Date:19990705
Docket: CA 153204

NOVA SCOTIA COURT OF APPEAL

Cite as: Bureau v. KPMG Quality Registrar, 1999 NSCA 100
Freeman, Hart, Bateman, JJ.A.

BETWEEN:

KATHRYN BUREAU	)	Bernadette Maxwell
	)	Michael J. O'Hara
	)	for the appellant
Appellant	)	
	)	
- and -	)	
	)	
	)	
KPMG QUALITY REGISTRAR	)	
and BARRY TRAVERS	)	Karin McCaskill
	)	for the respondent
Respondent	)	
	)	
	)	
	)	Appeal Heard:
	)	June 16, 1999
	)	
	)	
	)	Judgment Delivered:
	)	July 5, 1999
	)	
	)	

THE COURT: Appeal and cross-appeal dismissed as per reasons for judgment of Bateman,J.A., Hart and Freeman, JJ.A., concurring

BATEMAN,J.A.:

[1] Kathryn Bureau appeals from an Order of Justice K. Peter Richard of the Supreme Court fixing damages in an action for wrongful dismissal. The trial decision is reported at (1998), 171 N.S.R. (2d) 360.

BACKGROUND:

[2] Ms. Bureau is a 40-year-old quality assurance consultant specializing in the ISO quality registration system. Before joining KPMG Quality Registrar Inc. in January of 1996 she was self-employed operating her one-person consulting business under the corporate name, K. Dresser Enterprises Ltd. In the first full year of operation, 1995, her net income from that business was approximately $113,000 on gross billings of $195,000.

[3] KPMG decided to establish a quality assurance practice in Halifax. In the fall of 1995 that company recruited Ms. Bureau to join the firm as an associate. Her principal contact in that regard was Barry Travers who is a partner with KPMG and was at that time charged with the responsibility of starting the quality assurance practice.

[4] In a series of meetings Ms. Bureau and Mr. Travers discussed her possible employment with KPMG. Their discussions culminated in a written offer of employment dated November 14, 1995. She commenced working with the company on January 2, 1996. KPMG terminated her contract of employment March 3, 1997 with one month's pay in lieu of notice. The relevant circumstances are recited in considerable detail in

the trial judge's decision.

[5] Ms. Bureau sued for damages naming KPMG and Barry Travers defendants. Her claim alleged both wrongful dismissal and negligent misrepresentation.

[6] The trial judge found no negligent misrepresentation but awarded damages equivalent to five months notice for wrongful dismissal. Ms. Bureau appeals the dismissal of her claim for negligent misrepresentation and also the notice period for the wrongful dismissal. The respondent cross-appeals, claiming that the five-month notice period should be reduced due to Ms. Bureau's failure to mitigate.

ISSUES:

[7] The appellant identifies the following issues:

(i) Did the trial judge err in failing to properly apply the principles of negligent misrepresentation as set out by the Supreme Court of Canada in **Queen v. Cognos**, [1993]1 S.C.R. 87?

(ii) Did the trial judge err in failing to award more than five months pay in lieu of notice under all the circumstances of the case?

(iii) If the answer to either or both of these questions is yes, how are damages to be calculated?

[8] On the cross-appeal the respondent asks:

(i) Did the trial judge err in law by not reducing the notice period for five months to account for the appellant's failure to mitigate her loss?

STANDARD OF REVIEW:

[9] In **Toneguzzo- Norvell (Guardian as litem of) v. Burnaby Hospital,** [1994] 1 S.C.R. 114, McLachlin said at p 121:

> It is by now well established that a Court of Appeal must not interfere with a trial judge's conclusions on matters of fact unless there is palpable or overriding error. In principle, a Court of Appeal will only intervene if the judge has made a manifest error, has ignored conclusive or relevant evidence, has misunderstood the evidence, or has drawn erroneous conclusions from it: see *P. (D.) v. S. (C.)*, [1993] 4 S.C.R. 141, at pp. 188-89 (per L'Heureux-Dubé J.), and all cases cited therein, as well as *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353, at pp. 388-89 (per Wilson J.), and *Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802, at pp. 806-8 (per Ritchie J.). A Court of Appeal is clearly not entitled to interfere merely because it takes a different view of the evidence. The finding of facts and the drawing of evidentiary conclusions from facts is the province of the trial judge, not the Court of Appeal. (Emphasis added)

ANALYSIS:

(a) Appeal:

(i) Did the trial judge err in failing to properly apply the principles of negligent misrepresentation as set out by the Supreme Court of Canada in Queen v. Cognos, [1993]1 S.C.R. 87?

[10] It is the appellant's submission that in the pre-contractual meetings KPMG, through Barry Travers, materially misrepresented the terms of employment. The appellant says that Travers failed to advise her that KPMG was hiring her for a one-year trial period only. Additionally, she says that she was misled by Travers in that he

represented that KPMG was making a three year commitment to the quality assurance practice when in fact their commitment to that practice was for one year only.

[11] At p.364 of his decision the trial judge describes the finalization of Ms. Bureau's terms of employment with KPMG:

> Travers and Bureau met again on 24 November at the KPMG office in Halifax at which time Travers presented a written "Offer of Employment". The salary was shown as $75,000 which was quickly negotiated up to $85,000 which was the upper limit agreed to by Joe McMullen. Travers said that they decided on the higher salary level because they felt that Bureau had the expertise and ability to "kick start" the ISO program in the Halifax office. The offer contained provision for a bonus based on performance, social membership fees, parking, secretarial support, computer equipment, a private office and a full range of support services. Bureau said that she felt the "practice was mine to develop". The offer also provided for Bureau being able to service some of her present clients until the retainer had been completed and to retain all revenues from that as well as from her teaching assignments at TUNS and other institutions. It was agreed that her outside work would not consume more than one week per month until completed.

[12] Although Ms Bureau did not sign the written offer, the trial judge found that it was the contract of employment, both parties having viewed it as such and having conducted themselves in a manner consistent with its terms. This finding is not in dispute on the appeal.

[13] There was extensive evidence about the working relationship between Ms. Bureau and KPMG. Ms. Bureau's testified that she did not receive the expected support from the company necessary to get the quality assurance practice going. She felt this particularly in relation to promotional and secretarial assistance. In her view, KPMG was not forthcoming in their expectations of the practice, and left her too much on her own. KPMG, on the other hand, felt that she did not display the requisite

leadership and focus and that she alienated staff. While Barry Travers provided a positive performance review in August of 1996, after another partner, Brian Rogers, took over responsibility for the practice in the fall of that year, it became clear that her performance was an issue. Nevertheless, testified Ms. Bureau, her dismissal came as a shock.

[14] Relevant to the issue of what tenure of employment, if any, was promised or implied by KPMG are clauses 13 and 14 of the contract which provide:

> 13. KPMG has the right to terminate your employment one year after your commencement date, by paying one month's salary.
>
> 14. You have the right to terminate your employment upon giving one month's notice.

[15] Ms. Bureau and Mr. Travers, discussed these provisions. Their evidence is in substantial conflict on this important area. Ms. Bureau testified that upon reviewing this aspect of the letter offering employment Mr. Travers assured her that clauses 13 and 14 were there for her protection, to enable her to leave if she was unhappy at KPMG. She acknowledged on cross-examination, however, that Mr. Travers had explained to her that clause 13 was inserted to demonstrate KPMG's commitment to getting the practice started. She acknowledged, as well, that he did not tell her that KPMG would never invoke the clause. Ms. Bureau knew that her continuation with KPMG would be contingent upon good performance.

[16] It was Mr. Travers' evidence that he explained at their meeting that KPMG was enthusiastic about the ISO practice but that clauses 13 and 14 were included for mutual

benefit as neither knew how the business would develop. He explained that KPMG was prepared to guarantee that "regardless of how it goes . . . we would stick with it through the year".

[17] Ms. Bureau testified, as well, that she understood that she might have an opportunity for partnership in KPMG within two or three years. From this she assumed that she had some assurance of a long term relationship with the company. Mr. Travers, however, recalled that when she inquired about partnership he had advised her that it was a possibility but cautioned that it had taken him 11 years to become a partner. He also explained that several senior managers at KPMG did not have partnership status.

[18] It is the appellant's submission that Mr. Travers should have advised her in the pre-contractual negotiations "that KPMG had decided to hire her for a one-year trial period only, and that if she did not fit into the corporate culture within that time she would be dismissed without cause on one month's notice". The failure to do so was, she says, a material lack of disclosure amounting to a negligent misrepresentation. The respondent says that the evidence does not support the appellant's submission that Ms. Bureau was hired on a one year trial period. I would agree. Brian Rogers, who assumed responsibility for the ISO practice in November of 1996, testified in response to questioning by the appellant's counsel that he assumed from a reading of the offer of employment that Ms. Bureau was hired on a one year trial period. That is the extent of the evidence on this point. Clearly the trial judge did not accept that such was the

nature of the hiring arrangement.

[19] The appellant relies upon **Queen v. Cognos**, **supra**. In her submission, the facts of this case are “remarkably similar” to those in **Cognos**. I do not agree. Cognos, an Ottawa-based computer software company, advertised for an accountant to help with the development of a new accounting software product. Mr. Queen, a chartered accountant who lived in Calgary applied for the job. During the interview the manager told the appellant that the project in question was a major one which would be developed over a period of two years with enhancements and maintenance thereafter, and that the position for which he was interviewed would be needed throughout this period. They did not tell Mr. Queen that funding for the project was not guaranteed nor that the position for which he was interviewed was subject to budgetary approval. He accepted the job of manager, financial standards. He signed a written employment contract which permitted Cognos to terminate his employment at any time "without cause" upon one month's notice, or payment of one month's salary in lieu of notice, and to reassign him to another position within the company without reduction in salary, upon one month's notice. He commenced employment in April 1983. In September Cognos advised him that there would be a reassignment of personnel involved with the project owing to diminished research and development funding. The first notice of termination of employment he received was rescinded, but in July 1984 he received a second notice effective October 25, 1984. He worked until that day and was paid until November 15. The trial judge upheld the appellant's action against Cognos and awarded him damages for negligent misrepresentation. The Court of Appeal reversed the judgment

and dismissed the action on the basis that the misrepresentation was not “negligent” and, in any event, the term in the contract providing for dismissal on notice was an effective disclaimer precluding any separate action in tort. On further appeal the Supreme Court of Canada confirmed the trial judge’s finding that there were misrepresentations by the employer and that they were negligently made. In reinstating the trial judgment, the Court held that the misrepresentation related to the very existence of the job offered, not as to its length and, therefore, the contractual provision for notice did not bar an action in tort. Iacobucci, J., said at p.114:

> Had the appellant's action been based on pre-contractual representations concerning the length of his involvement on the Multiview project or his "job security", as characterized by the Court of Appeal, the concurrency question might be resolved differently in light of the termination and reassignment provisions of the contract. However, it is clear that the appellant's claim was not that Mr. Johnston negligently misrepresented the amount of time he would be working on Multiview or the conditions under which his employment could be terminated. In other words, he did not argue that the respondent, through its representative, breached a common law duty of care by negligently misrepresenting his security of employment with Cognos. Rather, the appellant argued that Mr. Johnston negligently misrepresented the nature and existence of the employment opportunity being offered. It is the existence, or reality, of the job being interviewed for, not the extent of the appellant's involvement therein, which is at the heart of this tort action. A close reading of the employment agreement reveals that it contains no express provisions dealing with the respondent's obligations with respect to the nature and existence of the *Multiview* project. Accordingly, the *ratio decidendi* of my reasons in *BG Checo* is inapplicable to the present appeal. While both cases involve pre-contractual negligent misrepresentations, only *BG Checo* involved an impermissible concurrent liability in tort and contract . . . (Emphasis added)

[20] In **BG Checo International Ltd. v. British Columbia**, [1993] 1 S.C.R. 12, (S.C.C), a companion case to **Cognos**, Iacobucci, J., dissenting in part, had differed with Justices McLachlin and LaForest for the majority on whether a pre-contractual representation which becomes a contractual term can found liability in negligent misrepresentation. Iacobucci, J., joined by the late Sopinka, J., was of the view that, generally speaking, a duty of care in tort could not be concurrent with a duty defined by

an express term of the contract. It was the majority position that the mere fact that the parties had dealt with a matter in the contract did not inevitably mean that they intended to exclude the right to sue in tort. It depends upon the circumstances of the case and the wording of the contractual terms. Where the tort duty is not contradicted by the contract, it may be sued upon.

[21] All judges agreed in **Cognos**, however, that the question of concurrency did not arise. In other words, that none of the contractual terms addressed the subject matter of the misrepresentation. In addition they accepted the trial judge's factual finding that the defendant company had negligently misrepresented the nature and existence of the employment opportunity.

[22] Iacobucci said at p.129:

> . . . the representations most relevant to the appellant's action are not those relating to his future involvement and responsibilities with Cognos, but those relating to the very existence of the job for which he had applied. That is a matter of existing fact. It was implicitly represented that the job applied for did in fact, at the time of the interview, exist in the manner described by Mr. Johnston. As found by the trial judge, however, such was not the case. The employment opportunity described to the appellant was not, at the time of the interview, a *fait accompli* for the respondent. ...

[23] McLachlin, J., in a concurring judgment, agreed with this characterization of the misrepresentation. At p.142:

> . . .Rather, by implying that the Multiview project was a reality, that it had the financial support of Cognos, and that it had passed through the feasibility and costing stage, Johnston on behalf of Cognos caused the plaintiff to be misled as to the level of the risk to the plaintiff that Cognos might at some point choose to exercise its termination power under the employment contract. The plaintiff, believing Johnston, concluded that the risk of being transferred or terminated was low.

[24] Here, at p.368, Justice Richard made crucial findings of fact:

> Bureau, in her Statement of Claim says she was induced to enter the employ of

> KPMG QR by the negligent misrepresentations of both defendants. These misrepresentations include but are not limited to - a firm commitment for funding to promote and develop the ISO practice in Halifax, sufficient funding for administrative support, the likelihood of a partnership in KPMG and security of employment. She felt that the possibility of her dismissal within 15 months was essentially non-existent.
>
> To be actionable, a negligent misrepresentation must be more than a misunderstanding. The fact that the reality of employment with KPMG did not meet with the sanguine expectations of Bureau does not, of itself, constitute negligence. The following factors militate against a finding of negligent misrepresentation.
>
> 1. Funding for the project was alluded to in the Offer of Employment and was further defined in the "Client service and marketing costs" section of Profit Plan which was discussed at the 24 November 1995 meeting. The salary projection would suggest that Bureau would be provided with secretarial and other assistance but not dedicated full time staff. The fact that Bureau expected better office accommodations and a full time secretary is not the result of any misrepresentations on the part of the defendants.
>
> 2. I am satisfied that Travers told Bureau that a partnership was a "distinct possibility". It is reasonable to assume that such a possibility would be contingent upon performance and the attainment of revenue objectives. Bureau was mistaken if she honestly believed that partnership would come, as a matter of course, after two or three years employment. There is nothing in the evidence to support such a belief.
>
> 3. Paragraph 13 of the Offer of Employment clearly set out that KPMG could terminate employment after a year. Travers explained that this clause gave her the assurance of at least one year employment. Bureau acknowledged that she was aware of this clause.
>
> (Emphasis added)

[25] Unlike the circumstances in **Checo**, **supra**, concurrency was not an issue before Justice Richard. It was the respondent's position, not that clause 13 precluded the action in tort, but that there had been no misrepresentation. After reciting a relevant passage from **Cognos**, **supra** Justice Richard said:

> On the whole of the evidence before me I cannot conclude that Travers was negligent in any of the representations made to Bureau during pre-contractual negotiations. In response to questions he said that there was a "distinct possibility" of a partnership - Ms. Bureau put her own "spin" on this and assumed that such would materialize in two or three years. The offer of employment promised "secretarial support" which Bureau interpreted to mean a full time secretary. These and other statements made to Bureau or included in the offer of employment were neither inaccurate or untrue. If they were misleading it was only because of the interpretation which Bureau placed upon them. (Emphasis added)

[26] The trial judge thus found that the pre-contractual representations made by Mr. Travers (and KPMG) were truthful, accurate and not misleading. The decision of the judge in this regard reveals no palpable and overriding error, indeed, the evidence supports his findings. Justice Richard did not accept the appellant's submissions that the respondents misrepresented the nature of the employment opportunity. This is a fundamental and material distinction from **Cognos**, where the trial judge found that there had been such a misrepresentation. It is unnecessary in these factual circumstances to consider, had a misrepresentation been negligently made, whether clause 13 would bar recovery in tort.

[27] The appellant says that the trial judge erred in failing to specifically address the arguments that Ms. Bureau should have been told that she was hired for only a one year trial period; that KPMG should have told her that they had made just a one year commitment to the quality assurance practice; and that Travers led her to believe that she would have three years to develop the practice. That these representations or omissions on the part of KPMG occurred is simply not supported on a review of the transcript, it is therefore unsurprising that the trial judge did not address each in detail. The judge's comments, above quoted, are adequate in the circumstances. His failure to more specifically refer to these points does not, in my view, speak of a misapprehension of the evidence or arguments.

[28] In my view this ground of appeal cannot succeed.

(ii) Did the trial judge err in failing to award more than five months pay in lieu of notice under all the circumstances of the case?

[29] Justice Richard held that KPMG, having extended Ms. Bureau's contract for three months beyond the one year period waived its right to terminate the contract on one month's notice as provided in clause 13. That finding is not on appeal. He fixed a notice period of five months.

[30] The appellant says that Ms. Bureau is entitled to augmented damages because she was induced to leave her company and join KPMG and that she is also so entitled because the dismissal was in bad faith and the manner of the dismissal itself callous, citing **Wallace v. United Grain Growers Ltd.** (1997), 152, D.L.R. (4th) 1 (S.C.C.) and **Robertson v. Weavexx Corp.** (1997), 25 C.C.E.L. (2d) 264 (B.C.C.A.).

In **Wallace**, **supra**, Jack Wallace, a salesperson, was hired away from a competitor company by Public Press (a wholly owned subsidiary of UGG). Forty five years old, and having worked for his former employer for 25 years, Wallace sought and received assurances that if he performed as expected he could work for the company until retirement. He commenced employment with Public Press in 1972 and was top salesperson at the company each year thereafter. He was summarily dismissed in 1986 at 59 years of age. At trial he was awarded 24 months salary in lieu of notice and $15,000 in aggravated damages for mental distress. On appeal the notice period was reduced to 15 months and the aggravated damages eliminated. Wallace appealed to the Supreme Court of Canada. Iacobucci, J., writing for the majority, confirmed the long

standing legal right of employers and employees to terminate an employment contract at any time provided there was no express provision to the contrary. If an employer dismisses an employee without good cause, he must give the employee reasonable notice or compensation in lieu thereof. In this regard he said at p.28:

> A requirement of "good faith" reasons for dismissal would, in effect, contravene these principles and deprive employers of the ability to determine the composition of their workforce. In the context of the accepted theories on the employment relationship, such a law would, in my opinion, be overly intrusive and inconsistent with established principles of employment law, and more appropriately, should be left to legislative enactment rather than judicial pronouncement.

[31] Iacobucci, J. approved the principles articulated by McRuer, C.J.H.C. in **Bardal v. Globe & Mail Ltd.** (1960), 24 D.L.R. (2d) 140 (Ont. H.C.) as those relevant to determining reasonable notice. McRuer, C.J.H.C. said in **Bardal** at p.145:

> There can be no catalogue laid down as to what is reasonable notice in particular classes of cases. The reasonableness of the notice must be decided with reference to each particular case, having 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.

[32] Commenting that **Bardal** does not purport to list all of the relevant factors, Iacobucci, J. noted that appropriate considerations will depend upon the circumstances of the case. "One such factor that has been considered is whether the dismissed employee had been induced to leave previous secure employment . . . " (at p.30). As to an assurance of job security falling short of a contractual term he continued (at p.30 **Wallace**):

> In my opinion, such inducements are properly included among the considerations which tend to lengthen the amount of notice. . . there is a need to safeguard the employee's reliance and expectation interests in inducement situations. I note, however, that not all inducements will carry equal weight when determining the appropriate period of notice. <u>The significance of the inducement in question will vary with the circumstances of the particular case and its effect, if any, on the notice period is a matter best left to the discretion of the trial judge</u>. (Emphasis added)

[33] The trial judge in **Wallace** found that “UGG went to great lengths to relieve Wallace’s fears about jeopardizing his existing secure employment and to entice him into joining their company”. Iacobucci, J. was satisfied that the promise of job security and the assurance that he could work for the company until retirement, as well as the assurances of fair treatment, were inducements “which supported the trial judge’s decision to award damages at the high end of the scale” (at p.31). Summarizing, he said at p.33:

> The point at which the employment relationship ruptures is the time when the employee is most vulnerable and hence, most in need of protection. In recognition of this need, the law ought to encourage conduct that minimizes the damage and dislocation (both economic and personal) that result from dismissal. In *Machtinger*, supra, it was noted that the manner in which employment can be terminated is equally important to an individual's identity as the work itself (at p.1002). By way of expanding upon this statement, I note that the loss of one's job is always a traumatic event. However, when termination is accompanied by acts of bad faith in the manner of discharge, the results can be especially devastating. In my opinion, to ensure that employees receive adequate protection, employers ought to be held to an obligation of good faith and fair dealing in the manner of dismissal, the breach of which will be compensated for by adding to the length of the notice period.

And at p. 34:

> The obligation of good faith and fair dealing is incapable of precise definition. However, at a minimum, I believe that in the course of dismissal employers ought to be candid, reasonable, honest and forthright with their employees and should refrain from engaging in conduct that is unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive.

[34] He went on to cite examples of “bad faith” discharges: an employer who made a wrongful accusation of theft which the employer communicated to other potential employers; an employee who was told that his position would be terminated but another found for him within the company which would require a transfer when, in fact, the company was contemplating his dismissal - they did not tell him of the decision to dismiss him for over a month although the employers knew that he was in the process

of selling his house in anticipation of the transfer; an employer decided to fire an employee when he was on disability leave suffering from a major depression. These examples illustrate the dramatic departure from a good faith standard which would underpin an award of augmented damages.

[35] Iacobucci continued at p. 35:

> It has long been accepted that a dismissed employee is not entitled to compensation for injuries flowing from the fact of the dismissal itself: see e.g. *Addis, supra*. Thus, although the loss of a job is very often the cause of injured feelings and emotional upset, the law does not recognize these as compensable losses. However, where an employee can establish that an employer engaged in bad faith conduct or unfair dealing in the course of dismissal, injuries such as humiliation, embarrassment and damage to one's sense of self-worth and self-esteem might all be worthy of compensation depending upon the circumstances of the case. In these situations, compensation does not flow from the fact of dismissal itself, but rather from the manner in which the dismissal was effected by the employer.

[36] The appellant submits that the contract contained the following implied terms:

1. Her employment status was that of a permanent employee on the partnership track;
2. KPMG QR would not dismiss her without just cause;
3. KPMG QR would not dismiss her in bad faith.

[37] In the appellant's view, the fact of her dismissal without cause constituted a breach of such terms and thereby entitles her to enhanced damages. It is apparent from Justice Richard's analysis of the evidence, reproduced above, that he did not find such terms to be implied. As McLauchlin, J. said in **Toneguzzo**, **supra**, "the drawing of evidentiary conclusions from the facts is the province of the trial judge." In fixing the period of notice he said at p.371:

> There is no question that KPMG "courted" Bureau as the person to head up the fledgling ISO program at the Halifax office. The invitation to attend the Toronto meeting in November 1995, the several meetings with Travers and the "upbeat" nature of these meetings all combined to give Bureau the feeling that she was really wanted. In addition, Bureau must have been impressed by the fact that KPMG raised the starting salary from $65,000 to 85,000. She saw KPMG as an international professional organization in which a partnership was a "distinct" possibility. She envisaged a less stressful work environment in which she could spend more time with her family and maintain her ISO training contracts.
>
> On the other hand, KPMG felt that they were gaining a very successful and experienced professional who could "jump start" the ISO program. They knew that Bureau had clients in the training aspects of ISO and these could become clients of KPMG QR. There was no one in the Halifax office with the knowledge and expertise to get the ISO program up and running.
>
> For both parties, the reality did not measure up to expectations. Bureau was disappointed with her conditions of employment. KPMG did not get the "kick start" for the ISO program that they anticipated. It is unfortunate that Bureau's marital problems distracted her during this formative stage of her employment. Bureau's dissatisfaction manifested itself in the fall of 1996 when she aggressively attempted to renew her relationship with KPMG's principal competitor QMI. Although Travers gave Bureau "passing grades" on the 31 August Performance Assessment, KPMG through Brian Rogers later expressed dissatisfaction with Bureau's performance. He told her that the Managing Partner wanted her fired but Rogers opted to extend her contract for a further three months.

[38] He made no finding that the respondents engaged in bad faith conduct nor unfair dealings, nor that the manner of dismissal warranted compensation. The evidence does not support the appellant's allegation of bad faith dismissal. In these circumstances the fact that KPMG had recruited Ms. Bureau to join the firm does not, absent other blameworthy conduct by the respondents, entitle her to an enhanced notice period. Justice Richard was satisfied that Ms. Bureau's optimistic expectations of her future were not attributable to pre-contractual assurances of tenure from Barry Travers. The facts of this case are not comparable to those in **Wallace**.

[39] Nor is the appellant assisted by a comparison with the judgment in **Weavexx**. There, Mr. Taylor, the head of a Weavexx business unit, recruited Peter Robertson, a

salesperson employed by a small competitor of Weavexx. Mr. Robertson was known to change employers as better opportunities arose. Weavexx, in making an offer to Robertson, sought and received a commitment that this job would be his last in the industry. In other words, that he would stay with Weavexx for the balance of his working life. There was no written contract of employment. Robertson commenced work with Weavexx on February 22, 1993 but due to a corporate reorganization was discharged on August 11, 1993. In fixing the notice period at 12 months, Goldie, J.A. said at p.270:

> The principal distinguishing feature of the present case is the active recruitment of the respondent. In this respect the offer of permanent employment with the significant prospect of higher earnings and the promise of Mr. Taylor to do his best to obtain recognition of past service for pension purposes were material inducements. Even so the commitment elicited from Mr. Robertson as it conveyed the sense that Weavexx was intended to be a "peak of career" opportunity.
>
> Inducements are of variable significance. . . .

And at p.272:

> Also part of the inducement to the respondent in making the move he did was, no doubt, the discussions as to long term employment resulting from the appellant insisting on an undertaking that the respondent would not move to another competitor. As I have concluded, those discussions lacked contractual force in terms of the respondent's assertion of a fixed term contract but nevertheless, they were and are, in my opinion, significant on the issue of reasonable notice.

[40] As these cases reveal, it is not every inducement that results in augmented damages on dismissal. As stated above, while accepting that KPMG “courted” Ms. Bureau, Justice Richard was not satisfied that Mr. Travers gave Ms. Bureau assurances of tenure. He found her expectations of the employment opportunity to have been overly optimistic:

> . . . statements made to Bureau or included in the offer of employment were neither inaccurate or untrue. If they were misleading it was only because of the interpretation

which Bureau placed on them.

[41] The appellant says, as well, that the manner of the dismissal was deserving of extra compensation in terms of a longer notice period. At a meeting in Brian Rogers' office Ms. Bureau was told that her contract would not be renewed. She was understandably upset. At trial she said of her reaction - "I was being difficult and belligerent. I said "I am not leaving until I have a reason, a valid reason, as to why you're doing this." Brian Rogers suggested that she should leave the building and collect her personal belongings at a later date. He walked her to her office to retrieve her coat, asked if she wanted to make a telephone call, which she did, and escorted her from the building. Ms. Bureau testified that she felt like a criminal. The experience was humiliating. Justice Richard was aware of this evidence. He said: "The final termination notice and dismissal came very swiftly and in a somewhat peremptory fashion." He obviously did not accept that the manner of dismissal in these circumstances entitled her to a longer notice period. I would agree. As Iacobucci, J. recognized in **Wallace**, **supra**, "the loss of one's job is always a traumatic event". It is not humiliation, embarrassment and damage to one's sense of self-worth and self-esteem alone which entitle the employee to augmented damages. There must be an accompanying act of bad faith or unfair dealings on the part of the employer.

[42] This ground of appeal must fail.

(b) Cross-Appeal:

(i) Did the trial judge err in law by not reducing the notice period for five months to account for the appellant's failure to mitigate her loss?

[43] QMI (Quality Management Institute) had been a significant client of Ms. Bureau's company, K. Dresser Enterprises Ltd. Dresser was under contract with QMI to work approximately three or four days per week for a fixed fee of $1000 weekly. That contractual relationship ended when Ms. Bureau accepted employment with KPMG. In October of 1996, while still employed with KPMG, Ms. Bureau explored with QMI the possibility of resuming a contractual relationship should she leave KPMG. They were unable to agree on an amount of weekly remuneration. QMI was prepared to pay at the same rate as it had previously, while Ms. Bureau wanted substantially more.

[44] When she left KPMG Ms. Bureau did not attempt to arrange another contract with QMI. At trial, Arnold Vaz, a principal with that company testified that, had she done so, it was likely that she would have been able to arrange work at about $60,000 annually for a three to four-day week.

[45] In his provisional comments on damages for negligent misrepresentation Justice Richard said (at p.370):

> . . . It seems to me that a more reasonable measure of damages would be the amount necessary to restore the plaintiff to an income equivalent to that which she would have enjoyed had her employment not been terminated. It is clear from the evidence of Vaz that the QMI contract would probably have been renewed at about $60,000 per year. Bureau said she was embarrassed to approach QMI. She did contact most, if not all of her other previous clients. Failure to follow up on QMI could be construed as a failure to mitigate her losses. These two factors alone would bear very heavily on any calculation of Bureau's damages. (Emphasis added)

[46] The respondent argues that in fixing damages for the unjust dismissal Justice Richard should have made allowance for this failure to mitigate. On the damages for wrongful dismissal he said (at p.372):

> The final termination notice and dismissal came very swiftly and in a somewhat peremptory fashion. Although the notice provided for two months' salary, only one month was actually paid. Considering all the factors enumerated in **Bardal v. Globe & Mail Ltd.** quoted in **Wallace**, supra and also that Bureau's only recourse was to rebuild her consulting practice I fix the period of notice at five months. One month was paid on termination leaving a balance of four months outstanding. (Emphasis added)

[47] Justice Richard's earlier remarks on damages reveal that he was alive to the question of mitigation. I do not, however, take him to be making a definitive finding of failure to mitigate by Ms. Bureau. Nor, in my view would the evidence support such an inference. The obligation was upon Ms. Bureau to take all reasonable steps to mitigate. She gave sound reasons, in the circumstances, for her reticence to contact QMI. Keeping in mind that the onus is upon the employer on issues of mitigation, I would not disturb the notice period.

DISPOSITION:

[48] I would dismiss the appeal and cross-appeal with costs on the appeal to the

respondent fixed at 40% of those at trial plus disbursements. There shall be no costs on the cross-appeal.

Bateman, J.A.

Concurred in:

Hart, J.A.

Freeman, J.A.