CITATION: *Barton v. Rona Ontario Inc.*, 2012 ONSC 3809
COURT FILE NO.: CV-09-097622-00
DATE: 20120803

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
KERRY BARTON	)	Kevin L. MacDonald and Marianne Keriakos, for the Plaintiff
	)	
	)	
- and -	)	
	)	
	)	
RONA ONTARIO INC.	)	
	)	Sonia Regenbogen, for the Defendant
	)	
	)	
	)	**HEARD:** June 28-29, 2012

REASONS FOR DECISION

LAUWERS J.:

[1] The plaintiff sues the defendant for wrongful dismissal and associated damages. The defence is that there was just cause for termination.

Factual outline

[2] The plaintiff was employed in various capacities by Home Depot Canada for more than 10 years. He began his employment with Rona as a zone manager of the store in Woodbridge, Ontario on September 6, 2005. In December 2005 he was promoted to the position of assistant store manager at the defendant's new store in Barrie, Ontario.

[3] As assistant store manager, Mr. Barton reported to the store's manager, William Sadler. Mr. Barton was responsible for managing about 140 employees. One of the employees at the store was Kai Malmstrom, who was wheelchair bound. Mr. Malmstrom was and still is a project guide coordinator at the Rona store in Barrie whose job is to assist customers in designing and coordinating projects from start to finish.

[4] In April of 2009 a computerized training program was scheduled for the training centre at the Barrie store. Mr. Malmstrom wanted to attend and the management team at the store wanted to accommodate him. The problem was that the training centre is on the second or mezzanine floor and was not accessible by individuals in wheelchairs.

[5] Mr. Malmstrom and his colleague Gord Stirk thought that one way to accommodate Mr. Malmstrom would be to use an order picker truck and lift Mr. Malmstrom in his wheelchair on a skid to the second floor. This lift manoeuvre was done by Mr. Stirk in the morning on April 17, 2009. Mr. Malmstrom was brought down using the same method in the afternoon. For convenience I will refer to the lifts up and down as the "incident".

[6] In the view of Clint Marsh, the operations manager and third in command of the store, the incident involved clear breaches of Rona's safety rules. He reported the incident to Linda Gierak, a human resources adviser for Rona. She operated out of the Barrie store and served other stores as well. She carried out an investigation and reported to her superiors at Rona Ontario, Adina Ingram and Miranda Corman, who did a fresh investigation.

[7] Following the investigation Rona terminated Mr. Barton and Mr. Stirk for their roles in the incident.

The issues

[8] The issues are:

(a) Did Rona have just cause to terminate the plaintiff's employment?

(b) If the plaintiff was wrongfully dismissed, what are his damages?

I address each issue in turn.

Did Rona have just case to terminate Mr. Barton's employment?

[9] The Supreme Court of Canada's approach in *McKinley v. B.C. Tel* 2001 SCC 38, [2001] 2 S.C.R. 161 sets the framework for analyzing whether an employee's wrongful act will be found to constitute just cause for termination. As a factual matter, the employee had been somewhat dishonest about his medical condition and the treatments available for it. The issue in that case was whether an employee's dishonesty could inevitably justify termination. The Supreme Court held that there was no such invariable rule.

[10] The court adopted "a contextual approach to assessing whether an employee's dishonesty provides just cause for a dismissal" (*McKinley,* at para 51). Iacobucci J. for the court, rejected the "absolute, unqualified rule", that "an employer would be entitled to dismiss an employee for just cause for a single act of dishonesty, however minor" (*McKinley,* at para 55). He noted at para 56 that:

> Such an approach could foster results that are both unreasonable and unjust. Absent an analysis of the surrounding circumstances of the alleged misconduct, its level of seriousness, and the extent to which it impacted upon the employment relationship,

> dismissal on a ground as morally disreputable as "dishonesty" might well have an overly harsh and far-reaching impact for employees. In addition, allowing termination for cause wherever an employee's conduct can be labelled "dishonest" would further unjustly augment the power employers wield within the employment relationship.

[11] In short, the Supreme Court concluded that the "principle of proportionality" requires an "effective balance" to "be struck between the severity of an employee's misconduct and the sanction imposed" (*McKinley*, at para 53). The Supreme Court of Canada thus effectively adopted the approach to progressive discipline that labour arbitrators had been applying for years in a labour context.

[12] As I see it, I am instructed by *McKinley* to adopt an analogous approach to assessing whether Mr. Barton's clear misconduct justifies Rona's termination of his employment. The contextual approach, to paraphrase paragraph 57 of the decision, requires me to examine the case on its own particular facts and circumstances, while considering the nature and seriousness of the misconduct, in order to assess whether it is reconcilable with sustaining the employment relationship. This approach mitigates the possibility that Mr. Barton will be unduly punished by the strict application of an unequivocal rule, but recognizes that misconduct going to the core of the employment relationship could warrant dismissal for just cause.

[13] The plaintiff cites Echlin J. in *Tong v. Home Depot of Canada Inc.*, [2004] O.J. No. 3458 (Ont. S.C.J.), at para 1 as explaining the basic rationale for the *McKinley* approach: "Just Cause is "the capital punishment crime of employment law"." Echlin J. elaborated in *Carscallen v FRI Corp*., [2005] O.J. No. 2400 at paras70, 72:

> **70** A modern seminal Canadian expression of a definition of "just cause" has been provided by Schroeder J.A. in dissent in the off-cited R. v. Arthurs, ex parte Port Arthur's Shipbuilding Co. (1967), 62 D.L.R. (2d) 342 at p. 348 (Ont. C.A.) (per Schroeder J.A. dissenting):
>
> > 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.
>
> **72** The important factors emerging from these expressions of the principle of law include that the misconduct must be "serious"; that the misconduct must amount to "a repudiation of the contract"; that the acts "evince of intention to no longer be bound by the contract"[sic]; that dismissal is an "extreme measure"; and must not be resorted to in trifling cases. As previously observed, just cause is truly is the "capital punishment of employment law".

[14] The elements of the analytical framework were set out by the Ontario Court of Appeal in *Dowling v. Ontario (Workplace Safety and Insurance Board)*, [2004] O.J. No. 4812, 246 D.L.R. (4th) 65 per Gillese J.A. at paras 49-50:

> **49** Following McKinley, it can be seen that the core question for determination is whether an employee has engaged in misconduct that is incompatible with the fundamental terms of the employment relationship. The rationale for the standard is that the sanction imposed for misconduct is to be proportional -- dismissal is warranted when the misconduct is sufficiently serious that it strikes at the heart of the employment relationship. This is a factual inquiry to be determined by a contextual examination of the nature and circumstances of the misconduct.
>
> **50** Application of the standard consists of:
>
> 1. determining the nature and extent of the misconduct;
> 2. considering the surrounding circumstances; and,
> 3. deciding whether dismissal is warranted (i.e. whether dismissal is a proportional response).

The Nature and Extent of the Misconduct

[15] Rona is culturally committed to workplace safety. This is well reflected in its documentation and its practices.

[16] Rona documentation clearly states its expectations. The Employee Hand Book has sections in it on workplace safety. In the section entitled "Safety and You," the preamble states:

> The well being and often the lives of coworkers depend on the conduct of each individual and their adherence to safety rules. It is, therefore, the intent of Rona to enforce safety rules strictly and take appropriate action against any employee who fails to maintain proper safe conduct at all times, or who violates any of the rules listed in the handbook.

Rule 7 states that: "All safety guards must be in place before operating any machine or equipment" and rule 24 provides that "No riders are permitted on forklifts or tractors." The section entitled "Guidelines for Conduct on the Job" sets out disciplinary consequences for the breach of work-day rules. Among the breaches that "may be deemed as sufficient cause of immediate dismissal" include: rule 5: "Failure to operate power equipment in a safe manner," and rule 14: "Any deliberate act which might endanger the safety or lives of others."

[17] Among the "Causes for Immediate Dismissal" are listed:

> 5. Use of power equipment by unauthorized employee, or riding on any moving equipment (i.e. hitching rides on lift trucks, tractors) et cetera.
>
> 6. Wilful and deliberate violation of Company safety rules.
>
> 10. Any deliberate act that may endanger the safety or lives of others.

[18] I note that similar terms are set out in the document entitled "Causes for Immediate Dismissal" that Mr. Barton signed when he was hired.

[19] Rona's Code of Conduct obliges employees to comply with legislation concerning occupational health and safety laws and regulations. In addition, Rona's Health and Safety National Manual provides additional details.

[20] As part of his training, Mr. Barton undertook a safety training program for forklift trucks provided by Safe-Tech Training. Among the safety rules are:

> 15. Do not permit passengers on any part of a lift truck;
>
> 38. Use only approved personal work platform (safety cage) securely fastened to the forks to elevate anyone.

[21] Mr. Barton admitted that he was familiar with all of this information except for the Health and Safety National Manual. Mr. Barton was involved in the practical application of the safety rules in the store.

[22] Mr. MacDonald submits that Rona's Employee Hand Book was not a term of his employment contract because it was not referred to or incorporated by reference in his offer of employment dated August 29, 2005, which contained the terms and conditions of his employment, or in his promotion letter dated April 4, 2006. Mr. MacDonald cites *Dawson v. FAG Bearings Ltd.*, [2008] O.J. No. 4305 at paras 30-33 (Ont. S.C.J.), where Taylor J. held that an employer's "Progressive Discipline Policy" did not form part of the employment contract, because the employee only "received the Employee Handbook 9 to 12 months after she began her employment."

[23] I do not accept this argument. In *Campbell v. MacMillan Bloedel Ltd.*, [1978] 2 W.W.R. 686 Anderson J. observed at pp. 690 to 691 (B.C.S.C.):

> In my view, it is not correct to compare the fluid relationship that exists between master and servant to other commercial contracts. The relations between master and servant are, at best, uncertain and change from time to time in accordance with circumstances and the conduct of the parties. The court, as a general rule, when called upon to interpret an ordinary commercial contract is bound to concern itself with the terms of the agreement as they are spelled out therein, and cannot go outside the four corners of the agreement. Such is not the case with an agreement made between master and servant. Such an agreement is not reduced to writing and, moreover, the terms of the bargain between the parties are determined by the conduct of the parties during the term of employment, and not by conscious negotiation and agreement between the parties. For example, the courts have held that a master cannot discharge his servant except upon reasonable notice. The courts have held that an employer cannot compel a person who has achieved senior status to revert to junior status. These are not express but implied terms. The contract is not written down. There is no certainty. There are no fixed terms. The terms of the contract may vary from day to day or from year to year ... The terms of the contract are not express (or consciously spelled out by the parties), but are implied by the court, by reference to the complete history of the employer-employee relationship.

> In other words, the court does not apply the principles of contract law as though in a vacuum, but reviews the history of the relations between the parties in its entirety so as to arrive at a rational solution in each particular case. The relationship of master and servant in the modern corporate world cannot be determined as though that relationship consisted of a single contract with fixed terms and conditions.

[24] Much of wrongful dismissal law consists of decisions reconciling management rights with employee rights. Employers change policies and working conditions in response to changing business conditions. Sometimes an employer's change in policy will be treated as a wrongful dismissal. Other times it will be accepted as an ordinary incident of the employer's right to manage the business; the policy then becomes a part of the contractual relationship. In this instance I find that the imposition of safety policies falls well within Rona's management rights; they are as binding on Mr. Barton as if they had been set out in a written contract. I therefore reject the plaintiff's submission that Rona's Employee Hand Book did not form part of the employment contract between Rona and Mr. Barton.

[25] Rona also relies on the *Occupational Health and Safety Act* R.S.O. 1990, c.O.1, as amended. Section 25 imposes on all employees the duty to work in a safe manner and to comply with the Act and the Regulations. Section 27 of the Act imposes duties on supervisors to ensure that workers are working in a manner that is consistent with the obligations under the Act and the Regulations. Section 66(4) of the Act deems that any act or neglect of the company exposes it to prosecution. Rona submits that the plaintiff's conduct breached the Act and exposed the company to prosecution.

[26] I note that Mr. Barton did not personally breach the safety rules, in the sense that he did not perform the lift or the descent himself. I also find that Mr. Barton did not positively give permission for the lift or the descent. That said, it was his obligation as a manager to enforce the safety rules and to ensure that neither Mr. Stirk nor Mr. Malmstrom did anything that would violate the rules. I find that Mr. Barton breached his obligations as a manager in failing to take the steps that he could have taken to prevent the lift and to prevent the descent. He did not instruct Mr. Stirk and Mr. Malmstrom not to undertake the lift when he had the opportunity to do so on April 16, 2009, nor did he take steps to prevent the descent on April 17, 2009.

The Surrounding Circumstances

[27] Mr. Barton was quite concerned to ensure that Mr. Malmstrom would have an opportunity to take the training program. He discussed it with Mr. Malmstrom and on April 15 they agreed, Mr. Barton testified, that one of the attendees at the seminar on April 17, Scott Curtis, would undertake to train Mr. Malmstrom after he himself got trained at the seminar. Mr. Barton asserted in evidence that he informed the store's management group of this plan on April 15 and that they were agreeable. Mr. Marsh confirmed this evidence.

[28] April 16 was a busy day, particularly in the evening hours when the store was hosting a "ladies' night". There were about 100 women in attendance and Mr. Barton was pressed to ensure that things were working smoothly for them. At one point during the evening, Gord Stirk and Mr. Malmstrom approached him when he was on his way elsewhere in the store and suggested to him that Mr. Malmstrom, who wanted to attend the training session on the second

floor, could be lifted to that floor using an order picker. Mr. Barton testified that he reminded Mr. Stirk and Mr. Malmstrom about the discussion earlier in the week and the plan whereby Mr. Curtis would train Mr. Malmstrom. He testified that he tried to convey his discomfort with the idea; he expected they would respond to his signals and discontinue the plan. Mr. Barton was called away, it seems before the conversation ended, and did not return.

[29] Mr. Malmstrom denied knowledge of any plan for Mr. Curtis to provide him with training on the ground floor. On this issue I accept Mr. Barton's evidence. Mr. Malmstrom was plainly keen to join his colleagues at the session.

[30] Mr. Malmstrom denied that Mr. Barton communicated discomfort with the idea of the lift scheme. On this issue I accept Mr. Barton's evidence about what he tried to communicate, but Mr. Malmstrom was not listening. In cross-examination Mr. Malmstrom said that Mr. Barton did not give permission but Mr. Malmstrom "felt he was okay with it." I accept Mr. Malmstrom's evidence on his subjective sense that Mr. Barton was agreeable.

[31] Mr. Barton asserted that he did not positively give permission for the lift scheme and I accept that evidence. But he admitted in cross-examination that he did not order Mr. Stirk and Mr. Malmstrom not to carry out the lift scheme, although he agreed that he had the authority to do so. This was Mr. Barton's most serious mistake.

The Incident

[32] On April 17 at around 8:00 a.m, Mr. Malmstrom met with Mr. Stirk who got an order picker. Clint Marsh noticed what they were doing and approached them. Mr. Malmstrom went off to his office to get a portable ramp so that he could transit onto a skid. He did not hear the conversation between Mr. Stirk and Mr. Marsh.

[33] Mr. Marsh testified that he instructed Mr. Stirk not to perform the lift, but he was called away by customer service to deal with a disgruntled customer. When he got back Mr. Malmstrom was on the second level. Mr. Marsh was not in the store when the descent occurred. He testified that he was told by Mr. Stirk that Mr. Barton had given him permission to do the lift. Mr. Marsh testified that he was disciplined by a three month demotion with a cut in pay and a two-year final warning letter.

[34] Mr. Malmstrom used the ramp to get onto the skid and Mr. Stirk then used the order picker forklift to elevate Mr. Malmstrom to the second level. The wheelchair was tied down for the lift. Mr. Malmstrom was uncertain whether Mr. Stirk was wearing his safety harness as the operator of the truck because he could not see Mr. Stirk since he had his back to him.

[35] Mr. Barton arrived at about 10:00 a.m. to start his shift. He went to his office on the second floor beside the training centre and noticed that Mr. Malmstrom was present. Mr. Malmstrom says that he spoke to Mr. Barton who did not appear to be upset and who did not mention discipline.

[36] After the training session was over towards the middle of the afternoon it came time for the descent. Mr. Malmstrom testified that Mr. Stirk seemed rushed and asked him whether it was okay to do the descent without securing the wheelchair on the skid. Mr. Malmstrom agreed

since the wheelchair had brakes. Mr. Stirk then used the forklift to return Mr. Malmstrom in his wheelchair to the first floor.

The Investigations

[37] Ms. Gierak was not present in the building on April 17. Mr. Marsh advised her of the incident when she returned, and she investigated. Her reporting memo to superiors Adina Ingram and Miranda Corman dated April 24, 2009 states:

> Everyone I spoke to is aware this is never to happen again, and honestly it would break my heart if someone was to lose their job as a result of Kai's request to be lifted to training. Gord admits no one gave him permission to break the forklift/safety policy, and Kerry and Clint admit they would stop it if they could re-do the whole thing. At first I believed that this wasn't careless or irresponsible act, that it was done safely to give Kai access to the training, but now I have discovered that Gord wasn't wearing his own safety equipment on the Order Picker so he was working from a height w/out his own fall protection equipment when bringing Kai down.
>
> I do feel even disciplinary action would affect store morale negativity as everyone loves Kai and was just trying to give him training access he deserves to obtain, but if not issued at a Final WW level we have not done our due diligence to prevent a future situation. This wasn't a case of someone 'hitching a ride' or acting out in horseplay, and there was a wilful effort to ensure safety of Kai, and for those reasons I am not recommending a termination. Many people were involved spotting and assisting at both ground and mezzanine levels, including at least one mgmt, at least one JHSC member and even LP.
>
> I feel there would be a min of four individuals that would have to be issued at the final level:
>
> Final Warnings:
>
> Kai – it was his request – he was the unauthorized person 'riding' equipment
>
> Gord – the machine operator, supervisor, allowing someone to 'ride' the machinery without safe passenger cage
>
> Kerry – for learning of the plan Thursday night and not stopping a safety violation/potentially harmful situation
>
> Clint – for being the MOD and not stopping a safety violation/potentially harmful situation

[38] The full text of Ms. Gierak's interview with Mr. Barton and Mr. Marsh follows:

- Kerry confirmed he did talk to Kai Thursday night, he was aware Kai was planning to bring in the ramp so he could drive on and off the forklift equipment.

- Kerry didn't start work until 10am, Kai was already lifted up by that point.

- Clint was the opening manager, he first learned of the plan when Gord pulled the equipment in place just before the training. He talked to Kai because we were told by Bill Sadler this wasn't occurring due to Kai's comfort level with it. Kai said he was fine with it, as long as Gord is driving and he is secure to the chair.

- Clint admits he was taken aback by the situation, believes he asked Ford if I (Linda/HR) gave him permission and he said no. Clint was given the impression that Kerry was aware of the plan and gave Gord permission.

- Both Kerry and Clint know everyone had the best intentions as everyone's focus was on giving Kai access to the training and his safety. Many people were involved, Scott Curtis (member of JHSC) and Dan Barkwell helped at the mezzanine level, Holger Kaiserling (mgr), Nick Morrone was spotting and many other observing/spotting.

- When asked if they would do anything different, both said yes. Both admit if they could redo it, they wouldn't let it happen.

- Kerry feels it was done in efforts to make the best decision for Kai and the business, everyone hates that Kai can't attend this training.

- Kerry believes RONA's low accessibility of the store layout is also to blame.

- They were confident Kai would be safe or they would have stopped it.

- When asked about what they feel would be the appropriate action for this, how they felt if Gord was to receive a Final Warning for being the operator or Kai for being an unauthorized passenger on a forklift? They felt that it was wrong to issue just them documentation, unless EVERY person present and involved also received documentation.

- Both confirmed it will not happen again. They do not feel follow up documentation is necessary because there was no horseplay or deliberate act to harm. Everyone only had the best intensions for Kai [*Sic*].

[39] Ms. Gierak's notes from her conversation with Mr. Stirk state:

- Gord knew why I wanted to talk to him, Kai let him know I was inquiring.

- I asked what happened, he stated Kai asked him too, he wanted to help Kai gain access to the training room.

- They used ratchet straps, similar to the straps we use to hold products to trucks, weight restriction of the straps far exceeded the weight of Kai and chair.

- Strap went over back of chair and attached to skid, other when (sic) from skid through chair, over lap and back to skid.

- Scott Curtis (member of JHSC) and Dan Barkwell helped w the railing, about 15 people were around when it happened all helping/spotting. They were not tied off with fall equipment.

- Kai's personal ramp was used to get Kai onto the pallet, ramp was taken upstairs to let him drive off the pallet.

- He wouldn't have done it if it wasn't safe and wouldn't have felt comfortable will (sic) anyone else operating the forklift but himself.

- He didn't get permission from anyone (not Clint or Kerry who knew it was happening). Gord knew that Kerry had talked to Kai about what was happening and he assumed he approved as he wasn't told otherwise.

- Gord will research the costs of a safe passenger cage from the manufacturer that will fit Kai's chair.

- He is aware it isn't to happen again.

- We spoke about his responsibilities for safety as a Supervisor and possible fines/consequences.

- Gord did it because Kai asked, he wasn't thinking of himself but knowing how important this training was to Kai.

- I explained to Gord that though his intentions might have been in the right place, safety comes before training and he did violate a safety policy. I let him know there could be follow up documentation.

- Gord became upset and didn't think that would be fair. Said if it was a concern it should have been addressed by Kerry or Clint, and everyone that helped should also have follow up as well.

Second conversation with Gord confirmed he didn't have the equipment on the whole time, he was so focused on Kai and the safety of the operation he focus on his own safety. When asked if he had it on while up at the mezzanine level he said without confidence 'yeah', but when asked again stated he wasn't 100% sure.

[40] Ms. Gierak testified at length. I have no reason to doubt that her notes excerpted above accurately record what she heard from the people she interviewed. In cross examination Mr. MacDonald was intent on pushing Ms. Gierak to endorse her original recommendation that no one be terminated. She responded that once all of the facts were known to her, including the fact that Mr. Malmstrom was not strapped in during the descent, and that Mr. Stirk did not have a safety harness on, she has supported termination. She gave evidence that although Mr. Barton's performance appraisals before the incident were good she was upset that he did not report the incident to her which caused her to lose trust in him. She testified that she did not make the decision to terminate Mr. Barton. That decision was made by head office.

[41] Adina Ingram testified that in April of 2009 she was one of the senior human resource advisors reporting to head office. She conducted another investigation after receiving the Linda Gierak's notes. She is no longer employed by Rona.

[42] Ms. Ingram testified that her concern was with the risk to Mr. Malmstrom, but also with the risk to the public since the area of the lift was not secured. According to the video, somebody walked under the order picker when the lift was happening. She recommended termination because of the clear violation of Rona rules, and the *Occupational Health and Safety Act*. In her view there is a higher expectation placed on a manager like Mr. Barton. He had the opportunity to stop the lift and the descent and he failed to take it.

Was Mr. Barton's Dismissal Warranted?

[43] Rona submits that its safety expectations were communicated directly to Mr. Barton. Rona expected him to faithfully administer them in his managerial role. He failed utterly and in so doing fundamentally breached the employment contract, entitling Rona to dismiss him. Ms. Regenbogen submits:

> As a supervisor, it was the Plaintiff's responsibility to enforce compliance with Rona's health and safety rules, and to promote safe practices by leading by example. The Plaintiff gave his permission to Mr. Malmstrom to proceed with the plan to lift him on the Order Picker. He did not say, as he should have, <u>do not proceed with that plan</u>. He should have taken steps to ensure that it did not happen. [Emphasis by defence.]

[44] She submits that Mr. Barton's conduct exposed Rona to liability under the *Occupational Health and Safety Act*: "This was a fundamental breach of duties as a supervisory employee. The Plaintiff's total disregard for Rona's policies and protocols related to health and safety is fundamentally incompatible with the position of a role model and authority figure within the Store."

[45] Ms. Regenbogen adds that Mr. Barton exposed an employee "to a serious risk of injury, or even death, in the workplace. This is fundamentally at odds with his role as a managerial employee responsible for managing the store." Accordingly, Ms. Regenbogen argues that Mr. Barton's "failure to enforce the observance of fundamental safety rules resulted in irreparable harm to his employment relationship."

[46] Ms. Regenbogen submits that employees with leadership responsibilities are held to a higher standard than non-managerial employees. This is justified on two grounds: "first, leaders set an example for the other employees with whom they work; and second, employers must be able to have a greater degree of trust in supervisory employees, in whose hands they place much of the responsibility for ensuring the proper behaviour of subordinate employees, without being subject to the same level of supervision themselves." She relies on the decision in *Durand v. Quaker Oats Company of Canada* [1990] B.C.J. No. 725 (C.A) per Locke J.A. While that case turned on self-dealing by an employee in a conflict of interest situation and is not factually apposite, I accept the proposition that she advances.

[47] The defendant cites two arbitration decisions in which the employee's dismissal was upheld in situations of serious risk of personal injury: *Con-Agra Limited-Lamb-Weston Division v. United Steelworkers of America, Local Union 6034,* 2011 CanLII 82275 (AB GAA) at page 30-31. In *Canadian General Tower Ltd. and United Steelworkers of America, Local Union 862* (Schramm) [2003] OLAA 801 at para 160 the arbitrator said:

> To put the matter another way: I agree with the company that it must be armed with the right to discharge employees for safety violations of [the] kind discussed here, or will not be able to meet "its due diligence" obligations under the *Occupational Health and Safety Act*. Nor will it be able to fulfill its several commitments to the Ministry and the Courts to maintain a safe workplace. And employees will not be able—or induced-- to fulfill their safety obligations to each other.

The grievor had knowingly and deliberately done precisely what he had been warned not to do by taping down a button, which disabled a safety control on a dangerous piece of equipment.

[48] Rona relies on *Wilson v. Champion Forest Products (Alberta) Ltd.* (1988) 90 A.R. 338, [1988] A.J. 636 (Alta.Q.B.). The plaintiff was a supervisor who failed personally to carry out proper procedures in the shutdown of a machine. The court accepted the employer's argument that: "Because Mr. Wilson was a supervisor, the crews looked on him as a leader and trained in safety." The company argued that it was a "deliberate breach of the necessary safety procedures" and the court concluded that while "there is some argument that perhaps another type of penalty could have been utilized under these circumstances," dismissal was justified. This case precedes *McKinley*.

[49] Finally, Rona relies on *Poirier v. Wal-Mart Canada Corp.* 2006 BCSC 1138, [2006] B.C.J. No. 1725. In that case, according to the head note, the plaintiff was dismissed for cause "based on deceitful and dishonest manipulation of the store's payroll account for improper accounting practices in relation to the sick pay and offset cash accounts." The dismissal was upheld. Arnold-Bailey J. stated at paragraph 58:

> In this case there can be no doubt that the plaintiff occupied a senior position with very significant authority and one that required a very high degree of trust and honesty. He was required to provide leadership to the employees of the store and was entrusted with tens of thousands of dollars weekly to carry out the work of the defendant. He was trusted to work with a high degree of autonomy and to report truthfully and completely to those positions senior to his.

[50] In my view the Supreme Court of Canada's decision in *McKinley* introduced a more sophisticated and nuanced analysis. I also put cases relating to dishonesty and self-dealing generally into a different category than cases involving breaches of policy. The former cases involve fundamental character flaws that may well cause an employer to lose trust and confidence in an employee.

[51] The analysis undertaken by Echlin J. in *Tong v. Home Depot of Canada Inc.* is instructive. He stated at paragraphs 18-20:

> **18** The evidence led at trial is too weak to sustain a finding of just cause. In this instance, Home Depot has failed to meet the onus required to establish just cause.
>
> **19** I reach this conclusion after applying the clear standard the law expects of employers who choose to summarily dismiss employees for alleged workplace wrongdoings. In this case, no prior complaints had ever been levelled against Mr. Tong regarding the length of his lunch breaks, his arrival and departure times, his morning and afternoon breaks, or how he punched into the timeclock. Mr. Tong was given no warnings. The option of discipline short of termination was not utilized by Home Depot.
>
> **20** Having regard for the fact that there had been no prior record of similar conduct, perhaps a suspension or punishment short of dismissal might have been more appropriate, if a proper investigation had been conducted and if culpability was found. Alternatively, if the employer had determined that it must dismiss, it could have done so with notice or pay in lieu thereof.

[52] In paragraph 20, Echlin J. hinted at a distinction that in my view is critical to the legal analysis. Employers may terminate for good and valid business reasons that do not, however, pass muster as just cause. In this case, for example, Rona might have formed the view that Mr. Barton lacked the character required of a senior management person and did not want him back. Rona could have decided that, given the large number of store staff who witnessed the incident and assisted in the lift and the descent, it was necessary to make an example of him, both for internal and external audiences. Rona chose to terminate Mr. Barton for business reasons that seem good and sufficient to it.

[53] But the court's assessment is much more specific. It does not consider the totality of the business reasons why an employer might wish to terminate an employee. It focuses on the specific acts of the employee's misconduct and whether those, in and of themselves, are capable of justifying termination.

[54] Considering the *McKinley* contextual approach, I recognize that Mr. Barton's misconduct was serious. I also note that: his performance appraisals were good; he had no disciplinary record; he did not give permission for the lift and the descent, he tried however ineffectually to prevent the lift albeit not the descent; and he did not perform or witness either move and was not aware of the incidental safety breaches.

[55] In applying the *McKinley* analysis, the "principle of proportionality" requires me to consider whether the termination was the "effective balance" to "be struck between the severity of an employee's misconduct and the sanction imposed". I find that Mr. Barton's specific acts of misconduct are not severe enough to warrant his dismissal. This is a situation in which a stern warning to Mr. Barton never again to permit a safety infraction by an employee would have sufficed to ensure that neither the incident nor another one like it would ever occur under Mr. Barton's watch. Some other discipline short of termination might also have been appropriate. Taking the approach of Warkentin J. in *Ritchie v 830234 Ontario Inc*, [2009] O.J. No. 2800 and of Echlin J in *Tong v. Home Depot of Canada Inc*, in my view progressive discipline would have been effective. There was nothing in Mr. Barton's excellent work record to suggest that he would not be amenable to such discipline or that he would repeat such misconduct in the future. I

am, in short, unable to find that Mr. Barton's misconduct meets the threshold in *Dowling* of striking at the heart of the employment relationship.

[56] I do not fault Rona for terminating Mr. Barton's employment for its own business reasons, but doing so is a breach of contract for which Mr. Barton is entitled to damages.

The Determination of Damages

[57] Mr. Barton was out of work for about twelve months from the date of his termination by Rona on May 4, 2009 until he obtained new fulltime employment on May 12, 2010. He now earns significantly less then he earned with Rona but he is no longer working in management, which is to his liking.

[58] Mr. Barton carried out a disciplined job search. Rona does not argue that he failed to mitigate even though he did not pursue positions at the level of management that he held at Rona. Mr. Barton seeks twelve months compensation in lieu of notice. Rona submits that the reasonable period of notice is four months, using the common rule of thumb of one month of notice for each year of employment. There is no such rule, nor could there be given the *Bardal* factors.

[59] Both parties agree that the ruling precedent is *Bardal v. Globe & Mail Ltd.* [1960] O.W.N. 253 (H.C.J.) at paras 14, 20 and 21. The period of notice must have 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."

[60] I note that at the date of his dismissal Mr. Barton was 64 years old and had been employed by Rona for three years and eight months. He was the second in command at the store. There was a recession under way making other employment hard to find for a person like him who had spent his working life in retail. His difficulty is shown by the fact that it took him 12 months to find a new job.

[61] The plaintiff relies on relatively current cases. In *Love v. Acuity Investment Management Inc.* 2011ONCA 130, the court took a contextual approach. The employee was fifty years of age and had been employed as a vice president for two years and seven months. The court set aside an award of five months and substituted a period of nine months. Goudge J.A. pointed out that it was an error to rely too heavily on an employee's short length of service. While it is a factor, it is only one of several and should not be given disproportionate weight. The court considered the relatively high level of his employment, and his high level of compensation together with the possibility of equity participation as factors that would point to a longer period of reasonable notice.

[62] The plaintiff also refers to *McNeil v. Presstran Industries* [1992] O.J. 2576 (C.A.). The plaintiff was 64 years old with five years of service when he was constructively dismissed. The court found that a notice period of twelve months was appropriate.

[63] The plaintiff cites on *Findlay v. Kershaw Manufacturing Canada Ltd.* [1989] O.J. 2294 (H.C.J.). The plaintiff was employed by the defendant as its general manager for less than three

years although he had been employed by the company for a time. He was about 60 years old on the date of his dismissal. Chadwick J. considered especially the employee's age (*Findlay, at* para 54) and concluded that a notice period of twelve months would be appropriate.

[64] The defendant relies on a number of cases for its submission that a four month notice period is appropriate. Rona relies on these cases to submit that "in no case should the reasonable notice period be greater than six months." Ms. Regenbogen cites *Petrisor v. Bennett-Dunlop Ford Sales Ltd.* [1982] S.J. 1019 (S.K.Q.B.), in which a used car sales manager who was 54 years old with six years of service got three months notice. In *Dewitt v. A. & B. Sound Ltd.*, [1978] B.C.J No. 1204 (B.C.S.C.), a 51 year old office manager with less than seven years of service got four months. In *Currie v. Matrix Environmental Solutions Ltd*. 2007 SKQB 245, [2007] S.J. No. 450, a 59 year old office manager with four years of service got six months notice. Finally, in *Sherrard v. Moncton Chrysler Dodge (1980) Ltd.*, [1990] N.B.J... No. 238 (Q.B.) (affirmed [1990] N.B.R. 869 (C.A.)), a 59 year old fleet and lease manager with six years of service received an award based on six months notice.

[65] I find the precedents referred to by Rona to be unpersuasive. They are relatively older precedents and none are from Ontario.

[66] Considering the *Bardal* factors set out above and the precedents, I set the plaintiff's reasonable notice period at ten months. Entitlement to ten months salary in lieu of notice is $58,900.00. Mr. Barton mitigated somewhat which requires a subtraction of $4,319.46, for a total of $54,580.00 plus benefits at 4% of salary plus $3,000.00. If I have misunderstood the numbers, I may be spoken to if the parties cannot agree.

[67] The plaintiff also claims an award of aggravated (*Wallace*) or moral damages based on the Supreme Court of Canada's decision in *Keays v. Honda Canada Inc*. [2008] 2 S.C.R. No. 362. Mr. MacDonald seeks $25,000.00 on this head.

[68] Mr. MacDonald submits that the termination letter provided by Rona to Mr. Barton could not be used by him to obtain employment since it was not a letter of recommendation. He also points to Rona's failure to comply with the *Employment Standards Act*. The disqualification to entitlement for termination pay under that Act requires "wilful misconduct" or "wilful neglect of duty," both of which have a significantly intentional component that was not proven in this case.

[69] The defendant points to the Court of Appeal's decision in *Mulvihill v. Ottawa (City)* [2008] O.J. No. 1070, Gillese J.A. stated at paragraph 49:

> It cannot mean that because the City terminated Ms. Mulvihill's employment for cause but abandoned cause as a defence during the course of litigation, its initial act of alleging cause for dismissal was not warranted. 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 the point will automatically expose it to a finding of bad faith.

[70] I find that Rona did have such a reasonable basis in Mr. Barton's case. Further, in order to be eligible for *Wallace* damages the employee must prove actual damages based on medical

attention, professional assistance and so on: *Branch v. Canadian Imperial Bank of Commerce* 2010 ONSC 1103 at para 18, *Brien v. Niagara Motors Limited* 2009 ONCA 887 at para 3. There is no such evidence in this case. As the Supreme Court of Canada noted in *Keays* at para 56: "The normal distress and hurt feelings resulting from dismissal are not compensable." I decline to award moral damages in this case.

[71] The plaintiff has been successful and is entitled to costs. If these cannot be agreed between the parties, I will accept written submissions on a 10-day turnaround basis starting with the plaintiff and ending with the plaintiff's reply submissions.

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P.D. Lauwers J.

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