Supreme Court of British Columbia
Yeager v. R.J. Hastings Agencies Ltd.
Date: 1984-10-01

D.J. McKinlay, for plaintiff.

G.A. Paruk, for defendant.

(Vancouver No. C822558)

1st October 1984. WOOD J.:–

I

[1] The plaintiff seeks damages alleging he was wrongfully dismissed on 30th April 1982, after 30 years' employment with the defendant company.

[2] The defendant argues that the plaintiff was given adequate notice of its intention to terminate his employment. Alternatively, it is said that there was sufficient cause to terminate summarily. The defendant also pleads a failure by the plaintiff to mitigate his damages in the event that neither of the offered defences succeed.

[3] For the reasons which are set out at length below, I have decided that the plaintiff was dismissed without notice and that there was no cause sufficient to justify such summary termination.

II

[4] The defendant company is a manufacturers' agent for various lines of clothing. Its major principals are Stanfields and McGregors, whom it represents to both wholesale and retail customers in British Columbia, the Yukon and several states in the northwest United States of America. It was not disclosed when the company started in business; however, the plaintiff began his employment as a warehouseman in 1952, and I had the distinct impression from the evidence that if the company was not a relatively new one at that time it certainly did not do a large business.

[5] In 1955 the plaintiff became a salesman, at which time he was posted to and given responsibility for the company's business in the interior region of British Columbia. From then until 1963 he spent up to 40 weeks each year on the road, travelling throughout the Cariboo, the Okanagan and the Kootenays, serving the defendant's existing customers and soliciting new ones. He enjoyed considerable independence during this period and he made a significant contribution to the growth and success of the defendant's business.

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[6] In 1963 he was moved back to Vancouver where he was asked to take over a number of major accounts including that of all the Eaton's department stores in the lower mainland. Even though he resided in the Vancouver area from that point on, he continued, for a number of years, to travel in the interior of the province, spending up to one half of his time on the road. He did so because he felt it was essential for the good of the defendant's business that he personally keep in close contact with those customers whom he had serviced on a full-time basis for so many years.

[7] Commencing in 1954 the plaintiff took advantage of the opportunity offered him, from time to time, to purchase small blocks of the company's stock. By 1969 he held 32 per cent of its issued non-voting shares. In 1970 the company founder and president, R. J. Hastings, decided to retire. His son, R. V. Hastings ("Mr. Hastings"), became president. This change was accompanied by a redistribution and a further issue of shares. After this reorganization the plaintiff held 27.5 per cent of the non-voting shares as were then issued, but he had also acquired 15 per cent of the issued voting shares of the company.

[8] While the fact of being a shareholder has no legal impact on the plaintiffs status as an employee, insofar as this action is concerned, it is a circumstance which I find reflects the extent to which he was involved in the growth of the company over the years and the value which the defendant attributed to his efforts in that regard.

[9] This reorganization of the company left Mr. Hastings in firm control with 65 per cent of the issued voting stock. There was some suggestion that the plaintiff was resentful of this turn of events because he had expected to become president. The plaintiff denied that to be the case, saying he had neither the education nor the skills for the job. He felt that he had been the senior Hastings' "No. 1 man", as he put it, and he was content to retain that position with the new president.

[10] There is no doubt that the plaintiff believed he enjoyed a special status with the company when the father was president. Whether he did or did not is unimportant, but I am satisfied that he certainly had a better relationship with him than he did with the son. Mr. Hastings, who is seven years younger than the plaintiff. had begun his career with the defendant working as a warehouseman under the direct supervision of the plaintiff. While he denied that this caused him any problems in later years, I am satisfied that he was never able to accept the attitude of equality which stemmed from the plaintiffs belief that the company belonged as much to him as it did to anyone else. As the years passed and the problems which eventually led to the plaintiffs dismissal began to manifest themselves,

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I have no doubt but that the attitude of each toward the other was affected by a growing resentment that had its origin in these changes in 1970.

III

[11] The chronology of events from this point on is important to a consideration of both of the substantive defences which are raised to the plaintiffs claim. I propose to deal with the evidence of each circumstance in its proper sequence, as that chronology is also important to an understanding of why I have concluded that those defences should not prevail.

[12] By 1977 the plaintiff had been servicing the Eaton's account for 14 years. The account had grown significantly as new stores were opened. In that year, the head office in eastern Canada instituted a nationwide change in buying procedures. This change coincided with a change in personnel in the local purchasing office. Ms. June Rees took over the position of buyer for men's dress fashions and thus became the person with whom the plaintiff had to do business. She also assumed responsibility for implementing the new buying procedures.

[13] The plaintiff resisted these changes, which had the effect of reducing the amount of merchandise ordered from the defendant company's two major principals. He obviously had difficulty getting along with Ms. Rees. She complained that he went over her head to protest the changes. She described that as unprofessional and rude. She says that the plaintiff refused to accept the inevitable. Eventually she went to her immediate superior, Wayne Duzita, and advised him that she would have nothing further to do with the plaintiff. Mr. Duzita, in his testimony, made a point of the fact that it was Ms. Rees and not he who had the complaint. In his view, however, the customer is always right and, since there was very little time in which to implement the new buying procedures, he contacted R. V. Hastings who, at his request, eventually removed the plaintiff from the account.

[14] In his evidence Mr. Hastings described this as an embarrassment which had never occurred before in the history of the agency. While it may have been the first time that such a change had occurred at the request of the customer, it was not the first time that a problem had arisen between an Eaton's buyer and the agency. The plaintiff, whose evidence on this point was not contradicted, testified that his move back to the lower mainland in 1963 was precipitated by a request that he take over this account because of the inability of both the senior Hastings and his son to get along with Mr. White, who was then the buyer for Eaton's.

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[15] Mr. Hastings had some knowledge of a “problem with Ms. Rees” before the request to remove the plaintiff came from Mr. Duzita. He had spoken to the plaintiff and reminded him of the importance of co-operating with the buyer, but when he removed the plaintiff from the account no further discussion ensued. There was no suggestion at any time that there had been any shortcoming in the plaintiffs job performance. As a consequence the plaintiff was understandably left with the impression that there was an internal reorganization taking place for the benefit of other sales people employed by the defendant as well as for himself.

[16] Having had a chance to observe Ms. Rees in the witness stand, I am not surprised that the plaintiff had difficulty getting along with her. She struck me as a person of very definite views who would brook no interference with her decisions. The plaintiff had, by this point, 25 years of unblemished work experience. The next incident about which the defendant complains occurred two years later. In my view, this was an isolated occurrence and should be regarded as such. I am reinforced in this view by the fact that when the plaintiff was removed from the Eaton’s account, he was given the Hudson’s Bay account in exchange. This was a larger and presumably more demanding customer to service.

[17] Approximately two years later a problem arose with respect to the Army and Navy Stores account, for which the plaintiff had responsibility. This customer operated two stores, one in Vancouver and the other in New Westminster. Mr. Hastings testified that he received complaints from both the buyer and the manager that the plaintiff was responsible for loading too much inventory in one store while the other was short. He says he spoke to the plaintiff who responded that he was too busy to do inventory counts.

[18] The plaintiff testified that Mr. Singh, the buyer for Army and Navy, bought for both stores and decided how much inventory to put in each. Thus, he alleges that any imbalance in inventory was not his fault. He acknowledges that Mr. Singh demanded that he do monthly stock counts in each store and that he told Mr. Hastings he could not find time to do that. He claims that Mr. Hastings told him not to worry and took the account over himself.

[19] Mr. Singh did not testify. It is thus not possible to determine if there was an inventory imbalance between the two stores nor, if so, whose fault that was. When Mr. Hastings took over the account, no indication was given to the plaintiff that the change resulted from or reflected any shortcoming on his part and, certainly, it is not clear from the evidence that it did.

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[20] In May 1979 there was a disagreement between the plaintiff and Mr. Hastings relating to the purchase of a new company car. According to Mr. Hastings, the plaintiff presented him with a quotation for a car which, in his view, included $1,500 worth of unnecessary options. He told the plaintiff that, and instructed him to find a car worth $8,000, not $10,000. He then left town and when he returned he was distressed to find that the plaintiff had purchased the same car with most, if not all, of the same options.

[21] The plaintiff denies the substance of Mr. Hastings' version of this event. He says that when he showed the quotation to Mr. Hastings, there was discussion about the necessity for wire wheels and air conditioning, as a result of which he had the former removed and he personally paid for the latter.

[22] Mr. Hastings testified that he contemplated firing the plaintiff on this occasion, but decided, in the end, to be "a nice guy". When he finally issued the company cheque required to pay for the car, he indicated his annoyance by telling the plaintiff that he had lost confidence in him.

[23] It was conceded that this incident could not be relied upon in the defence of cause, because the plaintiffs "misconduct" was condoned by the defendant. That clearly was the case if, indeed, there was any misconduct on the part of the plaintiff. I am not satisfied, on the evidence, that there was. It is clear from the evidence, however, that this was one of those occasions when the plaintiffs attitude of equality adversely affected not only the event itself, but also the reaction of both parties to it.

[24] Some time in late 1980 Mr. Hastings decided to remove from the plaintiff's responsibility what were called the north shore independent accounts. These were four or five smaller independent retail outlets situated in North and West Vancouver. The complaint was that the plaintiff was not servicing the accounts, a conclusion which Mr. Hastings drew because, he said, there was a lack of growth in the existing business and no new accounts were being added. When he spoke to the plaintiff about the problem, he says that the plaintiff replied that he was too busy to solicit new business.

[25] The plaintiff denies that there were complaints of lack of servicing from any of the North Shore customers. There is no evidence of any. The owner of one such store, in fact, testified that the plaintiff serviced his account well. It is not surprising, therefore, that Mr. Hastings made no critical comment to the plaintiff when he decided to give these accounts to another salesman. It must also be noted that there is no evidence of any growth in the

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old accounts or of the addition of any new accounts in this area once the plaintiff was relieved of its territorial responsibility.

[26] In addition to the specific complaints just discussed, six employees of the defendant, including Mr. Hastings, all testified to a negative attitude on the part of the plaintiff which began some time in the late 1970's and became increasingly obvious as time went on. This attitude manifested itself in irritability, rudeness to customers, remarks derogatory to Mr. Hastings and advice to younger employees to leave the defendant's employ and get into a sensible business. A phenomenon known as "pulling a Yeager" became a topic of discussion around the office. This involved the plaintiff leaving work to go home in the mid-afternoon after announcing to the world at large that he had had enough.

[27] These manifestations of dissatisfaction and unhappiness in his work were clearly much more significant and disruptive in their effect in the last year before he was dismissed, but certainly it was obvious that, by December 1980, the plaintiff was experiencing some distress on the job. The suggestion is that his attitude had a negative effect on the other employees, although only one expressed the view that the plaintiff's remarks about the business caused him to consider changing jobs.

[28] The plaintiff himself acknowledged in evidence that he may have had "less patience" in the last five years that he worked for the defendant, and that in the last year he may have been critical of the way Mr. Hastings was running the company. His intention, he says, was to criticize constructively. In particular, he felt that his talents were not being properly or effectively utilized. He stated he was a builder, not a stock counter, a reference to the numerous inventory counts he had to do in order to assist customers with their purchase orders.

[29] Some time in November 1980 Mr. Hastings concluded that both he and the plaintiff would be happier if the plaintiff was working somewhere else. An effort was made to justify this conclusion on the basis of what was suggested to be the plaintiff's misconduct on the job. I have just summarized the conduct relied upon in support of such a suggestion. In my view, while it is clear that the plaintiff was not performing as well as he once had, there was nothing that could be characterized properly as misconduct. There was evidence of a growing problem which was adversely affecting the plaintiff's performance, and there was certainly evidence of Mr. Hastings' growing resentment toward the plaintiff.

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[30] In any event, Mr. Hastings made what he described as the most difficult decision of his life. He decided to dismiss the plaintiff. With that purpose in mind, he invited the plaintiff to join him for a drink after work at the Hollyburn Golf and Country Club. This meeting occurred on either the last Friday in November or the first Friday in December.

IV

[31] There were only two people present at this Friday meeting, the plaintiff and Mr. Hastings. Their respective recollections of the event differ dramatically.

[32] I shall summarize Mr. Hastings' version of the event first. He had, he said, discussed the matter informally with a number of people, including lawyers. He concluded that he would give the plaintiff notice. He opened the meeting by telling the plaintiff that he was giving him notice of dismissal and he explained that this meant he wanted the plaintiff to leave the firm. He invited the plaintiff to take as much time off work as he required in order to find other employment and suggested he should leave within six months. He acknowledged that he was part of the plaintiff's problem. He told the plaintiff he had reached this decision because of the plaintiff's poor job performance. The only response which he attributed to the plaintiff throughout the course of this 1½ hour meeting was a request that he keep the dismissal confidential, so as not to hurt the plaintiff's chances of obtaining other employment.

[33] The plaintiff's recollection is that Mr. Hastings opened the conversation by saying that he had to make some readjustments in the firm and that he wanted his letter of resignation. Mr. Hastings said he felt that the plaintiff would be happier working somewhere else, where his skills could be more fully utilized. The plaintiff said that after the letter of resignation was requested, he was in such a state of shock that he can recall little else. He certainly does not recall any suggestion from Mr. Hastings that his job performance was inadequate in any way.

[34] When the plaintiff went home, he told his wife that he had been asked to resign from the company. She was alarmed. She insisted that another meeting be arranged at which she could be present. This was done. It was scheduled for the next morning at the same place.

[35] Again, the recollections of this meeting differ widely. Mr. Hastings says that he brought his wife with him and that she stayed for the whole meeting. She concurs with that view. He says that Mrs. Yeager began by asking if the plaintiff had been fired. He replied in

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the negative, explaining that the plaintiff had been given notice and that he was expected to leave within six months. He insists that the word “resignation” was not used at either meeting. Mrs. Hastings also says that the word “resignation” was not used at the Saturday morning meeting and that her husband explained in some detail to Mrs. Yeager the reasons why the plaintiff was being dismissed. Mr. Hastings denied in his evidence that he gave Mrs. Yeager the reasons for the plaintiffs dismissal. In his view, it was none of her business. There was no suggestion in the evidence of either Mr. or Mrs. Hastings that the notice of dismissal given the day before was withdrawn at the Saturday meeting.

[36] Both the plaintiff and his wife testified that the second meeting began with Mrs. Yeager asking if her husband had been asked to resign, to which questione Mr. Hastings responded in the negative, asserting that he had merely suggested to the plaintiff that he might be better off working somewhere else, such as in a business of his own. Both deny that Mrs. Hastings was present for more than a few moments at the beginning of the meeting. Mrs. Yeager says that she was so relieved to hear that the plaintiff had not been asked to resign that she did not bother to inquire what, if any, reason there might have been for the request in the first place. She is certain that the words “notice” or “notice of dismissal” were never used. After confirming that the plaintiff had not been asked to resign there followed, she says, a discussion of various businesses that he might be able to start, including some in which Mr. Hastings could participate as a silent partner.

[37] It is difficult to reconcile these different versions of what occurred at the two meetings just described. The consequences of the meetings and the events which followed, however, are less equivocal. It is clear that both the plaintiff and his wife came away from the second meeting with the belief that, while it had been suggested to the plaintiff that he had gone as far as he could with the defendant company, and that he should consider leaving, the decision whether or not to leave and. if so, when, was left entirely to him. Mrs. Yeager’s subsequent description of the event to Dr. Davison confirms that to have been her understanding. The plaintiff’s testimony, which I accept, satisfies me that his belief was in accord with that of his wife.

[38] It is also clear that nothing further transpired in the 17 months that followed before the plaintiff was summarily dismissed. Six months came and went without the plaintiff being told that his notice had expired or that he should leave. Mr. Hastings explained that this was because he had had some further informal discussions with people, including lawyers, as a result of which he concluded that 12 months was a more appropriate length of notice, given the many years that the plaintiff had worked for the defendant. He did not

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communicate that decision to the plaintiff. In any event, 12 months came and went without any suggestion that the notice period had expired and that the plaintiff should leave forthwith.

[39] The mere fact that nothing was subsequently done to confirm that a notice of dismissal had been given serves to reinforce the plaintiff's version of the conversations and to confirm that his belief in the state of affairs thereafter existing was justified. Finally, the formality of Mr. Hastings' action in dismissing the plaintiff "for cause" on 30th April 1982 serves to rebut the suggestion that he himself believed that any proper notice of dismissal had been given to the plaintiff 17 months earlier.

[40] Notice of dismissal must be specific and unequivocal and it must be clearly communicated to the employee if it is to be effective in law. The onus of proving that such a notice has been given rests upon the employer who seeks to raise it as a defence to an action for damages for wrongful dismissal. On the evidence before me, I cannot conclude that such a notice was probably given to the plaintiff in December 1980 or at any time before he was terminated on 30th April 1982. The defence of notice therefore fails.

V

[41] The next circumstance relied upon by the defendant as giving rise to cause for summary dismissal occurred in January 1981. It was then that the Work Wearhouse account was removed from the plaintiffs responsibilities. This was an account which the plaintiff had handled for a number of years as it grew from two stores to a large chain of corporate and franchise operations. According to Mr. Hastings, it was taken from the plaintiff because the customer's buyer, Ms. Campbell, found the plaintiff difficult to get along with. There was apparently a personality conflict and a difference of opinion between them over servicing requirements. Eventually, Mr. A. E. Hughes, the vice-president of marketing for Stanfields, became involved and it was agreed to remove the plaintiff rather than to risk further displeasure from Ms. Campbell.

[42] The plaintiff testified that Ms. Campbell wanted him to do an unreasonable number of stock counts at times which conflicted with obligations he felt he had to other customers. He said he told her that he could not accommodate her requests but that he would try to work out something.

[43] While Ms. Campbell was not called as a witness, so that no first hand account of her actual complaints was available, it seems to be common ground that she was a new

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buyer whose emergence coincided with a corporate decision to reduce inventory and increase turnover. These changes led to a problem with the buyer, which resulted in the plaintiff being taken off the account. As Mr. Duzita said in connection with the Eaton's incident, in the defendant's business the customer is always right. The plaintiff was apparently unable, or unwilling, to give effect to that rule in this instance.

[44] There is a difference of opinion over what was actually said at the time the plaintiff was removed from the account and it was given to another salesman. It is not disputed, however, that once again the plaintiff was not told anything from which he could infer that he was being removed for any lack of performance on his part. He was not aware of the involvement of Mr. Hughes until this litigation arose.

[45] It was a year later that the final sequence of events, said to justify the plaintiff's summary dismissal, occurred. The first in this series of complaints involved the plaintiff's mishandling of the Fields Stores account. The plaintiff had looked after this account for four or five years prior to any difficulty arising. Once again, the onset of problems seemed to coincide with the arrival on the scene of a new buyer, Mr. Caron, who complained that the plaintiff was not providing the level of service which he expected, particularly in the area of promotional advice and assistance. He eventually indicated that he no longer wanted to deal with the plaintiff. Apparently the situation continued for several months, during which time Mr. Arkell, the vice-president of marketing for Fields Stores, advised Mr. Hastings, on several occasions, that there was a problem with the level of service provided by the plaintiff and that he expected that problem to be remedied. On the last occasion, Mr. Arkell indicated that if the defendant company could not provide the level of service desired, then Fields would deal with an agency that could.

[46] In March 1982 matters were brought to a head when the plaintiff and Mr. Caron had a major disagreement. He told the plaintiff he would not allow him back into any of Fields' stores. He telephoned Mr. Hastings to give him the same advice. When the plaintiff advised Mr. Hastings of Mr. Caron's edict, he says he was told not to worry about it. Mr. Hastings took over the account himself, and in a short while the volume of sales doubled.

[47] At the same time that the plaintiff's problems with the Fields Stores account were reaching the breaking point, the defendant company suffered several embarrassments by virtue of the plaintiff's mishandling of the Work Wear World account. The plaintiff was responsible for originally luring this customer away from another agency. It was then a very small operation of two or three stores. It grew quickly as the franchise branch of the

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business developed. In 1981, when the account stood at ten retail outlets, the plaintiff gave responsibility for some stores to another salesman, following which he had three corporate stores and four to five franchise stores left to service.

[48] In late 1981 a new buyer, Ms. Peel, took over purchasing for the corporate stores. Shortly thereafter the plaintiff persuaded her to order a new line of stock. As an inducement, he promised an allowance that would enable her to clear some old lines at reduced prices. He had no authority to do this. The principal would not agree to provide the allowance. Mr. Hastings was embarrassed to have to advise the customer that the defendant company was forced to renegue on the plaintiff's promise.

[49] A short while later Ms. Peel ordered a large number of what she understood were first quality knit shirts referred to as clearings. When they arrived and she found out that they were, in fact, substandard, she demanded a discount. Eventually Mr. Hastings was able to negotiate a discount with the less than happy manufacturer. Ms. Peel was not called to testify and it is not clear from the evidence how this misunderstanding arose. The plaintiff disclaimed any responsibility for it and there is no evidence to contradict him.

[50] There is no doubt, however, that the plaintiff was responsible for tripling a stock order for the three corporate stores, when that order was submitted by Ms. Peel. This error was discovered when the second shipment arrived at the customer's warehouse. Mr. Hastings instructed the plaintiff to take immediate steps to cancel the third order. He failed to do so. In the end the customer wound up with three times the inventory it had ordered.

[51] By 25th March 1982 Work Wear World had not yet submitted any orders for the fall and winter lines of merchandise. Concerned over this, Mr. Hastings accompanied the plaintiff on a visit to Ms. Peel on that date. He testified that he received the distinct impression from that meeting that he would have to take the plaintiff off the account or risk the defendant losing it altogether. It was on the way home from that meeting that he decided, he says, to terminate the plaintiff's employment.

[52] The defendant advanced two other examples of what were said to be the plaintiff's inability to perform his job adequately. In early 1982 R. V. Hastings removed the Woolco Stores account from the plaintiff's responsibility, because of his alleged failure to properly service the customer. There was no evidence that the customer had any complaint about the level of service it received. It was also suggested that the plaintiff's conduct was jeopardizing The Bay account. Ms. Innouye, the regional department manager for The Bay, and the person through whom 80 per cent of the defendant's merchandise was

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ordered, testified that while the plaintiff had problems getting along with some of the staff at different stores, she had no difficulties with him and the level of service he provided was satisfactory. The size of the account grew in the five years that the plaintiff handled it. I find no substance in either of these allegations.

[53] In addition to the final series of problems that arose with respect to the plaintiff's handling of customer accounts, his general job performance deteriorated considerably in the 15 months prior to his dismissal. All of the manifestations of the negative attitude described earlier became more noticeable to his fellow employees and more disruptive in their effect upon the defendant's business. The plaintiff became increasingly forgetful. He was often unable to remember details such as stock numbers, colour codes, product lines and packaging modes, all of which knowledge was essential if he was to serve customers efficiently and complete order forms correctly on their behalf. The extent of his disability in this area is apparent from a review of the order forms for The Bay, which he had worked on for seven days just prior to his dismissal. Errors abound to the point where they had to be completely re-done following his departure.

VI

[54] The job performance of the plaintiff from 1979 onwards and, in particular, during the last 12 to 15 months prior to his dismissal, is in such sharp contrast to that during his first 27 years with the defendant company that one is driven to look for an explanation for this change in the evidence. I am satisfied that such an explanation exists.

[55] I have already described how, for ten to fifteen years from 1955 onward, the plaintiff spent many weeks each year travelling in pursuit of the defendant's business. The resulting long absences from home inevitably took their toll on his marriage. In 1972 and again in 1975 he sought the assistance of marriage counselling and for that purpose was given psychiatric referrals by his family doctor. His need for psychiatric counselling at this point demonstrates that as early as five years before the first circumstance relied upon by the defendant as justification for summary dismissal, the plaintiff had begun to suffer from what I conclude eventually became a serious mental illness.

[56] In 1980 he again sought psychiatric counselling and he was referred for this purpose to Dr. Yeung. While the impetus for this referral was ostensibly a reccurrence of his matrimonial problems, Dr. Yeung also noted at this time that the plaintiff was suffering from stress at work. As his problems at home grew, the plaintiff, over the years, increasingly sought solace in his work. The evidence satisfies me, however, that the

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emotional stress which the plaintiff experienced from his marital problems eventually began to have an effect on his job performance. This, in turn, led to stress at work. Thus the job which had originally provided a refuge from his marital problems became a contributing factor in the development of his mental illness. The plaintiff was trapped in a revolving problem of ever-increasing severity.

[57] The referral to Dr. Yeung was in September 1980, some three months before the abortive attempt by Mr. Hastings to give the plaintiff notice of dismissal. The plaintiff was described as being in obvious distress at that time. Thereafter, the deterioration in his mental condition accelerated.

[58] The plaintiff testified that the request for his letter of resignation was a terrible blow to him. He was being asked to leave a company to which he had given his best for over 28 years; a company which he felt he had built and in which he felt he was an equal partner. Even though he understood that the request for his resignation had been withdrawn, he was left with the realization that he was no longer either needed or wanted by that company. He felt devastated by that turn of events.

[59] Mrs. Yeager confirmed that the plaintiff was terribly discontented after the December meetings at which his resignation had been discussed. Dr. Yeung noted a swift decline in the plaintiff's emotional condition in the months immediately following these meetings. I am satisfied that they had a serious negative impact upon the plaintiff's already fragile emotional condition. I am also satisfied that it was not simply a coincidence that the first serious allegation of so-called misconduct on the part of the plaintiff, namely, his inability to properly service the Work Wearhouse account, occurred within two months of those meetings.

[60] Dr. Yeung's concern grew in the early part of 1981. By this time the plaintiff was exhibiting a number of peculiar symptoms. His wife reported that he occasionally walked with a limp, that he suffered from poor co-ordination, and that he often displayed unusual, involuntary facial mannerisms. A number of people noted that he suffered from poor memory. He was frequently irritable and unpleasant. It was noted that the plaintiff himself did not recognize or accept many of these symptoms, nor did he believe himself to be mentally ill. He did have doubts about his ability in everything, however, and expressed concern to Dr. Yeung about his irritability.

[61] As a result of his own concerns. Dr. Yeung referred the plaintiff to a clinical psychologist, Dr. Gunter Reith, for a psychological assessment. Dr. Reith, in his testing of

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the plaintiff, confirmed the existence of: depressive ideation; an acute personality disorder characterized by a strong sense of nonconformity and rebelliousness; borderline impulse control which manifested itself in low temper and frustration control, and very poor memory function. These findings read like an objective litany of the complaints of the plaintiff's conduct at work, as expressed by his fellow employees.

[62] It was Dr. Reith's report to Dr. Yeung, dated 24th February 1981, that first suggested "some type of mild organic impairment" and that led Dr. Yeung to seek further assessments. He referred the plaintiff for a C.T. scan and a neurological assessment.

[63] Dr. Davison, the neurologist who examined the plaintiff, reported, in May 1981, that all symptoms were indicative of a dementing process. In September 1981 he reported that the results of the C.T. scan and other testing confirmed the diagnosis of presenile dementia or Alzheimer's disease. In May 1981 Mrs. Yeager had hinted at the possibility of "brain disease" to the plaintiff, who steadfastly refused to believe that there was anything wrong with him. In August 1981 Dr. Yeung began the difficult task of breaking to the plaintiff the news that he had been diagnosed as suffering from an incurable form of organic brain disease. The plaintiff was told that there was a possibility of a "slight shrinking" of the brain. He was told that this could cause memory loss and affect his ability at work. He was advised not to take on new challenges or additional stress at work.

[64] According to Dr. Yeung, the significance of this advice was not appreciated by the plaintiff until the beginning of 1982, at which time it was accompanied by the onset of a deep depression. Again, I am satisfied that it was no mere coincidence that the development of these circumstances paralleled the last and most serious of the incidents which were relied upon by the defendant in its defence of cause. Dr. Yeung testified that the plaintiff had become very unhappy at work, where he felt he was not appreciated. The plaintiff's preoccupation with his problems at work is highlighted by the fact that he reported to Dr. Yeung, when the Fields' account was removed from him in March 1982. From his point of view, this was further evidence of his employer's lack of appreciation. The realization that he would never achieve what he had set out for himself in his work further aggravated the depression from which he was then suffering. To the extent that the plaintiff did, in fact, appreciate the diagnosis of "some slight shrinking of the brain", he must have felt, by 1982, that he was trapped in a web of circumstances from which there was no escape.

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[65] In fact, the diagnosis of presenile dementia, or Alzheimer's disease, proved to be incorrect. Further psychological assessments and C.T. scans conducted in 1983 disclosed no abnormalities. There remains, however, not the slightest doubt that from some time in the 1970's on the plaintiff was suffering from a mental illness of increasing severity and that by the beginning of 1982, possibly earlier, he was disabled as a result of that illness. I am satisfied, on the basis of all of the evidence, that the plaintiffs deteriorating job performance from 1979 onwards was due entirely to the effects which this illness had upon him. Notwithstanding the defendant's early complaints concerning the plaintiff's conduct on the job, however, I find that it was not until 1981 that the illness began seriously to interfere with the plaintiff's capacity to perform his job. By 1982 he was occupationally disabled.

[66] That disability, however, was of a transient nature. Notwithstanding an increase in its severity immediately after his dismissal, the plaintiff's condition has improved steadily since the end of 1982. He is no longer disabled. In fact, Dr. Calder, his family physician, testified that he is now in better shape mentally than at any time since 1972. Even Dr. Noone, a psychiatrist who assessed the plaintiff for the defence, conceded that the plaintiff's disability appears to have been transient.

VII

[67] So that there may be no uncertainty about what follows, I shall summarize the findings that emerge from the evidence to this point. The plaintiff, after 27 years of exemplary service to the defendant company, began, in 1979, to exhibit signs of reduced performance on the job. This circumstance was the direct result of a mental illness from which he was then suffering. Over the course of the next three years that illness increased in its severity. As that happened, there was a corresponding increase in its interference with and negative impact upon his ability to perform his job. By 1981 the illness was severe enough that the plaintiff's ability to perform his job was significantly impaired. By the beginning of 1982, as the result of the progressive development of that illness, the plaintiff was occupationally disabled. The illness itself proved to be of a temporary nature. The plaintiff's mental condition has improved steadily since the end of 1982 to the point where, by the time of trial, he was in a better emotional condition than he had been at any time since 1972, long before any troubles arose on the job.

VIII

[68] I turn now to consider the defence of cause. The test most frequently applied in this court to define the type of conduct which is capable of giving rise to cause for summary

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dismissal is found in the judgment of Schroeder J.A. in *R. v. Arthurs; Ex parte Port Arthur Shipbldg Co.,* [1967] 2 O.R. 49, 62 D.L.R. (2d) 342 at 348, reversed on other grounds (sub nom. *Port Arthur Shipbldg. Co. v. Arthurs)* [1969] S.C.R. 85, 70 D.L.R. (2d) 693:

> "If an employee has been guilty of serious misconduct, habitual neglect of duty, incompetence, or conduct incompatible with his duties, or prejudicial to the employer's business, or if he has been guilty of wilful disobedience to the employer's orders in a matter of substance, the law recognizes the employer's right to dismiss the delinquent employee."

[69] The degree of such misconduct required to establish cause in any given case is that described by Lord Evershed M.R. in *Laws v. London Chronicle (Indicator Newspapers) Ltd.,* [1959] 1 W.L.R. 698 at 700, [1959] 2 All E.R. 285 (C.A.):

> "To my mind, the proper conclusion to be drawn from the passages I have cited and the cases to which we have been referred is that, since a contract of service is but an example of contracts in general, so that the general law of contract will be applicable, it follows that the question must be – if summary dismissal is claimed to be justifiable – whether the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract of service. It is, no doubt, therefore, generally true that wilful disobedience of an order will justify summary dismissal, since wilful disobedience of a lawful and reasonable order shows a disregard – a complete disregard – of a condition essential to the contract of service, namely, the condition that the servant must obey the proper orders of the master, and that unless he does so the relationship is, so to speak, struck at fundamentally."

[70] Simply put, if the misconduct of the servant is such as to amount to a fundamental breach of the contract of service, the master is entitled to, in effect, rescind that contract without notice. An essential characteristic of any conduct which justifies summary dismissal is its wilful nature, for it is this feature of the conduct which gives rise to the inference that the servant intends no longer to be bound by the contract of service, with the result that the relationship is "struck at fundamentally".

[71] It is for this reason that the law has long recognized that absence from work due to illness is not cause for summary dismissal. Historically, illness has been attributed to the act of God. In *Davies v. Ebbw Vale Urban Dist. Council* (1911), 75 J.P. 340, 27 T.L.R. 543 at 544 (K.B.), Channell J. expressed the point this way:

> "Treating the case as one of illness, upon the authorities loss arising from temporary incapacity of a servant owing to illness fell upon the master. That was based upon the ground that illness was not a breach of contract, but was the act of God."

See also *Cuckson v*. *Stones* (1858), 1 El. and El. 248, 120 E.R. 902; *Can v. Hadrill* (1874), 39 J.P. 246; and *Warburton v*. *Co-op. Wholesale Soc. Ltd.,* [1917] 1 K.B. 663 (C.A.).

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[72] Even where the illness is itself brought on by imprudence or wilful misconduct, it will still be treated as an act of God and the resulting absence from work will be no cause for summary dismissal: see *K. v. Raschen* (1878), 38 L.T. 38 (Div. Ct.) (venereal disease), and *McDougal v. Van Allan Co.* (1909), 19 O.L.R. 351 (cocaine addiction).

[73] In this case, of course, illness has resulted not in the plaintiff's absence from work but, rather, in his incapacity to perform his work properly. As a consequence, his conduct in the last few months prior to his dismissal appears to have been such as would meet the standard described in the *Port Arthur Shipbldg.* case. Can such conduct, in the circumstances, give rise to cause for summary dismissal? I conclude that it cannot. From the point of view of the application of the principles just discussed, there is, in my view, no distinction between absence from work and misconduct at work when illness is the cause of both. In neither instance is the resulting effect upon the performance of the contract of service a consequence of any wilful act on the part of the servant. The prejudice to the master's business may be greater in the latter case, but that circumstance merely highlights the need for a timely recognition of the problem which would, in turn, lead to an absence from work while the illness is treated.

[74] Moving from the realm of hypothetical application of legal principles to the facts of this case does not affect the outcome of the inquiry. It was clear from the evidence that the plaintiff never accepted the fact that he was suffering from a mental illness. That is a phenomenon often exhibited by those who are, in fact, mentally ill. The evidence satisfies me that throughout the entire period when the plaintiff's illness was interfering with his capacity to perform his job adequately, he believed that he was doing his job as well as he had always done it. Indeed, a good part of the stress which he experienced from his employment resulted from his inability to appreciate that there was a nexus between his job performance and the fact that so many business accounts were being taken away from him. What to his employer was, in each case, an action necessitated by his inability to perform thus seemed to him to be further evidence of lack of appreciation.

[75] The evidence established that at the time of each customer complaint which, in turn, led to an account being removed from the plaintiff's responsibility, nothing was said to the plaintiff by Mr. Hastings from which any inference of criticism could be drawn. It was argued on behalf of the defence, however, that there were two instances where Mr. Hastings directed forceful criticism to the plaintiff, sufficient to give him notice that his job performance was inadequate. If this were the case, then it might be argued that any

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subsequent misconduct on the part of the plaintiff would have to have been wilful in nature. It is therefore necessary to examine each instance alleged.

[76] The first occasion was immediately after the disagreement which followed the purchase of a new car by the plaintiff in 1979. Mr. Hastings testified that as a result of what occurred he said to the plaintiff: “I have lost confidence in you – you have an obligation to restore my confidence”. While I have some difficulty grasping the significance of such an assertion, in anything other than the very limited context in which it was said, I do accept that such a statement was made. In my view, however, that statement would not have the effect of alerting the plaintiff to the fact that his job performance was inadequate. In any event, this confrontation occurred before the illness of the plaintiff had caused any significant interference with his ability to perform his job adequately.

[77] The other circumstances which, it was argued, would have combined to give the plaintiff warning that his job performance was inadequate were the meetings in December 1980, at which it was alleged he was given notice of dismissal. I have already alluded to the difficulty I have reconciling the different versions of what occurred at those two meetings. On this particular subject, the evidence of Mr. Hastings at trial that he did not describe the plaintiffs “problems” to Mrs. Yeager at the second meeting, cannot be reconciled with what he said on examination-for-discovery, where he asserted the very opposite. This contradiction clouds the entirety of his evidence on this point. I find it impossible to conclude that he gave any indication of dissatisfaction at either meeting from which the plaintiff could have concluded that he was not performing his job adequately.

[78] On all of the evidence I find that as a result of the mental illness from which he was suffering, the plaintiff was incapable of appreciating that there was a steady decline in his ability to perform his job adequately from 1979 onward, and that accordingly such “misconduct” as resulted from that illness in the last few months before his dismissal was not wilful in nature. That being so, it could not give rise to cause for summary dismissal.

[79] This conclusion does not complete an examination of the defence of cause which has been raised, however, for it is argued that even if the plaintiff’s misconduct was the inadvertent result of mental illness, the effect of that illness was incapacity to such an extent that his dismissal without notice was justified. Although this alternative position was pleaded and argued as though it were part of the defence of cause, in fact it is based on the doctrine of frustration of contract. Properly stated, the defendant’s argument is that the plaintiff’s incapacity due to illness was of such a nature that the very object of the contract

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of employment was frustrated and that it was therefore justified in treating that contract as at an end.

[80] Whether or not the incapacity of an employee due to illness will result in the frustration of a contract of employment will depend, in each case, on the relationship of the term of the incapacity or absence from work to the duration of the contract itself. In *Jackson v. Union Marine Ins. Co.* (1874), L.R. 10C.P. 125 (Ex. Ch.), that relationship was described by Bramwell B., at p. 145, in the following terms:

> "Thus, A. enters the service of B., and is ill and cannot perform his work. No action will lie against him; but B. may hire a fresh servant, and not wait his recovery, if his illness would put an end, in a business sense, to their business engagement, and would frustrate the object of that engagement: a short illness would not suffice, if consistent with the object they had in view."

[81] In *Dartmouth Ferry Comm. v. Marks* (1904), 34 S.C.R. 366, the issue before the court was the right of the estate of a deceased employee to collect wages from his former employer for the period during which he was absent from work due to an illness which was originally thought to be temporary but from which he, in fact, eventually died. Davies J., speaking for the majority of the court, said at p. 374:

> "That truth is now admitted and is beyond controversy that on and after the 15th of December, when Captain Marks ceased working, he was permanently disabled from doing his work he had contracted to do. In law, this disablement is termed the act of God. It not only, in my opinion, justified the Commission in formally determining the contract, if they had chosen to take that course, but by rendering it impossible that he could ever afterwards discharge his duties under his contract, the permanent disablement determined and ended the contract. The consideration which moved the Commission to promise wages was gone. The mutuality necessary for longer continance [sic] of the contract ceased. Captain Marks could not be sued by the Commission for non-performance by him of his promise to serve them in the capacity of captain of one of their steamers. He could plead to any such action, disablement or incapacity by the act of God. The same result would have followed if he had become insane or had lost the physical use of his limbs. The fact of the disablement arising from occult internal troubles cannot make any difference. There is no analogy between such permanent disablement and temporary sickness. The law permits the latter on the ground of common humanity to be offered as an excuse for not discharging duty temporarily and suffers the disabled party to recover wages for the time he is temporarily away from his work."

[82] Although the illness in that case was obviously a permanent one, in the ordinary sense of that term, in this passage Davies J. has clearly used the term "permanent" to describe an illness that would, in the language of Bramwell B. in the *Jackson* case [at p. 145], "put an end, in [the] business sense, to their business engagement" and thus "frustrate the object of that engagement". By contrast, the term "temporary" is used to characterize one which would not have such an effect on the contract of service.

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[83] Can it be said in the circumstances that the plaintiff's illness was such as to "put an end, in a business sense, to [the] business engagement" which he had with the defendant? Given all of the relevant considerations, was the plaintiff's illness properly characterized as "temporary" or "permanent"?

[84] While all medical witnesses now agree that the plaintiff's incapacity due to illness was transient in nature, the length of time that he was occupationally disabled is not capable of precise determination. His illness was certainly affecting his job performance from, at least, the beginning of 1979 on, but it was probably not until some time near the end of 1981 that it resulted in incapacity. By the middle of 1983 he had recovered to the point where he was in better condition emotionally than he had been at any time since 1972. On all of the evidence, I would conclude that the plaintiff's illness left him incapable of discharging his duties at work for two years.

[85] Two years is a long period of disability. However, as noted above, the length of the period of disability alone is not determinative of the issue. In *Warburton v. Co-op. Wholesale Soc. Ltd.,* supra, an absence from work of 13 months due to injury on the job was characterized by all members of the Court of Appeal as a "temporary illness".

[86] In *Marshall v. Harland & Wolff Ltd..* [1972] 1 W.L.R. 899, [1972] I.C.R. 101, [1972] 2 All E.R. 715, the court suggested some guidelines that could be used in determining whether an illness should be considered temporary or permanent in the case of a contract of employment for an indefinite period terminable by notice. There, an employee became disabled due to illness during his twenty-third year on the job. After an absence of 18 months he was terminated. In speaking for the court, which held that his termination was wrongful, Sir John Donaldson said [at pp. 718-19]:

> "In the context of incapacity due to sickness, the question of whether or not the relationship has come to an end by frustration sounds more difficult than it is. The tribunal must ask itself: was the employee's incapacity, looked at before the purported dismissal, of such a nature, or did it appear likely to continue for such a period, that further performance of his obligations in the future would either be impossible or would be a thing radically different from that undertaken by him and agreed to be accepted by the employer under the agreed terms of his employment? In considering the answer to this question, the tribunal should take account of:
>
> "(a) *The terms of the contract, including the provisions as to sickness pay* – The whole basis of weekly employment may be destroyed more quickly than that of monthly employment and that in turn more quickly than annual employment. When the contract provides for sick pay, it is plain that the contract cannot be frustrated so long as the employee returns to work, or appears likely to return to work, within the period during which such sick pay is payable. But the converse is not necessarily

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true, for the right to sick pay may expire before the incapacity has gone on, or appears likely to go on, for so long as to make a return to work impossible or radically different from the obligations undertaken under the contract of employment.

"(b) *How long the employment was likely to last in the absence of sickness* – The relationship is less likely to survive if the employment was inherently temporary in its nature or for the duration of a particular job, than if it was expected to be long term or even lifelong.

"(c) *The nature of the employment* – Where the employee is one of many in the same category, the relationship is more likely to survive the period of incapacity than if he occupies a key post which must be filled and tilled on a permanent basis if his absence is prolonged.

"(d) *The nature of the illness or injury and how long it has already continued and the prospects of recovery* – The greater the degree of incapacity and the longer the period over which it has persisted and is likely to persist, the more likely it is that the relationship has been destroyed.

"(e) *The period of past employment* – A relationship which is of long standing is not so easily destroyed as one which has but a short history. This is good sense and, we think, no less good law, even if it involves some implied and scarcely detectable change in the contract of employment year by year as the duration of the relationship lengthens. The legal basis is that over a long period of service the parties must be assumed to have contemplated a longer period or periods of sickness than over a shorter period.

"These factors are interrelated and cumulative, but are not necessarily exhaustive of those which have to be taken into account … Any other factors which bear upon this issue must also be considered."

[87] Without relating the evidence in this case to each of these considerations individually, the following points seem to be pertinent. The contract of employment was one that was clearly intended by the parties to be of long, if not lifelong, duration. The permanency of that relationship is exemplified not only by the 30 years that it had actually endured to the point of dismissal, but also by the fact that over the years the plaintiff was invited to, and did, become a significant shareholder of the company's stock. While he made an important contribution to the success of the defendant's business, before his illness began to interfere with his job performance, there was nothing about the position he held that would characterize it as a key post requiring a permanent replacement in the event of his prolonged absence.

[88] He was 55 years of age at the time of his dismissal. Subject to the usual contingencies, he had ten years of continued service to look forward to before reaching normal retirement age.

[89] On the basis of these circumstances alone, I hold that the plaintiffs disability due to illness for a period of two years, followed as it would have been by his return to work with normal job performance thereafter, was not an incapacity of such a nature that it frustrated

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the contract of employment between these parties and entitled the defendant company to treat that contract as at an end.

[90] I am also of the view that this conclusion is not affected by the erroneous diagnosis of permanent organic brain disease which was current at the time of the plaintiff's dismissal. In the *Dartmouth Ferry Comm.* case, Davies J. suggested that the characterization of a disabling illness as either temporary or permanent is to be determined on the basis of its ultimate outcome and not by the state of knowledge existing at the time of the termination. At p. 375 he said:

> "The belief of the employee or his medical adviser that the former's disability was only temporary cannot affect the question in the light of the subsequent knowledge which revealed its permanency. The excuse for not working for a short time, which a temporary illness would justify, cannot apply to absence from work caused by permanent disability."

[91] A similar inference flows from a close reading of the judgment in *Storey v. Fulham Steel Works Co.* (1907), 23 T.L.R. 306, affirmed 24 T.L.R. 89 (C.A.). In that case there was a five-year contract of service commencing in August 1903. In the summer of 1905 the plaintiff began to suffer a nervous breakdown. There were intermittent absences from work thereafter, until January 1906 when, on his doctor's instructions, he began an indefinite absence from work. There was no certain prognosis in existence when he was terminated in April 1906. By the middle of May, however, he was fit to return to work. He succeeded in an action for breach of the contract of employment. The fact that at the time he was dismissed there was nothing more than a hope that the plaintiff would get better was not fatal to his claim. At p. 307, Channell J. said:

> "Here, the agreement had in April, 1906, when the notice was given, still two years and four months to run, and the question therefore was, had the defendants any reason to think that the plaintiff would not be able to perform a substantial part of that unexpired period?"

[92] In any event, in this case, Mr. Hastings had no knowledge of the erroneous diagnosis when he made his decision to terminate the plaintiff. In the hours immediately before that termination was effected, Mrs. Yeager sought to impress upon him the serious nature of the plaintiff's illness as it was then understood to be. She invited him to discuss the matter with Dr. Yeung. He told her that nothing would change his mind. He said, "It has gone past the stage where I can do anything about it". Thus, leaving aside the effect of the authorities just referred to, the defendant could not now plead reliance upon an erroneous diagnosis of permanent illness as a justification for the plaintiff's dismissal.

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[93] In the result, the summary termination of the plaintiff by the defendant on 30th April 1982 was not justified by cause, nor was the contract of employment between the parties frustrated so as to entitle the defendant to treat it as at an end. Accordingly, although the defendant was, in any event, entitled to terminate that contract, it was obligated to give the plaintiff adequate notice of such termination.

[94] To some, this conclusion may seem to place an unrealistic burden on an employer who is faced with the unhappy circumstance of having an employee who, by reason of illness, is incapacitated from work. There are several reasons why, in my opinion, that is not the case.

[95] It is, of course, always open for the parties to a contract of employment for an indefinite period to provide in that contract for the contingency of illness. In this case, while there was no evidence of any such provision in the contract of employment, there was a disability insurance programme, which the defendant had originally contracted for, but which in later years the plaintiff himself had paid for. Such programmes are common enough and provide a means whereby the burden of illness can be equitably shared by the parties.

[96] In this case the plaintiff's illness was caused, in part, by stress associated with his employment. When a person has devoted 30 years of faithful service to the benefit of an employer's business, only to suffer an illness that is partially attributable to that employment, the employer in such circumstances is not entitled to discard the employee whose usefulness has been thus destroyed, unless, of course, the terms of the contract of employment provide for such determination. The fact that the parties to a contract of employment would not be likely to agree to such a provision merely serves to illustrate that such a course of conduct would not be acceptable in today's society.

[97] There is, in this case, an additional factor which persuades me that the conclusion I have reached works no injustice to the defendant. In 1979 Mr. Hastings advised the plaintiff to seek professional help for his emotional problems and, in December 1980, he told Mr. Abby Lipson, the president of MacGregors, that the plaintiff was getting professional help for his emotional problems. He thus knew that the plaintiff had such problems for some time before the decision to terminate was made. I have already alluded to the fact that notwithstanding his dissatisfaction with the plaintiffs conduct, Mr. Hastings did not at any time warn the plaintiff that his performance on the job was inadequate.

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[98] In *Manning v. Surrey Memorial Hosp. Soc.,* [1975] W.W.D. 35, 54 D.L.R. (3d) 312 (B.C.S.C), the evidence established that the plaintiff was incompetent in the discharge of his duties, albeit to a degree that was held insufficient to give cause for summary dismissal. At p. 315, Munroe J. said:

> "… I am of the opinion that at very least, the plaintiff ought to have received proper warning that his job was in jeopardy and have been given a reasonable opportunity thereafter to have corrected the deficiencies existing in the accounting department. I hold that the plaintiff was entitled to reasonable notice of his dismissal or to payment of salary in lieu thereof."

[99] Similarly, in *Lafreniere v. Chevron Asphalt Ltd.,* [1982] B.C.W.L.D. 1793, B.C.S.C., Vancouver No. C811221, 13th September 1982 (not yet reported), where at pp. 9 and 10 McKay J. said:

> "The plaintiff was a long time senior employee with an excellent work record. There is no question but that he had difficulty in adjusting to his new superior and that, in some respects, his performance was substandard during 1979 and 1980. If his job was in jeopardy he should have been told in clear terms and given a reasonable opportunity to correct any of his shortcomings. His long and loyal service entitled him to at least that consideration."

[100] These cases do not stand as authority for the proposition that a warning, such as they describe, must be given before there can be a dismissal for cause. Indeed, as in this case, the court in each instance concluded that there was no cause sufficient to justify summary termination. In my view, however, the remarks quoted establish a standard that this court expects of an employer when an employee demonstrates an unsatisfactory level of job performance which is inconsistent with either the expectations of the employer or the past performance of the employee. The fact that, in this case, the employer had some knowledge of the cause of the plaintiffs problems made the standard expected of it all the more exacting. Had Mr. Hastings reacted to the information he had in accordance with that standard, the effect might well have been to assist the plaintiff in appreciating the fact that there was a serious problem associated with his performance at work.

[101] In *Rivest v. CanfargeLtd.,* [1977] 4 W.W.R. 515, 1 B.L.R. 316, 4 A.R. 164(T.D.), the plaintiff suffered from a mental strain which the court found constituted a real illness, with the result that his misconduct on the job did not amount to cause for summary dismissal. At p. 521, Bowen J. describes exactly what, in my view, is the proper standard to be expected of an employer facing a situation such as existed in this case. He said:

> "The plaintiff had given 19 years of exemplary service to the company. As a result of things beyond his control, in the spring of 1974 he was placed in a position of strain and tension that occasioned an illness on his part. If his superiors had taken the time

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> in June 1974 to assess the situation from a reasonable and understanding point of view, undoubtedly he would have been placed on a leave of absence for sickness until he was able to return to work."

IX

[102] The next matter for determination is the length of notice of dismissal which ought properly to have been given to the plaintiff in the circumstances. In *Bardal v. Globe & Mail Ltd.*, [1960] O.W.N. 253, 24 D.L.R.(2d) 140 at 145 (H.C.), McRuer C.J.H.C. described the test to be applied when determining the proper length of such notice. He said:

> 'There can be no catalogue laid down as to what is reasonable notice in particular classes of cases. The reasonableness of the notice must be decided with reference to each particular case, having regard to the character of the employment, the length of service of the servant, the age of the servant and the availability of similar employment, having regard to the experience, training and qualifications of the servant."

[103] Applying all of these considerations to the evidence in this case, which I have already reviewed at great length, I conclude that the plaintiff ought to have been given 18 months' notice of dismissal. For obvious reasons the argument of the defendant that this notice period should be adjusted downward due to the serious nature of the plaintiff's misconduct is without merit and is, accordingly, rejected.

X

[104] Finally, there is the defendant's argument that the plaintiff, since his dismissal, has failed to mitigate his damages. I do not need to deal with this argument at any length. The evidence established that immediately following and probably as a consequence of his dismissal, the mental condition of the plaintiff suffered a further deterioration. It was not until December 1982 that any improvement was noted. Thereafter improvement was steady until, at the time of trial orjust before, he was noted to be in better condition mentally than at any time since 1972. It would be ludicrous to suggest that the plaintiff was in any fit condition to find alternative employment up to at least the summer of 1983. Thereafter the evidence does not establish any failure on his part to meet his obligation to mitigate. There is no merit to this argument.

XI

[105] The evidence established that the plaintiff earned $2,000 per month as a regular salary. There was, in addition, a bonus structure in place which supplemented this regular salary. The evidence of Mr. Hastings established that bonuses of $1,000 would have been paid to the plaintiff on 15th May 1982, 15th March 1983, 15th May 1983, 15th August 1983

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and 15th September 1983. No other bonuses would have been paid. In addition, the evidence established that each July the plaintiff received a vacation allowance of $1,000.

[106] No evidence was led as to the value of any additional benefits which the plaintiff received as a result of his employment, nor was there any evidence from which the replacement cost of such benefits to the plaintiff could be ascertained. The plaintiff claims dividends from his shareholdings that ought to have been paid to him in June and December 1982 and June 1983. Notwithstanding his assertion that these dividends were really part of his salary, paid in that form to give him a tax break, I cannot overlook the evidence of Mr. Hastings that no dividends were paid to any shareholders in 1982 or up to the time of trial in 1983. Any right which the plaintiff may have to such dividends that ought to have been paid would, in any event, not be a matter for determination in an action for damages for wrongful dismissal.

[107] In addition to the standard headings under which damages are recognized to arise in an action for wrongful dismissal, the plaintiff, relying on the decision in *Wuorinen v. W.C.B.,* [1983] B.C.W.L.D. 780, 1 C.C.E.L. 29 (S.C.), seeks damages for mental distress suffered by the plaintiff as a consequence of the manner in which his employment was terminated. In light of the majority of the opinions expressed in our Court of Appeal in *Vorvis v. I.C.B.C.* (1984), 53 B.C.L.R. 63, 9 D.L.R. (4th) 43, I am of the view that there is no evidence in this case that would form the basis for such an award.

[108] I assess the plaintiff's damages at $43,000, calculated as follows:

(a) Salary due May 1982 through October 1983		$36,000
(b) Bonus payable:		
(i) 15th May 1982	$1,000	
(ii) 15th March 1983	$1,000	
(iii) 15th May 1983	$1,000	
(iv) 15th August 1983	$1,000	
(v) 15th September 1983	$1,000	5,000
(c) Holiday allowance:		
(i) July 1982	$1,000	
(ii) July 1983	$1,000	2,000
	Total:	$43,000

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[109] The plaintiff is entitled to interest calculated on the foregoing in accordance with the provisions of the Court Order Interest Act, R.S.B.C. 1979, c. 76, and at the rate from time to time in effect from 1st May 1982 to the date of judgment.

[110] Finally, I have considered the plaintiff's argument that I should award costs against the defendant on a solicitor and own client basis. I decline to do so. The plaintiff is entitled to his costs as taxed on a party and party basis.

Judgment for plaintiff.

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