CITATION: Walker v. Hulse, Playfair and McGarry, 2017 ONSC 358
COURT FILE NO.: 15-2125
DATE: 20170117

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
JAMES HOWARD WALKER Plaintiff (Respondent)	)	Self-Represented
– and –	)	
HULSE, PLAYFAIR AND MCGARRY Defendant (Appellant)	)	Amanda Sarginson, for the Defendant/Appellant
	)	**HEARD:** January 10, 2017

ADDITIONAL REASONS FOR DECISION

(*On appeal of Deputy Judge Rosalind Conway's decision dated May 29, 2015*)

BEAUDOIN J.

Background

[1] On January 31, 2014, the Respondent commenced an action in Small Claims Court against his former employer, the Appellant, Hulse, Playfair and McGarry, seeking damages in the amount of $25,000 for wrongful dismissal, mental distress, aggravated damages, punitive damages and intentional infliction of mental suffering.

[2] The deputy judge rejected Mr. Walker's claim to wrongful dismissal damages under common law, finding that his termination was governed by his employment contract which limited his notice upon termination to *The Employment Standards Act*.

[3] The deputy judge rejected all of Mr. Walker's claims except for aggravated damages for which she awarded him the sum of $5000.

[4] In considering this appeal, it is helpful to review the trial judges' findings under the other heads of damages. She rejected the claim for mental distress damages and noted that no medical evidence had been called. She concluded at para. 72 of the decision:

> Causation is a problem in this case, because the plaintiff had various stressors in his personal life. Counsel for the defendant referred to the manner of termination, which he argued was respectful: the plaintiff was questioned, an investigation was done, she argued, and he was suspended with pay. The fact that he was terminated without cause was within the employer's right at any time, and no opposition was made by the defendant to the plaintiff receiving unemployment insurance.

[5] With respect to punitive damages; she concluded at para. 74:

> While the termination process was abrupt and came without the usual written warnings, I cannot find the Patrick McGarry's actions rose to the level of being malicious, oppressive and high-handed. The court's sense of decency is not shocked by the termination.

[6] With respect to the claim of intentional infliction of mental suffering, she found that the employer and accommodated Mr. Walker in many ways and concluded at para. 84:

> I find that there is no evidence that Howard Walker was bullied or harassed. On the evidence before the court, I do not and cannot conclude that management calculated to inflict mental suffering upon the plaintiff, nor do I find any evidence of mental suffering, beyond the distress would normally be experienced by loss of employment.

[7] In making an award of aggravated damages, the trial judge relied on the decision of *Honda Canada v. Keays*, [2008] 2 S.C.R. 362 and concluded at para. 77:

> The precipitating events in the manner dismissal need to be examined in context. Patrick McGarry had deleted the public (at least public to the employees) commendation of the plaintiff. He had put the plaintiff on paid leave for the telephone incident, for infringing a policy that did not exist in any written form. There was no cause for dismissal, but in the termination letter it was threatened; if no release was signed, the plaintiff would be terminated for cause and would receive no severance pay. Given that the defendant's concession and position is that that this was a termination without cause, I find on circumstances of this case

> the termination letter sent by Patrick McGarry to the plaintiff gives rise to aggravated damages.

[8] The Appellant appeals the award of aggravated damages given by the deputy judge in respect to this sole issue on the grounds that she erred in law when she awarded aggravated damages when there was no finding by the deputy judge that the Appellant conducted itself in a manner that was unfair or in bad faith when it terminated Mr. Walker such as to justify an award of aggravated damages; and furthermore, there was no evidence, in any form, to show that the Respondent suffered any actual damages as a result of his termination.

The Facts

[9] The Respondent was employed by the Appellant from September 12 to January 2, 2014. The terms and conditions of his employment were set out in an employment contract that was entered into on September 24, 2012.

[10] On December 23, 2013, the Respondent was suspended with pay pending the Appellant's investigation into his conduct as it related to inappropriate comments made regarding a co-worker and for his failing to complete his job responsibilities on that date.

[11] When he returned to work on January 2, 2014, he was notified that his employment was being terminated effectively and he was provided with a letter of termination. While the letter of termination provided to the Respondent indicated that the Appellant felt that it had grounds to terminate his employment for cause, it nevertheless paid the Respondent two weeks' pay in lieu of notice in accordance with his employment contract with the *Employment Standards Act*.

The Standard of Review

[12] In *Housen v. Nikolaisen* [2002] 2. S.C.R. No. 235, the Supreme Court of Canada set out the Standard of Review applicable by an appellate court to the decision of the lower court. Were the issue on appeal is a question of mixed fact and law the standard of review is of *palpable and overriding error*. Where the issue on appeal is a question of law, the standard of *correctness* is applicable: The Court held at para 36:

> To summarize, a finding of negligence by a trial judge involves applying a legal standard to a set of facts, and thus is a question of mixed fact and law. Matters of mixed fact and law lie along a spectrum. Where, for instance, an error with respect to a finding of negligence can be attributed to the application of an incorrect standard, a failure to consider a required element of a legal test, or similar error in principle, such an error can be characterized as an error of law, subject to a standard of correctness. Appellate courts must be cautious, however, in finding that a trial judge erred in law in his or her determination of negligence, as it is often difficult to extricate the legal questions from the factual. It is for this reason that these matters are referred to as questions of "mixed law and fact". Where the legal principle is not readily extricable, then the matter is one of "mixed law and fact" and is subject to a more stringent standard. The general rule, as stated in *Jaegli Enterprises*, *supra*, is that, where the issue on appeal involves the trial judge's interpretation of the evidence as a whole, it should not be overturned absent palpable and overriding error. (Emphasis mine)

The Law

[13] At para. 57 in *Honda v. Keays*, the Supreme Court of Canada confirmed the general damages allocated in wrongful dismissal actions are confined to the loss suffered as a result of the employer's failure to provide notice and that no damages are available to the employee for the actual loss of his or her job and/or the pain and distress that may have been suffered as a consequence of having been terminated. The Court confirmed that, as an exception to this general rule, damages in the manner in which a person's employment was terminated will only be available "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."

[14] Further, at para. 59, the Supreme Court held that there was no reason to retain the distinction between "true aggravated damages" resulting from a separate cause of action and moral damages resulting from the conduct in the manner of termination. It went on to state that if an employee can prove that the manner of dismissal caused mental distress that was in the contemplation of the parties, that those damages will be awarded not through an arbitrary extension of the notice but through an award that reflects the actual damages. The Court gave examples of such conduct: "attacking the employee's reputation by declarations made at the time of dismissal, misrepresentations regarding the reasons for the decision, or dismissal meant to deprive the employee of the pension benefit or other right, permanent status for instance…).

[15] In this case, the deputy judge made no findings of fact regarding the Appellant's conduct when it terminated the Respondent which would support an award of aggravated damages. In effect, the deputy judge made findings of fact with respect to the other claims for damages which do not support a finding of bad faith that would be essential to establishing such claim. The deputy judge appears to have relied on the termination letter wherein the employer asserted its belief that it had cause to terminate the employee but was prepared to abandon that claim in the course of attempting a resolution with the employee.

[16] The Court of Appeal in *Mulvihill v. Ottawa (City)*, 2008 ONCA (CanLII) held that where an employer initially asserts that it has just cause to terminated employee, but later abandons its claim for cause during the course of litigation, that should not automatically lead to the conclusion that its initial act of alleging cause for dismissal was not warranted. The Court went on to specifically state at para. 49:

> …The mere fact that cause is alleged, but not ultimately proven, does not automatically mean that Wallace damages are to be awarded. So long as an employer has a reasonable basis on which to believe it can dismiss an employee for cause, the employer has the right to take that position without fear that failure to succeed on that point will automatically expose bad faith.

[17] In this case, the Appellant gave evidence at trial to support its reasons for belief had just cause, however, given the fact that a termination clause was in place, the Appellant offered to pay an additional two weeks and the forgiveness of a $700 loan in the hope of avoiding litigation. After the Respondent's refusal of its offer, the Appellant nevertheless paid the two weeks' notice as required by the employment contract and did not interfere with his right to claim employment insurance. Once the matter proceeded to trial, the Appellant once again chose a course of action to not spend time at trial trying to prove that it had just cause. The Appellant never conceded that it did not have just cause to terminate the Respondent during the trial.

[18] Moreover, the trial judge did not find that the employer's offer to provide the Respondent with an additional two weeks in exchange for a release was untruthful, misleading or unduly insensitive as set out in *Honda v. Keays*. The trial judge's findings on the claim for punitive damages undermine the finding of conduct that was sufficiently egregious as to give rise to a claim of aggravated damages.

[19] More importantly, there was no evidence of any kind that the Respondent suffered any actual damage as a result of the termination. The Court of Appeal has provided some guidance on this issue in the case of *Brien v. Niagara Motors Limited*, 2009 ONCA 887 (CanLII). In that case, the Court of Appeal refused to award aggravated damages in the absence of medical evidence to support the plaintiff's claim.

[20] In this case, the Respondent's failure to present any evidence, medical or otherwise to substantiate his claim to aggravated damages is fatal to his claim. The deputy judge had already found that the evidence presented at trial was insufficient to establish either causation or actual damages in her assessment of the Respondent's claim for mental distress. Having made that finding, it was not open to the deputy judge to award the Respondent an amount by way of aggravated damages.

[21] The deputy judge failed to consider a required element of the legal test and this was an error of law to which the standard of correctness applies.

[22] For these reasons, I set aside the award of aggravated damages in favour of the Respondent. The Appellant does not seek costs and no costs of this appeal are awarded.

Mr. Justice Robert N. Beaudoin

Released: January 17, 2017

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