

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Citation: *Pinet v. 3D Datacomm Inc.*, 2018 NSSM 80

Claim No: SCCH 471153

BETWEEN:

MARC PINET

Claimant

-and –

3D DATACOMM INC.

Defendant

Owen Bland appeared for the Claimant, Marc Pinet.

Mike Milburn appeared for the Defendant, 3D Datacomm Inc.

Editorial Note: The electronic version of this judgment has been edited for grammar, punctuation and like errors, and addresses and phone numbers have been removed.

DECISION

(1) This is a claim for wages and commission arising from the termination of the Claimant's employment by the Defendant, 3D Datacomm Inc. ("3D") after a term of employment of only seven months. There have been some expressions of disappointment in Mr. Pinet's sales numbers, however, just cause has not been proven. He was paid one week's pay on his termination. He is seeking a higher sum.

(2) The issue is straightforward, namely if the Defendant provided the Claimant adequate notice or payment in lieu. The facts are not seriously disputed.

The Facts

(3) Marc Pinet worked for 3D from October 26, 2016 until he was let go by the Defendant on May 26, 2017, a total of seven months. He was employed as a sales representative selling the products of the Defendant, primarily "Smart Boards". His compensation consisted of salary and commission.

(4) Mr. Pinet testified that he was contacted by Tracey Cowie of Venor regarding a position in the tech sector. She advised him to contact Mr. Wade Yeo at 3D if he was interested. He was told the company was based in Dartmouth but operated out of Fredericton, New Brunswick. His starting salary was \$55,000 per year plus car allowance and commission. There is disagreement as to how the commission structure

worked. He decided to accept the position because he wanted a change and this job “made sense”.

(5) Prior to working for the Defendant, Mr. Pinet held various jobs in Halifax. He had worked after his graduation with Freedom 55 Financial. He spent a brief time with Rosas Cantina and CSIS. Before this job, he worked for nine and a half years for G & K Services selling and renting flame retardant clothing. In his final position, he was earning approximately \$70,000 year inclusive of commissions and benefits.

(6) He was placed on a 90 day probationary term commencing on October 26, 2016. He was to get trained by way of online training courses. He felt confident he could earn \$1,500,000 in sales to earn income at a level he wanted and meet his targets.

(7) While working at 3D, Mr. Pinet’s territory was a portion of Nova Scotia. He was provided a list of clients he was to serve and a list of prospects. He would meet each week with Mike Pope to discuss his sales figures. He was told it would take approximately 9 to 12 months for effective sales numbers to occur. It took the same amount of time for many sales to become finalized.

(8) Mr. Pinet described himself as part of a three person team. His supervisor, Wade Yeo had been let go on December 6. He testified there was little guidance or feedback and that which he was receiving was positive.

(9) He met with Mike Milburn on March 2, 2017. He was told the goal would be increased to \$2.4 million. Mr. Pinet described what he understood to be a track record of other sales personnel taking approximately 3 years to get to that level. He discussed a number of specific accounts where he is claiming commission for sales of Smart Boards, including Admiral Insurance and L’Arche Homefires.

(10) He testified about the L’Arche Homefires account, Mr. Milburn made tweaks to the proposal. The Smart Board was installed in June 2017 even though the sales terms were finalized in March.

(11) He testified that despite his efforts on the accounts he had not been paid commissions. Mr. Milburn’s reply during their meeting was that he had not sold anything yet. He requested details on commission structure in effect and was referred to John Warrington. On May 26, 2017, he was advised he was being let go as “it was not working out”. He tendered into evidence a letter dated April 3, 2017 indicating he would be classed as AE1 if the numbers did not increase. He was not happy to sign the letter. They met several more times in April. There is no evidence of what “AE1” means, but it is clear Mr. Pinet did not think he was getting terminated.

(12) Mr. Pinet testified that he was 38 when he was terminated. He was advised 3D was only required to pay him one week’s pay as severance. He is now working at Assante Capital Management in Halifax.

(13) He was required to get training through Cisco Systems. It was not done so he did not get correct information for the accreditation. He had worked for his previous employer for nine years and five months. He described a number of other partial successes. He feels that he was not given enough time to do the job and build a clientele.

(14) Under cross-examination, he testified that the L'Arche Home Fires account was already existing. However, he updated the quote as the result of his efforts. He did six joint calls with several others. He acknowledged he was not working for 3D when the deals closed and the clients took delivery of the products in the L'Arche or Admiral Insurance deals.

(15) Michael Milburn is the President of 3D. He opened his evidence indicating he wanted the job to work out. He estimates there are approximately 30 to 35 employees working for the Defendant. He described having met Mr. Pinet through a referral arranged by Venor. He was told Mr. Pinet was looking for a new job. It was necessary to train him to ensure the products and manufacturers' expectations were understood by the sales and service team.

(16) On March 20, Mr. Milburn sent Mr. Pinet a review of the account base. There was a listing of 140 to 150 prospective accounts. He was expected to contact clients to see what service was required and if there were any additional needs. He would be paid based on paid invoices. According to Mr. Milburn, Mr. Pinet's sales totals for May 2017 were \$1311 while the company average was \$8000 or more. The average number of quotes by the sales staff was 60 while Mr. Pinet had 12. A decision was made to reduce staff, terminate his position and start fresh. They provided one week's notice.

(17) Under cross-examination, he acknowledged the other Nova Scotia salesperson, Mike Schultz, had been working with 3D since 2007. He acknowledges that Mr. Schultz and the others would have higher results given their respective experience. Mr. Pinet's experience was the lowest of all of them. He disagrees that work performed by Mr. Pinet resulted in the deals for which he received commissions. Instead, the closings occurred after he left. He indicated he implied Mr. Pinet would be terminated if the sales numbers did not go up. He was not aware Mr. Yeo and Mr. Pope had given Mr. Pinet positive feedback. He described his work with L'Arche Home Fires and Admiral as part of the job. Mr. Milburn confirmed Mr. Yeo was terminated due to low sales numbers and Mr. Schultz now works for competitor. Mr. Pinet has been replaced by Shawn MacDonald.

(18) He described the commission as paid on a "revolving profitability matrix". Mr. Pinet would have been paid 16% commission. This was not communicated to him. He believes Mr. Pinet would have this information. He was not given the extra time to complete the largest sale in July. He was not aware that Mr. Pinet had been approached as he was not personally involved in the search or hiring

(19) In rebuttal evidence, Mr. Pinet testified that Venor made first contact. He undertook the larger number of training courses to be knowledgeable in front of the clients. He denies ever receiving a commission statement.

The Law

(20) The law in Nova Scotia relating to wrongful dismissal has been considered in a number of cases. I had occasion to address this issue and summarize the law in *Costa v. Electec Engineering Inc.*, 2015 NSSM 1 (affirmed 2015 NSSC 130). The cases cited in that decision are binding on this court, even though Small Claims Court decisions are not in and of themselves binding.

“It is well settled that on termination, the terminated employee is entitled to reasonable notice or payment *in lieu* of notice. The issue of what constitutes reasonable notice has received extensive judicial consideration in Canada. The leading case on the point is *Bardal v. Globe & Mail Ltd.*, [1960] O.J. 149 (HC), where Chief Justice McRuer stated the following:

“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.”

This case has been cited and applied with approval by many courts in Canada, including the Supreme Court of Canada in *Wallace (supra)* and by our Court of Appeal, in *Bureau v. KPMG Quality Registrar Inc.*, 1999 NSCA 1479 and subsequent cases. I hasten to add that the law today is simply known as “employment law”, rather than the archaic term, “master-servant”.

In awarding damages for wrongful dismissal, it is important to note that the dismissal of an employee is not in and of itself, grounds for a cause of action. It is the period of reasonable notice which is required based on the application of the *Bardal* factors and, while not applicable in this case, the basis for *Wallace* damages.

Some cases and authors discuss “a rule of thumb” in damages for wrongful dismissal as one month’s notice or pay in lieu for each year of employment. The cases have been quick to point out that this is not a legal standard and emphasize that the award is based on the facts in each case. I have reviewed the various summaries of awards reviewed by the leading Canadian works, namely, David M. Harris, *Wrongful Dismissal* and H. Levitt, *The Law of Dismissal in Canada* (3rd Edition), for guidance. In addition, I reviewed the impressive work of my colleague, Michael J. O’Hara, in his compilation of wrongful dismissal damage awards in Nova Scotia found on the website of the Nova Scotia Barristers’ Library....

The Defendant has submitted several times that the required amount of notice is based on the time lines set out in the *Labour Standards Code*.

I recently had occasion to address this issue in another wrongful dismissal case, namely, *MacKenzie v. AMEC Environment & Infrastructure Ltd.*, 2014 NSSM 34:

“The *Labour Standards Code*, R.S.N.S. 1989, c. 246, as am., provides a legislatively prescribed means of addressing employment issues. It is considered a minimum standard and has been accorded curial deference when a party has elected to pursue a remedy both in common law and under the *Code* (*Fredericks v. 2753014 Canada Inc.*, 2008 NSSC 377). However, unlike some provinces, the Code does not oust the jurisdiction of the Court. Rather, it gives an affected party a choice of forum...
...Justice Duncan reviewed the doctrine of curial deference and stated the following regarding the awarding of damages for wrongful dismissal:

“Does the *Code* provide effective redress for wrongful dismissal?....

To restate it in the current context, a claim for wrongful dismissal does not attract effective redress under the *Labour Standards Code*. It provides a statutory minimum. Section 6 of the *Code* preserves to the plaintiff the

more favourable benefit or rights in the common law that a court may find, and which are not otherwise available.” (underscoring mine)

(21) In other words, it is necessary to consider the circumstances surrounding the Claimant and his dismissal in light of the *Bardal* factors. In doing so, this court is not bound by amounts stipulated in the *Labour Standards Code*.

(22) Furthermore, it is necessary to consider whether there were grounds for dismissal or just cause and if the Claimant was induced to accept the position. For the reasons stated below, I have found the answers to both questions to be in the negative.

Just Cause

(23) In cases of wrongful dismissal, the onus is on the employer to prove on a balance of probabilities the employee was dismissed for just cause.

(24) Counsel for the Claimant has submitted a number of cases dealing with what constitutes just cause. I find the decision of Justice Davison in *Brown v. Sears Limited*, 1998 NSSC 153, to be the most applicable. His Lordship stated the following:

“I accept the submissions on behalf of the defence to the effect 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.”

(25) The other cases deal with the issue of incompetence. In his evidence, Mr. Milburn stated he did not find Mr. Pinet to be incompetent, merely, that he did not meet the sales objectives set out for him. I do not find the evidence establishes incompetence on Mr. Pinet’s part.

(26) It is true Mr. Pinet did not meet the targets for closed business in the short time he was employed by the Defendant. His training was complete in November. It is not appropriate to compare his targets with those of more experience. He has been in sales before. His failure to perform those standards were mitigated by positive feedback on the part of his two superiors, Mr. Yeo and Mr. Pope. Those responsible for training him were either let go or resigned. Up until then, he believed he was doing fine. There does not appear to have been any additional efforts made to keep him on track until April 3 when he was told there were concerns with his sales numbers. More importantly, he was not told clearly if he failed to fulfill those obligations in the next two months, his position would be terminated.

(27) In the end, this was a poor fit. Mr. Pinet was just getting started in his position. His employer was in a difficult financial and staffing position. 3D wanted more production in a shorter time from its staff but not getting it. For all intents and purposes, the job changed and Mr. Pinet was not ready for those changes. I find there was no evidence of just cause.

Inducement

(28) The notion of inducement is set out in the cases as recognition for the proposition that if one is induced to accept a position by leaving an otherwise secure position, damages for wrongful dismissal may be increased upon termination without cause.

(29) A recent statement on that was provided by Justice James L. Chipman in *Reiner v. Maritime Business College (2009) Ltd*, 2016 NSSC 291:

[39] The Supreme Court of Canada recognized in *Wallace* that inducement to leave secure employment is a factor which will tend to extend the reasonable notice period as a means of protecting the employee's reliance and expectations, with Justice Iacobucci stating at paras. 83 and 85:

... [M]any courts have sought to compensate the reliance and expectation interests of terminated employees by increasing the period of reasonable notice where the employer has induced the employee to "quit a secure, well-paying job . . . on the strength of promises of career advancement and greater responsibility, security and compensation with the new organization" (I. Christie et al., *supra*, at p. 623)...

...In my opinion, such inducements are properly included among the considerations which tend to lengthen the amount of notice required. I concur with the comments of Christie et al., *supra*, and recognize that there is a need to safeguard the employee's reliance and expectation interests in inducement situations. I note, however, that not all inducements will carry equal weight when determining the appropriate period of notice. The significance of the inducement in question will vary with the circumstances of the particular case and its effect, if any, on the notice period is a matter best left to the discretion of the trial judge.

[40] Howard A. Levitt in *The Law of Dismissal in Canada* writes with regard to the inducement factor:

The fact that an employer induced an employee to leave a secure, well-paying position which is no longer available to join that employer will increase the notice period. The rationale for this is that the employee would not have left a secure job if there had not been an implied agreement of reasonable job security with the new employer...

Inducement is a continuum, a composite of factors, between being unemployed and anxious for work in one extreme to being securely and happily employed, not desiring to leave, and then being approached with a series of progressively higher offers and promises in the other. How close the situation is to the latter will determine to what extent the person was "induced".

[41] Inducement requires previous secure employment. I have found that Dr. Reiner has not established that she in fact had previous secure employment. Accordingly, it is my further determination that the inducement factor is not a relevant consideration with respect to the Applicant.

[42] I would add there is no evidence on the Application to support a finding of inducement. Courts have recognized that an inducement must go beyond the ordinary level of persuasion (see *Firalti v. Kohler Ltd.*, [2008] O.J. No. 2763 (Ont. Sup. Ct.) at para. 25). In *McCulloch v. IPlatform Inc.*, [2004] O.J. No. 5237 (Ont. Sup. Ct.), Justice Echlin said:

[23] Whenever an employee quits one job and moves to another, it can be argued that an allurements/enticement has taken place....

[25] If employees were not interested in moving, they would not even give the recruiter or new employer the time of day.

[26] Should every move from one employer to another represent potential exposure to the new employer for prior service? The clear and unquestionable answer is "no".

[Emphasis added]

(30) In applying these principles to the circumstances of this case, I find the Claimant was previously employed for a fairly extensive period of time, almost nine and a half years. However, I am not satisfied the level of persuasion used by 3D was sufficient to constitute inducement. First of all, he accepted what was essentially a lower paying job (\$55,000 vs. \$70,000). Mr. Pinet is educated, having obtained a Bachelor of Commerce degree from Dalhousie University. On the witness stand, he has a demeanor of an experienced professional. Significantly, there is nothing in his work history to suggest he would be pursued to the degree near the end of the continuum referred to in the cases. One might expect that level of inducement if Mr. Pinet had a work history of selling technology products to the same degree as industrial clothing or financial products (Mr. Pinet's previous experience). Thus, there is ample evidence to suggest it reasonable to expect him to be approached and give a good impression to a prospective employer. Without further evidence, I am unable to find he was induced beyond the ordinary level of persuasion one uses for a new employee.

Period of Notice – *Bardal* Factors

(31) Having found the Claimant has been terminated without just cause, it is necessary to determine if the amount paid, one week, is sufficient payment in lieu. For the reasons set out below, I find it is not. As noted above, I will not augment the award for any finding of inducements or bad faith.

Character of the Employment

(32) The employment is sales and service of technological products offered by the Defendant's suppliers. There is ongoing training in the features of the various products and services. That necessarily means having the aptitude for learning that work

Length of Service

(33) It is not disputed that the length of service in this instance was quite short, seven months. The longer the duration, the longer is anticipated the award for service.

Age

(34) At the time of his dismissal, the Claimant was 38 years old. He has found other employment working in a different industry.

Availability of Similar Employment

(35) It is not clear there is similar employment available for Mr. Pinet. Furthermore, there is no evidence that he can or wants to pursue the sale of flame retardant clothes or similar products as he did prior to taking this position. He is currently employed in the financial industry. He is certainly capable of retraining and moving forward.

(36) Mr. Bland has proposed that I award Mr. Pinet wages of five months, namely the length of time it took him to find other employment. Had I found there to have been an inducement to take the position I may have considered something closer to that length. I note from the cases that I am not bound by the so-called rule of thumb of one month for every year of service. However, I find this a useful guideline. I find the damage award was not adequate. I find the Claimant ought to have been given three weeks' notice or payment in lieu. He has already received one week's notice. Based on the Record of Employment in evidence, he has paid \$1204.62 for one week. I find he is entitled to receive an additional \$2409.24 plus vacation pay of 4%, or \$96.37 for a total of \$2505.61.

Commission

(37) Frankly, the evidence for the commission payable is difficult to follow and not overly helpful. The scales differ depending upon who is making the claim. I find Mr. Pinet was instrumental in the success of the Admiral Insurance and L'Arche Home Fires accounts. However, I find he was not present for the entire sale. It is just to pay him for his time and efforts. I am not satisfied with the calculations presented by the Claimant. There is no evidence commission does not accrue and become payable after termination. I award \$1000 under this heading.

Prejudgment Interest

(38) The Claimant shall have prejudgment interest on the amount of wages (from May 26) and commission payable (from July 2017). I set the amount payable at 2% for both figures and award \$70.11.

Costs

(39) The Claimant shall have his costs of \$250.00 representing \$199.35 filing fees and service fees.

Summary

(40) In summary, I find for the Claimant and award the following:

Lost wages/Commissions:	\$3505.61
General Damages:	\$ 100.00
Prejudgment Interest:	\$ 70.11
Costs:	<u>\$ 250.00</u>
Total	\$3925.72

(41) An order shall issue accordingly.

Dated at Halifax, NS,
on April 12, 2018;

Gregg W. Knudsen, Adjudicator

Original: Court File
Copy: Claimant (s)
Copy: Defendant(s)