1989 CarswellOnt 3273
Ontario District Court

MacDonald v. Northern Breweries Ltd.

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John Richard MacDonald, Plaintiff and Northern Breweries Ltd., Defendant

FitzGerald D.C.J.

Judgment: December 13, 1989
Docket: Algoma 4798/88

Proceedings: Additional reasons, (December 13, 1989), Doc. Algoma 4798/88 (Ont. Dist. Ct.)

Counsel: George W. Priddle, Esq. for Plaintiff.
Francis A. Donnelly, Esq. for Defendant.

Subject: Employment; Public
Headnote
Employment law

***FitzGerald D.C.J.*:**

I. The Issue:

1 The plaintiff claims damages for wrongful dismissal. The defendant corporation pleads just cause: said cause being that the plaintiff by his own act, in violation of company policy rendered himself incapable of adequate performance of his contract of employment thereby justifying immediate dismissal without notice.

II. The Facts:

A. Conditions of Employment

2 The plaintiff is a 42 year old man who is married with one child. After an initial three to four year of period of employment at Algoma Steel at labour and as a crane operator his career has been that of a salesman selling snowmobiles and automobiles. He was so employed when in March 1977 he heard of, applied for and was hired as a beer salesman for the defendant Northern Breweries. The job offered better pay than his then current employment.

3 The plaintiff was told by the Vice-President and the General Manager that it was a tough job, being to promote the company products seven days a week, 24 hours a day. In practice the job consisted of visiting and getting to know the liquor licensees in the City of Sault Ste. Marie and a large surrounding area requiring the use of a motor vehicle. At such licensee visits it was the plaintiff's job to sit down with the customers and promote consumption of the defendant's products, particularly draft and bottled beer. While the defendant had a monopoly on draft beer the plaintiff's job was to wean the younger crowd from competing bottled beer to the defendant's draft beer and of course to promote its bottle beer as well. It was conceded by his immediate superior Charbonneau and by management generally that this involved consuming beer with the customers and that this was the accepted method of pushing the product. It was not denied that officers of the defendant company stated to the plaintiff that it was difficult to get others to drink if you didn't do it yourself. As part of his employment the plaintiff was expected to visit at least two or three licensed establishments per day and to drink with the customers. He was given a "float" of money to buy drinks of company products for customers and a car to get him from one establishment to another. His expense account was

around $450.00 per week. His immediate superior Charbonneau, and indeed all senior officers of the company were well aware that to effectively carry out his employment he was required to drink and drive.

4 In addition to licensee visits the plaintiff was required to monitor upcoming events such as concerts, weddings, anniversaries and special events and to contact the sponsors to assist them in obtaining banquet permits, setting up the beer service, stocking the bars, etc. in the hope that the sponsor would buy the company's product. A lot of this work would be done on Saturdays and occasionally on Sundays. All these activities were demonstrated to him by company personnel when he took the job in 1977.

B. Performance of the Employment Contract

5 The plaintiff faithfully and diligently carried out his duties until his summary dismissal on June 26, 1987; a period of just over ten years.

6 During that period the plaintiff was never reprimanded disciplined, warned or even directed in the performance of his duties. Despite the fact that Charbonneau, his sales manager, did not like him personally I conclude that the defendant company was completely satisfied with his performance. Even Charbonneau conceded that his discharge would "leave a gap" in the sales structure.

C. Alleged Breach of Contract

7 On June 10th, 1986, the plaintiff, in the course of his employment, attended at a local hotel to wait for a customer for whom he was to fill out forms for a banquet permit. As usual, while waiting he drank with the customers and promoted Northern Brewery products. As it turned out the customer failed to show. The plaintiff finally decided to go home, and, believing himself to be capable of driving, did so. Unfortunately for him, he was involved in a collision and was charged with having more than .08 alcohol in his blood and with impaired driving. His breathalyzer reading was 2.0. The company continued the plaintiff in its employment without any change including use of a company car until June 26th, 1987, the day following his plea of guilty to and conviction of impaired driving wherein he received a three month mandatory suspension of driving license with the probability of a further nine month suspension by the Registrar of Motor Vehicles.

D. The Company Reaction

8 On the day following his arrest the plaintiff reported to Charbonneau, a habitual notetaker, whose original notes are now Exhibit 10. Mr. Charbonneau noted that the plaintiff "was aware of the repercussions and was doing everything possible to keep his job" and "indicating he has the following to drive him:

> Mother - 2 days
>
> Nichols - 1 day
>
> Enzo - 1 day
>
> (unknown) - 1 day".

9 Mr. Charbonneau also noted that the plaintiff was to pay for damage to the automobile. No other notes were produced for the ensuing period ending with the dismissal of the plaintiff on June 26, 1987.

10 On that day the plaintiff had been working all morning loading a truck for an event to take place in Iron Bridge that evening under the impression that he would get a lift there in the truck. Instead, about 12:30 p.m., the plaintiff was called in by Charbonneau and handed Exhibit 1 which is a masterpiece of obfuscation. The essential portion reads:

> The court's finding and the penalty imposed confirm an unacceptable performance of your employment duties and inability in the future to perform a necessary task of your duties.

11 With the assistance of the cross-examination of Charbonneau I conclude that this was intended to mean:

You were in breach of your contract of employment by driving while impaired and since the result is suspension of your license for 3 months (and possibly for 12) you are unable to drive yourself about which is a necessary part of your contract of employment, hence your employment is terminated.

12 In fact, Charbonneau concedes, it was not because the plaintiff was driving after consuming alcohol or even the fact that he was impaired by such consumptio that led to his dismissal; it was the single, salient fact that he did not have a license to drive. Charbonneau even went so far as to admit that if the plaintiff had not lost his license he would not have been fired.

13 I therefore find that the employer's true reason for the dismissal of the plaintiff, as clarified by the evidence at trial, was the one single fact that for a period of 3 months certain and an additional 9 months probable, the plaintiff would not have a license to drive.

III. Questions to be Addressed

14 Two questions need to be canvassed in deciding whether, in all the circumstances, this constituted just cause for dismissal without notice, namely:

1. Was the stated reason the only or the real reason for the action taken?, and

2. Having regard to the policy and conduct of the company was the deficiency complained of sufficiently damaging to the company to justify the extreme penalty of dismissal without notice?

IV. The Defendant's Argument

15 In argument counsel for the company took the following positions:

1. That despite the nature of the employee's duties, company policy provided that while it was necessary for the plaintiff to drink and drive in furtherance of his employment no employee was permitted to drive while impaired. That even a single breach of that policy was just cause for immediate dismissal

2. That company policy dictated that if a sales employee thereby lost his license he would be dismissed.

3. That it would be premature for the company to discharge, or even to discipline the plaintiff immediately following the accident, although it knew the breathalyzer reading made conviction a virtual certainty, until a conviction was registered and the license actually lost.

4. That the company owed no duty to the plaintiff to warnthe plaintiff that he would be discharged immediately upon conviction.

5. That the company owed no duty whatever to assist the plaintiff by offering him alternative employment within the company or to advise him that he should be seeking other employment while awaiting his case coming to trial.

V. Authorities Cited

16 The defendant relies upon the 1886 statement by Lord Esher of the rule in *Pearce v. Foster* (1886) 17 Q.B.D. 536.

The rule of law is that where a person has entered into the position of servant, if he does anything incompatible with the due or faithful discharge of his duty to his master, the latter has a right to dismiss him. The relation of master and servant implies necessarily that the servant shall be in a position to perform his duty duly and faith-fully, and if by his own act he prevents himself from doing so, the master may dismiss him.

17 But this only part of the dictum. Even in those days, not every failure to duly perform his duty brought about a servant's dismissal. Lord Esher went on to say:

> What circumstances will put a servant into the position of not being able to perform, in a due manner, his duties, or of not being able to perform his duty in a faithful manner, it is impossible to enumerate.

18 It is my view that in today's climate the employer owes something more to a long term, faithful and effective employee than the rigid application of the rule in *Pearce v. Foster* after a single, albeit serious, failure to perfectly perform his duties. Where there are alternatives which can be resorted to at little or no cost or inconvenience to the employer, there will be circumstances when it would be unjust to enforce immediate dismissal. My brother Flinn, C.C.J. so decided in an unreported case noted in (1984) W.D.P.M. 316-022-3, where he found that dismissal of a truck driver for a temporary suspension of license when the employer had employed him on other work for two months and could have continued to do so for the balance of his suspension was not just cause for dismissal.

VI. Other Circumstances Relating to the Plaintiff's Employment

(a) The Defendant's Policies

19 The defendant says it had a policy which indicated that an employee who is convicted of impaired driving in a company vehicle is subject to immediate dismissal. The plaintiff was hired in 1977. No such policy was stated to him then nor at any time since, orally or in writing, unless it be found in Exhibits 4, 5 or 9.

20 Not until October 27, 1983 was the matter of drinking and driving recorded as being brought up at a sales meeting. Notes made after the meeting by Charbonneau were in his words a synopsis and recollection of what was discussed.

21 Mr. Charbonneau writes:

> Drinking and driving. It's very important sales reps watch themselves on this point, as the medias and government are very up on this topic. Sales reps were advised to seek other forms of transportation if they feel they may be impaired. The risk and consequences are too great for others and the reps to take this topic lightly.

22 The plaintiff recalls being at that meeting but was not asked to change his duties or alter his performance in any way.

23 There was another meeting on November 23, 1983. Exhibit 4 records the following:

> Be careful with Hospitality Rooms as we are liable should anyone leaving our room be intoxicated. Put pressure on the booking individual to ensure no one leaves intoxicated and drives.
>
> On drinking and driving when in doubt don't.

24 The plaintiff recalls these two items but not the last one which reads:

> Drinking and driving is a taboo. If under the influence of alcohol do not drive.

25 The plaintiff says he was required to drink and drive and that no statement was read in those terms at the sales meeting. Charbonneau admits that the exhibit is a synopsis, that the word taboo is his and that he is well aware that the company salesmen drink and drive daily as part of their employment. I believe the plaintiff when he says the last item was not discussed in those terms.

26 On paper, this was the company policy, but in practice the officers of the company and guests frequently drank beer after work in the hospitality room and some, Eaket and Ostertag in particular, to the point where in the plaintiff's opinion, which I accept as genuine, they were unfit to drive; but drove away in company cars anyway. Indeed the informal talk in the hospitality room was that it was okay to drink and drive as long as you weren't caught. Moreover all employees other than truck drivers were entitled to drink beer at morning and afternoon breaks and at lunch time and were allowed to drive home.

27 By May of 1984 public pressure against drinking and driving resulted in Exhibit 9 - addressed to "ALL EMPLOYEES". The memo went to all employees and contained the following final paragraph:

> I would remind you of the following:
>
> 1. Being incapacitated while at work, either intoxicated or impaired through the use of alcohol or drugs, is a violation of this Company's rule and any employee violating this rule is subject to dismissal.
>
> 2. For All Delivery Personnel: Drinking during the working day, from the start to finish of a shift or work assignment, including break periods and lunch hour, is a violation of this Company's rule and any employee violating this rule is subject to the normal disciplinary procedure.

28 Charbonneau admitted that this item 1 did not apply to the plaintiff who did not work in the plant and that item 2 applied only to truck drivers; definitely not the plaintiff.

29 The plaintiff does not recall seeing this memo; probably because it did not appear to apply to him.

(b) Application of the Purported Policy

30 These rules and the so called policies set out in Exhibit 4 and 5 appear to have been freely ignored by senior personnel of the company, quite openly and in the presence of the plaintiff. I accept his evidence in that regard. In fact I found him to be a credible witness. His testimony was in large measure uncontradicted. The defendant suggested that the plaintiff knew all along that he would probably lose his job after he was convicted; but I accept his evidence that his then counsel told him he would not lose his job even though his counsel based a strong plea for leniency on the basis that he would lose his job if there was a long period of suspension. There is no evidence that counsel specifically was instructed to do so or that the idea came from the plaintiff. I find that the plaintiff sincerely believed he would be given a chance to do his job even without a driver's licence.

31 The plaintiff had good reason to believe that this would be so. Some time previously a salesman for the company had lost his license for three months on being convicted of a drinking offence and was permitted to carry out his job with a relative driving for him and was not discharged as a result.

VII. The Plaintiff's Reaction to Arrest and the Company's Response

32 With this precedent in mind the plaintiff, on the morning of the conviction, outlined how he could carry on the job to Mr. Charbonneau. He even named the persons who would assist. Charbonneau said nothing in reply to this. He made no objection but simply put the plaintiff back to work. Though he mentally rejected that scheme that very morning he never so advised the plaintiff. He even told the plaintiff it was up to him to pay for damage to the company car as the insurance would not cover the company when its employee was impaired. He was given another company car to drive.

33 At that very time the plaintiff asked Charbonneau what the consequences would be. Charbonneau says he gave the plaintiff no definite answer although he had decided "close to the outset" to recommend his dismissal and felt strongly that senior management would agree. He was just waiting for the virtually inevitable conviction. Although a job came open in the retail store that the plaintiff could have taken at less money neither Charbonneau nor anyone else in the company suggested or encouraged him to apply for it. At no time did anyone in the company bother to tell the plaintiff that his suggested plan for substitute drivers was not acceptable or that he should apply for the retail store job coming open in the company as his dismissal was almost inevitable. Every thing the company did or failed to do had the effect of confirming the plaintiff's belief that he would not lose his job.

34 Somewhat weakly, Charbonneau says that he now realizes that had he told the plaintiff what his prospects were the plaintiff would have had over a year to be looking for alternative employment while he still held a driver's license. Even more weakly Charbonneau says "If he'd had any initiative he should have protected himself" and "I think the hints were there".

VIII. Findings on Company Actions

35 The defendant owed this man more than hints. The defendant owed a duty to deal with the plaintiff fairly and not to "mousetrap" the plaintiff into a situation where an employer he has faithfully served for 10 years, without any warning, cast him on the job market without a driver's license.

36 The President of the company, who on June 26, 1987 made the decision to fire the plaintiff, did not testify. I take the charitable view that he was probably unaware of the extent to which Charbonneau had kept the plaintiff in the dark and that his evidence would in any event be unlikely to assist the defendant's case. The President, shortly after the plaintiff's arrest asked him if he would be interested in a different job within the company. The plaintiff said he would, but never heard from the President again.

37 I further find that the memoranda of sales meetings, Exhibits 4 and 5, do not reflect the true policy and practice of the defendant company as it relates to its salesmen. That policy as it was actually practiced was to permit their salesmen to drink and drive and if by mischance they committed and were convicted of a traffic offence involving alcohol whilst so employed to do everything reasonable to protect that employment including giving the employee an opportunity to arrange alternative means of transportation. It is clear on the evidence that Charbonneau could have done that and failed to do so because of his dislike of the plaintiff personally.

38 It is my view that previous experience of the company showed that its salesmen could successfully carry out their duties while being driven by a third person. Therefore the dismissal of a faithful employee simply because he is without a license is not justified. There was no evidence tendered by the defendant to show that what worked for three months would not work for 12 months, nor is the employer entitled to reject the employee's tendered plan for performance without at least discussing that plan with the employee.

IX. The Law Applicable

39 It is not necessary in this case to go outside the basic principles outlined in *Pearce v. Foster*. The simple fact is that the plaintiff by his own act depriving himself of a license to drive had *not* "prevented himself from performing his duty duly and faithfully". He has placed himself in a position where it is more difficult for *him* to do so but with no more than minor inconvenience to the employer. In the circumstances of this case, until the employer has shown that not to be the case it has not establishe just cause and was therefore not entitled to dismiss the plaintiff without notice.

40 If further authority need be cited the words of LeBel J. in *Stilwell v. Audio Pictures Ltd.* (1955) O.W.N. at 794 are pertinent.

> It is only in exceptional circumstances that an employer is justified in summarily dismissing an employee upon his making a single mistake or misconducting himself once. The test in these cases is whether the alleged misconduct of the employee was such as to interfere with and to prejudice the safe and proper conduct of the business of the company, and, therefore, to justify immediate dismissal.

41 The defendant failed to satisfy the onus of showing that the plaintiff's conduct interfered with or prejudiced the safe and proper conduct of the business of the company.

42 The law in Ontario was intensively reviewed in the Ontario High Court decision of Hart J. in *Robinson v. Canadian Acceptance Corp. Ltd.* (1973) 43 D.L.R. (3d) 301.

43 At page 306 he quotes the Ontario Court of Appeal case *McIntyre v. Hockin*, 16 O.A.R. 498 where McLennan J.A. states at p. 501:

> The causes which are sufficient to justify dismissal must vary with the nature of the employment and the circumstances of each case. Dismissal is an extreme measure, and not to be resorted to for trifling causes. The fault must be something which a reasonable man could not be expected to overlook, regard being had to the nature and circumstances of the employment....

X. Court Findings

(a) Just Cause

44 In all the circumstances of this case it was incumbent on the employer, having regard to the nature and circumstances of the employment, to take a reasonable approach to the predicament in which the plaintiff found himself; a predicament which the defendant ought reasonably to have approached with sympathy. It was all very well to suggest to its salesmen that they use taxis at Christmas time "because the police are out" but otherwise to leave it to the individual salesman, influenced by the alcohol necessarily consumed, to make the fine distinction whether or not he was within the legally permitted limits. It is surely foreseeable that at some point its salesman may by reason of the influence of alcohol upon him, make the very error of judgment which occurred here. If the company is not prepared to stand behind its employee in such circumstances that policy should be clearly and specifically spelled out and brought directly and preferably in writing to the attention of the employee intended to be affected by it. That was not done by the defendant in this case.

45 While it forms no part of the case before me the defendant may well consider whether it is in the corporate interest to promote the sale of its products by permitting its salesmen to both drink and drive, and whether it may have a duty not to expose its employees and the public to the risks involved in so doing.

46 I therefore find the plaintiff to have been wrongfully dismissed.

(b) Period of Notice

47 Having regard to the very short period of transgression compared to over 10 years of faithful and due performance in a demanding employment the proper period of notice was 12 months. See *Hardie v. Trans Canada Resources Ltd.* (1976) 71 D.L.R. (3rd) 668.

XI. Damages

48 The plaintiff at the time of his dismissal was earning $30,200.00 per year together with the benefits set out in Exhibit 2. There is no evidence that non-continuation of these benefits resulted in any cost to the plaintiff; hence they do not qualify for inclusion in the plaintiff's damages. (See *Wilks v. Moore Dry Kiln Co.* (1981) 32 B.C.L.R. 149 as quoted in *Levitt*, *The Law of Wrongful Dismissal in Canada* para. 801:3 page 200 and ff.

49 The plaintiff wasted no time in seeking alternate employment but found it difficult to obtain employment in the area of his expertise primarily because he had no driver's licence.

50 The plaintiff was discharged June 26, 1987 and found employment selling boats on 18 April 1988. In the meantime he received unemployment insurance at $506.00 every two weeks till April, 1988. The money earned from Sea Mate Marine from his T4 to the end of December 1987 was $11,219.20. He did not begin again until April of 1989 until his employer went out of business in August 1989. Then, having his license back he obtained his present job as an auto salesman about three weeks later.

51 The damages suffered by the plaintiff were therefore $30,200.00 less amounts earned in mitigation between June 26, 1988 and June 25, 1989.

52 *Peck v. Levesque Plywood Ltd.* (1979) 27 O.R. (2d) 108, Ontario Court of Appeal is conclusive that damages for wrongful dismissal are not "remuneration" within the meaning of the *Unemployment Insurance Act, 1971* and that no deduction is to be made by the employer by reason thereof from the damages awarded herein.

XII. Mitigation

53

The plaintiff found permanent but seasonal employment

at Sea Mate Marine on April 18, 1988. Between then and June 26, 1988, (the end of the notice period) he earned $8,307.00. His total earnings from April 18 to October 31, 1988, were $11,219.20. In November and December, 1988, he was laid off and would not again be employed until the spring of 1989. The rate of earning over the 6.5 months was therefore $\frac{\$11,219}{6.5}$ = $1,726.00 per month.

54 Since a seasonal commission salesman must himself apportion his earnings to sustain himself over his periods of non production, (done for him by his employer if paid an annual salary in 12 monthly instalments) the actual benefit of the money earned had to be spread over the entire period of employment. Of the 6.5 months concerned only 2.3 fell within the notice period. A fair sum to be applied in mitigation would therefore be $1,746.00 × 2.3 or $4,027.33.

55 The plaintiff's salary loss was therefore:

Total annual earnings per contract	$30,200.00
Earned in mitigation	4,027.33
Total Salary Loss	$26,172.67.

XIII. Judgment and Costs

56 In addition to his salary loss of $26,172.67 the plaintiff is entitled to recover the sum of $1,751.80 which would have been paid by the defendant into the company pension plan for the benefit of the plaintiff.

57 The plaintiff shall therefore have judgment against the defendant for $27,924.47.

58 Having regard to the callous manner of the plaintiff's dismissal and the failure to adequately advise the plaintiff os his status over a period of a year when the company knew the plaintiff was almost certain to be fired, those costs shall be on a solicitor and client basis.

XIV. Disbursements

59 I have been asked to disqualify as recoverable costs the amount spent by the plaintiff obtaining the private investigators reports of the activities of Ostertag. This evidence is relevant to the proof of the approved pattern of performance of the duties of a company salesman which in turn is relevant to the question of whether drinking and driving was an accepted part of the beer salesman's job. The fact that confirmation of these matters was obtained by cross-examination of company personnel at trial does not render the obtaining of such evidence improper or unnecessary. It was proper and necessary preparation for trial. The expense of obtaining the surveillance reports in question are a proper disbursement and recoverable as such.

XV. Prejudgment Interest

60 Prejudgment interest shall be calculated at the rate provided in the *Courts of Justice Act* from the 26th day of June, 1988. Steele J. held in *Rushton v. Lake Ontario Steel Co. Ltd.* (1980) 29 O.R. (2d) 68 that since this is to replace salary in lieu of notice interest should be calculated on a reducing balance of $^{1}/_{12}$ each month over the required period. With respect I feel this flies in the face of the decision of the Ontario Court of Appeal in *Peck v. Levesque Plywood Ltd.* (supra) which found that such awards are not to be treated as "remuneration". I therefore prefer the reasoning in *Rogers v. Canadian Acceptance Corp. Ltd.* (1982) 50 N.S.R. (2d) 537 as adopted by *McRae J.* in *Blackburn v. Coyle Motors Ltd.* (1983) 44 O.R. (2d) 690 at 696. On this basis interest shall be calculated from the date of termination on the full award.

61 I have not been advised of any pre-trial offers of settlement. My award of costs will of course be subject to any such offers and to the pre-trial report, if any.