Date: 19961106
Docket: 33041
Registry: Prince George

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

ROSE BYERS

PLAINTIFF

AND:

CITY OF PRINCE GEORGE (DOWNTOWN PARKING COMMISSION)

DEFENDANT

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE MEIKLEM
(IN CHAMBERS)

Counsel for the Plaintiff:	Dick Byl
Counsel for the Defendant:	Oliver Hui
Place and Date of Hearing:	Prince George, B.C. October 11, 1996

[1] The issue on this Summary Trial is the length of the reasonable notice period to terminate the plaintiff's employment with the defendant as a booth attendant at a city parkade after fourteen years and eight months.

[2] The plaintiff was terminated in May of 1996 and is now fifty-five years old. She has a grade 7 education and she has no formal training or other education. Her prior work experience was as a hotel chambermaid. She intends to find other employment in the hotel industry, but her first effort at obtaining employment was in the week of October 7th to 11th in 1996. She made inquiries at two motels in the city of Prince George, but her efforts were unsuccessful; in part because the busier summer season in the motel industry was then past. She has not asked for a letter of recommendation from the City, she has not sought job openings through Employment Canada or inquired about parking booth attendant work, nor has she prepared a resume or inquired of her friends regarding employment.

[3] Mrs. Byers says that she has been ill since her termination and describes her illness as "just nerves". Mrs. Byers was cross-examined on her affidavits in the course of this summary trial and testified that she has had to cope with the passing of her father since the termination of her employment. She lost her composure somewhat during a gentle cross-examination and it is evident that she is not perhaps

fully ready to test the job market. Nevertheless it appears likely that she would have obtained some employment as a chambermaid if she had made an earlier effort to obtain such employment.

[4] Plaintiff's counsel suggests that "a month or so" might be deducted for failure to mitigate and I will return to that issue at the end of my decision.

[5] The plaintiff seeks a finding that the reasonable notice period is in the range of twelve to fifteen months, while the defendant submits that the payment of eight weeks pay in lieu of notice that was provided on termination was adequate.

[6] The plaintiff's rate of pay was $892.57 bi-weekly. Her position was full time and her job duties had remained more or less constant since the start of her employment. Her duties included unlocking the doors in the parkade each morning, sweeping and cleaning the parkade prior to opening, accepting applications for new monthly parking privileges (including the acceptance of payment and issuing stalls and receipts), assisting people having difficulty with computerized access and relieving other attendants at other parkades from time to time.

[7] The defendant has cited the Court of Appeal decision in ***Pelech v. Hyundai Auto Canada Inc.***, (1991) 63 B.C.L.R. (2d) 24 (B.C.C.A.) which overturned an award of four months damages for

the termination of an unskilled shipper/receiver after just under four years of employment and awarded the four weeks notice that is the minimum prescribed by the ***Employment Standards Act***. Of course s. 42 of the ***Employment Standards Act*** does not provide for any minimum notice in excess of eight weeks.

[8] It is common ground that the important factors to be considered are set out in ***Bardal v. The Globe and Mail Ltd.*** [1960] 24 D.L.R. (2d) 140 and ***Ansari v. British Columbia Hydro and Power Authority*** (1986) 2 B.C.L.R. (2d) 33 (B.C.S.C.). The important factors are:

(1) The character and responsibility of the employment function.
(2) The employee's age.
(3) The employee's length of service with the employer.
(4) The availability of equivalent alternative employment.

[9] A number of the cases cites to me by the plaintiff were not too useful because of the great disparity between the character of the employment they dealt with by comparison to the character of Mrs. Byers' employment.

[10] In so far as the character and responsibility of her employment is concerned, Mrs. Byers is in a position comparable to the plaintiff in ***Pelech***. Although there was responsibility

over money involved and for a period of time in the early 80's she made bank deposits for her employer, she was an unskilled employee with far less than a high school education, who after nearly fifteen years of employment was making slightly in excess of $11.00 per hour. This case is significantly distinguishable from ***Pelech*** however on the factors of the age of the plaintiffs and the length of service. In ***Pelech*** the plaintiff was in his early twenties, whereas Mrs. Byers is fifty-five. Mrs. Byers' length of service is approximately five and one-half years in excess of the period of employment that would entitle an employee to the maximum eight weeks notice provided under s. 42 of the ***Employment Standards Act*** which, as I read the section, is nine completed years of employment.

[11] I consider the cases from British Columbia courts to be weightier authority than those from other provinces and I will briefly review those cases cited to me which I find useful.

[12] In ***Merilees v. Sears Canada Inc.***, (1988) 22 C.C.E.L. 317 (B.C.C.A.) nine months salary in lieu of notice was awarded to Mrs. Merilees who was a nine-year employee who started as an office worker on a part-time basis, moved to a full time sales position, and was promoted two years before her termination to an assistant manager in the cosmetics and hosiery departments. The report of the Court of Appeal decision does not state her age, but she would appear to be younger than Mrs. Byers. Her

job responsibility obviously exceeded that of the plaintiff in this case.

[13] In ***Zarantonello v. Forest Industries Flying Tankers Limited***, Nanaimo Registry No. 11177, Hutchinson, J., the plaintiff was a clerk/typist and storage person in the defendant's warehouse looking after parts and supplies. Her salary on termination in 1990 was $2,235.00 per month. Her age is not stated in the decision. Her length of service was five years and she was awarded four months severance pay. I would assess the character and responsibility of Ms. Zarantonello's job as exceeding that of the plaintiff in this case.

[14] In ***Tataryn v. Dueck on Broadway Limited***, Vancouver Registry No. C803708, Wallace, J., the plaintiff was a service mechanic whose mechanical skills were acquired with on the job training. When he was terminated in 1980 at age fifty-three after a twenty-seven years of service with the defendant, Wallace J. stated:

> In my view the proper period of notice required to be given an employee of this long period of service is not less than six months and could well justify a period of one year. I find that the notice the Defendant was required to give the Plaintiff was six months in these circumstances.

It would appear the circumstances referred to included the fact that the employer had approximately one month before formally

terminating him advised him he should look for other employment.

[15] In ***Styba v. University of British Columbia Employees Society***, Vancouver Registry No. C922372, a fifty-three year old office administrator and secretary with eleven years service was awarded fourteen months severance pay. The termination was in December 1991 and Mrs. Styba's salary was $27,213.18 per annum. Her job responsibilities included administrative activities of the union, including work allocation and supervision of employees, monthly preparation of draft for newsletter and purchasing inventory and equipment for the office. These job responsibilities obviously greatly exceed those of the plaintiff in this case.

[16] In ***Medwid v. White Spot Limited*** Vancouver Registry No. C935253, Shaw, J., a forty-four year old order clerk was terminated in February 1993 after four and one-half years of employment, the first three years of which were part-time. Her salary started at $10.00 per hour and when she obtained full time employment her salary was set at $22,500.00. Her salary $23,175.00 when she was terminated. She had a grade 12 education and her job remained essentially the same on termination as it had been since commencement. Three months notice was considered reasonable. Although it was held that certain basic skills and education were required, which I assess as exceeding those required of Mrs. Byers, this case is

roughly comparable in so far as the character and responsibility of the employment is concerned, although it involves a younger plaintiff than Mrs. Byers and a shorter length of service.

[17] In ***Collins v. Jim Pattison Industries Ltd.***, Vancouver Registry No. C924611, Clancy, J., a fifty-six year old mechanic who had been employed by the defendant for sixteen years was held entitled to nine months notice. This case is the most comparable to the case before me in terms of the age of the plaintiff and the length of service, although obviously a certified automobile mechanic holds a more highly skilled and responsible job than a monthly parking booth attendant.

[18] While the character and responsibility of Mrs. Byers' job as a monthly parking booth attendant would indicate a notice requirement at the low end of the scale - perhaps the statutory minimums set out in the ***Employment Standards Act***, - her age and her length of service are factors that reasonably compel a lengthier notice period.

[19] The factor of the availability of equivalent alternative employment does not warrant extensive discussion in this case. This factor is, in this case, primarily a function of the character of employment sought, and the employee's age and prior employment history. Although generally in part also dependent upon extraneous economic factors, given a reasonably

healthy economy, the more menial and lower paid the employment, the greater its availability.

[20] My consideration of the principal factors and the awards in other cases leads me to the conclusion that the reasonable notice period in the circumstances of this case is four months. I also conclude that if Mrs. Byers had been diligent in seeking comparable alternative employment following her termination she probably would have obtained employment providing earnings equivalent to one month's pay during this notice period, and I therefore reduce the award I would otherwise make by one month. Since she was provided with eight weeks pay on termination she is entitled judgment against the defendant for three months less eight weeks, which I calculate as [(3 x $1933) - $3,570] = $2,229.00.

[21] The defendant relies upon Rule 57(10) and argues that there was not sufficient reason for bringing the proceedings in the Supreme Court. I accept the defendant's argument on that point. The most comparable cases cited to me were the ***Medwid*** case and the ***Collins*** case. In the ***Medwid*** case the job character in question was marginally more skilled than a monthly parking booth attendant but the employee was younger and employed for a significantly shorter period the award was three months. In the ***Collins*** case the age of the employee and length of service were very similar to the case at bar, but the job character was significantly more skilled and responsible

and the award was nine months. In this case after deduction for the eight weeks severance that was paid on termination it would require an award of eight months to exceed the small claims jurisdiction, even without consideration of the lack of mitigation.

[22] The Writ of Summons was issued on July 3rd, which is two months following the termination, and the plaintiff had made absolutely no efforts to obtain employment by that time. I cannot conclude that there was any reasonable expectation that an award of eight months or more could be obtained in respect of the plaintiff's type of employment notwithstanding her length of service and her age. There will therefore be no award of costs.

Ian A. Pitkin J.