COURT OF APPEAL FOR ONTARIO

CITATION: Krmpotic v. Thunder Bay Electronics Limited, 2024 ONCA 332
DATE: 20240502
DOCKET: C70976

Gillese and Copeland JJ.A. and Wilton-Siegel J. (*ad hoc*)

BETWEEN

Drago Krmpotic

Plaintiff (Respondent)

and

Thunder Bay Electronics Limited
and Hill Street Financial Services Inc.

Defendants (Appellants)

Derek Zulianello, for the appellants

Michael R. Switzer, for the respondent

Heard: February 9, 2024

On appeal from the judgment of Justice John S. Fregeau of the Superior Court of Justice, dated June 27, 2022, with reasons at 2022 ONSC 3748.

Gillese J.A.:

[1] In this employment law appeal, the court must address mitigation, the awarding of aggravated damages, and the joint and several liability of common employers.

I. BACKGROUND

[2] Drago Krmpotic (“Mr. Krmpotic” or the “respondent”) began work as a carpenter in 1976, and became a journeyman carpenter in 1983. In 1987, he began working in Thunder Bay, Ontario, in the maintenance department of Thunder Bay Electronics Limited (“TBEL”) and Hill Street Financial Services (“Hill Street”) (together, the “appellants”). TBEL is in the business of television broadcasting. Hill Street provides administrative and accounting services for TBEL. Hill Street owns the building out of which TBEL operates.

[3] Within 18 months of being hired by the appellants, Mr. Krmpotic was made the Building Maintenance Supervisor, a position he held until his employment with the appellants ended. Later in his employment, Mr. Krmpotic also assumed responsibility for the ongoing maintenance of TBEL’s fleet of vehicles. There was no written employment agreement between the parties.

[4] On June 13, 2016, after Mr. Krmpotic worked full time for the appellants for almost 30 years, the appellants terminated his employment without notice or cause. At that time, Mr. Krmpotic was 59 years old, earning an annual salary of approximately $72,864 ($6,072 per month). He had been on medical leave to recover from back surgery and had returned to work just hours before he was called into the meeting in which the appellants ended his employment. The back surgery was necessary because Mr. Krmpotic suffered a number of workplace

injuries over the course of his employment with the appellants. Dr. Puskas had performed the surgery on April 18, 2016.

[5] At the termination meeting, the appellants offered Mr. Krmpotic a severance package of 16 months' salary and asked him to sign a Memorandum of Settlement and Release (the "Settlement Memorandum"). Mr. Krmpotic refused and began this action for wrongful dismissal.

[6] In addition to claiming damages for wrongful dismissal, Mr. Krmpotic claimed for mental distress and aggravated/moral damages. Because his action was brought under r. 76 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, Mr. Krmpotic limited his total damages claim to $100,000, exclusive of the amounts the appellants paid him post-termination.

[7] The appellants continued to pay Mr. Krmpotic his regular salary for approximately 16 months post-termination; they also maintained his employee group benefit plan for several years.

[8] In November 2017, Mr. Krmpotic and his wife moved from Thunder Bay to Toronto so that he could work at his son's residential renovation company. However, Mr. Krmpotic lost this job opportunity because he could not meet its physical demands.

[9] Since losing his employment with the appellants, Mr. Krmpotic has suffered back pain, knee pain, anxiety, depression, fear, mental distress, confused emotions, anger, disturbed sleep, worry, frustration, helplessness, and defeat.

[10] At trial, direct evidence went in by way of affidavit, with cross-examination occurring through Zoom conferencing. Mr. Krmpotic provided affidavit evidence. So, too, did his wife and his son. All three were cross-examined. Don Caron, the appellants' sole witness, provided an affidavit on which he was cross-examined.

[11] The trial judge found that Mr. Krmpotic was a "loyal, responsible and trusted employee" who was called on to perform a broad range of skilled tasks over his 29 years of employment with the appellants. Mr. Krmpotic's job made significant physical demands on him. For example, at the appellants' request, Mr. Krmpotic was trained to work at heights, in tower rescue, and in tower climbing, so that he could climb the appellants' transmission towers to service and change equipment. He was often called on to do these things, including in inclement weather conditions. Other physical demands of his job included moving heavy objects, demolition and waste removal, and the ongoing maintenance of buildings, grounds, and equipment. Indeed, the trial judge found that in the course of his employment, Mr. Krmpotic did "everything necessary" for the appellants. Based on Mr. Krmpotic's "exemplary loyalty and dedication" to his employers, the trial judge found he was entitled to a reasonable notice period of 24 months.

[12] At trial, the appellants argued that the reasonable notice period should be reduced because the respondent had failed to make reasonable efforts to mitigate his damages. The trial judge rejected this, explaining that when Mr. Krmpotic's employment was terminated he was 59 years of age, recovering from back surgery, and significantly limited in his ability to perform the physical labour that his occupation demanded. Based on the evidence of Mr. Krmpotic, his wife, and his son, the trial judge was satisfied that Mr. Krmpotic was "unable to perform any meaningful physical labour due to his physical condition" during the reasonable notice period.

[13] After allowing for the appellants' payments of 16 months' salary, the trial judge awarded Mr. Krmpotic damages of $48,576 for the remaining 8 months of notice.

[14] The trial judge dismissed Mr. Krmpotic's claim for mental distress damages because Mr. Krmpotic had not provided the court with medical or psychological evidence confirming that the manner in which his employment was terminated resulted in mental distress. He noted that Mr. Krmpotic, his wife, and son, had all provided evidence of Mr. Krmpotic's mental health concerns, which included anxiety, depression, fear, poor sleep, frustration, and helplessness. However, the trial judge said that without further and better evidence, he was unable to conclude that those symptoms were not the result of Mr. Krmpotic's physical disabilities and

resultant inability, as a skilled labourer for his entire life, to engage in meaningful and productive employment.

[15] Nonetheless, the trial judge awarded Mr. Krmpotic $50,000 for what he termed “aggravated/moral damages” (“aggravated damages”) because he found that the manner in which the appellants terminated Mr. Krmpotic’s employment was “the antithesis of an employer’s duty” to be candid, reasonable, honest and forthright, and to “refrain from engaging in conduct that is unfair or in bad faith by being untruthful, misleading or unduly insensitive”.

[16] The trial judge ordered the appellants jointly and severally liable for the damage awards.

II. THE ISSUES

[17] The appellants submit that the trial judge erred in:

1. finding the respondent was unable to mitigate during the reasonable notice period due to physical incapacity;
2. awarding aggravated damages; and
3. holding the appellants jointly and severally liable.

ISSUE 1 REASONABLE EFFORTS TO MITIGATE

[18] The appellants assert here, as they did below, that the period of reasonable notice must be reduced based on the respondent’s failure to mitigate. They submit that the trial judge erred in concluding that the respondent was unable to mitigate

during the reasonable notice period because of physical incapacity. They make a number of arguments in support of this submission, the most salient of which are that the trial judge: (1) found, in the “complete absence of any medical evidence”, that the respondent could not work during the notice period because of physical incapacity; and (2) ignored the medical evidence which indicated the respondent was capable of working.

[19] I do not accept this submission or the arguments advanced in support of it. Whether a terminated employee took reasonable steps to mitigate is largely a question of fact – absent an error in principle or a palpable and overriding error, a decision respecting mitigation is entitled to deference: *Lake v. La Presse*, 2022 ONCA 742, at para. 13. The trial judge made no error in principle nor did he make any factual error, much less a palpable and overriding one.

[20] The principles governing mitigation are well-known. As a dismissed employee, Mr. Krmpotic had a duty to take reasonable steps to mitigate his damages by searching for comparable alternate employment within the reasonable notice period. The appellants had the burden of proving that (1) Mr. Krmpotic failed to take reasonable steps to mitigate; and (2) had he done so, mitigation was possible, in the sense that he would have been expected to secure comparable alternative employment: *Lake*, at para. 12; *Southcott Estates Inc. v. Toronto Catholic District School Board*, 2012 SCC 51, [2012] 2 S.C.R. 675, at paras. 23-24.

[21] In considering whether Mr. Krmpotic had fulfilled his duty to mitigate, the trial judge acknowledged that his attempts to find alternate employment in the period immediately following termination were “scant at best”. However, the trial judge was not persuaded that Mr. Krmpotic failed to make reasonable efforts to mitigate during the notice period because, at that time, Mr. Krmpotic was (1) 59 years old, (2) recovering from back surgery, and (3) “significantly limited in his ability to perform the physical labour which his occupation demands on a daily basis”.

[22] All three reasons are findings of fact; I see no basis for appellate interference with them. The first two findings are indisputable. And, on the record, the third finding was fully open to the trial judge. He accepted the evidence of Mr. Krmpotic, his wife, and his son, as sufficient to establish that Mr. Krmpotic could not undertake comparable employment during the notice period because of his physical incapacity. He also had the evidence of Mr. Krmpotic’s relocation to Toronto in November 2017, so he could work for his son’s residential renovation business. That evidence showed that Mr. Krmpotic’s back had not recovered sufficiently for him to perform the requisite physical work. Mr. Krmpotic’s son testified the job was available to his father at any time after his employment had been terminated, and that the job would pay him more than what he had been earning with the appellants – but it was conditional on Mr. Krmpotic being able to do the physical work required by the job. Unfortunately, even in November 2017, Mr. Krmpotic had not recovered sufficient physical capacity to perform the work.

[23] Mr. Krmpotic and his wife uprooted themselves from Thunder Bay and moved to Toronto so he could work for his son in his renovation business. Had he been able to physically manage that work, Mr. Krmpotic would have partially mitigated his damages because the re-employment attempt took place around 16 months after termination. However, he could not perform the job due to physical incapacity. In the circumstances, the trial judge made no palpable and overriding error in finding that Mr. Krmpotic was unable to mitigate during the notice period given his physical incapacity.

[24] The appellants assert that the trial judge's finding of physical incapacity was an error in principle because it was made in the absence of medical evidence to that effect. They rely on two cases for this assertion: *Lemesani v. Lowery's Inc.*, 2017 ONSC 1808, aff'd on other grounds 2018 ONCA 270; and *Sinnathamby v. The Chesterfield Shop Ltd.*, 2016 ONSC 6966.

[25] I do not see these cases as establishing the general principle that physical incapacity can only be established by expert medical evidence. In any event, *Lemesani* and *Sinnathamby* are readily distinguishable from the present case. In *Lemesani* and *Sinnathamby*, the claims related to non-physical injuries that were unsupported by any evidence. In the present case, the claims relate to physical injuries for which there was evidence. Mr. Krmpotic's medical history included numerous back and knee problems, and four different back injuries sustained at work, ultimately resulting in the need for back surgery. Mr. Krmpotic's evidence on

his physical limitations was supported by the evidence of his wife and son. And all of this was buttressed by the evidence of Mr. Krmpotic's attempt at re-employment in November 2017 which failed due to physical incapacity.

[26] Nor do I accept the appellants' assertion that the trial judge ignored the evidence in Dr. Puskas' report, dated May 11, 2016 (the "Report"), when making his finding of physical incapacity. It is true the Report states Mr. Krmpotic had no leg pain, some back stiffness, and was happy post-surgery. But it described Mr. Krmpotic's physical capacity as "he can stand on his toes, walk on his heels and do a deep knee bend". That does not speak of a physical capacity to do the kind of hard physical work that Mr. Krmpotic's employment demanded. This is underscored by the notes in the Report that Mr. Krmpotic had not yet begun physiotherapy and that he and Dr. Puskas had discussed how to augment Mr. Krmpotic's recovery and "speed it along". While the Report said it would be "routine" to get back to full employment within 8 to 9 weeks post-surgery, it also stated that much had to be done to maximise Mr. Krmpotic's "physical fitness, his work durability and the projection of long-term pain resolution".

[27] In short, the Report did not clear Mr. Krmpotic for return to work of a comparable physical nature to that which he had performed for the appellants over his many years of employment with them. Nor does it conflict with the trial judge's finding that, during the notice period, Mr. Krmpotic was physically incapable of performing work of such a nature.

[28] I conclude on this issue by declining to address the appellants' complaint that the trial judge erred by considering whether a new employer would have a duty to accommodate Mr. Krmpotic. I leave that question to a proceeding in which the matter is germane to the outcome and is squarely raised and addressed. The issue on this appeal is whether the trial judge made a palpable and overriding error in finding that Mr. Krmpotic was physically incapable of comparable work during the reasonable notice period. For the reasons given, he did not.

ISSUE 2 AGGRAVATED DAMAGES

[29] The appellants submit that the trial judge erred in awarding the respondent aggravated damages. They say that, following *Honda Canada Inc. v. Keays*, 2008 SCC 39, [2008] 2 S.C.R. 362, the trial judge could award aggravated damages only if there was evidence of both mental distress – that is, distress beyond the normal distress and hurt feelings resulting from dismissal – and that the mental distress was caused by the manner of dismissal. Accordingly, they contend, not only did the trial judge err in considering mental distress and the manner of dismissal separately, but also that, once he rejected the respondent's claim for damages for mental distress, the trial judge was precluded in law from making an award for aggravated damages.

[30] I do not accept the appellants' submission. In my view, it reflects an unduly narrow view of the employer's duty of good faith during the termination process

and the meaning of mental distress in that context. Further, I see no error in the trial judge's determination that Mr. Caron's conduct in the termination meeting breached that duty and caused Mr. Krmpotic harm deserving of compensation.

[31] The principles governing the employer's obligations on termination are clearly articulated in a series of Supreme Court of Canada decisions that include *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701, at para. 98; *Keays*, at para. 58; and *Matthews v. Ocean Nutrition Canada Ltd.,* 2020 SCC 26, [2020] 3 S.C.R. 64, at paras. 40, 44. Those principles can be summarised as follows.

[32] The duty of honest performance applies to all contracts, including employment contracts. It encompasses the employer's duty to exercise good faith during the course of dismissal from employment. Breach of the duty of good faith occurs through conduct that is unfair or made in bad faith, as for example, by being "untruthful, misleading or unduly insensitive". Callous or insensitive conduct in the manner of dismissal is a breach of the duty to exercise good faith.

[33] While the normal distress and hurt feelings resulting from dismissal are not compensable, aggravated damages are available where the employer engages in conduct that is unfair or amounts to bad faith during the dismissal process by being untruthful, misleading, or unduly insensitive, and the employee suffers damages as a consequence. As the trial judge noted, in *Boucher v. Wal-Mart Canada Corp.*, 2014 ONCA 419, 120 O.R. (3d) 481, at para. 66, this court confirmed that

aggravated damages compensate an employee for the additional harm suffered because of the employer's conduct.

[34] Mental distress is a broad concept. It includes a diagnosable psychological condition arising from the manner of dismissal but is not limited to that. There is a spectrum along which a person can suffer mental distress as a result of the manner of dismissal. At one end is the person who suffers the normal distress and hurt feelings resulting from dismissal, which are not compensable in damages. At the other end of the spectrum is the person who suffers from a diagnosable psychological condition as a result of the manner of dismissal. In between those two end points, there is a spectrum along which the manner of dismissal has caused mental distress that does not reach the level of a diagnosable psychological injury.

[35] In my view, on a full reading of his reasons, the trial judge approached the issue of mental distress in that fashion. The fact that Mr. Krmpotic had not established, through medical evidence, that he had suffered a diagnosable psychological injury, was not the end of a consideration of the issue of mental distress damages. As the trial judge correctly understood, he had to go further and determine whether (1) the appellants' conduct, during the course of termination amounted to a breach of their duty of honest performance; and (2), if so, whether Mr. Krmpotic suffered harm – beyond the normal distress and hurt feelings arising from dismissal - as a result of that breach. The trial judge found in Mr. Krmpotic's

favour on both matters: the appellants had engaged in conduct that amounted to bad faith during the dismissal process; and, Mr. Krmpotic suffered harm beyond the normal distress and hurt feelings that result from dismissal. These findings were fully open to the trial judge.

[36] The trial judge found that Mr. Caron breached the duty of good faith in the manner of dismissal in a number of ways. Mr. Caron claimed that Mr. Krmpotic had been dismissed for financial reasons and that the appellants' financial statements would support that claim. However, he refused to produce the financial statements. Further, while the trial judge found that Mr. Caron was not directly untruthful with Mr. Krmpotic during the termination meeting, he had "no hesitation" in finding that Mr. Caron was neither candid nor forthright. He found that Mr. Krmpotic's employment was terminated because his physical limitations restricted him from continuing to perform the wide array of job duties and responsibilities that he had performed for the appellants over the previous 29 years. He described Mr. Caron's conduct during the termination process as the antithesis of what is required by the duty of good faith in dismissal. Mr. Krmpotic was terminated within two hours of returning to work after his back surgery. During the termination meeting, instead of being candid, reasonable, honest, and forthright, Mr. Caron engaged in conduct that was untruthful, misleading, and unduly insensitive.

[37] Reading the trial judge's reasons as a whole, it is clear that he accepted that as a result of the manner of dismissal, Mr. Krmpotic was plagued by anxiety,

depression, fear, poor sleep, frustration, and feelings of helplessness. That is, he found that Mr. Krmpotic suffered harm beyond the normal distress and hurt feelings resulting from dismissal.

[38] Accordingly, I see no basis for appellate interference with the trial judge's determination of this issue.

ISSUE 3 JOINT AND SEVERAL LIABILITY

[39] The appellants submit that the trial judge erred in making them jointly and severally liable for the damages awards. They say that TBEL was Mr. Krmpotic's employer when his employment was terminated and the trial judge gave no reasons for ordering joint and several liability. Accordingly, the appellants contend, liability (if any) should be that of TBEL alone.

[40] I do not accept this submission.

[41] In the first sentence of his reasons, the trial judge states that Mr. Krmpotic "was employed by the [appellants] for approximately 30 years, from February 1987 to June 13, 2016, when he was terminated without cause or notice". In my view, he made no error in finding that both appellants employed Mr. Krmpotic for the duration of his employment with them. Having made that finding, the trial judge made no error in holding them both liable for the damages Mr. Krmpotic suffered.

[42] Mr. Krmpotic's evidence made it clear that he was employed by both appellants. However, so too did the appellants' evidence. The appellants' only

witness at trial was Mr. Caron, who was the Vice-President and General Manager of TBEL and also the President of Hill Street. In his affidavit, Mr. Caron states that Mr. Krmpotic's employment was "transferred" between the appellants a number of times during his employment with them.

[43] In any event, the Settlement Memorandum leaves no doubt that both appellants were Mr. Krmpotic's employers. It will be recalled that the appellants drafted the Settlement Memorandum and asked Mr. Krmpotic to sign it at the termination meeting. The Settlement Memorandum describes the parties to it as the employer and the employee. The "Employer" is defined as TBEL and Hill Street together; the "Employee" is defined as Mr. Krmpotic. The first preamble in the Settlement Memorandum states that "WHEREAS the Employee has been employed by Thunder Bay Electronics Limited and Hill St. Financial Services Inc. since on or about Feb. 24,1987". And, the Settlement Agreement concludes with the statement that the "Employer" is signing on behalf of "THUNDER BAY ELECTRONICS LIMITED, HILL ST. FINANCIAL SERVICES INC." These three parts of the Settlement Memorandum make it crystal clear that the appellants together employed Mr. Krmpotic for the duration of his employment with them.

[44] Because Mr. Krmpotic was employed by both appellants, the trial judge made no error in ordering them jointly and severally liable for damages arising from their wrongful termination of his employment.

III. DISPOSITION

[45] For these reasons, I would dismiss the appeal with costs to the respondent fixed at the agreed-on sum of $12,000, all inclusive.

Released: May 2, 2024 “E.E.G.”

“E.E. Gillese J.A.”
“I agree. J. Copeland J.A.”
“I agree. Wilton-Siegel J. (*ad hoc*)”