IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Cite as: Hoadley v. Manpower Services Ltd., 2005 NSSM 17
Claim No.: SCCH 2369236
Date:20050425

BETWEEN:

Name: **Debra Grace Hoadley** Claimant

- and -

Name: **Manpower Services Ltd.**

Defendant

Revised Decision: The text of the original decision has been revised to remove personal identifying information of the parties on November 3, 2006.. This decision replaces the previously distributed decision.

Counsel:
Claimant: Self-Represented
Defendant: Barry Kuretsky

D E C I S I O N

This is a wrongful dismissal case. The hearing took place on February 14, 2005. The Claimant, Debra Hoadley, represented herself. The Defendant, Manpower Services Canada Limited was represented by Barry Kuretzky of Kuretzky Vassos LLP, Barristers and Solicitors, Toronto.

EVIDENCE

Ms. Hoadley was hired by Manpower Services Services Limited to act as an in-hour staffing specialist in July, 2004. The original terms of the arrangement called for her working 4 hours per day 5 days a week in a flexible arrangement, although it was stated that it was not to exceed 20 hours per week.

The Claimant testified that she was led to believe that the hiring would lead to full-time employment and said that she would not have stayed there if that had not been the case.

In November, 2004 the Claimant was sent to Toronto to attend "Predictable Performance Systems" ("PPS") training from the employer. She successfully completed this course and was issued a Certificate of Accomplishment (entered as Exhibit C-7) certifying that she had successfully completed the PPS training course.

She testified that this was the first time she had been given any formal training and upon her return to the Halifax office realized that a number of things were being done wrong in the Halifax office. She met with her Halifax manager, David Osborne, on her return and discussed those things at a November 16, 2004 meeting. According to her evidence, this meeting became quite emotional and although she indicated that she was excited about what she had learned and wanted to start implementing things, Mr. Osborne was upset and argumentative during this two hour meeting.

On the next day, November 17, 2004, Mr. Osborne called Ms. Hoadley on the telephone and they both apologized to the other . They then arranged and did meet at the Delta Hotel to "solidify" the employment arrangement. At this time, Mr. Osborne told Ms. Hoadley that the other employee in the office, Diana, was on probation and if that did not work out, Ms. Hoadley would be offered a one year position at $33,150.00.

During the weekend of November 27th-28th, Ms. Hoadley had a migraine and was quite ill. This extended to the Monday, November 29th and she called in sick on that day.

The next day (November 30th) when she arrived at work Mr. Osborne called her into his office and terminated her. According to Ms. Hoadley's testimony, he carefully followed her and watched her as she gathered up her personal items and made her feel like a "common criminal". He would not let her use the office phone to make a phone call and followed directly behind her when she left the office. His only statement despite her questioning was that he had seen her time slip (apparently a reference to the sick day) and that due to the move and budget cuts, the assignment was ended.

On cross-examination, Ms. Hoadley was asked about the employment agreement that she signed on September 11, 2003. This was tendered as Exhibit D-9. She testified that she had never read the employment agreement part of the document and was not given a copy to take home.

It was also brought out on cross-examination that during the July - November, 2004 period, she did have one "outside" assignment for a company called Edge-a-Links. In that assignment she was paid at a rate of $10.00 per hour as opposed to the $13.00 regular rate she was paid for the in-house work.

David Osborne is the Nova Scotia manager for the Defendant company. He gave evidence and indicated that the Defendant is a global staffing firm. He explained that there are no guarantees of work for the employees as the Defendant cannot control this. The Defendant tries to communicate as much of this to the employees as possible.

He testified that in late June he was looking for a temporary in-hour position. He went through the applications on file and saw Ms.Hoadley's. Apparently he reviewed the resume and in the result ended up taking her on as the in-house staffing specialist. He confirmed that it clearly was an in-house assignment. He also stated that due to the status of the budgets which were very tight there were no long-term promises.

He unequivocally stated that Debra "did a great job for us". He stated to the best of his recollection he was hoping to have her in a more solid relationship and that the next step would have been for a one year contract. He said that the budget had come out in late November and there was only one position available and that the performance regarding Diane had turned around. Therefore the position Ms. Hoadley had occupied was ended.

On cross-examination Mr. Osborne was asked why there was a posting on "Career Beacon" for a staffing specialist on December 3, 2004, three days after Ms. Hoadley was terminated. His response was that it was a pro-active position, for competitive information, and to build up the data base.

POSITION OF PARTIES

The Claimant seeks compensation in the amount of $6,760.00 for wrongful dismissal as well as delivery of a computer. The claimed amount represents 10 weeks of notice at $520.00 per week (40 hours x $13.00/hr), 10 weeks' worth of medical and dental benefit, an OUP bonus and costs.

The Defendant essentially argues two points. First, the Claimant's employment was not terminated. Rather, the Defendant states that the Claimant's "temporary assignment with Manpower ended". The Defendant refers to the employment agreement of September 11, 2003, and the terms thereof which state that the duration of an assignment was wholly at Manpower's discretion.

Alternatively, the Defendant, again referring to the employment agreement dated September 11, 2003 pleads that if the employment was terminated then the only notice obligation is that referenced in the agreement which is the notice required by the applicable statute - in this case, the Nova Scotia *Labour Standards Code*. This would be one week notice of termination or pay in lieu thereof. The Defendant states the Plaintiff is not entitled to any further damages beyond that required by the *Labour Standards Code*.

The Defendant also alleges that the Claimant has failed to mitigate her damages.

FINDINGS

The first question is whether the employment agreement of September 11, 2003 applies to this in-house hiring. In my opinion it does not.

I quote directly from the employer's employment agreement which was tendered as Exhibit D-9 and shows up on the fourth page of what is a pre-printed form containing spaces to be filled in with personal information, work history, education history, qualifications, certifications, office skills, office automation skills, industrial skills and safety equipment. The employment agreement in fine print on the last half of the fourth page includes the following which I set out in tabular form:

> *During employment with the Company, whether or not in any position applied for, or some other, or a change in position, now or hereafter, I understand and agree*

that the Company may terminate my employment at any time without cause by giving me written notice of termination as is required by applicable Statute or pay in lieu thereof, and without further liability to me for notice at common law for wages, salary or benefits except such as may have been actually earned by me for work performed as at the date of such termination.

It is further understood and agree that employment with the Company may comprise a variety of assignments, terms, or tasks from time to time ***subject always to the needs of the Company's customers.***

It is further understood and agreed that I may elect to work or not for any temporary period(s) when requested to accept any assignments.

Unless otherwise agreed to in writing, I understand and agree in consideration of the Company employing me that, with respect to this Application for Employment, the Company is not acting as an employment agency or as my agent in the securing of employment with ***the Company's customers(s)*** *nor is the Company acting as agent for the* ***Company's customers*** *in the seeking for applicants for permanent positions with the* ***Company's client organizations****.*

I understand and agree that the full and accurate completion of the information required above along with the completion of the Company's application process shall constitute a conditional offer of employment to me subject to my availability and the availability of ***customer assignments*** *calling for the skills and qualifications which I possess and I agree to consider acceptance of such assignment from the Company.*

(**Emphasis supplied)**

When one reads this agreement it seems to be inescapable that what it objectively intends to cover is a temporary placement or staffing arrangement. In other words, and the evidence clearly described this, Manpower provides temporary employees to its clients/customers. The above quoted portions of the agreement refer in several places to the Company's (the Defendant herein) customers/clients and the needs of the Company's customers. From any objective viewpoint, what is contemplated by this agreement is assignments whereby the employee is sent out to the client or customer organizations that hire ManPower Services to supply staff. Nowhere does this employment agreement explicitly, or even in my view, implicitly, contemplate the hiring between

ManPower and an employee whereby the employee provides work and services directly to ManPower.

Therefore, on ordinary contractual interpretative analysis, I would find that this employment agreement does not apply to the employment relationship that existed between the Claimant and the Defendant herein.

Furthermore, I am supported in this view by the approach that the courts have taken to employment agreements which purport to oust or rebut the common law presumption that, absent just cause, reasonable notice of termination of employment is required. The leading case is ***Machtinger v. HOJ Industries Ltd,*** [1992] 1 SCR 986 in which Iacobucci, J. for the majority stated that the common law principle is a "...presumption, rebuttable if the contract of employment **clearly** specifies some other period of notice, either expressly or implicitly".

A recent example from the Ontario Court of Appeal is the case of ***Ceccol v. The Ontario Gymnastic Federation*** [2001, CanLII 8589]. The following paragraphs are pertinent:

> [45] *Which of the two plausible interpretations of article 5.4 should govern the Federation-Ceccol employment contract? Machtinger instructs that the presumption if reasonable notice can be rebutted only if the employment contract "clearly specifies some other periodof notice" (p. 998). I do not think that article 5.4 achieves that* ***high level of clarity****.*
>
> *[46}* *Moreover, I think it is important to acknowledge what is at stake in the conflicting interpretations put forward by the parties. Ceccol worked loyally and professionally for the Federation for almost 16 years. Her final salary was $50,000.00. If she is entitled to only the eight wek payment established by the ESA,she will receive approximately $7700.00. If she is entitled to reasonable notice, which the Federation is content to accept is 16 months, she will receive approximately $66,700.00.*

> *[47] In an important line of cases in recent years, the Supreme Court of Canada has discussed, often with genuine eloquence, the role work plays in a person's life, the imbalance in many employer-employee relationships and the desirability of interpreting legislation and the common law to provide a measure of protection to vulnerable employees. See Reference Re Public Service Employee Relations Act (Alta), [1987] 1 S.C.R. 313, Machtinger, supra, and Wallace v. United Grain Growers Ltd. [1997] 3 S.C.R. 701 ("Wallace");*
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> *[48] These factors have clearly influenced the interpretation of employment contracts. In Wallace, Lacobucci J. said, at pp. 740-41:*
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> > *The contract of employment has many characteristics that set it apart from the ordinary commercial contract. Some of the views of this subject that have already been approved of in previous decisions of this court (see e.g. Machtinger, supra) bear repeating. As K. Swinton noted in "Contract Law and the Employment Relationship: The Proper Forum for Reform" in B. J. Reiter and J. Swan, eds., Studies in contract Law (1980), 357, at p. 363;*
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> > *. . . the terms of the employment contract rarely result from an exercise of free bargaining power in the way that the paradigm commercial exchange between two traders does. Individual employees on the whole lack both the bargaining power and the information necessary to achieve more favourable contract provisions than those offered by the employer, particularly with regard to tenure.*

What these cases indicate is that if the employer is going to oust the common law presumption, it must do so **clearly** and use a **high level of clarity**. Any ambiguity in the wording used or doubt will be construed against the employer. This, in my view, is quite distinct from and goes beyond the normal rule of normal rule of *contra proferentum*.

It seems to me that the same principle ought to apply where, as here, the purported agreement seems to cover some other employment relationship, and seeks to oust or rebut the common law principle. As I have stated it seems to me, objectively viewed, this contract only covers the relationship between Manpower and its employees with respect to outside assignments. That, it seems to me, is the inescapable conclusion on the plain wording and I do not think there is any doubt of that.

However, even if there is doubt and the contract is one which, as here, purports to limit or rebut the common law presumption, then, for the reasons given above, I think the weight of authority leads to a conclusion which favours the employee. Accordingly, I conclude the contract does not apply to the employment relationship in question.

The further potential question is whether, in the absence of the written contract, it should be found, by implication or otherwise, that this was merely an assignment, terminable at Manpower's discretion and without any obligation on the part of Manpower.

I would reject this.

First, it clearly flies in the face of the common law principle and leaving aside the contract, I find nothing in the evidence to support (and certainly not to the degree the law requires) an implication that would rebut the common law presumption. It seems to me that the facts are all against such an implication.

The evidence herein points to the relationship of employment in the traditional sense and for an indefinite duration. Ms. Hoadley was expected to show up for work every Monday morning on an indefinite basis and work a five day work week as in any other typical office job. She would have had no practical option to refuse to show up on any given day.

She worked at the physical location of the employer.

The clear inference, and I think the only reasonable inference on the evidence, was that there was an expectation on both sides that her employment was for an indefinite duration. Even accepting that there was some sort of a general temporary aspect to the employment, there was certainly no evidence of a specific time period.

Also of relevance here is the fact that the company sent Ms. Hoadley to training in November which she attended in the first part of November for approximately 2 weeks prior to the termination. It certainly seems inconsistent with the position of a temporary hiring or assignment that the employee is sent for training at the employer's expense from Halifax to Toronto for in-house training.

She's never been contacted with any further assignments.

Based on all this, I reject the suggestion that this constituted in any practical sense and, in any legal sense, an end of an assignment.

Therefore, in conclusion, I find that the employment was of indefinite duration and since there was no allegation and no evidence of just cause, it was subject to the common law duty to provide reasonable notice of termination.

Reasonable Notice

In my opinion a reasonable period of notice in this case would be two months. This is based on the period of service, the age of the employee (45), and the type of position.

The notice period is applied to the remuneration that would have been received during the notice period. The Claimant has claimed on the basis of 40 hour week @ $13.00 per hour. On the evidence, she had averaged somewhere in the range of 36-38 hours per work. She has also claimed for dental and medical benefits and for a "OUP" bonus. No evidence was given on these last two points. Also, there was no evidence with the respect to the computer claim.

I would find that she has proven her case as far as the salary component goes on the basis of the earnings that she had received while employed by ManPower. Based on the detailed report of earnings, this would appear to be approximately $2100.00 per month. I calculate this by taking the total amount of the earning of $10,452.00/ 5 months being the period July - November inclusive. The evidence indicated that she did actually receive the one week's pay which I calculate to be $500 and is to be deducted. Therefore, I would allow the claim for $3700.00 representing the gross earnings for two months less one week ($500).

Little evidence was given by way of demonstrating that there was a failure to mitigate. The Defendant bears this burden and I reject this argument.

There was some comment made about damages under the "Wallace principle". While there was some evidence that could lead to such a finding, I do not think it was sufficient and I would disallow that type of claim.

Therefore the order will be for $3,700.00 plus costs of $160.00.

For clarity, although it is probably not necessary, I would state that this would be subject to any applicable statutory deductions.

DATED at Halifax, Halifax Regional Municipality, Nova Scotia on April 25, 2005.

Michael J. O'Hara
Adjudicator

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