Most Negative Treatment: Distinguished
Most Recent Distinguished: Bois v. Majestech Corp. Canada | 2001 CarswellOnt 3325, 108 A.C.W.S. (3d) 484 | (Ont. S.C.J., May 28, 2001)

1984 CarswellOnt 753
Ontario Supreme Court, High Court of Justice

Matheson v. Matheson International Trucks Ltd.

1984 CarswellOnt 753, [1984] O.J. No. 306, 4 C.C.E.L. 271

MATHESON v. MATHESON INTERNATIONAL TRUCKS LTD.

Parker A.C.J.H.C.O.

Judgment: March 29, 1984

Counsel: *P. Jewell, Q.C.*, for plaintiff.
G. Cooper, for defendant.

Subject: Employment; Public

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Labour and employment law

II Employment law
II.3 Interpretation of employment contract
II.3.h Parties to contract
II.3.h.ii Miscellaneous

Labour and employment law

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Labour and employment law

II Employment law
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Headnote

Employment Law --- Elements of employment relationship — Interpretation of employment contract — Parties to contract

1984 CarswellOnt 753, [1984] O.J. No. 306, 4 C.C.E.L. 271

Employment Law --- Termination and dismissal — Termination of employment by employer — What constituting just cause (grounds for dismissal) — Incapacity to perform work — Incompetence and employer dissatisfaction

Employment Law --- Termination and dismissal — Termination of employment by employer — What constituting just cause (grounds for dismissal) — Condonation

Dismissal for cause — Condonation — Plaintiff discharged for incompetence and offered one month's severance pay — Such payment not evidence of condonation in this case but act of generosity — Defence of just cause not barred.

Dismissal — Just cause — Onus of proof resting on employer to prove cause beyond balance of probabilities.

Dismissal — Just cause — Incompetence — Employer required to prove employee's performance fell below objective standard.

Employment contract — Validity not affected by employee's shareholdings in employer.

The plaintiff was employed by International Harvester of Canada for 30 years in positions ranging from office clerk to branch manager. In 1978 International Harvester initiated a policy whereby it sold off its branch operations to dealers. Pursuant to a co-dealership arrangement between plaintiff and International Harvester, the defendant company was incorporated as the operating company. Both the plaintiff and International Harvester contributed capital to, and owned shares in, the defendant.

The plaintiff was appointed president and general manager of the defendant. A subsidiary of International Harvester managed its interest in the defendant and it placed three of its members on the defendant's board of directors.

On November 12, 1980, the plaintiff was discharged by the defendant's board of directors. The plaintiff brought an action for damages for wrongful dismissal. The defendant alleged that the plaintiff was discharged for cause by reason of incompetence. The plaintiff alleged that the payment of one month's salary on termination constituted evidence of condonation barring the defence of just cause.

Held:

The plaintiff's action was dismissed.

The payment of one month's salary was an act of generosity in this case, rather than evidence of condonation. To hold that any payment to an employee dismissed for cause condones the defence of cause would simply lead to the result that employers would not make such payments.

If an employer terminates an employee for just cause, the employer must demonstrate the existence of the cause beyond the balance of probabilities. In dismissal of an employee for incompetence, the employer must prove that the employee's performance fell below an objective standard. An employer need only prove gross incompetence if termination was abrupt and without prior warnings.

The determination of a valid employment relationship between the employer and the employee was not affected, on the facts of this case, by the plaintiff's shareholdings in the defendant. The characterization of the relationship turned on the employment contract entered into with the employer.

Table of Authorities

Cases considered:

Atkinson v. Boyd, Phillips & Co., B.C. C.A., Robertson, Carrothers and Aikens JJ.A., January 3, 1979 (unreported) — *referred to*

Castell v. Gardiner etc. & Assoc. (1972), 30 D.L.R. (3d) 506 (B.C. S.C.) — *applied*

Chantler v. Applied Power, Ont. H.C., Eberle J., December 15, 1982 (unreported) — *considered*

Chow v. Paragon Cafe Ltd., [1941] 3 W.W.R. 80 (Sask. Dist. Ct.)*distinguished*

Empey v. Coastal Towing Co., [1977] 1 W.W.R. 673, 31 C.P.R. (2d) 157 (B.C. S.C.) — *applied*

Erlund v. Quality Communication Prods. Ltd. (1972), 29 D.L.R. (3d) 476 (Man. Q.B.) — *distinguished*

Guildford v. Anglo-French S.S. Co. (1883), 9 S.C.R. 303 — *referred to*

Housepian v. Work Wear Corp. of Can. Ltd. (1981), 33 O.R. (2d) 575, 125 D.L.R. (3d) 447 (Co. Ct.) — *considered*

Lee v. Lee's Air Farming Ltd., [1961] A.C. 12, [1960] 3 All E.R. 420 (P.C.) — *referred to*

Ross v. Willards Chocolates Ltd., [1927] 2 D.L.R. 461 (Man. K.B.) — *referred to*

Tracey v. Swansea Const. Const. Co., [1965] 1 O.R. 203, 47 D.L.R. (2d) 295 (H.C.), affirmed [1965] 2 O.R. 182n, 50 D.L.R. (2d) 130n (C.A.) — *referred to*

Warren v. Super Drug Markets Ltd. (1965), 53 W.W.R. 25, 54 D.L.R. (2d) 183 (Sask. Q.B.) — *referred to*

Authorities considered:

16 Hals. (4th), p. 437, para. 644.

Words and phrases considered:

BEST OF HIS ABILITY

The plaintiff focuses on the words "best of his ability" and says that the test of competency should be determined by the employee's capacity. I reject that argument because it runs counter to the proposition that all employees are engaged subject to an implied warranty that they are reasonably competent for the work for which they are employed. To accept the plaintiff's argument would lead to the absurd result that a well-intentioned but wholly incompetent employee would be immune from termination of his employment.

CONDONATION

. . . the giving of one month's pay by the employer was an act of generosity, as opposed to one of condonation. In support of this approach, I rely on *Empey v. Coastal Towing Co.*, [1977] 1 W.W.R. 673 . . . (B.C. S.C.), and *Castel*

v. Gardiner & Ass. (1972), 30 D.L.R. (3d) 506 (B.C. S.C.). If it were the law that an employer who gives some pay to an employee whom he has a right to dismiss for cause loses that right, employers would simply never give any severance pay when terminating an employee for what they perceive as just cause.

ACTION for damages for wrongful dismissal.

***Parker A.C.J.H.C.O.*:**

1 The plaintiff was employed by International Harvester Canada for approximately 30 years, holding positions from office clerk to branch manager. About 1978, International Harvester had a policy change whereby it began to sell off its branches to dealers. Mr. Matheson submitted an application to International Harvester to purchase their Ottawa branch. Since Mr. Matheson was unable to raise the necessary capital to fully purchase the dealership, he entered into a co-dealership arrangement whereby the defendant company was incorporated as the operating company and its shares would be held in proportion to the capital contributed. Mr. Matheson contributed $75,000, International Harvester $665,000. Mr. Matheson's share of the operating profits were to be used to buy out the shares held by International Harvester.

2 On the change-over, Mr. Matheson resigned from International Harvester and was appointed president and general manager of Matheson International Trucks Ltd. As part of its policy of changing from branches to dealers, International Harvester set up a subsidiary, DealCor, to supervise the change-overs and to look after the interest of International Harvester until the buy-outs were completed. Three members from DealCor were appointed directors of the defendant company. They were W.D. Day, regional manager; W.G. Revell, operations manager; and R.P. McLeod, financial analyst.

3 Mr. Matheson was discharged by the board of directors on November 12, 1980. He alleges that he was wrongfully dismissed. The defendant alleges that Mr. Matheson was discharged for incompetence.

4 Mr. Jewell, counsel for the plaintiff, submitted that the defendant is precluded from alleging dismissal for cause because it offered one month's severance pay to him on his date of dismissal and did not give reasons on the date of termination for its actions. Mr. Jewell argues that on the date of termination, November 12, 1980, the board of directors of the defendant corporation had to make a choice: either it could have dismissed Mr. Matheson alleging just cause without any further payment, or it could have terminated his employment with reasonable payment in lieu of notice. By choosing to terminate and provide a month's severance pay, the plaintiff argues that the defendant waived its right to rely upon a defence of just cause because the one month's pay is evidence of condonation of the plaintiff's conduct. Mr. Jewell cites Tracey v. Swansea Const. Co., [1965] 1 O.R. 203, 47 D.L.R. (2d) 295 (H.C.), affirmed without written reasons [1965] 2 O.R. 182n, 50 D.L.R. (2d) 130n (C.A.), and Chow v. Paragon Cafe Ltd., [1941] 3 W.W.R. 80 (Sask. Dist. Ct.), in support of this proposition.

5 In Tracey v. Swansea Const. Co., supra, the employer dismissed the plaintiff-employee for cause but gave one week's notice. The employer relied upon the defence of just cause. The Court looked at the entire pattern of events, beginning with the first acts of alleged misconduct and the employer's forbearance from acting on that information, and ending at the moment of dismissal with one week's notice. The giving of a week's notice at the moment of termination was treated as evidence of condonation because it was given after a period of time when the employer could have acted upon the events which in themselves would have given rise to just cause for dismissal. Similarly, Chow v. Paragon Cafe Ltd., supra, can be looked at as a case where the termination with some notice acted as evidence of condonation of the employee's conduct.

6 While it may be true that Mr. Matheson was not told the reasons why he was terminated without notice at the November 12, 1980 meeting, the evidence satisfied me that the plaintiff knew or ought to have known that there were serious problems with his performance as the president of the corporation.

7 In my opinion, the giving of one month's pay by the employer was an act of generosity, as opposed to one of condonation. In support of this approach, I rely upon Empey v. Coastal Towing Co., [1977] 1 W.W.R. 673, 31 C.P.R. (2d) 157 (B.C. S.C.), and Castell v. Gardiner etc. & Ass. (1972), 30 D.L.R. (3d) 506 (B.C. S.C.). If it were the law that an employer who gives some pay to an employee whom he has a right to dismiss for cause loses that right, employers would simply never give any severance pay when terminating an employee for what they perceive as just cause.

8 The general principle of competency is succinctly stated in 16 Hals. (4th) p. 437, para. 644:

> Where a skilled employee is engaged, there is on his part an implied warranty that he is reasonably competent for the work which he is employed to undertake, and if he proves to be incompetent the employer is not bound to continue him in his service for the term for which he was engaged.

9 If the employer terminates an employee on the ground of just cause, the onus rests upon the employer to prove its existence, an onus that must be demonstrated beyond the balance of probabilities: Warren v. Super Drug Markets Ltd. (1965), 53 W.W.R. 25 at 34, 54 D.L.R. (2d) 183 (Sask. Q.B.). The test for just cause on the ground of incompetency was expressed by Galt J. in Ross v. Willards Chocolates Ltd., [1927] 2 D.L.R. 461 at 469-70 (Man. K.B.):

> It is not always easy for an employer who finds an employee thoroughly unsatisfactory and deficient in obedience or competence to point to a single instance which would justify his summary dismissal. But I do not think it is necessary to rely upon such a single instance where the employee's conduct shows a general laxity and disregard of instructions in a business requiring energy, accuracy of accounts, and strict adherence to instructions, such as this business required.

10 The employer then must adduce evidence of an accumulation of events which prove Mr. Matheson was incompetent in his position as president of the defendant corporation. The plaintiff's performance must fall below an objective standard. It is not enough for the employer to dismiss for what he honestly believes to be just cause; the true test is whether just cause existed. Support for this proposition may be found in Atkinson v. Boyd, Phillips & Co., an unreported decision of the British Columbia Court of Appeal, Robertson, Carrothers and Aikens JJ.A., released January 3, 1979, at pp. 14, 15.

11 Counsel for the plaintiff goes further and argues that the test is not an objective one of competence but one governed by the words of an employment agreement entered into between the dealer corporation and Mr. Matheson on November 1, 1978. Paragraph 7 of that agreement states:

> The representative shall conduct the business and affairs of the Dealer Corporation to the best of his ability, and will adhere to the business management and other policies from time to time determined by the Board of Directors of the Dealer Corporation, and, without limiting the generality of the foregoing, the Representative shall, as and when requested by the Dealer Corporation, provide to the Dealer Corporation financial and management advice concerning sales and marketing programs, administrative procedures, budgets, accounting and cost methods, overhead costs and other services of a general managerial nature.

12 The plaintiff focuses on the words "best of his ability" and says that the test of competency should be determined by the employee's capacity. I reject that argument because it runs counter to the proposition that all employees are engaged subject to an implied warranty that they are reasonably competent for the work for which they are employed. To accept the plaintiff's argument would lead to the absurd result that a well-intentioned but wholly incompetent employee would be immune from termination of his employment.

13 Counsel for the plaintiff further argues that the employer must prove gross incompetency. He relies upon the following comment by Wilson J. in Erlund v. Quality Communication Prods. Ltd. (1972), 29 D.L.R. (3d) 476 at 481 (Man. Q.B.):

> Incompetence, of course, is a cause for dismissal, but hardly without notice, unless the incompetence be gross to the point where it merges with other factors of greater severity, which I do not find here.

14 In my opinion, it would be necessary for the employer to prove gross incompetence only if the firing had been abrupt. The evidence discloses that Mr. Matheson had many prior warnings indicating that his level of performance was unsatisfactory.

15 Mr. Matheson impressed me as a person with excellent sales ability. He had held a number of sales positions with International Harvester before entering the co-dealership arrangement and had enjoyed a fair amount of success. He was quite successful as a branch manager. As a branch manager, however, he was not responsible for his own accounting and financial management. In his new position as president of Matheson International Trucks Ltd., the plaintiff was responsible for these functions.

16 The first fiscal year of the defendant consisted of the months of September and October 1979. The defendant made a profit in that period and Mr. Matheson's share was used to increase his equity in the company from $75,000 to $91,000. Problems began the second year. Although none of the incidents complained of amounted to serious misconduct, they did indicate that Mr. Matheson was not carrying out his responsibilities. He failed to submit reports and financial statements on time. When information was requested, he could not supply it. He ignored correspondence sent to him by the directors and failed to carry out their requests. He was referred to an Achievement Valuation of himself as company president made in 1979 by Mr. Revell dated April 12, 1979. There are five levels of achievement in every category. The lowest, F, is defined as "Fails to meet minimum position accountabilities". Mr. Matheson was graded F in all categories. The completed report was signed by the plaintiff. Although he stated in evidence that he disagreed with the evaluation, he did not suggest to anyone at the time that it was incorrect. When Mr. Matheson was questioned about various matters complained of, many of his answers were vague and uncertain. He implied that the problems were beyond his control.

17 Mr. Matheson could not recall having received correspondence directed to him. When asked about a letter containing a long list of omissions in the May financial statement for 1979, he said, "I imagine I gave it to Mr. Henderson, the accountant". Those he thought he may have received, he was not sure what he had done with them. A report of the financial analyst dated 5/4/79 commented, "Definite lack of internal control within operation".

18 By February of 1980, the letters to Mr. Matheson were becoming more ominous. A letter from Mr. Day listed ten matters of concern, one of which read, "Continuing under current management". Mr. Matheson was asked what he thought was meant by this and he said, "I didn't think about it". On cross-examination he was asked did he not think this referred to him and he stated "no". I cannot accept his evidence on this point.

19 Mr. Matheson was referred to a letter from Mr. McLeod to Mr. Day with a copy to Mr. Matheson in which he said:

> All accounts 60 days and over are on a C.O.D. basis. I have expressed to the parties involved that the accounts receivable accounts outstanding at the 30 day level as of this month must also be reviewed and that under no circumstances should accounts run beyond 60 days and that they must personally review and collect each outstanding account prior to the end of May. Failure to meet this objective may have dire consequences and would have to be discussed at a special board meeting.

Mr. Matheson stated that what Mr. McLeod was asking was impossible, so he ignored the directive.

20 On March 21, 1980, Mr. Day wrote to Mr. Matheson:

> Several important matters were discussed at our March 6th meeting. These matters must be resolved or another management review meeting will be necessary within three weeks. We will not or cannot continue as in the past. Perhaps the importance of these matters are not appreciated by all parties. This is not a healthy corporation; profits

> are not available for profit distribution, accounting is inadequate, credit procedures with high past due levels are not acceptable and 1980 Management Plan is still not complete.

Mr. Matheson stated that Mr. Day was not telling him anything that he did not already know. He was asked whether it occurred to him that he might be talking about changing the president and he replied that "It never entered my mind".

21 In a letter dated May 23, 1980, Mr. Day advised Mr. Matheson that his past due accounts receivable for February exceeded the total past due in each of the other five North American DealCor regions. He then said:

> If this and other management deficiencies cannot be corrected immediately then International Harvester will implement management changes. Our DealCor agreements should be reviewed relating to operator responsibilities, duties, etc. We will not hesitate to institute corporate changes if current adversities are not recognized, corrected and immediate improvements made.

Mr. Matheson said it never entered his mind that his position as president might be in jeopardy. In view of the correspondence, I find it impossible to believe this statement.

22 Mr. McLeod was called by Mr. Matheson to explain some of the correspondence and the problems that Mr. Matheson had to deal with. He testified that Mr. Matheson was always cooperative with him and [he] implied that the recommendations he put forward were usually carried out by Mr. Matheson. Mr. McLeod testified that as a manager Mr. Matheson was quite decisive. On cross-examination, he was shown one of his letters dated April 25, 1980, to Mr. Matheson, headed "Third Request". He agreed that Mr. Matheson had not answered his first or second letters but stated that this "had not bothered him particularly".

23 He was referred to another letter which he had written to the accountant of the defendant, with a copy to Mr. Matheson, in which he stated: "It becomes a little disconcerting that it takes three requests in order to accomplish a very simple task". Mr. McLeod stated that it really did not bother him when he could not get an answer to his letters, but it seemed to bother Mr. Day, his former superior. Mr. McLeod stated that Mr. Day took an autocratic approach and insisted that instructions and communications be in writing. After hearing Mr. McLeod, one can understand why this procedure was necessary. He testified that most of the letters he wrote to Mr. Matheson were written to satisfy Mr. Day. He seldom got a reply in writing. He testified that he would telephone the secretary-treasurer and try to get the information from him.

24 Mr. McLeod was referred to a letter of April 22, 1980, to Mr. Matheson, in which he stated: "All accounts over 60 days will be placed on a C.O.D. basis". Following this he visited Mr. Matheson and reported to Mr. Day on May 16, 1980, that all accounts 60 days and over were on a C.O.D. basis. Mr. McLeod admitted that this statement was untrue. Mr. McLeod was referred to the final sentence in his letter which stated, "Failure to meet this objective may have dire consequences". He agreed that he had passed this message on to Mr. Matheson. After hearing the cross-examination of Mr. McLeod, I cannot accept his evidence that Mr. Matheson carried out the recommendations put forward by the directors, or his opinion that as a manager Mr. Matheson was quite decisive.

25 Mr. Day testified that each dealer was given an audit package from which the accountants prepared the final audited statements. In 1978 and 1979 the accountants were unable to prepare financial statements for the defendant because supporting documents were not available to them. Mr. Day testified that in the first quarter of 1980 he was unable to secure financial statements from the accountants or even get unaudited monthly financial statements from Mr. Matheson. When he failed to submit financial statements, letters would be written to him but he did not reply.

26 Mr. Matheson submitted one budget eight months after the year end; by that point it was not of much help to anyone. An estimate of future sales made after the period had passed could hardly be relied on. A statement that sales exceeded sales estimates means nothing if the estimates were not given until after the sales were made.

27 The president of each dealer company was responsible for submitting a management plan the first month of each fiscal year setting out the budget for the coming year. Correspondence indicates that Mr. Day pressed Mr. Matheson for his plan in February but did not receive it until June when only four months were left in the fiscal year. By then the plan was useless.

28 Mr. Day testified that Mr. Matheson was unwilling to accept suggestions and did not carry out directives from the board. While he seemed to accept criticism, he took no corrective action to solve the problem discussed. Even when he promised corrective action, promises were never kept. Mr. Matheson did not know what was going on within his company. Mr. Matheson's sole concern was increasing sales; however, the company's more pressing problems were in the areas of management and accounting. By tying up too much money in vehicle inventory, parts and accounts receivables, the company had no cash to operate.

29 The defendant has satisfied me that Mr. Matheson was incompetent and that his discharge was justified.

30 In the alternative, counsel for the defendant argued that the relationship between itself and the plaintiff was one of joint venture and therefore the defendant was not Mr. Matheson's employer. Only International Harvester and the plaintiff owned shares in the defendant corporation, and the intention of both parties was to permit the plaintiff to "buy out" the shareholdings of International Harvester from funds received as a dividend or bonus from the defendant corporation.

31 This issue was addressed by the Supreme Court of Canada in Guildford v. Anglo-French S.S. Co. (1883), 9 S.C.R. 303. The Court held that the fact that the plaintiff was the largest shareholder of the defendant, had no bearing in his action for wrongful dismissal. At p. 308, Ritchie J. states:

> This question as to the ownership of the vessel, the captain being a shareholder, had, as I have said, in my opinion, nothing whatever to do with the case, as everything must turn on the contract entered into with the company, with which [the] plaintiff's interest in the ship as a shareholder had nothing whatever to do.

32 The employment agreement entered into between the defendant and the plaintiff on November 1, 1978, is very strong evidence of the nature of the relationship between them.

33 I prefer, then, to characterize the relationship between the plaintiff and the defendant corporation as that of employer-employee. The plaintiff's shareholdings in the defendant corporation and his position on the board do not "itself affect the validity of his contractual relationship with the company..." per Lord Morris in Lee v. Lee's Air Farming Ltd., [1961] A.C. 12, [1960] 3 All E.R. 420, [1960] 3 W.L.R. 758 at 766 (P.C.).

34 In the event that I am wrong in finding that the employer had just cause in terminating Mr. Matheson's employment, I assess the damages claimed.

35 The plaintiff initially claimed damages for emotional distress resulting from the wrongful dismissal but abandoned this claim at the opening of trial.

36 As previously discussed, the plaintiff worked for International Harvester for approximately 30 years before entering into a co-dealership agreement with International Harvester to form Matheson International Trucks Ltd. He was then employed by the defendant corporation for two years and two months. The plaintiff takes the position that his duration of employment for the purpose of his damages assessment spans his employment with both Matheson International Trucks Ltd. and International Harvester. While it is true that the Court will consider all of the years that an employee works for different subsidiaries of the same conglomerate, two factors militate against the application of such a proposition here. First, the plaintiff refers to only the period of employment with Matheson International Trucks in his pleadings and makes no claim against International Harvester. Second, the plaintiff resigned from International Harvester and entered into a wholly different relationship with the defendant corporation. Instead of

Matheson International being a whollyowned subsidiary of International Harvester, the intention of both investors was to have the defendant corporation fully owned by the plaintiff by operation of the buy-out agreement. While the plaintiff may have been deemed an employee of International Harvester for a short period of time to protect his unearned commission, at the time of his dismissal he was solely an employee of Matheson International Trucks. For that reason, I consider the plaintiff's length of employment with the defendant to be two years and two months.

37 There has been a trend in recent decisions to consider the plaintiff's conduct in reducing the period of notice in wrongful dismissal actions: Chantler v. Applied Power, an unreported decision of the Supreme Court of Ontario, Eberle J., released December 15, 1982, and Housepian v. Work Wear Corp. of Can. Ltd. (1981), 33 O.R. (2d) 575, 125 D.L.R. (3d) 447 (Co. Ct.) . Given my finding that the plaintiff was, in part, responsible for the losses of the defendant corporation due to incompetence during his tenure as president, and the fact that the corporation had to be dissolved in 1981 because of its losses, I find the proper period of notice to be three months.

38 As indicated in the minutes of the meeting held November 12, 1980, in which the plaintiff was removed as president and director of the defendant corporation, he recovered one month's severance pay. At the point of termination the plaintiff was receiving $33,000 per annum and the use of an automobile. Assuming that the automobile benefit could be valued at $8,000 per annum, the damages for being deprived of its use for three months is $2,000. The plaintiff would have been entitled to payment of two months' salary or ($33,000/12) × 2 = $5,500. His damages assessment, then, would be $5,500 and $2,000 equalling $7,500 had he been successful in the action.

39 The action is therefore dismissed with costs, if demanded.

Action dismissed.