

COURT OF APPEAL FOR ONTARIO

CITATION: Boucher v. Wal-Mart Canada Corp., 2014 ONCA 419

DATE: 20140522

DOCKET: C56243 and C56262

Hoy A.C.J.O., Laskin and Tulloch JJ.A.

BETWEEN

Meredith Boucher

Plaintiff (Respondent)

and

Wal-Mart Canada Corp. and Jason Pinnock

Defendants (Appellants)

J. Gardner Hodder and Stefan De Smit, for the appellant Jason Pinnock

John D.R. Craig and Christina E. Hall, for the appellant Wal-Mart Canada Corp.

Myron W. Shulgan and Claudio Martini, for the respondent

Heard: October 7, 2013

On appeal from the judgment of Justice Renee M. Pomerance of the Superior Court of Justice, dated October 10, 2012, sitting with a jury.

Laskin J.A.:

A. OVERVIEW

[1] The respondent Meredith Boucher began working for the appellant Wal-Mart in 1999. She was a good employee. In November 2008 she was promoted

to the position of assistant manager at the Wal-Mart store in Windsor. Her immediate supervisor was the store manager, the appellant Jason Pinnock.

[2] At first Boucher and Pinnock worked well together. Their relationship turned sour, however, after an incident in May 2009 in which Boucher refused to falsify a temperature log. Pinnock then became abusive towards her. He belittled, humiliated and demeaned her, continuously, often in front of co-workers. Boucher complained about Pinnock's misconduct to Wal-Mart's senior management. They undertook to investigate her complaints. But in mid-November 2009 they told her that her complaints were "unsubstantiated" and that she would be held accountable for making them. A few days later, after Pinnock again humiliated Boucher in front of other employees, she quit. A few weeks later she sued Wal-Mart and Pinnock for "constructive" dismissal and for damages.

[3] The action was tried before a judge and a jury. The jury found that Boucher had been constructively dismissed and awarded her damages equivalent to 20 weeks salary, as specified in her employment contract. The jury also awarded her damages of \$1,200,000 against Wal-Mart, made up of \$200,000 in aggravated damages for the manner in which she was dismissed, and \$1,000,000 in punitive damages. And the jury awarded Boucher damages of \$250,000 against Pinnock, made up of \$100,000 for intentional infliction of

mental suffering, and \$150,000 in punitive damages (awards for which Wal-Mart is vicariously liable as Pinnock's employer).

[4] On appeal, Pinnock and Wal-Mart challenge both their liability for and the amount of damages for intentional infliction of mental suffering, aggravated damages and punitive damages.

[5] Pinnock makes these submissions:

- (1) The award of damages for intentional infliction of mental suffering should be set aside because the trial judge incorrectly instructed the jury on the elements of the tort. Alternatively, the award is unreasonable, or at least excessive;
- (2) The award of punitive damages should be set aside because it was not rationally required to punish Pinnock for his conduct.

[6] Wal-Mart makes the following submissions:

- (1) The award of aggravated damages should be set aside because of an error in the trial judge's charge. Alternatively, the award is excessive and should be reduced.
- (2) The award of punitive damages should be set aside or reduced because:
 - The trial judge erred in her charge;
 - Wal-Mart's conduct was not so reprehensible to warrant punitive damages;
 - Alternatively an award of punitive damages was not rationally required to punish Wal-Mart;
 - The trial judge erred by failing to give the jury guidance on a reasonable range for an award of punitive damages;

- The trial judge erred by permitting Boucher to amend her Statement of Claim to conform to the jury's verdict.

[7] Finally, Boucher has cross-appealed against Wal-Mart. She submits that the trial judge erred in law by instructing the jury that she could not recover future income loss beyond the period specified in her employment contract. She asks for \$726,601 to compensate her for her loss of income until retirement.

B. BACKGROUND

(a) Meredith Boucher and her employment with Wal-Mart

[8] Meredith Boucher is 43 years old, is married, and has one child. She entered the labour force after finishing high school.

[9] In 1999, Boucher began working for Wal-Mart at its store in Chatham. She received regular promotions. In January 2000, she was promoted to customer service manager. In January 2001, she was transferred to the Wal-Mart store in Newmarket where she continued working as a customer service manager.

[10] In 2005 Boucher was transferred back to the Wal-Mart store in Chatham and promoted to department manager. In September 2007, she was promoted to administrative manager of the Wal-Mart store in Wallaceburg, and in March 2008 she became an assistant manager trainee. In November 2008, Boucher accepted a transfer to Wal-Mart's Windsor store as an assistant manager.

[11] Boucher testified that she valued her work at Wal-Mart. She intended to work there until she retired.

(b) Wal-Mart and its policies

[12] Wal-Mart is one of the world's largest retailers with stores throughout North America. This litigation arises out of events that took place at its Windsor store.

[13] According to the evidence at trial, Wal-Mart holds itself out as a business that regards its employees highly. It has a number of workplace policies intended to reflect its concern for its employees. One policy that figured prominently in this trial was Wal-Mart's Open Door Communication Policy: Wal-Mart encourages its employees to report on a confidential basis concerns about how its stores are operated or its employees treated.

[14] Wal-Mart also has a Prevention of Violence in the Workplace Policy. It undertakes to take all employee reports of incidents seriously and to protect an employee making a complaint from acts of retaliation. Finally, Wal-Mart has a Harassment and Discrimination Policy. The purpose of this policy is to protect employees from unwelcome conduct that offends a person's feelings. Wal-Mart requires all of its employees to treat each other with dignity and respect.

[15] Boucher's evidence was that Wal-Mart paid lip service to its policies. It did not enforce them. And when Boucher sought the protection of these policies,

she was threatened that she would be held accountable if her complaints proved unwarranted.

(c) The working relationship between Pinnock and Boucher

[16] Much of Boucher's evidence about the deterioration of her relationship with Pinnock was contested by the appellants. In this brief summary I set out the evidence supporting Boucher's claims, as it was obviously accepted by the jury.

(i) In the beginning

[17] Initially, Pinnock and Boucher had a good working relationship. Soon after Boucher's transfer to the Windsor store, Pinnock chose her over eight other candidates as his Lead Assistant Manager. He told her that she was the "most promotable" of everyone in the store. He was happy to have her on his team because she was a real "go-getter".

[18] In April 2009 Pinnock gave Boucher her first performance appraisal. He evaluated her favourably, describing her as "[o]verall, a great asset to any team." However, the good working relationship between the two ended after an incident in May 2009.

(ii) The May 2009 Temperature Log Incident

[19] For health reasons, Wal-Mart must maintain temperature logs, which record temperatures of food and dairy products stored in its coolers. Boucher was responsible for ensuring that the logs were maintained.

[20] In May 2009 Boucher went on a month long course at Wal-Mart's Food Academy. Another assistant manager assumed her responsibility for the temperature logs. During that month, an employee did not complete a temperature log in one of the departments for which Boucher would have been responsible had she been in the store.

[21] When Boucher returned to the store at the end May, Pinnock told her the incomplete log would negatively affect the store's pending evaluation, and this in turn would negatively affect his own evaluation as store manager. Pinnock told Boucher to make sure that the store received a "green" evaluation, not the "yellow" evaluation it would receive if the log remained incomplete. In other words, Pinnock told Boucher to alter the log. She refused to do so. Because she refused, Pinnock subjected her to a disciplinary "coaching" session.

(iii) The June 3, 2009 Open Door Meeting

[22] Boucher felt that Pinnock had unfairly disciplined her for her refusal to alter the temperature log. She also had developed concerns about Pinnock's use of

profane and disrespectful language when he spoke to her and other female assistant managers.

[23] To express her concerns, Boucher decided to use Wal-Mart's Open Door Communication Policy. She asked for and was granted a meeting with the District People Manager. Boucher and one other assistant manager met with him to relate their concerns about Pinnock's conduct. In breach of the policy, however, Pinnock was made aware of the meeting. He berated Boucher and then admonished her; she testified that he "let me know that if I was ever going to have a effing meeting about him again, that I'd better have the effing decency to at least tell him before I do it."

(iv) Pinnock's Conduct: June to October 2009

[24] Boucher testified that from the day Pinnock found out about her meeting with the District People Manager, he subjected her to an unrelenting and increasing torrent of abuse. He regularly used profane language when he spoke to her. He belittled her. He demeaned her in front of other employees. He even called in other employees so he had an audience when he berated her and showed his disdain for her.

[25] Boucher gave many specific examples of Pinnock's abuse. A sampling is as follows:

- Pinnock pulled employees who reported to Boucher into morning store tours and in front of them told Boucher how stupid she was, and that her career was blowing away;
- When Pinnock criticized Boucher, he pounded his chest and said “let me know when you can’t fucking handle it anymore”;
- Pinnock berated Boucher in front of other managers, and even store customers: “he would say this is a fucking shit show, look at this fucking mess”

[26] Other Wal-Mart employees testified about Pinnock’s conduct towards Boucher. For example:

- One assistant manager testified that after the May 2009 temperature log incident, Pinnock turned “ferocious” towards Boucher. His treatment of her was “humiliating”. She said, “we were constantly called idiots like we were so stupid”;
- Another assistant manager testified that after the May 2009 incident, Pinnock’s treatment of Boucher was “terrible, horrific”

(d) Boucher’s complaints to Wal-Mart and Wal-Mart’s investigation

(i) The October 26, 2009 meeting with Wal-Mart representatives

[27] On October 26, 2009, Boucher met with three senior management representatives of Wal-Mart. She had asked for the meeting because nothing had been done to address her complaints about Pinnock’s treatment of her.

[28] The management team said that they would investigate Boucher’s concerns. They also told her to report any new incidents of misconduct. But they also cautioned Boucher that if her concerns were found to be unwarranted, she would be held accountable for raising them.

(ii) Boucher's November 2, 2009 complaint

[29] Pinnock continued to be abusive towards Boucher. As she had been asked to do, she reported the incidents to Wal-Mart's District People Manager. She got no response.

(iii) The results of Wal-Mart's investigation

[30] Witnesses for Wal-Mart testified that its management team did investigate Boucher's complaints. They held three meetings at the Windsor store with several employees. They completed their investigation in early November and met with Boucher on November 14, 2009 to discuss their findings.

[31] Wal-Mart's management team told Boucher that they had investigated her complaints and found them to be "unsubstantiated". They also told her that she would be held accountable for making these unsubstantiated complaints, but they had not yet decided what discipline she would face. They concluded that Boucher was trying to undermine Pinnock's authority. Boucher left the meeting in tears.

[32] Pinnock, on the other hand, was not disciplined for his conduct or even cautioned about it. He was spoken to only about his and his team's use of inappropriate language.

[33] In reaching their findings, Wal-Mart's management team appeared to ignore the numerous incidents in which Pinnock berated Boucher in front of co-

workers. And little evidence was led at trial that Wal-Mart's investigators sought information from the other assistant managers who had witnessed Pinnock's abusive conduct.

(e) The Final Incident: November 18, 2009

[34] At the end of Boucher's shift on November 18, Pinnock again berated her because ten extra skids of products delivered to the store overnight had not been unloaded. Pinnock grabbed Boucher by the elbow in front of a group of co-workers. He told her to prove to him that she could count to ten. He prompted her by initiating the count, then told her to count out loud along with him. Boucher was so humiliated she left the store.

[35] Four days later, Boucher sent Wal-Mart an email that she did not intend to return to work until her complaints about Pinnock were resolved to her satisfaction. They never were. And she never returned to work. In early December she started this lawsuit for constructive dismissal and damages.

(f) Pinnock's Motives: the Evidence of Samantha Russell

[36] Samantha Russell was the Store People Manager. She had observed how Pinnock treated Boucher. At one point she cautioned Pinnock about going after Boucher so hard because Boucher was beginning to look ill. Pinnock replied: "Not until she fucking quits." When Pinnock found out that Boucher had quit he was overjoyed. He had achieved his goal.

(g) The Effect of Pinnock's and Wal-Mart's Conduct

[37] Boucher testified about the effect of Pinnock's conduct toward her, and of Wal-Mart's failure to do anything about it, or even acknowledge it. She said that she was stressed out. She could not eat or sleep. She had abdominal pain, constipation and bloating. She lost weight and began vomiting blood. Co-workers testified that Boucher went from a fun-loving, lively, positive leader to a defeated and broken person.

[38] Boucher went to see her family doctor, Dr. Avril MacDonald, three times between September and November 2009. In Dr. MacDonald's opinion, Boucher's physical symptoms were stress-related. Dr. MacDonald prescribed a sedative and referred Boucher to a psychiatrist. Boucher saw a therapist in December, but by then she was already feeling better. She testified that by late December she felt she had nearly fully recovered and was actively looking for another job.

[39] Boucher had not found another job by the time of trial in September 2012. Her employment contract with Wal-Mart entitled her to two weeks pay for every year of employment. As she had worked for Wal-Mart for ten years, she was entitled to 20 weeks pay. Wal-Mart, in fact, paid her salary for eight months.

C. PINNOCK'S APPEAL

(1) The Award for Intentional Infliction of Mental Suffering

[40] The jury awarded Boucher \$100,000 for Pinnock's intentional infliction of mental suffering. Pinnock challenges the award on three bases:

- The trial judge incorrectly instructed the jury on the proper elements of the tort;
- No reasonable jury could have found Pinnock liable;
- Alternatively, the amount awarded is excessive

(a) The Elements of the Tort and the Trial Judge's Charge

[41] The tort of intentional infliction of mental suffering has three elements. The plaintiff must prove:

- The defendant's conduct was flagrant and outrageous;
- The defendant's conduct was calculated to harm the plaintiff;
- The defendant's conduct caused the plaintiff to suffer a visible and provable illness.

See *Prinzo v. Baycrest Centre for Geriatric Care* (2002), 60 O.R. (3d) 474 (C.A.).

[42] The trial judge instructed the jury several times on the three elements of the tort. Pinnock submits that the trial judge misstated the second element. She told the jury:

In determining whether the conduct was calculated to produce harm, you must be satisfied that Mr. Pinnock either intended to produce the consequences or *alternatively, ought to have known that the*

consequences were substantially certain to occur. Has it been established that Mr. Pinnock intended to cause mental suffering on the part of Ms. Boucher, or engaged in conduct that was substantially certain to cause such suffering? [Emphasis added.]

[43] The alternative, that Pinnock could be liable if he “ought to have known” the consequences were substantially certain to occur, is wrong, he contends, because it imports an objective test into the tort. I am inclined to agree that the trial judge misstated the second element. The test is purely subjective as Weiler J.A. said in *Prinzo*, at para. 61:

[F]or the conduct to be calculated to produce harm, either the actor must desire to produce the consequences that follow, or the consequences must be known by the actor to be substantially certain to follow.

See also *Piresferreira v. Ayotte*, 2010 ONCA 384, 319 D.L.R. (4th) 665, leave to appeal to S.C.C. refused, [2010] S.C.C.A. No. 283, at para. 75.

[44] The plaintiff cannot establish intentional infliction of mental suffering by showing only that the defendant ought to have known that harm would occur. The defendant must have intended to produce the kind of harm that occurred or have known that it was almost certain to occur: see *Piresferreira*, at para. 78.

[45] However, I would not give effect to this error on appeal because Pinnock’s trial counsel did not object to the charge at trial, and the error did not result in an injustice.¹

[46] The trial judge gave counsel a draft of her proposed jury instructions and invited their comments and objections. Neither counsel for Pinnock nor for Wal-Mart objected to the proposed charge on intentional infliction of mental suffering. The trial judge prepared revised instructions, which incorporated some suggestions from counsel, and before delivering her charge, gave counsel a final opportunity to comment. Again, counsel for Pinnock and Wal-Mart did not object.

[47] In their review of jury instructions in civil cases, appellate courts justifiably have been unsympathetic to objections to a charge made for the first time on appeal. That must be especially so when counsel have been given the opportunity to consider and comment on the charge in advance. Even where the alleged error is one of “misdirection”, as is the case here, as opposed to an error of “non-direction”, an appellate court will not interfere unless the error produces an injustice: see *G.K. v. D.K.* (1999), 122 O.A.C. 36; and *Marshall v. Watson Wyatt and Co.* (2002), 57 O.R. (3d) 813 (C.A.).

[48] The error here was inconsequential; it caused no injustice. The evidence of Samantha Russell, which I reviewed earlier and which the jury almost certainly

¹ Counsel for Pinnock and Wal-Mart on appeal were not counsel at trial.

accepted, shows that Pinnock intended by his conduct to cause the very harm that occurred; he wished to cause Boucher so much stress or mental anguish that she would resign. I would therefore not give effect to Pinnock's submission on the charge.

(b) Liability

[49] Pinnock submits that no jury acting reasonably could have found him liable for this tort. I do not agree with this submission. Appellate review of a civil jury award is limited. The standard is "unreasonableness" and this standard applies to liability as well as to amount. A civil jury verdict should be set aside only where it is so plainly unreasonable and unjust that no jury, reviewing the evidence as a whole and acting judicially, could have arrived at the verdict: see *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, at para. 30. In this case the evidence led at trial reasonably supported each of the three elements of the tort of intentional infliction of mental suffering.

[50] Pinnock's conduct was flagrant and outrageous. He belittled, humiliated and demeaned Boucher continuously and unrelentingly, often in front of co-workers, for nearly six months.

[51] Pinnock intended to produce the harm that eventually occurred. He wanted to get Boucher to resign. To do so, he wanted to cause her so much emotional distress or mental anguish that she would have no alternative but to

quit her job. The evidence of Samantha Russell, which was not challenged in cross-examination, and was reviewed by the trial judge for the jury, supports this element of the tort. Ms. Russell testified that Pinnock was “overjoyed” when Boucher resigned because he had achieved his goal.

[52] Because of Pinnock’s conduct, Boucher suffered a visible and provable illness. The stress of Pinnock’s conduct caused physical symptoms: Boucher suffered abdominal pain, constipation and weight loss. She vomited blood and could not eat or sleep. Her appearance became grey and haggard. These physical symptoms were similar to those suffered by the plaintiff in *Prinzo*, and were held in that case to meet the third element of the tort. And, as in *Prinzo*, Boucher’s family doctor confirmed her symptoms and attributed them to the stress of Pinnock’s conduct. Although Boucher’s symptoms did not last long, that is not surprising. They cleared up once the person who caused them – Pinnock – was no longer part of her life.

[53] The jury’s finding of liability was reasonable. Appellate intervention is not justified.

(c) Amount

[54] The jury’s award of \$100,000 is undoubtedly high – according to counsel for Pinnock, substantially higher than any other award against an individual employee in a breach of employment contract case. That it is so high does not

mean that it is so plainly unreasonable it should be set aside. To state the obvious, there is no precedent until it is done for the first time. The jury's awards of \$800,000 for punitive damages in *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 and later of \$1,000,000 for punitive damages in *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595 were unprecedented at the time. Yet both awards were upheld by the Supreme Court of Canada, even though appellate courts have greater latitude to intervene in punitive damage awards than they do in ordinary tort awards.

[55] Though very high, I am not persuaded that the \$100,000 award against Pinnock is unreasonable. The harm Boucher incurred because of Pinnock's conduct was severe. She suffered serious physical symptoms. She went from a cheerful, productive worker to a broken and defeated employee, left with no reasonable alternative but to resign. Her symptoms eased only when Pinnock no longer controlled her employment.

[56] The jury represents the collective conscience of the community. The magnitude of their award shows that they were deeply offended by Pinnock's mistreatment of Boucher. We are not justified in substituting our own award unless we are satisfied the jury's award is so inordinately high to be plainly unreasonable. On this record I am not so satisfied.

[57] I therefore conclude that the jury's award of \$100,000 for intentional infliction of mental suffering was not unreasonable. I would therefore uphold this award.

(2) The Award of Punitive Damages

[58] The jury also awarded Boucher \$150,000 in punitive damages against Pinnock. On appeal, Pinnock seeks to set aside this award on the ground it was not rationally required to punish his misconduct.

[59] The award of damages for intentional infliction of mental suffering was compensatory. It was meant to compensate Boucher for the harm she suffered because of Pinnock's misconduct. Punitive damage awards are not compensatory. They are meant to punish the defendant in exceptional cases where the defendant's conduct has been "malicious, oppressive and high-handed" and "represents a marked departure from the ordinary standards of decent behaviour", see *Whiten*, at para. 36.²

[60] In other words, punitive damages focus on the defendant's conduct, not on the plaintiff's loss. Their purpose is retribution, deterrence and denunciation. Here, for reasons I have already outlined, Pinnock's misconduct met this exceptional standard of malicious and oppressive conduct. Pinnock deliberately

² In *Vorvis v. Insurance Corp. of British Columbia*, [1989] 1 S.C.R. 1085 and in *Hill v. Church of Scientology*, the Supreme Court of Canada used a different string of adjectives: "harsh, vindictive, reprehensible and malicious". In my view the word "reprehensible" captures the kind of conduct that justifies an award of punitive damages.

targeted Boucher. He wanted her to resign. He persisted with his mistreatment of her over the course of over five months. He forced her to leave a job that meant a great deal to her. His conduct did indeed amount to a marked departure from the ordinary standards of decent human behaviour.

[61] That it did, however, does not alone mean the \$150,000 award of punitive damages should be upheld. To be upheld, it must, together with the compensatory award of \$100,000, be rationally required to punish Pinnock. The standard of appellate review is whether a reasonable jury, properly instructed, could have concluded that an award of punitive damages in that amount, and no less, was rationally required to punish the defendant's misconduct, see *Whiten*, at para. 107.

[62] Putting the test the other way around, "if the award of punitive damages when added to compensatory damages, produces a total sum that is so 'inordinately large' that it exceeds what is 'rationally' required to punish the defendant, it will be reduced or set aside on appeal,": see *Whiten*, at para. 109. And, as Binnie J. said in *Whiten*, at para. 108, to ensure rationality an appellate court has "supervisory powers over punitive damages that are more interventionist than in the case of other jury awards of general damages."

[63] Thus, once the tort damages are upheld, we must ask whether an additional award of \$150,000 is required for the purposes of retribution,

denunciation and deterrence. In short, we must ask whether the jury's award is proportionate to these purposes.

[64] The award of tort damages against Pinnock is very high. The magnitude of this compensatory award carried a strong punitive component. The compensatory award alone provided retribution to Boucher, substantially denounced Pinnock for his conduct, and in the Windsor community would likely deter Pinnock and other senior employees from engaging in similar conduct. An additional award of \$150,000 against an individual employee is not rationally required to achieve these purposes or to punish Pinnock. To give modest effect to the jury's view of Pinnock's misconduct, an award of \$10,000 in punitive damages would be appropriate. Accordingly, I would allow Pinnock's appeal on punitive damages and reduce the jury's award from \$150,000 to \$10,000.

D. WAL-MART'S APPEAL

(1) The award of aggravated damages

[65] The jury awarded Boucher \$200,000 for aggravated damages. Wal-Mart submits that the award should be set aside or reduced for two reasons: first, the trial judge failed to caution the jury against double recovery, thus compensating Boucher twice for Pinnock's conduct; and second, \$200,000 is excessive. I would not give effect to Wal-Mart's submission.

(a) The trial judge's charge

[66] Aggravated damages are compensatory damages. They are part of breach of contract damages. They compensate a plaintiff for the additional harm suffered because of the way the contract was breached. In a wrongful dismissal claim, aggravated damages may be awarded against the employer where “the employer engages in conduct during the course of dismissal that is ‘unfair or is in bad faith’”: see *Honda Canada Inc. v. Keays*, 2008 SCC 39, [2008] 2 S.C.R. 362, at para. 57. However, “the normal distress and hurt feelings resulting from dismissal are not compensable.”: see *Honda*, at para. 56.

[67] The trial judge correctly instructed the jury on the purpose of aggravated damages and on the standard for awarding them. She said in part:

Will now turn to a discussion of aggravated damages. Aggravated damages may be awarded where the manner in which an employee was dismissed was unfair or carried out in bad faith. Aggravated damages may be awarded to compensate the employee for mental distress and or loss of dignity. Such an award is permitted where the plaintiff has experienced injury to her feelings, dignity, pride or self respect. These damages may compensate an employee when the circumstances of dismissal are insensitive, demeaning or humiliating.

The law recognizes that breach of an employment agreement will inevitably cause some mental distress. An employee cannot receive damages for the normal distress and hurt feelings that would arise in the ordinary course of dismissal. In the ordinary course the discharged employee is expected to bear all of this with

a measure of fortitude and be satisfied with damages to compensate for the failure to give proper notice.

But if you find unfair or bad faith conduct in the manner of dismissal, then it is proper for you to compensate for the effects of this. The time at which an employment relationship ruptures is usually the time when the employee is most vulnerable and in need of protection. In recognition of this the law encourages conduct that minimizes the damage and dislocation, both economic and personal, that results from dismissal. To ensure that employees receive adequate protection, employers are held to an obligation of good faith and fair dealing in the manner of dismissal.

[68] Wal-Mart contends that the trial judge erred in her charge because she failed to caution the jury against double recovery. Wal-Mart's argument is that Pinnock's intentional infliction of mental suffering grounded both the tort award against him and the aggravated damages award against Wal-Mart. Boucher should not be compensated twice for the same wrong.

[69] I do not accept Wal-Mart's contention. The caution requested on appeal was not requested by Wal-Mart's counsel at trial. Quite the contrary. Wal-Mart's counsel approved of the trial judge's instructions. As I said earlier, the absence of an objection at trial weighs heavily against a party on appeal. That is especially so where the objection relates to an omission from the charge, as is the case here, not a misstatement of the law or evidence. Only if Wal-Mart could show that the absence of the caution it now seeks caused an injustice could it succeed on this branch of its appeal. And in my opinion, the absence of a caution did not cause an injustice. I say that for three reasons.

[70] First, the tort award against Pinnock and the aggravated damages award against Wal-Mart vindicate different interests in law.

[71] Second, I do not view the jury's aggravated damages awarded to have resulted in double recovery for Boucher. Pinnock's misconduct brought about Boucher's mental anguish. But the unfair way Walmart dealt with Pinnock's misconduct and Boucher's complaints about it brought about Boucher's constructive dismissal.

[72] Wal-Mart took no steps to bring an end to Pinnock's misconduct. It did not take Boucher's complaints seriously, finding them unsubstantiated despite substantial evidence from co-workers that they were well-founded. It failed to enforce its workplace policies, which on their face were designed to protect employees from the kind of treatment Pinnock subjected Boucher to. And it threatened Boucher with retaliation for making her complaints, an especially vindictive act. Despite all of this Boucher was willing to continue to work at the store if Wal-Mart addressed her complaints about Pinnock. Only when Wal-Mart refused to do so, did Boucher resign. These considerations show that Wal-Mart's own conduct justified a separate and substantial award for aggravated damages.

[73] Third, although the trial judge's charge on aggravated damages is not as clear as it might have been, I do not think that it would have led the jury to

compensate Boucher twice for the same wrong, Pinnock's misconduct. Early in her charge, the trial judge did tell the jury that "the claims against Wal-Mart and Pinnock are based on the same facts." Standing alone, that instruction is problematic. However, later in her charge, when she instructed the jury on aggravated damages, she correctly told them – in the passages I quoted at para. 67 of these reasons – that "these damages may compensate an employee when the circumstances of dismissal are insensitive, demeaning or humiliating."

[74] The trial judge did not outline for the jury the specifics of Wal-Mart's own conduct that would warrant aggravated damages. However, the evidentiary considerations relating to Wal-Mart's conduct that I have just outlined were before the jury. And Boucher's counsel referred to these considerations in his closing address to the jury.

[75] I therefore conclude that an award of aggravated damages against Wal-Mart was justified, and that the trial judge's charge did not cause an injustice.

(b) Amount

[76] In the alternative, Wal-Mart argues that an award of \$200,000 is excessive – unprecedented in Canadian employment law. As was the tort award against Pinnock, this award against Wal-Mart is very high, reflecting the jury's strong disapproval of its conduct. For the reasons that I have just discussed, I do not

consider that the award gives Boucher “double recovery” for Pinnock’s misconduct.

[77] Thus, the remaining question is whether the amount of the award is so high this court ought to scale it back. In the light of Wal-Mart’s conduct, I am not persuaded that the jury’s view of the amount is so plainly unreasonable that it ought to be reduced. Accordingly, I would not interfere with the award of \$200,000.

(2) The Punitive Damages Award

[78] The jury awarded Boucher \$1,000,000 in punitive damages against Wal-Mart. On appeal, Wal-Mart seeks to set aside or substantially reduce this award on five grounds:

- The trial judge erred in her instructions to the jury on the requirement of an “independent actionable wrong”;
- Wal-Mart’s conduct was not so reprehensible to warrant punitive damages;
- Once the aggravated damages award is upheld, an additional award of \$1,000,000 is not rationally required to punish Wal-Mart or meet the objectives of retribution, deterrence and denunciation;
- The trial judge erred by failing to give the jury guidance on a reasonable range for an award of punitive damages; and
- The trial judge erred by permitting Boucher to amend her statement of claim to conform to the jury’s verdict

(a) Independent Actionable Wrong

[79] To obtain an award of punitive damages, a plaintiff must meet two basic requirements. First, the plaintiff must show that the defendant's conduct is reprehensible: in the words of Binnie J. in *Whiten*, "malicious, oppressive and high-handed" and "a marked departure from ordinary standards of decent behaviour": see *Whiten*, at para. 36. Second, the plaintiff must show 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.

[80] When the claim against the defendant is for breach of contract, as is Boucher's claim against Wal-Mart, the plaintiff must meet a third requirement. The plaintiff must show that the defendant committed an actionable wrong independent of the underlying claim for damages for breach of contract. In Canada, this requirement originated in the Supreme Court of Canada's judgment in *Vorvis*, itself a case about a breach of an employment contract, and was later affirmed in *Whiten*, at paras. 78-83.

[81] Wal-Mart submits that the trial judge incorrectly instructed the jury on this third requirement. I agree with Wal-Mart's submission. Counsel for Boucher had argued before the jury, at least implicitly, if not expressly, that Wal-Mart's actionable wrong was the breach of its duty of good faith and fair dealing in the way Boucher was dismissed. That breach was an actionable wrong as required

by *Vorvis* and affirmed by *Whiten*. But, instead of instructing the jury on that actionable wrong, the trial judge instructed the jury that the actionable wrong was Pinnock's intentional infliction of mental suffering of Boucher. She said:

An award of punitive damages is restricted to cases where the employer has committed a wrongful act independent of the act of dismissal, that is so malicious and outrageous that it is deserving of punishment on its own.

There is here an allegation of intentional infliction of mental suffering...if you find that mental distress or mental suffering was intentionally inflicted, that will impact on your determination of whether punitive damages should be awarded.

In other words, the trial judge told the jury that the tort committed by Pinnock can be an actionable wrong by Wal-Mart that supports a punitive damages award against it.

[82] The problem with this instruction is that it punishes the employer for the employee's misconduct. It thus grounds the award of punitive damages against Wal-Mart solely on the basis that it is vicariously liable for Pinnock's wrong. However, as McLachlin C.J.C. said in *Blackwater v. Plint*, [2005] 3 S.C.R. 3, at para. 91, "punitive damages cannot be awarded in the absence of reprehensible conduct specifically referable to the employer." And, it seems to me, the employer's reprehensible conduct must go beyond mere negligent conduct. Its conduct must itself be harsh, offensive or high-handed. See also S.M. Waddams, *The Law of Damages*, looseleaf 2nd ed., (Toronto: Canada Law

Book, updated to 2013) at p. 11-29; and *67122 Ontario Ltd. v. Segaz Industries Canada Inc.* (2000), 183 D.L.R. (4th) 488 (Ont. C.A.), at para. 23, rev'd on other grounds, [2001] 2 S.C.R. 983. The trial judge, however, never tied the requirement of an independent actionable wrong to Wal-Mart's own conduct.

[83] What then is the effect of the error in the trial judge's charge? I would not give it any effect. The jury's award of aggravated damages shows that they found the manner of Wal-Mart's dismissal most unfair. In substance, they found that Wal-Mart breached its duty of good faith and fair dealing towards Boucher. It committed an actionable wrong that would support an award of punitive damages.

[84] Moreover, the evidence reasonably supports the jury's finding that Wal-Mart's own conduct was reprehensible. That evidence, which I reviewed earlier, includes Wal-Mart's refusal to take Boucher's complaints about Pinnock seriously, its dismissal of those complaints as unsubstantiated despite substantial evidence to the contrary, its unwillingness to discipline Pinnock or intervene to stop his continuing mistreatment of Boucher, its threatened reprisal against her, and its contravention of its workplace policies. Although Wal-Mart may not have deliberately sought Boucher's resignation, on the evidence led at trial that the jury undoubtedly accepted, Wal-Mart's actions and its inaction were reprehensible.

[85] Thus although the trial judge erred in her instructions on the requirement of an independent actionable wrong, in my view the error was harmless. I would not set aside the punitive damages awarded against Wal-Mart because of this error.

(b) Reprehensible Conduct

[86] Wal-Mart submits that its conduct was not so reprehensible to attract an award of punitive damages. I disagree. From the evidence I have just outlined, the jury could reasonably conclude that Wal-Mart's conduct toward Boucher was sufficiently reprehensible to merit an award of punitive damages.

(c) Rationally Required

[87] The jury found Wal-Mart liable for aggravated damages of \$200,000. In addition, Wal-Mart is vicariously liable for the \$100,000 tort award against Pinnock. And Wal-Mart is liable for damages for constructive dismissal and for \$140,000 in trial costs. In the light of these compensatory awards, Wal-Mart submits that an additional punitive damages award of \$1,000,000 is not rationally required to punish it or to give effect to denunciation and deterrence. I accept Wal-Mart's submission.

[88] The very high aggravated damages award by itself sends a significant denunciatory and punitive message and likely will have a deterrent effect. Additionally, although the jury was justified in finding Wal-Mart's misconduct

sufficiently reprehensible to warrant an award of punitive damages, its misconduct falls far short of the gravity and duration of the misconduct in other cases that have attracted high punitive damages awards. These cases were extensively reviewed by my colleagues Lauwers J.A. in dissent and Cronk J.A. for the majority in *Pate Estate v. Galway-Cavendish and Harvey (Township)*, 2013 ONCA 669, 312 O.A.C. 244. Two of these cases will illustrate the differences: *Whiten* and *Pate Estate* itself.

[89] In *Whiten*, the Supreme Court of Canada upheld the jury's award of \$1,000,000 in punitive damages. In that case, however, Pilot, the insurer, refused to pay a fire loss claim. Instead:

Pilot acted maliciously and vindictively by maintaining a serious accusation of arson for two years in the face of the opinions of an adjuster and several experts it had retained that the fire was accidental. It abused the obvious power imbalance in its relationship with its insured by refusing to pay a claim that it knew or surely should have known was valid, and even by cutting off rental payments on the Whitens' rented cottage. It took advantage of its dominant financial position to try to force the Whitens to compromise or even abandon their claim. Indeed, throughout the nearly two years that the claim was outstanding, Pilot entirely disregarded the Whitens' rights.

See *Whiten*, at para. 137. In addition to the punitive damages, the plaintiffs in *Whiten* received substantial costs and their out-of-pocket losses from the fire, but no aggravated damages or compensatory tort damages.

[90] In *Pate Estate*, the municipality wrongfully dismissed Mr. Pate, its senior building inspector. It alleged that he had engaged in wrongdoing, and instigated an Ontario Provincial Police investigation, which led to criminal charges and a four-day trial at which Pate was acquitted. As Lauwers J.A. noted at para. 9 of his reasons:

The local media reported extensively on the criminal proceedings and Mr. Pate remained in the public spotlight from March 26, 1999, when he was wrongfully dismissed, until his acquittal on December 17, 2002. Mr. Pate did not obtain employment in the municipal field again and passed away in January 2011.

[91] Pate sued the municipality for damages and at a second trial, the trial judge awarded \$550,000 in punitive damages in addition to the award of aggravated damages of \$75,000 made at the first trial. The majority of this court reduced the punitive damages award to \$450,000. In dissent, Lauwers J.A. would have upheld the award of \$550,000.

[92] Here, by contrast, Wal-Mart is already liable for significant compensatory damages. Its misconduct lasted less than six months. It did not profit from its wrong. And while it obviously maintained a power imbalance over Boucher, it did not set out to force her resignation. In the light of these considerations, a punitive damages award of \$100,000 on top of the compensatory damages it must pay is all that is rationally needed to punish Wal-Mart and denounce and

deter its conduct. Accordingly, I would allow Wal-Mart's appeal on punitive damages and reduce the award from \$1,000,000 to \$100,000.

[93] It is thus unnecessary to address the remaining two grounds advanced by Wal-Mart: the trial judge erred by failing to give the jury guidance on a reasonable range of punitive damages, and the trial judge erred by granting Boucher's amendment to the Statement of Claim to conform to the jury's verdict.

[94] I will say, however, that Wal-Mart's trial counsel did not ask the trial judge to give the jury guidance on a range of punitive damages. And after Boucher made her motion to amend her Statement of Claim, the trial judge asked counsel for Wal-Mart what prejudice his client would suffer if the amendment was granted – he responded that he could not say he would have conducted the defence differently.

E. BOUCHER'S CROSS-APPEAL

[95] At trial Boucher sought an award of damages for future loss of income of \$726,601. This amount represented her loss of income until retirement age. She claimed that she suffered this loss because of Pinnock's tortious conduct – his intentional infliction of mental suffering – for which Wal-Mart was vicariously liable. However, the trial judge ruled and then instructed the jury that Boucher's claim for future loss of income was limited to the amount provided for in her employment contract, 20 weeks salary.

[96] Boucher cross-appeals from the judgment at trial on the ground that the trial judge erred in law in her ruling. For the reasons that follow, the trial judge's ruling was correct and I would therefore dismiss Boucher's cross-appeal.

(a) Dr. Charette's Evidence

[97] In asserting her loss of future income claim, Boucher relied on the expert evidence of Dr. Michael Charette, an economics professor at the University of Windsor. Dr. Charette put forward two scenarios for Boucher's income loss. The first scenario assumed that she worked at Wal-Mart as an assistant manager until age 65 at an annual salary of \$55,000. On that scenario, she would have earned \$1,335,663.

[98] The second scenario assumed that after being constructively dismissed by Wal-Mart, Boucher would have had to go back into the workforce at an entry level position – in effect “start over again”. Dr. Charette made this assumption because in his opinion Boucher's age and level of education combined with the state of the retail market would likely preclude her from obtaining a middle management position. On this second scenario, Boucher would have earned \$735,599 by age 65.

[99] On Dr. Charette's second projection, Boucher would earn \$600,064 less than the amount she would have earned at Wal-Mart until age 65. That figure

combined with her loss of income of \$126,537 from the date she left Wal-Mart to the date of trial represented her total future loss of income claim of \$726,601.

(b) The trial judge's ruling

[100] Boucher led Dr. Charette's expert evidence without objection by either appellant's trial counsel. However, after all of the evidence was completed, the trial judge ruled that Boucher could not pursue her claim for future loss of income. The trial judge gave two reasons: first, a claim for future loss of income must be based on a loss of earning capacity, and on the evidence at trial, Boucher had not suffered a loss of earning capacity; and second, Boucher was only entitled to the loss of income provided for in her employment contract.

(c) Discussion

[101] On her cross-appeal, Boucher submits that the trial judge erred in law because she failed to apply the principle that an injured party must be restored to the position she would have been in but for the wrongdoer's tortious conduct. Here, Boucher testified that she intended to work at Wal-Mart until she retired and Wal-Mart led no evidence that it would otherwise have let her go.

[102] I do not accept this submission for the two reasons given by the trial judge. In Canada, as the trial judge said in her ruling, an award for future loss of income compensates a plaintiff for loss of earning capacity – in other words, the loss of an asset, the capacity to earn: see *M.B. v. British Columbia*, 2003 SCC 53,

[2003] 2 S.C.R. 477; *Lazare v. Harvey*, 2008 ONCA 171. Typically, in personal injury actions, plaintiffs have justifiable future loss of income claims because the accident has impaired their capacity to earn income.

[103] A claim for future loss of income can arise in an employment context where a plaintiff has not recovered from the effects of the wrongdoer's action and the plaintiff has thus suffered a loss of any earning capacity because of the wrongdoer's tortious conduct: see, for example, *Piresferreira*.

[104] Here, however, Boucher had recovered from Pinnock's tortious conduct, his intentional infliction of mental suffering, well before trial; indeed, she recovered in less than two months after she left Wal-Mart. She therefore did not suffer a loss of earning capacity. She simply could not find another comparable job. The trial judge wrote at para. 17 of her ruling:

It is incapacity to earn income that drives the entitlement to damages for lost wages. In this case, that critical factor is missing. There is no evidence to indicate that the alleged wrongs on the part of either defendant left the plaintiff unable to work. This is not a case in which the mental distress or other harm has caused lasting effects or continuing disability. To the contrary, it was the plaintiff's evidence that she left Wal-Mart in November 2009 and by December 2009 was well enough to work. Her failure to secure employment is based, not on incapacity, but on the failure to find a job with a comparable salary and level of responsibility.

[105] I agree.

[106] Because Boucher did not suffer a loss of earning capacity, her claim for future loss of income is limited to the amount provided for in her employment contract: two weeks pay for every year of service, or 20 weeks. Wal-Mart paid her that amount. As I have said, it paid her for eight months.

[107] Boucher did not have an employment contract that guaranteed her employment to age 65. And Wal-Mart did not have to lead evidence to show that it would have terminated her employment before she turned 65. It always had that right under its contract with Boucher, on giving her the appropriate notice or on paying the amount specified instead of notice. Boucher was entitled to be put in the position she would have been in if the contract had been performed: employment subject to dismissal in accordance with the terms of her contract. In her cross-appeal, however, she seeks to be put in a better position: lifetime employment. That she was not entitled to.

[108] I would dismiss the cross-appeal.

F. CONCLUSION

[109] Pinnock and Wal-Mart appeal their liability for and the amount of damages for intentional infliction of mental suffering, aggravated damages and punitive damages awarded by the jury. Boucher cross-appeals from the trial judge's ruling precluding her from pursuing a future loss of income claim beyond the amount provided for in her employment contract.

[110] I would uphold the jury's damages award of \$100,000 against Pinnock for intentional infliction of mental suffering. I would also uphold the jury's aggravated damages award of \$200,000 against Wal-Mart.

[111] I would, however, allow the appeals on punitive damages. I would reduce the punitive damages award against Pinnock from \$150,000 to \$10,000 and the punitive damages award against Wal-Mart from \$1,000,000 to \$100,000. Especially in the light of the significant compensatory awards against each appellant, those amounts are all that is rationally required to punish Pinnock and Wal-Mart and to denounce and deter their conduct.

[112] I would dismiss Boucher's cross-appeal. The trial judge correctly ruled that as Boucher had not suffered a loss of earning capacity, her loss of future income claim was limited to the amount provided for in her employment contract.

[113] The parties may make brief written submissions on the costs of the appeal and cross-appeal within 20 days of the release of the court's reasons.

"John Laskin J.A."

"I agree. M. Tulloch J.A."

Hoy A.C.J.O. (Dissenting):

[114] I agree with my colleague's disposition of Jason Pinnock's appeal, Wal-Mart's appeal of the punitive damages awarded against it, and Boucher's cross-appeal against Wal-Mart. I part company with him on the merits of Wal-Mart's appeal of the aggravated damages awarded against it. I would reduce those damages to \$25,000.

[115] In an employment context, aggravated damages compensate a plaintiff for her mental distress caused by the manner of dismissal: *Honda Canada Inc. v. Keays*, 2008 SCC 39, [2008] 2 S.C.R. 362.

[116] In my view, the trial judge erred by failing to caution the jury that they could only consider Wal-Mart's conduct when assessing damages to compensate Boucher for the mental distress arising from the manner in which it dismissed her: they could not compensate Boucher for any mental distress they might find Pinnock intentionally inflicted. As I discuss below, from both the charge and the quantum of aggravated damages assessed against Wal-Mart, it is clear that the jury considered Pinnock's conduct in assessing the aggravated damages it awarded against Wal-Mart. The jury awarded damages against Pinnock to compensate Boucher for her mental suffering because of his misconduct, and Wal-Mart is vicariously liable for the damages awarded against Pinnock. This resulted in an injustice: Wal-Mart is required to compensate Boucher twice for the mental suffering occasioned by Pinnock's misconduct, and Boucher will receive

double-compensation. Moreover, as I explain below, the award of aggravated damages against Wal-Mart is plainly unreasonable. I would reduce the aggravated damages assessed against Wal-Mart to \$25,000.

[117] Unlike my colleague, I am strongly of the view that from the charge as a whole, the jury would reasonably have understood that they were to take Pinnock's conduct into account in assessing aggravated or mental distress damages against Wal-Mart, whether or not they awarded damages against Pinnock for intentionally inflicting mental stress on Boucher.

[118] The trial judge charged the jury that: "the claims against Walmart and Mr. Pinnock are based on the same facts"; Boucher's "claim against Walmart is based on the conduct of Mr. Pinnock"; and "[t]he conduct alleged against Mr. Pinnock is the same conduct alleged in the claim against Walmart."

[119] Then, in addressing the question of whether Boucher was entitled to aggravated damages for the manner in which she was dismissed, the trial judge explained: "Aggravated damages are intended to compensate for harm that flowed as a consequence of the manner of dismissal. Here, the question is whether the circumstances that led Ms. Boucher to leave her employment caused her mental distress". Essentially, those circumstances were Pinnock's conduct.

[120] Boucher's claim against Wal-Mart for constructive dismissal was based on Pinnock's conduct. Despite this, any mental suffering that the jury found was intentionally inflicted by Pinnock should not have been included in the assessment of the damages necessary to compensate Boucher for the mental distress she suffered as a consequence of the manner of dismissal. This was accounted for by the damages awarded against Pinnock, and Wal-Mart is vicariously liable for those damages. Any aggravated damages awarded against Wal-Mart could only be based on mental distress Boucher suffered as a result of Wal-Mart's conduct.

[121] As my colleague explains, the trial judge also told the jury that the tort committed by Pinnock supported a punitive damages award against Wal-Mart. Considering the charge as a whole, this further reference to Pinnock's conduct in the context of the determination of punitive damages against Wal-Mart would reinforce the jury's understanding that they could similarly consider Pinnock's conduct in assessing aggravated damages against Wal-Mart.

[122] As I indicated above, the quantum of aggravated damages the jury assessed against Wal-Mart shows that, as instructed, they in fact considered Pinnock's conduct. The jury awarded damages of \$100,000 for *intentional* infliction of mental suffering against Pinnock – the direct cause of Boucher's mental suffering. I agree with my colleague that the \$100,000 award is very high, given that Boucher's symptoms did not last long. As my colleague also notes,

those symptoms “cleared up once the person who caused them – Pinnock – was no longer part of her life.” Yet, the jury awarded aggravated damages for mental distress against Wal-Mart of \$200,000 – twice the amount awarded against Pinnock. Rationally, the jury must have considered Pinnock’s conduct in arriving at this amount.

[123] I agree with my colleague that Wal-Mart’s own conduct justifies an award of aggravated damages against it. Wal-Mart failed to maintain the confidentiality of Boucher’s June 3, 2009 meeting with management about Pinnock’s conduct, and told Boucher, in October and November of 2009, that they would hold her accountable for unsubstantiated complaints against Pinnock, in each case contrary to its own policies. Moreover, it appears that the jury accepted that Wal-Mart was aware of Pinnock’s conduct and failed to intervene to prevent it from recurring. While Pinnock’s actions were the direct cause of Boucher’s mental distress, Wal-Mart’s conduct also contributed to her mental distress. What then, is the appropriate amount of aggravated damages? In my view, given the award against Pinnock, it must be relatively modest.

[124] Simply deducting \$100,000 from the \$200,000 awarded by the jury, to eliminate the double-counting, leaves an amount that is plainly unreasonable: Boucher has already been generously compensated for the mental distress she suffered. As my colleague notes, the \$100,000 amount awarded against Pinnock is very high and includes a strong punitive component. It is sustainable on appeal

on the basis that it compensates Boucher for all – or nearly all – of her mental distress during the relevant period. Considering this, an award of aggravated damages in the amount of \$100,000 against Wal-Mart would be largely punitive. To the extent that Wal-Mart’s conduct towards Boucher merits sanction, it is addressed through the separate punitive damages awarded against it. I would award aggravated damages against Wal-Mart in the amount of \$25,000 to compensate her for any additional mental distress that might be seen to have been caused by Wal-Mart’s own conduct in the course of her dismissal.

Released: May 22, 2014 (“A.H.”)

“Alexandra Hoy A.C.J.O.”