

Orovec v. Ryan Duffy's Management Ltd., 2016 NSSM 7 (CanLII)

Date: 2016-04-14

Docket: 445948

Citation: Orovec v. Ryan Duffy's Management Ltd., 2016 NSSM 7 (CanLII), <http://canlii.ca/t/gphm0>, retrieved on 2016-05-05

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IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Cite as: Orovec v. Ryan Duffy's Management Ltd., 2016 NSSM 7

2016

Claim No. 445948

BETWEEN:

DANIEL OROVEC
Claimant

- and -

RYAN DUFFY'S MANAGEMENT LIMITED
Defendant

Hearing Dates: February 2, 2016
Appearances: Claimant – Daniel Orovec
Defendant – William Russell, Barrister and Solicitor

DECISION and ORDER

- [1] This is a claim for damages for wrongful dismissal.
- [2] The Claimant worked for the Defendant from January 5, 2015, to May 15, 2015, a period of approximately four and one-half months. There is no allegation by the employer of just cause for the dismissal. The issue here is whether the claimant is entitled to damages for failure to provide appropriate notice.
- [3] The basic and essential facts here include that the Claimant was hired at an annual salary of \$75,000.

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That salary was changed to \$50,000 effective May 1, 2015. On May 15, he was terminated and was paid one week's pay in lieu of notice (on the basis of \$50,000 pay rate). He secured new employment and started on June 29th in his new job. His claim herein is for the interim period of approximately six weeks.

- [4] In this case, as in other dismissal cases, the law implies a term in the employment relationship that, in the absence of just cause, the employer can only properly terminate the employee relationship upon giving reasonable notice or pay in lieu of reasonable notice. This implied term may be supplanted by an express term should the parties so agree in either a written contract or some other clear communication that shows the unequivocal agreement by the employee.
- [5] There was no such express term here. Therefore, the Claimant was entitled to reasonable notice of termination of his employment.
- [6] What would be reasonable notice in this particular case? The case law looks at four principal factors – length of service, position of employer, age, and prospects for re-employment. Other factors may be considered such as whether the employee was induced to leave the previous employment.
- [7] Here, the 48 year old chief operating officer worked for approximately four and one-half months. His role was purportedly as chief operations officer in the restaurant/food services industry as well as functioning as an executive chef. Apparently, the prospects of re-employment for a restaurant chef or executive chef are fairly good. This appears to be confirmed by the fact that the Claimant did obtain alternate employment within six weeks as an executive chef.
- [8] Following the May 15th termination, the Claimant found new employment, and actually commenced his new employment on June 29th. His claim, as presented, was for the lost income for the six weeks period from May 15 to June 29, 2015.
- [9] I might also comment at this point that there was no basis here to reduce his claim from a failure to mitigate. In my view, the Claimant acted reasonably and secured alternate employment within a very reasonable time.
- [10] In my assessment, the range of reasonable notice that this employee was entitled to would be three months. I base that on his age, the level of employment which was a level which included managerial and supervisory functions and which is recognized as a factor which increases the notice. The length of service is short but, that is offset by the fact that he was induced away from his previous employment. Therefore, as I have said, I find that a reasonable notice period here would be three months.
- [11] Additionally, I refer to the following Nova Scotia cases where the length of service was less than a year.

| CASE NAME | POSITION | AGE | LENGTH OF SERVICE | NOTICE |
|--|----------------|---------|-------------------|-----------------|
| Wilson v. Sobeys Inc. S402/22 1996 CanLII 5323 (NS SC), 155 N.S.R. (2d) | Aircraft Pilot | Unknown | 0 Years 3 Months | 3 Months |

| | | | | |
|---|------------------------|---------|------------------|------------------|
| Annand v. Peter M. Cox Enterprises Ltd. et al. S321/24 1992 CanLII 4666 (NS SC), 111 N.S.R. (2d) 196 | Estimator Manager | 61 | 0 Years 3 Months | 1 Month |
| Taggart v. K.D.N. Distribution & Warehousing Ltd. S410/14 1997 CanLII 14952 (NS SC), 160 N.S.R. (2d) 192 | Operations Manager | Unknown | 0 Years 4 Months | 6 Months |
| Sherman v. Sarsfield Foods Ltd. S318/25 107 N.S.R. (2d) 141 | Maintenance Supervisor | 54 | 0 Years 4 Months | 1 Month |
| MacLean v. 2300528 Nova Scotia Ltd. S391/15 1995 CanLII 4162 (NS SC), 148 N.S.R. (2d) 352 | Office Clerk | Unknown | 0 Years 5 Months | 3 Months |
| Davidson v. Metropolitan Area Growth Investments Ltd. 28 N.S.R. (2d) 376 | Corporate Secretary | Unknown | 0 Years 5 Months | 12 Months |
| Rodgers v. Sun Radio Ltd. 1991 CanLII 4262 (NS SC), 109 N.S.R. (2d) 415 | Radio Announcer | 32 | 0 Years 6 Months | 3 Months |
| Scruton v. MacCosham Service Company Ltd. S383/29 1995 CanLII 4443 (NS SC), 144 N.S.R. (2d) | Branch Manager | 53 | 0 Years 8 Months | 7 Months |

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Mourant v. Amherst (Town) Town Manager 34 0 Years 9 Mo 9 Months
nths

S443/13

1999 CanLII 3303 (NS
SC), 177 N.S.R. (2d)

75

Lewis v. Associated Laboratories Ltd. Laboratory Technician Unknown 0 Years 9 Mo 3 Months
nths

S129/17

44 N.S.R. (2d) 567

Goyer v. Castle Motor Inn Holdings Ltd. Motel Manager 53 0 Years 11 M 6 Months
onths

S292/2

1990 CanLII 4174 (NS
SC), 96 N.S.R. (2d) 2

8

Goyer v. Castle Motor Inn Holdings Ltd. Motel Manager 53 0 Years 11 M 6 Months
onths

S304/27

1990 CanLII 2369 (NS
CA), 100 N.S.R. (2d)

179

MacDonald v. Seaboard G.M. Diesel Ltd. et al. General Manager Unknown 0 Years 11 M 6 Months
onths

S183/1

61 N.S.R. (2d) 229

- [12] These cases support the finding that three months' reasonable notice is within the appropriate range for this case.
- [13] The Claimant is seeking compensation for the six weeks when he was without employment; the three months clearly exceeds that and I need only consider the six week period.
- [14] The question then arises as to what salary level to apply to that six week period since at that stage and after early May, his salary was at the \$50,000 per annum level.
- [15] In its defence, the Defendant states that the Claimant agreed with the new position as Executive Chef at a salary of \$50,000 per annum. For the reasons that follow, I do not accept this.

- [16] It appears from the evidence that sometime in early April, the Claimant was advised that the relationship between The Hollis Hotel and the Defendant was ending. Under this the Defendant had been provided with some \$40,000 per month which apparently partly funded the cost of the Claimant's annual salary of \$75,000. This arrangement was unknown to the Claimant at the time of his hiring and there is certainly no reference to this in the formal offer letter of December 12, 2014, from Venor Recruitment to the Claimant. This formed no part of the terms of the employment contract between the Claimant and the Defendant.
- [17] There was a meeting which took place on or around April 1st between Damian Byrne, President of the Defendant, and the Claimant. Mr. Byrne told him that they could not continue with the chief operating officer position as it was the money from The Hollis Hotel which allowed Mr. Oravec to be hired in the first place. The Claimant testified that this was the first time this fact was voiced in any way. Mr. Byrne apparently went on and told him that if he was interested he could stay on as chef at Ryan Duffy's at a reduction of \$25,000 in salary, that is, for \$50,000 per annum.
- [18] This was a very significant change and one that the law would consider to be fundamental in the employer relationship. Just the change in salary alone – a full one-third, is clearly fundamental in my view. In law, this was a repudiation by the employer and therefore engages the concept of constructive dismissal. Constructive dismissal in basic terms is a unilateral change in the fundamental term or terms of the employee relationship. As I have said, this was clearly a fundamental change. As well, it was unilaterally imposed. The questions that arise are whether the Claimant accepted the change in which case it would no longer be unilateral but would be bilateral. A further question is whether one month's notice of the change was sufficient.
- [19] I will deal with the second question first. In law, the notice required to unilaterally change a fundamental term is the same period of notice that would be required to terminate the employee relationship. Therefore, in order to properly change the salary from \$75,000 to \$50,000, the employer was required to provide the same notice of that that would have been given to terminate the employment. What would be reasonable notice as at early April when the employee had been there for three months?
- [20] In my view, the notice period would be three months as I have already discussed above. I consider this to be reasonable notice whether viewed as at early April or whether viewed as at mid-May. Therefore, I find one month's notice was not sufficient to give notice of such a fundamental change.
- [21] The question then is whether by staying in the position, is the employee seen to have agreed to the change? Here, the law affords an employee a reasonable period of time to decide whether or not to accept the fundamental change. As I understood the evidence, when Mr. Byrne presented the Claimant with the prospect of continuing as chef at \$50,000 (which took place in early April), it was a verbal discussion only and the particulars of the role and job and other items of the position were not spelled out. This came several weeks later – towards the end of April in discussions and/or emails from Heather Coffen. Those particulars were not acceptable to the Claimant and he communicated this to Ms. Coffen who, he described as evasive and non-committal. Following that, within a period of approximately two weeks he was terminated from employment.
- [22] Based on this, I would conclude that, as a matter of law, the Claimant never agreed to the change in salary from \$75,000 to \$50,000. Albeit, he stayed in the position and the reason for that was that he had personal financial commitments to deal with and, as well, effectively mitigated the loss he otherwise would have incurred. Given the time frame and given the circumstances, he should not be seen to have agreed to this fundamental change.
- [23] From this, it will also be apparent that I reject the notion, which I understood to be advanced on behalf of the Defendant here, that there were effectively two different employment relationships, with the first one

ending at the end of May, and the second one being the two week period in May. Such a theory is inconsistent with my finding on the appropriate period of notice being three months and my finding that the Claimant did not agree to the change of salary to \$50,000.

- [24] In conclusion upon the issue of liability therefore I find that the Claimant is entitled to six week's pay at the rate of \$75,000 per annum. This will make him whole for the period May 15 to June 29. From this is to be deducted the one weeks' pay (at \$50,000 rate) he received.
- [25] As well, he is also entitled to the two week's pay, for the first two weeks of May, for the difference between \$75,000 and \$50,000 per annum.
- [26] The damage calculation is as follows:

| | |
|--|-----------------|
| Six weeks at \$75,000 per year | \$ 8,653.85 |
| Less one week's pay (calculated at \$50,000) | <u>- 961.54</u> |
| | \$ 7,692.31 |
| Plus two week's salary for the difference between \$75,000 & \$50,000 | <u>961.54</u> |
| TOTAL | \$ 8,653.85 |

- [27] I will make an order for this sum, less statutory deductions, plus the cost for the filing fee of \$199.35.
- [28] I note in closing that the Claimant had added Damian Byrne as one of the Defendants. While Mr. Byrne is an owner and director of the Defendant, Ryan Duffy's Management Limited, there was no basis in the evidence for including him in his personal capacity. Therefore, the claim is dismissed as against him, and, I have removed his name from the style of cause in this decision.

ORDER

- [29] It is hereby ordered that the Defendant, Ryan Duffy's Management Limited pay to the Claimant, Daniel Orovec, the sum of \$8,653.85, plus costs of \$199.35.
- [30] This award is subject to any mandatory withholding requirements imposed on the Defendant pursuant to the *Income Tax Act of Canada*.

DATED at Halifax, Nova Scotia, this 14 day of April, 2016.

MICHAEL J. O'HARA
ADJUDICATOR