

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Maxwell v. British Columbia*,
2014 BCCA 339

Date: 20140904
Docket: CA041149

Between:

Beverley Maxwell

Respondent/
Appellant on Cross Appeal
(Plaintiff)

And

**Her Majesty the Queen in right of the Province of British Columbia
and British Columbia College of Teachers**

Appellants/
Respondents on Cross Appeal
(Defendants)

Before: The Honourable Mr. Justice Chiasson
The Honourable Madam Justice Neilson
The Honourable Madam Justice Garson

On appeal from: An order of the Supreme Court of British Columbia, dated
August 1, 2013 (*Maxwell v. British Columbia*, 2013 BCSC 1386,
Vancouver Registry S120764).

Counsel for the Appellants: A. Dalmyn

Counsel for the Respondent: B. Curtis

Place and Date of Hearing: Vancouver, British Columbia
June 2, 2014

Place and Date of Judgment: Vancouver, British Columbia
September 4, 2014

Written Reasons by:

The Honourable Mr. Justice Chiasson

Concurred in by:

The Honourable Madam Justice Neilson
The Honourable Madam Justice Garson

Summary:

The respondent was employed by the British Columbia College of Teachers as the director of certification. Prior to January 2012, the College was responsible for regulating the teaching profession in British Columbia. Effective January 9, 2012, the College was dissolved by the appellant Province pursuant to the Teachers Act and replaced by the Teacher Regulation Branch. The legislation also provided that “all of the rights ... of the College of Teachers are transferred to and vested in the government” and “all of the debts, liabilities, and obligations of the College of Teachers are transferred to and assumed by the government”. On December 1, 2011, the respondent was offered employment with the Branch, but did not accept it. The respondent contends she was dismissed and sought payment of a severance amount and related benefits pursuant to her contract of employment with the College. The appellants disputed her contention and asserted that she was obliged and failed to mitigate any damages she sustained by accepting the employment offered to her by the Branch. The trial judge awarded the respondent \$271,000 in salary and other benefits pursuant to the contract of employment. He did not allow the respondent’s claim for additional pension benefits. The appellants appealed and the respondent cross appealed. Held: appeal and cross appeal dismissed. Dissolution of the College ended the respondent’s employment. Because her contract of employment provided specifically for the consequences of termination, she was not obliged to mitigate damages. The judge did not err refusing to award the respondent additional pension benefits.

Reasons for Judgment of the Honourable Mr. Justice Chiasson:**Introduction**

[1] This appeal concerns the severance rights of employees under employment contracts when the employer is dissolved by statute.

Background

[2] The respondent was employed by the British Columbia College of Teachers as the director of certification. Prior to January 2012, the College was responsible for regulating the teaching profession in British Columbia. Effective January 9, 2012, the College was dissolved by the appellant Province pursuant to the *Teachers Act*, S.B.C. 2011, c. 19, and replaced by the Teacher Regulation Branch.

[3] The legislation also provided that “all of the rights ... of the College of Teachers are transferred to and vested in the government” and “all of the debts,

liabilities, and obligations of the College of Teachers are transferred to and assumed by the government” (s. 87(1)(c) and (d)).

[4] On December 1, 2011, the respondent was offered employment with the Branch, but did not accept it. On December 12, 2011, she so advised Ms. Kennedy, the interim registrar of the College appointed by the government. They discussed the respondent’s last day at work as January 6, 2012, the Friday before January 9, 2012. The respondent contends she was dismissed and seeks payment of a severance amount and related benefits pursuant to her contract of employment with the College.

[5] The trial judge set out the material terms of the respondent’s employment contract with the College:

1.01 Term

The employment of the Employee in the capacity of Director, Certification will continue from the date of execution of this Agreement until termination by either party pursuant to Article 1.02 (the “Term”).

1.02 Termination

- a) This agreement may be terminated at any time by mutual agreement of the Parties.
- b) The Employee shall be entitled to terminate this agreement upon one (1) month written notice to the College.
- c) The Registrar, shall be entitled to terminate the Employee for cause without notice or pay in lieu of notice, provided that the Employee has been given reasonable notice in writing in advance of the possible termination decision and the reasons for the possible termination and has been provided with an opportunity to respond before a decision to terminate is made.
- d) The Registrar shall be entitled to terminate the Employee without cause provided that the Employee has been given reasonable notice in writing in advance of the possible termination decision and the reasons for the possible termination and has been provided with an opportunity for the Employee to make representations before a decision to terminate is made. The Employee may be accompanied by a representative at any meetings held with the Employer related to the possible termination.
- e) If the Registrar makes a decision to terminate the employment of the Employee without cause, the College shall provide an all-inclusive payment in lieu of notice, based upon the employee’s salary and the College’s cost of the benefits (which includes the College’s cost of

pension contributions) that would have been provided to the Employee during the period of notice of the Employee at the time of termination. The payment will occur as follows:

- i. If the Employee is terminated at any time within the first four years of employment, the Employee shall be paid a lump-sum equivalent of four months' salary and the College's cost of the benefits (which includes the College's cost of pension contributions) that would have been provided to the Employee during the period of notice;
- ii. If the Employee is terminated at any time after four years of employment, the Employee shall be entitled to a lump-sum payment equivalent to one (1) month salary and the College's cost of the benefits (which includes the College's cost of pension contributions) that would have been provided to the Employee during the period of notice for each completed year of service up to nine (9) years of employment, plus two (2) additional months of salary and the College's cost of the benefits (which includes the College's cost of pension contributions) that would have been provided to the Employee during the period of notice for each additional year of employment completed after nine (9) years. In addition, the Employee will receive a further additional month of salary and the College's cost of benefits (which includes the College's cost of pension contributions) for each full year, or part year, the Employee is over 50 years of age.
- iii. The total payment under provision 1.02(e) (ii) shall not exceed 24 months of salary and the College's cost of benefits (which includes the College's cost of pension contributions).
- iv. The Employee agrees that the lump sum to be paid represents a genuine pre-estimate of damages for early termination of this Agreement and that such sum is not a penalty.

[6] The Province and the College both denied that the respondent was dismissed from her employment, asserted that she was obliged to mitigate any damages and pleaded that she was not entitled to compensation because she failed to accept the Branch's offer of employment.

[7] The trial judge awarded:

... the severance amounts set out in the Contract, being \$271,000 in salary, \$5,824.92, representing the College's cost of benefits in the severance period, and \$35,720.26 representing the contributions to the Pension Plan that the College would have made during that period.

He dismissed the respondent's claim for additional pension benefits.

[8] The Province and the College appeal and the respondent cross appeals.

The trial judgment

[9] The judge stated the issues as follows (at para. 33):

1. Was Ms. Maxwell's employment with the College terminated by Ms. Kennedy at the December 12, 2011 meeting or by reason of the dissolution of the College pursuant to the terms of the *Act*?
2. If Ms. Maxwell's employment was terminated by reason of the dissolution of the College pursuant to the terms of the *Act*, is she nonetheless entitled to the severance payment and related benefits set out in the Contract?
3. If Ms. Maxwell is not entitled to the severance payment and related benefits set out in the Contract, what is she entitled to at common law? and
4. Was Ms. Maxwell required to mitigate her damages and, if so, did she fail to do so?

[10] He addressed the disagreement between the parties whether the respondent was terminated as a result of her conversation with Ms. Kennedy on December 12, 2011. He stated at para. 46:

... [the respondent's] termination was brought about by the change in structure put in place under the *Act* and was not effected independently by Ms. Kennedy. January 9, 2012 was a Monday and January 6, 2012 was the preceding Friday. ... [W]hen [the respondent] indicated that she would not be taking up employment with [the Branch], it only made sense that Friday January 6, 2012 would be her last formal day of work at the College.

The judge concluded at para. 47:

... I find that [the respondent] was not terminated by Ms. Kennedy on December 12, 2011. Rather, her employment with the College ended as a result of the dissolution of the College under the *Act*.

[11] The judge rejected the submission of the appellants that the contract of employment had been frustrated. He also concluded that their interpretation of the termination provisions of the contract as applying only if the decision to terminate was made by the registrar of the College was not sustainable.

[12] He accepted the expert, actuarial evidence adduced by the respondent to establish the amount the respondent "would need in order to obtain the same

monthly pension and bridge benefits she would have been entitled to had she continued to accrue pensionable service for an additional 24 months”, but rejected that claim, stating at para. 81:

... to permit [the respondent] to recover damages on this basis would be inconsistent with clause 1.02(e)(iii) of the Contract which provides that the total severance payment due to [her] “shall not exceed 24 months of salary and the College’s cost of benefits (which includes the College’s cost of pension contributions)”.

He awarded the respondent the amount the College would have contributed to the pension plan during the 24 month severance period, \$35,720.26, and the cost of other benefits, \$5,824.92.

[13] The judge held that the termination provisions of the contract applied and that the respondent was not obliged to mitigate her damages because her entitlement was fixed by agreement of the parties.

Positions of the parties

[14] The appellants contend that the respondent was not terminated by any act of the College and that her employment ended by the dissolution of the College. They state that the respondent had a right to pay in lieu of notice as damages, did not have a right to the severance package stated in her contract and was obliged to mitigate her damages.

[15] The respondent agrees that her employment ended as a result of the dissolution of the College, as was held by the trial judge. She contends that the judge correctly held that she was entitled to the severance package in her contract and that she had no obligations to mitigate.

[16] The respondent cross appeals, stating that the judge erred in failing to award her damages reflecting her lost participation in her pension plan during the 24 month severance period.

Discussion

Termination

[17] The appellants state that there are two kinds of employment termination: actual and constructive dismissal. In the present case, there was no actual dismissal; the respondent was terminated by operation of law when the College was dissolved.

[18] The appellants contend that the contractual severance provisions are inoperative because the College did not fire the respondent. That is, that the provisions apply only when there is an actual, as opposed to a constructive, dismissal. No authority was cited to support a differentiation between the effect of constructive as opposed to actual dismissal. The appellants rely on the language of the severance provisions.

[19] There is some authority for the proposition that there is no difference in effect between actual and constructive dismissal (*Evans v. Teamsters Local Union No. 31*, 2008 SCC 20; *Maver v. Greenheat Energy Corporation*, 2012 BCSC 1139). In *Evans*, the Court observed at para. 27:

Given that both wrongful dismissal and constructive dismissal are characterized by employer-imposed termination of the employment contract (without cause), there is no principled reason to distinguish between them when evaluating the need to mitigate.

[20] The appellants assert that because no decision to terminate the respondent was made by the College, the severance provisions in the contract do not apply and the respondent's rights are to be determined at common law. She was obliged to mitigate by accepting the position offered to her by the Branch.

[21] Article 1.02 provides for various termination scenarios, including termination by the College. Article 1.02(e) provides that if a decision is made to terminate the respondent without cause, she is entitled to certain payments.

[22] The issue often arises in the context of the transfer or sale of a business. Because the contract of employment is a personal contract between an employer and employee, it cannot be transferred or assigned without the employee's consent: *Nokes v. Doncaster Amalgamated Collieries Ltd.*, [1940] A.C. 1014; *White v. Stenson Holdings Ltd.* (1983), 43 B.C.L.R. 340 (S.C.). Termination is effected through the action of the employer disposing of the business.

[23] In the present case, dissolution was not the act of the College, but the effect at law was the same: the respondent's employment was terminated without cause. Although the College did not itself make the decision to terminate the respondent's employment, the government's decision to dissolve the College amounted to the same thing.

[24] Pursuant to the *Teachers Act*, the government was vested with the College's right to end the employment relationship with the respondent, but all of the liabilities and obligations of the College were transferred to and assumed by the government. In my view, those obligations included the respondent's right not to be terminated without cause absent contractual compensation. The government assumed that obligation and the College's liability to compensate.

Mitigation

[25] The trial judge dealt with mitigation at para. 84:

[84] The law in British Columbia is well settled that where there exists a contractual severance provision, a dismissed employee is entitled to the specified amount and is not required to mitigate absent a duty to do so imposed by the contract. That principle was confirmed by the Court of Appeal recently in *Allen v. Ainsworth Lumber Co. Ltd.*, 2013 BCCA 271 at para. 38, citing *Philp v. Expo 86 Corp.* (1987), 45 D.L.R. (4th) 449 (BCCA) and *Bowes v. Goss Power Products Ltd.*, 2012 ONCA 425, 351 D.L.R. (4th) 219. No such duty to mitigate is required by the Contract here.

[26] The appellants disagree and state that the judge:

... erred in saying that the law in BC was well settled. The cases have had varying results depending on the language and context of the parachute term and the efforts to mitigate.

In my view, the judge was correct: the law in this Province is settled. The fact that there have been varying results based on the language and context of the contracts in issue does not derogate from that fact.

[27] Where a contract provides for the effect of termination, generally the provisions of the contract prevail. Recourse to the common law is not required. In some circumstances, the contract may require mitigation, but where it does not the innocent party is entitled to what was agreed. The guilty party is not entitled to graft onto the bargain struck by the parties additional terms that dilute or modify the entitlement of the innocent party.

[28] In the present case, the contract specifically provides that if the respondent was terminated without cause, “the College shall provide an all-inclusive payment in lieu of notice”. It continues to specify the components of that payment. I see no basis on which it could be contended that the respondent was obliged to mitigate and that her failure to do so would relieve the appellants from their contractual obligations.

The cross appeal

[29] The respondent relies on Article 3.05(b) of the contract, which she contends is ambiguous. She asserts that the trial judge struggled “with ambiguities in the clause – there was a lack of clarity”.

[30] Article 3.05(b) states:

Prior to any termination from employment the Registrar will permit the Employee to enter into an agreement which would extend the Employee’s pensionable service for a period not longer than the payment in lieu of notice provided for in Article 1.02(e). Agreement by the Registrar to such an agreement will not be unreasonably withheld.

[31] The judge addressed the article at para. 80:

[80] Clause 3.05 (b) does not on its face provide for an extension of Ms. Maxwell’s pensionable service under the Pension Plan. Rather, it simply directs that the registrar will permit Ms. Maxwell to enter into an agreement for such an extension. However, the clause does not identify with whom

Ms. Maxwell would reach such an agreement. It would not be with the College or the registrar given that the College has no authority to determine eligibility for pensionable service. That is governed by the terms of the Pension Plan and decisions of the Plan's board of trustees. Likely, such an agreement would be with the Plan's trustees, however that is not clear from the wording of clause 3.05 (b) and there is no evidence that such an agreement is possible or would be acceptable to the trustees.

He continued in para. 81:

[81] Further, to permit Ms. Maxwell to recover damages on this basis would be inconsistent with clause 1.02 (e)(iii) of the Contract which provides that the total severance payment due to Ms. Maxwell "shall not exceed 24 months of salary and the College's cost of benefits (which includes the College's cost of pension contributions)". In my view, it is not open to Ms. Maxwell to claim entitlement to a severance payment under the Contract but at the same time ignore the cap on such a payment established by the Contract. Accordingly, I find that Ms. Maxwell is entitled to recover the amount that the College would have contributed to the Pension Plan on her behalf during the 24 month severance period. Based on Ms. Maxwell's 2011 year end pay stub, that amount is \$35,720.26.

[32] Article 3.05(b) is not worded happily, but I do not agree with the respondent's contention that it imposes an obligation on the College to "enter into a deal with [the respondent] prior to termination whereby her pension participation would be extended by 24 months" and that "[i]f the College – for whatever reason – could not fulfill that promise, [the respondent] would be entitled to damages for the College's breach of that promise". I do agree with her contention that Article 1.02(e)(iii) would not be applicable to such damages because it refers specifically to amounts payable pursuant to Article 1.02(e)(ii).

[33] The respondent argues that the deletion of a provision stating that any pension extension will not result in any additional cost or liability to the College supports her position. I do not agree. The deletion does not alter the essential character of the provision.

[34] Article 3.05(b) merely gives the respondent an opportunity to attempt to continue her pension despite no longer having the status of employee. Essentially, her claim is for loss of opportunity. It is not clear to me that the appellants did anything to deprive the respondent of whatever opportunity may have been available

to her. Although she was terminated without cause, she knew well in advance that the College would be dissolved. There is no evidence that she took any steps to obtain a pension continuance or any evidence as to whether she likely would have received a continuance had she sought it.

Conclusion

[35] I would dismiss the appeal and cross appeal.

“The Honourable Mr. Justice Chiasson”

I agree:

“The Honourable Madam Justice Neilson”

I agree:

“The Honourable Madam Justice Garson”