CITATION: *Morison v Ergo-Industrial Seating Systems Inc.*, 2016 ONSC 6725
COURT FILE NO.:13-56686
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SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Tom Morison, Plaintiff

AND

Ergo-Industrial Seating Systems Inc., Defendant

BEFORE: Justice P. E. Roger

COUNSEL: Paul Champ and Christine Johnson, for the Plaintiff

Albert Campea, for the Defendant

HEARD: October 11 to 14, 2016

REASONS FOR DECISION

[1] This is a wrongful dismissal action. The plaintiff, Tom Morison, sues the defendant, Ergo-Industrial Seating Systems Inc., seeking:

(a) damages for reasonable notice equivalent to 14 months' remuneration, less mitigation income earned during the notice period;

(b) aggravated damages for alleged breaches of the duty of good faith; and

(c) punitive damages for alleged high-handed treatment of the plaintiff.

[2] The plaintiff was 58 years old at the time of his dismissal, born on August 14, 1954. He worked in furniture sales since 1978 for a number of companies. His relationship with the defendant began on August 9, 2004. The nature of their relationship between August 9, 2004 and January 1, 2006, is an issue (whether the plaintiff was then an employee or an independent contractor). It is not disputed that the plaintiff was an employee by January 1, 2006, until his dismissal on October 22, 2012.

[3] The plaintiff was the defendant's regional manager, responsible for Eastern Ontario and Western Quebec, as well as manager for federal government sales. He claims that he was a top salesperson, unaware of any issue relating to his employment until October 22, 2012, when the defendant's owner and president called him to inform him that his employment was terminated. Five months' notice was offered, including one month of working notice. The plaintiff alleges that the defendant did not act fairly and that there was no basis to allege just cause. He alleges that allegations of cause were made in bad faith to facilitate a more favourable settlement.

[4] The defendant disputes the bad faith allegations, arguing that it had a *bona fide* belief of cause relating to an alleged mismanaged demo chair account, failing to properly market the health care line of products, and difficulties with the plaintiff cooperating positively with his immediate superior. The defendant denies that cause was a strategy to save money over the negotiations related to the plaintiff's dismissal. The defendant alleges that the appropriate period of reasonable notice was six to eight months. The defendant recognizes that the plaintiff was an employee from January 1, 2006 to October 22, 2012 but argues that he was an independent contractor from August 9, 2004 until December 31, 2005, such that the period of employment is six years, nine months, and 22 days, rather than eight years and slightly over two months if the period of employment began on August 9, 2004. The defendant alleges that the plaintiff failed to mitigate and that this is not a situation warranting either aggravated or punitive damages.

[5] The issues raised in this case can be summarized as follows:

(a) the amount of compensatory damages in lieu of notice for wrongful dismissal. This issue includes determining the length of service, what constitutes reasonable notice of termination in this particular case, the plaintiff's remuneration during the notice period, whether the defendant established that the plaintiff failed to mitigate, and how this should impact damages;

(b) whether aggravated damages are available; and

(c) whether punitive damages are available.

Damages for Reasonable Notice

[6] I will first address the length of service. The plaintiff was hired as an independent sales contractor effective August 9, 2004. He was then hired as an employee effective December 1, 2006. Subsequently, in 2008, the Canada Revenue Agency (CRA) conducted a review of the self-employment status of the plaintiff for the period commencing January 1, 2006. CRA determined that he was an employee, with the result that the plaintiff and defendant made all required adjustments back to January 1, 2006.

[7] Reasonable notice is implied for employees and also for the intermediate category of dependant contractor: see e.g. *McKee v. Reid's Heritage Homes Ltd*., 2009 ONCA 916, 315 D.L.R. (4th) 129. The first part of this analysis it to determine if the plaintiff was an employee or a contractor. If he was a contractor, the next step would be to determine whether he was an independent or a dependent contractor.

[8] In determining the status of a work relationship, as mentioned in *McKee*, at para. 37, one looks at the total relationship of the parties, assessing whether the worker was engaged to perform the services as a person in business on his own account. The employer's level of control over the worker is a factor, as are the degree of financial risk taken by the worker and the worker's opportunity for profit.

[9] As stated in *McKee*, at para. 39:

> In *Belton* [*v. Liberty Insurance Co. of Canada* (2004), 72 O.R. (3d) 81 (C.A.)], Juriansz J.A., writing on behalf of the court, upheld the use of the following five principles, modelled on the *Sagaz* [*671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59, [2001] 2 S.C.R. 983] factors, at paras. 11, 15:
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> 1. Whether or not the agent was limited exclusively to the service of the principal;
> 2. Whether or not the agent is subject to the control of the principal, not only as to the product sold, but also as to when, where and how it is sold;

3. Whether or not the agent has an investment or interest in what are characterized as the "tools" relating to his service;

4. Whether or not the agent has undertaken any risk in the business sense or, alternatively, has any expectation of profit associated with the delivery of his service as distinct from a fixed commission;

5. Whether or not the activity of the agent is part of the business organization of the principal for which he works. In other words, whose business is it?

[10] Paragraph 4.3 of the Independent Sales Contractor Agreement makes it clear that this is an exclusive arrangement. Similarly, paragraphs 2.1, 3.2 to 3.6, and 4.1 demonstrate significant control by the defendant over the products to be sold, including where, when, and how the products are to be sold. The plaintiff had no expectation of profit other than commission. The defendant is required to provide company sales policies, product/sales training, sales literature, business cards, and stationary sufficient to perform the sales duties and to pass along all leads for business in his territory. When you consider the nature of the parties' relationship during this time, it is clear that the plaintiff's activities are part of the business of the defendant. When you consider all the evidence presented and assess the *Belton* factors, the analysis favours that the total relationship between the parties was, from the outset, one of employment.

[11] Consequently, the length of service — a factor to be considered for the purposes of determining what constitutes reasonable notice of termination — was from August 9, 2004 to October 22, 2012, a period slightly exceeding eight years.

[12] As indicated at para. 28 of *Honda Canada Inc. v. Keays*, 2008 SCC 39, [2008] 2 S.C.R. 362, in determining what constitutes reasonable notice of termination, the courts have generally applied the following principles outlined in *Bardal v. Globe & Mail Ltd.* (1960), 24 D.L.R. (2d) 140 (Ont. H.C.), at p. 145:

> There can be no catalogue laid down as to what is reasonable notice in particular classes of cases. The reasonableness of the notice must be decided with reference to

> each particular case, having regard to the character of the employment, the length of service of the servant, the age of the servant and the availability of similar employment, having regard to the experience, training and qualifications of the servant.

[13] This list is not exhaustive and, as indicated by Bastarache J. in *Honda v. Keays*, no one factor should be given disproportionate weight.

[14] The plaintiff was 58 years old at the time of dismissal. The length of service was just over eight years. The plaintiff was the defendant's sales manager in the Ottawa region from Kingston, north to the Quebec border, including Gatineau, and manager of sales to the federal government. His duties included the development of sales in his territory with the private and health sector and also with the federal government. He was required to meet sales targets and ensure strong and growing customer relationships in the public and private sector. The evidence established that the market for office chairs is somewhat complex, and the position involved a working knowledge of the request for proposal process. The level of demand and complexity of the plaintiff's job with the defendant was reflected in his compensation level. The evidence also indicated that this is a somewhat narrow market in terms of players, that established manufacturers tend to keep their representatives, and, consequently, that it is hard to break into this market and even more so at a level comparative to that enjoyed by the plaintiff with the defendant.

[15] The plaintiff referred me to a number of cases with a range of reasonable notice of between 10 and 14 months. The defendant distinguished these cases and referred me to *Ackerman v. Thomson and McKinnon, Auchincloss, Kohlmeyer, Inc.* (1974), 4 O.R. (2d) 240 (C.A.) and *Lelievre v. Commerce and Industry Insurance Company of Canada,* 2007 BCSC 253, in support of six to eight months of reasonable notice.

[16] Determining the period of reasonable notice is an art not a science: *McNevan v. AmeriCredit Corp.* (2008), 94 O.R. (3d) 458 (C.A.), at para. 34, citing *Minott v. O'Shanter Development Co.* (1999), 42 O.R. (3d) 321 (C.A.), at pp. 343–44. It involves the court weighing and balancing a catalogue of relevant factors, with no two cases being identical.

[17] When I weigh and balance all relevant aspects of the evidence, particularly with reference to the character of the employment, the length of service, the plaintiff's age, and the availability of similar employment, considering his experience, training, and qualifications, I conclude that these factors militate in favour of a longer notice period and that 12 months constitutes reasonable notice of termination in this case.

[18] The parties could not agree on what the plaintiff would have earned during the notice period, as they could not agree on his commission income.

[19] The plaintiff's compensation package in 2012 consisted of a base salary of $115,000, a car allowance of $9,450, and benefits, plus commissions. The plaintiff's prior commissions were $41,887.49 in 2010, $76,060.23 in 2011, and $74,982.73 paid by the defendant in 2012 up to November 20, 2012 (up to the end of the one-month working notice).

[20] In his submissions, the plaintiff calculated or estimated that his commission income for November 2012 was actually $20,086.63, or $8,208.66 more than what was paid by the defendant. The plaintiff adjusted his 2012 commission income of $74,982.73 by adding to that amount the $8,208.66 he estimated he was due, for a total of $83,191.39 (this is method one of estimating the plaintiff's 12 months' commissions: see Exhibit B). The plaintiff also estimated that his December commissions would have been $26,322 (see Exhibit B for these calculations) and argued that December sales must be considered as they represented his best sales month. Using method one (which assumes 2012 commissions of $83,191.39), the plaintiff calculated his monthly income at $17,303 and, using method two (which assumes 2012 commissions at $92,092.86), his monthly income would be $18,045 (see Exhibit B). The plaintiff also suggested another method to capture December 2012 commissions (method three) which used commissions earned from January 2012 to December 2012, arriving at commissions of $108,261.12 for 2012 and an average for commissions over the past two years of $92,509.12. Method three would generate total monthly remuneration of $19,392.59 (annual remuneration = $115,000 base salary + $9,449.96 allowances + $108,261.12).

[21] The defendant argued that I should use a three-year average and that I should not increase the November commissions paid, as these sales were shipped after the plaintiff's

dismissal and, in any event, Mr. Morison was not the effective and substantial cause of the added sales, particularly not of the December 2012 sales. The defendant calculated the three-year average for commissions at $67,046.37 (I arrive at $64,310.15 using the unadjusted 2012 number and at $67,046.37 on the 2012 adjusted number). This would generate total monthly remuneration of $15,958.02 ($115,000 + $9,449.96 + $67,046.37). Another method, suggested by the defendant, would be to average out the commissions from January 2012 to November 2012 ($74,982.73) at $6,816.61 per month, which would generate total remuneration in the range of $17,187.44. I note that if we use an average for commissions of the last two years we arrive at $16,664.28 total monthly remuneration and, if we adjust for the added November commissions, the average over the last two years would be $17,006.31.

[22] Significant sales were realized in September and October 2012, which shipped in late November, early December 2012, and in January 2013 (see Exhibit 1, tab 20). Having considered the evidence at trial, I am convinced, on a balance of probabilities, that the plaintiff was an effective and substantial cause of these sales. Indeed, they were made to clients of the plaintiff prior to his dismissal, although not yet shipped. Fairness requires that we somehow consider these sales when determining the plaintiff's commission income over the notice period. As well, significant sales were made on November 15, 2012, in December 2012, and in January 2013 to an important historical client of the plaintiff (Exhibit 1, tabs 33 and 35). This evidence supports the plaintiff's arguments that his commission income was steadily increasing.

[23] Furthermore, the evidence (see e.g. Exhibit 2, tab 8) indicates that the defendant's sales in this region increased each year between 2010 and 2012. We can also see that 2013 sales went up and that the largest 2013 sales were made to clients who were historically clients of the plaintiff (see Exhibit 2, tab 10). Even if we exclude 2013 and only consider sales for 2011 and 2012, we see that sales for each of 2011 and 2012 vastly exceeded the 2010 sales in this region and that the trend in sales has clearly been upward.

[24] Consequently, I do not believe that using the 2010 commission income in the calculation of some average would generate a fair estimation of the plaintiff's commission income. Using an average can, in some circumstances, be a useful guide. However, in this

case, even if we only consider the plaintiff's commissions paid up to November 2012 ($74,982.73), we see that the amount of commissions earned by the plaintiff in 2010 ($41,887.49) is out of line with the amount earned for commissions in each of 2011 and 2012. We also see a clear trend upward with a significant increase between 2010 and 2011 and a 9.4% increase in commissions between 2011 and 2012. Using the 2010 commissions would therefore undervalue the plaintiff's commissions over the notice period. Similarly, using the full amount of the increase between 2011 and 2012 might overvalue the plaintiff's commissions. Considering all of the evidence, applying half of that 9.4% increase, or 4.7%, to the adjusted amount of commissions for 2012 ($83,191.39) would generate commissions over the notice period of $87,101.39. For the reasons stated above, assessing all of the evidence on sales and commissions and considering all of the many submissions of both parties, this seems the fairest estimation of the plaintiff's commission income over the notice period.

[25] Consequently, I find that the amount of commission income for the plaintiff for a period of 12 months is $87,101.39. Adding his annual allowance and benefits, plus annual base salary, brings the plaintiff's total remuneration during the notice period to $211,551.35, or $17,629.28 per month. I realize that this monthly amount is approximately $1,697 over the amount estimated by the defendant for the three-year monthly average ($15,932.23). However, considering the evidence relevant to the plaintiff's income and to the defendant's sales for the period starting in 2010 up to 2012, and considering the significant sales to historical clients of the plaintiff made in December 2012 or early in the defendant's fiscal 2013, I am satisfied that this is a fair assessment of what the plaintiff's income would have been during the notice period.

[26] The onus is on the defendant to establish that the plaintiff's conduct in seeking alternative employment was unreasonable in all respects. The defendant argues that the plaintiff made too few applications, exerted too few efforts, conducted a job search that lasted only six weeks, took the first job he was offered at considerably lower income without sufficiently trying to negotiate better terms, did not look for jobs outside the office furniture industry, and did not use a job-hunting firm. The defendant brought to my attention the decisions in *Anderson v. Cardinal Health*, 2013 ONSC 5226, *Robinson v. Team Cooperheat-*

MQS Canada Inc., 2008 ABQB 409, 95 Alta. L.R. (4th) 249, and *Steinebach v. Clean Energy Compression Corp.*, 2016 BCCA 112, 84 B.C.L.R. (5th) 389.

[27] Mr. Morison, through his contacts, found employment within six weeks of his dismissal with a competitor of the defendant. The evidence from most witnesses was that this is a rather limited market with few opportunities, as manufacturers are often already represented. The evidence from most witnesses was that, generally, good employment opportunities in this industry are rare. Considering the experience of the plaintiff, it was not unreasonable for him to look initially in the industry and in the market that he knew and had contact in. Through an acquaintance, an opportunity materialized. The base income was quite lower than what Mr. Morison was accustomed to; however, he testified that he needed to generate income. Indeed, the defendant did not pay statutory amounts owing until June 15, 2015. Mr. Morison's evidence was that he negotiated for the best possible terms of employment. The representative of this new employer testified that more was simply not available. Mr. Morison expected to generate more commission income than what actually materialized.

[28] I agree that Mr. Morison could not have known precisely what his income would turn out to be and that, in all of the circumstances, it was not unreasonable for him to have accepted such employment. Mr. Morison testified that he was under financial pressure. He testified that he had to cash significant amounts of RRSPs in 2013 and still his evidence was that he was hurting financially and eventually had to sell his home. He also testified that he made additional and ongoing efforts to find other employment. Although his evidence in this area was not overly detailed, it was more than sufficient to establish that he did not act unreasonably. I find the arguments raised by the defendant in this regard to be unsupported by the evidence and, in any event, insufficient to meet its onus of establishing a conduct that was unreasonable in all respects.

[29] Consequently, the plaintiff's damages for reasonable notice are:

(a) 12 months' notice period, less one month paid working notice: 11 x $17,629.28 = $193,922.08;

(b) less statutory amounts paid on June 15, 2015: $42,144;

(c) less mitigation earnings from Neutral Posture until October 21, 2013: $52,838.76;

(d) total: $98,939.32, plus pre-judgment interest on that amount.

Aggravated Damages

[30] In an action for wrongful dismissal, the general rule is that damages are limited to those resulting from the employer's failure to give proper notice (in breach of the implied obligation in the employment contract to give reasonable notice in the absence of just cause), and that no damages are available to the employee for the actual loss of his or her employment or for the pain and distress that may have been suffered as a result of being terminated. That is because, at the time the contract of employment was formed, psychological damages would not have been in the contemplation of both parties as a result of the dismissal, as the dismissal was always a clear legal possibility. Damages resulting from the manner of dismissal must then be available only if they result from conduct during dismissal that is unfair or in bad faith: see *Honda v. Keays*, *supra*, at paras. 50, 56–57). As indicated by Bastarache J. in *Honda v. Keays*, at paras. 58–60:

> In *Wallace* [*v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701], the Court held employers "to an obligation of good faith and fair dealing in the manner of dismissal" (para. 95) and created the expectation that, in the course of dismissal, employers would be "candid, reasonable, honest and forthright with their employees" (para. 98). At least since that time, then, there has been expectation by both parties to the contract that employers will act in good faith in the manner of dismissal. Failure to do so can lead to foreseeable, compensable damages….
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> To be perfectly clear, I will conclude this analysis of our jurisprudence by saying that there is no reason to retain the distinction between "true aggravated damages" resulting from a separate cause of action and moral damages resulting from conduct in the manner of termination. Damages attributable to conduct in the manner of dismissal are always to be awarded under the *Hadley* [*v. Baxendale* (1854), 9 Ex. 341, 156 E.R. 145] principle. Moreover, in cases where damages are awarded, no extension of the notice period is to be used to determine the proper amount to be paid. The amount is to be fixed according to the same principles and in the same way as in all other cases dealing with moral damages. Thus, if the employee can prove that the manner of dismissal caused mental distress that was in the contemplation of the parties, those

> damages will be awarded not through an arbitrary extension of the notice period, but through an award that reflects the actual damages. Examples of conduct in dismissal resulting in compensable damages are attacking the employee's reputation by declarations made at the time of dismissal, misrepresentation regarding the reason for the decision, or dismissal meant to deprive the employee of a pension benefit or other right, permanent status for instance (see also the examples in *Wallace*, at paras. 99-100).
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> In light of the above discussion, the confusion between damages for conduct in dismissal and punitive damages is unsurprising, given that both have to do with conduct at the time of dismissal. It is important to emphasize here that the fundamental nature of damages for conduct in dismissal must be retained. This means that the award of damages for psychological injury in this context is still intended to be compensatory. The Court must avoid the pitfall of double-compensation or double-punishment that has been exemplified by this case.

[31] What is fatal to the plaintiff's claim for aggravated damages is the insufficient evidence of actual damages resulting from the manner of dismissal. The plaintiff's evidence on this point was extremely limited and really had more to do with the ordinary pain, distress, and financial stress associated with losing a job, rather than that which might result from the manner of dismissal. Otherwise, the claim was made out.

[32] Although the defendant initially alleged cause (until June 2015), its conduct was completely inconsistent with allegations of just cause. Just cause generally involves conduct so serious that there is a complete breakdown in the relationship. Here, the defendant made a decision to terminate the plaintiff's employment around mid-September 2012. This is evidenced by the offer of employment to his replacement, dated September 27, 2012 (Exhibit 1, tab 25), and from the earlier meetings with this candidate. Nonetheless, the defendant first provided notice to the plaintiff of his dismissal on October 22, 2012, with one month working notice. This conduct is inconsistent with the allegations of cause alluded to in the dismissal letter and wholly inconsistent with the pleadings of cause contained in the defendant's statement of defence.

[33] This inconsistency is more apparent when one considers the defendant's Employee Handbook (Exhibit 1, tab 50). As indicated by the defendant's handbook, dismissal for cause involves a situation where continuing the relationship is untenable such as following a serious violation, act of dishonesty or conduct that is materially detrimental to the business, or the financial position of the company. This is simply not the case, and the conduct of the defendant was completely at odds with any such factual concept of cause.

[34] In its statement of defence, the defendant alleges cause essentially on three bases: poor performance and failing to market the healthcare and private sector; failing to meet sales targets; and abuse of the demo account "or worse".

[35] The evidence was clear that the plaintiff generally met and exceeded his sales target. He was not challenged on this point, and the defendant did not produce evidence that could in any way support its position that this belief was reasonably held. On the contrary, it was essentially admitted that Mr. Morison was one of the defendant's top performers.

[36] The plaintiff provided a significant amount of evidence that he diligently marketed to the private sector, and particularly to the healthcare sector. The defendant's evidence on this point was quite general and inconsistent and did not challenge the evidence of the plaintiff relating to his efforts. The fact that the plaintiff did not include this experience in his curriculum vitae does not support this allegation or the reasonableness of the belief. Similarly, the fact that the plaintiff's immediate superior felt he lacked energy on this issue and that someone else might be more driven does not at all convince me that the defendant had reasonable beliefs to allege cause on this basis.

[37] Similarly, on the demo account, it was clear that the plaintiff was doing his best to address the concerns raised by the defendant and that this was, at worst, a management problem/issue for the plaintiff, shared with the defendant and amongst a number of other representatives of the defendant. It was admitted by a former manager of the defendant that Mr. Morison's concerns over this issue were valid and well taken, and not reflective of sloppy handling. What is particularly troubling is that, despite Mr. Cassaday stating that he did not share this opinion, the defendant did not investigate this issue prior to early 2014. One would

have thought that the duty to investigate such a serious allegation as "abusing the Demo Account, or worse" would have required the defendant to investigate this issue beforehand. In any event, all of this clearly contradicts the defendant's alleged *bona fide* belief in having a reasonable basis for making such an allegation.

[38] Another convincing inconsistency is the clear evidence that the actual dismissal date of October 22, 2012 was not at all established or arrived at as the result of some investigation or finding related to the allegations of cause. It is clear that the dismissal date was arrived at simply in an effort to accommodate the starting date of the hired replacement. Another inconsistency with the allegations that these beliefs were reasonably held is the complete lack of any warning.

[39] Mr. Cassaday, for the defendant, tried to blame the reasonableness of the defendant's belief at the time on his previous counsel, which I found totally unconvincing. Mr. Cassaday admitted that he was advised as early as September 24, 2012 that he would not be able to establish cause. The defendant's failure to bring evidence in support of the reasonableness of such beliefs completely contradicts this allegation and I do not accept Mr. Cassaday's evidence that he reasonably believed that the defendant had cause. This is amplified when one factors into the analysis the defendant's Employee Handbook and how the defendant defines dismissal with cause therein.

[40] It is clear that an employer can allege just cause as a ground for dismissal and that abandoning cause at any stage, in the course of the action, does not necessarily mean that such conduct should attract aggravated damages. Provided the employer had a reasonable basis on which it believed it could dismiss an employee for cause, a finding of bad faith will not automatically follow: see *Mulvihill v. Ottawa (City)*, 2008 ONCA 201, 90 O.R. (3d) 285, at paras. 49, 55 .

[41] However, in this case, the evidence is rather clear that the plaintiff was simply not a good fit with his new immediate superior (Exhibit 1, tab 19 being a convincing example). It is equally clear that this superior knew someone she respected who expressed interest in Mr. Morison's position. The defendant was interested in trying someone new who had what

the defendant perceived was a more positive disposition towards the healthcare sector. The defendant was clearly entitled to these beliefs and to hire someone else. However, none of this constituted reasonable belief in just cause.

[42] Considering all the evidence on this issue, I conclude that alleging cause was an integral part of the defendant's negotiation strategy. The defendant was counselled in September 2012 that it would not be able to establish cause. The defendant alluded to a possibility of alleging cause in its dismissal letter. The defendant then alleged cause in its defence and adopted a rather aggressive position while providing no convincing evidence at trial that could support its alleged reasonable belief in cause or that it was reasonably justified in initially adopting a position of just cause.

[43] This is exactly the kind of conduct mentioned in *Honda v. Keays* as an example of conduct in dismissal that could result in aggravated damages. I find that the defendant did not act fairly or in good faith in the manner of dismissal of Mr. Morison as the defendant was not candid, reasonably honest, nor forthright with Mr. Morison. The defendant, by its allegations made with no reasonable basis in support thereof, attacked the reputation of Mr. Morison by making misrepresentations regarding the reasons for his dismissal for financial gain (i.e. seeking a better outcome in its negotiations with Mr. Morison). This is a classic example of bad faith.

[44] However, the law is clear that any damages resulting from such a conduct are to be compensatory and are to reflect the actual damages sustained.

[45] On this point, the evidence in this case is quite different from that in *Middleton v. Highlands East (Municipality)*, 2013 ONSC 763, 8 M.P.L.R. (5th) 114, where the Court found, at para. 142, sufficient evidence of mental distress. Here, the evidence of mental distress caused by the manner of dismissal cannot be dissociated from the usual anguish and stress resulting from having one's employment terminated. I point out that I am not concerned with the lack of a medical report (on which time was spent during closing arguments), but rather with the lack of convincing evidence of mental distress on which I could properly assess damages resulting from the manner of dismissal. By way of example, some of the plaintiff's evidence on this related to how he was in a fog when he found out by a friend that

he would be dismissed and how this was a horrible day, with other parts of his evidence relating to his financial distress. Despite mentioning that the allegations of cause got his back up and caused him some upset, his evidence in that regard was extremely superficial and lacked particulars. The evidence is not at all convincing and is simply not sufficient to warrant any damages in this context, since normal distress and hurt feelings resulting from a dismissal are not compensable. For these reasons, the facts relevant to damages in this case are quite different from those in cases such *as Boucher v. Wal-Mart Canada Corp.*, 2014 ONCA 419, 120 O.R. (3d) 481, and *Strudwick v. Applied Consumer & Clinical Evaluations Inc.*, 2016 ONCA 520, and do not give rise to compensable damages.

[46] As indicated in *Canada (A.G.) v. Robitaille*, 2011 FC 1218, at para. 38, the employee's testimony may be sufficient to establish such damages and the absence of medical evidence does not deny the damages suffered by the employee as long as there is evidence of such damages and evidence of a causal connection between the moral injury and the wrongful conduct.

Punitive Damages

[47] The plaintiff's allegations in this regard include the following facts: the manner of dismissal (a quick telephone call followed by a letter that alluded to the possibility of cause); the allegations of cause initially pleaded and the lack of a reasonable belief on the part of the defendant to support the allegations of cause; the lack of any warning and of any investigation; the lack of reasons provided by the employer at the time of dismissal; the two months' delay by the defendant in providing the plaintiff with his record of employment; the failing of the defendant to pay any amount owing under the *Employment Standards Act, 2000*, S.O. 2000, c. 41, until June 15, 2015 ($42,144 was paid on that date); the financial impact these delays had on the plaintiff (he had to cash significant amounts of his RRSPs and had to sell his house); the employer's knowledge of the plaintiff's financial circumstances (Mr. Cassaday admitted to such knowledge); that the allegations of cause were made for tactical reasons with no reasonable basis supporting such a belief (I made this finding above); and that the dismissal letter did not comply with the *Employment Standards Act, 2000*. The plaintiff also directed my attention to a number of cases on this issue.

[48] The defendant argued that punitive damages are not warranted. It pointed to factual differences in the cases relied upon by the plaintiff and argued that the facts in this case are not exceptional, with no intentional or harsh treatment over a period of time.

[49] An excellent summary of the law applicable to punitive damages is provided by our Court of Appeal in *Boucher v. Wal-Mart Canada Corp.*, *supra*, at paras. 78–92. Basically, in an employment or breach of contract setting, three basic requirements need to be established by the plaintiff:

1) That the defendant's conduct is reprehensible, "malicious, oppressive and high-handed", and "a marked departure from ordinary standards of decent behaviour".

2) That a punitive damages award, when added to any compensatory award, is rationally required to punish the defendant and to meet the objectives of retribution, deterrence, and denunciation.

3) That the defendant committed an actionable wrong independent of the underlying claim for damages for breach of contract (in this case, something other than breach of the implied notice provision). A breach of the defendant's duty of good faith and fair dealings would constitute an independent actionable wrong.

[50] As indicated in *Honda v. Keays,* at paras. 62 and 68:

> [Writing for the majority in *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595, at para. 79, Binnie J.] specified that an "actionable wrong" within the *Vorvis* [*v. Insurance Corporation of British Columbia*, [1989] 1 S.C.R. 1085] rule does not require an independent tort and that a breach of the contractual duty of good faith can qualify as an independent wrong…. Damages for conduct in the manner of dismissal are compensatory; punitive damages are restricted to advertent wrongful acts that are so malicious and outrageous that they are deserving of punishment on their own. This distinction must guide judges in their analysis.
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> …
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> Courts should only resort to punitive damages in exceptional cases (*Whiten*, at para. 69). The independent actionable wrong requirement is but one of many factors that

merit careful consideration by the courts in allocating punitive damages. Another important thing to be considered is that conduct meriting punitive damages awards must be "harsh, vindictive, reprehensible and malicious", as well as "extreme in its nature and such that by any reasonable standard it is deserving of full condemnation and punishment" (*Vorvis*, at p. 1108)….

[51] Similarly, in *Whiten*, at para. 94, Binnie J. stated as follows:

To this end, not only should the pleadings of punitive damages be more rigorous in the future than in the past (see para. 87 above), but it would be helpful if the trial judge's charge to the jury included words to convey an understanding of the following points, even at the risk of some repetition for emphasis. (1) Punitive damages are very much the exception rather than the rule, (2) imposed *only* if there has been high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour. (3) Where they are awarded, punitive damages should be assessed in an amount reasonably proportionate to such factors as the harm caused, the degree of the misconduct, the relative vulnerability of the plaintiff and any advantage or profit gained by the defendant, (4) having regard to any other fines or penalties suffered by the defendant for the misconduct in question. (5) Punitive damages are generally given only where the misconduct would otherwise be unpunished or where other penalties are or are likely to be inadequate to achieve the objectives of retribution, deterrence and denunciation. (6) Their purpose is not to compensate the plaintiff, but (7) to give a defendant his or her just desert (retribution), to deter the defendant and others from similar misconduct in the future (deterrence), and to mark the community's collective condemnation (denunciation) of what has happened. (8) Punitive damages are awarded *only* where compensatory damages, which to some extent are punitive, are insufficient to accomplish these objectives, and (9) they are given in an amount that is no greater than necessary to rationally accomplish their purpose. (10) While normally the state would be the recipient of any fine or penalty for misconduct, the plaintiff will keep punitive damages as a "windfall" in addition to compensatory damages. (11) Judges and juries in our system

> have usually found that moderate awards of punitive damages, which inevitably carry a stigma in the broader community, are generally sufficient. [Emphasis in original.]

[52] In this case, the defendant committed an actionable wrong independent of the underlying claim for damages for breach of contract: the breach of its duty of good faith, as found above.

[53] I find the facts of this case particularly troubling. Not only did the defendant assert cause when there was no reasonable basis for such an assertion, the defendant delayed in providing the plaintiff his record of employment, and significantly delayed in paying amounts owing under the *Employment Standards Act, 2000*, until June 15, 2015. This had a significant financial impact on the plaintiff and the employer had knowledge of the plaintiff's financial circumstances. Moreover, the allegations of cause, made with no reasonable basis, were made for tactical and financial gain considerations.

[54] I had the advantage of listening to the evidence and observing the witnesses and I find such conduct to be reprehensible. It exceeds what might be considered as ill-advised. The allegations of cause, made with no reasonable basis, and the significantly delayed payment of statutory amounts were intentional and financially impacted the plaintiff. These actions of the defendant were designed to financially benefit the defendant and the defendant had knowledge of the plaintiff's precarious financial position. Such a conduct is "malicious, oppressive and high-handed" and "a marked departure from ordinary standards of decent behaviour". A similar finding was made in *Kelly v. Norsemont Mining Inc*., 2013 BCSC 147, at para. 115.

[55] Since I have awarded no amount for aggravated damages, the pitfalls of double-compensation or double-punishment mentioned in *Honda v. Keays* is avoided if I award punitive damages.

[56] Considering the facts of this case, I find that an award of punitive damages is rationally required to punish the defendant and to meet the objectives of retribution, deterrence, and denunciation. Employers cannot be allowed to behave in such a fashion without a clear message being sent by this Court that this is not acceptable.

[57] As indicated in *Whiten*, the amount awarded must be proportionate to such factors as the harm caused, the degree of the misconduct, the relative vulnerability of the plaintiff, and any advantage or profit gained by the defendant. On the issue of harm caused, I did not find that the plaintiff provided sufficient evidence to warrant compensable damages. However, the plaintiff did provide some evidence of financial stress and of vulnerability. The degree of misconduct was moderately serious and the conduct was driven, to a certain extent, by the defendant's expectation of financial gain. A proportionate amount, as indicated in *Whiten*, should give the defendant its just desert, should deter the defendant and others from similar misconduct in the future, and should mark the community's collective condemnation of what has happened, thereby achieving retribution, deterrence, and denunciation.

[58] I have carefully reviewed the evidence and the cases mentioned by both parties and, although the circumstances of this case are serious and clearly warrant punitive damages, I agree with the defendant that they are not, on a spectrum of seriousness, quite as serious as the facts contained in the many cases referred to be the plaintiff. Consequently, I find the amount sought by the plaintiff of $250,000 to be excessive. In fact, this case is a somewhat less serious version than the situation found in *Kelly v. Norsemont Mining Inc.*, where the Court awarded $100,000 in punitive damages.

[59] Consequently, considering all of the above, I conclude that a proportionate and reasonable award of punitive damages is $50,000 and I award Mr. Morison that amount.

[60] Subject to offers or other circumstances, my preliminary view is that the plaintiff is entitled to his costs. If the parties are unable to agree on costs they may make brief written submissions with a costs outline as follows: by the plaintiff within the next 30 days and by the defendant within 10 days following receipt of the plaintiff's submissions.

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Justice P.E. Roger

Date: October 28, 2016

CITATION:*Morison v Ergo-Industrial Seating Systems Inc.*, 2016 ONSC 6725
COURT FILE NO.:13-56686
DATE: 2016-10-28

ONTARIO

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Tom Morison, Plaintiff

AND

Ergo-Industrial Seating Systems Inc., Defendant

BEFORE: Justice P. E. Roger

COUNSEL: Paul Champ and Christine Johnson, for the Plaintiff

Albert Campea, for the Defendant

HEARD: October 11 to 14, 2016

REASONS FOR DECISION

Justice P.E. Roger

Released: October 28, 2016