

SUPREME COURT OF NOVA SCOTIA
Citation: Irwin v. Sysco Halifax, 2010 NSSC 291

Date: 20100623
Docket: Hfx. No. 311662
Registry: Halifax

Between:

Heather Irwin

Plaintiff

v.

Sysco Halifax, a body corporate

Defendant

DECISION

Judge: The Honourable Justice Suzanne M. Hood

Heard: June 16, 2010, in Halifax, Nova Scotia

Written Decision: July 22, 2010 (*Written release of oral decision of June 23, 2010*)

Counsel: Peter M. Landry for the Plaintiff
Mark Tector for the Defendant

By the Court:

INTRODUCTION

[1] Heather Irwin was hired to complete a maternity leave term position with the defendant. The maternity leave employee did not return and another person was hired to fill the full-time position. Heather Irwin was offered other work for the balance of the term. She claims constructive dismissal. The defendant says there was no constructive dismissal and that she failed to mitigate her damages.

ISSUES

[2] The issues are constructive dismissal and mitigation.

FACTS

[3] Heather Irwin was hired by Sysco to be a Human Resources (“HR”) Generalist for a maternity leave. Her term of employment began on August 5, 2008 for a term ending on August 28, 2009. Taunia MacAdam said that Heather Irwin had called her for a reference. They had formerly worked together. She

subsequently offered her the term position. She said their discussion was very general about her duties because she herself was quite new to the job. As she herself put it, the HR Department was a mess.

[4] Heather Irwin signed a contract which set out the terms of her employment, salary, benefits, etc. She performed HR Generalist duties and understood everyone was happy with her work. The maternity leave employee resigned and the position became available around January 2009. Unbeknownst to Ms. Irwin, Taunia MacAdam contacted a woman with whom she had previously worked who was a HR Generalist and asked her to consider coming to work there. This was done around the beginning of February 2009. She then went on two weeks' vacation. Upon her return, the person she had contacted, Jennifer Meisner, advised her, on February 16, that she would in fact take the job.

[5] Ms. MacAdam got approval for funding to keep Heather Irwin on until the end of August which was the end of her term. She said there was much HR work to be done. Heather Irwin had hoped to get the position but was told on February 17 that someone else was hired. It was also suggested at that time that she might be interested in a buyer position with Sysco.

[6] There was an email from Taunia MacAdam to Heather Irwin the following day to see if she wanted to chat. She said that Heather Irwin had been giving her the “cold shoulder.” She said she heard nothing from her on the 18th or 19th. She said that, on the 19th, she told Ms. Irwin this could not continue as they worked as a team and, because they were HR, they could not be seen to not be working well together. She said she still heard nothing on the 20th and was out of the office on the 23rd, which was Monday. On February 23, Heather Irwin wrote a letter to Taunia MacAdam and expressed quite strongly her disappointment with the decision not to hire her. She left that letter on Taunia MacAdam’s desk. When she returned to the office on the 24th, Ms. MacAdam saw it. She met with Heather Irwin and she testified she thought that, at the end of the meeting, things were better. She said they should meet again.

[7] There was a subsequent meeting on February 26 where various duties were presented to Heather Irwin for her to consider. Ms. MacAdam referred to it as her “wish list.” Included on that list (Tab 10 of Exhibit Book) was training of the new hire. The following day, they met to discuss what Ms. MacAdam referred to as

“logistics.” This referred to things to do such as where Jennifer Meisner would sit, getting her a computer, etc., etc.

[8] Work continued thereafter as usual and there are emails evidencing that in the Exhibit Book.

[9] An announcement was prepared (Tab 26 of the Exhibit Book) which refers to Heather Irwin “working on specific HR related projects” and introducing Jennifer Meisner as the HR Generalist.

[10] Taunia MacAdam said she chose tasks to help Heather Irwin get broad experience in HR and not to do just administrative tasks. She had worked in administration for many years before retraining in HR.

[11] On March 9, the new hire, Jennifer Meisner, started. Heather Irwin was to train her and had previously set up her work station. On that day, the three of them went out for lunch, that is, Ms. MacAdam, Ms. Irwin and Ms. Meisner. There is no evidence there was anything untoward that occurred during that day or at lunch.

[12] That evening, Heather Irwin wrote her letter of resignation and handed it in the next day, March 10. She said she could not stay because of Taunia MacAdam's behaviour towards her between February 18 and March 9, having to face her co-workers and having to sit beside and train her replacement. She said it was overwhelming and humiliating.

ANALYSIS

Constructive Dismissal

[13] The position was a term position evidenced by the contract Heather Irwin signed. It provided (Tab 3 of Exhibit Book), among other things, that her position title was Human Resources Generalist. The effective date of the contract was August 5, 2008. The status was Full Time Term - Maternity Leave Replacement. It set out her salary, benefits, vacation and other provisions.

[14] Heather Irwin did not claim she was promised the position should it become available. She described her duties as the Human Resources Generalist. She and Taunia MacAdam were the only people in the HR Department and Taunia MacAdam is the Director for the Atlantic Region. Heather Irwin was doing all the

regular Human Resources Generalist duties for Halifax and St. John's. When the new person was hired, she took over those duties, was called the Human Resources Generalist and Heather Irwin's phone number was to be given to her.

[15] The original posting for the maternity leave position is Exhibit 2. There is no dispute that Heather Irwin did not see it. She was hired by Taunia MacAdam without reference to it. It lists the duties and I summarize them as follows:

- Complete, process and track all human resources paperwork
- Assist in the recruitment process
- Complete, process all paperwork to enroll/change associates into benefit programs
- Process all Workers Compensation and short-term disability claims
- Administer collective agreements for each location
- Coordinate and prepare background material for various labour relations issues
- Conduct information and training sessions for associates on benefits, ethics, etc.
- Assist the HR Director in their duties in the functioning of the department
- Work on special projects.

[16] I conclude that, although this posting was not shown to Ms. Irwin, these were in fact the duties of the HR Generalist and the duties Heather Irwin was to take over during the maternity leave.

[17] Once the new person was hired, Taunia MacAdam and Heather Irwin discussed Heather Irwin's role for the balance of her term. The discussion list prepared by Tanya MacAdam includes:

- Audits
- Prepare for Operational Audits
- WCB/Return to Work Processes
- Create Tracking Systems & train - grievance & customer service
- Share Summer Recruitment
- Audit & Fix up information in People@Work
- Share in Ethics Training
- Previous vacation entitlements project
- Train Jennifer
- Finalize HR Procedure Manual
- Policy Development
- Strategic Hiring Initiative completion
- Other - to discuss.

There are some additional notes on the bottom about "orientation package," "training for managers on interviewing and recruitment." Those notes were made by Ms. MacAdam during the meeting she had with Ms. Irwin.

[18] In addition, the announcement of the new hire prepared by Ms. MacAdam says with respect to Jennifer Meisner:

I would like to introduce Jennifer Meisner to the HR team as an H.R. Generalist. Jennifer will be responsible for the day to day HR duties for the teams at Halifax and St. John's. ...

[19] It says with respect to Heather Irwin:

She will be working on specific HR related projects which will help ensure our continued success.

[20] The question is whether Heather Irwin was constructively dismissed. The onus is on her to show she was constructively dismissed.

[21] In *Farber v. Royal Trust Co.*, [1996] S.C.J. No. 118, the Supreme Court of Canada said at para. 24:

24 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. Since the employer has not formally dismissed the employee, this is referred to as 'constructive dismissal'. By unilaterally seeking to make substantial changes to the essential terms of the employment contract, the employer is ceasing to meet its obligations and is therefore terminating the contract. The employee can then treat the contract as resiliated for breach and can leave. In such circumstances, the employee is entitled to compensation in lieu of notice and, where appropriate, damages.

The court continued in para. 25:

25 ... The extent of the employer's discretion to make changes will depend on what the parties agreed when they entered into the contract. ...

The court then said in para. 26:

26 To reach the conclusion that an employee has been constructively dismissed, the court must therefore determine whether the unilateral changes imposed by the employer substantially altered the essential terms of the employee's contract of employment. For this purpose, the judge must ask whether, at the time the offer was made, a reasonable person in the same situation as the employee would have felt that the essential terms of the employment contract were being substantially changed. The fact that the employee may have been prepared to accept some of the changes is not conclusive, because there might be other reasons for the employee's willingness to accept less than what he or she was entitled to have.

[22] It is clear in this case that the changes were unilateral.

[23] I conclude that Heather Irwin's duties did change substantially. She was no longer the HR Generalist doing the routine day to day duties which the maternity leave person had done and which duties are described in Sysco's posting of the position. Instead, she was to do solely projects. It is true that projects are part of the job Heather Irwin had been hired to do but they were not the only part of the job. Except for training Jennifer Meisner, Heather Irwin would no longer be doing those day to day duties.

[24] The position for which Heather Irwin was hired was no longer available to her. It was no longer a term position. The previous term position to fill in for a maternity leave subsequently became a full-time permanent position filled by Jennifer Meisner. I conclude a reasonable person would have concluded that the essential terms of her employment had been substantially changed.

[25] In my view, the duties proposed to Heather Irwin were of a different kind. They were projects, not the day to day work. When her phone number would have been changed, she would not be the person receiving the routine HR calls she had previously received. The wording of the announcement is, in my view, indicative of Sysco's approach to the change in her duties. It refers to Jennifer Meisner as the HR Generalist and Heather Irwin as a project person: "specific HR related projects" is the wording used.

[26] The new duties Heather Irwin was to undertake were not well defined. She was given a list of possible projects but, as Taunia MacAdam said, they were discussed on a "high level", that is, without details.

[27] The fact that her salary and benefits remained the same, as well as the person to whom she reported in the same department, is not conclusive. Nor is the fact that Heather Irwin considered accepting the changes and may have agreed, in general terms, to some. As Justice Warner said in *Burns v. Sobeys Group Inc.*, 2007 NSSC 363, para. 86:

86 Having the same salary, benefits and work location is relevant, but it is not the whole story. ...

[28] However, as in *Burns, supra*, the details had not been worked out. The “logistics” meeting the following day was to discuss details of setting up Jennifer Meisner, not details of the work Heather Irwin was supposed to do.

[29] As Justice Warner said in *Burns*, in para. 51, there are five categories of employer conduct which should be considered:

1. change in job duties;
2. geographical relocation;
3. cessation of employment ...;

4. changes in working conditions;
5. inappropriate employer conduct ...

[30] In this case, number 1, change in job duties, is the critical factor. Justice Warner in para. 52 quoted from the text, *QUITTING FOR GOOD REASON, The Law of Constructive Dismissal in Canada* by Echlin and Fantini (2001: Canada Law Book). I refer to the two parts of that quote which are relevant here:

- a) ... it is not the direction of the change but the degree of the change which is critical to assessing whether altered job duties amount to a fundamental breach of the employment contract. ... Courts may take into account whether there has been a reduction or broadening of duties, a change in the nature of the work to be performed by the employee, altered reporting relationships, a change in job title, or a loss of status, prestige or authority. ...

...

- e) Employees are generally entitled to reject fundamental changes to the terms of their employment, particularly where those alternations result in a downgrading of their duties or status. A distinct problem arises in the case of lateral transfers and job reassignments of a similar nature. ...

[31] In *Cook MacKinnon v. Acadia University*, 2009 NSSC 269, Justice Warner said the question was whether the employee had good reason to resign. He said in para. 58 of that decision:

58. Whether she had ‘good reason’ depends on:

- 1) The express and implied terms of her employment contract;
- 2) Whether those terms were breached by the employer; and
- 3) If so, whether the breach was a substantial or fundamental change to the essential terms of the employment contract.

[32] In that case, only a portion of the vice-president’s duties were taken away and she was still the Vice-President, Student Affairs. Her duties had changed over a number of years but Justice Warner concluded the role taken away was not a “core” function as the plaintiff had said. He concluded it did not go to the root of her employment contract. He concluded Enrollment and Admissions were only a small part of her duties.

[33] This, in my view, is unlike the situation here. Heather Irwin was hired as an HR Generalist. The change in her duties meant she was no longer doing most of the same functions she had done previously. This, I conclude, was made clear because someone else was hired to fill that very position on a permanent basis. I therefore conclude that she was constructively dismissed.

Mitigation

[34] After Heather Irwin was advised that she was not offered the full-time position, she met with Taunia MacAdam. She had previously sent her a letter expressing her disappointment but also saying she would behave like a professional.

[35] Both Taunia Irwin and Heather Irwin testified about Taunia MacAdam's suggestion that Heather Irwin stay on at Sysco in a buyer position. Taunia MacAdam said she had spoken to Jeff Brenton, the Vice-President of Merchandising with respect to this and there were positions available, then and in the future. She said Heather Irwin flatly refused to consider them because she wanted a career in HR. Taunia MacAdam said she viewed Heather Irwin as an asset to the company and wanted to find a way for her to stay.

[36] Heather Irwin testified she followed up with Jeff Brenton but there were in fact no positions available. Jeff Brenton testified that he did not recall Heather Irwin speaking with him but admitted on cross-examination that it was possible she

might have had a brief conversation with him, as he put it, a “water cooler conversation” which he did not recall. He testified there were several maternity leaves coming up in his department. One was right away, another after that and another in September when Heather Irwin would have completed her term with HR. In my view, this testimony may not be inconsistent. If Heather Irwin did speak to Jeff Brenton and learned there were maternity leave positions, she may have quite reasonably concluded these were not permanent positions and she would be better advised to continue to seek work in her chosen field of HR. I therefore do not see this to be evidence of failing to mitigate.

[37] After the meeting between Taunia MacAdam and Heather Irwin, Ms. MacAdam said she believed Heather Irwin was okay with what had occurred and they would meet again to discuss the work she would do for the balance of her term. They met on February 26. Although Heather Irwin did not bring a list of what she wanted to do as had been suggested, Taunia MacAdam provided a list. I accept that she gave the list to Heather Irwin at the start of the meeting. Heather Irwin’s notes on it are, in my view, notes she made during that meeting.

[38] Taunia MacAdam and Heather Irwin discussed Heather Irwin's future work. Taunia MacAdam's list is a list of projects which fit within the Human Resources area. Taunia MacAdam, in good faith, prepared this list. She had also arranged through the president of Sysco to have a budget approved for an additional person in HR, Heather Irwin, for the succeeding five and a half months approximately. She testified the department was in a state of disarray when she had arrived approximately a year previously and believed that Heather Irwin would be an asset in getting it reorganized in the following months.

[39] It is not entirely clear whether Heather Irwin agreed to undertake these projects. Less than two weeks after the meeting, Jennifer Meisner came to her new job in Heather Irwin's previous position. It was only then that Heather Irwin would have begun to undertake those projects.

[40] The onus is on the employer to prove that Heather Irwin failed to mitigate. The leading case on mitigation is the Supreme Court of Canada decision in *Evans v. Teamsters Local Union No. 31* [2008] S.C.J. No. 20. In that decision, Justice Bastarache, writing for the majority, discussed when employees might be expected

to mitigate by continuing to work for the employer who had dismissed or constructively dismissed them. He said in para. 29:

29 ... it is an accepted principle of employment law that employers are entitled (indeed encouraged) to give employees working notice and that, absent bad faith or other extenuating circumstances, they are not required to financially compensate an employee simply because they have terminated the employment contract. It is likewise appropriate to assume that in the absence of conditions rendering the return to work unreasonable, on an objective basis, an employee can be expected to mitigate damages by returning to work for the dismissing employer.

He said in that same paragraph:

... It can also be expected that in both situations the employee will find that continuing to work may be difficult. ...

[41] He qualified his statement about continuing to work in para. 30 where he said:

30 I do not mean to suggest with the above analysis that an employee should always be required to return to work for the dismissing employer and my qualification that this should only occur where there are no barriers to re-employment is significant.

He continued in that paragraph:

Where the employer offers the employee a chance to mitigate damages by returning to work for him or her, the central issue is whether a reasonable person would accept such an opportunity. In 1989, the Ontario Court of Appeal held that a reasonable person should be expected to do so ‘where the salary offered is the same, where the working conditions are not substantially different or the work demeaning, and where the personal relationships involved are not acrimonious.’ In *Cox*, the British Columbia Court of Appeal held that other relevant factors include the history and nature of the employment, whether or not the employee has commenced litigation, and whether the offer of re-employment was made while the employee was still working for the employer or only after he or she had already left. ... In my view, the foregoing elements all underline the importance of a multi-faceted and contextual analysis. The critical element is that an employee “not [be] obliged to mitigate while working in an atmosphere of hostility, embarrassment or humiliation” (*Farquhar* at p. 94). And it is that factor which must be at the forefront of the inquiry of what is reasonable. Thus, although an objective standard must be used to evaluate whether a reasonable person in the employee’s position would have accepted the employer’s offer ..., it is extremely important that the non-tangible elements of the situation - - including work atmosphere, stigma and a loss of dignity as well as nature and conditions of employment, the tangible elements -- be included in the evaluation.

[42] In that case, Justice Bastarache referred, in para. 49, to the employer’s desire to have the plaintiff “continue his work with the organization.” He continued in para. 50:

50 Although the fears expressed by Mr. Evans may have been subjectively justified, there was no evidence of acrimony between Mr. Hennessy and Mr. Evans, and no evidence that Mr. Evans would be unable to perform his duties in the future. ...

[43] The conditions of employment must be viewed objectively; that is, whether a reasonable person in Heather Irwin’s position would have taken the position offered and remained for the balance of the term contract. Heather Irwin’s

working conditions, salary, benefits, etc., would have remained the same. She would have continued to work in the same department, reporting to the same person. She had not commenced litigation and the offer to continue working was made approximately two weeks before her resignation.

[44] It must be remembered that this was not the situation of a long term permanent employee but someone who had a one year term contract with six months left to run as of February 26.

[45] Heather Irwin said she resigned because of Taunia MacAdam's behaviour toward her between February 18 and March 9. She found it overwhelming and humiliating having to face co-workers with the new employee on the job and having to sit beside her and train her.

[46] As I have also said, the test is objective. Certainly it would have been uncomfortable and perhaps difficult for Heather Irwin to continue; however, I find no evidence of hostility. Taunia MacAdam tried her best to accommodate Heather Irwin. She tried to find work for her in HR and, beyond that, to find a way to keep

her in the organization after her HR term ended. This is evidence of good faith and not of hostility towards Heather Irwin.

[47] There may have been some awkwardness in the relationship between Heather Irwin and Taunia MacAdam in the days immediately following the meeting of February 17 when Heather Irwin found she was not to have the permanent position. It appears to have dissipated by the time of the February 26 meeting. Even on March 9, Taunia MacAdam, Heather Irwin and the new employee, Ms. Meisner, had what was described as a cordial lunch together at a restaurant.

[48] It would not have been easy for Heather Irwin to sit beside and train the new employee but that would have been less and less as Jennifer Meisner was an experienced Human Resources Generalist learning the ropes at a new company. She testified that, without Heather Irwin's assistance, she felt she could function day to day within three months. She testified that, without Heather Irwin there, she was thrown into it and mostly taught herself with support from Taunia MacAdam. Had Heather Irwin been there, one can only conclude that the time period would have been substantially less and that Heather Irwin would then have been working

on the projects she and Taunia MacAdam had discussed. Those projects were suggestions and there was negotiation between Taunia MacAdam and Heather Irwin about which were to be done.

[49] I do not need to decide if the audit project was to be the primary project as Heather Irwin said or just one of many projects proposed by Taunia MacAdam. In any event, Heather Irwin would have been occupied for most of her remaining time at Sysco on a variety of projects as well as spending time initially training Jennifer Meisner.

[50] I am not satisfied that Heather Irwin would have objectively suffered humiliation or embarrassment or that the atmosphere was one of hostility if she had continued to work for Sysco from March 10 to August 28.

[51] Heather Irwin has said that Taunia MacAdam treated her badly but gave no examples except to say that she chastised her for coming in late and leaving early. The evidence is that her work hours were 8:00 a.m to 5:00 p.m, according to her contract, but there is, in my view, no dispute that she arrived around 9:00 a.m. She was also dealing with her sister's illness. I am satisfied that Taunia MacAdam was

okay with her late arrivals because she was helping to get her sister's children off to school after Heather Irwin explained that to her. There is no other evidence, other than vague generalities from Heather Irwin, that Taunia MacAdam was hard on her after their meetings in mid-February. She initially had a brief period of bad relations with Taunia MacAdam but, after their meeting on February 23, I find as a fact that things settled back into a normal routine. This is evidenced in the emails between Taunia MacAdam and Heather Irwin around this time.

[52] Heather Irwin met with Jennifer Meisner and began to train her on the day Jennifer Meisner began work. No one testified that the working relationship was marked by problems. It was after only one day of work with Jennifer Meisner that Heather Irwin wrote her letter of resignation. She said she found it difficult to work with someone who got the job she wanted and whom she had to train to do it. She said it was awkward to deal with other employees in her new capacity.

[53] In my view, looked at objectively, a reasonable person would have continued in the position Sysco offered. Heather Irwin was looking for experience in Human Resources to help her get a permanent position elsewhere. She had spent approximately seven months doing Human Resources Generalist work

including a lot of administrative work similar to that which she had done in her previous career. The projects from which she was to chose would have given her greater experience in pure HR work. She could have benefited from that experience and from the positive view Sysco and, especially, Taunia MacAdam had of her. This is evidenced by Taunia MacAdam's desire to try to keep her in the organization.

[54] I conclude Sysco has satisfied me there were no barriers to Heather Irwin remaining with Sysco for the balance of her term and that she failed to mitigate by not remaining. Heather Irwin's feelings may have been subjective feelings of humiliation but I conclude, since that is not the test, that these were not sufficient reason for her to tender her resignation and not take on the position offered to her. A reasonable person would have accepted the position and continued to work until August 28.

[55] Accordingly, the claim is dismissed. The defendant is entitled to its costs. If the parties cannot agree, I will accept written submissions.

Hood, J.