer and behaviour as a private citizen is the same.

[41] While I doubt that an employer can require an employee to testify voluntarily in a case between two strangers to the employment contract, I do not need to resolve that issue because in this case no directive was given to Ms. Panton to do so. In this circumstance, at least, Ms. Panton was entitled to exercise her civil liberties. Although Crown counsel could have chosen both to look at the logbooks and to subpoena Ms. Panton to testify, a not uncommon step in cases requiring testimony from an employee, Crown counsel did not do so. Had Crown counsel done so, Ms. Panton would have been called on to meet her civic responsibility, and there is no reason to believe that in those circumstances she would have provided less than the whole truth in testimony.

[42] Lastly, insofar as Ms. Panton's motive is relevant, I note that her position was based on sincere security concerns for the safety of herself and others. The sincerity of this concern was not undermined at trial, and may be understood in the context of the climate which surrounded the Society's clinic at times relevant to this case.

[43] On these considerations, I conclude that Ms. Panton's behaviour in setting a condition on her voluntary testimony is not a basis of just cause for dismissal.

iii) Failure to advise Ms. Zander

[44] The third aspect of Ms. Panton's behaviour found to constitute cause for dismissal was Ms. Panton's failure to advise Ms. Zander of her conversation with Crown counsel. However there was no direction to Ms. Panton to report back on the meeting or otherwise communicate with Ms. Zander. The failure by Ms. Panton to report to Ms. Zander, or to the Board, was at most a single event of poor judgment or inadequate communication, not surprising in the deteriorating climate of the employment relationship. As Ms. Panton's actions did not contravene a directive or, in my view, step beyond appropriate behaviour, I conclude that in these circumstances the failure to communicate could not support dismissal without notice.

iv) Conclusion

[45] Taking the proven conduct as a whole, it is in my view that the repudiation of the employment relationship by Ms. Panton, found by the trial judge, is not supported by the facts found by the trial judge concerning Ms Panton's conduct in the ***Lewis*** prosecution. Nor was the employer entitled to say that the necessary relationship of trust was irreparably harmed by this conduct and thus that it was relieved from its obligation to give reasonable notice upon dismissal. Although an employer may lose confidence in an employee, not every loss of confidence demonstrates cause for dismissal. Only where conduct of the employee is sufficiently egregious in all the circumstances, does the right to terminate for cause exists. Such was not the case here.

[46] I recognize that the Society did not advance the ***Lewis*** prosecution incident as the sole justification for dismissal. However, the trial judge did not find that the other matters themselves constituted cause. The communications concerning the Parker inquiry were not acted upon by the Board when discovered, not even to the extent of reprimand. They occurred during an obvious deterioration in the employment relationship both prior to and after Ms. Panton's commencement of leave for stress related problems. Her actions on the Parker inquiry did not

contravene an instruction, and ultimately there was no evidence that the actions were contrary to the Board's stated wishes or its best interests. Ms. Panton's failure to seek instruction before replying to the Chief Constable's letter could not form a basis for dismissal without notice.

[47] Likewise, Ms. Panton's behaviour towards Ms. Zander and the Board, much criticized by the trial judge and clearly requiring correction, did not amount to cause. This is particularly so as the standard of behaviour of Ms. Zander towards Ms. Panton was also deficient and, given her position of authority over Ms. Panton, equally lamentable.

[48] To the extent that conduct must be assessed to determine whether cause is established, I further observe that each case must be decided on its own circumstances. These circumstances include the length of service, the nature of the employment, the status of the employee, the circumstances of the misconduct, the character of the misconduct and the impact of the misconduct upon the employer. In the circumstances of this case, it was a reversible error to fail to consider Ms. Panton's senior rank, her sincere concerns regarding the security of herself and others, her intention to obey the directive given, and the faltering relationship between Ms. Panton and the Board at the time of her meeting with Crown counsel.

[49] The finding of cause for dismissal is, in my view, a reversible error. I would allow the appeal.

B. Damages

[50] The next issue is assessment of damages. The assessment of damages requires an understanding of the duties and responsibilities of the position filled by Ms. Panton and, in the circumstances of this case particularly, the sufficiency of efforts made by her to obtain suitable alternate employment. In my view, these are properly matters for the trial court. I would remit the matter to the trial court for assessment of damages.

C. Costs

[51] As Ms. Panton has been successful on the issue of liability and the matter of damages is remitted to the trial court, she is entitled to costs of the appeal.

"The Honourable Madam Justice "Saunders

I AGREE:

"The Honourable Mr. Justice Esson"

Dissenting Reasons for Judgment of the Honourable Madam Justice Newbury:

[52] I have read the reasons for judgment of Madam Justice Saunders and regrettably find myself unable to agree with them or with the allowing of Ms. Panton's appeal.

[53] I begin by noting that in my view, the appeal is not concerned mainly with the duty of an employee to participate voluntarily as a witness in a prosecution of significance to her employer. I too doubt that an employer can require an employee to testify voluntarily in a case between

two strangers to the employment contract; however, the conduct which the trial judge found justified Ms. Panton's dismissal was her failure to deliver the log books to Crown counsel on behalf of the Society as requested by Ms. Zander. No qualification or condition was attached to that request; yet Ms. Panton took it upon herself to circumvent the direction by attaching a condition to Crown counsel's use of the log books. Thus while appearing to have delivered the books, she effectively circumvented the Board's decision to provide them to the Crown and in addition, did not tell her superiors what she had done. In my view, the trial judge was correct in concluding that Ms. Panton had been given a clear directive to deliver the logs. It was surely not necessary for the employer to add that they should be delivered "without reservation" - that must be implied in a direction that is not made subject to any qualification.

[54] Nor can it be said in my view that Ms. Paton lacked the degree of willfulness required to constitute cause. Her action was taken after deliberation and had the desired effect; the fact that she did not disclose it to anyone indicates in my view an understanding of the implications her decision would have for the Society. This is a matter entirely separate from the question of whether Ms. Panton could be required to testify in accordance with the Society's wishes.

[55] It follows that I see no basis for interfering with trial judge's conclusion that Ms. Paton's conduct in relation to the logs constituted a repudiation of her responsibilities as an employee. The case seems to fall clearly within the principle stated by this Court in ***Stein v. British Columbia (Housing Management Commission)*** (1992), 65 B.C.L.R. (2d) 181, where Southin J.A. noted the proposition that:

> ... an employer has the right to determine how his business shall be conducted. He may lay down any procedures he thinks advisable so long as they are neither contrary to law nor dishonest nor dangerous to the health of the employees and are within the ambit of the job for which any particular employee was hired. It is not for the employee nor for the court to consider the wisdom of the procedures. The employer is the boss and it is an essential implied term every employment contract that, subject to the limitations I have expressed, the employee must obey the orders given to him. [at 185]

[56] Last, I note that had I been of the opposite view, I would have concluded that it was necessary to remit the other two alleged grounds of cause for dismissal to the trial court, in light of the fact that the trial judge dealt only with the "log books" matter and did not decide whether the other incidents set out in the particulars (see para. 4 of Madam Justice Saunders' Reasons) constituted cause.

[57] I would dismiss the appeal.

"The Honourable Madam
Justice Newbury"