COURT FILE NO. 05-CV-301702SR
DATE: 20061106

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
	)	Kevin Fox, for the Plaintiff
	)	
	)	
Sean Beard	)	
Plaintiff	)	
	)	
- and -	)	
	)	
	)	
Suite Collections Canada Inc	)	Evert Van Woudenberg, for the Defendant
	)	
	)	
	)	
Defendant	)	
	)	
	)	
	)	**HEARD:** October 25 and 26, 2006

THORBURN J.

Introduction

[1] Sean Beard claims that he was wrongfully dismissed from his employment with Suite Collections Inc.. Suite alleges that Mr. Beard was dismissed for just cause.

[2] Mr. Beard was a Manager of Legal Collections for Suite or its predecessor company, MetCap Living Management Inc., from November, 2001 to February 7, 2005. Mr. Beard had extensive responsibilities and reported directly to the President and Chief Executive Officer, Brent Merrill. There were up to five employees reporting to Mr. Beard from time to time. He was thirty six years of age at the time of dismissal.

[3] As at January 2005, Mr. Beard's base salary was $56,500.00. He also earned a performance bonus of $4,500.00 in 2004 and had earned a performance bonus each year that he

was with Suite. In 2004, Beard was also given a retention bonus for remaining with Suite after it acquired MetCap. The parties agree that this was a one-time payment.

Issues

[4] The issues to be determined are:

a) Whether there was just cause to dismiss Beard and, if not,

b) What damages have been suffered by Beard as a result of his wrongful dismissal.

[5] Suite asserts that there was just cause to dismiss Beard for the following reasons:

1. He made racist and sexist slurs;
2. He ignored business opportunities that would have generated business for Suite;
3. He was engaged in sexual harassment of a subordinate, Ms. Monica Kecskemeti ("Kecskemeti") in that he:
    i. circulated inappropriate and graphic emails in breach of Suite's email policy provisions; and
    ii. made unwanted sexual advances.
4. He breached provisions of the *Tenant Protection Act;* and
5. He failed to attend to his duties as a manager by:
    i. failing to communicate with his subordinates; and
    ii. missing significant amounts of time from work.

[6] Mr. Beard denies that there was just cause for his dismissal.

The Evidence

[7] Mr. Beard was the only witness called by the plaintiff.

[8] The defendant called three witnesses: Ms. Hiba Farah, Ms. Kecskemeti, and Mr. Merrill.

A. Undisputed Evidence

[9] The parties agree on the following facts:

[10] From September 2003 to February 2004, Ms. Kecskemeti was employed by a temporary employment agency that had placed her at Suite as a receptionist. As at February 2004 she was engaged by Suite as a Property Administrator and later an employee in the Seniors Accounting Department. Mr. Beard had no involvement in her hire and Ms. Kecskemeti did not report to him.

[11] In September 2004, Ms. Kecskemeti was hired by Mr. Beard to work in the Collections Department. From mid-October 2004 to the time of Beard's dismissal on February 7, 2005, Ms. Kecskemeti reported to Mr. Beard.

[12] There was a consensual sexual relationship between Ms. Kecskemeti and Mr. Beard from October, 2003 to June, 2004.

[13] There were graphic sexual email exchanges between Ms. Kecskemeti and Mr. Beard from June 18 to October 7, 2004, and none thereafter.

[14] The parties agree that Ms. Tao, Vice President of Suite and Mr. Merrill, President of Suite, met with Mr. Beard on December 8, 2004. At that time Mr. Beard was advised that some of Mr. Beard's staff were concerned that he was difficult to get on his cell phone and that he did not always answer. Mr. Beard explained that his cell phone had to be turned off during court hours but that he would make an effort to return calls more promptly. No other performance issues were raised at that time.

[15] At the December 8, 2004 meeting Merrill asked Mr. Beard if he was having a sexual relationship with Ms. Kecskemeti. Mr. Beard stated that he was not.

[16] Ms. Tao and Mr. Merrill met with Mr. Beard again on January 14, 2005. At that time Mr. Beard was advised that two employees said that he had used the words "nigger" and "cunt" in the office. Mr. Beard requested but Ms Tao refused to tell him who had leveled these accusations and she refused to set up a meeting with the complainants. Mr. Beard denied that he had ever used the words "nigger" or "cunt" in the office. Mr. Beard testified however that he did use profanity in the office and apologized for so doing.

[17] From January 29 to February 4, 2005 Mr. Beard was on vacation.

[18] Mr. Beard met with Mr. Merrill on the morning of February 7, 2005 at which time Merrill advised Mr. Beard that Ms. Kecskemeti said Mr. Beard had sexually harassed her and that, given the sensitive nature of the allegations, he had no choice but to let Mr. Beard go. Mr. Merrill also repeated the allegation that Mr. Beard had used racial slurs. Mr. Merrill advised that if he did not resign, Mr. Beard would be dismissed for just cause by the end of the day.

[19] Mr. Beard denied the allegation and advised that, while he and Ms. Kecskemeti had had a consensual sexual relationship, the relationship had ended in June 2004 and there had been no sexual relationship while Mr. Beard was her supervisor. Later in the day on February 7, 2005,

Mr. Beard was given a letter advising him that he was being dismissed for just cause, effective immediately.

[20] In the letter of dismissal Merrill stated that "... if any reference inquiries were made to MetCap, it would honestly answer questions asked, including reference to the above matters if appropriate."

B. Evidence Regarding the Allegations of Wrongdoing

1. Racist and Sexist Slurs

[21] Ms. Farah reported to Mr. Beard. She testified that on at least two or three occasions she heard Mr. Beard use the word "nigger" while on the telephone in the office. Ms. Farah states that she also heard Mr. Beard refer to a fellow worker as a "Chinese cunt".

[22] Ms. Farah indicated that there was a witness to the second incident but she did not provide her employer with the name of that individual as she was not sure the individual wanted to come forward.

[23] Beard denied the use of any such language. He conceded however that he did use profanity in the office and said that it was customary for employees in that office to use profanity.

2. Ignoring Business Opportunities

[24] Ms. Farah stated that she received a telephone call from a federal government official who sought to inquire about using the defendant for collection services. Ms. Farah said the official wished to speak to a manager. She took a message and gave it to Mr. Beard.

[25] Ms. Farah testified that Mr. Beard took the message and threw it in the garbage. She stated that there were several such incidents.

[26] Beard denied that these incidents took place.

[27] The evidence of Ms. Farah directly contradicted the evidence given by Mr. Beard as it pertains to the above two allegations. No witnesses were produced to corroborate the evidence of either party.

[28] I adopt the test for assessing credibility set out in *Sylvan Lake Golf and Tennis Club Ltd. v. Performance Industries Ltd. and O'Connor* (1996), 190 A.R. 321 (Q.B.) as cited in *Leach v. Canadian Blood Services* [2001] A.J. No 119 (Q.B.).

[29] Mr. Beard's counsel suggested that Ms. Farah's self-interest made her an unreliable interest, as commissions earned on the deals struck by Mr. Beard affected her earnings.

[30] Having considered all of the evidence, I find Ms. Farah to be a credible witness. I therefore believe that Mr. Beard made the above-noted racial and sexist remarks, and that he did fail to pursue at least one business opportunity available to the plaintiff.

3. Sexual Harassment

(i) Email exchanges

[31] As stated above, the parties had a consensual sexual relationship until June 2004. Ms. Kecskemeti stated that when they began their affair she kept a journal in which she recorded the time she spent with Mr. Beard. Ms. Kecskemeti did not advise her employer of the existence of the journal until after the commencement of the trial as she considered it to be personal.

[32] The parties agreed that graphic emails were exchanged between Ms. Kecskemeti and Mr. Beard from June to October 2004. These exchanges ceased on or about the time Ms. Kecskemeti was hired by Mr. Beard to work in his department in October 2004. Both Ms. Kecskemeti and Mr. Beard's emails were highly inappropriate and were sent during office hours from company computers.

[33] From the emails produced it is clear that Ms. Kecskemeti sometimes initiated email discussions. For example,

[34] On July 15, 2004, Ms. Kecskemeti and Mr. Beard exchanged the following correspondence:

> Ms. Kecskemeti: "So we watched porn last night and finally did doggy and I totally got him to slap my ass and cum on my A' hole"
>
> Mr. Beard: " It's good to have goals in life",
>
> Ms. Kecskemeti: "You're just bitter because you didn't get any…"

[35] On August 12, 2004 Ms. Kecskemeti and Mr. Beard exchanged the following correspondence:

> Ms. Kecskemeti: "My oven is hot. I tried fixing it myself but it only made it worse."
>
> Mr. Beard: "I thought that's what your boyfriend was for."

[36] On September 30, 2004 Ms. Kecskemeti and Mr. Beard exchanged the following correspondence:

> Ms. Kecskemeti: "I'm not miserable. I have a headache and every time I see you it's like being tempted by the devil so of course I'm going to be moody…" and,

[37] On October 7, 2004 Ms. Kecskemeti and Mr. Beard exchanged the following correspondence:

> Mr. Beard: "Gotta love Hungarian women."
>
> Ms. Kecskemeti: "There was almost an orgy last night at my place, it was so crazy. I had an ex-boyfriend and his new girlfriend over and my honey. Well it seems this chick totally digs me…so we smoke and drink and I'm sitting on my baby, when she starts getting us to do all these weird things. I thought it was just me but after just talking to my baby…he too was getting these weird vibes like we were all going to just get it on with each other. That would have been some pretty funny shit…go figure, we were all Hungarians."
>
> Mr. Beard: "Interesting story but on a more business note…do you want to grab a drink after work? I spoke with Lucy to speak with Robert so I got some things to go over with you?"

[38] Such comments on their face, do not seem consistent with Ms. Kecskemeti's claim that after June of 2004, "Sean would come on to me persistently, over my disinclination".

[39] Ms. Kecskemeti testified that the emails must be looked at in the context of telephone calls she says preceded these email exchanges. No evidence was presented concerning the alleged telephone calls.

[40] Mr. Beard was presented with a copy of the company Information Systems, Internet and Email policies upon cross-examination and confirmed that he had signed it. The policy clearly prohibits the transmission of any indecent or sexually explicit emails. No evidence was provided to determine whether the policy was consistently enforced.

[41] I find that given the active participation on the part of Ms. Kecskemeti in the dissemination of the emails, they do not constitute sexual harassment. They do however, represent a clear breach of section 6.3 of the Company policy which provides that:

> "MetCap Living specifically prohibits the transmission, creation or receipt of any indecent, pornographic, lewd, sexually explicit or defamatory material on or across any of its computer systems, including via e-mail."

No penalty for breach is set out in the Company policy.

(ii) Requests for Sex

[42] Ms. Kecskemeti also claimed that she was subjected to sexual harassment in the form of requests for sex. In particular she stated that at her job interview in September 2004, Mr. Beard closed the door and allegedly said: ""I've already seen you naked and since we have fucked, there is not really anything to talk about." He asked me if the desk looked familiar (we had sex on it once). He only talked to me very briefly about the job. I felt like he wanted a sexual service provider and offered him a blowjob. We went up to the 33rd floor file room and I gave him a blowjob there."

[43] Ms. Kecskemeti further claims that in December 2004 Mr. Beard tried hard to convince her to have sex with him.

[44] In January 2005 SB allegedly told Ms. Kecskemeti that he had taken Ecstasy and told her that he wanted to "eat me out for hours."

[45] In both December 2004 and January 2005, Ms. Kecskemeti testified that she refused Mr. Beard's advances and no sexual activity took place on either occasion.

[46] Ms. Kecskemeti's testimony at trial was different from her statement dated February 1, 2005. In her February 1, 2005 statement to her employer, Ms. Kecskemeti stated that by June of 2004, "I made it clear that I had now found someone and wanted to be faithful to him."

[47] No mention was made of the numerous graphic and sexually explicit emails that continued to be sent from June 2004 until October of 2004, nor was there any mention of the three alleged incidents wherein Mr. Beard is said to have sought to have had sexual intercourse after she commenced working for Mr. Beard.

[48] Moreover, there was no evidence in any of the email exchanges that Ms. Kecskemeti took any steps to dissuade or inhibit Mr. Beard.

[49] Finally, Ms. Kecskemeti advised that two to four times per week Mr. Beard came to her apartment to spend all afternoon and evening with her. At that time she was employed two days per week. Moreover, Mr. Merrill testified that Mr. Beard could not perform his job working twenty hours per week and no evidence was presented to show that deadlines were missed as a result of a failure to attend at work.

[50] Mr. Beard denied that he made advances to Ms. Kecskemeti on any of the three occasions set out above.

[51] I have carefully reviewed the testimony of Mr. Beard and Ms. Kecskemeti. There were no independent witnesses to the alleged incidents of sexual harassment although the emails exchanged between the parties assist in putting the relationship into context. I have concluded

that Ms. Kecskemeti is not a reliable witness and I therefore prefer the evidence of Mr. Beard as it pertains to their relationship.

[52] While I found Mr. Beard to be a less than exemplary witness, his testimony did not contain the same number of inconsistencies as did that of Ms. Kecskemeti.

[53] The Supreme Court of Canada in *Janzen v. Platy Enterprises* [1989] S.C.J. No. 41 at 56 defined sexual harassment in the workplace as:

> …unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victim of the harassment. …
>
> …Sexual harassment also encompasses situations in which sexual demands are foisted upon unwilling employees or in which employees must endure sexual groping, propositions, and inappropriate comments, but where no tangible economic rewards are attached to the involvement in the behaviour.

[54] In the words of Swinton J. in *S.S v. H. & D.P.M. Inc.* [1999] O.J. No. 4802 (S.C.), at para. 43:

> While there was an inequality of bargaining power between them, as she was an employee and he was the president of the company employing her, I do not find that her consent was involuntary. It is clear in *Norberg* supra, that not every sexual relationship between an employee and supervisor or superior is involuntary because of inequality of bargaining power. What vitiates consent is the element of duress, unconscionability, or exploitation in the arrangement, and that is lacking here.

[55] Based on the evidence before me, I find that Ms. Kecskemeti did consent to the graphic sexual email exchanges with Mr. Beard, at least until October of 2004. I find that there was no duress or exploitation that would vitiate consent. There was no evidence of email exchanges after that date.

[56] Given the context of the long-term consensual sexual relationship until at least June of 2004, the fact that Ms. Kecskemeti continued to participate in the exchange of graphic sexual emails to Mr. Beard until October 7, 2004, that she says she "offered" to give Mr. Beard a blowjob at her job interview, and that on the two subsequent occasions when he allegedly made advances and was rejected by Ms. Kecskemeti, he proceeded no further, I do not accept that Mr. Beard sexually harassed Ms. Kecskemeti.

[57] I do not find that Mr. Beard's conduct was unwelcome or that there was the duress, unconscionability or exploitation necessary for a finding of sexual harassment.

4. Breach of the *Tenant Protection Act*

[58] Ms. Kecskemeti advised that on one occasion Mr. Beard made her call the Sheriff for a tenant eviction after receiving a copy of the court order staying the eviction. He told her that if questioned, she should say she never saw it.

[59] Mr. Beard denies that this incident took place.

[60] An affidavit was signed by Rosetta Morales ("Morales") to confirm Ms. Kecskemeti's version of events. However, the defendant did not call her as a witness in these proceedings. Counsel advised that Ms. Morales is no longer employed by the defendant, but no information was given to confirm the efforts made to locate Ms. Morales.

[61] As I did not find Ms. Kecskemeti's evidence to be reliable, there is insufficient evidence to substantiate this claim.

5. Failure to Attend to Duties

[62] The parties agreed that at the December meeting with Ms. Tao and Mr. Merrill, Mr. Beard was advised that there were complaints that he was difficult to reach and did not always respond to telephone calls. He agreed to improve this.

[63] Ms. Kecskemeti testified that, while she was a temporary employee working two days a week, Mr. Beard for a certain period, would leave the office between 11 a.m. and 1 p.m. two to four days per week, to spend the rest of the day with her.

[64] Mr. Beard denied this. Moreover, Mr. Merrill testified that Mr. Beard's job could not be done in 20 hours per week. The parties agreed that Mr. Beard received a bonus for performance, each of the three years he was employed by the defendant.

[65] Thus, while there were clearly some complaints in December, I find that there is insufficient evidence to conclude that Mr. Beard was seriously derelict in his duties such that there were grounds to dismiss him on this basis.

[66] In summary, I find that only the claims of racial and sexist slurs, loss of at least one possible business opportunity and breach of the Company email policy, can be supported on the evidence before me.

The Law

1. Test to Establish Just Cause

[67] The employer has the onus of justifying the employee's dismissal on the balance of probabilities.

[68] Whether an employer is justified in dismissing an employee on the grounds of certain conduct is a question that requires an assessment of the context of the alleged misconduct. Just cause for dismissal exists where the conduct 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. (See *McKinley v. B.C. Tel*, [2001] 2 S.C.R. 161 at para 33-34 and 39.)

In *McKinley,* Iacobucci J. enunciated the analytical framework to be used. The particular facts and circumstances of each case are considered, as are the nature and seriousness of the wrongdoing, in order to assess whether it is reconcilable with sustaining the employment relationship. The analysis is not only contextual, but also involves assessing the proportionality of misconduct to dismissal. As noted by Iacobucci J. in *McKinley* at paragraph 53:

> … An effective balance must be struck between the severity of an employee's misconduct and the sanction imposed. The importance of this balance is better understood by considering the sense of identity and self-worth individuals frequently derive from their employment,

(a) Warning

[69] In *Leach v. Canadian Blood Service*, [2001] A.J. No. 119 (Q.B.) at para 117, Coutu J. of the Alberta Court of Queen's Bench held that whether a warning and an opportunity to improve is necessary to justify summary dismissal, depends upon the circumstances and the nature of the misconduct.

(b) Employer Policy

[70] In *Tse v. Trow Consulting Engineers Ltd.* [1995], OJ No. 252 (S.C.), Cumming J. accepted that notification or a warning can be made in the form of employer policy manual if the factors set out H.A. Levitt, *The Law of Dismissal in Canada*, 2nd ed. (Aurora, Ont.: Canada Law Book, 1992), at 179-181 can be satisfied, namely:

1. The rules must be distributed.
2. The rules must be known to the employees.
3. The rules must be consistently enforced.
4. The employees must be warned that they will be terminated if a rule is breached.
5. The rules must be reasonable.

6. The implications of breaking the rules in question are sufficiently serious to justify termination.
7. Whether a reasonable excuse exists.

[71] Dickson J. (as he then was) in *Kane v. University of British Columbia (Board of Governors)* [1980] 1 S.C.R. 1105 at 1103*)*, held that: "[a] high standard of justice is required when the right to continue in one's profession or employment is at stake."

[72] Upon review of all of the circumstances and bearing in mind that:

- Ms. Farah was overhearing a conversation that took place with an unknown party over the telephone, in the case of the racial slurs, and
- there is no evidence that the Company email policy was enforced,
- although Mr. Beard did fail to follow up on at least one business opportunity he was generally regarded by his employer to work diligently and the precise reasons for failing to follow up on the business opportunity were not canvassed at trial,

I do not believe there is just cause for summary dismissal in this case. While I find the behaviour of Mr. Beard to be inappropriate, particularly given his role as a supervisor, he should have been given a clear warning that this behaviour was unacceptable, and would not be tolerated.

2. Damages

[73] I have reviewed the cases and other materials submitted to me by counsel regarding the quantification of damages. I find that Mr. Beard is entitled to three months' pay in lieu of notice, considering his term of employment, age, education and position with Suite.

[74] In the circumstances of this case, no bonus is payable.

[75] I further find that the sum of $600.00 must be deducted from the monies otherwise payable as this represents the sum that was actually earned by Mr. Beard during the three-month period after termination of his employment.

[76] Since Mr. Beard's base salary was $56,500, he is awarded the sum of $13,525.00 which sum is net of the $600.00 actually earned.

(a) Wallace Damages

[77] Counsel for the plaintiff has suggested that the conduct of the defendant was such that Wallace damages were warranted under the circumstances.

[78] In *Fleming v. Ricoh Canada Inc.*, [2003] O.J. No. 5557, at paragraph 18 Whitten J. observed that:

> If just cause is not established and if the lack of procedural fairness is particularly egregious, the employee has the right to evoke the principles of *Wallace v. United Grain Growers*, which could lead to an enhanced severance period.

[79] In this case, I find no such egregious conduct. Suite did address with Mr. Beard the specific allegations regarding the claim of racial and sexist slurs and the claims that he was at times, unavailable to those who reported to him. Suite did not become aware of the *Tenant Protection Act* issue until it was raised by Ms. Kecskemeti on February 23, 2005, after Mr. Beard had been dismissed.

[80] As soon as Ms. Kecskemeti and Ms. Farah complained, Suite responded quickly and obtained statements from them. On February 7, 2006, prior to termination, Beard was informed of the general nature of the allegations that were known at the time.

[81] Finally, I do not believe that Mr. Merrill's statement that "... if any reference inquiries were made to MetCap, it would honestly answer questions asked, including reference to the above matters if appropriate" constitutes egregious conduct.

[82] For these reasons, no Wallace damages are awarded.

3. Costs

[83] Costs shall follow the event. The parties have agreed that the successful party should received $10,000.00 for partial indemnity costs. I therefore fix and award to Mr. Beard the sum of $10,000 inclusive of disbursements and G.S.T.. If there are other factors of which I am unaware which would require costs to be approached on a different basis, I will hear those submissions now.

THORBURN J.

Released: November 6, 2006

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ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

Sean Beard

Plaintiff

- and -

Suite Collections Canada Inc.

Defendant

REASONS FOR JUDGMENT

THORBURN J.

Released: November 3, 2006