

IN THE MATTER OF:

A COMPLAINT OF ALLEGED UNJUST DISMISSAL UNDER DIVISION
XIV - PART III, SECTION 240 OF THE *CANADA LABOUR CODE*,
R.S.C. 1985, c. L-2

BETWEEN:

Nicole K. Fontaine,

COMPLAINANT,

- and -

White Buffalo Youth Inhalant Treatment Centre Inc.,

RESPONDENT.

ADJUDICATOR'S DECISION
October 5, 2018

T. F. (TED) KOSKIE, B.Sc., J.D.

REPRESENTATIVES:

Complainant, Nicole K. Fontaine, Self Represented

W. Allan Brabant, for the Respondent, White Buffalo Youth Inhalant Treatment
Centre Inc.

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1. INTRODUCTION

[1] Nicole K. Fontaine ("Fontaine") lodged a complaint¹ ("Complaint") pursuant to section 240 of the *Canada Labour Code*, Part III ("Code") alleging that White Buffalo Youth Inhalant Treatment Centre Inc. ("WBTC") unjustly dismissed her from her employment effective January 11, 2017.

[2] WBTC took issue with the Complaint.²

[3] Fontaine asked that the Complaint be referred to an adjudicator.³

[4] The Minister of Labour (Canada) appointed me to hear and determine the Complaint.⁴

2. FACTS

[5] WBTC is a non-profit corporation that provides residential and outreach services ("Services") for First Nations female youth (twelve to seventeen years of age) from across Canada that are experiencing difficulties relating to abuse of inhalants, addictions and mental health needs. It is operated by a Board that represents a membership comprising ten Tribal Councils.

[6] WBTC commenced operations in 1996. It entered agreements:

a) to lease premises from the Prince Albert Grand Council ("PAGC") from which it

¹Exhibit G-1, Fontaine Complaint dated January 30, 2017

²Exhibit G-2, WBTC Statement dated May 26, 2017

³Exhibit G-3, Fontaine letter dated August 14, 2017

⁴Human Resources and Skills Development Canada letter dated September 7, 2017

could offer and provide its Services; and

- b) for PAGC to provide management services, including, *inter alia*, human resource and financial services.⁵

[7] PAGC management included attending to administration of WBTC's personnel needs, as well as maintaining files in connection therewith.

[8] The initial agreements—starting in 1996—were for five year periods. The agreement length changed to one year in 2016. Apart from agreement length, the terms of Exhibit FN-1 are the same as prior agreements.⁶

[9] By way of a document dated November 25, 2015, PAGC offered Fontaine employment with WBTC as a full-time Outreach Worker for a definite term starting on January 4, 2016, and ending on January 3, 2017. On November 27, 2015, Fontaine accepted that offer.⁵

[10] By letter dated October 21, 2016, WBTC gave notice to PAGC that it intended to assume responsibility for its own human resource and financial services effective January 1, 2017.⁶ PAGC did not reply to this letter. On November 28, 2016, WBTC wrote to PAGC asking to meet and discuss transition issues.⁷

[11] By letter dated December 5, 2016, PAGC responded to WBTC and advised it:

⁵The last of which is Exhibit FN-1, a Management Services Agreement between WBTC & PAGC dated March 18, 2016, for a one year term commencing April 1, 2016, and ending March 31, 2017.

⁶Examination in Chief of Colleen Rudderham ("Rudderham")

⁵Exhibit FN-2, Employment Agreement

⁶Exhibit FN-3, Letter from WBTC to PAGC dated October 21, 2016.

⁷*Ibid.*

- a) did not agree to a transition;
- b) would not agree to meet with WBTC;
- c) would not release financial, management and human resource related documents and files to WBTC; and
- d) gave notice for WBTC to vacate the premises it leased on or before March 31, 2017.⁸

[12] Rudderham testified:

- a) she served as the Executive Director of WBTC since on or about April 2016—the first year in an “acting” capacity and the second year in a “full time” capacity;
- b) following receipt of PAGC’s letter, WBTC had:
 - i) a “very tense time” with PAGC; and
 - ii) no access to its personnel records;
- c) WBTC’s facility was closed for the last two weeks of December 2016;
- d) she came back to work in the first or second week of January 2017; and
- e) she knew Fontaine’s employment agreement was expiring, but “did not know it was as soon as it was”;

⁸Exhibit FN-4, Letter from PAGC to WBTC dated December 5, 2016.

- f) the “usual approach” would have been for PAGC to give WBTC notice of an expiring term and consult about what to do, but this did not happen with Fontaine;
- g) she did not have WBTC approval to offer another employment term to Fontaine;
- h) she decided not to offer Fontaine another employment term and on January 11, 2017, forwarded a letter to her to that effect;⁹
- i) she did everything within her power to send this decision to Fontaine immediately after finding out the end of her employment term; and
- j) WBTC asked PAGC to prepare Fontaine’s Record of Employment, which it did.⁹

[13] Dale Skibinski (“Skibinski”) testified:

- a) he began as WBTC’s Human Resources and Finance Manager on November 30, 2016;
- b) in January 2017, Fontaine approached him and asked if WBTC had a new contract for her;
- c) he responded “no”;
- d) a few days later, Fontaine again approached him and again asked if WBTC had a new contract for her;

⁹Exhibit FN-5, Letter from WBTC to Fontaine dated January 11, 2017

⁹Exhibit FN-6, Record of Employment for Fontaine dated January 25, 2017

- e) he again responded “no”;
- f) he explained to Fontaine that all “employee hires” must be approved by Rudderham;
- g) he prepared a draft employment agreement for Rudderham to consider;¹⁰
- h) he shared this draft with Fontaine;
- i) upon her return to work in January 2017, Rudderham decided not to offer a new employment term to Fontaine; and
- j) he met with Fontaine and read and gave Exhibit FN-5 to her.

[14] Fontaine testified:

- a) she was a good employee, appreciated her job and was never disciplined;
- b) when Skibinski gave her the draft agreement, she believed WBTC was willing to employ her for another year;
- c) this belief was fortified by the fact that she was involved in a Restructuring Work Plan¹¹ and Administrative Schedule¹² that went beyond the expiration of her employment term;
- d) she did not contact Rudderham because she:

¹⁰Exhibit FN-7, draft Employment Agreement dated January 4, 2017 (unsigned)

¹¹Exhibit E-1

¹²Exhibit E-2

- i) knew she was on leave; and
 - ii) “understood what she was going through”;
- e) Skibinski told her he needed to discuss the employment agreement with Rudderham;
- f) she asked Skibinski “every day” if the contract had been approved;
- g) Skibinski ultimately gave her Exhibit FN-5.

[15] On cross-examination, Fontaine admitted Exhibits E-1 and E-2 were planning documents and subject to change depending on staffing and client loads.

3. DISPUTE

[16] The issues herein are as follows:

- a) Did WBTC “dismiss” Fontaine?
- b) If WBTC dismissed Fontaine, did it unjustly dismiss her?
- c) If WBTC unjustly dismissed Fontaine, what remedy is available to her?

4. DECISION

[17] I find WBTC did not dismiss Fontaine from her employment.

[18] I find that I do not have the jurisdiction under section 240 of the *Code* to rule upon the Complaint.

[19] Under the circumstances, I do not believe this is an appropriate case to award costs and I decline to do so.

5. REASONS

5.1 CODE

[20] The relevant provisions of the *Code* are:

Complaint to inspector for unjust dismissal

240(1) Subject to subsections (2) and 242(3.1), any person

- (a) who has completed twelve consecutive months of continuous employment by an employer, and
- (b) who is not a member of a group of employees subject to a collective agreement,

may make a complaint in writing to an inspector if the employee has been dismissed and considers the dismissal to be unjust.

Time for making complaint

(2) Subject to subsection (3), a complaint under subsection (1) shall be made within ninety days from the date on which the person making the complaint was dismissed.

Extension of time

(3) The Minister may extend the period of time referred to in subsection (2) where the Minister is satisfied that a complaint was made in that period to a government official who had no authority to deal with the complaint but that the person making the complaint believed the official had that authority.

...

Reference to adjudicator

242(1) The Minister may, on receipt of a report pursuant to subsection 241(3), appoint any person that the Minister considers appropriate as an adjudicator to hear and adjudicate on the complaint in respect of which the report was made, and refer the complaint to the adjudicator along with any statement provided pursuant to subsection 241(1).

Powers of adjudicator

- (2) An adjudicator to whom a complaint has been referred under subsection (1)
 - (a) shall consider the complaint within such time as the Governor in Council may by regulation prescribe;
 - (b) shall determine the procedure to be followed, but shall give full opportunity to the parties to the complaint to present evidence and make submissions to the adjudicator and shall consider the information relating to the complaint; and

- (c) has, in relation to any complaint before the adjudicator, the powers conferred on the Canada Industrial Relations Board, in relation to any proceeding before the Board, under paragraphs 16(a), (b) and (c).

Decision of adjudicator

(3) Subject to subsection (3.1), an adjudicator to whom a complaint has been referred under subsection (1) shall

- (a) consider whether the dismissal of the person who made the complaint was unjust and render a decision thereon; and
- (b) send a copy of the decision with the reasons therefor to each party to the complaint and to the Minister.

Limitation on complaints

(3.1) No complaint shall be considered by an adjudicator under subsection (3) in respect of a person where

- (a) that person has been laid off because of lack of work or because of the discontinuance of a function; or
- (b) a procedure for redress has been provided elsewhere in or under this or any other Act of Parliament.

Where unjust dismissal

(4) Where an adjudicator decides pursuant to subsection (3) that a person has been unjustly dismissed, the adjudicator may, by order, require the employer who dismissed the person to

- (a) pay the person compensation not exceeding the amount of money that is equivalent to the remuneration that would, but for the dismissal, have been paid by the employer to the person;
- (b) reinstate the person in his employ; and
- (c) do any other like thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal.

5.2 ANALYSIS

5.2.1 DID WBTC "DISMISS" FONTAINE?

[21] WBTC takes the position that:

- a) what had taken place on the facts of this matter was not a "dismissal," but simply the non-renewal of a contract for a fixed term of employment;
- b) therefore, the failure to renew a contract for a fixed term of employment did not

amount to a “dismissal”; and

- c) since no dismissal had occurred, I was therefore without jurisdiction to decide whether any such dismissal was unjust and, if so, grant any remedies as allowed pursuant to the *Code*.

[22] In so arguing, counsel for WBTC referred me to the decision of Adjudicator R. K. Deeley in *Dakota Ojibway Tribal Council Housing Authority Inc. v Vivie*.¹³ After referring to the Federal Court of Appeal decision in *Eskasoni School Board v MacIassac*,¹⁴ the learned adjudicator said:

64 The Federal Court of Appeal found that in the absence of any statutory provision extending the normal meaning of dismissal, the court was unable to find that the failure of the employer to renew a contract for a fixed term of employment amounted to a dismissal.

65 This decision was followed by a Federal Court Trial Division decision in *Sagkeeng Education Authority Inc. v. Guimond* (1995) F.C.J. 1549, in which a teacher had been hired as a permanent teacher for a fixed term of employment. After several contract renewals over a period of approximately ten years her last contract was not renewed.

66 It was held that a decision not to renew a contract for a fixed term of employment did not constitute a dismissal.

...

72 In considering the matters in issue I have also reviewed the Supreme Court of Canada decision in the case of *Chambly (City) v. Gagnon* (1999) 1 S.C.R 8. In this case the Supreme Court of Canada found that a Chief of Police was not “dismissed” when his five year fixed term contract of employment expired and was not renewed. It was found that the City did not carry out any act which deprived this employee of his post or office. Rather, the contract for an agreed period of time simply came to an end.

[23] The contra interpretive argument was raised and dismissed by the Federal Court of Appeal in *Eskasoni*. There, the Court of Appeal said:

6 In answer to that contention, counsel for the respondents argued that the words “to dismiss” and “dismissed” in section 61.5 should be given a very wide meaning and be interpreted as referring to any decision of an employer not to continue to give work

¹³[2007] C.L.A.D. No. 452

¹⁴(1986) F.C.J. 263 (C.A.)

to an employee, so as to allow the section to achieve its purpose of giving security of employment to employees who are not protected by a collective agreement. Moreover, said he, a narrow interpretation of the words "dismiss" and "dismissal" would contravene subsection 28(1) of the *Code* in that it would give to the contract providing for a fixed term of employment the effect of depriving the employee of his rights under section 61.5 of the *Code*.

7 The *Labour Code* does not contain any definition of the words "to dismiss" and "dismissal". However, the meaning of these words and of their French equivalents "congedier" and "congediement" is reasonably clear: they all refer to an act or decision of an employer that has the effect of terminating a contract of employment. In the absence of a statutory provision extending the normal meaning of those expressions, I am unable to read them as embracing the failure of an employer to renew a contract for a fixed term of employment.

8 That interpretation may have some regrettable consequences in that it does not give all employees the security of employment that they may well deserve to enjoy. However, it does not, in my view, contravene subsection 28(1). Under that subsection, the provisions of Part III of the *Code* apply notwithstanding any contractual stipulation to the contrary. Insofar as section 61.5 is concerned, this means that a contract cannot deprive an employee who has been dismissed, of his right to make a complaint under section 61.5; this does not mean, however, that the employer and the employee cannot so arrange their relationship that there be no dismissal and, for that reason, no occasion for section 61.5 to apply.

[24] I am satisfied the authorities cited to me by counsel for WBTC are good law.

[25] The evidence establishes that both WBTC and Fontaine signed an agreement for a one year employment term.

[26] Both parties understood Fontaine's employment would not be renewed unless same was approved and accepted by WBTC's Executive Director. Both Rudderham and Skibinski confirmed that from WBTC's perspective. So did Fontaine. She testified that Skibinski told her a renewal agreement would need to be discussed with and approved by the Executive Director. I am satisfied she understood that. Otherwise she would not have frequently asked Skibinski about its status.

[27] It is understandable that Fontaine believed WBTC was willing to employ her for another year. She testified that:

a) she had been a good employee;

- b) a new agreement had been drafted; and
- c) she was involved in work that was planned to go beyond the expiration of her employment term.

However, Fontaine knew the Executive Director was away on leave and, therefore, any decision in that regard would have to await her return.

[28] The prospect of renewal or extension, even an expectation that this may occur, is not a promise that term will be renewed or extended.¹⁵

[29] The evidence establishes that:

- a) WBTC decided not to renew Fontaine's employment; and
- b) no new employment contract was executed by the parties.

[30] WBTC wrote to Fontaine advising it would not be offering her a new employment contract. This occurred one week after the expiration of her employment contract. The evidence is clear that WBTC would have liked to write and send such a letter contemporaneously with the expiration date of the original employment contract. However, it was hampered in so doing by the ongoing difficulties it was having with PAGC. I find such an explanation to be quite reasonable.

[31] It was not necessary for WBTC to send a letter confirming the expiration of the fixed term agreement. It is a courtesy, but not a requirement. Without it, the agreement still ends. The fact that it is sent a week after the expiration does not extend the agreement.

[32] If an employment relationship continues beyond the fixed term, and there is no

¹⁵*Pennock v. United Farmers of Alberta Co-Operative Limited*, 2008 ABCA 278 (CanLII) at para. 8

clear agreement between the parties what the new terms of employment are, the courts have held that the contract becomes an indefinite one. Accordingly, it becomes subject to termination on reasonable notice.¹⁶ This has been reaffirmed and applied in the context of the unjust dismissal provisions of the *Code* in *Bigstone v White Bear Education Complex Inc.*¹⁷

[33] However, if the fixed-term contract has expired, and the parties are negotiating a new contract or term, then it would be improper to infer that the employment is indefinite in the absence of verbal representations or conduct that would signal as much. This approach was adopted in *Flynn v. Shorcan Brokers Limited*¹⁸ and affirmed by the Ontario Court of Appeal.¹⁹

[34] In this instance, it was clearly understood that Fontaine's employment would not be automatically renewed. There were no words or conduct that would have lead Fontaine to believe that her employment had become indefinite. On the contrary, both Fontaine and WBTC understood that a decision on Fontaine's employment status would be forthcoming.

[35] These circumstances can be distinguished from those in which it has been held that the indefinite extension of a fixed term contract makes dismissal subject to reasonable notice requirements. The period of time following the expiration of the fixed term agreement was brief. There was a clear understanding between the parties that Fontaine's employment was for a fixed term and would remain so. The issue under review was whether that term would be extended, an alternative contract offered, or the employment relationship was at an end. Fontaine's continued employment with WBTC was clearly qualified by the mutually understood requirement of a further contract being

¹⁶*Buckley v. Students Union of St. Thomas University Inc.*, 1992 CanLII 2704 (NB QB);
Bohn v. Midwest Veterinary Purchasing Cooperative Ltd., 2009 MBQB 216 (CanLII)

¹⁷*Bigstone v. White Bear Education Complex Inc.*, [2009] C.L.A.D. No. 18

¹⁸2004 CanLII 2538 (ON SC)

¹⁹2006 CanLII 3462 (ON CA)

agreed-upon and signed in the near future.

[36] I am satisfied on the evidence no agreement was reached between the parties to extend, renew or continue Fontaine's employment. There was no approved offer by WBTC. There was nothing to accept by Fontaine.

[37] Based on the law, WBTC's non-renewal of Fontaine's employment agreement does not amount to dismissal.

[38] I find WBTC did not dismiss Fontaine from her employment.

[39] I therefore find that I do not have the jurisdiction under section 240 of the Code to rule upon the Complaint.

5.2.2 IF WBTC DISMISSED FONTAINE, DID IT UNJUSTLY DISMISS HER?

[40] In light of my findings above, it is not necessary for me to deal with this issue.

5.2.3 IF WBTC UNJUSTLY TERMINATED FONTAINE'S EMPLOYMENT, WHAT REMEDY IS AVAILABLE TO HER?

[41] In light of my findings above, it is not necessary for me to deal with this issue.

Dated at Saskatoon, Saskatchewan, on October 5, 2018.



T. F. (TED)KOSKIE, B.Sc., J.D.,
ADJUDICATOR