IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Gregg v. Freightliner Ltd.***
2004 BCSC 1574

Date: 20041130
Docket: S031838
Registry: Vancouver

Between:

Peter Gregg

Plaintiff

And:

Freightliner Ltd., doing business as Western Star Trucks

Defendant

Before: The Honourable Madam Justice Bennett

Reasons for Judgment

(In Chambers)

Counsel for the Plaintiff	Murray Tevlin & Dan Gleadle
Counsel for the Defendant	Mark Andrews & Gavin Marshall
Date and Place of Hearing:	March 24 and 25, 2004 Vancouver, B.C.

[1] On October 12, 2001, Freightliner Ltd., (“Freightliner”) doing business as Western Star Trucks, announced it was closing its plant in Kelowna, B.C. Termination letters were issued to the employees. This application, brought pursuant to Rule 18A of the ***Rules of Court***, relates to the termination of the “non-bargaining” employees. The application will resolve a significant issue in the litigation. Subject to the argument on decertification, there is no objection to this issue being decided by way of Rule 18A.

FACTS

[2] White Motor Company was a truck manufacturer in Kelowna, B.C. In 1981, White Motor Company was bought by Western Star Trucks Inc. In September 2000, Western Star Trucks Inc. was acquired by Freightliner. Effective June 30, 2001, Western Star Trucks Inc. amalgamated with Freightliner.

[3] The truck manufacturing plant in Kelowna had been facing financial difficulties for a considerable period of time.

[4] In 2001, restructuring commenced with reduced operations, lay-offs and salary roll-backs of non-union employees. Employees were advised that their salaries would be “rolled back” 5% effective January 2002. Eventually, part of the restructuring included the closure of the manufacturing plant in Kelowna.

[5] A “town hall” meeting was held on October 12, 2001 which was attended by almost all of the Freightliner employees. The plant manager, Carsten Reinhardt, advised those present that the plant would be closed in late 2002. Similar announcements and a press release issued shortly afterwards confirmed that the plant would close in late 2002.

[6] On December 3, 2001, notices of termination were issued. Some employees were terminated effective January 4, 2002. Many employees were terminated September 30, 2002. I will discuss these letters of termination more fully in these Reasons.

[7] Class action proceedings were taken for, amongst other things, wrongful dismissal, and the class action was certified on February 13, 2003. Mr. Gregg is named as the representative plaintiff.

[8] In his affidavit, Mr. Gregg suggested that there was uncertainty regarding whether or when the plant would close. In his examination for discovery, he clearly states that as of December 3, 2001, he was aware the plant would cease operations on September 30, 2002. This date is also confirmed by Trudy Houghton, the Human Resources Manager for Freightliner and Will Spencer, another employee.

[9] In fact, the union held a wildcat strike on November 2, 2001 to protest the September 30, 2002 plant closure.

[10] Freightliner was transferring its operations to a plant in Portland, Oregon. There were approximately 60 positions available in Portland, Oregon for persons terminated at the Kelowna plant.

[11] The process of identifying those who would be on the list to be offered employment in Portland began immediately. In his discovery, Mr. Gregg acknowledges that at some point, he cannot recall when, he was advised that he would not receive an offer to go to Portland. A number of offers were made regarding Portland positions before December 1, 2001. This process continued through September 2002.

[12] Around November 1, 2002, 75 non-union employees signed a petition requesting that the 5% wage roll-back announced earlier be set aside. The petition includes the following:

> The time that this facility and its people have left has been established as finite. However, there will be an opportunity given to some individuals to carry on their professional manufacturing careers with Freightliner LLC in their other locations.
>
> For those individuals who will not be able to take advantage of continuing their employment with Freightliner, we would like to request the 5% wage roll-back effective January 6, 2002 to be rescinded for this facility. [Emphasis added]

[13] The petition further supports that the employees knew the plant would close.

[14] There were three forms of termination letters issued on December 1, 2003. Those whose termination ceased January 4, 2002 received a letter which stated:

> This letter will confirm that your employment with Western Star Trucks, a division of Freightliner Ltd. (the "Company") will cease, effective January 4, 2002.

[15] Further, the letter stated:

> You will receive a letter confirming the details regarding the specifics of your final pay to your release date...
>
> ...
>
> If you are offered employment with Freightliner LLC and you accept the position, you are <u>not eligible</u> to the severance package outlined in this letter. [Emphasis in original]...

Approximately 23 employees received this letter.

[16] Two other forms of letters were sent. Those with written contracts of employment received a different form letter than those without written contracts. Mr. Gregg had no written contract. However, both of these latter groups of employees' letters read, in part:

> This letter will confirm that your employment with Western Star Truck, a Division of Freightliner

> Ltd. (the “Company”) will cease, effective September 30, 2002, unless you are advised otherwise...
>
> ...
>
> You will receive a letter confirming your release date and details regarding the specifics of your final pay prior to your release date...
>
> ...
>
> If you are offered employment with Freightliner LLC and you accept the position, you are <u>not eligible</u> to the severance package outlined in this letter. [Emphasis in original]...

[17] It is clear from the evidence that the plant was closing September 30, 2002 and that would be the final day of employment. Further, the employees knew that the plant was closing on September 30, 2002.

[18] Freightliner offered considerable resources in job counselling, resume writing and job searching.

[19] Mr. Gregg, in his examination for discovery said, that the December 3, 2001 letters would impact employees differently. Some had received job offers for Portland, some had been told they would not receive a job offer for Portland, at least one employee, Greg Mandrusiak, was offered a position in Portland, accepted, and the offer was later withdrawn.

[20] Thirty-four of the sixty employees who were offered positions in Freightliner LLC before December 2001, accepted

them. Further offers were made, including into September 2002, shortly before the plant closed. Other employees found work before September 30, 2002 and left early. A few employees left and were hired back on fixed contract terms to aid in the decommissioning of the plant.

[21] Mr. Gregg deposed that the situation at Freightliner created a “climate of uncertainty”.

[22] Everyone who received the December 3, 2001 letter and who remained employed by Freightliner as of June 25, 2002, received a second letter. This letter opened with the following paragraph:

> As we advised you formally by letter on December 3, 2001, your employment at Western Star Trucks, a division of Freightliner Ltd. will cease on September 30, 2002.

The letter continued with the details of the severance package. For example, Mr. Gregg received a potential cash payout of $119,133.74, depending on which option he chose regarding certain benefits.

[23] The Kelowna plant ceased production September 27, 2002, but employees were paid to September 30, 2002.

[24] Mr. Gregg commenced working for White Motors in 1973, and except for a one year lay-off between December 31, 1982 to December 21, 1983, worked continuously for the company.

Issues

[25] 1. The Defendant seeks to decertify the issue in paragraph 6b of the Certification Order.

2. Was the December 3, 2001 letter effective notice of termination of employment?

3. If the December 3, 2001 letter did not provide effective notice of termination, did the letter of June 25, 2002 provide effective notice of termination?

1. Application to Decertify Paragraph 6b.

[26] Paragraph 6b of the Certification Order reads as follows:

> Did Freightliner provide effective notice of termination of the contracts of employment, prior to September 30, 2002?

[27] The defendant submits, that based on the evidence filed in this application, this question is not a "common issue" as defined in s. 1 of the ***Class Proceeding Act***, R.S.B.C., 1996, c. 50 (the "***Act***"). The ***Act*** defines common issues as follows:

> (a) common but not necessarily identical issues of fact, or
> (b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts.

[28] Section 8(3) of the ***Act*** permits an amendment to the certification order.

[29] The defendant submits that it is clear from the evidence, given the different dates people left the employ of Freightliner, that the claims will quickly be reduced to individual claims.

[30] At the certification hearing, Freightliner took the position that, rather than certify, the plaintiff should proceed with a test case on the issue of notice. The concern regarding individual claims was raised and decided on the certification hearing: See ***Gregg v. Freightliner Ltd.***, 2003 BCSC 241 at paras. 83-85.

[31] I conclude that the issue of notice remains a "common issue" under the ***Act*** and can be decided by way of Rule 18A.

2. Was the December 3, 2001 letter effective notice of termination?

[32] An employer must give reasonable notice to an employee when terminating employment. The purpose of reasonable notice is to provide the employee with time to find other employment.

[33] In this case, the defendant relies on the notice provided in writing December 3, 2001. It does not rely on the notice provided at the "town hall" meeting October 12, 2001, but submit that is a circumstance to consider.

[34] Counsel do not take issue with the test to be applied with respect to notice. All agree with the statements by Wood J. in ***Yeager v. R.J. Hastings Agencies Ltd.*** (1984) 5 C.C.E.L. 266 at 276-8 (B.C.S.C.) and refined in ***Gibb v. Novacorp International Consulting Inc. and Nova, an Alberta Corporation*** (1990), 48 B.C.L.R (2d) 28 at 33-34.

[35] In ***Yeager***, Wood J. said this:

> Notice of dismissal must be specific and unequivocal and it must be clearly communicated to the employee if it is to be effective in law. The onus of proving that such a notice has been given rests upon the employer who seeks to raise it as a defence to an action for damages for wrongful dismissal.

[36] In ***Gibb***, Wood J.A. said the following, after referring to the above-noted test:

> While I do not resile from anything I said in Yeager, the facts of that case must be kept in mind. There the defendant pleaded, inter alia, that notice had in fact been given to the plaintiff some 16 months prior to his summary dismissal. The success of that defense depended on what had transpired at two meetings between the plaintiff and the defendant, a matter about which there was much conflicting evidence. In the end I accepted the plaintiff's evidence that he had come away from those meetings with the understanding that it had been suggested to him that he had gone as far as he could with the defendant company, and that he should consider leaving, but the decision whether or not to leave, and if so when, was left entirely to him.
>
> I do not think that in order to be specific and unequivocal, the notice given must necessarily use the words "you are hereby dismissed effective ..." or some such equivalent. If the words used are such

> as would lead a reasonable person to the clear understanding that his employment is at an end as of some date certain in the future, it may well be that specific, unequivocal notice has been clearly communicated. It must in every case depend on all of the circumstances in evidence.

[37] I have been referred to and read numerous cases that factually apply the above-noted standard. For example, the plaintiff submits that this case is very similar to the case of ***Royster v. 3584747 Canada Inc. (c.o.b. Kmart Canada Ltd.)*** (2001), 12 C.C.E.L. (3d) 259 (B.C.S.C.). The Hudson's Bay Company bought Kmart and decided to close a number of stores including the store where Ms. Royster worked. As a result, on March 2, 1998, she was given written notice that her employment would terminate June 25, 1998. The letter also stated that:

> During the notice period, the Hudson's Bay Company will make every effort to locate an alternate position for you. We hope to place as many employees as possible within the Company. A job offer would, of course, cancel this notice of termination. ...

[38] The trial judge found that the wording of the notice of termination conveyed that the notice was only final if a job offer from the company did not materialize.

[39] On the other hand, the defendant submits that the case of ***Jalbert v. University of British Columbia*** (2000), 4 C.C.E.L. (3d) 285 (B.C.C.A.) is on point.

[40] Ms. Jalbert was aware that funding for her position was in question. A termination letter dated December 9, 1996 stated that due to a shortage of funding her position would be terminated on August 29, 1997. A letter of December 23, 1996 stated that UBC anticipated that it would get funding and would be able to keep her on full-time. Other circumstances also suggested she would be kept past her termination date. The trial judge found that this was not sufficient notice. The Court of Appeal reversed the trial judge and found that UBC had given effective notice, but that it intended to rehire her at the end of the notice period on a different contractual basis. I find this decision more helpful given the evidence before me in this case.

[41] The question is, would a reasonable person, in the circumstances of the representative plaintiff, after reading the December 3, 2001 letter, conclude that his or her employment was terminating at a point certain?

[42] Three letters of termination were issued on December 3, 2001 purporting to give notice of the termination of employment.

January 4, 2002 termination

[43] I will deal first with those who received the letters terminating employment effective January 4, 2002.

[44] This letter could not be more specific. The termination date of January 4, 2002 is clearly stated. The letter also states:

> Further, if you are offered employment with Freightliner LLC and you accept the position you are not eligible for the payments outlined in this letter.

Portland, Oregon

[45] This raises the effect of job opportunities in Portland, Oregon on the notice of termination. It was well-known amongst the employees that approximately 60 positions would be available in Portland, Oregon. Many of those offers were made before December 3, 2001. It was submitted by the plaintiff that the uncertainty surrounding who would be offered the Portland jobs made the notice of termination equivocal.

[46] Although described in the job offer as an “internal company transfer” for the purpose of accruing benefits, it is manifest from the evidence that these were not continuations of the same job within Freightliner Ltd. First, it was employment with a different company (Freightliner LLC), and in a different country. These facts alone are sufficient to

distinguish this case from ***Royster***. In ***Royster***, the notice said "a job offer, would of course, cancel this notice of termination". Here, the offer of employment in Portland alone was not sufficient to rescind the notice requirements, as telling an employee he or she was being moved, without choice, from Kelowna to Oregon, could amount to constructive dismissal. In this case, only acceptance of the job in Portland, Oregon would result in the employee being ineligible for the severance package, not simply the offer of employment.

[47] The employment in Portland, Oregon was a new contract of employment, not simply a continuance of the employment with Freightliner.

[48] I find that the possibility of a job opportunity in Portland, Oregon did not affect the certainty of the notice of termination.

September 30, 2002 termination

[49] The letters to the contract and non-contract employees are sufficiently similar that they may be dealt with together.

[50] All the surrounding circumstances are to be considered when assessing whether the notice given was effective in law. These include that in recent years, Western Star had been in financial difficulty. There had been a number of lay-offs,

wage roll-backs and a restructuring plan implemented. By October 12, 2001, virtually all the employees knew that the Kelowna plant would be closing by late 2002. There was no question that the plant would close. On December 3, 2001, all those who received the notices knew the plant would close September 30, 2002. Therefore, a clear, final date of the end of their employment with Freightliner was stated in the December 3, 2001 notice. The words, “unless you are advised otherwise”, and, “You will receive a letter confirming your release date”, must be read in this context.

[51] The evidence showed that as the plant shut down, certain jobs became redundant. Although many people found other work in the plant, some were released earlier. A few people were given short-term contracts beyond September 30, 2002 to facilitate the decommissioning process. I have already addressed the Portland job issue, and those findings apply equally to these letters.

[52] In my view, any reasonable person in the circumstances of the plaintiff, reading this notice would know that he or she would not have employment with Freightliner Ltd. after September 30, 2002. In fact, Mr. Gregg acknowledged that he knew he would not have work after September 30, 2002.

[53] The employment may have ended sooner, which is referenced in the letters by “unless you are advised otherwise”, but that would engage a reasonableness of notice issue, not whether the notice itself was specific and unequivocal. The paragraph in the letter advising that further confirmation of the release date did not mean, and in these circumstances, could not reasonably be understood to mean, that the release date would be later than September 30, 2002. An earlier release date, as noted above, affects the reasonableness of the notice.

[54] I conclude that the December 3, 2002 notice was specific and unequivocal and amounted to proper notice.

3. Effect of the June 25, 2002 letter

[55] The plaintiff argues that this letter incorporated all the uncertainty of the December 3, 2001 letter. If I had found the December 3, 2001 letter uncertain, there is nothing in the language of the June 25, 2002 letter which detracts from its unequivocal language that those in receipt of this letter would cease to be employed by Freightliner Ltd. as of September 30, 2002.

CONCLUSION

[56] In summary, the notices of termination provided December 3, 2001 to the non-bargaining employees of Freightliner Ltd.

were valid notice as the date of termination with Freightliner was specific and unequivocal and was clearly communicated.

"E, Bennett, J."