Citation: *Williams v. WildMan*, 2009 YKSM 2 Date: 20090213
Docket: 07-S0128
Registry: Whitehorse

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

Dean Williams
Plaintiff

v.

WildMan Productions Incorporated
Defendant

Appearances:
Dean Williams — Appearing on own behalf
Peter Sandiford — Agent for Jocelyn Barrett, Solicitor for the Defendant

REASONS FOR DECISION

Overview

[1] The Defendant, WildMan Productions Incorporated, was previously found liable to the Plaintiff, Dean Williams, for breach of a six month oral contract for services entered into on December 10, 2007, with a commencement date of January 3, 2008 (the "Contract"). The Plaintiff's services were terminated, without cause, by the Defendant on January 26, 2008. Therefore, there are damages owing from January 27, 2008 until July 3, 2008.

[2] A separate hearing was conducted to assess the damages owing from the Defendant to the Plaintiff arising from the breach of the Contract. At this hearing, the Court heard evidence from an owner of the Defendant, Phil Timpany, a local film industry worker, Kurt Waddington, an independent contractor in the television production industry from Burnaby, British Columbia, Chris Aikenhead (by

affidavit), Ron Daub, an owner of the Defendant (by affidavit), and Anne Daub, the bookkeeper for the Defendant.

[3] This is my decision on damages.

Issues:

[4] There were three issues raised in this hearing:

a. Cause for termination subsequently determined;
b. The balance of monies owing between the parties; and
c. Mitigation of damages by the Plaintiff.

Issue #1: Cause subsequently determined

[5] The Defendant argues that there was a term of the Contract that the Defendant could terminate the contract if there was not enough work to justify maintaining the contractual relationship.

[6] The Defendant argues that the termination of the Plaintiff was justified due to circumstances that existed at the time of termination, in particular, the shortage of work that the Defendant had.

[7] The evidence of Mr. Timpany and Mr. Daub was that the Plaintiff was made aware at the time the Contract was agreed upon that the Contract was work-dependant, and the Defendant could terminate the Contract if there was a work shortage. They also provided evidence that the Defendant had insufficient work for the Plaintiff at the time he was terminated, due in large part to the Defendant not receiving a particular contract for a video about nursing in the Yukon.

[8] The evidence of Mr. Waddington and Mr. Aikenhead was tendered to show that it was a generally understood term in any fixed-term contract for services in the television and film industry that the contract was contingent on

work being available and that the party receiving the services could terminate the contract if there was insufficient work.

[9] I do not find it necessary to consider this argument further or to assess the relative merits on the evidence. This argument, if successful, would lead to a finding that there was, in fact, no breach of the Contract between the Defendant and the Plaintiff. The time for this position to have been advanced was at the trial stage, not at a hearing for the assessment of damages after a finding that there has been a breach of the Contract.

Issue #2: <u>What is the balance of monies due and owing from the Defendant to the Plaintiff?</u>

[10] There are two aspects to this issue (leaving aside for the moment the issue of mitigation of damages). Firstly, there are claims for monies owed by each party to the other for the period of time prior to the commencement of the Contract. The Plaintiff had provided services to the Defendant on other short-term contracts from May to December, 2007, and these monies relate to the provision of services under those contracts. (See 2008 YKSM 1).

[11] Secondly, there is the claim for loss between January 27 and July 3, 2008, resulting directly from the Defendant's breach of the Contract.

Assessment of monies owing June, 2007 to January 26, 2008

[12] The evidence of the Defendant, through Anne Daub, sets out the following schedule of payments owing and made to the Plaintiff for services provided to the Defendant from May, 2007 until termination on January 26, 2008:

Time Period	Base pay	Bonus	Paid	Balance
May 2007	$4,000.00	n/a	$4,192.57	- $ 3.00[1]
June	$1,500.00	$2,030.40	$3,534.90	- $ 4.50[2]
July	$1,500.00	$ 41.25	$3,000.00	- $1,458.75[3]
August	$ 750.00	$ 524.55	$2,092.06	- $ 817.51[4]
September	$3,000.00	n/a	$3,000.00	$ 0.00
October	$3,000.00	n/a	$3,000.00	$ 0.00
November	$3,000.00	$1,743.30	$3,000.00	+$1,743.30
December	$1,500.00	n/a	$4,260.77	- $2,760.77[5]
January, 2008	$3,000.00	$ 666.53	$2,900.33	+$ 766.20[6]

[13] The end result is that, based upon the Defendant's calculations, as of January 26, 2008, the Plaintiff owed $2,535.03 to the Defendant as follows:

a. Wage overpayment: July - $1,458.75, August - $225.45, December - $856.70; = Total of $2,540.90
b. Airfare: August - $592.06, December - $160.77, January $200.33; = Total of $953.16,
c. Service charges: $7.50
d. Offset by monies owed to Plaintiff for wage and bonus in January, 2008 - $966.53

[14] The Plaintiff agrees with the $1,458.75 owed for July, 2007. He has not disputed the August and December wage overpayment calculations, other than to raise some concerns about the Defendant's position as to exactly what the bonus percentages were and how the bonus was to be calculated. I find,

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[1] Pd: Airfare: Edmonton-Whitehorse, $192.57, banking service charges, $3.00
[2] Banking service charges
[3] Advance of $1,500.00 less bonus of $41.25
[4] Pd: Airfare: Whitehorse-Vancouver, $265.17, Vancouver-Whitehorse $261.47, $65.42 (change fee); Plaintiff only worked portion of month – 13 days
[5] Pd: Airfare: Whitehorse-Vancouver, $160.77; includes $1,743.30 bonus for November, $856.70 advance; Plaintiff only worked portion of month
[6] Pd: Airfare: Edmonton-Vancouver-Whitehorse, $200.33 (Plaintiff paid $200.00 of total invoice of $400.33), Bonus not yet paid

however, that these expressions of concern by the Plaintiff are not sufficiently supported by evidence that would cause me to do other than to accept as accurate the figures put forward by the Defendant.

[15] The Plaintiff has not disputed the May and June service charges.

[16] He does disagree, however, with the calculations for the airfare costs for August and December, 2007 and for January, 2008.

[17] The Plaintiff agrees that that the $261.47 plus $65.42 change fee is owed to the Defendant for the August flights. He claims, however, that the agreement between the parties was as simple as one party pays the way down and the other party pays the way back.

[18] For the December, 2007 and January, 2008 flights, the Plaintiff claims that these flights were a bonus from the Defendant, and were agreed to as part of the Contract.

[19] The Defendant claims that the airfare for the August and December, 2007/January 2008 flights were advances on the Plaintiff's pay for which the Defendant was to be compensated.

[20] The evidence of both parties is that the Plaintiff's May, 2007 flight to Whitehorse was paid for by the Defendant with no expectation of recovery from the Plaintiff.

[21] The Plaintiff's evidence was that he had told Mr. Daub that he would repay him for the return flight from Vancouver in August, and the associated change fee.

[22] The Plaintiff paid $200.00, of the total cost of $400.33, for the airfare for his return from Edmonton to Whitehorse, through Vancouver, to commence work on January 3, 2008.

[23] It is difficult to sort out with any certainty what exactly the parties had or had not agreed to. In all the circumstances, I find that the parties were contributing more or less equally to the Plaintiff's airfare costs for the August and December/January flights, with the Plaintiff assuming full responsibility for the change fee for the August flight. I have assessed these costs as being consistent with what the Plaintiff testified to as being the arrangement of one party (the Defendant) paying the way out and the other party (the Plaintiff) paying the way back.

[24] As such, the Plaintiff owes the Defendant a total of $527.22 for airfare for monies expended by the Defendant for the August, 2007 and January, 2008 return flights to Whitehorse. The Defendant will absorb the remaining $425.94.

[25] Therefore, the balance owed by the Plaintiff to the Defendant as of January 26, 2008 is $2,109.09.

Assessment of monies owing from January 27 to July 3, 2008

[26] Ms. Daub provided the following calculations of wages and bonuses the Plaintiff would have been entitled to from February 1, to July 3, 2008:

Time Period	Base Pay	Bonus	Balance
February	$3,000.00	$ 21.89	$ 3,021.89
March	$3,000.00	$ 167.37	$ 3,167.37
April	$3,000.00	$ 821.82	$ 3,821.82
May	$3,000.00	$ 50.00	$ 3,050.00
June	$3,000.00	$ 105.57	$ 3,105.57
		Total:	$16,166.65

[27] The Plaintiff does not dispute the accuracy of these calculations. He testified that Ms. Daub's calculations as to bonus monies due are all that he has to go on.

[28] I note that the actual term of the Contract was from January 3 to July 3, 2008. I am satisfied, however, that in all the circumstances, it is appropriate to deal with an assessment of damages that covers the period from February 1 until June 30, 2008.

[29] The Plaintiff provided evidence that he owes $300.00 to Mr. Timpany for an unpaid oil bill. I will deduct this amount from the amount owing to the Plaintiff by the Defendant.

[30] Therefore, the balance of monies owed by the Defendant to the Plaintiff as of July 1, 2008 is $13,757.56, subject to my findings on the efforts made by the Plaintiff to mitigate his losses.

Issue #3: Mitigation of Damages

[31] The Defendant takes the position that the Plaintiff did not mitigate his damages by either expending all reasonable efforts to look for work in the Yukon, or, alternatively, by not returning to his home in Vancouver where work was easier to obtain.

[32] It is clear in law that a Plaintiff has a duty to take all reasonable steps to mitigate any losses suffered as a result of a breach of contract. In the context of a breach of an employment contract, there is a duty on the Plaintiff to take reasonable steps to find alternative employment. Damages will not be awarded to a Plaintiff for any losses attributable to a failure to take such steps.

[33] The onus is on the Defendant to prove that the Plaintiff has failed to take reasonable steps to mitigate the losses suffered as a result of the breach of contract. (See ***Michaels*** v. ***Red Deer College*** (1975), 57 D.L.R. (3d) 386 (S.C.C.), at pp. 9-10).

[34] The Plaintiff remained in the Yukon after his contract with the Defendant was terminated. He testified that he stayed for two reasons: 1) to explore his options in the Yukon to see what he could obtain for work, and 2) to commence this litigation.

[35] There was also the evidence at trial that the Plaintiff had sub-leased his residence in Vancouver for six months from January to July, 2008, on the basis of the six month Contract in the Yukon with the Defendant.

[36] The Plaintiff earned $7,715.36 in income from working in the Yukon between January 27 to approximately June 9, 2008, as follows:

a. 188 hours for Northern Native Broadcasting Yukon from March 3-April 4, with insurable earnings of $4,299.76;
b. 35.5 hours for the Available Light Film Festival from March 1-9, earning $710.00;
c. 11 hours for the Yukon Arts Centre on April 3-4, earning $171.60;
d. 17 hours for Aasman Brand Communications, earning $434.00, invoiced May 1, 2008;
e. 35 hours for Carcross/Tagish First Nation, earning $600.00, invoiced May 5, 2008;
f. Trondek Hwech'in, earning $300.00, invoiced May 28, 2008;
g. Jessica Hall, earning $200.00, invoiced May 28, 2008; and,
h. First People's Performances, earning $1,000.00, invoiced May 31, and July 20, 2008.

[37] He made several contacts while in Whitehorse in order to seek work: WHTV (Whitehorse Television), Yukon Arts Centre, Eclectic Video Productions, Yukon Film and Sound Commission, Photovision, and Zero Gravity Inc.

[38] He did not apply for work at several locations, including, but not limited to: Sunstone, Nakai Theatre, Guild Hall Theatre, and Treeline Productions.

[39] The Plaintiff agreed that the work in Yukon was sporadic; sometimes plentiful and sometimes not. He further agreed that Vancouver was the hub for the type of work he was qualified to do. In closing submissions, which are not evidence *per se*, the Plaintiff stated that in order to acquire work in the Yukon after January 26, he “low-balled” himself and the work he was paid for is not fully representative of the actual work he put in.

[40] The trial in this matter occurred on June 2, 2008. The Plaintiff left Whitehorse approximately one week after the trial and returned to Vancouver. He did not look for work in the Yukon the last week that he was in Whitehorse, other than to contact the Vancouver Film School by telephone.

[41] He testified that after returning to Vancouver, he spent a week on the internet searching in Vancouver for jobs and e-mailing potential sources of work.

[42] He was unable to obtain any work or contracts in Vancouver, and from June to July he had no income. He had saved some money, so he spent some of this time reorganizing. He also borrowed $500.00 to assist himself financially. He stated that although Vancouver may have been the hub of the industry, it was still difficult to find work.

[43] Considering all the circumstances, I find that it was reasonable for the Plaintiff to attempt to find work in the Yukon after the Contract was terminated. It would not be reasonable to require him to have immediately returned to Vancouver and look for work there, in order to mitigate his losses.

[44] I further find that the Plaintiff made reasonable efforts to secure what work that he could in the Yukon, and that he continued to do so until this matter proceeded to trial.

[45] I also find that it was reasonable for him to spend a week in Whitehorse immediately after the June 2 court date, not actively seeking employment but making arrangements to return to Vancouver was reasonable.

[46] Finally, I find that his inability to secure work while in Vancouver for the balance of June, 2007 cannot be said to be due to a failure on his part to take reasonable steps. There is no evidence that work was immediately available in Vancouver, and the evidence of the Plaintiff is that he made some efforts.

[47] As such, I find that the Defendant has not discharged the onus upon him to establish that the Defendant failed to mitigate his damages.

[48] Therefore, in considering the duty to mitigate, the $7,715.36 earned by the Plaintiff will be deducted from the monies owed by the Defendant to the Plaintiff. There will be no further reduction.

Conclusion

[49] The Plaintiff is awarded damages for breach of contract in the amount of $6,042.20. Pre-judgment interest is awarded pursuant to the *Judicature Act*, R.S.Y. 2002, c. 128 from October 20, 2008. Post-judgment interest is awarded pursuant to the *Judicature Act*.

[50] The Plaintiff is further awarded $100.00 for the preparation and filing of pleadings, as well as disbursement costs as assessed by the clerk of the court.

Cozens T.C.J.