IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *Larochelle* v. *North Yukon Renewable Resources Council* 2006 YKSC 06

Date: 20060120
Docket No.: S.C. No. 04-A0065
Registry: Whitehorse

Between:

CONNIE LAROCHELLE

Plaintiff

And

NORTH YUKON RENEWABLE RESOURCES COUNCIL

Defendant

Before: Mr. Justice W.M. Darichuk

Appearances:

E. Joie Quarton — Counsel for the Plaintiff
Daniel S. Shier — Counsel for the Defendant

REASONS FOR JUDGMENT

INTRODUCTION

OVERVIEW

[1] Asserting negligent misrepresentation, unjust enrichment, breach of contract and/or wrongful dismissal on the part of the defendant in respect to her employment as its Executive Director in the settlement of Old Crow, Yukon, the plaintiff seeks, in both contact and tort, special and general damages. The issues to be determined concern, not only the sufficiency of the evidence to sustain any award of damages, but as well, the sufficiency of the pleadings to frame an action for breach of contract.

[2] At the commencement of the trial, the defendant acknowledged (a) its liability for the payment of $800.00 for moving expenses (b) an additional sum of $2,899.71 for wages and (c) that its counterclaim be struck for failure to provide particulars thereof by October 14, 2005.

PRELIMINARY ISSUE

Do the plaintiff's pleadings limit her claims to negligence and unjust enrichment?

[3] The defendant submits that "… There is no allegation that an actual breach of contract occurred". Absent such an allegation in the Amended Statement of Claim, the plaintiff "is limited to claiming in negligence and unjust enrichment".

[4] Rule 19(1) of the *Rules of Court* provides:

> (1) A pleading shall be as brief as the nature of the case will permit and must contain a statement in summary form of the material facts on which the party relies, but not the evidence by which the facts are to be proved.

[5] A review of the Amended Statement of Claim does not favourably endorse the defendant's submission. Aside from other references to her employment agreement in her pleadings, paragraphs 16 and 29 specifically contain the following statements, respectively, "… The negligent representations of the Defendant to the Plaintiff constitute a breach of contract by the Defendant" and "By reason of the Defendant's … breaches of contract … the Plaintiff has suffered deprivation, loss and damages, particulars of which include the following: …".

[6] As noted by Robins, J.A. in *Wallace v. Toronto-Dominion* Bank (1983), 41 O.R. (2d) 161 at p. 179:

> "Pleadings are meant to provide a party with notice of the case to be met; a defendant is entitled to know what the plaintiff asserts against him and to be in a position to direct evidence to the issues disclosed by the pleadings; this is fundamental. …"

[7] The Amended Statement of Claims meets this test. Had the defendant required the plaintiff to specifically quantify all damages alleged to be attributable to the "breaches of contract", it could have sought further and better particulars pursuant to the *Rules of Court.* However, it is evident from paragraphs 16 and 29 that damages (some of which had been particularized) were being claimed by the plaintiff for breaches of contract. As these paragraphs specifically provide the defendant with notice of what is being claimed, the plaintiff is not limited in advancing her claims restricted to "… negligence and unjust enrichment".

BACKGROUND

[8] The plaintiff, who had previous experience working in a small, isolated community, applied for an advertised position of Executive Director for the defendant. The application was by way of a letter dated January 14, 2004, addressed to its then Executive Director, Mr. Birch Howard ("Howard"). Her *curriculum vitae*, enclosed with her application, indicated that she had related volunteer and work experience and, as well, possessed the requisite financial, management and administrative skills for the position.

[9] On January 28, 2004, following telephone conversations, inquiries and discussions with Howard, the plaintiff was interviewed over the phone by members of

the defendant. Shortly thereafter she was offered the position. She declined to accept it due to her concerns respecting the adequacy of the salary to maintain her family and availability of employment in the community for her spouse. In response to her latter concern, by way of e-mail and faxed messages, Howard directed her attention to six potential postings for her spouse. Further discussions and proposals between the parties culminated in a written agreement dated February 6, 2004.

[10] According to the testimony of the plaintiff, immediately following her arrival in the community on February 5, 2004, she commenced her training in the company of Howard at his office. She examined financial statements and research projects to determine how Howard had prepared them. Howard remained to assist her for three days, not only in regard to her office duties, but in showing her available housing accommodation. She remained in the community and discharged duties required of her until she left to complete a residency program in environmental management at the Royal Roads University in Victoria, B.C. on February 12, 2004.

[11] The Employment Agreement executed by the parties reads, in part:

> 1.0 Description of Services
> 1.1 The Employee hereby agrees to provide the following services to the RRC:
> 1.1.1. The duties as outlined in a description of requirements, …
>
> 2.0 Length of Employment Term
> 2.1 … this Agreement shall be in effect for a period of twelve months; …
>
> 7.0 Termination of this Agreement
> Either party may terminate this Agreement for cause or breach of Agreement, and either party to this Agreement may terminate the Agreement on the expiration of 15

> working days after written notice to terminate is delivered to either party. A severance payment of 15 working days pay may be made in lieu of notice in the event that the working relationship is to be terminated immediately. …
>
> 9.0 Completeness of the Agreement
> The Employee and the RRC acknowledge reading and understanding this Agreement and agree to be bound by the terms and conditions. Further, the Employee and the RRC agree that it is the complete statement of the agreement between the parties and supersedes all proposals or prior agreements, written or oral, and all other communications between the parties relating to the subject matter of this contract.

[12] The duties of the plaintiff, as set forth in the document annexed to the Agreement and entitled “Description of Requirements – Executive Director/Secretariat commencing February 6th, 2004 - North Yukon Renewable Resources Council” were detailed under the headings of “Research”, “ Meetings”, “Finance”, “General Administration” and “Public Consultation”. The following duties were specified under the heading of “Finances”:

> Finance
>
> Financial duties as necessary to fulfill obligations of the Final Agreement and Contribution Agreement:
>
> - Prepare annual budgets for approval;
> - Prepare books for annual audit;
> - Accounts payable and receivable;
> - Banking and reconciling bank statements;
> - Tracking honoraria and travel expenses;
> - Prepare periodic financial statements and reports (quarterly/yearly);
> - Prepare payroll, WCB and GST
> - Vigilantly pursue funding opportunities or assistance for the RRC to carry out its mandate.

[13] For more than one reason, the plaintiff’s claim in tort cannot succeed.

[14] The five constituent elements of the tort of negligent misrepresentation were considered by the Supreme Court of Canada in *Queen v Cognos*, [1993] 1 S.C.R. 87 ("Cognos"). At page 110, Iacobucci J. states:

> "(1) there must be a duty of care based on a "special relationship" between the representor and the representee; (2) the representation in question must be untrue, inaccurate or misleading;(3) the representor must have acted negligently in making said misrepresentation; (4) the representee must have relied, in a reasonable manner, on said negligent misrepresentation; and (5) the reliance must have been detrimental to the representee in the sense that damages resulted. …"

[15] In *Cognos*, *supra*, pre-employment representations were made by the employer to the respondent during the course of a hiring interview for the development of a project. By the representations held out to the respondent, funding for the project appeared secure. The level of risk of his employment being terminated or being transferred was low. He was advised that the project was major in nature; the subject position was needed throughout the period and staff would be doubled. At no time was he made aware of the fact that there was no guaranteed funding for the project or that the position he applied for was subject to budgetary approval. Were it not for these representations, the respondent would not have left the secure employment that he enjoyed at the time or signed the contract of employment. The representations, which concerned both the nature and existence of the employment, turned out to be negligently made and false. The project cost estimate was considered, for the first time, two weeks after the respondent commenced employment.

[16] The aforesaid written employment agreement contained a clause which permitted the employer to terminate the employment, without cause, upon one month's

notice, or payment of one month's salary in lieu of notice. A further clause permitted the employer to reassign the respondent to a different position upon similar notice or payment. These clauses do not focus on pre-contractual representations but concerned rights and obligations of the parties on termination of the agreement.

[17] Although the contract signed by the respondent herein contains a similar clause concerning termination of employment, significantly, the employment agreement between the parties contains clause 9.0, supra. This clause acknowledges the completeness of the agreement between the parties and specifically provides that it "… supersedes all proposals or prior agreement, written or oral, and all other communications between the parties relating to the subject matter of this contract". (Underlining mine). Howard was present when this agreement was signed by the plaintiff. As he noted in his testimony, there did not appear to be any confusion on the part of the plaintiff as she explained its terms to council members.

[18] However, the effect of clause 9.0 aforesaid, is to exempt the defendant from tortious liability. Even assuming Howard had negligently misrepresented the security or certainty of the defendant's funding, the effect of this clause is to negate the requisite duty of care and specifically disclaim and extinguish tortuous liability arising from such representations. As noted by LaForest and McLachlin, JJ. (as she then was) at p. 26 in *BG Checo International Ltd.* v. *British Columbia Hydro and Power Authority,* [1993] 1 S.C.R. 12.,

> In our view, the general rule emerging from the Court's decision in Central Trust Co. v. Rafuse, [1986] 2 S.C.R. 147, is that where a given wrong prima facie supports an action in contract and in tort, the party may sue in either or both, except where the contract indicates that the parties intended

> to limit or negative the right to sue in tort. This limitation on the general rule of concurrency arises because it is always open to parties to limit or waive the duties which the common law would impose on them for negligence. This principle is of great importance in preserving a sphere of individual liberty and commercial flexibility. … So a plaintiff may sue either in contract or in tort, subject to any limit the parties themselves have placed on that right by their contract. …

[19] Further, even assuming that the requisite duty of care was established, the preponderance of the evidence does not establish that Howard knowingly made false and/or inaccurate representations concerning funding when the existing ten-year agreement ended on March 31, 2004. On the contrary. Howard had every reason to believe, as early as October 2003, from comments made by Cathy Constable, the Director of Claims Implementation Secretariat, YTG, that requisite interim funding would be provided by the Yukon Government in anticipation of a renewal of the Contribution Agreement.

[20] Aside from over-draft banking privileges, his testimony that "I was satisfied there were enough funds to hire an Executive Director …" is supported by statements made by government officials, not only orally, but in writing. His testimony concerning funding and statements made to him were summarized in his letter to the plaintiff, as secretariat of the defendant and members (present and some past members) dated April 19, 2004 he states, in part:

> "In May of 2003, I brought up the concern that there was a possibility that funding to the RRC might be reduced for 2004/2005, due to the fact that Council had received 1 year of funding for the first 1 ½ months of Operation (February 14th, 1995) and then another full year of funding on April 1st,1995. It was seen by the Members that the option of reducing the budget for the 2003/2004 fiscal year and making it "stretch" over a 2 year period (to safeguard against

> the possibility of running out of money in 2004/2005) would seriously impede the functionality of the Council. It was decided to keep the Council's original budget and to plan as though we would be receiving the full amount of the Contribution Agreement on April 1st.
>
> Later in October, during the RRC Annual Workshop in Old Crow, Cathy Constable (Director of Implementation, Land Claims and Implementation Secretariat, YTG) identified that negotiations were ongoing, but that the Yukon Government would front the funds to the RRC in anticipation of the Contributing Agreement, which would be negotiated sometime later. This was followed up with a letter from Allan Kaprowsky (Manager of Claims Implementation and Aboriginal Affairs, YTG) stating that the Yukon Government would pay the full amount of the Contribution Agreement (roughly equivalent to last year's funding amounts) to the North Yukon RRC, and that the reporting requirements (audit, annual report, and budget/work plan) would remain the same. This was echoed in a conference call on the second week of March, 2004, between Allan Kaprowsky and representatives from the other RRCs and YF&WMB. If I had some advance warning that the Council would not be receiving adequate funding on April 1st (as guaranteed in the Vuntut Gwitchin Final Agreement, by Cathy Constable, and in writing by Allan Kaprowsky), I would have suggested quite strongly that the council might want to reconsider hiring a replacement until funding was again secured. I see these events as being completely beyond my control and, while they are unfortunate, not necessarily devastating to long-term functionality of the North Yukon RRC."

[21] The letter dated December 1, 2003, from Allan Koprowsky to the defendant and others confirms Howard's assertions concerning the contribution funding arrangements for the 2004/2005 fiscal year. It reads in part:

> "…further to discussion at the annual meeting in Old Crow on October 22, 2003, I provide the following confirmation of funding agreements applicable for the 2004/2005 fiscal year.
>
> The Department of Environment, on behalf of the Yukon government, will enter into a renewed contribution agreement with … North Yukon … Councils for a one-year period. … Councils are requested to submit budgets, as

> usual, for processing and approval to support the payment of contribution funds by April 1, 2004.
>
> As you are aware, Canada agreed to an increased level of funding to the Council's for the fiscal years 2002/03, 2003/04 and 2004/05 ($20K and $25K for the North Yukon RRC) and workplans are required as per previous arrangements.

[22] It is not without significance that the plaintiff's previous employment came to an end due to lack of funds; that the employment agreement with the defendant was not signed by her until the day following her arrival at the community of Old Crow; that prior to the execution of the agreement, she attended her predecessor's office where she had the opportunity to read the aforesaid letter from Koprowsky and examine all fiscal and other documents; that she failed to make appropriate inquiries despite acknowledging that from prior experience she was aware that "sometimes funding is delayed" and that she was a participant with Howard and other members of the defendant in a conference call with Allan Koprowsky on March 11, 2004.

[23] The difficulties presented by a one-year agreement and with continuing negotiations for a further ten-year agreement, were noted in the minutes of this call, as well as "…cash flow challenges to the RRC". As of the next council meeting of the defendant held March 18, 2004, the cash flow and other financial difficulties of the defendant were such that the defendant did not have sufficient funds to pay her salary. When she realized that (a) the defendant had only $10,000.00 of funding left for the entire year and out of these funds council members indicated several outstanding accounts should be paid, (b) there appeared to be open purchase orders and (c) the bank account was overdrawn, she "stopped working" for the defendant. Confirmation for the reasons for termination of her employment is contained in the first paragraph of her letter dated April 27, 2004, to the Members, Chair and Vice Chair of the defendant:

> "A number of events have led to the breach of the above contract. After issuing the final pay and holiday pay to the Departing Executive Director along with paying a number of other accounts payable, the NYRRC did not have the funds to issue me pay beyond March 19, 2004."

[24] As the defendant was unable to pay her salary after March 19, 2004, it breached a fundamental term of the contract and the plaintiff was justified in repudiating her contract of employment. Constructively dismissed from her employment, she is entitled to the benefits of the contract respecting severance pay and unpaid wages. In passing, it is to be noted that the circumstances precipitating the termination of her employment fall markedly short of establishing conduct on the part of the defendant that would attract an award for punitive damages pursuant to the decision of the Supreme Court of Canada in *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701.

[25] The Employment Agreement specifically allowed either party to terminate the agreement *"…for cause or breach of Agreement"* under Paragraph 7.0. and provided that "A severance pay of 15 working days of pay may be made in lieu of notice in the event that the working relationship is to be terminated immediately." In accordance with this provision, she is entitled to an award of damages equivalent to 15 working days of pay.

[26] Dealing with claims for damages in tort and contract, LaForest and McLachlin, JJ. (as she then was) state at page 37 of their judgment in *BG Checo International Ltd. v. British Columbia Hydro and Power Authority,* supra:

> The measure of damages in contract and for the tort of negligent misrepresentation are:
>
> Contract: the plaintiff is to be put in the position it would have been in had the contract been performed as agreed.

> Tort: the plaintiff is to be put in the position it would have been in had the misrepresentation not been made.

[27] As the efforts of the plaintiff to mitigate her damages following termination of her employment until she left the community on May 3, 2004, were reasonable and she "…was not paid for all the hours she worked before leaving Old Crow, nor did she work all the hours she would have worked if her employment had not been terminated on March 26, 2004", in addition to the award for severance pay she is entitled to a further award, of $2,445.70 to place her in the position she "… would have been in had the contract been performed as agreed." (This amount is based on the Plaintiff's time sheets and summarized by her learned counsel in Appendix 1 of her written submission. A copy of this Appendix is attached hereto.) Other costs, such as the accommodation costs in Beaver Creek and board costs for her daughter in Kamloops are disallowed. Had the contract been performed as agreed, no liability for payment of such costs would exist on the part of the defendant.

[28] On March 26, 2004, the plaintiff applied for employment insurance benefits. Under the heading of "COMMENTS" on the form entitled Record of Employment, signed by the Chairperson of the defendant was recorded "*delayed core funding required to pay salary & associated costs; funding arrival date not confirmed as of yet".* Two weeks later she commenced to receive employment insurance benefits.

[29] She testified that she didn't want to leave the defendant "high and dry" so she volunteered her services and continued to discharge the duties of the office of Executive Director of the defendant. Pending receipt of bridge funding, the plaintiff was requested to "keep track" of her hours of work as a volunteer. She has not received payment for all these hours and other hours to which she is entitled to be compensated, despite bridge

financing funds subsequently received from Vuntut Gwitchin First Nation for "…*administrative purposes - essentially to compensate your Executive Director for her professional services and to pay for other office charges (phone, fax, e-mail, etc.) until the Yukon funding is received by the Council".*

[30] According to Robert A. Bruce, a council member of the defendant, when cheques payable to the plaintiff were presented to the chairperson for signature for her services rendered subsequent to her resignation, he declined to sign them on the basis that the plaintiff had performed these services as a volunteer and was receiving insurance benefits for her time expended for such purpose.

[31] The basis of the plaintiff's claim for unjust enrichment is that she "… is entitled to be paid for the hours that she worked after her employment had been terminated" and "… In addition, the Defendant was unjustly enriched by receiving both the benefit of the Plaintiff's work and the bridge funding which was loaned to them for the purpose of paying the Plaintiff."

[32] The test for unjust enrichment has three elements: (1) an enrichment of the defendant, (2) a corresponding deprivation of the plaintiff, and (3) an absence of juristic reason for enrichment. See *Pettkus v. Becker,* [1980] 2 S.C.R. 834*,* at p. 848 and *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762 at 784*.* Even assuming that the loan qualified as an "enrichment of the defendant", the second and third prongs of the test have not been satisfied. Aside from the receipt of employment insurance benefits for the services she performed, the plaintiff was not legally entitled to the proceeds of the bridge financing. Accordingly, there was no "corresponding deprivation". Even further assuming the first and second prong having been satisfied, the donation of her

services constitutes a sufficient juristic reason for enrichment on the part of the defendant.

[33] In the result, the plaintiff will have judgment in the amount equal to her entitlement for severance pay pursuant to Paragraph 7 of the Employment Agreement plus the sum of $2,445.70. In addition, she is awarded pre-judgment interest in accordance with the relevant provisions of *The Judicature Act*, R.S.Y. 2002, c.128 on both sums.

[34] Failing agreement, counsel may secure a date from the Office of the Trial Co-ordinator to address the issue of costs.

DARICHUK J.

Appendix 1-Wage Loss

Time Worked and Wages **Owing**

(based on Plaintiffs time sheets, Exhibit 1, Tab 6)

March 20 - 26. 2004

The Plaintiff worked and was paid for 41 hours @ $21/hr.

March 27 - 31. 2004

The Plaintiff worked 31.5 hours, but was only paid $315.00

(which represents payment for 15 hours).

The Plaintiff should have been paid for the balance of hours she worked plus the additional hours up to 37.5 which she did not work.

31.5 @ $21 = $661.50 - $315.00 paid = $346.50 owing. $ 346.50

Plus: 37.5 - 31.5 = 6 hours not worked.

6 @ $21 = $126.00. $ 126.00

April 1 - 12. 2004

The Plaintiff worked 47.3 hours.

The Plaintiff was paid for 43.25 hours @ $21 = $908.25.

47.3 @ $21 = $994.87- $908.25 paid = $86.62 owing. $ 86.62

In addition, the Plaintiff should have worked 60 hours between April 1 - 12.

Plus: 60 - 47.3 = 12.7 hours not worked.

12.7 @ $21 = $266.70. $ 266.70

April 13 - 16. 2004

The Plaintiff was not able to work in the office because of the fumes.

The Plaintiff should have been paid for 30 hours @ $21 =$630.00 $ 630.00

April 19 –25,2004

The Plaintiff worked and was paid for 58 hours - no wages owing.

April 26 - 30. 2004

The Plaintiff did not work and was not paid.

The Plaintiff should have been paid for 37.5 hours @ $21 = $787.50 $ 787.50

Appendix 1 (continued)

May 2 - 5. 2004

The Plaintiff should have worked 4 days @ 7.5 hrs/day x $21 = $630.00	$ 630.00
TOTAL WAGES OWING:	$2,873.32
Plus: Vacation pay @6%	$ 172.38
TOTAL:	**$3,045.70**
Less: Work at Yukon College	$ 600.00
Wages owing:	**$2,445.70**

Please note that where there is reference to wages having been paid, this refers to the wages paid by the Defendant in February 2005 (Exhibit 2).