# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Schinnerl v. Kwantlen Polytechnic University,* 2016 BCSC 2026

Date: 20161103
Docket: S163404
Registry: Vancouver

Between:

**Sandra Schinnerl**

Plaintiff

And

**Kwantlen Polytechnic University**

Defendant

Before: The Honourable Mr. Justice Steeves

## Reasons for Judgment

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| Counsel for the Plaintiff: | Kemily G. Ho |
| Counsel for the Defendant: | Dianne D. Rideout<br>Andrew McDaniel |
| Place and Dates of Hearing: | Vancouver, B.C.<br>August 31 and September 1, 2016 |
| Place and Date of Judgment: | Vancouver, B.C.<br>November 3, 2016 |

## A. INTRODUCTION

[1] In this summary trial the plaintiff claims damages for wrongful dismissal against the defendant. She commenced employment with the defendant in August 2007 and she was dismissed without cause on March 1, 2016.

[2] The primary issue is whether the plaintiff complied with the duty to mitigate her damages when she worked part-time in a new position she obtained three months after her dismissal from the defendant. The defendant says she had the opportunity to work full-time and it was unreasonable not to work full-time. There is also an issue as to the length of the notice in this case.

[3] There was an issue between the parties as to whether this was an appropriate case for a summary trial. However, the parties are now agreed it should proceed on that basis.

## B. BACKGROUND

[4] The plaintiff is 48 years old and has an undergraduate honours degree in commerce and a master's degree in higher education. She is currently completing a PhD in education and immigration policy as it relates to international students.

[5] The defendant is a university with campuses in Surrey, Langley, Richmond and Cloverdale, British Columbia. Its students include international students and it is subject to the *Public Sector Employers Act,* R.S.B.C. 1996, c. 384.

[6] In April 2007 the plaintiff accepted employment with the defendant as Director, International Programs and Exchanges. She commenced work on August 27, 2007 at a salary of $99,799.96.

[7] In October 2013 the plaintiff requested and received from the defendant a one-year education leave to pursue doctoral studies in public policy, specifically immigration policy as it relates to international students. She commenced her leave on September 1, 2014 with an end date of September 1, 2015 but the return to work date was subsequently extended to March 1, 2016. The policy under which the leave

was given stated that the cost was a debt owed by the plaintiff but this was subsequently waived by the defendant.

[8] On her return to work on March 1, 2016 the plaintiff was terminated from her employment without cause, apparently as a result of restructuring by the defendant. The defendant offered continuation of salary and benefits for a ten-month period, March 2, 2016 to December 31, 2016. The plaintiff was required to conduct reasonable job searches and advise the defendant if she obtained new employment during the salary continuation period. In addition, the offer included the following provisions:

> …
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> 7. If you obtain new employment during the Salary Continuation Period with a "public sector employer" as defined in the Public Sector Employers Act, and if such employment provides you with gross monthly earnings which are less than the salary described in paragraph 2 above, the University shall pay you the shortfall during the remainder of the Salary Continuation Period
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> 8. If you obtain new employment that is ongoing in nature during the Salary Continuance Period with an employer that is not a "public sector employer" as defined in the Public Sector Employers Act, all salary continuance payments shall end effective on the date you commence such employment, and the University shall provide you with a lump sum severance payment, less deductions required by law, equal to 50% of the remaining salary you would have received under paragraph 2 above if you had remained unemployed until the end of the Salary Continuance Period.
>
> …

[9] The plaintiff did not accept the defendant's offer. Nonetheless the defendant paid the plaintiff as described in its offer.

[10] After her termination from the defendant the plaintiff learned of an employment opportunity at Douglas College, which is also a "public sector employer" as defined in the *Public Sector Employers Act,* R.S.B.C. 1996, c. 384. She made inquiries and had discussions with Dr. Guangwei Ouyang, Vice President of International Education and Strategic Partnerships at Douglas College. On March 30, 2016 she applied for a newly-created position at Douglas College titled Director of Global Engagement.

[11] In May 2016 the plaintiff was interviewed by the selection committee at Douglas College for the director position and she also gave a public presentation there. There is a dispute about the events in May 2016 (discussed below) but ultimately the plaintiff accepted the position of Director, Global Engagement. She was to start work on June 1, 2016 but this was extended to June 13, 2016. Of significance to this litigation is that the plaintiff started work on a part-time basis from June 13, 2016 to December 31, 2016, after which she worked full-time. The full-time salary at the Douglas College position is more than the plaintiff earned when working at the defendant.

[12] On May 31, 2016 the defendant ended the salary continuation to the plaintiff effective June 1, 2016 because the plaintiff had obtained the alternate position at Douglas College. The result was that she received her salary (and benefits) from the defendant only for the three months before she started work at Douglas College.

[13] The defendant says that the plaintiff was offered a full-time position by Douglas College and she was required to accept that full-time position in order to comply with her duty to mitigate her damages. On the other hand, the plaintiff says she acted reasonably by working part-time to start in order to complete her doctoral studies, something she commenced while working at the defendant.

## C. ANALYSIS

[14] The plaintiff submits that she is entitled to notice of 10-12 months at her salary with the defendant of $99,799,96, less what the defendant paid her for the three-month salary continuance and less the amount she was paid by Douglas College for the balance of the notice period. According to the defendant, since the plaintiff obtained work almost immediately, she is entitled to three months' notice. Without that work opportunity the notice period would be 8-10 months, according to the defendant.

[15] There are two broad issues for consideration:

(a) What is the length of notice required to be given by the defendant to the plaintiff in order to terminate her employment?

(b) Did the plaintiff comply with her duty to mitigate her damages when she found alternate work on a part-time basis? Did she have the opportunity to work full-time?

**(a) Notice**

[16] It is trite law that an employee can be terminated from her employment without cause as long as the employer provides appropriate notice or makes payment in lieu of notice. In the subject case the plaintiff was terminated from her employment without cause but there is a dispute about the amount of notice.

[17] The main point of contention arises from the following statement from a previous judgment (*Ansari v. B.C. Hydro and Power Authority* (1986), 2 B.C.L.R. (2d) 33, at p. 43; aff'd [1986] B.C.J. No. 3005 (S.C.)):

> 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.
>
> [Emphasis added]

[18] The defendant points to the fact that the plaintiff was able to obtain alternate employment within three months of her termination from the defendant and, therefore, the notice period terminated on the date she started the alternate work. (See also, *Saalfeld v. Absolute Software Corp.,* 2009 BCCA 18 , at paras. 13, 16; *Carlysle-Smith v. Dennison Dodge Chrysler Ltd.,* [1997] B.C.J. No. 3075, at para. 37.) That is, according to the defendant, since there was alternate work available to the plaintiff three months after her dismissal the appropriate notice period is three months.

[19] In my view the defendant's approach to calculate the appropriate notice period conflates notice with mitigation. In my view the two issues are to be

considered separately in order to avoid any confusion between them (*Dunlop v. B.C. Hydro & Power Authority,* [1989] 32 BCLR (2d) 334, 1988 CanLII 3217 (C.A.), at para. 18; *Ostick v. Novacorp International Consulting Inc.,* [1989] B.C.J. No. 165 (S.C.), at pp. 8-9). Specifically, in this case, I conclude that the determination of the notice period is a separate issue from the issue of whether the plaintiff mitigated her damages. In this case and perhaps all cases, the ultimate result is the same: the amount of damages is unchanged whether the analysis is one involving the notice period or one involving mitigation.



[20] Looking at the notice period in this way, the plaintiff worked for the defendant for about nine years and six months, from August 27, 2007 to March 1, 2016. She is currently 48 years old, her former responsibilities with the defendant as Director, International Programs and Exchanges were at a high level and she had an expectation of long-term employment. I also note that the defendant's offer of March 1, 2016 included a ten-month notice period.

[21] In these circumstances I conclude that a ten-month notice period is appropriate in this case.

**(b) Mitigation**

[22] The facts related to the issue of mitigation here are centred on the plaintiff's employment with Douglas College. She was dismissed from her employment with the defendant on March 1, 2016 and was paid a salary continuation for three months (after she did not accept a ten-month notice period from March 2, 2016 to December 31, 2016). She applied for a position at Douglas College on March 30, 2016, she was successful in her application and she ultimately started work there on June 13, 2016.

[23] The significant aspect of the plaintiff's new position at Douglas College is that she worked part-time from June 13, 2016 to December 31, 2016. The defendant says that she had the opportunity to work full-time and she unreasonably declined to do so. Therefore, any obligation to pay salary in lieu of notice to the plaintiff ended when she started work with Douglas College. For her part, the plaintiff says she

acted reasonably by starting to work part-time at Douglas College in order to complete her doctoral studies. She says her education was approved (and paid for) by the defendant and it was a benefit to her and Douglas College to complete her studies.



[24] A useful discussion of the duty to mitigate for the purposes of this trial is as follows (*Forshaw v. Aluminex Extrusions Ltd.,* [1989] B.C.J. No. 1527 (C.A.), at pp. 6-7 ):

> That "duty" - to take reasonable steps to obtain equivalent employment elsewhere and to accept such employment if available - is not an obligation owed by the dismissed employee to the former employer to act in the employer's interests. It would indeed be strange that such a duty would arise where an employer has breached his contractual obligation to his employee, having in mind that no duty to seek other employment lies on an employee who receives proper notice.
>
> The duty to "act reasonably", in - seeking and accepting alternate employment, cannot be a duty to take such steps as will reduce the claim against the defaulting former employer, but must be a duty to take such steps as a reasonable person in the dismissed employee's position would take In [sic] his own interests - to maintain his income and his position in his industry, trade or profession. The question whether or not the employee has acted reasonably must be judged in relation to his own position, and not in relation to that of the employer who has wrongfully dismissed him. The [sic] former employer cannot have any right to expect that the former employee will accept lower-paying alternate employment with doubtful prospects, and then sue for the difference between what he makes in that work and what he would have made had he received the notice to which he was entitled.

[25] The plaintiff emphasizes the statement in the above quote that the duty to mitigate is not an obligation owed by her to the defendant to act in its interests. Instead she was entitled to work part-time because it was "in [her] own interests." She also says that her interests in completing her doctoral studies were consistent with the interests of the defendant when it supported her studies by paying for her educational leave. It was also in the interests of Douglas College because it would have an employee closer to completion of her PhD.

[26] For its part, the defendant emphasizes that the plaintiff was to "maintain [her] income and [her] position in [her] industry, trade or profession", as set out in the above quote. That is, it is not the plaintiff's subjective desires that are to be

examined but what objective steps she took to maintain her income and position. By turning down an offer of full-time work at Douglas College the plaintiff breached her duty to mitigate.

[27] There is something of an issue of fact that both parties submit I should decide. This relates to conversations between the plaintiff and Dr. Ouyang in early May 2016.

[28] The difficulties assessing factual disputes in a summary trial on the basis of affidavit evidence are well known. However, conflicting evidence does arise in summary trials and it is not always a reason to deprive litigants of the benefit of a summary trial that has the distinct advantages of cost and time over a full trial (*Inspiration Management v. McDermid St. Lawrence,* [1989] B.C.J. No. 1003, CanLII 229 (C.A.), at paras. 47, 56). I am in agreement with the parties that the factual issues in this trial can be decided on the basis of affidavit evidence.

[29] According to the plaintiff, in her discussions with Dr. Ouyang there was little if any reference to the director position she applied for at Douglas College being a full-time position. Instead the discussion was only about her working part-time in order to complete her doctoral studies, which Dr. Ouyang supported. In contrast, Dr. Ouyang has deposed that the offer that was made to the plaintiff was for a full-time position. There is no dispute that the plaintiff and Dr. Ouyang ultimately agreed that the plaintiff would work part-time for a period of time, then would work full-time.

[30] The plaintiff has filed two affidavits on August 13, 2016 and August 27, 2016, the latter in response to the single affidavit of Dr. Ouyang, filed on August 24, 2016.

[31] In her first affidavit the plaintiff deposed that she “understood” from her conversations with Dr. Ouyang that Douglas College was “entirely willing” to support completion of her doctoral studies. She also deposed that she was “informed”, apparently by Dr. Ouyang, that he intended to retire from his position at Douglas College and the director position there was “designed as a means of succession planning” (para. 46). Further, according to the plaintiff, it was “critical” for the

successor to Dr. Ouyang to hold a PhD (para. 43). In the same affidavit the plaintiff stated that she discussed a number of suggestions with Dr. Ouyang including working "on a part time basis for a period of time", although she could not recall which person proposed those suggestions (paras. 49, 50).

[32] In her second affidavit the plaintiff stated that she could not "recall or agree" that she was offered full-time employment by Dr. Ouyang. She also deposed that "a few options for making arrangements which would accommodate my studies" were discussed and "I cannot recall who suggested which option" (para. 4). In her examination for discovery the plaintiff said that she told Dr. Ouyang that she needed to "balance my studies and *my full time position*" (emphasis added) and she again said she could not recall who raised the issue of part-time work.

[33] In his affidavit Dr. Ouyang explained that the plaintiff was the successful candidate and he "advised her that [he] wished to offer her employment in that position on a full-time basis…" (para. 13). The plaintiff points out that the phrase "wished to offer" does not reflect a binding offer. However, I conclude that Dr. Ouyang was accurately recording the language he used in his conversation with the plaintiff rather than reflecting a precise legal meaning.

[34] Looking at the other evidence it is clear from the posting of the position the plaintiff applied for at Douglas College that it was a full-time position. This is consistent with Dr. Ouyang's evidence and his explanation that the position had been vacant for three months, he had been doing some of the duties for that position and he wanted it filled sooner rather than later on a full-time basis. The plaintiff deposes that she could not recall the details of her discussions with Dr. Ouyang including who proposed what.

[35] Overall, I conclude that the offer of employment to the plaintiff by Dr. Ouyang was for a full-time position. That is what the position was posted as, that is the position that the plaintiff applied for and she was successful in her application. She sought a change to the offer that permitted her to work part-time so she could complete her doctoral studies. Dr. Ouyang was initially opposed to part-time work

but he ultimately agreed and that was the basis of the contract between the plaintiff and Douglas College.

[36] In my view, the plaintiff was certainly entitled to negotiate a change from full-time to part-time work so she could get closer to completion of her PhD studies. However, that is a separate matter from her duty to mitigate the damages she is entitled to from her dismissal by the defendant. By turning down full-time work at Douglas College but then seeking damages for full-time work she is essentially claiming that her former employer should pay for part of her continuing education. It is true that the education commenced with the defendant but its obligation to contribute ended under its educational leave policy as well as with the plaintiff's dismissal.

[37] I can agree with the plaintiff that a dismissed employee is entitled to consider her long-term interests but I do not agree this means her former employer is required to pay for the interests of the plaintiff at issue here. Nor do I agree that the plaintiff is entitled to be placed in the best possible position in relation to her long-term career objective following her dismissal. The plaintiff relies on previous judgments but they can be distinguished on the facts because there was no alternate position available to the dismissed employee (for example, *Haff v. Valeant Pharmaceuticals International Inc.,* 2013 BCSC 1720, at para. 70). Similarly, the efforts of a disabled former employee to refocus his vocational aspirations in the absence of alternate work is a different case than the subject one (*Birch v. London Drugs Ltd.,* 2003 BCSC 1253, at para. 27).

[38] In my view the subject case is analogous to a previous judgment where it was held that a dismissed employee cannot elect to take further training with the cost of the training as a charge against the former employer (*Cimpan v. Kolumbia Inn Daycare Society,* 2006 BCSC 1828, at para. 107).

[39] In summary, the defendant's obligation to pay notice to the plaintiff ended on June 13, 2016, when the plaintiff commenced employment with Douglas College. That was the date the plaintiff had the opportunity to work full-time and mitigate all

of her damages after that date. She was entitled to choose not to take full-time employment but the cost of that choice does not lie with the defendant. I note the defendant has only paid the plaintiff up to June 1, 2016.

## D. SUMMARY

[40] The plaintiff commenced her employment with the defendant in August 2007 and she was dismissed without cause in March 2016.

[41] The plaintiff is entitled to damages equivalent to ten months' salary at $3,838 bi-weekly for the defendant's wrongful dismissal of her.

[42] The defendant's obligation to pay notice ended on June 13, 2016 when the plaintiff had the opportunity to work full-time in alternate employment and thus mitigate her damages after that date. The defendant has paid the plaintiff up to June 1, 2016.

[43] The parties may address costs in further submissions if that is necessary.

"The Honourable Mr. Justice Steeves"