Fraser v. Klondike Broadcasting Co. Ltd.
2002 YKSC 24

Date: 20020416
Docket: S.C. No. 99-A0223
Registry: Whitehorse

IN THE SUPREME COURT OF THE YUKON TERRITORY

BETWEEN:

ROCH SHANNON FRASER

PLAINTIFF

AND:

KLONDIKE BROADCASTING COMPANY LIMITED

DEFENDANT

REASONS FOR JUDGMENT OF
MR. JUSTICE VEALE

INTRODUCTION

[1] Roch Shannon Fraser claims that he was constructively dismissed by Klondike Broadcasting Company Limited (CKRW) on November 18, 1999, when CKRW changed his broadcast shift from the morning show to the midday show. CKRW claims that it had the contractual right to do so. A constructive dismissal occurs when an employer makes a fundamental change to an employee's terms of employment that entitles the employee to treat the contract of employment as terminated.

ISSUES

[2] The issues are:

1. Was the assignment of Mr. Fraser from his morning show host position to the midday show a constructive dismissal?

2. If it was a constructive dismissal, what is the reasonable notice period and was Mr. Fraser required to accept the assigned position to mitigate his damages?

THE FACTS

[3] I find the following facts:

1. Mr. Fraser is a 45-year-old broadcaster who has spent almost 19 of his 21 years in broadcasting as a morning show host.

2. By letter dated March 28, 1994, Mr. Fraser was hired by CKRW to be Program Director at its radio station in Whitehorse. The position included overseeing the news department and he reported directly to the assistant station manager. It was a management position.

3. Mr. Fraser's salary was $50,000 per year. He was also provided a six-passenger vehicle and a fully paid dental plan for his family. He was entitled to an annual vacation of six weeks.

4. Mr. Fraser was hired away from his previous job in Abbotsford and all his moving expenses were paid.

5. Although the letter dated March 28, 1994, did not say it, Mr. Fraser says that his employment included the position of morning show host. Satnam Rai, the General Manager of CKRW, agreed that the position of Program Director permitted Mr. Fraser to assign himself the morning show host position.

6. Mr. Fraser commenced his new job in May 1994 and within three weeks he assigned himself the morning show host position. To do so, he reassigned the current morning show host to the weekend morning show host position. That person was not happy and left CKRW shortly after his re-assignment.

7. Mr. Fraser considers the morning show host position to be the most important broadcast position at the radio station. Mr. Rai has a different view and I will address this issue later in greater depth.

8. By letter dated May 15, 1995, Mr. Rai eliminated Mr. Fraser's position as Program Director effective May 28, 1995. There was no previous discussion but afterwards Mr. Rai indicated it was a decision made by "higher office", referring to the owner, Mr. Hougen. The letter is set out in full as follows:

> As a result of ongoing reevaluation, CKRW is in process of streamlining and down sizing. One consequence of this will be the elimination of the position of Program Director, effective May 28, 1995.
>
> We are providing you with this written notice of the elimination of your position. We are concurrently offering you a position of DJ, at a salary of $40,000 per annum with two weeks of paid vacation per year.
>
> As a DJ you will be expected to work 40 hours a week as assigned by the General Manager.

> Please acknowledge your acceptance in writing by May 19, 1995.

9. Mr. Fraser agreed to accept the DJ position by letter dated May 19, 1995, at a salary of $40,000 per annum with two weeks paid vacation each year.

10. Mr. Fraser continued his role as morning show host but with a $10,000 reduction in salary and a four-week reduction in his annual vacation. Through discussions with Mr. Rai, loss of the vehicle privilege was delayed until July 30, 1995, and the dental insurance was retained with Mr. Fraser paying one half of the premium.

11. Mr. Fraser was devastated by this demotion from a senior management position. However, there were no similar broadcasting positions available in Whitehorse and he did not wish to uproot his children from school or his wife who also worked in the community. As a result, he accepted the demotion.

12. Mr. Fraser acknowledged that he was also offered a position of commission salesman to make up the $10,000 salary loss. Mr. Fraser pursued this offer from 1996 to 1998 and was able to earn $20,000 per year in additional income. Thus, his annual income ultimately increased although his position and other benefits were reduced.

13. The reason given for the demotion was that costs were too high for the revenues generated. There was no prior discussion with Mr. Fraser about other options or alternatives. As there were only two management positions, Mr. Rai's and Mr. Fraser's, it was Mr. Fraser's job that was eliminated.

14. On May 28, 1997, there was another memo from Mr. Rai requiring all employees to record accurate pay cards. Any discrepancy was to be a ground for immediate dismissal. This memo included Mr. Fraser but was not directed at him specifically. Mr. Fraser considered this memo to be typical of Mr. Rai's management style.

15. On August 14, 1997, a memo from Mr. Rai to all staff announced the appointment of Mr. Fraser to the position of operations manager for the station, when Mr. Rai was away or too busy. There was no increase in salary or benefits. Mr. Fraser considered this to have been a token gesture which was just done to give him supervision over one employee who was causing problems for Mr. Rai. No duties as operations manager were ever assigned by Mr. Rai.

16. On February 24, 1999, a memo from Mr. Rai set out the times for announcers to work. At that point, the morning show was co-hosted by Mr. Fraser and Wayne Klinck whose hours of work were 5:00 a.m. to 2:00 p.m. The memo ended with: "If you are not able to comply with above requirements, I suggest we part ways immediately."

17. On September 9, 1999, Mr. Rai wrote a memo about the failure of Mr. Fraser to do the "top 5 countdown" during the summer. Mr. Fraser had a reasonable explanation for that. However, the memorandum had a more ominous note as it ended with this:

> …I would like to see you put in more effort in the morning show and if you do not have the energy or the drive to do it right we should just part ways. I am giving you last opportunity to get your show together or you will leave me no choice but to look for a new host.

18. Wayne Klinck left the morning show in June 1999. Mr. Rai was content with the morning show in the summer of 1999 but his memo of September 19, 1999, indicated his feelings that the morning show lacked energy and drive.

19. Mr. Rai moved Keith Ellert into the position of co-host of the morning show on October 4, 1999. After six weeks, Mr. Rai felt there was no chemistry between Keith Ellert and Mr. Fraser.

20. Without any prior discussion with Mr. Fraser, Mr. Rai left the following memo dated November 18, 1999, in Mr. Fraser's mailbox:

> Effective Monday, November 22, 1999 your new air shift will be 10:00 to 15:00. You will be required to come to work at 9:00 and work till 18:00 with one hour lunch.
>
> During request hour please insure that you play requests within our format. In future if you are not feeling well make sure you call me.
>
> I would like you to read PSA's, give out station ID's, time and temp. You are very well aware, as what needs to be done given your number of years of experience.
>
> You will be required to do remotes as per previous understanding.

21. Mr. Fraser was flabbergasted when he received the November 18, 1999 memo as he started his broadcast shift at 5:00 a.m. on Friday, November 19, 1999. He considered himself fired from the morning show host position and left the station and his job without any discussion with Mr. Rai. He considered the midday announcer position to be a lesser position and a clear demotion which would affect his career prospects.

22. The November 18, 1999 memo made no changes to the terms of Mr. Fraser's employment except that he would be required to work the midday shift from 10:00 a.m. to 3:00 p.m. which would result in one more hour of broadcast time. Mr. Fraser felt that he would lose the weekend work at off site or remote locations because of his view that such work usually went to the morning show host.

23. Mr. Fraser never received a performance evaluation while at CKRW.

24. There is a clear factual dispute between Mr. Rai and Mr. Fraser about the importance of the morning show host position. From Mr. Fraser's point of view, he was hired to be the morning show host and it was the key broadcasting position at the radio station. The morning show host requires more skills and personality to entertain listeners between 6:00 a.m. and 10:00 a.m. each weekday. It requires rising at 4:00 a.m.

25. Mr. Rai testified that, in his opinion, one shift was not more important than any other one. He considered Mr. Fraser to be a valued employee who would perform better on the midday show.

26. Brian Antonson gave expert evidence about the role of the morning show host for a radio station. He had no experience or statistics about the Whitehorse market. However, Mr. Antonson has extensive experience both in the radio business from 1969 to 1977 and as an instructor and now Associate Dean of the Broadcast and Media Communication Department of the British Columbia Institute of Technology.

27. Mr. Rai testified that CKRW is a contemporary hit radio station serving a market of 20,000 to 25,000 people. Its program day starts with the morning show from 6:00 to 10:00 a.m. The midday show runs from 10:00 a.m. to 3:00 p.m. followed by the afternoon or drive show from 3:00 to 7:00 p.m. From 7:00 p.m. to 6:00 a.m., the station is automated and does not have a live broadcast.

28. Mr. Rai indicated that 97 percent of the advertising revenue for CKRW came from a Total Audience Plan which advertisers preferred as it resulted in the clients' advertising being heard equally during the daily radio shows. He had no statistics to indicate the number of listeners for the respective daily programs. However, the CKRW 1994 retail rate card indicated the same rate of $35.00 for a 60 second ad for the morning show and the afternoon drive show. The midday show had an ad rate of $30.00 for 60 seconds of advertising time.

29. Mr. Antonson testified, based on nationwide statistics that he felt were relevant to Whitehorse, that the morning show host's role is the key to the success of a radio station. Basically, he said the morning show had the highest number of listeners and hence broadcasters would start their careers in the shows with a lower number of listeners and move up to the morning show host position. In other words, radio stations earn more revenues from the morning show and put their best talent in that position to ensure they attract the largest audience and the most advertising revenue. Mr. Antonson was of the opinion that a change from the morning show host position to the midday show would be a "demotion in status, prestige and importance."

30. I find that the morning show host position is the high profile desirable job in any radio market including Whitehorse. This is confirmed by the fact that CKRW sometimes allocated two broadcasters to the morning show. However, the host position in the other daily radio shows performs similar functions but usually with less profile, prestige and status.

THE LAW AND ITS APPLICATION

Issue 1: Was the assignment of Mr. Fraser from his morning show host position to the midday show a constructive dismissal?

[4] It is well known that when an employer dismisses an employee without cause, the employer must give reasonable notice or compensation based upon reasonable notice.

[5] In this case, it is clear that the employer did not intend to terminate Mr. Fraser but rather wished to assign him to a new shift in the broadcast day. The issue in this case is whether the actions of CKRW have resulted in the constructive dismissal of Mr. Fraser.

[6] The seminal Canadian case on constructive dismissal is *Farber v. Royal Trust Co.,* [1997] 1 S.C.R. 846. Gonthier J. summarized the law in paragraph 33:

> Thus, it has been established in a number of Canadian common law decisions that where an employer unilaterally makes a fundamental or substantial change to an employee's contract of employment – <u>a change that violates the contract's terms</u> – the employer is committing a fundamental breach of the contract that results in its termination and entitles the employee to consider himself or herself constructively dismissed. The employee can then claim damages from the employer in lieu of reasonable notice. (My emphasis.)

[7] Gonthier J. makes a further crucial observation at paragraph 35, when he stated:

> However, each constructive dismissal case must be decided on its own facts, since the specific features of each employment contract and each situation must be taken into account to determine whether the essential terms of the contract have been substantially changed.

[8] It is also well established that the test for whether a change in an employee's position constitutes a breach of a fundamental term is an objective one. (See *Cayen v. Woodward Stores Ltd.* (1993), 100 D.L.R. (4th) 294 (B.C.C.A.).) Further, in *Reber v. Lloyds Bank International*, [1985] B.C.J. No. 2341 (C.A.) (QL), the court was of the opinion that not every loss of prestige and position was a demotion and not every demotion would be a breach of contract going to its root (see paragraph 53).

[9] It is important to note that both parties agreed that the May 19, 1995 demotion of Mr. Fraser from Program Director to DJ is not in issue in this case. It was clearly a demotion ultimately consented to by Mr. Fraser for the benefit of his family based on the lack of alternative work available in the local radio industry. The unequal balance of power between an employer and employee was eloquently discussed by Iacobucci J. in *Wallace v. United Grain Growers Ltd,* [1997] 3 S.C.R. 701. It certainly would have applied to the 1995 demotion. Counsel for Mr. Fraser specifically did not apply *Wallace v. United Grain Growers Ltd, supra,* to the November 18, 1999 assignment to the midday show.

[10] The express term of the employment contract is clear: "As a DJ you will be expected to work 40 hours a week as assigned by the General Manager." There is no mention of the morning show host position and the General Manager has the right to assign the employee which suggests discretion and flexibility.

[11] Because Mr. Fraser had been continuously employed by CKRW as the morning show host, his counsel submitted that it was an implied term of his contract of employment that he would continue to be so employed. Counsel for CKRW submitted that an implied term could not override an express term.

[12] The legal principle governing the implication of terms to be implied as a matter of fact have been considered by McLachlin J., as she then was, in *Machtinger v. HOJ Industries Ltd.,* [1992] 1 S.C.R. 986, at paragraph 46. She referred to Treitel*, The Law of Contract*, (7th ed. 1987) for the distinction between terms implied in fact, terms implied in law and terms implied as a matter of customs or usage.

[13] Treitel said this at p. 187 of the 9th edition (1995):

> … the test for implying a new term in fact is to ask whether the parties would have agreed to it – not whether it would have been reasonable for them to have done so. It follows that a term cannot be implied in fact if it actually conflicts with the express terms of the contract

[14] It is reasonable not to have implied terms trump express terms when dealing with the implication of facts. The finding of an implied term which is not explicitly expressed in a contract must be based upon the factual intention of the parties. This is not to say that an express term can never be overruled by an implied term. There may be exceptional circumstances where the parties would agree that an express term of a contract is no longer applicable due to changed circumstances or the passage of time.

[15] In this case, CKRW clearly thought it was employing Mr. Fraser as a DJ subject to assignment by the General Manager. Mr. Fraser thought he was being continued in his employment as a morning show host. That conflict must be resolved in favour of the

written express terms of the contract that Mr. Fraser was hired as a DJ not as morning show host. There is no evidence to support the proposition that CKRW intended to employ Mr. Fraser solely as the morning show host. In fact Mr. Rai made it clear that Mr. Fraser could be replaced as morning show host in the September 9, 1999 memo.

[16] The compelling interpretation of this contract of employment is that a DJ could be assigned to different time slots or shows in the broadcast day, despite the fact that the morning show host may have been the preferred position of an experienced broadcaster. In fact, the proposed assignment of Mr. Fraser was no different than the assignment he made in 1994 to open the position of morning show host for himself.

[17] Although I am not prepared to interpret the contract as employing Mr. Fraser as the morning show host, I must now consider whether the assignment to the midday show was a fundamental breach of his employment contract.

[18] The test to be applied is an objective one. In other words, was the assignment a demotion involving a substantial change to an essential term of the employment contract? There is no doubt that Mr Fraser subjectively considered it as a demotion and that view was certainly supported by Mr. Antonson. There was clearly a loss of prestige and status, but in my view, not of a magnitude to constitute a fundamental breach of contract.

[19] The assignment to the midday show did not violate a term of the contract. The only change in his employment was a change in his hours of broadcasting from 6:00 a.m. to 10:00 a.m. to the midday slot of 10:00 a.m. to 3:00 p.m. It was not a transfer to a desk job or some more menial task at the station. His salary and total hours of work remained the same. His ability to do the remote location work on weekends was not changed. No doubt

there was some loss of status but not such a loss as to amount to a fundamental breach. The amount of air time was increased from 4 to 5 hours by the assignment, which could be considered an advantage. The fact of not having to rise at 4:00 a.m. appears to be an advantage.

[20] I am of the view that the change in assignment was permitted by the contract and did not constitute a fundamental breach. The fact that it was clumsily executed by management does not change my view.

Issue 2: If it was a constructive dismissal, what is the reasonable notice period and was Mr. Fraser required to accept the assigned position to mitigate his damages?

[21] Although my decision on the first issue disposes of Mr. Fraser's claim, I will address the damages and mitigation issues as well.

[22] In determining what constitutes reasonable notice of termination, the principles set out in *Bardal v. The Globe and Mail Ltd.* (1960), 24 D.L.R. (2nd) 140 (Ont. H.C.) should be applied. Each case must be decided according to the character of the employment, the length of service, the age of the employee and the availability of similar employment.

[23] In this case, Mr. Fraser is 45 years old. He has 19 years of experience as a morning show host. Although his length of service was 5 1/2 years, I take into consideration the fact that he was approached by CKRW to come to the Yukon. It is also a notorious fact that broadcasting positions are few in number in the Yukon market, with only CBC and CHON FM as alternatives. Furthermore, the costs of relocating are substantial. Considering all these factors, reasonable notice of eight months is appropriate.

[24] Counsel for CKRW also made a submission to the effect that even if I decided constructive dismissal had occurred, Mr. Fraser still had an obligation to mitigate damages by staying in the position offered by CKRW and working out the notice period. At first blush, this concept seems illogical because once constructive dismissal is found, the employee should be entitled to treat his employment as terminated. (See *Farber v. Royal Trust, supra*, at para. 33.)

[25] However, there appears to be a narrow window for the application of mitigation in some circumstances where there has been a constructive dismissal. The most widely quoted statement of this principle of mitigation arises from the judgment of Lambert J. in *Farquhar v. Butler Brothers Supplies Ltd.* (1988), 23 B.C.L.R. (2nd) 89 (C.A.) at page 95:

> The cases where there is an obligation to continue in the work force of the employer, under a new employment relationship, following a constructive dismissal, will roughly correspond with those cases where it is reasonable to expect the employment relationship to continue through a period of notice, rather than to end with pay in lieu of notice. There must be a situation of mutual understanding and respect, and a situation where neither the employer nor the employee is likely to put the other's interests in jeopardy. But if there is such a situation, then a reasonable employee should offer to work out the notice period, either where notice is given or where there is a constructive dismissal and an offer of a new working relationship."

[26] Lambert J. did not require an employee to work in an atmosphere of "hostility, embarrassment or humiliation."

[27] While this issue has not been addressed in the Supreme Court of Canada, it has been applied in *Misfud v. MacMillan Bathurst Inc.* (1989), 63 D.L.R. (4th) 714 (Ont. C.A.)

and also by Lambert J. in *Wood v. Owen De Bathe Ltd.,* [1999] B.C.J. No. 173 (C.A.), a case which followed but did not refer to *Farber v. Royal Trust, supra*.

[28] In my view, it would be unreasonable to place Mr. Fraser in the position of continuing in his new position which he subjectively considered to be a demotion. While the personal relationships may not have been acrimonious, it was clearly a situation where Mr. Fraser would be embarrassed or humiliated to work in the midday position.

SUMMARY

[29] As I have found there was no constructive dismissal, Mr. Fraser's claim is dismissed. I have also found that eight months would be a reasonable notice period but that mitigation in the sense of taking the offered position would be unreasonable in the circumstances.

[30] There will be no order for costs, as the handling of the employer's legal right to assign Mr. Fraser to a new DJ position was insensitive.

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Veale J.

Counsel for the Plaintiff — Daniel S. Shier

Counsel for the Defendant — R. Grant Macdonald, Q.C.