Cite as: Squires v. Ayerst, McKenna & Harrison Inc., 1991 NSSC 14

1990 S.H. No. 71522

IN THE SUPREME COURT OF NOVA SCOTIA
TRIAL DIVISION

BETWEEN:

GEOFFREY CHARLES SQUIRES

Plaintiff

- and -

AYERST, McKENNA & HARRISON INC.,
doing business under the name of
AYERST LABORATORIES

Defendant

HEARD: At Halifax, Nova Scotia, before the Honourable Mr. Justice David W. Gruchy on May 22, 23, 24 and 27, 1991

DECISION: June 28, 1991

COUNSEL: Mr. James L. Connors, Counsel for the Plaintiff

Mr. Robert A. Street, Counsel for the Defendant

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GRUCHY, J.

Introduction

The plaintiff is 35 years of age, is married and has two children. He resides in the Halifax area. He obtained a Bachelor of Science in Pharmacy from the University of Saskatchewan. After graduation he commenced employment with the defendant on May 2, 1977. He had a solid record of achievement and promotion with the defendant and rose to be the District Sales Manager for the Atlantic Provinces.

The defendant is a national pharmaceutical manufacturing and sales company and is the Canadian subsidiary of American Home Products Corporation.

On January 8, 1990, the plaintiff wrote a memorandum to his various sales representatives in Atlantic Canada and sent copies to his immediate superiors. A copy of the memorandum was given to Mr. Etienne Attar, the Director of Sales of the defendant. He took exception to the contents of it, finding that it was evidence of poor judgment and management. As a result, the plaintiff was summoned to the head office of the defendant at Montreal where he was given the opportunity to resign or be dismissed immediately. He attended the meeting in Montreal on January 22, 1990, and on January 26, 1990, his employment was terminated without further notice effective February 2, 1990.

The plaintiff has sued for wrongful dismissal. The defendant has claimed that there was just cause for the dismissal.

Facts

The plaintiff had a record of achievement within the defendant company. By 1983 he had demonstrated an ability as a salesman, having won awards in 1978 and 1983. In 1983 he was promoted to the position of Product Manager for the Company. He served in that position for a few years and ultimately was promoted to his present position - District Sales Manager of District Number One. Under the direction of the plaintiff, that district came from virtually the lowest of the Company's nine Canadian districts to the highest, in terms of sales.

From time to time (as outlined below) the defendant conducted reviews of the plaintiff's performance. Those reviews were generally positive; some aspects of the reviews were very complimentary to the plaintiff, while one aspect, that of interpersonal relationships with other staff members, indicated that some improvement was required.

At no time during the plaintiff's employment by the defendant did the plaintiff ever receive any reprimand or warning concerning his performance, or otherwise.

The defendant promoted competition among the districts. Generally speaking, the defendant had been sales oriented. Within the year or so prior to the plaintiff's dismissal, the defendant had changed its direction or philosophy somewhat from being sales oriented to marketing. The distinction between the approaches was explained in evidence. The competition among the districts had been related to sales and the criteria for the competitions had been statistically based. With the change of direction, a subjective element was added to the competitions for awards to district manager of the year and district of the year. The awards included certain financial and other benefits to the winning manager and his staff.

In early January, 1990, the plaintiff met his six sales representatives and, amongst other subjects, discussed the awards. The plaintiff concluded with his representatives that a memorandum should be forwarded to head office outlining the previous year's achievements of their district so that they would be before the appropriate officers.

Immediately following the meeting the plaintiff prepared the memorandum and forwarded it to each of the representatives. In fact, the memorandum was addressed to the representatives congratulating them on their performance during the year in question but the memorandum was designed to impress upon head office the district's performance. Copies of the memorandum were forwarded to the plaintiff's immediate superior, Mr. Jean-Guy Larin and Mr. Al Blair, the National Sales Manager of the defendant. Mr. Larin liked the memo. He made a copy of it and gave it to Mr. Attar. Mr. Attar took great exception

to it as he said it was full of nuances questioning management's judgment. He spoke to his confreres and met with them concerning it. They then changed their minds about its merits. The plaintiff was contacted about it and was informed he was in difficulty. He in turn contacted his sales representatives to ask them their opinions concerning the memorandum and received, to a large degree, reassurance from them.

On January 17 or 18, 1990, Messrs. Blair, Larin, Attar and deKapelle and Ms. Thibodeau, all head office staff of the defendant, met and decided that the plaintiff's employment with the defendant would be terminated.

The plaintiff was then ordered to go to Montreal to discuss the memorandum. He drafted and took with him two possible letters of apology which he felt might be used to placate the situation. The plaintiff went to Montreal with "cap in hand" on January 22, 1990. He met Messrs. Blair and Larin. Other people participated.

The participants in the meeting proceeded by a pre-arranged agenda. The memorandum and other matters were discussed. At the termination of the meeting, the plaintiff was given the option of resigning or being fired. He asked for a few days to think the matter over, obtained legal advice and then refused to resign.

During the course of the meeting the plaintiff asked to take advantage of the Company's "Assurance of Fair Treatment Policies and Procedures". That policy permitted any employee to appeal a superior's decision upwards through the ranks of management to and including an appeal to the Chairman of the Board. The individuals with whom the plaintiff was meeting refused to allow such an appeal to be made. They instructed

the plaintiff to leave the premises immediately and not to talk to anyone about his situation.

The meeting had centered chiefly around the memorandum in question. Other topics, however, were covered, including various other complaints. Negative aspects of his performance reviews were also discussed.

On leaving, the plaintiff met Mr. E.E. Campana who at that time was the Vice President of Administration of the defendant. He has since retired. He and the plaintiff knew one another and Mr. Campana apparently had a great deal of respect for the plaintiff. The meeting was quite accidental and when Mr. Campana realized that the plaintiff was greatly upset about something, he cancelled his luncheon appointment and took the plaintiff to lunch to talk the matter over with him.

After the meeting in Montreal and before the plaintiff's refusal to resign, Messrs. Blair and Larin met the sales representatives of District Number One at the Halifax International Airport during which they gathered further information concerning the plaintiff and his performance. Mr. Larin, in his evidence, indicated that the meeting was designed to obtain information, both positive and negative, concerning the plaintiff. The negative aspects of their findings were used as subsequently determined causes for the dismissal of the plaintiff. Following the meeting with the sales representatives, Messrs. Blair and Larin then met with the plaintiff briefly when he informed them of his decision not to resign.

The letter of dismissal dated January 26, 1990, sets out the reason for dismissal and one paragraph is as follows:

"Geoff,

> Due to repetitive problems in attitude which resulted in serious mismanagement of your district and because we cannot foresee, based on passed (sic) evaluations of your behaviour any possibility of a change in attitude, Ayerst has therefore no other choice but to terminate your employment with the Company as of February 2, 1990."

The letter was written in a form to be "read and accepted by both parties" and Mr. Larin signed as Regional Sales Manager. The plaintiff did not sign the letter.

Definition of Just Cause

The facts will be examined in relation to the law of just cause. The defendant has submitted that an acceptable definition of just cause is found in **Clouston & Co., Limited v. Corry**, [1906] A.C. 122 at pp.128-9 where it is stated by Lord James as follows:

> "Still there are cases which can be quoted in support of either side of the question involved, and between some of them it is apparently impossible to avoid a conflict... Now the sufficiency of the justification depended upon the extent of misconduct. There is no fixed rule of law defining the degree of misconduct which will justify dismissal. Of course there may be misconduct in a servant which will not justify the determination of the contract of service by one of the parties to it against the will of the other. On the other hand, misconduct inconsistent with the fulfilment of the express or implied conditions of service will justify dismissal."

Mr. Justice MacIntosh of this Court addressed the definition of just cause in **Delano v. Atlantic Trust Co.** (1978), 24 N.S.R. (2d) 53 at pp.69, 70 as follows:

"That an employment contract can be determined by an employer for just cause is well-settled.

The definition of the words 'just cause' were considered by the Appeal Division of the Supreme Court of Nova Scotia in **Walker v. Keating, Smith and Walker** (1974), 6 N.S.R. (2d) 1, where Mr. Justice Cooper stated the following at page 11:

> In the first place I think that 'just cause' as used in s.76(5)(b)(i) of the **Education Act** must mean such cause as would justify a master in summarily dismissing a servant. Whether or not just cause for dismissal exists has been held to be a question of mixed fact and law - see, **Re United Steelworkers of America, Local 7085 and East Coast Smelting & Chemical Co. Ltd.** (1972), 21 D.L.R. (3d) 23. MacDonald, J., in the **Canadian Gypsum** case, supra, at p.314 refers to the legal requirement for justifiable dismissal without notice as being that set out in 25 Halsbury (3rd Ed.), p.485, namely:
>
> > 'Misconduct, inconsistent with the due and faithful discharge by the servant of the duties for which he was engaged, is good cause for his dismissal.'
> >
> > And in the leading case of **Clouston & Co. v. Corry,** [1906] A.C. at 129, it was said that "misconduct inconsistent with the fulfilment of the express or implied conditions of service will justify dismissal". **(Cf. Laws v. London Chronicle (Indicator Newspapers) Ltd.** (1959), 2 A.E.R. 285.)
>
> I refer also to what was said by Schroeder, J.A., in his dissenting judgment approved by the Supreme Court in **Regina v. Arthurs; Ex parte Port Arthur Shipbuilding Co.,** [1947] 2 O.R. 49, at p.55:
>
> > 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.

> Schroeder, J.A.'s judgment was approved in the Supreme Court of Canada, [1969] S.C.R. 85, and is referred to by Robertson, J.A., in **International Woodworkers of America, Local 1-217 v. Industrial Mill Installations Ltd.**, [1972] 1 W.W.R. 321, at 337:
>
> > At common law there is no obligation on an employer to retain indefinitely in his employ an employee whose work is unsatisfactory."

The facts of the case seem to indicate that a conflict of personalities may have been involved in this dismissal, although it is not clear as to between whom the clash occurred. I have kept in mind in this regard the case of **Armstrong v. Atlantic Traders Limited, Smith and International Holdings** (1981), 46 N.S.R. (2d) 117 at p.141, and the passage in Levitt, **The Law of Dismissal in Canada** (1985), at p.119.

Defendant's Case

(a) Stated Cause - Memorandum

The memorandum of January 8, 1990, is quite long and does not need to be set forth in full. It was addressed by the plaintiff to Linda (MacKenzie), Anne (Doiron), Lois (Fearon), Martin (Ducey), Mark (LeDuc) and Carl (Wadman). Those individuals and the plaintiff were the entire sales staff for the Atlantic Provinces. Upon receipt of his copy of the memorandum, Mr. Larin was so pleased with its contents that he forwarded copies to Mr. Attar and Mr. Boily, Vice President, Sales & Marketing.

Mr. Attar gave evidence of the objectionable aspects of the memorandum. He said that when he read it he became angry

about its nuances questioning judgment of management. The tenor of the memorandum was contrary to the change in direction of the defendant from sales orientation to market orientation. Mr. Attar reviewed it in a memorandum to Mr. Blair dated January 16, 1990. He found nine specific complaints about it. He concluded that Mr. Squires had made "some significant management mistakes in writing this memo...." He wanted, "as a start", a written retraction and pointed out that Squires had been identified as a "performance problem" when there had been a general staff review for Mr. Boily on October 25, 1989.

Mr. Attar's evidence included a thorough review of the memorandum and the problems with it. He said he had discussed it with others at head office, including house counsel of the defendant. He also wrote memos concerning it to Messrs. Larin and Boily and a Mr. Roustan.

On January 16, 1990, Mr. Blair expressed to Mr. Larin some of Mr. Attar's concerns and asked him to discuss the matter with the plaintiff to be followed with a stern reprimand. On either January 17 or 18 Mr. Attar called a meeting at which Messrs. Blair, Larin, Dubreuil and Ms. Thibodeau (house counsel) were all present. Mr. Attar said that the purpose of the meeting, as far as he was concerned, was to force Mr. Larin to make a decision regarding the plaintiff. Mr. Larin, apparently following Mr. Attar's lead, on January 17, 1990, wrote a memorandum wherein he spoke of the plaintiff's shortcomings and concluded:

> "Our mutual patience has lasted for too many years. I do not believe that a plan of action will drastically change his behaviour on a short term.
>
> Consequently, I propose that Geoff Squires terminate his function and leave our company which does not deserve to be treated this way by a scatterbrain like him."

Conclusion re Memorandum

I find nothing wrong with the content or tone of the plaintiff's memorandum of January 8, 1990. Members of the plaintiff's sales staff, in effect, collaborated with the plaintiff in its preparation. There may be errors in the memorandum with respect to statistics or with price increases or targets. There is no error within this memorandum either taken singly or in combination with any other errors, or in combination with the tone, which would justify a dismissal. Nor would this memorandum, taken together with all of the other reasons set forth by the defendant, justify dismissal. I doubt even that the memorandum, taken together with all of the other reasons given by the defendant in justification for the dismissal would justify more than a rebuke.

The memorandum was sent to each of the sales representatives and they had an opportunity to look at it before they received telephone inquiries from the plaintiff, prompted by the complaint he received from Mr. Blair. While some of them found small faults with it, that faultfinding was not crystalized in any way until management asked them to put their minds specifically to the problem.

It is not of importance at all in this case to determine whether the plaintiff was correct in his conclusion that his district was the true winner of the District of the Year Award. In examining the criteria for that award, and on the basis of the statistics developed by the plaintiff, I would have thought that the plaintiff's district was in fact the winner. It appears to me that a subjective criterion was added to the criteria without any clear explanation to the participants.

The memorandum was sent to Messrs. Larin and Blair. They initially found no fault with it. It was not until Mr. Attar saw it, became angry and pushed them, that they took exception to it. Mr. Attar, in effect, pushed his co-workers at head office to the point where they agreed with him; he forced the process which brought about dismissal of the plaintiff.

Mr. Attar impressed me as an aggressive, able, articulate and ruthless individual. It is of interest to note that of the four main participants in this event - Squires, Larin, Blair and Attar - only Mr. Attar has remained "intact". The plaintiff has been dismissed, Mr. Larin has left the company and Mr. Blair has been demoted.

I conclude that to find as much fault in the memorandum in question as Mr. Attar did required either an exercise in paranoia or a deliberate attempt to undermine the plaintiff in order to obtain dismissal.

While I make the following observation in the context of the memorandum, it is intended that it be referable to this decision as a whole. I found the plaintiff to be a bright, articulate and careful witness. I believed him. Where his evidence is at variance with any evidence produced by the defendant, I accept that of the plaintiff. Similarly, I found the plaintiff's witnesses to be of excellent quality and character. In particular, I was impressed by Mr. Campana. He had left the defendant by way of a retirement agreement. He was a most impressive witness. He was thoughtful, evenhanded and fair. When Mr. Campana read the memorandum and the plaintiff explained to him that he had been dismissed as a result of it, Mr. Campana concluded that somebody had decided they "did not like the plaintiff's waves", fired him and then tried to find justification. I agree with Mr. Campana.

Further, with respect to credibility, the plaintiff called witnesses whom I found to be impressive, both by their professional stature and apparent frankness. That is in sharp contrast with the evidence of the defendant which I found to be inconsistent both with the evidence of the plaintiff and, on several key points, with itself and not in accord with its own records.

(b) **Other Events in Justification**

(i) **Appraisals**

Two performance appraisals of the plaintiff were submitted by the defence. They were purported to form part of the cumulative cause for dismissal. Various areas of accountability were to be numerically evaluated and assigned values from 1 to 5. Of the nine subjects in the first of these appraisals, the plaintiff received marks in two subjects signifying that his results "fell short of the requirements of the job in some areas this year". In all other areas of accountability, the plaintiff was assigned average or above average marks. In the second appraisal concerning the period from January to December, 1988, the plaintiff received results as follows:

PART C -- ADMINISTRATION & DEVELOPMENT

ACCOUNTABILITIES	COMMENTS	RATING
Coaching & Counselling	Geoff is providing all the time they need to develop themselves. Spends time in the field on regular basis providing the main tools & direction. Provides reps with very good and practical memos and visual aids to overcome problems. Good spirit. Improvement in flexibility.	3

Recruitment & Hiring	He has hired Linda Mosher to replace R. Swetman. This new acquisition was a great decision and at the present time (Feb/89) she is leading the district. For P. McMillan replacement, it is in process.	4
Communication & Reporting	Reporting: Regularly, very well documented. Has a good capacity of analyzing complex situations and explaining to his representatives. Will try to keep the quantity down to the essential and improve the clarity of his communication.	3
Team Building	His team has a great respect and confidence in Geoff. They rely on him. The team gets along well together. In spite of a very tough situation in the market place (see different government policy), the spirit and motivation is high.	4
Personnel Development	As we mentioned, Geoff will continue to improve his coaching by having more flexibility and improving his verbal communication skills. At the D.M. conference, he will continue what he is doing now; be less impusive and more listening. Geoff has a strong personality, very well organized, lot of creativity and autonomy.	3

This evaluation, of course, is to be contrasted to the memo from Mr. Blair to Mr. Larin dated January 17, 1990, which is also set forth in full as follows:

> "From your recent memo dated January 16th and Etienne Attar's, I must admit that we have a very critical issue with Geoff Squires' behavior.
>
> We all know and agree that his lack of judgement, his lack of team vision, his rejection of our marketing and sales strategy have been discussed many times, verbally and in writing. More so, he doesn't have the respect and credibility from his D.M. peers, and, before Christmas, he was seriously criticized by some of his

representatives who do not trust him and perceive him as a 'boss' rather than a human and honest manager.

Our mutual patience has lasted for too many years. I do not believe that a plan of action will drastically change his behavior on a short term.

Consequently, I propose that Geoff Squires terminate his function and leave our company which does not deserve to be treated this way by a scatterbrain like him.

Awaiting your comments."

This memo was not given to the plaintiff. The allegations in the second paragraph were not substantiated.

Conclusion re Appraisals

The appraisals were prepared on an inconsistent basis. They do, however, favour the plaintiff. They cannot in any way be used as a grounds for dismissal or even part of a cumulative cause. Even those aspects of the appraisals which might be termed negative were not accompanied by any kind of a warning to the plaintiff. I reject the concept that these appraisals form any basis for dismissal.

(ii) **World Figure Skating Tickets**

During the latter part of 1989 the World Figure Skating Championships were being planned for Halifax. For the comfort of the participants there was to be a medical aid station. Ms. Nadine Wentzell was the chair of a committee to obtain pharmaceuticals for that facility. She contacted the defendant by approaching the plaintiff. She said in her evidence, and in a written complaint to Mr. Larin, that the plaintiff, upon being approached to supply free of charge a small supply of pharmaceuticals, said he would like to have a number of tickets

for the World Figure Skating event. She did not have tickets available and could not make them available. Some telephone calls passed between them. In the letter to Mr. Larin she said she "did not truly believe that the provision of the product was conditional to acquiring tickets". Subsequently, the plaintiff left a message for Ms. Wentzell to the effect that Ayerst would not supply complimentary products and that she could buy them at any drugstore in town.

The defendant has taken the position that the plaintiff was attempting to obtain a personal benefit. He, on the other hand, says that the purpose of his obtaining tickets was for use either for an incentive to his sales personnel or possibly for business promotion. The defendant also says that the plaintiff used bad judgment in refusing to give the product to Ms. Wentzell for the purpose enunciated by her.

Conclusion re World Figure Skating Tickets

I reject the inference that the plaintiff sought a personal benefit. There is no objective evidence to support such an allegation. The defendant's own witness indicated in her letter to them that she did not draw a direct connection between the request for tickets and the supplying of free product. In her evidence she said she had no idea what the plaintiff intended to do with the tickets. The evidence led by the defendant of the "scalping prices" of tickets being advertised in the Chronicle Herald, a Provincial Halifax newspaper, was nothing but innuendo, and I reject it. I also reject the suggestion that the plaintiff's refusal to supply the product was evidence of poor judgment. Mr. Campana made it clear that the decision to supply a free product to this particular event was certainly a matter of judgment only and one which should not be criticized. I also note that Mr. Larin told Ms. Wentzell

that the plaintiff's dismissal was not related to this incident. Further, even if the request for tickets was made, there were legitimate and acceptable reasons for it. The tickets might have been used for promotional purposes, a well-established practice within the defendant's method of operation.

(iii) Customer Relations

The defendant uncovered various incidents of poor customer relations. One such incident was described by Mark LeDuc. He described how on a particular occasion when the plaintiff was doing a sales call with Mr. LeDuc, they went to a customer near Moncton. Mr. LeDuc said that the plaintiff had taken back pharmaceutical goods, misleading the customer into thinking that a credit invoice would be given while knowing fully that no credit would be given. Mr. LeDuc said that Mr. Squires' attitude at the time was to the effect that the customer would forget about such a matter in any event.

Conclusion re LeDuc's Complaint

I heard both the evidence of Mark LeDuc and the plaintiff with respect to this matter and I accept the plaintiff's explanation of it. Mr. LeDuc was a relatively new employee at the time of the incident and may well have misinterpreted or misconstrued the import of the incident. At any rate, he certainly did not consider it worthwhile reporting at the time, or even drawing it to anyone's attention. The incident was simply one of several used by the defendant to attempt to justify its actions. One may readily conclude that the plaintiff made virtually thousands of sales calls with his representatives and if, out of those calls, the defendant was successful only in discovering those complaints brought before me, I conclude that the plaintiff was indeed a remarkably fine salesman.

(iv) Ducey's Complaint

Another such incident was related by Mr. Martin Ducey who was the sales representative of Newfoundland, excluding the City of Corner Brook and the west coast of Newfoundland. Mr. Ducey received in error a copy of an invoice to a pharmacy outside his jurisdiction and wrote a humorous but envious remark to the plaintiff concerning the volume of sales elsewhere of a particular drug. Mr. Ducey says the plaintiff wrote a misleading note at the bottom of the invoice and returned it to Mr. Ducey. He complained that the plaintiff had deliberately misled him.

Conclusion re Ducey Complaint

I accept the plaintiff's explanation of this incident. Even if the plaintiff did in fact mislead Mr. Ducey, the worst that could be said about the plaintiff is that he misled Mr. Ducey to make better sales by using some incorrect figures. Such an action should not be considered as part of a cumulative justification for dismissal. The defendant in its post-trial brief submitted that the plaintiff committed perjury in testifying to this incident. I very firmly reject that suggestion.

(v) Lois Fearon's A.P.M.R. Course

The defendant took exception to the plaintiff granting to Lois Fearon permission to defer taking a particular course. She was a sales representative who commenced her employment with the defendant on November 7, 1987. Company policy required that a certain course (the "APMR course") be taken by all sales representatives within the first three years of employment.

Ms. Fearon, when she was employed by the company, was taking a university course in business administration. The plaintiff discussed the matter with his superior and it had been agreed that Ms. Fearon would not be required to take the APMR course within the three years as it would interfere with her university course. When Ms. Fearon would ordinarily have been required to take the course, a memorandum was written to her indicating she should take the course, and to which the plaintiff took considerable exception. He wrote a strongly worded note to his superiors concerning the matter and the defendant has raised that note as an indication of his overall attitude and as an incident in the accumulated cause for dismissal.

Conclusion re Lois Fearon's A.P.M.R. Course

While the memorandum is somewhat intemperate in tone, there is no good reason why that should not have been. Clearly, the plaintiff had discussed this matter previously with his superiors and had obtained consent to do precisely what he had done. The plaintiff was expressing impatience and his disapproval of what had occurred. He was expressing it to Mr. Larin with whom he had had previous conversations. The memorandum was intended for Mr. Larin's eyes only. I do not find fault with it. The plaintiff had never been given any warning about the intemperate tone of it, although it is possible that Mr. Larin did object to it, but only mildly. It cannot be said at all that this memorandum formed any real part in the eventual dismissal of the plaintiff.

(vi) **Linda MacKenzie**

In further attempted justification of the defendant's position concerning the plaintiff's overall attitude, the defendant has produced certain memoranda drafted by the plaintiff concerning Linda MacKenzie, one of the sales representatives.

The defendant has indicated that the memoranda as drafted, and even as subsequently amended by the plaintiff, are clear indications of his lack of judgment.

Ms. Linda MacKenzie was a relatively new sales representative in 1989. She arranged for a symposium on menopause to be given in Yarmouth at which a guest doctor would be in attendance and would be a major speaker. This symposium was a joint effort with a competing pharmaceutical company. Ms. MacKenzie told of the efforts she made in putting on the symposium. She described how, during it, the plaintiff had acted, in her view, without sufficient decorum and at the end of the symposium and after the visiting doctor had been subjected to questioning by the public, the plaintiff had terminated the meeting in a rather rude manner. She then described how the plaintiff had driven her back to her hotel and was very critical of her efforts. She acknowledged that in the controversial memorandum of January 8, 1990, the plaintiff had given her full credit for putting on a particularly good show. The company takes the position, however, that the handling of this whole incident by the plaintiff was an example of his lack of judgment and poor management.

On the same trip to Yarmouth with Ms. MacKenzie the plaintiff went to a pharmacy with her. She said that during a particular call at a pharmacy at Aylesford she offered to take back certain merchandise from a pharmacist as it was outdated. In the presence of the pharmacist the plaintiff indicated that he would not authorize a credit for the outdated stock. She said that the pharmacist had become very upset and angry at the attitude and behavour of the plaintiff. She also said that the plaintiff had constantly undermined certain members of senior staff. She indicated that she had been disturbed by the controversial memorandum to the sales staff and had taken exception to it.

Conclusion re Linda MacKenzie

Linda MacKenzie was clearly a troublesome employee. When she gave evidence, she impressed me as one who has an extraordinarily aggressive personality - the same trait which will make her successful in sales. She is bright and articulate but is not a person who would take any personal criticism lightly. She struck me as one who would react negatively to constructive suggestions in that she would perceive them to be criticism. During the course of her examination and cross-examination, it appeared to me that Ms. MacKenzie had taken a strong dislike to the plaintiff. Her expression of that dislike would undoubtedly win the approval of Mr. Attar.

It was probably those same qualities of personality which the plaintiff was attempting to address in the memorandum which he sent to her. I concur in both his draft and the memorandum. They appear to be well justified. The memorandum cannot be truly given as a justification for the dismissal. I accept the evidence of the plaintiff concerning the Yarmouth symposium and the Aylesford incident. I reiterate that wherever his evidence differs with that of Ms. MacKenzie, I accept the plaintiff's evidence.

(vii) Montague, P.E.I.

The defendant led evidence of a sales call by the plaintiff with Lois Fearon at a pharmacy in Montague, P.E.I. The evidence indicated that the attitude and personality displayed by the plaintiff at the pharmacy so disturbed the pharmacist that he remarked to Ms. Fearon that he did not want to see the plaintiff again.

Conclusion re Montague, P.E.I.

The evidence concerning the poor relationship between the plaintiff and certain pharmacists, including the one in Montague, was singularly unimpressive. As I have noted above, the plaintiff undoubtedly made many sales calls and it would be nothing short of miraculous if during all those calls he had not offended some customers.

(viii) **LeDuc's Commissions**

Marc LeDuc also complained that he had been disappointed regarding the possibility of earning commissions on a certain sales volume of a particular drug in 1989. However, I concluded from his evidence, in combination with that of the plaintiff, that commission calculations were a head office function for which the plaintiff could not be held responsible.

(ix) Other evidence of a general nature concerning the plaintiff's attitude toward management and head office and other perceived indiscretions on the part of the plaintiff was led. I found them all unimpressive and did not convince me that the dismissal was justified. I also found it remarkable that certain key personnel of the defendant, such as Messrs. Blair and Wadman, did not give evidence.

Failure of Notice

By all objective criteria the plaintiff was doing well. The Company's continuing accolades to him indicated that. His performance reviews showed that. The defendant gave him

no notice of dissatisfaction with his performance. There had been a change of direction or emphasis within the Company, but no direction was given to him whereby he was put on notice that his method of operation was unacceptable. There may even have been employment offences committed by the plaintiff from time to time - especially as the rules changed - but he was never given adequate notice of them or given the opportunity to set matters right.

Near Cause

I have perused the cases dealing with "near cause" and in particular, **Smith v. Dawson Memorial Hospital et al** (1978), 29 N.S.R. (2d) 277; 45 A.P.R. 277, and **Morrell v. Grafton-Fraser Inc.** (1981), 44 N.S.R. (2d) 289; 83 A.P.R. 289 (T.D.); 51 N.S.R. (2d) 138; 102 A.P.R. 138 (C.A.). On the basis of my finding of fact herein, I do not feel that there were circumstances here to meet the near cause criteria.

Duty to Mitigate

It was my understanding in the course of the trial that the defendant had conceded that the plaintiff had made reasonable efforts to mitigate his damages. The matter, however, seems to have been raised in the post-trial memoranda.

I find that the plaintiff has taken all reasonable and necessary measures to mitigate his damages and has duly discharged his duty in this regard.

Damages

(a) **Length of Notice**

I refer to the case of **Bardal v. Globe & Mail Ltd.**, [1960] O.W.N. 253 at p.255; 24 D.L.R. (2d) 140 at p.145, for a general statement of the applicable law:

> " 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."

There are, however, lists of factors to be considered in determining the appropriate length of notice to which a dismissed employee is entitled. For the purposes of this action, I have considered the following enumerated subjects:

1. the availability of similar employment in this regard;

2. the plaintiff's relatively high corporate status for a person of his age;

3. the plaintiff's age, which is a factor reducing the period of notice herein;

4. the plaintiff's length of service with the defendant;

5. the plaintiff's loyalty to the defendant;

6. the marital and family status of the plaintiff;

7. the apparent contribution of the plaintiff to the defendant in terms of building business and in the performance of his job;

8. the degree of security of position which the plaintiff ought reasonably to have anticipated;

9. the plaintiff's relocation from his original home to his present residence in Nova Scotia;

10. there was no evidence to indicate that the nature of the defendant's business was such as would lead the plaintiff to anticipate mobility of employment;

11. the manner in which the plaintiff was dismissed;

12. lack of forewarning;

13. the accusation by the defendant that the plaintiff had, in effect, acted fraudulently to obtain a personal benefit, (although this is a factor which may more appropriately affect costs);

14. actions of the defendant taken subsequent to the dismissal in an apparent attempt to justify it.

In fixing the period of notice required in this case, I have kept in mind the various periods set in the following cases and the peculiar facts of each of these cases:

Shulman v. Xerox Canada Inc. (1986), 75 N.S.R. (2d) 7; 186 A.P.R. 7

MacEachern v. Nova Scotia (Attorney General) (1988), 83 N.S.R. (2d) 57, 210 A.P.R. 57

Burton v. MacMillan Bloedel, [1976] 4 W.W.R. 267

Allen v. Tandy Electronics Ltd., (1983) 2 C.C.E.L. 137

Bell v. Izaak Walton Killam Hospital for Children (1986), 74 N.S.R. (2d) 309, 180 A.P.R. 309

I have as well referred to the texts, Harris, **Wrongful Dismissal** and Levitt, **The Law of Dismissal in Canada.**

I find that the plaintiff was entitled to a period of notice of one year.

(b) Salary

I find that the plaintiff's basic annual salary previously paid by the defendant to the plaintiff was $54,000. I also find that he would in all likelihood have received an increase in salary effective January 1, 1991, of 5.9%.

(c) Commission

The plaintiff was undoubtedly enjoying a rapidly rising level of earnings in commissions. There was no reason to anticipate that his commissions would decrease in 1991 from the 1990 level. While it may or may not be correct that Mr. Blair's commissions in 1991 were below the level of the plaintiff's 1990 commissions, as the plaintiff's successor that would be expected, given the fact he was being asked to take over from the plaintiff. I consider that the plaintiff's commissions for twelve months from the defendant would have averaged $1,677.00 per month.

(d) **Benefits**

The plaintiff lost vacation benefits of two weeks, or $1,040.00 per week, totalling $2,080.

The personal benefit to the plaintiff for the use of the company vehicle, as evidenced by income tax returns, was $199.00 per month. This benefit was replaced after 4.6 months when the plaintiff once again acquired a company car from his new employer. This loss amounted to $927.00.

(e) **Job Search Expenses**

The claim for job search expenses put forward by the plaintiff was generally acceptable. I cannot accept, however, $795.50 as a reasonable cost for typing resumes and letters. It may well be that the plaintiff spent that amount of money but in doing so was guilty of "overkill". Similarly, 6118.75 km. for travel in a period of 4.6 months, during part of which the plaintiff accepted upgrading experiences, seems guite heavy. The defendant has objected to the use of government rates for calculating that cost. I find the approach is reasonable, but I reduce both the typing and mileage costs by fifty percent, or $1,346.15. The job finding costs are therefore approved in the amount of $2,000.00.

(f) **Pre-Judgment Interest**

I fix the pre-judgment interest rate at 10%.

(g) **Pensions**

I make no ruling in the matter of pensions but I retain my jurisdiction herein. If the parties are unable to

reach agreement on necessary calculations or any other matter respecting pensions, I will hear them.

(h) **Insurance**

I fix the amount of the insurance benefits loss at $390.00.

(i) **Stock Options**

Similarly to the matter of pensions, I retain jurisdiction with respect to the value and calculation of stock options. Should the parties be unable to conclude this matter, I will hear them.

(j) **Conclusion re damages**

I calculate the damages suffered by the plaintiff as a result of his wrongful dismissal as follows:

Loss of Salary at $54,000 for one year for 4.66 months	$20,970	
Salary difference for 7.34 months at $750 per month	5,505	
Salary Increase	265	
Lost Commissions	20,124	
Vacation Benefit	2,080	
Car Allowance	927	
Insurance Premiums	390	
Job Search Expenses	2,000	
		$52,261

Less Mitigation		
Employment income	1,950	
Commissions earned or estimated	3,493	5,443
LOSS:		**$46,818**

Pre-Judgment Interest

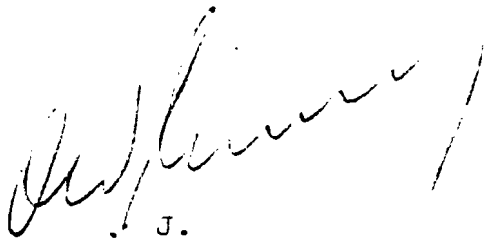
I fix pre-judgment interest at 10% per annum. As the plaintiff was entitled to notice, and not necessarily salary in advance, interest on the full sum shall commence April 2, 1990.

Stock Options

The parties have agreed that I need not deal with the calculation of damages under this head, but have requested that I retain jurisdiction to deal with any dispute that may arise with respect to this matter. I do so.

Costs

I award costs to the plaintiff. I retain jurisdiction in this matter as well, in the event the parties cannot reach agreement on the appropriate scale or with reference to disbursements.



J.

Halifax, Nova Scotia
June 28, 1991