



# Civil Resolution Tribunal

Date Issued: April 8, 2021

File: SC-2020-007450

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Mack v. Vancouver Free Press Publishing Corp.*, 2021 BCCRT 370

B E T W E E N :

ADRIAN MACK

**APPLICANT**

A N D :

VANCOUVER FREE PRESS PUBLISHING CORP.

**RESPONDENT**

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## REASONS FOR DECISION

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Tribunal Member:

Eric Regehr

## INTRODUCTION

1. The applicant, Adrian Mack, worked for the respondent, Vancouver Free Press Publishing Corp. (VFP), editing the movies section of the Georgia Straight newspaper. VFP temporarily laid off Mr. Mack on March 24, 2020, due to the COVID-19 pandemic. Mr. Mack says that VFP constructively dismissed him. He asks for an order that VFP terminated his employment and \$5,000 in severance.

2. VFP says that Mr. Mack refused a reasonable alternative position that it offered in late April 2020. So, VFP says that Mr. Mack resigned. It asks that I dismiss Mr. Mack's claims.
3. Mr. Mack is self-represented. VFP is represented by a lawyer, Anoushka Zachariah.

## **JURISDICTION AND PROCEDURE**

4. These are the formal written reasons of the Civil Resolution Tribunal (CRT). The CRT has jurisdiction over small claims brought under section 118 of the *Civil Resolution Tribunal Act* (CRTA). Section 2 of the CRTA states that the CRT's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the CRT must apply principles of law and fairness, and recognize any relationships between the dispute's parties that will likely continue after the CRT process has ended.
5. Section 39 of the CRTA says the CRT has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. In some respects, both sides to this dispute call into question the credibility, or truthfulness, of the other. However, in the circumstances of this dispute, I find that it is not necessary for me to resolve the credibility issues that the parties raised. I therefore decided to hear this dispute through written submissions.
6. Section 42 of the CRTA says the CRT may accept as evidence information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in a court of law. The CRT may also ask questions of the parties and witnesses and inform itself in any other way it considers appropriate.
7. Under section 10 of the CRTA, the CRT must refuse to resolve a claim that it considers to be outside the CRT's jurisdiction. VFP argues that the Employment Standards Branch (ESB) has exclusive jurisdiction to hear this dispute because it is about statutory entitlements under the *Employment Standards Act* (ESA).

8. In *Macaraeg v. E Care Contact Centers Ltd.*, 2008 BCCA 182, the court confirmed that the ESB has exclusive jurisdiction to enforce rights under the ESA. However, I find that Mr. Mack's claim is for damages for breach of contract, which is a civil remedy that the CRT can resolve under its small claims jurisdiction over damages up to \$5,000. So, I find that the CRT has jurisdiction to hear this dispute. This decision is consistent with several previous CRT decisions on this issue, including a decision involving VFP, *Kwan v. Vancouver Free Press Publishing Corp.*, 2020 BCCRT 1168.
9. Where permitted by section 118 of the CRTA, in resolving this dispute the CRT may order a party to pay money or to do or stop doing something. The CRT's order may include any terms or conditions the CRT considers appropriate.

## **ISSUES**

10. The issues in this dispute are:
  - a. Did VFP constructively dismiss Mr. Mack by temporarily laying him off?
  - b. If not, did he resign by refusing to accept a job with a company related to VFP?
  - c. If Mr. Mack was terminated, did he have to mitigate his damages?
  - d. What remedy, if any, is appropriate?

## **EVIDENCE AND ANALYSIS**

11. In a civil claim such as this, Mr. Mack as the applicant must prove his case on a balance of probabilities. While I have read all the parties' evidence and submissions, I only refer to what is necessary to explain my decision.
12. Most of the background facts are undisputed. Mr. Mack started working for VFP on May 16, 2011, as an employee on a fixed-term contract. His first contract was for 32 hours per week. Over the following year, his hours increased to 40 hours per week

and he became an indefinite employee, meaning that his employment had no fixed end date.

13. Mr. Mack's most recent written employment contract is dated August 11, 2016. Mr. Mack's hours were reduced to a maximum of 24 per week with an annual salary of \$29,952. Mr. Mack says that he negotiated the reduction "out of personal necessity".
14. The contract also said that VFP did not guarantee Mr. Mack 24 hours per week. The contract said that VFP could reduce Mr. Mack's hours "up to 40%" without it being considered "a termination, a breach of this agreement, or constructive dismissal under common law". There is nothing in the contract about the potential for a temporary layoff.
15. The contract said that VFP could terminate Mr. Mack without cause by providing notice or wages in lieu of notice (termination clause). In that event, Mr. Mack would be entitled to 2 weeks' wages after 12 consecutive months of employment, plus 1 week for each additional year of completed employment.
16. On March 24, 2020, VFP sent a notice to several staff members, including Mr. Mack, that they had been "temporarily laid off" due to "budgetary constraints associated with the COVID-19 Pandemic and its macro-economic effects". The notice said that VFP would "reassess" the temporary layoffs no later than April 30, 2020.
17. On April 28, 2020, a VFP editor, CS, emailed Mr. Mack about a potential position editing 2 online publications, 1 about cannabis and the other about esports, for 35 hours per week. Mr. Mack and CS spoke on the phone about the position. The parties disagree about whether CS made a "formal" job offer, but I find that the job was available to Mr. Mack if he wanted it. However, Mr. Mack was not interested. He did not want to work 35 hours per week. He also did not know anything about cannabis or esports and was not interested in those topics. So, regardless of whether there was a formal job offer, Mr. Mack did not pursue the opportunity.

18. It is undisputed that there were no further communications between the parties about a potential return to work until September 2020. At that time, Mr. Mack demanded severance from VFP under his contract. VFP refused, arguing that by refusing CS's job offer, Mr. Mack had resigned.

***Did VFP constructively dismiss Mr. Mack by temporarily laying him off?***

19. Mr. Mack says that VFP breached the employment contract by temporarily laying him off. He said that he never agreed to be temporarily laid off. He says that he was terminated on March 24, 2020.

20. VFP argues that the economic impacts of the early pandemic required it to temporarily lay off several staff members, including Mr. Mack. VFP points to a plunge in advertising revenues. VFP does not directly address Mr. Mack's argument that his contract did not allow VFP to temporarily lay him off.

21. I agree with Mr. Mack that an employer does not have a freestanding right to temporarily lay off employees. It is well-established that unless there is an express or implied term in the employment contract permitting temporary layoffs, a temporary layoff is a fundamental breach of the employment contract. This is true even if the employer legitimately needs to reduce expenses to react to economic downturns and genuinely intends to recall the employee. See *Besse v. Dr. A.S. Machner Inc.*, 2009 BCSC 1316, at paragraphs 78 to 80.

22. Mr. Mack's contract does not have an express term about temporary layoffs. VFP does not argue that there was an implied term to that effect, and I find that there was not. I agree with Mr. Mack that the term allowing VFP to reduce his hours by up to 40% is inconsistent with an implied term that would allow VFP to reduce his hours to nothing, which is effectively what the temporary layoff did. I therefore find that VFP fundamentally breached Mr. Mack's employment contract by temporarily laying him off on March 24, 2020.

23. When an employer fundamentally breaches an employment contract, the employee can either accept the change or treat their employment as terminated, which is known as “constructive dismissal”. This means that an employee can decide to accept a temporary layoff and wait to be recalled. The employee does not have to decide right away whether to treat a fundamental breach as constructive dismissal. The employee may take a reasonable amount of time to consider their new circumstances and decide what to do: *Cayen v. Woodward's Stores Ltd.*, 1993 CanLII 1416 (BC CA).
24. Mr. Mack’s evidence is somewhat inconsistent about whether he thought he was still employed after March 24, 2020. It is undisputed that VFP continued to pay for his extended health benefits even after April 28, 2020. Mr. Mack says that this meant that he was “still in some form or another” a VFP employee. On the other hand, he is adamant that he never accepted the temporary layoff, and there is no evidence other than acquiescing to receiving benefits to suggest otherwise. I take from his submissions that he was somewhat confused about what the temporary layoff meant and was waiting to see what VFP would offer.
25. I find that Mr. Mack chose to treat the March 24, 2020 temporary layoff as a termination when he turned down CS’s job offer on April 28, 2020. I find that this decision was more consistent with Mr. Mack rejecting the temporary layoff and considering himself constructively dismissed. Given that the temporary layoff notice said that VFP would reassess Mr. Mack’s position by the end of April 2020, I find that it was reasonable for Mr. Mack to wait to see what VFP would offer before deciding what to do. When Mr. Mack heard VFP’s proposal about how it could bring Mr. Mack back to work, he decided not to accept VFP’s fundamental breach and to treat his employment as terminated.
26. VFP relies on *Kwan*, who was also temporarily laid off on March 24, 2020. In that dispute, Ms. Kwan claimed that VFP constructively dismissed her by offering her a substantially different job when it recalled her in late April 2020. Although Ms. Kwan referred to the temporary layoff as “unlawful”, she did not argue that VFP had

terminated her by temporarily laying her off. In effect, unlike Mr. Mack, she appears to have accepted the temporary layoff. VFP successfully argued that it had not constructively dismissed Ms. Kwan because the job VFP reassigned her to was similar to her previous role. So, I find that this dispute is distinguishable even though it deals with the same round of temporary layoffs. In any event, other CRT decisions are not binding on me.

27. For these reasons, I find that VFP constructively dismissed Mr. Mack on March 24, 2020. This triggered the termination clause in Mr. Mack's contract. It follows that he did not resign on April 28, 2020, as VFP alleges.

***Did Mr. Mack have to mitigate his damages?***

28. As an alternative argument, VFP says that Mr. Mack failed to mitigate his damages after being terminated. When employees are wrongfully dismissed and they do not have enforceable termination clauses, they are entitled to damages based on the common law. At common law, these employees must take reasonable steps to mitigate their damages, generally by looking for and accepting reasonable alternative employment.

29. As Mr. Mack points out, the situation is different when there is a clause that specifies how much the employee will receive on termination. Unless the contract requires the employee to mitigate, the employee is entitled to receive their full contractual severance. This is because requiring the employee to mitigate would place a burden on the employee that they did not agree to when they signed the employment contract. See *Maxwell v. British Columbia*, 2014 BCCA 339, at paragraph 27.

30. VFP also relies on section 65(1)(f) of the ESA, which says that employees are not entitled to compensation for length of service under the ESA if they have rejected an offer of reasonable alternative employment. However, as discussed above, Mr. Mack does not claim severance pay under the ESA. He is enforcing the termination

clause in the parties' contract. I find that section 65(1)(f) has no bearing on how much Mr. Mack is entitled to receive under the parties' contract.

31. There is nothing in the parties' contract that required Mr. Mack to mitigate his damages or accept an alternative job offer from VFP. Therefore, I find that there is no basis to deduct anything from the amount of severance Mr. Mack is entitled to under the contract.

***What are Mr. Mack's damages?***

32. Mr. Mack says that his severance is \$6,100, although he does not say how he calculated this amount. Mr. Mack claimed the \$5,000 maximum under the CRT's small claims jurisdiction and abandoned any claim above \$5,000.
33. Mr. Mack was terminated on March 24, 2020, about 6 weeks before completing his 10<sup>th</sup> year of service with VFP. So, I find that he had accumulated 9 years of service for the purposes of calculating severance. The termination clause says that Mr. Mack is entitled to 2 weeks' wages for the first year and 1 week's wages for each additional year, for a total of 10 weeks of wages. Based on a salary of \$29,952, this equals \$5,760. So, I find that he is entitled to \$5,000 as claimed.
34. The *Court Order Interest Act* (COIA) applies to the CRT. Mr. Mack is entitled to pre-judgment interest on his severance from March 24, 2020, the date VFP terminated his employment, to the date of this decision. This equals \$45.35.
35. Under section 49 of the CRTA and CRT rules, the CRT will generally order an unsuccessful party to reimburse a successful party for CRT fees and reasonable dispute-related expenses. I find that Mr. Mack is entitled to reimbursement of \$175 in CRT fees. He did not claim any dispute-related expenses.
36. VFP claimed \$6,915.60 in legal fees. I dismiss this claim because VFP was unsuccessful.



37. Mr. Mack's other requested order is for a declaration that VFP terminated his employment. The CRT does not have jurisdiction to order declaratory relief. In any event, such an order would serve no purpose given my conclusions. So, I dismiss this claim.

## **ORDERS**

38. Within 30 days of the date of this order, I order VFP to pay Mr. Mack a total of \$5,220.35, broken down as follows:

- a. \$5,000 in damages,
- b. \$45.35 in pre-judgment interest under the COIA, and
- c. \$175 in CRT fees.

39. I dismiss Mr. Mack's claim for declaratory relief.

40. I dismiss VFP's claim for legal fees.

41. Mr. Mack is entitled to post-judgment interest, as applicable.

42. Under section 48 of the CRTA, the CRT will not provide the parties with the Order giving final effect to this decision until the time for making a notice of objection under section 56.1(2) has expired and no notice of objection has been made. The time for filing a notice of objection is 28 days after the party receives notice of the CRT's final decision. The Province of British Columbia has enacted a provision under the *COVID-19 Related Measures Act* which says that statutory decision makers, like the CRT, may waive, extend or suspend mandatory time periods. This provision is expected to be in effect until 90 days after the state of emergency declared on March 18, 2020 ends, but the Province may shorten or extend the 90-day timeline at any time. A party should contact the CRT as soon as possible if they want to ask the CRT to consider waiving, suspending or extending the mandatory time to file a Notice of Objection to a small claims dispute.

43. Under section 58.1 of the CRTA, a validated copy of the CRT's order can be enforced through the Provincial Court of British Columbia. A CRT order can only be enforced if it is an approved consent resolution order, or, if no objection has been made and the time for filing a notice of objection has passed. Once filed, a CRT order has the same force and effect as an order of the Provincial Court of British Columbia.

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Eric Regehr, Tribunal Member