Claim No: 350100

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Cite as: Giamac Inc. v. Semipixel, 2012 NSSM 46

BETWEEN:

GIAMAC INC.

Claimant

- and -

JUSTIN SAMPSON, c.o.b. as Semipixel

Defendant

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Dartmouth, Nova Scotia on July 3, 2012

Decision rendered on August 8, 2012

APPEARANCES

For the Claimant Eliza Maynes, counsel

For the Defendant self-represented

BY THE COURT:

[1] The Claimant is a company owned and operated by Mr. Gerry Giovannetti, based in Bedford, Nova Scotia. Its main business is arranging for the shipping of vehicles by rail, across Canada and the U.S.

[2] The Defendant, Justin Sampson, was hired by the Claimant in about 2007, to help develop and operate a computer system to handle incoming inquiries and provide quotes for service to customers. This was at a time when the business was starting to advance beyond the previous methods which relied more on faxes and emails.

[3] The Defendant started as an independent contractor, using a proprietorship name (Semipixel) - which explains it being named in the style of cause - but switched to an employment relationship partway through, which is what it remained until the end in about September 2009.

[4] The gist of this claim is an allegation that, upon leaving his employment, the Defendant failed to leave behind adequate instructions (in the form of a manual or tutorial) so that someone else could service and operate the system. The Claimant alleges that it lost significant business, and claims damages at the maximum allowed by this court, namely $25,000.00.

The Facts

[5] The Defendant is a young man who is now 25 years old, and who would have been 20 or at most 21 when he started working part-time for the Claimant

while enrolled in school working on a business degree. Although he had no formal credentials as a computer programmer, he was clearly very knowledgeable about computers and was helping to put himself through school as a freelance web designer and all-around computer handyman. His part-time employment with the Claimant lasted somewhere between two and three years, and ended when he graduated in about September 2009. He stated that toward the end, he was performing almost full-time hours. He was paid on an hourly basis, which was never pinned down precisely in the evidence but was in the area of $15.00 to $18.00, according to Mr. Giovannetti.

[6] According to the Defendant's evidence, which I accept and which was not really denied by Mr. Giovannetti, the Defendant did not have any job description but rather worked on things as directed by Mr. Giovannetti. At any given time he might be fixing a computer in the office, dealing with network issues, occasionally running deliveries or doing other errands, and even cleaning the office. The task which took up most of his time was adapting the existing computer system to handle quotes and such. He was clear in his evidence that he did not create the program, but only worked on it by trying to add functionality that was either lacking or inadequate.

[7] When it came time to leave his employment in order to take on full-time work as an accountant (for which he had just trained and qualified), the Defendant made a verbal offer to Mr. Giovannetti to help out in the event anything arose in the future. On all of the evidence, I find that this was basically the type of courtesy that most employees would offer to their employer upon leaving, with the expectation that it would be sparingly called upon, if at all.

[8] What the Defendant did not anticipate was that the Claimant would not hire a replacement employee who would pick up the threads and discover fairly early on what, if anything, he might need from his predecessor in order to keep the system running. Instead, months went by and suddenly the system went down, causing Mr. Giovannetti to call the Defendant and seek his help. It appears that the rather desperate situation caused Mr. Giovannetti to become very persistent and demanding of the Defendant, which led to bad feelings and resulted in the Defendant essentially refusing to remain involved.

[9] Mr. Giovannetti stated that what he lacked from the Defendant was a job description and a tutorial, which would have enabled him to hire a replacement and put such person in a position to take over seamlessly. It is essentially the Defendant’s failure to do these things that is the basis of the claim that he breached his contract.

[10] The Defendant says that he was never directly asked to create a job description, bearing in mind that he did not have one himself. He also insists that he was never specifically instructed to write any form of tutorial.

[11] According to Mr. Giovannetti it was in or about January 2010 that the system started to fail, and it was not restored to full functionality until August 2010. According to Mr. Giovannetti, during that seven month period the company lost as much as $700,000 worth of revenue because it was unable properly to handle quotes and referrals from the website www.moveit.ca, which is a significant source of the Claimant’s business.

[12] Mr. Giovannetti also claimed that the Defendant was withholding passwords and other information that prevented him from having the computer system repaired and modified.

[13] Mr. Giovannetti conceded that he did not replace the Defendant after he left, but occasionally had unpaid interns from the Nova Scotia Community College and also eventually had consultants in to troubleshoot problems. One of those individuals was Jason Betts, who testified at the hearing.

[14] Mr. Betts testified that systems such as that being used by the Claimant will inevitably develop significant problems perhaps as frequently as every two months. He stated that he was able to get the system operating properly. He also stated that best practice is for programmers (such as the Defendant) to leave behind comments when they make changes to script files, and to leave behind other documentation when they develop new software. He stated that it would have helped him greatly had the Defendant left information behind before he left the Claimant’s employ.

[15] Under cross-examination, Mr. Betts conceded that it only took him a few hours to get a quick fix fashioned to get the system back up and running.

[16] The Defendant explained that it was not he who developed the software that was being used, so he felt no obligation to write any form of manual. He also testified that it was never mentioned while he was employed that he should be creating any form of documentation. It was not until after he left that Mr. Giovannetti started asking for information, and it was only after Mr. Giovannetti agreed to pay him for his time that he did as he was asked.

[17] The Defendant testified that anyone with a basic understanding of computer programming could have taken over the system, understood how it worked, and been able to fix any problems. He does not believe that it would have been cost-effective for him to have left behind detailed notes, and moreover the Claimant never paid him to do that. Also, such notes would have become outdated and useless very quickly as the system was constantly being changed. He also denied taking any passwords with him that were not known to Mr. Giovannetti.

[18] He testified that he took direction from Mr. Giovannetti who would come to him with ideas he wanted implemented or projects he wanted worked on, and that he had no mandate to do anything else.

[19] The Defendant testified that he did answer questions for a time after he left his employment, but that he balked when Mr. Giovannetti started to get persistent with multiple phone calls and emails, which he found to be harassing in nature. Moreover, he believed that Mr. Giovannetti ought to have hired someone to work on his IT needs rather than trying to extract ongoing support from him, a former employee, who was not being paid for such assistance.

Discussion

[20] The case could only succeed if it were found that the Defendant had either breached his contract, or had been so negligent in the performance of his duties that damage ensued.

[21] The law has always been careful not to place too high a burden on an employee. The contract of employment is different from most commercial contracts. It is expected that employees may make mistakes, and employers accept this as part of the cost of doing business. It would place a great chill on the employment relationship if an employee, who is perhaps not all that well paid, can be held liable in damages simply because he or she did something, or failed to do something, that costs the employer money.

[22] This was recognized as far back as 1922 in the leading case of *Pearson v. Black* [1922] O.W.N. 20. (Ont. H.C.), where Middleton J. (as he then was) stated in response to a damage claim by an orchard against its former manager:

> "It is not always easy to define the degree of misconduct or lack of skill which will justify dismissal. *Baster v. London & County Printing Works* [1899] 1 Q.B. 901, carries the law in the master's favour beyond the earlier cases. More must be shewn to justify an action by the master against the servant than to justify a dismissal. Mere lack of skill, in the sense that another and more skilful person might have done better, falls short of what is required. A somewhat similar standard to that adopted in actions against professional men should be applied."

[23] Put another way, *Pearson* holds that the action against an employee will resemble professional negligence, and the seriousness of the misconduct ought to be even greater than the type of misconduct that would justify summary termination. The extent of the duty owed by the employee will also depend on the degree of skill he or she professes. Thus a full-blown professional (such as a doctor or engineer) will be held to a higher standard than a technical or clerical employee. This is explained by the fact that the employer has a right to expect greater performance from the former than from the latter, and contracts are nothing more or less than the exchange of duties and expectations.

[24] Applying this standard, one would ask whether the Defendant professed such skill that he should be held to a high standard of performance. The next question is whether the Defendant's (alleged) failings would have been sufficient to justify his termination from employment, and even more so.

[25] On the facts of this case, I would have a hard time concluding that the Defendant undertook such a high degree of responsibility, or that he did anything that would have justified disciplinary action.

[26] Put another way, I do not agree that it was ever within the contemplation of the parties that this part-time hourly employee, a student in his early 20's, was assuming responsibility for the ongoing workings of the Claimant's computer system - not only during his employment but for weeks and months after he left employment. To the contrary, I find that his employment responsibility was to carry out the directions of Mr. Giovannetti to the best of his ability, and I see no basis in the facts to find that he failed to do so.

[27] Even if I were wrong on this point, the Claimant failed utterly to mitigate his damages. It is hard to understand why Mr. Giovannetti would have failed to hire someone else to take over the computer system almost immediately, given how important it was to the business. Instead, he allowed time to slip by while he took advantage of the Defendant's courtesy offer to "assist" and sought out the help of unpaid interns from the Community College, and only much later brought in a consultant to get the system up and running. I am satisfied, on all of the evidence, that the Claimant could have avoided all, or almost all, of the disruption to his business had he taken proper care of his system by hiring

someone to look after it. He or she could have contacted the Defendant, if questions arose, and the problems could all have been avoided.

[28] In summary, I do not find it credible to place blame on the Defendant for having created the problem. I do not find him to have been negligent or to have breached his contract of employment in an actionable sense. I further find that any damages could have been avoided by the Claimant (i.e. Mr. Giovannetti) , who instead appears to have procrastinated and tried to fix his problems cheaply. In the end, he is entirely the author of his company's own misfortune.

[29] As such, the claim should be dismissed.

Eric K. Slone, Adjudicator