

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Chapple v. Umberto Management Ltd.*,
2009 BCCA 571

Date: 20091204
Docket: CA037208

Between:

Sarah Chapple

Respondent
(Plaintiff)

And

**Umberto Management Ltd. and
Il Caminetto Di Umberto Restaurant (1982) Ltd.**

Appellants
(Defendants)

Before: The Honourable Madam Justice Huddart
The Honourable Madam Justice Neilson
The Honourable Madam Justice Garson

On appeal from: Supreme Court of British Columbia, June 1, 2009
(*Chapple v. Umberto Management Ltd.*, 2009 BCSC 724, Vancouver Reg. S077794)

Oral Reasons for Judgment

Counsel for the Appellant: A.P. Devine

Counsel for the Respondent: N.R. Howell

Place and Date of Hearing: Vancouver, British Columbia
December 4, 2009

Place and Date of Judgment: Vancouver, British Columbia
December 4, 2009

[1] **NEILSON J.A.:** The respondent was employed by the appellants as a restaurant manager. On January 20, 2007, she was dismissed. This is an appeal from the award of damages for wrongful dismissal that she received on June 1, 2009, following a trial before a Supreme Court judge: 2009 BCSC 724.

[2] The appellants allege the trial judge erred in two respects. First, they say her finding that the respondent should receive 15 months' notice was excessive. Second, they maintain that her award of \$71,375 for gratuities the respondent would have earned during the severance period was based on a misapprehension of the evidence.

BACKGROUND

[3] The appellants operate two restaurants at Whistler: Trattoria and Il Caminetto. The respondent was hired in 1994 as a server at Trattoria. In 1999 she was promoted to a management position, and thereafter worked periodically at both restaurants as a manager until she was dismissed.

[4] Her dismissal arose from an incident at Il Caminetto on January 20, 2007, when a customer confronted the owner of the restaurants over a delay in being seated. The owner believed the respondent was responsible. At trial, what was said to whom as a result was disputed, and there was an issue as to whether he suspended her or dismissed her. The trial judge resolved that question in favour of the respondent, and that finding is not challenged on appeal. It is therefore unnecessary to go into the details of the incident.

[5] At the time of trial, the respondent was 38 years old. She had worked for the appellant for 13 1/2 years. Her annual base salary when she left was \$50,112.50. She estimated that she earned a further \$55,701 annually in gratuities. The appellant's estimate of her annual income from tips was \$19,500.

[6] In May, 2007, the respondent obtained a part-time administrative position as a restaurant director at another restaurant in Whistler, and began work there a few weeks later. This position did not offer the same opportunity to augment her income from gratuities, and as a result she earned significantly less than she had with the appellants.

ANALYSIS

[7] Both issues under review on this appeal are questions of fact. The appellants must accordingly demonstrate that the trial judge made a palpable and over-riding error before this Court will interfere with her findings: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235.

Was the award of 15 months' severance excessive?

[8] At trial, the appellants took the position that 10 or 11 months' notice was reasonable, while the respondent maintained she was entitled to 15 months' notice. As is common in such cases, both parties provided authorities to support their position. The trial judge reviewed these, and acknowledged the traditional statement of relevant factors to be considered from *Bardal v. Globe & Mail Ltd.* (1960), 24 D.L.R. (2d) 140 (Ont. H.C.) at 145. She concluded:

[64] Based on the evidence before me and the authorities to which I have referred, I find that the cases relied on by the plaintiff provide a more reasonable comparison to Ms. Chapple's circumstances. Ms. Chapple's length of service with the defendants is 13 1/2 years; she is 38 years old. She has devoted a large part of her productive working years into her career with the defendants. Ms. Chapple did not find another position until May 2007. That position does not expose her to the level of gratuities she earned at Il Caminetto or to the same level of responsibility. I find that her position as a manager in a busy, fine-dining restaurant in Whistler is not easily replicated in that community. These features are, in my view, sufficient to award the plaintiff somewhat more than her length of service with the defendants justifies. I agree with the plaintiff's position that damages in lieu of notice amounting to 15 months pay is appropriate. Ms. Chapple is entitled to damages in lieu of reasonable notice of \$62,641.

[9] The appellants reiterate their position at trial, relying on some of the same authorities considered by the trial judge. They argue that damages for wrongful dismissal is a contractual remedy. The award should not overcompensate the employee or penalize the employer. The goal is to set a notice period that reflects the time necessary for the respondent to find comparable employment. The appellants say that in this case comparable employment was readily available, and the trial judge's award of 15 months was excessive.

[10] The principle that guides this Court's review was set out in *Saalfeld v. Absolute Software Corp.*, 2009 BCCA 18, 88 B.C.L.R. (4th) 244, at para. 18:

[18] In the absence of an error in principle, the test on appeal is not whether I would have made the same award had I been the trial judge, it is whether the trial judge's award was beyond the range of reasonableness in all the circumstances. In light of *Bavaro*, while the award on the evidence before the trial judge was on the very high end of an acceptable range, I cannot accept the appellant's

submission that it warrants appellate intervention. Thus, I would not give effect to the first ground of appeal.

[11] I am not persuaded that the trial judge's assessment of the appropriate notice period was excessive. The appellants point to no error, and simply reiterate the arguments rejected by the trial judge. While the respondent did obtain new employment relatively quickly, it was a part-time position and did not provide the same level of remuneration. I would not accede to this ground of appeal.

Did the trial judge misapprehend the evidence in awarding \$71,375 for gratuities?

[12] The respondent did not declare all income from gratuities on her tax returns. Nor did she or the appellants keep records of her income from tips. As a result, the evidence before the trial judge on this issue was imprecise. It described two competing means of calculating this loss.

[13] The parties agreed that up to November, 2006 the appellants paid gratuities to their managers, referred to as "the House", in the amount of 2.5% of the gross revenue from customers for their shift. This was reduced to 2% in December, 2006. From that the managers would "tip out" the hostesses working the same shift, and the balance was theirs. Where two managers worked the shift, they would split the balance.

[14] Evidence from Anju Chawal, the appellants' book-keeper, and Michael Graham, who began work as a manager at Il Caminetto in November, 2006, provided a basis for the appellants' calculation of the respondent's annual income from gratuities. This used 2% of the total revenue for the restaurant, adjusted it downwards by 25% to allow for payments to hostesses, split it in half to represent payments to two managers on a shift, and applied the result to the number of days characteristically worked by the managers in a year, based on six days a week. This produced an estimate of \$19,000 annual income for a manager from gratuities.

[15] The respondent testified that on average she received \$200 per shift for gratuities, which produced annual income of \$55,701 based on the number of days she worked in 2006. She described several sources of additional gratuity income that did not form part of the appellants' calculation and that she said accounted for the difference in their totals. She said she frequently worked a seventh day in a week, and in that case her remuneration was based on gratuities alone. She received cash tips directly from customers "more than rarely" during

holiday periods, which she said covered 45 days annually. She was often the sole manager on a shift, so did not have to split the House gratuity, in particular she worked alone at the restaurants for 42 days during the fall of 2006. As well, the evidence indicated that she was less generous in tipping out the hostesses than the appellants suggested.

[16] The trial judge found that the respondent earned substantial income from gratuities, and that she was entitled to recover damages representing that income during the notice period even though she did not declare all of that income for tax purposes. She concluded that the respondent's figure of \$200 a night was a reasonable estimate of the gratuities she would have received had she continued her employment with the appellants for these reasons:

[83] In regard to the method of assessing loss of income from gratuities, there are certain features that lead me to conclude the gratuity income is equal to or greater than the income Ms. Chapple earned in base salary, which was \$165 per night. First, she was prepared to work a seventh day for tip income only. The amount of the gratuities would have to be sufficient to attract her to continue to work a seventh night rather than taking the night off. If her annual tips were \$19,500 and she worked all the shifts that she signed in for (275.5 days) and the seventh day in 10 work weeks, her nightly gratuities would amount to \$68 or approximately \$8.50 per hour based upon an eight hour shift. It is not realistic to assume that Ms. Chapple would be prepared to work an extra shift at that rate of pay.

[84] Second, the method proposed by the defendants, based on Mr. Graham's evidence, calculates gratuities at 2% of the gross and thereby necessarily excludes many variables that ought to be considered in properly estimating the amount of gratuities Ms. Chapple received. Mr. Graham did not provide evidence about what he actually received in gratuities, nor the method he uses for the declaration of the amount for tax purposes. Mr. Graham's experience in receiving gratuities may have been different than Ms. Chapple's experience; however, I have no evidence upon which to base any comparison.

[17] The appellants say that the trial judge's conclusions were not supported by any evidence and were unreasonable. They say, first, that there was no evidence to support the trial judge's inference that the respondent would not work an extra shift if she were paid only at the rate of gratuities postulated by the appellants. This unreasonable inference led her to wrongly reject the position of the appellants. As well, they argue that the respondent's calculation was wrongly based on the past figure of 2.5%, whereas the award must look forward and use the figure of 2% in place during the notice period.

[18] I am not persuaded that the trial judge made any reviewable error in her treatment of this issue. She carefully reviewed and weighed the evidence of both parties. She found the

respondent a credible witness in her account of the events surrounding her dismissal, and it is reasonable to infer that this finding informed her view of the respondent's evidence about the gratuities as well. While there was no onus on the appellants, it was open to the trial judge to rely on the limitations in Mr. Graham's evidence in reaching her conclusion. The trial judge specifically found that to use the 2% figure excluded other relevant variables, and rejected it as she was entitled to do.

CONCLUSION

[19] In short, Mr. Devine has said all that can be said on behalf of the appellants, but the appeal cannot succeed. On both issues, they are asking this Court to reweigh the evidence and reach a different conclusion than the trial judge did. That is not the role of this Court. In the absence of any reviewable error, I would dismiss the appeal.

[20] **HUDDART J.A.:** I agree.

[21] **GARSON J.A.:** I agree.

[22] **HUDDART J.A.:** The appeal is dismissed.

“The Honourable Madam Justice Neilson”