

CITATION: Sweeting v. Mok, 2015 ONSC 4154
COURT FILE NO.: 307/12
DATE: 2015-06-26

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

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Tanya Sweeting)	Jeffrey D. Ayotte, for the Plaintiff
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Plaintiff)	
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- and -)	
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Dr. Lawrence Man-Suen Mok)	John R. Dunn, for the Defendant
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Defendant)	
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)	HEARD: November 24-28, 2014

2015 ONSC 4154 (CanLII)

REASONS FOR JUDGMENT

Lack J.

[1] The plaintiff Tanya Sweeting seeks damages from the defendant Dr. Lawrence Man-Suen Mok for wrongful termination of her employment.

The Issue

[2] The issue is whether on June 20, 2012, Dr. Mok dismissed Ms. Sweeting from her employment, as she alleges. Alternatively, she claims he constructively dismissed her. Dr. Mok contends that Ms. Sweeting simply quit her job.

The Background

[3] There is no dispute about much of the background. Exhibit 7 is an Agreed Statement of Facts. The agreed facts include the following:

Ms. Sweeting resides in Peterborough and is now 52 years old. She is a registered practical nurse who worked for the defendant Dr. Mok for over 22 years. She was Dr. Mok's practice assistant and office manager. Ms. Sweeting's last day of work was June 20, 2012. At the time, she made \$60,000 per year and received six weeks annual paid vacation.

The defendant Dr. Mok is a medical doctor who specializes in plastic surgery. He has operated his practice in Peterborough since December 1978, over 35 years.

Dr. Mok operates a relatively small but extremely busy office. Over the years of Ms. Sweeting's employment, she was the one constant in Dr. Mok's practice. He did from time to time employ a secretary. Ms. Sweeting was, however, at all times, the key nurse and office manager.

Ms. Sweeting's employment responsibilities included assisting Dr. Mok with surgery daily from approximately 9:00 a.m. to 3:30 p.m.; completing administrative duties either before or after surgical time; completing all pre-operative and post-operative patient care; processing referrals both from and to physicians; and completing phone calls, patient appointment bookings and patient charting.

In December 2011, Dr. Mok's secretary stopped working in the office. In January 2012, Helene Mok, who is Dr. Mok's wife and a registered nurse, began working one day a week in the office. On April 25, 2012, Mrs. Mok began working two days a week.

The Secretary's Departure

[4] There are two versions of events about how the office would operate without the secretary. Ms. Sweeting testified that when the secretary left, she thought that she could manage all the administrative, secretarial and nursing work on her own. She said that was because she understood that starting in 2012 Dr. Mok was going to reduce the time that he saw patients to three days a week. He did not. Dr. Mok testified that Ms. Sweeting had said that she could handle the workload if he worked three days a week, which would free her on the remaining two days to do secretarial work. However, he said that since he needed to work four days, the

solution was that Mrs. Mok would come in one day a week to help out and that is how they started 2012.

[5] On April 25, 2012 Mrs. Mok received a call from Ms. Sweeting's husband. He told her essentially that Ms. Sweeting was overwhelmed at work and unless there were some changes he was going to "pull her out". Mrs. Mok immediately started working two days a week in Dr. Mok's office.

[6] There appears to be an issue whether Mr. Sweeting's phone call was precipitated by frustration over his own problems, but since he did not testify, the only relevance of his call is that it was the basis for action which Mrs. Mok took.

[7] I find that there were some discussions, but no plan that Dr. Mok would go to a three-day work week when the secretary left. However, the evidence established that it was unrealistic to think that Ms. Sweeting could do the job of two people even with the help of Mrs. Mok for one and then two days. The result was that Ms. Sweeting clearly was overworked after the secretary left. Even with Mrs. Mok working two days a week, Ms. Sweeting stayed late and often worked through her lunch hours. Mrs. Mok agreed in her testimony that Ms. Sweeting was very busy. Despite this, Ms. Sweeting did a good job. In his testimony, Dr. Mok described Ms. Sweeting's role in his office as indispensable. She did everything. Her nursing was top notch. Her administration was top notch. He rated her work as 10 out of 10, both before and after the secretary left at the end of December 2011.

[8] There had been some discussion in the past between Ms. Sweeting and Dr. Mok about when Dr. Mok would retire. His plans were uncertain. While Ms. Sweeting had another job offer in the past, I am satisfied that she was prepared to stay in Dr. Mok's employ until he did retire. She enjoyed her job. As well, her salary and holiday benefits were greater than she could hope to receive for similar employment elsewhere.

Electronic Medical Records

[9] Sometime in June 2012 Dr. Mok directed Ms. Sweeting to look into electronic medical recording (EMR). This is the first step in moving to a paperless, fully-computerized office. There are two versions of when and how Dr. Mok broached the subject of EMR with Ms. Sweeting.

[10] Ms. Sweeting testified that about one week before Wednesday, June 20 Dr. Mok told her to look into EMR. Later, on June 19, as Dr. Mok was leaving the office at the end of the day, he gave her a paper about EMR. As she recalls, that is the only time he gave her the flyer. Ms. Sweeting asked him: "Are you serious?" She then went and spoke to Martha in radiology about EMR. She said that the next morning, Dr. Mok was angry when he came in. He stood within a foot of her face said "What?" She repeated: "What?" He said: "Have you looked into it?" She told him that she had spoken to Martha in x-ray who would come and speak to him. Dr. Mok said something to the effect of: "Why the hell would I want to talk to someone in radiology about

this?” Ms. Sweeting suggested that she and the doctor talk about it at the end of the day. That led to the meeting after work on June 20.

[11] Dr. Mok testified that he left a pamphlet about EMR with Ms. Sweeting on June 6 or June 7 and asked her to look into it while he was away at a conference. She did not respond. When he returned on June 11 he asked Ms. Sweeting what she had found out. She told him to talk to Martha in x-ray. He did not respond. At the end of the week, on Thursday, June 14, he found the pamphlet back on his desk. He put it in Ms. Sweeting’s in-tray and asked her to look into it. She did not respond. On Wednesday, June 20, when he came into the office he asked Ms. Sweeting if she had done anything and she referred him to Martha. He asked why he would want to talk to Martha since an x-ray department was not relevant to his office. He testified that he was not angry and did not recall “being in her face”. She told him that she did not want to discuss it anymore and she suggested a meeting at the end of the day. He thought it was a good idea.

[12] I accept Dr. Mok’s evidence that he broached the topic of EMR with Ms. Sweeting on three occasions, as he said. Despite Ms. Sweeting’s insistence that Dr. Mok gave her the pamphlet on the day before June 20, that evidence does not make sense and I do not accept it. There was general agreement that Mrs. Mok was present. I accept Mrs. Mok’s evidence that the last time she was present before June 20 was Thursday June 14. Mrs. Mok remembered that because she did not work her usual Tuesday workday on June 19, due to dealing with wedding invitations. I find that Dr. Mok last gave Ms. Sweeting the pamphlet on Thursday, June 14.

[13] I do not accept Dr. Mok’s evidence that he was not angry on the morning of June 20 when he broached the topic. In his Statement of Defence he admitted that when Ms. Sweeting mentioned the x-ray department he said something along the lines of “what the hell do I want to talk to them for” and that there would have been “some degree of anger in his voice”. I find that is what he said and saying that with “some degree of anger in his voice” means he was angry. I also find that he was angry because he had broached the topic three times and he felt that Ms. Sweeting had not done what he asked her to do – look into it.

[14] Mrs. Mok and Ms. Sweeting had lunch together on June 20. Mrs. Mok testified that Ms. Sweeting brought up EMR and said she was too busy to look into it and if Dr. Mok pushed it she was going to quit. Mrs. Mok did not tell Dr. Mok about the discussion before the meeting. Ms. Sweeting did not deny making those comments but said the focus of her comments was not quitting but how busy she was. She testified that she was not opposed to the conversion, but did not know where she would get the time to do it.

The Meeting of June 20, 2012

[15] The meeting between Dr. Mok and Ms. Sweeting took place on June 20, at the end of the workday, at Dr. Mok’s desk in his inner office. Mrs. Mok was also present, at the invitation of Ms. Sweeting. By everyone’s estimation the meeting seemed very short – under ten minutes, perhaps as brief as five minutes.

Ms. Sweeting's Version of Events

[16] Ms. Sweeting described the meeting in her testimony. It began with Dr. Mok, in a condescending tone, asking her: "So Tanya exactly what is your impression of EMR records?" She answered that it was transferring the patient charts to disks. She said she believed he wanted to do it to avoid storing files. Mrs. Mok then asked Dr. Mok why he wanted to take it on, so close to retirement, noting that it was expensive. Dr. Mok just blew up. He said: "I'm not a fucking idiot. I wouldn't take this on if it's not going to work. I'm the boss. I'm the one that pays your pay cheque. If it wasn't for me you wouldn't have a job." Ms. Sweeting said he was speaking in a loud voice. She considered that he was yelling, shouting or screaming at her because generally he is soft-spoken. She said he must have said "fuck" four or five times during the meeting. Later, she estimated he said it at least three times. He waved his arms in the air. His feet were going under the desk. He picked up books and slammed them on his desk and briefcase.

[17] Ms. Sweeting sat quietly. Dr. Mok was looking at her with a disgusted look on his face and he pointed at her and said: "You are just resistant to change." She responded: "Dr. Mok, it is not that I am resistant to change. I'm not resistant to change, I'm just..." Then Mrs. Mok interrupted: "Lawrence she's just trying to tell you she doesn't have time." He said: "I'll fucking take it on myself". Ms. Sweeting testified that she tried to get things under control by saying: "Boss, I'm just trying to tell you I just don't have the time." Then Dr. Mok said: "Go! Get out! I am so sick of coming into this office every day and looking at your ugly face." Ms. Sweeting testified that he said this with such venom in his voice and disgust on his face that she knew: "I was done, that he wanted no more part of me. He wanted me out of that office because the way he looked right in my eyes and the way he said it with so much disgust I just thought 'Oh my God, how long has he been thinking about this? How long has he felt this way about me that he no longer wanted to work with me?'"

[18] She was shocked at his words and got up. She was in tears. She pointed her finger at him and said: "You have just hurt me so very deeply. How dare you say that to me! I have come into this office for 22 years every day with a smile on my face."

[19] She then left the room. She said that she did so because in her mind she had been fired. Mrs. Mok followed her out of Dr. Mok's inner office and told her that she did not want her to drive in that condition. Ms. Sweeting gave Mrs. Mok some instructions about the office. She left and did not return, except to drop off her parking pass and keys on the weekend when no one was there.

Dr. Mok's Version of Events

[20] Dr. Mok testified that the meeting in his office began with him asking Ms. Sweeting what her understanding was of EMR. He said she did not answer. Instead, she asked him why he was working four days instead of three. He responded by saying that he has expenses and said: "I have to make fucking pay cheques". He then asked her why she was so reluctant to look

into EMR. Again he did not get a response. He said: "You are resistant to change." As he did so, he gestured with his hand, his finger. He went on to say that he was going to relieve her of the responsibility of the exercise. He said he would do the research and see what was needed. If it was something they wanted, he would see about implementing it. Mrs. Mok then asked him why he would do it when he was so close to retirement. He said: "I am no fucking idiot. If things are not suitable, I will not do it. If we do it, we will do it properly. We will have the proper equipment and support and training and things will run smooth and I will not have to see the ugliness in the office." He ended the meeting by saying: "Let's get of here and go home." At that point, Ms. Sweeting jumped out of the seat and said: "How dare you! How dare you!" She then left and he did not know if she was coming back the next day, but he hoped that she would. He said that throughout the meeting his voice might have been raised a little, but there was nothing different from any other situation where there had been a disagreement. He may have moved his arms and hands, as he usually does in speaking, but he did not slam his hand on the desk. He was not angry. It never crossed his mind to terminate Ms. Sweeting's employment.

Mrs. Mok's Version of Events

[21] Mrs. Mok testified that Ms. Sweeting spoke first at the meeting and challenged Dr. Mok that he was still working a four-day work week when he had said he would go to three days. He responded by saying: "If I don't cut no one gets paid." She said he used "the F word" once or maybe twice, but no more. He was not angry, or flailing about, or pounding on his desk, or out of control or screaming. He was in perfect control. Mrs. Mok said that Ms. Sweeting then said that Dr. Mok had changed his mind about his retirement date and she was upset that nothing had been decided about it. It sounded like an attack. Dr. Mok said in reply that he had not agreed to go to a three-day week and he had never set a retirement date.

[22] Mrs. Mok testified that things then escalated and EMR were brought up. Dr. Mok told Ms. Sweeting that her problem was that she is resisting change. He gestured with a matter-of-fact kind of pointing, but he was not angry. Ms. Sweeting took offence, her volume went up and she said she is always looking at ways to improve the office. Dr. Mok said that he would look after it and she didn't have to do anything about it. While he was talking about what he proposed to do, Ms. Sweeting said twice: "You don't want to do this." He said he would take care of the training and whatever it took so that "we don't have to put up with this ugliness and this tension in the office when EMR is brought up". Ms. Sweeting took that personally. That is, she took it that it was she who was ugly. She stood up and said: "How dare you! How dare you! I am in this office every day with a smile on my face." She broke into tears. She was shaking. She got up and left.

[23] Mrs. Mok followed her. Ms. Sweeting was out of control. She held up some office papers in Mrs. Mok's direction and said that people were calling her back. She told Mrs. Mok to call her if she had any questions. She left.

What happened at the meeting?

[24] I accept Ms. Sweeting's description of what took place at the meeting to the extent that it differs in any material respect from the other two versions.

[25] Mrs. Mok testified that the meeting began with Ms. Sweeting on the attack, challenging Dr. Mok about the number of days that he was working. That is unlikely. Both Dr. Mok and Ms. Sweeting testified that it began with Dr. Mok asking Ms. Sweeting what her understanding was of EMR. That makes more sense because a discussion of EMR was the purpose of the meeting. I find that is how the meeting began.

[26] Ms. Mok's evidence overall, in my view, was tainted by subsequent events and what she had read, surmised or reasoned retrospectively. For example, she was asked in her evidence in chief about the discussion between Dr. Mok and Ms. Sweeting when they arrived at work on the morning of June 20. At first, she testified that she heard nothing. Later, she testified that she heard Dr. Mok asking Ms. Sweeting if she did anything about EMR. Still later, she testified about Ms. Sweeting's reply and Dr. Mok's response. She was challenged twice in cross-examination about the inconsistency in her evidence. First, she repeated a part of what she said she had heard and added: "I do remember that". The second time she repeated what she said she had heard and said she was "clear" about it, but not the details. It is hard to accept that she heard what she said, if she was not clear on the details of such a short exchange. Likewise, her evidence about the meeting seemed to be interspersed with suppositions that she made afterward, rather than being a faithful rendition of what had happened. For example, she testified that Ms. Sweeting jumped up and said "how dare you" in response to Dr. Mok's comment about "ugliness" because she thought that he meant that it was she who was ugly. In cross-examination Mrs. Mok was asked about the words used. Mrs. Mok said she used "ugliness" as "a synonym". She does not remember the exact words used. She read "ugliness" in the documents. Consequently, I do not put much weight on Mrs. Mok's evidence.

[27] I find that the discussion, having begun with EMR, then moved on to expenses. There is general agreement that Dr. Mok said "I'm the one that pays your fucking pay cheques" or something to that effect. I find that Dr. Mok was angry throughout the meeting. That language taken in context, from a person who was described as being generally soft-spoken and mild, shows that he was angry. Ms. Sweeting testified that he was. Dr. Mok testified that he was not. However, he admitted in his Statement of Defence that he allowed himself to become upset and angry to the point of using the "F word" two or three times. He eventually admitted on cross-examination that there might have been some degree of anger in the voice. He was quibbling about the obvious. He also quibbled in his testimony about whether he was yelling or speaking in a raised voice. I accept that his granddaughter who was at the back of the office, in another room, heard nothing. However, she was concentrating on what she was doing, to the point where she could not listen to a radio. He is soft-spoken. I find that for him, he was speaking in a loud voice. Ms. Sweeting would have perceived that he was shouting.

[28] Dr. Mok was angry because Ms. Sweeting had failed to look into EMR, as he had asked her to do. In his Statement of Defence he pleaded that Ms. Sweeting had refused several direct instructions from him to assist him in investigating the pros and cons of EMR. In my view, her

conduct cannot be put on that plane. Dr. Mok agreed on cross-examination that he never gave Ms. Sweeting such explicit instructions about EMR. What he said to Ms. Sweeting on the topic was vague.

[29] There is general agreement that Dr. Mok said to Ms. Sweeting: “You are resistant to change”, or words very close to them. Ms. Sweeting said that Dr. Mok pointed his finger at her when he did. Dr. Mok testified that he gestured with his hand, his finger. In cross-examination he said he pointed in the air. It was put to him that in his examination for discovery he had admitted that he had pointed his finger at her. His explanation for the discrepancy was that he pointed in her direction, on a 45-degree angle. I find he pointed his finger at her. His evidence, to the effect that he did not really do it, is simply not credible.

[30] There is also general agreement that Dr. Mok said that he would take the EMR project on himself. He probably enlarged a little on what he would do.

[31] The meeting ended when Ms. Sweeting left. On the evidence of Ms. Sweeting and Mrs. Mok, Ms. Sweeting jumped up and said words to the effect: “How dare you! I come into this office every day with a smile on my face.”

[32] Ms. Sweeting testified that what precipitated her response was Dr. Mok saying: “Go! Get out! I am so sick of coming into this office every day and looking at your ugly face.” Dr. Mok denied he used those words. He testified that after he said that he would take on the issue of EMR himself, he said he would “not have to see the ugliness in the office,” and then he ended the meeting by saying: “Let’s get of here and go home.”

[33] I do not accept Dr. Mok’s evidence. He denied using the words “ugly face” and said he only remembered “ugliness”. Yet, in his Statement of Defence he admitted that he said something “along the lines of that he hoped he would not have to see Tanya making an ugly face in the office”, after he said he would take on the EMR investigation himself. His explanation for the discrepancy was that in the Statement of Defence, he was only repeating the allegation. The explanation made no sense. Nor would Ms. Sweeting’s response, on his version of events. What is far more likely, in my view, is that, as both Ms. Sweeting and Mrs. Mok testified, Ms. Sweeting responded negatively to Dr. Mok’s suggestion that he would take on EMR. Ms. Sweeting testified that she said she did not have time. Mrs. Mok testified that Ms. Sweeting said something along the lines of: “You don’t want to do that.” I find that Dr. Mok, angry and frustrated, then said exactly what Ms. Sweeting reported that he said.

[34] Dr. Mok was not a credible witness. In his Statement of Defence, Dr. Mok pleaded that Ms. Sweeting provoked “a confrontation” at the meeting in which she was determined to force Dr. Mok to abandon any thought of introducing EMR under the threat of her resigning her position if he did not. He also pleaded that she delivered “an ultimatum” to him at the meeting, on the subject of the EMR. However, he agreed on cross-examination that Ms. Sweeting never said in the meeting that she did not want him to implement EMR and would quit if he did. He

also agreed that she did not provoke a confrontation in the meeting; did not give him such an ultimatum and never said that she quit.

Did Dr. Mok terminate Ms. Sweeting's Employment?

[35] Ms. Sweeting did not quit her job. I accept Dr. Mok's evidence that he did not intend to terminate Ms. Sweeting's employment. I find, however, that he did, in fact, fire Ms. Sweeting, when in his anger, he told her: "Go! Get out! I am so sick of coming into this office every day and looking at your ugly face." Ms. Sweeting took it that way. Objectively, in my view, that is how any reasonable person would interpret those words spoken to a 22-year employee in that close, professional, work environment. Not only did he tell her to go, he said "get out", which is stronger. He referred to his ongoing antipathy toward her. He then insulted her in a very personal way. It was done after a meeting in which he had pointed at her, shouted at her, accused her of being resistant to change and used profanity. He saw the impact it had on her. When she left the meeting, she was crying. I am sure that he did not expect that she would return to work. He did not try to rectify any misunderstanding. He never contacted her afterwards. Instead, he and Mrs. Mok prepared to deal with the next day's work without Ms. Sweeting.

Did Dr. Mok constructively dismiss Ms. Sweeting?

[36] If I am wrong in my view that the facts as I have found establish that Dr. Mok fired Ms. Sweeting at the meeting, the issue remains whether she was constructively dismissed.

[37] An employer owes a duty to its employees to treat them fairly, with civility, decency, respect and dignity. An employer who subjects employees to treatment that renders competent performance of their work impossible, or continued employment intolerable, exposes itself to an action for constructive dismissal. Where the employer's treatment of the employee is of sufficient severity and effect, it will be characterized as an unjustified repudiation of the employment contract. Whether such treatment is viewed as a breach of a specified fundamental implied term of the employment relationship or as a repudiation of the entire employment relationship, the result is the same. The employee is entitled to treat the employment contract as at an end, and to recover at least damages in lieu of reasonable notice. See *Stamos v. Annuity Research & Marketing Service Ltd.*, 2002 CanLII 49618 (ON SC) at paragraph 60.

[38] Dr. Mok's counsel submits that one incident is not sufficient to constitute unjustified repudiation of the employment contract. I do not agree. It must depend on the circumstances.

[39] The background circumstances here were that Dr. Mok and Ms. Sweeting had worked very closely together for 22 years. She had been his office assistant in every sense of the word. She had been dealing with a workload that was significantly increased when the secretary left. She was overworked. Dr. Mok had to have known that. Yet, her performance continued to be excellent. She simply had not met Dr. Mok's expectations in dealing with his vague request to "look into" EMR because she did not have the time.

[40] During the meeting of June 20, Dr. Mok treated Ms. Sweeting with condescension. He shouted at her. He pointed at her. His behaviour was aggressive. His language was hostile and he used profanity. He accused her of being resistant to change. He told her to get out. He said he was sick of her presence and made an insulting personal reference. He did all of this in the presence of Mrs. Mok who was also an employee and Ms. Sweeting's subordinate in the office. His conduct had the effect of diminishing Ms. Sweeting's stature and dignity in the office. When he saw the impact it had on her, he did nothing. In the context of the particular work environment in which they operated, that treatment made future performance of her work impossible and her continued employment intolerable. The employment relationship was effectively destroyed in that meeting. Ms. Sweeting was quite entitled to treat the employment relationship as constructively terminated.

Damages

[41] Ms. Sweeting is entitled to damages in lieu of notice of termination.

[42] In assessing the length of notice that Ms. Sweeting would have been entitled to, if she had been dismissed in the normal fashion by her employer, a number of factors have to be looked at. The reasonableness of notice varies from case to case and each case must be decided on its own particular facts. In *Bardal v. The Globe & Mail Ltd.* (1960), 24 D.L.R. (2d) 140 (Ont. H.C.) Chief Justice McRuer set out a number of factors that should be addressed. It is not an exhaustive list. He said at p. 145: "There can be no catalogue laid down as to what is reasonable notice in particular classes of cases. The reasonableness of the notice must be decided with reference to each particular case, having regard to the character of the employment, the length of service of the servant, the age of the servant and the availability of similar employment, having regard to the experience, training and qualifications of the servant."

[43] Ms. Sweeting was just over fifty years of age at the time that she was dismissed. She had worked for Dr. Mok for 22 years, most of her working career. She was the key employee in the small, busy professional office of her employer. She is a registered practical nurse by education. By on-the-job training she learned and performed the specialized nursing functions and the managerial and supervisory duties required in a plastic surgery environment. Because she was the key employee she earned \$60,000 a year and received six weeks annual paid vacation, which was generous remuneration tailored to the role she played. There is no issue that her wage package was not typical for a registered practical nurse in the community.

[44] Ms. Sweeting gave evidence about the extensive efforts that she made to try to find similar employment in the community. Almost immediately she canvassed plastic surgeons and other medical specialists in the area. No similar work was available. She was not challenged on this evidence and I accept it. The unavailability of similar employment, in my view, is an important factor in this case, particularly given that the purpose of reasonable notice is to assist an employee in finding comparable work.

[45] Taking all of the circumstances into account, I find that the notice period should be 24 months.

[46] Ms. Sweeting's last day of work was June 20, 2012. I find that Ms. Sweeting made reasonable efforts to mitigate her damages. The steps she took made sense. She made a logical progression out of unemployment. First, she obtained employment for six weeks with Cosmetic Transformations, an establishment that does medical tattooing. During the period from November 12, 2012 to December 5, 2012 she earned a total of \$2,975. Her rate of pay was \$25 per hour. Next, she did private palliative care nursing from February 4, 2013 to February 8, 2013 caring for the parent of a local dermatologist. Her rate of pay was the same and she earned \$1,162.50. She then obtained employment in that dermatologist's office starting March 4, 2013 at the same rate of pay. During the period March 4, 2013 to December 22, 2013 she earned \$26,606.50. From December 23, 2013 to June 22, 2014 she earned \$34,088.75. She continues to work for the dermatologist.

[47] Consequently, I calculate Ms. Sweeting's damages in lieu of notice at 24 months or \$120,000. She had total earnings of \$48,840.25 from June 22, 2012 to June 22, 2014 which must be deducted from damages. Ms. Sweeting's damages are therefore \$71,159.75. However, the parties are agreed that Dr. Mok is entitled to a credit of \$1,666.67 because he paid her that amount for the seven days following June 20, 2012: Exhibit 7 Agreed Statement of Facts. Therefore, Dr. Mok is ordered to pay Ms. Sweeting damages in the amount of \$69,493.08. She is also entitled to prejudgment interest on that amount at the rate of 3% from the date of dismissal.

Aggravated Damages

[48] Ms. Sweeting also claims aggravated damages.

[49] Ms. Sweeting's evidence was that following her dismissal, she became very depressed. She said she was deeply affected by the loss of a person she considered a mentor and found that it was like experiencing a death. She began suffering from nightmares and still gets them. She lost weight during the summer. In September 2012 she had a couple of sessions with a counsellor. She did not take medication.

[50] Dr. Mok also failed to file Ms. Sweeting's Record of Employment within the requisite period. It was about a week late. He checked off "E" on the form, meaning "quit".

[51] In *Boucher v. Wal-Mart Canada Corp.* (2014), 120 O.R. (3d) 481 (Ont. C.A.) at para. 66, Justice Laskin defined aggravated damages as follows:

Aggravated damages are compensatory. 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

Keays v. Honda Canada Inc., 2008 SCC 39, [2008] 2 S.C.R. 362 (S.C.C.), at para. 57. However, “the normal distress and hurt feelings resulting from dismissal are not compensable.”: see *Honda*, at para. 56.

[52] There was no evidence presented about the consequences of late-filing of the R.O.E. There was no expert medical evidence presented to support Ms. Sweeting’s claim of mental distress. The evidence falls short of proving that Ms. Sweeting suffered specific compensable damages directly related to the conduct during the course of the dismissal, as distinct from the mental distress which inevitably flows from dismissal. I find that Ms. Sweeting is not entitled to aggravated damages.

Punitive Damages

[53] Ms. Sweeting also claims punitive damages for the manner of her dismissal.

[54] Punitive damages 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”. They focus on the defendant’s conduct and not on the plaintiff’s loss. Their purpose is retribution, deterrence and denunciation. See *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595 (S.C.C.); *Boucher, supra. at para. 59*.

[55] I do not think that the conduct of Dr. Mok met this exceptional standard of malicious and oppressive conduct. His actions had not been part of a persistent course of action nor were they part of a plan to force Ms. Sweeting to resign. Ms. Sweeting is not entitled to punitive damages.

Costs

[56] The issue of costs remains. If the parties are unable to settle the issue of costs, they may make written submissions. The plaintiff may make brief written submissions as to costs within thirty days of the release of this judgment. The defendant may respond within fifteen days of receipt of the plaintiff’s submissions. The plaintiff may reply within seven days of receipt of the defendant’s response.

M. L. Lack J.

Released: June 26, 2015

COURT FILE NO.: 307/12
DATE: 2015-06-26

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

Tanya Sweeting

Plaintiff

- and -

Dr. Lawrence Man-Suen Mok

Defendant

REASONS FOR JUDGMENT

Lack J.

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