IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Cite as: *Perry v. South Shore Distributors Ltd*, 2015 NSSM 20

Claim: SCY No. 435739
Registry: Yarmouth

Between:

DEBRA PERRY

Claimant

– and –

SOUTH SHORE DISTRIBUTORS LTD

Defendant

Adjudicator: Andrew S. Nickerson, Q.C.

Heard: May 21, 2015

Decision: June 2, 2015

Appearances: The Claimants, self-represented
Sinead Russell, for the Defendant

DECISION

Evidence

[1] Deborah Perry testified in her own behalf. She states that the defendant is in the business of delivering newspapers and flyers. She stated she was first employed by the defendant in August of 2010 as a carrier, which involve delivering newspapers to customers along a particular route. When she began that employment she signed a carrier agreement, introduced as Exhibit 2, which included a number of terms. The terms which are relevant to this matter are that a carrier had to "have a reliable substitute trained or access to another vehicle" and that either party would give two weeks' notice of termination. She worked in that capacity for approximately one year and then became a "district manager". In that role she was to supervise carriers, recruit and train carriers and generally supervise the operations in her particular district which

was the Yarmouth, Digby and Shelburne County area. One of the terms was that she was to deliver "open routes and down routes". She functioned in that capacity until December 29, 2014 at which time she says she was dismissed. She alleges her dismissal was without notice and continued to function in her job up to that point, as she had in the past.

[2] On November 30, 2014, Mr. Mike McDonald, one of the principals of the defendant sent an email (Exhibit 4) to the Plaintiff which read as follows:

> "Just to give you a heads up as we have basically been told not to expect a rate reduction on our distributor cost this year with all the layoffs, etc. and the fact we are down 1000 customers per day ($50,000) from the same period last year that we won't be paying both the management salary and route pay. This will take affect on January 1st, so our hope is these routes will all be filled in the next month"

[3] The plaintiff says that she communicated to Mr. McDonald, by telephone, that she was not prepared to accept the terms of the November 30 e-mail and would not deliver papers for the "down routes" unless she was paid. She continued to work for the month of December, doing both her managerial work and delivering papers for the down routes. She also sent an email (Exhibit 6) dated November 30, 2014 that she would not accept the terms of Mr. MacDonald's as follows:

> "There is no way I can or will do down routes without being paid for them as I have always been. I will not take money from my salary to do these routes."

[4] The plaintiff claims the sum of $4816.17. She breaks this figure down as $1400 which was her manager's salary from December 15 to December 27, prorated pay for one day December 29, 2014 in the amount of $116.67, and payments for the down routes that she completed between December 15 and December 27 which she estimates at $1900 and two weeks' salary at $1400 as paid in lieu of notice.

[5] As evidenced by Exhibit 5, there was an e-mail exchange between Mr. McDonald and the plaintiff on December 28, 2014 where Mr. McDonald made it clear that the only

compensation he was prepared to pay was $1400 plus HST for managerial duties provided that the plaintiff did the down routes at no compensation. The plaintiff objected to this in a reply e-mail stating she would not be doing the down routes without compensation. In reply to Ms. Russell's question as to whether she had given notice, she stated that she did give notice that she would not be doing the down routes without compensation.

[6] The plaintiff continued to do her work as usual except that when she was advised on December 28, 2014 that she would not be paid for the down routes, she did not do those routes and papers for several routes remained undelivered.

[7] The plaintiff acknowledges that on December 29 Mr. John McDonald sent a further e-mail at 9:15 AM advising the plaintiff that by failing to perform her duties as outlined in her job description and not giving a two-week notice he had no choice but to terminate her contract.

[8] The plaintiff states that she made it very clear throughout that she would not be doing the routes without compensation and any loss to the defendant was as a result of the defendant's failure to agree to pay her. She says that the defendant knew full well that without pay the down routes would not be delivered.

[9] The plaintiff called Christine Woodworth as a witness. Ms. Woodworth is the district manager for the defendant for an area along the south shore of Nova Scotia. She stated that she is paid a salary biweekly and that she is paid and has been paid for doing down routes. She stated that she was never told that she would not be paid for doing the down routes. The longest period of time in respect of which she had down routes was approximately 3 months. She was asked about whether another manager had an assistant to which she responded that she was not aware. She testified that when you worked it out the compensation given the carriers amounted to approximately minimum wage. She testified in cross examination that the principals of the defendant were quite direct in the way they speak, but she never felt they were inappropriate or abusive.

[10] Brian Boudreau was called as a witness for the plaintiff. Mr. Boudreau said he had worked for the company for three years and has been a district manager as of January

of 2015. He oversees seven carriers. He says that he knows the plaintiff because she recruited him, but only had casual meetings with her since. He admitted generally discussing the plaintiffs and her dismissal with her, but said it was not a detailed conversation at all. He recalled that in the conversation she told him to "watch your back".

[11] In cross examination Mr. Boudreau stated that he did receive an e-mail dated December 29, 2014 at 7 PM from Mr. John McDonald outlining to the other managers and carriers Mr. McDonald's explanation to them as to why the plaintiff was no longer employed. He stated that not all carriers have substitutes and in fact most do not. He testified that he does do down routes and gets paid for them the same as his own route. He was asked about his conversations or knowledge about a specific dispute between two other persons working for the defendant which I will not review in detail because I do not consider it relevant. He testified that he was quite satisfied with the plaintiff's performance when she was his supervisor.

[12] At the outset of the presentation of the defense, the court allowed Exhibit 1 to be entered. This is a written decision of the Occupational Health and Safety Appeal Panel for the Province of Nova Scotia, dated April 16, 2010. This decision holds that the carriers who work for the defendant are not employees but independent contractors. I allowed this to be entered as an exhibit, but do have some reservations as to its admissibility. As will be seen by the balance of decision nothing in the result turns on it so I will not make full formal ruling.

[13] John McDonald testified for the defendant. He stated that he was co-owner and president of the defendant. The newspaper for which he delivers is not directly involved in the deliveries but receives complaints from customers and passes those on to his company. He stated that there is a $2 dollar charge for each complaint charged against his company by the newspaper. He stressed that the carriers and managers are not employees; they are independent contractors. He said that carriers get paid a set amount for each route based on an analysis of time, mileage, and the number of papers, which he referred to as their "commission".

[14] Mr. McDonald testified that the plaintiff began employment in August of 2010 doing a carrier route in the Carleton Yarmouth County area. One year later, she became a district manager. When she became a district manager he met with her at the Boston Pizza restaurant in Yarmouth and explained her duties. She was not asked to sign a contract but was provided with a document outlining her responsibilities which has been entered as Exhibit 3. He states that he told her that as a manager these were her work conditions. He testified that she was told that she could not keep her route and that she must recruit a replacement. He advised her that her hours and duties would be quite variable ranging from days when she had little or nothing to do and other days when she would be extremely active. He says that he stressed that recruitment and training was a top priority for her position.

[15] Mr. McDonald expressed his dismay that the plaintiff seemed unable to recruit and retain carriers. He states that the plaintiff repeatedly told him that there was a Digby route that she could not fill. For his part, he says that he made it clear to her as early as July of 2014 that he was concerned that she was neglecting her other duties by doing the down routes and that he did not wish her to continue this.

[16] Mr. McDonald stated that he did send the November 30, 2014 e-mail advising that the company's operations were being restructured and the company would no longer pay the plaintiff for the down routes. He testified that circulation had fallen off and that this decision had to be made to control costs. He said that a $1400 cost for the manager plus paying the routes was simply too costly. He felt that giving 30 days' notice of the changes was fair and reasonable.

[17] Mr. McDonald states that he did have a phone conversation with the plaintiff shortly after the November 30 e-mail wherein he advised her that, as a district manager, the job was to recruit carriers and not to do the routes herself. He made it clear during that conversation that she would not be paid for doing down routes after the end of 2014. He admits that the plaintiff told him clearly that she would not do routes if she was not paid.

[18] Mr. McDonald states that he had come to the Yarmouth area for approximately 3 weeks after December 30, 2014, spending his time reorganizing and recruiting a

manager and carriers. He did not quantify the costs of this in his evidence. Mr. McDonald says that the plaintiff failed to give two weeks' notice of her intention to leave her position.

[19] He expressed concern that there were several routes in the plaintiff's area, which had not had full-time carriers for five or six months. He expressed dismay at this because he says that when he had to come to the Yarmouth area to manage the aftermath of the plaintiff's departure he was able to find a carrier for the Digby route within a day or so. Mr. McDonald did admit that he did place an ad on Kijiji prior to the plaintiff's departure at a rate of $1000 which did not result in finding a carrier. He admitted that the Digby route is a hard route to staff. He felt that he had treated the plaintiff very well. She had wanted to take on extra duties for the Shelburne area, which she did and then when she requested an assistant, an assistant was provided.

[20] Mr. McDonald testified that as a result of the plaintiff not delivering papers on December 30, 2014 there were over 400 angry customers who complained to the newspaper which resulted in a two dollar charge per complaint to his company. He also testified that the newspaper had given many customers a free week's paper as compensation for the non-delivery which would be charged back to his company.

Submissions

[21] Ms. Russell submits that the plaintiff breached her contract by not showing up for work in delivering papers for the down routes as she was required in accordance with her job as a district manager. She characterizes the plaintiff's statement that she would not comply with the terms of the November 30 e-mail as an anticipatory breach of contract. She argues that the plaintiff knew full well the harm that would come to the company if she did not deliver papers for the down routes on December 29. Ms. Russell agrees that the plaintiff is entitled to payment of her $1400 compensation between December 15 and December 27, but argues that this should not be paid because the damages arising from the counterclaim far outweigh this amount and she seeks an award against the Plaintiff on the counterclaim.

[22] The plaintiff says that she was an employee and that the defendant's conduct amounted to a constructive dismissal. The plaintiff agrees that two weeks' notice would have been the proper notice for dismissal. The plaintiff also states that two weeks' notice to the defendant would have been proper for her to leave her position. Then she says that she did give proper notice of her intent to terminate at the end of December 2014 because she had made it very clear at the end of November that she would not continue to work or perform her duties if she was not going to be paid for the down routes.

Findings and analysis

[23] I do not find a substantial conflict in the evidence. Both parties admit the general nature of their relationship although they characterize it differently; the plaintiff as employer-employee and the defendant as an independent contractor. Both parties agree that the November 30, 2014 e-mail was delivered and received by the plaintiff. Both parties agreed that McDonald and the plaintiff had a conversation in which the plaintiff clearly stated that she was not going to deliver the down routes if she was not paid. Ms. Perry sent the December 1, 2014 email noted above and Mr. MacDonald did not deny receiving that email.

[24] I inferred from the evidence of both parties that they were both direct and forthright in their communications. They both appeared to be quite strong-willed individuals (which I do not consider a negative characteristic). I have concluded that I am not required to make credibility findings in order to reach a result. I found both witnesses to be forthright in their evidence. However, I did find the evidence presented as to Mr. McDonald's interaction with other employees to be quite irrelevant. This case really turns on relationship and the communications between these two parties and the legal interpretation of those communications.

[25] I do not find it absolutely necessary to determine whether the relationship between these parties was that of employer employee or independent contractor. Both parties have agreed that a two-week notice to terminate the relationship would be required on the part of the other. I find those positions to be reasonable both in terms of the

contractual relationship between them if it was an independent contracting relationship as that was part of the original carrier agreement. Equally the parties agreed that two weeks' notice would be appropriate if their relationship was that of employer employee.

[26] I come to this conclusion with some relief, because the evidence was not sufficiently detailed for me to really determine the nature of this relationship. However, if I was forced to make a decision on this point I would have concluded it was an independent contractor relationship on the basis that payment was made at $1400 plus HST and no deductions were taken for payroll. This mode of payment was accepted by the plaintiff, which indicates her tacit acceptance of the relationship being that of independent contractor. I further find that both parties would have known that HST is not payable on wages and that if wages are paid appropriate deductions for tax, employment insurance and Canada Pension Plan are required.

[27] The parties did not seem to dispute that the plaintiff had made it clear that if she were not paid for the down routes, she would not be working at the end of December. The conditions were put forward very clearly by Mr. McDonald in his November 30 e-mail. I find that Mr. MacDonald was clearly told by telephone and by email, that Ms. Perry would not accept those terms and would not attend for work under those terms. I therefore conclude that Mr. McDonald had clear notice that Ms. Perry would not accept those contract terms. He clearly had more than two weeks' notice of this.

[28] On the other hand, Ms. Perry was equally well notified that the contract terms available to her as at the end of December did not involve being paid for down routes. She was very clear in her evidence that she advised Mr. McDonald this was not acceptable and she would not work if she were not paid for the down routes. She therefore also had ample notice, greater than two weeks, that her contract would not be continued if she were not prepared to meet the new contract terms.

[29] It would appear to me that both parties carried on throughout the month of December, hoping that the other party would change their position. This does not change the fact that each party knew full well that the other party was not prepared to continue the relationship unless the opposing party change the position.

[30] From this analysis I conclude that the plaintiff is not entitled to further notice, arising out of the events of December 28 and December 29. I also conclude that the defendant, being clear about the plaintiff's position, ought to have anticipated that the plaintiff would not be offering her services and should have taken steps to ensure the continuation of its business, in the event that the plaintiff was not going to do the down routes. Neither party appears to have taken steps to address the situation where the other party would not change the position.

[31] I find that the plaintiff is entitled to be paid $1400 plus HST for the work performed between December 15 and December 27, 2014. The plaintiff also claims approximately $1900 for delivering down routes during that same period. The court has been provided with absolutely no evidence whatsoever as to how that figure is calculated, other than the plaintiff's suggestion that it is a reasonable estimate. I have no evidence as to the particular routes that were done, the rates which were applicable to those routes, or any other information to assess the value of the services provided. The burden is on the plaintiff to establish a claim and she has not brought forward the evidence to prove that part of her claim. I thus have no legal basis to allow it. As I have indicated above, in my view the plaintiff had adequate notice, and therefore I will not award a further two-week notice period as requested by the plaintiff. Nor does the evidence clearly establish on a balance of probabilities that the plaintiff on December 29, 2014 was to be paid for that day.

[32] While I understand the defendants' frustration and annoyance that papers were not delivered in the last days of December and that complaints were received and penalties imposed upon the defendant, I am unable to attribute those losses to the plaintiff. As I stated above, the defendant knew clearly the plaintiff's position and the risk that she would not be performing duties. The defendant failed to put in place a contingency plan or address that possibility. Ms. Russell's able submission clearly outlines the fact of the loss and to some degree the quantum of the loss, but I have not been provided with any authority or persuasive argument as to the legal principle upon which the plaintiff would be liable, other than the submission that the plaintiff was required to give two weeks'

notice of her departure. I have already held that she did that approximately a month before.

[33] I also think that the principle of mitigation bears on this matter. Ms. Russell characterized Ms. Perry's actions in November as "anticipatory breach" of contract. If so, then the Defendant had an obligation to mitigate its damages. The Defendant was legally obliged to take all reasonable steps to minimize its losses and I find that it did not do so and cannot now claim those damages against the Plaintiff.

[34] Therefore, in the result I will award $1400 plus $210 in HST to the plaintiff. The plaintiff being partially successful, I will award costs in the amount of $ 96.80 for the filing fee. There is an affidavit of service in the file. However, the plaintiff has provided no evidence of the cost of that service and therefore I cannot award compensation for the cost of service.

Dated at Yarmouth this 2nd day of June, 2015.

Andrew S. Nickerson Q.C., Adjudicator