

CITATION: Volchoff v. Wright Auto Sales Inc., 2015 ONSC 8029
COURT FILE NO.: CV-14-215-SR
DATE: 2015 Dec 30

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
Larry Volchoff)
) Paul Amey, for the Plaintiff
Plaintiff)
)
– and –)
)
Wright Auto Sales Inc.)
) Glenn Christie, for the Defendant
Defendant)
)
)
)
) **HEARD: December 8, 9, 11 and 14, 2015**

2015 ONSC 8029 (CanLII)

REASONS FOR JUDGMENT

THE HONOURABLE MR. JUSTICE R. J. NIGHTINGALE

Overview

- [1] Larry Volchoff was employed as the Manager by the Defendant Wright Auto Sales Inc. at its Cambridge location from August 8, 2012 until June 16, 2014. The Defendant states that Volchoff's employment was terminated then for just cause because of his being under the influence of alcohol at work on a number of occasions and because he drove its vehicles when he was impaired because of his consumption of alcohol.
- [2] Mr. Volchoff denies there was any just cause for his termination and seeks damages because of that wrongful termination.

The Facts

- [3] The Plaintiff, who was 63 years old and had extensive experience in the used car sales business, applied for employment with the Defendant in August 2012 as its Manager for its Cambridge operation.
- [4] He was interviewed by Rick Major, the Defendant's Operations Manager in Waterloo, who provided Mr. Volchoff with a written offer of employment which he accepted on August 8, 2012. I accept the Plaintiff's evidence that at that time there was no discussion whatsoever about any policy of the Defendant prohibiting Mr. Volchoff's consumption of alcohol during work hours nor was any reference made to it in the accepted written of employment.
- [5] The evidence establishes that Mr. Volchoff performed his job duties as required by the Defendant including running the Cambridge dealership, conducting his own sales and being responsible for 9 or 10 employees there including salesmen, finance managers, detailers and a receptionist. He scheduled his own long hours working 6 days a week. Mr. Major confirmed that he trusted Volchoff and that he did a good job resulting in an increase in sales at the Cambridge office and increased income for Volchoff and the other salesmen as well.
- [6] Mr. Volchoff was required to attend regular managers' meetings at the Waterloo office of Wright Auto Sales each Wednesday at approximately 3 PM. Mr. Major and the Defendant's controller Sharon McDonald attended as well. Volchoff would travel from Cambridge occasionally taking a company vehicle to have it safety checked at the Waterloo branch. His evidence, which I accept, was that from the outset he would regularly attend as he had for many years before and have lunch at a restaurant in Waterloo not far from the Defendant's Waterloo office and would have one glass of wine there before the meeting. That evidence was confirmed by the admitted evidence of the restaurant's owner Mr. Thukral who was not cross examined.

February 12, 2014 meeting

- [7] There were no concerns or complaints of Mr. Volchoff's alcohol consumption raised to him by Mr. Major, Ms. McDonald or by the Cambridge staff for that entire period commencing August 8, 2012 until a managers' meeting in Waterloo on February 12, 2014. The Defendant's receptionist Tanya Shea said she smelled alcohol on Mr. Volchoff's breath when he arrived to attend the meeting. It was not a strong smell, there was no slurring of his words and he was not intoxicated. She said nothing to Mr. Volchoff about it but simply suggested to a manager that Volchoff may want to use a breath mint. She would speak to Volchoff three or four times a week by telephone but at no time was there any indication to her that he was under the influence of alcohol.
- [8] After the managers' meeting, Mr. Volchoff stated he was asked by McDonald and Major if he had been drinking. He immediately replied he had a glass of wine at lunch. He was told they could smell alcohol on his breath and that other employees could as well. His evidence was that Major then told him that he couldn't tell Volchoff what he could or couldn't do at lunch but that he had to be responsible with alcohol at work. Neither McDonald nor Major denied that that was said by Major and both confirmed it was possible Major said that. I accept Mr. Volchoff's evidence that that is indeed what was said to him by Major.
- [9] Volchoff's evidence was that there were no discussions then about a no alcohol drinking or "zero tolerance" policy of the Defendant. His evidence was that he was given no warning then about any future consumption of alcohol by him other than what Major had said. He was not told and did not have any understanding that he could no longer have a glass of wine at lunch before the Wednesday managers' meetings.
- [10] Sharon McDonald indicated it was hard for her to remember back to that meeting. She initially suggested they had received some complaints by staff of Volchoff having the smell of alcohol on his breath but later admitted it was only the complaint of one staff member. She also confirmed Mr. Volchoff readily admitted when asked if he drank

alcohol during lunch that he occasionally had a glass of white wine before the managers meeting.

- [11] Her initial evidence was that she told him there was a zero tolerance policy in the dealership for alcohol. However, she did not explain what that meant in her evidence and she said Volchoff did not ask. Her memory problems of what was actually said at that meeting were confirmed by her evidence that she could not remember if she asked Volchoff in that meeting if he had a drinking problem.
- [12] In addition, all that Mr. Major said in his evidence after Volchoff admitted he had a glass of wine at lunch prior to coming to that meeting was that they let him know it wasn't a good situation of drinking during business hours. He then said that the Defendant basically had a zero tolerance policy that "work and alcohol doesn't mix".
- [13] I do not accept the evidence of McDonald and Major that in that meeting Volchoff told them that he wouldn't have a glass of wine at lunch before the managers meetings again. Rather, it makes more sense that Volchoff was simply told effectively that if he had some alcohol at lunch, he would have to be responsible at work.
- [14] Although Sharon McDonald stated she told Mr. Volchoff that there would be "repercussions" if he continued to drink alcohol during work hours, Mr. Major said no such thing nor did he confirm that McDonald said that to Volchoff. What is clear is that Mr. Volchoff continued to regularly attend at the nearby restaurant prior to the subsequent Wednesday managers' meetings in Waterloo and had one glass of wine there before the meetings without any further admonitions or warnings from Mr. Major or Ms. McDonald.
- [15] That evidence in my view confirms Volchoff's understanding that he was not told he was prohibited because of company policy from having a glass of wine at lunch but rather that if he did, he had to be responsible and not be under the influence of alcohol at work. Because of this and the memory problems of both McDonald and Major about what they could recall or not of what was said at those meetings, which is also referred to further herein, I choose to accept the evidence of Volchoff especially where it conflicts with that

of McDonald and Major. I accept that Volchoff was not told his job was in jeopardy if he consumed some alcohol at lunch. Accordingly, the evidence does not suggest that Volchoff was intentionally violating any alcohol policy of the Defendant after that date.

[16] Mr. Volchoff also stated in his evidence that both before and after February 12, 2014, after the managers' meetings which lasted approximately one hour and a half, he would occasionally attend at the same nearby restaurant for a snack or to obtain takeout food there. He would occasionally then have one or two glasses of wine. That evidence was also confirmed by the uncontradicted evidence of Mr. Thukral who was not cross examined. Volchoff confirmed that that consumption of alcohol did not affect him.

[17] He stated that if he had stopped at that restaurant occasionally after the Wednesday managers' meetings and then stopped off at the Cambridge office after 5 PM on the way home to Brantford, he would not deal with customers there or do work and would only ask staff what was going on before he left to go home.

March 10, 2014 meeting

[18] Volchoff's evidence was that he was called to the Waterloo office that day and was told by McDonald and Major that a customer had complained that on the previous day Sunday, March 9, Volchoff was drunk in the Cambridge dealership at about 1:45 PM. Volchoff adamantly denied he was or that he had drank any alcohol that day.

[19] He was then told for the first time that there was a zero tolerance for drinking alcohol on the premises while at work but was not asked if he had a drinking problem. He again told them he only had an occasional glass of wine on Wednesdays at lunch before the managers meeting but not otherwise. He did not understand he was being told then he couldn't have a drink at lunch and was given no warning that if he violated this zero-tolerance policy in the future, that would result in the automatic termination of his employment. He did not say he would stop having a glass of wine at lunch after that.

[20] McDonald's evidence was that she understood a customer had only complained of the smell of alcohol on the plaintiff but she had no details of that complaint. She said

Volchoff denied he had any smell of alcohol on his breath that day but said he wouldn't have a glass of wine at lunch anymore. Her initial evidence of what she told him about the company zero-tolerance policy was rather vague suggesting there was to be no consumption of alcohol during work hours while on the premises at work or while driving a company car then subsequently stating there was to be no alcohol consumption during work hours. She admitted this policy was never put to writing anywhere in the company and was not added to the Employee Manual until after Volchoff was fired.

[21] Major's evidence was that Volchoff stated he had not been drinking on that Sunday at work and that he would have an occasional glass of wine at lunch prior to the managers meetings only. He stated that the zero-tolerance policy essentially was that there was to be no alcohol consumed during work hours. However, Major admitted that he only heard about this customer complaint from another manager but he named neither the customer nor the manager in his evidence. Furthermore, neither the customer nor manager gave evidence at trial.

[22] I again do not accept the evidence of McDonald or Major where it conflicts with that of Volchoff. It was clear from Major's own admissions at trial that he had a difficult time remembering what was actually discussed in those meetings. He actually stated he couldn't remember his own age sometimes. He didn't make any notes of those meetings and just before giving evidence at trial, he refreshed his memory only by looking at the notes McDonald had prepared of the meetings that formed part of Volchoff's file.

June 11, 2014 meeting

[23] Mr. Volchoff stated that he was called to another meeting that day at the Waterloo office by Major and McDonald. There he was told by Major that an accusation had been made by staff in Cambridge that Volchoff had been driving a company vehicle while impaired and that he was at work under the influence of alcohol.

[24] Volchoff was surprised at those allegations, immediately denied them and said they weren't true. Major refused to tell him any details or who those staff members were. Volchoff was then told they were going to do a further investigation and Major then

provided him with a letter already prepared suspending him for one week with pay. Volchoff was told there was a zero tolerance for substance abuse and was asked if he had a substance abuse problem which he denied. He denied that he was offered assistance if he had one. That suspension letter confirmed he would be given an opportunity to answer the allegations in a subsequent meeting scheduled for June 16.

- [25] Volchoff's evidence, which I accept, was confirmed by McDonald and Major who stated that when asked by him, they refused to give him the names of the employees who complained about his alcohol consumption. They both admitted they had had a meeting the day before with these employees. The suspension letter alleged that Volchoff had driven Wright Auto Sales vehicles while impaired or under the influence.

June 16, 2014 meeting

- [26] At this meeting again in Major's office, Volchoff was told by Major and McDonald that they had statements from the staff and now had proof of the accusations against him mentioned in their previous meeting of June 11.
- [27] He was told that his Cambridge staff had said he was at work while under the influence of alcohol which he immediately stated wasn't true. Volchoff was asked if he had a substance abuse problem and he denied it. Even though Volchoff was assured on June 11, 2014 that he would have a chance to answer the allegations against him on June 16, he was simply told they had spoken to the employees but he was never provided with specifics of any such allegations including who his accusers were.
- [28] Major's explanation for his refusing to do that was that he did not want to jeopardize Volchoff's relationship with them if he returned to work. I do not accept that evidence. It defies common sense as it appeared the decision was already made to terminate his employment. Volchoff was given no chance to respond to the vague allegations but rather, he was simply given his termination letter which surprised him. That letter had already been typed up before the meeting after Major and McDonald had obtained legal advice.

[29] Volchoff frankly admitted at trial that he drank one glass of white wine prior to the Wednesday management meetings and occasionally one or two glasses after the meetings which was confirmed by the restaurant owner. He never drank any alcohol while on work premises and other than on Wednesdays, he would have a bag lunch at his desk with no alcohol which was confirmed by some staff at trial. No staff members at his office had ever raised any concerns with him during his entire period of employment there regarding his alcohol consumption. He was not told he could not have alcohol at lunch and he denied he had any time drove a company vehicle when he was under the influence of alcohol or when he was impaired.

[30] He admitted that after work, he would occasionally go to a local restaurant or local bar with some of the employees and have a glass of wine or two. He would buy drinks for them there to thank them for their good work. Sometimes he would go back to the dealership to pick up his car and briefcase and then go home. He denied he was ever loud or obnoxious with a customer over a paint issue when he returned to work from the bar.

Analysis of Defendant's Alcohol Consumption Allegations against Volchoff

[31] The onus is on the Defendant to establish the grounds of just cause for the dismissal of the Plaintiff on a balance of probabilities.

[32] The evidence establishes that the Plaintiff may have had a smell of alcohol on his breath at the February 12, 2014 managers meeting but nothing more. He readily admitted having one glass of wine at lunch before that meeting and he regularly had done so since he was hired in August 2012. I reject the evidence of Mr. Major that Volchoff's speech was disjointed in that meeting which was at best vague and nonspecific. Furthermore, that was not the evidence of Tanya Shea or McDonald who only stated that there was a smell of alcohol on his breath at that meeting.

[33] Regarding the March 10, 2014 meeting, the Defendant called no evidence at trial to confirm the third-hand hearsay evidence from the alleged customer who allegedly stated that the Plaintiff had been consuming alcohol or was drunk at work on the prior Sunday. Defendant's counsel concedes that point but suggests it is the warning given to the

Plaintiff at that meeting that is relevant and significant. No evidence was called to suggest that the Plaintiff at any time in fact drank alcohol while at work especially on Sundays. No evidence was led that anything was done by the Defendant to verify that allegation. I accept the Plaintiff's evidence that there was no substance whatsoever to that allegation.

[34] Major and McDonald stated that as a result of complaints made by the Cambridge staff at a meeting on June 10, 2014, they suspended him with pay on June 11 because they were told by staff that Volchoff was under the influence while at work and had driven the defendant's vehicles while impaired or under the influence.

[35] What is significant is that, except for an unsubstantiated allegation by Peter Stancu described below, none of the Cambridge staff had ever complained to Major or McDonald or Volchoff about Volchoff's alleged consumption of alcohol during work hours before that date.

[36] In fact on June 10, the sales staff from Cambridge operation approached Major to complain about a change Volchoff had made to the Internet sales leads a few months before with the result that he took those leads himself rather than distribute them among the staff. They feared that would reduce their incomes significantly although they all did better financially while under Volchoff's management. Major admitted the sales staff members were very upset at this suggesting Volchoff was treating them unfairly. Major immediately changed the policy without advising Volchoff.

[37] Major however stated that it was the sales staff's complaints of Volchoff's alcohol consumption that was the "primary concern" in that meeting that day. He stated "to a person" that all salesmen made comments that Volchoff was seen coming back from extended lunch periods smelling of alcohol on his breath and showing signs of impairment, being intoxicated at work or under the influence of alcohol and driving company vehicles when he had something to drink. I will deal with that evidence shortly.

[38] The Defendant has not established in my view the grounds for Volchoff's dismissal for the following reasons.

- [39] Firstly, what is abundantly clear is that at no time was a specific allegation made by any staff members that Volchoff on a specific date or dates consumed alcohol to excess. The evidence tendered by Major and McDonald as well as the employees was vague, nonspecific and without any details. It is clear that Major and McDonald obtained no specific circumstances or dates of the allegations from the employees and Major and McDonald refused to give any such details to Volchoff who asked for them after he denied any such allegations.
- [40] Secondly, the details of the allegations made by Major and McDonald against Volchoff on June 11 and June 16 were not borne out by the evidence of the defendant's witnesses at trial. Moreover, with the exception of the witness Knaud whose evidence I will refer to shortly, their evidence did not clearly confirm that any these allegations took place after the February 12 and March 10, 2014 meetings rather than before those dates.
- [41] John Hillier only stated at trial that when the Plaintiff came back from the Wednesday meetings around 5 PM, he had a bright red face and strong smell of alcohol on his breath but he could not say he had too much alcohol to drink. He admitted that whatever alcohol he consumed didn't affect his ability to do his job including dealing with customers. In fact, Volchoff was always helpful and Mr. Hillier never hesitated to go to him for assistance with his customers even if he had a smell of alcohol on him. He did not describe Volchoff as being loud or obnoxious with his customers and at no time did he complain to Major or McDonald of Volchoff's alcohol consumption before the meeting of June 10, 2014 at which time he admitted he complained of Volchoff changing the internet leads.
- [42] I do not accept the evidence of Hillier that there was any significant consumption of alcohol by Volchoff during company hours. His evidence that he feared reporting Volchoff's alcohol consumption to Major or McDonald makes no sense. Clearly, he knew how to and in fact complained to Major on June 10 about Volchoff's change in the internet leads which he said cost him financially. He obviously knew how to report any alcohol concerns if there were any but he didn't do so for almost 2 years which is

more consistent with there being no concerns at work with Volchoff's alcohol consumption.

[43] Moreover, the evidence of Cory Botelho, the defendant's Cambridge detail manager, is that he was told by the salesmen, which would include Hillier, that they were going to complain to Major on June 10 about Volchoff's changing the internet leads but they said nothing to him about their going to complain of his alcohol consumption. The logical inference from this evidence is that the salesmen's primary and real concern was Volchoff's change in the internet leads for his personal benefit and not his alcohol consumption which in fact was not significant.

[44] Lastly, it was clear to me that Mr. Volchoff throughout the trial displayed a natural rosy cheek complexion when there was no suggestion he had been drinking alcohol.

[45] Corey Botelho only stated that he would regularly go to the local bar after work hours at 4:30 PM with the Plaintiff. The Plaintiff would have two glasses of wine and would then routinely go home. He stated that only one time in April or May 2014 when he returned, he saw Volchoff being rude to one of John Hillier's customers. However, he admits he wasn't paying any particular attention to that incident. In any event, Hillier himself did not mention this incident in his evidence at all and I find no significance whatsoever to it.

[46] He stated that the only signs of Volchoff's alcohol consumption at any time was his having rosy cheeks and a smell of alcohol but there were never any other symptoms including any slurring of speech or balance issues. He was never concerned with Volchoff's ability to drive his car after his consumption of alcohol after work and he never saw Volchoff consume any alcohol during work hours.

[47] The evidence of the Cambridge business manager Peter Stancu was only that he "suspected" or "thought" at times that Volchoff consumed alcohol. He never saw him consume alcohol at work and only observed that he would leave for long periods of time and return with bloodshot eyes but he never smelled alcohol on him. He stated he went out with other employees and Volchoff on two occasions after work hours and only saw Volchoff then having one glass of white wine and starting a second glass when Stancu

left. He never saw Volchoff impaired or intoxicated by alcohol or display symptoms of slurred speech, unsteadiness on his feet or any change in his personality. He conceded he never saw anything to suggest that Volchoff's alcohol consumption affected his performance in the workplace even though he had regular daily contact with him.

[48] After being told by "someone else" (who he didn't name) that Volchoff was likely going to be at a particular location drinking, he stated he reported that to McDonald in the early winter of 2013 as he was concerned. No other details were provided in court and McDonald never mentioned this in her evidence. Major stated that he received a report before February 12, 2014 about Volchoff's consumption of alcohol but found no substance to it when he checked it out. This incident has no substance or significance.

[49] Michael Knaud was a salesman who stated he observed Volchoff to have rosy cheeks, glazed eyes, slurred speech and the smell of alcohol on him when he returned from the Wednesday managers meetings. He said he saw him in that condition dealing with customers.

[50] However, when cross examined, he admitted that when Volchoff returned from the managers meeting after 5 PM, he would not stay long and could only recall three or five times that he talked to customers. Nevertheless, he admitted he routinely asked for Volchoff's assistance on customers car paint issues on those Wednesdays with no concerns.

[51] He was particularly vague and hesitant in his evidence when he suggested that Volchoff's alcohol consumption affected his ability to deal with customers admitting he couldn't recall anything specifically. He admitted that no customers ever complained to him about Volchoff being under the influence of alcohol when they went into his office to deal with him after Knaud stated Volchoff had consumed alcohol earlier. He at no time suggested Volchoff had any alcohol to drink during work hours other than on Wednesdays.

[52] Mr. Knaud in my view was intentionally vague and not truthful when he initially stated he had trouble recalling and could not honestly recall anything about Volchoff changing the internet prospects leads. He initially stated when cross examined that he did not think

Volchoff was being selfish or controlling by doing so. However he then admitted he signed his own written statement of June 11, 2014 that he provided to Major saying exactly that i.e., that he thought Volchoff was “very selfish and controls all aspects of the dealership, leads, etc”. He also admitted that the three salesmen complained to Major about that. His evidence is neither credible nor reliable and I reject his evidence wherever it conflicts with that of Mr. Volchoff.

[53] The parties admitted the written statement of Defendant’s Cambridge business manager Mr Chopra. His first complaint to the Defendant on June 12, 2014 was about the Plaintiff’s alleged controlling “all aspects of the dealership including all leads, sales etc” which made it difficult for him. He only mentioned that he went for dinner and drinks with Volchoff after work and that Volchoff had taken a car with a dealer plate to these dinners. However, he could not say Volchoff was under the influence of alcohol during the day at work.

[54] Lastly, for some unexplained reason, the Defendant did not call as a witness at trial Scott Wright despite his availability, a salesman at the time who also allegedly complained about the Plaintiff at the June 10, 2014 meeting with Major and who replaced Volchoff after he was fired.

Defendant’s Zero-Tolerance Policy

[55] The evidence establishes that if there was a zero tolerance policy for consumption of alcohol during work hours for all the Defendant’s employees including the Plaintiff, the existence or details of that rule were never provided to the Plaintiff when he was hired in August 2012.

[56] Although the evidence of Michael Knaud suggested that he allegedly was told when he was hired in 2010 that Wright Auto Sales had a zero tolerance policy of not consuming alcohol before working, he stated he couldn’t recall what that meant and in particular that he couldn’t have some alcohol at lunch hour. As indicated above, I do not accept his evidence especially as none of the other Defendant’s employees who gave evidence at

trial suggested they were ever told that or that there was such a zero tolerance policy while they and Volchoff worked there.

[57] In any event, it is clear that the Defendant's zero tolerance policy was not included in the employee handbook until after Volchoff was terminated in June 2014. This is not a case involving safety standards or policies of operating potentially dangerous company machinery during work hours. I am not satisfied that the zero-tolerance policy of the Defendant, whatever it was, was a term of the employment contract between the Plaintiff and the Defendant when he was first hired or, because of the lack of consideration, became one after he was hired. *Wiebe v. Central Transport Refrigeration (MAN) Ltd.* [1994] M.J. No. 27 (C.A.).

[58] Moreover, the evidence of Major and McDonald and Volchoff is that the policy at best was ambiguous. I accept Volchoff's evidence that he was simply told on February 12, 2014 after admitting he had a glass of wine that they couldn't dictate what he did at lunch hour but that he had to be responsible at work including not driving a company vehicle while his ability to do so was impaired by alcohol. That is a reasonable interpretation of the policy which is consistent with Volchoff's continuing to consume a glass of wine regularly at lunch before his Wednesday managers meetings, occasionally one or two glasses of wine after but never consuming alcohol while at work or having consumed alcohol to the extent it affected his ability to perform his job including dealing with customers or driving company vehicles.

[59] Mr. Volchoff was a trusted employee whose work record was excellent resulting in increased profits for the dealership, himself and the salesmen who worked under him. The evidence did not suggest that the employer had lost that trust in him because of his actions or that it couldn't be reinstated.

[60] Lastly, the evidence was clear from Volchoff, Major and McDonald that at no time was he warned that his job was in jeopardy or that his breach of this rule in the future could lead to his dismissal or that he would be terminated. *Coupe v. Malone's Restaurant Ltd.* 2006 CarswellBC 2235 (BCSC).

- [61] Accordingly, the Defendant's evidence does not establish the Plaintiff was in breach of any alleged zero-tolerance policy of the Defendant regarding non-consumption of alcohol by the Plaintiff.
- [62] Our Courts have long recognized that work is one of the most fundamental aspects of a person's life, providing the individual with the means of financial support and, as importantly, a contributory role in society. Not only is work fundamental to an individual's identity, but the manner in which employment can be terminated is equally important. *Reference Re Public Service Employee Relations Act (Alberta)* 1987 1 S.C.R. 313; *Machtinger v. HOJ Industries Limited* [1992] 1 S.C.R. 986.
- [63] The Supreme Court of Canada in *McKinley v. BC Tel* 2001 SCC 38 confirmed that the Court in determining whether there was just cause for dismissal is to apply a contextual approach examining each case on its own particular facts and circumstances and to consider the nature and seriousness of the misconduct of the employee in order to assess whether it is reconcilable with sustaining the employment relationship.
- [64] The Ontario Court of Appeal in *Dowling v. Ontario (Workplace Safety and Insurance Board)* 2004 Canlii 36920 (ONCA) confirmed that the core question for determination is whether an employee has engaged in misconduct that is incompatible with the fundamental terms of the employment relationship. The rationale for the standard is that the sanction imposed for misconduct is to be proportional - dismissal is warranted when the misconduct is sufficiently serious that it strikes at the heart of the employment relationship.
- [65] The first step for the Court is to determine the nature and extent of misconduct. The second step requires the consideration of the surrounding circumstances for both the employer and the employee. The third step is to determine whether the dismissal is warranted as a proportional response; this involves determining whether the misconduct is sufficiently serious so as to give rise to a breakdown in the employment relationship.
- [66] As indicated above, the evidence in this case falls far short of establishing the Plaintiff's consumption of alcohol prior to and after the Wednesday managers meetings and after

work hours in any way affected or impaired his ability to perform his work duties. That includes his dealing with staff and salesmen at the Cambridge office or dealing with customers of that office. No admissible evidence was provided at trial of any complaints let alone specific complaints of customers regarding Volchoff's consumption of alcohol during work hours or that his consumption affected his ability to deal with customers.

[67] The evidence in fact confirms that the Plaintiff, even if he had consumed some alcohol on Wednesdays, properly carried out his job functions. The allegation of his being rude to a customer was not substantiated and in any event the Defendant's business was thriving including that of the individual salesmen. There was no suggestion that the Defendant's business interests were being affected by Volchoff's consumption of alcohol.

[68] Moreover, there was no evidence that the Plaintiff's consumption of alcohol was sufficiently serious that it struck at the heart of the employment relationship. The Plaintiff was a trusted employee who was never told of any specific allegations against him including the names of his accusers. He was never told his job was in jeopardy at any time let alone that he could or would be dismissed because of his continued consumption of alcohol during work hours.

[69] It is clear that the Defendant's salesmen's complaints regarding his consumption of alcohol were only raised for the first time with management after they complained to them because of Volchoff's changes in his handling of the internet sales leads that might affect them financially. In other words, his alcohol consumption never was a significant issue for any of the sales staff.

[70] Lastly, the evidence does not establish that the Plaintiff's dismissal because of his consumption of alcohol is warranted as a proportional response to it. The alleged misconduct did not establish that he ever drove a company vehicle while his ability to do so was impaired because of his consumption of alcohol or that any of the employees were concerned to the extent they believed he should not be driving a company or other vehicle.

- [71] Mr. Volchoff was a valued and trusted manager . Mr. Major and Ms. McDonald in their almost daily telephone discussions with Mr. Volchoff never noted any signs of consumption of impairment by alcohol on him during business hours.
- [72] The *McKinley* analysis requires the principle of proportionality to be considered is whether the termination was the effective balance to be struck between the severity of employee's conduct and the sanction imposed.
- [73] In my view, the rather vague acts of misconduct by consumption of alcohol during work hours by the Plaintiff are not serious enough to warrant his dismissal. Again, he was never told that his job was in jeopardy or that his employment could or would be terminated if he continued to consume alcohol during working hours.
- [74] He was placed on a suspension with pay for one week pending investigation of his conduct. An imposition of continued discipline including a further suspension, with or without pay, for a reasonable period of time, including a specific warning that any further violation would result in his termination, would have been appropriate to bring home to Mr. Volchoff his employer's serious concerns, if it had them, with his conduct and make him realize his job was now in jeopardy if he continued. Progressive discipline, short of termination of employment, was clearly more appropriate in this case. *Barton v. Rona Ontario Inc.*, 2012 ONSC 3809.
- [75] In my view, the Defendant has not established that the alleged misconduct of the Plaintiff meets the threshold in *Dowling* of striking at the heart of the employment relationship. Accordingly, the Defendant breached its contract with the Plaintiff by terminating his employment without notice and the Plaintiff is entitled to damages for wrongful dismissal.

Damages

- [76] The Ontario Court of Appeal in *Bardal v. Globe and Mail Limited* (1960) 24 D.L.R. (2d) 140 confirmed that the reasonable period of the notice to the employee must be decided with reference to each particular case having regard to the character of the employment, the length of service of the employee, the age of the servant and the availability of similar employment, having regard to the experience, training and qualifications of the employee.
- [77] The Plaintiff was 65 years old when he was terminated in June 2014 having worked 2 ½ years with the Defendant. He had a grade 10 education with his last 25 years of employment exclusively in the car sales business.
- [78] He was responsible for managing the entire operation at the Cambridge dealership of the Defendant including hiring, training and supervising approximately 9 staff members including other sales agents. He regularly met with his manager and was successful in raising the income of the office, himself and his sales agents while he was there. His income totalled \$120,000 in 2013 and over \$65,000 when he was terminated in June 2014.
- [79] On termination, Volchoff confirmed he could not find another car sales manager's position despite his reasonable efforts to find such employment applying through other dealerships in the area and on the Internet. He understandably attributed his inability to obtain such manager's work due to his age. He did obtain some independent used-car sales work from July to September earning \$3442 and was finally able to obtain only a used car sales position on a full-time basis at another dealership in Cambridge in mid-October 2014.
- [80] In applying a contextual approach to these factors, the appropriate period of reasonable notice is five months. *Vist v. Best Thereatronics Limited* 2015 ONSC 2619 (Divisional Court).
- [81] The parties have agreed that the appropriate amount of damages for the period of five months notice owing to the Plaintiff, after deducting the amounts earned by the Plaintiff during the notice period, is \$48,557.68.

Conclusion

[82] The Plaintiff shall have judgment against the Defendant in the amount of \$48,557.68 together with prejudgment interest thereon in accordance of the Courts of Justice Act.

[83] If the parties are unable to agree on the date or rate of commencement of prejudgment interest or the costs of this action, the Plaintiff can provide written submissions of no more than three pages in length together a bill of costs within 10 days from date of this decision. The Defendant shall similarly have 10 days thereafter to provide responding submissions.

The Honourable Mr. Justice R. J. Nightingale

Released: December 30, 2015

CITATION: Volchoff v. Wright Auto Sales, 2015 ONSC 8029
COURT FILE NO.: CV-14-215-SR

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Larry Volchoff

Plaintiff

– and –

Wright Auto Sales Inc.

Defendant

REASONS FOR JUDGMENT

The Honourable Mr. Justice R. J. Nightingale

Released: December 30, 2015