Date: 20001020
Docket: SH 151156C

1998

IN THE SUPREME COURT OF NOVA SCOTIA
Cite as: Daniel v. Survival Systems Ltd. 2000 NSSC 64

Between:

JOSEPH D. DANIEL

Plaintiff

- and -

SURVIVAL SYSTEMS LIMITED

D E C I S I O N

HEARD: before the Honourable Chief Justice Joseph P. Kennedy, Supreme Court of Nova Scotia, Halifax, Nova Scotia, April 19, 20, 2000.

DECISION: October 20, 2000

COUNSEL: Ian C. Pickard for the Plaintiff
George Clarke for the Defendant

KENNEDY, C.J.:

[1] The plaintiff, Joseph Daniel (Daniel) a chartered accountant, was employed by the defendant, Survival Systems Limited (the Company) for a period of twenty months from December of 1996 until his termination on August 31st, 1998.

[2] The Company is in the business of providing various types of survival safety training to members of the armed forces and "offshore" oil and gas personnel, both domestically and internationally. It also manufactures and markets survival training simulators.

[3] In December of 1996, the Company hired Daniel as an hourly paid employee in its accounting department. Subsequently, in April of 1997, Daniel was given the salaried position of controller.

[4] The Company dismissed Daniel from his position without notice on August 31st, 1998. The termination letter of that date was written by Albert Bohemier (Bohemier), the President of the Company.

[5] Daniel has brought this action alleging that the dismissal was without just cause.

[6] The Company has responded claiming the termination was justified because of Daniel's insubordination, particularly his consistent failure to show up for work on time.

FACTS:

[7] There is some dispute as to facts.

[8] Significant to the plaintiff's case is the testimony of Stefan Gashus (Gashus). At times relevant, he oversaw the accounting department at the Company with the title of vice-president finance reporting to Bohemier. Gashus hired Daniel and was his boss in that department. Gashus left the employ of the Company by agreement shortly after Daniel was dismissed.

[9] Gashus testified that it was his function to supervise the employees that worked in accounting. Bohemier agreed with this assertion and acknowledged that it was Gashus who determined Daniel's work schedule prior to August 11, 1998. Gashus said that prior to a meeting with Bohemier on August 11th, 1998, the Company policy was that someone would be available in the accounting department from 8:00 a.m. until 5:30 p.m. each working day. He said that by arrangement, one of the clerical employees would come to work at 8:00 a.m. and be available to answer questions, and that both he and Daniel, the chartered accountants, would arrive at 9:00 a.m. Daniel testified that being in compliance with the accounting department

policy as set out by Gashus, he did not understand that there was any difficulty with his punctuality until August 11th of 1998.

[10] The meeting involving Daniel, Gashus and Bohemier on August 11, 1998 is central to this action and the circumstances surrounding that meeting and its specifics must be determined in order to assess just cause.

[11] I am satisfied that Bohemier had expressed to Gashus, during the period preceding that meeting, that he was dissatisfied with the operation of the accounting department, specific to availability of the staff within that department from 8:00 a.m. onward on work days. Despite the department policy that a clerical officer be present at 8:00 a.m., this was often not happening. Bohemier wanted one of the accountants to be available at 8:00 a.m. It was Bohemier's belief that Daniel would have been aware of his concerns because, "some of my notes were strategically placed so that others would see". Notwithstanding Bohemier's belief, I find that Daniel taking directions from Gashus would not have reason to consider his personal attendance at work to be a problem prior to August 11, 1998.

[12] There is no definitive evidence of Bohemier's concerns as they related to Daniel, were being communicated to the plaintiff. This situation changed on August 11, 1998. Frustrated with the operation of the accounting department and what he perceived to be the questionable work ethic of the staff within, Bohemier had a meeting with Gashus and Daniel.

[13] Bohemier testified that he convened the meeting so that there would be "no room for doubt" about what he required from his two accountants.

[14] At that meeting, Bohemier directed that both Gashus and Daniel were to be in the office at 8:00 a.m. every working morning.

[15] He on the same date, distributed a memo directed to Gashus and copied to Daniel and other staff of the accounting department. Significantly, it was also copied to legal counsel for the Company.

[16] It read:

> " Please be advised that effective immediately, the Accountant/Finance Departments hours of operation will be 8 a.m. to 5 p.m. Monday through Friday, no exceptions for any staff.
>
> Also please ensure that lunch hours are just that – one hour per day. With regard to breaks, I wish for you and your staff to exercise common sense in terms of timing and length of breaks.
>
> Based on historical performance regarding working hours and lateness for work, this issue is not open for discussion. As discussed

this morning, any further violation of this policy will be considered grounds for dismissal."

[17] Daniel acknowledged that as a result of that meeting and the memo that followed, that as of August 11, 1998, whatever he might have understood prior thereto, he knew that his hours of work were from 8: 00 a.m. to 5:00 p.m. and that tardiness could mean termination.

[18] I find that subsequent to August 11, 1998, Daniel was aware that Bohemier wanted him in the office before 8:00 a.m. and that his being there on time was significant to his future employment by the Company.

[19] After the meeting and memo, Bohemier had his executive assistant monitor the morning arrival time of the accounting department staff and keep a log of her observations. That log shows that Daniel arrived as follows:

August 12 - 8:01
August 13 - 8:00
August 14 - 8:01
August 17 - 8:03
August 18 - 8:08
August 19 - 8:00
August 20 - 8:04
August 21 - 7:58
August 24 - 8:09
August 25 - 8:09
August 26 - 8:00
August 27 - 8:07
August 28 - 7:59
August 31 - 8:09

[20] On August 31st, 1998, Bohemier gave Daniel a letter of termination. It read:

> This is to advise you that your employment with Survival Systems Limited is terminated effective immediately.
>
> As per Labour Board requirements, we will provide you with one week's pay in lieu of notice. Please advise me of the number of vacation days owed to you as pay in lieu of vacation will be calculated and included with your final pay.
>
> The reason for your dismissal is based on our discussion regarding working hours. You have continued to be late for work at least five time since you were notified in writing 11 August that your working hours were to be 8 a.m. to 5 p.m. with no exceptions. As was stated in my memo of 11 August 'any further violation of this policy will be considered grounds for dismissal.'
>
> I ask that you sign the enclosed standard release that staff sign when they leave."

[21] Bohemier testified that between August 11 and August 31st he had conversation with Daniel in which he (Daniel) inquired as to whether he could leave work early if he worked through his lunch hour, or if he didn't take breaks. Both of these requests were denied.

[22] Bohemier testified that he began to believe that there was no point in talking to Daniel about timeliness any further. "I believed in my mind that Daniel would not comply. I believed he would challenge me."

[23] When Bohemier returned from a trip and saw the time log sheets, he confronted Daniel, discussed his performance since the August 11th meeting and gave him the termination letter.

[24] Daniel does not dispute the times as shown on the log sheets. He testified that after the August 11 meeting and memo, he didn't intend to be late. He said that he set out for work each morning with the intent to arrive for work before 8 a.m.

[25] He pointed out that he was never more than nine minutes late. He said he didn't agree with the policy, but he did his best to comply. "I thought that arriving at 8:05 a.m. was getting to work on time." "If I was five minutes late, it didn't effect anything."

[26] There is a conflict in evidence specific to a meeting between Bohemier and Daniel on August 31, 1998, the termination date, that needs to be addressed.

[27] Bohemier testified, that although he had written the termination letter and had it available, he had not as yet made up his mind to fire Daniel when he met him on August 31, 1998.

[28] He asked Daniel questions about his lateness, inquiring as to the reason, whether he had problems with his alarm clock? Did he experience traffic delays? Did he have car problems?

[29] Bohemier said that Daniel did not use any of the these alternatives as excuses but responded that he had been late "because I felt like it".

[30] Bohemier said that that response was the impetus that caused him to give Daniel the termination letter.

[31] Daniel absolutely denies that he made such a response.

[32] The discrepancy must be addressed because of the defendant's claim of insubordination. I cannot find on the balance of probabilities that this flippant explanation was given by Daniel.

[33] Significantly, immediately after the August 31st meeting, Bohemier dictated a memo to the file detailing the specifics of this encounter with Daniel and does not make reference to the remark. I find that had the alleged remark been the impetus for the firing, it would have been detailed in that memo.

JUST CAUSE:

[34] I agree with the plaintiff's submission that the issue of "just cause" must be restricted to the events taking place after August 11, 1998 meeting and memo. Although Bohemier was voicing dissatisfaction with the accounting department and the attendance for work of the staff therein to Gashus prior to that date. I have found that there is no evidence that this concern was being communicated to Daniel at least as it applied to him.

[35] Daniel was, up until that date, responding to Gashus as required.

[36] The defendant Company submits that the failure of Daniel to arrive on time after being directed to do so was insubordination that in the circumstances justified termination without notice.

[37] The author Levitt, *The Law of Dismissal in Canada*, (2nd Edition) (Aurora: Canada Law Book, 1992) is instructive as to the test for determination of just cause. He sets out that the onus is squarely on the employer to prove cause. At p. 121:

> "The employer must prove cause on the balance of probabilities based on a finding of real incompetence or misconduct, rather than simple dissatisfaction with performance or concern as to potential misconduct."

[38] And at p. 122:

> "Causes must be determined objectively. 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 standards utilized by the court. A company might believe that it has cause for the employee's termination because management no longer has confidence in the employee's ability to properly fulfil his functions. However, if cause objectively determined does not exist, the employee must be provided with reasonable notice. In one decision, the employer's subjective view of conduct has been held to be one factor to be considered.
>
> Since dismissal without notice is such a severe punishment, it can be justified only by misconduct of the most serious kind."

[39] The oft-quoted explanation of what can constitute just cause is set out in *R. v. Arthurs, Ex. P. Pt. Arthur Shipbuilding Co.*, [1967] 62 D.L.R. (2d) 342 (Ont. C.A.) Schroeder, J.A. said 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."

[40] As to insubordination justifying cause for dismissal; Levitt in *The Law of Dismissal in Canada (supra)* at p. 142 cites *Heyes v. First City Trust Co.* (1981), 12 A.C.W.S. (2d) (B.C.S.C.) At p. 9:

> "Wilful disobedience is, of course, a ground upon which an employer may dismiss without notice. In order to justify the dismissal on those grounds there is an onus upon the defendant to establish there were acts wilfully carried out by the employee in defiance of clear and unequivocal instructions of a superior or refusal to carry out policies or procedures well-known by the employee as being necessary to the fulfilment of the employer's objectives."

[41] It is clear that "wilful" is the operative word when assessing employees disobedience of company orders.

[42] Levitt *(supra)* cites examples of employee action that has been found to be a cause for dismissal. In *Rising v. Sternson Ltd.* (1984), 26 A.C.W.S. (2d) 283

(Ont. Co.Ct.) a vice-president of marketing refused to obey a direct order to work on a Saturday and advised a subordinate to do likewise which was found to be cause for dismissal.

[43] And, in this Province, *Smith v. Worldwide Church of God* (1980), 39 N.S.R. (2d) 430 (N.S.S.C.) in which a church minister challenged church teaching and leadership from the pulpit after having agreed that he would not do so, this was found by the court to be wilful disobedience justifying termination.

[44] When the "wilful" element could not be demonstrated by the employer as in *Bell v. Izaak Walton Killam Hospital For Children* (1986), 74 N.S.R. (2d) 309 (N.S.S.C.) the termination was found to be wrongful.

[45] Despite the clear message to Daniel given on August 11, that he was to be at work on time and that on time meant at 8:00 a.m., it is not shown, on the balance of probabilities that his tardiness was "wilful" insubordination.

[46] Daniel's pattern of work did change. He was coming in earlier than he had prior to the relevant meeting and memo. Those late arrivals logged, that were five minutes or less, might well be explained by a discrepancy in time-keeping devices. As to those five incidences of lateness beyond five minutes, although none exceeded ten minutes, they are troubling.

[47] I, like Bohemier, question why Daniel, given the clear directive given to him on August 11, 1998, was so cavalier. Like Bohemier, I wondered why Daniel, during this period so soon after the directive, didn't arrive early for work on some occasions, as a sign of good faith. But unlike Bohemier, I do not characterize Daniel's failure over so short a period of time, to be wilful insubordination.

[48] I repeat Daniel's submission, that he was making a sincere effort to comply with the August 11th directive and always thought he was on time.

[49] Had I found that Daniel had told Bohemier that he was late "because he felt like it", my interpretation of his actions might have been otherwise; however, this response is not found as fact.

[50] I do not find wilful insubordination on the part of Daniel and therefore do not find just cause for dismissal as it was argued by the defendant Company.

AS TO NOTICE:

[51] The factors to consider when determining reasonable notice are set out in *Bardal v. Globe & Mail Ltd.*, [1960] O.W.N. 253 (H.C.) At p. 255:

> "There could be no catalogue laid down as to what was 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."

[52] I have had referred to me extensive Nova Scotia case law specific to the issue as it applies to short-term employees and conclude there is significant latitude available depending on the circumstances of each case.

[53] In this specific, given the age of the plaintiff, the position he filled and the work ethic and demeanor he displayed while performing the job in question, I find that a fair notice period is three months.

[54] Daniel though, found other employment as of November 9, 1998, ten weeks after his dismissal by the Company. He had received one week's severance pay and so is seeking nine weeks salary in lieu of notice.

[55] Given his position with the Company and considering his twenty month term of employment, I find that this suggestion is reasonable and I award nine weeks salary and benefits.

THE BONUSES:

[56] The plaintiff, Daniel claims to have been entitled to a bonus of $2,000 which he has not received.

[57] In a memo dated January 15, 1998, Daniel confirms a discussion that he had with Gashus in which an increase in salary and two possible bonuses for Daniel were discussed.

[58] The bonuses of $1,000 each were contingent upon Daniel implementing a "costing program" by December 31, 1998 and upon his continually having month end information prepared by the 15th of the following month.

[59] Gashus testified that Daniel, on the basis of what he had accomplished to the date of termination, would have been entitled to those bonuses.

[60] Bohemier testified otherwise. He said that to his knowledge, only one month's performance by Daniel, as of August 31st, would have satisfied the second condition and that the "costing system" was not accomplished as of that date.

[61] On the totality of the evidence, I cannot find these bonuses were owed Daniel in whole or in part.

AS TO "WALLACE" DAMAGES:

[62] The plaintiff also seeks so-called "*Wallace*" or bad faith damages. In *Wallace v. United Grain Growers Ltd.* (1997), 219 N.R. 161 (S.C.C.) Iacobucci, J. says at p. 208:

> "Thus, for most people, work is one of the defining features of their lives. Accordingly, any change in a person's employment status is bound to have far-reaching repercussions....
>
> The point at which the employment relationship ruptures is the time when the employee is most vulnerable and hence, most in need of protection. In recognition of this need, the law ought to encourage conduct that minimizes the damage and dislocation (both economic, and personal) that result from dismissal... I note that the loss of one's job is always a traumatic event. However, when termination is accompanied by acts of bad faith in the manner of discharge, the result can be especially devastating. In my opinion, to ensure that employees receive adequate protection, employers ought to be held to an obligation of good faith and fair dealing in the manner of dismissal, the breach of which will be compensated for by adding to the length of the notice period."

[63] The court continued at p. 210:

> "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."

[64] The plaintiff submits that in *Wallace (supra)* the Supreme Court gave additional damages to the plaintiff because the employer therein had made the decision to "play hardball" throughout the litigation and maintained unfounded allegations of cause. Daniel argues that the same two factors are applicable in this case.

[65] The plaintiff says that, here too, the Company has maintained an unreasonable position concerning just cause throughout and has forced the plaintiff into court. He says that this is economic warfare of the nature that the Supreme Court of Canada warned employers against in *Wallace (supra)*.

[66] Daniel calls the Company's conduct to bad faith that should attract an award of *Wallace* damages.

[67] Although I have not found just cause in this specific, I do not find the defendant's actions in this matter to have been "bad faith".

[68] Bohemier presented to this Court as a hard driving, manifestly accomplished businessman; a man who has taken an idea and transformed it into a successful international Company. He expects his employees to share his spirit and enthusiasm for the company and its endeavours.

[69] I have found that his discontent with the work hours of the accounting department staff, although not shown to have been communicated to Daniel, was real and seemed reasonable to me.

[70] His concern and the Company's position were made very clear to Daniel by the August 11th meeting and memo. That Daniel's reaction to that directive was frustrating to Bohemier is understandable.

[71] A young man truly concerned about his future with that Company would have been early for work, when his presence there on time was made central to his employment. That Bohemier's frustration with Daniel resulted in his termination in the manner and during the time frame herein, was not objectively fair, however neither was it bad faith.

[72] The manner of termination was not justified on the facts and so will be addressed by damages, however, the Company's actions were not for the egregious nature that attract *Wallace* type damages.

CONCLUSION

[73] Having found no just cause for the termination of Daniel without notice, I would have awarded damages based on three months notice. Those damages are reduced to nine weeks pay and benefits because Daniel found employment ten weeks after the termination and has been paid one week's severance pay.

[74] I do not find any bonus pay owing to Daniel.

[75] I do not find *Wallace* damages justified in this matter.

[76] There will be interest at the appropriate rate and costs payable to the plaintiff.

Chief Justice Kennedy

Halifax, Nova Scotia