

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Redd's Roadhouse Restaurants Ltd. v. Randall*,
2014 BCSC 1464

Date: 20140718
Docket: 14 0522
Registry: Victoria

Between:

Redd's Roadhouse Restaurants Ltd. carrying on business as Comfort Hotel & Conference Centre

Appellant

And

Tina Louise Randall

Respondent

Corrected Judgment: The front page of this judgment
was corrected on August 6, 2014

Before: The Honourable Mr. Justice Savage

On appeal from: An order of the Provincial Court of British Columbia, dated January 28, 2014 (*Randall v. Redd's Roadhouse*, File 11/1138, Victoria Registry)

Oral Reasons for Judgment

Counsel for the Appellant: D. McLeod

Counsel for the Respondent: S. Farquhar

Place and Date of Hearing: Victoria, B.C.
July 18, 2014

Place and Date of Judgment: Victoria, B.C.
July 18, 2014

I. Introduction

[1] This is an appeal from the order of Smith P.C.J., in *Randall v. Redd's Roadhouse*, File 11/1138, Victoria Registry, January 28, 2014, that the respondent employee was wrongfully dismissed and entitled to damages for the employer's failure to give reasonable notice.

[2] The appellant Redd's Roadhouse advances three issues in the appeal, that the learned provincial court judge erred in law in (1) finding that the respondent had been wrongfully dismissed, (2) in determining that the question of mitigation was to be calculated on the basis of hours worked, not actual loss, and (3) in failing to admit the evidence by affidavit of one Jeannette LeBleu.

[3] The parties agree that the standard of review for errors of law is correctness, and errors of fact, palpable and overriding error.

II. The Evidentiary Ruling

[4] I will deal with the last error alleged first. It is clear from the *Small Claims Act* that the court has a broad discretion concerning the admission of evidence. As the appellant observes, Rule 10(1) says that "A Judge may conduct a trial without complying with the formal Rules of Procedure and Evidence, and in doing so may...(b) receive evidence in any other way the Judge thinks is appropriate". The Judge referred to the rule as flexible. Indeed it is. It provides that a judge *may* not *must* conduct a trial without complying with the formal Rules of Procedure and Evidence.

[5] In this case the Judge made a ruling at trial not to admit an affidavit of Ms. LeBleu tendered by the appellant in place of the viva voce evidence of Ms. LeBleu. The affidavit of Ms. LeBleu would have contradicted the evidence of the respondent, Ms. Randall, although there was other evidence. The Judge in his ruling noted that the case was being conducted with both parties represented by counsel. It had elements of formality. He noted the circumstances in which the application arose, the inability of the appellant to locate the witness, and the fact that an earlier

trial date had been adjourned. He weighed the prejudice to the appellant with the prejudice to the respondent, who would not be able to cross-examine a witness regarding the statements in the affidavit.

[6] In my opinion no error of law arises, and no palpable and overriding error is shown by the trial judge exercising his discretion to not admit the affidavit.

III. The Wrongful Dismissal Finding

[7] Redd's Roadhouse argues that an employer has the right to determine how its business is going to be conducted, and may lay down procedures, not contrary to law, otherwise dangerous and which are within the ambit of the employee's job. The respondent does not take issue with that proposition, which is supported by decisions such as *Stein v. British Columbia (Housing Management Commission)* (1992), 65 B.C.L.R. (2d) 181.

[8] The respondent cites *Wiebe v. Central Transport*, (1993) 84 Man.R. (2d) 273 for the proposition that to justify dismissal, there must be conduct by the employee which breaches the employment contract to such a degree that the employer is entitled to treat that conduct as a repudiation of the contract of employment. Redd's Roadhouse appears to take no issue with that proposition of law.

[9] In this case Redd's Roadhouse argues that the employee effectively repudiated the contract by her conduct, and in any event, Redd's Roadhouse was entitled to terminate her employment as she made unreasonable demands regarding her shifts. It is apparent that the respondent, a long term, valuable and able employee, spoke with her supervisors, including the bar manager, and gained approval for her plan to continue to work for Redd's Roadhouse but to also take on other part-time employment.

[10] When a new supervisor was hired, she and another employee no longer received shifts. When she queried this, she was told she was laid off and was issued a record of employment without any severance. Redd's Roadhouse says that the respondent wanted to cherry pick her shifts. However, the trial judge accepted the

evidence of the respondent regarding her availability, and that she had received approval from her supervisors, the bar manager Mr. Claus, and the new bar manager, Ms. LeBleu.

[11] The respondent was not advised by her employer that the shifts she preferred, most of which she had historically worked, were not appropriate or unavailable. Redd's Roadhouse says that the bar managers could not approve such matters, but the evidence is to the contrary. The evidence from Mr. Claus, another long-term employee, is that he did approve these shifts, and this arrangement. It was the evidence of the former general manager of the hotel, Mr. Mills, that the bar manager was responsible for the assigning and scheduling of shifts.

[12] The Judge below noted that, prior to her termination, the respondent's schedule reflected the approved shifts. Then she was terminated. There is no suggestion that there was any warning, or that the employer advised the employee that their position with respect to shifts had changed.

[13] In the circumstances, in my view no error has been shown in the learned trial judge's finding that the respondent, a 23 year employee, had been wrongfully dismissed without notice when, without explanation, she received no more shifts and was then issued a record of employment terminating her employment.

IV. Mitigation

[14] Redd's Roadhouse says that the respondent suffered no loss, because she earned more money than she earned before, when exclusively employed by Redd's Roadhouse.

[15] Redd's Roadhouse says that the appropriate way of looking at the claim for damages is to compare the earnings of the respondent before and after the employment with Redd's Roadhouse. Based on that comparison the respondent has suffered no loss.

[16] Of course the burden of proving a failure to mitigate in wrongful dismissal cases rests on the employer.

[17] In most cases the method of determining whether damages have been mitigated compares pre and post employment income. In this case, however, the employer's position ignores the evidence, found as a fact by the judge below, that the respondent had obtained the approval of her supervisor for her proposed shifts and her new employment. That was the evidence of Mr. Claus and the evidence of the respondent.

[18] Thus, it was contemplated by both parties that the respondent would be working in two jobs, the new job for which she was training, and her continuing employment with Redd's Roadhouse. It was in those circumstances that the judge below calculated her losses by excluding the contemplated earnings from the new employer. I see no error in that.

V. Conclusion

[19] The appeal is dismissed;

[20] The respondent is entitled to her costs of this appeal; and

[21] The monies paid into court shall be paid to the respondent (\$22,741.31 and \$200).

“The Honourable Mr. Justice Savage”