

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN: EDITH ROSE RELPH PLAINTIFF AND: BRITISH COLUMBIA NATIVE HOUSING CORPORATION and UNITED NATIVE NATIONS SOCIETY DEFENDANTS REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE LAMPERSON

Counsel for the Plaintiff: WADE MARKE
Counsel for the Defendant: RAVINDER R.S. UPPAL

Place and Date of Hearing: Kamloops, B.C. June 28, 1996 and November 4, 1996

June 28, 1996 and November 4, 1996[1] This is an action for wrongful dismissal. It is agreed that the plaintiff's employment was terminated without cause.

The issues are:

1. Did the plaintiff receive sufficient notice of termination and if not, what are her damages?
2. Was the relationship between the plaintiff and British Columbia Native Housing Corporation (B.C.N.H.C.) and the United Native Nations Society (U.N.N.) such that the latter organization was also one of the plaintiff's employers?

FACTS

[2] In October, 1987, the plaintiff commenced work for the B.C.N.H.C. as a secretarial trainer. Eventually she was promoted to office administrator and housing officer. The function of B.C.N.H.C. was to administer native housing programs for the Central Mortgage and Housing Corporation (C.M.H.C.). These programs were brought to an end by the Federal Government in December 1993. Consequently the B.C.N.H.C. no longer needed the plaintiff's services. At the time of her termination, the plaintiff was paid \$1,093.62 every two weeks.

[3] She received notice of termination by a letter dated December 15, 1993. Paragraph 3 of that letter reads as follows:

Effective today's date, I am giving you seven (7) weeks (plus two (2) days) notice as required by the Employment Standards, therefore your last day with the Corporation will be February 04, 1994.

Although Mr. Dennis Fletcher, who signed the notice of termination, spoke to the plaintiff on December 15th, he did not tell her that her job was ending. Instead he mailed the notice. Because she was travelling in the course of her job, she did not receive it until December 22nd.

[4] The notice of termination must be considered within the context of the following inter-office memoranda which were circulated earlier that year.

(1) June 22, 1993 "CONFIDENTIAL"

MEMO TO: Dennis Fletcher
BCNH Provincial Administrator

MEMO FROM: Edie Relph
Housing Officer

SUBJECT: ANNUAL VACATION

Due to unforeseen circumstances, I would like to change my holiday leave from August to July 12-16'93. Marg is finished her holidays on July 9th so will be on duty to cover RNH.

I would also appreciate receiving a payout for the balance of my holidays due (2 weeks) up to my Anniversary Date of October 21, 1993.

Danny, you advised us to look for other employment as the RNH/ERP Programs will be eliminated by the Federal Government effective December 31, 1993. In this regard, I am requesting a letter of reference so that I may include it with my resume to prospective employers.

Thank you.

"E.Relph"

CC: Dan Smith - UNN President
Sandy Wong - BCNH Comptroller

(2) To: ALL B.C. NATIVE HOUSING STAFF

From: Dennis Fletcher, Provincial Administrator

Date: 24 June 1993

Subject: Program Cutbacks

Regretfully I must advise all staff that Canada Mortgage and Housing Corporation has cancelled our RNH Agency Agreement, and our Emergency Repair Agreement effective January 1, 1994. This is a result of the recent Federal Government Budget announcements in April cancelling all funding for most Social Housing Programs.

In effect this means that we will no longer be the Delivery Agents for the Rural and Native Housing Program and the Emergency Repair Program. We must all realize that this will have an enormous impact on the operations of B.C. Native Housing Corporation. We are determined to protest against these cutbacks and will do everything within our power to have these programs reinstated back to the people who need them the most.

I am advising all staff of this however the chances of having the programs reinstated at this point are very slim. I want all staff members to know that if a job opportunity comes up that they are interested in they should go ahead and consider it as a number of staffing positions within BCNHC will be eliminated over the next while.

These are drastic measures for troublesome times and I want to take this time to extend my thanks to all staff who have been a part of this organization and the dedication with which they have shown.

I will be updating staff of all arrangements as quickly as possible.

cc: Dan Smith, President, United Native Nations
Nelson Mayer, Vice-President, United Native Nations
Sandy Wong, Secretary Treasurer, UNN
Board of Directors, United Native Nations

"Dennis Fletcher"

(3) June 25, 1993

TO WHOM IT MAY CONCERN:

Edith Relph has been employed with B.C. Native Housing Corporation since October 1987 in the position of Housing Officer. During her time with us Edith was a valuable asset to the Corporation. Her intelligence along with a compassionate approach in sometimes difficult situations was a great benefit to both the Corporation as well as the clientele which we serve.

I can confirm to you that Edith took pride in carrying out her duties and responsibilities to the best of her ability. I am also confident that Edith will apply herself as diligently to anything which she undertakes to do with as much enthusiasm as she did while employed with B.C. Native Housing Corporation.

Please feel free to call me at my office in Clinton at (604) 459-2234 should you wish clarification or have any further questions.

Yours truly,

Dennis Fletcher
Provincial Administrator
B.C. Native Housing Corporation

DF/smc

cc: Personnel File

(4) To: All B.C. Native Housing Staff

From: Dennis Fletcher, Provincial
Administrator, BCNHC

Date: 30 June 1993

Subject: Program Cutbacks

Further to my memo of June 24, 1993 regarding the cutbacks and elimination of the Emergency Repair Program as well as the Rural and Native Housing Program. Regretfully I must also advise that the Residential Rehabilitation Assistance Program Agency Agreements with Canada Mortgage and Housing Corp. have also been cancelled effective December 31, 1993.

This means that we will no longer be the delivery agents for the RRAP program. As in my previous memo we are doing all we can to protest these cutbacks and eliminations however, the chances of the programs being reinstated at this point are slim.

I want all staff to be aware of this because it is clear that a number of staffing positions within BCNHC will be eliminated over the next while.

I will update staff of all arrangements as soon as possible.

cc: Dan Smith, President, United Native Nations
Nelson Mayer, Vice-President, United Native
Nations
Sandy Wong, Secretary Treasurer, United Native
Nations
Board of Directors, United Native Nations

[5] It should be noted that the plaintiff denies having seen the memorandum of June 30th. The plaintiff and another employee testified that Mr. Fletcher, the Administrator of B.C.N.H.C., despite the gloomy official view, told them that they need not worry because there would be other programs that would keep them employed. This evidence was not contradicted.

[6] The defendants argue that the plaintiff effectively received notice of termination on or before June 22, 1993 and that therefore the period of notice given by the December 15th letter was adequate. Although the memoranda clearly forecasted serious problems and suggested that employees avail themselves of other job opportunities they did not in my opinion constitute notice of dismissal. Both the June 24 memorandum and the June 30 memorandum indicate that "a number of staffing positions within B.C.N.H.C. will be eliminated over the next while". That phraseology lends itself to the inference that not all staffing positions would be terminated. Those memoranda constituted a warning but were not notice to the plaintiff. That, together with the fact that Mr. Fletcher gave private assurances that basic staff did not have to worry and that there were other programs to fall back on, leads me to conclude that the plaintiff did not have notice until she received the letter of December 15th.

[7] I would classify the plaintiff's position with the Defendant to have been somewhere between lower to middle management. The defendants argue that this situation is similar to that in *Porter v. Hammond Operating Corporation* (1991), 36 C.C.E.L. 1. Although the facts seem similar, I find that they are substantially different. In that case the plaintiff accepted a lower ranked job and it was evident for months that his job was winding down. Even so he was given three months notice. That is different from the circumstances here. After considering the cases, I have concluded that the plaintiff is entitled to six months notice less the notice which she actually received. I also find that she made extensive efforts to find other employment and that she did her best to mitigate her losses. Accordingly, I will award her somewhat less than one-half of her 1993 income which was \$30,621.36. Accordingly I assess her damages to be \$12,000.00.

[8] The plaintiff seeks judgment not only against the B.C.N.H.S. but also against U.N.N. on the basis that in her opinion both organizations appeared to be one entity. U.N.N. contends that it is not a proper defendant because although it owned all the shares in B.C.N.H.C., the latter was an independent entity and the one for which the plaintiff worked. Mr. Wong, who is the Secretary-Treasurer for U.N.N., says that each society had its own employees but that all of them were paid from one account in order to simplify things. In the course of giving her evidence, the plaintiff stated that throughout her employment she understood that she was employed by both organizations and that in her mind B.C.N.H.S. was a part of U.N.N. which was the parent organization. She was required to attend U.N.N. annual meetings and was paid travel expenses in that regard.

[9] During the period of her employment the plaintiff received pay cheques from various entities. Initially she was paid by Native Personnel Services Ltd. and for a very short time by Ravenstone Services Inc. and later by U.N.N.

[10] The defendant's position is on the one hand supported by the fact that there is documentation which is under the letterhead of British Columbia Native Housing Corporation including job guidelines which were prepared by the plaintiff. On the other hand, the plaintiff on June 12, 1990 entered into an employment contract with Native Personnel Services Ltd. which was the organization through which the plaintiff was then paid. It contains the following clauses under the heading "Terms of Employment":

1. The employee agrees to accept assignment to United Native Nations Society as a temporary placement in the position of delivery agent/secretary;
2. The employee agrees to accept personal practices and policies of U.N.N.S. while on assignment to that organization;
3. The employee acknowledges and understands that this employment contract may be terminated forthwith upon N.P.S. receiving written notice from U.N.N.S. that a placement is no longer required for the position the employee is filling.

[11] It is also clear from correspondence emanating from C.M.H.C. that it considered U.N.N. its agent for delivering services to natives. Furthermore, it is noteworthy that copies of all memoranda sent to employees by B.C.N.H.C. pertaining to program cutbacks were copied to both the President and Secretary-Treasurer of U.N.N. That also holds true of the final notice of termination sent to the plaintiff.

[12] This evidence must of course be viewed together with the fact that there is other documentation which indicates that the plaintiff treated B.C.N.H.C. as her employer. This is evident from certain documents such as verification of income and also from the job guidelines prepared by the plaintiff and letters in which the plaintiff indicated that she was employed by B.C.N.H.C.

[13] A situation similar to this was canvassed by the British Columbia Court of Appeal in *Sinclair v. Dover Engineering Services Ltd. et al*, (1988) 49 D.L.R. (4th) 297. The trial judge in that case which is reported at 11 B.C.L.R. (2d) 176 made the following findings of fact at pages 179 to 180.

For 12 years the public who did business with Dover would clearly have been led to believe that the plaintiff was an employee of that company. He offered and provided services to the public in the name of Dover. All invoices for work done by him were sent out on Dover's letterhead. All his correspondence to clients was sent out under the letterhead of Dover. He had business cards which suggested that he represented Dover.

On the other hand, he was paid by Cyril, which held itself out as his employer, to those who would be interested to know. All income tax, unemployment insurance and Canada Pension Plan payments were deducted and remitted to the Federal Government by Serle, as his employer. Workmen's Compensation Board payments were similarly deducted and remitted provincially. Cyril entered into group insurance programs and contracted with British Columbia Medical Insurance Services and CU & C, all for the plaintiff's benefit, holding itself out in each case as his employer.

[14] It seems to me that those facts are very similar to those in this case. Wallace, J.A. in delivering his Reasons for Judgment after the appeal of the trial judge's decision said the following:

In my opinion, all of the circumstances of this case clearly support the inference that the plaintiff was employed under a contract of service for Cyril Management Ltd. and Dover Engineering Services Ltd., both of which exercise control over Mr. Sinclair and his affairs. This arrangement, with which the plaintiff, Mr. Sinclair, acquiesced, was devised because of the various beneficial aspects of the employer companies. They cannot, in my opinion, now deny its existence or the responsibility which it imposes upon them respecting their employee and the notice to which he is entitled upon dismissal. I would dismiss the Appeal.

[15] It is also clear from those reasons that a person may in certain circumstances be considered to be working for more than one company if the other company exercised control over that person in the manner that an employer would. Upon weighing these factors I have concluded that the United Nations Society is jointly and severally liable together with B.C.N.H.C. for the amount awarded under this judgment.

[16] I expressed some concern that the plaintiff may have waived her right to notice because of paragraph 3 in the employment contract with Native Personnel Services and to which I referred at paragraph 10 of these reasons. The answer to that problem is to be found in s.4 of the Employment Standards Act S.B.C. 1995, Chap. 38, which provides:

The requirements of this Act or the Regulations are minimum requirements, and an agreement to waive any of those requirements is of no effect subject to sections 43, 49, 61 and 69.

[17] In *Machtinger v. Hoj Industries Ltd.* (1992) 91 D.L.R. 491, the Supreme Court of Canada held that a notice provision in the contract was void for all purposes and that the parties had not contracted out of the right to reasonable notice, which could be greater than the statutory minimum set out in the Ontario Employment Standards Act.

[18] Iacobucci J. concluded:

That both the plain meaning of ss. 3, 4 and 6 and a consideration of the objects of the Act lead to the same results: where an employment contract fails to comply with the minimum notice periods set out in the Act, the employee can only be dismissed without cause if he or she is given reasonable notice.

[19] Consequently I have concluded that the clause in question does not bar the plaintiff from recovering damages.

[20] The plaintiff will have judgment in the sum of \$12,000.00 plus her costs.

"G.W. Lamperson"

LAMPERSO N J.