COURT OF APPEAL FOR ONTARIO

CITATION: Filice v. Complex Services Inc., 2018 ONCA 625
DATE: 20180710
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2018 ONCA 625 (CanLII)

Simmons, Roberts and Nordheimer JJ.A.

BETWEEN

Antonio Filice

Plaintiff (Respondent)

and

Complex Services Inc.

Defendant (Appellant)

Frank Cesario, for the appellant

Margaret A. Hoy, for the respondent

Heard: January 19, 2018

On appeal from the judgment of Justice Antonio Skarica of the Superior Court of Justice, sitting without a jury, dated May 17, 2016 with reasons reported at 2016 ONSC 3256.

Nordheimer J.A.:

[1] Complex Services Inc. appeals from the judgment of Skarica J. dated May 17, 2016 that awarded the plaintiff damages for constructive dismissal in the amount of $75,723.64, punitive damages of $100,000, and costs of $82,600.

2018 ONCA 625 (CanLII)

[2] In my view, the trial judge erred in two significant respects. First, by holding, in effect, that the reasonable notice period arising from the respondent's constructive dismissal was 17 months. Second, by concluding that punitive damages were appropriate in this case. I would therefore allow the appeal for the reasons that follow.

Background

[3] The appellant is under contract with the Ontario Lottery and Gaming Corporation to operate Casino Niagara and Fallsview Casino, both of which are located in the Niagara Falls area (collectively, "the Casino"). The respondent was employed as a Security Shift Supervisor by the appellant at the Casino. The respondent had been employed since April 1999.

[4] The Alcohol and Gaming Commission of Ontario ("AGCO") is the government body responsible for the licensing of gaming employees and the enforcement of gaming legislation, including the *Gaming Control Act, 1992*, S.O. 1992, c. 24. The AGCO reports to the Ministry of the Attorney General and serves as an oversight regulatory body to ensure the proper security and integrity

of gaming in Ontario, and that operations are conducted in the best interests of the public.

2018 ONCA 625 (CanLII)

[5] The AGCO operates several units, including a Licensing and Registration Unit, which processes gaming licenses and registrations; an Audit and Compliance Unit, which has offices within the Casino and conducts audits, inspections, and compliance reviews; and an Enforcement Unit, which has offices within the Casino and is staffed with Ontario Provincial Police ("OPP") officers.

[6] The Casino maintains a Security Department. Among other things, the Security Department is responsible for managing the Casino's lost and found processes, which include the collection of property and money from the Casino's facilities.

[7] All employees in the Casino's Security Department are required to maintain a valid gaming registration issued by the AGCO. This requirement is mandated under the *Gaming Control Act* and is a condition of employment. Without a valid gaming registration, an individual is prohibited by law from working anywhere in the Casino's Security Department.

[8] On December 17, 2007, the Casino's Director of Security, Mr. Richard Paris, was advised that the AGCO Compliance Unit had performed a routine audit of the Casino's lost and found logs from September to December 2007.

The AGCO audit identified several discrepancies, and those discrepancies corresponded with entries that the respondent had made. The AGCO directed the Casino to conduct its own audit. Consequently, Mr. Paris directed members of the Security Department management to conduct an audit of lost and found records for 2007.

[9] On December 18, 2007, Mr. Paris was contacted by the AGCO Enforcement Unit regarding the Compliance Unit's audit and the Security Department's review of lost and found records. Mr. Paris updated the AGCO on the review.

[10] The AGCO Enforcement Unit, through its OPP staff officers, asked to interview the respondent on December 19, 2007 regarding the results of the audits conducted to date. Mr. Paris escorted the respondent to the meeting with the OPP officers. Mr. Paris then left. On the way to the meeting, the respondent asked Mr. Paris what the meeting was about. Mr. Paris said that he did not know.

[11] At the conclusion of the meeting, the OPP officers escorted the respondent back to Mr. Paris's office. The officers advised Mr. Paris that the respondent was under investigation for theft in the workplace, that the investigation was ongoing, and that no charges had yet been laid. Upon receiving this information from the officers, Mr. Paris advised the respondent that he was being placed on an

2018 ONCA 625 (CanLII)

investigative suspension, pursuant to Casino policies, effective immediately. The respondent was escorted from the premises and prohibited from returning. From that point forward, the respondent was suspended without pay.

2018 ONCA 625 (CanLII)

[12] The Casino maintains an Associate Handbook Security Edition (the “Handbook”). The Handbook provides:

> Investigative Suspension may be used as part of the coaching and counselling process to verify allegations of misconduct. During an investigation, the Associate may be prohibited from working. If a decision is made to separate the Associate’s employment, he or she may not be reimbursed for time spent on Investigative Suspension.

The appellant has a discipline policy to the same effect.

[13] On December 31, 2007, the Casino provided the AGCO and the OPP with the audit report prepared by the Casino's Internal Audit Department detailing its review into found money discrepancies (the "Audit Report"). The Audit Report identified a number of weaknesses in the lost and found procedures, and identified recommendations to be implemented to address them. During the first two weeks of January 2008, the Casino continued to provide documents requested by the OPP for the ongoing criminal investigation.

[14] On January 21, 2008, the OPP charged the respondent with four counts of theft under $5,000 and one count of breach of trust. Also on that date, the AGCO suspended the respondent’s gaming registration. As a result, the

respondent was precluded from performing his duties as a Security Supervisor for the Casino, and the Casino was precluded from using the services of the respondent as a Security Supervisor: *Gaming Control Act*, ss. 5(1)(a) and 5(4)(b).

2018 ONCA 625 (CanLII)

[15] On March 7, 2008, Mr. Paris wrote to the respondent on behalf of the appellant. He told the respondent that the workplace investigation of the Casino was separate and apart from the criminal proceedings. Mr. Paris also stated that, although the workplace investigation was ongoing, it would be deferred until the AGCO and criminal matters were concluded. To this end, the letter suggested that it would be in the interests of all parties to defer the respondent's interview with the Casino's Corporate Investigator until the AGCO and criminal matters were concluded. The respondent did not respond to that letter.

[16] The respondent had a hearing scheduled for May 13, 2008 before the AGCO to appeal the suspension of his registration. However, that hearing was adjourned indefinitely at the respondent’s request. The respondent advised AGCO that he would like to deal with his criminal charges before he dealt with the suspension of his registration.

[17] On November 3, 2008, three of the five criminal charges were withdrawn. On February 7, 2009, the remaining two criminal charges against the respondent were dismissed. The dismissal of the charges appears to have happened after

an adverse ruling was made by the trial judge regarding the Crown's ability to rely on certain business records. The Crown then chose not to call any further evidence and the charges were dismissed.

2018 ONCA 625 (CanLII)

[18] While the respondent's criminal matter was concluded, his gaming registration remained suspended by the AGCO. On May 12, 2009, prior to an appeal on the AGCO suspension being heard, the respondent directed his legal counsel to voluntarily surrender his gaming registration to the AGCO. On May 15, 2009, the AGCO cancelled the respondent's gaming registration. As a result, he was precluded from reapplying for another registration for at least two years.

[19] On May 29, 2009, Mr. Paris wrote to the respondent and advised him that, in light of the requirement that the respondent maintain a valid gaming registration, his employment was at an end since he had surrendered his gaming registration.

[20] In November 2009, the respondent commenced the underlying action against the appellant. He claimed wrongful dismissal, false arrest, malicious prosecution, breach of the *Charter of Rights and Freedoms*, negligence, and intentional infliction of mental suffering.

[21] On December 20, 2011, the Casino brought a motion for summary judgment seeking the dismissal of the respondent's claims. That motion was adjourned to permit the respondent to bring a motion to amend the statement of

claim to claim constructive dismissal. On March 12, 2012, the respondent issued an amended statement of claim stating that he was constructively dismissed, effective December 19, 2007, when he was placed on a leave of absence without pay.

2018 ONCA 625 (CanLII)

[22] The appellant's motion for summary judgment was then heard. In a decision dated October 24, 2012, Henderson J. granted partial summary judgment.[1] He dismissed the claims for false arrest, malicious prosecution, breach of the *Charter*, negligence, and intentional infliction of mental suffering but ordered the claim of constructive dismissal to proceed to trial. In his reasons, the motion judge made the following findings:

(i) AGCO and the OPP are both statutory bodies that operated independently of the appellant;

(ii) there was no evidence that any representative of the appellant ever accused the respondent of theft; and

(iii) there was no flagrant or outrageous conduct by the appellant in relation to the respondent.

[23] The constructive dismissal claim proceeded to trial in May 2016 over seven days. The respondent called seven witnesses in addition to giving

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[1] *Filice v Complex Services*, 2012 ONSC 6058

evidence himself. The appellant called only Mr. Paris. Neither party called any witnesses from the OPP or the AGCO who were involved in their respective investigations of the respondent.

2018 ONCA 625 (CanLII)

[24] On May 17, 2016, the last day of the trial, Skarica J. released his written reasons for judgment comprising 76 pages. He found in favour of the respondent. He awarded damages of $75,723.64 for constructive dismissal, punitive damages of $100,000, and costs. The compensatory damages were calculated as the amount of pay that had been withheld from the respondent during his suspension that spanned approximately 17 months.

Analysis

Standard of review

[25] The Supreme Court set out the guiding principles on the standard of review for appeals from judicial decisions in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 325. Questions of law are reviewable for correctness, and questions of fact or questions of mixed fact and law are reviewable for palpable and overriding error, unless there is an extricable question of law: *Housen*, at paras. 8, 10, and 36. The identification of the correct legal standard is an extricable question of law, but the application of a legal standard to a set of facts is a question of mixed fact and law: *Housen*, at paras. 27 and 31. I address the standard of review applicable to each issue below.

Constructive dismissal

[26] I begin my analysis, as the trial judge also correctly did, with the decision in *Potter v. New Brunswick Legal Aid Services Commission*, 2015 SCC 10, [2015] 1 S.C.R. 500. In that decision, at paras. 32-46, Wagner J. set out the test for constructive dismissal. The test involves two branches. The first branch of the test applies where there has been a single act by the employer that may constitute a breach of the contract of employment. The second branch applies where there has been a continuing course of conduct by the employer that may, collectively, give rise to a finding that the contract of employment has been breached. It is the first branch of the test for constructive dismissal that is engaged here.

[27] The first branch of the test for constructive dismissal requires a review of the specific terms of the contract of employment. It involves two steps that must be considered independently of each other: *Potter*, at para. 38. The first step is to identify an express or implied contractual term that has been breached. The second step is to then determine if the breach is sufficiently serious to constitute constructive dismissal. The first step is assessed on an objective basis, whereas the second step is analyzed on a modified objective standard of a reasonable employee in similar circumstances: *Chapman v. GPM Investment Management*, 2017 ONCA 227, at paras. 16-17.

2018 ONCA 625 (CanLII)

2018 ONCA 625 (CanLII)

[28] In this case, the respondent was suspended without pay. That would normally involve a breach of the contract of employment unless it was an express or implied term of the contract that the employer could suspend an employee without pay. The trial judge did not make any express finding on this first requirement. However, the trial judge did say, at para. 260 of his reasons, that the appellant's policy and procedure "appears to give the power to the defendant to suspend without pay during an investigation."

[29] I note that both the Handbook and the appellant's discipline policy expressly provide that the respondent could be suspended. However, such a suspension was not automatic. Rather, it was to be imposed at the discretion of the appellant. In the same vein, the power to impose a suspension without pay was also left in the hands of the appellant.

[30] The burden of establishing constructive dismissal lies on the employee. However, where an administrative suspension is involved, the burden shifts to the employer to show that the suspension is justified: *Potter*, at para. 41. A number of factors are to be considered in determining whether a suspension is justified, some of which were outlined in *Cabiakman v. Industrial Alliance Life Insurance Co.*, 2004 SCC 55, [2004] 3 S.C.R. 195, at para. 65 where LeBel and Fish JJ. said:

> For example, the courts may consider the following factors: whether there is a sufficient connection between

> the act with which the employee is charged and the kind of employment the employee holds; the actual nature of the charges; whether there are reasonable grounds for believing that maintaining the employment relationship, even temporarily, would be prejudicial to the business or to the employer's reputation; and whether there are immediate and significant adverse effects that cannot practically be counteracted by other measures (such as assigning the employee to another position).

2018 ONCA 625 (CanLII)

[31] In my view, the evidence demonstrates that the suspension was clearly justified in this case. The respondent was a Security Supervisor with the appellant. Information came to the appellant's attention that the respondent was possibly involved in theft from the Casino's lost and found facilities. In these circumstances, and given the regulated nature of the appellant's operations, it was entirely reasonable for the appellant to suspend the respondent pending a determination of the validity of the concerns respecting the asserted misconduct. Indeed, given the nature of the allegations, it would have been irresponsible of the appellant not to have done so. Whether the appellant was justified in suspending the appellant without pay, however, is a separate issue that I will come to later.

[32] I pause at this point to take issue with certain findings made by the trial judge. The trial judge found, at para. 261, that:

> Mr. Paris told the police only half the story. Mr. Paris told the police that the Lost and Found records showed discrepancies which implicated Mr. Filice. He did not tell police that he was aware of numerous issues both

> regarding the record keeping and procedures and laxity of enforcement of those procedures…

And at para. 262 that there were "serious defects in the procedures and record keeping that Mr. Paris was aware of and did not disclose to the police…".

2018 ONCA 625 (CanLII)

[33] First, the finding that Mr. Paris told the police about the discrepancies, and that they implicated the respondent, is simply wrong. It was not Mr. Paris who identified the possible problem with the respondent. To the contrary, it was officials from the AGCO's Compliance Unit who first identified the problem and the respondent's apparent connection to it. In addition, it was the AGCO's Enforcement Unit, which is staffed by OPP officers, that first contacted Mr. Paris on December 18, 2007. Indeed, Mr. Paris's uncontested evidence was that Sergeant Taylor of the OPP called him to discuss the audit issues – not the other way around.

[34] Second, the finding that Mr. Paris did not disclose accounting control defects to the police is also wrong. Mr. Paris gave evidence that, not only had he discussed flaws in the appellant's lost and found procedures with the OPP, but that the AGCO Compliance Unit was provided with a copy of the appellant's Audit Report. The Audit Report clearly outlines problems with those procedures. Moreover, Mr. Paris was specifically cross-examined on this point and his answers were consistent and unshaken from his evidence in-chief.

2018 ONCA 625 (CanLII)

[35] As will become apparent, these erroneous findings infected the trial judge's entire analysis, leading him to believe that Mr. Paris was not a credible witness. As a result, the trial judge inferred that the appellant acted in an ulterior and unfair manner by attempting to hide other causes of the discrepancies in the lost and found records from the OPP.

[36] Further on this point, no one from the OPP who was involved in the investigation was called as a witness at trial. There was no basis, consequently, for the trial judge to make factual findings about what the OPP knew, or did not know, regarding its investigation into the respondent. In fact, given the close proximity of the AGCO Compliance Unit's and Enforcement Unit's operations stationed inside the Casinos and the fact that the Enforcement Unit is staffed with OPP officers, it might have been a reasonable inference to conclude that the OPP officers knew what the AGCO in-casino units knew. In any event, it was unfair of the trial judge to make adverse findings regarding the appellant's involvement with the OPP's investigation in the absence of that evidence.

[37] Given the content of the appellant's policies and Handbook, which the parties seem to have treated as forming part of the contract of employment, the appellant had the contractual right to suspend the respondent. However, absent express language in the employment contract stipulating that any suspension would be without pay, the burden rests on the appellant to establish that a suspension without pay was justified. If the appellant cannot justify a suspension

without pay, then taking that step amounts to a unilateral change in the employment relationship that constitutes a breach of the contract of employment.

[38] In this case, as the appellant's policies make clear, whether the suspension is with or without pay is a matter for the appellant to determine in its discretion. In making that determination, the appellant must establish that it acted reasonably. See, for example, the discussions regarding the exercise of a contractual discretionary power in *Greenberg v. Meffert* (1985), 18 D.L.R. (4th) 548, at p. 554 (Ont. C.A.), [1985] O.J. No. 2539, at para. 18; *Marshall v. Bernard Place Corp.* (2002), 58 O.R. (3d) 97 (C.A.), [2002] O.J. No. 463; and *Willowbrook Nurseries Inc. v. Royal Bank of Canada*, 2017 ONCA 974, at para. 40. In this case, however, it does not appear that the appellant turned its mind to whether the appellant's suspension should be with or without pay. Rather, the appellant appears to have treated the suspension without pay as being automatic.

[39] There may be situations where an employer would be fully entitled to suspend an employee without pay given the nature of the allegations made. However, those situations must be viewed as exceptional, and in any case, it still falls to the employer to justify that decision as a reasonable one. As LeBel and Fish JJ. said in *Cabiakman*, at para. 60:

> However, it would seem to be appropriate to note that, as a rule, the power to suspend for administrative reasons <u>does not entail</u>, as a corollary, the right to suspend the payment of salary. The employer cannot

2018 ONCA 625 (CanLII)

> unilaterally, and without further cause, avoid the obligation to pay the employee's salary if it denies the employee an opportunity to perform the work.
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> [Original emphasis.]

2018 ONCA 625 (CanLII)

[40] In this case, at least at the very early stage of the investigation, it is difficult to see how the appellant could reasonably have concluded that a suspension without pay was warranted. The OPP investigation was ongoing. It was not then clear whether criminal charges would be laid. The appellant did not have any other information to suggest that a suspension without pay was justified. Indeed, the appellant knew that there were flaws generally in their lost and found procedures that went beyond the respondent's activities. While there might have been a point later in time when the suspension of the respondent without pay could have been justified, depending how matters unfolded, there was an insufficient foundation for a suspension without pay on December 19, when the respondent was told he was suspended and escorted out of the premises. In my view, when the appellant suspended the respondent without pay on December 19, it made a unilateral change to the employment relationship and breached the implied term of the employment contract that the power to suspend without pay would not be exercised unreasonably.

[41] That conclusion then leads to the second step of the first branch of the *Potter* analysis, which requires the court to determine whether the suspension "could reasonably be perceived as having *substantially changed the essential*

terms of the contract" (emphasis in original): *Potter*, at para. 45. As I alluded to above, this second step is assessed from the perspective of a similarly situated reasonable employee. Part of the consideration is whether the suspension "had a minimal impact" on the employee.

2018 ONCA 625 (CanLII)

[42] I believe it would be beyond reasonable debate, whether from the viewpoint of a reasonable employee or otherwise, that suspending an employee without pay would have an impact on the employee that would be more than minimal. Accepting that the appellant had a legitimate business interest in suspending the respondent, given his position and the nature of the allegations, the substantial impact of suspending the respondent without pay rendered the suspension a breach of the contract of employment that amounts to a constructive dismissal under the *Potter* test.

Compensatory damages

[43] Notwithstanding that there are certain unique circumstances of this case, having concluded that the respondent was constructively dismissed, it still remains to be determined what damages flow from the breach itself. Unfortunately, the trial judge failed to undertake a proper damages assessment. Rather, he simply treated the entire period that the respondent was suspended as being the appropriate notice period for which he was to be compensated. As *Potter* again makes clear, damages for constructive dismissal are the same as

they are for wrongful dismissal. The appropriate notice period has to be determined and damages awarded in lieu of that notice period. In this case, 17 months would have been an inordinately lengthy notice period for someone in the respondent's position with his length of service.

2018 ONCA 625 (CanLII)

[44] The respondent's length of service was approximately 8 years and 8 months, based on a start date of April 1999 and a termination date of December 19, 2007 when he was constructively dismissed. He was almost 50 years old at the time of his dismissal and he was earning approximately $50,000. I also note that it took the appellant seven months to find other employment. Applying the factors from *Bardal v. Globe & Mail Ltd.* (1960), 24 D.L.R. (2d) 140 (Ont. H.C.), I find that reasonable notice in this case is seven months.

[45] I pause at this juncture to address one unique aspect of this case. Approximately a month after he was suspended, the respondent's gaming registration was suspended by the AGCO. It is not disputed that, in order to fulfill his duties as a Security Supervisor, the respondent was required by law to have a gaming registration. Two consequences, that arise from that fact, require mention.

[46] First, there is the appellant's submission that the suspension of the respondent's gaming registration limits any claim for damages arising from his dismissal to the one month before his gaming registration was suspended.

2018 ONCA 625 (CanLII)

[47] The general rule for the assessment of damages is that they are assessed as of the date of the breach. While there are exceptions to that general rule, where fairness requires an exception, those exceptions do not easily apply: *Rougemount Capital Inc. v. Computer Associates International Inc.*, 2016 ONCA 847, 410 D.L.R. (4th) 509, at paras. 45 & 50.

[48] I do not see that fairness requires an exception in this case. As I have already said, the appellant appears to have treated the suspension without pay as being automatic. It ought not to have treated the respondent in that fashion. Consequently, if fairness has a role to play, it argues in favour of the respondent being entitled to his appropriate measure of damages in light of the appellant's breach of the employment contract and not in allowing the appellant to rely on a subsequent event that happens to enure to its benefit. I should note, on this point, that the appellant did not allege that, if a dismissal should be found, the contract of employment became frustrated as a result of the suspension of the respondent's gaming registration, or that the suspension of the respondent's gaming registration constituted an inability to mitigate, or any other like reason. Consequently, I do not need to address whether those issues might have led to a different damages assessment.

[49] Second, there is the respondent's submission that the appellant had an obligation to offer the respondent another job, within its organization, that did not

require the respondent to have a gaming registration. I reject that submission for a number of reasons.

2018 ONCA 625 (CanLII)

[50] One is that the respondent was unable to point to any authority that stands for the proposition that an employer has an obligation to relocate an employee to another position, in these circumstances. The respondent was not employed by the appellant under a collective bargaining agreement subject to a labour law scheme. In fact, holding that the appellant had a duty to offer alternative employment would be contrary to the fundamental principles of individual agency, freedom of contract, and tantamount to binding the parties to a specific performance obligation for employment which has long been rejected by the common law, except perhaps in the rarest of circumstances, none of which are present here. See, for example, *Lumley v. Wagner* (1852), 64 E.R. 1209 (E.W.H.C. (Ch)); *Labelle v. Ottawa Real Estate Board*, 1977 CarswellOnt 1079 (H.C.J.), at para. 50; *Gillespie v. Overs*, 1987 CarswellOnt 3404 (H.C.J.), at para. 170; *Quirola v. Xerox Canada Inc.*, 1996 CarswellOnt 1692 (Gen. Div.), at para. 33; *Clitheroe v. Hydro One Inc.*, 2002 CarswellOnt 3919 (S.C.J.), at paras. 11-18; *McDonald v. Anishinabek Police Service* (2006), 279 D.L.R. (4th) 460 (Ont. Div. Ct.), [2006] O.J. No. 4210, at para. 77; and *Evans v. Teamsters, Local 31*, 2008 SCC 20, [2008] 1 S.C.R. 661, at para. 108 *per* Abella J. dissenting.

[51] Another is that the respondent never asked the appellant to find him a different position.

[52] Yet another is that the respondent also never demonstrated that he was willing to accept some other position. To the contrary, it would seem that he would not have been willing to accept another position given his evidence at trial, to which the trial judge referred in his reasons at para. 19, that the respondent "felt that he could not return to the Casino due to the humiliation and embarrassment of his being escorted out of the Casino in front of numerous employees and his subsequent charge of theft."

[53] There are two other issues that require mention in relation to the question of damages. One is condonation, that is, that the respondent condoned the appellant's actions and thus cannot complain about the actions that the appellant took. It is true that the respondent does not appear to have made any objection to the appellant's suspension of his employment without pay. If an employee consents to, or acquiesces in, a change of the terms of employment, the change is not a unilateral act and will not constitute a breach: *Potter* at para. 37. However, the simple fact is that condonation is a defence and it was not pleaded as a defence in this case. Without that pleading, in my view, it is not open to the appellant to raise that issue for the first time on appeal as impacting the assessment of damages.

[54] The other is the suggestion that the respondent's claim is statute-barred because it was advanced more than two years after the act of dismissal. The dismissal occurred on December 19, 2007. This action was commenced in

2018 ONCA 625 (CanLII)

November, 2009. I cannot tell the exact date because the formal issued statement of claim is not in the appeal book. The action as originally constituted claimed wrongful dismissal but not constructive dismissal. The statement of claim was amended on March 12, 2012, apparently by way of a motion, to add a claim for constructive dismissal.

2018 ONCA 625 (CanLII)

[55] There is no information in the record whether the issue of the limitations period was argued when the respondent sought leave to amend his statement of claim. That is where it ought to have been argued but I have to assume it was not. If so, it is, in my view, again too late to raise the issue in this court. However, even if it were open to the appellant to raise the issue now, I would not give effect to it. The appellant was on notice of the respondent's essential claim, that is, that his dismissal was improper. Whether the claim is styled as wrongful dismissal or constructive dismissal, the appellant was fully aware of the nature of the claim it was facing within the two year limitation period.

Punitive damages

[56] I now turn to the trial judge's award of punitive damages. An appellate court has a much broader scope for review on an appeal from an award of punitive damages. As Cory J. said in *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 at para. 197:

> Unlike compensatory damages, punitive damages are not at large. Consequently, courts have a much greater

> scope and discretion on appeal. The appellate review should be based upon the court's estimation as to whether the punitive damages serve a rational purpose. In other words, was the misconduct of the defendant so outrageous that punitive damages were rationally required to act as deterrence?

2018 ONCA 625 (CanLII)

[57] Punitive damages are only to be awarded where compensatory damages are inadequate to accomplish the objectives of retribution, deterrence, and condemnation: *Pate Estate v. Galway-Cavendish (Township),* 2013 ONCA 669, 117 O.R. (3d) 481, at para. 211; and *Rutman v. Rabinowitz*, 2018 ONCA 80, at paras. 94-97 *per curiam*. Further, an award of punitive damages is exceptional. As Binnie J. said in *Whiten v. Pilot Insurance Co*., 2002 SCC 18, [2002] 1 S.C.R. 595, at para. 36:

> Punitive damages are awarded against a defendant in exceptional cases for "malicious, oppressive and high-handed" misconduct that "offends the court's sense of decency".
>
> [Citation omitted.]

[58] In this case, the trial judge simply stated (at para. 276):

> In my opinion, the compensatory award in addition to any costs award does not rationally meet the objectives of retribution, deterrence and denunciation.

[59] The trial judge did not engage in any analysis of why the compensatory award that he decided on was inadequate to achieve those objectives. In failing to do so, he committed an error in principle. The fact remains that, insofar as the appellant was not justified in suspending the respondent without pay, it will pay

for that error through the award of compensatory damages. On this point, it must not be forgotten that compensatory damages have a punitive element to them. As Binnie J. also said in *Whiten*, at para. 123:

> Compensatory damages also punish. In many cases they will be all the “punishment” required. To the extent a defendant has suffered other retribution, denunciation or deterrence, either civil or criminal, for the misconduct in question, the need for *additional* punishment in the case before the court is lessened and may be eliminated.
>
> [Original emphasis.].

[60] This same point was made in *Pate Estate* where Cronk J.A. said, at para. 214:

> It is therefore incumbent on trial judges, when considering whether to award punitive damages and quantifying those damages where such an award is justified, to have regard to the punitive components of the compensation otherwise awarded to the plaintiff and the penalties otherwise imposed on the defendant. This did not occur in this case.

[61] On that basis alone, the award of punitive damages must be set aside. Given that conclusion, it is unnecessary for me to address the other errors that the appellant submits the trial judge made in his punitive damages assessment. In not addressing those points, however, I should not be taken as otherwise agreeing with the trial judge’s reasons for his award of punitive damages.

2018 ONCA 625 (CanLII)

2018 ONCA 625 (CanLII)

Conclusion

[62] I would allow the appeal and set aside the trial judgment, including the damages awards. In its place, I would grant judgment to the respondent solely for compensatory damages for seven months' lost wages. I assume that the parties will be able to agree on the amount.

[63] While the appellant enjoyed a measure of success on this appeal, it was not entirely successful. Consequently, I would fix the costs of the appeal at $10,000, payable by the respondent to the appellant.

[64] If the parties cannot agree on the issue of the costs of the trial, they may make written submissions. The appellant shall have 15 days from the date of these reasons to file its written submissions and the respondent shall have 10 days thereafter to respond. No reply submissions are to be filed. The submissions are not to exceed five pages.

Released: "JS" July 10, 2018

"I.V.B. Nordheimer J.A."
"I agree. Janet Simmons J.A."
"I agree. L.B. Roberts J.A."