Court of Queen's Bench of Alberta

Citation: Ross v IBM Canada Limited, 2015 ABQB 563

Date: 20150904
Docket: 1103 05313
Registry: Edmonton

Between:

D'Arcy John Ross

Plaintiff

- and -

IBM Canada Limited

Defendant

Memorandum of Decision
of the
Honourable Madam Justice J.B. Veit

Summary

[1] D'Arcy Ross, whose employment as a senior salesman was summarily terminated by IBM Canada Limited when it learned – as a result of two unintended, butt-dialled, communications - that Mr. Ross was regularly working for his private corporation on what IBM considered to be IBM time, sues for wrongful dismissal. IBM counters that the promotion by Mr. Ross of his personal financial interests on IBM time was a clear breach of the clear business conduct guidelines which Mr. Ross knew were at the core of the employment contract, that a pre-discipline warning was not required in the circumstances, and that termination was a proportional response to Mr. Ross' misconduct.

[2] Mr. Ross' claim is denied: IBM has proved that Mr. Ross' regular breach of IBM's Business Conduct Guidelines relating to operating personal businesses on IBM time was inconsistent with the maintenance of an employment relationship.

[3] The expression "IBM time" is interpreted according to the intention of the parties as gleaned from the circumstances surrounding the creation of the employment contract. Here, the expression means a full, 8 or 9 to 5, work week.

[4] Mr. Ross himself has established that he regularly performed non-IBM work on IBM time.

[5] The breach of IBM's Business Conduct Guidelines was major: it was not an isolated incident, but rather a regular pattern of conduct; Mr. Ross was a highly paid employee; Mr. Ross' continued lack of insight into IBM's entitlement to compliance with its guidelines made future compliance unlikely especially given Mr. Ross' autonomous work situation. Because of the severity of the breach, it was not necessary for IBM to give Mr. Ross a pre-discipline warning. In all the circumstances, summary dismissal was justified.

[6] IBM has proved that it did not terminate Mr. Ross because of unsatisfactory work performance.

[7] IBM's counter-claim for unjust enrichment against Mr. Ross is denied. The evidence does not establish that Mr. Ross was working half time for Compartment Inc.

Cases and authority cited

[8] **By the Plaintiff:** ***Henry v Foxco Ltd.***, 2004 NBCA 22; ***Holwen v Alberta Plywood Ltd.***, 2005 ABQB 464; ***McKinley v BC Tel***, 2001 SCC 38; ***Dowling v Ontario (Workplace Safety and Insurance Board)***, 2004 CarswellOnt 4923 (Ontario Court of Appeal); ***Winfield v Pattison Sign Group***, 2013 ABQB 595; ***Asurion Canada Inc. v Brown and Cormier***, 2013 NBCA 13; ***Porta v Weyerhaeuser Canada Ltd.***, 2001 BCSC 1480; ***Machtinger v HOJ Industries Ltd.***, [1992] 1 SCR 986, 1992 CarswellOnt 892 (Supreme Court of Canada); ***Christensen v Family Counselling Centre of Sault Ste. Marie & District***, 2001 CarswellOnt 4048 (Ontario Court of Appeal); ***Ceccol v Ontario Gymnastic Federation***, 2001 CarswellOnt 3026 (Ontario Court of Appeal); ***Gillespie v 1200333 Alberta Ltd.***, 2012 ABQB 105; ***Bardal v Globe & Mail Ltd.***, 1960 CarswellOnt 144 (Ontario High Court of Justice); ***Wallace v United Grain Growers Ltd.***, [1997] 3 SCR 701, 1997 CarswellMan 455 (Supreme Court of Canada); ***Egan v Alcatel Canada Inc.***, 2006 CarswellOnt 28 (Ontario Court of Appeal), leave to appeal to SCC refused; ***Munoz v Sierra Systems Group Inc.***, 2015 BCSC 269; Howard A. Levitt, *The Law of Dismissal in Canada*, *Third Edition*, loose-leaf (consulted on May 26, 2015), (Toronto: Canada Law Book, 2015).

[9] **By the Defendant:** ***Potter v New Brunswick Legal Aid Services***, 2015 SCC 10; ***Farber v Royal Trust Co.***, [1997] 1 SCR 846; ***Shah v Xerox Canada Ltd.***, 49 CCEL (2d) 166, 2000 CarswellOnt 831 (CA); ***Leung v Doppler Industries Incorporated***, 10 CCEL (2d) 147, 1995 CanLII 2530; ***McKinley v BC Tel***, 2001 SCC 38; ***Foerderer v Nova Chemicals Corporation***, 2007 ABQB 349; ***Ennis v Canadian Imperial Bank of Commerce***, 13 CCEL 35, 1986 CanLII 1208; ***Bonneville v Unisource Canada Inc.***, 2002 SKQB 304; ***Shafer v Pan Matrix Informatics***, 80 AR 378, 1987 CarswellAlta 463 at para 41 (QB); ***Cornell v Rogers Cablesystems Inc.***, 17 CCEL 232, 1987 CarswellOnt 901 at paras 18-19 (Dist Ct); Stacey Reginald Ball, *Canadian Employment Law*, vol 1, loose-leaf (consulted on 27 May, 2015), (Toronto, Ont: Canada Law Book, 2014); ***RBC Dominion Securities Inc. v Merrill Lynch Canada Inc. et al***, 2007 BCCA 22; ***Ross v Readyfoods Ltd.***, 9 Man R (2d) 393, 1981 CarswellMan 282; ***Garrett v Fiberglas Can. Inc.***, 10 CCEL 178, 1985 CanLII 1393; ***Forshaw v***

Aluminex Extrusions Ltd., 24 CCEL 92, 1988 CarswellBC 730; ***Vorvis v Insurance Corp of British Columbia***, [1989] 1 SCR 1085, 1989 CarswellBC 76; ***Bardal v Globe & Mail Ltd.***, 24 DLR (2d) 140, 1960 CarswellOnt 144 (Ont H Ct J); ***Honda Canada Inc. v Keays***, 2008 SCC 39; ***Machtinger v HOJ Industries Ltd.***, [1992] 1 SCR 986, 1992 CarswellOnt 892; ***Toronto-Dominion Bank v Wallace***, 145 DLR (3d) 431, 1983 CarswellOnt 835; ***Cemco Electrical Manufacturing Co. v Van Snellenberg*** (1946), [1947] SCR 121; ***Red Deer College v Michaels*** (1975), [1976] 2 SCR 324; ***Brace v Calder***, [1895] 2 QB 253 (CA); ***Pettkus v Becker***, [1980] 2 SCR 834; ***Garland v Consumers' Gas Co.***, 2004 SCC 25***; Design Home Gift and Paper Inc. v Tucci*** [2007] O.J. No. 2019; ***Thomas v Canex Foods Ltd.*** 200 BCSC 748; ***Gingerich v Kobe Sportswear Inc.*** [2008] O.J. No. 310; ***Richards v Richards*** 2013 ABQB 484; Mitchell McInnes, *The Canadian Law of Unjust Enrichment and Restitution* (Markham, Ont: LexisNexis, 2014).

[10] **By the court:** ***Nexxtep Resources Ltd. v Talisman Resources Ltd.*** 2013 ABCA 40; ***Poliquin v Devon Canada Corp.*** 2009 ABCA 216

1. Background

[11] On August 9, 2010, Mr. Ross was hired by IBM Canada in a senior, i.e. Band 9, sales position, which was understood to be a full-time position. Mr. Ross was to be paid a salary of $140,000.00 annually, together with the opportunity of adding commissions and similar remuneration for an expected total remuneration of $193,000.00 annually; no overtime was to be paid. In addition, Mr. Ross received medical and other benefits. At this level, there was no probationary period; indeed, Mr. Ross was described as a "hot skills" recruit. The IBM employee who referred Mr. Ross to the hiring personnel received a $10,000.00 bonus. Although Mr. Ross had access to IBM office space in Edmonton, he was a "mobile employee", i.e. he was essentially based in his home. He had regular telephone and electronic contact with his supervisor.

[12] During the hiring process, Mr. Ross informed IBM that, since 2007, he had been the President, and co-owner with his spouse, of Compartment Inc., a privately held business which designed, manufactured, sold and installed custom residential storage components. As between them, Mr. Ross was responsible for the operations of the business while his wife paid the bills and performed similar chores. Mr. Ross informed IBM that he had continued to operate Compartment Inc. while he worked at Joesoftware Inc. as a consultant/salesman from 2009 until August 9, 2010; at Joesoftware, Mr. Ross was earning $40,000.00 annually, on a part-time basis, plus commission. Mr. Ross told IBM that upon acceptance at IBM, he would transfer operational responsibilities relating to Compartment Inc. to his wife. Later, in January 2011, when he was asked to introduce himself to his new team, Mr. Ross repeated these comments about his relationship with Compartment Inc. At no time was Mr. Ross ever told by IBM that he had to sever all relationship with Compartment Inc.

[13] Prior to his employment with IBM in August, 2010, Mr. Ross had been employed with IBM from 1999 to 2001.

[14] During the recruitment process, Mr. Ross inquired about the opportunities for advancement and was told that IBM typically looked for a 2 year commitment in a particular employment before encouraging an employee to explore different opportunities within the company.

[15] It was a condition of his employment that Mr. Ross understand, and abide by, IBM's Business Conduct Guidelines. Those guidelines include the following:

> 2.0 Introduction
>
> . . .
>
> Because rapid changes in our industry constantly present new ethical and legal issues, no set of guidelines should be considered the absolute last word under all circumstances. If you have any questions about interpreting or applying these Guidelines – or about guidelines and procedures published by IBM or its operating units, subsidiaries or specific functions, such as the Public Sector guidelines – it is your responsibility to consult your manager or IBM counsel. A violation of any IBM guidelines can result in disciplinary action, including dismissal.
>
> . . .
>
> 5.1 Conflicts of interest
>
> Your private life is very much your own. You are, however, an IBMer both on and off the job and a conflict of interest may arise if you engage in any activities or advance any person interests at the expense of IBM's interests. It's up to you to avoid situations in which your loyalty may become divided. Each individual's situation is different, and in evaluating your own, you will have to consider many factors. The most common type of conflicts are addressed here to help you make informed decisions.
>
> .5.1.1 Assisting a competitor
>
> . . .
>
> 5.1.2 Competing against IBM
>
> . . .
>
> 5.1.3 Supplying IBM
>
> . . .
>
> 5.1.4 Using IBM's time and assets
>
> You may not perform non-IBM work or solicit such business on IBM premises or while working on IBM time, including time you are given with pay to handle personal matters. Also, you are not permitted to use IBM assets, including equipment, telephones, materials, resources or proprietary information for any outside work.
>
> . . .

[16] Mr. Ross understood that a violation of the Business Conduct Guidelines could result in disciplinary action up to and including dismissal. Mr. Ross was familiar with the Guidelines as a result of his earlier employment with IBM. In addition, Mr. Ross went through the online certification course dealing with the Business Conduct Guidelines twice, once in 2010 and once in 2011. Mr. Ross never asked anyone at IBM about any aspect of his ongoing commitment to Compartment Inc. in relation to the Business Conduct Guidelines.

[17] While he was employed at IBM, Mr. Ross received a good deal of training, including trips to Georgia, San Francisco, Vancouver, in various IBM interests.

[18] For a variety of reasons, Mr. Ross' employment at IBM was not very satisfying to him:

- it took a long while to gain access to the software that he felt he required to properly do his work and even to ensure that he was receiving all of the emails directed to him;

- he was not assigned his own territory or quota so was not able to work effectively towards earning the maximum commission possible;

- within a few months of the commencement of his employment, IBM shifted its enterprise asset management focus from a national perspective to a regional, industry-based, one and placed Mr. Ross under a supervisor based in Calgary rather than one based in Toronto. Alberta' energy sector includes many companies which are heavily physical asset based. Mr. Ross received the impression that unless he moved to Calgary he would not be very financially successful in his job;

- as he left the Toronto-based sales team, Mr. Ross received a performance appraisal at level 3, which Mr. Ross described as "poor" and strongly felt he did not deserve, even though it was an appraisal which IBM found acceptable. IBM's own rating protocol for performance appraisals describes a rating of 3 as:

> Among the lowest contributors this year, needs to improve. When compared to others: does not fully execute all job responsibilities, or executes responsibilities, but with a lower degree of results, and/or does not demonstrate as high a level of knowledge, skill effectiveness, or initiative. Consecutive PBC 3 ratings are unacceptable in IBM's high performance culture. Improvement is required and separation from IBM will result, if performance is not improved.

[19] Mr. Ross' supervisor had scheduled a weekly telephone meeting with Mr. Ross on January 21, 2011. In anticipation of that meeting, the supervisor had emailed to Mr. Ross a document which he expected Mr. Ross to complete and return and then discuss during the meeting. Mr. Ross did not complete the document forwarded by the supervisor. Indeed, Mr. Ross cancelled the meeting, stating that he was double-booked on an earlier scheduled appointment. When the supervisor telephoned Mr. Ross in the afternoon of January 21, 2011, to find out what was happening, the supervisor states that Mr. Ross said something to the effect that he still felt somewhat overwhelmed, that it was "like drinking from a fire-hose".

[20] During the afternoon of January 21, 2011, Mr. Ross pocket-dialled, or butt-dialled, to his IBM supervisor two portions of a conversation he was having with a Compartment Inc. installer/sub-contractor at the home of a Compartment Inc. customer in St. Albert. The first portion commenced at 2:14 p.m. and lasted for 98 seconds; the second portion commenced at 2:16 p.m. and lasted for 118 seconds. The conversation between Mr. Ross and the sub-contractor was not finished when the transmission concluded.

[21] In the afternoon of January 21, Mr. Ross received work emails from IBM, but did not respond to them that afternoon. He did, however, make a Compartment Inc. phone call on his IBM phone.

[22] January 21 was a Friday afternoon. Mr. Ross' supervisor, Mr. Brown, contacted IBM's HR personnel to get advice about what to do. Mr. Brown did contact Mr. Ross during the next week to find out if there was anything which was impeding Mr. Ross' commitment to work. Mr. Ross did not mention any problems connected to Compartment Inc.

[23] On January 31, 2011, Mr. Ross had a conversation with his superior, Mr. Brown, specifically concerning the pocket dials. Mr. Brown sent an email on the same date "confirming" the content of the telephone call, and, in particular, the fact that Compartment Inc. was in the furniture/wardrobe business and that Mr. Ross spent 3 hours a day working for that company. The email also contained the following:

> As a reminder under IBM Business Conduct Guidelines the following should be fully understood at all times:
>
> Personal Use of IBM's Time
>
> Whether or not your personal activity presents a conflict
>
> of interest, you may not conduct non-IB work or solicit such
>
> business on IBM premises or while working on IBM time,
>
> including time you are given with pay to handler personal matters.

[24] Within minutes of receiving that email, Mr. Ross replied to Mr. Brown:

> As a clarification on point #4, I have spent 3 hours a week, not a day, assisting with the company. I have also tried to make sure that it is during the lunch hours so not to interfere with IBM work as per the corporate guidelines.

[25] On February 7, 2011, Mr. Ross was terminated by IBM. The letter of termination of that date included the following:

> This will confirm the termination of your employment with IBM Canada Ltd. ("IBM") for cause effective immediately. In particular, your employment is being terminated due to your current continued active employment with your family company, Compartment Inc. As a result of your accidental calls to me on January 21, 2011, IBM discovered and you confirmed that you have been conducting work at Compartment Inc. during IBM business hours.
>
> Since your employment is being terminated for cause, you are not entitled to notice of termination or severance pay.

[26] IBM has proved that Mr. Ross charged some Compartment Inc. long distance calls to his IBM account; in a similar way, the evidence established that Mr. Ross made some minor use of IBM equipment for the benefit of Compartment Inc.

[27] During his time at IBM, Mr. Ross did not contribute to the closing of any deals.

[28] Part of the loss suffered by Mr. Ross upon termination was medical coverage for his spouse who suffers from a chronic condition for which she requires medication.

[29] After termination at IBM, Mr. Ross returned to work full time at Compartment Inc. until early 2013 when he went to work for an industrial air compressor business. In addition to that work, he also purchased, renovated, and "flipped" a residence which sold in 2012 for a considerable profit. Mr. Ross remained at the air compressor business for approximately one year after which he resumed search for employment.

2. IBM accepts that it bears the onus of establishing, on a balance of probabilities, that it had just cause for the termination of Mr. Ross and that such termination, which is the capital punishment of employment law, was a proportional response to the situation here

[30] Mr. Ross' termination being clear to all, IBM acknowledges that it bears the onus of proving just cause on a balance of probabilities and that termination - which is commonly described as the capital punishment of employment law – was the appropriate sanction.

3. What constitutes "just cause"?

[31] I agree with the plaintiff that the ***McKinley*** test, adjusted to encompass broader grounds than dishonesty, continues to set the standard for just cause:

> [The court] examines each case on its own particular facts and circumstances, and considers the nature and seriousness of the [misconduct] in order to assess whether it is reconcilable with sustaining the employment relationship. Such an approach mitigates the possibility that an employee will be unduly punished by the strict application of an unequivocal rule that equates all forms of [misconduct] with just cause for dismissal. At the same time, it would properly emphasize that [misconduct] going to the core of the employment relationship carries the potential to warrant dismissal for just cause.

[32] Whether a warning must be given to an employee prior to summary dismissal is one of the factors that a court will consider in determining if termination was justified: each situation must be assessed on its own circumstances. The more serious the misconduct, the less likely will a court require an employer to give notice to an employee of unacceptable misconduct. However, if an employer has tolerated certain behaviour in the past, but decides to longer tolerate that conduct, notice must be given to employees of the change in approach. Also, if an employee has demonstrated faithfulness to an employer and the misconduct is not, assessed objectively, very serious, notice of the potential consequences of the breach may have to be given.

4. How do the just cause principles apply here?

a) What is "IBM time"?

[33] The trial evidence establishes that no definition of "IBM time" referred to in article 5.1.4 of the Business Conduct Guidelines was contained in the BCG or made explicit anywhere else in IBM materials.

[34] Therefore, the court must determine the meaning of the expression. As our Court of Appeal held in ***Nexxtep***, a contract must be interpreted according to its context:

> 20 It is trite law that contracts should be enforced in accordance with the intention of the parties, which is to be gleaned from the words used in their agreements. Extrinsic evidence is not admissible when the document is clear and unambiguous. However, this does not mean that a court interpreting a contract is confined only to examining the words used, and to give them a dictionary meaning. Contracts are not to be interpreted in a vacuum. Contextual evidence of surrounding circumstances, disclosing facts known to the parties at the time the contract was made, is part of the interpretative process.
>
> 21 Indeed, this Court has held that the interpretation of the words used in a contract must have regard "to the relevant background context known to the parties": ATCO Electric Ltd v. Alberta (Energy and Utilities Board), 2004 ABCA 215, [2004] 11 WWR 220, at para 76. The court adopted Lord Bingham of Cornhill's statement of the law in Bank of Credit & Commerce International v. Ali, [2001] 1 All ER 961 (HL) at 965:
>
> To ascertain the intention of the parties the court reads the terms of the contract as a whole, giving the words used their natural and ordinary meaning in the context of the

> agreement, the parties' relationship and all the relevant facts surrounding the transaction so far as known to the parties. To ascertain the parties' intentions the court does not of course inquire into the parties' subjective states of mind but makes and objective judgment based on the materials already identified.

[35] It was clear to Mr. Ross that the job for which he could have been paid roughly $200,000.00 a year was a full-time job. That meant that his full work energies during a normal working day should have been devoted to the interests of IBM. The nature of his job was that he had to deal with other people who were working normal working days – for example, people employed in the head offices of oil and gas companies. IBM's, and Mr. Ross', work was not of the bohemian variety where people might even be expected to keep idiosyncratic hours. A minimum work day from 8 to 5 or 9 to 5, five days a week, is a reasonable expectation for a person earning in the $140,000.00-$$200,000.00 a year range.

b) Did Mr. Ross perform non-IBM work or solicit non-IBM business while working on IBM time?

[36] Mr. Ross agreed that he had charged certain long distance telephone calls which were made for the benefit of Compartment Inc. to IBM and that he had made those calls on IBM equipment.

[37] Mr. Ross testified that, in general, the time he spent on Compartment Inc. business while employed at IBM was "very minimal, under 3 hours a week" and that the time involved in the entire St. Albert event was 45 minutes – including the return drive from his home in the West end of Edmonton to the customer's home in St. Albert. I accept Mr. Ross' evidence that the amount of time he spent on IBM business was 3-4 hours a week, not 3 hours a day.

[38] The evidence, including Mr. Ross' own evidence, clearly establishes that Mr. Ross solicited business and performed work connected to remuneration for his company and himself, during IBM time.

[39] The fact that the key evidence of the breach of IBM's Business Conduct Guidelines was supplied by Mr. Ross himself answers any issues raised with respect to the quality of the investigation conducted by IBM into what it perceived as possible wrongdoing. In any event, the investigation was conducted fairly. I accept Mr. Brown's evidence that when he spoke to Mr. Ross, Mr. Ross told him that he spent 3 hours a day on Compartment Inc. business; I find also that Mr. Ross mis-spoke on that occasion and that he had meant to say 3 hours a week on Compartment Inc. business. However, Mr. Brown cannot be faulted for reporting what was in fact told to him. HR suggested that Mr. Ross be given the opportunity of explaining his dereliction of duty; this opportunity was in fact provided. Mr. Ross did not acknowledge that anything was interfering with his ability to devote full-time to IBM's interests. There is a big difference, of course, between spending 3 hours a day on one's own business and 3 hours a week on one's own business; however, spending 3 hours a week on one's own business when one is in full-time employment with an employer who expects, and has a right to, full-time commitment, is a significant breach of the employment relationship.

c) Was Mr. Ross' breach of the guidelines major or minor?

[40] Mr. Ross' use of IBM equipment and his charging IBM relatively small amounts of money for telephone calls, etc. made on IBM equipment during IBM time for the benefit of

Compartment Inc. constituted a minor breach of the Business Conduct Guidelines. At the most, this conduct warranted only a comment from IBM to the effect that this was not acceptable.

[41] However, I have concluded that Mr. Ross' attending at a customer's residence on January 21, 2011, together with Mr. Ross' own admission that he spent 3-4 hours a week on Compartment Inc. business, constituted a major breach of the BCG.

[42] In coming to this conclusion, I note first that we are not dealing with an isolated incident: the amount of time Mr. Ross spent on Compartment Inc. business was significant. In that context, 3 to 4 hours a week over a 6 month period engaging in work for an operating business is a significant amount of time; 3 hours a day would have been an even more significant amount of time but 3 hours a day was not a threshold for what constitutes a significant amount of time.

[43] Mr. Ross relies on ***Woodward***. With respect, that case is of no assistance to him. The trial judge in that case found that, in the relevant time period, the involvement of the employee in a new business "had not affected his ability to work fulltime for [the employer]". The evidence which was accepted by the trial judge was that, over a 5 month period, the employee had on 5 occasions, one of which was in the evening, conducted short visits with people in connection with the new business but that during that entire period the new business "was not carrying on business". The trial judge distinguished the situation he was dealing with from that in Ross v Readyfoods where the trial judge had found:

> 17 The evidence satisfies me that during the period of the employment in which the employer's complaints arose the plaintiff did spend significant time during usual business hours on Goldbrook affairs - time during which the corporate defendant was entitled exclusively to have the focus of his attention and energies directed to its affairs.
>
> . . .
>
> The case is not one of an isolated occasion or incident but of a pattern of conduct inconsistent with the plaintiff's contractual obligation to devote himself only to the service of the employer during normal business hours, an obligation to which emphasis was added in the Fall of 1977 when the plaintiff first informed Mr. Levenstein about Goldbrook and gave him the assurances already mentioned. [*page400]
>
> 'The rule of law is that where a person has entered into the position of servant, if he does anything incompatible with the due or faithful discharge of his duty to his master, the latter has a right to dismiss him.', per Lord Esher, M.R., in Pearce v. Foster, 17 Q.B.D. 536, at 539.

[44] Moreover, the trial judge in the ***Woodward*** case noted that the employer in that case "did not view Woodward's conduct as justifying his termination without notice"; that is another major difference on the evidence from the situation here.

[45] Mr. Ross' own evidence prevents this court from concluding that Mr. Ross was, during the period in question, working fulltime for IBM as he was required to do. On the contrary, the evidence establishes that Mr. Ross was working for personal gain on IBM time.

> *d) Do any mitigating circumstances lessen the seriousness of the significant breach of the Business Conduct Guidelines?*

[46] When asked why his wife did not deal with the problem which arose on January 21, 2011, Mr. Ross explained that she did not do any of the design work. I find as a fact that Ms.

Ross' work for Compartment Inc. did not change after Mr. Ross became employed at Joesoftware or at IBM: she only ever did administrative support work for that company. Mr. Ross knew, or should have known, when he accepted employment at IBM that he could not transfer operating responsibility for Compartment Inc. to his wife because she had no knowledge of any of the operating aspects – e.g. design, sourcing, and training - of the business.

[47] Mr. Ross testified that, since Compartment Inc. was in a completely different kind of work from IBM, he did not understand how working for Compartment Inc. could be a conflict with his employment at IBM. I find as a fact that IBM's Business Conduct Guidelines are clear: in particular, they had separate headings in the conflict area for assisting competitors, competing against IBM and working for a non-competing business on IBM time. Mr. Ross may not have agreed with IBM's guidelines, but he understood them, or should have understood them. Indeed, if he had any difficulty understanding the plain language of the guidelines, he could have – should have – made inquiries of IBM's HR staff. In any event, as our Court of Appeal held in ***Poliquin***:

> It is also irrelevant whether the employee considered his actions as dishonest or immoral because, as noted in Snider v. New Brunswick Telephone Company Limited (1986), 69 N.B.R. (2d) 8 at para. 23 (Q.B.), aff'd (1987), 78 N.B.R. (2d) 266 (C.A.), "his employer is justified in losing confidence in him" because he "may not be able to act with single minded faithfulness in his employer's interest if a dispute arose over work performed or accounts charged [in the future]".

[48] Mr. Ross disagreed with the suggestion that he would not have been hired by IBM if they had known the extent of his weekly commitment to Compartment Inc. He suggests that if the total amount of time he was working on Compartment Inc. was really material to IBM, IBM should have followed up with his last employer, Joesoftware, to learn their impression of how Mr. Ross could juggle his commitment to two funding sources. I conclude that the fact that IBM did not follow up with Joesoftware is no indication of the importance to IBM of a full-time commitment from Mr. Ross. On the one hand, IBM knew that the employment with Joesoftware was only part-time; therefore, it would not have been helpful or pertinent to learn that Mr. Ross devoted considerable time every week to the affairs of Compartment Inc. On the other, IBM also knew that Mr. Ross' income from Joesoftware was $40,000.00 per annum; that level of income would probably be translated into some level of time, which would obviously be less than full time. In other words, there is nothing in the circumstances here that allowed Mr. Ross to conclude that IBM was not expecting him to work full-time in support of IBM interests.

[49] In the result, not only are there no mitigating circumstances relating to Mr. Ross' misconduct, but his continuing lack of insight into IBM's entitlement to compliance with the Business Conduct Guidelines in their entirety establishes that Mr. Ross would be unlikely to change his attitude in the future and that it would be difficult for IBM to monitor any future conduct, especially in Mr. Ross' autonomous setting.

e) Was IBM required to give Mr. Ross a warning and an opportunity to change his behaviour?

[50] In the circumstances here, IBM was not required to give Mr. Ross a warning about unacceptable conduct and an opportunity to improve his conduct.

[51] As indicated above, the breach by Mr. Ross was a major one, involving as it did repeated breaches of the Business Conduct Guidelines since the commencement of employment. This conduct was deceitful: even if Mr. Ross had honestly intended to transfer operational responsibilities to his wife when he began employment with IBM, despite the fact that his wife had never, during the period 2007 to 2010 assumed any of those responsibilities, it was soon obvious to him, or should have been, that this operational transfer could not, in fact, take place. Not only did he not volunteer this information to IBM, but, when given the opportunity in January 2011 to disclose and discuss this problem, he refrained from doing so.

[52] In addition, in the circumstances here, no additional notice by IBM of its expectations concerning full-time work was needed. It was made abundantly clear to Mr. Ross that he was obliged to conform to IBM's Business Conduct Guidelines and that breach of the guidelines could lead to dismissal. The guidelines themselves were clear. Mr. Ross was a senior employee who should have understood the guidelines. Moreover, it was also made clear to Mr. Ross that he had an obligation to seek advice if he had any question about the application of the guidelines to himself and his business interests.

[53] Finally, in the circumstances here, where Mr. Ross was a senior, mobile, autonomous employee, the working relationship was imbedded in an honour system; IBM's conclusion that Mr. Ross' breach of trust was not repairable is objectively reasonable.

f) Was IBM dismissing Mr. Ross for poor performance?

[54] Although Mr. Ross had not yet contributed to concluding a deal on IBM's behalf, and although IBM had invested a considerable amount of money in Mr. Ross, nothing in the evidence suggests that IBM terminated Mr. Ross because of his performance.

[55] On the contrary, I accept the evidence of Mr. Wilshaw to the effect that the performance appraisal of 3 he gave to Mr. Ross was not a bad omen for Mr. Ross' career at IBM. Mr. Wilshaw himself had, in the past, received an appraisal at that level but had risen to head a very successful IBM sales team. Indeed, I accept Mr. Wilshaw's evidence to the effect that he didn't really like to do an appraisal so early in Mr. Ross' employment because it could not have realistically been expected that Mr. Ross would be performing at a "hot skills" level within the short period of employment, and with the short exposure to the new product and the new team.

[56] The evidence does not support any concern by Mr. Ross that his transfer to the Calgary-based industry-focussed team selling asset management programs was in any way work related. On the contrary, the evidence established that IBM was continually changing its sales approach as it processed new information and new ideas. The move to an industry-based focus had been successfully tried elsewhere; IBM was entitled to adapt its sales focus accordingly.

[57] Similarly, I accept the evidence of Mr. Ross' supervisor at the time of termination: Mr. Brown testified that, during the 6 weeks that Mr. Ross was under his supervision, his observation was that Mr. Ross was doing what he could to advance IBM's interests. Mr. Brown also had placed Mr. Ross on an incentive plan which would be the most advantageous to Mr. Ross in balancing guaranteed income together with the opportunity of earning additional income. Mr. Ross had been given a defined role, a defined territory and a defined target: it was clear that IBM considered Mr. Ross to be a trusted senior employee.

g) Overall assessment

[58] Viewed objectively by a reasonable employer, Mr. Ross' misconduct evidenced a breakdown in the employment relationship: insofar as the nature of the workplace is concerned, as a mobile employee, Mr. Ross was working in an honour system. The employer, who has no effective means, and no wish, to micromanage the employee, must be able to rely on the assumption that the employee is devoting his full-time efforts to IBM's interests. This was no longer reasonably possible for IBM.

[59] As to the nature of the position, although Mr. Ross did not supervise any employees, he was in a senior position with IBM, having commensurate remuneration. The employer must be able to rely on the fact that the employee is doing his part to earn the relatively high income received.

[60] Finally, Mr. Ross' misconduct constituted a clear breach of a clear conduct standard that was emphasized by the employer as being at the core of the employment contract. The repeated breach of the conduct guidelines was inconsistent with the fulfillment of the express terms of his employment contract.

[61] IBM was justified in summarily dismissing Mr. Ross.

5. Damages

[62] In light of the view that I have taken about the dismissal, it is not necessary for me to address damages. Therefore, I will only make the following comments:

- damages would be calculated according to the contractual notice provisions;

- Mr. Ross would not be entitled to additional damages because of the no-compete clause in his contract;

- Mr. Ross would not be entitled to additional damages because of any alleged inducement;

- Mr. Ross would not be entitled to additional damages based on the discussions about his remaining in the position to which he was hired for a period of 18 months-2 years before entertaining opportunities elsewhere in IBM.

6. IBM's counter-claim

[63] IBM's counter-claim for damages is denied.

[64] The essence of the counter-claim relates to Mr. Ross' unjust enrichment while taking salary from IBM. However, this position appears to be based on the evidence of Mr. Ross' telephone conversation with Mr. Brown on January 31, 2011 in which Mr. Ross said that he worked for Compartment Inc. 3 hours a day. As I have indicated above, I accept Mr. Ross' evidence that, if he said that to Mr. Brown, he mis-spoke and that, in reality, he spent 3 hours a week on Compartment Inc. business. The reason I accept Mr. Ross' evidence on that point is the evidence from Messrs. Wilshaw and Brown to the effect that, generally, they did not have any difficulty in getting in touch with Mr. Ross, that Mr. Ross generally accomplished all the specific tasks they set for him, that Mr. Ross had achieved good results at the training programs he attended etc. None of this could have been accomplished had Mr. Ross only been working half-time for IBM.

7. Costs

[65] If the parties are not agreed on costs, I may be spoken to within 30 days of the release of this decision.

Heard on the 1st day of June, 2015 to the 5th day of June, 2015.
Dated at the City of Edmonton, Alberta this 4th day of September, 2015.

J.B. Veit
J.C.Q.B.A.

Appearances:

Maurice C. Dransfeld, McLennan Ross LLP
for the Plaintiff

Laura Inglis, Bennett Jones LLP
for the Defendant