

CANADA / JUDGMENT

# Duprey v. Seanix Technology (Canada) Inc.

2002 BCSC 1335

## COURT

Supreme Court of British Columbia

## DECIDED

17 September 2002

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| Citation: | Duprey v. Seanix Technology (Canada) Inc.                                  |
| Date:     | 20020917<br>2002 BCSC 1335                                                 |
| Docket:   | S004002<br>Registry: Vancouver<br>IN THE SUPREME COURT OF BRITISH COLUMBIA |
| BETWEEN:  | JOSEPH DUPREY<br>PLAINTIFF                                                 |
| AND:      | SEANIX TECHNOLOGY (CANADA) INC.<br>DEFENDANT                               |

## REASONS FOR JUDGMENT

### OF THE

HONOURABLE MR. JUSTICE BARROW

#### Counsel for the Plaintiff:

D.B. Kirkham, Q.C.

Elyssa L. Lockhart

#### Counsel for the Defendant:

A.D.C. Ross

#### Date and Place of Trial:

July 15-19 and 22, 2002

Vancouver, BC

## Introduction

- [1] The plaintiff is a fifty-six year old computer sales person. The defendant is in the business of manufacturing computers. After a long and successful career with Phillips Electronics and Packard Bell, the plaintiff was hired by the defendant as the director of retail sales in February 2000 to assist them in increasing their retail computer sales. He was to be paid as a commissioned sales person. After three months of employment he was fired. In this action, the plaintiff seeks damages for commissions which he says are due to him for, among other things, sales made by the defendant to Future Shop subsequent to his termination but as a result of his efforts.
- [2] There are several issues between the parties. Firstly, they disagree as to the terms of the plaintiff's employment contract. The plaintiff argues that the employment contract was contained in an oral agreement made in mid-January 2000 and supplemented by a job description that also set out the terms of remuneration. The defendant argues that the employment contract is contained in a written contract signed by the parties in early February 2000. That document, unlike the oral agreement upon which the plaintiff relies, contains two terms of significance to this litigation: it provides that the first six months of the plaintiff's employment were probationary in nature, and it purports to fix the length of notice required upon dismissal.
- [3] Secondly, there is an issue as to whether the plaintiff was wrongfully dismissed and, if so, whether the manner in which he was dismissed was such that it ought to cause the court to increase the length of the notice period that would otherwise be applicable.
- [4] The final issue is the proper interpretation of the terms of the contract with regard to the plaintiff's entitlement to commission. The plaintiff argues that he is entitled to commission on all sales for which he was the effective cause, regardless of whether those sales concluded before or after the termination of his employment. The defendant argues that commission is payable only on those sales completed during the currency of the plaintiff's employment inclusive of any notice period.
- [5] There are, on some issues, significant conflicts in the evidence. On other issues there are no material conflicts. I will address the areas of conflict as they arise. Unless otherwise stated, the facts noted in what follows are those based on uncontradicted evidence.

## The Contract of Employment

- [6] By the later part of 1999 Packard Bell, the plaintiff's then employer, had decided to get out of the retail computer business in western Canada. At that time the plaintiff held the position of director of sales, western region. The plaintiff became aware that the defendant was contemplating expanding its retail business and, in anticipation of his employment ending, he contacted the defendant and arranged an interview.
- [7] A meeting was held in January 2000 between the plaintiff and various senior managers from the defendant, including Mr. Joe Hooker, the defendant's vice president of sales. The result of this meeting was that the parties agreed to meet again, at which time it was expected that the plaintiff would make a presentation to the defendant's executives as to how he might assist the defendant in expanding its retail business. Accordingly, the plaintiff prepared a presentation and delivered it during a meeting with the same people later in January. Immediately following the meeting the plaintiff was offered the job of director of retail sales for western Canada. His remuneration was to consist of a monthly salary of \$4,000 plus commission. He accepted the offer but requested that it be put in writing. The defendant agreed to do that. The parties did not discuss all of the details of the plaintiff's engagement, for example, they did not discuss vacation entitlement, benefits, or pension details.
- [8] Some time after the meeting, but before he started work, the plaintiff received a document entitled "Director of Retail Sales - Western Canada, Position Profile". It described the responsibilities of the position and set out the commission structure. The plaintiff reported for work on February 2, 2000. On February 3rd, he received further documentation consisting of a letter from Mr. Hooker, another position profile and a document entitled "Terms and Conditions of Employment Agreement". The position profile was identical to the earlier document that the plaintiff had received except that the title of the position was "Manager of Retail Sales - Western Canada" as opposed to "Director of Retail Sales - Western Canada".
- [9] The plaintiff reviewed these documents and the only concern he expressed to Mr. Hooker, the person to whom he would be reporting, was that the title should be director as opposed to manager of retail sales because this indicated a particular status that was important to convey to potential customers. Mr. Hooker agreed to make the change. The plaintiff then signed the employment agreement and the letter that accompanied it on February 4, 2000.
- [10] In combination, the letter and the employment agreement provide that the plaintiff would receive a salary of \$4,000 per month. In addition, he would receive a monthly commission equal to a percentage of the value of the sales he was able to generate less \$4,000. The percentage or multiplier used to calculate the commission varied according to the type of product that was sold. Specifically, the agreement contained the following list:

Products

Multiplier

## Internet Appliances

2

## Economy PCs

1

## Value PCs

1

## Performance

1.2

## Monitors

1.2

## Flat Panels

2.0

## Notebooks

1.2

## Other

1

[11] The letter states that "Commission is paid out on the last payroll in the following month it is earned". It further stipulates that the plaintiff would be reporting to Mr. Hooker. It also provides that the first six months of the plaintiff's employment would be probationary in nature and if the plaintiff was kept on after that period, he would be entitled to various medical benefits. This letter was signed on behalf of the defendant by Mr. Hooker and Ms. Ng, the assistant to the president. On February 4th, it was signed by the plaintiff who, in doing so, agreed to the terms contained in it.

[12] The Terms and Conditions of Employment Agreement contain the following significant terms:

## 1.2 Remuneration

1.2.1 Salary - Remuneration is based on an annual salary that is paid semi-monthly (every 15th and Last Day of the Month). Salary is paid via direct deposit to the Employee's bank account.

**Monthly Salary: \$4,000.00**

The Company normally conducts an annual salary review in October of each year. Nevertheless the Company may review the Employee's salary at an earlier date. Any changes to the Employee's remuneration will be communicated in writing.

1.2.2 Commission - the Employee will receive commission as per the attached structure given by the Manager. Commission will be paid on the last payroll in the following month that it is earned.

...

**1.4 Probation**

As of the date of commencement, the Employee will be on a six (6) month probation. Upon successful completion of this probationary period, the Employee will become a permanent employee of the Company and be entitled to participate in such additional benefits as the Company generally provides for employees of the same job classification as outlined in this Agreement.

...

**2.1 Termination**

2.1.1 The Company may terminate this Agreement for any reason and at any time, provided that the Company gives the Employee the prescribed notice and/or compensation (payment in lieu), as stipulated in the Employment Standards Act of British Columbia.

**5.1 General**

...

5.1.4 This Agreement binds the Employee during employment with the Company and survives termination of the employment, regardless of how employment is terminated, whether for cause or otherwise.

The agreement is signed by Ms. Ng on behalf of the defendant. After her signature, the following statement appears:

I acknowledge that I have had sufficient time to review this Agreement thoroughly; I understand the terms of this Agreement and my obligations hereunder; and I have been advised, and have been given an opportunity, to obtain legal advice about this Agreement.

There then appears the plaintiff's signature.

[13] The plaintiff's position is that the terms of the employment contract were settled in January prior to the signing of the various documents on February 4, 2000. While agreeing that additional documents were signed on February 4th there was, according to the plaintiff, no fresh consideration for the additional terms in those documents and thus they do not amount to a binding contract. If the plaintiff is correct, then the provisions in the February

4, 2000 document limiting the period of notice to which the plaintiff would otherwise be entitled and stipulating the probationary nature of the employment during the first six months would not apply.

- [14] In support of this position, the plaintiff relies on *Francis v. Canadian Imperial Bank of Commerce* (1994), 7 C.C.E.L. (2d) 1 (Ont.C.A.). In that case, the defendant bank extended to the plaintiff, by letter, a formal offer of employment that was subject only to the receipt of satisfactory references. By return correspondence, the plaintiff unconditionally accepted the offer and, following receipt by the bank of satisfactory references, began work. On his first day, the bank gave him a document which, among other things, purported to limit the length of notice to which the plaintiff would be entitled should he be dismissed. The plaintiff signed the document acknowledging at trial that he had probably read it. The plaintiff was dismissed several years later and at trial the bank sought to rely on the written agreement. The court held that the plaintiff and the defendant had entered into a valid and binding contract of employment by way of the exchange of letters, and that the subsequent document imposed significant limitations on what would have otherwise been the plaintiff's rights under the contract. The court found that the written document provided nothing to the plaintiff by way of consideration in exchange for these additional promises.
- [15] The defendant argues that several aspects of the case at bar distinguish it from *Francis*, supra. It is only necessary to deal with one of those matters. The defendant maintains that there was fresh consideration capable of supporting the additional terms in the written contract that was signed on February 4, 2000. In particular the plaintiff was, by the terms of that agreement, provided with medical benefits (although these were not to be effective until after the probationary term) and a paid time-off scheme, in which he was entitled to participate following the completion of his first year of service.
- [16] In my view, there was sufficient fresh consideration to render contractually binding the additional terms in the written contract dealing with the probationary term and the notice period upon dismissal. The fact that, for example, the plaintiff would not become eligible for medical benefits until after the completion of the probationary period does not, as the plaintiff argues, render it incapable of constituting consideration. The defendant was obliged to provide the coverage under the conditions stipulated. It remained of value to the plaintiff, albeit, at least initially, only potentially available. Therefore I find that the employment contract between the parties consists of the document entitled Terms and Conditions of Employment signed February 4, 2000 and the letter from Mr. Hooker dated February 3, 2000 with the accompanying position profile.

#### Was the Plaintiff Wrongfully Dismissed?

- [17] Shortly after the plaintiff was hired he approached the buyer for Future Shop, one Mr. McTaggart. The plaintiff initiated this contact with a view to convincing Future Shop to carry the defendant's products for retail sale. Mr. McTaggart told the plaintiff that Future Shop was not interested in doing business on that basis but that they were interested in finding a

manufacturer to produce computers under Future Shop's private brand name. The plaintiff advised Mr. Hooker of this possibility and arranged for Mr. McTaggart to tour the defendant's manufacturing facility.

- [18] Following the tour, there was an exploratory meeting on February 15th involving primarily the plaintiff, Mr. Hooker, and Mr. McTaggart. At the conclusion of the meeting, it was apparent that Future Shop was prepared to pursue the matter further. Before the defendant could commit to going any further, it required the approval of its president as this undertaking had the potential to be significant, and it would involve a type of arrangement which the defendant had not previously been engaged in. On February 28th, the president of the defendant advised Mr. Hooker to proceed.
- [19] There followed a series of negotiations and meetings between Future Shop and the defendant. An agreement to produce private label computers on behalf of Future Shop was ultimately entered into on May 10, 2000. On May 16, 2000, the first orders by Future Shop pursuant to that contract were received. The relationship between the defendant and Future Shop has proven very successful. Between the time the agreement was signed and February 2002, computers worth in excess of \$82 million had been sold by the defendant to Future Shop.
- [20] It is clear that, but for the plaintiff's association with Mr. McTaggart, an agreement between Future Shop and the defendant would never have been concluded. Indeed, the defendant would not, in all likelihood, have given serious consideration to such an arrangement with anyone. Moreover, it is clear that, over and above introducing the parties, the plaintiff played a significant role in the negotiations. His role was not primarily a decision-making one, but rather the defendant was content to exploit the plaintiff's good relationship with the Future Shop officials by having him remain, at least initially, the principal point of contact between the defendant and Future Shop.
- [21] In his evidence, which I accept, the plaintiff indicated that he was devoting approximately 40 percent of his time to this initiative. He was also servicing his other retail accounts in a manner that will be addressed in more detail below. It is as against this background that the plaintiff was summarily fired on May 4, 2000.
- [22] The plaintiff argues that the defendant breached an implied term of the contract of employment, namely that it would act honestly and in good faith towards the plaintiff. The plaintiff alleges this breach occurred when the defendant terminated him without cause and solely to avoid liability for commissions in respect of sales to Future Shop. Given the terms of the contract, as I have found them, the plaintiff was on probation at the time he was terminated.
- [23] In *Jadot v. Concert Industries Ltd.* (1997), 44 B.C.L.R. (3d) 327 at paragraphs 28 and 29, Rowles J.A. made the following observations regarding the standard for dismissal of probationary employees:

The standard for dismissal of a regular employee is just cause; for a probationary employee the standard is suitability: see *Pathak v. Royal Bank* (1996), 21 B.C.L.R. (3d) 108, 18 C.C.E.L. (2d) 266 (B.C. C.A.). In this case, Concert Industries dismissed the appellant because its officers concluded that the appellant was not a suitable candidate for long-term employment.

After a careful review of the authorities, the trial judge concluded, correctly in my view, that an employer, during a probationary period "has the implied contractual right to dismiss a probationary employee without notice and without giving reasons provided the employer acts in good faith in the assessment of a probationary employee's suitability for the permanent position".

(emphasis added)

[24] The issue in the circumstances of this case is, therefore, whether the defendant acted in good faith in its assessment of the suitability of the plaintiff for continued employment. In my view, the defendant did not.

[25] The defendant advanced five reasons for the dismissal of the plaintiff. These were that the plaintiff was not using Lotus Notes to track his activity; that he was responsible for difficulties in relation to a sale to The Brick, another large retail outlet; that he was not reporting to Mr. Hooker and when he was, it was not in sufficient detail; that he was not adequately covering the accounts to which he had been assigned; and, finally, that he was not meeting revenue and profit margin expectations. In my view there is no merit in any of these assertions.

[26] Before addressing the items individually, it is worthy of note that, with one exception, there is not a single documented instance of Mr. Hooker commenting to anyone, including the plaintiff, about the plaintiff's performance. The one exception relates to an e-mail sent by Mr. Hooker to the plaintiff on March 17, 2000. In that e-mail Mr. Hooker said:

I am pleased with your efforts in the last couple of weeks Joe, especially since our discussion on managing and paying attention to the existing business as well as the forward progress on our new prospects! I truly [sic] believe this will be a rewarding year in retail for all of us!

### Use of Lotus Notes

[27] Lotus Notes is, as I understand it, a software application that includes e-mail, calendaring and other tools that was in common use by the defendant's employees. The plaintiff maintains that he used this tool during his employment for the specified purpose. He also asserts that the production of his records in that format have been withheld in the course of this litigation.

[28] Mr. Hooker maintains that he examined the contents of the plaintiff's computer and found nothing on Lotus Notes. I reject Mr. Hooker's evidence in this regard and indeed in most cases where his evidence conflicts with that of the plaintiff I prefer the plaintiff's account. My reasons for coming to that conclusion will become clear as the reasons for, and the manner of, the plaintiff's dismissal are addressed. There is no suggestion that Mr. Hooker

ever spoke with, or wrote to, the plaintiff regarding his alleged failure to use Lotus Notes. If the plaintiff was not using that tool as expected, and if it was a matter of any concern, it makes no sense that Mr. Hooker would not at least raise the issue with the plaintiff orally if not in writing. I am not satisfied there was any concern, genuine or otherwise, on Mr. Hooker's part regarding the plaintiff's use of Lotus Notes.

## The Brick

- [29] The second reason advanced for the plaintiff's dismissal relates to two matters involving sales to The Brick. One of those issues involved shipping costs, and the other involved a 4 percent price uplift that the plaintiff had negotiated on the sale of computers to The Brick.
- [30] As to the shipping cost matter, the issue was that the plaintiff had sold computers to The Brick and when they were delivered, the cost of shipping was added to the price. The Brick had a policy of not paying shipping and hence attempted to deduct that cost from their remittance. This matter was brought to the plaintiff's attention. He was not aware of The Brick's policy in this regard, and the sense he conveyed in his evidence was that he was surprised by it. He supported his evidence in this regard by noting that the defendant had been doing business with The Brick long before the plaintiff's employment began and no one, either at The Brick or the defendant, had alerted him to this policy. In any event, once it was brought to his attention he reported to Mr. Hooker that he would meet with the appropriate authorities at The Brick and resolve the matter. He did that prior to his departure. There was no complaint by Mr. Hooker about the plaintiff's response to this matter. Indeed, it could have been completely resolved by way of simply adding the shipping costs to the price of the product; a solution that I understand was acceptable to The Brick. The only reason that solution was not adopted was due to limitations in the defendant's ability to deal with the accounting adjustments that would be necessary as a result. This, it seems to me, was at worst an understandable oversight that the plaintiff resolved reasonably and to the apparent satisfaction of Mr. Hooker. I do not accept that it remained a concern of Mr. Hooker's at the time the plaintiff was fired.
- [31] As to the 4 percent price uplift, this involved the plaintiff negotiating an increase in the sales price of the defendant's products to The Brick, an accomplishment, in and of itself, about which there could be no complaint. This was done, according to the plaintiff, as part of an arrangement whereby the extra funds would be later made available to The Brick in the form of product promotion. According to the plaintiff, this is a common practice in the industry. Indeed, he had devoted a significant proportion of his initial presentation to the defendant, prior to being hired, explaining this and related retail arrangements peculiar to the industry. The plaintiff maintained that Mr. Hooker approved the arrangement. Mr. Hooker testified on examination for discovery that he did not authorize this pricing arrangement. At trial, he acknowledged that he had approved it (the documentation indicates that he was clearly aware of the pricing arrangement and that his only stated concern was that the plaintiff not receive a commission on the uplifted price). He offered no

explanation for this conflict in his evidence other than that he initially did not recall approving the arrangement. He indicated that his concern was not whether he had approved it but rather that the details of how the 4 percent fund would be accessed, and under what conditions, were matters that the plaintiff should have settled upon prior to entering into the arrangement. He did not, however, in discussing the uplifted prices in the various e-mails that he exchanged with the plaintiff ever express that as a concern. I accept that it was a matter that remained to be resolved but that it did not support the notion that the plaintiff was in any way unsuitable for ongoing employment with the defendant. It was a matter that arose in the course of pursuing new business. It required an adjustment in the defendant's accounting practises but was not in any way a reflection on the plaintiff or his suitability for continued employment with the defendant as a sales person.

### Failure to Report

[32] The next reason advanced by Mr. Hooker for the dismissal of the plaintiff was his alleged failure to report, and report adequately. On April 12, 2000, Mr. Hooker sent out an e-mail to all of the retail sales people stating:

As I'm sure you will all agree, I have been some-what [sic] lax and deficient on [sic] the demands I have placed on you with respect to your activity management This changes effective today.

For now - nothing formal.

He then requested that the sales people provide him with weekly reports on a variety of matters. He wrote that the respondents should:

Keep it simple, very brief, concise and too [sic] the point (bullet format) for all info contained.

The plaintiff responded in a timely way as requested, and Mr. Hooker advised him his response was too brief. The plaintiff immediately (within 3 1/2 hours) provided a more detailed response, which apparently met with Mr. Hooker's approval. The plaintiff provided two further weekly reports before being terminated. None of these brought criticism from Mr. Hooker. All were provided on a timely basis and all appear to be responsive to the request made.

[33] There is no basis to conclude that the plaintiff was unsuitable for employment with the defendant on this account and I do not accept that Mr. Hooker so concluded. It is worth noting that while at least one of the other four retail sales persons expressed concern that the reporting was time consuming and not generally necessary, there was no evidence anyone else was doing anything more than the plaintiff in responding to Mr. Hooker's request.

## Sales and Profit Margin Issues

- [34] The defendant alleges that the plaintiff was not providing adequate coverage to the retail accounts to which he was assigned. There is no evidence to suggest that any of these companies expressed any concerns to the defendant in this regard nor is there any evidence that Mr. Hooker expressed any concern to the plaintiff. Perhaps the best measure of account coverage is to be found in the sales volumes that were generated.
- [35] The defendant indicated that the plaintiff was not producing results in terms of retail sales. In seeking to defend this position, Mr. Hooker produced a spreadsheet that he relied upon to assess the plaintiff's performance. The document was fundamentally flawed in a number of respects. Firstly, in creating it, Mr. Hooker used the wrong multiplier in attempting to project sales volume from a quarterly report to an annual forecast. He multiplied by three instead of four, thus seriously understating the projection. In addition, he made no effort to take account of the fact that, as the evidence and common sense suggest, computer retail sales are strongest in the back-to-school and pre-Christmas periods, neither of which had occurred when the plaintiff was fired. Further, the document relied on sales volumes from the previous year in relation to CompuSmart that were not accurate. Finally, the profit margins in the document attributed to sales to The Brick were ultimately proven to be wrong.
- [36] Mr. Hooker now realizes that the sales information that he produced was fundamentally flawed. He asserts however that he did not know that at the time and that he relied on that information in good faith. He must have known, however, of the cyclical nature of the sales environment in which he and the plaintiff were operating. He did not, assuming he believed that the numbers he was basing his decision on were accurate, take the time to ask the plaintiff about them (doing so would likely have revealed some of the errors as the plaintiff had pointed them out to Mr. Hooker in an earlier e-mail).
- [37] The sales to the three major accounts for which the plaintiff was responsible during his brief tenure with the defendant were quite remarkable. For the three months from February 1999 to April 1999, sales to The Brick by the defendant were \$429,076. For the same period in 2000, sales were \$731,249. Sales to CompuSmart for the relevant period in 1999 were \$629,865; in 2000, sales were \$355,683. This decline in sales was investigated by the plaintiff and explained to Mr. Hooker. It appears to have been the result of a decline in sales generally experienced by CompuSmart. Sales to A & B Sound in 1999 were \$358,257; in 2000, sales were \$849,063. In summary, sales to the three primary retail outlets for the defendant's computers rose for the period of the plaintiff's employment over the previous year from \$1.4 million to \$1.9 million. All of this was achieved while the plaintiff was spending, to Mr. Hooker's certain knowledge, approximately 40 percent of his time on the Future Shop negotiations. It was achieved, again to Mr. Hooker's certain knowledge, from a standing start by an employee who was previously unfamiliar with the defendant's products. It was also achieved notwithstanding the fact that the plaintiff had taken a week's holiday in April and had donated time to working on the production line during a particularly busy period in

March. Even by Mr. Hooker's calculations, there is no basis for the defendant to have been concerned about the plaintiff's performance given these circumstances.

- [38] The final concern the defendant advances for letting the plaintiff go is that he was not meeting profit margin expectations. There is no merit in this suggestion. The defendant's internal organization was such that sales people such as the plaintiff did not have the power to set the price on the goods they were selling. They were responsible for generating interest in the products and ultimately for concluding sales; however, the price at which the goods were sold was set by others in the organization. Sales people had a role to play in the setting of prices. They were expected to advise the marketing people of the competitors' pricing and other factors of relevance in the market place, but they were not charged with the responsibility of setting the price. They were not, therefore, in control of the profit margin. No doubt in part because of this, the plaintiff's contract with the defendant sets out gross sales expectations (in his case some \$16 million annually) but makes no mention of profit margins. In addition, Mr. Hooker could not have been unaware that profit margins were falling generally in the industry due to the intensely competitive nature of the market place. There is simply no basis upon which to conclude that the plaintiff's performance was wanting because of the falling profit margins.
- [39] In summary, I find no evidence upon which the defendant, primarily in the person of Mr. Hooker, could have been concerned about the plaintiff's suitability for continued employment. Indeed, on the surface it appears that his dismissal occurred in the face of evidence which suggests that he was an effective salesperson seemingly intent upon attempting to advance the interests of his new employer.
- [40] If the evidence consisted only of the foregoing, I would be reluctant to conclude that the defendant acted in bad faith in discharging the plaintiff. There are, however, two other matters worthy of note.
- [41] Firstly, even assuming that Mr. Hooker had concerns about the plaintiff's performance there was nothing relating to those concerns that precipitated the plaintiff's abrupt firing. His probationary period was not yet half over; none of the irritants that Mr. Hooker maintains were of concern to him occurred at or even near the time of the plaintiff's dismissal. There is, of course, no requirement that there be any temporal proximity between the causes for the dismissal and the actual dismissal but when there is not, it is at least curious.
- [42] The most significant and troubling matter relates to the conclusion of the Future Shop arrangement. There is no real dispute that it was primarily through the plaintiff's initiative and on the basis of his association with the Future Shop buyer that the private label sales arrangement got off the ground. There is no doubt that many others in the defendant's organization worked on the arrangement and indeed made the decisions regarding it. The plaintiff was responsible, however, for the germination of the idea and its initial development.

- [43] It is apparent that the defendant was aware of the potential liability it had to the plaintiff for commissions in relation to this agreement. On March 17, 2000 Mr. Hooker sent the plaintiff an e-mail indicating the need, in his view, to adjust his contract to deal with private label sales. No adjustment to the commission structure was ever settled. By May 2, 2000, however, the defendant's position had changed. On that day the plaintiff was called to a meeting with the defendant's vice-president of marketing and told that he was being taken off of the Future Shop account. He was told that there would be a "finder's fee" for his efforts in relation to the Future Shop account. He was told to call Future Shop and tell them of this change. The plaintiff refused and requested a meeting with Mr. Girard the president of the defendant. He was advised that Mr. Girard would be away until May 8, 2000. On that day the plaintiff was fired without having met with Mr. Girard.
- [44] When the timing of his dismissal is juxtaposed with the timing of the conclusion of the Future Shop arrangement, the conclusion that the defendant was acting in bad faith is inescapable. The plaintiff was terminated on May 8, 2000. The Future Shop contract was signed on May 10, 2000. The first Future Shop orders under the contract were received May 16, 2000, one day after the one-week notice period to which the plaintiff was entitled under his contract of employment. Following the plaintiff's dismissal, no commissions were paid by the defendant on Future Shop sales for the balance of the calendar year. Those sales were treated as a house account. By 2001, however, Mr. Hooker assumed responsibility for the Future Shop account and earned commission on sales to them at the rate of 0.2 percent. Given the volume of sales involved, this account alone provided a substantial income.
- [45] As indicated above, I reject Mr. Hooker's evidence in most instances where it conflicts with that of the plaintiff. Some of the reasons for that are noted above. In addition to those matters, there are others instances in which his evidence was wanting. He testified, for example, that he was not present when another employee of the defendant told the plaintiff, several days prior to him being fired, that the plaintiff was being taken off the Future Shop account. On examination for discovery, he testified that he was present when the plaintiff was told this. He explained that he simply recalled the matter differently now. It was a very significant event in the defendant's relationship with the plaintiff. I find it odd that Mr. Hooker would be in doubt about his presence, never mind be so fundamentally mistaken. Further, Mr. Hooker testified that the plaintiff was terminated because of his concerns about his performance and concerns of others that were expressed to him. No evidence from others was called to support this proposition.
- [46] On the other hand, I found the plaintiff to be a credible witness who gave his evidence in a forthright manner. I do not accept that the plaintiff had as significant a role in the closing of the Future Shop arrangement as he perceives, but I do not doubt the sincerity with which he holds that view.

[47] In my view, the plaintiff was fired in an effort by the defendant to avoid the payment to him of commissions on the sale of computers to Future Shop. I find that the defendant did not act in good faith in its assessment of the plaintiff's suitability for continuing employment.

What is the appropriate notice period?

[48] The defendant argues that even if the defendant acted in bad faith in terminating the plaintiff, the notice period remains as the parties contracted for, namely, one week. The defendant argues that the decision of the Supreme Court of Canada in *Wallace v. United Grain Growers Ltd.* (1997), 152 D.L.R. (4th) 1 deals with bad faith in the manner of an employee's dismissal and that if the defendant acted in bad faith in this case, it was not in relation to the manner of dismissal.

[49] Iacobucci J. in *Wallace*, supra, at paragraph 95, said the following about the need for good faith on the part of employers when terminating an employee:

The point at which the employment relationship ruptures is the time when the employee is most vulnerable and hence, most in need of protection. In recognition of this need, the law ought to encourage conduct that minimizes the damage and dislocation (both economic and personal) that result from dismissal. In *Machtinger*, supra, it was noted that the manner in which employment can be terminated is equally important to an individual's identity as the work itself (at p. 1002). By way of expanding upon this statement, I note that the loss of one's job is always a traumatic event. However, when termination is accompanied by acts of bad faith in the manner of discharge, the results can be especially devastating. In my opinion, to ensure that employees receive adequate protection, employers ought to be held to an obligation of good faith and fair dealing in the manner of dismissal, the breach of which will be compensated for by adding to the length of the notice period.

[50] Further, at paragraph 98, he continued:

The obligation of good faith and fair dealing is incapable of precise definition. However, at a minimum, I believe that in the course of dismissal employers ought to be candid, reasonable, honest and forthright with their employees and should refrain from engaging in conduct that is unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive. In order to illustrate possible breaches of this obligation, I refer now to some examples of the conduct over which the courts expressed their disapproval in the cases cited above.

[51] The issue to be resolved is whether an employer's conduct in terminating an employee, in order to avoid paying the employee for work that he had done, can be described as conduct relating to the manner of dismissal. It is first worth noting the obligation of good faith and fair dealing is, as Iacobucci J. pointed out, "incapable of precise definition". Secondly, whatever the outer limits of the obligation it involves, at a minimum, an obligation to be candid, reasonable and honest.

- [52] In the case at bar, the only conclusion the plaintiff could reasonably have come to upon his dismissal was that he was not suited to the employment; that he was somehow less than satisfactory as an employee. I have found, however, that it was not the case and that the defendant did not believe it to be the case. It follows from that finding that the defendant misled the plaintiff by not explaining the true reason for his dismissal. In so doing, it acted in a manner within the scope of behaviour that Wallace, *supra*, holds is worthy of sanction.
- [53] The parties contracted for the notice period applicable in the event of a termination of employment. At the time of the plaintiff's dismissal, he was entitled to one week's notice. Given the bad faith manner in which he was dismissed, and bearing in mind the length of his employment and the nature of bad faith, I would add to the notice period a further period of one month.

#### Private Label Sales

- [54] Before dealing with the issue of damages, it is necessary to deal with a number of matters relating to private label sales.
- [55] As noted above, private label sales or private branded sales, in the context of this litigation, refer to the notion of a manufacturer, in this case the defendant, producing computers with someone else's brand name on them. The plaintiff argues that his employment contract, by its terms, covers the sale of private label products. The plaintiff seeks to have the court interpret the contract as requiring the payment of commissions to the plaintiff for as long as the defendant continues to do business with Future Shop under the private label agreement entered into May 10, 2000. The basis of his entitlement, argues the plaintiff, is that he was and remains the effective cause of those sales and the contract ought to be interpreted as requiring payment of commissions on all such sales. As of February 2002, the defendant had sold computers valued at some \$84 million to Future Shop. On the plaintiff's view of the contract, he is entitled to \$840,000 in commission to February 2002. His future entitlement, assuming sales under the Future Shop arrangement continue at the rate they did in 2001, would be approximately \$524,000 per year for the duration of the arrangement. It is to be recalled that the plaintiff worked for the defendant for only three months.
- [56] The defendant agrees that the contract applies to private label sales but takes the position that, by its terms, no commission is payable to the plaintiff on sales to Future Shop because no sales were concluded during the currency of the plaintiff's employment, including the one-week notice period.
- [57] To resolve this issue, some appreciation of the differences between private label arrangements and other retail sales is necessary. In regular retail sales by the defendant, the products bear the defendant's brand name. Private label sales, as the phrase suggests, bear the house brand name of the company for whom they are produced. They are of no value to the defendant unless they are purchased by the entity for which they are manufactured. When sold as private label computers, there is no goodwill generated for the defendant.

- [58] In routine retail sales, the computers are configured by the defendant in accordance with its appreciation of the market conditions. In private label arrangements, the purchaser dictates the configuration of the computer based on its appreciation of its market.
- [59] Routine retail sales of the defendant's products do not require any modification of its manufacturing facility. For private label computers, however, the defendant must manufacture to the purchaser's specifications and configurations; it must package to the purchaser's specifications; it must provide operating instructions that meet the purchaser's requirements; and all of this is done with a view to hiding the manufacturer's involvement as opposed to emphasizing it, as is the case in routine retail sales.
- [60] All of the foregoing distinctions affect the role of the salesperson involved in these transactions. In routine retail sales, the manufacturer's sales people have a direct interest in motivating retail sales people to sell the manufacturer's products. In the plaintiff's case, this was done by encouraging the use and understanding of the defendant's web store; by on-going training of retail sales people in the understanding and operation of the defendant's products; and by developing relationships with the people who purchase for the retailers and, to a lesser extent, their sales staff. These are all tasks that consume a significant portion of a retail salesperson's time and energy. How well these tasks are done has a significant bearing on how successful the salesperson is. These tasks have little, if any, application to private label sales. In private label sales, the retailers are responsible for motivating their staff to sell their private label products; the retailers are responsible to ensure that their staff are familiar with the product and its performance.
- [61] Finally, the conclusion of a private label arrangement involves significant participation by many employees on behalf of the manufacturer. Such an arrangement cannot, and was not in this case, be concluded by a single salesperson.
- [62] In short, private label arrangements are fundamentally different than direct retail sales, both in terms of the involvement of the defendant as manufacturer and in terms of the involvement of the plaintiff as salesperson.
- [63] The evidence suggests that, at the time of the plaintiff's hiring, neither the defendant nor the plaintiff had any idea that the defendant would be concluding a private label arrangement with Future Shop or anyone else. The plaintiff had no experience in private label arrangements. The proposal he made to the defendant, at the time he was being considered for employment, was geared exclusively toward routine retail sales. The defendant had never previously been involved in a private label production arrangement. Its retail presence was limited to selling its computers under its brand name to retail outlets. The evidence suggests that it was not, at the time of the plaintiff's hiring, considering such an option.

[64] In construing this contract of employment, like all contracts, it is necessary to look at the terms used by the parties to express their intention. The position profile portion of the contract is not particularly helpful. It describes the plaintiff's roles as follows:

The primary role of the Manager of Retail Sales is to drive sales and revenue growth by focusing on targets and expanding partner relationships. This will be accomplished through facilitating internal sales and service delivery, co-leading retail direction and strategy, co-leading target objectives, co-development of product initiatives, competitive analysis, teaming with marketing and sales pursuit groups in the execution of all- [sic] appropriate sales and revenue growth activities.

[65] The contract then sets out in bullet format a number of specific responsibilities of the plaintiff. The plaintiff places particular emphasis on the following provisions:

- a) Work with leadership to identify target customers via the 'strategic selling' process
- b) Set appointments with key decision makers
- c) Identify product diversification opportunities for all Seanix retail products
- d) Facilitate partner development and co-development sessions.

These phrases, the plaintiff argues, are broad enough to encompass private label sales. Further, the plaintiff argues that, under the commission structure, there is a category called "other" which must mean something, and the only thing it might reasonably mean is private brand sales.

[66] The plaintiff grounds his argument, in part, on the notion that because the contract in question was prepared by the defendant, it ought to be interpreted *contra proferentem*. The rule of construction embodied in the phrase *contra proferentem* has particular, albeit not exclusive, application to the interpretation of limitation or exclusion clauses that are sought to be enforced against the non-authorial party. In *Arthur Andersen Inc. v. Toronto-Dominion Bank* (1994), 17 O.R. (3d) 363 Abella J.A., as she then was, said (in dissent) at p. 395:

It is a rule meant to relieve the non-authorial party to a contract from an interpretation that party could not clearly discern from a plain reading of the document. This prevents the party who did draft and understand the contract from springing a hidden contractual burden on an unsuspecting signator...

[67] Generally, the rule is applied in cases in which there is an ambiguity in the contract, and in which it can be said that the non-authorial party was induced to enter into the contract on the assumption the agreement meant one thing but which the author of the document knew or intended otherwise (*Arthur Anderson, supra*, per Grange and McKinley J.J.A. at p. 371).

[68] The court is not concerned here with construing a limitation or exclusion clause. Further, there is no suggestion that the plaintiff was induced to enter into the agreement under the conditions noted in *Arthur Anderson, supra*. I am satisfied, for the reasons noted above, that

neither party contemplated private label agreements; and hence, neither considered the application of the contract wording to such arrangements. Moreover, the evidence does not support the notion that the contract was prepared by the defendant and presented to the plaintiff on the basis that its provisions were unalterable. Indeed, the plaintiff sought to have the title of the position changed and that was agreed to. He did not seek any other changes. Finally, I cannot help but conclude that to accede to the plaintiff's interpretation of the contract would accomplish, albeit on behalf of the non-authorial party, that which the contra proferentem rule is intended to prevent, namely, the creation of a hidden contractual burden on an unsuspecting signator.

- [69] In the contract repeated reference is made to retail sales. While it might be argued that private label sales involve sales to retailers and thus might be described as retail sales, for the reasons noted above, in substance they have almost nothing in common with retail sales, as that phrase was being used by the parties at the time the contract was settled. The contract makes no mention of private label sales or any synonym of that phrase.
- [70] One phrase in the contract, upon which the plaintiff places reliance, is the phrase requiring the plaintiff to identify product diversification opportunities for all Seanix retail products. In my view, products sold under another brand name cannot fairly be described as Seanix retail products notwithstanding that those computers are manufactured by Seanix with Seanix technology and eventually sold at retail.
- [71] To the extent there is ambiguity in the terms of a contract, it is appropriate to look to "the genesis and aim of the transaction" in an effort to resolve it (per Cardozo J. in *Utica City National Bank v. Gunn* (1918), 118 N.E. 607 at 608, referring to Stephen's Digest of the Law of Evidence and Wigmore on Evidence, quoted with approval in *Canada Square Corp. Ltd. v. Versafood Services Ltd. et al.* (1981), 130 D.L.R. (3d) 205 at p. 215 (Ont.C.A.)). The genesis and aim of the agreement entered into by the plaintiff and the defendant was, among other things, to establish rules for the determination of commissions payable to the plaintiff on the sale of retail computers in the traditional sense of that expression.
- [72] Finally, it bears mentioning that the interpretation of the contract proposed by the plaintiff would entitle the plaintiff to commissions for as long as the defendant continued to do business with Future Shop. This would lead to, as pointed out above, an entitlement on the part of the plaintiff to commissions to the end of February 2002 in the amount of \$840,000 with the prospect of further commissions approaching \$540,000 per year, henceforth for the duration of its relationship. Similarly, if the defendant's interpretation of the contract is accurate, then the plaintiff would not be entitled to anything for his efforts in bringing about what must be one of the single most significant sales arrangements in the company's history. Both of these conclusions approach the absurd and if an interpretation leads to such a result it is to be avoided if possible (*Coodin et al. v. Binsky et al.* (1972), 34 D.L.R. (3d) 257 (Man.C.A.)).

- [73] For all of the foregoing reasons, I find that the contract extends only to retail sales in the traditional sense.
- [74] The contract is, in the result, silent on the remuneration to which the plaintiff is entitled for his efforts in pursuing the private label brand agreement with Future Shop. The plaintiff is entitled to recover the value of his services on a quantum meruit basis (*Morrison-Knudsen Co., Inc. et al. v. British Columbia Hydro and Power Authority* (1978), 85 D.L.R. (3d) 186 at p. 227 (B.C.C.A)).
- [75] Before turning to the issue of damages, comment on the plaintiff's primary argument regarding the interpretation of the contract is warranted. The plaintiff argued that he was entitled to commission on all sales for which he was the effective cause. While the contract does not specifically provide for this, the plaintiff argues, by analogy to a number of cases dealing primarily with real estate agents and their entitlement to commission, that such a term should be implied in the plaintiff's contract.
- [76] The defendant argues that there are a number of features that distinguish the principal/agent relationship in the context of real estate transactions from the relationship between the plaintiff and the defendant such that the analogy the plaintiff seeks to draw is inappropriate. The defendant says, firstly, that unlike real estate agents, the plaintiff was an employee of the defendant. The defendant was at liberty to terminate that relationship in accordance with the terms of the contract. Once terminated the defendant's obligations to the plaintiff are at an end. Secondly, and in my view most significantly, unlike real estate agents, who are generally engaged to arrange for the sale of a single piece of property on a one-time basis, the plaintiff was engaged to promote repeated sales of mass produced items to both existing and future customers of the defendant.
- [77] The defendant also argues that, in cases more closely aligned with the case at bar, courts have been decidedly reluctant to imply a term such as the one sought by the plaintiff.
- [78] I will not deal with all of the cases cited by the parties because, for the most part, they simply underscore the high degree to which disputes of this nature fall to be decided on the specific terms of the contract in issue. I will, however, deal with the three cases upon which most reliance was placed.
- [79] The plaintiff relies in particular on *Manson v. Flemming-Pedlar Limited* (1951), 3 W.W.R. (N.S.) 241 (Man.K.B.) and *Hawkins v. Mack Maritime Distributors Ltd.* (1970), 2 N.B.R. (2d) 427 (C.A.).
- [80] In *Manson*, supra, the plaintiff was a full-time commission salesperson selling refrigeration products on behalf of the defendant. His contract of employment provided that he was to be paid a commission on all "installed sales made in his territory". The plaintiff had, through his contacts, introduced to the defendant several potential purchasers of the defendant's equipment. He worked on negotiations with those purchasers until he fell ill and, thereafter, was unable to continue with his employment. Subsequent to his departure from the

defendant, the defendant sold equipment to the customers with whom the plaintiff had been negotiating. The plaintiff sued for commission on those sales.

- [81] Kelly J. held, on the circumstances before him, that the contract contained an implied term that the plaintiff was entitled to a commission upon introduction and to payment upon completion of the sale. It is important to note that the business context within which the contract was being interpreted involved the sale of single items on a one-time basis. In the case at bar, the circumstances are significantly different.
- [82] Reliance is also placed by the plaintiff on Hawkins, *supra*. At issue in that case was the plaintiff's entitlement to commission on the sale of transportation equipment. There were two transactions of concern. The first involved equipment that the defendant had rented to a customer under terms which included an option to purchase (presumably through the efforts of the plaintiff). Shortly after the plaintiff's voluntary departure from the defendant's employ, the customer exercised the option to purchase and the plaintiff claimed commission. The second transaction involved a sale that was completed prior to the plaintiff's departure but for which delivery was not made until several months later.
- [83] The court held, at p. 428, that "[i]n this context, we consider a commission to be earned when a salesman, who has been the effective cause of the sale, has substantially performed his duties in connection with such a sale..." (emphasis added). Again the "context" involved the sale of existing items on a one-time basis to specific customers.
- [84] The defendant places reliance on the decision of Saunders J. (as she then was) in *Martin v. International Maple Leaf Springs Water Corp.*, [1998] B.C.J. No. 1663. The plaintiff in that case was hired by the defendant to sell the defendant's bottled water. The terms of his employment were set out in writing and are remarkably similar to the terms of the plaintiff's contract in the case at bar. The plaintiff in *Martin*, *supra*, sought, among other things, commission on all future sales made to customers that he had arranged contracts with while in the defendant's employ. Sanders J. rejected this claim and, in doing so, held as follows (at para. 34):

In my view Mr. Martin is not entitled to such compensation. His contract with the company was simply a contract of employment, although he sought to elevate it to some sort of business partnership. Under a contract of employment, an employer is entitled to dismiss the employee upon providing adequate notice. Mr. Martin's contention would require the company to continue to pay him for sales they would service long after he left the company's employment. In my view if that result was intended it should have been so stated in the employment contract, which it was not. The letter of understanding refers to bottled water sales arranged with Mr. Martin's direct involvement. In my view this contemplates only sales made while he was in the company's employment. I find he is not entitled to compensation for commissions projected past his notice period.

[85] I find the remarks of Sanders J. apposite in the circumstances of the case at bar. Accordingly, I decline to interpret the contract in the manner sought by the plaintiff.

## Damages

[86] It is reasonable, given the nature of the plaintiff's remuneration generally, to value his services in relation to the Future Shop arrangement and the conventional retail sales on a commission basis.

[87] Dealing firstly with the regular retail sales, it would not be reasonable to compensate the plaintiff by awarding him commission on the sales that the defendant achieved to his accounts in the month following his dismissal. If he had continued working, those sales would, it is reasonable to conclude, have been higher. Nor is it reasonable to base his commission on the sales generated for the same period in the previous year. He was not attending to the accounts in that period, and it is not clear that anyone was specifically focusing on retail sales. I am, therefore, going to award the plaintiff the sum of \$6,453 representing 1 percent commission based on the average sales he achieved during the three months of his employment.

[88] The next issue is to determine the level of commission and the sales in relation to which that commission is payable on sales to Future Shop under the private label agreement.

[89] I do not think it reasonable that the plaintiff earn a 1 percent commission on the sales to Future Shop. That would be to ignore the fact that those sales were made on a smaller margin than is otherwise the case in retail sales. Further, it would ignore the fact that the salesperson's role is more limited, for the reasons set out above, in transactions of this nature. I hold that a reasonable commission in the circumstances is 0.5 percent.

[90] The contract with Future Shop does not require that they purchase any specific number or value of computers from the defendant. All parties recognized and intended, however, that the relationship would continue for some time. While it is now apparent that it may carry on indefinitely, that could not have been known at the time. At the time the defendant was contemplating spending money and committing resources to this arrangement, it required from Future Shop a letter of intent by which their expectations would be documented. Although no one suggests this document constitutes a binding contract, it does demonstrate the parties' expectations at the time. It contains a forecast for purchases for the year from April 2, 2000 to March 31, 2001. Further, the contract itself contains the following provision:

Term: The term of this agreement shall be for a period of one year commencing on the date of acceptance by Future Shop. This Agreement shall be automatically renewed for successive 12-month periods unless it is earlier terminated in accordance with the provisions of section 30 below.

- [91] In my view it is reasonable in light of the above to value the plaintiff's services to the defendant on the basis of the sales that flowed from the private label agreement over the first year of the life of the agreement. Those sales amounted to \$39,992,266. The commission due to the plaintiff on a quantum meruit basis is therefore \$199,961.
- [92] There is one further issue relating to the plaintiff's claim. It involves the manner in which the plaintiff was compensated in the month of April 2000. He took one week off during that month as arranged prior to his employment. He was paid \$3,000 in salary. When his commissions were calculated he was paid those, less \$4,000 which was his normal salary. It was conceded at trial by all (except Mr. Hooker) that the plaintiff was entitled to be paid for the month of April the gross value of his commissions less \$3,000. He is accordingly entitled to judgment in the amount of \$1,000.

## Summary

- [93] In summary, the plaintiff is entitled to an award based upon quantum meruit for the private label sales to Future Shop for the year following his termination in the amount of \$199,961. He is entitled to a further \$6,453 being the amount of commission he would have earned during the period by which the notice period is extended due to the bad faith manner in which he was dismissed. Finally, he is entitled to \$1,000 representing the difference between what he was paid and what he was entitled to be paid for the month of April 2000.
- [94] There will be interest pursuant to the Court Order Interest Act, R.S.B.C. 1996, c. 79, from the dates at which the various sums became due. In the event counsel are unable to agree on that matter, they are at liberty to apply.
- [95] Unless either of the parties has a submission to make, the plaintiff will have his costs at scale 3.

"G.M. Barrow, J."

The Honourable Mr. Justice G.M. Barrow

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