



No. S-150627
Vancouver Registry

In the Supreme Court of British Columbia

Between

Monica Winter

Plaintiff

and

Her Majesty the Queen in right of the Province of British Columbia and the British Columbia
College of Teachers

Defendants

RESPONSE TO CIVIL CLAIM

Filed by: Her Majesty the Queen in right of the Province of British Columbia and the British Columbia College of Teachers (the "Defendants")

Part 1: RESPONSE TO NOTICE OF CIVIL CLAIM FACTS

Division 1 – Defendants' Response to Facts

1. The facts alleged in paragraphs 1, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, and 20 of Part 1 of the notice of civil claim are admitted.
2. The facts alleged in paragraphs 2, 13, 15 – 19, and 21 - 24 of Part 1 of the notice of civil claim are denied.

Division 2 – Defendants' Version of Facts

Legislative Backdrop

1. The British Columbia College of Teachers (the "College") was a statutory corporation continued by s. 2 of the *Teaching Profession Act*, R.S.B.C. 1996 c. 449.

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2. In November of 2011 the Legislature enacted the *Teachers Act*, S.B.C. 2011 c. 19 (the "*Act*"), which received Royal Assent on November 14, 2011 and prospectively dissolved the College. Certain sections of the *Act* came into force by Royal Assent but the majority of the sections, including section 87 which dissolved the College, came into force on January 9, 2012 by way of B.C. Reg. 239/11 enacted December 14, 2011.
3. The functions of the College were transferred to the newly created successor entity the Teacher Regulation Branch which is a branch of the Defendant, Her Majesty the Queen in Right of the Province of British Columbia (the "Province").
4. As of January 9, 2012, any reference to the College in any commercial paper, contract, lease, license, permit or other instrument or document is deemed to be a reference to the Province. The Province pleads and relies on section 87 (4) of the *Act* and the repeal of the *Teachers Profession Act*, *supra* on January 9, 2012.

Plaintiff's Individual Factual and Contractual Situation

5. Prior to January 9, 2012, the Plaintiff was the Director of Finance and Operations with the College. The Plaintiff's contract of employment with the College was individualized, and provided for substantially different benefits and protections as compared to other employees of the College.
6. The Plaintiff was employed by the College pursuant to a written contract of employment dated July 22, 2011 (the "College Contract") which included the following terms:
 - a) express termination provisions that entitled the Plaintiff to a lump-sum payment equivalent to:
 - i. one (1) month's salary plus the College's cost of benefits (including pension contributions) for each completed year of service up to nine (9) years of employment;
 - ii. plus two (2) additional months of salary plus the College's cost of benefits (including pension contributions) for each additional year of employment completed after nine (9) years;
 - iii. a further additional month of salary and the College's cost of benefits (including pension contributions) for each full year or part year that she was over the age of 50 years of age; and
 - iv. a limit on the total payment under the termination provisions of 24 months of salary and the College's cost of benefits (including pension contributions).(Collectively the "Termination Provisions"); and
 - b) express compensation provisions setting out:
 - i. the Plaintiff's annual salary as \$114,575;

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- ii. that the Plaintiff's salary was to be reviewed annually by the College and any salary adjustments to be adjusted annually on July 1st;
- iii. that the Plaintiff's annual vacation entitlement from the 1st through to her 5th year of service was 140 hours of annual vacation;
- iv. that the Plaintiff's annual vacation entitlement from the 6th through to her 10th year of service was 175 hours of annual vacation;
- v. that the Plaintiff's annual vacation entitlement from her 11th the 1st year of service on was 210 hours of annual vacation; and
- vi. that the Plaintiff was entitled to ten (10) discretionary days annually

(Collectively the "Compensation Provisions").

7. In or about September 2011, the Plaintiff was advised, due to her position as Director of Finance and Operations, that the Ministry of Education was drafting legislation with the intention of discontinuing the College and absorbing the function of the College into the Ministry of Education. At that time, the College had approximately 48 employees.
8. In October of 2011, the Council for the College voted to give all Directors at the College, such as the Plaintiff, a 18.2% raise retroactive to July 1, 2011 which substantially increased the Plaintiff's annual salary to \$135,500.
9. Starting in November 2011, the Public Service Agency, the human resources branch of the Province (the "PSA") engaged with the College to assist with the transition of the College's functions into the Province. The PSA expended a great deal of effort comparing the respective compensation practices and terms and conditions of employment that existed within the College and the Province to ensure that in the transfer to the Province, employees were offered employment on substantially the same terms and conditions as they had with the College.
10. The PSA also provided a great deal of information as to the consequences of the dissolution of the College and the assumption of its responsibilities by the Province as well as the consequences for each individual employee's employment. Members of the PSA made it clear that they would make sure all questions would be addressed. Starting in November of 2011, the PSA arranged and held numerous group and individual meetings with the College employees to:
 - a) Explain public service terms and conditions of employment;
 - b) Explain public service benefit entitlements and the flexible benefits options; and
 - c) Explain participation in the Public Service Pension Plan and the implications for those who were currently enrolled in either the Municipal Pension Plan or the Teachers Pension Plan.
11. Employees of the College also received independent legal advice as a group from lawyers at Roper Greyell LLP in November of 2011.
12. In further answer to paragraph 2 of the Notice of Civil Claim, the Province says that the Plaintiff was never "terminated" by the College. Section 87 (c) of the *Act* transferred to

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and vested in the Province all of the rights, property and assets of the College and section 87 (d) transferred to and caused the assumption by the Province all of the debts, liabilities and obligations of the College and, as set out further below, the Plaintiff specifically agreed to have her employment terms move over to the Province.

13. In anticipation of the fact that the College was to be dissolved on January 9, 2012 and its existing responsibilities, liabilities and assets transferred to the Province, the Plaintiff was offered regular employment with the Province on December 1, 2011 by way of a written offer of employment in the form of a letter from the Deputy Minister of Education (the "Offer of Employment").
14. The Offer of Employment proposed to employ the Plaintiff on substantially the same terms and conditions as the College Contract. However, the Offer of Employment had the following implications:
 - a) The Plaintiff's employment would be transferred from the College to the Province;
 - b) the Plaintiff would be an excluded employee, and be bound by the Terms and Conditions of Employment for Excluded Employees which in turn specifically incorporates the *Public Sector Employers Act, R.S.B.C. 1996, c. 384*;
 - c) The Plaintiff's years of service with the College and pension would transfer with her;
 - d) The Plaintiff's annual base salary with the Province would be \$ 113,073.64, approximately the same level of salary the Plaintiff had received from the College before the salary increase approved by the Council for the College in October of 2011;
 - e) The Plaintiff would, however, receive salary protection for two (2) years in the form of an additional annual payment of \$22,426.36, which was the difference between the Plaintiff's base salary as an employee of the Province and her former salary as an employee of the College as of October 2011 (the "Salary Protection");
 - f) The two (2) years of Salary Protection would run from the date of the transfer of the Plaintiff's employment from the College to the Province;
 - g) while the Plaintiff's annual vacation entitlement as an employee of the Province would be 140 hours and less than the 175 hours she was receiving at the College, she would also have protection for her current College entitlement for two (2) years from the date of the transfer of her employment as she was allowed to carry over for that two (2) year period an additional 98 hours of vacation entitlement (the "Vacation Protection"); and
 - h) As the College's maximum annual vacation entitlement was capped at 210 hours; whereas the Province's maximum vacation entitlement cap is 245 hours, the Plaintiff's prospective annual vacation entitlement had in fact increased.
15. The Plaintiff's employment by the Province allowed her to continue her employment in the same manner, on substantially the same terms, and in the same capacity as she did at the College without any break in employment. As such, the Plaintiff did not suffer any loss whatsoever from the transfer/assignment of her employment.

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16. The Offer of Employment remained open for acceptance until December 14, 2011, which provided the Plaintiff fourteen (14) days to decide whether to accept. The Plaintiff was provided a reasonable opportunity to obtain legal advice as to whether to accept the offer of employment. The Province does not know whether the Plaintiff took such opportunity.
17. The Plaintiff communicated her acceptance of the Province's offer of employment by signing the letter on December 7, 2011, and returning the letter as directed to the acting Registrar at the Ministry of Education.
18. The Plaintiff freely accepted the Offer of Employment in full satisfaction and substitution for the College Contract.
19. The Plaintiff's employment history and experience is distinguishable from the other employees of the College. In particular, some other employees at the College:
 - a) did not hold the same management position as the Plaintiff;
 - b) did not receive the same Salary Protection and Vacation Protection terms as the Plaintiff;
 - c) were offered positions that differed from their pre-existing positions;
 - d) did not accept a position with the new equivalent body at the Province, the Teacher Regulation Branch;
 - e) accepted different positions with the Province;
 - f) declined to accept any new position with the Province; and/or
 - g) were not offered new positions with the Province.
20. The Plaintiff continues to be employed by the Province at the Teacher Regulation Branch.
21. On January 9, 2014, the Plaintiff was no longer eligible for the Salary Protection and her annual salary reverted to \$113,073.64.
22. On January 9, 2014, the Plaintiff's annual vacation entitlement was changed to 154 hours.
23. On January 28, 2014 the Plaintiff's position changed to Director of Certification. However, her salary and all other terms and conditions of her employment remained unchanged.
24. The Plaintiff currently receives an annual salary of \$116,465.77 and an annual vacation entitlement of 161 hours.
25. Other employees who agreed to transfer over to the Province had changes made to their position, salary and vacation entitlement at different times and for different reasons.
26. The Province does not have full information for the career path taken by other employees who did not choose to transfer to the Province.

Part 2: RESPONSE TO RELIEF SOUGHT

27. The Defendants do not consent to the granting of the relief sought in any of the paragraphs and sub-paragraphs of Part 2 of the notice of civil claim.
28. The Defendants oppose the granting of the relief sought in all of the paragraphs and sub-paragraphs of Part 2 of the notice of civil claim.

Part 3: LEGAL BASIS

Claim against the College

29. The College was dissolved by the *Act*. There is no basis in law for this Plaintiff to commence any action against the College or to recover any remedy against the College, pursuant to the terms of the *Act*.

Alleged Breach of Contract

30. The Defendants deny that they breached the College Contract as alleged or at all.
31. The actions and conduct set out in paragraphs 11 - 22 of Part 1 of the Notice of Civil Claim constituted a novation of the Plaintiff's employment contract, or alternatively an assignment or transfer of her employment contract. Accordingly, the Plaintiff's employment was never terminated by the College. The Plaintiff is currently an employee of the Province and was not terminated on January 6, 2012 as alleged. She is therefore not entitled to any severance as alleged, or at all.
32. The Plaintiff received valuable consideration for the novation of the terms of her employment.
33. Furthermore, this Plaintiff cannot purport to rely on the severance provisions in the College Contract as an outstanding "debt" and take employment with the Province. The termination provisions in the College Contract ceased to exist upon the Plaintiff's acceptance of employment with the Province. If the Plaintiff receives termination pay and all of the benefits from her old job in her employment with the Province she would effectively be given or entitled to "double credit".
34. Furthermore, the Province says that the Plaintiff was given working notice as of September 2011 of any changes in the conditions of her employment, and has continued to be employed with the Province for over three (3) years after express notice of the change to her terms of employment was provided to her.

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35. In the alternative, the Province relies upon the doctrines of estoppel, unjust enrichment, waiver, laches, avoidance of loss and acquiescence.
36. In the further alternative, if the Plaintiff's contract was terminated at any time, which is not admitted but expressly denied, then the Plaintiff fully mitigated the losses arising from the alleged termination of her employment. The Plaintiff has fully avoided any and all losses.
37. In the further alternative, the Province says that the Plaintiff's claim is not a liquidated damages claim.

Class Proceedings

38. In answer to paragraph 24 of the Notice of Civil Claim, the Province say that the Plaintiff has not raised a claim which is suitable for proceedings under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 (the "CPA") and, in particular:
 - a) There are no common issues as the claims are independent and unique to each proposed class member;
 - b) Proceedings under the CPA are not the preferable means to resolve the dispute given the level of individuality of the required assessment;
 - c) The Plaintiff has raised claims that disclose no viable cause of action;
 - d) The Plaintiff has not proposed a class with any appropriate unifying characteristics; and
 - e) The Plaintiff is not an appropriate representative of the proposed class.
39. The members of the proposed class do not have substantially or sufficiently similar employment contracts.
40. For example, the Plaintiff's contract with the College contained express Termination Provisions that entitled her to a lump-sum payment calculated in a specific way with a specific maximum of 24 months of salary and the College's cost of benefits (including pension contributions) for those 24 months.
41. Only two other College employees (both also Directors in a management position) had contracts with the same Termination Provisions. One such Director has already received severance in respect of her employment with the College.
42. Certain employees had no termination provisions in their contracts at all; whereas other employee's termination provisions varied from:
 - one week to three week's salary plus the College's cost of benefits (including pension contributions) for each completed year of service up to nine years of employment;
 - plus one to three additional weeks of salary plus the College's cost of benefits (including pension contributions) for each additional year of employment completed after nine years; and

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- a further additional one to three weeks of salary and the College's cost of benefits (including pension contributions) for each full year or part year that she was over the age of 50 years of age.
43. Furthermore, the limit on the total payment under the termination provisions of the other employees' contracts varied from 24 weeks to 48 weeks.
 44. The Plaintiff's Compensation Provisions were also distinct from the compensation provisions provided to other employees of the College. Salaries, vacation benefits, entitlement to flex days and entitlement to discretionary days also varied greatly between the contracts of employees with the College.
 45. The members of the proposed class held different duties both before and after the dissolution of the College and were not advised of the same information about its dissolution at the same time.
 46. Some of the College's employees retired, others resigned, and others agreed to the novation of their contracts with the College by accepting the Province's offer of employment.
 47. The members of the proposed class did not suffer any, or alternatively the same type of loss as a result of the dissolution of the College. Some of the employees of the College were either promoted and/or received increased salaries with the Province, either in the Teacher Regulation Branch or elsewhere within the Province. The members of the proposed class have followed different career paths since January 9, 2012.

Defendants' address for service:

Ministry of Justice
Legal Services Branch
1301 – 865 Hornby Street
Vancouver, BC V6Z 2G3

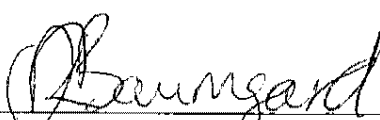
Fax number address for service (if any): (604) 660-2636

E-mail address for service (if any): N/A

Place of trial: Vancouver

The address of the registry is: 800 Smithe Street, Vancouver, BC V6Z 3E1

Date: April 24, 2015



Solicitors for the Defendants,
Deborah L. Baumgard and Tara Callan

Rule 7-1 (1) of the Supreme Court Civil Rules states:

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- (1) Unless all parties of record consent or the court otherwise orders, each party of record to an action must, within 35 days after the end of the pleading period,
 - (a) prepare a list of documents in Form 22 that lists
 - (i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party at trial to prove or disprove a material fact, and
 - (ii) all other documents to which the party intends to refer at trial, and
 - (b) serve the list on all parties of record.