

Date: 20010913
Docket: S. H. No. 157657

IN THE SUPREME COURT OF NOVA SCOTIA
[Cite as: Kaiser v. Dural, 2001 NSSC 131]

BETWEEN:

CYRIL D. KAISER

PLAINTIFF

- and -

DURAL, a division of MULTIBOND INC.

DEFENDANT

D E C I S I O N

HEARD: At Halifax, Nova Scotia, before the Honourable Justice C.
Richard Coughlan, on May 7th, 8th, 9th and 10th, 2001

**DATE OF
DECISION:** September 13th, 2001

COUNSEL: Robert L. Barnes, Q.C. and Meaghan Beaton (law student),
for the plaintiff
Jean McKenna, for the defendant

COUGHLAN, J.:

- [1] Cyril Kaiser was employed by Dural as a sales representative in the Maritime Provinces. He worked in the adhesive business since 1972. Much of his career was spent in the Maritimes. Dural is in the adhesives and coating business. Dural wanted to increase its business in the Maritimes and hired Mr. Kaiser. Dural wanted to take advantage of Mr. Kaiser's knowledge and contacts. Less than a year after hiring him, Dural fired Mr. Kaiser.
- [2] The questions for the court are: Did Dural have just cause to fire Mr. Kaiser? If Mr. Kaiser was wrongfully dismissed, what notice is he to receive?

FACTS

- [3] Cyril Kaiser was fifty-seven years old at the time of trial. After finishing grade twelve he went to work. In 1972 he began working for Swift Adhesives. He became plant manager in 1978. He continued working for Swift until 1992. In 1980, he moved to Moncton to work in Swift's plant. When the Moncton plant was closed, he received a severance package. In September of 1992 he was hired by Swift as its salesman in the Maritime Provinces. His position was eliminated in 1994.
- [4] In 1995, Adhpro Adhesives hired Mr. Kaiser to manufacture adhesives in Dartmouth. According to Howard McKay, principal of Adhpro, Mr. Kaiser knew the accounts in Atlantic Canada and helped Mr. McKay tremendously in developing accounts in New Brunswick. Mr. McKay said Mr. Kaiser was personable, got along well with people, did a good job for him by speeding up Adhpro getting in the door of prospective customers.
- [5] Dural made the decision to expand its business in the Maritimes and decided its next step was to hire a resident salesperson to service existing accounts and get new customers. Patrick Commander, Dural's marketing manager, who knew Cyril Kaiser, mentioned Mr. Kaiser's name to Michael Sales, Dural's managing director and C.E.O. Mr. Sales gave Mr. Kaiser's name to Robert Proulx, a salesperson with Dural, to arrange a meeting with Mr. Kaiser to determine if they could work together. Mr. Proulx reported he could work with Mr. Kaiser and Mr. Kaiser had contacts in the packaging industry dating back possibly twenty years and, "As for Cyril, I believe he

- would do a job for Dural because of his contacts. I haven't worked for him so I don't know of his abilities." (See exhibit 1, tab 1).
- [6] Mr. Proulx called Mr. Kaiser to arrange a meeting to determine if they were compatible and could work together. Mr. Proulx met Mr. Kaiser at Adhpro's plant in Dartmouth. He told him Dural was looking for a salesperson and asked if he was interested. Mr. Kaiser responded, "I might be".
- [7] Mr. Sales contacted Mr. Kaiser and arranged a face-to-face meeting. Mr. Kaiser flew to Toronto. Mr. Sales testified after the meeting he thought Mr. Kaiser had good knowledge of the products and customers in the Maritimes. He was concerned about Cyril's lack of sales experience but thought Cyril had "the goods".
- [8] Mr. Sales testified at the meeting he told Mr. Kaiser about Dural, its history in the Maritimes, it did not know the Maritime market well, it had a demanding standard for salespeople of sales of \$200,000.00 - \$300,000.00 a year, it did not provide cars, that salespeople are to be on the road consistently. He told Mr. Kaiser the salary would be \$40,000.00 a year. He had heard from Mr. Proulx that Cyril wanted \$50,000.00. He further testified at the end of the meeting he thanked Mr. Kaiser for coming and said he would discuss the matter with others and be in touch.
- [9] Mr. Kaiser testified at the meeting he and Mr. Sales discussed the years he worked at Swift and the accounts he had at Swift. They discussed salary and that Dural did not supply cars to salespeople. Mr. Sales said the salary for a younger salesperson would be \$20,000.00 but for Mr. Kaiser it would be \$40,000.00. He testified Mr. Sales seemed impressed with the people he knew in the industry, for example, at McCain's. They talked of the wood business. Mr. Kaiser said his experience was more in packaging materials.
- [10] Mr. Kaiser testified he told Mr. Sales he would call Howard McKay when he got home and resign, giving Mr. McKay two weeks notice. Dural was looking for the salesperson to start working on June 15th. He testified Mr. Sales did not say anything when Mr. Kaiser said he was giving Adhpro notice the following Monday. Mr. Kaiser stated he left the meeting with Mr. Sales with the impression he had the job with Dural if he obtained a car.
- [11] After the meeting, Mr. Kaiser made arrangements to purchase a car and sent his resignation from Adhpro to Mr. McKay by registered mail. He reported to Mr. Sales he had arranged for the car and submitted his resignation so he could start work on June 15th.

- [12] Mr. Sales consulted a lawyer in Montreal concerning hiring Mr. Kaiser and the lawyer drafted a letter to Mr. Kaiser (exhibit 2) and the offer of employment (exhibit 3). The offer of employment was signed by Mr. Kaiser and returned to Dural.
- [13] Mr. Kaiser commenced working for Dural. But in the words of Howard McKay, "Mr. Kaiser was not a salesman". Dural was not pleased with the progress Mr. Kaiser was making. Mr. Proulx travelled to the Maritimes every fourth or fifth week to assist Mr. Kaiser. He did not think Cyril was making enough calls - telephone calls are not enough, you have to keep making personal calls on customers to develop the business. Mr. Proulx did testify no new business is expected of a new salesperson for three months, but you do expect to make test runs of products.
- [14] Mr. Sales testified he called Cyril every two to three weeks asking how it was going, about whether any business coming, any trials coming. Mr. Kaiser responded, "it's tough out there". Mr. Kaiser did not ask for assistance. Mr. Sales was getting negative feedback from Mr. Proulx and Mr. Commander about Mr. Kaiser's lack of sales ability.
- [15] Mr. Sales made a decision around the time of a sales meeting in February to fire Mr. Kaiser. The steps to implement the decision were not in place when Mr. Kaiser became ill.
- [16] Mr. Kaiser had surgery in April, 1999 and returned home on April 24th, 1999. On May 13th, 1999 arrangements were made for Mr. Sales and Mr. Proulx to meet with Mr. Kaiser. Mr. Kaiser was picked up at his home and the three went to a restaurant for breakfast. Mr. Proulx asked Mr. Kaiser how he was feeling and when he would be coming back to work. At the restaurant, Mr. Kaiser was told there was some bad news, he was not likely to succeed and was passed an envelope which contained notice of firing (exhibit 1 - tab 9). Mr. Kaiser was taken home.
- [17] Joyce Kaiser, Cyril Kaiser's wife, testified that when Mr. Kaiser returned home from the meeting at which he was fired, he cried, feared what the family would do and in her words he "completely folded". Mr. and Mrs. Kaiser did not know if Mr. Kaiser was entitled to disability benefits, they had no money and did not know what they could do. A claim was made for employment insurance benefits as well as disability benefits.
- [18] Mr. Kaiser is unable to return to work because of his health.

JUST CAUSE

- [19] The burden is on Dural to prove the dismissal was for just cause. Dural wanted to increase its business in the Maritimes. It knew Mr. Kaiser was well known in the adhesive business in the Maritimes, had long standing relationships with potential customers. Mr. Commander knew Mr. Kaiser as a plant manager, servicing the Maritimes from Moncton for many years, and that Mr. Kaiser knew people acquiring adhesives in the Atlantic Provinces. As Mr. Proulx stated - he believed Mr. Kaiser would do a job for Dural because of his contacts.
- [20] Dural was aware most of Mr. Kaiser's experience was in manufacturing, not sales; that he was weak in wood adhesives as his experience was in packaging materials. Mr. Sales testified he was concerned about Mr. Kaiser's lack of sales experience. Dural normally hired experienced salespeople. Mr. Sales also testified Mr. Kaiser was not Dural's normal type of hire and his sales experience was in Mr. Sales' mind when Mr. Kaiser was hired.
- [21] Dural does not have a Human Resources Department. It is a level organization. Overhead is kept low. Staff wear many hats. Human Resources is done by the management team. Dural does not have a program of progressive discipline. Mr. Sales testified Dural does not have personnel files; does not conduct personnel evaluations. The company is not big on paperwork. Dural does not have a sales training program. No one, not Mr. Sales, Mr. Proulx and not Mr. Commander ever told Mr. Kaiser if he failed to meet sales expectations he would be fired. Mr. Sales spoke to Mr. Kaiser every two to three weeks and asked him how the job was going. No warning was given to Mr. Kaiser. Mr. Sales stated Dural never does that with anybody. Dural makes business decisions about employees and then gets legal advice how to do it.
- [22] Mr. Kaiser is not a salesperson. Howard McKay said so. Mr. Commander testified Mr. Kaiser did not have the ability to close a sale - he never asked for the order. Mr. Kaiser did not keep accurate records. In many instances, his mileage records were unbelievable. He was not a good salesperson; although Dural did not give him long to prove himself or offer any sales training.
- [23] Incompetence is clearly recognized as a ground for dismissal. However, to justify dismissal for cause without appropriate warning, the incompetence must be gross in nature. (**Babcock v. Weickert (C. & R.) Enterprises Ltd.** (1993), 126 N.S.R. (2d) 170 (C.A.))

- [24] I find that Mr. Kaiser was not so incompetent as to justify dismissal without appropriate warning.
- [25] When dismissing an employee notice of unsatisfactory performance of duties must be given. In **Babcock v. Weickert, supra**, Pugsley, J.A., giving the decision of the Court, stated at p. 176:

45 In **Brown v. Sears Ltd.** (1988), 88 N.S.R. (2d) 426; 225 A.P.R. 426 (T.D.), at p. 430, Davison, J., in listing the obligations imposed on the employer in that case to justify dismissal for incompetence, concluded that the employer must show:

“(1) it has established reasonable objective standards of performance;

“(2) the employee has failed to meet those standards;

“(3) the employee has had warning that he has failed to meet those standards and that the employee’s position with the employer will be in jeopardy if he continues to fail to meet the standards; and

“(4) that reasonable time was afforded to correct the situation.”

- [26] Dural has not met the test. Mr. Kaiser was not given reasonable objective standards of performance. Mr. Sales testified the expectation was that Mr. Kaiser would add business for Dural. He did not have a specific expectation. He was hoping to add to the business. Mr. Kaiser received no warning his performance was unsatisfactory and if it continued he would be fired. He was given no opportunity to correct his performance.
- [27] I find Dural dismissed Mr. Kaiser without just cause.

CONTRACT

[28] Dural contends that paragraph number six of exhibit three, “The Offer of Employment” dated June 4th, 1998 and signed by Mr. Kaiser limits the notice Dural is required to give Mr. Kaiser. The provision for termination of employment is ambiguous. No reference is made to the Labour Standards Code, but merely the minimum notice required by law. Having been drafted by Dural’s lawyer, the offer must be read *contra proferentem*. The offer being ambiguous, it is for the court to determine the appropriate notice.

REASONABLE NOTICE

[29] The classic statement of the factors to be considered in determining reasonable notice of termination is that of Chief Justice McRuer in **Bardal v. The Globe & Mail Ltd.** (1960), 24 D.L.R. (2d) 140 at p. 145:

There can be no catalogue laid down as to what is reasonable notice in particular classes of cases. The reasonableness of the notice must be decided with reference to each particular case, having regard to the character of the employment, the length of service of the servant, the age of the servant and the availability of similar employment, having regard to the experience, training and qualifications of the servant.

[30] The courts have added other factors to be considered, including whether the employee has been induced to leave secure employment, as well as the manner of the dismissal. (**Wallace v. United Grain Growers Ltd.** (1997), 152 D.L.R. (4th) 1) (S.C.C.)).

[31] In determining the appropriate notice to which Mr. Kaiser is entitled, I have considered the factors set out in **Bardal v. The Globe & Mail Ltd.**, *supra*, and **Wallace v. United Grain Growers Ltd.**, *supra*, including: Mr. Kaiser’s age, length of employment, his limited experience as a salesman and his extensive experience in the adhesive industry in the Maritimes.

[32] Howard McKay gave evidence he would be happy to have Mr. Kaiser back as an employee if Mr. Kaiser’s health permitted it.

[33] The evidence is clear Dural wanted Mr. Kaiser as an employee. Dural wanted to increase its business in the Maritimes and wanted to take advantage of Mr. Kaiser’s contacts in the industry. Dural deviated from its normal practice of hiring experienced salespersons. Mr. Sales had concern about Mr. Kaiser’s lack of sales experience, but the concern was overcome by the desire to have Mr. Kaiser’s industry contacts.

- [34] Mr. Kaiser gave evidence that he was not considering leaving Adhpro prior to Dural contacting him. He was not looking for work before he was approached. To Mr. Proulx's inquiry as to whether he would be interested in working for Dural, Mr. Kaiser responded, "I might be".
- [35] Although Mr. Kaiser acknowledged his job with Adhpro was not his ideal job, and if the opportunity arose he would consider another position, I find Mr. Kaiser was induced by Dural to leave his employment with Adhpro.
- [36] At the time Mr. Kaiser was fired, he was recuperating from open heart surgery. He had the surgery in April, 1999. Mrs. Kaiser testified when she told Mr. Sales that Cyril would be off work until July he responded, "his thoughts were with Cyril and get well soon". The decision to fire Mr. Kaiser was made at the time of the sales meeting in early February.
- [37] Mr. Sales testified it was his understanding Mr. Kaiser was recovering and close to being ready to come back to work. Mr. Sales told Mr. Proulx of the decision to fire Mr. Kaiser and asked him to arrange a meeting. The meeting with Mr. Kaiser was arranged for May 13th, 1999.
- [38] Mr. Sales decided to fire Mr. Kaiser in a restaurant. Mr. Proulx did not think it was a good idea. He knew it would be upsetting to Mr. Kaiser. Mr. Proulx said he probably told Mr. Sales of his concern. Mr. Proulx does not recall Mr. Sales' response to his concern.
- [39] Messrs. Sales and Proulx picked up Mr. Kaiser and drove him to the breakfast meeting. Mr. Sales stated that Mr. Kaiser looked fine. Mr. Proulx asked Mr. Kaiser how he was feeling and when would he be coming back to work.
- [40] There are different versions as to what happened at the meeting.
- [41] Mr. Sales says they arrived at the restaurant. There were not many people at the restaurant. They had the meal and at the end he said to Mr. Kaiser, "We have some bad news. You are not likely to succeed." and he passed the envelope saying, "The details were in the letter." He says there was no public display which surprised him. He believes Cyril opened the envelope in the restaurant.
- [42] Mr. Proulx does not recall voices being raised in the restaurant or the letter being thrown back by Mr. Kaiser. He does not know how many people were in the restaurant. When the letter was given to Mr. Kaiser it was pretty well the end of the discussion. Mr. Kaiser was then taken home. Mr. Kaiser looked okay when left at his home. Mr. Proulx said he would not have fired Mr. Kaiser in the restaurant, he would probably have done it in a hotel room.

- [43] Mr. Kaiser says Messrs. Sales and Proulx picked him up at home on May 13th and went to Cousin's Restaurant in Halifax. They were seated and he ordered coffee and a piece of toast. His toast and coffee were almost finished when he was fired and given the letter. He said he was embarrassed, humiliated and felt his blood pressure going up. He raised his voice a bit. He got loud. He said, "You can't do this. I am going to get a lawyer." Mr. Sales said, "We can do this." Mr. Kaiser said he had to go home.
- [44] I accept Mr. Kaiser's version of what happened in the restaurant over that of Mr. Proulx and Mr. Sales. Mr. Proulx was not sure of the details of what happened in the restaurant and his evidence was to the best of his recollection. My impression of Mr. Sales is he was so interested in completing firing Mr. Kaiser, he did not care about the impact on Mr. Kaiser - the details of the meeting were not important to him.
- [45] Mr. Sales' evidence was that he did not think the place of termination was an issue. He could have arranged a meeting room at a hotel. It was no concern to Mr. Sales that Mr. Kaiser was a few weeks out of the hospital. He testified it was his idea to do the firing privately as he did not know how Mr. Kaiser would react. He did not follow up what effect the firing might have. It was no concern of his there might be further problems because of the firing. He did not think about the effect of the record of employment on Mr. Kaiser's employment insurance benefits. He did not think clause two of the letter of termination (exhibit 1 - tab 9) might cause Mr. Kaiser to think he was not eligible for disability benefits. He did not consider the effect no letter of reference was given to Mr. Kaiser might have. He did not think.
- [46] When he returned home from the meeting, Mr. Kaiser went to bed. His wife called his doctor who told him to rest. He felt devastated. He had no idea what he would do. His doctor says he cannot work at all.
- [47] Mrs. Kaiser testified when her husband returned from the meeting he cried. He said, "What are we going to do now?" He completely folded. The firing deflated his ego. He had been looking forward to going back to work in July, now no job, no nothing. They did not know if Mr. Kaiser was eligible for disability benefits. They had no money.
- [48] Mrs. Kaiser went with Mr. Kaiser to make his employment insurance claim. Mr. Kaiser was wiped. He had to wait six weeks for benefits because he had been fired. He did receive his benefits from his disability policy through Dural.

- [49] Having considered all of the evidence and having regard to the character of Mr. Kaiser's employment, the length of his service, his age, his experience, training and qualifications, the inducement from his prior employment and the manner of his firing, I find that Mr. Kaiser is entitled to a period of notice of nine months.
- [50] Mr. Kaiser is not able to return to work. Dural contends that as he cannot work, it cannot use the benefit of the mitigation; therefore, no notice is required. Howard McKay's evidence is, he would be happy to have Mr. Kaiser back as an employee if his health permitted it. An employee is entitled to reasonable notice whether disabled or not. In **Sylvester v. British Columbia**, [1997] 2 S.C.R. 315, Major, J., in giving the court's opinion, stated at p. 320:
- ... The fact that an employee could not have worked during the notice period is irrelevant to the assessment of these damages. They are based on the premise that the employee would have worked during the notice period. Therefore, an employee who is wrongfully dismissed while working and an employee who is wrongfully dismissed while receiving disability benefits are both entitled to damages consisting of the salary the employee would have earned had the employee worked during the notice period.
- [51] The fact that Mr. Kaiser was not able to return to work does not relieve Dural of the requirement to give reasonable notice of termination of employment.
- [52] Mr. Kaiser had purchased a car when he was offered a job by Dural. The car was purchased for the purposes of Mr. Kaiser's employment with Dural with the full knowledge of Dural. When he was fired, the car was repossessed. When the car was purchased a down payment of \$2,300.00 was made. When the car was repossessed, there was a deficiency. Mr. Kaiser paid \$300.00 of the deficiency and the balance was forgiven. Mr. Kaiser will recover from Dural the down payment of \$2,300.00 and the \$300.00 paid on the deficiency.
- [53] Mr. Kaiser received a car allowance from Dural of \$1,031.00 per month. At the time of firing, Mr. Kaiser was owed two months car allowance for a total of \$2,062.00.
- [54] Mr. Kaiser is also entitled to vacation pay. If the parties are not able to agree on the amount of vacation pay, I will hear them.
- [55] Dural will also pay 80% of Mr. Kaiser's health benefits costs, which amounted to \$81.00 per month. Mr. Kaiser will recover the amount of the employer's contribution from Dural.

[56] Mr. Kaiser is also entitled to prejudgment interest. If the parties are not able to agree on the amount, I will hear counsel.

[57] Mr. Kaiser will have costs of the action on a party/party basis in accordance with Tariff A, Scale III of the **Costs and Fees Act**, R.S.N.S. 1989, c. 104. If the parties are not able to agree on the “amount involved”, I will hear counsel.

C. Richard Coughlan, J.