Citation: *Young* v. *ElderActive Recreation Association*, 2007 YKSM 4

Date: 20071130
Docket: T.C. 06-S0117
Registry: Whitehorse

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

JOYCE YOUNG

Plaintiff

v.

ELDERACTIVE RECREATION ASSOCIATION

Defendant

Appearances:
Joyce Young — Appearing on her own behalf
Sharleen Dumont — Counsel for Defendant

REASONS FOR JUDGMENT

[1] LUTHER T.C.J. (Oral): The Court is prepared to give its decision in the civil case involving a plaintiff, Joyce Young, and defendant, ElderActive Recreation Association. This was a case that was heard in the Small Claims Court of the Territorial Court of the Yukon. The amended claim was filed on the 11th of September 2007. The reply to the original claim was filed back in March. The evidence in this matter was heard yesterday, and the Court heard the arguments of both the plaintiff and the

defendant's counsel, and undertook to give a decision today. Indeed, the decision is ready to be delivered.

[2] The facts are as set out in the agreed statement of facts, signed and dated November 16, 2007. In addition, the Court heard evidence yesterday from the plaintiff and her two witnesses, Doug Graham and Marjorie Rogers. The defendant had one witness, William Simpson. The Court is not going to rule nor comment on every issue that was raised in this case; some of them are rather peripheral.

[3] The central issue is whether or not the plaintiff resigned or was constructively dismissed. While the plaintiff undoubtedly felt slighted and deeply hurt as a member of an association of which she was the founding president, this case in no way turns on her rights as a member. The Board was dealing with her as a paid employee. Her membership was not an issue. In my view, this is clearly not a case where there was a fiduciary duty owed by the Board to the plaintiff. The relationship was one of employer and employee.

[4] This case is very dissimilar to *Hodgkinson* v. *Simms,* [1994] S.C.J. No. 84 (QL), because the plaintiff there relied on the defendant's financial advice. The defendant failed to disclose a conflict of interest and benefited thereby.

[5] Fiduciary duty is discussed by the Supreme Court of Canada in a number of recent cases, including *Wewaykum Indian Band* v. *Canada,* [2002] S.C.J. No. 79, 2002 SCC 79 (QL), and also *Ross River Dena Council Band* v. *Canada*, [2002] S.C.J. No. 54, 2002 SCC 54 (QL), and it talks about the fiduciary duty owed by the Crown to Indian Bands. There is also discussion of fiduciary relationship in *Gladstone* v. *Canada*

(Attorney General), [2005] S.C.J. No. 20, 2005 SCC 21 (QL), and in that case it was held there was no fiduciary relationship.

[6] Another interesting case from the Supreme Court of Canada called *Named Person* v. *Vancouver Sun*, [2007] S.C.J. No. 43, 2007 SCC 43 (QL), and at paragraph 138:

> …the Law Society quite rightly pointed out that a lawyer's relationship with his or her client is a fiduciary one, as this Court reaffirmed in a recent judgment (*Strother* v. *3464920 Canada Inc*., 2007 SCC 24), and that for this reason, the lawyer has a duty to disclose to his or her client any relevant information that he or she may properly disclose (*R* v. *Henry* (1990), 61 C.C.C. (3d) 455 (Que. C.A.), at pp. 464-65). This duty to disclose serves a number of purposes, one of which is to enable the client to give informed instructions to the lawyer. Another is to protect the integrity of the solicitor-client relationship. This duty is so important that, according to some, a lawyer who is unable or unwilling to discharge it must refuse or cease to represent the client in question (*Spector* v. *Ageda*, [1971] 3 All E.R. 417 (Ch. D.), at p.430).

[7] The Supreme Court also dealt with this concept in *Peoples Department Stores Inc. (Trustee of)* v. *Wise,* [2004] S.C.J. No. 64, 2004 SCC 68 (QL). In that case, they were dealing with s. 122(1) of the *federal Act* dealing with bankruptcies, and that case at s. 122(1) says:

> Every director and officer of a corporation in exercising their powers and discharging their duties shall
>
> (a) act honestly and in good faith with the view to the best interest of the corporation; and
>
> (b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.
>
> The first duty has been referred to in this case as the "fiduciary duty". It is better described as the "duty of loyalty". We will use the expression "statutory fiduciary duty" for purposes of clarity when referring to the duty under the CBCA. This duty requires directors and officers to act honestly and in good faith with a view to the best

> interest of the corporation. The second duty is commonly referred to as the "duty of care". Generally speaking, it imposes a legal obligation upon directors and officers to be diligent in supervising and managing the corporation's affairs.
>
> The trial judge did not apply or consider separately the two duties imposed on directors….

[8] Furthermore, the Supreme Court of Canada talked about a case that was mentioned in one of the authorities mentioned by the plaintiff, that is, of *Lac Minerals Ltd.* v*. International Corona Resources Ltd*., [1989] S.C.J. No. 83 (QL). In *Lac Minerals*, La Forest noted that there are certain common threads running through fiduciary duties that arise from relationships marked by discretionary power and trust, such as loyalty and "the avoidance of a conflict of duty in interest and a duty not to profit at the expense of the beneficiary." In this case, I would note that there is no evidence that the Board of Directors profited at the expense of the plaintiff.

[9] Overall the Court determines that there is no fiduciary duty from the Board to the employee, but even if I am wrong in this determination, there is no evidence whatsoever that the Board benefited at the plaintiff's expense.

[10] As to the plaintiff's concern that the Yukon Government was wanting more control and more financial information, this was obviously of concern to the Board. The old adage "He who pays the piper calls the tune" is somewhat in play. The Board wanted to satisfy the major donor; by doing so, it was not disloyal to the plaintiff.

[11] As to the constitutionality of the Board, I feel it necessary to make some comments on that. The Court reviewed the constitution of the ElderActive Recreation Association, as found in tab 2 of the blue book, and notes that in 8.10 and 8.13, there is

some informality, and also in 8.14(a), members can demand a Special General Meeting without delay. There are various articles dealing with the executive committee and the Board of Directors. There may well have been a deficiency in the formal makeup of the executive committee and the Board in early 2004, but we have to remember that this was a volunteer organization. The Games were coming up in several months, there was a certain urgency to the work of the Board and the work of the plaintiff. The plaintiff did not, in this time frame, challenge the makeup of the Board. She, in fact, chaired some meetings, including the meeting of February 17, 2004, found in tab 6, and actively addressed the special meeting on April 2nd. The Board, in fact, recognized this problem by having people serve on a pro-tem basis until the AGM in May. In my opinion, the plaintiff is estopped from now claiming constitutional irregularities and that the decisions of the Board were *ultra vires*.

[12] As to the main issue of constructive dismissal, the plaintiff maintains that she was harassed and embarrassed, and that she suffered a loss of prestige and her role became subservient. She claims that going from chair administrator to a staff person was totally unacceptable.

[13] The plaintiff's situation is worlds apart from that of David Farber, as set out in *Farber* v. *Royal Trust Co.*, [1997] 1 S.C.R. 846. Mr. Farber was about to suffer a substantial loss of income in the transfer to the Dollard-des-Ormeaux branch, one of the most problematic and least profitable in the province. It is also interesting to note that Mr. Farber had worked for the defendant for 18 years. In paragraph 24 of that decision, the Court stated:

> Where an employer decides unilaterally to make substantial changes to the essential terms of an employee's contract of employment and the employee does not agree to the changes and leaves his or her job, the employee has not resigned, but has been dismissed.

[14] It is my view that a reasonable person in the same situation as the plaintiff would not have felt the essential terms of the employment contract were being substantially changed. The defendant was only in existence since 2000. The plaintiff was employed as executive director in 2002. The plaintiff was appointed as chair administrator starting January 1, 2003.

[15] The facts here are also much different than in *Vorvis* v. *Insurance Corporation of British Columbia*, [1989] 1 S.C.R. 1085 (QL), where a valued employee was now going to be subject to weekly productivity meetings which degenerated into a form of inquisition. Also decidedly different, the case of *Farquhar* v. *Butler Brothers Supplies Ltd*. (B.C.C.A.) [1998] B.C.J. No. 191 (QL), where there was an eight-year employment history and a substantial cut in salary.

[16] In *Hainsworth* v. *World Peace Forum Society*, 2006 BCSC 809, there was a change in reporting (no longer to the Board), access to the Board was to be limited, and the new person she was to report to, Mr. Keighley, ordered her to his office and demanded that she decide right then and there if she was going to accept the new position. Furthermore, Mr. Keighley changed the password in the computer of the society which the plaintiff was using.

[17] In the *Hainsworth* case, at paragraph 37, there was reference to *Assouline* v. *Ogibar Inc.* (1991), 39 C.C.E.L. 100 (B.C.S.C.):

> …there was a heated disagreement between the worker and the employer and over the telephone the worker told the employer that if the employer did not honour its contractual commitments, he would no longer be able to work for them. The employer took the position that those words constituted a resignation but the court held:
>
> > Given all the surrounding circumstances, would a reasonable man have understood the plaintiff's statement that he had just resigned? The test is an objective one. Having considered the parties' testimony, the context of the telephone conversation, the dispute over contractual terms, and the fact that other employees were questioning the contractual terms regarding commissions, a reasonable man would have interpreted the plaintiff's remarks as a statement as to future options.

[18] The plaintiff, according to her own evidence and that of Ms. Rogers, was increasingly frustrated by the Board. Both Ms. Rogers and the plaintiff were concerned that the Board members were not taking their positions seriously. Ms. Rogers in particular tried to educate the Board. In December 2003 she resigned. She was nervous and concerned about her national reputation. Interestingly, Ms. Rogers said that the plaintiff was not getting the response from the Board that she needed.

[19] The Court has read and re-read the letter of March 29, 2004, and in its letter, the Board acknowledged that it has "not been fulfilling our responsibilities." The Board set out what it needed. The financial information sought was not unreasonable in terms of extent, nor timing. The Board was properly concerned about finances. The plaintiff had suggested that the last paragraph of that letter should be construed as a threat. This paragraph says:

> Furthermore, it should be understood that the position of General Manager is dependent on funding. With the above information and a reporting schedule, the Board of Directors for the ElderActive Recreation Association will be able to give more assistance to the

> General Manager and monitor the progress of the games organization and the costs incurred as per our contract.

[20] Given her feelings at the time, one might understand to an extent an interpretation by the plaintiff that this was a threat, but when you read the letter as a whole, coupled with what was going on at the time and the concerns that the government had, the Court does not read this as a threat. In my view, this letter was well-written and set out clearly what the Board's intentions were.

[21] The plaintiff had been frustrated for a few months. She became even more so after the March 25, 2004 meeting at the Westmark, when it had been brought to her attention that Sue Meikle had brought to William Simpson's attention that the plaintiff had contacted several ministers regarding problems with the Games. Even at this meeting, the plaintiff indicated she was considering resigning her position as Games Manager. The Board's letter of March 29th and Sue Meikle's e-mail of the same date undoubtedly affected the plaintiff. On March 31st, she sent an e-mail as per tab 16:

> To whom it may concern:
>
> Please consider this document as my resignation from the employ of the ElderActive Recreation Association as the General Manager for the 2004 Canada Senior Games. As this resignation has implications for both the Board and for me, I would like to meet with the following Board members to discuss this.

She lists several names.

> The name left off is deliberate and must be that way for this meeting. I am sure that we can come to an amicable solution, but I will no longer serve as a "staff" person for the ElderActive Recreation Association.

[22] Following that, the plaintiff attended a meeting on April 2, 2004, and the evidence discloses the tone of the meeting, who was there, where it was held. In my view, there

is no evidence that the Board harassed her. They did clearly ask that she sign the resignation e-mail, which, in fact, she did. Again, based on the evidence, the Court does not feel that the plaintiff was intimidated at this meeting. Clearly, she had two days to reflect on the e-mail which she had sent. In that time frame, she could easily have sought legal advice. She easily could have told the Board at the meeting that the e-mail was a protest or a bargaining strategy, but instead she chose to go ahead and sign the e-mail, this correspondence of resignation. It is my view that she chose to sign this of her own free will. With the signed resignation, the Board had every right to accept it, which, in fact, it did. The plaintiff, very unwisely, had very clearly resigned her paid position. In my view, this is obviously not a case of constructive dismissal. Her strategy of trying to change the employee position to that of a contract position backfired on her.

[23] On the issue of the overtime, there is no conclusive and specific evidence as to how many overtime hours were worked. Most certainly there were some, maybe many, but it is important to go to the wording of the contract of employment:

> We agree that these hours could far exceed a 40 hour week. At the end of this contract, an adjustment could be made to compensate her for this time. This arrangement would be between ERA and Joyce Young based on the financial success of the project.

[24] There is no evidence before me of time sheets submitted monthly. The plaintiff quit before October 31, 2004. There is no evidence before me of the financial success or otherwise of the project. Also note the use of the word "could"; there was not a firm commitment by the defendant to pay for overtime. Thus there will be no reward for overtime hours worked.

[25] For Joyce Young, the plaintiff, who was the founding president, the chief inspirational officer, and the heart and soul of the volunteers, this saga indeed must be very, very sad. It did not have to be this way. Her signed resignation sealed her fate. Accordingly, the plaintiff's action is dismissed.

[26] Is there anything further on this file for the defendant?

[27] MS. DUMONT: Nothing, thank you.

[28] THE COURT: Anything further then for you, Ms. Young?

[29] MS. YOUNG: Not at this time, Your Honour.

[30] THE COURT: Okay, that is fine. That is all for this afternoon.

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LUTHER T.C.J.