

Court of King's Bench of Alberta

Citation: Falkenberg v Stephen Avenue Securities Inc, 2025 ABKB 485

Date: 20250819
Docket: 2101 06972
Registry: Calgary

Between:

Colleen Falkenberg

Appellant

- and -

Stephen Avenue Securities Inc.

Respondent

**Reasons for Decision
of the
Honourable Justice R.W. Armstrong**

Appeal from the Decision by
J.T. Prowse, The Honourable Applications Judge
Dated the 21st day of September 2023
(Docket: 2101 06972)

Introduction

[1] The Appellant, Colleen Falkenberg, was employed by the Respondent, Stephen Avenue Securities Inc. ("SAS"), as a Registered Representative as defined by the Investment Industry Regulatory Organization of Canada ("IIROC"). Throughout her career, Ms. Falkenberg also fulfilled other roles at SAS, including compliance officer and corporate secretary.

[2] SAS terminated Ms. Falkenberg's employment in December 2020. Ms. Falkenberg was working part-time, three days per week, and she was earning a salary of \$5,000 per month. At the time of the termination of her employment, SAS paid Ms. Falkenberg one month of salary in lieu of notice of the termination.

[3] Ms. Falkenberg started a wrongful dismissal claim against SAS. She applied for summary judgment of her claim, and in April 2023, an Applications Judge determined that Ms. Falkenberg's employment had been terminated by SAS without cause. Accordingly, she was entitled to reasonable notice of the termination of her employment, or to payment of wages in lieu of that reasonable notice. The finding that Ms. Falkenberg's employment was terminated without cause is not the subject of this appeal and that finding stands.

[4] On September 20, 2023, the Applications Judge conducted a hearing to determine Ms. Falkenberg's entitlement to damages. Ms. Falkenberg claimed that she had worked for SAS since 1996, she held a managerial position, and she was 59 years old when SAS terminated her employment without cause. According to Ms. Falkenberg, her age, length of service and the nature of her employment entitled her to reasonable notice at the top end of the allowable range, namely 24 months.

[5] SAS argued that Ms. Falkenberg had only been employed with them since 2018, when she signed a written employment agreement. Prior to 2018, SAS argued there were gaps in Ms. Falkenberg's employment history that contradicted her assertion of continuous employment since 1996. According to SAS, Ms. Falkenberg's entitlement to notice ought to be based on the brief tenure of her employment since the written employment agreement was executed in 2018.

The Applications Judge's Decision

[6] Following the hearing on damages, the Applications Judge issued a brief written endorsement setting out his decision and the reasons for his decision.

[7] The key findings and reasons given by the Applications Judge are set out at the beginning of the endorsement as follows:

The evidence indicates that, while the plaintiff had been employed since 1996 by SAS, she may have been simply a casual employee, who earned modest sums from SAS (then owned by her husband via a holding company) from time to time. In fact, she completely waived any salary on one occasion.

The plaintiff had the opportunity to submit documentation to establish that she earned regular market-value wages since 1996 but she did not do so. We know she earned no salary in 2016 and 2017. For prior years she provided a few T-4 slips but redacted the amount of salary earned, as would have been shown on those slips!

As a result, I am going to base her award on her being a casual part-time employee from time to time back to 1996. In the circumstances, in my view she is entitled to 6 months pay in lieu of notice. Having received one month's pay, judgment shall be issued to her for 5 months pay at \$5,000 per month.

[8] The Applications Judge concluded his endorsement with the following:

As indicated at the outset of these reasons, given the paucity of evidence (which would have been available to the plaintiff) that she was anything more than a casual part-time employee, I base my damages assessment on her only being a full-time employee since February of 2018, and a casual occasional employee prior to that. Accordingly I base the damages award on six months notice less one month paid.

Grounds of Appeal and Standard of Review

[9] The Notice of Appeal of the Applications Judge’s order alleges that the decision of the Applications Judge to award six months’ notice was unreasonable. The proper assessment of damages in this case turns on the question of whether Ms. Falkenberg was a casual employee for the years 1996 through 2018 and on the assessment of the overall length of her tenure with SAS.

[10] As this appeal is an appeal from the decision of an Applications Judge, the applicable standard of review is correctness.

Was Ms. Falkenberg a Casual Employee

[11] The assessment of damages conducted by the Applications Judge was based primarily on his determination that Ms. Falkenberg was a “casual part-time employee.” The Applications Judge did not define what a casual employee is; however, he appears to have based his finding on the fact that she earned “modest sums from SAS,” that she “completely waived salary on occasion,” and that she “earned no salary in 2016 and 2017.”

[12] The term “casual employee” has no precise definition at common law. The term has been interpreted to apply to someone who works ‘on call’ and may be employed for short periods of time to, for example, “meet unforeseen needs,” “meet emergencies,” “replace employees for short periods of absences such as vacation leave, sick leave, training etc,” or “conduct projects that are anticipated but dependent on the availability of funds.”: *Canada (Attorney General) v Marinov*, [2000] FCJ No 446, 186 DLR (4th) 517 at paras 20-21.

[13] The Supreme Court of Nova Scotia articulated a similar interpretation of the term casual employee in *Halifax (Municipality) v Nova Scotia (Pay Equity Commission Hearing Panel)* (1996), 152 NSR (2d) 35, 21 CCEL (2d) 161. In the course of reviewing a decision of a hearing panel of the Pay Equity Commission, the Court accepted the following description of a casual employee:

... one who works when the employer encounters an unforeseen need for that employee. The casual employee does not, in other words, work at predictable times for predictable durations. Other characteristics present in casual work are the absence of a work schedule; no commitment by the employer to offer work or the employee to accept work; the absence of an obligation between the employee and the employer; no evidence of significant integration into the employer’s establishment; no shared community of interest with other employees; no fixed duration for the work; the job function is not ongoing or “permanent”; there is no expectation of hours to be worked; the work is sporadic and unreliable and there is no evidence of a regular work pattern over time.

[14] In *Re Transcontinental Vancouver and CEP, Local 525G*, [2013] BC WLD 2482, 113 CLAS 234 at para 32, the labour arbitrator, who was called upon to interpret a collective agreement, offered a similar definition of a casual employee:

While I recognize that in the vernacular of the Parties, the terms “casual” and “part time” may be used interchangeably, the use of casual employees is not authorized by the collective agreement, whatever it may be taken to mean. While it is a form of employment, it is generally regarded as being of a transitory or limited nature. More precisely, my general understanding of a casual employee is someone who is not regularly scheduled to work. Such an employee is under no obligation to work unless the employee agrees to do so in response to an incidental call or invitation made by an employer.

[15] Whether an employee is a casual employee or not is a fact specific determination that must be made on a case-by-case basis. A non-exhaustive list of the factors that should be considered when making the determination include:

1. Whether there is a written employment contract and the terms of any employment contract, whether in writing or not.
2. The existence or absence of a regular work schedule – for example does the employee only work on a sporadic as needed or on-call basis or does the employee have regular hours and expectations to meet.
3. The existence or absence of a pattern of work over time.
4. The nature of the employee’s duties and responsibilities.
5. How the employee is paid, including whether the employee is enrolled in any company benefit plans.
6. Whether the employee can refuse work.
7. The degree of integration of the employee into the workplace.
8. The expectations of the parties involved in the employment relationship.
9. Any relevant regulatory issues and tax treatment.
10. Any other factors that the judge may consider relevant to the question of whether the employee is a casual employee.

[16] No single factor is determinative, and a decision as to whether an employee is a casual employee ought to be based on a weighing of all the relevant factors. In the present case, the Applications Judge erred in finding that Ms. Falkenberg was a casual employee based only on the fact that she failed to establish that she earned regular market-wages since 1996 and earned no salary in 2016. While a salary that fluctuates may be one indicator of casual employment, it is not, in and of itself determinative. The Applications Judge did not appear to turn his mind to any of the other relevant factors relating to Ms. Falkenberg’s employment when he classified her as a casual employee for the period 1996 to 2018.

[17] Ms. Falkenberg started working for SAS in 1996. She worked for her husband, who owned SAS through a holding company, until October 2017 when Gathering Waters Ltd. (GWL) purchased shares in SAS with a view to acquiring all of SAS. The initial share purchase was

effective February 16, 2018. Following the initial share purchase, the terms of Ms. Falkenberg's employment were set out in a written employment contract with SAS (the 2018 Employment Agreement). The 2018 Employment Agreement was signed some months after the effective date of the initial purchase; however, it was made effective as of February 16, 2018.

[18] The 2018 Employment Agreement described Ms. Falkenberg's role as Compliance Officer, Corporate Secretary, and Registered Representative as defined by the Investment Industry Regulatory Organization of Canada (IIROC). The 2018 Employment Agreement did not fundamentally change the duties and responsibilities that Ms. Falkenberg had been performing for SAS throughout her career. The intent and effect of the 2018 Employment Agreement was to ensure operational continuity during and immediately following the share purchase process.

[19] Pursuant to the 2018 Employment Agreement, Ms. Falkenberg was to be paid a salary of \$90,000 per year with all employment income subject to statutory deductions. In addition to her salary, Ms. Falkenberg was entitled to benefits including life insurance, accidental death and dismemberment insurance, and medical and dental coverage. The 2018 Employment Agreement entitled Ms. Falkenberg to 6 weeks of vacation per year but it also required Ms. Falkenberg to devote her full time and attention to her duties at SAS.

[20] While the CEO of SAS, Michael Cappuccitti gave evidence that he was not aware of the 2018 Employment Agreement until the summer of 2020, no steps were ever taken to repudiate the contract and, in fact, a further employment agreement was entered into between Ms. Falkenberg and SAS in March 2020 (the 2020 Employment Agreement). The 2020 Employment Agreement fulfilled a term of the Debt and Share Purchase Agreement dated February 7, 2020, whereby GWL purchased the balance of the SAS shares. Article 4.1(g) of that Debt and Share Purchase Agreement addressed Ms. Falkenberg's employment with SAS. It said:

Employees. Colleen's salary will be maintained at a rate of \$10,000 per month until such time as each of the new CFO and the new COO complete a three month probationary period to allow time for training for reach [*sic*] position and a formal offer of employment is extended by the UDP. At the time of Closing, the Company shall enter into employment agreements with each of Terry Falkenberg and Colleen Falkenberg on terms outlined in the Employment Agreements attached as Schedule "G" to this Agreement.

[21] Rather than repudiating any alleged employment agreement, Mr. Cappuccitti went ahead and entered into the 2020 Employment Agreement on behalf of SAS. The 2020 Employment Agreement references Ms. Falkenberg's "continued employment" with SAS. The 2020 Employment Agreement was substantially similar to the 2018 Employment Agreement, although Ms. Falkenberg's salary was increased, subject to renegotiation following the appointment of a new CFO and CCO. Again, the intent of the 2020 Employment Agreement appears to have been to ensure continuity of SAS operations for the new owners. The new owners wanted Ms. Falkenberg to continue to provide the same services and perform the same duties as she had for SAS in the past.

[22] The written Employment Agreements support the finding that Ms. Falkenberg was a regular (as opposed to casual) employee. She was paid an annual salary and enrolled in the company benefit plan. She was required to devote her full time and attention to her duties of employment. The terms of both the 2018 and 2020 Employment Agreements are not indicative of the kind of periodic, transactional work typical of a casual employee. Importantly, neither the

2018 nor the 2020 Employment Agreements represented a material change in the nature of Ms. Falkenberg's roles and responsibilities at SAS. The Employment Agreements reduced into writing the existing relationship between SAS and Ms. Falkenberg, and that existing relationship was not one consistent with Ms. Falkenberg being a casual employee.

[23] Throughout her employment with SAS, the nature of Ms. Falkenberg's duties and responsibilities were integral to the ongoing operation of SAS. The duties described in the Schedule to the 2020 Employment Agreement reflected the duties she had performed for SAS in the past and included overseeing daily operations of the company, setting goals, implementing strategic and compliance plans, human resources functions, acting as a backup to the CFO and CCO, and establishing the corporate governance structure. Again, the nature of Ms. Falkenberg's duties are inconsistent with casual employment. Her role, both before signing the 2018 and 2020 Employment Agreements and after, went far beyond meeting unforeseen needs or emergencies or completing defined projects at SAS. She was integral to the day-to-day operation of SAS and engaged in high level decision making on behalf of the company including goal setting, setting of corporate strategy, and governance.

[24] Of particular note in this case, Ms. Falkenberg's employment was a regulatory requirement for SAS to conduct its business. Ms. Falkenberg was the sole employee of SAS registered with the regulatory body (IIROC) to submit mandatory annual filings. Such a responsibility is not consistent with the role of a casual employee.

[25] In September 2020, Ms. Falkenberg and SAS agreed that she would start working part-time for a salary of \$5,000.00 per month. Part-time is not synonymous with casual. A part-time employee whose role is vital to the functioning of a company, who maintains a regular schedule and who is fully integrated into the operations and culture of an employer is not a casual employee.

[26] The Applications Judge relied on the fact that Ms. Falkenberg worked for her husband and earned no salary in 2016 and 2017 when he determined she was a casual employee. While a fluctuating salary is a factor to consider, it is not determinative on its own. Ms. Falkenberg's evidence was that when she was working for her husband she would, from time to time, not receive a regular salary, usually due to the financial circumstances of SAS at the time. When the totality of Ms. Falkenberg's roles and responsibilities at SAS during her tenure are considered, the fact that she worked for her husband for many years and that she might have received a reduced or no salary for a period of time does not undermine her status as a regular employee of SAS performing functions integral to its ongoing business.

[27] When Ms. Falkenberg's role at SAS is reviewed in light of all the relevant factors, I conclude she was not a casual employee. Her entitlement to reasonable notice of the termination of her employment should not have been predicated on her classification as a casual employee.

Determination of Reasonable Notice

[28] While SAS alleged it had after acquired cause to terminate Ms. Falkenberg's employment without notice, the Applications Judge held that Ms. Falkenberg's employment was terminated without cause. That decision was not appealed. The issue is therefore the reasonable notice that SAS should have given Ms. Falkenberg when they terminated her employment.

[29] Reasonable notice is fact specific and must be decided based on the nature of employment, the length of the employment, the age of the employee at the time of the termination and the availability of similar employment having regard to the experience, training and qualifications of the employee: *Bardal v Globe and Mail Ltd*, [1960] 24 DLR (2d) 140 at p 145, OJ No 149 (QL); *Honda Canada Inc v Keays*, 2008 SCC 39 at para 28.

[30] The main dispute between the parties in relation to the assessment of reasonable notice is Ms. Falkenberg's length of employment with SAS. She argues that she was employed continuously since 1996. SAS argues that she was employed since 2018 when she and SAS entered into the 2018 Employment Agreement. SAS maintains that the fact Ms. Falkenberg did not receive salary in 2016 is consistent with an interruption in her employment such that she cannot claim continuous employment back to 1996.

[31] The evidence establishes that Ms. Falkenberg was a long-term employee of SAS whose employment commenced in 1996. Karen O'Connor was the CFO of SAS between 2005 and 2020. She is not a party to this action and while she remains friendly with the Falkenbergs, she does not have a stake in the outcome of this litigation. In her affidavit of November 29, 2021 (filed December 1, 2021) she confirms, based on her knowledge of human resource and payroll records, that Ms. Falkenberg's start date with SAS was July 15, 1996. While later payroll records show a 2018 start date for Ms. Falkenberg, which coincided with the effective date of the 2018 Employment Agreement, that does not negate the clear and convincing evidence that Ms. Falkenberg was continuously employed by and actively providing services to SAS since 1996.

[32] Ms. O'Connor was questioned on her affidavit. During questioning her evidence that SAS paid Ms. Falkenberg as an employee throughout her tenure was not in any way undermined. She explained the reasons why Ms. Falkenberg may have deferred her salary in years where the financial health of SAS was poor, and she explained how the artwork given to Ms. Falkenberg in lieu of salary in 2017 was reflected in the financial statements.

[33] While SAS argues that a lack of salary must mean an interruption in employment, that is not necessarily the case. Certainly, if no wages are paid and no work is done, an interruption in employment may be inferred. However, a deferral or waiver of salary is not, by itself, indicative of a termination of an employment relationship when the employee continues to perform the duties and responsibilities of her employment as Ms. Falkenberg did in this case.

[34] Ms. O'Connor also confirmed in her questioning that Ms. Falkenberg was never an owner of SAS. She was an employee throughout her tenure.

[35] In addition to the evidence of Ms. O'Connor, regulatory filings confirm Ms. Falkenberg's status as an employee of SAS. Ms. Falkenberg served as the registered representative for SAS throughout her tenure. As a registered representative she must be an employee of SAS. Her status as a registered representative, and therefore as an employee, was consistent throughout her tenure with SAS.

[36] SAS relies on a lack of T-4 forms as evidence that Ms. Falkenberg did not earn any employment income prior to 2003, in 2005, 2006 and in 2017. This approach ignores the evidence of the role that Ms. Falkenberg was fulfilling for SAS as an employee in all those years. The fact that Ms. Falkenberg may have waived her salary in 2017 and accepted artwork in lieu of her salary does not suggest an interruption in her employment when she continued to fulfill the duties and responsibilities of her employment.

[37] It is also no answer to the claim that SAS was not responsible for Ms. Falkenberg's tenure prior to finalizing the purchase of the business in 2020. "When a business is sold as a going concern, credit is given to an employee for his or her years of past service.": *Jones v Temple Real Estate Investment Trust*, 2018 ABQB 606 at para 13, citing *Sorel v Tomenson Saunders Whitehead Ltd* (39 DLR (4th) 460 at 462 (BCCA); *Addison v M Loeb Ltd*, [1986] OJ No 2367 at paras 21-22; *Radwan v Arteif Furniture Manufacturing Inc*, 2002 ABQB 742 at para 38.

[38] Considering all the indicia of employment present, even in light of missing T-4 statements, I find that Ms. Falkenberg was continuously employed by SAS from July 1996 through to December 2020 when SAS terminated her employment without cause. For the purpose of determining her entitlement to reasonable notice, Ms. Falkenberg's tenure therefore spans 24 years.

[39] Ms. Falkenberg was 59 years old when SAS terminated her employment. While her duties and responsibilities fluctuated throughout her tenure, at the time of the termination of her employment, she held a management position with SAS that included such roles as compliance officer, operations manager, and chief information technology officer.

[40] The Applications Judge determined that Ms. Falkenberg was entitled to 6 months of notice based on her status as a casual, part-time employee. Part time status is not a relevant factor when determining a reasonable notice period. The impact of part-time status will be reflected in the calculation of damages as the part-time wage will be the basis for calculating the value of the loss over the reasonable notice period. Part-time status is not a factor that will lead to a reduction in an applicable notice period. "No matter how many hours per week an employee works, he or she is still a permanent employee, and entitled to appropriate notice or compensation in lieu thereof.": *Monti v Hamilton-Wentworth (Regional Municipality)* (1999), 89 ACWS (3d) 722, 45 CCEL (2d) 230 at para 15. See also: *Stuart v Navigata Communications Ltd*, 2007 BCSC 463 at para 15; *Brown v Hrt Motors Inc*, 2020 ABQB 620 at para 32.

[41] Considering the relevant *Bardal* factors and excluding irrelevant considerations such as part-time status, I find that a reasonable notice period for Ms. Falkenberg is 18 months. While the Appellant argued for 24 months based on authorities with similar *Bardal* factors, the circumstances of this case warrant some reduction from the upper limit of 24 months.

[42] Based on the evidence, it is clear that Ms. Falkenberg was aware she would not be in her position with SAS indefinitely. Following the sale of the initial stake in SAS, the purchaser advised both Mr. and Ms. Falkenberg that upon completion of the purchase, both of them would be phased out. In other words, by the end of 2019, Ms. Falkenberg was aware that SAS would likely terminate her employment at some point following the completion of the sale of SAS. While those discussions do not amount to an enforceable agreement regarding the termination of Ms. Falkenberg's employment due to the entire agreement clause in the 2020 Debt and Share Purchase Agreement, the entire agreement clause does not negate Ms. Falkenberg's personal knowledge of the likely pending termination of her employment.

[43] While I do not find that the December 2019 discussion amounted to actual notice, Ms. Falkenberg was informed that her employment with SAS was not going to be indefinite. That distinguishes her circumstances from those of other plaintiffs with long tenures who would have reasonably expected continued employment for an indefinite time.

[44] Given a reasonable notice period of 18 months at a salary of \$5,000 per month, Ms. Falkenberg is entitled to judgment in the amount of \$90,000, less the one month of salary paid at the time of termination and minus any additional amounts already paid pursuant to the judgment of the Applications Judge.

Heard on the 23rd day of April 2025.

Dated at the City of Calgary, Alberta this 19th day of August 2025.

R.W. Armstrong
J.C.K.B.A.

Appearances:

Tina R. Cai
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for the Appellant

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Muneeza Sheikh Employment & Human Rights
for the Respondent