

COPY

IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20050714
Docket: S041463
Registry: Vancouver

Between:

Howie Parks

Plaintiff

And:

Vancouver International Airport Authority

Defendant

Before: The Honourable Madam Justice Gerow

Oral Reasons for Judgment

In Chambers
July 14, 2005

Counsel for the Plaintiff:

B.W. Curtis

Counsel for the Defendant:

A.C. Favell

Place of Hearing:

Vancouver, B.C.

[1] **THE COURT:** Mr. Parks was employed by the Vancouver International Airport Authority from May 1, 2000 to December 2, 2003 in a middle management position. He began his employment with the Airport Authority as a Shift Superintendent in Airport Operations. In October 2002 he moved to Airport South to become Superintendent, Airport South. On November 18, 2003, Mr. Parks was advised that he was promoted to the position of Shift Manager, Airport Operations as part of a reorganization that involved a number of management employees. He was

advised that due to the number of people involved in the reorganization the change was not optional.

[2] Mr. Parks did not view the change as a promotion and had a number of concerns including compensation, hours of work and job description. Mr. Parks made efforts to speak to his superiors regarding his concerns. On December 2, 2003, following discussions with Mr. Levy, the Director of Airport Operations, Mr. Parks advised Mr. Levy that he would not take the new position. As a result of the discussions on December 2, 2003, Mr. Parks' employment with the Airport Authority terminated. Mr. Parks has commenced a wrongful dismissal action seeking judgment against the Airport Authority on this summary trial application.

[3] The issues are:

1. Did Mr. Parks resign or was he constructively dismissed?
2. If he was constructively dismissed, what is the appropriate notice period?
3. Did Mr. Parks fail to mitigate his damages by neither accepting the new position nor seeking alternative employment in a timely fashion?
4. What are the appropriate damages?

Background

[4] Mr. Parks is 51 years old. He is married with two dependent children, aged 13 and 16.

[5] Mr. Parks joined the Airport Authority in May 2000. In October 2002 Mr. Parks was asked to take over the position of Manager, Airport South for six months. He was told that if he did not want to stay at Airport South he could come back to the main terminal. When Mr. Parks agreed to take the position, it was downgraded to a superintendent position.

[6] Mr. Parks had significant responsibility in his position as Superintendent, Airport South. These are set out in the job description and include:

1. Facilitation of the \$5 million airport construction project with the Canadian Air Transport Security Authority;
2. Passenger screening;
3. Developing and maintaining relationships with the tenants and operators at Airport South and ensuring long term planning and operation of the facility was done in partnership and with consultation;
4. Directing the day-to-day operations;
5. Managing the utilization of the South Airport terminal building; and
6. Acting as long-range planning liaison between the airport and the tenants and operators.

[7] In May 2003 Mr. Parks was asked if he wanted to continue in the position of Superintendent, Airport South. There is a dispute between the parties as to whether, at the time he agreed to stay in the position, there was any discussion

regarding the length of time he would be in that position. Mr. Parks said he expected to stay in the position for three to four years. Ms. Chambers, the Director of Security and Planning deposes that she advised Mr. Parks that the position was a developmental position and that it was the organization's intention to have employees in the position for no longer than one to two years at a time.

[8] On May 23, 2003, Mr. Parks received a letter from the Airport Authority confirming his permanent appointment to the position of Superintendent, Airport South reporting to Ms. Chambers who at the time held the position of Director Terminal Operations.

[9] Ms. Chambers' evidence is that "permanent" simply means that it is not a term or temporary position that will end on a set date. Any management position is subject to change. Prior to moving Mr. Parks into the position, it had been decided to rotate various operation superintendents throughout the Airport South manager position on a periodic basis so they could develop additional management skills. The reason that the position was described as temporary when Mr. Parks first took it in October 2002 was that the budgeting was not in place to make it a permanent position.

[10] Ms. Mawhinney, the Vice President of Human Resources for the Airport Authority agrees with Ms. Chambers that the Airport South's manager position was temporary, and says that is the reason the position was downgraded from manager to superintendent. She deposes that the reference to "permanent appointment" did not mean that Mr. Parks would be in the position on a permanent basis. The

reference to permanent was meant to differentiate that position from a temporary part-time or term position. The plan was to rotate different superintendents through the position on a periodic basis so they would be able to obtain training in administrative duties, budgeting and planning, as compared to the day-to-day operational duties the superintendents have in Airport Operations.

[11] Ms. Mawhinney deposes that the downgrading was consistent with it being a developmental position for superintendents such as Mr. Parks. As such it would mean a lateral transfer for superintendents. The decision to place Mr. Parks in the Airport South position was part of this overall strategy and the intention was to move him back to the Airport Operations within one to two years.

[12] According to the Airport Authority, the philosophy of the senior management was to reorganize on an ongoing basis in order to achieve a management and supervisory team that was interchangeable and highly flexible. The Airport Authority wanted to ensure that superintendents and managers could be moved from one position to another quickly to meet the needs of the business.

[13] The Airport Authority's position is that all of its management team, including Mr. Parks, knew that the corporate culture was one of ongoing reorganization and change. The Airport Authority says this was reflected in a number of reorganizations during the time Mr. Parks was employed. Due to this philosophy of ongoing reorganization and change, no management employee had any expectation they would remain in any position for an extended length of time.

[14] The Airport Authority takes the position that by indicating that he would not take the new position, Mr. Parks resigned and the Airport Authority accepted his resignation. The Airport Authority is disappointed Mr. Parks did not take the position as Manager, Shift Operations as it was a promotion to a position that was, in the Airport Authority's view, a positive move for Mr. Parks in a job he could perform well.

[15] Mr. Parks, however, deposes that he was never advised that his position as Superintendent, Airport South was a short term position or that he would be moved back to Airport Operations. He was concerned that in the new position of Manager, Airport Operations he would have more responsibilities for the same or less remuneration.

[16] Mr. Parks was informed that his base salary would remain the same but it was unclear as to whether he would retain his shift premium payment of \$5,000 per year or whether it would be rolled into his base salary. As well, the bonus arrangement was changed. Mr. Parks was also concerned that he was not provided with a job description or consulted regarding the proposed change of position.

[17] Mr. Parks says that his expectation, based on his early experience when he changed positions, was that the Airport Authority would consult him regarding any new position and give him a choice as to whether or not he would take the new position.

[18] The Airport Authority says that Mr. Parks was advised of the changes on November 18, 2003 when he was told that he would be moving to a new role as Shift Manager, Airport Operations and another individual would be taking on the

position of Superintendent, Airport South. At that time he was told that he had no option regarding the change.

[19] The Airport Authority points to the fact that Mr. Parks did not raise any concerns until December 1, 2002 when he sent an e-mail to Mr. Levy, the Director, Airport Operations, as an indication that the proposed reorganization did not surprise him. In the e-mail Mr. Parks raised concerns regarding the compensation package, the lack of a job description, and his work schedule.

[20] Mr. Levy deposes that he met with Mr. Parks the same day and discussed Mr. Parks' concerns. Mr. Levy advised Mr. Parks that he would become part of the bonus program for management and that he would receive a maximum of 15 percent of his gross salary based on his performance. His base salary would remain the same. Mr. Levy says that he told Mr. Parks no decision had been made regarding what hours the shift managers would be required to work and that he was looking to the shift managers to be creative in determining how they could provide the best coverage to manage the facility. Mr. Levy told Mr. Parks that the job description had not been created but explained to him management's vision of the expanded role. Mr. Levy explained that he would be meeting with the shift managers to develop in more detail how Airport Operations could achieve management's objectives. Mr. Levy also explained the changes were not optional.

[21] The following day, December 2, 2003, Mr. Parks advised Mr. Levy that based on the compensation offer and the impact the job would have on his family life he could not take the position. He advised Mr. Levy he wanted to remain in the position

long enough to bring his replacement up to speed. The same day Mr. Levy met with Mr. Parks to deliver a letter of acceptance of his resignation. At the meeting Mr. Parks took the position that he had not resigned. Following a discussion Mr. Levy escorted Mr. Parks out of the building.

[22] At the time of the termination Mr. Parks was earning a base salary of \$69,500 per year plus a fixed bonus of \$4,500 per year plus \$5,000 per year in shift premiums for a total of \$79,000 per year. Mr. Parks says this amount was guaranteed. In addition, Mr. Parks had benefits including medical and dental coverage. He was working Monday to Friday from 7 a.m. to 4 p.m. with some flexibility to arrive and depart earlier or later. Saturdays, Sundays and evenings were not part of his normal work schedule.

[23] Mr. Parks believed that the compensation offer for Shift Manager was for the same base salary, \$69,500 plus only a speculative bonus that could range from 0 percent to 15 percent. As well, Mr. Parks believed that the shift manager position required evening and weekend work.

[24] The Airport Authority agrees that at the time of termination Mr. Parks was earning \$79,000 per year but says the fixed bonus was not guaranteed. The compensation for the new position would have been \$69,500 plus the shift premium. The bonus could result in a total compensation of \$84,360.

[25] On his termination the Airport Authority paid Mr. Parks severance in the amount of \$15,000.

[26] Following the termination, Mr. Parks did not work until May 2004 when he was hired by the RCMP at a rate of \$69,271 per year. On August 2, 2004, Mr. Parks took a new position with the RCMP paying an annual salary of \$85,425.

Was Mr. Parks fired or did he resign?

[27] The first issue is: was Mr. Parks fired or did he resign? Mr. Parks takes the position that he was fired from his position as Superintendent, Airport South and that the proposed changes to his employment contract through the Shift Manager transfer constituted fundamental breaches of the employment contract.

[28] An employer cannot make fundamental and unilateral changes to a contract of employment unless such changes are specifically permitted by the contract of employment. This principle applies even if the change is a promotion: ***Hanni v. Western Road Rail Systems (1991) Inc.*** (2002), 17 C.C.E.L. (3d) 79 (S.C.) at ¶ 52 and 53, 2002 BCSC 402.

[29] It is apparent from the description that the job being offered to Mr. Parks was either a slight promotion or at worse a lateral transfer. The questions are: what are the terms of the contract; has there been a breach; and if there has been a breach of the contract, is it a fundamental breach? Employers must be free to reorganize and restructure but in doing so they must reach a new contract of employment with employees who are fundamentally affected by the reorganization, or give adequate notice to them. In each case it must be determined whether the changes proposed were a breach of the contract of employment that were not specifically permitted by

the contract: ***Hart v. Bogardus Wilson (1984) Ltd.*** (1987), 13 B.C.L.R. (2d) 269 (C.A.).

[30] There is no evidence regarding a written contract of employment between Mr. Parks and the Airport Authority.

[31] Although the Airport Authority asserts that Mr. Parks knew that the philosophy of senior management was one of ongoing reorganization and change, no evidence was adduced of any directives to Mr. Parks setting out that philosophy or that anyone actually recalls advising Mr. Parks of that philosophy. Mr. Parks denies that he ever agreed to his position being changed without consultation and agreement. Mr. Parks' understanding of the contract of employment was that any changes to his position would be done in consultation with him and with his agreement as was done when his position was changed from Superintendent, Shift Operations to Superintendent, Airport South.

[32] The evidence from the Airport Authority supports Mr. Parks' evidence that the prior change in his position from Shift Superintendent to Superintendent, Airport South had been made with consultation. Ms. Chambers deposes that when Mr. Parks was moved to the Airport South position the position was discussed with him and that, although he expressed concerns, he took the position. Mr. Parks' evidence is that, although his duties had changed from when he was first employed by the Airport Authority, he had been consulted before any changes had been made, and given a choice as to whether he would take the position. There is no evidence that Mr. Parks agreed that his job duties, hours and compensation could be changed

without his consent, either at the time he originally took a position with the Airport Authority in 2000 or when his position was changed in 2002. The changes the Airport Authority proposed regarding Mr. Parks becoming a Shift Manager were without consultation or his consent. Mr. Parks says that the proposed change to his position from Superintendent, Airport South would have resulted in several fundamental changes to his contract of employment, including material changes to the compensation structure, the days and hours worked, and the imposition of additional duties.

[33] The evidence regarding what the Airport Authority told Mr. Parks about compensation is confusing. In his third affidavit Mr. Levy deposes that there was a misapprehension on the part of Mr. Parks regarding whether the shift premium was to form part of the base salary of \$69,500 or to be in addition to the base salary, and that it was always to be added to the base salary. At the same time Mr. Parks was told there would likely be shift work in that there was an expectation of “24/7 coverage.” Although in his first affidavit Mr. Levy deposed that “in the Shift Manager position the base was supposed to be \$69,500 with shift premium of \$5,000 rolled into it”, he now says that means in addition to. In my view, the normal meaning of “rolling into” is included rather in addition to, particularly in light of the fact that it was reasonable to assume that there would be shift work given the coverage expectation.

[34] Whether there has been a fundamental breach is a question of the terms of the contract. In *Hart* the Court held that it was open to the trial judge to conclude

that it was a fundamental breach to force a promotion on an employee where the employee had to give up a fixed salary for performance-based compensation.

[35] I agree with Mr. Parks that it was reasonable to infer that what he was being offered was a job where the remuneration could potentially be more than what he was making but could also potentially be less. He was required to trade a more certain-base salary for a potentially greater bonus.

[36] As well, Mr. Parks was required to take on additional supervisory duties. The Airport Authority points to his original position of Shift Superintendent, Airport Operations and says that the position of Shift Manager, Airport Operations is not very different. However, Mr. Parks was not in the position of Shift Manager at the time of the proposed change but was in the position of Superintendent, Airport South. Mr. Parks' duties as Superintendent, Airport South did not include the supervisory role that he would have as Shift Manager. As Shift Manager Mr. Parks would have to manage and supervise an additional 30 employees. I agree with Mr. Parks this would be a significant change to his duties.

[37] Finally, Mr. Parks says he would have had to work different hours than the hours he was working as Superintendent, Airport South. The Airport Authority's position is that the hours for Shift Managers were not set at the time Mr. Levy spoke to Mr. Parks and that Mr. Levy made it clear that this was something the Shift Managers would work out in consultation with him. However, Mr. Levy also made it clear to Mr. Parks that the expectation was for 24 hours a day and seven days a week coverage. In my view, it was reasonable for Mr. Parks to infer that there would

be a requirement for shift or weekend work which would interfere with both his family and community life. Mr. Parks' evidence was that he was concerned that the changes to his work schedule would result in him incurring additional child care expenses and other family inconvenience he had not planned for.

[38] A unilateral change to an employee's hours of work may constitute a fundamental breach of the employment contract. One must look at the changes objectively in order to determine whether the changes to Mr. Parks' duties, hours and wages were sufficient to constitute the breach of a fundamental term of its contract of employment. *Hanni*, at ¶ 58, 61 and 62.

[39] There is no evidence that changes to such fundamental terms were permitted by the employment contract. Mutuality is required for every change to the basic terms of a contract such as hours, salaries and duties, unless the contract itself gives the employer the right to make such unilateral changes. *Farquhar v. Butler Brothers Supplies Ltd.* (1988), 23 B.C.L.R. (2d) 89 at p. 93 (C.A.). In the case at bar, there is no evidence of any mutuality or contractual right to make such changes.

[40] Viewed objectively, I am satisfied that the changes in Mr. Parks' duties, compensation and hours were sufficient to constitute a breach of the fundamental terms of his contract of employment. There is no evidence that Mr. Parks ever agreed or discussed with the employer that it could change his hours of work, compensation and duties without his agreement. As I indicated earlier, the evidence is to the contrary, in that the early change in position from Shift Superintendent,

Airport Operations to Superintendent, Airport South was made after consultation with Mr. Parks and with his agreement.

[41] Even though there was no agreement that Mr. Parks' duties, compensation and hours would always remain the same, the lack of any agreement that the Airport Authority could unilaterally change Mr. Parks' position required that the Airport Authority negotiate any proposed changes to Mr. Parks' duties, hours and compensation. Here, there was no negotiation and no choice.

[42] I am satisfied that the proposed changes constitute a breach of fundamental terms of the employment contract which was not specifically permitted by either contract or agreement. In my view, Mr. Parks has established that he was constructively dismissed. Given that no new contract was entered into, the Airport Authority was required to give Mr. Parks adequate notice.

What is the appropriate notice period?

[43] The next issue is: what is the appropriate notice period? The circumstances of the individual must be considered in determining reasonable notice including the nature of the employment, the length of service, the age of the employee and the availability of similar employment. As well, the education, training and qualifications of the employee are factors to be considered. Although the list is not exhaustive, these are important factors to take into consideration. ***Ansari v B.C. Hydro*** (1986), 2 B.C.L.R. (2d) 33 (S.C.) aff'd (1986), 55 B.C.L.R. (2d) xxxiii (C.A.), ***Flintoff v. Trimex Marketing Inc.***, [1999] B.C.J. 1550 (S.C.).

[44] At the time of termination Mr. Parks was 51 years old. He had worked for the Airport Authority for three years and seven months. He submits that given his background and the responsibilities of the position he is entitled to a significant notice period even though the length of his service was relatively short. Mr. Parks suggests the appropriate range of notice for similar positions with similar levels of responsibility is eight to ten months, and given the very responsible position he had and the lack of equivalent alternative employment, the appropriate notice period is 10 months.

[45] The Airport Authority says that Mr. Parks did not act reasonably in not taking the position of Shift Manager until he found other employment, or in not seeking alternative employment in a timely fashion following his termination. In the alternative, it takes the position that the appropriate notice period is four to six months.

[46] The purpose of a notice period is to bridge the period of unemployment. During the period of unemployment the employee is not required to take any job available in order to mitigate his loss, however he is expected to pursue reasonable employment opportunities commensurate with his age, education and training. ***Shinn v. TBC Teletheatre B.C.*** (2001), 85 B.C.L.R. (3d) 75 (C.A.) at ¶ 35.

[47] In ***Zalusky v. Nestle Canada Inc.*** (1992), 6 C.C.E.L. (2d) 73, [1992] B.C.J. No. 2921 (S.C.), Tysoe J. reviewed the law regarding the requirement to continue to work with the same employer. The employee is only required to take the steps in mitigation that a reasonable person would take.

[48] Although the Airport Authority asserts that Mr. Parks should have taken the new position until he found alternate employment, it is apparent that the working relationship deteriorated rapidly after Mr. Parks sent his e-mail raising his concerns about the new position on December 1, 2003 and by December 2nd, that was no longer a reasonable option. The relationship between the parties had significantly deteriorated as evidenced by the fact that on December 2nd, Mr. Parks was given a short period of time to clean out his office of personal belongings and escorted off the premises. In the circumstances, I am of the view it was reasonable for Mr. Parks not to take the Shift Manager position while he looked for alternate employment.

[49] Mr. Parks says that the period of notice should be increased because of the manner of the dismissal, relying on ***Wallace v. United Grain Growers Ltd.***, [1997] 3 S.C.R. 701, 152 D.L.R. (4th) 1. However, I do not accept Mr. Parks' assertion that the manner in which the Airport Authority treated him was of such a nature as to justify an extension of the notice period. There is no evidence that Mr. Parks was treated in bad faith. Mr. Levy escorted Mr. Parks to a side entrance and expressed sadness and disappointment that things had not worked out. There was no public humiliation. Mr. Parks was paid \$15,000 of severance pay.

[50] I was provided with authorities from both Mr. Parks and the Airport Authority regarding the appropriate notice period. The cases range from three months to twelve months. Both parties assert that the other "cherry picked" the cases to show either the high end or the low end of the spectrum. It is clear that each case must be determined on its own facts taking into account the factors enunciated in ***Ansari***.

[51] Given Mr. Parks' age, length of service, education and duties, I am of the view that the appropriate notice period is seven months.

Did Mr. Parks fail to mitigate his damages by not seeking employment in a timely fashion?

[52] The next issue is: did Mr. Parks fail to mitigate his damages by not seeking employment in a timely fashion? The Airport Authority asserts that Mr. Parks took no steps to pursue alternate employment until April 2004, as by his own admission he did not make any applications for jobs until then. On April 20th, he contacted the RCMP and on May 4, 2004 was offered employment. He began working for the RCMP on May 10th and is still employed there.

[53] Although Mr. Parks says he looked in newspapers, on the internet and had general conversations about possibilities of employment, there is minimal evidence that he made any efforts to seek employment until the beginning of April 2004. I accept Mr. Parks' submission that the onus is on the Airport Authority to establish that he failed to mitigate his damages; however, there must be some reasonable effort on the part of the employee. I agree that the timing of the termination would have inhibited Mr. Parks' ability to seek employment for at least a month. As well Mr. Parks states he was emotionally upset as a result of the manner in which he was terminated and says that, together with the timing of the termination (just before Christmas), delayed his ability to obtain alternative employment. However, there is no medical evidence to suggest that Mr. Parks was depressed or suffering from stress.


[54] Although I agree that there is no evidence that jobs were available, the evidence is that Mr. Parks obtained employment less than two months after he began looking in earnest. In these circumstances, it is reasonable to infer that if Mr. Parks had made efforts earlier he would have obtained employment somewhat sooner. In my view, it is appropriate to reduce the award to the equivalent of five months salary; two months due to the timing and upset Mr. Parks experienced from losing his job so abruptly and three months to seek appropriate alternate employment.

Damages

[55] I turn next to the issue of damages. Mr. Parks says he was without work during the notice period. During this time he would have earned his base salary plus shift premium and received his bonus of \$4,500. The Airport Authority has presented no evidence that Mr. Parks would not have received his bonus.

[56] Mr. Parks is entitled to damages including the fixed bonus and five months of salary and shift premium of \$31,041.67 (which is the equivalent of 5/12 of \$69,500 plus \$5,000) plus the \$4,500 bonus. He is entitled to special damages of \$1,621.77 for his medical expenses because the Airport Authority stopped his benefits immediately after termination. From that amount should be deducted the gross payment of \$15,000 made by the Airport Authority to Mr. Parks. The total amount of the damage award is \$22,163.44.

[57] Mr. Parks is also entitled to costs at scale 3 subject to submissions.

A handwritten signature in black ink, appearing to read "Aron J.", is located at the bottom center of the page.