SMALL CLAIMS COURT OF NOVA SCOTIA
Citation: *Frampton v. Ace Mechanical Ltd.*, 2024 NSSM 37

Date: 20240618
Docket: 524862
Registry: Halifax

Between:

Samantha Frampton

Claimant

v.

Ace Mechanical Limited and EFP Engineering Limited

Defendants

Adjudicator: Michael J. O'Hara

Heard: March 1 and 14, 2024

Decision: June 18, 2024

Appearances: Laura Neilan, for the Claimant
Ron Pink, K.C., for the Defendants

By the Court:

[1] This is a claim arising from the termination of the Claimant's employment by the Defendants on April 3, 2023. The Claimant is seeking $25,000, the maximum amount claimable in this Court in respect of salary continuance as well as the unpaid balance of a signing and entry bonus.

[2] The Defendants deny the claim in its entirety and submit that the Claimant was not suitable for the position and, on that basis, was terminated during the initial three month probationary period. Given the termination, it is further asserted that there is no entitlement to the balance of the signing and entry bonus.

Background

[3] Through a third party, the Claimant entered into discussions with the principals of the Defendants for employment as the CFO for both companies. Discussions took place in and around November of 2022 by phone and video. As well, the Claimant travelled to Halifax from Calgary in November to meet with the principals in person. A written contract was negotiated and signed by both sides. It is dated November 30, 2022.

[4] Of particular relevance to this matter are the following two paragraphs of the written agreement of November 30, 2022:

> **Probationary Period**
> The first 90 days (3 months) will be a probationary period with review discussions held every 30 days. In the event of termination without cause, a 3 month salary continuance would be provided.
>
> [Underlining in original]

> **Signing & Entry Bonus**
> An entry bonus of $15,000 will be provided. $5,000 paid the first week of employment, $5,000 paid at the 3 month point and the final instalment paid at the 6 month point. In the event that the candidate terminates their employment with the Companies in the first 18 months, the Signing & Entry bonus would be repayable in full within 30 days.

[5] The Claimant's first day of work was January 9, 2023. There were a number of issues between the Claimant and the Defendants during the term of her employment. Several of those will be mentioned further on in these reasons. Her employment was terminated by written notice dated and effective as of April 3, 2023.

[6] The Defendants made no payments of salary continuance at the time of termination, relying on the probationary clause in the written contract. The Defendants did not pay the second or third instalment of the $15,000 entry bonus.

[7] The Claimant seeks both of those items which would total approximately $41,000 but caps her claim at the $25,000 jurisdictional limit of this Court.

Issues

[8] During the initial three-month probationary period, what legal standard applied to the Claimant – "suitability" or just cause in the event of termination?

[9] Despite being terminated, is the Claimant entitled to three months' salary continuance if there is no just cause?

[10] Was there just cause?

[11] Is the Claimant disentitled to the balance of the Signing and Entry Bonus because of the termination of her employment?

Analysis

[12] There are two items of claim here. First, the claimed salary continuance of three months' salary and secondly, payment of the balance of the Signing and Entry Bonus.

Salary Continuance if Terminated During Probationary Period

[13] This is the most significant issue in this case and concerns the interpretation of the probationary/termination paragraph of the written agreement which, for convenience, I again cite:

> **Probationary Period**
> The first 90 days (3 months) will be a probationary period with review discussions held every 30 days. In the event of termination without cause, a 3 month salary continuance would be provided.

[14] The Claimant's submission is that this paragraph, while establishing a three month probationary period with a "suitability" standard, nevertheless provides for a three month salary continuance if the Claimant was terminated without cause in that initial 90 day period.

[15] The Claimant refers to the Ontario Court of Appeal decision of *Nagribianko v. Select Wine Merchants Limited*, 2017 ONCA 540, and, in particular the highlighted wording in paragraph 6 as follows:

> The trial judge's decision to treat the term "Probation..... Six months" as having no meaning was wrong. The parties agreed to a probationary contract of employment, and the term "probation" was not ambiguous. The status of a probationary employee has acquired a clear meaning at common law. Unless the employment contract specifies otherwise, probationary status enables an employee to be terminated without notice during the probationary period if the employer makes a good faith determination that the employee is unsuitable for permanent employment, and provided the probationary employee was given a fair and reasonable opportunity to demonstrate their suitability: Mison v. Bank of Nova Scotia (1994), 1994 CanLII 7383 (ON SC) 6 C.C.E.L. (2d) 146 (Ont. Ct. (Gen. Div.)), at para. 43.
>
> [Underlining added]

[16] The Claimant also refers to the case of *Easton v. Wilmslow Properties*, [2001] OJ No. 447.

[17] The Claimant asserts that the “cause” referred to in the quoted paragraph from the agreement is the same as “just cause” as that term is generally understood in the law of wrongful dismissal.

[18] The Claimant says that the Defendant in this present case cannot establish just cause and therefore she is entitled to three months of salary which, at $125,000 per annum would equate to $31,250 for the three months.

[19] Against this, the Defendant submits that the Claimant was terminated during the probationary period for which the standard at law is “suitability”.

[20] The evidence establishes that the Clamant was not suitable and the Defendants made that determination after providing a fair opportunity to the Claimant to demonstrate her suitability.

[21] Alternatively, the Defendant says that there was just cause for the termination. Either way, nothing is owed to the Claimant in the Defendants’ assertion.

[22] Further, the Defendant says that if the Claimant’s argument is accepted the probationary status is rendered meaningless.

[23] For the reasons that follow I find that the Defendant’s position must prevail. My analysis on this point starts with a consideration of the law concerning probationary employees.

[24] In Nova Scotia, most of the cases concerning probationary employees are found in the arbitral jurisprudence and judicial reviews of such cases in the Supreme Court. There are a limited number of Supreme Court cases dealing with probationary employees in what may be considered as common law probationary employment situation.

[25] In one of the more recent cases - *MacKinnon v. Nova Scotia (Justice)* 2012, NSSC 302, Wood, J. (as he then was), quotes approvingly from a 1997 decision of Hood, J. in *Survival Systems v. Johnston* 1997, NSJ No. 406, as follows:

> [26] The governing principles for the termination of probationary employment were discussed by Hood, J. of this Court in Survival Systems v. Johnston, [1997] N.S.J. No. 406. These principles were adopted with approval from a prior Manitoba decision and are found at para. 23:
>
> > 1. The onus is upon an employer to show that it has just cause to discharge even a probationary employee.
> >
> > 2. Just cause may be that the employee is, in the opinion of the employer, unsuitable for a job.
> >
> > 3. The unsuitability which would justify the termination of a probationary employee may go beyond those grounds which might support the discharge of a regular employee and may include such considerations as character, compatibility, as well as ability to meet the present and future production standards expected by the employer.
> >
> > 4. Where a probationer has been terminated for unsuitability, the employer's judgement and discretion in the matter cannot be questioned.
> >
> > 5. All of the foregoing is subject to the requirement of the employer showing that the discharge was in the bona fide exercise of the employer's discretion and judgement that the employee was not suitable and not for some other reason or improper motive which would not justify a dismissal.

[26] See also *Mourant v. Amherst (Town),* 1999 NSSC 3303; *Caissie v. Family and Children Services of Yarmouth*, 1999 NSSC 2105; *Taggart v. KDN Distribution*, 1997 NSSC 14952; *Wilson v. Sobeys*, 1996 NSSC 21.

[27] In *Nagribianko v. Select Wine Merchants,* 2016 ONSC 490 the Divisional Court of the Ontario Superior Court of Justice, stated the following:

> [26] Counsel for the Appellant submitted that in adopting the Respondent's subjective understanding of "probation", the Deputy Judge erred in law. <u>The term "probation" has a recognized meaning in employment law.</u>

[27] Having held that the employment contract provided for a probationary period of six months, the Deputy Judge erred in law in failing to recognize that the employment of a probationary employee is different in nature from that of a non-probationary employee.

[28] In interpreting a contract, the question the Court should ask is what reasonable persons in the same circumstances as the parties would have understood the contract to mean. The subjective intentions of the parties are irrelevant. The goal is to ascertain the objective intent of the parties through the application of legal principles of interpretation. *Salah v Timothy's Coffees of the World Inc.*, 2010 ONCA 673 at para 16.

[29] Counsel for the Appellant also submitted that the Deputy Judge also erred in failing to consider that the Respondent, on his own evidence, understood that probationary employment is different in nature from non-probationary employment and that his employment was at risk during that period.

[30] He also erred in law in concluding that the Respondent was entitled to reasonable notice at common law.

What is the Test to Be Applied for Dismissal of a Probationary Employee?

[31] The standard for dismissal from non-probationary employment is just cause.

[32] The standard for dismissal from probationary employment is different. It is suitability.

[33] Probation is a testing period for the employer to assess a probationary employee's suitability. It offers the employer an opportunity to determine if the employee will work in harmony with the organization, if hired permanently. Suitability includes considerations of the probationary employee's character, ability to work with others, and ability to meet the employer's present and future standards. *Jadot v Concert Industries Ltd*, [1997] BCJ No 2403 (BC CA) at para 30, *Markey v Port Weller Dry Docks Ltd*, 1974 CanLII 671 (ON SC), 47 DLR (3d) 7, 4 OR (2d) 12 at para 50.

[34] The nature of the employment relationship during probation is tentative. In *Pathak v. Royal Bank*, [1996] BCWLD 891 (BC CA) at para 8, the British Columbia Court of Appeal described the difference between probationary and regular employment:

> ... it is not appropriate to analogize from the legal and practical considerations pertaining to a regular employee in order to answer a question relating to a probationer's terms of employment. Probation is intended to ascertain whether a

> settled and ongoing relationship would work out. Its tentative nature is the controlling feature …
>
> [35] A probationary employer must extend to the probationary employee a fair opportunity to demonstrate suitability for permanent employment. However, in the absence of bad faith, an employer is entitled to dismiss a probationary employee without notice and without giving reasons. *Jadot v Concert Industries Ltd*, [1997] BCJ No 2403 (BC CA) at para 29, *Markey v Port Weller Dry Docks Ltd*, 1974 CanLII 671 (ON SC), 47 DLR(3d) 7, 4 OR (2d) 12 at para 63.
>
> [36] Where the employment of a probationary employee has been terminated for unsuitability, the employer's judgment and discretion in the matter cannot be questioned. All that is required is that the employer show that it acted fairly in determining whether the probationary employee was suitable and that he/she was given a fair opportunity to demonstrate his/her ability.
>
> [37] In *Markey v. Port Weller Dry Docks*, 1974 CanLII 671 (ON SC), 47 DLR (3d) 7, 4 O.R. (2d) 12 the Court commented at para 50: "implicit in the term 'probationary' is the right of the company to decide whether to permit the employee to become a permanent employee or not, as that is the basic reason for setting up a period of probation ....[T]he process of determining whether or not a probationary employee is to be retained is in the hands of the company." *Mison v Bank of Nova Scotia*, [1994] OJ No 2068 (Ont CJ (Gen Div)) at para 41 to 43, *Markey v Port Weller Dry Docks Ltd*, 47 DLR (3d) 7, 4 OR (2d) 12 at para 50.
>
> [All underlining added]

[28] This decision was upheld by the Ontario Court of Appeal in *Nagribianko v. Select Wine Merchants Limited*, 2017 ONCA 540 where, the Court stated:

> [6] The trial judge's decision to treat the term "Probation…… Six months" as having no meaning was wrong. The parties agreed to a probationary contract of employment, and the term "probation" was not ambiguous. The status of a probationary employee has acquired a clear meaning at common law. Unless the employment contract specifies otherwise, probationary status enables an employee to be terminated without notice during the probationary period if the employer makes a good faith determination that the employee is unsuitable for permanent employment, and provided the probationary employee was given a fair and reasonable opportunity to demonstrate their suitability: *Mison v. Bank of Nova Scotia* (1994), 1994 CanLII 7383 (ON SC), 6 C.C.E.L. (2d) 146 (Ont. Ct. (Gen. Div.)), at para. 43.
>
> [7] It is true that there is a presumption that an indefinite employment contract is terminable only on reasonable notice, however that presumption is overcome if the

> parties agree to a probationary period of employment: *Machtinger v. HOJ Industries Ltd.*, 1992 CanLII 102 (SCC), [1992] 1 S.C.R. 986, at p. 999; *Jadot v. Concert Industries Ltd.* (1997), 1997 CanLII 4137 (BC CA), 44 B.C.L.R. (3d) 327 (C.A.), at para. 29; *Ly v. British Columbia (Interior Health Authority)*, 2017 BCSC 42, [2017] B.C.J. No. 43, at para. 42.
>
> [8] Since it is not possible to contract out of the minimum notice standards provided for in the *Employment Standards Act, 2000*, S.O. 2000, c. 41 (the "*ESA*"), probationary employees are entitled to receive statutory notice, or pay in lieu of that notice. In this case, the required period of notice is one week, which the appellant received: *ESA*, ss. 54, 61.
>
> [9] This is not a case such as *Machtinger*, or *Garreton v. Complete Innovations Inc.*, 2016 ONSC 1178, [2016] O.J. No. 869, where the termination clauses in employment contracts were rendered null and void because they expressly provide for notice periods shorter than the statutory minimum, contrary to employment standards legislation. There is nothing in the appellant's employment contract purporting to oust the statutory notice requirements under the *ESA*.
>
> [10] The Divisional Court was therefore correct in holding that the trial judge erred in failing to give effect to the probationary term of the contract, and in treating the appellant, for dismissal purposes, as though he was a permanent employee.
>
> [Underlining added]

[29] I consider the statements in the *Nagribianko* case both at the Court of Appeal and Divisional Court level to accurately and comprehensively represent the common law of probation in Canadian law. These statements of principle are consistent with the statements from the referenced Nova Scotia cases.

[30] I should note however that in some of the earlier cases, from Nova Scotia and other jurisdictions, the suitability standard for probationary employee is treated under the general rubric of just cause. That does not change the test of suitability but is potentially confusing when distinguishing between the "traditional" just cause standard on the one hand and the suitability standard associated with probationary status on the other hand. It would appear that the more recent cases treat the suitability standard applicable to probationary employees as a separate and standalone class, distinct from the just cause standard. Respectfully, that appears to be the preferred means of terminology.

[31] Returning to the position advanced by the Claimant, what is essentially being put forward is a simultaneous acknowledgment of a probationary period while, at the same time arguing for a just cause standard applicable to the same initial three month period during which, in the case of termination without just cause, there would be a three month salary continuance.

[32] With respect, it seems to me that this proposition is logically flawed. Both of these standards cannot co-exist in respect of a given employee and for a given time period.

[33] They can however both exist for different time periods; to be specific:

- The probationary status and its suitability standard would apply for the initial three month probationary period;

- The three month salary continuance (in the absence of just cause) would apply for the period after the initial probationary period (assuming the employee successfully completes the probationary period.

[34] Otherwise, to hold that the salary continuance provision applied during the initial three month probationary period would necessarily mean that the probationary status is essentially rendered meaningless.

[35] As a general principle of contractual interpretation, courts strive to give each and every provision in a contract some meaning. I would refer here to some of the "cannons" of construction of written agreements as set out in the *Law of Contracts*, McCamus (3d) as follows:

> **2) Construction of the Agreement as a Whole**
>
> Agreements are to be construed in such fashion as to effectuate the intentions of the parties as can best be determined from the entirety of the agreement. Individual terms are thus to be construed in the light of their relationship to other parts of the agreement

> and the overall objectives of the agreement. In *BG Checo International Ltd v British Columbia Hydro & Power Authority*, LaForest and McLachlin JJ stated the basic principle in the following terms: "It is a cardinal rule of the construction of contracts that the various parts of the contract are to be interpreted in the context of the intentions of the parties as evident from the contract as a whole.
>
> Each term must be interpreted, to the extent that it may bear the appropriate meaning, harmoniously with the other terms of the agreement. (at page 819)
>
> …
>
> **3) Giving Effect to All Parts of the Agreement**
>
> The basic principle that terms are to be interpreted in the context of the entire agreement between the parties is often coupled with the instruction that effect should be given, is possible, to all parts of the agreement. No provision of the agreement, it is sometimes said, should be considered to be "otiose" or "redundant" or mere surplusage. In *Re Strans Music Hall Co Ltd*, Lord Romilly MR provided the following statement of the general principle: "The proper mode of construing any written instrument is, to give effect to every part of it, if this be possible, and not to strike out or nullify one clause in a deed, unless it be impossible to reconcile it with another in a more express clause in the same deed. Thus, courts will lean against an interpretation of an agreement that will render one of the terms meaningless. (at page 821)

[36] McCamus also states (p. 814):

> Headings for clauses or groups of clauses may also be of assistance in their interpretation. A heading might, for example, signal the purpose of the clause subject to interpretation. Again, however, in the event of a conflict between a heading and the operative provisions, the latter would prevail.

[37] I find that the only way to give each of these two provisions meaning is to apply the first clause to the probationary period and the second clause to the period of employment, if any, after the probationary period. That is to say, in the first 90 days the following clause applies:

> The first 90 days (3 months) will be a probationary period with review discussions held every 30 days.

[38] Following that time period, if the employee is retained, this clause would apply:

> In the event of termination without cause, a 3 month salary continuance would be provided

[39] Against this, the Claimant says that this would mean the employee would be limited to a 3 month salary continuance for an indefinite period and this result would be unrealistic or absurd. That may or may not be the case, but it would certainly be entirely lawful and within the requirements of the *Labour Standards Code,* R.S.N.S. 1989, c. 246. Apart from the minimal statutory requirement, parties are free to agree to whatever notice of termination they wish (*Machtinger* v. *HOJ Industries Ltd.*, 1992 SCC 102).

[40] The consequence of this conclusion is that the standard applicable to the Claimant here is that of a probationary employee - suitability.

[41] There was a significant amount of evidence that established that the Claimant was not suitable to the position and, the evidence also showed that the employer acted fairly and gave the Claimant a fair opportunity to demonstrate her suitability. I would refer to the following:

- She had a period of 90 days to demonstrate her suitability
- She was given written directions, at the beginning of her employment clearly outlining the expectations of the employers;
- She was given further written instructions within a few weeks of starting her employment;
- She was given oral instructions on an ongoing basis;
- There were a number of issues with her performance. The biggest issue related to the lack of progress made in the financial statement preparation for the external auditors. This appears to be an ongoing issue and was raised repeatedly at

weekly meetings;

- She was continuously and frequently tardy and, respectfully, I do not accept the suggested interpretation that she could arrive whenever she chose every day, as opposed to an interpretation that she chose a starting time and stick to that time. Here I take notice of the industry she was working in and the fact that the work day starts earlier than many others;
- She regularly missed project management meetings and billing meetings. I accept that these were important meetings for the CFO of these companies;
- She frequently would not respond to emails from co-workers including her superiors.

[42] It appears beyond debate that the Claimant did not satisfy the employers that she was a suitable fit for their company. And, as I have already said, in my view she had a full opportunity to otherwise demonstrate that and I see no evidence whatsoever of any bad faith on the part of the employers.

[43] The Claimant's first day of work was January 9th and her last day was April 3rd. I calculate that to be 84 days. It is within the 90 day probationary period. Alternatively, if it is to be calculated in accordance with three months, that would have terminated on April 9th and April 3rd would be less than three months. Either way the notice of termination was given prior to the end of the probationary period.

[44] It follows that this aspect of the claim must be dismissed.

Just Cause

[45] If my conclusion in the previous section is wrong, it is appropriate to consider further the position of the Claimant that both parts of the relevant paragraph (quoted above) apply to the probationary period. That is to say, the first 90 days constitute a probationary period and it recognizes the standard of suitability applies

but if the employee is terminated for not being suitable, three months of salary continuance would be provided unless there was cause, meaning just cause in the traditional sense.

[46] As noted earlier, the Claimant refers to the following passage of the Ontario Court of Appeal in the *Nagribianko* case at paragraph 6:

> Unless the employment contract specifies otherwise, probationary status enables an employee to be terminated without notice during the probationary period…

[47] In effect, I understand the Claimant to be saying the employment contract here does specify otherwise – it says the employee is to receive three months' salary continuance if terminated, unless there is just cause. Then, it is further argued that just cause cannot be established here because the Claimant was never warned that her job was in jeopardy because of performance issues. Reference is made to case law indicating that performance or incompetence can only constitute just cause if the employee is advised of the standards to be met, given a reasonable time to meet them, and advice that termination may occur if the standards are not achieved. No such warnings were given here so just cause cannot be shown.

[48] Since 2001, any discussion of just cause invariably will refer to *McKinley v. BC Tel*, 2001 SCC 38. In this Province *McKinley* has been mentioned in several cases, including: *MacLeod v. Whebby*, 2014 NSSC 306 per Chipman, J. at para 20; *Garner v. Bank of Nova Scotia*, 2015 NSSC 122, per Smith, ACJ (as she then was) at paras. 184-87; *Arnold v. O'Regan Halifax Limited*, 2023 NSCA 37 per Fichaud, J.A., at para 50.

[49] In *McKinley,* the Court stated (para 48):

> . ….. I am of the view that whether an employer is justified in dismissing an employee on the grounds of dishonesty is a question that requires an assessment of the context of the alleged misconduct. More specifically, the test is whether the employee's dishonesty gave rise to a breakdown in the employment relationship. This test can be expressed in different ways. One could say, for example, that just cause for dismissal exists where the dishonesty violates an essential condition of the employment contract, breaches the faith

> inherent to the work relationship, or is fundamentally or directly inconsistent with the employee's obligation to his or her employer.

[50] In the *Garner* case, after quoting from *McKinley,* the Court states:

> [187] Although the Court in McKinley, *supra*, was considering employee dishonesty in particular, lower courts view the contextual approach endorsed in that case as applying to any case where an employer raises the defence of just cause: see, for example, *Bonneville v Unisource Canada Inc*, 2002 SKQB 304 at ¶35; *MacLeod v W Eric Whebby Ltd*, 2014 NSSC 306, at ¶20.
>
> [188] According to the Supreme Court of Canada, when considering whether an employer was entitled to terminate an employee for cause, the test is whether the employee's conduct gave rise to a breakdown in the employment relationship. This approach requires a consideration of the employment relationship as a whole in order to determine whether the employee's conduct justifies termination.

[51] The Claimant refers to the Supreme Court case of *Sattva Capital v. Creston Moly Corp*, 2014 SCC 53, for the proposition that the surrounding circumstances must be considered in interpreting the employment contract. I would also refer to the following comments of Warner, J. in *Kerr v. Valley Volkswagen*, 2014 NSSC 27 at para 27:

> [27] In **Geoff R. Hall**, *Canadian Contractual Interpretation Law, Second Edition* (Markham: LexisNexis, 2012), at ch. 7.4.1 Hall makes similar contextual observations about employment contracts:
>
> > The interpretation of employment contracts is one of several areas in which policy goals other than interpretative accuracy affect the interpretative process. . . . Unless there is a contractual provision to the contrary, an employment contract will be interpreted in a manner which further employment law principles, specifically the protection of employees who are vulnerable in dealings with their employers and for whom employment is important to their sense of self-worth. …
> >
> > However, at the end of the day, interpretation of an employment contract is still an exercise in contractual interpretation, so in the absence of some basis for refusing to enforce a contract (such as unconscionability) the intention of the parties will generally prevail if they are clearly expressed, even if doing so

> detracts from the employment law goals which are otherwise presumed to apply. …
>
> The courts go some considerable distance to protect employees, and in doing so will read many things into employment contracts, which may be hard to reconcile with the parties' intentions. At the same time, the courts are reluctant to override clear contractual interpretations and generally will give effect to those intentions if clearly expressed. …

[52] Finally, I would refer to the Ontario Court of Appeal decision in *Agostino v. Gary Bean Securities*, 2015 ONCA 49, dismissing the employee's appeal. At para 4, Doherty, J.A. states:

> There is no legal principle requiring progressive discipline in every case. The trial judge considered whether progressive discipline was appropriate in these circumstances and determined that it was not given his conclusion that the appellant's dishonesty went to the heart of the employment relationship (see paras. 86-91). We agree with his conclusion.

[53] The Claimant is suggesting that in order to claim just cause, the Defendant employers had a duty to warn which is a defining feature of progressive discipline. At the same time the Claimant is recognizing that this was during a probationary period. The issue, boiled down, is whether a progressive discipline process can be implemented during a probationary period. No authority has been provided supporting that and on principle I do not think they can exist at the same time.

[54] It should at this point be stated that it has been recognized in previous case law in this Province that gross incompetence would justify cause without any warning or progressive discipline being applied. In *Babcock v. Weikert*, 1993 NSCA 163, the Court stated:

> In his text, *Wrongful Dismissal* (1984), 1993 Edition, Harris writes at 3-144):
>
> > This somewhat confusing statement apparently is to be understood to mean that only gross incompetence warrants discharge.
>
> This was the interpretation accepted by MacIntosh, J. in *Delano v. Atlantic Trust Company* (1977), 24 N.S.R.(2d) 53.

> Subsequent cases support the view that to justify dismissal for cause without appropriate warning, the incompetence must be gross in nature.

[55] To similar effect, in *Musgrave v. Levesque Securities*, 2000 NSSC 3312, Moir J. stated:

> In cases of alleged incompetence, the court must first determine whether the employee has been guilty of such gross incompetence as will justify dismissal without warning.

[56] I would refer to the comments of Fichaud, J.A. in the *Arnold* case (para. 50):

> The common law's approach to termination of employment has evolved from contractual principles of repudiation and fundamental breach. In a wrongful dismissal lawsuit, just cause involves "misconduct by the employee" that (1) "goes to the root of the employment contract", or (2) caused "a breakdown of the employment relationship" or (3) "undermined his essential obligations" to his employer: *McKinley v. B.C. Tel*, 2001 SCC 38, [2001] 2 S.C.R. 161, paras.48 and 58, per Iacobucci J. for the Court…

[57] Given those comments that the common law has evolved from contractual principles of repudiation and fundamental breach, it appears that may be that the cases that refer to gross incompetence have to be reconsidered in light of the approach outlined in *McKinley*. It would seem that the proper approach is to determine whether the employee's misconduct (1) "goes to the root of the employment contract", or (2) caused "a breakdown of the employment relationship" or (3) "undermined her essential obligations to her employer".

[58] The most significant shortfall here was the Claimant's failure to complete the year-end work which was to go to the external auditors. Before reviewing that evidence, it is to be remembered that the Claimant here was not a first time or junior accountant but rather was hired as a Chief Financial Officer at an annual salary of $125,000, participation in a bonus plan, and a full benefits plan paid 100% by the employer after probation.

[59] I note the following:

- The Claimant's employment contract included responsibility for year-end working papers to be prepared for the external accountants;

- An introductory "on-board" memo was provided to her on her first day of work of January 9th. Item 1.0 reads:

  1.0 2022 close out soon as per RBC request (1 March?)

- Mr. Ferguson, the CEO and principal owner, emphasized to the Claimant the importance of this issue on her first day of work;

- The Claimant confirmed that she understood that it was the top priority and that she had been so advised. The reason it was a priority was that the companies' bankers needed external financial statements in order to increase the limit of the operating line by $500,000. In her evidence she confirmed that she knew this;

- This issue was raised by Mr. Ferguson on multiple occasions;

- The external accountants, Bruce & Monahan, sent the information request which included 22 items in a detailed memo to the Claimant on February 3;

- On March 8, Jody Nickerson, the functioning accountant at Bruce & Monahan for this file, had a call with the Claimant at which time she advised him that she was near completion of the required items;

- On March 23 Mr. Nickerson and the Claimant had a further discussion at which time it became clear to Mr. Nickerson that the materials were nowhere near being completed;

- On April 3, 2022, the Claimant was dismissed and Mr. Nickerson was advised of that on or about that date;

- On April 5 Mr. Nickerson was given a USB stick with the

completed work that the Claimant (along with other employees) had thus far assembled. Based on his review, he concluded that 75% of the work was yet to be done;

- Following that, the Defendant hired an independent accountant named Charlene MacLeod to complete the work. She did so in the later part of April and part of May;

- Ms. MacLeod testified that it took her 35 hours to complete all of the necessary tasks and provide the requested material to the external accountants;

- Mr. Nickerson indicated that any competent accounting professional would have been able to complete the work in question;

- Ms. MacLeod stated that the work was not complicated or difficult, it was pretty straight-forward financially. She stated that it was not a lot of work to do and took her 35 hours to get to the finish line.

[60] In light of the totality of this evidence, I would conclude that the Claimant's inability to complete the year-end work which was the number one priority, constituted a significant undermining of an essential obligation.

[61] To put this plainly, the Claimant had two months to do this work and in that time only completed approximately 25% of the task. Ms. MacLeod completed the balance of the work in the equivalent of one week.

[62] I recognize that the Claimant had other tasks and probably could not devote herself full-time to this matter. Against that, I note that she had the memo since February 3 which means she had at least eight weeks to complete it and would have meant something in the range of five-six hours per week calculated on the basis of the 35 hours mentioned by Ms. Macleod.

[63] The only reasonable conclusion I can arrive at on the evidence is that the Claimant did not meet this most essential obligation of her position. And, I regret to say, by quite a significant measure did not meet it that would, it seems, meet the standard of "gross incompetence", if that is the standard.

[64] I should add this. The assertion that the just cause standard should be applied relative to the potential salary continuation, cannot mean that I ignore the three month probationary period. To do so would be wholly artificial and would be contrary to the directions from *Sattva* to consider background circumstances and from *McKinley* to follow a contextual approach in considering just cause. Significantly, that means the Claimant, or anyone in such a position, would know that she was being assessed by the employer during that time period and may or may not successfully complete the probation. To then layer on top of that some additional type of warning that her employment was in jeopardy would be unnecessary and redundant. It was something which was and would be understood by anyone in the position of the Claimant.

[65] Although stated in a different factual context, the following statement from *Carias v. CIBC*, 2003 BCSA 587, is apt:

> [85] This is not a case of an employee who, unaware of the standards expected of him, transgresses some undefined rule of conduct. Nor can the plaintiff's situation be compared to that of an employee who, having had such conduct go uncorrected by his employer in the past, would be entitled to a caution or warning.

[66] I find that the inability of the Claimant to fulfill this essential obligation satisfies the Defendant's burden to establish just cause.

[67] In addition to that, the Claimant was routinely late for work in the mornings and routinely missed project management and billing meetings for which her attendance was expected and which she had been advised of on her first day of work on January 9th as it was included in the orientation memo previously referred to.

[68] Further, there were a number of unanswered emails sent to the Claimant by the senior management of the companies.

[69] By themselves these incidents would not constitute just cause but cumulatively they cannot be ignored and only make the conclusion more compelling.

[70] As stated, it is my view that the failure to complete the year-end work constitutes significant misconduct that satisfies the principles or tests of *McKinley*.

[71] I find that just cause has been established.

Entry Bonus

[72] The entry bonus reads as follows:

> **Signing & Entry Bonus**
> An entry bonus of $15,000 will be provided. $5,000 paid the first week of employment, $5,000 paid at the three month point and the final instalment paid at the 6 month point. In the event that the candidate terminates their employment with Companies in the first 18 months, the Signing & Entry bonus would be repayable in full within 30 days.

[73] The Defendant paid the first instalment of $5,000 but has not paid the second or third installment. As I understand it the position taken is that since she did not successfully complete the probationary period, she was not entitled to the signing entry bonus.

[74] The written wording in the contract does not say that. On the other hand, it does make reference to what will happen if the employee terminates the employment and that is to make the signing entry bonus repayable. In order to accede to the Defendant's position on this point I would have to imply the term that it is to be repaid if the probationary period is not successful.

[75] It is stated to be a “signing and bonus”. In effect, I am being asked to imply that it was a retention bonus. I see no legal basis to imply such a term. It does not satisfy the test of being so obvious to hardly need stating or alternatively to instill commercial efficacy in the contract.

[76] On the other hand, it seems to me that this signing and entry bonus on its wording, is payable whether or not the candidate completes the probationary period. It is called an “entry bonus.” It would seem that in some measure it provided the person in the position of the Claimant, who was moving from Alberta to take this position, with some motivation to make that move and some security that there would be this money payable whatever else happened.

[77] That the parties agreed that it would be paid in installments seems immaterial to the conclusion that I arrive at.

[78] I will award the unpaid amount of the bonus which is $10,000.

Other Considerations

[79] I should also mention that during the hearing the potential application of the Nova Scotia *Labour Standards Code* arose but, upon review at that time it was concluded and, agreed to by the Claimant that the *Labour Standards Code* did not apply because the term of employment was less than three months (see sub-section 72(3)(a)).

[80] There may be withholding tax applicable to the $10,000 required under federal legislation. If that is the case, my order will naturally be subject to that.

[81] Given the mixed success I am not awarding costs to either party.

Order

[82] It is hereby ordered that the Defendant pay to the Claimant the sum of $10,000, subject to any statutory withholding requirements.

[83] There will be no costs payable by either party.

Michael O’Hara, Small Claims Court Adjudicator