Date: 19970509
Docket: C960348
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

PETER T. ELMS

PLAINTIFF

AND:

HYWEL JONES ARCHITECT LIMITED

DEFENDANT

REASONS FOR JUDGMENT

OF THE

HONOURABLE MADAM JUSTICE LOO

Date and place of hearing: April 15 - 17, 1997
Vancouver, British Columbia

Counsel for the plaintiff: Thomas G. Keast

Counsel for the defendant: Timothy J. Delaney

[1] This is an action for wrongful dismissal.

[2] The plaintiff is an architectural technician who took his training in a four year college program in England. He came to Canada in 1974. He is presently 45 years old. From 1974 until 1985, the plaintiff had a succession of employers until he started work with Lubor Trubka Associates, Architects. It was there that he met Hywel Jones, an architect who shared office space with Lubor Trubka from 1982 when he became a registered architect, until 1984 when he started his own firm which is the defendant.

[3] The plaintiff started work with the defendant on September 1, 1989.

[4] The plaintiff was considered a senior architectural technician. His duties included preparation of construction drawings, site supervision, and acting as job captain for various projects. He had strong technical and site review skills. Mr. Jones acknowledged that the plaintiff was a valued employee.

[5] On November 21, 1995 Mr. Jones told the plaintiff that he would be laid off because of lack of work, and that he was giving him six weeks notice. He was told to continue working until the end of December, at which time his employment would end.

[6] It is common ground that six weeks notice was inadequate. It is fair to say that on November 21, 1995 the plaintiff was not provided with reasonable notice and he was therefore wrongfully dismissed. However that does not end the matter.

[7] The defendant says that on December 21, 1995 it

properly terminated the plaintiff's employment for cause. The grounds for just cause can be conveniently described as follows:

1. in making copies of the AUTOCAD software;
2. in making copies of Safeway details;
3. in taking a set of the design drawings for a Langley townhouse project, and for an I.G.A. project;

4. in making copies of computer discs which contained Mr. Jones "original drawings'.

[8] It is important to understand the layout of the defendant's office. It is a fairly small office. In December 1995, there were six persons working in the office. In addition to the plaintiff and Mr. Jones, there was Gerry Bell, a senior architectural technician, Lindsay Bennett and Tammy Yuhasz, both intermediate technicians, a receptionist, and Sidney Latheron, a contract employee who like the plaintiff, was also considered a senior architectural technician.

[9] With the exception of a photocopy room, a storage room, and a small meeting room, there are no walls or doors in the office. The boardroom has no door and is delineated by a seven foot glass wall. Mr. Jones and the technicians occupy work stations. Ms. Bennett sat some fifteen feet away from the plaintiff's work station. From where she was seated she could observe the plaintiff.

[10] On December 20, 1995 there was an office Christmas luncheon. Everyone in the office attended, except the plaintiff. During the course of the luncheon, Mr. Jones said that his staff told him about the plaintiff 'stealing" from him.

[11] The next day, December 21, 1995, Mr. Jones asked the plaintiff into the boardroom and terminated his employment. Within half an hour, the plaintiff packed his belongings and left the office.

[12] The parties differ on what Mr. Jones said at the meeting was the reason for summary dismissal: the plaintiff's taking of software, drawings, details and other work, or the plaintiff's taking of just the software.

[13] According to the plaintiff, Mr. Jones told him he was terminating his employment because he had taken 'software and things'. The plaintiff admitted that he had taken a copy of the AUTOCAD software, but said he asked Mr. Jones, what he meant by "things', but it was not made clear to him. Mr. Jones gave him two options. He could accept on his Record of Employment that he had been laid off, but he would receive no pay from December 15, 1995. The plaintiff had been paid to that date. His salary from December 15, 1995 to December 22, 1995 would represent payment towards the software. The other option would to accept on his Record of Employment that he has been dismissed, and be paid to December 22, 1995. Being "dismissed" from his employment, rather than being "laid off", would affect the plaintiff's entitlement to unemployment insurance benefits.

[14] The plaintiff did not want his Record of Employment to show that he had been dismissed, and he offered to return the software. Mr. Jones declined the offer.

[15] The plaintiff said he told Mr. Jones he did not understand why he would be upset at the plaintiff making a copy of the software when there were other unauthorized copies in the office. In addition, he pointed out that when he joined the firm he had brought VERSACAD with him without compensation. His taking of the AUTOCAD without compensation was no different than his bringing the VERSACAD without compensation.

[16] The plaintiff said he would accept the first option: his Record of Employment would show that he had been laid off, and he would receive no further pay from December 15, 1995, in lieu of payment for the software. He wanted a letter confirming the terms of their agreement.

[17] The plaintiff said that he told Mr. Jones that he would return the next day to pick up his Record of Employment and the letter.

[18] When the plaintiff returned the next morning, he said that Mr. Jones did not go through with what they discussed the day before. Instead, he was presented with another one sentence letter for him to sign. It reads:

> This will acknowledge that payment dated December 15, 1995 in the amount of $1,400.00 is the final payment due, that the required six weeks notice has been given, and that no further monies will be claimed.

[19] The plaintiff said that he was told to take it or leave it.

[20] Again, Mr. Jones gave him the two options relating to what was to be shown on his Record of Employment, and that he would receive no further payment for his last week of work if he accepted a layoff.

[21] The plaintiff said that he wanted to talk to his wife. He left the office and returned an hour later. He asked for a witness to be brought into the meeting so that he could explain what had occurred the previous day, the options he was presented, and the option he was accepting.

[22] Mr. Latheron became the third person in the meeting between the plaintiff and Mr. Jones.

[23] The plaintiff said that in Mr. Latheron's presence, he explained that the previous day he had offered to return AUTOCAD, but his offer was declined, and that he was now agreeing to keep the software in lieu of any further compensation to him.

[24] The plaintiff insists that at no time during the meeting of December 21, or the two meetings of December 22, 1995, did Mr. Jones ever raise the issue of the drawings or the Safeway details.

[25] Mr. Jones' version of what occurred is as follows: On December 21, 1995, he told the plaintiff he was concerned with four things the plaintiff had taken, contrary to the policy of the office. They were the copies of AUTOCAD, the Safeway details, the computer discs containing his work, and the drawings.

[26] Mr. Jones testified that the plaintiff "denied all counts'.

[27] It was only when he told the plaintiff that he had been overheard speaking to Stan at CADD Solutions Inc. that the plaintiff changed his story, admitted that he had copied AUTOCAD, but said 'so what?". Apart from admitting to copying the software, the plaintiff continued to deny the other counts.

[28] It was Mr. Jones' view that there were four breaches of his confidence in the plaintiff. He had lost trust. The plaintiff had let him down and had let his staff down.

[29] With respect to the options, Mr. Jones said that he offered the plaintiff pay to only December 15 because the plaintiff had not done a stick of work for the last six weeks to warrant any further pay. Mr. Jones thought that the plaintiff should be willing to accept his Record of Employment showing that he was laid off, because he would not want the stigma of having been dismissed.

[30] The plaintiff's Record of Employment shows that he had been dismissed from his employment, rather than laid off.

[31] Mr. Jones declined the plaintiff's offer to return the software, because it was of no value to him. The plaintiff could have copied it in the meantime.

[32] Mr. Latheron testified. While his recollection of the meeting is vague, he recalled Mr. Jones accusing the plaintiff of stealing software, and offering to write on the plaintiff's separation slip that he had been let go for lack of work, rather than for theft. According to Mr. Latheron, the meeting revolved around why the plaintiff was not accepting the offer to be let go for lack of work rather than theft.

[33] Mr. Latheron did not give evidence of any discussion between the plaintiff and Mr. Jones about the plaintiff taking anything from the office, other than the AUTOCAD software.

[34] I find that on December 21, 1995 Mr. Jones accused the plaintiff of stealing the AUTOCAD software, and summarily dismissed him for that reason alone.

[35] The plaintiff claims that it was only after the defendant realized that there were shortcomings in relying on the software as the grounds for cause that it drummed up other grounds, namely, the taking of the drawings and the Safeway details. The plaintiff also points to the position taken by the defendant that the grounds for termination could only be given at the conclusion of examinations for discovery, as indicating that at the time of termination the plaintiff had no grounds other than the taking of the software.

[36] In my view, it does not matter what Mr. Jones told the plaintiff were the reasons for his dismissal. As stated by the Court of Appeal in Carr v. Fama Hldg. Ltd. (1989), 40 B.C.L.R. (2d) 125 at p. 132: "...an employer may dismiss an employee, giving the wrong reasons, provided that causes which would justify dismissal did in fact exist at the time".

[37] It is therefore necessary to review each of the grounds for cause, bearing in mind that each of the grounds either separately or together, must meet the test of a fundamental breach of the contract of employment, giving the employer the right to summarily dismiss the employee. In Ennis v. Canadian Imperial Bank of Commerce (1986), 13 C.C.E.L. 25, Finch J. (as he then was) succinctly set out the law relating to termination on the basis of cause. He stated at p. 27:

> The onus of proving cause justifying summary dismissal of an employee rests on the employer. Since dismissal without notice is such a severe punishment, it can be justified only by misconduct of the most serious kind. If the plaintiff's conduct is inconsistent with his fulfillment of the express or implied conditions of service, or is incompatible with the due and faithful discharge of his duties to his employer, summary dismissal will be justified. If the employee's conduct interferes with or prejudices the safe and proper conduct of the employer's business, summary dismissal will be justified. If the employee's conduct reveals a character which is dishonest or untrustworthy, summary dismissal will be justified.
>
> The exact standard of misbehavior required to be shown varies with the nature of the business engaged in by the employer, and with the position of responsibility and trust held by the employee. Real misconduct or incompetence must be demonstrated. The employee's conduct, and the character it reveals, must be such as to undermine, or seriously impair, the essential trust and confidence the employer is entitled to place in the employee in the circumstances of their particular relationship. The employee's behaviour must show that he is repudiating the contract of employment or one of its essential conditions.

A. THE GROUNDS FOR TERMINATING ON THE BASIS OF JUST CAUSE

1. THE AUTOCAD SOFTWARE

[38] The plaintiff said that in December 1995, after he was given his notice of termination on November 21, 1995, he copied the software. He needed to find other work and one of the options he was exploring was buying a computer and setting up an office at home. He saw nothing wrong in taking a copy of the software because the defendant had not only taken the benefit of the VERSACAD software he brought with him to the firm, the defendant had also made three unauthorized copies of the software for its own use.

[39] Mr. Jones admits that the defendant had made copies of the AUTOCAD contrary to the terms of the AUTOCAD software license agreement.

[40] The plaintiff argues that the copying of the software did not deprive the defendant, but AUTOCAD. Both the plaintiff and the defendant stand culpable. The defendant has been deprived of nothing while AUTOCAD has been deprived of four licenses: three by the defendant, and one by the plaintiff. In other words, the plaintiff did not depart from the standard set by his employer.

[41] The defendant says that the plaintiff initially denied taking the software. He only admitted to taking it after he was told that he had been overheard speaking to Stan at CADD Solutions Inc. The plaintiff was therefore dishonest.

[42] According to the plaintiff, Mr. Jones said that if he, the plaintiff, had gone to him on November 21, 1995 and indicated that he wanted a copy of the software, some arrangement could have been made. That evidence was not contradicted by Mr. Jones.

[43] I do not find that making and taking a copy of the software by the plaintiff in these circumstances constituted grounds for summary dismissal.

2. THE SAFEWAY DETAILS

[44] The plaintiff stated that the Safeway details which were on a normal two by three foot drawing had been discarded along with other drawings and prints during a cleanup of old work. He took the Safeway drawings showing the details and cut them up into booklet size. He cut them up in the plotting/trimming area of the office.

[45] The details are described by Mr. Jones as "fairly generic". He did not know whether the plaintiff had worked on the details.

[46] Mr. Jones had come out of a meeting "unexpectedly", and saw the plaintiff cutting up the drawing into small sheets. Mr. Jones never said anything to the plaintiff. His reason for not saying anything, is that he had to go back into the meeting and he wanted to find out from the others in the office, including Lindsay Bennett and Tammy Yuhasz whether any of them had given the plaintiff "permission" to take copies of the details.

[47] The inference to be drawn is that another employee in the office, including a more junior employee could have given permission to the plaintiff to take copies of the details.

[48] Lindsay Bennett also saw the plaintiff cutting up the details.

[49] It is not surprising that both Mr. Jones and Ms. Bennett saw the plaintiff cutting up the Safeway details because he never made any effort to conceal what he was doing. The plaintiff said he wanted the details to show prospective employers what he was capable of doing, even though he did not work on those particular details. He had however, worked on similar details for an I.G.A. store.

[50] There was no company policy, oral or written, or at least none that was communicated to Mr. Jones, that he could not do what he did. The fact that the plaintiff cut up the

Safeway details in the full view of others in the office leads me to conclude, not only did the plaintiff not know or think that what he did was wrong, by itself the cutting and taking of the Safeway details does not constitute grounds for terminating his employment on the basis of just cause.

3. THE DRAWINGS

[51] The plaintiff took a roll of drawings for a Langley townhouse project, and a roll of drawings for an I.G.A. project in Port McNeil. He had been the job captain for both projects. The drawings were obsolete. The plaintiff said he wanted copies of the drawings to show prospective employers the size of projects he had been in charge of as job captain.

[52] Mr. Jones said that if the plaintiff had asked for copies of the Langley drawings he would not have consented, because they are design drawings and the plaintiff is only capable of doing construction drawings. If the plaintiff did any work on the drawings, it would only be for the lettering or the blackening of the walls.

[53] The plaintiff worked on some of the I.G.A. drawings. Mr. Jones said that if the plaintiff had asked, he would have allowed him to take copies of his work on the I.G.A. project.

[54] The defendant's complaint appears to be that the plaintiff did not obtain prior permission before he took copies of the drawings, and the Safeway details. Mr. Jones admittedly knew that when he terminated the plaintiff in November 1995, the plaintiff would have to start looking for other work. In line with the practice in the architectural business, Mr. Jones knew that the plaintiff would need samples of his work to show prospective employers. Mr. Jones always reviewed samples of work before he hired anyone in his office, and at times he would have the plaintiff review the work samples.

[55] Mr. Jones gave evidence which amounted to opinion evidence. He said that there is a general practice in the industry regarding employees taking drawings from their employers: an employee should always ask an employer what drawings should be taken so the drawings are matched to what the employee has done, and they reflect the employee's ability and skill.

[56] I allowed Mr. Jones to give the evidence even though the notice requirements for expert evidence had not been complied with. The evidence goes to weight. I do not attach great weight to the evidence. If there was such a practice, policy, or procedure in the office, there is no evidence that it was communicated to the plaintiff.

[57] According to Mr. Latheron, if he had a revised set of drawings, it would mean that there would be an obsolete drawing. He admitted on cross-examination that if he had a number of obsolete drawings at his work station, he could throw the obsolete drawings away in order to keep his desk clean.

[58] Mr. Jones does not consider it likely that the plaintiff would use either the drawings or the Safeway details in order to compete with the defendant, or to gain any other advantage, competitive or otherwise.

[59] The defendant relies on Beyea v. Irving Oil Ltd. (1985), 8 C.C.E.L. 128 (N.B.Q.B.) where the plaintiff had arranged to deliver to his neighbour, waste oil which belonged to the defendant employer. The New Brunswick Queen's Bench held that even though the product was waste oil, financial loss to the employer was not relevant to an inquiry into theft as cause for dismissal.

[60] In my view Beyea is distinguishable because there, the court found that the plaintiff knew that the defendant would disapprove of what he was doing, and his behaviour was deceitful. Here, I do not find that the plaintiff knew that the defendant would disapprove of what it was he was doing. The drawings were obsolete and by Mr. Latheron's evidence, obsolete drawings could be thrown away. In Beyea there was a detailed policy procedure for dealing with waste oil, it was made known to the plaintiff. In addition, the court found that as Mr. Beyea exercised authority over a substantial number of employees, his actions would set the standard for their

behaviour.

4. COPYING DISCS WHICH CONTAIN ORIGINAL DRAWINGS

[61] Mr. Jones' original drawings are contained on computer discs. It is alleged that the plaintiff made unauthorized copies for his own use. The plaintiff denies having done so. The defendant's evidence on this point rests entirely on the evidence of Lindsay Bennett, who since the plaintiff's termination married, became Lindsay Harrison, and moved to Williams Lake. With respect, I will continue to refer to her as Ms. Bennett to avoid any confusion.

[62] From the end of November 1995, Ms. Bennett became suspicious of the plaintiff. She claims she saw him copying discs which are said to contain original drawings.

[63] The plaintiff was working at his drawing board. His computer work station was behind him. According to Ms. Bennett, the plaintiff had no computer work at that time. It was a small office and it was easy to know what each person was working on. Besides, Ms. Bennett, from where she sat, could easily observe what the plaintiff was doing.

[64] The plaintiff had a stack of computer discs beside his computer. The discs were labeled with different colours. AUTOCAD has only red labels. Ms. Bennett therefore concluded that the plaintiff was copying something other than AUTOCAD. According to Ms. Bennett, the computer functions he was carrying out were consistent with copying disc to disc as opposed to copying from the hard drive to disc. After a while the computer would beep. The plaintiff would turn around from his drawing board, remove the disc, insert another disc, press one key, and return to his drawing board. Ms. Bennett could see that the plaintiff's computer screen was black and white, indicating to her that the plaintiff was in MS DOS Shell and not DOS. Ms. Bennett maintained that if the plaintiff had been copying from his hard drive to the disc, he would have had to type in a series of key strokes and then press "enter".

[65] Ms. Bennett says she became suspicious when she saw the plaintiff with a medium size sport bag. She claimed that until then, the plaintiff had never used a bag of that sort. When everyone was out of the office, Ms. Bennett unzipped the bag and looked into it. She saw three boxes of discs. She did not look into the boxes. She recalls one of the boxes being labeled MS DOS.

[66] The defendant claims that the plaintiff brought the duffel bag to work for the purpose of concealing removal of the defendant's property. The plaintiff, however, says that he started bringing the bag to work when he moved to West Vancouver in September 1995.

[67] I accept the plaintiff's evidence that the medium size bag he brought to Court with him each day of this trial was the same bag he started to take to work with him after he and his family moved to West Vancouver in September 1995, before his employment was terminated. It is similar to the bags people commonly take to offices these days for carrying workout gear, books, their lunch, or whatever. The bag is too small too have accommodated any of the drawings the plaintiff is said to have stolen from the office.

B. DOES JUST CAUSE EXIST?

[68] While the defendant must prove on a balance of probabilities that the plaintiff took copies of the computer discs containing the defendant's original drawings, it must be remembered that the defendant is alleging that the plaintiff committed theft. While the defendant does not have to meet a criminal burden of proof, the burden of proof required is commensurate with the seriousness of the allegation: Continental Ins. Co. v. Dalton Cartage Co. Ltd. (1982), 131 D.L.R. (3d) 559 at p. 563. On this aspect of the case, the defendant has not met the burden of proof required and I am unable to conclude that the plaintiff copied the computer discs containing the defendant's original drawings. It may be that Ms. Bennett is correct when she says that the plaintiff was copying from disc to disc, but I must still be satisfied that the discs contained the defendant's original drawings. I am

not so satisfied.

[69] I find that the plaintiff did not try to conceal either the copying of the discs or the software, or the fact that he was taking copies of the Langley or I.G.A. drawings. The defendant made much of the fact that it was not until late in this litigation that the plaintiff produced the drawings he took from the office, and that it was consistent with the plaintiff deliberately trying to conceal his acts. I find that it was not because the plaintiff was trying to deceive the defendant by hiding what he had done, but because the plaintiff honestly thought there was nothing wrong in taking copies of obsolete drawings, or copies of the Safeway details. If the plaintiff was trying to hide what he was doing in a small open area office, he would not have done it so that he could be seen or heard. The plaintiff had a key to the office. If he was deliberately trying to conceal what it was he was doing, he would have done so when no one was at the office.

[70] The defendant says that the plaintiff was dishonest, and that dishonesty is always grounds for dismissal without notice. The defendant also says that in taking a copy of the AUTOCAD software, a copy of the design drawings for the Langley apartment building, a copy of the construction drawings for the I.G.A. project, and copies of the Safeway details, the plaintiff was dishonest and deceitful. It is said that the plaintiff's thefts and dishonest conduct revealed a character flaw in the plaintiff which destroyed the defendant's confidence in him.

[71] The conduct complained of here occurred at a time when the plaintiff had already be given notice of termination. The plaintiff was required to mitigate his losses by taking steps to look for other work. Whatever the working relationship was between the parties before the plaintiff was given notice of the termination of his employment on November 21, 1995, I do not think the law can ignore the harsh reality that an employee's attitude towards his employer will change once the employee is told that his employment will be terminated. In saying this, I do not mean that an employee is free to steal from the employer or commit other serious breaches of the express or implied terms of the employment contract. However, once the employee is given notice, the employee's obligation to exert his best efforts for the employer must co-exist with the employee's obligation to mitigate his damages by making his best effort to find other work.

[72] Here, I do not find that there was any intent on the part of the plaintiff to deliberately deceive, or defraud the defendant. The plaintiff's conduct must be considered in light of the fact that he had already been given notice and he knew that in less that six weeks he would be without work. I accept the plaintiff's evidence that he took the details and the drawings so that he could show prospective employers the size of the jobs he had worked on and the type of work he was capable of carrying out. I do not think the conduct complained of is serious enough in these circumstances to warrant terminating the plaintiff on the basis of cause.

[73] From observing Mr. Jones and hearing his evidence, I accept that after the plaintiff was wrongfully dismissed on November 21, 1995 his productivity level fell. It was likely due in part to both the termination and the decreased workload. Mr. Jones said that the plaintiff had not done a stick of work for the last six weeks to warrant any pay. In my view, Mr. Jones seized on the plaintiff's taking a copy of the software as an opportunity to immediately terminate the plaintiff's employment and to relieve the defendant of any further obligation to pay him.

[74] The defendant relies on McPhillips v. British Columbia Ferry Corp. (1994), 94 B.C.L.R. (2d) 1 (C.A.), and King v. Oshawa Group Ltd. (1993), 46 C.C.E.L. 181 (Ont. Gen. Div.)

[75] In McPhillips, the plaintiff was responsible for the purchase of draperies for a ferry refit. He ordered from a drapery firm, draperies and a bedspread for his own use and charged the goods to his employer's account. He made no effort to pay for the items himself. The acts complained of in this

case do not approach the deliberate acts of deceit in McPhillips.

[76] In King, the court found on a balance of probabilities, that the plaintiff had committed a theft of a flashlight and the defendant was justified in summarily dismissing him from its employ. The defendant had previously been expressly warned about the defendant's policy about the applicable policy. Here, there was no policy about taking obsolete drawings, or any requirement for prior consent. If there was such a policy or practice, it was made known only to Mr. Jones.

[77] The defendant also relies on Murrell v. Simon Fraser University et al, unreported, April 30, 1996, B.C.S.C., Vancouver Registry No. C945866. In my view, that case is also distinguishable. There, the plaintiff, the university's senior administrative staff member, breached her position of trust by using faculty funds as a source of personal loans, by ordering a microwave for personal use, by using a university charge card contrary to policy, and committing many other acts which together amounted to just cause. I do not think the dishonesty which was found to exist in that case can be compared to the dishonesty which is said to have been exhibited by the plaintiff in this case.

C. THE PERIOD OF REASONABLE NOTICE

[78] The plaintiff was wrongfully dismissed and he is therefore entitled to damages equivalent to what he would have received had he been given reasonable notice based on the character of employment and the length of service: Ansari v. B.C. Hydro (1986), 2 B.C.L.R. (2d) 33, affirmed (1986), 55 B.C.L.R. (2d) xxxiii (C.A.)

[79] The plaintiff says that the appropriate range of notice is seven to nine months. The defendant says that the plaintiff's damages should be limited to four to six months, less the one month of notice that the plaintiff received from November 21 to December 21, 1995.

[80] The plaintiff is 45 years old. He had worked with the defendant for six years as an architectural technician, a position for which he is trained. In 1995 he was earning $4,200 each month. Up to the date of trial he has been unable to find similar alternate employment. The plaintiff has set up an office at home and since May 1, 1996 has been able to find a modest amount of contract work.

[81] The facts in White v. BC Timber Limited, (unreported) September 14, 1983, B.C.S.C., Vancouver Registry No. C825099, are similar. There the plaintiff was an engineering technician whose employment was terminated after just over eight years of service. He was earning an annual salary of $31,920 plus substantial fringe benefits. He was 37 years old. The period of reasonable notice was set at seven months.

[82] Under all of the circumstances, I find an appropriate period of notice to be eight months.

[83] During the eight months, the plaintiff received the following amounts from consulting or contract work:

May 1996	$2,962.00
June 1996	$ 850.00
July 1996	$ 625.00
August 1996	$2,400.00

[84] With the help of an accountant, the plaintiff relies on a schedule of operating which deducts from his consulting income, direct business expenses of $7,839.16, office-in-home expenses of $2,196.18, and automobile expenses of $1,804.36 for a net business income of $648.70 for ten months ended October 31, 1996.

[85] Included in the direct business expenses is $2,551.37 for the purchase of a computer. In calculating the office-in-home expense, the plaintiff has claimed twenty percent of his home expenses for utilities, insurance, maintenance, property taxes, municipal taxes and security monitoring.

[86] The defendant says many of the expenses claimed by the plaintiff would have been incurred whether he had started his consulting business or not. Therefore the only expenses that should be deducted are advertising expenses, bank charges, meals and entertainment, legal and accounting fees, and postage totaling $1,700.13. The defendant also says that it is appropriate to reduce the $6,058.28 the plaintiff has incurred towards the purchase of office equipment and a computer lease. It is said that the computer may have some personal use, and that it and the office equipment may well have a ten, twelve or fifteen year lifetime.

[87] The defendant does not argue that the plaintiff has failed to mitigate, or that the plaintiff ought not to have set up his consulting business at home. While the law does not appear to be clear on the matter, I think a terminated employee is allowed the reasonable expenses incurred in setting up his business at home, particularly if the plaintiff has been unsuccessful in finding employment comparable to what he had before his employment was terminated. In setting up a consulting business at home, the plaintiff is attempting to mitigate his losses. If he had set up an office in a normal office environment, he would have been able to claim his reasonable business expenses, such as rent and other overhead, and I do not see why he cannot do so for an office at home.

[88] I agree with the defendant that it should not have to bear the entire capital cost of the computer but there was no accounting evidence on what the depreciated or amortized amount would be. In my view, an allowance of twenty percent of the capital cost of the computer and office equipment is appropriate. Therefore, the plaintiff's total consulting expenses are reduced from $11,839.70 to $9,333 or $933.33 per month.

[89] From the eight months notice must be deducted the one months working notice from November 21 to December 21, 1995, and the actual amounts earned by the defendant during the remaining seven months, less his consulting expenses of $933.33 from January 1996 to and including July 1996.

[90] Therefore, the calculations are as follows:

1.	Eight months notice ($4,200 x 8)	$33,600.00
2.	Less one months working notice	- 4,200.00
		$29,400.00
3.	Monies earned from May to August 1995 $6,837	
	Less expenses from January to July 1995 ($933.33 x 7) $6,533.31	- 303.69
	Balance	$29,096.31

[91] The plaintiff will have judgment against the defendant in the amount of $29,096.31 together with costs and court order interest.

"Loo, J."