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King v. Kenair Apartments Ltd.

Between
Ross King, plaintiff, and
Kenair Apartments Limited, defendant

[2001] O.J. No. 1568

8 C.C.E.L. (3d) 289

104 A.C.W.S. (3d) 886

Court File No. 96-CU-98451SR

Ontario Superior Court of Justice

Trafford J.

Heard: April 20, 2001.
Judgment: April 25, 2001.

(21 paras.)

Master and servant -- Dismissal without cause -- Circumstances when dismissal not justified -- Notice of dismissal -- Reasonable notice -- Considerations affecting -- Practice -- Judgments and orders -- Summary judgments.

Motion by the plaintiff, King, for summary judgment. King was employed by Kenair Apartments as building manager for five years. He was promoted to that position from concierge. In addition to his annual salary of $35,000, King was given the use of a two-bedroom apartment which had an annual rental value of $18,000. King's performance was never formally reviewed. However, during his tenure both as concierge and building manager, King was advised by management on several occasions that they were pleased with his work. King owned an interest in a travel agency, which did not impede his ability to fulfil his obligations to Kenair. Kenair was aware of his involvement in the agency and had never complained about it. In December 1995, Kenair advised King that it was terminating his employment due to the fact that he owned and operated a separate company. King was told to vacate his apartment within seven days. At the time of his dismissal, King was 62 years old and his health was deteriorating. King was unable to find other employment. He commenced this

action for wrongful dismissal. Kenair argued that King was dismissed for just cause and relied on an affidavit containing conclusory statements about King's alleged failings in his duties.

HELD: Motion allowed. The circumstances in Kenair's affidavit were not proven. Affidavits from persons who might have had actual knowledge of the circumstances were not tendered. It was possible to decide the action without cross-examination and it was essentially just and fair to do so. Kenair had not proved just cause, as King was not given reasonable time to correct any significant deficiencies in his performance with knowledge that failure to do so would result in the termination of his employment. The proper notice period was nine to 12 months. Kenair had not proceeded reasonably, honestly and fairly in terminating King's employment. The termination was unduly insensitive and indicative of a lack of good faith and unfair dealing. Although damages of $35,000 to $40,000 were appropriate, the court's jurisdiction was limited to damages of $25,000.

Statutes, Regulations and Rules Cited:

Courts of Justice Act.

Ontario Rules of Civil Procedure, Rules 20.04, 76.06(14).

Counsel:

Martin P. Forget, for the plaintiff.
John C. O'Reilly, for the defendant.

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1 **TRAFFORD J.**:-- On or about December 31, 1995, Ross King, a manager of two apartment buildings on Avenue Road in Toronto owned by Kenair Apartments Limited, was notified of the termination of his employment effective immediately. Mr. King was approximately 62 years old and in poor health. He had worked in the capacity of a building manager with the defendant company for about five and a half years. He supervised six or seven employees. As a part of his compensation, the plaintiff was paid a salary of approximately $35,500 per year and given a two bedroom apartment in one of the buildings for him and his family. The termination required him to vacate the apartment immediately.

2 With the assistance of counsel, he, inter alia, commenced an action for wrongful dismissal. This is a motion under rule 76.06(14) for summary judgement emerging from the defendant filing a Notice of Refusal to Proceed by way of Summary Trial in response to a motion for summary trial filed by the plaintiff. The motion for summary judgement succeeds. Damages in the amount of $25,000 are awarded to the plaintiff. Pre-judgement and post-judgement interest plus the GST are to be paid by the defendant in accordance with the Courts of Justice Act. Counsel may approach the Court on issues of costs if they wish to do so.

3 Let me begin by summarizing the material aspects of the case. Reference will then be made to the jurisdiction of the Court under rule 76.06(14). The reasons for judgement will also be given in brief form.

4 The affidavit filed on behalf of the plaintiff tends to establish the following circumstances. On or about May 31, 1990 Mr. King was hired by the defendant as a concierge for the building located

at 500 Avenue Road in Toronto. He was subsequently promoted to the position of building manager for the building located at 561 Avenue Road. It, too, was owned by the defendant. This promotion occurred in August 1991. The second building consisted of 600 residential units. A memorandum was sent by the defendant to all of the tenants advising them of the appointment of the plaintiff. It provided, in part, as follows:

> "We are pleased to advise that Mr. Ross King has been engaged as your new building manager to succeed .... Mr. King, with several years experience in real estate and property management, has served as concierge at 500 Avenue for the past 1 1/2 years where he has demonstrated the personal qualities necessary to take on his new responsibilities as building manager of 561 Avenue Road. Mr. and Mrs. King (Margaret) are fine people who, with the capable support of our building and mechanical staff, look forward to the opportunity to carry on in the tradition of providing the high quality service you have come to expect."

His duties as building manager consisted of servicing the tenants, managing the building including a staff of six or seven employees, full and part-time, and assisting in the management of several other residential buildings owned and operated by the defendant in the area. He also assisted during the turnover of other building managers. He held the position of building manager for approximately five years prior to his dismissal. Throughout his tenure he was continuously asked to work more hours, often exceeding 12 hours per day and working weekends, vacations and off-days.

5 His performance was never formally reviewed. On three occasions he met with the property manager of the defendant, Ron Schmidt, to discuss the various aspects of his employment including his workload. In September 1993 Mr. King expressed concern to Mr. Schmidt about the number of hours he was putting in as a building manager. No measures were taken to reduce his workload or to respond to any of his concerns raised at the meeting. A memorandum was sent by the plaintiff to his supervisor confirming the content of the meeting. In September 1994 a further such meeting occurred with his supervisor. Mr. King's workload had been increasing. He raised similar concerns during this meeting. Those concerns were also confirmed in writing to his supervisor, the general manager and the owner of the defendant. The defendant did not respond to any of the concerns. Mr. King continued to work diligently. In September 1995 he, again, met with his supervisor and reiterated his concerns about the number of hours he was working. By then, these concerns were exacerbated by a gradual deterioration of his health. No change was made in his responsibilities. Indeed, in October 1995 he assumed the additional responsibilities of managing the building located at 500 Avenue Road while continuing responsibilities in that capacity at 561 Avenue Road. During his tenure, both as concierge and building manager, the management at the defendant advised him on several occasions that they were pleased with his performance. This was particularly so after he assumed dual responsibility for the management of the buildings at 500 Avenue Road and 561 Avenue Road. No representative of the defendant ever advised him that his employment was in jeopardy for any reason.

6 On December 29, 1995 Mr. Schmidt advised the plaintiff that Kenair Apartments Limited was terminating his employment due to the fact that he owned and operated a separate company. The suggestion made during the meeting was that he was "... serving two masters ...". It was further said that such a work pattern was unacceptable to the defendant. A severance package in the amount of $4,000 less statutory deductions was offered to him. He was also told that he was to vacate his

apartment within seven days. Mr. Schmidt advised him he was preparing a letter confirming his dismissal.

7 On December 31, 1995 Mr. King received the letter. It confirmed the offer of severance and notice to vacate the apartment within seven days. It also asked him to execute a release enclosed with the letter that provided he acknowledged having had the opportunity to receive independent legal advice. The letter stated that the offer of severance was open for acceptance until the close of business on January 2, 1996.

8 Mr. King did own 75% of a small travel company called Caribbean Homes. It was registered and operated in Miami, Florida. He was a director of the company. In 1995 he was approached by representatives of Conference Travel and Tours who expressed an interest in purchasing the client lists of Caribbean Homes. As his company had always operated at a loss and its financial position at the time was a negative one, an agreement was entered into whereby, in essence, Caribbean Homes sold its rights to book travel in Canada to Conference Travel and Tours. Pursuant to this agreement, the plaintiff gave three training sessions to employees of the purchaser. The remainder of his duties under the agreement were fulfilled by staff situated in Miami, Florida. At no time did the ownership of this company impede his ability to fulfil his obligations to the defendant. His role, in a practical sense, was limited to the performance of administrative duties from time-to-time. They were completed during his days off. The company rarely turned a profit. He never received a salary. Nor did he receive dividends either before or after his dismissal by the defendant. He had purchased the company prior to becoming an employee of the defendant. The management of the defendant was aware of his ownership of the company and at no time before his dismissal complained about his commitments to it.

9 Following the dismissal on December 31, 1995, the plaintiff attempted to secure employment by sending his resume to several prospective employers who had placed ads in local newspapers. He only received a few responses. He had telephone conversations with several of them during which the employment with the defendant was reviewed. His age and the circumstances surrounding his dismissal were of concern to prospective employers. Most of them chose not to interview him in person. In addition to attempting to locate further employment, the plaintiff also attempted to earn income through his company. However, no financial success resulted from those efforts.

10 Over the last year of his employment with the defendant as a building manager he was paid approximately $35,500. He was also provided with a two-bedroom apartment with a rental value of $18,000 per year. Of that amount, approximately $6,000 was taxable. The balance, approximately $12,000, was treated as tax free benefit in lieu of salary.

11 At the time of his dismissal, the plaintiff was 62 years old and his health was deteriorating. In August 1994 he had suffered an umbilical hernia which caused great discomfort when lifting or bending. His physician suggested surgery. However, in light of the anticipated recovery time and its likely effect on his employment, he declined to have it done then. In the fall of 1995 he was involved in a motor vehicle accident. This was caused by a temporary blackout which lasted for a few seconds. Following his dismissal by the defendant he became depressed. He received a prescription for anti-depressant medication. Over the years since his dismissal, his health has continued to deteriorate. Presently, he lives with problems relating to a detached retina, kidney stones, strokes and other ailments.

12 As December 29, 1995 was a Friday, the plaintiff was unable to speak to a solicitor before New Year's Day 1996. On January 5, 1996 he retained a solicitor who notified the defendant of the plaintiff's position, namely, that he was wrongfully dismissed and that he remained ready, willing and able to perform his duties as building manager. The defendant responded by stating that its offer had expired and that it would be taking immediate action to evict the plaintiff and his family from the apartment. Mr. King was unable to retain a lawyer before the offer expired on January 2, 1996.

13 On January 12, 1996 the defendant issued a Notice of Application returnable on January 25, 1996 seeking an order evicting the plaintiff and his family from the apartment and declaring the tenancy agreement to be terminated. They had moved into the apartment in September 1991 when he assumed the position of building manager. When he was verbally dismissed by Mr. Schmidt he was told he had seven days to vacate the apartment. Further to the Notice of Application filed by the defendant, Mr. Schmidt filed an affidavit in which he purported to have terminated the employment for cause. The defendant obtained a default judgement due to an inadvertent error made by the solicitor for the plaintiff. The defendant was advised of an intention to move to set aside the default judgement. It was set aside on consent and a hearing was scheduled for March 11, 1996. One day prior to the hearing the defendant agreed to terminate the tenancy of the plaintiff effective March 31, 1996. On that date the plaintiff and his family moved out of the premises. This, then, is the evidence relied upon by the plaintiff in this motion for summary judgement.

14 The evidence filed by the respondent/defendant on the motion was, at best, conclusory. Mr. Schmidt, the Vice-President of Property Management of the defendant, filed an affidavit which asserted that the plaintiff was dismissed for just cause. The particulars were provided in the following manner:

> "Neglecting his duties in order to devote time to the operation of his travel business which he operated out of his apartment at 561 Avenue Road ... inattention to administrative duties ... failing to ensure that maintenance and repair requests from clients were dealt with promptly ... failing to ensure that housekeeping duties were attended to ... failing to follow proper procedures specifically those procedures relating to vacation booking ... failing to ensure that snow removal was attended to promptly and effectively ... failing to ensure that units were properly prepared for occupancy ... failing to retain copies of signed leases ... The plaintiff (has) been warned, repeatedly, of the above issues, but refused to take the required remedial steps ...".

The circumstances relied upon in arriving at those conclusions were not proved in this motion. Affidavits from other persons who may have had actual knowledge of such circumstances were not tendered. In this case, this failure tends against the merit of the defence. See rule 76.06(11).

15 On a motion for summary judgement under rule 76.06(14) the presiding judge shall grant judgement unless:

> (a) the judge is unable to decide the issues in the action, in the absence of cross-examination; or
> (b) it would be otherwise unjust to decide the issues on the motion.

The test for summary judgement under this rule is less onerous than the one for summary judgement under rule 20.04. See Newcourt Credit Group Inc. v. Hummel Pharmacy Ltd., [1998] O.J. No. 314 (Div. Ct.).

16 The purpose of rule 76.06(14) and the nature of the jurisdiction given to the Court by the rule has been described by the Ontario Court of Appeal as follows:

> "The purpose of rule 76.06 is to allow the parties to bring forward a relatively inexpensive application for summary judgement. Evidence to be considered includes the affidavits of the parties, any supporting material that can properly be placed before the court and the affidavits of witnesses. Summary judgement can only be granted when all of the evidence reviewed in total upon applying the principles of justice and fairness demonstrates a clear case wherein the motions judge may enter judgement. In circumstances where the case is not clear or where it dictates that justice and fairness would suggest otherwise, it is appropriate for the judge to refer the matter to trial."

See McGill v. Broadview Foundation, [2001] O.J. No. 108 at para. 4 (C.A.).

17 The case law under rule 20.04 suggests that a motion for summary judgement requires a respondent to lead evidence or risk losing the motion. It applies, with equal force, to motions of a similar nature under rule 76.06. See rule 76.06(9) and Newcourt Credit Group Inc. v. Hummel Pharmacy Ltd., supra. The responding party may not rest on mere allegations or denials of the party's pleadings, but must set out, in affidavit material, specific facts to show that judgement ought not to be granted. In a motion like this one, the motions judge should make determinations of fact, including determinations of credibility, unless he/she is unable to do so without cross-examination.

18 Given the evidence tendered on this motion, I am able to decide the issues in the action without cross-examination. To do so in the circumstances of this case is essentially just and fair. A number of observations are pertinent to these conclusions. First, the respondent's material does not make out a defence of just cause as there is no suggestion in the affidavit of Mr. Schmidt that reasonable time was given to the plaintiff to correct any significant deficiencies in his performance with knowledge that a failure to do so would result in the termination of the employment. See Munro v. Thompson, Tooze, McLean, Rollo & Elkin, [1998] O.J. No. 3839 at paras. 10-11 (Gen. Div.) for a description of the elements of a dismissal for cause based upon incompetence or dissatisfaction with employee performance. See also Wood v. Canadian Marconi Co. (1995), 9 C.C.E.L. (2d) 174 (Div. Ct.). Second, the evidence in the affidavit of Mr. Schmidt is inconsistent with the course of conduct taken by him in late December 1995. There was no reference during the meeting of December 29, 1995 or in the subsequent correspondence to the present defence other than the ownership of the company. The absence of these other aspects of the defence is consistent with the plaintiff's description of his performance throughout his employment by the defendant. Third, if cross-examination of the plaintiff was permitted he would likely deny the defence of just cause. Indeed, that is his position in the affidavit tendered by the plaintiff in this motion. There is no reason to suspect a material omission from, or inaccuracy in, the affidavit. Nor is there any reason to suspect a deliberate falsehood on his part. Any such testimony by the plaintiff would leave the trial judge in the position of weighing the credibility of Mr. King against the credibility of Mr. Schmidt. In doing so, some regard would be given to the promotions of the plaintiff in August 1991 and October 1995 to other positions in the company and the letter to the tenants speaking highly of his capability. In other

words, the conduct of Mr. Schmidt vis à vis Mr. King at material times is significantly inconsistent with his present description of the performance of the plaintiff. In any event, if the defendant wanted a cross-examination of the plaintiff it could have consented to the motion for summary trial. Therefore, in my view, the absence of cross-examination is not a significant factor in this case. For similar approaches to the determination of this issue see Herold, J. in Elliott v. Gead Inc. (c.o.b. Northwest Floor Underlayments), [1998] O.J. No. 984 (Gen. Div.) and Morin, J. in Nad Business Solutions Inc. v. Inasec Inc., [2000] O.J. No. 1585 (S.C.J.).

19 Moreover, it is fair to determine the action on the basis of the record presently before the Court. There was ample opportunity for the defendant to file extensive affidavit material in response, if any such evidence was available. Given the competence of counsel for the defendant, the absence of further evidence is a telling circumstance on the issue of fairness. In those circumstances, neither party has a legitimate interest in proceeding to a full trial on the merits. For a similar approach to this issue, see Low, J. in Munro v. Thompson, Tooze, McLean, Rollo & Elkin, supra, at para. 14.

20 Accordingly, the issue becomes one of reasonable notice. The material facts are not in dispute. The plaintiff was employed as a building manager or concierge for 5 1/2 years by the defendant. He was 62 years of age when his employment was terminated. His health was poor. He had supervisory responsibility over 6 - 7 employees. He has been unable to obtain further employment despite reasonable efforts to do so. In my opinion, the proper notice period was 9 - 12 months. Moreover, the defendant employer in all of the circumstances of the case did not proceed reasonably, honestly and fairly in terminating the employment of Mr. King. It was unduly insensitive. The handling of this matter was indicative of a lack of good faith and unfair dealing with Mr. King. See Wallace v. United Grain Growers Ltd. (c.o.b. Public Press), [1997] S.C.J. No. 94.

21 In those circumstances, the plaintiff has proven his case of wrongful dismissal. Damages in the amount of $35,000 - $40,000 would be appropriate. Given the limitations on the jurisdiction of the Court in this trial, the damages are limited to $25,000. Pre-judgement and post-judgement interest plus GST are also payable by the defendant to the plaintiff in accordance with the Courts of Justice Act. Counsel may approach the Court on issues of costs if they wish to do so.

TRAFFORD J.

cp/d/qlrme