IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Dobbs v. The Cambie Malone's Corporation,*** 2011 BCSC 1830

Date: 20111214
Docket: S115383
Registry: Vancouver

Between:

Richard Dobbs

Plaintiff

And

The Cambie Malone's Corporation

Defendant

Before: The Honourable Madam Justice Wedge

Oral Reasons for Judgment

Counsel for the Plaintiff:	M. Sheard
Counsel for the Defendant:	K. McLean
Place and Date of Trial:	Vancouver, B.C. December 5-8, 2011
Place and Date of Judgment:	Vancouver, B.C. December 14, 2011

[1] **THE COURT:** The plaintiff, Mr. Dobbs, brought this wrongful dismissal action under Rule 15-1.

[2] Mr. Dobbs has worked most of his life in the hospitality industry. He is now 51 years of age. In March 1999, he was hired by Sam Yehia, the owner of the respondent company, Cambie Malone's, and quickly became the general manager of the company's flagship establishment, The Cambie in Gastown.

[3] Mr. Dobbs resigned from his position in October of 2007, but was re-employed by Mr. Yehia in September of 2008 in another senior management position with the company. Mr. Dobbs' employment was terminated some 30 months later in March of 2011. He was told at the time of his termination that the company was restructuring its management positions and that Mr. Dobbs' position would be eliminated.

[4] Mr. Dobbs was provided a three-week notice period, during which period he was expected, and did continue, to work for the company. The company told Mr. Dobbs that he was not being terminated for cause.

[5] Mr. Dobbs brought this action against Cambie Malone's alleging insufficient notice of termination. In response to the action, Cambie Malone's alleged that it had terminated Mr. Dobbs for cause and, as a result, he was not entitled to any notice prior to termination.

[6] At trial, Cambie Malone's did not entirely resile from its pleading of just cause, but it acknowledged that the central issue was the appropriate period of notice to which Mr. Dobbs was entitled.

[7] Mr. Dobbs' position was that as an employee with 11 years of employment service with Cambie Malone's, he was entitled to a substantial period of notice, or severance pay in lieu of such notice. The position of Cambie Malone's was that Mr. Dobbs had only 30 months of continuous service and must be treated as such for purposes of severance pay in lieu of notice.

[8] By way of reply, Mr. Dobbs argued that even if he was a 30-month employee, he was entitled to a substantial notice period given his senior position with the company and his reduced employment prospects due to his age and the economic pressures presently affecting the hospitality industry. However, Mr. Dobbs' primary position was that he ought to be treated, for the purposes of the appropriate notice period, as an 11-year employee.

[9] I agree with counsel for the parties that the central issue in this case is whether Mr. Dobbs should be regarded as an employee with 11 years of continuous service or an employee with 30 months of service at the time of his termination. However, the length of continuous service may have less bearing on the notice period than the parties assume. On the undisputed facts, Mr. Dobbs has either 11 years of continuous service, or 11 years of service consisting of an initial 8.5 years, a hiatus of 11 months and a subsequent 30 months of service prior to his termination. In my view, the issue is whether the notice period ought to be affected by the 11-month break in service given all of the factors present in this case.

[10] By way of background, Mr. Dobbs was hired by Mr. Yehia in March 1999 to fill the position of duty manager at the Cambie Hotel. The Cambie Hotel is one of the oldest in the Gastown area. It offers a pub and bar, a cafe, and a bake shop. It also offers hostel accommodations for backpacking travellers.

[11] As general manager, Mr. Dobbs was expected to oversee all of the hotel's operations, the pub and bar being the main source of the hotel's revenues. Mr. Dobbs was required, as one of his duties, to fill in as bartender, particularly during the busier evening shifts on the weekends.

[12] Mr. Dobbs eventually found that he was having difficulty handling the stresses of the job in combination with other stresses in his life. He gave notice in October 2007. It was common ground at the time that Mr. Dobbs' departure was greeted with surprise and dismay. The parting was, however, most amicable.

[13] Mr. Yehia attempted in February 2008 to persuade Mr. Dobbs to return to the employ of the company. He took Mr. Dobbs for dinner and discussed the matter. However, Mr. Dobbs decided to pursue a slightly different direction, accepting employment with the Tea House in Stanley Park. Mr. Dobbs testified that he was interested in the greater emphasis on food and dining that was offered at the Tea House.

[14] Mr. Yehia approached Mr. Dobbs on a second occasion some months later. He had heard that Mr. Dobbs' employment with the Tea House had been terminated. This time Mr. Yehia offered Mr. Dobbs a managerial position in human resources and food and beverage operations. The position was a fairly new one created by the company in anticipation of a growth in its employee complement leading up to the 2010 Winter Olympics in Vancouver and the expanded business opportunities the Olympics would provide.

[15] Mr. Yehia testified that he focused his discussion with Mr. Dobbs on the kind of position that would be a good fit for him and would not create the kinds of stresses that led to Mr. Dobbs' earlier departure from the company. Mr. Dobbs made clear that he wanted a position that would not entail bartending shifts or any other hands-on shift work. He wanted an office job which provided more regular weekday hours. The Human Resources and Operations Manager position appeared to provide those kinds of working conditions.

[16] Mr. Yehia testified that he viewed Mr. Dobbs as a talented individual who had previously demonstrated his strengths with the company. He saw Mr. Dobbs as able to locate, train and supervise staff that would be suitable and would, in fact, excel in the various operations and locations of Cambie Malone's.

[17] When Mr. Dobbs left Cambie Malone's in 2007, he was earning a base salary of $40,000 per year, supplemented by tips he earned when filling in shifts for the bar managers. He could earn approximately $125 during a day shift and up to $200 for a night shift.

[18] With the new position, Mr. Dobbs was offered a base salary of $45,000 per annum and the opportunity to earn in the range of up to $9,000 per annum in bonuses, depending on certain revenue and other related milestones being met.

[19] Neither Mr. Yehia nor Mr. Dobbs expressly discussed the effect of Mr. Dobbs' previous employment on the current job offer. The inference I draw from the evidence is that both were optimistic about Mr. Dobbs' long-term employment prospects and simply did not turn their minds specifically to the effect of his previous employment on the issue of severance pay should his employment come to an end.

[20] Mr. Dobbs had resigned previously and neither expected nor received severance pay at that time. None of Mr. Dobbs' conditions of employment were reduced to writing. There was no written employment contract as such. However, when Mr. Dobbs left the company in 2007, he was earning the equivalent of 6% in vacation pay as a longer-term employee, rather than the base 4%. He told Mr. Yehia upon his rehire that he expected to continue receiving 6%, and Mr. Yehia confirmed that expectation. Further, Mr. Yehia testified at that he knew Mr. Dobbs' strengths and talents from his earlier employment with the company. He was confident Mr. Dobbs could successfully fill the position of manager of human resources and operations because he had demonstrated good judgment with the hiring of employees in his role as general manager at The Cambie.

[21] Mr. Yehia said the new role to be assumed by Mr. Dobbs was crucial to the company because the hospitality industry is "all about its employees." According to Mr. Yehia, having the right staff, controlling costs and marketing were the “pillars” of the position. I infer that Mr. Yehia relied on his knowledge of Mr. Dobbs' previous experience with the company when he offered him the new job. The evidence suggests Mr. Yehia relied on Mr. Dobbs' prior experience not only in the industry, but as someone who understood Cambie Malone's operations.

[22] Mr. Dobbs testified that he accepted the job on the understanding that he would be in a daytime office administration position. He was very clear with Mr. Yehia that he did not want a position in which he would be responsible for

maintaining a presence on site at the pub during the busy weekend night hours. He had left such a position in 2007 and did not wish to return to it. Mr. Yehia confirmed in his evidence that this was Mr. Dobbs' focus in their discussions.

[23] Mr. Dobbs' new job commenced without incident. He testified that he met with the managers at the various locations on a regular basis, and his role was to hire and develop teams at each location. He travelled regularly to the Cambie Malone's locations on Vancouver Island and was responsible for overseeing both the Cambie Hotel and Malone's, a sports-oriented bar in Vancouver.

[24] Mr. Yehia testified that from the time of Mr. Dobbs' hire in September 2008 until December 2009 when Mr. Yehia stepped back from the operations component of the company, Mr. Dobbs was fulfilling his job in a satisfactory way.

[25] In the spring of 2009, Mr. Yehia had hired Tim Fernback to be the Chief Financial Officer of the company. In December 2009, Mr. Fernback took over as Chief Operations Officer when Mr. Yehia decided to focus on other aspects of the company, such as real estate acquisitions.

[26] At that time, Mr. Fernback took over the operations management and became Mr. Dobbs' direct supervisor. Mr. Fernback testified that he knew of no performance issues on the part of Mr. Dobbs when he first took over the operations in December 2009.

[27] Mr. Yehia testified that once he stepped out of the operations, he had no ongoing contact with or supervision over Mr. Dobbs and could not speak to Mr. Dobbs' job performance after that time. However, both Mr. Yehia and Mr. Fernback testified that in December 2009, in anticipation of the increased volume of business during the Winter Olympics, Cambie Malone's hired another individual to take over some of Mr. Dobbs' responsibilities. The new employee was to be responsible for food and beverage operations at the Cambie Hotel and Malone's, and would manage the Vancouver Island liquor outlets. Mr. Dobbs, they

said, was to manage the hostel operations at the three locations and was to take over the position of general manager at the Cambie Hotel.

[28] Mr. Dobbs denied that his job description changed in 2009. He said he would never have agreed to return to the position of general manager of The Cambie when he had earlier left the company for the very reason that he did not want such a position. According to Mr. Dobbs, he remained in his administrative position headquartered at the company's offices.

[29] His evidence was supported by that of Jillian Blackett, a co-worker who gave evidence at the trial. She testified that she worked at the desk next to Mr. Dobbs in the company's office between 2008 and the spring of 2011. According to Ms. Blackett, she was Mr. Dobbs' right-hand person. She was in charge of marketing and promotional events. She understood Mr. Dobbs to be Operations Manager for the various Cambie Malone's locations.

[30] Ms. Blackett and Mr. Dobbs worked a regular 9:00 to 5:00 job at the office, although they would attend at the Cambie or Malone's sites on some evenings to take in special events or simply to go and check in with the staff. Ms. Blackett testified that there was no general manager at the Cambie Hotel between 2008 and 2011. Her evidence in that regard was not challenged in cross-examination.

[31] Mr. Fernback and Mr. Yehia testified that Mr. Dobbs was removed from his Human Resources and Operations position in December 2009. However, there was not a single e-mail or other documentation evidence to sport that contention. I accept that some of Mr. Dobbs' job duties were taken over by the new hire in late 2009 in anticipation of the Olympics, but I do not accept that Mr. Dobbs was specifically reassigned to the position of General Manager at that time. Such a change would surely have been accompanied by at least an e-mail to that effect.

[32] Further, Mr. Dobbs had been adamant upon being hired back that he did not want such a position. Mr. Yehia acknowledged in his testimony that he wanted to

ensure when he rehired Mr. Dobbs that he would provide him with a different work environment than that which had caused Mr. Dobbs to leave previously.

[33] Although the company led evidence from Mr. Fernback in support of its position that Mr. Dobbs was terminated for cause, that evidence fell far short of establishing any basis for cause. The only documentary evidence consisted of a handful of e-mails exchanged between Mr. Dobbs and Mr. Fernback in early 2011 as to whether Mr. Dobbs was eligible for partial disability benefits. Mr. Fernback was apparently concerned that Mr. Dobbs may be facing challenges on the job as a result of a medical condition affecting his respiratory system.

[34] However, the record was devoid of any evidence to suggest that Mr. Dobbs' job performance was substandard for any reason. Ms. Blackett, who worked closely with Mr. Dobbs, saw no evidence of any difficulty. Mr. Fernback testified that Mr. Dobbs was not properly fulfilling the role of general manager at the Cambie. Even assuming that Mr. Dobbs had been moved into that position, the record is devoid of any evidence supporting Mr. Fernback's view, which was impressionistic and vague.

[35] What is clear from the evidence is that Mr. Dobbs was never given any clear feedback about his job performance, nor was he ever warned that his job was in jeopardy. Most importantly, when Mr. Dobbs was terminated, he was given a letter which clearly stated that he was not being terminated for cause. Rather his position was being phased out as a result of restructuring.

[36] Neither Mr. Yehia nor Mr. Fernback provided any explanation for their letter or their later change of heart. Counsel for Cambie Malone's as much as conceded there was no cause for Mr. Dobbs' dismissal. He conceded the real issue was the notice period required with respect to an employee of Mr. Dobbs' age, experience, and position at the time of termination, and his length of service.

[37] A wrongful dismissal is one without cause and without a reasonable notice period. Damages are payable in lieu of notice. The principles governing the length of

notice that must be given an employee whose services are terminated without cause were described by (then) Chief Justice McEachern in *Ansari v. B.C. Hydro* (1986), 2 B.C.L.R. (2d), 33 (S.C.) at p. 43, aff'd by the Court of Appeal, (1986), 55 B.C.L.R. (2d) xxxiii (C.A.).

[38] The learned Chief Justice said the following at p. 43:

> At the end of the day the question really comes down to what is objectively reasonable in the variable circumstances of each case, but I repeat that the most important factors are the responsibility of the employment function, age, length of service and the availability of equivalent alternative employment, but not necessarily in that order.

[39] As the *Ansari* case states, those considerations do not comprise an exhaustive list, nor is any one factor to be considered in priority over the others. As all of the cases indicate, what is reasonable depends on the unique circumstances of each case.

[40] The company in this case does not dispute that Mr. Dobbs' age, 51, is a relevant consideration. The case law amply supports that concession. In the case of *Orlando v. Vancouver Coastal Health Authority*, 2005 BCSC 926, Mr. Justice Taylor said at para. 49: "It is no secret that employees terminated at such an age have a much greater difficulty finding employment than do those of a younger age."

[41] Taylor J. cited Harding J. in *Birch v. Grinnell Fire Protection*, [1998] B.C.J. No. 1602 (S.C.) at para. 21 where he said: "[M]any potential employers these days are reluctant to hire new employees over the age of 50."

[42] I now turn to the factor of responsibility in his management function. Mr. Dobbs was a senior manager in Cambie Malone's. He was in a position superior to the managers in various locations. He was, in the words of Mr. Yehia, responsible for the most crucial aspects of the operation, which was the hiring of employees, developing their potential and overseeing the food and beverage operations.

[43] According to Mr. Yehia, the company employed 100 to 150 employees. According to Mr. Fernback, the company employed upward of 200 employees or more. I conclude that Mr. Dobbs fulfilled an important senior management position with the company.

[44] The next issue is the prevailing market conditions for managers in the hospitality industry. Once again the company quite properly conceded that the hospitality industry in the Lower Mainland of the province is under siege for a host of reasons, including the global economy's instability, and the changes in taxation and impaired driving laws. The company also concedes that Mr. Dobbs has taken extraordinary steps to find work in this industry without success. There is accordingly no issue with respect to mitigation. Mr. Dobbs attempted to mitigate, but found no comparable employment.

[45] I will now address the issue of length of service. As I have already noted, Mr. Dobbs submits that all 11 years of his service with Cambie Malone's should be taken into account with respect to the appropriate notice period, while the company says only the last 30 months are relevant.

[46] The question is, how is the 11-month hiatus to be treated? The law concerning this issue was succinctly stated by Mr. Justice Lysyk in *Beach v. Ikon Office Solutions, Inc.*, [1999] B.C.J. No. 1574 (S.C.), where the Court said at para. 13:

> Where there is no express term in the re-employment contract dealing with the issue, the question is whether the employer has effectively recognized continuity of service.

[47] In the earlier decision of *Chorny v. Freightliner of Canada Ltd.* (1995), 3 B.C.L.R. (3d) 116 (S.C.), the Court similarly concluded that absent any express employment contract term, the question is whether the employer has effectively treated the employee as a long-term employee.

[48] I have reviewed several other decisions on the issue, including *Potter v. Halliburton Group Canada Inc.*, 2004 BCSC 1376; *Swamy v. O'Bryan Hotels Ltd.*,

[1997] B.C.J. No. 2114 (S.C.); and *Graham v. Galaxie Signs Ltd.*, 2010 BCSC 609. All of these decisions stand for the proposition that in the absence of an express contract term dealing with a hiatus in an employee's term of employment, the question is whether the employer and employee conducted themselves at the point of rehire in a manner consistent with the employee being given credit for the entire employment period. It is a question of fact to be determined on all of the evidence.

[49] I will say, parenthetically, that I do not read *Graham v. Galaxie Signs Ltd.* as departing from any earlier case law. In *Graham*, Groves J. simply treated the issue as a finding of fact, as did the Courts in other decisions I have cited. I do not read the *Graham* decision as authority for the proposition that unless there is an express agreement recognizing prior service, it will not be recognized.

[50] I turn then to the facts of this case. Mr. Yehia was clearly quite anxious to have Mr. Dobbs return to a management position in Cambie Malone's. He wanted to place him in a position that was a comfortable fit. When Mr. Dobbs asked about the 6% vacation entitlement with which he had left the company, Mr. Yehia agreed that it would remain at 6%. Mr. Yehia knew that if Mr. Dobbs was treated as a new hire, he would be entitled to only 4%. He understood the implications of Mr. Dobbs receiving three weeks rather than two weeks' vacation.

[51] When Mr. Dobbs said he wanted a 9:00 to 5:00 job that did not entail pulling shifts, Mr. Yehia readily agreed. He was anxious to have the company benefit from Mr. Dobbs' prior experience with the company. In e-mail exchanges with Mr. Dobbs, he referred to the company as always keeping the door open for Mr. Dobbs. Mr. Yehia knew Mr. Dobbs' strengths and talents from the previous eight years of employment and wanted to build on those for the new Human Resources and Operations Manager position.

[52] I am satisfied that in the discussions leading to Mr. Dobbs' return to Cambie Malone's, the parties assumed that Mr. Dobbs would be treated as an employee with many years of service with the company and not as a newly hired employee. That being the case, I conclude that Mr. Dobbs had 11 years of service with the company

when he was terminated and should be regarded as such for purposes of the appropriate notice period.

[53] At the outset of these reasons, I observed that the 11-month gap in service may not be as crucial to the outcome of this case as the parties may have anticipated. That is because length of service is only one of many factors to consider when determining the appropriate period of notice to which an employee is entitled.

[54] In *Ansari*, cited earlier, the Court made clear that no particular priority is to be given any one of the factors enumerated. Moreover, the list of factors is non-exhaustive in nature.

[55] In my view, it is open to the Court to consider length of service as a factor even where it is not continuous service. The decision of Mr. Justice Taylor in *Orlando* is particularly instructive in this regard. In *Orlando*, the issue was whether the employee's years of service with a predecessor employer should be considered as a factor when considering the appropriate notice period. The predecessor employer merged with another entity and became a different legal entity. The issue was whether in the circumstances of the merger, and the discussions which took place with the employee at the time, were such that all of her employment years should be considered when determining the amount of severance pay as continuous service.

[56] Mr. Justice Taylor observed that length of service is but one of many factors to be taken into account. He also observed the following at para. 85:

> The length of notice is to be determined on a number of factors as discussed in *Ansari*, and the reduction of the length of service does not, in my view, lead to a straight line proportional reduction of the notice period, but rather engages an assessment as to the effect of the reduction of that factor in relation to the other factors that remain constant.

[57] In my view, that observation has resonance in the unique circumstances of this case. Like the plaintiff in the *Orlando* case, Mr. Dobbs is over 50 years of age and held a senior and specialized position in the company's structure. As Mr. Justice Taylor stated at para. 77:

> As one reaches the pinnacle of a career, the ability or opportunity to replicate it diminishes in direct proportion to the job's uniqueness and with respect to the person's age.

[58] Both of those factors are present in this case.

[59] I have already concluded that when determining the appropriate notice period, Mr. Dobbs should be treated as an employee with 11 years' service. I have considered the amount of severance awarded in a number of cases in which the various *Ansari* factors were similar to those in the present case.

[60] In *Chapple v. Umberto Management Ltd.*, 2009 BCSC 724, a 38-year-old restaurant manager with 13 years' service received a notice period of 15 months. In *Rodrigues v. Shendon Enterprises Ltd.*, 2010 BCSC 941, a 46-year-old manager of a restaurant with 16 years' service received 16 months' notice, in part on the basis that she would have difficulty finding equivalent employment. In *Potter,* cited earlier, a 48-year-old non-managerial employee with 17 years' service received a notice period of 12 months.

[61] On the basis of these and other similar cases cited by counsel, I conclude that Mr. Dobbs was entitled to 12 months' notice upon termination from Cambie Malone's. Accordingly he is entitled to damages in an amount equivalent to 12 months' pay. I understand that Mr. Dobbs was receiving an annual salary of $45,000. He is therefore entitled to that amount.

[62] Mr. Dobbs was entitled to a maximum bonus of $9,000. In the two years prior to his termination, he in fact earned an average of approximately $3,200. On that basis, I conclude that Mr. Dobbs is entitled to $3,200 in lieu of the bonus he would most likely have received during those 12 months.

[63] In the event that Mr. Dobbs' length of service was 30 months and not 11 years, he nevertheless would be entitled to a significant notice period. In *Zadorozniak v. Community Futures Development Corp.*, 2005 BCSC 26, Humphries J. found that a 49-year-old employee in a senior management position who had only 14 months service would have been entitled to a notice period of at

least six months. The Court increased that to 12 months' pay in lieu of notice due to the outrageous conduct of the employer when terminating the employee.

[64] In *Mackie v. West Coast Engineering Group Ltd.*, 2009 BCSC 1775, a 48-year-old manager with 21 months service received damages based on a nine-month notice period.

[65] I have also found instructive the cases cited and analysed by Madam Justice Loo in *Nishina v. Azuma Foods (Canada) Co., Ltd.*, 2010 BCSC 502, at para. 246. In the cases cited, employees of advancing age who occupied senior positions within the employer's structure and who had been terminated after three years or less were awarded severance in the range of six to nine months' notice.

[66] In this case, had I found Mr. Dobbs to have 30 months service, I would have awarded him damages in the range of nine months' pay in lieu of notice as well as lost bonuses for that period of time.

[67] I do not agree with counsel for the plaintiff that the termination was high handed or outrageous. The circumstances of this case do not bear any of the hallmarks of the cases cited by Mr. Dobbs' counsel. Accordingly, the claim for punitive or aggravated damages is dismissed.

[68] It has been conceded, quite appropriately, that Mr. Dobbs has fulfilled any existing duty to mitigate.

[69] In summary, I have concluded that Mr. Dobbs was dismissed without cause from his employment and is entitled to the following: an award of damages equivalent to 12 months' salary and bonuses in the amounts of $45,000 and $3,200 respectively, and court ordered interest on those amounts.

[70] Failing agreement concerning costs, the parties are at liberty to speak to the issue.

[71] Anything arising, counsel?

[72] MR. SHEARD: I did make submissions on vacation entitlement in addition.

[73] THE COURT: Yes.

[74] The plaintiff is entitled to his vacation entitlement. I think that is implicit from my reasons. He is entitled to vacation pay of 6% based on the 12-month notice period.

[75] Does that answer your question, counsel?

[76] MR. SHEARD: Yes, thank you.

[77] MR. McLEAN: My Lady, I may have missed it, but does the three weeks that he has already been paid factor into this at all? He was given three weeks' pay pursuant to we thought -- the client thought was [indiscernible]. Does it factor in as a deduction at this --

[78] THE COURT: No. Mr. Dobbs worked for those three weeks, counsel.

[79] MR. McLEAN: Yes.

[80] THE COURT: And he earned his pay during those three weeks.

[81] MR. McLEAN: Okay.

[82] THE COURT: But I thank you for seeking clarification.

[83] MR. McLEAN: Yeah, no, I just wanted to make clear.

[84] THE COURT: Very good. Anything further?

[85] MR. McLEAN: Costs issue?

[86] MR. SHEARD: Regarding costs, I take it My Lady invites my friend and I to discuss the matter.

[87] THE COURT: Yes. Mr. Dobbs is entitled to his costs. I just do not know if there are any special features in this case.

[88] MR. SHEARD: Okay.

[89] THE COURT: So I did not want to close the door on costs.

[90] MR. McLEAN: Well, then we will discuss it privately.

[91] MR. SHEARD: My Lady will remain seized.

[92] THE COURT: Yes.

[93] MR. SHEARD: Should anything arise?

[94] THE COURT: You can reach me through the registry.

[95] MR. SHEARD: Okay.

[96] THE COURT: All right. Thank you.

The Honourable Madam Justice C.A. Wedge