IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Adams v. Thinkific Labs Inc.,*
2024 BCSC 1129

Date: 20240626
Docket: S249913
Registry: New Westminster

Between:

Madeline Adams

Plaintiff

And

Thinkific Labs Inc.

Defendant

Before: The Honourable Justice Caldwell

Reasons for Judgment

In Chambers

Counsel for the Plaintiff:	J. Wu
Counsel for the Defendant:	M.R. Howcroft
Place and Date of Trial/Hearing:	New Westminster, B.C. January 19, 2024
Place and Date of Judgment:	New Westminster, B.C. June 26, 2024

[1] The claim before me is one of wrongful dismissal. The plaintiff, a former employee of the defendant, sues, alleging that she did not receive adequate compensation following the termination of her employment without cause.

[2] This matter comes before me as a summary trial. Both parties agree that it is suitable for such process and determination. I also agree.

BACKGROUND

[3] The plaintiff is currently 31 years of age. In 2021, she applied for a job with the defendant, a developer and operator of a software platform that enables entrepreneurs to create, market, sell, and deliver their own online courses.

[4] On August 19, 2021, the defendant, through its representative, sent the plaintiff an email offer of employment. That offer was detailed and extensive. It included details and documentation regarding:

- her compensation;
- her stock options and vesting;
- a health or personal spending account payment to support health and wellness;
- her hardware bonus entitlements;
- a learning and development stipend;
- a parental leave program;
- her vacation and leave entitlements;
- her work schedule details; and
- extensive brochure materials regarding various benefit plans that she would be eligible to participate in as an employee of the defendant.

[5] The email, details and documentation consisted of approximately 60 pages of information, some involving specific policies of the defendant and others relating to the extensive health and other benefits related to employment with the defendant.

[6] The August 19 email requested the plaintiff's full legal name, and her desired start date; and indicated that upon receipt of those details, the defendant would provide her with the official employment contract.

[7] The initial email did not include such things as a termination clause or any information regarding termination nor any mention of non-competition in the event of termination.

[8] The plaintiff responded to the email at approximately 11:00 a.m. on August 20, 2021, accepting the offer of employment, providing her full legal name and indicating her desired start date.

[9] Later that same day, at approximately 5:00 p.m., the defendant sent a formal, written document to the plaintiff by email. That document, entitled "Protection of Corporate Interests" was referred to as a "Letter" and as a "Letter Agreement", and did include terms regarding termination and non-competition. The document ran to a little more than five pages and, in point of fact, contained almost nothing save for additional burdens, limitations and obligations on the plaintiff—none of which had been addressed or even mentioned in the original 60 plus pages of offer of employment.

[10] The plaintiff received that document, signed it and returned it to the defendant.

[11] She began working for the defendant on September 20, 2021, and continued until she was terminated by letter dated May 23, 2023.

[12] During her time with the defendant, the plaintiff did, on occasion, coordinate and assign work to contractors but I am not satisfied that her role was managerial in nature. It was certainly not a senior management position.

[13] With the exception of a brief period of time, the plaintiff has not succeeded in gaining new employment. No significant complaint is raised by the defendant regarding the plaintiff's efforts in this regard.

POSITIONS OF THE PARTIES

[14] The plaintiff says that the defendant's initial email offer of August 19, 2021, accepted by the plaintiff the following day, constituted a full and binding employment contract. That contract contained no termination clause and therefore, pursuant to the decision in *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, the plaintiff was and is entitled to receive reasonable notice, or pay in lieu of reasonable notice, as determined by the common law.

[15] The plaintiff says that the written contract which she received from the defendant on August 20 significantly altered the initial contract by imposing termination and non-competition terms while not providing any new consideration. She says, therefore, that this "second" contract is unenforceable. In this regard, she relies on *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v. Aga*, 2021 SCC 22; *Quach v. Mitrux Services Ltd.*, 2020 BCCA 25; and *Krieser v. Active Chemicals Ltd.*, 2005 BCSC 1370 [*Krieser*].

[16] The defendant says that the initial email offer and subsequent acceptance did not constitute a contract of employment. He says that "common sense should prevail", and that the plaintiff knew and confirmed during her examination for discovery that she would not be working for the defendant, unless and until she signed a formal employment contract.

[17] He says that it is cumbersome, awkward, and expensive to require employers to provide even a single dollar of consideration in cases like this one where there are changes in the terms of employment. He submitted that "there's always promotion", in relation to offers of employment but that the employer should not have to worry about consideration and technicalities.

[18] He points to uncertainties—the lack of the plaintiff's full legal name and her selection of a start date—as indicating that there was in fact and law no contract until later on August 20, when the plaintiff signed the formal written contract of employment.

[19] Both parties agree through their counsel that if the written contract is enforceable, the plaintiff has received all that she was owed under the terms of that document and her action should be dismissed.

[20] They also agree that if the Letter or Letter Agreement is unenforceable and the initial email offer and acceptance governs, then she is entitled to a reasonable notice period with compensation to be determined by reference to the common law authorities.

[21] They disagree on the quantum of that notice.

[22] The plaintiff says that the period of notice at common law in this case is 6 months which translates into approximately $50,000. In support, she refers to the "*Bardal*" factors of age, length of service, position and availability of work (*Bardal v. Globe & Mail Ltd.*, 24 D.L.R. (2d) 140, 1960 CanLII 294 (Ont. H.C.)), and cites five cases which have somewhat similar facts and fall in the 5 to 8 months' notice range.

[23] From that sum would be deducted the amounts which the plaintiff did receive at termination and certain other monies which she has earned by way of occasional work since termination.

[24] After all deductions and adjustments, she seeks judgment in the amount of $39,980.77 plus costs and interest.

[25] The defendant submits that the appropriate award in the present situation, if common-law reasonable notice is required, is more in the range of 2.5 to 3 months ($20,000–$25,000) less the amounts already paid and the monies which the plaintiff has earned. The net result would be a new payment of approximately $10,000–$15,000, figures which would be well within the jurisdiction of the Small Claims division of the Provincial Court and thus, presumptively, operating to deny the plaintiff her assessable costs in Supreme Court. He agrees with the "*Bardal*" factors and cites four cases which, again, have somewhat similar facts and fall in the 2.5 to 4 months' notice range.

DISCUSSION AND DECISION

[26] The initial email offer in this case was extensive and detailed. I have already mentioned some, but not all, of the matters which it covered in considerable detail. The picture painted was nothing short of glowing and positive.

[27] The only two matters referred to in the email as being outstanding were the plaintiff's full legal name (and nick-names by which she liked to be referred), and her preferred start date. Both of those seem, in the context of the communication, to be minor administrative matters. They did not constitute significant substantive changes to the terms which had been offered by the defendant and accepted by the plaintiff.

[28] By contrast, the written document consisted almost entirely of new restrictive terms regarding termination, intellectual property and non-competition, significantly limiting plaintiff's right to seek employment in her chosen field in the event of termination. Those restrictive terms were added by the defendant without consultation and without the offer or provision of further consideration.

[29] Put quite simply, the overall tone and impression of the second document seems to be one of "we told you about all of the good stuff, but now that you are on board, here are some additional terms that we are imposing on you".

[30] It is worth noting that para 7.8 of the Letter Agreement actually refers to "prior oral and written agreements", saying that the written agreement replaces any such agreements. In *Krieser*, Justice Neilson (as she then was) said:

> [24] The arguments and authorities provided by the parties raise three issues. First, did the Contract contain new terms which were detrimental to the plaintiff? Second, if it did, what is required at law to provide adequate consideration for such changes to the employment relationship? Third, has the defendant established adequate consideration on the facts here?
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> [25] Turning to the first question, I find the Contract did introduce new terms that were detrimental to the plaintiff. The evidence is clear that the parties did not discuss termination provisions, or terms regarding intellectual property rights and restrictions on competition before June 3, 1985. I therefore find the plaintiff commenced employment on May 24, 1985 on the basis that these matters would be governed by the common law. The provisions in paragraphs 3 through 6 of the Contract thus introduced new

> restrictions on his pre-existing common law rights. All of those terms were to the employer's benefit.
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> [26] I reject the defendant's view that the short time frame between the interview and the Contract indicates that the Contract simply represented the culmination of ongoing negotiations between the parties. The defendant relies on ***Peerless Laundry and Cleaners Ltd. v. Neal***, [1953] 2 D.L.R. 494 (Man. C.A.) where such a conclusion was reached. I find that case distinguishable on the facts. There, a written agreement was signed by the employee about two weeks after verbal negotiations had taken place between him and the new owner of the business which had previously employed him. The previous owner had required employees to sign a written agreement, and the Court found it was reasonable that the new owner would similarly expect the plaintiff to enter a written agreement of employment, despite the fact that this was not discussed during the negotiations, and the employee was already working for the new owner. Accordingly, continuing employment under the new owner constituted sufficient consideration for the agreement.
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> [27] Here, there is no such prior history to assist the defendant. Nor is there any evidence of negotiations between May 17 and June 3, 1988. I am not convinced by Mr. Wilson's hazy recollection of events that the plaintiff was told at his interview that he would be required to sign a written agreement with additional terms.
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> [28] Having found the Contract introduced new provisions detrimental to the plaintiff, what does the law require as adequate consideration for such changes to an ongoing employment relationship?
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> [29] ***Watson*** makes it clear that continuing employment alone is not enough. The Court found that there must be forbearance or some other incentive to constitute good consideration. In ***Singh v. Empire Life Insurance Co.*** (2002), 4 B.C.L.R. (4th) 38, 2002 BCCA 452, the Court at para. 13 affirmed the views of the Ontario Court of Appeal in ***Francis v. Canadian Imperial Bank of Commerce*** (1994), 21 O.R. (3d) 75 (C.A.), that a modification to a pre-existing employment contract will not be enforced unless there is a further benefit to both parties.
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> [30] The Ontario Court of Appeal expressed this even more strongly in ***Hobbs v. TDI Canada Ltd.*** (2004), 246 D.L.R. (4th) 43 at para. 32:
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> > Francis makes it clear the law does not permit employers to present employees with changed terms of employment, threaten to fire them if they do not agree to them, and then rely on the continued employment relationship as the consideration for the new terms.
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> [Emphasis in original.]

[31] In the present case, the plaintiff had not yet started work for the defendant, however I find the reasoning of Justice Neilson applicable and persuasive. Terms of employment were offered and were accepted. Hours later, new terms were presented, one might say imposed. The only possible consideration was that the

plaintiff could keep the job if she now agreed to the additional, onerous and detrimental terms which had not been included in, or even contemplated by, the original agreement.

[32] I am aware of the decision of Justice Bauman (as he then was) in *Bern v. AMEC E&C Services Limited,* 2007 BCSC 856, but find that the facts of the present case are more similar and in line with those in *Krieser*.

[33] The Letter or Letter Agreement clearly imposed new and burdensome terms on the plaintiff, different in all aspects from the terms which had been presented and offered to induce her to accept employment from the defendant. Nothing of the sort had been included in, or even hinted at in the initial offer. The initial terms were not general discussion points in a meeting or interview; they consisted of over 60 pages of all-encompassing, detailed and clear inducements, amassed, collated and presented by the defendant to the plaintiff in their offer to her to join the defendant company.

[34] I also note that the Letter or Letter Agreement refers to almost none of the benefits to the plaintiff which were included in the original offer. It does mention salary and stock options but says nothing about vacation policy, benefits packages, hardware issues, and various other matters which were clearly included in the original offer and were intended to induce the plaintiff to accept the offer of employment. It seems at least arguable that if the defendant's position is correct, it was not bound to provide any such benefits to the plaintiff as she became bound by the strict, very narrow and almost entirely employer protective terms of the Letter Agreement.

[35] I find that such situation is clearly covered by the reasoning in *Krieser*. I find that the initial offer and acceptance was a complete agreement between the parties and that the defendant has failed to establish, on a balance of probabilities, that the plaintiff received any or any adequate consideration for the signing of the Letter Agreement—that written document is unenforceable and the plaintiff's entitlement to severance is to be determined by common law principles.

QUANTUM

[36] I have reviewed the authorities cited by both the plaintiff and defendant regarding appropriate periods of notice. Not unexpectedly, none of the cases are completely on point and were determined on their own facts and circumstances.

[37] In the present case, I consider particularly the following as to the matter of proper notice:

- the plaintiff was and remains quite young and her career is in its infancy;
- her field involves technology and she appears to be well situated and qualified to continue in related endeavours;
- the number of applications which the plaintiff has submitted indicates no lack of jobs in the technology industry;
- the plaintiff was successful in obtaining some employment following her termination but has not been successful in obtaining ongoing, full-time employment;
- the plaintiff was not in what could reasonably be considered a managerial position and certainly not a senior management position;
- the plaintiff was employed by the defendant for approximately 20 months, based on her chosen start date and termination date; and
- under the terms of the written contract, which has only now been determined to be unenforceable, the plaintiff was faced with a clear non-competition clause which was forcefully brought to her attention by, or on behalf of, the defendant at the time of her termination.

[38] In all of the circumstances, I order that the reasonable period of notice is 5 months. Based on the plaintiff's base salary at the time of termination ($100,000 per annum or $8,333.33 per month) I calculate her entitlement as follows:

Notice period of 5 months = 5 x $8,333.33:	$41,666.67
Subtract 3 weeks' pay received:	$5,769.23
Subtract mitigation earnings:	$4,250.00
Total owing:	**$31,647.44**

[39] The amount recovered is within the monetary jurisdiction of the Small Claims Court.

[40] I am aware that Rule 14-1(10) of the *Supreme Court Civil Rules* provides that a plaintiff is not entitled to costs, exclusive of disbursements, unless the court finds that there was sufficient reason for bringing the proceeding in the Supreme Court and so orders.

[41] I have considered this provision and have determined that I am unable to find sufficient reason for this proceeding to have been brought in Supreme Court so as to grant an exception to the Rule. Based on the plaintiff's own calculation and "best case scenario" her 6 months' notice period would have resulted in an award of less than $40,000—that is less than $5,000 over the monetary jurisdiction of the Small Claims Court. The risk of basing the decision of which court to choose based on a best possible outcome must rest with the plaintiff.

[42] I order that the plaintiff's costs recovery be limited to her reasonable disbursements as assessed or agreed.

"Caldwell J."