

1995

S.H. No. 135255

IN THE SUPREME COURT OF NOVA SCOTIA

Cite as: Hudgins v. Danka Business Systems Ltd., 1998 NSSC 93

BETWEEN:

PATRICK HUDGINS

PLAINTIFF

- and -

DANKA BUSINESS SYSTEMS LTD.

DEFENDANT

DECISION

HEARD: at Halifax, Nova Scotia before the Honourable Justice Walter R.E. Goodfellow on the 14, 15, 16, 17th and 28th day of April, 1998

DECISION: 1st May 1998

COUNSEL: Bernadette C. Maxwell, Nancy L. Elliott
Solicitors for Patrick Hudgins
Hugh H. Wright, Paul D. McLean and Articled Clerk Deanna Borden
Solicitors for Danka Business Systems Ltd.

Goodfellow, J.:

1. BACKGROUND

Patrick Hudgins, now 43, was employed as a Machine Specialist and Office Machine Salesman with Valley Stationers in Kentville, NS (from November 1993 to the end of August 1995), selling a machine known as the "Risograph", a type of colour duplicating machine that interfaces with computers. He then entered the employ of Danka Business Systems Limited. Prior to entering the employ of Danka, he negotiated terms of employment with Peter Lafferty, an agent of Danka. A considerable difference of opinion arises as to the representations made to Hudgins by Lafferty.

In this action, Hudgins advances that he turned down the first two offers made by Danka, through Lafferty, and that they reached final agreement whereby he was to receive a monthly salary of \$2,500.00 plus 35% commission on gross profits.

Hudgins was compensated at a level of \$2,500.00 plus 35% commission in the first month of his employment with Danka. In the next and subsequent months, Hudgins level of compensation varied based on changes which were made to the compensation plan affecting all Sales Representatives of Danka. Hudgins also claims Lafferty made representations that Danka would provide full service support to the Risograph equipment. Danka's position is that Hudgins never asked or required any or a particular level of service for Risograph equipment as a term of his employment. Hudgins remained in the employ of Danka until November 1996, when he left and took employment with Compass Document Solutions, with whom he is still employed as a non-

commission salaried employee earning approximately \$43,000.00 per annum. Hudgins claims the representations made by Danka indicated he could reasonably anticipate income in excess of \$100,000.00, and further Hudgins says that he turned down employment with a former employer, Halifax Office Products, which would have realized him income of \$100,000.00 plus, in order to take the employment with Danka.

Hudgins seeks damages for alleged negligent misrepresentation to him during the pre-employment negotiations, which he says he relied upon to his detriment, and breach of the verbal employment contract.

In addition, Hudgins advances a claim for repairs to his personal computer. This computer was compatible with the Risograph, and Hudgins says Danka did not have one with such capability. His computer was used in the office, on a regular basis, from September to the end of November, first of December 1995. Hudgins initially thought Danka were going to acquire it from him, and when he concluded Danka did not intend to pay for it, he took it home and discovered it had been damaged. Although he invoiced Danka for its sale to Danka, he now only seeks the cost of repairs.

The determination in this case is very much based upon credibility and the courts factual findings.

2. ISSUES

- (1) Did Danka breach the term of its contract with Hudgins?

- (2) In the event that there was a breach of contract by Danka, did Hudgins condone the breach?
- (3) Did Danka make negligent misrepresentations to Hudgins during the pre-employment negotiations upon which Hudgins relied to his detriment?
- (4) In the event that there was a breach of contract or a negligent misrepresentation, what is the appropriate level of damages?

3. NEGLIGENCE MISREPRESENTATION

In order to succeed in his claim for negligent misrepresentation, Hudgins must satisfy the five requirements as set out in *Queen v. Cognos Incorporated* (1993), 45 C.C.E.L. 153 (S.C.C.) at p. 171:

The required elements for a successful *Hedley Byrne, supra*, claim have been stated in many authorities, sometimes in varying forms. The decisions of this court suggest five general requirements: (1) there must be a duty of care based on a "special relationship" between the representor and the representee; (2) the representation in question must be untrue, inaccurate, or misleading; (3) the representor must have acted negligently in making said misrepresentation; (4) the representee must have relied, in a reasonable manner, on said negligent misrepresentation; and (5) the reliance must have been detrimental to the representee in the sense that damages resulted.

4. ISSUE (3) Did Danka make negligent misrepresentations to Hudgins during the pre-employment negotiations upon which Hudgins relied to his detriment?

I want to dispose of the third issue first. It is advanced as a significant portion of the claim.

SUMMATION

Hudgins counsel asserted that the misrepresentations made to Hudgins were:

1. That he would not be subject to the terms of the compensation plan
2. That is a term of his contract, there was a commitment to a particular level and quality of service to be provided by Danka for Risographs
3. That his acceptance of employment would be a deviation from the compensation plan and with an alleged contractual term relating to service, that Hudgins could expect to earn at least \$100,000.00 per annum.

I have no hesitation in answering this issue in the negative.

The evidence does not disclose misrepresentations representations, negligent as advanced or otherwise by Danka to Hudgins.

With one exception I very much prefer the evidence of Peter Lafferty over that of Patrick Hudgins. Patrick Hudgins made the first contact with Danka. He admits that in terms of potential income, there was no guarantee and the offers made to him and the one which he accepted, left his eventual income to be determined by the sales he generated and completed. He was well aware of this as Lafferty made it clear that there would be a quota. In this regard, the best Hudgins could say

when asked if there was any quota set up at the time of their negotiations in August, was that he had no clear recollection and no un-clear recollection. The projections of a possible level of income in the range of \$100,00 plus, did not come from Danka. They were the product of Hudgins own enthusiasm and interpretation of what might have been alternate employment with Halifax Office Products and his own misrepresentation, or at the very least, highly exaggerated assessment of his capacity to sell the Risograph. It was Hudgins who talked in terms of selling three machines per month, and when this is compared with the reality, it is clear that Hudgins did not deliver what he himself thought he could deliver, which in any event, was not a representation on the part of Danka, nor did it become any part of the contractual relationship. Over the period of approximately 13 months, Hudgins was involved with 11 sales of Risographs, only three of which did he get the full commission and split commission with all the others. The first sale was one that Lafferty played a major part in securing and was outside Hudgins territory. Lafferty was a salaried employee and made no effort to share in the commission. However, because it was in the New Brunswick territory, Hudgins received a split commission. Hudgins managed only one further sale in the fall of 1995. In addition to the reality of very limited sales, compared to his own assessment and projection, there is his historical sales income background, which is not at all supportive of Hudgins having the capacity to sell at a level that would bring to him an income in the range of \$100,000.00 or more. During his entire employment with Danka, he failed to meet his quota, which was 50% or less than his represented capacity in the pre-employment negotiations of August 1995.

Hudgins had previous employment with Halifax Products and may well have had the opportunity to take the job eventually taken by Kevin Sampson and held by Sampson for a period of less than a year. This was however, established in the evidence to be essentially a selling job with at least 80% of the income to be generated through commission income on sales.

I accept Lafferty's assessment of Hudgins as a salesman. Hudgins reported to Lafferty for approximately five months. He stated that Hudgins was a very knowledgeable person but not a good sales representative. Hudgins would frequently tell Lafferty that he had a good month, \$60, \$80, \$100,00 worth of sales, but the reality was far different and Hudgins never came through with the deals. In Lafferty's view, sales is not Hudgins niche and specifically, he is not a good canvasser and during the period in which he reported to Lafferty, Hudgins made limited sales calls and I accept Lafferty's expression based on his experience that sales relate to calls.

I specifically accept the evidence of Lafferty that in August 1995, Hudgins was hired because he was knowledgeable with respect to the product and that Lafferty asked him what did he think he could sell, and it was Hudgins that indicated he would sell at least three Riso systems a month.

There is absolutely no factual credible basis for Hudgins' claim of misrepresentation or even representations of such a substantial income.

With respect to whether or not Hudgins would be subject to the compensation plan, it is clear and I accept the evidence of Lafferty, that Hudgins knew his employment would be related to

a quota system and that a compensation plan would be coming into effect in the future which would apply to him. One exception to Lafferty's evidence, is with respect to when the compensation plan would be effective for Hudgins. Hudgins made it clear that he was going to be leaving the employment of Valley and had to consider the needs of his family. As it turns out, in all probability in August of 1995, Hudgins was on a draw commission basis with Valley owed Valley against draws he had received. This is consistent with his concern for some certainty of funds, in part because the Risograph is not a product that sells on a turnover basis, but rather a substantial investment, likely to be incurred by a particular segment of society, such as institutions, print shops, etc. and in part because it is a substantial investment, the time frame from contact to sale is of some duration, usually from six weeks onward. Lafferty recalls that Hudgins did say something to him along the lines that he needed something he could count on, and Hudgins may have said that he needed his salary. Hudgins indicated that he had to talk the matter over with his family, did so and then accepted employment with Danka. I am clearly satisfied that in discussions leading up to the employment, and as a term of employment, that Danka made it clear that Hudgins would come under the compensation plan when it came into effect.

I accept specifically Lafferty's evidence that he clearly told Hudgins he didn't know when the compensation plan would be coming into effect, but that Hudgins would fall under the plan. I further accept that when Hudgins sought authority from his superior, Karl Seigert and received approval to offer \$2,500.00 per month and 35% commission, Lafferty advised Hudgins that Seigert indicated to Lafferty to make sure and tell Hudgins that there were going to be changes and that Hudgins would fall under the new compensation plan that was anticipated. I accept Lafferty's evidence that

there were changes in compensation anticipated because selling is based upon an incentive theory, and the more you sell, the higher your compensation. I am satisfied that Lafferty made it clear to Hudgins in the negotiations leading up to employment, that there was a quota involved and income would be based upon commission.

What transpired was that Lafferty conveyed that initially, in essence as a transitional period, Hudgins would receive a salary plus 35% commission. No one anticipated that the compensation plan would come into being within three weeks of Hudgins entering employment and I accept Hudgins evidence that, had this been pointed out, he would not have been able to afford to go into the employ of Danka.

I hold that the employment contract was for the short term an actual salary of \$2,500.00 per month plus a commission of 35%, all of which would change when the compensation plan came into being and the reasonable period for which Danka should be held to this initial obligation is three months. I note with interest that on the day of Mr. Hudgins first employment, the memo to payroll referenced a three month period, although it did not recite accurately that this three month period was a salary, not to be reduced by commission. Hudgins knew and was advised that the rate of commission would vary, and indeed that is clear from the evidence of what transpires in this industry. The 35% rate was tied in with this initial period to provide a comfort level for Hudgins, due to his family responsibilities. I consider three months the maximum time frame for such entitlement.

Hudgins now makes a big issue out of what he says were representations and part of his contract employment that Danka would maintain a particular level of service.

There were comments made during the negotiations with respect to service being provided for the Risograph, and it was common knowledge that the Riso company would require a knowledgeable person such as Hudgins and a technician to take the courses required by the Riso company. It is significant that there is no evidence to suggest that at any time the Riso company intervened or took issue with the level of service provided by Danka for its product. The evidence of the service manager is clear that qualified people existed within the Danka organization. For example, the Moncton office would have been the logical office to service the first sale in which Hudgins received a commission and there was service capacity in both the Truro and Moncton offices. I have no doubt, based upon the evidence of some of the customers, that they were dissatisfied with the service capacity of the particular technician in the Halifax office. That is entirely separate from the allegation by Hudgins that there was a term of his employment as relates to service. I find that the discussions in August 1995 related only to the prerequisites of the Riso Corporation and that there was no contractual undertaking by Danka to Hudgins with respect to service or a particular level of service.

I further find that Hudgins suggestion that he spent over 50% of his time servicing the product, is an extreme exaggeration. There were very few machines sold in the first place. I have already noted that the first one sold would have been serviced out of Moncton. There is no reference by Hudgins in his first letter of complaint of October 31, 1995 referencing service, and the only time he raised the issue of service throughout his entire period of employment, prior to the time of his

departure, is on one occasion when he sought payment for a service call and payment was authorized by the service manager.

Shortly before Hudgins left the employment of Danka, he wrote a letter November 14th and attempts in that letter to relate the cancellation of the Nova Scotia Dental Association sale to lack of service. This is totally inaccurate and in fact, Hudgins in his evidence, acknowledged that he accepted and went along with a trial sale to the Nova Scotia Dental Association, whereby they had the use of the equipment, but were not bound to purchase it unless they secured approval for purchase at their annual meeting. Approval for purchase was not forthcoming, and there is no evidence whatsoever justifying Hudgins allegation that it relates to service or anything for which he is entitled to any compensation. He was paid the commission on the Nova Scotia Dental transaction with the full knowledge that if it was not finalized, the commission was repayable.

I hold Hudgins' representations that the demonstration model had constant frequent problems directly related to lack of service as unfounded. The demo model did have problems occasionally, but certainly not of the magnitude or related to service as advanced by Hudgins.

5. ISSUE (1) Did Danka breach the term of its contract with Hudgins?

To some extent I have dealt with the nature of the contract that was entered into under the heading of Issue #3.

Hudgins conveyed to Lafferty the need to have an income immediately, in order to meet his

family responsibilities. Hudgins conveyed and Lafferty acknowledged his need for salary at least starting out. In part, this was due to the fact that Hudgins probably owed his existing employer for draws that had not been satisfied by sales/commissions. Lafferty made it clear Hudgins would be under the compensation plan when it came into being, and they both clearly understood that Hudgins would have a quota of sales to meet, and that while he was to initially have a commission rate of 35% of gross profit, this rate of commission would not continue indefinitely and Hudgins commission rate would be subject to change on implementation of the compensation plan.

Neither Lafferty or Hudgins anticipated the introduction of a compensation plan would take place some 26 days after Hudgins started his employment with Danka. The salary and agreed 35% commission rate would continue for a reasonable time frame or related to the introduction of the compensation plan. It is interesting to note that Lafferty, in his memo September 5, 1995 to payroll, referred to a three month period, although he also referenced the \$2,500.00 a month as a salary draw against anticipated commissions. The extent to which Hudgins' contract deviated from the compensation plan was only to ensure a salary for a short reasonable period, with a specific 35% commission rate. In part, this was because the product to be sold by Hudgins was a substantial investment by a customer in a new product, a package of which would be in the range of \$30-\$40,000.00. This lengthen the selling period from what otherwise would prevail with less expensive replacement products.

I have already concluded that both Lafferty and Hudgins knew at the outset that there was a quota requirement, and I have addressed and dismissed the allegation that a particular level of service was directly, or by inference, a part of Hudgins contract of employment. As I said earlier,

Hudgins would not have, nor would Lafferty have expected him to take the employment if the salary offer were going to be changed in 26 days, and therefore, they effectively agreed on a limited, reasonable period of salary plus 35% commission rate, which I find is at the most, three months.

I find no merit or substance to Hudgins allegations that lease and costing done by Danka in the determination of gross profits for the commission basis, was inappropriate, improper or for that matter, beyond what they contemplated to the extend contemplated in the pre-employment negotiations. I find that Danka conducted itself well within, what one would anticipate within the industry.

It follows from Danka's treatment of Hudgins in the first three months that Danka has breached the interim provision of the contract.

This issue is therefore on this limited basis answered in the affirmative.

6. ISSUE (2) In the event that there was a breach of contract by Danka, did Hudgins condone the breach?

Danka raises the issue of condonation and there is certainly merit in attaching weight to the evidence of Hudgins continuing in the employ of Danka for such a long period of time, without forcing what he now says is his entitlement. I have accepted the evidence of Lafferty and Maynard wherever it conflicts with Hudgins evidence. Hudgins himself failed to file any commission claim whatsoever for the Furlong sale until after litigation was commenced. Hudgins determined the rate

of commission he expressed and filled in on his commission work sheets. Hudgins, on the only occasion when he was asked to service a Risograph, sought and was paid for such service. Hudgins letter of October 31, 1995 made no comment with respect to service or lack of service and it was first mentioned by him in his letter of October 17, 1996. His complaint with respect to service on the demonstration model has been refuted and I have accepted Lafferty's assessment of him as a salesman and the evidence as to how much time he spent in the office and was not properly utilizing his time to generate sales. In his letter of October 17, 1996, he alleges that Lafferty, Woodill and Graham "all promised to fix the shortages in my pay", and that is simply not truthful. It is his interpretation of his impression and when anybody showed a concerned willingness to pass on his claims with respect to pay, such did not and he knew they were not promises to provide the level he was seeking or any acknowledgment of entitlement to what he was seeking.

In concluding that there was a limited breach of the contract relating to the first three months of employment, I need go no further than to say that had it been necessary to rely upon Hudgins conduct and choice to remain in the employment of Danko to November 1996 constituted condonation of any further breaches, then I would not hesitate in reaching such a conclusion. I find that his conduct very much confirmed what I had already concluded. Namely, that Lafferty spelled out to him very clearly that other than in the short run, Hudgins would be subject to the compensation plan as relates to draw/salary and commission.

7. ISSUE (4) In the event that there was a breach of contract or a negligent misrepresentation, what is the appropriate level of damages?

Hudgins, in his evidence, submitted a summary which he indicated his claim for total commission and salary deficiency of \$54,569.36 and an adjustment for service (double commission) \$63,968.80, for a total of \$118,538.17. I will comment on some of his evidence in relation to that summary, but I do not feel that I am compelled to review each and every item. With respect to the claim for commission of Furlongs, the only evidence that supports any possible entitlement, was the attempt by Mr. Furlong to be fair and give some credit to Hudgins. Furlong however, does point out the degree of involvement by Ken Warren and I accept the evidence of Kathleen Maynard that all of the paper work and all of her dealings in relation to that sale, were with Ken Warren. The documentation is before me and it is significant that Hudgins did not file any commission claim for this sale, nor did he ever raise the issue of any entitlement until after the litigation had commenced. His claim for participation in the Furlong sale is unfounded and a manufactured claim, which does him no credit.

Hudgins claims a commission entitlement to the Nova Scotia Dental Association account, even though he acknowledge in evidence and accepted that this was in essence, a conditional sale and the sale was not finalized. Nova Scotia Dental Association, as there were entitled, returned the equipment and under no circumstances has Hudgins established any entitlement whatsoever to a commission. It provides an insight into Hudgins willingness to advance any claim, be it for the sale of computer, repairs to the computer, commission for non existent sales, etc. The final one I will comment on is the Creative Design and Promotions where he seeks a commission on a matter which did not finalize and took place after his employment ceased.

In argument before me, his solicitor advanced a claim for total loss of earnings to the end of

1998 in the amount of \$222,783.00 and then projected losses to the year 2002 of an additional \$90,000.00 for a total of \$312,783.00 plus the loss related to the computer of \$2,622.50, for a total claim of \$315,405.50.

This is a sheer fabrication which at best, can be described as a wish list. There is absolutely no foundation for any recovery by Mr. Hudgins for other than the limited reasonable period when he first went into employment.

In summary, I have concluded that there was no negligent misrepresentation on the part of Danka and if there were any negligent misrepresentation, it was that of Hudgins conveying his sale powers would result in sales of the magnitude of three (3) per month. Given his sales track record, he knew or ought to have known that this was a gross exaggeration on his part. Hudgins has not been able to substantiate any particular level of service was incorporated in his contract, and while there were some service problems, Hudgins sought and received payment for the one service call he was requested to make.

Hudgins is entitled to the contract as I have determined, namely the limited period of three months salary at \$2,500.00 per month plus commission at the rate of 35% of gross profits during that time frame. He has failed to establish any deviation from the industry patterns and manner of calculating gross profits and there has been no improper contractual breach by Danka, as alleged by Hudgins or otherwise.

It is acknowledged that Hudgins received \$2,500.00 for the first month and so he is entitled

to salary for two additional months of \$5,000.00 plus commissions at the rate of 35%. He received a 35% commission in relation to the Marshview sale and the only other sale in 1995 within the time frame, is that of Sasha Publishing. He claimed and received reimbursement for 25% and I have concluded he ought to have received the 35% on that sale, so that he is entitled to an additional 10%.

I note the mathematics as relates to sales and commissions is very difficult to reconcile with T4 slips, etc. and therefore counsel are entitled to comment upon my mathematics if they do not agree.

I take his entitlement to be salary of \$5,000.00 for October and November, plus the additional 10% commission of \$1,223.87, for a total of \$6,223.87, which is a gross income figure. I take the payments received on the summary prepared by Ms. Maynard, namely 22nd September 1995, \$1,153.85, 6th October 1995, \$1,153.85 to be the net based upon his entitlement for the first month from the 5th September to the 5th October.

What must be deducted from the \$6,223.87 is the actual salary he was paid for October and November, based on an entitlement to the gross pay of \$2,500 a month for each month. Assuming four pay periods, he was actually paid \$3,576.94, leaving his recovery on a net after tax deduction of \$2,646.93.

COSTS

Subject to payment into court, or an unequivocal offer of settlement.. I am inclined to view the amount involved for Tarrif A, Scale 3 to be the very limited amount of recovery.

J.