

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Klonteig v. West Kelowna (District)*,
2018 BCSC 124

Date: 20180126
Docket: S103086
Registry: Kelowna

Between:

Kerry Klonteig

Plaintiff

And

District of West Kelowna

Defendant

Before: The Honourable Madam Justice Heather MacNaughton

Reasons for Judgment

Counsel for the Plaintiff:

T. McCaffrey

Counsel for the Defendant:

B. Williamson

Place and Date of Trial/Hearing:

Kelowna, B.C.
January 8-12, 2018

Place and Date of Judgment:

Kelowna, B.C.
January 26, 2018

Introduction

[1] Kerry Klonteig is a trained firefighter. Between 1990 and 1995, while a full-time employee in the steel industry, he started working as an on-call firefighter. Commencing in 1995, he became a career firefighter with the City of Kelowna. He remained with the City of Kelowna for 13 years, the last three of which were as an Assistant Fire Chief.

[2] On June 16, 2008, after competing for the position, Mr. Klonteig began working for the City of West Kelowna, then known as the District of Westside (the “District”), as an Assistant Fire Chief.

[3] On October 9, 2013, the District terminated Mr. Klonteig’s employment for cause. He was 48 years old.

[4] The incident giving rise to the termination was Mr. Klonteig’s receipt of a 90-day administrative driving prohibition in the early morning hours of October 7, after he failed a roadside breathalyzer test twice. At the time, he was off duty but was driving a District vehicle allocated to the Fire Chief. The vehicle was towed and impounded.

Issues

[5] The issues before me are whether the District had cause to dismiss Mr. Klonteig and, if not, the appropriate damages.

Mr. Klonteig’s Work History

[6] In 1984, after he graduated from high school in Kelowna, Mr. Klonteig began working, in a sales capacity, for A.J. Forsyth Steel (“Forsyth”), a steel company in Kelowna. At the same time, he pursued a post-secondary diploma in business administration.

[7] Forsyth transferred Mr. Klonteig to Vancouver Island, first to Victoria and then to Nanaimo. In 1990, after the transfer to Nanaimo, he began working as a paid on-

call firefighter. He worked his way up to a Captain's position in the Nanaimo Fire Department before being transferred back to Kelowna by Forsyth.

[8] Paid on-call firefighters are trained to support career firefighters when called out to a fire incident. On-call firefighters carry a pager while working at their full-time jobs, and respond to the call if they are available. They are paid a small stipend when they are called out and are paid to attend weekly training.

[9] Career firefighters have full-time employment in the fire service. They work four days on and four days off. While on shift, they work two day and two night shifts.

[10] In 1992, after Mr. Klonteig returned to Kelowna, he applied for and obtained a paid on-call opportunity with the City of Kelowna's Fire Department.

[11] In 1993, the City of Kelowna advertised for applicants interested in career firefighting positions. The intention was to create a qualified list of candidates for upcoming vacancies. Mr. Klonteig successfully applied and, in July 1995, he began a full-time career as a firefighter. He continued as a firefighter until he was promoted to an Assistant Fire Chief position in 2005. He was one of four Assistant Fire Chiefs reporting to the City of Kelowna's Fire Chief. His specific assignment was operations, including emergency system and resource coordination for major fire incidents including wildfires, floods and landslides. In that capacity, he dealt with the Province and with fire districts throughout the central Okanagan. He was also responsible for human resource issues with Kelowna's Local 953 of the International Association of Firefighters ("IAFF").

[12] In May 2008, Mr. Klonteig successfully competed for an Assistant Fire Chief position with the newly-incorporated District. He had seen the posting and was encouraged by the District's Fire Chief, Wayne Schnitzler, to consider applying. Chief Schnitzler was on the interview panel, and he testified that Mr. Klonteig was known to him and had an excellent reputation. Mr. Klonteig was one of two Assistant Fire Chiefs. Although the move was a lateral one, Mr. Klonteig testified that he

believed that there were better advancement opportunities with the District. He aspired to become a Fire Chief.

[13] The terms of Mr. Klonteig’s employment were set out in a letter from the District’s Manager of Human Resources, Marnie Manders. It contained a termination provision as follows:

If the District of Westside terminates your employment, for any reason other than just cause, you are entitled to notice of termination or severance pay in accordance with the following:

1. After successful completion of the probation period but prior to the first twelve months of your employment: one (1) month notice or one (1) month salary, at the employer's option.
2. After completion of twelve months employment: reasonable notice in accordance with the common law, to a maximum of one month notice or salary in lieu of notice, at the employer's option, for each completed year of service, to a maximum of twenty four (24) months, and with a minimum of three (3) months notice or salary in lieu of notice.
3. If you secure other employment during this period, the amount paid to you will be decreased by 50% of the amount outstanding at the time you start working.
4. Except as restricted by the terms and conditions of a benefit plan carrier, benefit coverage for B.C. M.S.P., extended health, and dental will continue up to the end of the month in which your employment terminates. All other benefits will terminate at midnight on your final day of employment.

You will not be entitled to any further notice, payment or benefits once you have been provided the above-noted severance pay and/or notice.

[14] Mr. Klonteig testified that he read and understood the terms of his employment, and signed and returned a copy of the agreement.

[15] A District press release announcing Mr. Klonteig’s appointment referred to his “wealth of knowledge and understanding of Fire Services” and described him as a “strong leader”. Chief Schnitzler confirmed that he agreed with the content of the press release.

[16] Mr. Klonteig’s performance was evaluated annually by Chief Schnitzler. For each year of Mr. Klonteig’s service, in all performance categories, he was scored as either “meeting and often exceeding the job requirements”, or “exceeding the job

requirements more than 50% of the time”. Chief Schnitzler testified that Mr. Klonteig was an exemplary employee. The performance evaluations were signed off by Jason Johnson, who was then the District’s Chief Administrative Officer.

[17] Mr. Klonteig’s performance evaluations resulted in steady salary increases, until 2011 when he reached the top of the pay scale for the position of Assistant Fire Chief. Pursuant to District pay practices, because he could not receive pay increases after 2011, in each year thereafter he received bonuses.

[18] Written comments from Chief Schnitzler attest to the fact that Mr. Klonteig was “very respected” by the career and 50-60 paid on-call firefighters. The Chief also commented that Mr. Klonteig treated all members of the staff very well and was very good at communicating issues to them. In his 2012 performance evaluation, completed on June 19, 2013, he met and often exceeded the job requirements in 12 evaluation categories and regularly exceeded those requirements in 18 categories.

[19] Mr. Klonteig testified that his primary duties, occupying 50-60% of his time, were labour relations with Local 4457 and human relations for the District’s career firefighters. He was also responsible for looking after communication equipment and communications monitoring for the firefighters and with the City of Kelowna. This secondary focus included his role as the District representative charged with regional rescues.

[20] In his evidence, Chief Schnitzler described Mr. Klonteig’s role as administrative in nature. In each of Mr. Klonteig’s performance appraisals, Chief Schnitzler commented that Mr. Klonteig had limited opportunity for exposure to the District’s Council and limited public exposure. In Mr. Klonteig’s 2010 performance appraisal, Chief Schnitzler said this about his overall performance, “Very strong member of our team. Hope to give more opportunity as succession planning starts.” In appraisals for subsequent years, Chief Schnitzler scored Mr. Klonteig’s overall performance highly.

[21] Mr. Klonteig testified that he fell in love with firefighting and it was his life-long career. It was clear that being a firefighter was integral to Mr. Klonteig's identity and that he took pride in his work, his professionalism, and the relationships he had formed with the District's firefighters and the Chief.

[22] Firefighters Dennis Hall and Trevor Bredin testified on Mr. Klonteig's behalf. They were both on the executive of Local 4457 and dealt with Mr. Klonteig on labour/management issues and in contract negotiations. They spoke highly of Mr. Klonteig's abilities. They also testified about the fact that firefighters rarely leave the profession. They are a close-knit group and for the most part, firefighters are "lifers". Chief Schnitzler confirmed this in his evidence.

[23] Mr. Klonteig had an unblemished employment record. The District did not dispute that Mr. Klonteig was a valued and exemplary employee.

[24] When his employment was terminated, Mr. Klonteig was being paid an annual salary of \$101,581. He was also entitled to a performance-based bonus. In addition, he received other employment benefits, paid for by the District.

The Events of the Evening of October 7, 2013, and the Following Days

[25] In the early morning hours of October 7, while Mr. Klonteig was off duty, he was returning to his home in the District, from downtown Kelowna, after a "date night" with his spouse. He was crossing the William R. Bennett Bridge when he was pulled over by Constable Troy Bevan of the RCMP for suspected impaired driving.

[26] After failing two roadside breathalyser tests, Mr. Klonteig received a 90-day administrative driving prohibition, and the vehicle which he was driving, Chief Schnitzler's District pick-up truck, was impounded (the "Incident"). Although the pick-up truck had a fleet number on its rear tailgate, it was not decalated and bore no other indications that it belonged to the District or the fire service.

[27] On the same day, Mr. Klonteig reported the Incident to Chief Schnitzler. Although there is some disagreement with respect to the sequence of the

discussions and meetings which followed, I accept Mr. Klonteig's evidence that after he and Chief Schnitzler met, they travelled to the District's offices to discuss the Incident with Patty Tracy, who was then a corporate human resources advisor and later became the District's Manager of human resources.

[28] It was clear from the evidence of Ms. Tracy and Chief Schnitzler that they initially believed that the suspension of Mr. Klonteig's driving privileges was for 24 hours. At some point, they learned of the lengthier suspension.

[29] Initially, when they believed that Mr. Klonteig's driving suspension was for 24 hours, Ms. Tracy and Chief Schnitzler considered the possibility that the Incident might result in a letter of reprimand. However, as the length of the suspension became clear, and things were escalated to Mr. Johnson's level, a reprimand was no longer being considered, and Mr. Klonteig was sent home to begin what he believed would be a suspension of his employment.

[30] Both Ms. Tracy and Chief Schnitzler described Mr. Klonteig as being very forthright and honest about what had happened. He was distraught and remorseful, and expressed his remorse to them and later in a letter addressed to Mr. Johnson. They agreed that the Incident was entirely out of character for Mr. Klonteig. Mr. Klonteig was similarly remorseful in his evidence. He testified that he believed that he was not impaired and was capable of driving without risk. He acknowledged that he was incorrect about his level of impairment.

[31] Determining the sequence of the discussions and meetings with respect to Mr. Klonteig was hampered by the fact that, surprisingly, none of the District participants made notes of the meetings and what was discussed. In particular, Chief Schnitzler and Ms. Tracy did not make notes at either of their two meetings with Mr. Klonteig, nor did they provide information in writing to Mr. Johnson. Mr. Johnson testified that he made no notes either.

[32] At some point, on either October 7 or 8, 2013, after Mr. Johnson had been apprised with respect to the Incident, he decided that Mr. Klonteig's employment should be terminated.

[33] Pursuant to Bylaw No. 0146, the District's Council designated the Chief Administrative Officer with authority to promote, discipline, suspend and dismiss District staff. Mr. Johnson was not permitted to delegate his authority to another.

[34] Ms. Tracy and Chief Schnitzler did not agree that termination was the appropriate discipline and tried to persuade Mr. Johnson to consider a lesser sanction. Mr. Johnson was adamant. In his evidence, he expressed his outrage about the potential liability to which Mr. Klonteig had exposed the District's taxpayers and the risk he created for public safety.

[35] In his evidence, Mr. Johnson presented as a decisive individual who was certain in his decision and, despite the contrary advice of two of his senior managers, both of whom had worked much more closely with Mr. Klonteig than he had, he advised the District's Council of his decision to terminate Mr. Klonteig during an *in camera* meeting in advance of the regularly scheduled Council meeting on October 8, 2013. Mr. Johnson did not provide Council with a written brief and made no notes of his discussion with Council.

[36] In accordance with District practice, there were no minutes of the *in camera* meeting, and as the decision was Mr. Johnson's, no Council vote was required.

[37] In a last ditch effort to persuade Mr. Johnson to consider a lesser sanction, Ms. Tracy sent him an email on the evening of October 8, outlining the operational impact that the termination of Mr. Klonteig would have on the Fire Department and on the District. She explained the toll that both the Chief and Mr. Klonteig were experiencing as a result of the departure of the other Assistant Chief in August 2013 and the requirement that they divide his responsibilities between them. She reiterated that Mr. Klonteig had been given an administrative suspension and was

not charged criminally. She also outlined Mr. Klonteig’s record of service. In particular, as it related to Mr. Klonteig, she wrote:

Our IAFF [Labour Relations Committee] has been effective...Assistant Chief Klonteig is a valued member of the LRC. He was a member of the [District’s] negotiating committee last year and did a stellar job in this role. He clearly understands the aspects of IAFF’s proposals that affect budget and/or productivity and communicates same in a constructive way. At the same time he has garnered the respect of the IAFF as someone who follows through on their concerns. I believe as this unravels the majority of the members will support Assistant Chief Klonteig and his efforts going forward, however, there will be members who do not.

...

Kerry Klonteig Performance, [Psychometric Personality Profile]
Traits/Characteristics:

- Impeccable work record.
- Detail oriented to the point of being “teased”
- PPS complements [the Fire Chief’s] style very well
- Really stepped up when Darren left – has been working very hard
- An engaged and interested individual – my guess is that we will see a “different Kerry” going forward. He wants and will treasure a second chance.

[38] Ms. Tracy testified that she did not receive a response to her email but was told by Mr. Johnson to draft a termination letter to be delivered to Mr. Klonteig. She did so with the assistance of legal counsel.

[39] Mr. Johnson reviewed the letter and directed Chief Schnitzler to sign it and Ms. Tracy to deliver it. It was clear from Mr. Johnson’s evidence that, despite their misgivings, he involved these two senior managers in the termination to demonstrate to Mr. Klonteig that it was a “corporate” decision. Chief Schnitzler testified that he was told he had to sign the letter, and he explained that to firefighters Hall and Bredin, the representatives of Local 4577, when he met with them to advise that Mr. Klonteig’s employment had been terminated.

[40] On October 9, 2013, Mr. Tracy delivered the termination letter to Mr. Klonteig. It outlined the circumstances of the incident and said:

You were aware that you should not have been driving the Fire Chief's truck for a personal evening out, let alone when you would be consuming alcohol. This is a very serious incident as you were driving a District vehicle while impaired and consequently posed a threat to the safety of yourself and others travelling on the roads that evening. As well, the District vehicle was impounded. This is simply unacceptable for someone in your position whose job is to protect public safety.

This incident also reflects poorly on our Department and the District. You are a leader in the Fire Department and this incident displays an extremely poor use of judgment on your part. We recognize that you showed remorse, but it will be impossible for you to re-gain the necessary respect of the members of the Department. Your conduct has irreparably harmed the employment relationship. Therefore, the District has decided that it has no choice but to terminate your employment for just cause.

[41] As required by Mr. Johnson, the letter was signed by Chief Schnitzler.

[42] The termination letter was incorrect in two respects. First, it indicated that Mr. Klonteig was aware that he should not have been driving the Fire Chief's truck for a personal evening out. In fact, Chief Schnitzler had allowed Mr. Klonteig to drive his truck as the truck which would normally have been available to Mr. Klonteig was in use by another Fire Department employee. There were no Fire Department policies with respect to the personal use of vehicles and the Chief had not restricted Mr. Klonteig's use of the truck in any way.

[43] Second, it indicated that it would be impossible for Mr. Klonteig to regain the necessary respect of the members of the Fire Department. When the termination letter was delivered, the members of the Fire Department, with the possible exception of firefighters Hall and Bredin, were not aware of Mr. Klonteig's license suspension. Ms. Tracy had expressed her view, in her email on the evening of October 8, that Mr. Klonteig would have the support of the majority of the firefighters. In fact, 24 members of Local 4457 signed a letter of support for Mr. Klonteig. Chief Schnitzler testified that the total complement of career firefighters at the time was 28, including himself and the two Assistant Chiefs.

[44] Local 4457's letter was addressed "To whom this may concern". According to Mr. Hall's and Mr. Bredin's evidence, both of whom were members of the executive and who signed the letter, it was intended to be filed in these proceedings and to

address the suggestion in the termination letter that Mr. Klonteig had lost the respect of the firefighters. It provided:

On behalf of the attached members of the West Kelowna Professional Firefighters Association, please accept this letter of support and clarification in the matters of Assistant Chief Kerry Klonteig and the City of West Kelowna.

A/C Klonteig had a professional, successful, and productive relationship with the members of our association, that formed the professional fire service in West Kelowna. Through his operational experience and labor relations, our Union and City were able to form a relationship unheard of in the modern fire service. Our members relied on A/C Klonteig's organizational and operational dedication to our Fire Department, at a time when he carried the load of more than one Assistant Chief.

During the 6 years that A/C Klonteig served as a Chief Officer in our department, we went through many administrative, operational, and governance changes. Through this all, his professional approach to the career staff, paid on call, and city personnel would earn him the respect and confidence of our fire department and its members.

[Deleted portion found to be inadmissible.]

Please accept this letter and the attached signatures of our members, as clarification to the impression that the City of West Kelowna has formed, with regards to our operational confidence and respect we had and still have for Assistant Chief Kerry Klonteig.

[45] Firefighters Hall and Bredin, both of whom signed the letter, testified that signing the letter was voluntary on the part of their members.

The Promise of a Reference Letter

[46] Following Mr. Klonteig's termination, he was provided with a cheque for his outstanding unpaid wages and a payout of his accrued vacation time. All other benefits were terminated immediately or by the end of October 2013.

[47] Mr. Klonteig testified that both Chief Schnitzler and Ms. Tracy said they would give him a written reference letter. By email to Ms. Tracy, Mr. Klonteig followed up on the reference letter on October 12, 14, 15 and 29 and November 6, 2013. On November 7, Ms. Tracy responded indicating that they had been advised by legal counsel that, under the circumstances, they should not be providing Mr. Klonteig with formal letters of reference, and indicating that both she and Chief Schnitzler would provide any prospective employers with a verbal reference.

Mr. Klonteig's Employment History after the Termination

[48] Following his termination in late October 2013, Mr. Klonteig applied for employment insurance. The Employment Insurance Commission determined that the reason for Mr. Klonteig's loss of employment was not misconduct and paid him benefits. The District was advised of that determination by letter received on December 17, 2013, and did not formally request reconsideration of the decision.

[49] Mr. Klonteig also applied for a number of firefighting opportunities, including assistant fire chief positions and a chief's position in various communities throughout BC. Mr. Klonteig was unsuccessful in each competition. In some of those competitions, he was not granted an interview. In two, he was interviewed and asked about the circumstances of his departure from the District and, after being forthright about those circumstances, was not successful in obtaining the positions.

[50] In July 2014, and until the end of September, Mr. Klonteig obtained an hourly paid seasonal job with Firestorm Enterprises Ltd., a company which sets up temporary sprinkler systems to protect residences in fire-threatened areas.

[51] Starting in October 2014, Mr. Klonteig worked for Spartan Metal Processing Ltd. as an hourly-paid warehouse foreman in their machine shop, cutting steel plates and bars to customers' specifications. He remained with Spartan until January 2017.

[52] In February 2017, Mr. Klonteig accepted a job in Fort St. John with Fraction Energy Services, a company supplying water under pressure to gas and oil wells for the purposes of fracking. He left them to join Superior Fire Control Ltd. in June 2017. It provides industrial firefighting and decontamination to fracking sites in the oil and gas industry. Mr. Klonteig earns a base salary and a weekly field bonus when he is in the field.

[53] Mr. Klonteig has never returned to his career as a firefighter with a municipal fire department.

The Parties' Positions

[54] Mr. Klonteig alleges that he was wrongfully dismissed and seeks an order for payment of 18 months' severance, net of the employment insurance he received and income he earned during that period. He submits that he is entitled to a period of 18 months on the basis that the wrongful termination of his employment essentially erased his 18 years of experience as a career firefighter, and that he is entitled to additional damages for the manner in which he was terminated, and the District's failure to provide him with a reference letter, based on the Supreme Court of Canada's decision in *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701.

[55] Alternatively, Mr. Klonteig says that he is entitled to the notice provided for under his contract of employment.

[56] The District says that it had just cause to dismiss Mr. Klonteig. It submits that the Incident was serious enough to amount to just cause and that the District was not legally required to forgive or condone his conduct.

[57] Alternatively, the District says that there is no basis in the evidence for a finding of bad faith conduct or dealing on its part such as to warrant increasing the notice period or awarding aggravated damages.

[58] In the event that just cause is not found, the District submits that the amount of compensation in lieu of reasonable notice is set out in the contract of employment at five months' salary.

The Applicable Legal Principles

[59] The parties do not disagree about the legal approach to determining whether the District had just cause to dismiss Mr. Klonteig. It was articulated in *McKinley v. BC Tel*, 2001 SCC 38, and has been referred to in most subsequent wrongful dismissal cases in which cause is alleged.

[60] While there is no single test which defines the degree of misconduct that will justify summary dismissal, it is clear that the misconduct must be considered in the

context of the circumstances surrounding the misconduct and the nature of the employment relationship. Misconduct arising in one employment context might justify summary dismissal while it will not in a different employment context.

[61] *McKinley* involved an allegation of dishonesty. The Supreme Court of Canada said:

[48] ... I am of the view that whether an employer is justified in dismissing an employee on the grounds of dishonesty is a question that requires an assessment of the context of the alleged misconduct. ...

[51] ... I conclude that a contextual approach to assessing whether an employee's dishonesty provides just cause for dismissal emerges from the case law on point. In certain contexts, applying this approach might lead to a strict outcome. Where theft, misappropriation or serious fraud is found, the decisions considered here establish that cause for termination exists. This is consistent with this Court's reasoning in *Lake Ontario Portland Cement Company v. Groner*, [1961] S.C.R. 553, where this Court found that cause for dismissal on the basis of dishonesty exists where an employee acts fraudulently with respect to his employer. This principle necessarily rests on an examination of the nature and circumstances of the misconduct. Absent such analysis, it would be impossible for a court to conclude that the dishonesty was severely fraudulent in nature and thus, that it sufficed to justify dismissal without notice. [Emphasis added.]

[62] The Court further proposed a “principle of proportionality” in which an effective balance is struck “between the severity of the employee’s misconduct and the sanction imposed”: para. 53.

[63] Although *McKinley* involved dishonesty, the principles articulated in it have been applied in other cases in which the allegations of cause are not based on dishonesty.

[64] In *Whitehouse v. RBC Dominion Securities Inc.*, 2006 ABQB 372 at para. 26, the court cited an articulation of the concept of just cause from the Ontario Court of Appeal decision in *R. v. Arthurs, ExP. Port Arthur Shipbuilding Company* (1967), 62 D.L.R. (2d) 342 at page 348:

If an employee has been guilty of serious misconduct, habitual neglect of duty, incompetence or conduct incompatible with his duties or prejudicial to the employer’s business, or if he has been guilty of wilful disobedience to the employer’s orders in a matter of substance, the law recognizes the employer’s right to summarily dismiss the delinquent employee.

Analysis

[65] In this case, the District argues that Mr. Klonteig’s conduct was incompatible with his duties, in particular, his responsibility for ensuring public safety, and incompatible with the District’s “business” in that it put the taxpayers at risk for substantial exposure.

[66] For the reasons which follow, I have concluded that the District did not have just cause to dismiss Mr. Klonteig and that his dismissal was wrongful.

[67] While I accept that conduct which occurs while off duty may amount to cause, as was the case in some of the decisions relied on by the District, in my view such conduct must be or be likely to be prejudicial to the interests or reputation of the employer. In this case, Mr. Klonteig was not representing his employer when he engaged in the conduct that led to the suspension of his licence. The vehicle he was driving, although belonging to the District, was unmarked as such. There was no public knowledge of Mr. Klonteig’s administrative suspension.

[68] Further, the conduct was not of the same moral reprehensibility as the possession of child pornography and the attendant extensive publicity which gave rise to cause in *Kelly v. Linamar Corp.*, [2005] O.J. No. 4899 (S.C.J.), or the consorting with a prostitute on company premises and potential breach of privacy which gave rise to cause in *Whitehouse*, or the dishonest tax scheme engaged in by a chartered accountant and manager of internal audit at a hospital in *Hyland v. Royal Alexandra Hospital*, 2000 ABQB 458.

[69] I accept that the District’s community members would expect a senior employee, in a department dealing with the protection of the public and public safety, to avoid risk of public harm, I note that Mr. Klonteig was not the public face of the Fire Department. That role fell to Chief Schnitzler. Mr. Klonteig’s role was more administrative.

[70] Further, if Mr. Klonteig’s conduct did not cause the career firefighters in the Fire Department, whose role is to be the first to respond to fire scenes involving

impaired drivers, to lose confidence in him, it is difficult to conclude that members of the public at large would do so. In that regard, I also take into account that Constable Bevan exercised his discretion to administer an administrative license suspension as opposed to a criminal charge. There was no evidence that the public at large would have been offended by Mr. Klonteig's lack of judgment being sanctioned by a lengthy suspension without pay.

[71] Thus, the distinction between police officers, who are in a unique position with respect to public trust and confidence in their ability to discharge their duties, and the expectations which fall on other municipal employees, as discussed in *Lévis (City) v. Fraternité des policiers de Lévis Inc.*, 2007 SCC 14 at paras. 42-43, is applicable here.

[72] I therefore conclude that Mr. Klonteig's off-duty conduct was not incompatible with his faithful discharge of his duties or otherwise prejudicial to the interests or reputation of the District, and that his termination was without cause.

[73] I turn now to consider the damages to which Mr. Klonteig is entitled.

Wallace Damages

[74] In *Wallace* at para. 73, Justice Iacobucci, writing on behalf of the majority, reiterated the Court's earlier statement in *Vorvis v. Insurance Corporation of British Columbia*, [1989] 1 S.C.R. 1085 that any award of damages beyond compensation for breach of contract for failure to give reasonable notice of termination must be founded on a separately actionable course of conduct. Absent an independently actionable wrong, the foreseeability of mental distress, or the fact that the parties contemplated its occurrence, is of no consequence. However, Justice Iacobucci went on to explain at para. 74 that, in circumstances where the manner of dismissal has caused mental distress but falls short of an independent actionable wrong, a trial judge has discretion to extend the period of reasonable notice to which an employee is entitled.

[75] Although the Court did not recognize a claim in contract or in tort for bad faith discharge, at paras. 88 and 90-93 of *Wallace*, Justice Iacobucci indicated that due to the unique characteristics of an employment contract, bad faith conduct in the manner of dismissal is a factor that is properly compensated for by an addition to the notice period to which an employee is entitled on dismissal without cause. Those unique characteristics include the imbalance in bargaining power between employers and employees, and the vulnerability of employees in light of the essential nature of employment to an employee's financial and emotional well-being and sense of identity and self-worth.

[76] Justice Iacobucci wrote at paras. 94-95 and 98:

94. Thus, for most people, work is one of the defining features of their lives. Accordingly, any change in a person's employment status is bound to have far-reaching repercussions. ...

95. The point at which the employment relationship ruptures is the time when the employee is most vulnerable and hence, most in need of protection. In recognition of this need, the law ought to encourage conduct that minimizes the damage and dislocation (both economic and personal) that result from dismissal. ... I note that the loss of one's job is always a traumatic event. However, when termination is accompanied by acts of bad faith in the manner of discharge, the results can be especially devastating. In my opinion, to ensure that employees receive adequate protection, employers ought to be held to an obligation of good faith and fair dealing in the manner of dismissal, the breach of which will be compensated for by adding to the length of the notice period.

...

98. The obligation of good faith and fair dealing is incapable of precise definition. However, at a minimum, I believe that in the course of dismissal employers ought to be candid, reasonable, honest and forthright with their employees and should refrain from engaging in conduct that is unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive.

...

[77] Mr. Klonteig relies on these paragraphs in support of his submission that I should increase the notice period to which he would otherwise be entitled under his employment contract. He submits that the appropriate period would be 18 months as he has, in effect, lost the life-long career which he built over 18 years as a career firefighter.

[78] The primary focus of Mr. Klonteig's argument with respect to alleged bad faith in the manner of his termination is on the failure of the District to provide him with reference letters despite Ms. Tracy's and Chief Schnitzler's agreement to provide same. To a lesser extent, although not articulated, Mr. Klonteig may also be relying on his understanding that a sanction short of termination was being considered.

[79] I have concluded that neither of these two bases support a greater award of damages in this case.

[80] With respect to the failure to provide letters of reference, there was no evidence called which supported an argument that Mr. Klonteig's lack of success in finding employment in the firefighting field was as a result of the lack of letters of reference. I simply cannot determine on the evidentiary record that this affected his job search. It is also not clear on the evidence that Mr. Klonteig took up Ms. Tracy's offer that either or both she and Chief Schnitzler would provide him with an oral reference.

[81] With respect to the possibility of a sanction less than termination, Mr. Klonteig was not under the impression that the final decision with respect to his employment rested with Ms. Tracy or Chief Schnitzler. He understood that they would raise the Incident with Mr. Johnson. He was aware of Mr. Johnson's role because he wrote his letter of regret to Mr. Johnson.

[82] In addition, when the letter of reprimand was being discussed as a sanction, Mr. Klonteig was aware that Ms. Tracy and Chief Schnitzler believed that the suspension he was facing was of a 24-hour duration. He understood that a letter of reprimand was no longer being considered when he was suspended and sent home.

[83] Finally, I think it is clear that in *Honda Canada Inc. v. Keays*, 2008 SCC 39, the Supreme Court of Canada reconsidered and adjusted the *Wallace* approach of awarding damages for the manner of dismissal by extending the notice period: see paras. 49-56. Justice Bastarache writing for the majority said at paras. 57 and 59:

57. Damages resulting from the manner of dismissal must then be available only if they result from the circumstances described in *Wallace*, namely where the employer engages in conduct during the course of dismissal that is "unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive" (para. 98).

...

59. ... 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]* 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).

[84] In this case, there is no evidence which would support a finding that the manner of dismissal caused Mr. Klonteig mental distress that was in the contemplation of the parties. There was also no attack on his reputation by declarations made at the time of the dismissal. The District did not misrepresent the reason for the decision and Mr. Klonteig was not otherwise deprived of a benefit or right.

[85] Even if I were to find an evidentiary basis, in light of *Honda Canada Inc.*, it would not result in an extension of the notice period beyond what Mr. Klonteig was entitled to under his contract of employment.

[86] As a result, I conclude that Mr. Klonteig is limited to the five months' salary provided for in his employment contract. Based on his rate of pay at the date of his termination, he is entitled to \$42,325. During that five-month period, Mr. Klonteig received \$7,452 in unemployment insurance benefits which either he or the District

will be required to repay. I expect that counsel will be able to work out the repayment obligation amongst themselves.

Costs

[87] As Mr. Klonteig has been successful in establishing that his termination was without cause, in the normal course, he should be entitled to his costs of this proceeding. There may, however, be other factors of which I am not aware which might change this normal costs outcome. If the parties wish to speak to costs, they may arrange to do so through trial scheduling.

“MacNaughton J.”