Docket No.: CA 161242
Date: 20001109

NOVA SCOTIA COURT OF APPEAL

[Cite as: Wal-Mart Canada Inc. v. Day, 2000 NSCA 127]

Glube, C.J.N.S.; Freeman and Saunders, JJ.A.

BETWEEN:

WAL-MART CANADA INC.

Appellant

- and -

DARRYL DAY

Respondent

REASONS FOR JUDGMENT

Counsel:	George W. MacDonald, Q.C., Eric B. Durnford, Q.C. and Hugh Wright for the appellant Ian C. Pickard and J. Andrew Fraser for the respondent
Appeal Heard:	September 14, 2000
Judgment Delivered:	November 9, 2000
THE COURT:	The appeal is dismissed with costs plus disbursements as per reasons for judgment of Freeman, J.A.; Glube, C.J.N.S. and Saunders, J.A. concurring.

FREEMAN, J.A.:

[1] A jury awarded the respondent, Darryl Day, a total of 29 months' notice after it found that the appellant, Wal-Mart Canada Inc., had fired him as manager of one of its Halifax stores without cause and in circumstances that entitled him to augmented damages. With mitigation earnings deducted and bonuses added in for the 17-month notice period and the 12-month extended notice period, the award totaled $235,119.95.

[2] Mr. Day was dismissed for "editing" payroll records to avoid the appearance of staff overtime entitlements following a head-office directive that overtime would not be tolerated and imposing a "zero budget" for overtime, except for statutory holidays.

[3] Wal-Mart employees, referred to as "associates," recorded their time by "swiping" their identification cards through a computer when they arrived and left, and at the beginning and end of breaks. This created the raw data from which payroll records were compiled, subject to some necessary editing. When uneven numbers of swipes indicated an employee had forgotten to swipe in or out, for example, the computer froze and records had to be edited or corrected, with or without notice to the employee involved.

[4] Mr. Day testified that when making the adjustments which resulted in his dismissal he was giving effect to a memo dated January 23, 1997, from Bob Bedard,

regional vice-president of Wal-Mart, which read in part:

> EXCEPT FOR WHEN WE HAVE TO PAY FOR STATUTORY HOLIDAYS, OVERTIME WILL ***NOT*** BE TOLERATED IN 1997. AS A MATTER OF FACT THERE NEEDS TO BE ZERO BUDGET ON YOUR WORKBENCH EXCEPT FOR STATUTORY HOLIDAYS WHERE THE STORES ARE OPENED AND THE LAW REQUIRES THAT WE PAY O/T. (Emphasis in original.)

[5] Prior to the new policy employees had been paid at the overtime rate for each minute recorded in excess of each day's eight-hour shift. Mr. Day advised the staff there could be no more unauthorized overtime. They would be paid up to eight hours a day at regular rates, but shifts were to be scheduled for seven and a half hours per day to provide a half-hour buffer to absorb inadvertent overtime, as when an employee swiped in a few minutes early or out a few minutes late.

[6] Following this, when time records indicated more than eight hours, Mr. Day edited them to remove the unauthorized overtime. He signed each alteration: "D.F. Day." Mr. Day was familiar with Wal-Mart's strong policy statements warning against altering payroll or other records. The clerk in charge of payrolls reported his practice to the district manager, Doug Webber, who investigated. Mr. Day acknowledged what had taken place in a meeting with Mr. Webber on Monday, May 26, 1997. As a result he was suspended with pay pending a decision. He asked not to be kept in suspense because his wife was about to have their second child.

[7] Mr. Webber advised him the situation was serious but he would recommend against termination. Mr. Day testified that he expected Mr. Webber to "go to bat" for him with his superiors. Mr. Webber consulted with his superiors and learned the final determination was his responsibility. Mr. Webber did not disclose to Mr. Day that he

had the final word. On Friday, May 30, 1997 he informed Mr. Day he was terminated and passed him a letter stating in part:

> You admitted to me that for the pay period May 10th to May 23rd for Store 3138 you made over 80 different adjustments affecting 34 different Associates relating to overtime worked by those Associates, effectively wiping out the overtime to which they were entitled. . . .
>
> (b) That your action effectively stole income owed to other Associates who were entitled to receive same. . . .
>
> (c) You acknowledged to me that you knew your actions were against Company Policy;
>
> (d) Your actions have totally destroyed the essential trust the relationship which must exist between Wal-Mart and each of its Associates.

[8] At that time Mr. Webber told Mr. Day he agreed with the decision to terminate him, but did not acknowledge the decision was his.

[9] Wal-Mart alleges a total of 340 changes were made to the records. The alterations represented overtime worth $467. It does not allege that Mr. Day received the money, but that he benefitted indirectly by enhancing his reputation by eliminating overtime in his store. The store payroll for the period from the end of January to the end of May 1997 was about $400,000.

[10] The appellant raises issues on appeal as to the jury instructions respecting dishonesty and prejudice. It argues that the jury's finding that the appellant did not have just cause for dismissal on the grounds of dishonesty or that the respondent breached workplace policies of the appellant is "perverse, patently unreasonable and unjust." It asserts there was no evidence of bad faith on its part to justify putting the question of

augmented damages before the jury; the jury's verdict in awarding such damages was perverse and the amount unreasonable and unjust.

[11] The trial judge instructed the jury on the issue of dishonesty as follows:

> Dismissal for cause. There is no definition which sets out precisely what conduct or misconduct justifies dismissal without notice. Cause must be determined objectively; that is, it must be established that there are reasonable grounds for the termination. The subjective reactions or honest intention of a company in terminating an employee are not the standard utilized by the court. Although a company might believe that it has cause for the employee's termination, insofar as management no longer has confidence in the employee's ability to properly fulfil his functions, if cause objectively determined does not exist, the employee must be provided with reasonable notice. What constitutes just cause in a particular situation is particularly difficult to enumerate, because it depends not only on the category and possible consequences of the misconduct but on both the nature of the employment and the status of the employee. The existence of misconduct sufficient to justify just cause cannot be looked at in isolation. Whether misconduct constitutes cause has to be analyzed in the circumstances of each case. Now, misconduct must be more serious in order to justify the termination of a more senior, long-service employee who had made contributions to the company.
>
> Now, the first question is, "Has the defendant satisfied you that the plaintiff was dismissed for cause?" Your answer will be "yes" or "no". The plaintiff alleges -- and it is not disputed -- that he was dismissed without notice. And as I said, the defendant says notice is not required because the dismissal was for cause. Accordingly, it is the defendant that has the burden of proving, on the balance of probabilities, cause justifying the plaintiff's dismissal without notice. That is, the defendant must satisfy you, in [sic] the balance of probabilities, that the evidence establishes that the plaintiff was guilty of misconduct justifying his discharge. If cause exists in law for the dismissal of the plaintiff, then no notice or severance pay is required to be given to the employee and the plaintiff's claim for damages in that respect should be dismissed. What constitutes just cause in an individual situation is, as I've said, not always easy to determine. Subject to what I have to say later, generally just cause will exist if an employee has been guilty of serious misconduct that, in your opinion, is prejudicial to the employer's business or if the employee has been guilty of wilful disobedience to orders of substance given by the employer.
>
> The first alleged ground is dishonesty. The employer contends it was justified in dismissing the plaintiff because of his dishonesty. As you might expect, the law has always regarded dishonesty by an employee in the performance of his duties, particularly one in a position of trust or authority, as serious misconduct often justifying dismissal without any warning or notice. This is so because such conduct is looked on as a breach of the condition of faithful service. Now, dishonesty has been defined to include intentionally to lie, cheat, deceive or defraud, a lack of honesty or integrity and principle, a disposition to defraud, deceive or betray. In other words, dishonesty denotes conduct which the person knows would be considered dishonest by reasonable and honest people.

> If you find that because of the memo from Mr. Bedard he honestly believed the memo authorized or necessitated these changes, then you should consider this when you decide whether he was being dishonest when he made the changes to the payroll record. The defendant says here the dishonesty is reflected by the plaintiff's intentionally falsifying company records with respect to the overtime entitlements of other company employees or what has been known in Wal-Mart as associates. The plaintiff, on the other hand, says he believed he did nothing wrong and was following a directive that there was to be no overtime. Now, what the plaintiff did and whether he was dishonest in doing it are matters for you and only you to decide. Now, however, even if you find he acted dishonestly, you must examine any extenuating circumstances in deciding whether his dismissal was justified. In this regard, you might wish to consider his length of service, his position as store manager and any explanation he gave for his conduct, and also any other evidence, including any evidence as to any effect on the employer's interest that you find relevant in deciding whether the dismissal was justified. In considering all the circumstances in deciding whether the dismissal was justified, you should consider both the portions of the plaintiff -- the positions of the plaintiff and of the defendant, both their positions. In other words, you will wish to decide whether he was dishonest, and if so, whether in the circumstances it justified his dismissal without warning or notice. (Paragraphing inserted for convenience.)

[12] The appellant submits that Justice McAdam erred in thus instructing the jury on the issue of alleged dishonesty by an employee. It asserts that dishonesty by an employee is always grounds for dismissal without notice as a matter of law, and the jury should have been so instructed.

[13] The appellant relies on **McPhillips v. British Columbia Ferry Corp**. (1994), 26 C.P.C. (3d) 261 (B.C.C.A.) in which the Chief Steward of the ferry company was dismissed without notice in circumstances described by Hollinrake, J.A., writing for the court at p. 263, as follows:

> In the spring of 1991 the appellant was refitting one of its vessels and the respondent was one of a team responsible for this refit. His particular responsibility was for the purchase and installation of the draperies.
>
> In this regard the respondent dealt with Mr. Poustie, the director of sales of Westport Manufacturing Company Ltd. Westport's quotation for these draperies was less than the appellant had budgeted for.
>
> In early April of 1991 the respondent visited Westport's factory and ordered draperies and a bedspread for his own use and, according to the evidence of Mr. Poustie, told

> him to add these personal goods to the work order prepared in respect to the appellant's purchase order for draperies. This turn of events shocked Mr. Poustie to the point that he related what had happened to the president of the appellant. There followed an investigation by the appellant. The bona fides of this investigation was attacked at length by the respondent at trial. It was decided during the course of this investigation that the transaction would go ahead as allegedly arranged by the respondent with Mr. Poustie. The respondent made no effort to pay for these personal items at that time or at any time before the trial.

[14] The question put to the jury at p. 264 was similar to the question in the present case:

> Has the Defendant, B.C. Ferry Corporation, proven that it had cause for dismissing the Plaintiff, Wilfred McPhillips from his employment?

[15] The impugned jury instruction at p. 266 was the following:

> And as I said whether there is a cause to dismiss is a finding of fact. *If you are convinced that the plaintiff was dishonest, you must be convinced that that fact, in all the circumstances of the relationship between the plaintiff and the defendant, justified the firing.* (Emphasis in original.)

[16] The jury found for the respondent on the issue of cause and awarded directed special damages of $155,753.19 and punitive damages of $250,000. The appeal was allowed and a new trial ordered. Hollinrake, J.A. stated at pp. 267 and 268:

> Dishonesty is always cause for dismissal because it is a breach of the condition of faithful service. It is the employer's choice whether to dismiss or forgive. See *Boston Deep Sea Fishing & Ice Co. v. Ansell* (1888), 39 Ch.D. 339, especially Bowen L.J.
>
> . . .
>
> In my opinion, the law on this issue mandated the jury being charged that if it found dishonesty on the part of the respondent the appellant was justified, as a matter of law, in terminating his employment.

[17] Taken literally, these views express an extreme that is not the law in Nova Scotia, where reasonableness is consistently held to be a governing factor. Wal-Mart's own motivational literature illustrates why this safeguard is necessary. A passage on

"Honesty" states:

> In a retail environment, taking anything, large or small, is dishonest. For example, eating candy from a broken bag without paying for it is dishonest.

[18] This is a laudable expression of principle, an ideal, but it is inconceivable that courts would uphold the dismissal, without warning or notice, of a senior employee with an unblemished record, for eating a candy from a broken bag. A more realistic view was expressed in **Blackburn v. Victory Credit Union Ltd. et al.** (1998), 165 N.S.R. (2d) 1 (N.S.C.A.). In that case an employee who had worked for a credit union for 32 years, 17 as manager, was fired without notice for irregularities that resulted from the clinical depression from which he then suffered. He was found entitled both to 24 months' notice and long-term disability from the employers' insurance program. Justice Flinn stated at p. 16:

> Counsel refers to several cases where misconduct, of a dishonest nature, was determined to amount to just cause.
>
> The difficulty I have with the position of counsel for the employer is that, in dealing with this aspect of his first ground of appeal, he treats the acts of misconduct in isolation. The courts do not consider an act of misconduct, in and of itself, to be grounds for dismissal without notice, unless it is so grievous that it gives rise to the inference that the employee intends no longer to be bound by the contract of service.

[19] He cited at p. 17 **The Law of Dismissal in Canada** (2nd Ed. 1992), Levitt, at pp. 122-124 for the following as an "accurate summary" of the way the courts approach just cause:

> Cause must be determined objectively, that is, it must be established that there are reasonable grounds for the termination. The subjective reactions or honest intention of the company in terminating the employee are not the standards utilized by the court. Although a company might believe that it has cause for the employee's termination, insofar as management no longer has confidence in the employee's ability to properly fulfil his functions, if cause, objectively determined, does not exist, the employee must be provided with reasonable notice. . . .
>
> What constitutes just cause in a particular situation is particularly difficult to enumerate because

> it depends not only on the category and possible consequences of the misconduct, but on both the nature of the employment and the status of the employee. . . .
>
> The existence of misconduct sufficient to justify cause cannot be looked at in isolation. Whether misconduct constitutes cause has to be analyzed in the circumstances of each case. Misconduct must be more serious in order to justify the termination of a more senior, longer-service employee who has made contributions to the company.

[20] The respondent's factum cites Christie's **Employment Laws in Canada**, 3rd ed. v. 2, 1998 at p 15.19:

> [I]ndeed, some judges have suggested that dishonesty and theft will automatically warrant summary dismissal "as a matter of law" and cannot be mitigated by extenuating circumstances, but this appears to be a minority view [. . .] The gravamen of these offences, however, is not merely the economic harm sustained by the employer but, more importantly, the revelation of the employee's bad character which destroys the mutual trust and loyalty upon which the employment contract depends for its continued existence.

[21] The authors cite **McPhillips** as the example of the "minority" view and go on to write (at page 15.20, footnote 2) that the approach of most courts is to permit mitigation of theft and dishonesty.

[22] The trial judge's instructions to the jury respecting misconduct and dishonesty were crafted after discussion with counsel in which both **McPhillips** and **Blackburn** were brought to his attention. In my view he committed no error in rejecting the appellant's argument that dishonesty, standing alone and unexamined in light of circumstances, is always just cause for dismissal.

[23] The appellant's other main ground on the issue of just cause is that Justice MacAdam erred in law in failing to instruct the jury that it could find that Mr. Day's conduct was prejudicial to the appellant and constituted just cause for dismissal. It

submits that the following passage could have left the jury with the erroneous impression that it was necessary to prove both serious misconduct and prejudice, when either would have been sufficient:

> Subject to what I have to say later, generally just cause will exist if an employee has been guilty of serious misconduct that, in your opinion, is prejudicial to the employer's business or if the employee has been guilty of wilful disobedience to orders of substance given by the employer.

[24] The appellant emphasizes the use of the disjunctive "or" in this citation from **R. v. Arthurs; Ex Parte Port Arthur Shipbuilding Co.** (1967), 62 D.L.R. (2d) 342 (S.C.C) at p. 348:

> If an employee has been guilty of serious misconduct, habitual neglect of duty, incompetence, or conduct incompatible with his duties, or prejudicial to the employer's business, or if he has been guilty of wilful disobedience to the employer's orders in a matter of substance, the law recognizes the employer's right summarily to dismiss the delinquent employee. (Appellant's emphasis.)

[25] If the jury was left in doubt as to whether both, rather than either, of serious misconduct or prejudice must be proven, and it does not seem likely, the explanation of the trial judge, when he returned to give the subject more amplified treatment later in his instructions, should have resolved the matter. Justice McAdam read to the jury the same passage from the **Port Arthur** case relied on by the appellant and cited above.

[26] I have considered the trial record and submissions of counsel with particular emphasis on Justice MacAdam's instructions to the jury, bearing in mind the maxim that there is no such thing as a perfect jury charge (see **R. v. Evans** (1993), 82 C.C.C. (3d) 338 at p. 346). In my view the instructions were not in error; they were thorough, thoughtful and balanced, and contained nothing which could have confused the jury as

to the nature of its duty, nor as to what the appellant was required to prove.

[27] The first question the jury was required to answer was:

> Has the defendant satisfied you that the plaintiff was dismissed for cause?

[28] Having answered that in the negative, it was not required to go on to the next question as to whether the cause was dishonesty or breach of company rules. However the inclusion of that question should have assured the jury that a finding of either dishonesty or breach of company rules would have been sufficient, had it found that just cause for dismissal existed. It is clear the jury did not find the appellant had proved that it had just cause to dismiss Mr. Day. What remains unclear, although it is irrelevant to the outcome, is whether the jury found that dishonesty was unproved or proved but so mitigated by circumstances as not to amount to cause for dismissal.

[29] I cannot agree with the appellant's assertion that the evidence supporting just cause is so one-sided that "no jury reviewing the evidence as a whole and acting judicially could have reached such a verdict." Mr. Day's alleged dishonesty consisted of depriving associates of an apparent entitlement to overtime which they had earned. It was for the jury to consider whether they could have earned it when it was forbidden by company directive, and Mr. Day had testified he had informed them that unauthorized overtime would not be paid. The jury had to consider the manager's discretion in implementing the zero tolerance overtime policy within the framework of other company rules, the degree of guidance he was provided, and whether there was confusion or

conflict between that policy and the rules in light of the Bedard memo which banished overtime without offering the manager any instructions as to how to achieve this objective beyond an exhortation to better planning. In light of this memo it was open to the jury to conclude that the appellant had failed to prove dishonesty, breach of company rules, or other prejudicial misbehavior amounting to just cause for dismissal of Mr. Day. Mr. Day signed each altered entry, thus calling attention to it. This was evidence relevant both to the issues of dishonesty and any intentional breach of the rules, as well as the overriding issue whether his misconduct, if any, was "so grievous that it gives rise to the inference that the employee intends no longer to be bound by the contract of service." (See **Blackburn** supra.)

Notice and Augmented Damages

[30] In 1980 Mr. Day went directly from university to a company subsequently purchased by Wal-Mart. For 17 years he had an unblemished record working his way up to manager of Wal-Mart's new Halifax store with a $32,000,000. annual budget. At the time of his dismissal he was earning a salary of $24,200. plus an annual "draw" of $40,000. for a total of $64,200. per year. In my view 17 months' notice is not inordinately high after 17 years' service for someone in his senior position.

[31] However, the appellant also questions the 12 months' augmented damages.

[32] In **Bureau v. KPMG Quality Registrar Inc. et al.** (1999), 177 N.S.R. (2d) 133

Bateman, J.A. stated at p. 146:

> It is not humiliation, embarrassment and damage to one's sense of self-worth and self-esteem alone which entitle the employee to augmented damages. There must be an accompanying act of bad faith or unfair dealings on the part of the employer.

[33] The appellant asserts there was no evidence of bad faith or unfair dealings, so the question should have been withdrawn from the jury. I disagree. Iacobucci, J. discussed the duty of fairness employers owe to employees who are being dismissed in **Wallace v. United Grain Growers Ltd.**, [1997] 3 S.C.R. 701 at p. 743:

> The obligation of good faith and fair dealing is incapable of precise definition. However, at a minimum, I believe that in the course of dismissal employers ought to be candid, reasonable, honest and forthright with their employees and should refrain from engaging in conduct that is unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive. In order to illustrate possible breaches of this obligation, I refer now to some examples of the conduct over which the courts expressed their disapproval in the cases cited above.

[34] His first examples were **Trask v. Terra Nova Motors Ltd.** (1995), 9 C.C.E.L. (2d) 157 (Nfld. C.A.) and **Jivrag v. City of Calgary** (1986), 13 C.C.E.L. 120 (Alta. Q.B.). In both cases the employer had made unfounded accusations of dishonesty.

[35] There was evidence for the jury to consider that Mr. Webber had been less than candid, reasonable, honest and forthright both in his investigation of Mr. Day's alleged misconduct and in his communications with him leading up to the dismissal. It was for the jury to decide whether it was reasonable for him in the existing circumstances to rush to the conclusion that Mr. Day had acted dishonestly and to make the accusation, in a letter that would form part of Mr. Day's employment record, that he "effectively stole income owed to other Associates."

[36] The trial judge instructed the jury on the issue at considerable length, reviewing each detail of the transactions between Mr. Webber and Mr. Day in the week between their first meeting on the subject and Mr. Day's termination. I find no error of law in his explanations of the question for the jury on "augmented damages":

> In the conduct of the dismissal, did the defendant act in a manner that was unfair or indicate bad faith?

[37] The trial judge said in part:

> Now, the obligation of good faith and fair dealing is also incapable of precise definition; however, at a minimum, it requires during the course of dismissal employers ought to be candid, reasonable, honest and forthright with their employees and should refrain in engaging in conduct that is unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive. It has long been accepted that a dismissed employee is not entitled to compensation for injuries flowing from the fact of the dismissal itself. Thus, although the loss of a job is very often the cause of injured feelings and emotional upset, the law does not recognize these as compensable. However, where an employee can establish that the -- the burden is now on the employee -- where an employee can establish that the employer engaged in bad faith conduct or unfair dealing in the course of the dismissal, injuries such as humiliation, embarrassment and damage to one's sense of self-worth and self-esteem might be worthy of compensation depending on the circumstances. In these situations, compensation does not flow from the fact of the dismissal itself but rather from the manner in which the dismissal was effected. . . .
>
> However, there is no evidence that Mr. Day's prospects for employment were adversely affected by anything said or done by the defendant, particularly in the view of the fact he obtained employment shortly thereafter. . . .
>
> [N]ot all dismissals will warrant an award for the manner of dismissal and this is true even where there is an allegation of cause and you find that cause has not been established. . . . (Paragraphing inserted for convenience.)

[38] In my view the jury was fairly and properly instructed, and there was evidence before it for awarding 12 months' notice as augmented damages. Wal-Mart refused to disclose what Mr. Day's earnings would have been during the time period covered by the augmented damages. The evidence before the jury was that he had been earning $64,200. a year. Following the verdict, Wal-Mart disclosed that substantial bonuses payable for the year following Mr. Day's dismissal would increase his total award to $235,119.95, after deduction of his earnings from the lower-paying position he secured

with Canadian Tire a month after his dismissal from Wal-Mart. These unique circumstances have resulted in an award for augmented damages that is clearly generous, but not so high as to justify our interfering with it.

[39] This court has consistently followed the principles set forth In **Nance v. British Columbia Electric Railway Co.,** [1951] A.C. 601 (P.C.) in reviewing damage awards. At p. 613 Viscount Simon wrote:

> Whether the assessment of damages be by a judge or a jury, the appellate court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance. Even if the tribunal of first instance was a judge sitting alone, then, before the appellate court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account some relevant one); or, short of this, that the amount awarded is either so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage. (*Flint v. Lovell*, [1935] 1 K.B. 354), approved by the House of Lords in *Davies v. Powell Duffryn Associated Collieries, Ltd.,* [1942] A.C. 601. The last named case further shows that when on a proper direction the quantum is ascertained by a jury, the disparity between the figure at which they have arrived and any figure at which they could properly have arrived must, to justify correction by a court of appeal, be even wider than when the figure has been assessed by a judge sitting alone. The figure must be wholly “out of all proportion” (per Lord Wright, *Davies v. Powell Duffryn Associated Collieries, Ltd.,* [1942] A.C. 601).

[40] The appeal is dismissed with costs which are fixed at 40% of the costs at trial, plus disbursements.

Freeman, J.A.

Concurred in:

Glube, C.J.N.S.

Saunders, J.A.