

COPY

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20080506  
Docket: S065707  
Registry: Vancouver

Between:

**Margaret Gillette**

Plaintiff

And:

**Ian Sisett Law Corporation**

Defendant

Before: The Honourable Mr. Justice Cohen

## **Oral Reasons for Judgment**

In Chambers  
May 6, 2008

Counsel for the Plaintiff

S.K. Kent

Counsel for the Defendant

A.R.S. Gangji  
J.H. Fung

Place of Hearing:

Vancouver, B.C.

[1] **THE COURT:** This is an application by the defendant to dismiss the plaintiff's claim.

[2] The defendant is a lawyer. The plaintiff had been employed by the defendant since 1975, first as a receptionist and then as a legal assistant.

[3] On June 8, 2006, the plaintiff was injured in a motor vehicle accident. According to her affidavit sworn December 7, 2006, the plaintiff returned to work on July 17th and worked until July 21st. During that week, she did her best to perform as many duties and responsibilities as she could, but was not able to work full-time hours. She deposed that she was unable to work for more than three to four hours each day due to her injuries.

[4] According to the defendant's affidavit sworn November 28, 2006, on July 21, 2006, he met with the plaintiff to discuss how he and employees of the firm could help the plaintiff with the rehabilitation process, including how the firm could best accommodate her need for off-work recovery time, short-term disability benefits, etc.

[5] The plaintiff deposed that in the meeting with the defendant on July 21st, she advised him that she was unable to work for more than a few hours a day.

According to the plaintiff, the defendant's reply was that she was "no use to him or the firm." He told her that she would have to "go home and collect EI." She also deposed that the defendant made no mention of accommodating her during her period of recovery. She asked him if he would consider paying her a portion of her salary as a loan because EI would only pay a portion of her wages and he replied that he could not "gift" her any money. She claims she told him that she was willing

to pay him back by way of a subrogated claim through her ICBC claim, but the defendant was not willing to do that and maintained his position that he could not make her a gift.

[6] The defendant deposed that since her accident the plaintiff's behaviour and productive abilities have not been the same. He claims that when he observed her in the office on July 20th that she was in a state of confusion and had to leave the office mid-morning. He also claims that following assurances from him and other firm employees during their meeting on July 21st that the firm would look after things during her absence, the plaintiff said she would come in on Monday to tidy up her desk and deal with some client matters. He deposed that after the plaintiff left the office on July 24th he instructed an employee to draw a cheque to the plaintiff for \$1,500 and give it to the plaintiff as a subrogated loan and as a "top-up" of her income to avoid any hardship.

[7] The defendant's bookkeeper in her affidavit sworn November 15, 2006, deposed that the defendant asked her to speak with the plaintiff on July 24th about borrowing her office key to give to a newly hired employee and that the plaintiff was okay with this request. She also deposed that the plaintiff expressed some confusion about the record of employment form. Around this same time, the plaintiff started to clean out her desk. The bookkeeper deposed that neither she nor anyone else at the firm asked the plaintiff to clean out her desk.

[8] The plaintiff now alleges that the actions of the defendant and the employees of the firm led her to believe that she had been terminated from her employment.

Thus, the plaintiff claims damages for wrongful dismissal on the ground that she was terminated from her employment by the defendant on or about July 21, 2006, when she was laid off indefinitely for reasons of her disability.

[9] The trial of the action is set to commence on June 2, 2008, for four days. On the defendant's 18A application for dismissal of the plaintiff's action, the plaintiff takes the preliminary procedural position that the action is not suitable for disposition under Rule 18A because there are material conflicts in the affidavits that cannot be resolved on the basis of the documents and/or it would be unjust to do so citing ***Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.***, [1989] B.C.J. No. 1003, (1989), 36 B.C.L.R. (2d) 202; and ***Maddocks v. British Columbia Hazardous Waste Management Corp.***, [1992] B.C.J. No. 2786 (S.C.).

[10] The issues raised in the plaintiff's action are whether the defendant terminated the plaintiff's employment either constructively or otherwise; if the plaintiff's employment was terminated, what is the period of reasonable notice?, if the plaintiff was terminated, what is the quantum of her damages?

[11] The defence position is that the Rule 18A application to dismiss the plaintiff's action can be readily decided on the basis of the discovery evidence of the plaintiff, the affidavits filed and the documents annexed to the affidavits.

[12] According to defence counsel, the real dispute on the evidence surrounding the meeting between the parties on July 21st turns on the plaintiff's concern that the EI payments would not equal her pre-accident income. The defendant claims that he offered to advance the plaintiff a loan with subrogation, but not to gift her any

money. Her version is that he refused to give her a loan even with subrogation. Defence counsel argued that the minor conflicts in the evidence between the parties regarding their respective versions of what was said between them at the July 21st meeting ought to and can be resolved on the basis of the evidence before the Court in the defendant's summary judgment application. For example, defence counsel referred to the plaintiff's answers on discovery to the following questions:

Q Okay, so Mr. Sisett's idea was that since you weren't feeling well and you were having difficulty with your pain that it was probably better for you to, to take some time off to recover and in the meantime go on UIC, correct?

A Yes, he asked me to go on EI, yes.

Q And your concern was that you would only get a certain portion of your income. Do you recall expressing that concern to him?

A Yes.

Q And the solution that you and him agreed to was that he would give you a loan?

A No.

Q Correct?

A We didn't talk about a loan. I asked him for a loan and he said he couldn't gift me.

...

Q Well, let me ask you this, okay. When he made the suggestion that it probably would be better for you to go on EI, did you say to him, "I'm not going to go on EI"?

A No, I eventually --

Q Okay, the only objection that you took to his suggestion that you go on EI was that EI would only pay a portion of your wages, correct?

A Well, I told him that I wouldn't make as much.

Q Okay, so that was your only objection you had to his suggestion that you go on EI, correct? Right? You didn't say, "No, I'm not going to go on EI. I'm going to keep on working"?

A No, I asked him-

Q No, that is not the question that I have put to you. When he made the suggestion that you go on EI, you never said to him, "I'm not going to go on EI. I'm going to keep on working"?

A No, I didn't say that.

Q Okay, your only objection to EI at that point was that, "EI would only pay a portion of my wages," correct?

A Yes.

...

Q So you had a meeting with Mr. Sisett on July 21st, correct?

A July 21st, yes.

Q You leave that meeting with the impression that he is refusing to give you any sort of subrogated loan to top up your EI, correct?

A Yes.

Q Okay. And you are not aware of -- on July 25th or subsequently or July 25th, you are not aware that he has already sent out a letter to ICBC in which he commits his firm to giving you a loan for \$1,500?

A No, I wasn't aware.

Q You weren't aware of that? And then also you have a meeting with Mr. May. You've already picked up your ICBC claim file and the only conversation that you had with him is he expresses his concern about your medical condition and that after you finish the small talk about your medical condition, he gives you this cheque for \$1,500, correct?

A Yes.

Q Okay, and you refused to take it?

A Right, because I had already taken my file and this cheque is dated August 4th --

Q Okay, but you --

A -- 2006.

Q But you will agree with me, will you not, that this cheque being offered to you on August the 4th by Mr. May wasn't contingent on you keeping the file with them, correct?

A I'm sorry?

Q The \$1,500 cheque that was being given to you, nowhere did it say that it would only be given to you as long you kept the ICBC file with Sisett & Company?

A That's right.

Q Okay, and it's in keeping with what commitment Mr. Sisett made on July 25th, 2006, to give you a loan of \$1,500 to help you with topping up your EI?

A I guess that was -- it says advance loan.

Q Yes.

A But --

Q Which is exactly what you had asked for.

A But I wasn't aware of it. I didn't know about it.

...

Q Okay, but then on August the 4th, you are being -- after you picked up your ICBC file, you are given a cheque for \$1,500?

A Well, if I accepted the cheque, I mean I don't -- the file wasn't in the Sisett office at that point so I didn't accept the cheque.

Q That wasn't a condition of the \$1,500?

A As far as I'm concerned if he is no longer counsel, then --

Q Okay, okay, he is still your employer, though. Do you agree with me, he's still your employer?

A Yes.

Q Right.

A Well --

Q And he is not making a condition of his -- of your employment that you keep your ICBC claim with him because you have already got the file, correct?

A Well, I didn't know that.

Q Well, you -- he -- you are getting a cheque after you picked it up, your file -- you are getting a cheque for \$1,500 like you had asked for in your meeting of July the 21st?

A But nobody told me.

Q Okay, that is fine. That is fine. Now, upon getting this, this cheque, upon being offered this cheque by Mr. May, did you at any point say that, "What is this all about? I thought Ian had refused"? Did you say that to Mr. May?

A I had said to Mr. May that this \$1,500 doesn't apply anymore because I'm taking the file.

Q Well, okay, did you say to him at any time, "I don't understand this \$1,500 cheque. I thought Ian had refused to give it to me"?

A No.

Q Why not?

A I didn't think anything like that at all.

Q Okay, but that was part of the misunderstanding, correct? He left the meeting thinking that he was going to give you a cheque for \$1,500?

A He didn't say.

Q Well, the point is -- the point is that if he was giving -- if he was giving you this cheque as a loan, which is what you had requested in the meeting of July 21st, did that -- did the fact that it was being offered to you, did that make you think, "Hey, hang on a second, I maybe misunderstood what he said in the meeting of July 21st"?

A No, he was quite adamant that he was not going to gift me. At that meeting on July 21st, he was quite adamant.

...

Q Do you agree with Dr. Arthur that in, as of November 10th, 2006, that you were able to work on a part-time basis?

A No.

Q You don't agree with that?

A No.

Q So your evidence is that you were not in a position to work, even on a part-time basis, on November 10th, 2006, correct?

A Yes.

...

Q Okay, so you are saying that Mr. Sisett had an obligation to at least let you work one hour a day from July 21st, 2006; is that your evidence?

A Well, I thought that I could work two hours a day.

Q Okay.

A As kind of like on a consulting.

Q So you just wanted to work as a consultant. Did you ever say to Mr. Sisett, "You know what, I can be a consultant to you for a couple of hours a day"? Did you ever suggest to him that that is something that he should accommodate you with?

A Well, his demeanour in these meetings –

Q No, that's not –

A -didn't lend anything --

Q The question that I have for you is the following. Did you ever say to Mr. Sisett, "Ian, I want to work as a consultant for you for at least an hour or two a day"?

A No.

Q Did you ever say that to him?

A No.

[13] Defence counsel also made reference to the defendant's letter to the plaintiff dated August 9, 2006, in which he states that he was still prepared to advance her \$1,500 per month as a subrogated loan; his fax letter of August 14, 2006, to the plaintiff's then counsel stating that the plaintiff was terribly mistaken and that he had not terminated the plaintiff's employment and asking for counsel's assistance to clear up what he termed a "horrible misunderstanding"; to medical documents indicating that in the fall and winter of 2006 and the early part of 2007 the plaintiff was still totally disabled from working.

[14] Defence counsel referred to the decision of Baker J. in *Evans v. Listel Canada Ltd. (dba O'Doul's Restaurant and Bar)*, 2007 BCSC 299. At paragraphs 62 to 63, Her Ladyship states, as follows:

- 62 The law in British Columbia is that the commencement of an action for damages for wrongful dismissal is an acceptance by the employee of a constructive dismissal, if such dismissal can be proved, or, if the dismissal is not established, a repudiation by the employee of his contract of employment. See *Suleman v. B.C. Research Council*, cited above, at pp. 2-3.
- 63 In general, a constructive dismissal occurs when an employer breaches a fundamental term of an employment contract, or gives notice of its intention to do so. Such a breach, or anticipatory breach, gives the employee a right to treat the contract as terminated. The test for whether there has been a breach when an employer makes unilateral changes to the contract of employment - changes in salary, working conditions, authority, and so forth - is objective, but takes into account the circumstances of the employee. The issue is whether a reasonable person in the same situation as the employee would have felt that essential terms of the contract were being substantially altered. The cumulative effect of multiple actions may constitute a fundamental breach of an employment contract when no single action does so alone. The employee bears the burden of proof.

[15] Defence counsel contended that upon a review of the evidence before the Court, the Court can deal with the credibility issues and conclude that the plaintiff has failed to meet the burden on her of establishing constructive dismissal on the basis of the objective test set out in *Evans supra*.

[16] Moreover, the defence contends that even if the plaintiff were able to meet the burden of proof to establish liability, the damages available to her in any event would be modest. On this point, defence counsel submitted that even if the plaintiff had been medically cleared to work three hours a day as of January 7, 2007, and even if the defendant had an obligation to employ her on a part-time basis as of that date, the defendant's obligation would have ended on January 31, 2007, the plaintiff's intended retirement date. Counsel asserted that therefore the upper limit of the plaintiff's damages would be about \$1,500.

[17] The authorities provide that there are several factors which determine whether the issue raised in an 18A application are suitable for disposition by a summary trial. These include the amount of damages in issue; the complexity of the matter; its urgency; the potential for prejudice by reason of delay; the costs of taking the case forward to a conventional trial in relation to the amount involved; the course of the proceedings; and other relevant considerations: See *Western Delta Lands v. 3557537*, 2000 BCSC 54. In addition, on the point of when there are appropriate circumstances to make a credibility assessment: See *Urban Holdings Ltd. v. MacDuff*, 2007 BCSC 631, at paragraphs 17 to 19:

17 In *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202; 36 C.P.C. (2d) 199 (C.A.),

our Court of Appeal held at ¶43 that, on a summary trial under Rule 18A, the trial judge can make credibility assessments in the appropriate circumstances.

- 18 However, in cases such as this where the evidence of the parties on critical issues differs significantly, the proper approach is to conclude that it is not possible to find the facts necessary to determine the case. The credibility of the deponents must be tested by their being examined and cross-examined before the court or at least be cross-examined on their affidavits, although given the parties' differing positions, the latter might not be sufficient in this case.
- 19 Mr. Justice Melnick in *Chu v. Lee*, 2006 BCSC 547 determined that he could not decide the case pursuant to Rule 18A of the Rules of Court because the parties disputed most if not all aspects of the evidence. He stated at ¶12:

[12] I appreciate that counsel often proceed on the basis of a Rule 18A summary trial for reasons of economics if nothing else. This is especially so when the amount of the claim, as here, is so modest. However, there is a limit to the extent that the court can go in assessing credibility based only on affidavit evidence. This is, unfortunately, one of those cases.

[18] In the instant case, it is my opinion that when the relevant factors are applied to the facts in issue, the matter is not suitable for a disposition to Rule 18A.

[19] First and foremost, there is a large credibility gap between the parties regarding the ongoing dealings between them after the plaintiff's accident, especially surrounding meetings that took place in the defendant's office between the plaintiff, the defendant, and other employees of the firm on July 21st, 24th, and in early August 2006. Their version of events is very conflicted not just on minor matters but on the very issues underpinning whether the plaintiff was, in fact, sent home in a manner which was tantamount to the termination of her employment with the defendant.

[20] Defence counsel is quite correct in submitting that there are inferences which may ultimately be drawn from the whole of the evidence to conclude that the plaintiff was not terminated, but, in my view, those inferences should not be drawn at this stage of the litigation for the reasons that follow.

[21] Although the defence position is that even if the plaintiff were to succeed on liability, the damages available to her are not proportional to the cost of the parties undertaking a four-day trial, the plaintiff strongly disagrees with this position.

According to the plaintiff, the defence has misconstrued the law regarding retirement and, in any event, the plaintiff did not indicate an intention to fully retire at age 65.

The plaintiff submits that contrary to the defence view of her claim for damages, she will be seeking a substantial award given her length of service to the defendant as well as all of the other factors set out in the authorities for awarding damages for wrongful dismissal. She submits that an award based upon reasonable notice to her could be as high as \$100,000.

[22] Thus, it is my view, that the evidence should be tested by cross-examination at a conventional trial to determine whether, in fact, the defendant intended the plaintiff to remain at home and rehabilitate and that if she took his words as a dismissal then it was the result of a misunderstanding on her part regarding his intentions about her continued employment with his firm after she recovered from her injuries; or whether the plaintiff has met the burden on her of proving constructive dismissal.

[23] It also cannot be overlooked that the parties are far apart in their positions of whether the defendant offered the plaintiff \$1,500 to top up her EI; whether the defendant told her to stay at home and collect EI; whether the plaintiff was humiliated by her treatment at the hands of the defendant; and that at the end of the day she was left with no option but to apply for EI benefits as she was not permitted by the defendant to return to work on a part-time or any other basis.

[24] Moreover, there are conflicts in the evidence between the defendant's employees' version of events and that of the plaintiff regarding her return of the office key; the cleaning out of her desk; and other matters that allegedly transpired between the parties regarding the plaintiff's continued employment at the defendant's office.

[25] In light of the impending trial date, I do not consider it an expedient option to direct cross-examination on the affidavits. There will be no prejudice to the defendant from this short delay to the trial date and no unfair advantage to the plaintiff. While the issues in this case, both factual and legal, are not overly complex, there is a significant triable issue and financially enough at stake should the plaintiff succeed on liability that I find on balance it would be unjust to decide the merits of the case on the basis of the conflicted evidence in a summary trial.

[26] In the result, I find that the matter is not suitable for summary trial and should continue to a full trial on June 2nd.

[27] Costs in the cause.

Cohen J.