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COURT OF APPEAL FOR ONTARIO

DOHERTY, MOLDAVER and GILLESE JJ.A.

B E T W E E N :	)	
	)	
GREG SOMMERARD	)	**J. Lynn Thomson and**
	)	**Andrew J. McCreary**
Plaintiff (Respondent)	)	**for the appellant**
(Appellant by way of Cross-Appeal)	)	
	)	
- and -	)	
	)	
I.B.M. CANADA LTD. and THE GREAT-WEST LIFE ASSURANCE COMPANY	)	**Richard R. Marks**
	)	**for the respondent**
	)	
Defendant (Appellant)	)	
(Respondent by way of Cross-Appeal)	)	
	)	**Heard: March 20, 2006**

On appeal from judgment of Justice Heidi S. Levenson Polowin of the Superior Court of Justice dated June 30, 2004.

BY THE COURT:

[1] Greg Sommerard worked for IBM Canada Ltd. for almost four years in a non-managerial technical support position. During his employment, there were a number of documented incidents of angry outbursts by Mr. Sommerard. In early 2001, Mr. Sommerard went on short-term disability for medical reasons. IBM continued to pay him his full salary. His short-term disability benefits ended on March 8, 2001. He received no further income as he awaited a decision from The Great-West Life Assurance

Company,[1] IBM's long-term disability insurer, on his application for long-term disability. That application was rejected. He appealed that decision.

[2] On April 19, 2001, a nurse that worked for IBM spoke with Mr. Sommerard and told him that Great-West Life had denied his appeal. In that conversation, Mr. Sommerard said that he did not feel that he could return to work because he thought he might "thump somebody". The nurse asked him to clarify the comment and Mr. Sommerard said that he would hurt or hit someone at work. IBM concluded that the risk that Mr. Sommerard presented to other employees was too great to permit him continued employment with it. IBM sent him a letter in which he was told that his employment was terminated for cause "because of your threat to hurt someone if you returned to work at IBM".

[3] Mr. Sommerard sued IBM for wrongful dismissal. In essence, he argued that IBM wanted to dismiss him because he was a difficult employee and that it seized on the telephone call as an excuse justifying dismissal. He contended that IBM ought to have known that the threat was not real and, in light of his illness, that it rushed the decision to terminate his employment with inadequate investigation into the incident, his illness or alternatives to termination.

[4] The trial was conducted by Polowin J., sitting with a jury. The jury found that IBM did not have just cause for dismissing Mr. Sommerard. It determined that nine months was the reasonable notice period. It awarded a further four months in *Wallace* damages, $1,000 for aggravated damages and $22,000 for punitive damages.

[5] IBM appeals all aspects of the judgment below. The respondent cross-appeals seeking an increase in the punitive damages award. He also sought leave to appeal the costs order below.

[6] At the conclusion of the oral hearing of the appeal, the panel advised counsel of its intended disposition of certain of the issues. In light of that information, counsel agreed that it was unnecessary for the court to consider the costs appeal.

[7] For the reasons that follow, we would allow the appeal in part and dismiss the cross-appeal.

JUST CAUSE

[8] Jury verdicts are not easily disturbed. They are not to be set aside unless they are so plainly unreasonable and unjust that no jury reviewing the evidence as a whole, and acting judicially, could have reached it. In addition, the verdict can be set aside if there

[1] Mr. Sommerard's claim against Great-West Life was resolved by settlement after the first week of trial, under the terms of which Great-West Life paid Mr. Sommerard $80,000.

was no evidence to support it. See *McKinley v. B.C. Tel.*, [2001] 2 S.C.R. 161 at para. 60.

[9] IBM takes no issue with the instructions given by the trial judge in relation to cause. It also conceded, in oral argument, that the issue of cause had been properly left with the jury. It acknowledges that it bore the burden of satisfying the jury that the respondent had been guilty of misconduct justifying his dismissal without notice. It says, however, that a jury acting judicially could not have found an absence of cause.

[10] We agree with IBM's assertion that, as an employer, it has an obligation to provide its employees with a safe workplace. We also accept that the respondent was aware, as of December 2001, that further aggressive incidents would result in termination of his employment. However, as will be evident from the brief overview of the facts set out above, there was evidence before the jury upon which it could conclude that although IBM had legitimate concerns about the respondent, it acted precipitously in dismissing him. As the jury was entitled to accept the evidence led by the respondent, we cannot conclude that its verdict was plainly unreasonable. Consequently, we see no basis on which to interfere with the jury verdict that IBM did not have just cause when it dismissed the respondent on April 23, 2001.

NOTICE PERIOD

[11] An appellate court is not justified in interfering with the notice period fixed by a trier of fact unless it is unreasonable. See *Marshall v. Watson Wyatt and Co.* (2002), 57 O.R. (3d) 813 (C.A.) at para. 19.

[12] Reasonableness is to be decided with reference to each particular case, having regard to such things as the nature of the employment, the length of service, the employee's age at the time of dismissal and the availability of similar employment. See *Wallace v. United Grain Growers Ltd.,* [1997] 3 S.C.R. 701 at paras. 81 – 82 citing *Bardal v. Globe & Mail Ltd.* (1960), 24 D.L.R. (2d) 140 (Ont. H.C.). In her charge to the jury, Polowin J. offered her view that, on the evidence, the range of notice that might be given was from 3 to 5 months.

[13] The respondent did not hold a senior position. He did not have any specialized expertise or experience. He had been employed in a non-managerial technical support position for a period of less than four years, earning a salary of $33,600.00. He was 42 years old at the time of the dismissal. There is no suggestion that the respondent had been induced to work for the appellant. On the contrary, IBM did not recruit the respondent. Rather, his employment with IBM began when the company that he was working for merged with IBM. IBM made him no promises whatsoever including no assurances in respect to job security, the expectation of long employment or the possibility of advancement.

[14] We agree with the trial judge that in the circumstances of this case, an appropriate range was between three and five months. It follows, in our view, that the jury's award of nine months was well beyond what is reasonable. We would allow this aspect of the appeal and award four months notice.

WALLACE DAMAGES

[15] A dismissed employee is not entitled to compensation for injuries flowing from the fact of dismissal. However, employers are held to an obligation of good faith and fair dealing in the manner of dismissal. The breach of an employer's obligation in this regard may be compensated by adding to the length of the reasonable notice period. Compensation in these situations flows not from the dismissal itself but from the manner of dismissal. See *Wallace*, *supra,* at para. 103.

[16] IBM asks the court to set aside the jury verdict extending the notice period by four months on the basis that no jury acting judicially could have found its behaviour to have breached its duty of good faith and fair dealing. Again, IBM takes no issue with the trial judge's instructions in this regard.

[17] For similar reasons as given in relation to the jury verdict on cause, we see no basis on which to interfere with the jury verdict that an extension of the notice period was warranted. The threshold for interfering with a jury verdict is high. The jury was entitled to accept the respondent's evidence that his "threat" was more in the nature of a cry for help, that IBM knew of his illness (albeit not in detail), and that the manner of termination was unduly insensitive in light of his financial and emotional vulnerability.

[18] Although we are satisfied that it was open to the jury to award *Wallace* damages, it must be said that IBM was in a difficult position. It had to balance the respondent's needs and rights against its obligation to provide a safe workplace for all its employees. As the respondent acknowledged, IBM had worked with him in respect of the prior incidents involving his aggressive behaviour. We recognise as well that, out of a concern for the respondent's difficult financial position, IBM offered the respondent 11 weeks pay at the time of termination, even though it believed it had cause for dismissal. We note also that, in asking the respondent to sign a release, it followed standard practice. IBM made no suggestion in any documentation that the respondent had committed a criminal act. Finally, it is difficult to know whether and to what extent the difficulties that Mr. Sommerard endured after his dismissal flowed from the fact of termination as opposed to pre-existing difficulties in his personal life, including psychological problems that dated back to his early childhood.

[19] In the circumstances, while we are of the view that an additional four months notice is very generous, we see no basis on which to interfere with the jury award. There was no objection by IBM to the charge and the trial judge had instructed the jury that an

employer like IBM "will not be punished for a failed just-cause defence where those allegations [of cause] are made in good faith." She further told the jury that an award of one to four months was the appropriate range.

AGGRAVATED AND PUNITIVE DAMAGES

[20] In addition to awarding *Wallace* damages, the jury awarded the respondent $1,000 for aggravated damages and $22,000 for punitive damages.

[21] It is common ground that in wrongful dismissal actions, aggravated and punitive damages can only be awarded where, among other things, the employee is able to establish that the employer engaged in an independent actionable wrong that was separate from the breach of contract for failure to give reasonable notice of termination. See *McKinley v. B. C. Tel*., *supra*, at paras. 78 and 86; *Vorvis v. Insurance Corp. of British Columbia*, [1989] 1 S.C.R. 1085 at para. 25; and *Wallace*, *supra*, at para. 79.

[22] Having regard to the evidence at trial, we agree with IBM that the tort of intentional infliction of mental distress was the only possible "independent actionable wrong" that the jury could look to in determining whether the respondent had made out a case for aggravated or punitive damages. In her charge, the trial judge correctly instructed the jury on the elements of that tort and the jury was specifically asked, in question no. 7, whether the conduct of IBM justified an award of damages for it. The jury answered "No".

[23] Unfortunately, the jury was not told that a negative response to question no. 7 meant that the respondent's claim for aggravated and punitive damages must fail. Instead, the jury was allowed to scan the evidence on its own in search of another possible independent actionable wrong that could support an aggravated or punitive damages award. With respect, the jury should not have been permitted to engage in that exercise.

[24] The problem that occurred here can and should be avoided in the future.

[25] Plaintiffs who seek aggravated and/or punitive damages should particularize, in their pleadings, the independent actionable wrong or wrongs upon which they are relying and the material facts in support of them. They should do the same in relation to the conduct they seek to portray as "harsh, vindictive, reprehensible, malicious" and the like. See *Whiten v. Pilot Insurance Co*., [2002] 1 S.C.R. 595 at paras. 86 to 92.

[26] Proper pleadings serve several purposes. Defendants are made aware of the case they have to meet and trial judges are better able to determine whether a so-called "independent actionable wrong" is indeed "independent" and "actionable" and if so, whether it is supported by the evidence. The same applies to conduct of the employer said to justify aggravated and punitive damages.

[27] In addition, trial judges should, after considering the pleadings, instruct the jury in the charge on the possible independent actionable wrongs and how to determine whether they have been made out. In our view, it would be advisable for trial judges to explicitly canvas with counsel, prior to the charge and before counsel address the jury, their respective positions on these matters.

[28] As we have observed, in this case, the tort of intentional infliction of mental distress was the only possible independent actionable wrong capable of justifying an award of aggravated or punitive damages. It was adequately pleaded, IBM was not caught off guard, and the trial judge properly left it to the jury. The jury rejected it. That determination effectively put an end to the respondent's claim for aggravated and punitive damages. It follows that the awards made by the jury under those heads cannot stand.

[29] In the end, we would allow this aspect of the appeal as well, and dismiss the respondent's claim for aggravated and punitive damages.

DISPOSITION

[30] Accordingly, we would allow the appeal in part and dismiss the cross-appeal. Judgment in favour of the respondent is reduced to a total award of a sum equivalent to eight months salary. The appellant has enjoyed substantial success and should be entitled to costs on appeal. We leave that matter to be resolved between counsel, failing which, we will accept brief written submissions (not to exceed three pages double-spaced) no later than fifteen days from the date of release of these reasons.

Signed: **"Doherty J.A."**

"M.J. Moldaver J.A."
"E.E. Gillese J.A."

RELEASED: "DD" March 30, 2006