CEMCO ELECTRICAL MANUFACTURING COMPANY LIMITED (DEFENDANT) ..... APPELLANT;

AND

PETER VAN SNELLENBERG JR. (PLAINTIFF) ..... RESPONDENT.

1946

*May 2, 3, 6
*Oct. 1

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Master and servant—Contract of employment—Wrongful dismissal—Principal of mitigation of damages—True test applicable—Commission on sales—Charge of commission on sales tax—Whether honest mistake—Whether cause of dismissal—Contract "not to be performed within year"—Performance possible within year—Section 4 of the B.C. Statute of Frauds—National Selective Service Civilian Regulations—Notice of separation—Companies Act, R.S.B.C., 1936, c. 42, s. 98(1)(c).

*Present: Rinfret C.J. and Kerwin, Hudson, Rand and Estey JJ.

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In an action by the respondent for wrongful dismissal, the facts were that he was engaged by the appellant company as accountant and as salesman for its products, subject to the direction of the managing director, on terms of salary and commission. The respondent on many occasions had charged commissions on sales tax; and this was alleged *inter alia* as a cause for dismissal.

Held: Rand J. dissenting, that there is no evidence to substantiate the appellant company's charge that the respondent was either fraudulent or incompetent. Charging by the respondent of commissions on sales tax and some other items, even if the respondent himself did not claim that he was entitled to do so, was, particularly considering the extent of the business of the appellant, due to an honest mistake on his part.

Per Rand J. (dissenting): Respondent was a highly placed employee with corresponding competence and responsibility in whom complete trust in relation to the accounts, including his own remuneration, was placed; and once, in such circumstances, an objective act of misconduct appeared, an inference arose from it which should be met by the person shown to be at fault. This feature of the case has not been satisfactorily dealt with in the courts below. A re-trial of the issue of misconduct in relation to the taking of commission on taxes and a re-assessment of damages should be had.

In a claim at common law for damages for wrongful dismissal, when the right of the employer has been proved, the amount of damages is amenable to mitigation. The true test is not whether it was reasonable for the employee to refrain from seeking employment, but whether the employee took all reasonable steps to mitigate the loss consequent on the breach. In this case, the appellant company having broken the contract, the respondent was not entitled to consider it as still subsisting.

In the same claim for wrongful dismissal put upon the allegation that such dismissal did not comply with the National Selective Service Civilian Regulations, the trial judge found that the appellant company did not comply with the regulations but that the respondent himself did not use due diligence in trying to get employment and that once he knew he could not secure a new position without a notice of separation, due diligence would involve the making of some attempt on his part to secure it. The respondent did not appeal from that judgment and the issue must, therefore, be taken as settled.

The contention of the appellant, that any agreement as to alterations in the written contract was one which was required to be in writing because of the respondent's covenant not to divulge trade secrets during the continuance of his employment and after its termination, and that the contract was thus within the British Columbia Statute of Frauds as one not performable within a year, cannot be upheld. A contract is not one that is "not to be performed within the space of one year from the making thereof", within the meaning of section 4 of the statute, if all the obligations of the employee under the contract could have been carried out by him within the term of one year from its date; since the respondent might have died within the year, such covenant was one which might have been performed within the year.

As a result, the respondent is entitled to damages, as there was no basis for his dismissal and should recover the sum of $14,500 awarded him by the trial judge, less such amount as he could have earned between the date of his dismissal and the date marking the end of a contract year (had he obtained his notice of separation) by securing employment in some other remunerative position that may have been opened to him; and a new trial should be had, restricted to ascertaining such amount.—Rand J. dissenting.

APPEAL from the judgment of the majority of the Court of Appeal for British Columbia (1), reversing a judgment of the trial judge, Wilson J., which had maintained an action for damages for wrongful dismissal, and ordering a new trial as to guarantee of damages.

Alfred Bull K.C. for the appellant.

C. K. Guild K.C. for the respondent.

The judgment of the Chief Justice and of Kerwin, Hudson and Estey J.J. was delivered by

KERWIN, J.:—The appellant, Cemco Electrical Manufacturing Company Limited, is the defendant in an action brought by Peter Van Snellenberg, Junior, for the amount claimed to be due him under an agreement between the parties and for damages for wrongful dismissal. The terms of the original agreement are set forth in the following statement contained in the reasons for judgment of the trial judge:

The plaintiff herein was employed by the defendant on May 1, 1934, by a written contract, executed under seal by the defendant company to carry out the following duties:

(1) To continue (as he had been) in responsible charge of the office and accounts of the Company.

(2) To assume the capacity and perform the duties of salesman of and for the Company with respect to certain products specified in paragraph 1 of the contract, and also any other goods, etc., which the Company might specify in writing to the employee to sell for or on behalf of the Company under the terms of the agreement.

The plaintiff's remuneration was fixed by the contract as follows:

1. Salary: $20.00 per week.

2. Overriding commission: 1 per cent of all gross sales made by the defendant in excess of $3,000 in any one month.

3. Specific commissions: 10 per cent on sales of goods specified in paragraph 1 of the contract.

(1) (1945) 61 B.C.R. 507; [1945] 3 W.W.R. 369; [1946] 1 D.L.R. 105.

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In paragraph 3 of the contract the plaintiff contracted *inter alia* to faithfully, honestly and diligently serve the defendant in the capacities of salesman, supervisor of office work and accounting department and secretary-treasurer, and to at all times obey, observe and carry out the lawful directions of the Company's managing director with respect to his duties.

Paragraph 13 of the contract provided, *inter alia,* that the plaintiff should have no authority to extend the time for payment of any account.

Paragraph 20 read as follows:

"20. This agreement shall be in force for the period of one year from the date hereof at the end of which period it is contemplated that the same shall be revised and/or continued if, and as may then be, mutually agreed upon by and between the parties hereto; provided, however, that in the event of the employee being guilty of any act or omission in contravention of the terms, covenants or conditions herein contained the Company may at any time terminate this agreement with or without notice."

As the trial judge further points out, the plaintiff was continuously employed by the defendant from the date of this agreement to September 23, 1943, but at no time did the parties specifically agree, as contemplated by paragraph 20 to continue the contract. The Company's business grew steadily from 1934 and expanded greatly with war orders from the autumn of 1939, and with this expansion occurred an enormous increase in the plaintiff's commission earnings and in his duties. By a letter of September 23, 1943, the defendant purported to cancel the agreement because, as alleged in another letter of the same date, the plaintiff had failed to comply with the instructions of Mr. Darnbrough, the managing director, to take no more orders for the Company's products without his approval. By its statement of defence, the Company gave as additional reasons for its dismissal of the plaintiff: (1) that the plaintiff had, in contravention of paragraph 13 of the agreement, extended the time for payment of an account due the Company; (2) that the plaintiff had credited to his account and collected from the defendant commissions to the extent of $7,231.22 to which he was not entitled. The defendant counter-claimed for $1,718.61 which it alleged to be the net balance owing to it after crediting admitted amounts for commission and salary.

By an amendment to his claim, the plaintiff alleged certain verbal alterations in the written contract which he said had been agreed to by Mr. Darnbrough, notwithstanding the terms of paragraph (1) of the agreement by which

the plaintiff was to act as salesman for the Company with respect to certain specified equipment, accessories, goods and merchandise

and also any other goods, equipment and merchandise which the Company may specify in writing to the employee to sell for and on behalf of the Company under the terms of this agreement.

The Company contended that the agreement was one which was required to be in writing by virtue of the provisions of section 4 of the British Columbia Statute of Frauds, not so much because the plaintiff was "on and from the date hereof" to assume and carry out his duties but because of the provisions of paragraph 12 of the agreement:—

12. The employee shall not during the continuance of his employment, nor after its determination, by any means, without the consent in writing of the Company, divulge to any person not a director of the Company any trade secret, method of manufacture or special information employed in or conducive to the business of the Company, and which may come to his knowledge in the course of or by reason of his employment.

The trial judge and the Court of Appeal were right in holding that, as the plaintiff might have died before May 5, 1935, all his obligations under the contract could have been carried out within the term of one year from its date, and the statute did not apply. The earlier decisions upon this point are all the one way but, if the later case of *Reeve* v. *Jennings* (1) decides anything to the contrary, it should not be followed. For the reasons stated by the trial judge, there was ample consideration for the variations and additions to the written agreement.

The appellant relied upon the following provision of the British Columbia *Companies Act*, R.S.B.C. 1936, chapter 42:

98. (1) Contracts on behalf of a Company may be made as follows, that is to say:

* * *

(*c*) Any contract which if made between private persons would by law be valid although made by parol only and not reduced into writing, may be made by parol on behalf of the Company by any person acting under its authority, express or implied and may in the same manner be varied or discharged.

While there was no express authority to Mr. Darnbrough, such authority should under the circumstances be implied.

The trial judge has found, and the Court of Appeal has agreed with him, (*a*) that the variations and additions to the agreement alleged by the plaintiff were in fact

(1) [1910] 2 K.B. 522.

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made; (*b*) that the plaintiff had Mr. Darnbrough's approval, specific or general, to the taking of more orders, and (*c*) that the plaintiff did not extend the time for payment of an account due the Company. Not only has Mr. Bull failed to convince me that these conclusions are wrong, but I am satisfied, on the evidence, that they are the proper findings. The effect of the charging by the plaintiff in his accounts of commissions on sales tax presents more difficulty. The trial judge found he was not entitled to these commissions and the plaintiff did not appeal from that judgment. The trial judge is not quite accurate when he says that the plaintiff did not charge commissions on sales tax when it appeared as a separate item on invoices since the Company, before the Court of Appeal and in its factum in this Court, has indicated eight instances where commission was charged on invoices showing sales tax. It is true the total of these items, extending over four years, is only $6.08, and counsel for the plaintiff stated that after a careful search he was able to find only two other items totalling 26c., but the smallness of the amounts would not necessarily determine the matter. However, taking everything into consideration, I am satisfied that while not endorsing all that appears in the reasons for judgment of the members of the Courts below, they have reached the proper conclusion that there is no evidence to substantiate the Company's charge that the plaintiff was either fraudulent or incompetent. His charging of commissions on sales tax and on delivery charges and on the various other items referred to by counsel where the plaintiff himself does not now claim that he was entitled to do so under the terms of the original agreement or any variations thereof was, particularly considering the extent of the business being carried on by the Company, due to an honest mistake on his part.

The result is that there being no basis for the Company's dismissal of the plaintiff, he is entitled to damages and it is on this point that a difference of opinion exists between the trial judge and the majority of the Court of Appeal. The plaintiff's claim was put at common law and upon the allegation that his dismissal did not comply with the National Selective Service Civilian Regulations. As to the

latter, the trial judge found that the Company did not comply with the regulations, but that the plaintiff himself did not use due diligence in trying to get employment and that once he knew he could not secure a new position without a notice of separation, due diligence would involve the making of some attempt on his part to secure it. The plaintiff did not appeal from this judgment and the issue must, therefore, be taken as settled. As to the claim at common law, the majority of the judges in the Court of Appeal, taking that finding as a starting point, were unable to see why the same reasoning should not apply to the common law branch of the action. Mr. Justice O'Halloran considered that the test was whether it was reasonable for the plaintiff to refrain from seeking employment. The true test, however, is whether the plaintiff took all reasonable steps to mitigate the loss consequent on the breach: *British Westinghouse Electric Co.* v. *Underground Electric Railways Co.* (1). The Company having broken the contract, the plaintiff was not entitled to consider it as still subsisting. In fact he did not do this because he made approaches to at least two other companies from which nothing resulted because he had not received a notice of separation under the Regulations.

The plaintiff, therefore, is not entitled as of right to the $14,500 awarded him by the trial judge but, notwithstanding Mr. Bull's contention that the plaintiff is not entitled to damages to the end of a contract year, that is down to April 30, 1944, reasonable notice upon which the agreement between the parties, with its various additions, could be determined would be about seven months. Mr. Bull contended that the plaintiff was entitled on the evidence to nominal damages only and that he should not be granted the privilege of a new trial. The Court of Appeal, however, in its discretion decided otherwise and it is impossible to say that it proceeded upon any wrong principle. In fact, under all the circumstances, it appears to be an eminently proper case in which the plaintiff should be given the opportunity afforded by that Court's formal order. The result is that that order should stand by which the plaintiff recovers from the defendant as damages for unlawful dismissal, the sum of $14,500 less such amount as the plaintiff

(1) [1912] A.C. 673.

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could have earned between the date of his dismissal, namely, the 23rd September, 1943, and the 30th April, 1944 (had he obtained his notice of separation) by obtaining employment in the most remunerative of the positions open to him for employment in the Electrical Panel Manufacturing Company or the Canadian General Electric Company, or any company carrying on the same class of business as either of these companies, in or around Vancouver, and that a new trial be had, restricted to ascertaining such amount.

The appeal should be dismissed with costs and the cross-appeal without costs.

RAND J. (dissenting):—I agree with the Court of Appeal that there should be a new assessment of damages. The principle of mitigation is a necessary corollary of the basis of damages, namely, that they have arisen in a legal sense from a violation of a right. Underlying this is the assumption that a person must concern himself with his own interest if he would seek from the law the vindication of his civil engagements. In a contract of employment, the remuneration is either for work done or for the commitment to work. Upon a dismissal which is a repudiation of the obligation to accept the one or the other, as the remedy of specific performance is not available, the employee's capacity to work is now released to him to be used as he sees fit. He may decide to waste it or he may demand that the employer make good its full utility. In that event, he must act reasonably in seeking to employ it as he would or might have had the particular engagement not been made. It is the loss of earnings resulting from a denial of a right to use or commit his working capacity profitably that is the substance of his claim, and as he must prove his damages, it must appear that they arose from the breach of contract.

The failure of the employer to give a notice of separation from employment in the form prescribed under the National Selective Service Civil Regulations and that of the employee to demand one and to take every reasonable step to bring the discharge within the administration of those Regulations, do not affect the application of that principle. If

the employee acquiesces in a failure in formality on the employer's part, and abstains from availing himself of rights which the Regulations give him, he must, in a court to which he resorts, face the rules of law applicable to the claim which he makes. Both he and his employer may expose themselves to penalties under the Regulations by what they do, but I see no reason why either, if he sees fit, may not waive administrative remedial benefits imposed upon the contract.

But a more difficult question is presented, which is whether the act of the respondent in taking commission on the amount of sales tax was a breach of his contract justifying dismissal or whether it was done through oversight or in the belief that the terms of his employment allowed it.

The respondent, in addition to his capacity as special salesman, was in complete charge of the accounts. He himself made up the statements of his commission, prepared the cheques and placed all before the manager. But this material would not indicate or raise any question of tax or commission on it and from its acceptance by the manager no inference can be drawn of knowledge or notice on the part of the company of what was being done. This highly confidential relation between the company and the respondent called for the utmost good faith on his part, and once that was betrayed, the trust which was at the foundation of the employment was at an end.

The trial judge says:

> I think his action in charging commission on sales tax was an honest error. This is, I think, deducible from the fact that he did not charge commission on sales tax where the customer's invoice showed sales tax as a separate item, but only in cases where the invoices incorporated the sales tax in the sale price. It must be said that this was a serious error, and one which deprived the company of a substantial amount of money. However, when eminent counsel seriously argues that commission is payable on sales tax, perhaps the mistake of a layman who has the same impression must not be regarded too seriously, not at any rate as proof of want of honesty or diligence.

On that I would make these observations. It was not a fact that commission was not charged on sales tax in cases where the tax was shown as a separate item on the invoice. There were a number of instances of that sort. But how from such a circumstance a deduction can be made

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that the respondent considered himself entitled to charge "commission on sales" is not clear to me. This may mean "honest error" in thinking that he had a right to charge commission where the sales tax and the price of the goods were combined in one sum; but on what in the evidence or proceedings can that be based? Certainly not the fact that in other respects his testimony was accepted. And what is clear is that by "honest error" is not meant oversight from hurried work in a multitude of items.

In the Court of Appeal, the point is dealt with by Robertson J.A. in these words:

> Considering the volume of business which the appellant was doing during the years 1940-43, it is easy to see that small mistakes would occur in figuring the respondent's commission. In view of this fact and the cases to which I shall later refer, I am of the opinion the learned judge's findings should not be disturbed.

Now, as I have remarked, this ground of oversight is not that of the trial judge. The cases to which reference is made deal with the onus on the person alleging fraud, and it is stated that it would be necessary to prove that the plaintiff knew that he was not entitled to a commission on the sales tax. The authority given for this is *Rex* v. *Harcourt* (1); but proof of a criminal mind either as to its nature or the weight of evidence furnishes no guidance for such an issue as we have here. The question is that of a fundamental breach of contract, and considering the confidence reposed in the respondent, a lack of belief on his part that he was entitled to commission on the sales tax would, in the circumstances, make his act such a breach.

Smith J.A., with whom, on this point, O'Halloran J.A. agreed, puts the matter thus:

> There can be no doubt that such commissions were so charged and paid; and the learned judge has so found. But he has also found that the plaintiff honestly thought that he was entitled to charge them, and that he did not do so fraudulently or in such a manner as would furnish grounds for dismissal.

Then, after referring to the fact that the trial judge was in error in stating that the sales tax was charged only in cases where the invoice showed tax and price in a lump sum, he goes on:

(1) (1929) 64 O.L.R. 566.

I think it plain from the evidence that the plaintiff thought himself justified in law in making these commission charges on sales tax (regardless of whether the items of sales tax were or were not shown separately in the invoice) and that it was not until judgment was handed down that his mistake was made clear to him * * * It is no doubt true that the plaintiff was never expressly asked, and therefore never expressly said, that his mistake was an honest one. But does this matter when the whole argument of his counsel was that he was entitled in law to make these charges?

But it would be dangerous to allow such an argument to supply a defect of evidence going to the good faith of one in the position of the respondent.

Now it is not disputed that the respondent was not entitled to commission on the amount of the sales taxes, and Mr. Bull contends that the taking of it, in the absence of any explanatory evidence, requires us to draw the conclusion of bad faith. No questions on the actual knowledge or belief of the respondent were asked on either side, and Mr. Guild's answer is that the party alleging fraud must prove it. Of course fraud or bad faith must be proved; but here was a highly placed employee with corresponding competence and responsibility in whom complete trust in relation to the accounts, including his own remuneration, was placed; and once, in such circumstances, the objective act of misconduct appears, I should think an inference arises from it which should be met by the person shown to be at fault.

The dealing with this feature of the controversy in the courts below has not, in my opinion, been satisfactory, and it also should be referred back.

I would, therefore, allow the appeal, and direct a re-trial of the issue of misconduct in relation to the taking of commission on taxes, and a re-assessment of damages. The appellant should have his costs in this Court, but all other costs should remain as they now stand. The cross-appeal should be dismissed without costs.

Appeal dismissed with costs.

Cross-appeal dismissed without costs.

Solicitors for the appellant: *Walsh, Bull, Houser, Tupper, Ray & Carroll.*

Solicitor for the respondent: *Ian A. Shaw.*