COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Fredrickson v. Newtech Dental Laboratory Inc.,* 2015 BCCA 357

Date: 20150812
Docket: CA41629

Between:

Leah Ann Fredrickson

Appellant
(Plaintiff)

And

Newtech Dental Laboratory Inc.

Respondent
(Defendant)

Corrected Judgment: The first page of the judgment was corrected on August 13, 2015.

Before: The Honourable Mr. Justice Donald
The Honourable Madam Justice Saunders
The Honourable Mr. Justice Frankel

On appeal from: An order of the Supreme Court of British Columbia, dated February 28, 2014 (*Fredrickson v. Newtech Dental Laboratory Inc.*, 2014 BCSC 335, Chilliwack Docket No. S23532).

Counsel for the Appellant: T.D. Goepel

Counsel for the Respondent: L. Smith

Place and Date of Hearing: Vancouver, British Columbia
May 20, 2015

Place and Date of Judgment: Vancouver, British Columbia
August 12, 2015

Written Reasons by:
The Honourable Madam Justice Saunders

Concurred in by:
The Honourable Mr. Justice Donald
The Honourable Mr. Justice Frankel

Summary:

The appellant appeals the trial judge's finding that she failed to mitigate her damages because she did not accept an offer of re-employment from her employer. She argues the judge erred by concluding it was reasonable for her to accept that offer despite the extent of the offer of re-employment and the conduct of the employer. Held: Appeal allowed. The judge did not fully consider the significance of the offers of re-employment, which were not 'make whole' and left the employee in opposition to her employer. The judge also did not consider the mutual trust inherent to the employment relationship, which had been eroded by the employer's conduct.

Reasons for Judgment of the Honourable Madam Justice Saunders:

[1] Ms. Fredrickson appeals from the damages award in her claim against her former employer for wrongful dismissal. She contends the judge erred in finding that she had failed to mitigate her damages by declining the employer's offer of re-employment.

[2] In my respectful view, the judge erred in law in his treatment of the offers of re-employment as offers of whole re-employment and in his view that any gaps in entitlement to pay, in the circumstances, were of no moment for the purposes of assessing the reasonableness of Ms. Fredrickson's refusal to return to her former workplace. Second, in my view the judge failed to adequately consider the standard of mutual trust inherent in the employment relationship, and thereby erred in law by incompletely assessing the effect of non-tangible considerations to the circumstances. Incorporating both of these aspects into the assessment of the objective reasonableness of Ms. Frederickson's actions after she was dismissed leads ineluctably, in my view, to the conclusion that Ms. Frederickson did not fail to mitigate her damages, as alleged.

[3] The case is a story of initial misunderstanding and miscommunication. It arises from the termination in July 2011 of Ms. Fredrickson's employment as a registered dental technician assistant with Newtech Dental Laboratory Inc., a small business specializing in making crowns. Ms. Fredrickson had been employed at Newtech for eight and one-half years. Both Ms. Fredrickson and the owner of Newtech, Mr. Ferbey, testified that they had a good working relationship over the years. The office in which they worked was small, only Ms. Fredrickson, Mr. Ferbey and three other employees. They worked closely together.

[4] In 2010 and 2011 Ms. Frederickson came under significant stress resulting from her husband's illness and a serious accidental injury to her son. These were known to Mr. Ferbey. On April 27, 2011, Ms. Fredrickson advised that she may not be back the next day and on Thursday, April 28, 2011, she took a medical leave of absence. The judge found:

> She did not discuss the medical leave beforehand with Mr. Ferbey but, in the past, there had never been any issue with her taking medical leave if she needed to.

[5] While Ms. Fredrickson was on medical leave Mr. Ferbey disputed her entitlement to take the leave and there was disagreement at trial as to the response of Mr. Ferbey to her request for completed Employment Insurance forms. It was accepted at trial that Ms. Fredrickson continued on leave until July. On July 11, 2011, Ms. Fredrickson's doctor advised her she would be fit to return to work on July 20, 2011, and provided a note to that effect. Ms. Fredrickson then phoned Mr. Ferbey and advised him she would be returning to work on July 20, 2011.

[6] On July 20, 2011, Ms. Fredrickson reported for work at her usual time but was told by Mr. Ferbey that she was laid off because of insufficient work. Newtech provided Ms. Fredrickson with a record of employment for Employment Insurance purposes indicating that she had been laid off. Mr. Ferbey also gave her a letter of reference.

[7] Ms. Fredrickson then engaged counsel and sent a demand letter to Newtech on September 9, 2011. Although the letter is not in evidence, clearly Ms. Fredrickson took the position that she had been dismissed in July, because on September 23, 2011, Newtech, through its lawyer, directed Ms. Fredrickson to resume work effective September 26, 2011, and on September 26, 2011, advised her that if she was dismissed, she was obliged to mitigate her damages by accepting the offer of re-employment.

[8] On October 18, 2011, Ms. Fredrickson commenced this action for damages for wrongful dismissal. On October 19, 2011, apparently before it knew about the commencement of the action, Newtech offered to re-employ Ms. Fredrickson with an offer to pay her unpaid wages from July 20, 2011 until the date she was invited to return to work, September 26, 2011.

[9] On October 25 and November 4, 2011, Newtech again offered to re-employ Ms. Fredrickson at her same position, salary and benefits, and to pay her lost wages to the date of the first offer of re-employment, this being September 23, 2011. Yet again on April 19, 2012, Newtech offered to re-employ Ms. Fredrickson at her identical position, salary and benefits, and to pay her lost wages to the date of the initial offer.

[10] Ms. Fredrickson declined to accept all offers of re-employment, saying that Mr. Ferbey's behaviour since the time he purported to lay her off had broken the employment relationship such that it was reasonable for her to decline to return to work at that small office.

[11] Ms. Fredrickson tendered evidence at trial that she had applied for nearly 100 jobs of various descriptions all within the Abbotsford or surrounding area where she and her husband lived and had not been successful in obtaining any of those positions. Eventually Ms. Fredrickson obtained a diploma in bookkeeping and secured a position as a bookkeeper in August 2012.

[12] Throughout the litigation until closing submissions, Newtech took the position that it had not dismissed Ms. Fredrickson in July when it purported to lay her off. Only with closing submissions did Newtech acknowledge that Ms. Fredrickson had been dismissed without cause and without reasonable notice. This position is consistent with Mr. Justice McKay's decision in *Archibald v. Doman-Marpole Transport Ltd.*, [1983] B.C.J. No. 1284 (S.C.), where he said:

> 4. … There is nothing more fundamental to a contract of employment than that the employee be employed and that he be paid for his services. Doman unilaterally changed those fundamental terms. One can appreciate the need for employers to cut down on management or supervisory staff during economic downturns but the employee, subject to contractual arrangements, is still entitled to reasonable notice or payment in lieu of notice.

[13] Mr. Justice Esson referred to *Archibald* with approval in *Haverstock v. Citation Industries Ltd.*, [1986] B.C.J. No. 402 (C.A.), although the principle was not dispositive of that case because the employee initially consented to the layoff. The recognition in closing submissions that Ms. Fredrickson had been dismissed reduced the issues at trial to simply whether Ms. Fredrickson had failed to mitigate her damages by refusing Newtech's offer of re-employment.

[14] The judge concluded that there were no barriers to Ms. Fredrickson accepting the offers of re-employment and that her acceptance of that offer would have been the reasonable thing to do in the circumstances. He therefore found that she had failed to mitigate her damages and awarded damages for the period only from July 20, 2011, when she was laid off, to September 23, 2011, the date she was first offered re-employment.

[15] Ms. Fredrickson advances several errors by the judge in his treatment of the evidence and says that cumulatively these add up to an error in law by finding that a reasonable person would have returned to her job after having been dismissed from it. She complains that the judge failed to place any weight on the bad faith of Mr. Ferbey. I will only refer to two of Ms. Fredrickson's complaints, one that Mr. Ferbey surreptitiously recorded two conversations with her, and the other that Mr. Ferbey discussed her employment with another employee, including that he expressed agreement with that employee's statement that Ms. Fredrickson would be too embarrassed to return to work.

[16] An employee wrongfully terminated without cause is entitled to reasonable notice of dismissal, or, as a remedy, pay in lieu of reasonable notice. Where reasonable notice is not given and the employee suffers damages, the employee cannot recover the portion of damages that could have been mitigated.

[17] In an action for damages, the burden is on the employee to establish entitlement to damages. The burden is on the employer to prove a failure to mitigate if such is alleged.

[18] Normally allegations of failure to mitigate revolve around complaints that the dismissed employee did not make adequate efforts to find alternative employment that was there to be found. However, the theory that a plaintiff cannot recover damages that could have been mitigated applies as well to offers to return to employment, provided the offer of return to employment is to a reasonable working situation.

[19] Three cases elucidate the law of mitigation as it is before us: *Farquhar v. Butler Brothers Supplies Ltd*. (1988), 23 B.C.L.R. (2d) 89 (C.A.); *Cox v. Robertson*, 1999 BCCA 640; and *Evans v. Teamsters Local Union No. 31*, 2008 SCC 20.

[20] In *Farquhar*, Mr. Justice Lambert said for the court, in a passage referred to by Chief Justice McEachern in *Cox and* by Justice Bastarache in *Evans* (at 94):

> The employee is only required to take the steps in mitigation that a reasonable person would take. Sometimes it is clear from the circumstances that any further relationship between the employer and the employee is over. One or the other or both of them may have behaved in such a way that it would be unreasonable to expect either of them to maintain any new relationship of employer and employee. The employee is not obliged to mitigate by working in an atmosphere of hostility, embarrassment or humiliation.

[21] In *Cox,* Chief Justice McEachern, for the court, referred to the duty to accept re-employment as one that will arise infrequently.

[22] In *Evans*, the Supreme Court of Canada upheld a decision of the Yukon Court of Appeal setting aside a damages award on the basis Mr. Evans had not mitigated his damages by accepting an offer of re-employment with the Union. Mr. Justice Bastarache, writing for the majority, described the duty to mitigate as "the employee making a reasonable effort to mitigate the damages by seeking an alternate source of income" and referred to both *Farquhar* and *Cox*:

> [28] … Assuming there are no barriers to re-employment (potential barriers to be discussed below), requiring an employee to mitigate by taking temporary work with the dismissing employer is consistent with the notion that damages are meant to compensate for lack of notice, and *not* to penalize the employer for the dismissal itself.
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> …
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> [30] … Where the employer offers the employee a chance to mitigate damages by returning to work for him or her, the central issue is whether a reasonable person would accept such an opportunity. In 1989, the Ontario Court of Appeal held that a reasonable person should be expected to do so "[w]here the salary offered is the same, where the working conditions are not substantially different or the work demeaning, and where the personal relationships involved are not acrimonious" (*Mifsud v. MacMillan Bathurst Inc.* (1989), 70 O.R. (2d) 701, at p. 710). In *Cox*, the British Columbia Court of Appeal held that other relevant factors include the history and nature of the employment, whether or not the employee has commenced litigation, and whether the offer of re-employment was made while the employee was still working for the employer or only after he or she had already left (paras. 12-18). In my view, the foregoing elements all underline the importance of a multi-factored and contextual analysis. The critical element is that an employee "not [be] obliged to mitigate by working in

> an atmosphere of hostility, embarrassment or humiliation" (*Farquhar*, at p. 94), and it is that factor which must be at the forefront of the inquiry into what is reasonable. Thus, although an objective standard must be used to evaluate whether a reasonable person in the employee's position would have accepted the employer's offer (*Reibl v. Hughes*, [1980] 2 S.C.R. 880), it is extremely important that the non-tangible elements of the situation — including work atmosphere, stigma and loss of dignity, as well as nature and conditions of employment, the tangible elements — be included in the evaluation.

[23] In my respectful view, the judge erred in respect to the mitigation issue in two ways: failing to accord significance to the incomplete nature of the offer; and failing to reflect the intangible element of mutual trust, commensurate with the nature of the employment, that flows like a current in the employment relationship.

[24] I deal with these separately. It seems to me, on reading the judge's reasons for judgment, that the offer in September 2011 to re-hire or re-employ Ms. Fredrickson was taken by him to be a 'make whole' offer. Yet neither the September 23 nor the September 26 offer dealt with Ms. Fredrickson's lost income from July through to the date she was directed to return to work; that is, the September offers were not 'make whole' offers. At that time, however, she was entitled to compensation for that period because she had been wrongfully dismissed, although her employer continued to deny that this was so. Full compensation for that period not having been offered, a claim for the back pay would put them in opposition. As is apparent from the recitation of facts, the offers coming from Newtech to Ms. Fredrickson never caught up to her loss of income situation. By the time some back pay was offered in October, it was only to September 26, leaving her in the position of accepting less than she was entitled were she to resume employment.

[25] The judge considered this aspect and said:

> [72] The defendant made another offer of employment on or about October 25, 2011, just after Ms. Fredrickson commenced this action, which included an offer to pay Ms. Fredrickson her lost wages from the date of the layoff until the date of recall. It is true that if Ms. Fredrickson had accepted that offer, she would have returned to her place of employment while a claim was outstanding, but I do not believe that she and Mr. Ferbey could not have easily resolved any remaining issues. Whether an offer of employment is made before or after litigation has been commenced is merely one factor to consider in determining whether a reasonable person would accept the offer in mitigation of damages.

[26] In my respectful view, this consideration of the significance of the gap between Ms. Fredrickson's claim for wrongful dismissal and Newtech's offer is incomplete. It fails to recognize that the earliest offer for compensation made in October still contemplated a loss of about one month's income, or over 8% of Ms. Fredrickson's annual income, that is, it was not a trifle. Further, it was made while Newtech was maintaining that Ms. Fredrickson was not dismissed, and so entitlement to any compensation was still in issue. Efforts by Ms. Fredrickson to recover that amount

would need to traverse this essential issue, thus continuing the oppositional attitudes of Newtech and Ms. Fredrickson.

[27] In *Cox,* a case arising in the context of a small dental practice, Chief Justice McEachern recognized the practical difficulty of litigation ongoing, or claims ongoing, while a person is employed:

> [16] … it is noted that the plaintiff did not rush to litigation. As Mr. Justice Donald mentioned in argument, it is almost amusing, and highly artificial, to say that these two persons should be expected to work closely and professionally together on the same mouths in the morning and then attend examinations for discovery in afternoon and then continue to work harmoniously again the next day, all the while preparing for a summary trial.

[28] In my respectful view, the judge erred in principle in failing to reflect this inherent incompatibility of the parties' positions at the time of the offers of re-employment, and so in concluding it was not reasonable for Ms. Fredrickson to decline to step into that well of difference.

[29] Independent of the above, I am of the view that the trial judge was clearly wrong in failing to reflect the mutuality of trust, in the context of this employment, inherent in the relationship between employer and employee. The pertinent question when mitigation is in issue was described by Justice Bastarache as whether "a reasonable person in the employee's position would have accepted the employer's offer". To determine whether this is so, in my view requires a judge to consider the full nature of the employment relationship. This includes the obligations of good faith or fidelity on the part of both the employer and employee, consistent with the nature of the work and the workplace. Most frequently questions of good faith, fidelity and fair dealing are questions that arise in the context of allegations of cause for the employee's dismissal. The integrity of the employment relationship goes further, however. Just as trust of an employee, in the circumstances of the employment, is an important aspect for the employer, so too trust of the employer is important.

[30] In *Deildal v. Tod Mountain Development Ltd.* (1997), 33 B.C.L.R. (3d) 25 (C.A.), Mr. Justice Braidwood, for the majority, commented on the nature of an employment contract:

> [77] The contract under consideration here is not a simple commercial exchange in the marketplace of goods and services. A contract of employment is typically of longer term and more personal in nature than most contracts, and involves greater mutual dependence and trust, with a correspondingly greater opportunity for harm or abuse. It is quite logical to imply that the parties to such a contract would, if they turned their minds to the issue, mutually agree that they would take reasonable steps to protect each other from such harm, or at least would not deliberately and maliciously avail themselves of an opportunity to cause it.
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> [Emphasis added.]

[31] While of course not binding on us, I take the view expressed in *Edwards v. Chesterfield Royal Hospital NHS Trust*, [2011] UKSC 58 at para. 1, of the values of mutual trust in the employment relationship as pertinent to an offer of re-employment:

> … the employer and employee may not, without reasonable and proper cause, conduct themselves in a manner likely to destroy or seriously damage the relationship of confidence and trust between them.

[32] Recently, in *Potter v. New Brunswick Legal Aid Services Commission*, 2015 SCC 10, Justice Wagner affirmed the role of proportionality, mutual trust and the employer's good faith in the employment contract.

[33] In this case, Ms. Fredrickson's trust in her employer is eroded by at least two aspects of Mr. Ferbey's actions. One is his recording on two occasions of private conversations between them, and the subsequent use made of those conversations. The other is Mr. Ferbey's engagement in conversation with another employee concerning Ms. Fredrickson in which he agreed with that employee that Ms. Fredrickson would be too embarrassed to return to work. Whether Mr. Ferbey believed Ms. Fredrickson would be too embarrassed to return to work does not really matter. What is troubling is that by discussing Ms. Fredrickson with another employee, in the situation of a small workforce, he breached the confidence one would expect of the '"boss". So then one must ask whether, knowing these facts, Ms. Fredrickson acted unreasonably in refusing to return to that workplace. Here the question is not whether some person in that circumstance would have returned to her position, but whether Ms. Fredrickson is to be held to be unreasonable in not doing so. At this point in the analysis, the non-tangible but very real elements of the work place bear upon the question, remembering that it is an infrequent case that requires the employee to accept re-employment.

[34] *Evans* is raised as demonstrating the offer in this case should have been accepted. But this case is not *Evans*, in which there had been extensive negotiations between the employer Union and Mr. Evans for his return to work, including discussion of his request that Mr. Evans' wife be employed. This context demonstrated he did not hold concerns about returning to work, and the relationship with the employer Union was never seriously damaged. Instead, as in *Beggs v. Westport Foods Ltd.*, 2011 BCCA 76, the case before us is a case in which "any chance of repairing the employment relationship was irretrievably lost".

[35] For these two independent reasons, I conclude the judge erred in law by finding Ms. Fredrickson failed to mitigate her damages. On the conclusion that Ms. Fredrickson did not fail to mitigate her damages, the order must be set aside.

[36] This brings us to remedy. Ms. Fredrickson seeks damages in the amount of 12 months' salary in lieu of reasonable notice but we do not have full submissions on the factors usually considered in

determining that issue, and the judge did not address the period of reasonable notice prior to making his determination on mitigation. Accordingly, we do not have his views on the weight of the various factors that usually bear on such an assessment.

[37] In my view this is not a case in which we should find the facts necessary to determine the period of reasonable notice. I would therefore set aside the order and remit the question of reasonable notice to the trial judge.

"The Honourable Madam Justice Saunders"

I AGREE:

"The Honourable Mr. Justice Donald"

I AGREE:

"The Honourable Mr. Justice Frankel"