Citation: *O'Hara v. Selwyn Resources*, 2009 YKSM 6 Date: 20090514
Docket: 08-S0027
Registry: Whitehorse

IN THE SMALL CLAIMS COURT OF YUKON
Before: His Honour Judge Michael Cozens

Joanne O'Hara

Plaintiff

v.

Selwyn Resources Ltd.

Defendant

Appearances:
Joanne Eileen O'Hara — Appearing on own behalf
Jim Tucker — Counsel for Defendant

DECISION

Overview

[1] The Plaintiff, Joanne O'Hara, entered into a casual employment contract ("the Contract") with the Defendant, Pacifica Resources Ltd. (Pacifica subsequently changed its name to Selwyn Resources Ltd. On June 6, 2007). The Contract purports to be effective as of May 15, 2006, and was executed by the Plaintiff on May 22, 2006. The period of the Contract was from either June 1 or June 9, 2006 to October 31, 2006, or the end of the project related work, whichever came first.

[2] Under the Contract, the Plaintiff was to provide cooking services at an exploration camp operated by the Defendant.

[3] The Defendant gave the Plaintiff verbal notice of termination of her services under the Contract on August 14, 2006. This verbal notice was followed by written notice of termination on August 16, 2006. The termination of the

Plaintiff's employment was without notice, and the Defendant takes the position that it was done in reliance on the probationary period set out in Cause 8.1 of the Contract. In addition, the Defendant claims that there was just cause for the termination of the Plaintiff's services under the Contract, even if the termination also formed the basis for the termination of the Plaintiff's services purportedly within the probationary period.

[4] The Plaintiff takes the position that her probationary period ended as of June 8, 2006. She denies that there was any cause for the termination of her services by the Defendant, whether on the standard applicable to a probationary employee or to an employee not or no longer on probation.

[5] The Plaintiff claims $18,034 in damages for lost wages and vacation pay, air travel back to Ontario, room and board and miscellaneous expenses, pre-judgment interest from October 31, 2006, and costs.

Issues

1. Was the Plaintiff still on probation when the Defendant terminated her services?
2. If so, did the Defendant have reason to terminate the Plaintiff's services?
3. Alternatively, if the Plaintiff was not on probation, was the Defendant able to terminate the employment of the Plaintiff for cause?
4. If the Defendant wrongfully terminated the employment of the Plaintiff, what are the damages?

Factual Background

[6] The Defendant operated a remote exploration camp, called the Anniv Camp, on the Howard's Pass property in the Yukon. This camp is only accessible by airplane.

[7] The Plaintiff, who resided in Port Hope, Ontario, was offered the position of Camp Cook in an e-mail letter from the Defendant dated April 28, 2006. The term of employment proposed was pursuant to a casual contract and ran from June 1, 2006 until September 31, 2006, renewable by mutual consent. This offer of employment included an offer to pay for flights to Toronto, Ontario on a rotation of approximately 28 days in camp and 14 days out. The Defendant stated in this e-mail offer letter that a more formal contract would be put into place upon acceptance of the offer of employment.

[8] The Plaintiff responded by e-mail the same day and accepted the offer of employment as outlined.

[9] The Plaintiff was then provided a copy of a casual contract of employment with an effective date of May 15, 2006 (the "Casual Contract"). The preamble to the Casual Contract stated:

> This letter sets forth the terms and conditions under which Joanne O'Hara (the "Employee") agrees to provide cooking services in the Exploration Camp (the "Services") to Pacifica Resources Ltd. ("Pacifica"), Howard's Pass Property, Yukon (the "Property").

[10] On May 19, a subsequent e-mail was sent by Jason Dunning on behalf of the Defendant, to the Plaintiff, in which Mr. Dunning stated:

> Note that I caught a missing item during an audit of the new contracts on the first page with respect to contract duration. It does not change much, but please reprint and sign and send to the office. I won't sign the original but I will sign this new copy.

[11] A copy of the Casual Contract, as amended, was attached to the May 19 e-mail. The evidence of the Plaintiff is that the Casual Contract, as amended, was the one that she signed and mailed to the Defendant's Vancouver, British Columbia, office on May 22, 2006. The Casual Contract as amended, became the Contract.

[12] The preamble to the Contract states:

> This letter sets forth the terms and conditions under which Joanne O'Hara (the "Employee") agrees to provide cooking services in the Exploration Camp (the "Services") to Pacifica Resources Ltd. ("Pacifica"), **for a probationary period from June 1st, 2006 to June 8th, 2006 whereupon by mutual agreement to continue work by Pacifica and the Employee at the Howard's Pass Property, Yukon** (the "Property"), the period of the contract will be June 9th, 2006 to approximately October 31st, 2006 or the end of project-related work, whichever comes first. Note that the contract is extendable by mutual consent. (emphasis in original)

[13] Clause 8.1 of both the Casual Contract and the Contract read as follows:

> If the Employee is in default under this agreement, Pacifica may terminate this Agreement immediately upon written notice to the Employee, and Pacifica shall be free of all obligations for delivery of Services under this contract that have not yet been fulfilled. Either party, the Company or the Employee may terminate this contract at any time upon 15 days written notice. Pacifica is not required to provided any notice should the employee be terminated in the first three months of employment, which is considered a probationary period.

[14] According to the Defendant, the Plaintiff was terminated "at conclusion of the Plaintiff's period of probation" (Affidavit of the Defendant dated May 28, 2008). As noted, the oral notice of termination was given to the Plaintiff on August 14, 2006, and the written notice was provided on the 16th of August, 2006 and received by the Plaintiff via e-mail on August 18, 2006. The Plaintiff had been scheduled to return to the Anniv camp on August 17, 2006 but did not.

Analysis

Contract Commencement Date

[15] The first question to resolve is when did the Contract come into effect? The April 28th offer letter had a contractual start date of June 1, 2006. There is no corresponding date in the Casual Contract that followed this letter.

[16] However, the May 19th e-mail indicated an alteration to the "contract duration" and the preamble to the attached Contract, (for clarity the Casual Contract as amended), stipulates a contractual start date of June 9, 2006, immediately following an eight day probationary period.

[17] The evidence shows that the Plaintiff began to provide services to the Defendant in late May, 2006. The Defendant stated that the start date was May 29, 2006 and that she arrived at the Anniv camp on May 29, 2006. The Record of Employment provides an employment start date of May 26, 2006, as does the time sheet record for May, 2006.

[18] I find that the parties intended at the time of entering into the Contract, that the Plaintiff would provide services to the Defendant commencing June 1, 2006. I accept that the few days the Plaintiff worked for the Defendant in May before she actually commenced the June 1 – 8 probationary period were simply a practical reality that was not anticipated at the time the Contract was entered into.

[19] That said, the preamble of the Contract itself states that "…the period of the contract will be June 9th, 2006 to approximately October 31st, 2006…". The services provided by the Plaintiff during the eight day probationary period must have been governed by some agreement as to the terms and conditions regarding the obligations of the parties. I find it illogical that the Plaintiff would be expected to provide services to the Defendant for the time period prior to June 9, 2006 without some agreement as to terms and conditions. The only logical terms and conditions are those set out in the Contract.

[20] There is no independent evidence that the parties had agreed to operate under the terms of the Contract for the time period prior to the commencement of the Contract on June 9. I find, however, that such an agreement is implicit when

considering the pre-contractual negotiations and the actual performance by the parties.

[21] I find that meaning can be given to the reference in the May 19 letter to a change to the “contract duration” by noting both the start date change from June 1 to June 9, 2006 and the extension of the end date from the originally proposed September 31 to October 31, 2006.

[22] As such, I conclude that the Contract commenced on June 9, 2006, however the services the Plaintiff provided prior to that date were nonetheless governed by the terms of the Contract, insofar as these could be applicable.

Probationary Period Under the Contract

[23] What is the probationary period that governed the Plaintiff’s provision of services to the Defendant?

Position of the Defendant

[24] The Defendant takes the position that the employment start date contemplated in the Casual Contract was changed by the Contract to alter the original June 1, 2006 start date to an eight day probationary period from June 1 to June 8, which took place before the Contract came into effect. After this probationary period was concluded, the period of the Contract commenced on June 9. The three month probationary period under Clause 8.1 remained in effect and also started on June 9.

[25] There was no evidence that this position was communicated to the Plaintiff by the Defendant.

Position of the Plaintiff

[26] The Plaintiff takes the position that the June 1 to June 8 probationary period replaced the three month probationary period set out in Clause 8.1 of the

Contract. She testified that she assumed this to be the case, while yet being aware that Clause 8.1 was still in the Contract unchanged from what it read in the Casual Contract.

[27] I note that the Plaintiff did not, however, clarify her subjective opinion on this point with the Defendant at the time she signed the Contract, nor did she seek any legal advice on this point.

Finding

[28] There is no explanation in the evidence about the purpose of this initial eight day probationary period or about the purpose of the apparent additional three month probationary period. At best there is a comment in the May 19, 2006 e-mail from the Defendant to the Plaintiff respecting the change from the initial Casual Contract to make clearer the "contract duration", while otherwise not changing "much". The Plaintiff testified that in her experience it was not typical for a seasonal cook to be on probation at all.

[29] In the absence of any explanations, I find it difficult to construe why two separate successive probationary periods makes any logical sense from a contractual point of view. I could speculate that the initial period was perhaps to see whether the Plaintiff's services sufficiently satisfied the Defendant, such that the Contract would commence. This would be a sort of "easy out" for the Defendant, although not necessarily so for the Plaintiff.

[30] There is no evidence, however, that this was the intention of the Defendant in making the changes to the Casual Contract. There is no evidence that there were any negotiations or discussions between the parties leading up to or regarding the effect of the change to the preamble. There is also no evidence that the inclusion of an additional eight day probationary period was the Plaintiff's intention. To the extent that the Plaintiff testified on this issue, her position is contrary to the existence of such an intention on her part.

[31] What the Defendant is essentially asking me to do is to find that there was a period of employment, outside of the Contract, from May 26 to June 8, 2006, during which the Plaintiff was on probation (arguably for practical purposes commencing May 26th, despite the June 1 date stipulated), after which the Contract itself came into effect.

[32] I am aware that reasonable effort should be given to give full effect to each and every component of a contract. The golden rule in contract law is that the literal meaning must be given to the plain language of a contract, unless this would result in an absurdity. However, the paramount test of the meaning of words in a contract is the intention of the parties. This intention is to be determined by reference to the surrounding circumstances that existed at the time of the signing of the contract.

[33] The doctrine of objectivity also adds that what the parties have agreed to should be understood in the way in which their language would appear to the ordinary reasonable person looking at it from the outside.

[34] I am also aware that the court is not to strain to create an ambiguity that does not exist. The ambiguity must exist in the language of the contract itself and not be one created by extrinsic evidence. That said, extrinsic evidence is admissible in order to attempt to interpret the meaning of a contract where the contract is ambiguous as written. The courts may always have regard to the context and to the objective evidence of the surrounding circumstances underlying the negotiation of the contract. **(**See ***3869130 Canada Inc.*** *v.* ***I.C.B. Distribution***, 2008 ONCA 396 at para. 32).

[35] I have a problem accepting the Defendant's submission. The Plaintiff, who was not responsible for the drafting of the Contract, received notice of a change with respect to "contract duration". Highlighted in bold letters is the eight day probationary period. What is an ordinary, reasonable person in the position

of the Plaintiff supposed to think? It was not at all illogical for this Plaintiff to think that the duration of her probationary period had been changed, notwithstanding that it remained written as three months in Clause 8.1. It could be expected that a legally trained individual or one otherwise experienced in contracts would enquire further. The Plaintiff did not. She simply thought that the Defendant had changed the probationary period and failed to change Clause 8.1.

[36] I find that the Contract is ambiguous with respect to the duration of the probationary period. Yes, I could look at the preamble and Clause 8.1 and say that the intention of the parties was that there be two separate and distinct probation periods, operating at different times and serving different legitimate purposes. After the eight day probationary period, the parties would then meet and see whether there was a "mutual agreement" between them that would allow for the employment relationship to be continued under the Contract, including the entirety of Clause 8.1, or, more narrowly construed, whether the Defendant would choose to continue to employ the Plaintiff under the Contract.

[37] Thus there would be a form of "two-step" process towards the Plaintiff becoming a non-probationary employee or service provider. There is, however, no evidence that points towards that being the common intention of the parties. There is also no evidence that the parties ever met at or near the end of the eight day probationary period to see whether such a "mutual agreement" could be reached. The only evidence is that the Plaintiff continued to provide services to the Defendant after June 8, 2006.

[38] As the party responsible for the drafting of the Contract and the party who made the amendment to the Casual Contract, I find that it was incumbent on the Defendant to make it clear to the Plaintiff the extent to which the change did or did not alter the terms of the Contract from the terms in the Casual Contract. As the Defendant did not do so, the Defendant has to accept the negative consequences that flow from the ambiguity that was created.

[39] I note that there was no mention of any probationary period within the April 28, 2006 offer letter. Further, there was no acceptance by the Plaintiff of the Casual Contract as drafted, with only the three month probationary period referenced, as the Casual Contract as amended was sent to the Plaintiff shortly afterwards. Therefore, the probationary period, as bolded in the preamble to the Contract, would clearly be drawn to the Plaintiff's attention. It would have been easy at this point to resolve any potential ambiguity that the mention of two probationary periods may have created by the Defendant simply pointing out to the Plaintiff that the pre-contractual probationary period was in addition to the probationary period set out in Clause 8.1 of the Contract.

[40] In this respect, the case before me differs from ***Pathak*** v. ***Royal Bank of Canada***, [1996] B.C.J. No. 447 (C.A.), which was a case provided to me by the Defendant. In ***Pathak***, the plaintiff commenced employment as a "trainee account manager" under terms of an offer letter. This offer letter provided for a six month probationary period. The plaintiff also signed a standard form application for employment which provided for a three month probationary period and gave the defendant the right to extend the probationary period as it saw fit. The offer letter made no reference to the defendant bank having a right to extend the probationary period.

[41] The trial judge resolved the ambiguity created by these two documents by deciding that the offer letter should prevail, therefore not allowing the defendant to exercise a unilateral right to extend the probationary period. However, near the end of the six month probationary period, the defendant met with the plaintiff to discuss his work performance. This meeting was followed by a letter which advised the plaintiff that the defendant was extending the original six month probationary period by approximately one month. This letter invited the plaintiff to contact the defendant if the plaintiff had any questions. The defendant terminated the plaintiff's employment within the additional one month probationary period.

[42] The appellate court agreed with the following comments made by the trial judge in para. 9:

> The reality of the parties' relationship was that Mr. Pathak was a marginal candidate who did not appear to be meeting the expectations required of him. Although it would be unfair to allow the bank to rely on ambiguity in the employment contract to extend the probationary period where it was the bank's drafting of the contract that caused the ambiguity to arise, the extension of the probationary period must be upheld following the bank's express notice to the plaintiff that it intended to do so. This notice of extension, and Mr. Pathak's continuing employment with the bank, constituted an acquiescence by him to the bank's extension.

[43] The critical factor in this case is that the employer gave the employee notice of an intent to extend the probationary period, and the employee continued to perform his duties in apparent acquiescence to the employer's stated intention. This is a factor missing in the case before me. The ambiguity which I have found exists, is contained within the one document which governs the employer/employee relationship. There was no stated intention by the Defendant to either extend the probationary period or to have the Plaintiff subjected to two separate and consecutive probationary periods of employment. In these circumstances, I am not prepared to find that such a stated intention by the Defendant can be found within the language of the Contract itself. (See also ***Miguna*** v. ***African Canadian Legal Clinic***, [1996] O.J. No. 821, Ont. (C.J.), at paras. 3-8).

[44] As such, I find that the Plaintiff was subject to only an eight day probationary period prior to the Contract coming into effect. The parties did not agree on a three month probationary period to follow the eight day probationary period, and I give no effect to Clause 8.1 of the Contract insofar as it references a three month probationary period.

[45] In conclusion, I find that the Plaintiff was not on probation at the time her employment was terminated by the Defendant.

Termination during Probationary Period

[46] In the event that I am found to be wrong in my finding that the Plaintiff was not on probation at the time her employment was terminated by the Plaintiff, I will address the issue of whether her termination as a probationary employee was justified.

[47] The standard for termination of an employee during the probationary period is one of suitability, ***Jadot*** v. ***Concert Industries Ltd.*** (1997) 98 B.C.A.C. 100, at paras. 28, 29:

> …an employer during a probationary period "has the implied contractual right to dismiss a probationary employee without notice and without giving reasons provided the employer acts in good faith in the assessment of a probationary employee's suitability for the permanent position".

[48] Good faith requires that the employer make it clear to the probationary employee what the employer's expectations are, and give the employee every reasonable opportunity to prove himself or herself in the job they have been employed to do. A court examining the "good faith" actions of an employer in dismissing a probationary employee must look beyond the conscious motives of the employer, and look at both sides of the situation from the perspectives of the parties. The onus rests on the employer to justify the dismissal to the extent that:

> (1) he had given the probationary a reasonable opportunity to demonstrate his suitability for the job;
> (2) he decided that the employee was not suitable for the job;
> (3) that his decision was based on an honest, fair and reasonable assessment of the suitability of the employee, including not only job skills and performance by character, judgment, compatibility, reliability and future with the company.
>
> In cases of a probationary review, the court will not require that the employer establish actual cause, just that the employer decided that the employee was unsuitable, on the criteria indicated above. ***(Higginson*** v. ***Rocky Credit Union Ltd.*** (1995), 27 Alta. L.R. (3d) 348, (C.A.) at para. 6)

[49] The employer must show "…that he acted fairly and with reasonable diligence in determining whether the proposed employee was suitable in the job for which he was being tested". (***Higginson***, at para. 5, citing from ***Ritchie*** v. ***Intercontinental Packers Ltd.*** (1962), 2 C.C.E.L. 147 (S.C.Q.B.); See also ***Longshaw*** v. ***Monarch Beauty Supply Co.*** (1995), 14 B.C.L.R. (3d) 88 (S.C.), at paras. 38-44; ***Miguna***, at para. 9).

[50] I consider that the same reasoning applies to the termination of an employee during a probationary period within a fixed term contract for services as to the termination of a probationary employee within a permanent contract for services.

Reasons for termination

[51] The same evidentiary basis has been put forward by the Defendant to justify the dismissal of the Plaintiff, whether it be on the lower threshold of it being during a probationary period, or on the basis of just cause for dismissal outside of a probationary period. As such I will canvass the relevant evidence for the purpose of both situations.

[52] In the August 16, 2006 written notice of termination, the Defendant advised the Plaintiff that, after a thorough review by management, she was terminated because

> …it was concluded that daily operation of the kitchen at Anniv Camp was not at Pacifica's expectations because of on-going non-professional conduct, therefore, the continuation of your employment with Pacifica would negatively impact on the quality of living and morale in the Anniv Camp.

[53] In the Reply filed in this proceeding, the Defendant states that the Plaintiff's contract was terminated for the following reasons:

a. She provided inadequate or substandard food service to the people housed at the Anniv Camp;

b. She exercised poor control of food inventory with the Anniv Camp, running out of food staples such as milk and eggs on multiple occasions;
c. She failed and/or neglected to attend to the normal duties of the position of camp cook;
d. She failed and/or neglected to order food supplies for the Anniv Camp for the week following her departure on break, which order should properly have been placed the week before when the food supplies are actually required;
e. She failed and/or neglected to properly brief the individual replacing her prior to leaving the Anniv Camp for her scheduled break in August, 2006;
f. She conducted herself in a manner which was rude, abrasive and unduly critical towards other kitchen staff.

[54] In support of the Defendant's claim for cause to terminate the employment of the Plaintiff, the entire personnel file of the Plaintiff was provided as evidence by the Defendant. A chronology of the Plaintiff's employment up to August 21, 2006 was contained in a memo dated August 21, 2006. Portions of this memo indicated essentially the following:

- there was a conversation on July 13 between the Project Geologist, Geoff Newton, and the Plaintiff about concerns the Pacifica/camp occupants were having with the food service being provided;
- between July 13-23, there was some improvement in the food service but not equal to the service provided by other cooks;
- between July 24-August 2, when Mr. Newton was on break, the Plaintiff spent less time in the kitchen. After his return she spent more time in the kitchen;
- between August 3-9, the Plaintiff was rude to other kitchen staff, and left almost all of the work to a second cook, Barb Pfister;
- on August 10, the Plaintiff failed to brief Ms. Pfister on the ordering process, supplier contact information, and what had been ordered;
- on August 11, the kitchen ran out of eggs, bacon and milk. Subsequent checks indicated that no order had been placed by the Plaintiff for that week.

[55] The personnel file also contained a Memorandum prepared by Mr. Newton dated August 11, 2006. Some of Mr. Newton's comments are summarized below:

- since his August 3rd return to camp, he received numerous complaints about the Plaintiff. These included complaints that she was:

> …doing little work and being rude and abrasive to other kitchen staff. On top of these complaints, when she left for her break this Wednesday, August 9th, she left the camp without placing adequate food orders for this week;

- there were several reports from different sources which indicated that the Plaintiff was seldom in the kitchen, in particular when he was out of camp on break;
- he observed that the food was not as good as it had been under previous cooks, and there had been inventory problems with respect to shortages of milk and eggs;
- on one occasion bread and cheese had to be thrown out due to mold;
- only one small order had been placed for the week of August 11. He felt that the failure to brief Ms. Pfister as directed, and to place the orders was due to either gross negligence and incompetence on the part of the Plaintiff, or to a deliberate attempt to sabotage Ms. Pfister;
- he concluded that "Joanne seems to be guilty of extremely unprofessional conduct. She seems to have been doing a poor job of running the kitchen, and this latest incident, leaving the camp to go hungry, is completely unacceptable".

[56] The Memorandum concludes with a list of complaints recorded by Ms. Pfister, who had kept a written record at the suggestion of the camp manager, Doug Hanlan. (In his testimony at trial, Mr. Newton stated that he became aware after the fact that Mr. Hanlan was the father of Ms. Pfister's child. Mr. Newton

also stated that he wanted the Cook to report to him and not to the Camp Manager, which was contrary to the usual practice.)

[57] There was a further August 19, 2006 Memorandum prepared by Mr. Newton with respect to the July 13, 2006 conversation between the Plaintiff and himself, in which he stated that he pointed out to the Plaintiff the improvement in food services that were provided by 1984 Inc. during the Plaintiff's first break. He agreed with the Plaintiff's assertion that she could use the assistance of a bull cook in order to improve the cooking services she was providing, and arranged for this. The specific request of Mr. Newton at that time was for the Plaintiff to provide more salads and baking, as well as to order and use more produce. In examination, he agreed that people wanted more salads but that they didn't make a complaint about this. He also agreed that the food service improved after he spoke to the Plaintiff on July 13 and provided her a full-time bull cook.

[58] Mr. Newton also testified that he was advised by Mr. Keith Patterson that the baking had tapered off when Mr. Newton was off-site in late July/early August. He was back about one week before the Plaintiff left on her August break and he admitted that he didn't get on top of the food service issues that he had been told existed. He stated that he had received other complaints but had let these complaints slide because of the Plaintiff's upcoming break.

[59] I note that it appears the bulk of the complaints about the Plaintiff's work performance came from Ms. Pfister. She had been hired as the replacement cook during the Plaintiff's August break and started work one week to 10 days before the Plaintiff's break commenced. Ms. Pfister provided notes to the Defendant summarizing the problems she had with the Plaintiff. The date stamp on these notes is August 29, 2006. It appears, however, that she would have made these notes at or close to the time of the events she recalls, based upon the August 11 Memorandum prepared by Mr. Newton.

[60] I observe that much of the evidence adduced by the Defendant regarding the Plaintiff's work performance, including that of Ms. Pfister, was based upon hearsay information.

[61] None of the complaining employees provided any evidence by way of affidavit or testimony. This hearsay evidence is not admissible for the truth of its contents but is a factor for consideration in assessing whether the Defendant took reasonable steps in reaching the conclusion that the Plaintiff's services should be terminated within the probationary period. (***Jadot***, at para. 30)

Testimony of the Plaintiff

[62] The Plaintiff disputes that she failed to perform the job she was hired to do. In particular, she disagrees with the assertions in the August 11 letter from Mr. Newton to J.J. O'Donnell.

[63] The Plaintiff stated that when she first arrived at the camp, she met with Mr. Newton, asked what the expectations of her were, and was advised by him of these expectations.

[64] The Plaintiff is a camp cook with five years experience over the course of three or four prior contracts. She testified that she is an average cook, not the best, but not the worst. She stated that she asked Mr. Newton to advise her if there were complaints and to not allow them to build up. She described herself as a task-oriented person who socialized little. As the senior person in the kitchen she would direct people in a loud voice but she didn't yell. She agreed that she could be loud and be perceived as being blunt.

[65] She testified that the first complaint she heard was that the staff did not like "no-name' juice. She stated that the suppliers would provide "no-name" only if they were out of named products. This was the only complaint she heard before her first break.

[66] When she returned from her first break, she met with Mr. Newton on July 13, and he advised her of concerns about the food service, such as entrées, hot lunches, more baking, more salads etc. She saw these as recommendations only and not complaints. She considered these requests to be reasonable and attempted to implement them.

[67] Other than these two instances, she was not made aware, either orally or in writing, that were any concerns about her performance or that there were any problems.

[68] With respect to the circumstances in August, 2006 the Plaintiff denies that she failed to brief Ms. Pfister. She testified that she gradually allowed Ms. Pfister to take over the bulk of the kitchen work in order to prepare her for the full responsibility she would assume on the Plaintiff's break. She denied that she did not review the cook's responsibilities with Ms. Pfister, testifying that, in fact, this was the last thing she did before leaving camp for her break.

[69] The Plaintiff believes that Ms. Pfister made up her allegations against the Plaintiff in hopes that she would be able to replace the Plaintiff if she was terminated. She admitted to having one argument with Ms. Pfister in which she raised her voice. She stated that she apologized the next day for raising her voice.

[70] The Plaintiff states that she did, in fact, place the food orders for the week of August 11, 2006. She produced e-mails in support of her claim, including the following:

- e-mail Tuesday, August 1 at 2:07 p.m. to watsonlakefoods@northwestel.net for shipping by Angus Air by August 9, 2006; and

- e-mail Thursday, August 3 at 2:47 p.m. to “GP” <orders.foodservice@northwestel.net requiring delivery of certain items on August 4 and the remainder to Alcan (Air) on August 8, 2006.

[71] Copies of these e-mails were forwarded to Mr. J.J. O’Donnell, a representative of the Defendant, on August 14, 2006 at 7:48 and 8:00 p.m., once the Plaintiff was aware of the food shortage problem at the Anniv camp.

[72] The Plaintiff testified that the other occasions when the Camp was short of certain supplies was due to the supplier’s inability to fill the orders, and to the supply planes not being able to get into the camp. She testified that it was not due to her shortcomings.

[73] She said the shortfalls in staples suggested by the Defendant are exaggerated. She could not always stock sufficient fresh milk and, as such, kept cartoned milk available. Sometimes the suppliers would ship milk at or past the expiry date, which rendered it unusable. The bread was frozen so the expiry date was irrelevant. If left on the counter unused the bread would mold more quickly.

[74] The Plaintiff also provided explanations for some of the other minor concerns raised in the pleadings and at trial. These explanations appeared to be reasonable.

Application of the Law to these Facts

Termination during the Probationary Period

[75] The threshold for termination of an employee during the probationary period is lower than that required for the termination of an employee for just cause outside of a probationary period.

[76] I have no concerns about the existence of any improper motives of the Defendant in deciding to terminate the Plaintiff. I also have no concerns about accepting the testimony of Mr. Newton, insofar as he was stating to the court the information he had received from others as to the Plaintiff's work performance.

[77] The problem I have is that virtually none of these concerns were communicated to the Plaintiff, and on the one occasion she was advised of a concern, the communication appeared to have had a positive effect, although perhaps not as much as desired. Mr. Newton was candid in what he did and did not tell the Plaintiff regarding her work performance.

[78] The first part of the ***Higginson*** criteria requires that an employee be given a reasonable opportunity to demonstrate his or her suitability for the job. Implicit in this is a requirement that employer concerns about job performance be communicated to the employee so that the employee is provided an opportunity to alter or otherwise improve his or her performance. In the absence of such communication, a basic element of fairness is lacking.

[79] It may be, in certain circumstances, that job performance issues clearly demonstrate the unsuitability of the employee to the point that the communication of employer concerns to the employee would be of little or no benefit. In such cases the "reasonable opportunity" criteria may well be satisfied with minimal or no communication. I do not, however, find the case before me to be such a set of circumstances. Outside of the August food supply shortage while the Plaintiff was on break, I consider that the rest of the information relied on by the Defendant as a basis for the termination of the Plaintiff was information that should have been communicated to the Plaintiff in order to allow her to respond.

[80] As to the August food supply shortage, its exact causation is unclear. The Defendant provided evidence that the food suppliers' searches, made at Mr. Newton's request, indicated that they never received the orders from the Plaintiff.

The Plaintiff was able to provide copies of the e-mails she says that she sent for the orders, shortly after being informed that a problem existed. There does not appear to have been any system in place to ensure that the Plaintiff received verification from the supplier of the food order at the time the order was placed. Neither, however, is there any evidence that the Defendant communicated to the Plaintiff that receipt of such verification was required. In fact, the August 28, 2006 e-mail from 'Kyle's Desk' yukonfoodservice@northwestel.net, includes a suggestion that Mr. Newton may wish to consider looking into a system of automatic e-mail verification of receipt and review by the supplier of e-mail food orders.

[81] I find that Mr. Newton's conclusion that the Plaintiff was either grossly negligent or incompetent, or that she deliberately attempted to sabotage Ms. Pfister by not placing the food orders, to be unreasonable in all the circumstances. The Plaintiff may well have placed the food orders although, for unknown reasons, they never made it to the suppliers.

[82] As such, I conclude that even if the Plaintiff was on probation at the time she was terminated, the Defendant did not have a sufficient basis for her termination, even on the lesser standard applicable to a probationary employee.

Termination after the Probationary Period

[83] For the same reasons as stated above, and given the higher threshold required to terminate a non-probationary employee, I find that the Defendant has not demonstrated that there was just cause for termination of the Plaintiff.

Damages

[84] Clause 8.1 of the Contract allows for either party to terminate the Contract on 15 days Notice. This portion of Clause 8.1 remained in effect at the time of termination of the Plaintiff. As such the Plaintiff is entitled to be paid 15 days wages. The Plaintiff worked eight hours per day at $25.91 per hour and two

hours at $38.87 per hour, for a total daily wage of $285.02. Therefore she is awarded $4,275.30 for wages.

[85] The Plaintiff is entitled to holiday pay in the amount of $213.77.

[86] The Plaintiff seeks to be paid the costs of her airfare back to Toronto. Although Clause 1.5 of the Contract is not particularly clear on the Defendant's responsibility to pay for travel to the point of hire from the site of work, I am satisfied, given the reference to coverage for rotation flights to and from Toronto in the April 28, 2006 e-mail correspondence from the Defendant to the Plaintiff, and the stated intent in the August 16, 2006 termination letter to provide an airline flight to Toronto, that the Plaintiff is entitled to be reimbursed for this cost. Her evidence that the Defendant did not provide her with the flight back to Toronto is not contradicted. Therefore she is awarded $1,482.00 for her airfare.

[87] The Plaintiff is awarded $100.00 for the preparation and filing of pleadings, and disbursements to be assessed by the clerk of the court.

[88] The Plaintiff has claimed pre-judgment interest from October 31, 2006 at the rate of 4%. In all the circumstances, she shall have pre-judgment interest in the amount of $500.00. The Plaintiff is also awarded post-judgment interest pursuant to the ***Judicature Act***, R.S.Y. 2002 c. 128.

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Cozens T.C.J.