# NOVA SCOTIA COURT OF APPEAL

**Citation:** *Elmsdale Landscaping Ltd. v. Hiltz*, 2023 NSCA 56

**Date:** 20230803
**Docket:** CA 518642
**Registry:** Halifax

**Between:**

Elmsdale Landscaping Limited

Appellant

v.

James Hiltz

Respondent

---

| | |
|---|---|
| **Judge:** | The Honourable Chief Justice Michael J. Wood |
| **Appeal Heard:** | May 30, 2023, in Halifax, Nova Scotia |
| **Subject:** | Employment – Constructive Dismissal, Seasonal Employment, Aggravated Damages |
| **Summary:** | Mr. Hiltz was employed by Elmsdale for 17 years, primarily in its landscaping business which operated seasonally. He was suspended for performance issues and ultimately laid off. He was issued a Record of Employment saying it was due to lack of work even though Elmsdale was actively hiring. Two months later Elmsdale offered to recall Mr. Hiltz, but he did not accept because he had taken another position.<br><br>The trial judge found Mr. Hiltz was constructively dismissed and set the notice period at 12 months. She also awarded aggravated damages of $15,000. |
| **Issues:** | (1) Did the trial judge err in her application of the test for constructive dismissal?<br><br>(2) Was it an error to use a period for reasonable notice that extended beyond the end of the landscaping season? |

(3) Did Mr. Hiltz fail to mitigate his damages?

(4) Was there sufficient evidence to support an award of aggravated damages?

**Result:** The appeal was dismissed. Much of Elmsdale's appeal submissions were an attempt to reargue the judge's factual findings which is not permissible. The trial judge properly found Mr. Hiltz was constructively dismissed based on the evidence she accepted.

There is no principle that the notice period for a person employed in seasonal work is limited to the end of the current season. Each case must be determined based on the particular circumstances. The trial judge did this. There was no basis to interfere with the award of a 12-month notice period for Mr. Hiltz.

Elmsdale did not establish a failure to mitigate on the part of Mr. Hiltz. His explanation for not wanting to return to Elmsdale was accepted by the trial judge, who found it to be reasonable.

The trial judge had medical evidence as well as witness testimony concerning Mr. Hiltz's treatment by Elmsdale and the impact on him. This was adequate to justify the award of aggravated damages.

***This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 25 pages.***

# NOVA SCOTIA COURT OF APPEAL

**Citation:** *Elmsdale Landscaping Ltd. v. Hiltz*, 2023 NSCA 56

**Date:** 20230803
**Docket:** CA 518642
**Registry:** Halifax

**Between:**

Elmsdale Landscaping Limited

Appellant

v.

James Hiltz

Respondent

**Judges:** Wood, C.J.N.S.; Van den Eynden and Beaton, JJ.A.

**Appeal Heard:** May 30, 2023, in Halifax, Nova Scotia

**Held:** Appeal dismissed with costs, per reasons for judgment of Wood, C.J.N.S.; Van den Eynden and Beaton, JJ.A. concurring

**Counsel:** Dante V. Manna and Katherine Mack, for the appellant
Laura H. Neilan, for the respondent

**Reasons for judgment:**

[1] James Hiltz was employed by Elmsdale Landscaping Limited ("Elmsdale") for 17 years until the summer of 2020. His work was primarily in relation to the sod operation, and towards the end of his tenure he was employed as a sod cutter.

[2] Mr. Hiltz's pattern of employment flowed from the nature of the landscaping business. When he started with Elmsdale Mr. Hiltz would typically commence work in early June and continue until December when the season concluded. He would then be laid off and draw employment insurance benefits over the winter. Elmsdale would recall him for work in the spring and the cycle would be repeated.

[3] According to his testimony, in the last several years of his employment Elmsdale gave Mr. Hiltz work over the winter months to assist with his financial situation. The evidence from Elmsdale confirmed Mr. Hiltz was employed from time to time after the season ended but was subject to periodic layoff when there was insufficient work.

[4] On June 4, 2020, Mr. Hiltz was suspended for disciplinary reasons by Elmsdale. He never worked for the company again. In December 2020 he sued Elmsdale for wrongful dismissal. Following a two-day trial in March 2022, Justice Diane Rowe of the Nova Scotia Supreme Court issued a written decision (2022 NSSC 243). She concluded Mr. Hiltz had been constructively dismissed and awarded damages based on a 12-month period of reasonable notice. Given the circumstances surrounding the termination of his employment, she also awarded $15,000 in aggravated damages.

[5] Elmsdale alleges that the trial judge made the following errors:

1. Failing to properly apply the legal test for constructive dismissal.
2. Determining a notice period which extended beyond the end of the landscaping season (i.e. December).
3. Rejecting Elmsdale's submission that Mr. Hiltz had failed to mitigate his damages.
4. Awarding aggravated damages without a sufficient evidentiary basis.

## Standard of Review

[6] The standard of review to be applied by this Court is well known. In another employment case, *Halifax Herald Limited v. Clarke*, 2019 NSCA 31, Justice Beveridge described it as follows:

> [34] On an appeal from a civil judgment, an appellate court generally owes no deference to a trial judge's legal rulings. They must be correct. But on findings of fact, and of mixed law and fact, without an extricable legal error, deference is owed. This means the Court must not intervene unless the findings are unreasonable, unsupported by the evidence or amount to palpable and overriding error (see *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 25-26 and 36; *H.L. v. Canada (Attorney General)*, 2005 SCC 25 at paras. 55-56).
>
> [35] A useful recitation of these principles is found in *McPhee v. Canadian Union of Public Employees*, 2008 NSCA 104 where Cromwell J.A., as he then was, wrote:
>
>> [16] The main role of the Court of Appeal is to make sure that the trial judge applied correct legal principles: see, for example, *Housen v Nikolaisen*, [2002] 2 S.C.R. 235 at para. 9. If the trial judge misstates the law, or applies it in such a way as to show that he or she relied on a wrong legal principle, the appellate court must intervene and find that a legal error has been committed.
>>
>> [17] With respect to questions of fact and mixed questions of fact and law that do not reveal any underlying error of legal principle, the role of the appellate court is entirely different. An appeal to the Court of Appeal is not an opportunity for three judges to retry the case on the basis of a written transcript. Finding facts and drawing evidentiary conclusions from them are roles of the trial judge, not the Court of Appeal: see *Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital*, [1994] 1 S.C.R. 114 at 121. An appellant cannot challenge a trial judge's findings of fact simply because the appellant does not agree with them: *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at paras. 88 and 90. Findings of credibility are "... a vital aspect of the trier of fact's role.": see A.W. Mewett & Peter J. Sankoff, *Witnesses*, vol. 1 (looseleaf updated to Rel. 1 - 2008) (Toronto: Thomson Canada Limited,1991) at page 11-2.
>>
>> [18] Appellate intervention on questions of fact is permitted only if the trial judge is shown to have made a "palpable and overriding error": see, e.g. *Housen*, *supra* at para. 10. Sometimes the standard has been expressed in different words, such as "clear <u>and</u> determinative error", "<u>clearly wrong</u>" and "hav[ing] affected the result." (emphasis added): see, e.g. *H.L. v. Canada (Attorney General)*, [2005] 1 S.C.R. 401 at para. 55; *Delgamuukw v. British Columbia*, *supra* at paras. 78 and 88. However

> expressed, courts of appeal must accept a trial judge's findings of fact unless the judge is shown to have made factual errors that are clear <u>and</u> which affected the result.
>
> [19] This deferential approach on appeal applies to all of the trial judge's findings of fact, whether or not based on the judge's assessment of witness credibility and whether based on direct proof or on inferences which the judge drew from the evidence: see, e.g. *Housen*, *supra* at paras. 10-25; *H.L.*, *supra* at para. 54.
>
> [20] This deferential approach also applies to the judge's findings which apply the law to the facts - that is, to questions of mixed law and fact - unless the finding can be traced to a legal error: *Housen*, *supra* at paras. 26-37.
>
> [Emphasis added by Cromwell J.A.]

[7] I will return to the standard of review when I discuss the grounds of appeal raised by Elmsdale.

**Trial Decision – Factual Findings**

[8] Elmsdale argues, in part, that some of the trial judge's factual findings should be ignored or set aside because she failed to consider or misapprehended evidence. As the standard of review dictates, this Court must give significant deference to a trial judge's assessment of the evidence and the resulting factual findings. Not only must an error of fact be clear and obvious, it must also be so significant that it impacts the outcome before appellate intervention is justified.

[9] I have carefully reviewed the arguments advanced by Elmsdale as well as the evidentiary record. Elmsdale has not demonstrated the trial judge made any errors justifying intervention. In many respects, Elmsdale is re-arguing the evidence and asking us to reach a different factual conclusion than the trial judge. In light of the standard of review, this is not permissible on appeal.

[10] Elmsdale is owned by Mr. George Coupar, who is also the President. His daughter, Laura Coupar, is Vice-President and was the primary witness for Elmsdale at trial. It was Mr. George Coupar who made all of the decisions in relation to Mr. Hiltz's employment; although, these were generally communicated to Mr. Hiltz through Ms. Coupar.

[11] The absence of Mr. Coupar as a witness for Elmsdale was a matter of significance to the trial judge. She factored this into her assessment of the evidence, as she was entitled to do.

[12] A description of the events leading up to and following Mr. Hiltz's suspension on June 4, 2020 are found in the trial judge's decision. I will briefly outline the significant findings in order to provide context for my legal analysis.

[13] As previously noted, Mr. Hiltz worked for Elmsdale for 17 years in its landscaping business. He would typically be called for work in June and laid off in December following which he would draw employment insurance benefits. In later years he worked in Elmsdale's snow clearing business to earn additional money after the season ended.

[14] Mr. Hiltz valued his work at Elmsdale and felt it was like a family to him. From time to time, the company would advance him salary to assist him with his financial needs. He would then re-pay the loan, without interest, through his employment.

[15] On the evening of Thursday, June 4, 2020, Laura Coupar sent Mr. Hiltz a text advising him not to report to work the next day because George Coupar was upset with the condition of a sod field where he had been working.

[16] On Sunday, June 7, 2020, Mr. Hiltz received another text from Ms. Coupar telling him not to report to work Monday. On the evening of June 8th, Ms. Coupar texted Mr. Hiltz and offered to have him return as a sod layer the next day. He had been working as a sod cutter prior to his suspension. Mr. Hiltz responded to the text and questioned the fairness of being reassigned to a lesser position which would result in lower pay and the requirement to work at a variety of locations. Shortly afterwards Mr. Hiltz received a call from Mr. George Coupar, which the trial judge summarized in her decision:

> [42] Mr. Hiltz stated that Mr. Coupar said he 'was the worst employee' at Elmsdale, that he 'sucked with money', and his lack of care on the site would cause an accident and possibly death to another employee. His evidence was that he said nothing in response to Mr. Coupar, and after a few minutes of listening to him, he asked if Mr. Coupar was finished and then hung up. His immediate emotional reaction included shame, embarrassment, and a feeling of degradation, as he did not think Mr. Coupar felt that way about him. His recollection of Mr. Coupar's tone was that it was 'vicious'.

[17] Following the telephone call there was an email exchange between Mr. Hiltz and Ms. Coupar, which the trial judge described as follows:

> [44] Mr. Hiltz and his partner Ms. Gilby gave reliable and consistent evidence in regard to the phone call, its tone and content. I am satisfied that they were credible on this point, specifically.
>
> [45] Shortly after, Mr. Hiltz texted Ms. Coupar again, this time to accept the sod laying assignment by an attempt to lighten the situation, with: 'Lol what time Laura??????'.
>
> [46] Ms. Coupar's texted response was that she 'heard from George and he no longer wants you going with Jeremy. He said we'll call you if something comes up.' She also informed Mr. Hiltz that another employee was on their way to get the company truck from him.
>
> [47] In response Mr. Hiltz texted: 'So you are firing me?'
>
> [48] Ms. Coupar's response was: 'He didn't want you back in the sod field and then you didn't want to work with Jeremy where we need people. That's all I know'.
>
> [49] The response from Mr. Hiltz was lengthy:
>
>> I hope you know this is bullying, I stayed late and did what you asked to do, ask Sheldon, Noah and cam. Oh and by the way I NEVER said I wouldn't work with Jeromy I asked why I was getting demoted and then George called and reamed me out on my phone while I had it on speaker and my whole house heard George freak out at me and put me down to the lowest and said I'm the worst employee in the company and I suck with money and not to complain to other employees and that I've been a problem for years now… even my kids heard him say everything he said!!! although 17 years in the same profession says I've done something right, anyways have a good night Laura.

[18] In mid-June, Elmsdale posted a notice indicating they were seeking new employees. On June 17th, Mr. Hiltz filed a Labour Standards Board complaint in which he indicated he was not sure of his employment status with Elmsdale.

[19] On June 29th, Elmsdale issued a Record of Employment for Mr. Hiltz stating that he had been laid off due to a shortage of work. Elmsdale hired other personnel that summer including three sod cutters. Mr. Hiltz was not recalled for any of these positions.

[20] On July 28th, Ms. Coupar wrote to Mr. Hiltz to "clarify" his employment status. The letter said he was temporarily laid off due to a shortage of work.

[21] On August 11, 2020, Ms. Coupar and Mr. Hiltz exchanged text messages, which are set out in the following passage from the trial judge's decision:

> [57] On August 9th, 2020, Ms. Ashley phoned Mr. Hiltz to offer work but he did not respond to the call. Ms. Coupar followed up with a text on August 11th, 2020. The text exchange is as follows:
>
> > Ms. Coupar: Hi Jamie, Further to us notifying you last week of recall to work, you did not contact anyone to say you wouldn't be in August 10 as discussed, nor did you show up to the office for work at 5:45 am. … If you are refusing to be recalled please let us know…
> >
> > Mr. Hiltz: George told me I was the worst employee of Elmsdale Landscaping.. Further more you aren't even offering me my original job back and I feel like you won't call me back after layoffs… I feel like I've been a devoted employee for the last 17 years working the busiest time of year 6 days a week. I don't feel like I was treated in a way that I would want to come back to. I start a new job this week so unfortunately I'm not interested in what your offering,
> >
> > Ms. Coupar:…. We have started the new job yesterday and need all the people we can on that site This recall work is at the same rate of pay and same job duties you have done many times before that are part of your job position with Elmsdale Landscaping. Sorry to hear that you don't want to return to work with us, and best of luck at your new position.

[22] As noted in Mr. Hiltz's text, he had accepted a position with another company starting in mid-August. This job involved carpentry work, which was a new career path Mr. Hiltz had decided to pursue.

**Analysis**

*Constructive Dismissal*

[23] The Statement of Claim issued by Mr. Hiltz alleged he was wrongfully dismissed on or about June 4, 2020. As the trial judge found, he was told on that date not to report to work due to performance issues. This was reiterated on June 7th and again on June 8th when he was told not to report to work, and he would be recalled "if something came up". Elmsdale also repossessed the company truck, which had been provided to Mr. Hiltz.

[24] Mr. Hiltz's layoff was not due to shortage of work. As the evidence indicated it was a busy season, and Elmsdale was advertising for new employees in June. On June 29th, Elmsdale issued a Record of Employment confirming Mr. Hiltz's last day of work was June 4th. The document said the reason for issuance was shortage of work or end of contract or season. On July 28, 2020, Ms. Coupar

sent a letter to Mr. Hiltz to "clarify" his employment status, which included the following:

> You have been temporarily laid off from your employment based on a shortage of work. We have never communicated to you that you were fired or that your employment has been terminated. Your Record of Employment (ROE) confirms that the reason for the lay-off is shortage of work. We have been experiencing a slowdown in work over the last few weeks which is ongoing. We are unsure of when work will pick up.

[25] Ms. Coupar was questioned about the Record of Employment and this correspondence, and the trial judge made the following finding:

> [91] The Court found that Ms. Coupar was less forthcoming in regard to her evidence on the company's intent concerning the July 28th, 2020, letter to Mr. Hiltz, and evasive in regard to her knowledge of the Labour Standards Complaint or of the "layoff" notation on his Record of Employment.

[26] The trial judge went further and found that Elmsdale was acting in bad faith in its dealings with Mr. Hiltz:

> [124] The Court has noted earlier that Elmsdale was not candid with Mr. Hiltz about the suspension, its duration or any conditions that may have ended it. The phone call Mr. Hiltz received from Mr. Coupar reasonably created anxiety and uncertainty. I did not find that Elmsdale was credible or forthright in its evidence concerning the creation of the July 28th, 2020 letter to "clarify" Mr. Hiltz' status as laid off due to a shortage of work, as the company continued to hire additional employees for its busy season. It was clear that Mr. Hiltz specifically was not to be recalled to work, even as work was available. Taken together, I am satisfied the plaintiff has proven bad faith in its dismissal of Mr. Hiltz.

[27] It is clear from these findings that Mr. Hiltz's employment was suspended as of June 4, 2020 for alleged performance problems. Elmsdale did not call evidence at trial to establish justification for the suspension. Its evidence that Mr. Hiltz was laid off for lack of work was not accepted. It is obvious the trial judge found Elmsdale's explanation to be a pretext, which was given in order to avoid potential liability for Mr. Hiltz's claim.

[28] Counsel and the trial judge relied on the Supreme Court of Canada decision in *Potter v. New Brunswick Legal Aid Services Commission*, 2015 SCC 10 as representing the leading authority on constructive dismissal. As the judgment indicates, the fundamental question to be determined is whether the employer has demonstrated an intention not to be bound by the employment contract:

> [31] The burden rests on the employee to establish that he or she has been constructively dismissed. If the employee is successful, he or she is then entitled to damages in lieu of reasonable notice of termination. In *Farber*, the Court surveyed both the common law and the civil law jurisprudence in this regard. The solutions adopted and principles applied in the two legal systems are very similar. **In both, the purpose of the inquiry is to determine whether the employer's act evinced an intention no longer to be bound by the contract.**
>
> [Emphasis added]

[29] The court went on to say an employer's intention not to be bound by the employment contract might be demonstrated in two ways. The first is when they breach a substantial term of the employment contract:

> [34] The first branch of the test for constructive dismissal, the one that requires a review of specific terms of the contract, has two steps: first, the employer's unilateral change must be found to constitute a breach of the employment contract and, second, if it does constitute such a breach, it must be found to substantially alter an essential term of the contract (see Sproat, at p. 5-5). Often, the first step of the test will require little analysis, as the breach will be obvious. Where the breach is less obvious, however, as is often the case with suspensions, a more careful analysis may be required.

[30] The second manner by which an employer shows an intention not to be bound is through a course of conduct. The Supreme Court describes this in the following terms:

> [33] However, an employer's conduct will also constitute constructive dismissal if it more generally shows that the employer intended not to be bound by the contract. In applying *Farber*, courts have held that an employee can be found to have been constructively dismissed without identifying a specific term that was breached if the employer's treatment of the employee made continued employment intolerable: see, e.g., *Shah v. Xerox Canada Ltd.* (2000), 131 O.A.C. 44; *Whiting v. Winnipeg River Brokenhead Community Futures Development Corp.* (1998), 159 D.L.R. (4th) 18 (Man. C.A.). This approach is necessarily retrospective, as it requires consideration of the cumulative effect of past acts by the employer and the determination of whether those acts evinced an intention no longer to be bound by the contract.

[31] The appellant argues these two approaches to the analysis of an employer's intention should be treated as distinct and inflexible tests. They say the trial judge made an error in the first branch by not completing her analysis and determining whether Elmsdale's unjustified suspension represented a substantial alteration of an essential term of Mr. Hiltz's employment contract.

[32] The Supreme Court is clear the purpose of the analytical exercise is to determine the employer's intention to be bound by the employment contract. In some circumstances this may not require the judge to spend much time on considering whether a breach has taken place or the extent to which it has negatively impacted the employee. This flexible approach is evident in *Potter* where the court said:

> [36] The two-step approach to the first branch of the test for constructive dismissal is not a departure from the approach adopted in *Farber*. Rather, the situation in *Farber* was one in which the identification of a breach required only a cursory analysis. The emphasis in *Farber* was on the second step of this branch, as the evidentiary foundation for the perceived magnitude of the breach was the key issue in that case. **However, the identification of a unilateral act that amounted to a breach of the contract was implicit in the Court's reasoning. In many cases, this will be sufficient. The case at bar, however, is one in which the claim can be properly resolved only after both steps of the analysis have been completed.**
>
> [Emphasis added]

[33] The issue in *Potter*, was whether a paid administrative suspension of indefinite duration amounted to constructive dismissal. As the court noted, once the suspension was found to be unjustified, finding a constructive dismissal was virtually certain:

> [106] **I would suggest that in most cases in which a breach of an employment contract results from an unauthorized administrative suspension, a finding that the suspension amounted to a substantial change is inevitable**. If the employer is unable to show the suspension to be reasonable and justified, there is little chance, to my mind, that the employer could then turn around and say that a reasonable employee would not have felt that its unreasonable and unjustified acts evinced an intention no longer to be bound by the contract. Any exception to this rule would likely arise only if the unauthorized suspension was of particularly short duration.
>
> [Emphasis added]

[34] In applying this rationale to the facts before us, once Elmsdale failed to justify Mr. Hiltz's suspension, a finding of constructive dismissal is obvious. The trial judge made no error in reaching this conclusion.

[35] In some circumstances, the facts may support a finding of constructive dismissal under both branches of the *Potter* test (*Alberta Computers.com Inc. v. Thibert*, 2021 ABCA 213 at para. 52). The trial judge considered Mr. Hiltz's

alternative argument that Elmsdale had engaged in a course of conduct over the summer of 2020, which met the second branch of the *Potter* test. She concluded this had also been established for the following reasons:

> [94] The Court finds that it was reasonable for Mr. Hiltz to conclude that his continued employment at Elmsdale after June 8th, 2020, was not what the company intended, as it had not communicated an intent to continue the relationship with any certainty in a timely manner, and not recalled him to work during a busy season when available positions were unfilled. While it is the usual business practice for Elmsdale to call in and assign labourers work, it was also evident that Mr. Hiltz specifically was not to be called until he was personally deemed appropriate for continued employment with the company. This, coupled with the circumstances of Mr. Coupar's phone call, would also lead a reasonable person to conclude, as Mr. Hiltz certainly had by August 2020, that he should take steps to find other employment.

[36] The trial judge's conclusion that Mr. Hiltz was wrongfully dismissed is fully supported by the facts and applicable law. I would dismiss this ground of appeal.

*Determination of Reasonable Notice Period*

[37] The assessment of the period for reasonable notice in a wrongful dismissal case is inherently fact specific. It requires the trial judge to consider the individual circumstances of the employee and the position from which they were terminated. The Ontario Court of Appeal described the proper approach to the assessment of a reasonable notice period in *Humphrey v. Mene Inc.*, 2022 ONCA 531:

> [32] This court recognizes the 'fact-specific and contextual approach to the period of reasonable notice, limited by a range of reasonableness': *Strudwick v. Applied Consumer & Clinical Evaluations Inc.*, 2016 ONCA 520, 349 O.A.C. 360, at para. 40. As Favreau J.A. recently noted, '[t]his court should not interfere lightly with a court's determination of a common law notice period. Such a determination requires the court below to weigh multiple factors and assess the circumstances of each case on the basis of its unique circumstances': *Antchipalovskaia v. Guestlogix Inc.*, 2022 ONCA 454, at para. 56.

[38] Given the nature of the exercise, it is not surprising that appellate courts give significant deference to a trial judge's determination of the reasonable period of notice. For example, in *McNevan v. AmeriCredit Corp.*, 2008 ONCA 846 the court said:

> [34] As Laskin J.A. said in Minott v. O'Shanter Development Co. (1999), 42 O.R. (3d) 321, [1999] O.J. No. 5 (C.A.), at pp. 343-44 O.R.:
>
> > Determining the period of reasonable notice is an art not a science. In each case trial judges must weigh and balance a catalogue of relevant factors. No two cases are identical; and, ordinarily, there is no 'right' figure for reasonable notice. Instead, most cases yield a range of reasonableness. Therefore, a trial judge's determination of the period of reasonable notice is entitled to deference from an appellate court. An appeal court is not justified in interfering unless the figure arrived at by the trial judge is outside an acceptable range or unless, in arriving at the figure, the trial judge erred in principle or made an unreasonable finding of fact. If the trial judge erred in principle, an appellate court may substitute its own figure. But it should do so sparingly if the trial judge's award is within an acceptable range despite the error in principle. (Citation omitted)
>
> [35] From Minott, it is clear that this court is generally reluctant to interfere with a notice period that is within an acceptable range, even when the trial judge has made an error in principle.

[39] In *McNevan*, the court found the trial judge had erred in law by considering irrelevant factors but refused to intervene because the notice period, while generous, was not outside the reasonable range.

[40] In her decision, the trial judge correctly outlined the applicable legal principles:

> [107] *Bardal v. The Globe & Mail Ltd.*, 1960 CanLII 294 (ON SC), [1960] OWN 253 (HCJ) set out a framework of factors which a Court may consider in calculating an appropriate period of notice. *Bardal* was adopted by the Supreme Court of Canada in *Machtinger v. HOJ Industries Ltd.* 1992 CanLII 102 (SCC), [1992] 1 SCR 986. In *Bardal*, at para 145, the Court held that:
>
> > 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.

[41] The appellant argues that the trial judge erred in principle because the notice period for an employee who works on a seasonal basis can never extend beyond the end of the current season. In my view, there is no such general principle. As noted by the trial judge, in the leading case of *Bardal*, the Supreme Court of

Canada is clear that categorization of notice periods for particular classes of employment is not permissible.

[42] The appellant cites a number of cases on the issue of reasonable notice; however, none establish a general principle applicable to seasonal employees. In each case the court assessed the notice period based upon the individual circumstances of the employment and employee. A review of these decisions will demonstrate the point.

[43] In *Gray v. Manvers (Township)*, [1992] O.J. 2898 (OCJ), the plaintiff worked for 16 years operating the defendant's trucks, graders and snowplows over the winter months. He chose not to work in the summers. His employment was terminated in the fall of 1985. The court held that the plaintiff had no realistic expectation of work beyond each season and determined the notice to be the length of the current season. For Mr. Hiltz the trial judge found he had a reasonable expectation of recall each spring, which distinguishes his case from *Gray*.

[44] In *Rothberger v. Concord Excavating and Contracting Ltd.*, 2015 BCSC 729, the plaintiff was a heavy equipment operator who worked seasonally between early spring and late fall. He was dismissed from his employment in October 2012. The court found that the plaintiff was a full-time long-term employee with an understanding he would be re-hired each spring. After considering the appropriate circumstances, a period of reasonable notice of six months was awarded. The seasonal nature of the work was not discussed in the assessment of the notice period, which extended beyond the end of the construction season.

[45] In *Saunders v. Fredericton Golf and Curling Club Inc.*, 1994 CanLII 17358 (NBCA), the plaintiff had been seasonally employed each summer for 30 years. In the spring of 1992, the plaintiff was advised that his position was no longer available. The Court of Appeal held that he should have received notice of this at the conclusion of the 1991 season and awarded damages based upon what he would have earned over the 1992 season. The court did not specify the length of the notice period which it used.

[46] The Nova Scotia Supreme Court followed the approach in *Saunders* for a seasonal employee at a golf course in *Levy v. Ken-Wo Country Club*, 2001 NSSC 84. The court's analysis focused on the individual circumstances of the plaintiff and not any principle applicable to seasonal employment:

> [14] On the question of reasonable notice what then is reasonable notice in the circumstances considering Mr. Levy's age, his length of service and his

> exemplary service record. I find, as in the **Saunders** case, that a season's notice was reasonable to terminate Mr. Levy's yearly employment with Ken-Wo. This would have given Mr. Levy a reasonable opportunity to find alternate sources of income to replace his lost annual income from Ken-Wo and E.I. benefits.

[47] The New Brunswick Court of Appeal considered the notice period for a two-year employee in the fishing industry in *Vibert v. Paulin*, 2008 NBCA 23. In January 2004, Mr. Paulin was told he would not be recalled for the fishing season which would start in April. The trial judge awarded seven month's wages in lieu of notice. The court found the notice period excessive because of the plaintiff's circumstances and not because of any general principle concerning seasonal employees:

> [24] In addition, I am of the respectful opinion that the trial judge erred in placing too much emphasis on the character of the employment and its availability in the Acadian Peninsula region. As a result, the trial judge erred in principle by not according proper weight to Mr. Paulin's age and his length of service. Mr. Paulin was 34 years of age when he was terminated and had worked for Mr. Vibert's fishing operation for approximately two years. These facts clearly distinguish this case from the jurisprudence cited, and lead me to the conclusion that the trial judge's award with respect to the reasonable notice period is 'wholly erroneous' and should be reversed by this Court.
>
> [25] It would be wrong to suggest, as the trial decision seems to do, that if a fisher who works seasonally does not receive notice of termination at the end of the fishing season in a given year, that fisher will be automatically entitled to a year's compensation for the following year's fishing season, whether 24 or 34 years of age, whether having worked for two or fifteen years. That would impose the type of formulaic approach that was rejected in *Bramble*.
>
> [26] As a result, I come to the conclusion that Mr. Paulin should be entitled to four months' wages in lieu of notice covering the period of January 7, 2004 to May 7, 2004. More particularly, the date that Mr. Paulin received the letter from Mr. Vibert, January 7, 2004, was the effective date of dismissal. Four months' notice would be up to and including May 7, 2004. Based on his employment record from the 2003 lobster fishing season, Mr. Paulin would have started working on or about April 28, 2004. The notice period was one week short. Therefore, I would award him damages of $750 (based on $7500 for 10 weeks work).

[48] In its decision, the court specifically acknowledged the appropriateness of a 12-month notice period for a seasonal worker in the fishing industry in different circumstances:

> [21] More importantly, in *Savoie v. Chiasson*, this Court decided, in a case dealing with the same type of employment as the one at bar, that a twelve-month notice period was entirely adequate for an employee who was 55 years of age and who had been employed in the fishing industry on a seasonal basis for fifteen years.

[49] The trial judge considered all of the circumstances related to Mr. Hiltz and his employment with Elmsdale. He worked consistently for 17 years including winter employment at his request. The appellant has not demonstrated any error in principle on the part of the trial judge in awarding a notice period of 12 months.

[50] The appellant argues the final sentence in paragraph 115 of the trial judge's decision represents a finding that the notice period ended at the conclusion of the 2020 landscaping season. For context, I will set out the paragraph as well as those following:

> [115] There was an implicit agreement between Mr. Hiltz and Elmsdale that he would continue as a seasonal labourer with the company, reflected in the lengthy tenure of the relationship over 17 years. While he was not a full-time employee on the payroll from month to month, he had a reasonable expectation of some security of tenure on a year to year basis. **However, it is not reasonable that notice in this case should extend beyond the sequence of his usual seasonal employment in a given year.**
>
> [116] In the event that notice were given to Mr. Hiltz at the end of a landscaping season, he would have had roughly five to six months to obtain similar employment, if available, before the beginning of the next landscaping season.
>
> [117] I find that the reasonable notice period in this matter is twelve months notice period, taking into account the remainder of the 2020 landscaping season of seven months, and the ensuing five months prior to the beginning of the next year's season.

[Emphasis added]

[51] In the context of the entire decision, the reference to the "sequence of his usual seasonal employment" does not undermine the clear conclusion by the trial judge that 12 months is the appropriate notice period. She repeats this in para. 142 of her decision and it is incorporated in the final order, the form of which was consented to by counsel. I would dismiss this ground of appeal.

*Mitigation*

[52] A dismissed employee has an obligation to take reasonable steps to mitigate their damages through pursuing alternative employment during the notice period.

An employer has the burden of proving a failure to mitigate, which would justify a reduction in damages otherwise payable.

[53] A trial judge's findings with respect to mitigation are entitled to a high degree of appellate deference. The Ontario Court of Appeal in *Humphrey* described it as follows:

> [53] I begin with the observation that the burden is on a defendant to establish a failure to mitigate damages. The question is 'whether [the employee] has stood idly or unreasonably by, or has tried without success to obtain other employment': *Red Deer College v. Michaels*, [1976] 2 S.C.R. 324, at p. 331. Whether a terminated employee has failed to take reasonable steps to mitigate, and the effect of this failure on the quantum of damages, are typically questions of fact, subject to review for palpable and overriding error: *Beatty v. Best Theratronics Ltd.*, 27 C.C.E.L. (4th) 177, at para. 10, leave to appeal to S.C.C. refused, 36476 (October 8, 2015).

[54] In some circumstances an employer will argue that an employee failed to mitigate their damages by rejecting an offer for re-employment. The Supreme Court of Canada in *Evans v. Teamsters Union Local Union No. 31*, 2008 SCC 20 considered when a dismissed employee must accept an offer of employment with the same employer in order to mitigate their damages:

> [28] In my view, the courts have correctly determined that in some circumstances it will be necessary for a dismissed employee to mitigate his or her damages by returning to work for the same employer. Assuming there are no barriers to re-employment (potential barriers to be discussed below), requiring an employee to mitigate by taking temporary work with the dismissing employer is consistent with the notion that damages are meant to compensate for lack of notice, and *not* to penalize the employer for the dismissal itself. The notice period is meant to provide employees with sufficient opportunity to seek new employment and arrange their personal affairs, and employers who provide sufficient working notice are not required to pay an employee just because they have chosen to terminate the contract. Where notice is not given, the employer is required to pay damages in lieu of notice, but that requirement is subject to the employee making a reasonable effort to mitigate the damages by seeking an alternate source of income.

[55] The court went on to discuss the potential barriers which would justify an employee refusing to return to the workplace:

> [30] I do not mean to suggest with the above analysis that an employee should always be required to return to work for the dismissing employer and my qualification that this should only occur where there are no barriers to re-

> employment is significant. This Court has held that the employer bears the onus of demonstrating both that an employee has failed to make reasonable efforts to find work and that work could have been found (*Red Deer College v. Michaels*, [1976] 2 S.C.R. 324). Where the employer offers the employee a chance to mitigate damages by returning to work for him or her, the central issue is whether a reasonable person would accept such an opportunity. In 1989, the Ontario Court of Appeal held that a reasonable person should be expected to do so "[w]here the salary offered is the same, where the working conditions are not substantially different or the work demeaning, and where the personal relationships involved are not acrimonious" (*Mifsud v. MacMillan Bathurst Inc.* (1989), 70 O.R. (2d) 701, at p. 710). In *Cox*, the British Columbia Court of Appeal held that other relevant factors include the history and nature of the employment, whether or not the employee has commenced litigation, and whether the offer of re-employment was made while the employee was still working for the employer or only after he or she had already left (paras. 12-18). In my view, the foregoing elements all underline the importance of a multi-factored and contextual analysis. The critical element is that an employee "not [be] obliged to mitigate by working in an atmosphere of hostility, embarrassment or humiliation" (*Farquhar*, at p. 94), and it is that factor which must be at the forefront of the inquiry into what is reasonable. Thus, although an objective standard must be used to evaluate whether a reasonable person in the employee's position would have accepted the employer's offer (*Reibl v. Hughes*, [1980] 2 S.C.R. 880)**, it is extremely important that the non-tangible elements of the situation — including work atmosphere, stigma and loss of dignity, as well as nature and conditions of employment, the tangible elements — be included in the evaluation.**
>
> [Emphasis added]

[56] Elmsdale's primary mitigation argument at trial was Mr. Hiltz's failure to accept the recall offer referred to in the text exchange with Ms. Coupar on August 11, 2020. In his closing submissions following trial, counsel for Elmsdale set out their mitigation position:

> MR. MANNA: If I may just pay very quick reference to all the alternative arguments in the defendant's submissions ... prehearing submissions, I don't believe any of them have changed. In the first alternative, what we've put forward is that no wrongful dismissal damages would ... should be awarded beyond August 11th, 2020, which is when, as we say, the plaintiff failed to mitigate by not accepting that offer of, we would say, continued employment but, in the alternative, I suppose, employment.
>
> My friend said that he decided not to return to work because he felt it would be awkward. And I'll just note for the Court that 'awkward' is not the legal standard for mitigation by accepting an alternative offer of employment with the

> same employer. So it's not an awkwardness standard. And the actual standard is quoted in our brief submissions.

[57] In cross-examination, Mr. Hiltz testified that he was employed in the carpentry field from the week of August 11, 2020 until March 2021 with a period of layoff due to Covid. He said he did not pursue a possible opportunity to work with a former colleague in landscaping, which he became aware of in April 2021. He explained he wanted to pursue a carpentry career because he was interested in the work; it involved more year-round employment and involved “less controversy”.

[58] Mr. Hiltz said that between June 2020 and June 2021, he was actively looking for work but did not apply for any positions. He testified about reaching a stage in 2021 where he had almost given up on finding employment.

[59] The appellant alleges the trial judge made palpable and overriding errors because she discounted Mr. Hiltz’s decision to pursue a carpentry career rather than continue with landscaping as well as his failure to submit any job applications during the notice period. Elmsdale did not adduce any evidence of positions which they say were suitable for Mr. Hiltz and for which he should have applied.

[60] The trial judge correctly set out the applicable law with respect to the issue of mitigation:

> [95] Both parties cite *Evans v. Teamsters Local Union No. 31*, 2008 SCC 20. The principle established in the decision is that in cases of both constructive and wrongful dismissal, the employee is required to take steps to mitigate the lack of notice of termination. The employer must show that the employee failed to make reasonable efforts to return to work and that work could be found. The employee may also be expected to return to work to a dismissing employer, assuming that there are no barriers to re-employment, as a reasonable mitigation to address the financial impact of notice. in regard to mitigation is that [*sic*] I note that, at para 30, Bastarache J. notes a qualification that:
>
>> ... although an objective standard must be used to evaluate whether a reasonable person in the employee’s position could have accepted the employer’s offer (*Reibl v. Hughes*, [1908] 2 S.C.R. 880 (S.C.C)), it is extremely important that the non-tangible elements of the situation – including work atmosphere, stigma and loss of dignity, as well as nature and conditions of employment, the tangible elements – be included in the evaluation.

[61] The trial judge concluded that Mr. Hiltz behaved reasonably in not returning to work with Elmsdale given the circumstances which had unfolded over the summer of 2020. Her analysis was as follows:

> [97] The Court finds he was rebuffed in his attempt to take up the sod laying reassignment on June 8th, 2020. The Court will consider Mr. Hiltz' response to the company's offer of continued work as a sod layer made on August 9th, 2020.
>
> [98] At that point, Mr. Hiltz had experienced two months of mixed signals concerning his employment with Elmsdale. His attempt to take up the sod laying reassignment on June 8 was subsequently refused, with a conditional offer of an unknown task 'if something' came up. His request for a payout of his RRSP funds was granted, without the company advising what its intentions were in regard to his continued employment. Then a Record of Employment was issued with 'layoff' due to lack of work, despite his knowledge that the company was in its busiest season and advertising for new hires, approximately a month after his suspension. Then another month passed before he received a letter from Elmsdale indicating he was temporarily laid off due to a shortage of work.
>
> [99] A reasonable person would have taken steps to obtain other employment in the interim. Mr. Hiltz took steps to do so. He was then 42 years old, with a limited education, and an experienced labourer who had not looked for work in 17 years. When Elmsdale contacted him on August 9th, 2020, he advised the company that he had accepted a position with another company and stated that he did not feel, given his treatment by Mr. Coupar in their phone call with personally denigrating comments, that he could return. In the Court's view, in light of the evidence, this was a reasonable response.

[62] The trial judge also considered the evidence concerning Mr. Hiltz's decision to pursue carpentry rather than landscaping work and its relationship with his duty to mitigate:

> [105] Mr. Hiltz' positions were in carpentry, an area he had no prior working experience with, and he is currently engaged with Night Hawk Maintenance. Elmsdale asserts, without evidence, that Mr. Hiltz should have applied for similar positions in landscaping, as there were other positions available to him in the interim. It is not clear to me on the evidence presented by Elmsdale that there were other positions in this industry with similar rates of pay, hours or the benefits that he formerly received while with the company.
>
> [106] I find that Mr. Hiltz did take reasonable steps to mitigate his loss, as a return to work at Elmsdale was not in his interests, by finding alternate employment.

[63] I am satisfied the trial judge considered all of the evidence, as well as the lack of evidence, with respect to potential employment opportunities. She noted the

burden on an employer to establish a failure to mitigate. She found Mr. Hiltz's behaviour was reasonable in all of the circumstances. The appellant has not shown a palpable and overriding error by the trial judge in reaching this conclusion. She identified and applied the correct legal principles, and I would not allow this ground of appeal.

*Aggravated Damages*

[64] A dismissed employee may be entitled to an award of aggravated damages if they can meet the test described by the Supreme Court of Canada in *Honda Canada Inc. v. Keays*, 2008 SCC 39. In that decision the court distinguished between the normal distress and hurt feelings which would flow from a loss of employment and the type of employer conduct which should attract aggravated damages:

> [56] We must therefore begin by asking what was contemplated by the parties at the time of the formation of the contract, or, as stated in para. 44 of *Fidler*: '[W]hat did the contract promise?' The contract of employment is, by its very terms, subject to cancellation on notice or subject to payment of damages in lieu of notice without regard to the ordinary psychological impact of that decision. At the time the contract was formed, there would not ordinarily be contemplation of psychological damage resulting from the dismissal since the dismissal is a clear legal possibility. The normal distress and hurt feelings resulting from dismissal are not compensable.
>
> [57] Damages resulting from the manner of dismissal must then be available only if they result from the circumstances described in *Wallace*, namely where the employer engages in conduct during the course of dismissal that is 'unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive' (para. 98).

[65] On an appeal from an award of damages, deference to the trial judge is owed. The British Columbia Court of Appeal in *Lau v. Royal Bank of Canada*, 2017 BCCA 253 set out the standard of review as follows:

> [36] The standard of review for a damages award was discussed by this Court in *Sifton v. Wheaton Pontiac Buick GMC (Nanaimo) Ltd.,* 2010 BCCA 541, as follows:
>
>> [43] In the absence of some error of law or principle, the standard of review of an award of damages is reasonableness: see *Marchi v. Superior Bakery (1985) Ltd.*, 1999 BCCA 621 at para. 28, 130 B.C.A.C. 244, and *Saalfield v. Absolute Software Corp.*, 2009 BCCA 18 at para. 18, 100 B.C.L.R. (4th) 139, where Huddart J.A. said, for the Court,

> In the absence of an error in principle, the test on appeal is not whether I would have made the same award had I been the trial judge, it is whether the trial judge's award was beyond the range of reasonableness in all the circumstances.

> [37] This standard of review mandates deference, such that the appellate court may only interfere if the judge committed an error in principle, or awarded an amount that is inordinately high or low: *Capital Pontiac Buick Cadillac GMC Ltd. v. Coppola,* 2013 SKCA 80, 364 D.L.R. (4th) 351at para. 30 [*Coppola*]; *Naylor Group Inc. v. Ellis-Don Construction Ltd.,* 2001 SCC 58 at para. 80, [2001] 2 S.C.R. 943. The absence of any evidence to support the trial judge's conclusion entitles the appellate court to substitute its own view of a proper award: *Woelk v. Halvorson,* [1980] 2 S.C.R. 430 at 435, 114 D.L.R. (3d) 385.

[66] In *Lau*, the court set aside an award of aggravated damages because the trial judge had relied exclusively on the demeanour of the plaintiff while testifying. After noting that medical evidence is not required to support an award of aggravated damages, the court said:

> [49] On the other hand, damages for mental distress beyond the ordinary upset that accompanied termination of employment cannot be evidenced simply from the demeanor of the plaintiff in the witness stand. There must be an evidentiary foundation for such an award (see *Mustapha* at para. 9). That evidentiary foundation may be testimony demonstrating a "serious and prolonged disruption that transcended ordinary emotional upset or distress" (*Saadati* at para. 40).

[67] In *Capital Pontiac Buick Cadillac GMC Ltd. v. Coppola*, 2013 SKCA 80, the Saskatchewan Court of Appeal discussed the required evidentiary basis for an award of aggravated damages:

> [29] I would, however, pause here to address an evidentiary issue arising in this case, that being whether a plaintiff must adduce medical evidence to prove mental distress. There is conflicting authority on this point. On one hand, some courts have refused to award moral damages in the absence of medical evidence. [5] On the other hand, some courts have awarded damages notwithstanding the absence of formal medical evidence. [6] **Regardless, while evidence such as expert medical reports and itemized expense receipts would be of considerable assistance to a court in determining the quantum of moral damages, it is sensible to hold that medical evidence is not *strictly* necessary to prove the existence of mental distress *provided* there is an adequate factual basis to support an award of moral damages based on the employer's conduct** (see: *Keays*, at para. 90, per LeBel J. (Fish J. concurring)). Therefore, even though the respondent failed to adduce any specific medical reports or the like with respect to the mental distress that he says he has suffered due to the manner

> of his dismissal, this does not mean the trial judge was incorrect or erred in concluding that such damages had been established based on other evidence which led to findings of fact which were sufficient to underpin his claim to moral damages. Moreover, the respondent and the respondent's wife, who is a psychiatric nurse, did testify to the existence of some mental distress.
>
> [Emphasis added]

[68] After reciting the correct legal principles related to aggravated damages, the trial judge applied these to the evidence and concluded Elmsdale engaged in bad faith in the dismissal of Mr. Hiltz:

> [123] Mr. Hiltz requests that the Court consider the conduct of Elmsdale during the entire two month period, from his initial suspension and continuing until the penultimate text message from Elmsdale intended to confirm Mr. Hiltz had left the company, as demonstrating conduct that breaches the duty to exercise good faith in the manner of dismissal, as set out in Matthews.
>
> [124] The Court has noted earlier that Elmsdale was not candid with Mr. Hiltz about the suspension, its duration or any conditions that may have ended it. The phone call Mr. Hiltz received from Mr. Coupar reasonably created anxiety and uncertainty. I did not find that Elmsdale was credible or forthright in its evidence concerning the creation of the July 28th, 2020 letter to 'clarify' Mr. Hiltz' status as laid off due to a shortage of work, as the company continued to hire additional employees for its busy season. It was clear that Mr. Hiltz specifically was not to be recalled to work, even as work was available. Taken together, I am satisfied the plaintiff has proven bad faith in its dismissal of Mr. Hiltz.
>
> …
>
> [126] Elmsdale had intimate personal knowledge and experience with this worker developed over the course of 17 years. Elmsdale had made meaningful accommodations for Mr. Hiltz over that time to support his personal circumstances. It was an act of bad faith for those personal accommodations to be the subject of Mr. Coupar's call to Mr. Hiltz by calling him 'bad with money'.
>
> [127] All persons, whether engaged in seasonal or regularly intermittent employment, are entitled to dignity in the workplace as an implied condition of their employment agreement.

[69] The appellant takes issue with the finding of bad faith as a basis for awarding aggravated damages. It argues the conduct must relate to the "manner of termination" and the trial judge erred by considering events that took place before and after June 8, 2020, the effective date of the dismissal. In my view, this submission is overly narrow and is not an accurate representation of the principles governing the assessment of allegedly bad faith conduct on the part of an employer.

[70] The Supreme Court of Canada, in *Matthews v. Ocean Nutrition Canada Ltd.,* 2020 SCC 26 explained that in assessing an employer's actions, events outside the moment of dismissal can be considered:

> [40] It is apparent too from the pleadings here that there is a measure of uncertainty as to the impact of *Bhasin*, not just in Mr. Matthews' case but on employment law more generally. At a minimum, I believe this is an occasion to re-affirm two important principles stated in *Potter*. First, given the various submissions in this case, I would recall that the duty of honest performance — which Cromwell J. explained in *Bhasin* applies to all contracts, and means simply that parties "must not lie [to] or otherwise knowingly mislead" their counterparty "about matters directly linked to the performance of the contract" — is applicable to employment contracts (*Bhasin*, at para. 33, see also para. 73; *Potter*, at para. 99). Second, given the four-year period of alleged dishonesty leading up to Mr. Matthews' dismissal**, I would also reiterate that when an employee alleges a breach of the duty to exercise good faith in the manner of dismissal — a phrase introduced by this Court in *Wallace*, and reinforced in *Keays* — this means courts are able to examine a period of conduct that is not confined to the exact moment of termination itself**. All this reflects, in my view, settled law.
>
> [Emphasis added]

[71] In *Doyle v. Zochem Inc*., 2017 ONCA 130, the court confirms that conduct beyond the specific act of termination can be considered in assessing moral damages:

> [13] The factors relevant to an award of moral damages are not limited to the examples in *Honda*, at para. 59 and *Wallace*, at paras. 98, 101. Nor, is the time frame limited to the moment of dismissal**. Pre and post termination conduct may be considered in an award for moral damages, so long as it is "a component of the manner of dismissal**": *Gismondi v. Toronto (City*), 2003 CanLII 52143 (ON CA), 64 O.R. (3d) 688 (C.A.), at para. 23, leave to appeal to S.C.C. refused [2003] S.C.C.A. No. 312; Ball, at § 22:20.19(1.1), p. 22-50.
>
> [Emphasis added]

[72] The conduct relied on by the trial judge in finding bad faith shows Elmsdale left Mr. Hiltz in limbo concerning his employment status for weeks. The facts found by the trial judge demonstrate a sequence of events leading to Mr. Hiltz's departure from Elmsdale including:

1. He was put off work on June 4 as a result of performance concerns, which were never justified at trial.

2. Elmsdale offered him work as a sod layer on June 8, a position paying less money.
3. When Mr. Hiltz questioned the fairness of the perceived demotion, he received an abusive call from the president of Elmsdale following which he was told the sod layer position was not available and the company truck was being taken back.
4. Elmsdale issued a Record of Employment and sent Mr. Hiltz a letter "clarifying" his employment status, both of which said he was laid off due to lack of work even though the company was actively seeking new employees.

[73] In my view, these clearly fall within the scope of the "manner of dismissal" and the trial judge was entitled to rely on them in finding Elmsdale liable for aggravated damages.

[74] The trial judge based the aggravated damage award on the testimony of Mr. Hiltz and his wife as well as the medical evidence from his physician. She described her rationale for doing so as follows:

> [131] In some respect, this is a family matter. Mr. Hiltz was visibly distressed when recalling his employment with the company, and its ending. I am convinced that he was deeply affected by the manner in which his job with Elmsdale came to an end, and was distressed at how to deal with the loss.
>
> [132] Mr. Hiltz had come to trust his employer, in a singular way, seeing Elmsdale as not just as a company that paid him to dig and lay sod but as a family enterprise of which he was a member. He especially relied on his relationship with Mr. Coupar. When the employment ended, the relationship ended.
>
> [133] Mr. Hiltz was vulnerable, as he has a limited education. This, coupled with his age and low skilled work experience did not make it likely he could find comparably paid employment. He was wholly reliant on Elmsdale and the regularity of his seasonal employment to support his family. His wife testified that his employment income was not the sole income, and that she was also employed, but the loss of the Elmsdale job caused more stress on the family, and she observed more stress and anxiety for Mr. Hiltz specifically.
>
> [134] Mr. Hiltz' physician Dr Burden provided medical information that was included in the joint exhibit book provided by the parties, and he did not testify. In these materials, Dr Burden notes that anxiety and sleeplessness were triggered at the end of Mr. Hiltz' employment with Elmsdale, that required medication. He noted Mr. Hiltz lost '… a stable framework for an individual who is otherwise not highly resilient.' Mr. Hiltz' wife's evidence corroborated this account.

> [135] While *Keays* noted that 'The normal distress and hurt feelings which result from dismissal are not compensable' (at para. 56) this dismissal was characterized by Elmsdale's bad faith, triggering an unusual level of uncertainty and anxiety for Mr. Hiltz, who did struggle as a result and required medical intervention.

[75] The appellant argues that there was insufficient evidence to support an award of aggravated damages. It says Dr. Burden's opinion does not specify any impact on Mr. Hiltz, which would be beyond the normal distress of losing employment. In addition, Elmsdale submits he did not make a causal connection between Mr. Hiltz's symptoms of anxiety and depression and the dismissal.

[76] Dr. Burden's report includes answers to questions posed by Mr. Hiltz's legal counsel, one of which asked him to describe the psychological injuries sustained as a result of the dismissal. Dr. Burden's response was that Mr. Hiltz suffered from depression and anxiety requiring treatment. He went on to note he found it "difficult to say if this current status was wholly related to the dismissal". As noted by the trial judge, Mr. Hiltz's mental health worsened following the loss of employment.

[77] In addition to Dr. Burden, both Mr. Hiltz and his wife testified about his struggles following the loss of his job. This evidence, combined with the Burden report and the finding of bad faith conduct by Elmsdale, is sufficient to support the trial judge's finding Mr. Hiltz was experiencing more than the normal distress and hurt feelings flowing from the loss of a job.

[78] A fired employee may suffer psychological injury related to both the conduct of the employer and the loss of the position. It might not be possible to draw a clear causal separation between these since the impacts will be interrelated. That does not prevent a court from awarding aggravated damages as the trial judge did in this case. Ultimately the outcome will depend on the factual findings which flow from the evidence. Unless there is an absence of evidentiary support the trial judge's conclusions are entitled to deference.

[79] This is not a case, such as *Lau*, where there was no evidence which could justify an award of aggravated damages. Here the trial judge had the testimony of Mr. Hiltz, his spouse and the report of Dr. Burden to support her findings. In the circumstances, her decision to award aggravated damages in the amount of $15,000 was reasonable, and I would not allow this ground of appeal.

**Disposition**

[80] The appellant has not satisfied me that the trial judge committed any errors warranting appellant intervention. I would dismiss the appeal and award costs to the respondent of $6,700 representing 40% of the trial award.

Wood, C.J.N.S.

Concurred in:

Van den Eynden, J.A.
Beaton, J.A.