S.P. 04880

IN THE SUPREME COURT OF NOVA SCOTIA
Cite as: Nicholas v. Pictou Landing First Nation, 2000 NSSC 42

Hubert Nicholas

Plaintiff

- and -

Pictou Landing Band Council

Defendant

DECISION

HEARD: **at Pictou, Nova Scotia before the Honourable Justice Felix A. Cacchione on September 25th - 27th, 2000**

WRITTEN RELEASE OF DECISION **October 25th, 2000**

DECISION: **October 25th, 2000**

COUNSEL: **Timothy G. J. Daley, for the Plaintiff**
Ray E. O'Blenis, for the Defendant

Date: October 25th, 2000
Docket: S.P. 04880

CACCHIONE, J.

[1] The plaintiff claims damages for wrongful dismissal. He alleges that the defendant, in dismissing him without giving adequate notice and without proper payment in lieu of notice, breached the terms of a written fixed term contract. The plaintiff also alleges that the termination was done in a calculated fashion without any prior consultation or forewarning to him and in such a way to cause damage to his professional reputation.

[2] The defendant argues that the plaintiff's fixed term one year contract was not renewed. It is submitted that there was no requirement to give notice or pay in lieu of notice because the contract had expired. The defendant contends there was no termination or dismissal of the plaintiff but rather that the term of the contract had simply come to an end.

[3] It is common ground between the parties that the plaintiff was hired under a contract for a period of one year to teach grades 7 and 8 at the Pictou Landing First Nation School. This was the first time that grades 7 and 8 were offered at the Pictou Landing First Nation School. It was also the plaintiff's first teaching employment after his graduation from Teacher's College. The

employment contract signed by the parties on July 17th, 1997 was for a period of one year at a rate of $575.00 per week.

[4] FACTS

The plaintiff was a resident of the Pictou Landing First Nation Reserve for the first 14 years of his life. He moved away in order to complete his high school and university education. He obtained his Bachelor of Education degree and Teaching Certificate from the Nova Scotia Teacher's College. His course of studies while at the Teachers College focussed on teaching a junior high school program.

[5] The plaintiff was desirous of returning to Pictou Landing First Nation Reserve in order to put his education to good use in his community. While in his second year at the Teachers College the former Band Manager, Barry Francis, spoke to the plaintiff about his teaching grades 7 and 8 at the Pictou Landing First Nation School. The plaintiff also had conversations with Albert Denny, the Chief of the Pictou Landing First Nation Reserve about obtaining employment. Chief Denny promised the plaintiff a teaching job and this made him return to the Pictou Landing Reserve.

[6] On July 17th, 1997 the plaintiff met with the then Band Manager, Barry Francis, and was presented with an employment contract for a fixed term of one year.

The plaintiff reviewed the contract and signed it. Chief Albert Denny signed on behalf of the Pictou Landing Band Council.

[7] The employment contract contained the following clauses:

> 14(a) The BAND COUNCIL shall nby (sic) April 30th of each year inform the TEACHER whether or not they intend to renew the contract of employment for a further one year period.
>
> (b) The TEACHER shall by April 30th of each year inform the BAND COUNCIL whether or not they would like to have their contract of employment extended for further one year period.

[8] The plaintiff understood that the Band Council was to advise him if they wanted to renew his contract. He also understood that he would have to notify the Band Council if he wanted his contract renewed. The plaintiff, however, did not know how this was to be done. Clause 14 (a) and (b) was not discussed by any of the parties when the contract was signed.

[9] Some time after the contract was signed Noel Martin replaced Barry Francis as the Band Manager. The plaintiff, both prior to April 30th, 1998 and after that date, made it known to Noel Martin that he would like to have his contract renewed. The plaintiff had several conversations with Noel Martin over a period of several months beginning in March 1998. All of these conversations

concerned the renewal of the plaintiff's contract. On each occasion when the plaintiff raised this issue he was advised by Noel Martin that the Chief and Band Council would have to discuss it.

[10] The plaintiff also spoke with Chief Albert Denny about the renewal of his contract. He was again told that the matter would have to be discussed with the Band Council.

[11] At no time, either before April 30th, 1998 or after that date, did the Band Council ever inform the plaintiff whether or not it intended to renew his contract for a further one year period.

[12] The hierarchy on the Pictou Landing First Nation Reserve is that the Chief and Band Council, which consists of four councillors, have the ultimate decision-making authority. The Band Manager is an overseer and his role has been equated to that of a Town Clerk. The Band Manager is not a member of the Band Council. If a member of the community wants a matter raised with the Band Council he or she approaches the Band Manager who in turn brings the matter to the attention of Band Council. Mr. Noel Martin, the Band Manager, testified that it would be fair to say that by informing him a person would rightly believe that Council had been informed. In general terms the Band

Manager takes information and issues to Band Council and in turn also advises the members of the community of the decisions made by Band Council.

[13] The evidence discloses that the structure of this organization is fairly informal. There is no manual outlining policies and procedures or the responsibilities of the various members of Band Council and the Band Manager. It is clear that the Band Manager had difficulty getting all of the Council together for meetings. There exists no requirement for a minimum number of meetings nor is there a pre-set schedule of meetings. It would appear that meetings are held, if at all, when the Chief decides to hold them and when the four councillors can be brought together.

[14] On some issues the Chief and the Band Manager meet and make decisions, while on other issues the matter is taken before a meeting of the Chief and the Band Council if the Band Manager is able to get all of the members of Council together.

[15] In theory it is the Chief and Band Council who make decisions affecting the Band, however it is clear from the evidence that in practice many decisions are made by the Chief and the Band Manager acting alone. An example of this comes from the evidence of Chief Denny who testified that the decision to hire the plaintiff and the signing of his contract of employment had not been

approved by Council before a contract was signed. The Chief acted unilaterally in this instance.

[16] Decisions taken by the Chief and the Band Manager may or may not be subsequently ratified by Council. There is no indication that all decisions taken by the Chief and the Band Manager are ratified by Council.

[17] The evidence discloses that Mr. Martin met with the plaintiff twice before April 30th, 1998 and was told by the plaintiff that he wished to have his contract renewed. There were other meetings after April 30th where the plaintiff's wish to have his contract renewed was again made known to the Band Manager. On each occasion when this issue was raised with the Band Manager the plaintiff was told that the matter of renewal would have to be approved by the Chief and Council. The issue of contract renewal was raised for the first time with Council at a meeting held on August 27th, 1998, a mere five days before the opening of the new school year. Band Council did not vote on the renewal of the plaintiff's contract, however Band Council did vote to cancel the grade 7 and 8 program thereby effectively eliminating the plaintiff's teaching position.

[18] Despite being the person who is charged with advising the Band members of Council's decisions, Mr. Martin never told the plaintiff of the decision taken which cancelled the grades 7 and 8 program. The plaintiff learned of this

decision through a friend, Andrea Paul, who had been told of the program cancellation by Mr. Martin. Ms. Paul called the plaintiff on August 31st or September 1st, 1998 because she correctly assumed that no one had informed the plaintiff of the program cancellation.

[19] In addition to complying with the requirement to give notice under Clause 14(b) of the contract, the plaintiff was instructed by his school principal in April 1998 to order the necessary books and supplies for the following school year. The plaintiff inferred from this that he would be teaching again the following year and that his contract had been renewed.

[20] During the course of the contract the plaintiff was paid by means of a direct deposit to his bank account. Not having received his pay for the week following July 17th, 1998 the plaintiff approached the Band Manager, Mr. Martin, who issued a cheque to the plaintiff for the amount of his pay. The following week and up to the end of August 1998 the plaintiff continued to be paid the amount set out in the contract by means of a direct deposit to his bank account.

[21] At the end of August 1998 a Record of Employment was issued to the plaintiff. The comments section of the ROE states:

> Employee laid off - not enough students to make a class.

[22] In fact a total of four ROE's were prepared. The first ROE dated June 26th, 1998 was prepared with all of the others for the teachers employed by the Pictou Landing First Nation. This ROE was never given to the plaintiff because the Band Manager, Mr. Martin advised Shirley Francis, the author of the ROE, that the plaintiff's contract did not expire until July 17th, 1998. The comments section on this ROE states:

> End of school term.

[23] A handwritten addition states:

> Contract Expired July 17/98.

[24] A second ROE dated July 17th, 1998 notes in the comments section:

> End of school term. Contract expired July 17/98

[25] The evidence does not establish on a balance of probabilities that this ROE was given to the plaintiff.

[26] The third ROE dated August 30th, 1998 states in the comments section:

> Not enough students to make a full class. Employee terminated.

[27] The word "terminated" is scratched out and replaced with the words "laid off". This ROE was not given to the plaintiff because of a number of errors and scratched out entries contained on it. The use of the word "terminated"

supports the conclusion that the defendant was of a view that the contract was still in existence.

[28] The fourth ROE dated August 30th, 1998 notes in the comments section:

> Employee laid off - not enough students to make a class.

[29] This ROE was given to the plaintiff.

[30] The Band Council held a meeting on August 27th, 1998 in part to discuss the status of the grade 7 and 8 program and that of the plaintiff. Notes of that meeting were taken by Noel Martin, however the minutes of the meeting were only prepared by Mr. Martin on January 7th, 1999. It is noteworthy that these minutes were never circulated to any of the persons who attended the meeting and were only prepared after Mr. Martin was made aware that an action against the defendant had been commenced.

[31] The minutes indicate that Barry Evans, the new school principal, who had been hired a mere two days before the meeting, recommended that the grade 7 and 8 program be scrapped. The minutes also state that Mr. Evans also advised the meeting that he would find a position for the plaintiff to fill. In his testimony Mr. Evans denied making the recommendation that the grade 7 and 8 program be scrapped and he denied as well that he indicated to the meeting that a position for the plaintiff would be found. I accept the testimony of Mr. Evans

and where his evidence conflicts with that of Mr. Noel Martin's I accept Mr. Evans' evidence over that of Mr. Martin.

[32] Mr. Evans testified that the decision to scrap the grade 7 and 8 program had already been made before the meeting was held. His evidence was that on August 25th when he was hired, he was told that the grade 7 and 8 program would be scrapped.

[33] A review of the evidence concerning the minutes of the August 27th, 1998 meeting leads to the conclusion that these minutes are not an accurate representation of the discussion held at that meeting. Mr. Evans testified that in his view the minutes were false. A review of the whole of the evidence on this point confirms Mr. Evans' opinion.

[34] THE LAW

The defendant argues that the fixed term contract is clear and unambiguous. It is submitted that the contract was not renewed, but rather that it ended upon the expiration of the fixed term of employment. In support of this argument the defendant relies on the decision of the Nova Scotia Court of Appeal in **Nova Scotia v. Ottens** (1996), 156 N.S.R. (2d) 268. This case can be distinguished from the one at bar because in the **Ottens** case there was a clear memo sent to Mr. Ottens indicating that his contract was being extended for one month but not renewed. As well the contract

in the **Ottens** case did not contain a renewal clause or an option to renew such as the one found in the contract which the plaintiff signed. In the case at bar there is specific provision in the contract for an option to renew the contract. Clause 14(a) and (b) does not set out a specific mechanism for the renewal but it does require that both parties advise each other of their intentions regarding renewal prior to April 30th.

[35] Clause 14(a) and (b) is ambiguous in that it does not set out how each party is to convey its intention to the other. There is no indication whether notification under that clause is to be given verbally, by action, or in writing as was the case in **Eskasoni School Board and Eskasoni Band Council v. MacIsaac et al** (1986), 69 N.R. 315 (F.C.A.)

[36] In the case at bar the use of the words "whether or not", the lack of provision for how each party is to communicate its intent to the other and the absence of specific language regarding the consequences of a failure to confirm by April 30th the intent of the respective parties creates an ambiguity.

[37] Given the ambiguity in the wording of this clause the *contra proferentem* rule of interpretation is applicable. The gist of this rule that in a written contract where an ambiguous provision exists, that provision is to be construed most strongly against the person who selected the language.

[38] In the present case the contract was prepared by the defendant and the plaintiff had no input whatsoever into its preparation or its wording. In **Hillis Oils and Sales Limited v. Wynn's Canada Limited** (1986), 25 D.L.R. (4th) 649 Justice LeDain writing for a unanimous court found an ambiguity in the relevant clause at issue before the court. He referred to the contra proferentem rule and stated at page 657:

> ...The rule is, however, one of general application whenever, as in the case at bar, there is ambiguity in the meaning of a contract which one of the parties as the author of the document offers to the other, with no opportunity to modify its wording.

[39] The plaintiff argues that because Clause 14 of the contract is ambiguous it should be construed as against the defendant in accordance with the *contra proferentem* rule. It is submitted that the interpretation most favourable to the plaintiff should be given to this clause. The plaintiff contends that the defendant's failure to indicate whether or not it was renewing the contract should be interpreted as renewal of that contract. Although I agree that the defendant's failure to indicate one way or the other its position on renewal could be interpreted as a renewal of the contract, I prefer to find that the contract was renewed based on the defendant's conduct.

[40] The case of **Saint John Tug Boat v. Irving Refining Limited**, [1964] SCR 614 serves as authority for the conclusion that this contract was renewed. In the 1960's Irving Refining "Irving" required tug boats to guide large oil tankers through Saint John Harbour. It was important that the tugs be available whenever required to avoid delays that would be costly to Irving. As a result of a letter sent from Saint John Tug Boat ("Saint John") to Kent Lines (also owned by Irving) on March 27th, 1961, Irving made verbal arrangements to rent the "Ocean Rockswift" tug for a period of one month beginning on June 13th, 1961. This arrangement was expressly extended twice, each time for a period of two weeks. An Irving tug was supposed to arrive in August to take over the work of the Ocean Rockswift.

[41] In August, a new president succeeded the previous one at Kent Lines. While there was never any formal authorization to extend the agreement with Saint John, Irving continued to use the services of the Ocean Rockswift until late February, 1962. Accounts for these services were rendered to Irving each month, up to and including February 28th, 1961. After July, 1961, the invoices of Saint John were not paid, and Irving denied liability for all of the charges incurred since the middle of August, 1961.

[42] At trial, the judge found that Irving was liable for all invoices up to and including that of February 28th, 1961 because:

> [Irving] had ample opportunity to notify [Saint John] that it did not accept any liability ... but did not do so. [Irving] acquiesced in the tug being so employed. It had and took the benefit of such stand-by service and the probable avoidance of demurrage charges.

[43] On appeal, the Appeal Division varied this decision, restricting Saint John's recovery due to some alleged ambiguity in the letter of March 27th, 1961. The Supreme Court of Canada found that even if the intention of the letter was to end the contract on August 15th, 1961:

> ...Then it would appear to follow that in making the "stand-by" services of the tug available after that date the appellant was making a new offer and the invoices make it clear that it was an offer for the same services at the same rate. [at p. 621]

[44] The Supreme Court framed the issue as follows at p. 621 S.C.R.:

> ... whether or not the respondent's [Irving] course of conduct during the months in question constituted a continuing acceptance of these offers so as to give rise to a binding contract to pay for the "stand-by" services

of the tug at the rate specified in the invoices furnished by the appellant [Saint John].

[45] The Court then went on to consider the "test" that should be applied in accessing conduct:

> The test of whether conduct, unaccompanied by any verbal or written undertaking, can constitute an acceptance of an offer so as to bind the acceptor to the fulfilment of the contract, is made the subject of comment in **Anson on Contracts**, 21st ed., p. 28, where it is said:
>
> > The test of such a contract is objective and not a subjective one, that is to say, the intention which the law will attribute to a man is always that which his conduct bears when reasonably construed, and not that which was present in his own mind... The doing of the work is the offer; the permission to do it, or the acquiescence in its being done, constitutes the acceptance.

[46] The court then goes on to adopt the test outlined in **Smith v. Hughes** (1871), LR. 6 QB 597 at p.607.

> If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was consenting to the terms

> proposed by the other party and that other party upon that belief enters into a contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms.

[47] The Supreme Court, after considering some American authority along the same lines, stated at page 622:

> It must be appreciated that mere failure to disown responsibility to pay compensation for services rendered is not of itself always enough to bind the person who has had the benefit of the services. The circumstances must be such as to give rise to an inference that the alleged acceptor has consented to the work being done on the terms upon which it was offered before a binding contract will be implied.

[48] In the case at bar the defendant knew that the plaintiff wished to have his contract renewed. The defendant knew, or ought to have known, that the plaintiff had ordered school supplies for the upcoming school year. The defendant, upon being told by the plaintiff that he had not received his pay for the week following July 17th, 1998, chose to continue paying the plaintiff the same salary and in the same fashion as he had been paid previously. There was no indication given to the plaintiff that this was being done solely to conform with the payment schedule employed with other teachers. Toward the end of

the summer the defendant knew, or ought to have known, that the plaintiff was in his classroom preparing that room for the upcoming school year.

[49] I accept the plaintiff's evidence that during one of his many meetings with Noel Martin, the Band Manager, he was made to understand that he would have a job in the upcoming school year.

[50] The principle outlined in **Saint John Tug Boat** has been applied in other cases. In **Crouch v. Tennaplex Systems Limited, [1997] O.J. No. 4273,** Bell, J. of the Ontario Court of Justice (General Division) found the renewal clause in the contract before the court ambiguous. The court implied renewals of the contract based on the words of the contract, the conduct of the parties and the totality of the circumstances. The test set out in **Saint John Tug Boat** has also been considered and applied in **Mitchel Energy v. Canterra,** [1987] 2 W.W. R. 636 (Atlta. Q.B.), **McCunn Estate v. Canadian Imperial Bank of Canada** (1999), 45 O.R. (3d) 112, **Jostens v.Gendron** (1993), 1C.C.E.L.(2d) 275 and in **Beller, Carreau, Lucyshyn v. Cenalta**, [1999] A. J. No. 418.

[51] In the case at bar the plaintiff complied with the provisions of Clause 14(b) of the contract. On numerous occasions he notified not only the Band Manager, but also the Chief of the Pictou Landing Band Council of his desire to have his contract renewed. The plaintiff followed the instructions of his school principal

by ordering school supplies for the following year. He continued to be paid at the same salary and in the same fashion after his contract had expired. The plaintiff met with Andrea Paul, the Education Counsellor, at the Pictou Landing First Nation Reserve some weeks prior to the start of the new school year to discuss the enrolment in the grade 7 and 8 program. At trial Ms. Paul confirmed her discovery evidence that the Chief in late August 1998 told her to advise the plaintiff that it looked like there would be a grade 7 and 8 program in 1998. When Ms. Paul called the plaintiff on August 31st or September 1st, 1998 to advise him of the cancellation of the grade 7 and 8 program it was clear to her that the plaintiff knew nothing about this. Finally, consideration must also be given to the fact that at the August 27th, 1998 Band Council meeting a vote was taken to cancel the grade 7 and 8 program but no vote was taken on whether the plaintiff's contract should be renewed.

[52] A reasonable person viewing this situation would conclude that the plaintiff's contract had been renewed. In other words his offer to continue teaching as expressed to the Chief and the Band Manager had been accepted. Accordingly, I find that the plaintiff's contract signed on July 17th, 1997 was renewed for a further one year term.

[53] At the commencement of this trial counsel for the defendant advised the court that the defence would not be pursuing the defence that the dismissal was for just and reasonable cause. Accordingly I find the plaintiff was wrongfully dismissed from his employment with the defendant in August 1998.

[54] The issue becomes - What are the damages suffered by the plaintiff?

[55] There is a duty on a claimant to mitigate his or her damages. The burden rests upon the defendant to assert the plaintiff's failure to mitigate - **Michaels v. Red Deer College**, [1976] 2 S.C.R. 324. In the present case the defence has asserted the plaintiff's failure to mitigate. It is incumbent on the defendant to prove not only the plaintiff's failure to mitigate his damages but also that had the plaintiff taken reasonable steps to mitigate, he could in fact have found alternative employment - **Jorgenson v. Jack CEWE Ltd.**, [1979] 1 A.C.W.S. 138.

[56] The plaintiff became aware of his termination on August 31st or September 1st, 1998 and only as a result of his friend Andrea Paul telling him. Ms. Paul knew that no one in authority had advised the plaintiff. She also knew that the plaintiff had been actively preparing for the upcoming school year. The timing of the termination, a mere one or two days before the start of the new school year, and the fashion in which the plaintiff was advised of the termination left the plaintiff in a state of shock. This was compounded by the fact that the

plaintiff's performance evaluations had all been fairly positive. The plaintiff had no reason to believe that his ability and competence were in question or that his position was in jeopardy.

[57] As a result of this shock the plaintiff did not begin seeking other teaching employment until January 1999. His efforts were understandably unsuccessful. The evidence shows the optimum time to apply for a teaching position is in the months of April, May or June when School Boards normally advertise upcoming positions. Once a school year has started, the employment opportunities are virtually non-existent.

[58] The Defence argued that the plaintiff failed to mitigate his damages. It questioned why the plaintiff did not apply to other First Nations schools for a teaching position, however, no evidence was presented to establish that employment opportunities were available at these schools. There was also no evidence presented to suggest that opportunities existed in any other schools. Even if the plaintiff had started searching for a new position in September or October 1998 I am not satisfied that he could in fact have found alternative employment.

[59] While the defendant's actions fall short of behaviour which would attract exemplary damages, they should be taken into account in deciding whether the

plaintiff's award should be reduced because of his delay in attempting to mitigate his damages. On the whole of the evidence it has not been proven that the plaintiff failed to mitigate his damages and his award should not be reduced. In any event, even if a failure to mitigate had been established, the defendant's behaviour and treatment of the plaintiff would have caused me to not reduce the damage award.

[60] The measure of damages for breach of a fixed term contract is the recovery of wages the plaintiff would have received had the defendant performed the contract in the manner least disadvantageous to itself. In Employment Law in Canada (3rd) ed. (Butterworths Canada, 1998). The authors discuss damages under a fixed term contract by stating at 14.3:

> Where an employee has been hired for a definite term, in the absence of just cause for summary dismissal he or she can be terminated only by full payment of the contract amount of wages.

[61] In **Burton v. Howlett** (1999), 178 N.S.R. (2d) 325 Hall, J. was dealing with an action for wrongful dismissal under a fixed term contract. In addressing the issue of damages he stated as follows at page 337:

> This is not the ordinary case of wrongful dismissal where the court is obliged to fix the appropriate period of notice. The term of

employment was fixed by the contract between the parties. The defendant breached that contract by dismissing the plaintiff without just cause. Subject to any reduction for failure to mitigate, the plaintiff would be entitled to recover for the unexpired term of the contract or $46,000 as claimed by her counsel.

[62] In the present case I have determined that there was no failure to mitigate damages. The plaintiff's previous salary according to his contract was $575.00 per week, or $29,900.00 per year. The Record of Employment issued to the plaintiff shows his total insurable earnings as being $30,521.20, which translates into a weekly salary of $586.94. In fixing the damages to be awarded to the plaintiff under the renewed fixed term employment contract I use the amount shown in the written contract of July 1997. The plaintiff received wages from July 17th to August 31st, 1998 which must be deducted from his damage award. This totals 6 weeks of income amounting to a deduction of $3,450.00 from the annual income of $29,900.00 Accordingly I fix the plaintiff's damages at $26,450.00.

[63] The plaintiff claims special damages in the amount of $2,500.00 for an anticipated wage increase for the renewal period. No evidence was led establishing that it was customary for teachers to receive a $2,500.00 wage

increase after their first year of service. No award will be made under this head of damages.

[64] The plaintiff also claims damages for moving expenses and for loss of reputation. There is no evidence to support the claim that the plaintiff has spent money searching for new employment in an effort to mitigate his damages. There will be no award under this head of damages.

[65] It is submitted that the plaintiff's reputation has been damaged by the nature of his dismissal, its timing and the acrimony which has arisen because of the dismissal and because of this the plaintiff should be awarded damages. **Wallace v. United Grain Growers Ltd.** (1997), 152 D.L.R, (4th) 1 is cited in support for this claim. In that case the Court found a breach of the good faith obligation during the dismissal process. The Court concluded that aggravated damages could be used to ensure that employees receive adequate protection from employers who act in bad faith during the dismissal process. On the evidence presented in this case I cannot conclude that the defendant acted in bad faith. There will be no award for this head of damages.

[66] The plaintiff will recover $26,450.00 together with costs fixed under Tariff A, Scale 3 in the amount of $3,000.00.

Pictou, Nova Scotia